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***Ohio Adult Parole Authority v. Woodard*: Breathing New “Life” into an Old Fourteenth Amendment Controversy**

As most Americans know, persons accused of a crime have certain procedural rights that must be observed before the government may convict and punish them.¹ Criminal defendants are guaranteed, for instance, a fair and speedy trial,² the right not to incriminate themselves at trial,³ and representation by counsel.⁴ The U.S. Constitution also guarantees that the accused will not be deprived of “life, liberty, or property, without due process of law.”⁵ But what rights remain after a person has been lawfully convicted and sentenced?⁶

The United States Supreme Court has long struggled to define the post-conviction rights of prisoners,⁷ most often in the context of prison discipline⁸ or parole and probation decisions.⁹ Although due

1. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 499 (1966) (holding that law enforcement must notify persons accused of a crime of certain rights before officers can question them).

2. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”).

3. See *id.* amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself . . .”).

4. See *id.* amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”).

5. *Id.* amend. XIV, § 1.

6. Despite conviction and sentence, prisoners do not lose all of their constitutional rights. See *Meachum v. Fano*, 427 U.S. 215, 225 (1976) (“[T]he convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison.”). The Constitution’s guarantee that no person will be deprived of “life, liberty, or property without due process of law” applies to prisoners even during incarceration. See *Washington v. Harper*, 494 U.S. 210, 219-27 (1989) (noting that the Due Process Clause prevents prison officials from arbitrarily administering antipsychotic drugs to a prisoner); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (“Prisoners may also claim the protections of the Due Process Clause.”).

7. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 477-81 (1995) (describing the case history of the Court’s prisoner due process analysis); see also Karen H. Flax, *Liberty, Property, and the Burger Court: The Entitlement Doctrine in Transition*, 60 TUL. L. REV. 889, 910-15 (1986) (discussing due process in prisoner-rights cases); Susan N. Herman, *The New Liberty: The Procedural Due Process Rights of Prisoners and Others Under the Burger Court*, 59 N.Y.U. L. REV. 482, 504-25 (1984) (discussing the Supreme Court’s treatment of the liberty interests of prisoners); Doug Rendleman, *The New Due Process: Rights and Remedies*, 63 KY. L.J. 532, 645-64 (1975) (discussing the development of the Court’s due process doctrine as it relates to prisoners).

8. Prison discipline can come in many forms, including segregated confinement, see *Conner*, 515 U.S. at 474; revocation of “good-time credits,” *Wolff*, 418 U.S. at 546 & n.6; or transfer to another prison, see *Olim v. Wakinekona*, 461 U.S. 238, 240 (1983).

process has considerable significance in these contexts, it becomes even more important when the prisoner faces execution.¹⁰ Death, by definition, is an ultimate deprivation of liberty. Perhaps because it is so final, every state that allows the death penalty also allows the governor or some other authority to set aside the death sentence by granting clemency.¹¹ Clemency, whether granted or denied,¹² impacts

9. See, e.g., *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979) (involving parole release); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (involving parole revocation). Because each case involves a new and different set of circumstances, decisions regarding discipline or regarding probation and parole often require prison administrators to exercise a certain amount of discretion. See, e.g., *Morrissey*, 408 U.S. at 480 (noting that parole decisions have discretionary aspects).

10. Justices of the Supreme Court have often repeated the view that, because of the seriousness of the death penalty, the Court should carefully review cases involving its use. See *Herrera v. Collins*, 506 U.S. 390, 399 (1993); *Beck v. Alabama*, 447 U.S. 625, 637-38 (1980); *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); see also, e.g., *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (noting the "heightened standard of reliability" required by the Court in capital proceedings).

11. See ALA. CONST. amend. XXXVIII; ALA. CODE § 15-18-100 (1995); ARIZ. CONST. art. V, § 5; ARIZ. REV. STAT. ANN. § 31-443 (West 1996); ARK. CONST. art. VI, § 18; ARK. CODE ANN. § 16-93-204 (Michie Supp. 1997); CAL. CONST. art. V, § 8; CAL. PENAL CODE § 4800 (West 1982); COLO. CONST. art. IV, § 7; COLO. REV. STAT. ANN. § 16-17-101 (West 1998); CONN. CONST. art. IV, § 13; CONN. GEN. STAT. ANN. § 18-26 (West 1998); DEL. CONST. art. VII, § 1; DEL. CODE ANN. tit. 11, § 4361 (1996); FLA. CONST. art. IV, § 8; FLA. STAT. ANN. § 940.01 (West 1996); GA. CONST. art. IV, § 2, ¶ 2; GA. CODE ANN. § 42-9-20 (1997); IDAHO CONST. art. IV, § 7; IDAHO CODE § 20-240 (1997); ILL. CONST. art. V, § 12; 730 ILL. COMP. STAT. ANN. 5/3-3-13 (West 1997); IND. CONST. art. V, § 17; IND. CODE ANN. § 11-9-2-1 (Michie 1992); IOWA CONST. art. IV, § 16; IOWA CODE ANN. § 914.1 (West 1994); KAN. CONST. art. I, § 7; KAN. STAT. ANN. § 22-3701 (1995); KY. CONST. § 77; LA. CONST. art. IV, § 5(E); LA. REV. STAT. ANN. § 15:572 (West 1992); MD. CONST. art. II, § 20; MD. ANN. CODE art. 41, § 4-513 (1997); MISS. CONST. art. V, § 124; MISS. CODE ANN. § 47-5-115 (1993); MO. CONST. art. IV, § 7; MO. ANN. STAT. § 217.800 (West 1996); MONT. CONST. art. VI, § 12; MONT. CODE ANN. § 46-23-301 (1997); NEB. CONST. art. IV, § 13; NEB. REV. STAT. § 83-1,132 (1994); NEV. CONST. art. IV, § 14; NEV. REV. STAT. ANN. § 213.080 (Michie 1996); N.H. CONST. pt. 2, art. 52; N.H. REV. STAT. ANN. § 4:21 (1988); N.J. CONST. art. V, § 2, ¶ 1; N.J. STAT. ANN. § 2A:167-4 (West 1985); N.M. CONST. art. V, § 6; N.M. STAT. ANN. § 31-21-17 (Michie 1990); N.Y. CONST. art. IV, § 4; N.Y. EXEC. LAW § 15 (McKinney 1993); N.C. CONST. art. III, § 5(6); N.C. GEN. STAT. § 147-23 (1993); OHIO CONST. art. III, § 11; OHIO REV. CODE ANN. § 2967.02 (Anderson 1991); OKLA. CONST. art. VI, § 10; OKLA. STAT. tit. 57, § 332 (1996); OR. CONST. art. 5, § 14; OR. REV. STAT. § 144.640 (1997); PA. CONST. art. IV, § 9; PA. STAT. ANN. tit. 71, § 299 (West 1990); S.C. CONST. art. IV, § 14; S.C. CODE ANN. § 24-21-910 (Law Co-op. 1990); S.D. CONST. art. IV, § 3; S.D. CODIFIED LAWS § 24-14-1 (Michie 1988); TENN. CONST. art. III, § 6; TENN. CODE ANN. § 40-27-101 (1997); TEX. CONST. art. IV, § 11; TEX. CRIM. P. CODE ANN. § 48.01 (West 1997); UTAH CONST. art. VII, § 12; UTAH CODE ANN. § 77-27-5 (1995); VA. CONST. art. V, § 12; VA. CODE ANN. § 53.1-229 (Michie 1996); WASH. CONST. art. III, § 9; WASH. REV. CODE ANN. § 10.01.120 (West 1990); WYO. CONST. art. IV, § 5; WYO. STAT. ANN. § 7-13-801 (Michie 1997).

12. It should be noted that the U.S. Constitution does not require that states provide

both the life and liberty of a prisoner.¹³ Thus, the question arises whether clemency impacts these interests in such a way as to require states to follow federal due process procedures when considering appeals for clemency by prisoners. This issue arose in a recent case in which an inmate who had been sentenced to death sought to challenge Ohio's clemency regulations.

In *Ohio Adult Parole Authority v. Woodard*,¹⁴ a death row prisoner claimed that Ohio should have followed certain procedures to protect his life and liberty interests during clemency proceedings.¹⁵ In ruling against the inmate, eight Justices held that the State had not violated his constitutional rights, but a majority could not agree on a rationale.¹⁶ Although five Justices agreed with Woodard that clemency proceedings implicate a "life" interest under the Due

for clemency procedures for inmates. See *Rogers v. Peck*, 199 U.S. 425, 436 (1905).

13. Clemency is defined as an "act of [a] governor of [a] state when he commutes [a] death sentence to life imprisonment, or grant[s] pardon." BLACK'S LAW DICTIONARY 1113 (6th ed. 1990). Clemency can be viewed conceptually in at least two ways. One view is that clemency is merely an exercise of grace from the executive (typically the governor of a state). See Elkan Abramowitz & David Paget, Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 177 (1964). This view arises from the common law notion that "the king may extend his mercy on what terms he pleases, and consequently may annex to his pardon any condition that he thinks fit." *Schick v. Reed*, 419 U.S. 256, 261 (1974) (quoting 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 394 (Garland Publ'g, Inc. 1978) (1721)). Another view is that clemency exists to correct mistakes of the judiciary. See Michael A.E. Korengold et al., *And Justice for Few: The Collapse of the Capital Clemency System in the United States*, 20 HAMLINE L. REV. 349, 351 (1998). For a general discussion of issues surrounding the use of clemency, see *id.* See also Daniel T. Kobil, *Do the Paperwork or Die: Clemency, Ohio Style?*, 52 OHIO ST. L.J. 655, 662 (1991) (arguing that clemency is an integral part of the American system of justice); Victoria J. Palacios, *Faith in Fantasy: The Supreme Court's Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VAND. L. REV. 311, 331 (1996) (arguing that the Supreme Court has a flawed belief that commutation remedies injustice); Abramowitz & Paget, *supra*, at 137-41 (describing the history of clemency); *infra* notes 214-28 and accompanying text (discussing the debate over clemency's role in the American system of justice).

14. 118 S. Ct. 1244 (1998) (plurality opinion).

15. See *id.* at 1249 (plurality opinion); see also Brief for Respondents at 3, *Woodard*, 118 S. Ct. 1244 (No. 96-1769) ("Mr. Woodard has an independent federally protected life interest that remains intact and requires due process protection until execution takes place."); Brief for the National Association of Criminal Defense Lawyers at 2, *Woodard*, 118 S. Ct. 1244 (No. 96-1769) ("A capital defendant . . . has a constitutionally protected interest in 'life' until the moment of his death."). Woodard also requested that his mandatory clemency hearing be postponed and that his attorney be allowed to attend the proceedings. See *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1181 (6th Cir. 1997), *rev'd*, 118 S. Ct. 1244 (1998); see also *infra* notes 29-44 and accompanying text (discussing Ohio's clemency procedures and Woodard's objections).

16. See *Woodard*, 118 S. Ct. at 1253 (plurality opinion); *id.* at 1254 (O'Connor, J., concurring in part and concurring in the judgment).

Process Clause,¹⁷ only four of these five felt that the amount of process given to the prisoner was constitutionally sufficient.¹⁸ Justice Stevens, in dissent, argued that Woodard did have a constitutionally protected life interest for which the district court should determine how much process is due.¹⁹

This Note first discusses the facts of *Woodard*, its history in the lower courts, and the Supreme Court's resolution of the issues presented by the case.²⁰ After examining the role of due process in the prison context,²¹ the Note then examines the Court's present procedural due process analysis²² and traces the evolution of this analysis in prisoner-rights cases.²³ The Note also briefly discusses the role of clemency in the American judicial system.²⁴ Given that background, the Note analyzes the underlying differences between the plurality opinion in *Woodard* and the concurrence written by Justice O'Connor and discusses difficulties with both.²⁵ Finally, the Note proposes a new analysis for capital clemency cases that would address the concerns raised in the opinions of both Chief Justice Rehnquist and Justice O'Connor.²⁶

The Ohio Constitution vests broad discretion in the Governor to grant clemency for persons convicted of most crimes.²⁷ Specifically, the Governor may grant clemency "upon such conditions as he may think proper."²⁸ Except to the extent that the Ohio Legislature is

17. See *id.* at 1253-54 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 1254 (Stevens, J., concurring in part and dissenting in part).

18. See *id.* at 1253-54 (O'Connor, J., concurring in part and concurring in the judgment). The Justices concurring with Justice O'Connor were Justice Souter, Justice Ginsburg, and Justice Breyer. See *id.* at 1244.

19. See *id.* at 1254-57 (Stevens, J., concurring in part and dissenting in part).

20. See *infra* notes 27-90 and accompanying text.

21. See *infra* notes 91-101 and accompanying text.

22. See *infra* notes 102-22 and accompanying text.

23. See *infra* notes 123-213 and accompanying text.

24. See *infra* notes 214-28 and accompanying text.

25. See *infra* notes 229-303 and accompanying text.

26. See *infra* notes 304-10 and accompanying text.

27. See OHIO CONST. art. III, § 11.

28. *Id.* This phrase was not added until 1851, when the clemency provisions of the Ohio Constitution were revised. See Kobil, *supra* note 13, at 662-64. The first version of Ohio's Constitution, enacted in 1802, did not contain such an explicit statement. See *id.*

The only exceptions to the Governor's power to grant clemency are in cases of treason and impeachment. See *id.* In these cases, he cannot grant a pardon or a commutation at all. See OHIO CONST. art. III, § 11. In cases of treason, for example, the Governor can only suspend the sentence, and the Ohio General Assembly considers whether to grant a commutation, a pardon, or a reprieve. See *id.* The rationale behind the Governor's limited power to grant clemency in these cases is not clear. See Kobil, *supra* note 13, at 664. Interestingly, the treason limitation was not added to the Ohio

authorized to regulate the clemency application and investigation process, the Legislature cannot curtail the Governor's discretionary clemency power.²⁹

In exercising its power to regulate the clemency process, the Ohio Legislature created the Ohio Adult Parole Authority (the "Authority") to conduct clemency reviews.³⁰ Once a clemency application has been filed or "when directed by the Governor in any case," the Authority must conduct a "thorough investigation" into a clemency application.³¹ To carry out this mandate, the Authority promulgated rules to "establish a standard procedure for handling applications for clemency in death penalty cases and for review of death penalty cases where no application has been filed."³² The rules require that within forty-five days of execution the Authority must arrange a clemency hearing for a date approximately twenty-one days in advance of the scheduled execution date.³³ Before the hearing is held, the prisoner may request a personal interview with one or more

Constitution until 1851, while the impeachment limitation was included in the state's original constitution. *See id.* at 662-64.

29. *See* OHIO CONST. art. III, § 11. The relevant text in section 11 states that the Governor "shall have power . . . to grant reprieves, commutations, and pardons, for all crimes and offenses . . . upon such conditions as [the Governor] may think proper; subject, however, to such regulations, as to the manner of applying for pardons, as may be prescribed by law." *Id.* In a case involving this text, the Ohio Supreme Court interpreted the phrase "manner of applying for pardons," noting that it

includes the entire application process We find that the General Assembly's authority to regulate the application process extends to the time just before the Governor reaches a substantive decision concerning a pardon. Once this point is reached, the General Assembly's constitutionally granted authority to regulate procedurally the pardoning power of the Governor is at an end.

State ex rel. Maurer v. Sheward, 644 N.E.2d 369, 378 (Ohio 1994). The Ohio Supreme Court has also noted that this language "does *not* imply that the General Assembly may interfere with the discretion of the Governor in granting pardons." *State v. Morris*, 378 N.E.2d 708, 714 (Ohio 1978).

30. *See* OHIO REV. CODE ANN. § 2967.07 (Anderson 1996).

31. *Id.*

32. Ohio Death Penalty Clemency Procedure § II (1994).

33. *See id.* § VI(B)(3). Attendance at the hearing by the prisoner or his counsel is at the sole discretion of the Authority chairperson. *See id.* § VI(D)(3). At the hearing, the Authority considers all of the information it has gathered, including the inmate's files and any information previously provided. *See id.* § VI(E)(1).

This version of Ohio's death penalty clemency provisions is fairly new. In 1994, the rules were changed to require initiation of the clemency review immediately after the Ohio Supreme Court sets an execution date (rather than when the inmate files his first federal habeas petition). *See* Brief for Petitioner at 3, *Woodard*, 118 S. Ct. 1244 (No. 96-1769). The Legislature made this change to ensure that the Governor would have enough time to conduct an adequate clemency investigation before the scheduled execution date. *See id.*

members of the Authority.³⁴ Any information revealed at the interview must be presented at the subsequent hearing,³⁵ and the prisoner's attorney may not attend either proceeding.³⁶ After the hearing, the Authority must make a recommendation to the Governor to grant or deny clemency.³⁷ The Governor is free to follow or ignore the recommendation.³⁸

Eugene Woodard, sentenced to death for aggravated murder,³⁹ was notified that a mandatory clemency hearing had been scheduled for him and that he was eligible for a voluntary interview with one or more Authority members.⁴⁰ Under Ohio law, however, he could not receive immunity for any incriminating statements he might make at the voluntary interview.⁴¹ Instead of requesting an interview, Woodard asked the Authority to postpone his hearing and interview and asked that his counsel be allowed to participate in the proceedings.⁴² When he received no response from the Authority, Woodard brought a § 1983 action,⁴³ alleging that the Ohio clemency process violated his Fifth Amendment right not to incriminate himself and his Fourteenth Amendment right to due process.⁴⁴

34. See Ohio Death Penalty Clemency Procedure § VI(B)(4). If the inmate wants an interview, the request must be made in writing to the Authority. See *id.* § VI(C)(1). Upon receiving the request, the Authority chairperson appoints at least one board member to interview the inmate. See *id.* § VI(C)(2). Only the interviewer(s) and the inmate are allowed to be present. See *id.*

35. See *id.* § VI(E)(1).

36. See *id.* § VI(C)(2).

37. See *id.* § VI(E)(3).

38. See OHIO CONST. art. III, § 11.

39. See Brief for Petitioner at 6, *Woodard*, 118 S. Ct. 1244 (No. 96-1769). Woodard was on Ohio's death row for crimes committed on June 20, 1990. See *id.* On that night, Woodard and three others carjacked a vehicle and robbed the driver. See *id.* During the course of the crime, Woodard shot the driver in the chest and left him for dead. See *id.* In a later argument, Woodard insisted, "I should get the radio. I'm the one that shot the guy." *Id.*

40. See *Woodard*, 118 S. Ct. at 1248 (plurality opinion).

41. See *id.* (plurality opinion).

42. See *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1181 (6th Cir. 1997), *rev'd*, 118 S. Ct. 1244 (1998).

43. Section 1983 provides in relevant part:

Every person who, under color of any statute . . . causes to be subjected, any . . . person within the jurisdiction [of the United States] to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action . . . or other proper proceeding for redress

....

42 U.S.C. § 1983 (Supp. 1996).

44. See *Woodard*, 107 F.3d at 1181-82. Woodard also moved for a temporary restraining order against any clemency procedures in his case. See *id.* at 1182. Woodard argued that a "premature review would serve as an obstacle to a later, more timely clemency review, because such later review could only be obtained by leave of the

Although the district court ruled for the State, the Sixth Circuit Court of Appeals reversed, holding in favor of Woodard on his Fifth Amendment claim,⁴⁵ while accepting in part and rejecting in part his due process claim.⁴⁶

As to the Fifth Amendment claim, the Sixth Circuit ruled that Ohio's voluntary interview procedure presented Woodard with an unconstitutional "Hobson's choice."⁴⁷ If he spoke at the interview, anything Woodard said could be used against him in his postconviction proceedings; if he refused to speak, however, his chances of receiving clemency were substantially diminished.⁴⁸ The Sixth Circuit held, therefore, that the interview could place an "unconstitutional condition" on Woodard's Fifth amendment right

Authority." *Id.*

The case was initially assigned to a magistrate judge, who found against Woodard on a number of issues, including a substantive due process claim, a self-incrimination claim, a claim that Woodard had a right to counsel in Ohio's clemency proceedings, and an Eighth Amendment claim. *See id.* The magistrate judge did not address Woodard's additional equal protection and Ninth Amendment arguments. *See id.* Despite Woodard's objection, the district court adopted the magistrate judge's report and recommendation in full and entered judgment against him. *See id.*

45. *See id.* at 1193. The Sixth Circuit remanded the Fifth Amendment issue to the district court to adduce further facts about the Ohio clemency process and to determine whether the voluntary interview process in fact forced the inmate to risk self-incrimination. *See id.*

46. *See id.* at 1193-94. The Sixth Circuit also dispensed with a number of other constitutional arguments raised by Woodard on appeal, including claims arising under the Equal Protection Clause, Eighth Amendment, Ninth Amendment, and the substantive aspect of the Due Process Clause. *See id.* at 1193.

As to his Equal Protection claim, the Sixth Circuit noted that because Woodard "failed to object when the magistrate judge did not address it in the report and recommendation to the district court," it would not address the claim at the appellate level. *Id.* The court noted further that addressing the issue would not likely have changed its holding, because capital inmates are not a suspect class and the state "could have a rational basis for treating capital and non-capital prisoners differently" during the clemency process. *Id.* As to the other issues, the court noted that Woodard could have no substantive due process claim because there is no fundamental right to receive clemency, the Eighth Amendment is not implicated when procedural due process is not offended, and there is "no precedent for attaching clemency rights to the Ninth Amendment." *Id.*

47. *Id.* at 1189. According to the court, "[t]he phrase 'Hobson's choice' . . . comes from Thomas Hobson, an English liveryman who required every customer to choose the horse nearest the door. . . . A Hobson's choice is thus an apparently free choice when there is no real alternative." *Id.* at 1189 n.3 (quoting *Wang v. Reno*, 81 F.3d 808, 813 n.5 (9th Cir. 1996) (citations omitted) (first and third alterations in original)).

48. *See id.* at 1189. The court explained that the clemency interview represented a benefit to Woodard because "it dramatically increase[d] Woodard's chances of being granted clemency." *Id.* at 1190. The court did not address whether it mattered that Woodard's chances for receiving clemency, with or without the interview, were probably minimal in the first place.

not to incriminate himself, and that such a condition would not be justified by any compelling state interest.⁴⁹

The Sixth Circuit accepted in part and rejected in part Woodard's due process claim. It noted that the Supreme Court has analyzed procedural due process claims by first determining whether the inmate has a life or liberty interest protected by the Fourteenth Amendment.⁵⁰ In the court's view, Woodard failed to satisfy this "strand" of due process analysis because no life or liberty interest can be created by clemency proceedings.⁵¹ Relying on prior Supreme Court precedent, the court held, however, that Woodard did have "original" life and liberty interests protected under a second "strand" of due process analysis.⁵² Because clemency is an "integral part" of Ohio's adjudicatory system, the court believed that some amount of process was due to prisoners subject to clemency proceedings.⁵³ The court remanded the case to the district court to determine exactly what process was due.⁵⁴

Woodard appealed to the United States Supreme Court, which granted certiorari.⁵⁵ On Woodard's Fifth Amendment claim, all of the Justices agreed that the Sixth Circuit decision was incorrect.⁵⁶ Writing for a unanimous Court on this issue, Chief Justice Rehnquist reasoned that because the interview was voluntary, Woodard could not be "compelled" to speak within the meaning of the Fifth Amendment.⁵⁷ The Court analogized Woodard's situation to that of a criminal defendant facing a decision whether to testify at trial in his own defense.⁵⁸ Although Woodard might feel pressure to speak to improve his chances for clemency, Ohio's procedure did not force him to do so.⁵⁹

Woodard's Fourteenth Amendment due process claim, however, presented a much more controversial issue for the Court. Seven Justices agreed with Chief Justice Rehnquist's judgment that the Ohio clemency procedures did not violate Woodard's due process

49. See *id.* at 1189. The court therefore remanded the case to the district court to determine, after further fact-finding regarding Ohio's clemency process, whether the process would impose an unconstitutional condition. See *id.*

50. See *id.* at 1182.

51. See *id.* at 1183-84, 1186.

52. *Id.* at 1186 (citing *Evitts v. Lucey*, 469 U.S. 387 (1985)).

53. *Id.*

54. See *id.* at 1188.

55. See *Woodard v. Ohio Adult Parole Auth.*, 117 S. Ct. 2507 (1997).

56. See *Woodard*, 118 S. Ct. at 1247.

57. See *id.* at 1253 (plurality opinion).

58. See *id.* (plurality opinion).

59. See *id.* (plurality opinion).

rights,⁶⁰ but only three Justices—Scalia, Kennedy, and Thomas—agreed with his rationale for the judgment.⁶¹

In a plurality opinion in which these three Justices joined, Chief Justice Rehnquist rejected each of Woodard's due process claims.⁶² The plurality reasoned that an inmate facing execution does not possess a life interest in clemency proceedings, nor had Ohio created such an interest in its particular proceedings.⁶³ Further, the plurality distinguished the Court's prior holding in *Evitts v. Lucey*,⁶⁴ rejecting the notion that a "continuum" of due process exists at all stages of the adjudicative proceedings.⁶⁵

The Chief Justice first reasoned that there is no continuing life interest in clemency proceedings that requires constitutional due process protection.⁶⁶ Under the Court's prior ruling in *Connecticut Board of Pardons v. Dumschat*,⁶⁷ the Chief Justice noted that an inmate's interest in release is "extinguished by the conviction and sentence."⁶⁸ Clemency is therefore merely an inmate's "'unilateral hope'"⁶⁹ for release and does not rise to the level of an interest protected by the Fourteenth Amendment.⁷⁰ The Chief Justice

60. See *id.* (plurality opinion); *id.* at 1254 (O'Connor, J., concurring in part and concurring in the judgment).

61. See *id.* at 1247 (plurality opinion).

62. Of the eight Justices who concurred in the judgment, no more than four could agree on any one opinion. See *id.* The holding with respect to the Fourteenth Amendment, then, is limited to the facts of *Woodard* itself. See *id.* at 1253 (plurality opinion); see also 5 AM. JUR. 2D *Appellate Review* § 602 (1995) ("When a fragmented United States Supreme Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding may be viewed as that position taken by those Justices who concurred in the judgment on the narrowest grounds.").

63. See *Woodard*, 118 S. Ct. at 1249-51 (plurality opinion).

64. 469 U.S. 387 (1985).

65. See *Woodard*, 118 S. Ct. at 1251-52 (plurality opinion). As the Sixth Circuit explained in *Woodard*, a continuum of due process protection means that the "degree to which each component [of a state's adjudicatory system] forms 'an integral part' of the overall adjudicative system determines the degree to which due process plays a role. Of course, the more distant the procedure from initial proceedings, the less stringent the requirements must be." *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1186 (6th Cir. 1997), *rev'd*, 118 S. Ct. 1244 (1998). But see *Woodard*, 118 S. Ct. at 1251 (plurality opinion) ("Related decisions similarly make clear that there is no continuum requiring varying levels of process at every conceivable phase of the criminal system.").

66. See *Woodard*, 118 S. Ct. at 1249-50 (plurality opinion).

67. 452 U.S. 458 (1981).

68. *Woodard*, 118 S. Ct. at 1249 (plurality opinion) (citing *Dumschat*, 452 U.S. at 464).

69. *Id.* at 1250 (plurality opinion) (quoting *Dumschat*, 452 U.S. at 465).

70. See *id.* at 1250-51 (plurality opinion). The Chief Justice views clemency as merely a matter of grace derived from the executive's historical right to grant pardon. See *id.* at 1251-52 (plurality opinion). But see Korengold et al., *supra* note 13, at 350 (stating that the historical role of clemency was to correct mistakes of the judiciary).

conceded, however, that there remains a "residual life interest, for example, in not being summarily executed by prison guards."⁷¹

Next, Chief Justice Rehnquist stated that Ohio's clemency procedures themselves do not create a protected due process interest.⁷² Although the procedures are mandatory, he pointed out that the Governor enjoys broad discretion in determining the factors he will use to grant clemency; therefore, Woodard's expectation of clemency was only minimal.⁷³

Finally, the Chief Justice rejected Woodard's claim, premised on the Court's 1985 decision in *Evitts*,⁷⁴ that a continuum of due process protection exists at all stages in the adjudicative process.⁷⁵ According to the Chief Justice, *Evitts* merely combined the holdings of two prior lines of cases.⁷⁶ One line held that a right to effective assistance of counsel exists at trial,⁷⁷ while the other held that criminal defendants are entitled to certain procedural safeguards on a first appeal as of right.⁷⁸ In *Evitts*, reasoned the Chief Justice, "these two lines of cases justified the Court's conclusion that a criminal defendant has a right to effective assistance of counsel on a first appeal as of right."⁷⁹ In *Woodard*, the Chief Justice distinguished the discretionary nature of clemency from the mandatory first appeal as of right discussed in *Evitts* and concluded that "clemency is [not] an integral part of Ohio's system of adjudicating the guilt or innocence of the defendant."⁸⁰

Justice O'Connor filed a concurrence, joined by Justices Souter, Ginsburg, and Breyer,⁸¹ in which she disagreed with the Chief Justice's conclusion that prisoners facing execution have no remaining life interest. According to Justice O'Connor, an inmate

71. *Woodard*, 118 S. Ct. at 1250 (plurality opinion); see also *infra* notes 286-93 and accompanying text (discussing the residual life interest).

72. See *Woodard*, 118 S. Ct. at 1251-52 (plurality opinion).

73. See *id.* at 1251 (plurality opinion).

74. In *Evitts*, the Court held that criminal defendants have a right to effective assistance of counsel on their first appeal as of right. See *Evitts v. Lucey*, 469 U.S. 387, 394-96 (1985).

75. See *Woodard*, 118 S. Ct. at 1251 (plurality opinion).

76. See *id.* (plurality opinion).

77. See *id.* (plurality opinion) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963)).

78. See *id.* (plurality opinion) (citing *Douglas v. California*, 372 U.S. 353, 358 (1963); *Griffin v. Illinois*, 351 U.S. 12, 20 (1956) (plurality opinion)).

79. *Id.* (plurality opinion) (citing *Evitts*, 469 U.S. at 394-96).

80. *Id.* (plurality opinion). Justice O'Connor did not dispute the Chief Justice's analysis of *Evitts*. See *id.* at 1253-54 (O'Connor, J., concurring in part and concurring in the judgment).

81. See *id.* at 1253 (O'Connor, J., concurring in part and concurring in the judgment).

facing execution does have a continuing life interest that requires due process protection.⁸² Although an inmate's liberty interest is extinguished by the conviction and sentence, an inmate retains an interest in his life until he is executed.⁸³ Regardless of state proceedings, she asserted, an inmate facing execution is entitled to at least minimal Fourteenth Amendment due process protections.⁸⁴ Justice O'Connor nonetheless concluded that since minimal due process requires only notice of the hearing and an opportunity to participate in the interview, Woodard had in fact received the minimum protections, and thus Ohio's clemency procedures did not violate the Fourteenth Amendment.⁸⁵

In dissent, Justice Stevens vigorously opposed the Chief Justice's view that Woodard did not have a constitutionally cognizable life interest in clemency proceedings.⁸⁶ Whereas an inmate's interest in liberty is extinguished by conviction, Justice Stevens argued that Woodard's interest in his life was not extinguished because he was still alive.⁸⁷ He explained that the life interest at stake for Woodard was much more important than the liberty interests at stake in prior precedent cited by Chief Justice Rehnquist.⁸⁸ The finality of death, he claimed, justifies more protection than the mere restriction of physical freedom.⁸⁹ Finally, having recognized a life interest protected under the Due Process Clause, Justice Stevens argued that the case should be remanded so that the district court could determine whether Ohio's procedures provide adequate due process.⁹⁰

The controversy in *Woodard* primarily concerned the Court's interpretation of the Fourteenth Amendment, which guarantees all persons due process of law.⁹¹ In accordance with this protection against arbitrary or unfair state action, the State may only deprive an individual of "life, liberty, or property" if it follows certain procedures designed to protect that individual from arbitrary or

82. *See id.* (O'Connor, J., concurring in part and concurring in the judgment).

83. *See id.* at 1254 (O'Connor, J., concurring in part and concurring in the judgment).

84. *See id.* (O'Connor, J., concurring in part and concurring in the judgment).

85. *See id.* (O'Connor, J., concurring in part and concurring in the judgment).

86. *See id.* at 1254-56 (Stevens, J., concurring in part and dissenting in part).

87. *See id.* at 1255 (Stevens, J., concurring in part and dissenting in part).

88. *See id.* (Stevens, J., concurring in part and dissenting in part) (citing *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 461 (1981)).

89. *See id.* at 1256 (Stevens, J., concurring in part and dissenting in part).

90. *See id.* at 1257 (Stevens, J., concurring in part and dissenting in part).

91. *See* U.S. CONST. amend. XIV, § 1.

unfair state action.⁹² Such procedural due process “emphasizes fairness between the State and the individual dealing with the State.”⁹³ It is not always clear, however, when state action against inmates violates the Due Process Clause.⁹⁴

State action towards prisoners often implicates due process concerns. Because an inherent tension exists between prisoners and prison officials, determining when a prisoner’s due process rights are implicated is especially important. Prison officials need flexibility to handle the myriad problems posed by incarcerating individuals against their will;⁹⁵ however, too much discretion might invite arbitrary results.⁹⁶ To resolve this tension between the State and its prisoners, the Supreme Court has developed a two-step analysis to determine when and how much procedural protection is warranted.⁹⁷ First, a court looks to see if the State’s action, such as discipline, has affected some interest⁹⁸ recognized by the Due Process Clause.⁹⁹ The Clause protects only three interests: life, liberty, and property.¹⁰⁰ If

92. See *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

93. *Ross v. Moffitt*, 417 U.S. 600, 609 (1974).

94. See, e.g., *Sandin v. Conner*, 515 U.S. 472 (1995) (disciplinary segregated confinement of an inmate); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458 (1981) (commutation of life sentences); *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1 (1979) (parole release determinations); *Meachum v. Fano*, 427 U.S. 215 (1976) (intrastate transfer of an inmate); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation).

95. See *Conner*, 515 U.S. at 482 (noting that the Court should give flexibility to “state officials trying to manage a volatile environment”).

96. See *Woodard*, 118 S. Ct. at 1254 (O’Connor, J., concurring in part and concurring in the judgment) (expressing concern about the possibility of arbitrary clemency decisions by state officials).

97. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 570-71 (1972) (“[T]o determine whether due process requirements apply in the first place, we must look . . . to . . . the interest at stake.”); see also *Flax*, *supra* note 7, at 891 (describing the two-step analysis); Henry Paul Monaghan, *Of “Liberty” and “Property,”* 62 CORNELL L. REV. 405, 409 (1977) (noting the analytical shift in the Court’s due process framework to a two-step process); *Rendleman*, *supra* note 7, at 547 (explaining the *Roth* test for recognizing due process interests).

98. Under the first step of this bifurcated analysis, it is not always clear what constitutes a life, liberty, or property interest. Although liberty and property interests have evolved into substantial constitutionally defined concepts, see Monaghan, *supra* note 97, at 405-44, the Court has rarely discussed life as a protected interest. See Daniel T. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. RICH. L. REV. 201, 217 (1993) (“[T]he Court has omitted mention of the protection of life from most discussions of procedural due process.”).

99. See *Meachum*, 427 U.S. at 223-24.

100. See U.S. CONST. amend. XIV, § 2; *Meachum*, 427 U.S. at 223; see also Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 72 (1982) (noting that the Due Process Clause only protects individuals who demonstrate a deprivation of life, liberty, or

the court determines that one of these interests has been affected, the second step is to determine how much process is due the prisoner.¹⁰¹

The Court's due process analysis began as a single-step analysis under which the Due Process Clause was always implicated; the issue was simply how much process was due.¹⁰² In *Goldberg v. Kelly*,¹⁰³ families receiving state welfare payments alleged denial of due process when benefits were terminated without prior notice and a hearing.¹⁰⁴ The Court held that a pretermination hearing was required to provide the welfare recipient with adequate procedural due process.¹⁰⁵ In reaching this conclusion, the Court noted that "the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends on whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."¹⁰⁶ Thus, the Court essentially treated the phrase "life, liberty and property" as an open-ended grant of procedural protection for any benefit that the government attempted to take away from an individual.¹⁰⁷

The Court refined its procedural due process analysis in *Board of Regents of State Colleges v. Roth*.¹⁰⁸ In *Roth*, an untenured college professor who was not rehired after one year of service claimed that the college's refusal to provide an explanation for its decision violated the Due Process Clause because it infringed on an alleged property right in his job.¹⁰⁹ In rejecting Roth's claim, the Court decided that it would first look to the "nature" of the claimed interest, rather than just its "weight" (as the Court had done in

property).

101. See *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979).

102. See, e.g., *Flax*, *supra* note 7, at 891 ("[P]rocedural due process analysis proceeded in a one-step fashion: when the government was accused of harming somebody, the Court would determine whether the government was proceeding fairly in light of all the circumstances.").

103. 397 U.S. 254 (1970).

104. See *id.* at 255.

105. See *id.* at 264.

106. *Id.* at 263 (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

107. The one-step analysis is primarily an academic distinction and not one that has been recognized explicitly by the Court. See *Flax*, *supra* note 7, at 891; *Herman*, *supra* note 7, at 489; *Monaghan*, *supra* note 97, at 406-07; *Rendleman*, *supra* note 7, at 646; *Smolla*, *supra* note 100, at 76; Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 262.

108. 408 U.S. 564 (1972).

109. See *id.* at 569.

Goldberg).¹¹⁰ Only after finding a constitutionally recognized interest at stake would the Court determine the procedures needed to protect that interest.¹¹¹ The *Roth* Court held that the interest in a non-tenured teaching position did not constitute a constitutionally protected property or liberty interest; therefore, it did not reach the question of how much process *Roth* was due.¹¹²

The "bifurcated" due process analysis established in *Roth* has led to controversy over defining the circumstances under which a life, liberty, or property interest is at stake in any given case.¹¹³ One view, labeled "positivism," holds that these interests can only be created by the states themselves, through statutes, regulations, and other practices or customs,¹¹⁴ that is, certain state laws or practices must affirmatively entitle the aggrieved person to the interest.¹¹⁵ In

110. See *id.* at 571. By looking solely at the "weight" of the interest, the *Goldberg* Court considered only the impact of the state's action on the individual. See *Goldberg*, 397 U.S. at 262-63. Under this one-step analysis, if the state action inflicted a sufficiently serious—that is, "grievous"—loss on the person, the Court would then remedy the due process violation. See *id.* at 263. Thus, the Court assumed that some process was automatically due the individual. In *Roth*, however, the Court bifurcated the analysis, looking first to the "nature" of the interest before examining its weight. See *Roth*, 408 U.S. at 571. Under the "nature" prong of the analysis, the Court must identify whether there exists a life, liberty, or property interest that would be protected by the Due Process Clause. See *id.* For an interesting discussion of the practical effects of using either one of these analyses in prisoner-rights cases, see Flax, *supra* note 7, at 891-905.

111. See *Roth*, 408 U.S. at 571.

112. In holding that *Roth* had no constitutionally protected property interest in his job, the Court noted that to have a property interest in a benefit, a person "must have more than a unilateral expectation" of the benefit. *Id.* at 577. Eventually, the Court transplanted this language into its liberty interest determinations. See, e.g., *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979) ("The Due Process Clause applies when government action deprives a person of liberty or property . . . [T]o obtain a protectible right, 'a person . . . must have more than a unilateral expectation of it.'" (quoting *Roth*, 408 U.S. at 577)).

113. See Flax, *supra* note 7, at 891-99; Herman, *supra* note 7, at 504-28; Rendleman, *supra* note 7, at 645-64; Peter N. Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CAL. L. REV. 146, 151-56 (1983).

114. See Flax, *supra* note 7, at 889 (discussing the "positivist" view of liberty). Another commentator argues that the development of the positivist doctrine is merely a reinstatement of the discredited "right-privilege" distinction in constitutional law. See Smolla, *supra* note 100, at 69. The right-privilege doctrine is the view that government benefits (such as employment) are merely privileges with no procedural rights attached. See *id.* By receiving the benefit, the recipient is not entitled to complain if it is taken away for any reason. See *id.* at 72. Perhaps the most well-known statement of the doctrine was made by then-Massachusetts Supreme Judicial Court Justice Oliver Wendell Holmes when, in rejecting the wrongful dismissal claim of a police officer, he noted that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

115. See Flax, *supra* note 7, at 891. As Professor Flax explains, under a positivist view,

Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex,¹¹⁶ instance, the Court employed a positivist conception of liberty when it held that the mandatory nature of the Nebraska parole statute sufficiently constrained the discretion of state officials to create a legal entitlement.¹¹⁷

An alternative view, most often expressed by Justice Stevens in prisoners' post-conviction rights cases, has held that inmates have due process rights that exist independently of state statutes and regulations.¹¹⁸ These rights emanate from the basic human dignity that every person possesses, even prisoners who have been substantially deprived of their liberty.¹¹⁹ Under this view, the impact of the state action on the prisoner is more important than the alleged source of the due process right.¹²⁰ Actions that are "sufficiently grievous"¹²¹ entitle the prisoner to some amount of due process.¹²²

Since its 1972 decision in *Morrissey v. Brewer*,¹²³ the Court has

courts do not determine due process interests by looking at how much harm the government action has caused. *See id.* Rather, regardless of the harm, the interest in due process must arise out of the language of a state pronouncement which gives a person some expectation that due process is deserved. *See id.* Only if some positive law has created the interest will a court determine how much process is due as a result of the state action. *See id.*

In determining the amount of process due, courts use a test formulated by the Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The test considers three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335. At least one commentator has criticized this test. *See* Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976). Professor Mashaw has argued that the test does not consider "the full range of concerns embodied in the due process clause." *Id.* at 30. Moreover, the test does not consider the value of due process protections to the individual plaintiff requesting them. *See id.* For these reasons, he has suggested a more "value-sensitive approach" to the due process calculus by considering perspectives such as individual dignity, equality, and tradition. *See id.* at 46-59.

116. 442 U.S. 1 (1979).

117. *See id.* at 14.

118. *See* *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting).

119. *See id.* at 232-33 (Stevens, J., dissenting) (citing *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 712-13 (7th Cir. 1973)).

120. *See id.* at 230 (Stevens, J., dissenting).

121. *Id.* at 234 (Stevens, J., dissenting).

122. *See id.* (Stevens, J., dissenting).

123. 408 U.S. 471 (1972).

struggled with the question of when and to what degree prisoners are entitled to due process.¹²⁴ In *Morrissey*, an early prisoner-rights case, the Court held that a prisoner's interest in maintaining parole status is protected by the Due Process Clause.¹²⁵ The Court noted that the amount of process due a prisoner facing parole revocation was "the extent to which an individual will be 'condemned to suffer grievous loss.'" ¹²⁶ The Court determined what constituted a grievous loss by considering "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." ¹²⁷ Essentially, then, in order to determine the amount of process due, the Court balanced the individual's interest in remaining free on parole against the government's interest in dealing with parole violations.¹²⁸

124. See generally Flax, *supra* note 7, at 910-15 (discussing due process in the prisoner-rights area); Herman, *supra* note 7, at 503-28 (explaining the liberty interests of prisoners); Rendleman, *supra* note 7, at 645-64 (discussing due process in prison).

125. Plaintiff *Morrissey's* parole was revoked because, according to his parole officer, he had purchased a car under false pretenses, lied to the police, and violated other provisions of his parole agreement. See *Morrissey*, 408 U.S. at 473. The parole officer also cited the repeated nature of the violations as justification for parole revocation. See *id.*

126. *Id.* at 481 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

127. *Id.* (quoting Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)). Although the Court couched its analysis in terms of determining the "nature" of the interest at stake, *see id.* at 481-82, the Court apparently considered only the "weight" of the government's action on the individual, *see supra* note 110 (discussing the difference between "nature" and "weight").

128. See *Morrissey*, 408 U.S. at 481. *Roth* and *Morrissey* were decided on the same day. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 564 (1972); *Morrissey*, 408 U.S. at 471. Although the language of the *Morrissey* Court indicated that it used what would be a two-step analysis under *Roth*, *see Morrissey*, 408 U.S. at 481 ("The question is . . . whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment." (emphasis added) (citing *Fuentes v. Shevin*, 407 U.S. 67 (1972))), the Court, in a single-step, merely applied the "grievous loss" standard—a "weight" determination—to decide the case, *see id.* at 481; *see also supra* note 110 (discussing the difference between "nature" and "weight"). The Court first seemed to assume that *Morrissey* had a liberty interest at stake, *see Morrissey*, 408 U.S. at 481; it then considered the "weight" or impact of parole revocation on *Morrissey*, *see id.* In *Roth*, the Court made explicit what was assumed in *Morrissey* by relegating the "weight" inquiry to the second step of the bifurcated analysis. See *Roth*, 408 U.S. at 570-71. Thus, *Morrissey* appears to have marked a transition period in the Court's due process analysis. See Monaghan, *supra* note 97, at 408-09 (noting that *Morrissey* "laid the groundwork" for the shift in standards).

Factual differences in these cases may provide a possible explanation for the Court's use of seemingly different standards in similar cases decided on the same day. *Roth* involved a college professor who merely faced the loss of his job, for which he was untenured. See *Roth*, 408 U.S. at 571. *Morrissey*, however, involved a person on parole who faced being put back in prison—a complete loss of his liberty. See *Morrissey*, 408

In striking the balance, the Court declared that an inmate on parole has a "conditional" interest in liberty that is protected by at least minimum procedural safeguards.¹²⁹ The Court noted that a parolee, who is not incarcerated but is subject to state supervision, has a greater expectation of freedom than an imprisoned inmate hoping for parole.¹³⁰ The parolee, it explained, also enjoys many of the same freedoms as individuals with unqualified liberty.¹³¹ Thus, revocation of parole would inflict a "grievous loss" on the parolee such that some process is due.¹³² In reaching this conclusion, the Court reasoned that the source of the parolee's due process right rests partly on an "implicit promise" between the parolee and the State that he will remain free so long as he follows the conditions of parole.¹³³ Although the State has many interests in further restricting the liberty of the parolee, the Court held that those interests are not so important as to allow completely unfettered parole revocation.¹³⁴

Limiting its holding in *Morrissey*, the Court in *Meachum v. Fano*¹³⁵ considerably narrowed the range of interests for which prisoners could claim due process protection by applying the two-step analysis¹³⁶ developed in *Board of Regents of State Colleges v. Roth*.¹³⁷

U.S. at 481. By emphasizing only the weight of the State's action in a one-step analysis in *Morrissey*, the Court was able to account for the serious impact of parole revocation on *Morrissey*. See *id.* Indeed, the Court devoted a large portion of its opinion to explaining the seriousness of this potential loss. See *id.* *Roth*, however, appears to have been a better case factually to focus on the first of the two steps—determining whether a protected interest was at stake—because Roth attempted to claim a property right in an untenured position. See *Roth*, 408 U.S. at 571.

129. See *Morrissey*, 408 U.S. at 482.

130. See *id.*

131. See *id.*

132. *Id.* According to the Court, the "minimum" due process required a hearing before revocation to determine whether the parole violation in fact occurred. See *id.* at 485. At the hearing, the parolee was entitled to written notice of the violations, disclosure of the evidence against him, the opportunity to present witnesses, the right to confront and cross-examine witnesses, an impartial hearing body, and a written statement of the reasons for parole revocation. See *id.* at 486-87.

133. See *id.* at 482. Although the *Morrissey* Court has been characterized as using a positivist approach to liberty, see *Paul v. Davis*, 424 U.S. 693, 711 (1976), it has been argued that this characterization is "revisionist," Herman, *supra* note 7, at 505. By noting the "implicit promise" between the state and the prisoner in *Morrissey*, the Court appeared to rely partly on the positivist conception but, as Professor Herman notes, the majority opinion did not even quote or reproduce the parole statutes and regulations affecting *Morrissey*. *Id.*

134. See *Morrissey*, 408 U.S. at 482.

135. 427 U.S. 215 (1976).

136. See *id.* at 223-24; see also Flax, *supra* note 7, at 897-98 (discussing *Meachum*).

137. 408 U.S. 564 (1972); see also *supra* notes 108-10 and accompanying text (discussing the facts and holding of *Roth*).

In *Meachum*, an inmate asserted that he was entitled to due process protection from being transferred from one prison to another with substantially less favorable conditions.¹³⁸ The Court relied on its decision in *Roth* for the proposition that “the determining factor is the nature of the interest involved rather than its weight.”¹³⁹ Thus, the Court did not automatically consider how much process was due as it had done in *Morrissey*.¹⁴⁰ Instead, the Court asked a threshold question: Is the transfer of an inmate from one prison to another sufficient to “invoke the protections of the Due Process Clause”?¹⁴¹

To justify its use of this two-step analysis in the context of prisoners, the Court rejected the notion “that *any* grievous loss visited upon a person by the State is sufficient to invoke” due process.¹⁴² The Court noted that although prisoners continue to have constitutionally protected liberty interests even after conviction, a conviction “sufficiently extinguishe[s] the defendant’s liberty interest to empower the State to confine him in any of its prisons.”¹⁴³ So long as the confinement is “within the normal limits or range of custody which the conviction has authorized the State to impose,” the State’s actions do not trigger the Due Process Clause.¹⁴⁴ Thus, even though the inmate’s transfer represented a substantial loss to the prisoner (to the extent that prison life was more difficult), it did not automatically warrant consideration by the Court as to what process was due. In sum, because the Court did not detect a liberty interest in *Meachum*’s transfer, it did not even consider the question of what process, if any,

138. *See Meachum*, 427 U.S. at 216. *Meachum* was transferred from a medium security facility to a maximum security facility based on informants’ reports that *Meachum* had been involved in nine serious fires at the medium security complex. *See id.* at 217.

139. *Id.* at 224 (discussing *Roth*’s contribution to the Court’s present procedural due process analysis).

140. *See id.* at 223-24.

141. *Id.* at 224.

142. *Id.*

143. *Id.*

144. *Id.* at 225. Significantly, the majority in *Meachum* (including then-Justice Rehnquist) recognized that under certain circumstances procedural due process rights can derive from sources other than state statutes and regulations. *See id.* at 223-25. A state’s conduct affecting a prisoner can implicate the Due Process Clause directly if the action is beyond the scope of the lawfully imposed sentence, regardless of whether a statute or regulation also creates a due process interest. *See id.* Only some state actions, then, will implicate the Due Process Clause directly under this analysis. *See id.* Justice Stevens also recognized that state action can trigger the Due Process Clause automatically. *See id.* at 230-34 (Stevens, J., dissenting). But for Justice Stevens, *every* state action implicates due process; the only relevant issue is the *extent* to which due process is implicated. *See id.* (Stevens, J., dissenting). Under Justice Stevens’s analysis, then, prisoners are protected by the Due Process Clause against a wider range of state actions.

was due.¹⁴⁵

Significantly, the Court noted that if it held in favor of *Meachum*, it would subject many other discretionary decisions by state prison officials to judicial review.¹⁴⁶ These decisions, said the Court, "traditionally have been the business of prison administrators rather than of the federal courts."¹⁴⁷ The Court believed that requiring due process protections in inmate transfer situations would open the door to challenges by inmates of virtually every other discretionary state decision that inflicted some loss on the inmate¹⁴⁸—the Court was "unwilling to go so far."¹⁴⁹

Finally, the *Meachum* Court, in recognizing that the sources of inmates' liberty interests are often limited to those found in state laws or regulations,¹⁵⁰ applied a positivist conception of liberty as further justification for barring *Meachum's* claim. The Court noted that no Massachusetts law gave prisoners a right to remain at a particular prison.¹⁵¹ However, state law did give prison officials broad discretion to transfer prisoners for almost any reason.¹⁵² The Court held, therefore, that inmates have no substantial expectation of remaining at any particular prison and thus no due process is required before transferring them.¹⁵³

Justice Stevens, in dissent, sharply disagreed with the majority's conception of liberty.¹⁵⁴ He argued that the source of a liberty interest does not rest solely in the content of state laws and regulations,¹⁵⁵ rather, it lies in the "basic freedom" protected by the

145. *See id.* at 223.

146. *See id.* at 225.

147. *Id.*

148. *See id.* ("[U]nder the approach urged here, any transfer, for whatever reason, would require a hearing . . ."). But Justice Stevens, in dissent, disagreed with this assessment. *See id.* at 235 (Stevens, J., dissenting) ("[G]rievous loss . . . is somewhat flexible. I would certainly not consider every transfer within a prison system, even to more onerous conditions of confinement, such a loss.").

149. *Id.* at 225.

150. *See id.*; *see also* Flax, *supra* note 7, at 897-98 (discussing *Meachum*); *supra* notes 113-17 and accompanying text (discussing the positivist view of the source of due process interests).

151. *See Meachum*, 427 U.S. at 226. *Meachum* apparently had attempted to use *Wolff v. McDonnell*, 418 U.S. 539 (1974), to bolster his claim. In *Wolff*, the Court held that a prisoner's liberty was implicated when he lost good-time credits towards release because of serious misconduct. *See id.* at 558. The Court in *Meachum* emphasized, however, that "[t]he liberty interest in *Wolff* had its roots in state law." *Meachum*, 427 U.S. at 226.

152. *See Meachum*, 427 U.S. at 227.

153. *See id.* at 228.

154. *See id.* at 229-30 (Stevens, J., dissenting).

155. *See id.* at 230 (Stevens, J., dissenting).

Constitution.¹⁵⁶ In other words, humans have liberty interests because they have freedom, not because the State chooses to let them be free.¹⁵⁷ According to Justice Stevens, the relevant question, then, is to what degree the State may deprive an inmate of liberty by virtue of his conviction and sentence.¹⁵⁸ The prisoner retains a "residuum of constitutionally protected liberty," Justice Stevens reasoned, and if the State's deprivation amounts to sufficiently serious loss of that protected liberty, then the Constitution affords him procedural safeguards.¹⁵⁹

Cases decided after *Meachum* tended to rely on its limited conception of liberty for inmates. In *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*,¹⁶⁰ the Court applied the same reasoning as it had in *Meachum*, although it reached the opposite result.¹⁶¹ *Greenholtz* required the Court to consider whether parole-release determinations by the Nebraska Board of Parole implicated a prisoner's liberty interest under the Due Process Clause.¹⁶² As prescribed by *Roth* and *Meachum*, the Court first looked to state law to determine if such an interest existed.¹⁶³ Nebraska statutes described in great detail the circumstances and procedures under which an inmate could be paroled, requiring the Board of Parole to release inmates under certain conditions unless one of four specified reasons for denial was present.¹⁶⁴ Because of

156. *See id.* (Stevens, J., dissenting). Justice Stevens explained, "I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations." *Id.* (Stevens, J., dissenting).

157. *See id.* (Stevens, J., dissenting).

158. *See id.* at 230-31 (Stevens, J., dissenting).

159. *Id.* at 232 (Stevens, J., dissenting). The majority in *Meachum* (including then-Justice Rehnquist) did not appear to disagree that an inmate retains a residuum of liberty. In the majority's view, the residuum of liberty only protects the inmate from state actions that are outside the scope of the lawfully imposed sentence. *See id.* at 225. For Justice Stevens, the residuum of liberty protects the inmate from all state actions; it is what requires procedural protection under the Due Process Clause, depending on the seriousness of the impact on the inmate's residual liberty. *See id.* (Stevens, J., dissenting). Both Justice Stevens and Chief Justice Rehnquist carried forward their respective conceptions of this "residuum" in *Woodard*. *See Woodard*, 118 S. Ct. at 1251 (plurality opinion); *id.* at 1255 n.3 (Stevens, J., concurring in part and dissenting in part); *infra* notes 286-87 and accompanying text (discussing Chief Justice Rehnquist's use of the "residual" life concept in *Woodard*).

160. 442 U.S. 1 (1979).

161. *See id.* at 15-16.

162. *See id.* at 3.

163. *See id.* at 7.

164. *See id.* at 11. The relevant statute provided:

the mandatory language in the statute, the Court reasoned that prisoners have a legitimate expectation of release when parole conditions are met.¹⁶⁵ Thus, the State had created a liberty interest in parole release that the Due Process Clause would protect.¹⁶⁶

The *Greenholtz* Court emphasized that the mere possibility of parole was not in itself a sufficient basis for implicating federal due process protection.¹⁶⁷ *Greenholtz* argued that the interest in parole revocation, recognized by the Court in *Morrissey*, was the same as the interest at stake in a parole-release determination by the State.¹⁶⁸ The Court rejected this argument by carefully distinguishing parole release and parole revocation.¹⁶⁹ According to the Court, “[t]here is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires.”¹⁷⁰ Thus, the Court reasoned that it is worse to have freedom (by virtue of parole), and then have it revoked, than not to have freedom in the first place (because of imprisonment) and have it denied.¹⁷¹ State decisions regarding parole release and parole revocation, therefore,

Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

- (a) There is a substantial risk that he will not conform to the conditions of parole;
- (b) His release would depreciate the seriousness of his crime or promote disrespect for law;
- (c) His release would have a substantially adverse effect on institutional discipline; or
- (d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

NEB. REV. STAT. § 83-1114(1) (1976) (repealed 1991).

165. See *Greenholtz*, 442 U.S. at 12.

166. See *id.* The Court went on to hold, however, that the procedural protections in the Nebraska statute were sufficient to satisfy the federal due process requirements. See *id.* at 16. Unlike the Eighth Circuit, the Court did not require that a formal hearing be held for every inmate or that every adverse decision by the Board be accompanied by a statement from the Board indicating the evidence on which it relied. See *id.*

167. See *id.* at 11. Justice Powell disagreed with this view in a separate opinion. See *id.* at 19 (Powell, J., concurring in part and dissenting in part) (“I am convinced that the presence of a parole system is sufficient to create a liberty interest . . .”).

168. See *id.* at 9.

169. See *id.*

170. *Id.* The Court, apparently aware of the relative weakness of this argument, explained further that “it is not sophistic to attach greater importance to a person’s justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom.” *Id.* at 10 (quoting *United States ex rel. Bey v. Connecticut Bd. of Parole*, 443 F.2d 1079, 1086 (2d Cir. 1971)).

171. See *id.* at 10.

were sufficiently different for the Court to justify not providing the same protection to both.¹⁷²

Strengthening its positivist position in *Olim v. Wakinekona*,¹⁷³ the Court reasserted its view that state law is the primary source of liberty interests for prisoners.¹⁷⁴ In *Olim*, a prisoner challenged his transfer from a prison in Hawaii to a prison on the mainland.¹⁷⁵ According to Hawaii's prison regulations, a hearing was required for any transfer that would result in a substantial loss to the inmate.¹⁷⁶ The regulations required a committee to recommend a course of action to the prison administrator who, according to the Court, had no standards or criteria governing or burdening his discretion to follow or ignore the recommendation.¹⁷⁷

Holding that the State had not created a protectable liberty interest, the Court examined Hawaii's prison regulations and determined that the prison administrator was afforded significant discretion in transfer decisions.¹⁷⁸ Whereas the Nebraska statute in

172. *See id.*

173. 461 U.S. 238 (1983).

174. *See id.* at 249. The Court also reaffirmed the view it had asserted in *Meachum* that the Due Process Clause can be implicated directly if the state takes action against a prisoner that is not "within the normal limits or range of custody which the conviction has authorized the State to impose." *Id.* at 247 (quoting *Meachum v. Fano*, 427 U.S. 215, 225 (1976)).

175. *See id.* at 240. *Olim* could not remain at his maximum-security facility due to impending construction. *See id.* at 241. Because no other Hawaiian maximum-security facility could offer the correctional programs he needed, and because he was still considered a security risk (having been convicted of several felonies while in prison), *Olim* was transferred to another maximum-security prison on the mainland. *See id.*

176. *See id.* at 242. (citing paragraph 3 of Rule IV of the Supplementary Rules and Regulations of the Corrections Division, Hawaii Dep't of Social Servs. & Housing (1976)).

177. *See id.* at 242-43. The regulations stated:

"[The Administrator] may, as the final decisionmaker:

- (a) Affirm or reverse, in whole or in part, the recommendation; or
- (b) hold in abeyance any action he believes jeopardizes the safety, security, or welfare of the staff, inmate . . . , other inmates . . . , institution, or community and refer the matter back to the Program Committee for further study and recommendation."

Id. (alteration in original) (quoting paragraph 3(d)(3) of Rule IV of the Supplementary Rules and Regulations of the Corrections Division, Hawaii Dep't of Social Servs. & Housing (1976)).

178. *See id.* at 249. Justice Marshall, in a dissent joined by Justice Brennan in full and by Justice Stevens in part, echoed a theme often promoted by Justice Stevens in prisoner-rights cases: Inmates have liberty interests outside of those created by state law because they retain a "significant" amount of constitutionally protected liberty despite incarceration. *Id.* at 251 (Marshall, J., dissenting). Because the interstate transfer of an inmate "represents a substantial qualitative change" in that it has "banished [the inmate] from his home," it implicates a liberty interest, regardless of state law. *Id.* at 252

*Greenholtz*¹⁷⁹ had restricted the discretion of prison administrators, the Court noted that in Hawaii officials could transfer a prisoner “for whatever reason or for no reason at all.”¹⁸⁰ Accordingly, the Court proclaimed: “Process is not an end in itself.”¹⁸¹ As a result, where prison statutes and regulations give unbridled discretion to administrators, there is no liberty interest for process to protect.¹⁸²

The Court’s decision in *Connecticut Board of Pardons v. Dumschat*¹⁸³ foreshadowed the conflict that lay ahead in *Woodard*. In *Dumschat*, prisoners serving life terms challenged their denials of commutation by the State Board of Pardons as improperly infringing on their Fourteenth Amendment liberty interests.¹⁸⁴ The prisoners argued that each individual who is denied commutation should at least receive a written statement of the reasons for the denial.¹⁸⁵ The Second Circuit, relying on the fact that the Connecticut Board of Pardons had been granting over seventy-five percent of all applications for commutation from prisoners serving life sentences, held that the likelihood of receiving commutation created a protectable liberty interest in commutation.¹⁸⁶

In a majority opinion written by Chief Justice Burger, the Supreme Court disagreed, holding that the mere existence of the opportunity for commutation did not create a protectable liberty interest in commutation.¹⁸⁷ A prisoner’s expectation of commutation, the Court noted, is much like his expectation of parole release—only a “unilateral hope.”¹⁸⁸ The statistical likelihood of commutation is not sufficient to create a liberty interest; instead, the prisoner must show that the State intended to inhibit the discretion of the

(Marshall, J., dissenting).

179. See *supra* notes 160-72 and accompanying text (discussing *Greenholtz*).

180. *Olim*, 461 U.S. at 250 (quoting *Meachum v. Fano*, 427 U.S. 215, 228 (1976)).

181. *Id.*

182. See *id.*; see also *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983) (holding that inmates have a protected liberty interest in administrative segregation because the state’s regulations contained mandatory directives constraining administrative discretion); *Jago v. Van Curen*, 454 U.S. 14, 19 (1981) (holding that Ohio statutes do not create a protectable liberty interest in parole release); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (holding that a Nebraska statutory provision granting mandatory credits for good behavior gave prisoners a liberty interest under the Due Process Clause).

183. 452 U.S. 458 (1981).

184. See *id.* at 459.

185. See *id.* at 461.

186. See *Dumschat v. Connecticut Bd. of Pardons*, 618 F.2d 216, 220 (2d Cir. 1980), *rev’d*, 452 U.S. 458 (1981).

187. See *Dumschat*, 452 U.S. at 465.

188. *Id.* (citing *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 11 (1979)).

decisionmaker.¹⁸⁹ Thus, the Court held that a State does not create a liberty interest merely because “‘a wholly and expressly discretionary state privilege has been granted generously in the past.’”¹⁹⁰

The Court then held that the Connecticut commutation statute at issue created no protectable liberty interest since it set no standard criteria by which the Board of Pardons was required to approve commutations.¹⁹¹ Contrasting this statute with the statute at issue in *Greenholtz*, the Court noted that the Connecticut statute contained “no definitions, no criteria, and no mandated ‘shalls.’”¹⁹² At most, the Connecticut statute gave prisoners the right to seek commutation; according to the Court, it did not give them any constitutional rights in the commutation itself.¹⁹³

As it had done in prior prisoner-rights cases, the *Dumschat* Court looked for protectable liberty interests in positive sources—state statutes, regulations, and other practices.¹⁹⁴ The Court also reaffirmed that a prisoner’s liberty interest is extinguished by his conviction.¹⁹⁵ Much like his dissent in *Meachum*, however, Justice Stevens vigorously opposed this view.¹⁹⁶ He again argued that prisoners retain a “residuum of constitutionally protected liberty” at all times while in the state’s custody.¹⁹⁷ He argued that this liberty interest is never fully extinguished.¹⁹⁸ If it were, the state’s commutation process could be “totally arbitrary” with no recourse for the inmates.¹⁹⁹

More recently, in *Sandin v. Conner*,²⁰⁰ the Court further restricted the range of liberty interests requiring due process protection. In *Conner*, an inmate challenged his thirty-day

189. *See id.*

190. *Id.* (quoting *Leis v. Flynt*, 439 U.S. 438, 444 n.5 (1979)).

191. *See id.* at 466.

192. *Id.*

193. *See id.*

194. *See id.*; *see also supra* notes 113-22 and accompanying text (discussing the approaches the Court has used to determine the availability of prisoners’ liberty interests).

195. *See Dumschat*, 452 U.S. at 464 (citing *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979)).

196. *See id.* at 469 (Stevens, J., dissenting). Justice Stevens especially opposed this view in *Woodard*, arguing that an inmate’s interest in life—as opposed to liberty—can never fully be extinguished. *See Woodard*, 118 S. Ct. at 1255 (Stevens, J., concurring in part and dissenting in part).

197. *Dumschat*, 452 U.S. at 469 (Stevens, J., dissenting).

198. *See id.* (Stevens, J., dissenting).

199. *Id.* at 470 (Stevens, J., dissenting).

200. 515 U.S. 472 (1995).

segregated confinement²⁰¹ on the grounds that the Due Process Clause required the State to allow him to present witnesses at the disciplinary hearing.²⁰² The Court rejected his claim, holding that disciplinary confinement does not directly implicate the Due Process Clause, and that the State had not implicated due process concerns in the confinement.²⁰³

In an opinion authored by Chief Justice Rehnquist, the Court noted that *Meachum* and its progeny had created two undesirable results.²⁰⁴ First, this line of cases discouraged states from codifying prison management regulations in order to avoid creating liberty interests.²⁰⁵ Second, *Meachum* and its progeny led to “the involvement of federal courts in the day-to-day management of prisons.”²⁰⁶ To manage such a “volatile environment,” Chief Justice Rehnquist wrote, prison officials need flexibility to fine-tune the “ordinary incidents of prison life.”²⁰⁷

To address these problems, the Court in *Conner* imposed an additional requirement for state-created liberty interests—the circumstances of the deprivation of liberty must impose “an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”²⁰⁸ Consequently, the assumption that any punitive action taken by the State creates a liberty interest is incorrect.²⁰⁹ As the Court noted, a wide range of discipline falls within the range of activities permitted by the Due Process Clause.²¹⁰ Accordingly, the Court held that Conner’s discipline in this case was not “atypical” or “significant.”²¹¹ Not only was disciplinary confinement similar in conditions to other forms of punishment, but the duration of Conner’s sentence was also not affected by the

201. Conner, the inmate, was placed in segregated confinement as a result of “physical interference to impair a correctional function” and for using foul language directed towards a security guard. *Id.* at 475.

202. *See id.* at 475-76.

203. *See id.* at 483-86.

204. *See id.* at 482-83.

205. *See id.* at 482.

206. *Id.*

207. *Id.*

208. *Id.* at 484. In dissent, Justice Ginsburg, who was joined by Justice Stevens, voiced a familiar theme: “I see the Due Process Clause itself, not Hawaii’s prison code, as the wellspring of the protection due Conner.... [T]he process due by reason of the Constitution should not depend on the particularities of the local prison’s code.” *Id.* at 489-90 (Ginsburg, J., dissenting).

209. *See id.* at 484.

210. *See id.* at 485.

211. *See id.* at 486.

confinement.²¹² The state's prison regulation providing for disciplinary confinement, therefore, did not give rise to a protectable liberty interest.²¹³

While knowledge of prior prisoner-rights cases is important in understanding *Woodard*, the role of clemency in American jurisprudence is significant as well. Clemency has its roots in common-law England, where the sovereign held the authority to grant mercy to lawbreakers.²¹⁴ As were many other characteristics of English law, the power to grant mercy was incorporated into the post-Revolutionary American state governments.²¹⁵ Most of the states at that time allowed the governor alone to exercise the power of clemency, and this decision was not reviewable by the courts.²¹⁶

Despite its strong historical underpinnings, clemency's role in the American judicial process has been vigorously debated.²¹⁷ Some commentators believe that clemency performs an extralegal, nonjudicial function by bestowing grace on lawfully convicted individuals who otherwise have no right to a reduction or elimination of their sentence.²¹⁸ Derived from this view is the notion that the courts have given these individuals all of the process that society has mandated is due them; clemency is merely an extra chance given to the individual, and, as such, no more process is due.²¹⁹ Other commentators claim that clemency forms an integral part of the judicial process in that it helps to correct mistakes by the judiciary.²²⁰ Under this view, clemency is not gratuitous but is a necessary part of

212. *See id.*

213. *See id.*

214. *See* Korengold et al., *supra* note 13, at 352.

215. *See id.* at 354.

216. *See id.* at 355.

217. *See, e.g.,* Kobil, *supra* note 98, at 215 (arguing that clemency is an "integral part of our justice system"); Daniel T. Kobil, *The Quality of Mercy Strained: Wrestling the Pardon Power from the King*, 69 TEX. L. REV. 569, 572 (1991) (arguing that clemency achieves justice "by individualizing sentences and remitting undeserved punishment"); Korengold et al., *supra* note 13, at 359 (arguing that declines in grants of clemency make it no longer a realistic check on the judiciary); Palacios, *supra* note 13, at 331-32 (arguing that commutation enhances justice by overriding the courts in particular cases); Abramowitz & Paget, *supra* note 13, at 177 (arguing that clemency is only a matter of grace).

218. *See, e.g.,* Mark R. Schlakman, *Clemency and the Battered Woman*, FLA. B.J., Oct. 1994, at 72, 72; Abramowitz & Paget, *supra* note 13, at 177.

219. *See* Abramowitz & Paget, *supra* note 13, at 177-78; *see also* *Woodard*, 118 S. Ct. at 1251 (plurality opinion) ("Clemency proceedings . . . do not determine . . . guilt or innocence . . . and are not intended primarily to enhance the reliability of the trial process.").

220. *See* Kobil, *supra* note 98, at 215 (citing *Herrera v. Collins*, 506 U.S. 390, 411-12 (1993)).

determining the guilt or innocence of individuals, particularly those who have been wrongly convicted.²²¹

The debate over clemency's role in the judicial process forms part of an overarching debate concerning whether the Supreme Court's decision in *Evitts v. Lucey*²²² created a second "strand" of due process analysis. In *Evitts*, the Court held that inmates have a right to effective assistance of counsel on a first appeal as of right.²²³ The *Evitts* Court noted that "if a State has created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant,' the procedures used in deciding appeals must comport with the demands of [due process]."²²⁴ The Sixth Circuit in *Woodard* applied this logic to state clemency proceedings. It reasoned that clemency proceedings are an integral part of Ohio's adjudicatory system, and as a result some due process is required.²²⁵ Because the clemency proceeding is far removed from trial, however, only minimal process is due.²²⁶ Under this reasoning, then, due process is required to the extent that a particular state proceeding assists in determining guilt or innocence.²²⁷ The Supreme Court, however, rejected this rationale, holding that a second "strand" of due process analysis does not exist and that clemency is not an integral part of the adjudicatory process.²²⁸

Although the plurality in *Woodard* reaffirmed a familiar theme in prior prisoner-rights cases—positivism²²⁹—the recognition of a life interest in capital clemency proceedings by a majority of the Court

221. See *id.* at 214; see also *Herrera*, 506 U.S. at 411-12 (noting that clemency historically has been available to prevent "miscarriages of justice"); *Biddle v. Perovich*, 274 U.S. 480, 486 (1927) (noting that clemency is not merely an act of grace but serves the public welfare). Another commentator has argued that the Court uses commutation as a "smokescreen" to justify denial of remedies to inmates and to support its "overall deregulation of death." Palacios, *supra* note 13, at 335.

222. 469 U.S. 387 (1985).

223. See *id.* at 396.

224. *Id.* at 393 (first alteration in original) (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956) (plurality opinion)).

225. See *Ohio Adult Parole Auth. v. Woodard*, 107 F.3d 1178, 1186 (6th Cir. 1997), *rev'd*, 118 S. Ct. 1244 (1998).

226. See *id.* at 1186-87.

227. See *id.* at 1186.

228. See *Woodard*, 118 S. Ct. at 1250-51 (plurality opinion). Instead, the Court continued its practice of using a two-step due process analysis. See *id.* at 1247-49 (plurality opinion); *id.* at 1253-54 (O'Connor, J., concurring in part and concurring in the judgment). Both the plurality and the concurrence framed the due process issue by first determining if clemency creates an interest that the Fourteenth Amendment will protect and then, if necessary, determining how much process is due. Indeed, the use of this analysis was never questioned or challenged by any member of the Court.

229. See *infra* notes 235-38 and accompanying text.

was groundbreaking.²³⁰ Underlying differences between the plurality opinion and the concurrence in *Woodard*, however, expose deep, fundamental divisions between the Justices about the nature of cognizable due process interests. The concurrence—fearing more than the plurality that arbitrariness in the proceedings could undermine due process—disregarded the historical underpinnings of clemency and the availability of other remedies.²³¹ The plurality, disagreeing with the concurrence as to what extent a life interest should be recognized,²³² justified its result by using precedent regarding liberty interests to analyze this life interest case.²³³ Furthermore, the plurality and the concurrence conceptualized life interests in quite different ways, each having its own problems.²³⁴ Ultimately, what remains is a due process controversy left largely unresolved by this case.

The plurality opinion in *Woodard* continued the practice of examining state law as the source of protected interests, reaffirming the utility of the positivist analysis.²³⁵ Throughout his opinion, the Chief Justice emphasized the broad discretion afforded the Ohio Governor in clemency determinations.²³⁶ He also noted that clemency is merely a “matter of grace,” thus giving the executive a wide range of factors to consider in making his decision.²³⁷ Chief Justice Rehnquist concluded that Ohio has not created a protectable life or liberty interest in clemency proceedings through any of its statutes, regulations, or practices.²³⁸

230. See *infra* notes 239-47 and accompanying text.

231. See *infra* notes 248-65 and accompanying text.

232. See *infra* notes 266-69 and accompanying text.

233. See *infra* notes 270-85 and accompanying text.

234. See *infra* notes 286-300 and accompanying text.

235. See *Woodard*, 118 S. Ct. at 1247-52 (plurality opinion).

236. The Chief Justice acknowledged that the Authority's procedures for conducting clemency reviews were mandatory, much like the Nebraska statute in *Greenholtz*. See *id.* at 1250 (plurality opinion). He distinguished *Woodard*'s situation by emphasizing the fact that the Governor had ultimate decisionmaking authority; the Authority's role was merely advisory. See *id.* at 1250-51 (plurality opinion). The State had therefore not created an interest that it was now attempting to ignore. See *id.* at 1251 (plurality opinion). Additionally, as the Chief Justice noted, *Woodard*'s claim of a protectable interest in the clemency process itself is not cognizable under the Due Process Clause. See *id.* at 1249 n.2 (plurality opinion).

237. *Id.* at 1250 (plurality opinion).

238. See *id.* (plurality opinion). The Chief Justice also noted that this conclusion would not change under the new analysis from *Sandin v. Conner*, 515 U.S. 472 (1995). See *Woodard*, 118 S. Ct. at 1251 (plurality opinion). According to the Chief Justice, a denial of clemency would not impose the kind of atypical hardship on an inmate envisioned by the Court in *Conner*. See *id.* at 1251 (plurality opinion); see also *supra* notes 200-13 and accompanying text (discussing *Conner*). It would merely mean “that the inmate must

Despite the plurality's reliance on positivist analysis, a majority of the Justices moved in a new direction by expressing a willingness to recognize a *life* (as opposed to liberty) interest in capital clemency proceedings.²³⁹ In procedural due process cases preceding *Woodard*, the Court had searched for either "property" or "liberty" interests that had been adversely affected by state action.²⁴⁰ The third interest present in the language of the Fourteenth Amendment—"life"—had rarely, if ever, been explicitly addressed in the context of procedural due process.²⁴¹ Thus, the five Justices who recognized a life interest in clemency proceedings were willing to develop the Court's procedural due process framework one step further.

Significantly, these five Justices potentially have paved the way for a new avenue by which prisoners facing execution may collaterally attack²⁴² their death sentences. The Justices seem to conceive of the life interest as existing independently of either state laws or the nature of state action (such as clemency denial).²⁴³ Justice O'Connor, for example, based her finding of a protectable life

serve the sentence originally imposed." *Woodard*, 118 S. Ct. at 1251 (plurality opinion).

239. Justices Stevens, O'Connor, Souter, Ginsburg, and Breyer each supported the proposition that prisoners have a life interest in clemency proceedings. See *id.* at 1253 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 1254-56 (Stevens, J., concurring in part and dissenting in part).

240. See, e.g., *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 459 (1981) (liberty interests); *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 5 (1979) (liberty interests); *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972) (liberty and property interests); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (liberty interests).

241. See *Kobil*, *supra* note 98, at 217 ("[T]he Court has omitted mention of the protection of life from most discussions of procedural due process."). Of course, the Court has examined life interests in other contexts, such as the constitutionality of abortion, see *Roe v. Wade*, 410 U.S. 113 (1973), and the death penalty, see *Gregg v. Georgia*, 428 U.S. 153 (1976). In the context of abortion, however, the Court dealt with the issue of "life" only to the extent that it held that a human fetus is not a "person" within the meaning of the Fourteenth Amendment. See *Roe*, 410 U.S. at 157. Death penalty cases implicate the "life" language of the Fourteenth Amendment only to the extent that capital punishment must be carried out using objective standards for determining which convicted defendants live or die. See *Woodson v. North Carolina*, 428 U.S. 280, 302-03 (1976). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 13.3, at 491-96 (5th ed. 1995) (discussing the Court's definition of "life").

242. Collateral attack is defined as "an attack made by or in an action or proceeding that has an independent purpose other than impeaching or overturning the judgment." BLACK'S LAW DICTIONARY 261 (6th ed. 1990). For example, in *Custis v. United States*, 511 U.S. 485 (1994), a defendant in a federal sentencing proceeding collaterally attacked the validity of his sentence, maintaining that ineffective assistance of counsel at his earlier state trials made those convictions fundamentally unfair. See *id.* at 487.

243. See *Woodard*, 118 S. Ct. at 1253-54 (O'Connor, J., concurring in part and concurring in the judgment).

interest on the Fourteenth Amendment itself.²⁴⁴ Unlike the plurality, she did not examine either Ohio law or the effect of a clemency denial to determine that Woodard had a constitutionally protected interest;²⁴⁵ instead, she relied on the view that every living person has an interest in life that is protected by the Fourteenth Amendment.²⁴⁶ It is conceivable, then, that every prisoner facing death by execution could challenge the state's clemency proceedings on the basis that the state's procedures do not respect his interest in life.²⁴⁷

Despite the fact that five Justices may have paved the way for groundbreaking due process jurisprudence, deep divisions still separate these Justices and the *Woodard* plurality. Justice O'Connor is more concerned than the Chief Justice about the possibility of arbitrary state clemency proceedings.²⁴⁸ She agreed with the Chief Justice that clemency historically has been committed to the executive,²⁴⁹ but she noted that the possibility exists of "a scheme whereby a state official flipped a coin to determine whether to grant clemency" or a "case where the State arbitrarily denied a prisoner any access to its clemency process."²⁵⁰ The Chief Justice, on the other hand, is more willing to trust the executive.²⁵¹ For instance, rather than focus on the potential for arbitrary clemency decisions, he highlighted the broad discretion afforded Ohio's Governor to grant

244. See *id.* at 1253 (O'Connor, J., concurring in part and concurring in the judgment).

245. See *id.* (O'Connor, J., concurring in part and concurring in the judgment).

246. See *id.* (O'Connor, J., concurring in part and concurring in the judgment). Notably, neither Justice O'Connor nor Justice Stevens provided support for this view, empirical or otherwise; rather, they seemed to characterize it as a self-evident proposition. See, e.g., *id.* at 1255 (Stevens, J., concurring in part and dissenting in part) ("There is . . . no room for legitimate debate about whether a living person has a constitutionally protected interest in life. He obviously does.").

247. The problem with allowing a collateral attack at this stage in the process is that "[t]he defendant has already had a full trial on the issue of guilt, and a trial on the issue of penalty; the requirement of still [another] adjudication offers an invitation to those who have nothing to lose by accepting it to advance entirely spurious claims." *Ford v. Wainwright*, 477 U.S. 399, 435 (1986) (Rehnquist, J., dissenting).

248. See *Woodard*, 118 S. Ct. at 1254 (O'Connor, J., concurring in part and concurring in the judgment); see also Korengold et al., *supra* note 13, at 363 (discussing how the often politicized nature of clemency decisions can lead to arbitrariness in those decisions).

249. See *Woodard*, 118 S. Ct. at 1253 (O'Connor, J., concurring in part and concurring in the judgment).

250. *Id.* at 1254 (O'Connor, J., concurring in part and concurring in the judgment).

251. See *id.* at 1250-52 (plurality opinion). The Chief Justice has often shown deference to the expertise and motives of state officials. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 482 (1995) (noting that federal courts should defer to state officials); *New York v. Quarles*, 467 U.S. 649, 651 (1984) (creating a *Miranda* exception based on officers' good-faith assessment of a public safety threat); *Hewitt v. Helms*, 459 U.S. 460, 470 (1983) (entrusting the day-to-day operation of prisons to the "expertise of prison officials").

clemency.²⁵² For the Chief Justice, the Governor's need for discretion outweighs the possibility that this decision may be arbitrary.

Although the concern of the concurrence about arbitrary clemency proceedings is well-placed, the plurality's position more accurately reflects the nature of clemency in the context of procedural due process. One could certainly imagine, as Justice O'Connor argued,²⁵³ that discretion might result in arbitrariness.²⁵⁴ For instance, one might envision a situation in which a Democratic governor only granted clemency to prisoners who take an oath to support the Democratic political party, or a scheme in which a male governor only grants clemency to fellow males. But these examples suffer from at least two flaws.

First, the concurrence's argument ignores the traditionally executive-oriented nature of clemency.²⁵⁵ Clemency is not part of the judicial process; if it were, it would not be vested in the executive.²⁵⁶ Clemency has "not traditionally been the business of courts."²⁵⁷ Instead, because of its inherently political nature, clemency has been a decision for the executive to make based on any "wide range of factors"²⁵⁸ that the executive deems appropriate.²⁵⁹ As with the

252. See *Woodard*, 118 S. Ct. at 1250-51 (plurality opinion).

253. See *id.* at 1254 (O'Connor, J., concurring in part and concurring in the judgment).

254. See *id.* (O'Connor, J., concurring in part and concurring in the judgment).

255. See Petitioner's Brief at 2, *Woodard* (No. 96-1769); Abramowitz & Paget, *supra* note 13, at 177.

256. Clemency is, however, also vested in the legislative branch at the federal level. See *Brown v. Walker*, 161 U.S. 591, 601 (1896); James N. Jorgensen, Note, *Federal Executive Clemency Power: The President's Prerogative to Escape Accountability*, 27 U. RICH. L. REV. 345, 360 (1993).

257. *Woodard*, 118 S. Ct. at 1249 (plurality opinion) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 464 (1981)).

258. *Id.* at 1250 (plurality opinion).

259. See Petitioner's Brief at 3, *Woodard* (No. 96-1769); Brief for the Criminal Justice Legal Foundation at 3, *Woodard* (No. 96-1769); Abramowitz & Paget, *supra* note 13, at 177. Even scholars who argue for more procedural protections at the clemency stage have acknowledged that clemency is (or has become) an essentially political decision. See, e.g., Korengold et al., *supra* note 13, at 363-65. Commentators have argued, however, that clemency decisions should be made based on considerations of justice, rather than "inappropriate" political reasons. See, e.g., Kobil, *supra* note 217, at 610. But, as the Court has pointed out previously, "individual acts of clemency inherently call for discriminating choices because no two cases are the same." *Schick v. Reed*, 419 U.S. 256, 268 (1974).

The inherently political nature of clemency raises the issue of whether the political question doctrine bars courts from reviewing clemency decisions. This doctrine holds that certain matters are better left resolved through political considerations rather than through judicial review. See NOWAK & ROTUNDA, *supra* note 241, § 2.15(a), at 104-05. Just because the issue involves political facets, however, does not mean the courts cannot

executive veto,²⁶⁰ the electorate decides whether the executive wields her discretion in an overly arbitrary manner. Because the courts have afforded an individual all of the formal procedural rights to which society has entitled him, clemency operates only as an outlet for mercy, which the executive may use on behalf of society when society (through the executive) deems it necessary to override the judicially imposed sentence.²⁶¹

Second, the concurrence's argument ignores the availability of other remedies against executive arbitrariness. The State may, of course, choose to fetter the discretion of its executive in clemency decisions by subjecting these decisions to state judicial review.²⁶² As Chief Justice Rehnquist pointed out in *Conner*, inmates may also draw upon the Eighth Amendment²⁶³ and the Equal Protection Clause²⁶⁴ in challenging arbitrary state proceedings.²⁶⁵

The plurality and the concurrence also differed sharply on the extent to which the Court should recognize a "life" interest under the Due Process Clause. Justice O'Connor, for instance, emphasized the notion that an inmate facing execution continues to have an interest in his life, despite the fact that his liberty interest has been completely extinguished.²⁶⁶ That is, asserting that all of an inmate's

review it. *See id.* The Court in *United States v. Nixon*, 418 U.S. 683 (1974), explained that under the political question doctrine, despite the existence of political issues, the judiciary can hear "the kind of controversy courts traditionally resolve." *Id.* at 696.

260. The veto is a "refusal by . . . a governor to sign into law a bill that has been passed by a legislature." BLACK'S LAW DICTIONARY 1565 (6th ed. 1990). Veto, unlike clemency, is not a wholly executive function. *See* 73 AM. JUR. 2D *Statutes* § 69 (1974). Thus, it is generally considered only a qualified power to the extent that it can be overridden by the legislature. *See id.*

261. *See* Abramowitz & Paget, *supra* note 13, at 177 (arguing that clemency cannot be challenged in the courts).

262. *See* Sandin v. Conner, 515 U.S. 472, 486 n.11 (1995).

263. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

264. The Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

265. *See* *Conner*, 515 U.S. at 487 n.11. In *Dumschat*, Chief Justice Burger noted that the respondents had not raised any equal protection claim, suggesting that a challenge to a state's commutation practices on those grounds could exist. *See* Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 n.9 (1981). Similarly, in *Woodard*, the Chief Justice noted that because *Woodard* had not raised an equal protection claim, the Court had no occasion to decide that particular issue. *See* *Woodard*, 118 S. Ct. at 1247 n.1 (plurality opinion). It appears, then, that the Court has not foreclosed a challenge to state clemency decisions on equal protection grounds.

266. *See* *Woodard*, 118 S. Ct. at 1253-54 (O'Connor, J., concurring in part and concurring in the judgment) (explaining that it is "incorrect . . . to say that a prisoner has been deprived of *all* interest in his life before execution").

liberty has been extinguished by conviction is quite different than asserting that all of an inmate's life has been extinguished, even before execution.²⁶⁷ Chief Justice Rehnquist, on the other hand, noted that an inmate's interest in his life is determined at trial; he may still be interested in his life at the clemency stage, but he has no legal right to that interest.²⁶⁸ By the time the inmate has reached the clemency stage, the Chief Justice claimed, he has only a residual life interest, for example, "in not being summarily executed by prison guards."²⁶⁹

Although the plurality's view on life interests adheres to prisoner-rights precedent concerning liberty, it does not fully explain why cases involving "liberty" interests should be used to decide a case involving a purported "life" interest. Before *Woodard*, the Court generally took a restricted view of prisoners' liberty interests under the Fourteenth Amendment. For example, the Court in *Greenholtz* rejected the notion that parole release implicates a liberty interest independent of any State law.²⁷⁰ *Dumschat* stood for the proposition that an inmate's appeal for commutation, like a request for parole, is merely a "unilateral hope" undeserving of Fourteenth Amendment protection.²⁷¹ In *Woodard*, the Chief Justice merely applied the same principles to appeals for clemency by inmates facing execution,²⁷² but he did not explain the implication of this application to claims such as *Woodard's*. The liberty interest involved with respect to the individual prisoner is physical freedom,²⁷³ but the interest involved in *Woodard* with respect to the individual prisoner is life itself,²⁷⁴ and, as Justice Stevens points out in his dissent in *Woodard*, an inmate's interest in being alive is qualitatively different from an interest in merely being free.²⁷⁵

267. See *id.* (O'Connor, J., concurring in part and concurring in the judgment).

268. See *id.* at 1249-50 (plurality opinion).

269. *Id.* at 1250 (plurality opinion). For a discussion of the "residual" life interest, see *infra* notes 286-93 and accompanying text.

270. See *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 11 (1979).

271. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (citing *Greenholtz*, 442 U.S. at 11).

272. See *Woodard*, 118 S. Ct. at 1249-51 (plurality opinion).

273. See, e.g., *Dumschat*, 452 U.S. at 459-67.

274. See *Woodard*, 118 S. Ct. at 1253 (O'Connor, J., concurring in part and concurring in the judgment). For an extensive discussion of this point, see Kobil, *supra* note 98, at 201-26.

275. See *Woodard*, 118 S. Ct. at 1255 (Stevens, J., concurring in part and dissenting in part). Insofar as Justice Stevens was concerned, this difference is a self-evident truth. See *id.* (Stevens, J., concurring in part and dissenting in part). Yet although he declared it a self-evident truth, Justice Stevens underscored his point by noting that "death is a

On one hand, it seems inapposite to use cases that turn on a recognition of liberty interests to decide a case involving a life interest.²⁷⁶ For example, the Chief Justice applied *Dumschat* to bar Woodard's claim,²⁷⁷ but *Dumschat* focused on an inmate's interest in being free from restraint upon commutation of his sentence.²⁷⁸ Because the inmate in *Dumschat* did not face execution, it would be illogical to conclude that he needed due process protection for his life.²⁷⁹ Woodard, however, faced state action that would soon deprive him of life, not just liberty.²⁸⁰

On the other hand, it might be entirely appropriate for the Court to rely on cases involving liberty interests to decide Woodard's case. In *Greenholtz*, for example, the Court relied on *Roth*—a case involving property interests—to decide whether the prisoner's claim implicated a protectable liberty interest.²⁸¹ In *Roth*, the Court noted that a protectable property interest does not arise out of the Due Process Clause merely because of an individual's "unilateral expectation" of some benefit.²⁸² Similarly, in *Greenholtz*, the Court held that a liberty interest protected by the Due Process Clause

different kind of punishment from any other which may be imposed in this country . . . it is different in both its severity and its finality.' " *Id.* at 1256 (Stevens, J., concurring in part and dissenting in part) (quoting *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977)). Indeed, since at least 1957, the Court has been concerned with the procedural fairness of death penalty cases. *See, e.g., Reid v. Covert*, 354 U.S. 1, 77 (1957) (Harlan, J., concurring). Because of the severity of this particular punishment, the Court has often displayed enhanced sensitivity regarding its use. The Court has held, for instance, that insane individuals may not be executed, even when insanity sets in after conviction. *See Ford v. Wainwright*, 477 U.S. 399, 411 (1986). Also, capital defendants must be given an opportunity to present mitigating circumstances to the jury, which must be given the choice of either imposing the death penalty or the lesser sentence of life imprisonment. *See Woodson v. North Carolina*, 428 U.S. 280, 303-05 (1976).

276. Justices O'Connor and Stevens both noted the impropriety of comparing Woodard's life interest to the liberty interest at stake in *Dumschat*. *See Woodard*, 118 S. Ct. at 1253-54 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 1255 (Stevens, J., concurring in part and dissenting in part).

277. *See id.* at 1249-50 (plurality opinion).

278. *See Dumschat*, 452 U.S. at 459-67.

279. *See Woodard*, 118 S. Ct. at 1255 (Stevens, J., concurring in part and dissenting in part).

280. *See id.* (Stevens, J., concurring in part and dissenting in part). The Chief Justice and Justice Stevens did not have a common understanding of "life" in the context of this case. Chief Justice Rehnquist seemed to consider an inmate facing execution as having already lost his "life" at the moment his death sentence was handed down at trial, *see id.* at 1252 n.5 (plurality opinion), but Justice Stevens considered an inmate's "life" to continue until the inmate is physically executed, *see id.* at 1255 (Stevens, J., concurring in part and dissenting in part).

281. *See Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 7 (1979) (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

282. *Roth*, 408 U.S. at 577.

cannot arise merely because of an inmate's "hope that the benefit will be obtained."²⁸³ To apply this principle to a purported life interest in the Due Process Clause does not necessarily seem to stretch precedent.²⁸⁴ Unfortunately, the Chief Justice did not explain why reliance on *Dumschat* and *Greenholtz* is appropriate; he offered no more than the conclusory statement that "[a]n appeal for clemency . . . 'is simply a unilateral hope.'"²⁸⁵

While the plurality opinion remained true to precedent, its view with respect to life interests lacks intuitive clarity. Even though the Chief Justice was unwilling to recognize a "continuing" life interest, he expressed his opinion that a "residual" life interest exists such that a prisoner may not be executed outside the normal parameters of the originally imposed death sentence.²⁸⁶ This "partial" life interest is similar to an inmate's liberty interest that may be infringed if the nature of the state's punishment is outside the range contemplated in the original sentence.²⁸⁷ In cases involving prisoners' liberty interests, the Court has recognized that although the conviction has extinguished an inmate's expectation of liberty, an inmate retains a small amount of liberty.²⁸⁸ That small amount of liberty prevented the state in *Washington v. Harper*,²⁸⁹ for instance, from arbitrarily administering psychotropic drugs to an inmate against his will.²⁹⁰ In *Woodard*, the Chief Justice extended this reasoning to an inmate's interest in life.²⁹¹ Although an inmate no longer has a legitimate expectation of life after he has been sentenced to death, the Chief Justice argued that the inmate does retain a small amount of interest

283. *Greenholtz*, 442 U.S. at 11 (citing *Roth*, 408 U.S. at 577).

284. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539, 557 (1973) (noting that the Court's positivist analysis of liberty "parallels the accepted due process analysis as to property"). But see *Jago v. Van Curen*, 454 U.S. 14, 17 (1981) (holding that the "mutually explicit understandings" language relied upon in a "property" interest case did not relate to the "liberty" interest asserted by the respondent).

285. *Woodard*, 118 S. Ct. at 1249 (plurality opinion) (quoting *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981)).

286. See *id.* at 1250 (plurality opinion).

287. See, e.g., *Sandin v. Conner*, 515 U.S. 472, 483-84 (1995); *Olim v. Wakinekona*, 461 U.S. 238, 247 (1983); *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

288. See *Washington v. Harper*, 494 U.S. 210, 221 (1990); *Greenholtz*, 442 U.S. at 7; *Meachum*, 427 U.S. at 225; *Wolff*, 418 U.S. at 555-56.

289. 494 U.S. 210 (1990).

290. See *id.* at 221. *Harper* involved a claim by an inmate that he should have received a judicial hearing before involuntarily being administered psychotropic drugs to calm his violent conduct. See *id.* at 210. Although the Court recognized that the inmate had some liberty interest in not being administered the drug, the Court determined that the state-provided procedures available to him were sufficient under the Due Process Clause. See *id.* at 222.

291. See *Woodard*, 118 S. Ct. at 1250 (plurality opinion).

in his life such that the State may only execute him in accordance with his sentence.²⁹² While this reasoning squares with precedent, it does not seem to make sense intuitively. It may be logical to say that an individual can have most of his *liberty* taken away and yet retain a small amount, but it seems counterintuitive to say that an inmate facing execution can have part of his *life* taken away while retaining some lesser portion. The Chief Justice, however, offered little elucidation for this point. He merely asserted without explanation that *Greenholtz* “makes clear” that Woodard cannot use his residual life interest to “challenge the clemency determination by requiring the procedural protections he seeks.”²⁹³

The concurrence, on the other hand, relied on a common-sense interpretation of a life interest. Justice O’Connor framed the issue as whether Woodard had an interest in his life that was sufficiently protected by the Due Process Clause so as to require procedural safeguards in Ohio’s clemency proceedings.²⁹⁴ It makes sense, of course, to say that an inmate facing death would have an interest in his life;²⁹⁵ but having an interest in life does not necessarily mean that an individual possesses a constitutionally recognizable life interest.²⁹⁶ This life interest, however defined, is at least a discrete, definable concept. As such, a life interest can be taken away without actually taking away life itself.²⁹⁷ Accordingly, the judicial system can

292. *See id.* (plurality opinion).

293. *Id.* (plurality opinion) (citing *Greenholtz*, 422 U.S. at 7).

294. *See id.* at 1253-54 (O’Connor, J., concurring in part and concurring in the judgment). Professor Kobil, arguing that the Court should recognize a life interest under the Due Process Clause, also appears to frame the issue in this way. *See Kobil, supra* note 98, at 207 (“A life interest would seem to be extant so long as the person draws breath.”). He argues that an unfavorable decision by the clemency authority deprives a person, literally, of life. *See id.* at 217. It cannot be otherwise, he claims, unless we are prepared “to make the harrowing admission that for purposes of the Due Process Clause he is already dead.” *Id.* In his brief to the Supreme Court, Woodard’s attorney made a similar point when he noted that Woodard is not “legally dead.” Brief for Respondent at 3, *Woodard* (No. 96-1769). In reply, the Ohio Attorney General argued that denying Woodard a life interest at the clemency stage does not render him legally dead. *See Reply Brief for Petitioners* at 1, *Woodard*, 118 S. Ct. 1244 (No. 96-1769). Instead, “[i]t just establishes that with respect to the requirements of due process, the life interest Mr. Woodard had before killing Mani Akram has been given the process it is due.” *Id.* at 1.

295. *See Woodard*, 118 S. Ct. at 1255-56 (Stevens, J., concurring in part and dissenting in part); *see also Kobil, supra* note 98, at 207 (“[I]n the case of a clemency request by a prisoner sentenced to death, is it not an interest in *life* that is being asserted, rather than an interest in *liberty*?”).

296. *See Woodard*, 118 S. Ct. at 1249-50 (plurality opinion).

297. *See id.* at 1250 (plurality opinion). An analogy can be made to property interests. Although a person might have an interest in property, such as a job, it does not follow that the person has a *constitutionally protected* property interest in that job. *See generally*

adjudicate away one's life interest, even though one continues to have an interest in life itself.²⁹⁸

The concurrence's interpretation of a life interest also comes at the expense of established precedent. In analyzing procedural due process cases involving prisoners, the Court has established that it must examine the "nature" of the interest at stake rather than the potential impact of the State's action on the prisoner.²⁹⁹ Thus, the relevant issue in *Woodard* was whether the inmate has a life interest in Ohio's clemency proceedings that is protected by the Due Process Clause.³⁰⁰ But the concurrence's alternative focus—whether *Woodard* had an interest in his life—led it to consider what would happen to *Woodard* if clemency were denied. If it were denied, *Woodard* would be executed—an obviously serious loss to him. By considering the impact of the State's actions on *Woodard*, however, Justice O'Connor appears to have relied on a *Morrissey*-type "grievous loss" analysis of due process, which has not been used since the *Roth* Court bifurcated the procedural due process analysis.

The Court's struggle over when to recognize due process rights for prisoners is not completely resolved by *Woodard*. Partly because of its limited holding,³⁰¹ *Woodard* only hints at the future direction of due process rights for prisoners facing execution. Four Justices in *Woodard* agreed with Justice O'Connor that clemency proceedings create minimal due process rights for inmates under a sentence of death.³⁰² In future cases involving challenges to clemency procedures by inmates facing execution, then, Justice O'Connor's opinion could likely hold the upper hand.³⁰³

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) (holding that an untenured college professor did not have a constitutionally recognizable property interest in his job). An at-will employee, for example, has no property right in his job, see NOWAK & ROTUNDA, *supra* note 241, § 13.5(d), at 519-21, but so long as he is employed he continues to have the job itself.

298. See *Woodard*, 118 S. Ct. at 1250 (plurality opinion).

299. See *supra* notes 102-22 and accompanying text (discussing the Court's present procedural due process analysis).

300. See *Woodard*, 118 S. Ct. at 1247 (plurality opinion).

301. See *supra* note 62 (discussing the significance of plurality opinions).

302. See *Woodard*, 118 S. Ct. at 1254 (plurality opinion). Justice Stevens noted his approval of Justice O'Connor's concurrence. See *id.* (Stevens, J., concurring in part and dissenting in part). His only disagreement with Justice O'Connor was whether the case required a remand to the district court. See *id.* at 1256-57 (Stevens, J., concurring in part and dissenting in part).

303. In *Woodard*, even Justice Stevens agreed that only minimal due process protections are required in capital clemency proceedings. See *id.* at 1256-57 (Stevens, J., concurring in part and dissenting in part). Therefore, in cases in which the inmate claims a life interest but the record clearly shows that he has received notice and an opportunity

The court in *Woodard* employed the procedural due process analysis, which focused its inquiry on whether the "life" language of the Due Process Clause is implicated in state clemency proceedings. But this method merely prolonged the debate by not adequately accounting for the unique nature of capital clemency proceedings,³⁰⁴ as reflected by Justice O'Connor's concerns about the potential for arbitrariness in clemency procedures and Chief Justice Rehnquist's desire not to restrict the broad discretion of those to whom the clemency power is committed.³⁰⁵ Perhaps a better standard for measuring an inmate's due process rights in capital clemency proceedings is to "couple a strong presumption in favor of administrative discretion . . . with a willingness to review decisions on a case-by-case basis as a safeguard against patently arbitrary action."³⁰⁶

This method of review would help alleviate Justice O'Connor's justifiable concern that capital clemency proceedings not be infected by arbitrariness.³⁰⁷ Rather than recognize a fully protectable life interest under the Due Process Clause, which arguably does not exist at the clemency stage,³⁰⁸ this practice would erect a framework by which the Court could review "patently arbitrary" clemency decisions by state officials. Because only patently arbitrary decisions would be reviewed, however, state officials would still retain a wide range of discretion in clemency decisions.

Although *Woodard* casts doubt on the efficacy of the Court's manner of pigeonholing state actions into only three due process interests (life, liberty, and property), the proposed case-by-case method would not require the Court to abandon this approach. Rather, it would merely require the Court to treat clemency

to participate in the clemency hearing, the Court probably will fully recognize the inmate's life interest (unlike in *Woodard*) but determine that the interest has been adequately protected. Such a case presumably would expand prisoners' rights but, ironically, would conclude with effectively the same result as *Woodard*.

304. See Herman, *supra* note 7, at 516-17 (questioning the utility of attempting to define liberty and property interests in procedural due process cases).

305. See *supra* notes 248-52 and accompanying text (discussing the underlying considerations in the opinions of both Chief Justice Rehnquist and Justice O'Connor). It also has been argued that this method of analysis fails to deal adequately with the capital nature of clemency. See Coleen E. Klasmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U. L. REV. 1507, 1539 (1995) ("[C]apital clemency is qualitatively distinct from parole denial and thus merits a different analysis.").

306. Flax, *supra* note 7, at 926. Professor Flax advocates this standard as a means for remedying state action in general. See *id.* at 925.

307. See *supra* notes 249-50 and accompanying text.

308. See *supra* notes 255-61 and accompanying text.

proceedings as a special subset of the entire procedural due process controversy. Implicit in this treatment would be the recognition that an individual's life interest is not divisible or extinguishable in the same way that a liberty interest is typically held to be.³⁰⁹ In this way, it would differ from the plurality's view that only a "residual" life interest exists after trial. But the proposed method balances the life interest recognition with a strong presumption that in capital clemency proceedings the executive is not acting arbitrarily. Implicit in this part of the standard is the recognition that clemency has not historically been reviewable by the courts; therefore, only clearly arbitrary uses of the authority should be subject to judicial review.

Not only would this practice protect against flagrant executive misuse of clemency power, but it would also free executive decisionmaking discretion from the rigid demands of due process. At least in the limited context of capital clemency proceedings, this standard could mitigate part of the controversy over prisoners' due process rights.³¹⁰ *Woodard* makes clear, however, that the Court's ongoing struggle to determine the due process rights of prisoners in other contexts is far from over.

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309. See *supra* notes 287-93 and accompanying text (discussing the divisibility of life and liberty interests).

310. Others have argued for a more rigid standard: the right to "meaningful" clemency proceedings. Professor Kobil suggests, for instance, that a right to seek clemency is empty without some guarantee that it will receive meaningful consideration. See Kobil, *supra* note 98, at 218 n.86. He argues that because clemency is "an integral part of our federal constitutional scheme . . . it ought to function in a meaningful way." *Id.* at 219-220. A related view is that states themselves should provide meaningful clemency proceedings. See generally Daniel Lim, *State Due Process Guarantees for Meaningful Death Penalty Clemency Proceedings*, 28 COLUM. J.L. & SOC. PROBS. 47 (1994) (arguing for meaningful clemency proceedings at the state level). One interesting suggestion for countering the discretion of the executive in clemency proceedings has been to give state legislatures the same discretion and authority as the executive to grant clemency. See Kobil, *supra* note 217, at 615.

