April 1997


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DRAWING THE IRON CURTAIN: PRISONERS’ RIGHTS
FROM MORRISEY v. BREWER TO
SANDIN v. CONNER*

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INTRODUCTION

The landscape of prisoners’ rights has undergone almost constant change since the Supreme Court began to recognize that prisoners maintain a “residuum of constitutionally protected liberty.” In June 1995, a divided Supreme Court in Sandin v. Conner again reconfigured the analysis for determining when a prisoner has a protected liberty interest entitling him or her to the procedural protections set forth under the Fourteenth Amendment. Part I of this Note analyzes the Court’s prisoners’ rights jurisprudence prior to Sandin. Part II of the Note reviews the Court’s decision in Sandin. Then Part III of the Note examines and critiques the new standard set forth in Sandin.

I. HISTORY

A. Introduction

Prisoners’ rights have evolved gradually over the last thirty-five years. During this evolution, federal courts have struggled consistently to strike the proper balance between the deference given to prison administrators and the definition and recognition of prisoners’


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2. Chief Justice Rehnquist delivered the opinion of the Court, which was joined by Justices O’Connor, Scalia, Kennedy and Thomas. Justice Ginsburg filed a dissent that was joined by Justice Stevens. Also, Justice Breyer filed a dissent that Justice Souter joined. See Sandin v. Conner, 115 S. Ct. 2293 (1995).

3. The Fourteenth Amendment provides in relevant part: “No State shall make or enforce any law ... ; nor shall any State deprive any person of life, liberty, or property, without due process of law ... .” U.S. CONST. amend. XIV, § 1.

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The Supreme Court has only added to this struggle by providing limited guidance and confusing standards to the lower courts.

Prior to 1970, the courts, employing the "Hands-Off" doctrine, generally abstained from interfering in prison affairs and declined the opportunity to hear prisoners' claims. The courts commonly justified their approach on one of five rationales: (1) separation of powers; (2) federalism; (3) judicial incompetence in prison administration; (4) fear of undermining prison disciplinary schemes; and (5) desire to avoid a flood of litigation. These five justifications, however, lost support as the penal system failed to achieve its public protection, crime reduction, and offender rehabilitation objectives. This led the courts initially to reevaluate their approach toward prisoners' rights and eventually to intervene at an increased pace in the administrative matters of the penal system.

For example, in 1972, the Court began to extend procedural due process rights to prisoners in *Morrissey v. Brewer.* In *Morrissey,* the Court addressed whether the Due Process Clause requires that a state afford a prisoner an opportunity to be heard prior to parole revocation. It concluded that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty, and its termination inflicts a 'grievous loss' on the parolee." The Court

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5. See id. at 166.


7. See Haas, supra note 6, at 797. The "Hands-Off" doctrine finds its origins in *Ruffin v. Commonwealth,* 62 Va. (21 Gratt.) 790, 796 (1871), where the court concluded:

A convicted felon [is one] whom the law in its humanity punishes by confinement in the penitentiary instead of with death. . . . For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State.

However, although the viability of the "Hands-Off" doctrine lasted throughout the 1960s, the concept of the state-slave enunciated in *Ruffin* had started to deteriorate much earlier. See Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944) ("A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.").

8. See Haas, supra note 6, at 795.

9. See id.


11. Id. at 482.
held, therefore, that the termination of parole requires orderly due process, albeit informal.12

In determining whether parole was a "liberty" interest entitled to protection under the Fourteenth Amendment, the Morrissey Court framed the analysis not as a question of "merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment."13 The Court distinguished the conditions of parole from those of confinement and recognized that "[t]he liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime."14 It further acknowledged that a parolee relies on the implicit promise that parole will only be revoked if the conditions of parole are violated.15

B. Development of the "Entitlement" Theory

The approach used by the Court in Morrissey proved to be short-lived. The 1970s ushered in a new approach to property interests that would have immeasurable implications for the concept of liberty in the context of prisoners' rights.16 Under the "entitlement" theory, a state may create a property interest when it grants individual benefits and restricts its own ability to rescind the grant. When such a

12. See id. The Court mandated a two-stage approach to parole revocation: a preliminary hearing at the time of the arrest of the parolee and a final revocation hearing. See id. at 485-88. The Court required that the preliminary hearing "be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available." Id. at 485. The purpose of the preliminary hearing is "to determine whether there is probable cause or reasonable ground" to believe that a parole violation has occurred. Id.

In addition, the Court outlined the minimum requirements of due process for the final revocation hearing:

(a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

Id. at 489. The Court added that the inquiry is "narrow" and should not be equated to a criminal prosecution. See id.

13. Id. at 481.

14. Id. at 482.

15. See id.

property interest is created, the interest is protected by the Due Process Clause.17

Literal interpretations of the Fifth and Fourteenth Amendments are the foundation for the entitlement theory.18 Both amendments provide that no person shall be deprived of "life, liberty, or property, without due process of law."19 This procedural protection, however, only extends to vested rights or "entitlements" in "life," "liberty," or "property" interests.20 In the case of state-created interests, due process protection applies "only if the state has made the interest a formally protected 'entitlement.'"21

The Court first applied this theory in Goldberg v. Kelly,22 where it considered the question of "whether the Due Process Clause requires that the recipient [of welfare benefits] be afforded an evidentiary hearing before the termination of the benefits."23 The Court concluded that "only a pre-termination evidentiary hearing provides the recipient with procedural due process."24 It noted that welfare benefits "are a matter of statutory entitlement for persons qualified to receive them,"25 and "[i]t may be realistic today to regard welfare entitlements as more like 'property' than a 'gratuity.'"26 The Court

19. The Fifth Amendment provides:
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
U.S. CONST. amend. V.
Section one of the Fourteenth Amendment provides, in relevant part:
All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
U.S. CONST. amend. XIV, § 1.
20. See Smolla, supra note 18, at 72.
21. Id. at 72.
23. Id. at 260.
24. Id. at 264.
25. Id. at 262. "The [Goldberg] opinion, however, did not explain exactly why or how the welfare statute in question created an entitlement." Herman, supra note 16, at 489.
reasoned that the "extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest . . . ." 27

Two years later, in *Board of Regents v. Roth*, 28 the entitlement theory served as the impetus for a new method of constitutional analysis by the Court. 29 In *Roth*, David Roth, a nontenured university professor, brought a suit alleging that the university's "decision not to rehire him . . . infringed his Fourteenth Amendment rights." 30 Roth alleged that the university's failure to provide notice and a hearing violated his right to procedural due process. 31

In deciding whether due process requirements applied, the Court echoed the sentiments of the *Morrissey* Court and focused on "the nature of the interest at stake," rather than the "weight" of the interest. 32 The first step in due process analysis, therefore, is to determine whether the "interest is within the Fourteenth Amendment's protection of liberty and property." 33 Only after a court determines that a constitutionally protected "liberty" or "property" interest has been impaired does the inquiry move to the second step—the determination of what process is due. 34

Justice Stewart, the author of the majority opinion in *Roth*, defined liberty expansively:

27. Id. at 262–63 (citation omitted). The Court, therefore, considered the weight of the interest involved, but "did not clarify whether it was a sufficient factor in and of itself" to trigger procedural due process protection. Herman, supra note 16, at 489.


29. See Herman, supra note 16, at 490–94.

30. 408 U.S. at 568.

31. See id. Roth also asserted that the university's true reason for failing to rehire him was to punish him for critical statements that he had made about the university's administration, thus in violation of his right to freedom of speech. See id.

32. See id. at 571. The Court noted that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Id. at 569. However, the Court also warned that "the range of interests protected by procedural due process is not infinite." Id. at 570.

33. Id. at 571.

34. It is in this second step that a court considers the "weight" of the interest. See id. at 570. In *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), the Court outlined the three factors that are balanced or weighed in the second step of the analysis:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.
Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized... as essential to the orderly pursuit of happiness by free men.\textsuperscript{35}

He then followed with a narrower definition of property:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.\textsuperscript{36}

The Court concluded that the principle of liberty was not an issue in the case\textsuperscript{37} and that Roth "did not have a property interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract of employment.”\textsuperscript{38}

\textit{Roth} explicitly bifurcated the procedural due process analysis and rejected the notion that the "weight" of the interest alone could trigger procedural due process protection. Thus, after \textit{Roth}, an individual could suffer a "grievous" loss and still not receive procedural due process protection if the interest at stake did not meet the threshold definition of liberty or property.\textsuperscript{39} Moreover, Justice Stewart's positivist definition of property provided a means for the Court to limit the role of the federal judiciary in certain contexts, such as § 1983 and government employee cases.\textsuperscript{40} The \textit{Roth} Court left it unclear whether a similar positivist definitional approach applied to liberty; a question answered by the Court in \textit{Paul v. Davis}.\textsuperscript{41}

In \textit{Paul}, the Court considered whether the defamation alleged by Edward Davis stated a claim for relief under § 1983 or the Fourteenth Amendment. The majority concluded that the interest in reputation asserted in \textit{Paul} was neither "liberty" nor "property" and was not en-

\textsuperscript{35} Roth, 408 U.S. at 572 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1976)).

\textsuperscript{36} Id. at 577. For a thorough analysis of the Court's discussion of "liberty" and "property" in \textit{Roth}, see Herman, supra note 16, at 492–94.

\textsuperscript{37} See \textit{Roth}, 408 U.S. at 574.

\textsuperscript{38} Id. at 578. The Court reasoned: Thus, the terms of the respondent's appointment secured absolutely no interest in re-employment for the next year. They supported absolutely no possible claim of entitlement to re-employment. Nor, significantly, was there any state statute or University rule or policy that secured his interest in re-employment or that created any legitimate claim to it.

\textit{Id.}

\textsuperscript{39} See Herman, supra note 16, at 492.

\textsuperscript{40} See \textit{id.} at 494.

\textsuperscript{41} 424 U.S. 693 (1976).
titled to due process protection. More important, Justice Rehnquist's majority opinion recognized the theoretical possibility that state-created liberty interests exist.

Although Paul provided a theoretical basis for applying a positivist approach to "liberty" interests, the Court has had little opportunity to do so. There are three primary reasons for this lack of opportunity: (1) asserted liberty interests typically have a constitutional basis; (2) the Court does not desire to clarify its definition of constitutionally protected liberty; and (3) procedural due process claims usually do not involve a "liberty" interest. Cases involving prisoners, however, represent one of the few instances where a procedural due process claim implicates a "liberty" interest. Since the state has the acknowledged power to deprive an individual of a freedom we might recognize as "liberty" in the prison context, prisoner cases by their very nature lend themselves to a positivist analysis of "liberty."

C. "Entitlement" Theory in Prisoners' Rights Cases

The first application of the entitlement theory to a prisoners' rights case occurred in Wolff v. McDonnell. In Wolff, a class action filed on behalf of inmates at a Nebraska prison alleged that "the rules, practices, and procedures" of the prison that governed the taking of "good time" credits violated the Due Process Clause of the Fourteenth Amendment. The Court concluded that although the Constitution does not guarantee good-time credit for satisfactory behavior while in prison, the State had "not only provided a statutory right to good time but also specified[d] that it is to be forfeited only for serious misbehavior." Since the state created the liberty interest and conditioned its deprivation on a finding of major misconduct, the Court

42. See id. at 711.
43. See id. at 710–11. Justice Rehnquist stated:
   It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.
Id. (footnote omitted). For a general discussion of Rehnquist's opinion, see Herman, supra note 16, at 500–01.
44. See Herman, supra note 16, at 502.
45. See id. at 503.
46. See id. at 503.
47. 418 U.S. 539 (1974).
48. Id. at 553.
49. Id. at 557.
held that "the prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment 'liberty'" to entitle him to protection.\textsuperscript{50}

The \textit{Wolff} Court rooted its decision in the notion that a person's state-created liberty interests merit the same protection as those created directly by the Constitution.\textsuperscript{51} However, it reasoned that "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."\textsuperscript{52}

The \textit{Morrissey} and \textit{Wolff} decisions exemplified the Court's expansive view of the constitutional protections afforded to prisoners.\textsuperscript{53} However, in \textit{Meachum v. Fano},\textsuperscript{54} the Court adopted a much more restrictive approach in defining prisoners' rights.\textsuperscript{55} The \textit{Meachum} Court addressed the question of "whether the Due Process Clause of the Fourteenth Amendment entitles a state prisoner to a hearing when he is transferred to a prison the conditions of which are substantially less favorable to the prisoner, absent a state law or practice conditioning

\begin{itemize}
  \item \textsuperscript{50} Id.
  \item \textsuperscript{51} Id. at 557-58.
  \item \textsuperscript{52} Id. at 556.
  \item \textsuperscript{53} See The Supreme Court, 1982 Term, 97 Harv. L. Rev. 103, 107 (1983). Commentators debated the effect \textit{Wolff} had on the landscape of prisoners' rights. Some offered:
    
    What, then, did \textit{Wolff} accomplish? Although the majority opinion arguably reached the right result, its rationale offered little guidance to the lower courts. The Court's opposition to a detailed set of rules, which would invite litigation and impose a "constitutional straitjacket," effectively ensured that prisoners would employ the broad rationale of \textit{Wolff} to challenge other practices. If good time revocations implicated a valid liberty interest and evoked the balancing test, then the same argument could be made when a prisoner was placed in isolation confinement or administrative segregation. How, short of either "hands off" or complete judicial supervision, could the Court select an appropriate standard of review for effecting its mutual accommodation?

    \textit{Bell}, supra note 4, at 171. While others argued:
    
    Most courts understood \textit{Wolff} to establish a general hearing requirement whenever a disciplinary charge might lead to either of the two types of punishment considered, regardless of the precise content of state law. Indeed, while the decision contained some talk of state promises, the Court seemed almost as unconcerned with the language and structure of state law as it had been in \textit{Morrissey}. The Court was vague about the source of its assertion that disciplinary confinement could be imposed only on a finding of major misconduct, just as it had not revealed the source of the "implicit promise" regarding the parole revocation in \textit{Morrissey}. \textit{Wolff}'s dictum about good-time credit being the creation of the state seemed rather irrelevant at the time, yet it was this dictum, and not \textit{Wolff}'s moderately pro-prisoner holding, that set the tone for subsequent case law.

    \textit{Herman}, supra note 16, at 508-09 (footnote omitted).
  \item \textsuperscript{54} 427 U.S. 215 (1976).
  \item \textsuperscript{55} See The Supreme Court, 1982 Term, supra note 53, at 108; see also Bell, supra note 4, at 171.
\end{itemize}
such transfers on proof of serious misconduct or the occurrence of other events.”

Prisoners in a Massachusetts prison had sought injunctive relief, declaratory relief, and damages under 42 U.S.C. § 1983, after they had been transferred by prison officials from a medium security prison to a maximum security prison with “substantially less favorable conditions.” After a two-and-one-half-month period of nine serious fires at the prison, prison officials had ordered the transfers of the prisoners thought to be responsible. The Court held that the Due Process Clause does not protect a prisoner against transfer from one prison to another prison within the state prison system. Although noting that a “convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement,” the Court reasoned that the liberty interest sought to be protected in Meachum was not one that “the courts must be alert to protect.”

In distinguishing Meachum from Wolff, the Court contrasted the liberty interest in each case. In Wolff, the liberty interest “had its roots in state law,” and the Due Process Clause required minimum procedures “to insure that the state-created right is not arbitrarily abrogated.” In Meachum, however, no Massachusetts law conferred a “right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct.”

A fear of placing the Due Process Clause “astride the day-to-day functioning of state prisons and involv[ing] the judiciary in issues and discretionary decisions that are not the business of federal judges” also guided the Court in its holding in Meachum. The Court noted, however, that the individual states could follow another course and require pretransfer hearings “by statute, by rule or regulation, or by interpretation of their own constitutions.” The Court concluded that “Massachusetts prison officials have the discretion to transfer prisoners for any number of reasons” and that the discretion was not limited to instances of serious misconduct.

56. 427 U.S. at 216.
57. See id. at 217, 222.
58. See id. at 216.
59. See id. at 225.
60. Id.
61. Id. at 226 (citing Wolff v. McDonnell, 418 U.S. 539, 557 (1974)).
62. Id.
63. Id. at 228-29.
64. Id. at 229.
65. Id. at 228.
Meachum seems to add little to the analysis of prisoners’ rights cases on its face. It marked, however, a significant shift in the analysis of prisoners’ rights cases for two primary reasons. First, the Meachum Court applied an extremely narrow entitlement analysis to the liberty interest at issue.66 “This analysis confined the search for liberty to rights specifically grounded on state laws, avoiding more inchoate and less formal indications that a state recognized a claim of right.”67 Second, in distinguishing Wolff, the Meachum Court focused on whether the nature of the state action was mandatory or discretionary.68 This dichotomy provided the framework for a different approach that restricted prisoners’ rights even more in defining state-created liberty interests in future cases.69 Thus, if state regulations used the words “shall,” “will,” or “must” when calling for state action, then the state action would be considered mandatory.

For example, in Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex,70 the Court accepted the prisoners’ argument that a Nebraska parole statute created a legitimate expectation of release entitled to protection under the Due Process Clause.71 The prisoners had filed “a class action under 42 U.S.C. § 1983 claiming that they had been unconstitutionally denied parole by the Board of Parole.”72 In particular, one of the claims brought by the prisoners stated “that the statutes and the Board’s procedures denied them procedural due process.”73 The challenged statutes established eligibility for discretionary parole when the minimum term of imprisonment had been served less good time credits.74 Additionally, the statute provided that the Board of Parole “shall order” release of a prisoner unless one of four conditions applied.75

The Court focused on the prisoners’ second argument that “the statute creates a presumption that parole release will be granted, and that this in turn creates a legitimate expectation of release absent the requisite finding that one of the justifications for deferral exists.”76

66. See Sargentich, supra note 6, at 415.
67. Id.
68. Meachum, 427 U.S. at 228.
70. 442 U.S. 1 (1979).
71. Id. at 12.
72. Id. at 3-4.
73. Id. at 4.
74. See id.
76. Id. at 12. The Court rejected the prisoners’ first argument that “a reasonable entitlement is created whenever a state provides for the possibility of parole.” Id. at 8-9.
Although the Court eventually accepted this argument, it provided conditional language. First, it noted that it interpreted the statute without the benefit of the Nebraska courts' interpretation of the scope of the interest the statute had intended for inmates. Second, the Court emphasized that the Nebraska statute had "unique structure and language" and any analysis of other state statutes "must be decided on a case-by-case basis."

Despite the presence of a liberty interest entitled to protection under the Fourteenth Amendment in *Greenholtz*, the Court eventually concluded that the procedures offered by the prison met the minimum requirements of the Due Process Clause. Nonetheless, the *Greenholtz* Court's approach to defining a liberty interest entitled to protection provided an impetus to the Court in *Hewitt v. Helms*.

The prisoner in *Hewitt* claimed that Pennsylvania prison officials' actions confining him to administrative segregation within the prison violated his rights under the Due Process Clause of the Fourteenth Amendment. The Court rejected the prisoner's assertion that the administrative segregation involved an interest that was "independently protected" by the Due Process Clause. However, the Court concluded that the prisoner had "acquire[d] a protected liberty interest in remaining in the general prison population" from the Pennsylvania statutes and regulations in question.

77. See id. at 12.
78. See id.
79. Id.
80. Id. at 16.
82. Id. at 462.
83. See id. at 466–68.
84. Id. at 470–71. Section 95.104(b)(1) of Title 37 of the Pennsylvania Code provides that:

> An inmate who has allegedly committed a Class I Misconduct may be placed in Close or Maximum Administrative Custody upon approval of the officer in charge of the institution, not routinely but based upon his assessment of the situation and the need for control pending application of procedures under § 95.103 of this title.

37 PA. CODE § 95.104(b)(1) (1978). Section 95.103(b)(3) of the same title provides:

> An inmate may be temporarily confined to Close or Maximum Administrative Custody in an investigative status upon approval of the officer in charge of the institution where it has been determined that there is a threat of a serious disturbance, or a serious threat to the individual or others. The inmate shall be notified in writing as soon as possible that he is under investigation and that he will receive a hearing if any disciplinary action is being considered after the investigation is completed. An investigation shall begin immediately to determine whether or not a behavior violation has occurred. If no behavior violation has occurred, the inmate must be released as soon as the reason for the security concern has abated but in all cases within ten days.

Id. § 95.103(b)(3). Finally, a State Bureau of Correction Administrative Directive states that when the State Police have been summoned to an institution:

> Pending arrival of the State Police, the institutional representative shall: 1. Place all suspects and resident witnesses or complainants in such custody, protective or other-
The Court identified two sources from which liberty interests protected by the Fourteenth Amendment may originate—the Due Process Clause and the laws of the States. In concluding that the Due Process Clause itself did not "implicitly" create an interest in being confined to a general population cell, the Court focused on the scope of the authority of prison officials and the nature of the liberty interests prisoners retain. Since "broad discretionary authority" is essential for prison officials, the Court reasoned that allowing any substantial deprivation imposed by prison officials to trigger procedural protections of due process would place the courts in an area reserved for prison administrators. Moreover, the Court recognized that prisoners retain only "the most basic liberty interests." Accordingly, it failed to classify confinement to a general population cell as one of these "basic liberty interests."

The Court then moved its analysis to the Pennsylvania statutes and regulations to determine if the state itself had created a liberty interest. Although the Court rejected the prisoner's argument that the very fact of Pennsylvania's creation of "a careful procedural structure to regulate the use of administrative segregation indicates the existence of a protected liberty interest," it nonetheless concluded that the prisoner had acquired a protected liberty interest in remaining in the general population. The Court reasoned that Pennsylvania had "gone beyond simple procedural guidelines" and had repeatedly used "explicitly mandatory language in connection with requiring specific substantive predicates." Although the Hewitt Court eventually held that the process that had been offered to the prisoner satisfied the minimum requirements of the Due Process Clause, the case marked a significant shift in the determination of prisoners' liberty interests. Hewitt and the cases that preceded it provided the framework for the Court when it heard Sandin v. Conner.

[PA. ADMIN. DIRECTIVE BC-ADM 004, § IV(B) (1975).
85. See Hewitt, 459 U.S. at 466.
86. See id. at 466-67.
87. See id.
88. See id. at 467.
89. See id. at 467-68.
90. Id. at 470-72.
91. Id. at 471-72. Specified substantive predicates include, for example, "the need for control" and "the threat of a serious disturbance." Id. at 472.]
II. THE CASE: SANDIN v. CONNER

A. Factual Background

In August 1987, a prison officer at Halawa Correctional Facility, a maximum security prison in Oahu, Hawaii, escorted DeMont Conner from his cell to the module program area and subjected Conner to a strip search, including an inspection of the rectal area. In response, Conner directed angry and foul language at the officer. As a result, he received notice eleven days later that he had been charged with disciplinary infractions—"'high misconduct' for using physical interference to impair a correctional function, and 'low moderate misconduct' for using abusive or obscene language and for harassing employees."

On August 28, 1987, Conner appeared before an adjustment committee and requested that he be allowed to present witnesses at the hearing. The committee rejected his request and "determined that Conner was guilty of the alleged misconduct." In addition, the committee "sentenced him to 30 days disciplinary segregation in the Special Holding Unit for the physical obstruction charge, and four hours segregation for each of the other two charges to be served concurrent with the thirty days."

Conner sought administrative review within fourteen days of receiving the committee's decision. Nine months later, the deputy administrator expunged Conner's disciplinary record with respect to the high misconduct charge because it was unsupported. However,
before the deputy administrator had decided Conner's appeal, Conner had filed suit in the United States District Court for the District of Hawaii pursuant to 42 U.S.C. § 1983. Conner’s complaint sought injunctive relief, declaratory relief, and damages for, inter alia, “a deprivation of procedural due process in connection with the disciplinary hearing.” The district court granted summary judgment in favor of the prison officials.

The Court of Appeals for the Ninth Circuit reversed the district court’s judgment and concluded that Conner “had a liberty interest in remaining free from disciplinary segregation.” In addition, the court found that there was a genuine issue of material fact as to whether Conner had received all of the due process to which he was entitled.

B. The Court's Decision

1. The Majority Opinion

Chief Justice Rehnquist’s majority opinion directed lower courts to focus their liberty interest inquiry on the “nature of the deprivation” rather than “the language of a particular regulation.” To concentrate on regulatory language, Rehnquist posited, would be to “encourage[ ] prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred benefits.” In addition, this approach had encouraged lower courts to draw negative inferences from mandatory language in the text of prison regulations. Although the Court recognized the logic of such inferences, it questioned whether this approach was sensible “in the case of a prison regulation primarily designed to guide correctional officials in the administration of a prison.” Moreover, this “negative implication jurisprudence” often results in procedural protections not intended by the regulation.

101. See id.
102. Id.
103. See id.
104. Id.
105. See id.
106. Id. at 2299.
107. Id.
108. "If A then B” also became “if not A, then not B.”
110. Id.
111. See id.
The Court then identified two undesirable effects from the *Hewitt* approach: "First, it creates disincentives for States to codify prison management procedures in the interest of uniform treatment. . . . Second, [it] has led to the involvement of federal courts in the day-to-day management of prisons, often squandering judicial resources with little offsetting benefit to anyone."  

The Court reasoned that prison guidelines are not only established to benefit the prisoner, but are necessary "to instruct subordinate employees" and "to confine the authority of prison personnel." However, the Court concluded that the *Hewitt* approach "discourages this desirable development." Moreover, the result of judicial involvement in day-to-day management conflicts with the notion that prison administrators ought to be awarded "deference" and "flexibility" in order to fine-tune the "ordinary incidents of prison life."

In light of these factors, the Court concluded that "the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause." Accordingly, it called for a "return to the due process principles . . . established and applied in *Wolff* and *Meachum*." The Court recognized that states may create liberty interests entitled to protection under the Due Process Clause. However, "these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."

Conner, relying on *Bell v. Wolfish* and *Ingraham v. Wright*, argued that "any state action taken for a punitive reason encroaches upon a liberty interest under the Due Process Clause even in the absence of any state regulation." The *Sandin* Court found no support

112. Id.
113. Id.
114. Id.
115. Id. at 2299-2300.
116. Id. at 2300.
117. Id.
118. See id.
119. Id. (citations omitted).
120. 441 U.S. 520 (1979).
for this proposition in either *Bell* or *Ingraham*. In *Bell*, the Court ruled that the punishment of a pretrial detainee prior to an adjudication of guilt was an "impermissible punishment," violative of due process of law, and distinguished it from "permissible regulation" of a pretrial detainee.123 The *Sandin* Court noted that "[s]uch a course would improperly extend the legitimate reasons for which such persons are detained—to ensure their presence at trial."124 Similarly, the *Ingraham* Court concluded that school children were sheltered from arbitrary corporal punishment from the state by the Due Process Clause.125 It noted that the Due Process Clause "historically encompassed the notion that the state could not 'physically punish an individual except in accordance with due process of law.'"126 The *Sandin* Court highlighted the danger if such a course of punishment were allowed: "Although children sent to public school are lawfully confined to the classroom, arbitrary corporal punishment represents an invasion of personal security to which their parents do not consent when entrusting the educational mission to the State."127

The *Sandin* Court, however, reasoned that the aim of punishing incarcerated prisoners—to effectuate prison management and prisoner rehabilitative goals—differed greatly from the aims found invalid in *Bell* and *Wolfish*.128 It found that the incarceration of prisoners "does not impose retribution in lieu of a valid conviction, nor does it maintain physical control over free citizens forced by law to subject themselves to state control over the educational mission."129 Therefore, the Court concluded that the punishment of incarcerated prisoners by prison officials "in response to a wide range of misconduct falls within the expected parameters of the sentence imposed by a court of law."130

The Court then turned to the specific facts involving prisoner Conner. It held that the segregated confinement imposed on Conner by prison administrators "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty

123. 441 U.S. at 535.
124. 115 S. Ct. at 2300.
125. 430 U.S. at 674.
126. Id.
127. 115 S. Ct. at 2301.
128. Id.
129. Id.
130. Id. In reaching this conclusion, the Court acknowledged that "prisoners do not shed all constitutional rights at the prison gate," but pointed out that "lawful incarceration" often results in the withdrawal or limitation of certain rights and privileges. Id.
The Court found no substantive difference between the conditions of disciplinary segregation and the conditions of administrative segregation and protected custody. Additionally, the Court noted that the State expunged Conner's "high misconduct" charge from his record nine months after serving time in segregation. Therefore, the Court concluded that since "Conner's confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction," the segregated confinement "did not work a major disruption in his environment."

Moreover, the Court rejected the notion that the State's action affected the duration of Conner's sentence. Thus, the Court held that neither the Due Process Clause nor the Hawaii prison regulation "afforded Conner a protected liberty interest that would entitle him to procedural protections set forth in Wolff."

2. The Dissenting Opinions

Justice Ginsburg's dissent, joined by Justice Stevens, highlighted the "anomaly" that results from deriving protected liberty interests from mandatory language in local prison codes: A state that highly regulates its prison system may be susceptible to constitutional claims, whereas a state that has very little regulation may not be susceptible at all. Therefore, Justice Ginsburg concluded that the due process "should not depend on the particularities of the local prison's code." Instead, Justice Ginsburg identified the "basic, universal requirements" of due process: (1) notice to the prisoner of the acts of misconduct that the prison officials allege the prisoner committed; and (2) an opportunity for the prisoner to respond to the charges before a decision-maker. Unlike the majority and Justice Breyer, Justice Ginsburg would not look to state law as a source of constitutionally protected liberty.

131. Id.
132. See id. ("The record shows that, at the time of Conner's punishment, disciplinary segregation, with insignificant exceptions, mirrored those conditions imposed upon inmates in administrative segregation and protective custody.").
133. See id.
134. Id.
135. See id. at 2302.
136. Id.
137. See id. at 2303 (Ginsburg, J., dissenting). "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.
138. Id.
139. See id.
Justice Breyer's dissent, joined by Justice Souter, urged that the majority's reasoning, read in light of the Court's precedent, leads to the conclusion that Conner's punishment deprived him of "liberty" within the terms of the Due Process Clause. Breyer specifically relied on two "general pre-existing principles" to reach his conclusion. First, "certain changes in conditions may be so severe or so different from ordinary conditions of confinement" that minimum requirements of due process must be provided, regardless of "whether or not state law gives state authorities broad discretionary power to impose them." Second, "deprivations that are less severe or more closely related to the original terms of confinement . . . will amount to deprivations of procedurally protected liberty," as long as state law limits the power of the prison administrators to impose the deprivation. Applying these principles to Conner's situation, Justice Breyer concluded that Conner's punishment "worked a fairly major change in Conner's conditions" and that "the prison's own disciplinary rules severely cabin the authority of prison officials to impose this kind of punishment." Thus, Conner's punishment clearly deprived him of procedurally protected liberty.

Justice Breyer then attacked the majority's imposition of a minimum standard for defining a procedurally-protected liberty interest. Specifically, he noted that if the standard was meant to radically change prior law, "its generality threatens the law with uncertainty." In contrast, Justice Breyer explained that neither a "radical reading" of the Court's opinion nor a "significant change" to present law was required in order to achieve the majority's objective—to read the Due Process Clause as a protection "against deprivations of freedom that are important, not comparatively insignificant." Instead,

140. See id. at 2304 (Breyer, J., dissenting).
141. See id. at 2305 ("If we apply these general pre-existing principles to the relevant facts before us, it seems fairly clear . . . that the prison punishment here at issue deprived Conner of constitutionally protected 'liberty.'").
143. Sandin, 115 S. Ct. at 2305 (Breyer, J., dissenting).
144. Id.
145. See id. at 2306. Justice Breyer cited two reasons for the majority's definition of a minimum standard for a protected liberty interest: (1) the present standard ("cabining of discretion") has provided procedural protection for "trivial" rights; and (2) the present standard involves the courts in matters of prison administration. See id.
146. Id. In particular, some courts may read the new standard as "offering significantly less protection against deprivation of liberty," whereas others may read it as extending to situations not anticipated by prior law. Id.
147. Id.
Justice Breyer offered that all that was required was "elaborating, and explaining, the Court's present standards" to the lower courts in order to clarify that the standards must be applied "in light of the purposes they were meant to serve."148

In support of his contention that a major revision of current doctrine was unnecessary "to remove minor prison matters from federal-court scrutiny," Justice Breyer pointed to three sets of considerations.149 First, he noted that although "some deprivations of an inmate's freedom are so severe in kind or degree . . . that they amount to deprivations of liberty, irrespective of whether state law (or prison rules) 'cabin discretion,' it is not easy to specify just when, or how much of, a loss triggers this protection."150 As a result, a middle category of imposed restraints or deprivations exists that falls neither obviously within nor obviously without the Due Process Clause's protection.151

Second, Breyer explained that the Court "developed its additional liberty-defining standard," i.e., cabin discretion, because of the "difficult line-drawing task that this middle category implies."152 He contrasted this approach with the way in which the Court determines the existence of "property" for Due Process Clause purposes.153 When the Due Process Clause protects liberty, it protects "an absence of government restraint" called freedom, not reliance upon an "entitlement" that state law created.154 Moreover, he noted that the prison context provides "other important reasons . . . to consider the provisions of state law."155 As a result, Justice Breyer concluded that "cabin discretion" could be used by the courts to aid in identifying those restraints that require constitutionally-guaranteed procedural protection.156

Third, Justice Breyer reasoned that there is no need to apply the "discretion-cabining" approach when a deprivation is so unimportant

148. Id.
149. Id.
150. Id. (citations omitted).
151. See id.
152. Id. at 2306-07. As explained, this standard looks to local law and determines whether the local law creates a "liberty interest" by significantly limiting the discretion of the authorities to impose a restraint on that interest. See id.
153. See id. at 2307. Under this "property" approach, the Due Process Clause aims to protect reliance upon an "entitlement" that local law has created. See id.
154. Id.
155. Id.
156. See id.
that it clearly falls outside of the middle category of restraints. He concluded that the Court had never held that unimportant prisoner deprivations fall within the scope of the Due Process Clause, even if a prison regulation limited a prison administrator's authority to impose a minor deprivation. Justice Breyer then called on the Court to "simply specify" this point.

Justice Breyer noted the problems that the majority identified, i.e., procedural protection for trivial rights as a result of using the "cabining of discretion" standard and the involvement of the courts in the routine matters of prison administration. As a result, he agreed that the Court "should make explicit the lower definitional limit [of liberty] in the prison context" under the Due Process Clause. However, he believed that the lower definitional limit was implicit in the Court's precedent and that the abandonment of this precedent was unnecessary.

III. Analysis

The Sandin Court reconfigured the analysis a court is to use for determining when a prisoner has a protected liberty interest entitled to procedural protection under the Due Process Clause. This new standard replaced the approach developed in Hewitt—an approach "that in practice [was] difficult to administer and which produce[d] anomalous results." Particularly, the Court focused on the undesirable results of the Hewitt approach: (1) "disincentives for States to codify prison management procedures in the interest of uniform treatment"; and (2) "involvement of federal courts in the day-to-day management of prisons." However, a close reading of the Sandin opinion and the underlying case law leads to the conclusion that the Court only replaced one set of problems with another. Moreover, one
of the apparent purposes of the *Sandin* opinion—the reduction of frivolous prisoner litigation—may not be realized.\(^{165}\)

In *Sandin*, the Court specifically called for a return to the due process principles "correctly established and applied in *Wolff* and *Meachum*."\(^{166}\) However, the Court seemed to rely upon only one principle from *Wolff*—the state's ability to create liberty interests protected under the Due Process Clause\(^{167}\)—and did not rely upon *Meachum* at all. Since the *Sandin* Court failed to cite to any portion of *Meachum* in support of this proposition, it is unclear from the opinion what principle the Court wished to return to in *Meachum*. Moreover, *Wolff* and *Meachum* represent different approaches to the development of prisoner liberty interests. Therefore, the Court's reliance on these cases for the foundation of its new standard is confusing and troubling.

*Wolff* represented the highpoint of the application of the Court's "mutual accommodation approach" to prisoner procedural due process claims.\(^{168}\) Under this approach, "there must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application."\(^{169}\) The Court explained that lawful imprisonment does not extinguish a prisoner's due process rights. While a prisoner's rights "may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime."\(^{170}\) The Court noted, however, that a prisoner's rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed.\(^{171}\) Prison disciplinary proceedings are not part of a criminal prosecution, and the full panoply of rights due a defendant in such proceedings does not apply.\(^{172}\)

*Meachum*, on the other hand, severely curtailed the development of a new liberty interest for prisoners.\(^{173}\) The Court adopted a narrow view of entitlement analysis when it evaluated whether the freedom from interprison transfer was a liberty interest that was protected

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167. See id. ("Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause.").
168. See Bell, supra note 4, at 168.
170. Id. at 555.
171. See id. at 556.
172. See id.
173. See Bell, supra note 4, at 174.
under the Due Process Clause. The constricted entitlement view of Meachum, "if followed to its extreme, would allow the state to pass a law granting some benefit while explicitly disapproving the extension of procedural protections when a benefit is deprived."

While Wolff represented perhaps the broadest approach to liberty interests in the prison context, Meachum and its progeny commenced a restrictive approach to those interests that culminated in Sandin. The Court's call for a return to the principles of these two cases is therefore confusing and provides little guidance for lower courts as they attempt to interpret and apply the new Sandin standard.

In addition to the conflicting case law that underlies the opinion, the actual language of the Sandin standard is amorphous and ambiguous. The Sandin standard provides that state-created liberty interests protected under the Due Process Clause

will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

Under this standard, a court must determine whether the deprivation suffered by the prisoner imposes "atypical and significant hardship in relation to ordinary incidents of prison life." The Court failed to provide any definitions for "atypical" and "significant." Furthermore, the Court failed to define "ordinary incidents of prison life." Instead of clarifying which state-created liberty interests gain procedural protection, this standard creates more questions than answers.

In order for a court to decide whether a deprivation is "atypical" or "significant," the court must initially determine "ordinary incidents of prison life." An objective basis for "ordinary incidents of prison life" likely leads to a different conclusion than a subjective basis. An objective basis views prison life from the perspective of a "reasonable inmate," whereas a subjective approach considers the subjective interpretations of each individual inmate.

For example, in Sandin, the Court compared Conner's segregation to administrative and protective segregation. However, the Court declined to state whether "ordinary incidents of prison life" included conditions of the general population. If a court did include

174. See Sargentich, supra note 6, at 415.
175. Id. at 416–17.
176. Sandin, 115 S. Ct. at 2300 (citations omitted).
177. See id. at 2301.
conditions of the general population in its analysis and a majority of
the prisoners interacted with the general population, then an "ordi-

nary incident of prison life" would include interaction with the general

population.\textsuperscript{178} Accordingly, disciplinary segregation for an extended

period of time could be classified as an "atypical hardship" and could

not be imposed without due process. Clearly, this conclusion differs
greatly from that reached in \textit{Sandin}.

Judge Shadur highlighted this shortcoming of the \textit{Sandin} standard
in his opinion in \textit{Leslie v. Doyle}\.\textsuperscript{179} He noted that the \textit{Sandin} Court
chose to compare prisoners in disciplinary segregation with those in
administrative segregation or protective custody, rather than with
prisoners in the general population\.\textsuperscript{180} Relying on his experience with
the Illinois prison system, he then contrasted the liberty afforded to
segregated inmates and the liberty afforded to those in the general
population: spending twenty-three hours a day in one's cell versus
spending many daylight hours utilizing the prison's facilities; eating
one's meals alone versus dining in the communal dining hall; and be-
ing personally attended by correction officers for any limited move-
ment that is permitted within the institution versus being free from
such attendance\.\textsuperscript{181} Judge Shadur concluded that

the irony lies in the fact that the [\textit{Sandin}] opinion makes its main
comparison ... between disciplinary segregation and administrative
custody, a status in which the existence of such constraints is at best
a necessary evil forced by the need to insulate such inmates from
perceived threats to their safety that would be entailed if they were
part of the general population. [T]his Court believes that the record
... has spawned a false premise—and that false premise has in turn
led to the false conclusion that disciplinary segregative status does
not impose a meaningful impairment and therefore does not impli-
cate the deprivation of a liberty interest\.\textsuperscript{182}

This opinion by Judge Shadur clearly demonstrates a major short-
coming of the \textit{Sandin} standard. The outcome of a particular case will
depend on what the lower court decides is an "ordinary incident of
prison life." Lacking guidance from the \textit{Sandin} opinion, courts will
likely develop different approaches. This result strays "from the real
concerns undergirding the liberty protected by the Due Process
Clause" as much as the \textit{Hewitt} standard did.

\textsuperscript{179} No. 93 C 7513, 1995 WL 475891 (N.D. Ill. August 10, 1995).
\textsuperscript{180} See id. at *3 n.4.
\textsuperscript{181} See id.
\textsuperscript{182} Id.
The reduction of frivolous prisoner litigation—an apparent objective of the Sandin Court—may not be realized. As the court in Temple v. Dahm explained, a practical result of Sandin is that “fewer seemingly frivolous prisoner lawsuits will be summarily dismissed.”

Prior to Sandin, a prisoner needed to demonstrate that a state law or regulation created a protectable liberty interest. Failure to produce a state law or regulation resulted in a dismissal of the case. After Sandin, a prisoner need only allege that an “atypical” and “significant” deprivation has occurred. The prisoner “has been spared the burden of ‘comb[ing] [prison] regulations in search of mandatory language on which to base entitlements of state-conferred privileges.’” Accordingly, a written record will likely be necessary to determine the existence of a liberty interest and this will surely extend the time before a case can be dismissed as frivolous.

Thus, the Sandin standard presents significant problems when lower courts try to apply it. The Court had hoped to remove the subjectivity created by the Hewitt standard, but the Sandin standard is no better. It depends heavily on what the reviewing court considers an “ordinary incident of prison life” and how that court defines “atypical and significant hardship.”

**Conclusion**

The new standard set forth by the Court for determining whether a liberty interest exists in a prison setting is fraught with ambiguity. Lower courts will struggle with the definitions of “significant” and “atypical,” as well as “ordinary incidents of prison life.” As a result, the Sandin Court’s objective of reducing the amount of prisoners’ rights litigation within the federal courts will not likely be met. Even more troubling is the new standard, which leaves little chance that

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184. Id. The court in McKinney v. Hanks, 911 F. Supp. 359 (N.D. Ind. 1995), agreed that the Sandin standard would not result in a decreased workload for the federal judiciary. Thus, in the spectrum of prison disciplinary cases and the determination of the presence of protectable liberty interests for inmates, the task of determining where these new fences are now located will fall to the United States district judges and United States magistrate judges, leaving to higher authority the decision as to where and when to build and tear down these new fences down [sic] in the future. Whatever else may be said with regard to the Sandin majority, it will not take a Brandeis brief to establish that the real workload of the federal trial judiciary will be greatly increased as the result of the Sandin decision, although clearly such was not the intent or purpose of its majority.
185. See Temple, 905 F. Supp. at 674 n.8.
186. Id.
187. See id.