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Sandin v. Conner: Locking Out Prisoners' Due Process Claims

Michelle C. Ciszak

SANDIN v. CONNER: LOCKING OUT PRISONERS' DUE PROCESS CLAIMS

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[1] More commonly known as the Due Process Clause, its original purpose was to protect individual rights from adverse government action without proper procedure.[2] The mission of the

1. U.S. CONST. amend. XIV, § 1; *see also* 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.1 (1986).

2. ROTUNDA et al., *supra* note 1, § 17.1. The Due Process Clause protects individuals from procedurally deficient government restrictions on freedom. *Id.* Due process inquiries focus on the distinction between "substantive" and "procedural" due process rights. *See generally* Leonard G. Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968) (discussing the grants and limitations of rights under the Fifth and Fourteenth Amendments). Substantive due process protects specific fundamental rights and safeguards individuals from arbitrary governmental limitations on their freedoms. ROTUNDA, *supra* note 1, § 17.1. The substantive component of the Due Process Clause effectuates certain guarantees of the Bill of Rights by preventing state legislatures from enacting legislation which denies such rights. *Id.* For example, should the state legislature attempt to enact a law denying the freedom of speech, substantive due process safeguards would protect this right of free speech. *Id.*

Once recognized, a substantive due process right cannot be withheld or violated without the required "process" of law. *Id.* This theory of "procedural" due process requires that, whenever the government seeks to exercise its power to deprive an individual of a fundamental right, procedural protections attach "to determine the basis for, and legality of, such action." *Id.* After determining that a substantive due process right exists, a court must examine the nature of the process that is "due." *Id.* The government's burden of observing procedural due process requirements does not, however, attach because an individual finds a specific deprivation unfavorable. *See id.* Only those deprivations which affect an individual's "life, liberty or property" require due process. *See* U.S. CONST. amend. XIV, § 1 (stating that an individual is protected from government action that impinges on "life, liberty, or property"). Case law establishes the proper procedures that states must follow to prevent the unfair deprivation of individual rights. *Id.* For an historical account of the court's development of procedural due process prior to the adoption of the Fourteenth Amendment, see Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENTARY 339 (1987).

While an individual may be deprived of his physical liberty for a certain period of time, the government must provide a trial to ensure that all existing procedures are followed. ROTUNDA et al., *supra* note 1, § 17.1. In other actions, such as the regulation of certain activities or the withdrawal of government benefits, the government must fulfill procedural due process requirements, but may do so with less process protections than are afforded at trial. *Id.* Whatever the degree of protection, due process requires that the procedure be "fundamentally fair to the individual in the resolution of the factual and legal basis for government actions which deprive him of life, liberty or property." *Id.* § 17.8, at 259.

On the issue of what rights individuals possess, philosopher Ronald Dworkin writes:

Due Process Clause is to ensure fundamental fairness.[3] Fundamental fairness requires that an individual has an opportunity to be heard, thereby limiting the risk of error in the government's decision-making process.[4] Due process analysis entails two steps.[5] First, a court examines whether due process safeguards should attach to a given situation.[6] If they should, a court must determine which procedures to apply.[7] The Constitution states that the recognition of a valid liberty interest is one situation that triggers the right to due process protections.[8]

> It is much in dispute, of course, what *particular* rights citizens have. Does the acknowledged right to free speech, for example, include the right to participate in nuisance demonstrations? In practice the Government will have the last word on what an individual's rights are, because its police will do what its officials and courts say. But that does not mean that the Government's view is necessarily the correct view; anyone who thinks it does must believe that men and women have only such moral rights as Government chooses to grant, which means that they have no moral rights at all.

R. DWORKIN, TAKING RIGHTS SERIOUSLY 184-85 (1977).

3. *See* ROTUNDA et al., *supra* note 1, § 17.1.

4. Thompson H. Gooding, Jr., *The Impact of Entitlement Analysis: Due Process in Correctional Administrative Hearings*, 33 U. FLA. L. REV. 151, 153 (1981); *see* ROTUNDA, *supra* note 1, § 17.1 (discussing the fundamental fairness purpose in due process jurisprudence).

5. Gooding, *supra* note 4, at 153.

6. *See, e.g.,* Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989) (analyzing procedural due process inquiries in two steps: (1) whether a liberty interest exists, and (2) whether the due process procedures were constitutionally sufficient); Meachum v. Fano, 427 U.S. 222, 223 (1976) (stating that the initial inquiry is whether a "liberty" interest is implicated before evaluating the amount of process due); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570 (1972) (stating that the first stage of due process inquiry begins with the nature of the interest at stake before evaluating the form of a hearing required); *see also* Gooding, *supra* note 4, at 153 (describing the two-part procedural due process inquiry).

7. *See supra* note 6; *supra* note 2 (discussing the distinction between "substantive" and "procedural" due process and the court's order of analysis in a due process inquiry); *see also* Edward L. Rubin, *Generalizing the Trial Model of Procedural Due Process: A New Basis for the Right to Treatment*, 17 HARV. C.R.-C.L. L. REV. 61, 68-73 (1982) (providing a detailed distinction between the concepts of "substantive" and "procedural" due process).

8. Gooding, *supra* note 4, at 153. The meaning of the word "liberty" does not dictate specific examples of freedom or individual choice. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 13.4(a) (3d ed. 1986). The notion of a "liberty" interest is the most significant limitation on state action against individual rights. *See id.* "Liberty," as mentioned in the Fifth and Fourteenth Amendments, is the prominent theme in those provisions. *Id.* The Court recognizes these provisions as being " 'incorporated' into the due process clause as well as 'fundamental rights' which are derived either from the concept of liberty or other constitutional values." *Id.* These rights provide "substantive prohibitions of government actions which would violate those rights." *Id.* The essence of procedural due process analysis centers around initially determining what types of freedom of action or liberty interests the government cannot limit without fair procedure, and then deciding what level of procedure is necessary to ensure fair deprivation. *Id.* The notion of a "liberty interest" may be sub-divided into three categories of governmental deprivation or restraint: "(1) physical freedom, (2) the exercise of fundamental constitutional rights, and (3) other forms

Unlike other substantive areas of law, the historical development of due process jurisprudence, and its application to prisoners' rights, occurred relatively recently.[9] Its origin traces only to the late 1960s.[10] Prior

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of freedom of choice or action." *Id.* Although the Due Process Clause focuses on procedures used to convict criminal defendants, due process safeguards extend from criminal matters to all government deprivations of liberty. *See id.* As Nowak noted, "[i]ndeed the protection of physical liberty is the oldest and most widely recognized part of the [due process] guarantee." *Id.* § 13.4(b).

9. Jack E. Call, *The Supreme Court and Prisoners' Rights*, 59 FED. PROBATION 36, 36 (1995).

10. *Id.* The explosion of prisoners' lawsuits over the past 30 years is linked directly to the rapid increase in the United States prison population as a whole. DAVID RUDOVSKY ET AL., THE AMERICAN CIVIL LIBERTIES UNION, THE RIGHTS OF PRISONERS, at xi (4th ed. 1988). It has been suggested that, given this population increase, the explosion of prisoners' rights suits concerning confinement conditions was necessary to avoid intolerable conditions. *Id.* Such suggestion went so far as to analogize prison conditions with Dante's depiction of Hell in his novel, *The Inferno*. *Id.*

Title 42, § 1983 of the U.S. Code provides for a civil action for a deprivation of rights and states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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 at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988). Under § 1983, prisoners may file civil suits in federal court against a prison or jail challenging conditions of their confinement. *Id.* If successful, the prisoner may be awarded money damages or other relief. ROGER A. HANSON & HENRY W.K. DALEY, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 1 (1995). A range of constitutional claims have arisen under § 1983. *See* Farmer v. Brennan, 114 S. Ct. 1970, 1974-75 (1994) (concerning the protection of inmates from violence by fellow inmates); Hudson v. McMillian, 503 U.S. 1, 9 (1992) (providing protection for prisoners from excessive force by prison officers); Estelle v. Gamble, 429 U.S. 97, 103 (1976) (raising the issue of adequate medical treatment); Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974) (challenging due process procedure in disciplinary proceedings); Cooper v. Pate, 378 U.S. 546 (1964) (per curiam) (addressing prisoners' asserted right to prison law library access).

Most § 1983 lawsuits are filed in federal court, although state courts may resolve these claims. HANSON & DALEY, *supra*, at 1 n.1. Representing an enormous portion of the United States district court system's civil docket, one in every 10 civil lawsuits is a § 1983 lawsuit. *Id.* at iii. The increase in § 1983 suits by prisoners has sparked debate among judges, attorneys, and other experts concerning the necessity and practicality of burdening the federal courts with these complaints. *Id.* at 3. One position that former Supreme Court Chief Justice Warren E. Burger, the Federal Courts Study Committee, and advocates of federalism argued, contends that § 1983 prisoners' lawsuits are a waste of scarce judicial resources, comparing them to cases in small claims court. *Id.* at 3-4. Contrasting this position, former Supreme Court Associate Justice Harry Blackmun, some federal judges, and advocates of prisoners' rights, contend that the extraordinary demand on federal courts to adjudicate § 1983 cases is overestimated. *Id.* at 4. Furthermore, Justice Blackmun recognized that these claims cannot adequately be deemed "frivolous or meritorious" before heard in federal court. *See id.* Indeed, Justice Blackmun asserted that federal courts need to "leave their doors open to all state prisoners" and refrain from

to that time, the Supreme Court avoided significant involvement in due process rights of prisoners.[11] Disciplinary rules and procedures governing prison communities were immune from traditional judiciary review, the rationale being that prison discipline was a matter solely for the discretion of prison officials.[12] But, because prison officials were the final arbiters of prisoners' grievances, unfair and arbitrary punishment of inmates remained common and unchecked.[13]

"siphon[ing] lawsuits off to some other dispute resolution forum," because of the potential for partisan results when a state court is forced to review the actions of its state prison. *Id.* at 4-5; *see generally* M. GLENN ABERNATHY & BARBARA A. PERRY, CIVIL LIBERTIES UNDER THE CONSTITUTION 166-67 (6th ed. 1993) (discussing the Supreme Court decisions that have developed the area of prisoners' rights law).

11. Call, *supra* note 9, at 36. The Court's abstention may be attributed to its unwillingness to usurp the functions of the legislative and executive branches of government, notions of federalism, a lack of understanding of the efficient operations of prisons, an unwillingness to interfere with state court jurisdiction over state prisons, or a fear of a flood of frivolous lawsuits from prisoners. *Id.* This "hands-off" period raised the question whether prisoners had any constitutional rights at all. As Professor Michael Mushlin noted, the "Constitution did not breach prison walls for over 170 years." 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1.02, at 7 (2d ed. 1993). Advocates of prisoners' rights, like the American Civil Liberties Union ("ACLU"), contend that this lack of judicial responsibility reflected the prevailing attitude that the purpose of incarceration was punishment. RUDOVSKY ET AL., *supra* note 10, at xii. This judicial attitude "reinforced the status quo of prison life" and, because no other political or social organizations intervened, the prison system remained insulated from public opinion and judicial management. *Id.* The "hands-off" period, therefore, emerged as a result of deference to the management decisions of prison officials. *Id.* at xii-xiii.

12. SHELDON KRANTZ, THE LAW OF CORRECTIONS AND PRISONERS' RIGHTS IN A NUTSHELL § 18 (1976); *see supra* note 11 and accompanying text (illustrating the reasons why the Court was reluctant to interfere in prisoners' due process cases).

13. *See* KRANTZ, *supra* note 12, § 18. Courts adhered to the "hands-off" doctrine even when a prisoner's safety was at risk. MUSHLIN, *supra* note 11, § 1.02. In one such case, inmates sought to litigate the dangerous conditions of their confinement, arguing that confinement in a room with a coal stove presented a dangerous risk of fire without any means of retreat. *Ex parte* Pickens, 101 F. Supp. 285, 286-87 (D. Alaska 1951). Although the court agreed with the classification of this condition as a "fabulous obscenity," *id.* at 287, the judge felt powerless to act because of the "hands-off" doctrine. *See id.* at 289. Misconduct sanctions that prison officials imposed during this era ranged in severity, and "includ[ed] verbal reprimands, loss of privileges, solitary confinement, transfer to another institution where the conditions of confinement were more onerous, and indefinite segregation in a maximum security unit within the prison." Charles H. Jones, Jr. & Edward Rhine, *Due Process and Prison Disciplinary Practices: From* Wolff *to* Hewitt, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 44, 52-53 (1985). Due process uniformity was virtually nonexistent because few restrictions as to the severity or length of sanctions existed and " '[u]ncertainty, even more than exemplary punishment, . . . was a major factor of control in the traditional prison.' " *Id.* at 52 n.41 (quoting McClearly, *Communication Patterns as Bases of Systems of Authority and Power*, in R.A. CLOWARD, THEORETICAL STUDIES IN SOCIAL ORGANIZATION OF THE PRISON (Social Science Research Council, pamphlet no. 15, 1960)).

Critics have advanced a separation of powers argument to justify strict adherence to the "hands-off" doctrine. *See generally* Kenneth C. Haas, *Judicial Politics and Correctional*

In the landmark case of *Wolff v. McDonnell*,[14] the Supreme Court abandoned its "hands-off" approach to prisoners' due process claims. Prisoners and their advocates took notice of the Court's entrance into this activist or "rights" period.[15] Prisoner lawsuits complaining about their conditions of confinement increased exponentially, creating a significant burden on federal dockets in recent years.[16] Unfortunately, this flood of litigation has overburdened already stressed federal judicial resources.[17] Commentators have argued that the courts themselves are to blame for this deluge of prisoners' lawsuits by "undertaking complex enforcement efforts and by expanding the standing to sue."[18] Regardless of who is to

Reform: An Analysis of the Decline of the "Hands-Off" Doctrine, 1977 DET. C.L. REV. 795, 797; Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L.J. 506, 512 (1963). Traditionally, management and control of correctional facilities were the responsibilities of the executive and legislative branches of government. MUSHLIN, supra note 11, § 1.02. As a result, courts were unwilling to dictate how the government should run its prisons. *Id.* The courts likely faced federalism concerns as well, and, therefore, were reluctant to dictate to the states how to manage their prisoners. *Id.* Judicial inexperience, a general lack of expertise with prison management, and a heavy judicial workload, also may have influenced the courts' hesitation to address prisoner claims. *Id.*

14. 418 U.S. 539 (1974); *see infra* notes 61-71 and accompanying text (discussing *Wolff's* holding and impact on the area of prisoners' rights).

15. *See* Call, *supra* note 9, at 36-37.

16. Robert G. Doumar, *Prisoners' Civil Rights Suits: A Pompous Delusion*, 11 GEO. MASON U. L. REV. 1, 6 (1988). The Administrative Office of the U.S. Courts (AO) recorded only 218 § 1983 cases in 1966, which was the first year that the AO counted prisoners' rights cases in a separate category. HANSON & DALEY, *supra* note 10, at 1-2. By 1992, the total prisoners rights cases had escalated to 26,824. *Id.* at 2. It is estimated that there is approximately one lawsuit for every 30 state inmates; in a state prison population of about 80,000 inmates, the number of § 1983 lawsuits roughly would number 26,000 to 28,000. *Id.* at 2-3.

17. Doumar, *supra* note 16, at 6. Over the last 20 years, the number of prisoner lawsuits has increased rapidly. Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 435 (1993). Because of recent sentencing reforms, the number of incarcerated individuals undoubtedly will increase, thus raising the number of prisoners' rights suits. *Id.* at 419.

18. Doumar, *supra* note 16, at 11. Both Doumar and Mushlin trace the explosion of prisoners' litigation to political, judicial, and societal developments in the 1960s. *Id.*; *see* MUSHLIN, *supra* note 11, § 1.03. Prisoners were becoming much more militant and assertive, particularly in the case of those belonging to the Black Muslim organization. *Id.* These prisoners opened the door to increased prison litigation for First Amendment religious rights and other related issues. *Id.* (citing Pierce v. La Vallee, 293 F.2d 233 (2d Cir. 1961); Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962); Brown v. McGinnis, 180 N.E.2d 791 (N.Y. 1962)). Additionally, government and private foundations provided funding for civil liberties litigation which otherwise would not have been economically feasible. *Id.*

At the judicial level during the 1960s, the Supreme Court expanded individual rights greatly through many landmark decisions. *See, e.g.*, Street v. New York, 394 U.S. 576 (1969) (providing free speech protection); Sherbert v. Verner, 374 U.S. 398 (1963) (recognizing protection for the free exercise of religion); Brown v. Board of Educ., 349 U.S. 294

"blame" for the proliferation of prisoners' constitutional claims, the Supreme Court's decisions in this area both have enlightened and confused the landscape of prisoners' due process jurisprudence.[19] From the landmark decision of *Wolff v. McDonnell*,[20] through twenty years of prisoners' rights decisions,[21] the Court has struggled to balance individual prisoners' rights with the exigencies of prison administration, and has searched for a due process formula which will allow everyone involved a just balance.

In *Sandin v. Conner*,[22] the Court redefined the methodology for recognizing liberty interests and reconsidered the types of deprivations that

(1955) (establishing protection against racial discrimination in public education); *see also* Katz v. United States, 389 U.S. 347 (1967) (establishing Fourth Amendment protection for privacy interests); United States v. Wade, 388 U.S. 218 (1967) (finding a right to counsel at a lineup); Miranda v. Arizona, 384 U.S. 436 (1966) (creating a right to warnings before custodial interrogation); Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the exclusionary rule applies to the states and bars illegally seized evidence). By enforcing constitutional rights, particularly for those "discrete and insular minorities" previously lacking access to the political process, the Court effectively communicated to prisoners that their constitutional claims would be considered. MUSHLIN, *supra* note 11, § 1.03 (citing Justice Stone's famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (describing groups with the greatest need for judicial protection)).

Two famous judicial comments marked the collapse of the traditional "hands-off" doctrine which had permitted the significant abuse of prisoners' constitutional rights toward prisoners. MUSHLIN, *supra* note 11, § 1.03. In a renowned statement that "sounded the death knell to the "hands-off" doctrine," Justice White declared: "[T]here is no Iron Curtain between the Constitution and the prisons of this country." *Id.* at 9 (alteration in original) (quoting Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974)). One year later, Justice Powell further undermined the hands-off doctrine and embraced constitutional guarantees for prisoners by proclaiming:

> [A] policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights.

Id. (quoting Procunier v. Martinez, 416 U.S. 396, 405-06 (1974)).

19. Barry R. Bell, Note, *Prisoners' Rights, Institutional Needs, and the Burger Court*, 72 VA. L. REV. 161, 166 (1986).

20. 418 U.S. 539 (1974).

21. *See, e.g.*, Washington v. Harper, 494 U.S. 210 (1990) (involuntary administration of psychotropic drugs); Hewitt v. Helms, 459 U.S. 460 (1983) (administrative segregation); Vitek v. Jones, 445 U.S. 480 (1980) (inmate transfer to a mental hospital); Greenholtz v. Inmates of the Neb. Penal & Correction Complex, 442 U.S. 1 (1979) (parole entitlements); Meachum v. Fano, 427 U.S. 215 (1976) (transfer to prison with less favorable conditions); Wolff v. McDonnell, 418 U.S. 539 (1974) (good-time credits for parole release); Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation).

22. 115 S. Ct. 2293 (1995).

invoke due process safeguards.[23] In *Sandin*, prisoner DeMont Conner[24] alleged that the petitioner and other Hawaii prison officials denied him procedural due process rights.[25] During an adjustment committee hearing on charges of misconduct, officials denied Conner's request to call witnesses he claimed would have proven his innocence.[26] Subsequently, the committee found him guilty of the misconduct charges.[27]

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23. *See id.* at 2295 (stating "[w]e granted certiorari to re-examine the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause").

24. *Id.* DeMont Conner was convicted of a multitude of offenses, including murder, kidnapping, robbery, and burglary and was serving a sentence of 30 years to life. *Id.* Conner was incarcerated in the Halawa Correctional Facility, a maximum-security prison in Oahu, Hawaii. *Id.*

25. *Id.* at 2296. Conner's claim sought to establish, based upon the Fourteenth Amendment due process right, a liberty interest in being free from disciplinary segregation. *Id.* Conner did not challenge his disciplinary sentence on the basis of the Eighth Amendment, which protects the individual against cruel and unusual punishment. *See* U.S. CONST. amend. VIII. Solitary confinement, or punitive segregation, has a long tradition in this country. MUSHLIN, *supra* note 11, § 2.02. Officials use this type of punishment for the most serious violations of prison rules. *Id.*; *see* BLAKE MCKELVEY, AMERICAN PRISONS: A STUDY IN AMERICAN SOCIAL HISTORY PRIOR TO 1915 1-16 (1968) (dating the historical use of solitary confinement as a punishment to the early nineteenth century); Thomas O. Murton, *Prison Management: The Past, The Present, and the Possible Future*, *in* PRISONS: PRESENT AND POSSIBLE 5, 9 (Marvin E. Wolfgang ed. 1979) (describing solitary confinement as a pervasive punishment). The potential for physical and mental harm to inmates restricted to solitary confinement has been well documented. MUSHLIN, *supra* note 11, § 2.02. For a discussion of the physical, emotional, and psychological effects of solitary confinement, see generally Thomas B. Benjamin & Kenneth Lux, *Solitary Confinement as Psychological Punishment*, 13 CAL. W. L. REV. 265 (1977); Maria A. Luise, Note, *Solitary Confinement: Legal and Psychological Considerations*, 15 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 301 (1989).

26. *Sandin*, 115 S. Ct. at 2296. The misconduct charges at issue resulted from an August 13, 1987 incident when Conner was escorted from his cell to the module program area to attend a religious service. Petition for Writ of Certiorari at 7, Sandin v. Conner, 115 S. Ct. 2293 (1995) (No. 93-1911). During a strip search that he believed was abusive and degrading, Conner became irate and obstructed the search. *Id.* He was charged with using "physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant"; this act was classified as a high misconduct offense. *Id.* at 8. In addition, Conner was charged with using "abusive or obscene language to a staff member," and engaging in "[h]arassment of employees"; both of these acts were classified as "low moderate" misconduct charges. *Id.*

The committee denied Conner's request to call witnesses because " '[w]itnesses were unavailable due to move [sic] to the medium facility and being short staffed on the modules.' " *Sandin*, 115 S. Ct at 2296, (alterations in original).

27. *Id.* Conner was found guilty, and sentenced to 30 days disciplinary segregation in the Special Holding Unit for a physical obstruction charge, and four hours segregation for the lower misconduct charges, to be served concurrently. *Id.* The Special Holding Unit holds inmates assigned to disciplinary segregation, administrative segregation, and protective custody. *Id.* at 2296 n.2. Inmates confined in disciplinary segregation receive the same privileges as those in administrative segregation except they receive one less phone call and visiting privilege. *Id.*

Conner initially sought administrative review of the committee's finding, but before the appeal was reviewed, he filed a federal civil rights action alleging that the committee violated his constitutional right to procedural due process during the disciplinary hearing.[28] The district court granted the prison officials' motion for summary judgment.[29] The United States Court of Appeals for the Ninth Circuit reversed and remanded the district court's judgment, concluding that Conner possessed a liberty interest in being free from disciplinary segregation, and questioned whether he received the due process protections *Wolff v. McDonnell* afforded.[30]

This Note first traces the history of the Supreme Court's treatment of prisoners' due process rights. This Note explains the development of prisoners' due process jurisprudence and its resulting effects on both fundamental individual rights and prison administration. Next, while discussing the addition of *Sandin v. Conner* to the landscape of prisoners' due process cases, this Note criticizes the impact of the majority's decision to return to the original due process methodology. This Note examines the return to the "nature of the deprivation" methodology[31] and questions the majority's application of the new methodology to the factual circumstances in *Sandin*. Finally, this Note analyzes the *Sandin* decision and predicts its impact on the lower courts and the future of prisoners' litigation of liberty interests under the Due Process Clause.

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28. *Id.* at 2296.

29. *Id.*

30. *Id.*; *see also* Conner v. Sakai, 15 F.3d 1463, 1466 (9th Cir. 1993) (citing Wolff v. McDonnell, 418 U.S. 539 (1974)), *rev'd*, 115 S. Ct. 2293 (1994). The Ninth Circuit based its decision on a Hawaii prison regulation that required the committee to find guilt when substantial evidence supported a misconduct charge. *Id.* That regulation states:

> "Upon completion of the hearing, the committee may take the matter under advisement and render a decision based upon evidence presented at the hearing to which the individual had an opportunity to respond or any cumulative evidence which may subsequently come to light may be used as a permissible inference of guilt, although disciplinary action shall be based upon more than mere silence. A *finding of guilt shall be made where*:
>
> (1) The inmate or ward admits the violation or pleads guilty.
>
> (2) *The charge is supported by substantial evidence*."

Sandin, 115 S. Ct. at 2296-97 n.3 (citing Haw. Admin. Rule § 17-201-18(b)(2) (1983)). Applying the test set forth in Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454 (1989), for determining whether limits have been placed on official discretion in the implementation of a state regulation, the Ninth Circuit analyzed the language of § 17-201-18(b) and determined that if the committee did not find substantial evidence of misconduct or the inmate did not admit guilt, it did not have the discretion to find guilt; thus, disciplinary segregation was not justified. *Conner*, 15 F.3d at 1466.

31. *See Sandin*, 115 S. Ct. at 2304 (Breyer, J., dissenting). The phrase "nature of the deprivation" is a term of art used in traditional due process analysis, which requires a court to examine the severity, in degree and kind, of the deprivation before determining it worthy of due process protection. *Id.*

I. THE EVOLUTION OF PRISONERS' DUE PROCESS ISSUES

In the landmark case of *Goldberg v. Kelly*,[32] the Supreme Court extended procedural due process protection to state welfare benefits.[33] This extension effectively elevated such state benefits from privileges to liberty interests.[34] Moreover, the decision initiated an onslaught of due process litigation by prisoners seeking the full panoply of procedural due process rights.[35] After *Goldberg*, the Supreme Court began to intervene in the area of prisoners' rights, specifically addressing prisoners' rights as they applied to internal disciplinary proceedings.[36]

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32. 397 U.S. 254 (1970).

33. *Id.* at 261-62. In *Goldberg*, the Court held that welfare benefits created a statutory entitlement for qualified persons and, thus, could not be terminated until procedural due process was provided through a pre-termination evidentiary hearing. *Id.* at 262-64. The *Goldberg* holding triggered extensive due process litigation and motivated state prisoners to file federal claims based on their new found right to "some kind of hearing." *See* Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1267-68, 1299-1304 (1975) (discussing *Goldberg* and its impact); 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, 489-525 (1984) (discussing *Goldberg* and due process cases following). Professor Herman has been summarized as arguing that the notion that "an individual can have no interest cognizable under the due process clause unless state law or practice has positively created one . . .[is] historically and philosophically wrong." *Id.* at 482; *see also infra* notes 163-75 and accompanying text (discussing the *Sandin* majority's problem with a methodology that focuses on state created law or practice to determine a liberty interest).

34. *See Goldberg*, 397 U.S. at 361-62. The notion of a liberty interest is taken directly from the language of the Fourteenth Amendment, which requires that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The initial question in any due process claim is whether a life, liberty or property interest is involved. *See, e.g.*, *Thompson*, 490 U.S. at 460 (following the two part due process analysis that requires finding a liberty interest implicated before considering what process is due); Meachum v. Fano, 427 U.S. 215, 223-24 (1976) (same); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (same); *see also* NOWAK ET AL., *supra* note 8, § 13.4, at 523-27 (further discussing the concept of a liberty interest and explaining the two part analysis for due process inquiries in prisoners' rights cases); Jay P. Kesan & Stephanie L. Teicher, Project, *Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994*, 83 GEO. L.J. 1461, 1482 (1995) (discussing the two-part analysis for due process inquiries). The Constitution, a court order, state statutes, treaties, regulations, or general policies and customs may create liberty interests. *Id.* at 1482-83.

35. *See* Herman, *supra* note 33, at 489-525 (elaborating on this new litigation).

36. *See* Mushlin, *supra* note 11, § 9.03 (discussing the Court's intervention in internal disciplinary proceedings). Although judicial attention toward prisoners' constitutional rights was replacing the hands-off period slowly, these early victories for prisoners involved cases of major abuse involving "severe physical punishment." RUDOVSKY, ET AL. *supra* note 10, at xiii. The ACLU criticized the demise of the hands-off doctrine because neither "judicial activism" nor the necessary review of administrative decisions of 'poorly trained personnel who deal directly with prisoners' followed it. *Id.*

Wolff v. McDonnell[37] marked the Supreme Court's first extension of procedural due process rights to prison disciplinary proceedings.[38] *Wolff*, although not the first case to discuss prisoners' rights, became the standard by which more than thirty subsequent Supreme Court decisions addressing the rights of prisoners would be measured.[39] Although the fundamental law of *Wolff* has remained intact, subsequent decisions illustrate the Court's movement away from traditional judicial interpretations towards a closer reliance on statutory language.[40]

A. A Precursor to Wolff: Morrissey v. Brewer *and the "Grievous Loss" Analysis*

Though *Wolff* and subsequent case law laid precedential foundation for the Supreme Court's decision in *Sandin v. Conner*,[41] the Court initiated its prisoner due process jurisprudence two years prior to *Wolff*, in *Morrissey v. Brewer*.[42] In *Morrissey*, the petitioners brought habeas corpus proceedings based on due process claims, demanding a hearing before having their paroles revoked.[43]

The *Morrissey* Court examined whether the specific circumstances of parole revocations warranted due process protection.[44] This examination required the Court to analyze the degree to which a person would be

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37. 418 U.S. 539 (1974).

38. *See id.* at 558 (requiring due process protection when prison officials make the determination to take a prisoner's good-time credits away because of serious misconduct).

39. *See* MUSHLIN, *supra* note 11, § 1.04, at 12 (marking *Wolff* as the beginning of the explosion of Supreme Court involvement with prisoners' due process litigation); *see also* Call, *supra* note 9, at 36-38 (discussing the relatively recent emergence of litigation of prisoners' rights through the application of due process law); *supra* note 21 (citing significant prisoner due process decisions).

40. *See* Hewitt v. Helms, 459 U.S. 460, 470-72 (1983) (focusing exclusively on state regulations as the basis for finding a liberty interest).

41. 115 S. Ct. 2293 (1995).

42. 408 U.S. 471 (1972).

43. *Id.* at 474. The prisoners filed petitions in district court after exhausting state remedies. *Id.* The district court, however, followed controlling authority which stated that failure to provide inmates with hearings before parole revocation was not violative of the Due Process Clause. *Id.* In a four to three decision, the United States Court of Appeals for the Eighth Circuit held that due process required no such hearing. Morrissey v. Brewer, 443 F.2d 942, 952 (8th Cir. 1971), *rev'd*, 408 U.S. 471 (1972). The Supreme Court disagreed with the Eighth Circuit, recognizing that parolees rely on an "implicit promise" that parole will be revoked only if they violate conditions imposed upon them. *Morrissey*, 408 U.S. at 482; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 10-9, 10-10 (2d ed. 1988) (discussing *Morrissey* and the idea of the parolee's liberty interest stemming from an "implicit promise"); Herman, *supra* note 33, at 505-06 (discussing the "implicit promise").

44. *Morrissey*, 408 U.S. at 480-82.

'condemned to suffer grievous loss.'[45] The Court recognized that because a parolee possesses a liberty interest in parole, and because its subsequent termination would inflict a "grievous loss" on the parolee, it fell appropriately within the protection of the Fourteenth Amendment.[46] The Court weighed the interests of the state in returning parolees to confinement without the burden of a "new adversary criminal trial" against the interests of the parolee in remaining free; finding the interests of the parolee paramount, the state was required to implement procedural due process protections.[47]

Morrissey was a significant victory for prisoners because it mandated specific procedural safeguards necessary to ensure the constitutionality of a parole hearing.[48] *Morrissey*, and the resulting application of rather ex-

45. *Id.* at 481 (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)). The Court evaluated whether any process was due by examining the extent to which the individual would have suffered a "grievous loss," *id.*, an analysis adopted in 1951 in *McGrath*, 341 U.S. at 168 (Frankfurter, J., concurring), *quoted in* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970). The focus on "grievous loss" as a due process determinant replaced previous criteria focusing upon the categorization of a benefit as a "right" or a "privilege." *Morrissey*, 408 U.S. at 481 (citing Graham v. Richardson, 403 U.S. 365, 374 (1971)).

46. *Morrissey*, 408 U.S. at 482; *see* Kesan & Teicher, *supra* note 34, at 1482-85 (discussing the sources of liberty interests); *infra* note 88 (explaining the distinction between a state conferred liberty interest and an inherent liberty interest).

47. *Morrissey*, 408 U.S. at 483-84. The Court recognized several of the state's interests in parole matters. *Id.* at 483. The state had an interest in stringent restrictions on an individual's liberty in order to prevent subsequent crime. *Id.* Additionally, the Court recognized the state's interest in returning parolees to prison without costly and time-consuming procedural burdens. *Id.* The Court balanced these concerns with society's interest in treating the parolee with basic fairness, however, and stated, "we [are not] persuaded by the argument that revocation is so totally a discretionary matter that some form of hearing would be administratively intolerable." *Id.* By eliminating the prison official's ability to revoke parole without procedural guarantees, the parolee's rehabilitation may continue, without arbitrary interference. *Id.* at 484.

48. The mandated minimal procedural safeguards included: (1) written notice of the alleged parole violations; (2) disclosure to the parolee of evidence against him; (3) opportunity to be heard and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless good cause is found for disallowing this right); (5) a "neutral and detached" hearing body (no requirement for members to be judicial officers or attorneys); and (6) a factfinder's written statement setting forth the evidence relied upon and reasons for parole revocation. *Id.* at 488-89. The Court refused explicitly to decide the issue of whether or not the parolee should be allowed counsel in this proceeding. *Id.* at 489. Less than one year after *Morrissey*, the Court addressed the issue of probation revocation proceedings in *Gagnon v. Scarpelli*. 411 U.S. 778 (1973). In *Gagnon*, recognizing that there was no real difference between parole revocation and probation revocation, the Court applied the *Morrissey* procedural standard and found that a probationer is entitled to a preliminary and final revocation hearing. *Id.* at 782. Additionally, the *Gagnon* Court granted an indigent parolee or probationer a due process right to counsel on a case-by-case basis to preserve notions of fundamental fairness. *See id.* at 783, 790.

tensive procedural safeguards,[49] caused the future of prisoners' due process protections to appear optimistic.[50] In applying constitutional protections to prisoners in *Morrissey*, the Supreme Court clearly had departed from its "hands-off" approach.[51]

B. Wolff v. McDonnell: *A Foundation for Prisoners' Due Process Inquiry*

Wolff v. McDonnell[52] is the seminal decision marking the the Supreme Court's involvement in prisoners' rights.[53] *Wolff* upheld the prisoners' challenge to the sufficiency of prison officials' discretion in disciplinary proceedings.[54] The case involved a Nebraska statute that provided fixed criteria for awarding good-time credits, which reduced the length of an inmate's confinement.[55] According to the statute, prison officials could revoke these credits only for "flagrant or serious misconduct."[56] If an inmate breached prison conduct seriously, he could be punished either through a reduction in good-time credits or confinement in a disciplinary cell.[57] Respondent Wolff, on behalf of himself and other inmates, filed a complaint for damages and injunctive relief pursuant to 42 U.S.C. § 1983, alleging that Nebraska's prison disciplinary proceedings violated his due process rights.[58]

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49. *See id.* at 786. The *Gagnon* Court awarded the probationer all of the procedure that *Morrissey* mandated for preliminary and final revocation hearings. *Id.*

50. *See generally* Call, *supra* note 9, at 36-38 (discussing the Court's involvement in prisoners' due process rights).

51. *See id.* (outlining the Court's movement from the "hands-off period" to the "rights period").

52. 418 U.S. 539 (1974).

53. MUSHLIN, *supra* note 11, § 9.03 (calling *Wolff* the Supreme Court's "initial prison discipline case"); *see also* Jones & Rhine, *supra* note 13, at 63 (recognizing *Wolff*'s impact as a major decision delineating necessary due process in prison disciplinary proceedings).

54. *Wolff*, 418 U.S. at 555-56.

55. *See id.* at 545 n.5 (quoting NEB. REV. STAT. § 83-185(2) (Cum. Supp. 1972) (current version in NEB. REV. STAT. § 83-4, 114.01(2) (1994 & R.S. Supp. 1995))); *infra* note 57 (citing Nebraska statutory language that established the required standard of misconduct that governing revocation of good-time credits).

56. *Wolff*, 418 U.S. at 546.

57. *Id.* at 546-47. The Nebraska statute granted responsibility for inmate discipline to the chief executive officer of the particular facility and provided for a range of disciplinary actions:

> Except in flagrant or serious cases, punishment for misconduct shall consist of deprivation of privileges. In cases of flagrant or serious misconduct, the chief executive officer may order that a person's reduction of term as provided in section 83-1,107 [good time credits] be forfeited or withheld and also that the person be confined in a disciplinary cell.

Id. at 545 n.5.

58. *Id.* at 542-43. Additionally, Respondents' claim alleged that the inmate legal assistance program did not meet constitutional standards and that regulations concerning

The district court rejected the procedural due process claim,[59] but the United States Court of Appeals for the Eighth Circuit reversed with respect to the due process claim.[60] The Supreme Court affirmed the Eighth Circuit's due process decision holding that, although the Due Process Clause did not create an inherent liberty interest in credit for good behavior, the relevant state statutory provisions created a liberty interest in a shortened prison sentence, which only a showing of serious misconduct could revoke.[61] Because prisoners in Nebraska could lose good-time credits only for "serious" misconduct, the classification of such conduct became crucial.[62] The *Wolff* Court asserted that minimum due process safeguards were necessary to protect against prison officials making arbitrary or retaliatory classifications.[63]

Although the *Wolff* Court held that appropriate procedural safeguards were necessary before a liberty interest could be terminated, the Court did *not* mandate the full range of procedures it had established in *Morrissey*.[64] Instead, the Court relied upon a "mutual accommodation" or balancing test that weighed prison administrative needs against the prisoner's individual rights.[65] The *Wolff* Court's balancing test contrib-

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inspection of mail between attorney and inmate were unconstitutionally restrictive. *Id.* at 543.

59. McDonnell v. Wolff, 342 F. Supp. 616, 628 (D. Neb. 1972), *aff'd in part and rev'd in part*, 483 F.2d 1059 (8th Cir. 1973), *aff'd in part and rev'd in part*, 418 U.S. 539 (1974).

60. McDonnell v. Wolff, 483 F.2d 1059 (8th Cir. 1973), *aff'd in part and rev'd in part*, 418 U.S. 539 (1974); *see also* Wolff, 418 U.S. at 544. The Eighth Circuit followed precedent outlined in *Morrissey* regarding proper due process procedures, but left the issue of the circumstances under which counsel would be required to the district court on remand. *Id.*; *supra* notes 42-51 and accompanying text (discussing the background and holding of *Morrissey*); *see supra* notes 48-49 (discussing the background and holding of *Gagnon v. Scarpelli*, which additionally considered the issue of counsel).

61. *Wolff*, 418 U.S. at 558.

62. *Id.*

63. *See id.*; *see also* JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS § 8.3 (4th ed. 1991) (noting that courts have granted relief when prison administrators acted arbitrarily or with capriciousness). The Supreme Court became involved in prison disciplinary proceedings in order to prevent prison officials from acting in a "capricious" and "arbitrary" manner, which occurred often prior to *Wolff*. *See, e.g.*, Howard v. Smyth, 365 F.2d 428, 431 (4th Cir.) (holding that, absent a hearing, an inmate's placement in solitary confinement for activities associated with requests for religious services was arbitrary punishment), *cert. denied*, 385 U.S. 988 (1966); *see also* Jones & Rhine, *supra* note 13, at 52-53 (summarizing sanctions prison officials can utilize).

64. *Wolff*, 418 U.S. at 559-60; *see supra* notes 42-51 (providing background and holding of *Morrissey*); *supra* notes 48-49 (providing background and holding of *Gagnon v. Scarpelli*, decided shortly after *Morrissey*).

65. *Wolff*, 418 U.S. at 556. The Court considered whether prisoners' issues should be addressed in light of individual constitutional rights or penal system objectives. *Id.* The Court in favoring the prisoner's argument concluded, "though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly

uted significantly to prisoners' due process law, even more so than its focus on defining liberty interests.[66]

The *Wolff* Court distinguished *Morrissey* with regard to disciplinary proceedings, and recognized an important state interest in controlling the structure and content of prison disciplinary hearings.[67] As a result, the significance of *Wolff* lies not in what procedures the Court stated were constitutionally required, but rather what was *not* required.[68] The Court applied the procedural requirements defined in *Morrissey* to a degree, but did not *mandate* a prisoner's right to confrontation and cross-examination of witnesses at disciplinary proceedings, nor did it provide for even a qualified right to counsel.[69] The Court wanted to avoid "encasing the disciplinary procedures in an inflexible constitutional straightjacket" and distinguished disciplinary procedures from those necessary in a criminal trial.[70] Instead, the Court adopted lesser procedural requirements, ex-

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stripped of constitutional protections when he is imprisoned for crime." *Id.* at 555; *see supra* note 18 (setting forth Justice White's now famous quote hailing support for inmates' constitutional rights). Though *Wolff*'s impact was viewed as a victory for prisoners' due process law, the Supreme Court only endorsed a *qualified* right to call witnesses at a disciplinary hearing, stating that witnesses should be permitted if calling them will not be "unduly hazardous to institutional safety or correctional goals." *Wolff*, 418 U.S. at 566; *see* JAMES J. GOBERT & NEIL P. COHEN, RIGHTS OF PRISONERS § 8.05 (1981). In rejecting the absolute right to call witnesses, the *Wolff* Court's decision did little to end unfettered discretion in deciding whether to allow the inmate's request for witnesses. *See id.*

66. *See* Sandin v. Conner, 115 S. Ct. 2293, 2297 (1995) (making this observation). The *Wolff* Court's brief discussion of the definition of a liberty interest set the stage for a more detailed discussion of the issue in *Meachum v. Fano*. *Id.*; *see infra* notes 82-90 and accompanying text (discussing the *Meachum* Court's analysis of what constitutes a liberty interest); *supra* note 8 (providing background discussion on the notion of a liberty interest).

67. *Wolff*, 418 U.S. at 561-63. The *Wolff* Court stated "the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing." *Id.* at 561. The Court went on to distinguish prison disciplinary proceedings from parole revocation hearings, the former taking place in a "closed, tightly controlled environment peopled by those who have chosen to violate the criminal law and who have been lawfully incarcerated for doing so." *Id.* The Court cited repeat offenders, overall tension, frustration, despair, and close contact between guards and inmates as reasons for leaving the structuring of prison disciplinary proceedings to the prison authorities. *Id.* at 561-62.

68. *See* PALMER, *supra* note 63, § 8.3, at 111 (illustrating that the prisoner has no absolute constitutional right to confrontation and cross-examination of witnesses; it necessarily must depend on prison officials' discretion). Because of its avoidance of establishing due process guidelines precisely, experts have criticized the *Wolff* decision for " 'fail[ing] to make the constitution [sic] a living document for many human beings,' by not requiring additional procedural rights in the prison context." *Id.* (quoting Taylor v. Schmidt, 380 F. Supp. 1222 (W.D. Wis. 1974)) (footnote omitted).

69. *Wolff*, 418 U.S. at 563-72. The Court determined that neither the right to retained nor appointed counsel was necessary in prison disciplinary proceedings. *Id.* at 569-70.

70. *Id.* at 563.

cluding the right to confront and cross-examine witnesses, to decrease the level of confrontation between prison staff and inmates, and to advance the rehabilitative goals of the penal institution.[71]

While *Wolff* signaled the Court's willingness to apply constitutional protections to liberty interests arising out of state statutes, this trend toward awarding more procedural rights to prisoners started to decline soon after it began.[72] In an important footnote, the *Wolff* majority, however, expressed its willingness to apply the same procedural safeguards afforded to deprivations of good-time credits to discipline imposed through solitary confinement.[73] Although *Wolff* established important constitutional guidelines for recognizing prisoners' liberty and signified a moderate pro-prisoner holding, prison officials retained a substantial amount of flexibility in disciplinary proceedings.[74]

C. *Predicates for Protection: The Beginning of Statutory Reliance in* Meachum v. Fano

In *Meachum v. Fano*,[75] the Supreme Court examined whether due process entitled a convicted state prisoner to a hearing prior to his transfer to

71. *See id.* (taking these confrontation and rehabilitation factors into account when evaluating Nebraska's procedure). Justice Marshall dissented, stating that, without the enforceable right to call witnesses, present documentary evidence, or confront and cross-examine witnesses, "the inmate is afforded no means to challenge the word of his accusers. Without these procedures, a disciplinary board cannot resolve disputed factual issues in any rational or accurate way." *Id.* at 582 (Marshall, J., dissenting). *See* Terrence J. Fleming, Note, *Noble Holding As Empty Promises: Minimum Due Process at Prison Disciplinary Hearings*, 7 NEW ENG. J. ON PRISON L. 145, 168-73 (1981) (suggesting that the Court should reconsider *Wolff* as to the appropriate amount of process due at prison disciplinary hearings).

72. *See* Call, *supra* note 9, at 38-39 (illustrating that abandoning the "hands-off" doctrine did not lead directly to judicial advocacy of all prisoners' claims).

73. *Wolff*, 418 U.S. at 571-72 n.19. The Court also stated that solitary confinement should be reserved for punishment of serious misbehavior. *Id.* The Court took further measures to categorize solitary confinement as a "major change in the conditions of confinement," and recognized the need for minimum procedural safeguards to protect against "arbitrary determination of the factual predicate for imposition" of the punishment under the statute. *Id.* In his brief to the Supreme Court, DeMont Conner relied on this footnote from *Wolff* as a firmly established principle dictating due process guarantees for disciplinary proceedings. Respondent's Brief at 11, Sandin v. Conner, 115 S. Ct. 2293 (1995) (No. 93-1911).

74. *See Wolff*, 418 U.S. at 571-72. The *Wolff* Court decided that in disciplinary hearings, prisoners should be guaranteed the following due process protections: advance written notice of the alleged violation, a written statement of the evidence the factfinder relied on, and a conditional right to call witnesses and present documentary evidence (subject to official discretion as to prison safety and correctional goals). *Id.* at 563-66; *see* PALMER, *supra* note 63, § 8.3 (illustrating the impact of *Wolff* on prisoners' rights and criticism of this holding).

75. 427 U.S. 215 (1976).

another prison facility.[76] Although the facts in *Meachum* were similar to *Wolff*, suggesting application of the *Wolff* standard, no state statute or practice existed in *Meachum* that created a liberty interest, requiring serious misconduct to be found before a prisoner could be transferred.[77]

The misconduct that sparked the due process claim in *Meachum* stemmed from repeated acts of arson within a medium-security prison which resulted in officials transferring several prisoners suspected of being involved in the fires to a maximum-security prison.[78] Though the Classification Board held hearings individually with each prisoner, the prisoners claimed that the lack of "adequate factfinding hearing[s]" denied them liberty without due process of law.[79]

Applying *Wolff*, the United States District Court for the District of Massachusetts held that the prisoners' hearings and notice were not constitutionally sufficient, and ordered them returned to the general prison population until the prison officials complied with proper procedure.[80] The First Circuit Court of Appeals affirmed,[81] holding that a transfer to a maximum-security facility constituted a "significant modification of the overall conditions of confinement."[82] The court found that this modification, by itself, was sufficient to trigger due process requirements.[83]

The Supreme Court reversed, noting initially that the Due Process Clause does not prevent "*any* change in the conditions of confinement having a substantial adverse impact on the prisoner."[84] Furthermore, the Court held that "the Due Process Clause in and of itself [did not] protect a duly convicted prisoner against [intrastate prison] transfer[s]."[85] The Court reasoned that the transfer, although the prisoner disliked it, was

76. *Id.* at 216. The new prison's conditions were substantially less favorable to the prisoner than his previous facility. *Id.*

77. *Id.* at 226-27.

78. *Id.* at 216. Nine serious fires were reported within a two and one half month period at the Massachusetts Correctional Institute at Norfolk. *Id.* Six respondent inmates were removed from the general prison population after reports from informants. *Id.* A Classification Board met to decide on a recommendation of administrative segregation or a transfer to a maximum-security facility; no loss of good-time credits or any period of disciplinary segregation was applied. *Id.* at 216-18, 222.

79. *Id.* at 217-22.

80. Fano v. Meachum, 387 F. Supp. 664, 668 (D. Mass.), *aff'd*, 520 F.2d 374 (1st Cir. 1975), *rev'd*, 427 U.S. 215 (1976). Additionally, the court ordered prison officials to promulgate regulations establishing procedures governing prisoner transfers based on informants' testimony. *Id.*

81. 520 F.2d 374, 380 (1st Cir. 1975), *rev'd*, 427 U.S. 215 (1976).

82. *Id.* at 378.

83. *See id.* at 378-79 (stating that the modification in conditions affected a liberty interest under the Fourteenth Amendment).

84. Meachum v. Fano, 427 U.S. 215, 224 (1976).

85. *Id.* at 225.

"within the normal limits or range of custody which the conviction ha[d] authorized the State to impose."[86]

In dictum, the Supreme Court distinguished *Wolff*, stating that a liberty interest existed in *Wolff* because there was a finding of serious misconduct.[87] The Court rejected the *Meachum* prisoners' reliance on their "grievous loss" as the basis for invoking due process, thereby substantially limiting due process protections unless tied to a state regulation.[88] The Court also rejected the inmates' argument that they relied upon, and expected to remain in, a particular prison as long as they maintained good behavior.[89] The Court stated that a prisoner's expectation of remaining in a certain prison is "too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all."[90]

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86. *Id.* While affirming *Wolff*'s holding that an inmate retains important rights in prison, *Meachum* also emphasized that not all deprivations should trigger due process analysis or be entitled to judicial scrutiny. *Id.* at 224-25; Thomas O. Sargentich, Comment, *Two Views of a Prisoner's Right to Due Process:* Meachum v. Fano, 12 HARV. C.R.-C.L. L. REV. 405, 409-10 (1977).

87. *Meachum*, 427 U.S. at 226-27.

88. *See id.* at 224 (noting that any "grievous loss" is not necessarily sufficient to make the procedural protections of Due Process). The *Meachum* Court "appear[ed] to adopt a narrow statutory entitlement analysis" to determine whether procedural due process was necessary. Gooding, *supra* note 4, at 161. In doing so, the Court arguably left open the possibility of "impact analysis." *Id.* With this analysis, the nature of the loss, rather than the statutory entitlement, would be the basis for due process applications. *Id.* The Court claimed that reliance on state statutes for applying due process protections " 'insure[d] that the state-created right [was] not arbitrarily abrogated.' " *Meachum*, 427 U.S. at 226 (quoting Wolff v. McDonnell, 418 U.S. 539, 557 (1974)) (alterations added). This is consistent with the due process approaches in prior cases. *See* Goss v. Lopez, 419 U.S. 565, 573 (1975) (state conferred right established a statutory entitlement); Perry v. Sindermann, 408 U.S. 593, 602-03 (1972) (same); Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (same); Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (same); *see also* Olim v. Wakinekona, 461 U.S. 238, 249 (1983) (concluding that a state created regulation on prison transfers did not create a liberty interest when no standards were established to govern prison officials' decisions). *But see* Vitek v. Jones, 445 U.S. 480 (1980). *Vitek* represents one instance where a state statute conferring a liberty interest need not be present to invoke Fourteenth Amendment protections. *Id.* at 494. In *Vitek*, a prisoner was to be transferred involuntarily from a prison to a state mental hospital. *Id.* at 484. The Court held that the prisoner's right to be free from such a transfer was a liberty interest independent of a state statute; it was "qualitatively different" from punishment, inherently related to incarceration, and had "stigmatizing consequences." *Id.* at 493-94; *see also* Washington v. Harper, 494 U.S. 210, 221-22 (1990) (concluding that independent of any state regulation, a prisoner had an inherent liberty interest in being protected from involuntary administration of psychotropic drugs).

89. *Meachum*, 427 U.S. at 228.

90. *Id.*; *cf.* Montanye v. Haymes, 427 U.S. 236, 242 (1976) (discussing the holding of *Meachum*, decided on the same day). In *Haymes*, a prisoner was transferred for circulating a petition alleging a deprivation of prisoners' right to counsel. *Id.* at 237-38. Because New York had no law entitling prisoners to due process before transfer, the Supreme Court

The *Meachum* decision narrowed prisoners' due process protections significantly and generated weighty criticism, particularly because it signified a return to unfettered discretion for prison officials.[91] *Meachum* marked the genesis of the Court's strict reliance on state statutes in determining whether a liberty interest existed.[92] *Meachum* illustrated further a significant retreat from earlier due process milestones which *Wolff* and its predecessors had established.[93]

D. Mechanical Reliance on Statutory Language: The Methodology of Greenholtz *and* Hewitt

The Supreme Court continued to develop its restrictive liberty principles in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*.[94] Respondents relied upon two theories to support their claim that parole determination is a constitutionally protected interest.[95] Relying on *Morrissey v. Brewer*,[96] in support of their first theory, several inmates alleged a constitutionally protected "conditional" liberty interest in parole grants.[97] The inmates claimed specifically that they were denied

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could not find a liberty interest. *See id.* at 243. On remand, the Second Circuit found that, even if Haymes was not entitled to due process, he had established a colorable claim that he was transferred for circulating a petition for the redress of grievances—an activity protected by the First and Fourteenth Amendments. Haymes v. Montanye, 547 F.2d 188, 191 (2d Cir. 1976), *cert. denied*, 431 U.S. 967 (1977).

91. Joseph P. Messina, Comment, Kentucky Department of Corrections v. Thompson: *The Demise of Protected Liberty Interests Under the Due Process Clause*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 233, 244-45 (1991). In his *Meachum* dissent, Justice Stevens asserted that if a prisoner's liberty is "no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases." *Meachum*, 427 U.S. at 233 (Stevens, J., dissenting). Justice Stevens equated the majority's holding with that of an historical state decision in Ruffin v. Commonwealth, 62 Va. 790, 796 (1871). *Meachum*, 427 U.S. at 231 (Stevens, J., dissenting). *Ruffin* deemed the inmate a "slave of the state," completely deprived of constitutional rights. *Id.*; *see* Sargentich, *supra* note 86, at 410. *Ruffin* declared that "[t]he bill of rights is a declaration of general principles to govern a society of freemen, and not of convicted felons and men civilly dead. . . . They are the slaves of the state undergoing punishment for heinous crimes committed against the laws of the land." *Id.* at n.39; *see also* Herman, *supra* note 33, at 512. Herman noted *Meachum*'s restrictions on prisoners' due process claims in federal court, a result that is "scarcely accidental." *Id.*; *cf.* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) (relying alternatively on a liberty interest in prisoner's parole based on an "implicit promise").

92. *See* Messina, *supra* note 91, at 245 (discussing *Meachum*'s contribution to the evolving landscape of prisoners' due process rights).

93. *Id.*

94. 442 U.S. 1 (1979).

95. *Id.* at 8.

96. 408 U.S. 471 (1972); *see supra* notes 42-51 and accompanying text (discussing *Morrissey*'s foundational contribution to the landscape of prisoners' due process decisions).

97. *Greenholtz*, 442 U.S. at 9.

parole unconstitutionally despite statutes that provided for both mandatory and discretionary parole.[98]

The United States District Court for the District of Nebraska held that the Parole Board procedures failed to satisfy the due process requirements *Morrissey* had established.[99] On appeal,[100] the Court of Appeals for the Eighth Circuit agreed with the District Court that the inmate had a "*Morrissey*-type, conditional liberty interest"[101] and also recognized a statutorily created liberty interest.[102] The court of appeals nevertheless modified the procedures the district court set forth.[103] Because the Eighth Circuit's parole procedures conflicted with other circuit court decisions, the Supreme Court granted certiorari[104] to resolve the conflict.[105]

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98. *Id.* at 3-4. According to Nebraska statutes, parole is mandatory when an inmate has served his maximum term less any earned good-time credits. NEB. REV. STAT. § 83-1, 107(1)(b) (1994). Inmates become eligible for discretionary parole when the minimum term, less earned good-time credits, has been served. *Id.* § 83-1,110(1). Discretionary parole proceedings begin with an initial review and follow established criteria for granting or rejecting parole. *See id.* § 83-192(f)(v) (detailing factors that make up the review, including, but not limited to, the inmate's offense, his or her history and criminal record, conduct, attitude, and employment during incarceration). After reviewing the inmate's entire record and determining that the inmate is not a "good risk" for parole, the Board may deny parole. *See Greenholtz*, 442 U.S. at 4. The Board must inform the inmate of the reasons for this decision and suggest recommendations to correct these deficiencies. *Id.* at 4-5. If the initial review determines that the inmate is a likely candidate for parole, a final hearing is scheduled which provides notice, an opportunity to present evidence, call witnesses, and obtain private counsel. *Id.* at 5. The inmate may not hear adverse testimony, nor cross-examine witnesses who provide such testimony. *Id.* If parole is denied, the Board must furnish the inmate with a written statement of the reasons for the denial. *Id.*

99. Inmates of the Neb. Penal & Correction Complex v. Greenholtz, 436 F. Supp. 432, 437-38 (D. Neb. 1976), *aff'd*, 576 F.2d 1274 (8th Cir. 1978), *rev'd*, 442 U.S. 1 (1979).

100. Inmates of the Neb. Penal & Correction Complex v. Greenholtz, 576 F.2d 1274 (8th Cir. 1978), *rev'd*, 442 U.S. 1 (1979).

101. *Greenholtz*, 442 U.S. at 5-6.

102. *Id.* (citing NEB. REV. STAT. § 83-1,114 (1976)).

103. *Greenholtz*, 576 F.2d at 1285. Modified procedures included: (1) a full, formal hearing; (2) written notice of the hearing setting forth the factors that the Board will consider for the decision; (3) the inmate's ability to present documentary evidence; (4) a record of the proceedings; and (5) a timely and full written explanation as to the facts relied upon to deny parole. *Id.* The Eighth Circuit did not allow an inmate the right to call witnesses except in unusual circumstances because of security considerations. *Id.*

104. 439 U.S. 817 (1978) (granting certiorari).

105. For an illustration of varying procedures governing parole determinations, see Brown v. Lundgren, 528 F.2d 1050, 1053 (5th Cir.) (explaining that the mere expectation of parole does not rise to the level of grievous loss for procedural protections should parole be denied), *cert. denied*, 429 U.S. 917 (1976); Scarpa v. United States Bd. of Parole, 477 F.2d 278, 281 (5th Cir.) (en banc) (noting how specific standards for procedural due process depend on a complexity of factors and standards), *vacated as moot*, 414 U.S. 809 (1973); *see also* Franklin v. Shields, 569 F.2d 784, 788 (4th Cir. 1977) (acknowledging that a state must provide minimum due process protections if it created a statutory liberty interest), *cert. denied*, 435 U.S. 1003 (1978); United States *ex rel.* Richerson v. Wolff, 525 F.2d

In an analysis reminiscent of *Meachum*, the *Greenholtz* Court began with the premise that "[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence."[106] Although the similar issues of parole revocation in *Morrissey* and the initial parole grant in *Greenholtz* appeared to justify the same constitutional protections, the Court distinguished them.[107]

The *Greenholtz* Court explained that the decision to grant parole or release, by its statutory nature, required an in-depth analysis of the facts coupled with the Board members subjective, sensitive appraisals.[108] Accordingly, based on the inmates' argument that the state statute conferred a reasonable entitlement to due process, the Court held that although the state statute alone created liberty interests, the possibility of parole offered only hope that the prisoner would obtain such benefit.[109]

In their second theory, the respondents' claimed that the language of the state statute created a legitimate expectation of parole, deserving of due process protections as provided in *Wolff*.[110] The *Greenholtz* Court made a distinction between the statute at issue and the *Wolff* statute that

797, 799 (7th Cir. 1975) (deciding minimum due process must be fulfilled in accordance with a state created liberty interest), *cert. denied*, 425 U.S. 914 (1976).

106. *Greenholtz*, 442 U.S. at 7.

107. *Id.* at 9. The parolees in *Morrissey* were enjoying aspects of "normal life" through employment and ongoing family contact, whereas the inmates in *Greenholtz* were restricted to the confines and rules of prison. *Id.*

108. *Id.* at 9-10. The Court decided that the decision to grant parole was "subtle and depends on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals by the Board members based upon their experience with the difficult and sensitive task of evaluating the advisability of parole release." *Id.* Courts have accepted the differences between the initial grant of parole and parole revocation, as *United States ex rel. Bey v. Connecticut Bd. of Parole* illustrated. 443 F.2d 1079, 1086 (1971) (distinguishing between maintaining conditional freedom and the mere anticipation of freedom). *See* Herman, *supra* note 33, at 513 (arguing that the interests of a parolee and a prospective parolee are virtually identical, and distinguishing the loss of liberty as more grievous for the parolee only because of his disdain for reincarceration).

109. *Greenholtz*, 442 U.S. at 11 (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)).

110. Respondents relied alternatively on the language of the statute governing parole releases to establish a liberty interest. *Id.* They argued that the use of the word "shall," coupled with four specific reasons for denying parole, created a presumption that parole release would be granted unless one of the four conditions was met, thus establishing a legitimate expectation of release. *Id.* at 11-12. The four reasons to deny parole within the Nebraska statute include: (1) whether there is substantial risk that the parolee will violate parole conditions; (2) the release would depreciate the seriousness of the offense or promote disrespect for the law; (3) the release would have a substantial, adverse effect on prison discipline; or (4) continued prison treatment, medical care, or vocational training will substantially affect the parolee's capacity to become a law-abiding citizen if released at a later time. *Greenholtz*, 442 U.S. at 11 (citing NEB. REV. STAT. § 83-1,114(1) (1976)); *see* Gooding, *supra* note 4, at 164 n.94 (describing the prisoner's reliance on a Nebraska statutory entitlement).

governed good-time credits, classifying the former as "predictive" and the latter as "factual."[111] The *Greenholtz* Court recognized that federalism affords the state independent control over many policies, and stated that procedures created to elicit certain facts, as required in *Morrissey* and *Wolff*, are not necessarily as subjective as parole proceedings.[112] In distinguishing the statute at issue in *Greenholtz*, through scrutiny of statutory language and labeling it as "factual" or "predictive," the Court demonstrated its preference for relying on statutory language when evaluating liberty expectations.[113]

The implicit methodology for evaluating due process claims in *Greenholtz* became explicit four years later in *Hewitt v. Helms*.[114] After a riot in a Pennsylvania state prison, officials moved the respondent prisoner from his cell in the general prison population to administrative segregation[115] pending investigation of his misconduct.[116] Although the Hearing Committee, and later the Program Review Committee, dropped the misconduct charge against the respondent due to insufficient evidence of guilt, he remained in restricted housing.[117]

The prisoner then sued the correctional institution claiming that his confinement in administrative segregation violated his Fourteenth Amendment due process rights.[118] The United States District Court for the Middle District of Pennsylvania granted the correctional facility's motion for summary judgment, but the United States Court of Appeals for

111. *Greenholtz*, 442 U.S. at 12.

112. *See id.* at 13-14. The Court emphasized: "this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis." *Greenholtz*, 442 U.S. at 12.

113. *See* Herman, *supra* note 33, at 516-17 (discussing the Court's abandonment of the traditional methods for evaluating due process inquiries and subsequent focus on statutory language).

114. 459 U.S. 460 (1983).

115. *Id.* at 463. Administrative confinement, as the statute defined, could be imposed when: (1) an inmate poses a threat to prison security; (2) when disciplinary charges are pending; or (3) when necessary for the prisoner's own safety. *Id.* at 463 n.1 (citing 37 PA. CODE § 95.104 (1978)).

116. *Id.* at 463-64. The actual riot resulted from several inmates' joint attempt to overtake the prison's control center. *Id.* at 463. In an extremely violent struggle, inmates attacked guards, injuring two, which resulted in the inmates being handcuffed to pipes. *Id.* State police units, local officers, and off-duty prison guards were called in to assist the prison officials. *Id.*

117. *Id.* at 464. The Program Review Committee concluded that Helms should remain in administrative segregation because he was viewed as "a danger to staff and to other inmates if released back into [the] general [prison] population," and "he was to be arraigned the following day on state criminal charges" and the Committee was still awaiting information detailing Helms's role in the riot. *Id.* at 465.

118. *Id.* at 462.

the Third Circuit reversed.[119] The Third Circuit held that the respondent had a protected liberty interest in remaining with the general prison population, which could not be eliminated unless he was provided with appropriate due process.[120]

The Supreme Court reversed,[121] rejecting the respondent's assertion that the Due Process Clause implicitly created a liberty interest in remaining in the general prison population, and stating that the respondent "[sought] to draw from the Due Process Clause more than it [could] provide."[122]

The respondent asserted alternatively that Pennsylvania regulations created a liberty interest in freedom from "restraints accompanying confinement in administrative segregation."[123] The Court denied firmly that it had held that statutes and regulations governing prison administration inherently conferred liberty interests.[124] The Court then concluded that prisoners do have a liberty interest in remaining free from administrative

119. Helms v. Hewitt, 655 F.2d 487, 489 (3d Cir. 1981), *rev'd*, 459 U.S. 460 (1983).

120. *Id.* at 503. The Supreme Court granted certiorari to consider whether due process requirements apply to prison officials when removing prisoners from the general prison population to more restrictive confinement. *Hewitt*, 459 U.S. at 462.

121. *Hewitt*, 459 U.S. at 478. Although the reasons for placing an inmate in administrative confinement differ from those for assigning disciplinary confinement, the conditions for the two types of confinement were " 'substantially identical.' " *Id.* at 480 (Stevens, J., dissenting) (quoting the majority).

122. *Hewitt*, 459 U.S. at 466-67. The Court has been consistent in limiting prisoners' to "the most basic liberty interests." *Id.* at 467. For example, the Court has held that there is no constitutional or inherent right to parole. Greenholtz v. Inmates of the Neb. Penal & Correction Complex, 442 U.S. 1, 7 (1979). Additionally, the Court has stated that "the Constitution *itself* does not guarantee good-time credit for satisfactory behavior while in prison," *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (emphasis added), and that the Due Process Clause does not protect the transfer of an inmate from one prison to another. *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

123. *Hewitt*, 459 U.S. at 469.

124. *Id.* (stating "we have never held that . . . [prison] regulations . . . conferred any liberty interest in and of themselves"). The *Hewitt* court distinguished this case from earlier cases in which the Court recognized a liberty interest in state-created statutes and regulations. *Id.* (distinguishing Vitek v. Jones, 445 U.S. 480 (1980) (involving a transfer to a mental hospital); *Greenholtz*, 442 U.S. at 3 (regarding parole expectations); *Wolff*, 418 U.S. at 539 (concerning good-time credits in parole revocation proceedings)). The Court concluded that, nonetheless, according to the relevant Pennsylvania regulations, Helms did acquire a protected liberty interest in remaining in the general prison population. *Hewitt*, 459 U.S. at 470-71; *see* Thomas L. Finigan, *The Procedural Due Process Implications of Involuntary State Prisoner Transfers:* Hewitt v. Helms *and* Olim v. Wakinekona, 25 B.C. L. REV. 1087, 1091-92 (1984) (explaining the distinctions between the Court's prior acknowledgments of state-created liberty interests and the *Hewitt* decision). *But see* Wright v. Enomoto, 462 F. Supp. 397 (N.D. Cal. 1976), *summarily aff'd*, 434 U.S. 1052 (1978). In *Wright*, the court, however, did admit that an exception existed, recognizing the necessity of a meaningful hearing before being classified in a maximum-security facility. *Id.* at 403-04.

segregation, if "the repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest."[125]

The cases since *Wolff*, particularly *Greenholtz* and *Hewitt*, illustrate the Supreme Court's departure from the examination of the "nature" of the liberty interest to a stringent focus on mandatory statutory language.[126] Following the *Hewitt* methodology, the Court became preoccupied with analyzing the intricate language of regulations and statutes, and less concerned with the nature or deprivation of the liberty interest.[127] This methodology afforded prisoners an enhanced opportunity to find entitlements in prison regulations and demand due process protections, thereby threatening states' control over prison regulations and daily management.[128]

Hewitt's statutory focus for determining liberty interests has produced several negative effects. First, *Hewitt* encouraged prisoners to "comb" statutory language to find a basis for liberty interests.[129] This, in turn, has discouraged states from codifying prison management procedures, further jeopardizing efforts to curb prison administrators' unfettered discretion.[130] Second, *Hewitt* led to increased judicial involvement in the daily management of prisons, thus wasting scarce judicial resources with little overall benefit.[131] Third, adhering strictly to statutory language to find a

125. *Hewitt*, 459 U.S. at 472. Having decided the prisoner had a statutorily conferred liberty interest, the Court then rejected the argument that the full panoply of due process protections that *Wolff* set forth were necessary. *Id.*; *see* MUSHLIN, *supra* note 11, § 9.06 (discussing the Court's conclusion in *Hewitt* that resulted in less procedural safeguards than *Wolff*). The Court decided that an informal, nonadversary review of the facts surrounding the administrative segregation, within a reasonable time *after* the segregation, was sufficient compliance with due process; anything more would offend prison management's objectives. *Hewitt*, 459 U.S. at 472. Commentators have criticized the *Hewitt* majority's decision that a transfer into solitary confinement is a reasonably foreseeable occurrence in prison life. Finigan, *supra* note 124, at 1105. Finigan agreed with Justice Stevens' dissent that such transfers infringe on a person's "residuum of liberty," thus making procedural protections even more necessary. *Id.* (quoting *Hewitt*, 459 U.S. at 488 (Stevens, J., dissenting)).

126. *See* Sandin v. Conner, 115 S. Ct. 2293, 2298-99 (1995) (recognizing this departure).

127. *Id.*

128. *See id.* at 2299.

129. *Id.*

130. *Id.* States may avoid creating liberty entitlements by refraining from enacting regulations and statutes; however, this result would sacrifice important goals of ensuring the safe operation and effective management of prisons. *Id.*

131. *Id. Hewitt* marks a distinct departure from accepted notions, as stated in *Wolff*, that courts must "afford appropriate deference and flexibility to state officials trying to manage a volatile [prison] environment." *Id.* (citing Wolff v. McDonnell, 418 U.S. 539, 561-63 (1974)); *see also* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 135-36 (1977) (finding that prison regulations prohibiting inmates from engaging in activi-

liberty interest, rather than examining the nature of the deprivation, creates a negative jurisprudence.[132] This negative jurisprudence means that courts have inferred from mandatory statutory language that a finding of guilt "shall" be imposed if they find that certain conditions exist.[133] In the absence of those statutory predicates, courts will not find guilt, even where a subjective examination, independent of the statutory language, properly would dictate such a guilty finding.[134]

For these reasons, prisoners' due process cases since *Wolff* have resulted in a narrow view of protected liberty interests.[135] More importantly, the Court's emphasis on state statutory language in evaluating liberty interest claims undermines and denies prisoners Fourteenth Amendment protection.[136] Examining statutory language, rather than

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ties that promoted a labor union, while permitting activities of other organizations, were permissible because they fell within the authority of prison officials to determine the conditions of confinement).

132. *See Sandin*, 115 S. Ct. at 2299.

133. *Id.* The *Sandin* majority did not determine that courts should *never* draw negative inferences from mandatory statutory language, recognizing its utility in defining "rights and remedies available to the general public." *Id.* In interpreting regulations that apply solely to the prison population, the Court, however, stated that drawing negative inferences clashed with the purpose of prison regulations, which were designed to guide officials' administrative duties. *Id.* Thus, by following *Hewitt*'s illustration of negative jurisprudence, courts recognized prisoners' liberty interests that the regulations never intended to create. *Id.*

134. *Id.* The *Hewitt* Court held that the Due Process Clause alone does not create a defensible interest in remaining in the general prison population. Hewitt v. Helms, 459 U.S. 460, 466-67 (1983). Rather, the Court searched for the right in the statutory language. *Id.* at 470-71. Justice Stevens discussed the long-term effects of this decision in his dissent:

> [T]he Court seems to assume that after his conviction a prisoner has, in essence, no liberty save that created, in writing, by the State which imprisons him. Under this view a prisoner crosses into limbo when he enters into penal confinement. He might have some minimal freedoms if the State chooses to bestow them; but such freedom as he has today may be taken away tomorrow.

Id. at 482 (Stevens, J., dissenting); *see also* Michael J. Murphy, Comment, *Liberty Within Prison Walls as a Natural Right?* Hewitt v. Helms, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 217, 233 (1985) (quoting Justice Stevens). Murphy notes that dangers exist when states determine the extent to which the Constitution protects a certain liberty. *Id.* at 235. Motivated by financial constraints, many state legislatures are wary about creating new liberty expectations for prisoners to litigate and decline to state procedural guidelines clearly. *Id.*

135. *See* Messina, *supra* note 91, at 233-34 (discussing trends in Supreme Court decisions regarding prisoners' due process rights).

136. *See* Murphy, *supra* note 134, at 235-37. Murphy recognized that, in addition to undermining the application and purpose of the Constitution, the Court in *Hewitt* failed to determine and articulate exactly what rights are protected. *Id.* at 236. Without a bright-line test, or at least articulable examples, courts will return to granting prison officials' decisions substantial deference. *See infra* notes 201-06 (illustrating Justice Ginsburg's dissent in *Sandin*, focusing upon the consequences of allocating Due Process inquiries to the states); *see also* Call, *supra* note 9, at 45 (offering a pre-*Sandin* prediction of future 5-4

the underlying liberty interest, does little to reduce the constant litigation of prisoners' rights and encourages courts to review these cases on an ad hoc basis.[137]

II. *SANDIN V. CONNER*: A BLEAK OUTLOOK FOR PRISONERS' LIBERTY INTERESTS CLAIMS

A. Disciplinary Proceedings: The Backdrop for Conner's Due Process Claim

In *Sandin v. Conner*,[138] the Supreme Court redefined the landscape of prisoners' due process law and dictated a new standard for reviewing such claims. DeMont Conner, an inmate in a Hawaii state prison, was undergoing a required strip search before attending a religious ceremony, when he became hostile and obstructed the guard's search.[139] Charged with "high misconduct," Conner appeared before a prison adjustment committee and requested the opportunity to present witnesses that he contended could establish his innocence.[140]

Citing only administrative, not safety, concerns, the adjustment committee denied Conner's request to call witnesses and found him guilty of the misconduct charges.[141] The committee sentenced him to thirty days in disciplinary confinement in a "Special Holding Unit."[142] Initially, Conner sought administrative review of the decision, but before the appeal was decided, he filed suit in the United States District Court for the District of Hawaii pursuant to 42 U.S.C. § 1983, alleging that he had been deprived of his procedural due process rights in disciplinary proceed-

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prisoners' rights decisions, favoring prisons, and thus threatening a return to the "deference period" of unfettered prison discretion).

137. Murphy, *supra* note 134, at 236-37. Murphy contends that the Supreme Court must adopt a more effective approach to communicate the rights of prisoners to the states so that state administrators may better safeguard those rights. *Id.*

138. 115 S. Ct. 2293 (1995).

139. Respondent's Brief at 3, Sandin v. Conner, 115 S. Ct. 2293 (1995) (No. 93-1911). Conner was serving an indeterminate sentence for 30 years to life in the Halawa Correctional Facility in Oahu, Hawaii, for numerous state crimes including murder, kidnapping, robbery, and burglary. *Sandin*, 115 S. Ct. at 2295.

140. *Sandin*, 115 S. Ct. at 2296. The notice of "high misconduct" alleged that Conner used "physical interference to impair a correctional function." *Id.* Additionally, Conner was charged with "low moderate misconduct for using abusive or obscene language and for harassing employees." *Id.*; *see supra* note 30 (providing the language of the Hawaii Administrative Rule detailing misconduct charge criteria).

141. *See Sandin*, 115 S. Ct. at 2296 (noting that the adjustment committee refused Conner's request to present witnesses because they were short staffed).

142. *Id.* The terms "disciplinary confinement" and "solitary confinement" are used interchangeably throughout the opinion and many other articles and secondary sources on prison confinement. The majority suggested that Conner's disciplinary confinement mirrored other kinds of administrative segregation and protective custody. *Id.* at 2301.

ings.[143] The district court granted summary judgment in favor of the prison officials.[144] The United States Court of Appeals for the Ninth Circuit reversed with respect to the disciplinary segregation issue,[145] determining that Conner had a liberty interest in remaining free from disciplinary segregation.[146] The court found that whether Conner had received all the process *Wolff* required was a disputed issue of fact.[147] Following previous cases, the Ninth Circuit based its establishment of Conner's liberty interest on a Hawaii prison regulation that instructed the committee to find guilt when substantial evidence supported a charge of misconduct.[148] The Supreme Court granted certiorari to reexamine the circumstances under which prisoners may rely on state prison regulations to establish liberty interests that the Due Process Clause of the Fourteenth Amendment protects.[149]

B. The Majority Opinion: A Return to the Past Dictates the Future of Prisoners' Due Process Claims

In *Sandin*, the Supreme Court reversed the Ninth Circuit and held that neither the Due Process Clause nor the Hawaii prison regulation created a liberty interest that implicated the procedural protections *Wolff* set forth.[150] Writing for the five-member majority,[151] Chief Justice Rehnquist criticized the Ninth Circuit's methodology and rejected the standard for evaluating due process claims that the Court had developed in the preceding twenty years.[152] In repudiating its prior approach, which focused upon the statutorily-created liberty interest, the Court reinstated the methodology of *Wolff*, and attempted to calm the growing concerns

143. *Id.* at 2296. Nine months after Conner's appeal for administrative review of the hearing, the deputy administrator determined that the high misconduct charge was unsupported and he expunged that charge from Conner's record. *Id.*

144. *Id.*

145. Conner v. Sakai, 15 F.3d 1463, 1465 (9th Cir. 1993), *rev'd*, 115 S. Ct. 2293 (1995).

146. *Id.* at 1466. The court based its determination on Hawaii's regulations, which "provide[d] explicit standards that fetter official discretion." *Id.*

147. *Id.* at 1467. The court found that while Conner was given advance notice of his hearing, a material fact existed as to whether he was permitted to call witnesses. *Id.* at 1467-68.

148. *Id.* at 1466 (citing *Hewitt* and *Thompson*).

149. *See Sandin*, 115 S. Ct. at 2297.

150. *Id.* at 2302.

151. Chief Justice Rehnquist delivered the opinion of the Court, which Justices O'Connor, Scalia, Kennedy, and Thomas joined. *Id.* at 2295. Justice Ginsburg dissented, and Justice Stevens joined. *Id.* Justice Breyer also filed a dissenting opinion, in which Justice Souter joined. *Id.*

152. *Id.* at 2299-2302. Chief Justice Rehnquist stated that "[t]he time ha[d] come to return to the due process principles . . . correctly established and applied in *Wolff* and *Meachum*." *Id.* at 2300.

over maintaining the integrity of prison administration and judicial efficiency.[153]

1. *Reaffirming* Wolff: *A Return to Mutual Accommodation*

The *Sandin* majority began its due process inquiry with a discussion of *Wolff*.[154] The majority recognized that in *Wolff*,[155] a state statute mandated reduced sentences for good behavior.[156] Absent this statute, however, inmates had no valid claim to a liberty interest under the Due Process Clause.[157] The *Wolff* Court had considered an inmate's interest in a "shortened prison sentence" one of "real substance."[158] As a result, *Wolff* established minimum procedural safeguards to reach a " 'mutual accommodation between institutional needs and objectives and the provisions of the Constitution.' "[159] Justice Rehnquist explained in *Sandin* that *Wolff*'s balancing test contributed substantially to prisoners' due process jurisprudence.[160] Following *Wolff*, the Supreme Court began to expand permissible prisoners' liberty interest claims, but in *Meachum*, the Court attempted to restrict the application of procedural due process.[161] The *Sandin* majority recognized that the dictum in *Meachum*, which distinguished the Court's focus in *Wolff*, marked the beginning of the Court's emphasis on statutory language as the analytical basis for creating liberty rights which eventually became the foundation in *Hewitt v. Helms*.[162]

2. *Abandoning the* Hewitt *Methodology*

Tracing case law from *Wolff* to *Hewitt*,[163] the *Sandin* majority criticized *Hewitt*'s focus on a strict examination of mandatory statutory language as the basis for determining liberty interests and cited its undesirable re-

153. *Id.* at 2300-02. The Court remained concerned with those instances where prison officials imposed "atypical" or "significant" hardship on prisoners. *Id.* at 2300.

154. *Id.* at 2297.

155. *See supra* notes 52-63 and accompanying text (discussing the factual background and holding of *Wolff*).

156. *Sandin*, 115 S. Ct. at 2297.

157. *Id.* (stating that the "Due Process Clause itself does not create a liberty interest").

158. *Id.* (quoting Wolff v. McDonnell, 418 U.S. 539, 556-57 (1974)).

159. *Id.* (quoting *Wolff*, 418 U.S. at 556).

160. *Id.* at 2297. *Sandin* explained *Wolff*'s test as balancing "prison management concerns with prisoners' liberty" to determine the amount of process due. *Id.*

161. *See id.*; Sargentich, *supra* note 86, at 406 (discussing the extension of procedural safeguards in *Wolff*, followed by restrictions imposed in *Meachum*).

162. *Sandin*, 115 S. Ct. at 2298 (discussing *Meachum*, *Greenholtz*, and *Hewitt*).

163. *See* discussion, *supra* part I (examining relevant case law that contributed to the landscape of prisoners due process claims).

sults.[164] According to Chief Justice Rehnquist, as the Court shifted its inquiry from the nature of the deprivation to the language of the regulation, it was encouraging prisoners to "comb" regulations for liberty interests on which they could base entitlements.[165] Moreover, courts responded to this shift by drawing "negative inferences" from mandatory language in the prison regulations.[166] The *Sandin* majority disagreed with this approach, but qualified its criticism by stating that this inference was "not altogether illogical[ ]," given the *Hewitt* standard.[167]

3. Prison Power: The Return of Judicial Deference

In supporting a departure from its approach in *Hewitt*, the *Sandin* majority emphasized two undesirable results that such an approach had caused.[168] First, the majority claimed that *Hewitt* provided disincentives for states to codify prison management procedures because of fear of frivolous constitutional claims.[169] The majority determined that states and prisoners possess a significant interest in having uniform treatment within the prison system, and that *Hewitt* threatened this goal substantially.[170] Chief Justice Rehnquist concluded that the *Hewitt* approach signified a return to the "standardless discretion" that plagued prisons prior to courts' recognition of prisoners' due process rights.[171]

Second, the majority observed that the *Hewitt* approach involved federal courts needlessly in the "day-to-day management" of prisons, while simultaneously "squandering" scarce judicial resources without significant benefit.[172] Despite the rationale behind the Court's initial involvement in prisoners' due process issues, the majority criticized federal court

164. *Sandin*, 115 S. Ct. at 2298-99. Interestingly, Rehnquist wrote *Hewitt*'s majority opinion, the same methodology which he criticized in *Sandin*. *Hewitt*, 459 U.S. 461; *see supra* notes 126-34 and accompanying text (discussing the negative effects of *Hewitt* methodology).

165. *Sandin*, 115 S. Ct. at 2299.

166. *Id.* The Court of Appeals' negative inference was that because the statute mandated a finding of guilt when certain conditions existed, absent those conditions, no finding of guilt was possible. *See id.*; *see supra* note 133 (describing the Court's opinion of the utility of negative jurisprudence within a prison regulation context).

167. *Sandin*, 115 S. Ct. at 2299.

168. *Id.*

169. *Id.*

170. *See id.* Such guidelines protect the prisoner from the random imposition of official discretion. *Id.* In addition, guidelines benefit the subordinate employees as well; by providing boundaries that curb the discretion of staff, the authoritarian structure of the prison allows for a safer environment. *Id.*

171. *See id.* (stating that this "standardless discretion" would allow states to avoid the creation of liberty interests).

172. *Id.*

involvement in prison administrative issues and re-embraced the notion of deference to state officials in prison management.[173]

These negative effects led the majority to reject the search for mandatory language in prison regulations to find liberty interests and to embrace the previous standard that *Wolff* and *Meachum* established.[174] According to the majority, *Wolff*'s approach, which focused upon liberty interests that imposed "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life," would better serve the interests of prison management and the allocation of judicial resources.[175]

4. Solitary Confinement: A "Typical and Insignificant" Deprivation

Applying the *Wolff* approach, focusing on the prisoner's deprivation, the majority decided that Conner was *not* entitled to a protectable Due Process Clause liberty interest.[176] Chief Justice Rehnquist cited the nature of the deprivations in *Vitek v. Jones*[177] and *Washington v. Harper*[178] as examples of circumstances where an inmate confronts "atypical and significant hardship."[179] Because Conner's solitary confinement did not differ significantly from administrative segregation, the majority asserted that his situation did not trigger the due process protections developed in *Wolff*.[180] Despite Conner's reference to dicta in other cases, which suggested that solitary confinement is a significant deprivation, the majority

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173. *Id.* at 2299-2300; *see infra* note 221 (illustrating examples of "trivial" administrative situations that prison administration officials better serve, rather than federal courts).

174. *Sandin*, 115 S. Ct. at 2300.

175. *Id.* These hardships are to be distinguished from those instances where the prisoner's sentence is exceeded in such an unexpected manner that the Due Process Clause would apply on its own. *See id.*

176. *Id.* at 2301; *see supra* note 88 (discussing liberty interests inherent in the Due Process Clause).

177. 445 U.S. 480, 494 (1980) (establishing a prisoner's liberty interest in being free from a transfer to a mental hospital against his will).

178. 494 U.S. 210, 227 (1990) (concluding that a prisoner possessed a liberty interest in being free from the administration of psychotropic drugs against his will).

179. *Sandin*, 115 S. Ct. at 2300. Additionally, the majority rejected Conner's assertion that any state action taken for punitive measures violates liberty interests even absent state regulations. *Id.* at 2300-01. The majority declined to recognize Conner's reliance on both *Bell v. Wolfish* and *Ingraham v. Wright*, because each case could easily be distinguished. *Id.*; *see also* Bell v. Wolfish, 441 U.S. 520, 523 (1979) (addressing the interests of pretrial detainees, not convicted prisoners); Ingraham v. Wright, 430 U.S. 651, 653 (1977) (dealing with arbitrary corporal punishment of school children, not convicted felons).

180. *Sandin*, 115 S. Ct. at 2301-02. Although Conner was placed in "disciplinary segregation," the Court maintained that such condition paralled "administrative segregation." *Id.* at 2301; *see supra* note 27 (explaining the similarities between administrative and disciplinary segregation). *But see supra* note 142 (discussing the majority's observation that Conner's disciplinary environment mirrored both administrative segregation and protective custody).

failed to classify Conner's segregation as an "atypical and significant hardship."[181] Furthermore, because officials expunged Conner's record after he served time in solitary confinement, the majority held that the adjustment committee did not affect the prisoner's prospect for parole.[182]

The *Sandin* majority concluded that Conner did not possess a valid liberty interest either under the Due Process Clause itself or through a statutory entitlement.[183] The majority viewed Conner's punishment as "within the range of confinement to be normally expected."[184] Concurrently, the majority abandoned the *Hewitt* methodology, returned to the approach that *Wolff* and *Meachum* developed, and thereby guided Due Process Clause analysis back to the nature of the deprivation.

C. The Dissents

Justice Ginsburg, who Justice Stevens joined, began the analysis of her dissent with the historical foundation of due process: the Constitution itself.[185] Justice Breyer, presenting an additional dissent that Justice Souter joined, disagreed with the majority's failure to classify solitary confinement as an "atypical and significant hardship."[186] Additionally, Justice Breyer argued that a liberty interest could depend on state statutes for its creation.[187]

1. Justice Ginsburg: Embracing Traditions of Liberty and Due Process

Justice Ginsburg began her argument by disagreeing clearly with the established method of looking for mandatory language to determine lib-

181. *Sandin*, 115 S. Ct. at 2301; *see supra* note 73 (referencing a footnote in *Wolff* where the Court recognized that a prisoner has a liberty interest in remaining free from solitary confinement).

182. *Sandin*, 115 S. Ct. at 2301-02. Nothing in Hawaii's code requires the parole board to deny parole because of a misconduct charge, or to grant parole in its absence. *Id.* at 2302 (citing HAW. REV. STAT. §§ 353-68-69 (1985)). *But cf. id.* (citing Haw. Admin. Rule § 23-700-33(b) (effective Aug. 1992) (providing that misconduct is a relevant consideration for parole review boards)); *infra* note 196 (illustrating Justice Ginsburg's argument that "disciplinary confinement . . . cannot be bracketed with administrative and protective custody"); *infra* note 209 (criticizing the prison official's attempt to make a disciplinary charge an administrative one through expungement); *see also* Martin A. Schwartz, *Restrictions on Prisoners' Liberty Interests*, N.Y.L.J., August 15, 1995, at 31 (finding the majority's reasoning that expungement could affect a liberty interest determination troubling).

183. *Sandin*, 115 S. Ct. at 2302. Because Conner did not have a liberty interest, he was not entitled to *Wolff*'s procedural protections. *Id.*

184. *Id.*

185. *Id.* at 2302-03 (Ginsburg, J., dissenting) (describing the Due Process Clause as the "wellspring" of the protection Conner merited).

186. *Id.* at 2304 (Breyer, J., dissenting).

187. *Id.* at 2305-07.

erty interest inquiries.[188] She asserted that recent trends in prisoner due process analysis, stemming from *Hewitt*, had proven to "yield . . . practical anomal[ies]" and undesirable results.[189] Current due process precedent, as applied to prisoners seeking to address liberty interests, focused upon parsing statutory language and abandoned the traditional analysis of the nature of the deprivation.[190] Although the Supreme Court had shown reluctance to rely upon the Due Process Clause *itself* to recognize liberty interests,[191] Justice Ginsburg purposefully ignored the statutory focus and looked directly to the Due Process Clause for guidance.[192]

a. Fundamental Protections of the Due Process Clause "Itself"

Justice Ginsburg advocated a return to the pre-*Hewitt* approach of *Wolff* and *Meachum*, which considered the nature of the deprivation affecting the prisoner.[193] At first, Justice Ginsburg seemingly agreed with the majority's abandonment of statutorily created liberty interests as the appropriate foundation for due process analysis.[194] However, she disagreed with the majority's result, which failed to recognize Conner's deprivation as deserving of due process protections.[195] In Justice Ginsburg's opinion, by depriving Conner of privileges for extended periods, stigmatizing his conduct record and prison reputation, and diminishing parole prospects, Conner's disciplinary segregation constituted a "severe altera-

188. *Id.* at 2303 (Ginsburg, J., dissenting) (stating that "[d]eriving protected liberty interests from mandatory language . . . would make . . . fundamental right[s] something more in certain states, something less in others").

189. *Id.* Justice Ginsburg explained the anomaly to be:

> a State that scarcely attempts to control the behavior of its prison guards may, for that very laxity, escape constitutional accountability; a State that tightly cabins the discretion of its prison workers may, for that attentiveness, become vulnerable to constitutional claims. An incentive for ruleless prison management disserves the State's penological goals and jeopardizes the welfare of prisoners.

Id.

190. *See id.* at 2302-03; *supra* notes 129-37 (discussing the practical, negative effects on prisoners' and prison administration that have resulted from the due process methodology outlined in *Hewitt*).

191. Many prisoners have argued that the Due Process Clause itself confers liberty interests in certain situations, but the Supreme Court has accepted this reasoning rarely, limiting such situations to those outlined in *Vitek* and *Washington*. *See supra* note 88 (discussing the unique facts of both cases where the Due Process Clause itself was found to confer a liberty interest irrespective of state regulation).

192. *Sandin*, 115 S. Ct. at 2303 (Ginsburg, J., dissenting) (maintaining that Constitutional protections should not depend on local law).

193. *Id.* at 2302-03.

194. *Id.* at 2303.

195. *Id.* at 2302-03; *see also Sandin*, 115 S. Ct. at 2304 (Breyer, J., dissenting). Justice Breyer stated that "the majority's reasoning . . . particularly when read in light of this Court's precedents, seems to me to lead to the opposite conclusion." *Id.*

tion in the conditions of his incarceration."[196] Additionally, Conner had to spend the entire time isolated in his cell, separated from routine inmate contact, with a reprieve of only fifty minutes each day for a shower and exercise and even then leg and waist chains constrained him.[197]

Following *Wolff* and *Meachum*, Justice Ginsburg argued that Conner's reduction of privileges, his threatened parole prospects, and the overall stigma of disciplinary confinement should qualify such confinement as a liberty interest sufficient to invoke due process protection.[198] Thus, she disagreed with the majority's benign characterization of Conner's segregation, and recognized that solitary confinement was indeed the sort of serious deprivation that the Due Process Clause *itself* sought to protect.[199] Recognizing only the Due Process Clause and not state action for the source of liberty interests, Ginsburg rejected the methodology that required courts to examine mandatory statutory codes for liberty interests, stating that this "would make of the fundamental right something more in certain States, something less in others."[200]

b. *Statutory Focus: An Unnecessary Phase in Due Process Analysis?*

To support her analysis, Justice Ginsburg illustrated the anomalous results that the *Hewitt* approach produced.[201] Following *Hewitt*'s reasoning, a state seeking to avoid constitutional accountability could construct a vague statute, assuring prisoners difficulty in defining liberty interests.[202] Conversely, a state that defined a statute narrowly to "cabin[ ]

196. *Id.* Although the state of Hawaii expunged Conner's record after his successful administrative appeal, Justice Ginsburg noted that "hindsight cannot tell us whether a liberty interest existed at the outset. One must, of course, know at the start the character of the interest at stake in order to determine *then* what process, if any, is constitutionally due. 'All's well that ends well' cannot be the measure here." *Id.* at 2303 n.1.

197. *Id.* at 2305 (Breyer, J., dissenting); *cf.* Wolff v. McDonnell, 418 U.S. 539, 571 n.19 (1974). In a significant footnote in *Wolff*, the Court compared the necessary procedural safeguards for deprivation of good-time credits to disciplinary confinement, specifically, solitary confinement. *Id.* The Court went on to state: "[solitary confinement] represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct." *Id.*

198. *Sandin*, 115 S. Ct. at 2302 (Ginsburg, J., dissenting).

199. *See id.* at 2303 & n.2 (noting that the majority provided no examples of what would constitute an "atypical, significant deprivation," but nevertheless fail to "trigger protection under the Due Process Clause itself").

200. *Id.* at 2303. Justice Ginsburg borrowed language from the Declaration of Independence when she stated: "Liberty that may vary from Ossining, New York, to San Quentin, California, does not resemble the 'Liberty' enshrined among 'unalienable Rights' with which all persons are 'endowed by their Creator.' " *Id.*

201. *Id.*; *see supra* note 189 and accompanying text (quoting this anomaly).

202. *See Sandin*, 115 S. Ct. at 2203 (Ginsburg, J., dissenting).

the discretion of its prison workers" would become more susceptible to constitutional claims.[203] Thus, Justice Ginsburg's opinion reflected the same concerns that the majority cited: results that impede fair and effective prison management and jeopardize the welfare of the prisoners.[204] She recognized that liberty interests cannot function as a fundamental part of the federal government if local prison codes treat them inconsistently.[205] As a solution, Justice Ginsburg asserted that Conner's liberty interest in remaining free from solitary confinement was one that the Due Process Clause of the Fourteenth Amendment protected directly.[206]

2. *Challenging the Majority: Advocating Notions of Stare Decisis*

Justice Breyer, with Justice Souter joining him, dissented on the basis that regardless of whether state law gives prison officials broad discretionary power to impose changes in a prisoner's confinement, the disciplinary confinement at issue deprived Conner of a constitutionally protected "liberty" interest.[207] In this respect, Justice Breyer disagreed with the majority's ultimate conclusion that on the facts of this case Conner's punishment was not a significant deprivation of a "liberty" interest.[208] Justice Breyer reached this conclusion notwithstanding the fact that Conner's disciplinary record was expunged, reasoning that a later expungement could not "restore" a lost liberty.[209] Thus, according to Justice Breyer, Conner was deprived of "liberty" within the meaning of the Due Process Clause and he was entitled to an additional disciplinary hearing if, on remand, there was a factual dispute.[210]

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203. *Id.*

204. *Id.*; *supra* notes 165-75 (illustrating the majority's similar concerns with the negative effects that *Hewitt* methodology produced). For a prisoners' rights advocate's perspective on *Hewitt* and its applicability to due process claims involving disciplinary charges, see JOHN BOSTON & DANIEL E. MANVILLE, PRISONERS' SELF-HELP LITIGATION MANUAL 263 (3d ed. 1995). Boston and Manville view *Hewitt*-type analysis suitable for "subjective" and "intuitive" judgments involving administrative segregation, but assert that *Wolff* "trial-type" safeguards are necessary for disciplinary proceedings. *Id.*

205. *Sandin*, 115 S. Ct. at 2303 (Ginsburg, J., dissenting).

206. *Id.* at 2304. Having determined that the prison officials deprived Conner of a liberty interest pursuant to the Due Process Clause, Justice Ginsburg recommended that the case be remanded "for a precisely focused determination whether Conner received the process that was indeed due." *Id.*

207. *Id.* (Breyer, J., dissenting).

208. *Id.*

209. *Id.* at 2309. Justice Breyer questioned the majority's reasoning, stating, "[h]ow can a *later* decision of prison authorities transform Conner's segregation for a violation of a specific disciplinary rule into a term of segregation under the administrative rules?" *Id.* According to Justice Breyer, despite the prison officials' expungement efforts to remedy the stigma of Conner's confinement, he nevertheless, "suffered a deprivation that was significant, not insignificant." *Id.*

210. *Id.* at 2310.

Contrary to the majority opinion, Justice Breyer saw no need to change, or to clarify pre-existing law's "liberty" defining standards in any respect.[211] Instead, Justice Breyer saw only the need to elaborate on, and explain, the Supreme Court's present standard in order to make clear that courts do not create procedurally protected "liberty" interests where only minor matters are at stake.[212] Justice Breyer asserted that the scope of prisoner deprivations may be categorized as (1) the significant, (2) the broad middle category, and (3) the insignificant.[213] Although significant deprivations clearly demand due process protections, and the insignificant deprivations do not, it was the difficulty of classifying the "broad middle category" of deprivations that prompted the majority to reformulate due process analysis.[214] Justice Breyer contended that a "radical revision" of existing law was not necessary to achieve the majority's objective of protecting only the significant prisoner deprivations.[215] According to Justice Breyer, prisoners' due process analysis was already in place and in need simply of explanation.[216]

a. Significant Deprivations of Liberty: Triggering Due Process Protections

Justice Breyer recognized that some changes in the conditions of a prisoner's confinement may be so severe as to trigger due process protections, irrespective of state statutes granting prison administrators the authority to impose them.[217] In such cases, the Court has held that state authorities may not impose changes in conditions of confinement "with-

211. *Id.* at 2306.

212. *Id.* Justice Breyer argued that the majority's decision "threatens the law with uncertainty, for some lower courts may read the majority opinion as offering significantly less protection against deprivation of liberty, while others may find in it an extension of protection to certain "atypical" hardships that preexisting law would not have covered." *Id.* For criticism of Justice Breyer's opinion that some lower courts might actually afford *more* protection to prisoners given the *Sandin* decision, see Schwartz, *supra* note 182, at 31 (stating that "this is nothing more than wishful thinking of a dissenting Justice. . . . It is simply unrealistic to think that the conservative majority intended to promote the procedural due process rights of prisoners in any respect"). *But see Sandin*, 115 S. Ct. at 2300 n.5. Here, the majority stated that its opinion, which abandoned the *Hewitt* methodology, "[did] not technically require us to overrule any holding of this Court. . . . Our decision today only abandons an approach that in practice is difficult to administer and which produces anomalous results." *Id.*

213. *See id.* at 2306-08; *infra* notes 217-46 and accompanying text (describing Justice Breyer's three categories of prisoner deprivations, and his argument that existing precedent addresses all three).

214. *Sandin*, 115 S. Ct. at 2306-07 (Breyer, J., dissenting).

215. *Id.* at 2306.

216. *Id.*

217. *Id.* at 2304 (Breyer, J., dissenting).

out complying with minimum requirements of due process."[218] Applying this general pre-existing principle to the facts of *Sandin*, Justice Breyer concluded that the majority should have determined that Conner's disciplinary confinement deprived him of a "constitutionally protected 'liberty.' "[219]

b. *The Insignificancies of Prison Life: Outside the Scope of Due Process Clause Protection*

Justice Breyer stated that just as some deprivations are so severe as to trigger automatically due process protections, other deprivations are so *insignificant* that they clearly do not fall within the scope of Due Process Clause analysis.[220] Justice Breyer recognized that these trivial deprivations, which are often similar to the prisoners' original conditions of confinement, should be identified easily as minor deprivations.[221] Although separating the "unimportant" from the "potentially significant" without the help of the "more objective 'discretion-cabining' test" would become the courts' burden, Justice Breyer argued that this task is well within the courts' capacity.[222] By applying judicial common sense, Justice Breyer

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218. *Id.* at 2304-05. Like the majority, Justice Breyer recognized the Court's classification of Vitek v. Jones, 445 U.S. 480 (1980), and Washington v. Harper, 494 U.S. 210 (1990), as examples of severe changes in the conditions of a prisoner's confinement warranting due process protection. *See id.* at 2300; *supra* note 88 (discussing the facts of *Vitek* and *Washington*).

219. *Sandin*, 115 S. Ct. at 2305 (Breyer, J., dissenting). As opposed to eight hours of commingling with other prisoners, Conner was allowed out of his cell only 50 minutes per day, for a shower and brief exercise. *Id.* at 2305. During this brief reprieve from his cell, Conner was constrained by leg irons and waist chains and isolated from other prisoners. *Id.* Justice Breyer recognized that this punishment demonstrated a "fairly major change" in the conditions of his confinement." *Id.*

220. *Id.* at 2308.

221. *Id.* One example of "trivial" rights the majority cited occurred in the case of Burgin v. Nix, 899 F.2d 733, 735 (8th Cir. 1990), in which an inmate claimed a liberty interest in receiving a hot "tray lunch" rather than a "sack lunch." *Sandin*, 115 S. Ct. at 2300. The majority cited additional common prisoner complaints raised as "liberty interests" and discouraged the involvement of federal courts in these insignificant matters. *Id.* at 2299-2300 (citing Klos v. Haskell, 48 F.3d 81, 86 (2d Cir. 1995) (claiming a liberty interest in the right to participate in prison "boot camp" type program); Segal v. Biller, 1994 U.S. App. LEXIS 30628, at *1 (9th Cir. 1994) (claiming a liberty interest in a waiver of the travel limit placed on prison furloughs); Spruytte v. Walters, 753 F.2d 498, 506-08 (6th Cir. 1985) (claiming a liberty interest in receiving a paperback dictionary), *cert. denied*, 474 U.S. 1054 (1986); Lyon v. Farrier, 727 F.2d 766, 767-69 (8th Cir.) (claiming a liberty interest in not being transferred to a smaller cell that lacked adequate outlets for television and a liberty interest in prison employment), *cert. denied*, 469 U.S. 839 (1984).

222. *Sandin*, 115 S. Ct. at 2308 (Breyer, J., dissenting); *see* Goss v. Lopez, 419 U.S. 565, 576 (1975) (discussing an attempt to establish a "*de minimus*" or insignificant line concept for defining property interests under the Due Process Clause; those falling below this

argued that significant matters, such as solitary confinement, are readily distinguishable from unimportant matters.[223]

Justice Breyer commented that the majority interpreted the "discretion-cabining" test as providing procedural protections for trivial rights, thus needlessly involving the courts in daily prison management.[224] However, Justice Breyer argued that this test, though useful in interpreting the "broad middle category" of prisoners' deprivations, is not necessary for determining insignificant deprivations.[225] Justice Breyer recognized that the Court's precedent has *never* held that comparatively unimportant deprivations fall within the scope of the Due Process Clause, regardless of whether state law limits the prison officials' authority to impose them.[226] Justice Breyer asserted that the majority did not need to create a new standard to limit insignificant prisoner deprivations from federal court inquiry, stating that this limit is "already implicit in the Court's precedent."[227]

c. *Where Do We Draw the Line?: The Utility of Statute Scrutiny in Defining the "Broad Middle Category" of Deprivations*

Justice Breyer noted that the Court has recognized deprivations, although less severe and closer to the original terms of confinement, that may deserve procedural protections, provided that state law "narrowly cabins the legal power of authorities to impose the deprivation."[228] Regardless of the existence of state-created liberty interests, Justice Breyer recognized difficulties in determining "*when,* or *how much* of, a loss triggers this protection."[229] He identified a "broad middle category" of dep-

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"line" would be too insignificant to necessitate federal judicial scrutiny which would provide more certainty to due process inquiries).

223. *Sandin*, 115 S. Ct. at 2308 (Breyer, J., dissenting).

224. *Id.*

225. *Id.* Justice Breyer argued that when a restraint fell clearly outside of the middle category as so unimportant to not warrant protection, the "discretion-cabining" approach was inapplicable. *Id.* at 2307.

226. *Id.* at 2308.

227. *Id.*

228. *Id.* at 2304; *see, e.g.,* Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461 (1989). *Thompson* illustrated the two sources from which liberty interests may arise: the Due Process Clause and state law creating enforceable rights. *Id.* at 460-61. Aside from the holdings in *Vitek* and *Washington*, the Court has been unwilling to grant liberty interests in the absence of state law conferring such rights. *See, e.g., id.* at 461 (stating that the Court's method of inquiry always has been to examine closely the language of the statutes and regulations); Olim v. Wakinekona, 461 U.S. 238, 248-49 (1983) (state regulations regarding interstate prison transfers governed existence of liberty interests); Hewitt v. Helms, 459 U.S. 460, 471-72 (1983) (liberty interest created by regulations requires that substantive predicates be observed before imposing administrative segregation).

229. *Sandin*, 115 S. Ct. at 2306 (Breyer, J., dissenting).

rivations that are "neither obviously so serious as to fall within, nor obviously so insignificant as to fall without the [Due Process] Clause's protection."[230] Unlike Justice Ginsburg, Justice Breyer recognized a value in preserving a standard that examines statutory language.[231] In particular, he cited the "cabining of discretion" standard, explicit in local statutes and regulations, as the key to interpreting the "broad middle category" of deprivations.[232]

Justice Breyer noted that the "difficult line-drawing task" within this middle category had motivated the Court to develop previously its additional liberty-defining standard in *Thompson* and *Hewitt*.[233] By examining state law provisions, the Court may determine the gravity of the liberty deprivation simply by the degree that the statute controls prison officials' unfettered discretion.[234]

Directing his analysis to the applicable Hawaii rules, Justice Breyer noted that the rules *do* "severely cabin the authority of prison officials to impose this kind of punishment."[235] The prison rules thus: (1) imposed substantial punishment; (2) restricted such punishment to the commission of a defined offense; and (3) established nondiscretionary standards for deciding if the inmate committed the offense.[236] Having chosen such "liberty-defining" standards to constitute the rule, officials *could not* assign punishment absent "specified substantive predicates."[237] Following

230. *Id.*

231. *Id.* at 2306-07.

232. *Id.*

233. *Id.*; *see, e.g., Thompson*, 490 U.S. at 461; *Hewitt*, 459 U.S. at 471-72.

234. *Sandin*, 115 S. Ct. at 2307 (Breyer, J., dissenting).

235. *Id.* at 2305. Various sections of the Hawaii Administrative Rules limit prison officials' discretion:

> (a) that certain specified acts shall constitute "*high misconduct*," Haw.Admin.Rule § 17-201-7a; (b) that misconduct punishable by more than four hours in disciplinary segregation "shall be punished" through a prison "adjustment committee" (composed of three unbiased members), §§ 17-201-12, 13; (c) that, when an inmate is charged with such misconduct, then (after notice and a hearing) "[a] finding of guilt shall be made" if the charged inmate admits guilt or the "charge is supported by substantial evidence," §§ 17-201-18(b), (b)(2); see §§ 17-201-16, 17 [requirements for notice and hearing]; and (d) that the "[s]anctions" for high misconduct that "may be imposed as punishment . . . shall include . . . [d]isciplinary segregation up to thirty days," § 17-201-7(b).

Id.

236. *Id.* at 2305-06.

237. *Id.* at 2306 (quoting Hewitt v. Helms, 459 U.S. 460, 471-72 (1983)). The concept of substantive predicates may be illustrated more simply by example: if the state has chosen to define a particular disciplinary regulation as "solitary confinement will be ordered if X is found," the state has created an inmate's liberty interest in not being deprived of freedom from solitary confinement unless X is found. Once a liberty interest is created, X cannot be "found" without constitutionally adequate due process.

this existing methodology, Justice Breyer noted that the Court of Appeals for the Ninth Circuit recognized a state created liberty interest; therefore, the only question for analysis on remand would simply be *what* process was due.[238]

According to Justice Breyer, several important reasons support state law as a proper basis for determining liberty interests in a prison context.[239] In one instance, he considered the state legislature or administrative agency's fitness to enact statutes or regulations to protect liberty interests, and the prison administrator's ability to comply, without the court "second-guess[ing]" its decisions.[240] Justice Breyer stated that such matters did not require the court's sophisticated, judgmental discretion, and were properly governed by the appropriate state provision.[241] Further, Justice Breyer argued that courts are well-equipped to determine whether state statutes or regulations sufficiently "cabin" the prison officials' discretion, thus courts may use this approach as a helpful "touchstone" for determining the "broad middle category" of deprivations, without significantly altering existing law.[242]

Justice Breyer recognized that the majority reaffirmed that the Due Process Clause protects state created liberty interests.[243] However, in light of this reaffirmation, Justice Breyer asserted that the majority should have affirmed, rather than reversed, the Ninth Circuit.[244] To alleviate the majority's fear that application of the Due Process Clause to "significant" deprivations would frustrate prison administration, Justice Breyer pointed out that the process which is due is not the "full blown

238. *Id.*

239. *Id.* at 2307. Justice Breyer's reasons for focusing on state law include: (1) that a further deprivation of an inmate's freedom, governed by local law, is more apt to have "played an important role in the life of the inmate"; (2) that the state has historically provided procedural protection for that type of matter that have normally proven useful in making determinations; (3) that the matter will probably not require sensitive, judgmental discretion, that would require the courts challenging prison administrators discretion; and (4) that the inmate himself could have avoided the deprivation by avoiding misbehavior, and believed that the restraint exceeded his imposed sentence. *Id.*

240. *Sandin*, 115 S. Ct. at 2307; *see* Meachum v. Fano, 427 U.S. 215, 225 (1976) (asserting that prison officials are more appropriate than federal courts when it comes to addressing a wide spectrum of prison disciplinary actions).

241. *Id.* For an argument supporting the analysis of state law in prisoners' due process inquiries, see *Prisoners' Rights—Punishments Imposed By Administrative Proceedings*, 109 HARV. L. REV. 141, 149 (1995) [hereinafter *Prisoners' Rights*]. The article argues that *Sandin*'s "prohibition on looking to a regulation's mandatory or discretionary character undermines a crucial piece of the analysis of state-born interests." *Id.*

242. *Sandin*, 115 S. Ct. at 2307 (Breyer, J., dissenting).

243. *See id.* at 2308-09.

244. *Id.* at 2308-09.

procedure" of a criminal trial.[245] Rather, Justice Breyer stressed that due process was a flexible doctrine designed to provide protections to particular situations, and in this case, should protect Conner's significant deprivation as well.[246]

III. Reformulating the Due Process Standard for Prisoners' Constitutional Challenges

A. Constitutional Guesswork: Attempting Classification of an "Atypical and Significant Hardship"

The *Sandin* majority reduced substantially prisoners' abilities to claim constitutional liberty interests successfully. By abandoning almost thirty years of decision-making methodology, the Court sent a clear message to prisoners: liberty interest suits that do not involve the nebulous classification of "atypical and significant hardships" will not prevail.[247] But in defining the interests that will invoke due process protections, the majority failed to include examples or to provide guidance as to what constitutes such a hardship.[248] Given the dissenting opinions' concern with the severity of solitary confinement, it is difficult to see how the majority dismissed this deprivation of freedom as easily as other trivialities of prison life.[249] The majority emphasized that the state expunged Conner's disciplinary charge eventually, thus removing any taint of discipline from his record.[250] This factor does little to correct the circumstances surrounding Conner's *punishment*.[251] Though negligible to a person unfamiliar with the prison system, "atypical and significant hardship" may very well exist

245. *Id.* at 2309.

246. *Id.*

247. *Id.* at 2300-02.

248. *Id.* at 2303 n.2 (Ginsburg, J., dissenting); *see Prisoners' Rights*, *supra* note 241, at 141 (recognizing that the majority's decision "engenders a number of interpretive puzzles"); Bell, *supra* note 19, at 190 (stating that judges will know if "conditions of confinement pass the bounds of civilized standards" when they see it) (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (comparing the vague applications of the obscenity test with determinations of prisoners' confinement)).

249. *See Sandin*, 115 S. Ct. at 2301-03 (dismissing Conner's confinement as not being an "atypical" or a "significant" deprivation).

250. *Id.* at 2301. During Supreme Court oral argument, one Justice categorized the act of expungement by stating, "[y]ou cannot retroactively make it done administratively. When it was done, it was done as a punishment." United States Supreme Court Official Transcript, No. 93-1911, 1995 WL 117628 at *44, *Sandin*, 115 S. Ct. 2293.

251. *See Sandin*, 115 S. Ct. at 2302 (Ginsburg, J., dissenting) (noting the stigma that attaches to an inmate assigned to disciplinary confinement); *see supra* notes 195-99 and accompanying text (discussing Justice Ginsburg's argument that solitary confinement should be classified as a significant deprivation of liberty).

in living a month of one's life in an environment that some believe to be physically and emotionally harmful.[252]

Examining the nature of the prisoner's deprivation is far more consistent with Due Process Clause jurisprudence; however, Chief Justice Rehnquist's analysis of Conner's deprivation should have dictated the opposite result.[253] Because of the *Sandin* majority's eagerness to re-embrace the *Wolff* standard, its decision ignored a significant footnote in *Wolff* where the Court confronted explicitly the issue of solitary confinement as a significant liberty interest.[254] The *Wolff* Court categorized solitary confinement as punishment that "represents a major change in the conditions of confinement and is normally imposed only when it is claimed and proved that there has been a major act of misconduct."[255] Additionally, the *Wolff* Court was careful to exclude more insignificant penalties, such as the mere loss of privileges, from the same due process protections.[256] By separating significant hardships of the prison disciplinary system from mere penalties or inconveniences, the *Wolff* Court addressed the critical issue of what disciplinary action would constitute a significant hardship and therefore, would demand a due process inquiry. By abandoning the important contemplations of *Wolff*, the *Sandin* majority ignored the severity of this type of solitary confinement and confused prisoners' due process jurisprudence greatly.

By contrast, Justice Ginsburg adopted the former *Wolff* methodology that examined the nature of the liberty interest, but categorized solitary confinement as an "atypical and significant hardship" deserving of due process protection.[257] The nature of solitary confinement[258] cannot be likened to asserting liberty interests in hot lunches as opposed to bag

252. *See supra* note 25 (discussing solitary confinement's potential for physical and mental harm on an inmate).

253. *See Sandin*, 115 S. Ct. at 2304 (Breyer, J., dissenting) (arguing that the "majority's reasoning . . ., particularly when read in light of this Court's precedents, seems to me to lead to the opposite conclusion").

254. *See* Wolff v. McDonnell, 418 U.S. 539, 571 n.19 (contemplating as serious issues both the deprivation of good-time credits and solitary confinement). The *Wolff* Court did not, however, intend the procedures it set forth to be interpreted as "graven in stone." *Id.* at 571-72.

255. *Id.* at 571-72 n.19.

256. *Id.* at 572 n.19. The Court stated that "[w]e do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges." *Id.*

257. *Sandin*, 115 S. Ct. at 2302-03 (Ginsburg, J., dissenting) (stating that the confinement "effected a severe alteration in the conditions of his incarceration").

258. *See* Sostre v. McGinnis, 442 F.2d 178, 192 (2d Cir. 1971) (describing solitary confinement as one of the primary " 'traditional disciplinary tools' of our prison systems"), *cert. denied*, 404 U.S. 1049 (1972). *See supra* note 25 (for an overview of the history of solitary confinement and its physical and emotional effects on inmates).

lunches or cells lacking sufficient television outlets.[259] By substantially limiting access to federal courts and articulating an unworkable standard for invoking a due process claim, the majority essentially equated the experience of one month in leg irons and solitude with a preference for hot food[260] and television.[261]

Additionally, Justice Breyer's position, advocating statutes as an important "touchstone" for determining liberty interests, raises compelling concerns for the future of state regulations.[262]Although the majority appears to retain the statutory due process inquiry, the higher threshold standard of "atypical and significant" hardship will most likely dominate the lower court's analysis, "offering significantly less protection against deprivation of liberty," even when the courts were willing to recognize a liberty interest before *Sandin*.[263] Justice Breyer recognized that the state of prisoners' due process jurisprudence was in need of interpretation; however, explicitly redefining the "lower definitional limit" of prisoners' liberty concerns would have placed due process on its proper path without abandoning recent precedent.[264]

B. The Future of Prisoners' Due Process Rights

In the twenty-one years separating *Wolff* and *Sandin*, the Court changed the way it analyzes prisoners' due process inquiries greatly. Due to a real concern for curbing unfettered discretion in prison administration, the Court in the 1970s began to involve itself in prisoners' cases to

259. *See Sandin*, 115 S. Ct. at 2300 (discussing trivial prisoners' claims litigated under the guise of liberty interests worthy of due process protections).

260. *See* Burgin v. Nix, 899 F.2d 733, 735 (8th Cir. 1990) (rejecting an asserted liberty interest in a hot lunch rather than a bag lunch); *see also supra* note 221 (illustrating the wide range of liberty interests prisoners have asserted).

261. *See* Lyon v. Farrier, 727 F.2d 766, 767-69 (8th Cir.) (claiming a liberty interest in adequate television outlets in a cell), *cert. denied*, 469 U.S. 839 (1984); *see supra* note 221 (illustrating cases in which inmates have claimed liberty interests in obvious trivialities).

262. *See Prisoners' Rights*, *supra* note 241, at 146-47. Critics of the majority's due process reformulation have focused on the Court's failure to integrate state laws into the new methodology, which ultimately "threaten[s] to eviscerate the unique character of state-born interests." *Id.*; *see also* Schwartz, *supra* note 182, at 31 (stating that since an "atypical and significant" hardship is a "very strong candidate" for a liberty interest stemming from the Constitution itself, "the state-created liberty interest approach is superfluous").

263. *Sandin*, 115 S. Ct. at 2306.

264. *Id.* at 2308. Prior to *Sandin*, many prisoners' decisions followed due process inquiries that focused on state statutes or regulations. *See, e.g.* Kentucky Dept. Of Corrections v. Thompson, 490 U.S. 454 (1989); Olim v. Wakinekona, 461 U.S. 238 (1983); Hewitt v. Helms, 459 U.S. 460 (1983); Meachum v. Fano, 427 U.S. 215 (1976); Montanye v. Haymes, 427 U.S. 236 (1976).

defend individual justice.[265] Although the methodology requiring scrutiny of prison regulations seemed to provide impetus for prisoner lawsuits through a broad extension of statutory entitlements, the Supreme Court's decision in *Sandin* may offer only a short-term remedy to this flood of litigation.[266] Its long-term effect will reduce severely the reality of prisoner "liberty."[267]

Justice Ginsburg recognized aptly the great risk *Sandin* carries regarding the future integrity of the Due Process Clause.[268] By failing to require federal inquiry of liberty interests, a fundamental constitutional provision is now dependent on local prison codes.[269] Essentially, delegating to prison officials the power to decide the fate of prisoners' liberty interests compromises constitutional principles.[270] But, even where state legislatures and administrative agencies, together with prison officials, have attempted to formulate regulations that "cabin" officials discretion, the new "atypical and significant" standard most likely will dominate the lower court's due process inquiries.[271] By either standard, the future of prisoners' due process rights undoubtedly will be affected by *Sandin*, and

265. *See* Call, *supra* note 9, at 36 (describing courts' growing concerns for abuse of prisoners' constitutional rights as the decline of the "hands-off" period).

266. *See* Philip Hager, *Should Inmate Suit Themselves?*, CAL. LAW. May 1995, at 33-35. Hager presents other practical solutions for the curbing the increase in prisoners lawsuits, none of which advocate changing due process methodology. *Id.* Current plans to halt prisoner litigation include: (1) new legislation that would deprive inmates of up to 30 days of good-time credits for filing a frivolous lawsuit; (2) conferences between a judge, prison officials, and the inmate by telephone, initiated after a complaint is filed, to resolve the case, or in the alternative, to tighten the issues; and (3) imposing fees on prisoners who choose to file lawsuits in order to lessen "the allure of 'free' litigation."

267. Erwin Chemerinsky, a University of Southern California law professor who helped represent DeMont Conner, commented on the potential broad impact of *Sandin* stating, "[i]f Rehnquist's opinion means what it seems to suggest, it could be a devastating blow for prisoners' rights. . . . It's significant because these inmates have nowhere else to turn for protection but the federal courts." David G. Savage, *High Court Ruling Limits Inmate Lawsuits*, L.A. TIMES, June 20, 1995, at A12. Other journalists commenting on the impact of the *Sandin* decision were not as sympathetic to this defeat for prisoners' due process rights. One commentator reported to the public, "[s]ome inmate lawsuits have merit, and can still win their day in court under the new Supreme Court standard. But most litigious lawbreakers yelping that their rights have been violated made a career out of stomping on other people's rights." Editorial, *Frivolous Lawsuits: Reigning in 'Jailhouse Lawyers'*, CIN. ENQUIRER, July 3, 1995, at A12.

268. *Sandin*, 115 S. Ct. at 2303 n.2. (Ginsburg, J., dissenting) (noting the difficulty in defining "atypical and significant hardship").

269. *Id.* at 2303; *see supra* notes 193-200 and accompanying text (discussing Ginsburg's analysis of the "Due Process Clause itself, not Hawaii's prison code, as the wellspring of the protection due Conner").

270. *See Sandin*, 115 S. Ct. at 2303 (Ginsburg, J., dissenting).

271. *See supra* note 239 (describing Justice Breyer's concerns about the demise of due process inquiry involving state statutes and regulations).

may very well provide the catalyst for a return to the period before judicial activism.[272] Justice Stevens's observation in his *Meachum* dissent captures the essence of Justice Ginsburg's concern:

> [I]f the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. . . . [E]ven the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore.[273]

More importantly, the majority's decision does little to reconcile ambiguities in prisoners' due process cases. The Court's failure to articulate a clear standard or to illustrate examples defining "atypical and significant hardship," leaves the lower courts with no guidance in deciding future prisoners' claims.[274]

In theory, a return to the liberty interest analysis set forth in *Wolff* and *Meachum* is needed; otherwise for prisoners' claims rarely will survive prison officials' interpretation of prison regulations. The conservative *Sandin* majority, motivated in part by the overwhelming costs of prisoners' litigation, returned a decision that may discourage prisoners' suits and alleviate the strain on court dockets, but will not necessarily represent a future image of "liberty" that is true to the Due Process Clause.[275] Deferring discretion to state prison officials to assign their most serious punishment presents a dangerous threat to the Due Process Clause's notion of "liberty."[276] Because the goal of the prisoners' rights movement

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272. *See* Schwartz, *supra* note 182, at 31 (concluding that the conservative *Sandin* majority did not intend to promote prisoners' due process rights "in any respect"); *see also Prisoners' Rights*, *supra* note 241, at 150 (concluding that *Sandin* reflected the Court's "concern for judicial economy and its lack of sympathy for prisoners' claims').

273. Meachum v. Fano, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting).

274. *See Sandin*, 115 S. Ct. at 2303 n.2 (Ginsburg, J., dissenting). Justice Ginsburg questioned the majority's failure to make the "atypical and significant" standard a workable reality. *Id.* She concluded that the Court "ventures no examples, leaving consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation.' " *Id.*; *see also* Murphy, *supra* note 134, at 236-37 (concluding that an unworkable decision that leaves lower courts without guidance needs reform).

275. *See Prisoners' Rights, supra* note 241, at 150 (discussing the possibility that the *Sandin* Court returned to earlier due process methodology in order to "weed out trivial claims" and protect scarce judicial resources); *see also* Theodore Eisenberg, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 501-02 (1989) (noting that the litigation "explosion," particularly with § 1983 claims, is a constant pressure on federal court judges and judicial funds); *see generally* Robert G. Doumar, *Prisoner Cases: Feeding the Monster in the Judicial Closet*, 14 ST. LOUIS U. PUB. L. REV. 21 (providing recent statistics and commentary on the deluge of prisoners' lawsuits).

276. *See Sandin*, 115 S. Ct at 2303 (Ginsburg, J., dissenting) (discussing the probable effect of the majority's decision on the Due Process Clause).

was to eradicate arbitrary and harmful treatment of inmates,[277] the majority's decision in *Sandin* sends the message to prisons that due process is necessary only when officials see fit. Given the inherent tensions between inmates and prison administrators, it is possible that the history of abuse also may repeat itself.[278] The slippery slope of deference to prison administrators is likely to make any expectation of retaining constitutional rights after incarceration a fiction. In such instance, the harm that deprivation can cause is so significant in the life of an incarcerated individual that an unbiased, clear guideline like the Due Process Clause is most necessary.

As a result of the negative effects of *Hewitt*, it is not surprising that the Supreme Court seized the opportunity in *Sandin* to steer due process analysis down a different path.[279] The majority's return to *Wolff* and *Meachum*, however, solved only part of the problem. By failing to recognize Conner's liberty interest as worthy of due process protection, and additionally failing to articulate a clear example of a deserving claim, the majority fails to clarify the status of the prisoner Due Process law.[280]

IV. Conclusion

Sandin v. Conner represents a return to an analysis of the inmate's deprivation, as set forth in *Wolff v. McDonnell*,[281] and the first step toward embracing traditional, consistent notions of Due Process analysis. The Court's abandonment of the *Hewitt* methodology, however, does little to improve the clarity of due process jurisprudence and provides no guidelines for determining an "atypical and significant deprivation" requiring due process protection. By failing to recognize Conner's solitary confinement as a valid liberty interest, and providing courts with a standard that requires extensive interpretation, the Court relegates a decision of immense magnitude to prison officials' discretion and lower courts guesswork. Effectively eliminating the federal court forum for a fair adjudication of inmates' claims, the *Sandin* Court created a thirty-year

277. *See generally* Rudovsky et al., *supra* note 10, at xiii (summarizing prisoners' rights judicial victories as combatting "major abuses and severe physical punishment" in the prison system).

278. *See supra* note 11 and accompanying text (discussing an overview of prisoners' constitutional rights, traditional deference to prison administrators, and the factors that sparked judicial attention toward prisoners' due process claims).

279. *See supra* notes 129-34 (discussing the negative effects of the *Hewitt* decision on the landscape of prisoners' due process).

280. *See Sandin*, 115 S. Ct. at 2306 (Breyer, J., dissenting).

281. 418 U.S. 539 (1974).

setback in prisoners' rights law and signaled to prisoners that their constitutional claims may be forever "locked out" from judicial review.

Michelle C. Ciszak