

NOTE

SANDIN v. CONNER: LOWERING THE BOOM ON THE PROCEDURAL RIGHTS OF PRISONERS

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INTRODUCTION

Imagine you are a convicted felon serving a lengthy sentence in state prison. Suspecting you have violated a prison rule, correctional authorities place you in solitary confinement for thirty days without hearing your side of the story. You seek redress for the prison's hasty judgment, but doubt the objectivity of the very state that convicted you in the first place. Federal court clearly is your best option, but to what extent are the federal courts appropriate forums for prisoners to assert claims of unfair treatment in state prisons?

This question has been the focus of considerable debate for many years.¹ While prisoners' rights advocates fight vehemently to expand—or, more realistically, to preserve—federal court oversight of state prison matters,² opponents scowl at the extraordinary number of state inmate claims³ crowding federal court dockets at the expense of civilian taxpayers.⁴

1. Compare *Bell v. Wolfish*, 441 U.S. 520, 547 (1979) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security."), with *Meachum v. Fano*, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting) ("[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."); For background information and additional perspectives, see Melvin Gutterman, *The Contours of Eighth Amendment Jurisprudence: Conditions of Confinement*, 48 SMU L. REV. 373, 399-403 (1995) (discussing separation of powers doctrine in context of judicial activism in prison affairs); 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, 570-75 (1984) (proposing prison due process alternatives that strike better balance between deference and prisoners' rights); David M. Levitt, *No Other State Uses Solitary Confinement Like N.J.*, THE REC., Mar. 6, 1994, available in LEXIS, NEXIS Library, PAPERS File (observing that punishments found cruel and unusual in other states are standards at youth detention center); MURDER IN THE FIRST (Warner Bros. 1995) (provoking sense of justice and fair play after innocent prisoner was sent to solitary confinement for several years).

2. See 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS 7-8 (Donald D. Kramer ed., 2d ed. 1993) (stating that federal courts, as constitutional law authorities, possess role as ultimate guardians of prisoners' rights). Because prisons are relatively hidden from public view, the potential for abusive state practices is immense. See *The Supreme Court, 1982 Term: Procedural Rights of Prisoners*, 97 HARV. L. REV. 103, 111 (1983) (commenting that in closed prison world prisoners are likely to be subjected to invalid state action).

3. The 33,000 state inmate claims heard in federal court in 1993 represented a five-fold increase since 1977. See David G. Savage, *High Court Ruling Limits Inmate Lawsuits*, L.A. TIMES, June 20, 1995, at A12.

4. See *id.* (documenting popular viewpoint that rise in state inmate claims is wasteful of tax dollars).

For inmates wishing to challenge a state prison's administration of discipline, this debate over prisoners' rights assumes great significance. Prisons are miniature, closed societies with extensive rules and punishments ranging from loss of privileges to solitary confinement.⁵ After charging inmates with violating prison rules, prisons often insure some degree of fairness by providing formal procedures such as written notice, a disciplinary hearing before a panel of prison officials, the opportunity to testify, and the opportunity to call witnesses and produce documentary evidence.⁶ Whether the U.S. Constitution actually requires prisons to furnish such rudimentary procedures has been the subject of numerous Supreme Court due process cases during the past two decades,⁷ the most recent of which was *Sandin v. Conner*.⁸

In *Sandin*, a five-Justice majority held that a prison need not provide formal procedures when deciding to place an inmate in solitary confinement for thirty days.⁹ In reaching this result, the Court altered its methodology for determining when such procedures are necessary.¹⁰ Whereas the Court previously examined the wording of state statutes and prison rules for guidance on when to require

5. See 1 MUSHLIN, *supra* note 2, at 422.

6. See *id.* at 422-23 (describing array of formal procedures that may accompany certain sanctions). More sophisticated procedures, including the right to counsel and the right to confront opposing witnesses, generally are not required in the prison setting. See *id.* at 423 (stating that traditional safeguards associated with criminal trials are not available in prison context). In support of its finding that inmates were not constitutionally entitled to confrontation and cross-examination rights, the Court in *Wolff v. McDonnell*, 418 U.S. 539 (1974), cogently described the context surrounding prison disciplinary hearings as follows:

[D]isciplinary hearings and the imposition of disagreeable sanctions necessarily involve confrontations between inmates and authority and between inmates who are being disciplined and those who would charge or furnish evidence against them. Retaliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable safety for guards and inmates may be at stake . . . [T]he proceedings to ascertain and sanction misconduct themselves play a major role in furthering the institutional goal of modifying the behavior and value systems of prison inmates sufficiently to permit them to live within the law when they are released . . . With some [inmates,] rehabilitation may be best achieved by simulating procedures of a free society to the maximum possible extent; but with others, it may be essential that discipline be swift and sure.

Id. at 562-63.

7. See, e.g., *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 464-65 (1989) (concluding that no procedures need accompany suspension of visitation privileges); *Board of Pardons v. Allen*, 482 U.S. 370, 378-81 (1987) (finding that due process applies to denial of parole); *Hewitt v. Helms*, 459 U.S. 461, 471-72 (1983) (holding that due process applies prior to administrative segregation); *Meachum v. Fano*, 427 U.S. 215, 226-28 (1976) (concluding that no procedures apply prior to interstate prison transfer); *Wolff*, 418 U.S. at 554-56 (finding that due process applies prior to revocation of good time credits).

8. 115 S. Ct. 2293 (1995).

9. See *Sandin v. Conner*, 115 S. Ct. 2293, 2301-02 (1995).

10. See *id.* at 2300.

procedural due process,¹¹ the Court in *Sandin* shifted its focus to the severity of the proposed punishment by deciding that a set of formal procedures must accompany only those punishments posing an "atypical and significant hardship" on the inmate.¹² The Court then found that thirty days of solitary confinement was not an "atypical and significant hardship."¹³

The *Sandin* decision symbolizes the Court's willingness to defer to state legislatures and prison administrators, as well as its desire to reduce the number of frivolous inmate lawsuits heard in federal court.¹⁴ This Note questions the ability of lower courts to apply the "atypical and significant hardship" standard given the Court's limited holding in *Sandin*. In addition, this Note contends that the Court's new standard probably enables state prisons to impose all but the most extreme punishments without any accompanying procedures.

Part I of this Note reviews the Supreme Court's most significant applications of procedural due process to the prison context over the past two decades. Part II provides the facts of *Sandin v. Conner* and the Supreme Court's analysis of the case. Part III analyzes the *Sandin* decision in detail and discusses the ramifications of the Court's new standard. Finally, Part IV presents an alternative approach for determining when procedural due process should accompany prison disciplinary action.

I. BACKGROUND

A. *Procedural Due Process Generally*

The Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person shall be deprived of life, liberty, or property without due process of law.¹⁵ Unlike substantive due process, which serves as a check against invalid government action, the procedural aspect of the Due Process Clause guarantees that an otherwise legitimate government action is administered fairly.¹⁶ Essentially,

11. See *infra* Part I.B.2 (discussing Court's approach to state-created liberty interests).

12. See *Sandin*, 115 S. Ct. at 2301-02.

13. See *id.* at 2300.

14. See *id.* at 2299 (opining that deference to states is especially warranted when "fine-tuning of the ordinary incidents of prison life" is concerned).

15. See U.S. CONST. amend. V; *id.* amend. XIV, § 1.

16. See Herman, *supra* note 1, at 502 (explaining that substantive due process claims challenge lawfulness of state action). Substantive due process claims attack the state's ability to interfere with individual freedom, not whether the state interfered fairly. See *id.* For example, if a state prohibited certain individuals from getting married, those persons most likely would challenge the state's power to do so rather than the absence of hearings accompanying that prohibition. See *id.*

even if a federal or state entity has the power to deprive a person of life, liberty, or property, the Constitution may require certain legal procedures to insure that the deprivation is neither arbitrary nor mistaken.¹⁷

Exactly when such procedures are mandatory has been the subject of much Supreme Court attention since its 1970 decision in *Goldberg v. Kelly*.¹⁸

Before *Goldberg*, procedural due process applied only when a genuine liberty or property right was at stake, but not when the government sought to revoke a benefit or privilege it had conferred previously.¹⁹ In *Goldberg*, however, the Court rejected this distinction between right and privilege in finding that a state must provide procedural due process before terminating an individual's welfare benefits.²⁰ Although receiving welfare benefits clearly was not a constitutional right, the state had enacted a statute granting the privilege of welfare to those who met specific eligibility requirements.²¹ As a result, the Court reasoned that welfare recipients acquired a quasi-property interest that could not be revoked arbitrarily, but rather only if the state's legal procedures determined that the recipient no longer was eligible under the statute.²²

The Court further elaborated on these principles two years later in *Board of Regents v. Roth*²³ and *Morrissey v. Brewer*.²⁴ In *Roth*, a state university had terminated a non-tenured faculty member without providing a hearing,²⁵ and in *Morrissey* the Court considered whether an individual was entitled to a hearing prior to parole revocation.²⁶ In both cases, the Court implemented a two-prong approach that

17. See *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (stating that "touchstone" of due process is protection of individual against arbitrary government action (citing *Dent v. West Virginia*, 129 U.S. 121, 123 (1889))); see also PENELOPE D. CLUTE, *THE LEGAL ASPECTS OF PRISONS AND JAILS* 109 (1980) (noting that purpose of Due Process Clause is to protect citizens against arbitrary or erroneous government action).

18. 397 U.S. 254 (1970).

19. See CLUTE, *supra* note 17, at 109-10 (explaining that, prior to *Goldberg*, procedural due process applied only to government interference with liberty or property rights, and not to privileges or benefits granted by states).

20. See *Goldberg v. Kelly*, 397 U.S. 254, 262-65 (1970).

21. See *id.* at 264 (agreeing with lower court's determination that pre-termination evidentiary hearing is required to satisfy due process in welfare deprivation cases).

22. See *id.* (explaining that danger of depriving eligible recipients is crucial factor in welfare benefits cases).

23. 408 U.S. 564 (1972).

24. 408 U.S. 471 (1972).

25. See *Board of Regents v. Roth*, 408 U.S. 564, 566-69 (1972) (reviewing Wisconsin state law and Wisconsin State University rule that failed to provide review hearings to non-tenured faculty after termination).

26. See *Morrissey v. Brewer*, 408 U.S. 471, 472 (1972) (determining whether Due Process Clause requires states to afford individuals a hearing before revocation of parole).

lower courts since have applied to all procedural due process questions.²⁷ The first prong, a threshold inquiry, asked whether a liberty or property interest was at stake and therefore worthy in principle of some form of procedural protection.²⁸ Protected liberty or property interests generally arose either from the Due Process Clause of the Constitution or from a state-created statutory entitlement similar to the welfare benefits in *Goldberg*.²⁹ Government actions implicating a protected interest under the first prong then proceeded to the second prong, under which the Court asked how much procedure was necessary under the circumstances.³⁰ The second prong primarily involved balancing the competing individual and government interests to determine what procedures supplied an adequate level of fairness.³¹ In *Roth*, the Court never reached the second prong because it declined to recognize a constitutional or state-created interest under the first prong.³² In contrast, the Court in *Morrissey* found that the parolee had a state-created liberty interest in avoiding the arbitrary revocation of his parole status.³³ Applying the second prong, the Court required the state to furnish the parolee with notice, a hearing before a neutral tribunal, and the opportunity

27. See *Roth*, 408 U.S. at 570-71; *Morrissey*, 408 U.S. at 481-83. For an excellent discussion of *Roth*, *Morrissey*, and the development of a bifurcated approach to due process questions, see Herman, *supra* note 1, at 482 (tracing evolution of "positivist" conception of liberty beginning with *Roth*).

28. See *Roth*, 408 U.S. at 571-72 (rejecting "wooden" distinction between rights and privileges when determining due process rights and noting that "liberty" and "property" must be given some meaning to observe boundaries set by Fourteenth Amendment); *Morrissey*, 408 U.S. at 481 (explaining that potential interest must fall within scope of "liberty" or "property" language of Fourteenth Amendment to require due process).

29. See *Roth*, 408 U.S. at 575. For a thorough treatment of the entitlement concept, see Rodney A. Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69, 69 (1982) (evaluating rationales supporting right-privilege doctrine and entitlement concept).

30. See *Morrissey*, 408 U.S. at 481-82 (noting that second prong is factual inquiry).

31. See *id.* at 481-83 (weighing parolees' interest in receiving review hearings against state's interest in efficient control of inmates).

32. See *Roth*, 408 U.S. at 573-75 ("It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895-96 (1961))).

33. See *Morrissey*, 408 U.S. at 481-82 (determining that liberty of parolee includes many "core values" of unqualified liberty and that termination without review inflicts "grievous loss" on parolee). The Court in *Morrissey* found that parole bore greater similarity to freedom than confinement. See *id.* at 482. Although the state subjected the parolee to many restrictions not applicable to other citizens, the parolee "relied on at least an implicit promise that parole w[ould] be revoked only if he fail[ed] to live up to the parole conditions." *Id.* Thus, the parolee had a liberty interest within the protection of the Due Process Clause. See *id.*

to present and cross-examine witnesses before terminating his parole status.³⁴

Since *Roth* and *Morrissey*, the Court rarely has had the opportunity to develop the concept of state-created liberty interests beyond the prisoners' rights context.³⁵ There are two explanations for this phenomenon. First, most judicially recognized liberty interests stem directly from the Due Process Clause and not from a state's statutory or regulatory scheme.³⁶ Second, in cases where a state-created liberty interest may otherwise have been at stake, the targeted individual more often has challenged the state's action for its very lawfulness (through a substantive due process claim) than for its procedural flaws.³⁷ Prisoners' rights cases are different. Because states have wide discretion to deprive convicted persons of certain freedoms, in particular the right to be free from physical restraint, substantive due process claims brought by prisoners generally are unsuccessful.³⁸ It therefore is not by accident that the vast majority of state-created liberty interest jurisprudence has occurred in prisoners' rights cases,³⁹ when a state's decision to punish is far more controversial than the nature of the punishment itself.

B. Procedural Due Process in the Prison Context

1. Development of a bifurcated approach

Wolff v. McDonnell remains the seminal Supreme Court case addressing procedural due process in the prison context.⁴⁰ *Wolff* involved a prison's decision to revoke several inmates' good-time credits—or statutorily mandated sentence reduction in exchange for satisfactory behavior—without providing formal procedures.⁴¹

34. See *id.* at 488-89 (stressing that review hearing is narrow inquiry and should remain flexible).

35. See Herman, *supra* note 1, at 502 (hypothesizing that Supreme Court has had little occasion to develop concept of state-created liberty interests because independent protection of those interests already existed and because Court generally wished to avoid "awkward task" of clarifying its mediocre rationale).

36. See *id.* (noting that most civilian liberty interests are based on Constitution, not on state law).

37. See *supra* notes 16-17 and accompanying text (explaining why substantive due process claims are more common when questionable state actions are at issue).

38. See Herman, *supra* note 1, at 503 (observing that when states have "acknowledged power" to deprive individual of freedom, as is case with prisoners, procedural claims become more prevalent).

39. See *id.* (noting that procedural issues more often arise as fallback position when states are assumed to have power to deprive individuals of certain liberties).

40. 418 U.S. 539 (1974).

41. See *Wolff v. McDonnell*, 418 U.S. 539, 544-52 (1974).

Applying the first prong of *Roth's* bifurcated approach, the Court concluded that the state's good-time credit statute created a liberty interest in avoiding additional prison time.⁴² Because the inmates could forfeit good-time credits only if found guilty of serious misconduct under the statute, certain procedures were necessary to insure the inmates would not lose that benefit arbitrarily.⁴³ In what later became significant dictum, the Court indicated that solitary confinement, like the loss of good-time credits, constituted "a major change in the conditions of confinement" requiring procedural safeguards under a first prong inquiry.⁴⁴

Two years after *Wolff*, the Court in *Meachum v. Fano*⁴⁵ clarified the first prong liberty interest analysis.⁴⁶ At issue in *Meachum* was whether a prison must supply due process before transferring inmates of a medium-security prison to a maximum-security facility with substantially worse living conditions.⁴⁷ The Court explained that changes in confinement conditions, even those having a "substantial adverse impact" on the prisoners, did not automatically invoke protection from the Due Process Clause itself.⁴⁸ Because the state

42. See *id.* at 557 (explaining that because state acknowledges that deprivation of good-time credits was punishment for major misconduct, prisoners' interest in keeping good-time credit is "liberty" within Fourteenth Amendment meaning).

43. See *id.* at 557-58 (equating liberty interests with property interests that require hearing).

44. See *id.* at 571 n.19. Comparing solitary confinement with the loss of good-time credits, the Court explained:

Although the complaint put at issue the procedures employed with respect to the deprivation of good time, under the Nebraska system, the same procedures are employed where disciplinary confinement is imposed[; thus,] . . . as in the case of good time, there should be minimum procedural safeguards as a hedge against arbitrary determination of the factual predicate for imposition of the sanction.

Id. Applying the second prong of the balancing test, the Court in *Wolff* explained that deprivation of good-time credits was not as devastating as the revocation of parole was to the inmate in *Morrissey*. See *id.* at 560-61. As a result, the inmate in *Wolff* was entitled to written notice, a written statement of factual findings, and the right to "call witnesses and to present documentary evidence" if doing so would "not be unduly hazardous to institutional safety or correctional goals." *Id.* at 566. Under the second prong of the *Roth* test, however, the Court found that an inmate's right to confront and cross-examine opposing witnesses would "present greater hazards to institutional interests." *Id.* at 567. Moreover, because the right to counsel "would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals," the Court did not require states to provide that right. *Id.* at 570.

45. 427 U.S. 215 (1976).

46. See *Meachum v. Fano*, 427 U.S. 215, 224-26 (1976) (explaining that nature of interest was critical to determining whether due process was violated and that state-created interest is equal to one created by Fourteenth Amendment).

47. See *id.* at 217-23 (contrasting Norfolk, a medium-security institution, with Walpole, a maximum security institution, where "the living conditions are substantially less favorable").

48. See *id.* at 224 (stating that "the determining factor [of whether due process attaches] is the nature of the interest involved rather than its weight" (citing *Board of Regents v. Roth*, 408 U.S. 564, 570-71 (1972)) and concluding that absent statutory or constitutional creation of liberty interest in remaining at specific prison, due process did not attach).

had the right to confine convicted persons in any of its prisons, the Court found that the inmates did not have a liberty interest in remaining at any particular facility.⁴⁹ Moreover, unlike *Wolff*, there was no state prison regulation in *Meachum* either giving the inmates a right to stay in their original institution, or preventing the prison from transferring the inmates without a specific finding of misconduct.⁵⁰

From *Meachum* onward, the Court consistently required prisons to provide procedural due process whenever a statute or prison regulation created a liberty interest in avoiding a specific punishment.⁵¹ In addition, although prisoners did not possess an inherent liberty interest when a prison's action fell "within the normal limits or range of custody which the conviction . . . authorized [a] state to impose,"⁵² the Court interpreted the Due Process Clause itself as bestowing a liberty interest in avoiding punishment that went beyond the normal scope of a typical criminal conviction.⁵³ Examples of this were *Vitek v. Jones*,⁵⁴ in which an inmate was transferred to a mental institution against his will,⁵⁵ and *Washington v. Harper*,⁵⁶ in which a prison administered antipsychotic drugs to an inmate without first obtaining his consent.⁵⁷ Finding that the actions transcended the

49. See *id.* at 224-25 (explaining that once conviction is valid, deprivation of certain liberties is constitutional).

50. See *id.* at 225-27 (contrasting fact that there was no specific statute entitling prisoners to remain in particular prisons with *Wolff*, in which state statute was source for good-time credits).

51. See Part I.B.2 (reviewing Supreme Court cases recognizing liberty interests created by state statutes and regulations); see also 1 MUSHLIN, *supra* note 2, at 432-33 (observing that due process protections were necessary when rights at stake were created by statute, state or federal regulation, or by express constitutional provision). Theoretically speaking, law would create liberty only if the individual were a "creature of the state." *Meachum*, 427 U.S. at 230 (Stevens, J., dissenting). As Justice Stevens wrote in his dissent to *Meachum*:

The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

. . . [Liberty] is that basic freedom which the Due Process Clause protects, rather than particular rights or privileges conferred by specific laws or regulations.

Id. (Stevens, J., dissenting).

52. *Id.* at 225.

53. See Sandin v. Conner, 115 S. Ct. 2295, 2297 n.4 (1995) (recalling two instances in which Court has found that due process yielded liberty interest independent of state law (citing *Washington v. Harper*, 494 U.S. 210 (1990); *Vitek v. Jones*, 445 U.S. 480 (1980))).

54. 445 U.S. 480 (1980).

55. See *Vitek v. Jones*, 445 U.S. 480, 484 (1980).

56. 494 U.S. 213 (1990).

57. See *Washington v. Harper*, 494 U.S. 213, 213-14 (1990). Antipsychotic medications, often called "neuroleptics" or "psychotropic drugs," are used to treat mental disorders such as schizophrenia. See *id.* at 214. These drugs, by altering the chemical balance of the brain, are designed to help one organize thought processes and regain a rational state of mind. See *id.*

permissible scope of the inmates' prison sentences,⁵⁸ the Court in both cases recognized liberty interests emanating directly from the Due Process Clause.⁵⁹ *Vitek* and *Washington* were exceptions, however, to the court's general rule that liberty interests yielding procedural protection could arise only from statutory or regulatory entitlements.⁶⁰

2. A new test for state-created liberty interests

In *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,⁶¹ the Court implemented a somewhat novel approach for determining whether a particular deprivation generated a protected liberty interest.⁶² In *Greenholtz*, inmates claimed they had been denied parole without sufficient due process.⁶³ Under the first prong of *Roth*, the Court read the parole statute to order an inmate's release from prison after the minimum term unless the Parole Board could raise an acceptable justification for denying parole.⁶⁴ Interpreting the statute's use of the word "shall" instead of "may" as a

58. See *id.* at 222; *Vitek*, 445 U.S. at 493.

59. See *Washington*, 494 U.S. at 221-22 ("We have no doubt that, in addition to the liberty interest created by the State's Policy, [the inmate] possesses a significant interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment."); *Vitek*, 445 U.S. at 492 ("Were an ordinary citizen to be subjected involuntarily to these consequences, it is undeniable that protected liberty interests would be unconstitutionally infringed absent compliance with the procedures required by the Due Process Clause.").

60. See *Sandin v. Conner*, 115 S. Ct. 2295, 2297 n.4 (1995) (indicating that Due Process Clause itself creates liberty interests in rare cases, namely *Vitek* and *Washington*). Liberty interests arise primarily from statutes, state and federal regulations, or express provisions of the Constitution. See *supra* note 51.

61. 442 U.S. 1 (1979).

62. See *Sandin*, 115 S. Ct. at 2298 (observing that Court in *Greenholtz* adopted new methodology for defining state-created liberty interests).

63. See *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 3-4 (1979) (arguing that statutes and Board's procedures denied inmates procedural due process).

64. See *id.* at 9-11. Specifically, the statute stated:

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

Id. at 11 (quoting NEB. REV. STAT. §§ 83-1,114(1) (1976)). The Court initially noted, however, that the mere existence of a parole system did not itself generate a liberty interest in the parole-release decision. See *id.* at 9-10. In response to the inmates' argument that parole release was analogous to the parole revocation that had implicated a liberty interest in *Morrissey*, the Court found that parole revocation was a more "grievous loss" because the parolee in *Morrissey* actually had experienced freedom. See *id.* at 9. But see *id.* at 19-20 (Powell, J., concurring in part and dissenting in part) ("From the day that he is sentenced in a State with a parole system, a prisoner justifiably expects release on parole when he meets the standards of eligibility applicable within that system. This is true even if denial of release w[ould] be a less severe disappointment than revocation of parole once granted.").

genuine, mandatory curb on the Parole Board's discretion, the Court found that the inmates had a legitimate expectation of release and were entitled to due process.⁶⁵ Applying the second prong of the analysis, the Court concluded that the state had provided adequate procedures under the circumstances to satisfy the inmates' due process rights.⁶⁶

Consistent with its holding in *Greenholtz*, the Court in *Board of Pardons v. Allen*⁶⁷ also found that the mandatory language of a parole statute triggered a liberty interest entitling the inmate to procedural protection.⁶⁸ Several commentators have observed astutely that the Court's decisions in *Greenholtz* and *Allen* overemphasized semantics by failing to recognize that, in practice, the parole statutes actually provided officials with very broad discretion in their decisionmaking.⁶⁹ In spite of this criticism, the Court's liberty interest methodology throughout the 1980s continually involved combing statutes and prison regulations for mandatory language.

In *Connecticut Board of Pardons v. Dumschat*,⁷⁰ the Court held that the Board of Pardons had unlimited discretion to modify prison sentences because the pertinent state statute "impos[ed] no limit on what procedure [wa]s to be followed, what evidence [was to] be considered, or what criteria [was] to be applied by the Board."⁷¹ As a result, the Board was not required to provide an inmate with a written statement explaining its reasons for denying a shortened sentence.⁷² The Court applied the same rationale in *Olim v. Wakinekona*,⁷³ where it found discretionary wording in a regulation that

65. See *id.* at 11-12 (recognizing Respondent's argument that provision's structure created presumption that parole release would be granted absent one of four justifications legitimizing denial of parole); *supra* note 64.

66. See *id.* at 15-16 (detailing Nebraska procedures as including an opportunity to be heard and, in instances when parole is denied, an opportunity for inmate to receive an explanation of where "he falls short of qualifying for parole").

67. 482 U.S. 369 (1987).

68. See *Board of Pardons v. Allen*, 482 U.S. 369, 376-80 (1987) (understanding statute's "the board shall release on parole" language to be mandatory). In *Allen*, as opposed to *Greenholtz*, no second-prong issue was raised as to whether the inmates actually had received sufficient due process. See *id.* at 370; *infra* note 236 (explaining significance of lack of second-prong issue in *Allen*).

69. See *Allen*, 482 U.S. at 384 (O'Connor, J., dissenting) (observing that, despite statute's discretionary appearance, Parole Board was subject to no genuine restraint in determining if inmate was fit for release); Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of Petitioner at 13, *Sandin v. Conner*, 115 S. Ct. 2293 (1995) (No. 93-1911) (expressing view that *Allen* was "triumph of form over substance"); see also discussion *infra* Part III.A (explaining *Allen*'s perplexing rationale).

70. 452 U.S. 458 (1981).

71. *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981).

72. See *id.*

73. 461 U.S. 238 (1983).

authorized the transfer of a Hawaiian inmate to a California prison 4000 miles away.⁷⁴ Similarly, in *Kentucky Department of Corrections v. Thompson*,⁷⁵ the Court neglected to find a liberty interest in receiving certain outside visitors because the visitation rules were not "worded in such a way that an inmate could reasonably expect to enforce them against the prison officials."⁷⁶

Perhaps no other case embodied the Court's hypertechnical, language-oriented approach more than *Hewitt v. Helms*,⁷⁷ the facts of which were analogous to those in *Sandin*.⁷⁸ In *Hewitt*, the Court considered whether inmates were entitled to due process before being placed in solitary confinement for administrative—as opposed to disciplinary—reasons.⁷⁹ As a threshold matter, the Court explained that because "inmates should reasonably anticipate receiving [administrative confinement] at some point in their incarceration," the Due Process Clause alone did not create a liberty interest.⁸⁰ The Court, however, did read the prison regulation's language to require officials to justify administrative confinement by "the need for control" or the need to suppress "the threat of a serious disturbance."⁸¹ Thus, the regulation was sufficiently mandatory to create a protected liberty interest in remaining in the general prison population.⁸² Although the liberty interest entitled the prisoner to due

74. See *Olim v. Wakinekona*, 461 U.S. 238, 249-51 (1983) (finding unfettered discretion in decisionmaking because administrator could have denied relief "for any constitutionally permissible reason or for no reason at all").

75. 490 U.S. 454 (1989).

76. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 464-65 (1989). The Court explained that because the regulations and procedures at issue did not reflect the requisite "mandatory language, they stop short of requiring that a particular result is to be reached upon a finding that substantive predicates are met." *Id.* at 464.

77. 459 U.S. 460 (1983).

78. Both Pennsylvania and Hawaii adopted regulations establishing two types of segregated housing within their correctional facilities. In both *Sandin* and *Hewitt*, petitioners argued that they were placed in solitary confinement without sufficient due process. See *Sandin v. Conner*, 115 S. Ct. 2295, 2296 (1995); *Hewitt v. Helms*, 459 U.S. 460, 462 (1983).

79. See *Hewitt*, 459 U.S. at 462. In *Hewitt*, the state of Pennsylvania had adopted two basic types of solitary confinement: disciplinary and administrative. Disciplinary segregation could be imposed when an inmate was found guilty of a misconduct infraction, and administrative confinement could be imposed when an inmate "pose[d] a threat to security, when disciplinary charges [we]re pending against an inmate, or when an inmate require[d] protection." *Id.* at 463 n.1.

80. See *id.* at 468.

81. *Id.* at 470 n.6 (requiring notification in writing that details pending investigation, alleged violations, and right to have a hearing if disciplinary action is contemplated following conclusion of investigation (citing 37 PA. CODE § 95.104(b)(1)(3) (1978))).

82. See *id.* at 470-71.

process under the first prong, the Court ultimately held that the prison had provided ample procedures under the circumstances.⁸³

In summary, before *Sandin v. Conner* the Supreme Court recognized state-created liberty interests when a statute or prison regulation contained: (1) substantive predicates or specific criteria to guide prison officials in deciding whether to alter the conditions or length of an inmate's confinement; and (2) mandatory language, earmarked with words such as "shall" or "must," permitting an adverse change in confinement only if the substantive predicates were met.⁸⁴ Naturally, those state prison codes that explicitly curtail the behavior of their prison officials were more susceptible to due process attack, a consequence even the Court itself could not deny:

It would be ironic to hold that when a State embarks on such desirable experimentation it thereby opens the door to scrutiny by the federal courts, while States that choose not to adopt such procedural provisions entirely avoid the strictures of the Due Process Clause.⁸⁵

Fittingly, the Court's consideration of *Sandin v. Conner* was based largely on its desire to address and hopefully to eliminate this problematic effect.⁸⁶

II. SANDIN V. CONNER

A. Facts and Procedural History

DeMont Conner currently is serving a thirty-years-to-life sentence at a maximum-security prison in Hawaii.⁸⁷ In August 1987, a prison guard subjected Conner to a strip-search, including an inspection of his rectal area for contraband.⁸⁸ During the search, Conner used profanity and made sarcastic statements to the guard.⁸⁹ Several days later, the prison gave Conner written notice that he had been charged with "high misconduct" for physically interfering with correctional

83. See *id.* at 477 (including timely notice of charges brought against inmate, review of existing evidence against inmate, and opportunity to present statement to committee).

84. See *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 462-63 (1989).

85. *Hewitt*, 459 U.S. at 471.

86. See *Sandin v. Conner*, 115 S. Ct. 2293, 2299-2300 (1995) (announcing that "the time has come to return to due process principles we believe were correctly established in *Wolff* and *Meachum*"); see also *Sandin v. Conner*, 63 U.S.L.W. 3291 (U.S. Oct. 7, 1994) (No. 93-1911) (granting certiorari to re-examine circumstances in which state regulations afford inmates liberty interest protected by Due Process Clause).

87. See *Sandin*, 115 S. Ct. at 2295.

88. See *id.* at 2295-96.

89. See *id.* at 2296.

functions,⁹⁰ and with "low moderate misconduct" for using obscene language and harassing a prison guard.⁹¹

At Conner's disciplinary hearing, the adjustment committee refused to allow him to present witnesses in his defense.⁹² The committee found Conner guilty of all charges and sentenced him to thirty days of "disciplinary segregation" in solitary confinement, which he promptly served.⁹³ Conner appealed the committee's decision, and after reviewing the incident several months later, a deputy administrator found the "high misconduct" charge inappropriate and expunged the guilty charge from Conner's record.⁹⁴

Prior to the administrator's actions, however, Conner instituted a civil rights action, under 42 U.S.C. § 1983, against the adjustment committee chairperson and other prison officials in the United States District Court for the District of Hawaii.⁹⁵ His amended complaint alleged, among other claims, that the committee's refusal to allow him to call witnesses deprived him of adequate procedural due process.⁹⁶

The District Court granted the defendants' motion for summary judgment.⁹⁷ On appeal, the Ninth Circuit reversed,⁹⁸ concluding

90. See *id.* (citing HAW. ADMIN. R. § 17-201-7(a)(14)). Section 17-201-7(a)(14) provides:
Prohibited Acts; high misconduct category.

(a) Acts constituting misconduct of high category shall be as follows: . . .

(14) The use of physical interference or obstacle resulting in the obstruction, hindrance, or impairment of the performance of a correctional function by a public servant.

HAW. ADMIN. RULE § 17-201-7(a)(14). Hawaii's prison regulations create several levels of misconduct ranging from "greatest misconduct" to "minor misconduct." See *Sandin*, 115 S. Ct. at 2296 n.1.

91. See *Sandin*, 115 S. Ct. at 2296 (citing HAW. ADMIN. R. § 17-201-9(a)(5)). Section 17-201-9(a)(5) provides:

Prohibited Acts; low moderate misconduct category.

(a) Acts constituting misconduct of low moderate category shall be as follows: . . .

(5) Using abusive or obscene language to a staff member.

HAW. ADMIN. R. § 17-201-9(a)(5).

92. See *Sandin*, 115 S. Ct. at 2296. According to the adjustment committee, witnesses were unavailable "due to move to the medium facility and being short staffed on the modules." *Id.* (quoting Appendix to Petition for Certiorari, at A67).

93. See *id.* Conner was sentenced to 30 days disciplinary segregation on the "high misconduct" charge and four hours segregation for each of the two "low moderate misconduct" charges, to be served concurrently. See *id.*; see also *supra* note 79 and accompanying text (explaining difference between disciplinary and administrative segregation).

94. See *Sandin*, 115 S. Ct. at 2296. The "low moderate misconduct" charge remained on Conner's record. See *id.* at 2301-02 n.10.

95. See *id.* at 2296 (noting that 42 U.S.C. § 1983 provides civil cause of action for deprivation of rights, privileges, or immunities guaranteed by the Constitution).

96. See *id.* Conner prayed for injunctive and declaratory relief for due process violations in connection with his disciplinary hearing. See *id.*

97. See also *Sandin*, 115 S. Ct. at 2296; Brief for Petitioner at 17, *Sandin v. Conner*, 115 S. Ct. 2293 (1995) (No. 93-1911).

that Hawaii's prison regulations created a liberty interest in avoiding disciplinary segregation,⁹⁹ and remanded the case to determine whether Conner had in fact received sufficient due process.¹⁰⁰ The Ninth Circuit reasoned that the regulation contained mandatory language¹⁰¹ authorizing disciplinary segregation only if the committee found "substantial evidence" supporting an inmate's guilt.¹⁰²

The Supreme Court granted certiorari to "reexamine the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause."¹⁰³ In a five-to-four decision, the Court reversed the Ninth Circuit and upheld the District Court's granting of summary judgment in favor of the prison officials.¹⁰⁴

B. *Holding and Rationale*

In an opinion by Chief Justice Rehnquist, the sharply divided Supreme Court held that neither the Hawaii prison regulation nor the Due Process Clause itself spawned a liberty interest in avoiding thirty days of disciplinary segregation.¹⁰⁵ In reaching this outcome, the Court explicitly discarded its approach of parsing state prison regulations for mandatory language and substantive predicates, opting instead to focus on the nature of the hardship imposed.¹⁰⁶

1. *Discarding the "mandatory language/substantive predicates" methodology*

Chief Justice Rehnquist initially observed that the Court's preoccupation with prison language "encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges."¹⁰⁷ This outcome arose because lower courts continually read prison regulations to create liberty interests for prisoners just as ordinary statutes created procedurally-

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

99. See *Conner*, 15 F.3d at 1466 (stating that regulations provide explicit standards that "fetter discretion" and thus create liberty interest).

100. See *id.* at 1470-71.

101. See *id.* at 1466.

102. See *id.* ("If the inmate does not admit guilt, or the committee does not find substantial evidence, the particular outcome—freedom from disciplinary segregation—must follow.").

103. *Sandin v. Conner*, 63 U.S.L.W. 3291 (U.S. Oct. 7, 1994) (No. 93-1911); see also *Sandin*, 115 S. Ct. at 2295.

104. See *Sandin*, 115 S. Ct. at 2302.

105. See *id.* at 2300-02.

106. See *id.* at 2299-2300.

107. *Id.* at 2299.

protected rights and privileges for the general public.¹⁰⁸ Unlike ordinary statutes, however, prison regulations were "primarily designed to guide correctional officials in the administration of a prison [and not] to confer rights on inmates."¹⁰⁹ As a result, the Court explained, lower courts inevitably applied procedural due process even when state legislatures did not intend to create liberty interests.¹¹⁰

According to the Court, this misapplication of procedural due process had two undesirable effects.¹¹¹ First, it discouraged states from drafting progressive correctional procedures that otherwise would provide fair discipline and curb the discretion of that staff who encountered inmates on a daily basis.¹¹² Instead, states were encouraged to "avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel."¹¹³ Second, the "mandatory language/substantive predicates" approach led to significant federal court involvement in the routine management of state prisons when, in the Court's view, the states genuinely deserved greater autonomy and flexibility.¹¹⁴ Comparatively trivial prison matters, such as participating in "boot camp,"¹¹⁵ receiving tray lunches as opposed to sack lunches,¹¹⁶ and remaining in cells with electrical outlets for televisions,¹¹⁷ increasingly became the subject of federal due process claims and effectively "squander[ed] judicial resources with little offsetting benefit to anyone."¹¹⁸

108. *See id.* (stating that courts have drawn negative inferences from mandatory language of prison regulations). "The Court of Appeals' approach in this case is typical: it inferred from the mandatory directive that a finding of guilt 'shall' be imposed under certain conditions the conclusion that the absence of such conditions prevents a finding of guilt." *Id.*

109. *Id.*

110. *See id.* ("[S]uch regulations [were] not designed to confer rights on inmates, but the result of the negative implication jurisprudence . . . is instead to attach procedural protections that may be of quite a different nature.").

111. *See id.*

112. *See id.* (explaining that prison guidelines are not created solely to benefit inmates but also to provide guidelines for subordinate prison employees to follow, thus ensuring more uniform treatment for similar incidents).

113. *Id.*

114. *See id.* ("[F]ederal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile environment.").

115. *See id.* at 2299-2300 (alleging liberty interest in right to participate in 'shock program,' a type of boot camp for inmates (citing *Klos v. Haskell*, 48 F.3d 81 (2d Cir. 1995))).

116. *See id.* at 2300 (claiming liberty interest in receiving a tray lunch rather than a sack lunch (citing *Burgin v. Nix*, 899 F.2d 733, 735 (8th Cir. 1990))).

117. *See id.* (asserting that liberty interest exists in remaining in larger cell equipped with electrical outlets for television and holding prison job (citing *Lyon v. Farrier*, 727 F.2d 766, 768-69 (8th Cir. 1984))).

118. *Id.* at 2299.

2. *A new approach for state-created liberty interests*

For the foregoing reasons, the Court announced that a return to the due process principles set forth in *Wolff* and *Meachum* was long overdue.¹¹⁹ The Court still maintained that liberty interests could arise from means other than the Due Process Clause itself.¹²⁰ In the Court's words, however, state-created liberty interests could arise only when a prison's action imposed an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹²¹

Although recognizing that "prisoners do not shed all constitutional rights at the prison gate,"¹²² the Court found that "[d]iscipline by prison officials in response to a wide range of misconduct f[ell] within the expected parameters of the [prison] sentence imposed by a court of law."¹²³ Accordingly, the Court held that Conner's disciplinary confinement "did not present the type of atypical, significant deprivation in which a state might conceivably create a liberty interest," and thus did not require due process.¹²⁴

In reaching this conclusion, the Court reasoned that disciplinary confinement was similar in duration and degree to administrative segregation and protective custody, both of which the prison could impose with broad discretion.¹²⁵ Responding to the argument that disciplinary segregation appeared on an inmate's permanent file and could affect parole prospects,¹²⁶ the Court noted that the "high misconduct" charge no longer appeared on Conner's record.¹²⁷ Moreover, whether the "low moderate misconduct" charge would affect Conner's parole status at some future time was "simply too

119. See *id.* at 2300 ("The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum*.").

120. See *id.*; see also *supra* notes 52-60 and accompanying text (discussing cases recognizing liberty interests emanating directly from Due Process Clause).

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

122. *Id.* at 2301 (citing *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974)). But see *id.* ("[L]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." (quoting *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 125 (1977))).

123. *Id.*

124. *Id.*

125. See *id.* at 2300-01 (noting expungement of "high misconduct" charge from Conner's record meant his confinement "did not exceed similar, but totally discretionary confinement in either duration or degree of restriction"). Prisons typically impose administrative confinement when an inmate either presents a danger, is awaiting disciplinary charges, or needs protection. See *Hewitt v. Helms*, 459 U.S. 460, 463 n.1 (1983). Disciplinary confinement, on the other hand, is imposed when an inmate is found guilty of a misconduct violation. See *id.*

126. See *Sandin*, 115 S. Ct. at 2303 n.1 (Ginsburg, J., dissenting).

127. See *id.* at 2301. The Court asserted that because of the expungement, Conner's confinement "mirrored those conditions imposed upon inmates in administrative segregation and protective custody." *Id.*

attenuated to invoke the procedural guarantees of the Due Process Clause."¹²⁸ Thus, because disciplinary segregation "was within the range of segregation to be normally expected for one serving an indeterminate term of 30 years to life," the Court found that Conner did not have a state-created liberty interest in avoiding such punishment.¹²⁹

C. *The Dissenting Opinions*

Justice Ginsburg, joined by Justice Stevens, dissented, concluding that Conner had a liberty interest in avoiding disciplinary confinement.¹³⁰ Disciplinary segregation, Justice Ginsburg contended, deprived inmates of privileges for extended periods of time and, unlike administrative confinement, stigmatized them and adversely affected their parole prospects.¹³¹ Echoing arguments made by Justices Brennan, Marshall, and Stevens in dissents to the Court's earlier prison due process cases,¹³² Justice Ginsburg viewed the Due Process Clause itself, rather than state prison regulations, as the source of Conner's protected liberty interest.¹³³ Justice Ginsburg

128. *Id.* at 2302.

129. *Id.*

130. *See id.* (Ginsburg, J., dissenting).

131. *See id.* (Ginsburg, J., dissenting) (noting that immediate and lingering consequences of disciplinary segregation qualify such confinement as liberty-depriving for purposes of due process clause protection).

132. *See, e.g., Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 470-71 (1989) (Marshall, J., Brennan, J., and Stevens, J., dissenting) (arguing that liberty interest was not "created" by Commonwealth's inmate visitation regulations and policies, but rather by the Due Process Clause); *Olim v. Wakinekona*, 461 U.S. 238, 251 (1983) (Marshall, J., and Brennan, J., dissenting) ("An inmate's liberty interest is not limited to whatever a state chooses to bestow upon him. An inmate retains a significant residuum of constitutionally protected liberty [under the Due Process Clause] following his incarceration independent of any state law."); *Hewitt v. Helms*, 459 U.S. 460, 488 (1983) (Stevens, J., Brennan, J., and Marshall, J., dissenting) ("[Prison regulations] provide evidentiary support for the conclusion that the [adverse action taken against a prisoner] affects a constitutionally protected interest in liberty. But the regulations do not *create* that interest. Even in their absence, Due Process safeguards would be required . . ."); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 468-69 (1981) (Stevens, J., and Marshall, J., dissenting) (arguing that "liberty that is worthy of constitutional protection is not merely 'a statutory creation of the State,' but is instead a natural extension of the Due Process Clause (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974))"); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 22 (1979) (Marshall, J., Brennan, J., and Stevens, J., dissenting in part) (arguing that "all prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system"); *Meachum v. Fano*, 427 U.S. 215, 230 (1976) (Stevens, J., Brennan, J., and Marshall, J., dissenting) ("I had thought it self-evident that all men were endowed by their Creator with liberty as one of the cardinal unalienable rights. It is that basic freedom which the Due Process Clause protects, rather than the particular rights or privileges conferred by specific laws or regulations.").

133. *See Sandin*, 115 S. Ct. at 2303 (Ginsburg, J., dissenting) ("Deriving protected liberty interests from mandatory language in local prison codes would make of the fundamental right something more in certain States, something less in others.").

observed, however, that Conner's claim probably would have failed on remand because he apparently had received sufficient due process under the circumstances.¹³⁴ As for the Court's new approach for recognizing state-created liberty interests, Justice Ginsburg criticized the majority for "leaving consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation.'" ¹³⁵

Justice Breyer, joined by Justice Souter, also dissented.¹³⁶ Like Justice Ginsburg, Justice Breyer determined that Conner had a protected liberty interest in avoiding disciplinary confinement.¹³⁷ In Justice Breyer's view, however, the Court need not have abandoned its former standard to prevent trivial prison matters from reaching the federal courts.¹³⁸ The Court's former approach, according to Justice Breyer, provided a useful way for lower courts to examine a large "middle category" of deprivations that were neither serious enough to invoke protection from the Due Process Clause itself nor so obviously minor that procedural protections would be inappropriate.¹³⁹ The failing of the old approach was that it required courts to distinguish relatively insignificant punishments, such as loss of privileges, from truly important ones, like disciplinary segregation.¹⁴⁰ Nonetheless, Justice Breyer did not find the task of distinguishing significant and insignificant deprivations unusually burdensome for the judiciary.¹⁴¹

Justice Breyer criticized the Court for disregarding workable precedent instead of simply explaining that procedural due process was not meant to accompany minor punishments.¹⁴² Additionally, he felt the majority was overlooking the second prong of *Roth*¹⁴³ and

134. See *id.* at 2303-04 (Ginsburg, J., dissenting) ("Unless Conner were to demonstrate . . . that an issue of material fact is genuinely in controversy, his due process claim would fail.").

135. *Id.* at 2303 n.2 (Ginsburg, J., dissenting) (quoting majority opinion at 2301).

136. See *id.* at 2304 (Breyer, J., dissenting).

137. See *id.* at 2309 (Breyer, J., dissenting) (arguing that Conner suffered significant deprivation of liberty within meaning of Due Process Clause, regardless of whether it later was expunged from his record).

138. See *id.* at 2306 (Breyer, J., dissenting).

139. See *id.* (Breyer, J., dissenting).

140. See *id.* at 2308 (Breyer, J., dissenting).

141. See *id.* (Breyer, J., dissenting) (believing that "making that judicial judgment seems no more difficult than many other judicial tasks").

142. See *id.* at 2306 (Breyer, J., dissenting) (contending that reliance on majority's new "atypical and significant hardship" standard rather than existing precedent could result in some lower courts offering protection only to most "significant" deprivations of liberty, and others extending protection to certain "atypical" hardships that preexisting law would not have protected).

143. See *id.* at 2309-10 (Breyer, J., dissenting) (observing that process due in prison discipline cases is not "full blown procedure" accompanying criminal trials).

the use of summary judgment¹⁴⁴ as barriers against frivolous prison claims.¹⁴⁵ Like Justice Ginsburg, Justice Breyer stressed the importance of these legal mechanisms in Conner's case¹⁴⁶ because it was doubtful whether any additional procedures, particularly the opportunity to call witnesses, were necessary.¹⁴⁷ Justice Breyer would have affirmed the Ninth Circuit's remand of *Sandin* to the District Court to ascertain whether Conner actually received sufficient due process under the second prong of the *Roth* test.¹⁴⁸

III. CRITICAL ANALYSIS OF *SANDIN V. CONNER*

A. *The Court's Former Methodology Was in Need of Revision*

The Court in *Sandin* had ample justification for changing its former prison due process analysis. First, although combing prison regulations for mandatory language and substantive predicates was a fairly objective judicial undertaking, this approach often produced widely different results to similar problems.¹⁴⁹ For example, suppose a prison finds inmates *A* and *B* guilty of reasonably similar violations but punishes *A* by revoking a mandatory, statutorily-created interest and punishes *B* by imposing a discretionary change in confinement.¹⁵⁰ Under the Court's former scheme, *A* would have been able to challenge the prison's failure to provide due process in federal court but not *B*, even if *B*'s punishment was more severe than *A*'s.¹⁵¹ An unequally unsatisfactory outcome would have occurred if *A* and *B* were inmates in different states and both received solitary confinement for the same infraction, but the prison code of *A*'s state contained the words "shall be confined" and the prison code of *B*'s

144. See *id.* at 2310 (Breyer, J., dissenting) (noting importance of relevant factual dispute to requirement of additional procedures).

145. See *id.* (Breyer, J., dissenting) (explaining that just as courts do not hold hearings without material issues of fact in dispute, so Due Process Clause does not allow inmates further hearing procedures without a factual issue).

146. See *id.* (Breyer J., dissenting) (asserting that finding that Conner was not deprived liberty within meaning of Due Process Clause likely will result in defense moving for summary judgment on remand, to which Conner would have to respond with specific factual showings to avoid adverse judgment).

147. See *id.* (Breyer, J., dissenting) (recognizing that adjustment committee based findings on Conner's admission of failure to comply with rectal examination).

148. See *id.* (Breyer, J., dissenting).

149. See 1 MUSHLIN, *supra* note 2, at 434 (explaining that prison authorities were able to insulate actions from judicial review by assigning sanctions that did not involve liberty interests).

150. See *id.* (providing hypothetical for purpose of explaining contradictory aspects of Court's approach).

151. See *id.* (describing "patently absurd result" occurring even if one set of sanctions were harsher than other).

state did not.¹⁵² In essence, the Court's former standard rendered an inmate's right to procedural due process dependent on the fortuitous (or, if a state diligently avoided using mandatory language, not so fortuitous) phrasing of prison regulations.¹⁵³

A second problem with the Court's pre-*Sandin* approach was its emphasis of form over substance. Fixating on words alone, the Court often failed to analyze whether prison authorities truly had the discretion to alter the conditions of an inmate's confinement.¹⁵⁴ In *Board of Pardons v. Allen*,¹⁵⁵ for example, the pertinent statute instructed the Board of Pardons to grant parole only if it found the prisoner was "able and willing to fulfill the obligations of a law-abiding citizen" and could be set free "without detriment . . . to the community."¹⁵⁶ The Court treated the phrase "shall grant parole" as indicative of the state legislature's intent to curtail the Board's discretion when making parole decisions.¹⁵⁷ Yet, as noted by Justice O'Connor in dissent, the Court in *Allen* "utterly fail[ed] to consider whether the purported 'standards' meaningfully constrain[ed] the discretion of state officials [because e]ven a cursory examination of the Montana statute reveal[ed] that the Board of Pardons [wa]s subject to no real restraint."¹⁵⁸ Moreover, an appellate court could not possibly have reviewed the Board's parole decisions without substituting its own subjective view of the inmate's fitness in place of the Board's equally-subjective, discretionary findings.¹⁵⁹

The third and most damaging consequence of the Court's former due process analysis was its theoretical inconsistency. States that made

152. See *Sandin*, 115 S. Ct. at 2303 (Ginsburg, J., dissenting) (indicating that, where liberty interests derive from mandatory language of prison codes, fundamental right to liberty would differ from state to state).

153. See *id.* (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.'" (quoting THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776))).

154. See *Board of Pardons v. Allen*, 482 U.S. 369, 381 (1987) (O'Connor, J., dissenting) (stating that majority in *Allen* relied on semantics over true substance of parole statute); Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 13, *Sandin v. Conner*, 115 S. Ct. 2293 (1995) (No. 93-1911).

155. 482 U.S. 369 (1987).

156. *Allen*, 482 U.S. at 376-77.

157. See *id.* at 377-78 (explaining that language itself created presumption that parole release would be granted).

158. *Id.* at 384 (O'Connor, J., dissenting).

159. See *id.* at 384-85 (O'Connor, J., dissenting). Justice O'Connor stated:

A parole statute providing that parole shall be granted unless the prospective parolee 'poses a danger to society' is not significantly different from one under which the parole board's decisions are nonreviewable, since a court would be unlikely to reverse a parole board decision made under such a discretionary standard.

Id. (quoting Herman, *supra* note 1, at 550).

legitimate efforts to curtail arbitrary prison discipline on their own faced constitutional scrutiny, but those states with the fewest procedural guidelines were not held accountable.¹⁶⁰ Never was this disincentive more obvious than in *Kentucky Department of Corrections v. Thompson*,¹⁶¹ when the Court declined to find a liberty interest because Kentucky's regulation was not "worded in such a way that an inmate could reasonably expect to enforce [it] against the prison officials."¹⁶² The message from *Thompson* and other pre-*Sandin* cases to the states was not subtle: take commendable steps to control the discretion of prison officials or reduce arbitrary discipline, and you will subject yourself to procedural due process claims in federal court.¹⁶³ Lower courts thus imposed procedural due process when it was least necessary, but denied the same when states refused to police themselves.¹⁶⁴ For this reason alone, the Court's decision to revise its standard was appropriate.¹⁶⁵

B. "An Atypical and Significant Hardship"

In *Sandin*, the Court's new standard recognized state-created liberty interests only for prison actions imposing an "atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹⁶⁶ As the following discussion explains, the Court failed to provide useful instruction for lower courts attempting to apply this standard to even remotely different factual scenarios. Moreover, the Court's new approach may have the practical effect of eliminating

160. See *Sandin v. Connor*, 115 S. Ct. 2295, 2299 (1995) ("States may avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel."); *id.* at 2303 (Ginsburg, J., dissenting) ("[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.").

161. 490 U.S. 455 (1989).

162. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 465 (1989). The Court determined that the statute itself, which read "'visitor[s] may be denied a visit'" if they fall into one of the described categories, does not create an objective expectation on behalf of prisoner that visit necessarily would be allowed absent occurrence of one of listed conditions. *Id.* at 464-65 (quoting Kentucky State Reformatory Procedures Memorandum, No. KSR 16-00-01 (issued and effective Sept. 30, 1995)) (emphasis added).

163. See Brief Amicus Curiae of the Criminal Justice Legal Foundation in Support of Petitioner at 12, *Sandin v. Connor*, 115 S. Ct. 2293 (1995) (No. 93-1911) (describing "paradoxical" message Court's cases sent to states). The Supreme Court itself characterized this effect as "ironic." See *Hewitt v. Helms*, 459 U.S. 460, 471 (1983) (noting built-in disincentive of pre-*Sandin* analysis).

164. See 1 MUSHLIN, *supra* note 2, at 433 (explaining ironic result of Court's due process methodology).

165. See *Sandin*, 115 S. Ct. at 2303 (Ginsburg, J., dissenting) ("An incentive for ruleless prison management disserves [a] State's penological goals and jeopardizes the welfare of prisoners.").

166. *Id.*

state-created liberty interests entirely as a significant source of due process protection.

1. *Inadequate guidance for lower courts*

Beyond stating that Conner's disciplinary confinement was an insignificant departure from the normal conditions of Conner's confinement,¹⁶⁷ the Court did not elaborate on its "atypical and significant hardship" language. For this reason, and because the Court based its holding on three very case-specific factual considerations,¹⁶⁸ lower courts will likely be at a loss when applying the Court's new test.¹⁶⁹

First, in noting that disciplinary confinement involved the same physical conditions as administrative confinement, which the prison had broad discretion to impose, the Court found that the former was not an "atypical and significant hardship."¹⁷⁰ According to the Court, the state's expungement of the incident from Conner's record negated the punitive aspects of his confinement, thereby reducing his segregation to the administrative variety.¹⁷¹ The relevance of the after-the-fact expungement, however, is dubious at best. Regardless of whether his record ultimately reflected the incident, any procedural violation or stigma associated with disciplinary confinement procedural violations already had occurred by that time.¹⁷² In assessing potential due process violations, reviewing courts must look to the point at which due process logically attaches: before the punishment is imposed.¹⁷³ Analyzing these situations in hindsight, as the Court's treatment of the expungement suggested, renders due

167. See *id.* at 2301 (noting that Conner's punishment largely mirrored those conditions imposed upon inmates in administrative segregation and protective custody).

168. See *id.* at 2309 (Breyer, J., dissenting) (discussing "special features" on which Court's holding relied, including expungement of "high misconduct" incident from Conner's record by deputy administrator).

169. See *id.* at 2306 (Breyer, J., dissenting) (foreseeing that vagueness of Court's new standard "threatens the law with uncertainty"). According to Justice Breyer, "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.* (Breyer, J., dissenting).

170. See *id.* at 2301.

171. See *id.* (noting that expungement of "high misconduct" charge from Conner's record nine months after he served time in segregation resulted in confinement not exceeding similar, though totally discretionary, confinement in either duration or degree of restriction).

172. See *id.* at 2309 (Breyer, J., dissenting) (questioning how "a later expungement [could] restore to Conner the liberty that, in fact, he had already lost").

173. See *id.* at 2303 n.1 (Ginsburg, J., dissenting) ("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."); see also *id.* at 2309 (Breyer, J., dissenting) ("Because Conner was found guilty under prison disciplinary rules, and was sentenced to solitary confinement under those rules, the Court should look to *those* rules.").

process useless in preventing, as opposed to merely redressing, arbitrary state action.¹⁷⁴

Second, regardless of the expungement, the Court also found that "based on a comparison between inmates inside and outside disciplinary segregation, the State's actions in placing [Conner] there for 30 days did not work a major disruption in his environment."¹⁷⁵ As Justice Breyer pointed out in dissent, however, the Court overstated the similarities between inmates in the general population and those in solitary confinement.¹⁷⁶ Every day, inmates in the general population had approximately eight to twelve hours in which to leave their cells, attend classes, work, and associate with one another.¹⁷⁷ In contrast, Conner's disciplinary segregation involved spending each day alone in a cell, except for approximately fifty minutes in which to shower and exercise while constrained by leg irons and waist chains.¹⁷⁸ If, from the prison's perspective, disciplinary confinement was supposed to deter inmate misconduct,¹⁷⁹ then thirty days of such a punishment logically should have presented a fairly substantial change in the inmate's environment.

As a third consideration, the Court explained that Conner's confinement was "to be normally expected for one serving an indeterminate term of 30 years to life."¹⁸⁰ Like the expungement of Conner's record, however, the length and "indeterminate" quality of his prison sentence should not have been relevant to the Court's rationale.¹⁸¹ The Court prefaced its holding by stating that it was returning to the principles it had applied correctly in *Wolff* and *Meachum*, both of which examined the "nature" of the proposed change in confinement rather than the language of prison regula-

174. See *id.* at 2303 n.1 (Ginsburg, J., dissenting) (recognizing that "hindsight cannot tell us whether a liberty interest existed at the outset"); see also *id.* at 2309 (Breyer, J., dissenting) (wondering how "a later decision of prison authorities [could] transform Conner's segregation for a violation of a specific disciplinary rule into a term of segregation under the administrative rules").

175. *Id.* at 2301. The Court noted that conditions at the prison actually involved significant amounts of "lockdown time," even for inmates in the general population. See *id.*

176. See *id.* at 2305 (Breyer, J., dissenting).

177. See *id.* (Breyer, J., dissenting).

178. See *id.* (Breyer, J., dissenting).

179. See 1 MUSHLIN, *supra* note 2, at 422 (observing that, for prison rules to be effective, sanctions are necessary). Deterrence in the prison environment is arguably more important than in civilian society because the ordinary deterrent effect of the criminal system has not been effective for convicted persons. See *id.* at 432 (noting that task of establishing prison rules must account for unsuccessful deterrent force of criminal law).

180. *Sandin*, 115 S. Ct. at 2302.

181. See John Boston, *Highlights of Most Important Cases*, NAT'L PRIS. PROJ. J., Summer 1995, at 6 (doubting significance of Court's reference to length of Conner's prison sentence).

tions.¹⁸² Applying this rationale, however, one would expect the "nature" of disciplinary confinement to be equally severe for all inmates regardless of the length of their individual prison terms.¹⁸³

One commentator has suggested that the Court's reliance on the foregoing considerations was necessary to preserve a majority of Justices who, although refusing to remove procedural protection from disciplinary confinement completely, nonetheless would support a narrow holding that left ample opportunity to distinguish future cases.¹⁸⁴ Whatever its motivation, the Court's meager application of its new standard to the facts of *Sandin* has left numerous questions open for interpretation.¹⁸⁵ Most notable among these questions is whether disciplinary confinement would be an "atypical and significant hardship" if the punitive action remained on an inmate's record and clearly affected that inmate's parole prospects.¹⁸⁶ Furthermore, if an inmate's prison sentence were relatively short, would thirty days of solitary confinement, even for administrative reasons, fall "within the range of confinement normally expected"?¹⁸⁷ Finally, would solitary confinement for periods of sixty days or longer qualify as "atypical and significant" relative to ordinary prison life?¹⁸⁸ Ironically, in answering these questions, lower courts may continue to resort

182. See *Sandin*, 115 S. Ct. at 2300; *id.* at 2298 (explaining that Court mistakenly had ceased to focus on "nature" of deprivations). The Court's recollection of what it had done "correctly" in *Wolff* and *Meachum* was somewhat inaccurate. In *Wolff* and *Meachum*, the Court also looked to the mandatory language of prison regulations in drawing conclusions regarding the existence of liberty interests. See *Meachum v. Fano*, 427 U.S. 216, 226-27 (1976) ("Here, Massachusetts law conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct."); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) ("[H]ere the State itself has not only provided a statutory right to goodtime but also specifies that it is to be forfeited only for serious misbehavior."). The only discernible difference between the Court's treatment of *Meachum* and *Wolff* on the one hand, and its treatment of *Greenholtz* and its progeny on the other hand, is that in the latter cases the Court actually said it was relying on the "unique structure and language" of the statute at issue. See *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 12 (1979). For this reason, the Court's declaration that it was returning to the principles of *Meachum* and *Wolff* is not necessarily a meaningful step toward adopting a more coherent basis for examining due process questions. See Boston, *supra* note 181, at 6 (stating that *Wolff* contained substance, if not exact terminology, of liberty interest analyses adopted later); see also discussion *infra* Part IV.B (recommending elimination of first prong of *Roth* test in lieu of mere reshaping of first prong requirement).

183. See Boston, *supra* note 181, at 6 (observing that length of inmate's sentence has no real connection to case).

184. See *id.* (noting that presence of those factors suggested need to hold narrow majority of Justices, because five probably would not have voted for broad ruling on disciplinary segregation).

185. See *id.* at 5.

186. See *supra* notes 126-28 and accompanying text (explaining majority's treatment of expungement issue).

187. See *supra* note 129 and accompanying text (relating majority's emphasis on length of Conner's sentence).

188. See Boston, *supra* note 181, at 8 (arguing that, after *Sandin*, duration of solitary confinement may have no effect on whether deprivation is "atypical and significant").

to state prison regulations for a more objective basis for distinguishing varying degrees and durations of confinement.¹⁸⁹

2. *The demise of state-created liberty interests?*

In *Vitek v. Jones*¹⁹⁰ and *Washington v. Harper*,¹⁹¹ the Court found that the transfer of an inmate to a mental institution¹⁹² and the administration of antipsychotic drugs without consent,¹⁹³ respectively, were severe enough to exceed the constitutionally permissible scope of the inmates' criminal convictions.¹⁹⁴ As a result, the Due Process Clause, independent of any state prison regulations, granted a liberty interest requiring procedural safeguards to accompany those state actions.¹⁹⁵ In addition to *Vitek* and *Washington*, the Court has recognized a class of punishments not severe enough to earn independent Due Process Clause protection but still deserving of some procedural protection.¹⁹⁶ The Court in *Sandin* openly rejected the parsing of prison code language as a means for analyzing this "broad middle category" of restraints.¹⁹⁷ A plain reading of *Sandin*, however, suggests that the Court's new "atypical and significant hardship" approach may not absorb this intermediate category. The practical effect of this approach may be the end of state-created liberty interests as sources of due process protection.

In finding a liberty interest originating from the Due Process Clause itself, the Court in *Vitek* explained that the prisoner's transfer to a mental hospital was not "within the range of confinement justified by

189. See *id.* (stating that lower courts may look to how states arrange disciplinary system into hierarchy of punishments). Boston suggests that examining how states divide infractions and sanctions may provide the "bright line" that lower courts will seek in applying the Supreme Court's new standard. See *id.*; see also *Wolff v. McDonnell*, 418 U.S. 539, 560-61 (1974) (recognizing that, because state reserved deprivation of good-time credits as sanction for serious misconduct, Court should not "discount its significance" as type of punishment).

190. 445 U.S. 480 (1980).

191. 494 U.S. 210 (1990).

192. See *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (concluding that felon is entitled to procedural safeguards before being transferred to mental institution).

193. See *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (recognizing that nonconsensual administration of antipsychotic drugs to inmate violated inmate's liberty interests that are protected by Due Process Clause).

194. See *Washington*, 494 U.S. at 221 (finding that state practice infringed inmate's liberty interest); *Vitek*, 445 U.S. at 493-94 (indicating that transfer of felon to mental institution without any procedural safeguards was beyond scope of state's power).

195. See *Washington*, 494 U.S. at 221 (citing Due Process Clause as authority, independent of any policy reason, for holding); *Vitek*, 445 U.S. at 493-94 (recognizing that Due Process protections apply to inmates being transferred to mental institution).

196. See *Sandin v. Conner*, 115 S. Ct. 2293, 2306-07 (1995) (Breyer, J., dissenting) (acknowledging "middle category" of punishments that traditionally have not received independent Due Process Clause protection but that nevertheless deserve some procedural protection).

197. See *id.* at 2299-2300.

the imposition of a prison sentence" because the consequences for the prisoner were "qualitatively different" from ordinary confinement.¹⁹⁸ In *Sandin*, the Court found that Conner's disciplinary confinement was not a "dramatic departure" from normal prison conditions because it fell "within the expected parameters of the sentence imposed by a court of law."¹⁹⁹ Based on this comparison, it is difficult to conceive of punishments that would constitute "atypical and significant hardships" without also qualifying for constitutional protection under the Due Process Clause itself.²⁰⁰

Justice Kennedy, a member of the *Sandin* majority,²⁰¹ previously expressed his belief that a permanent ban on prison visitation privileges would implicate the Due Process Clause directly.²⁰² As for parole release, it is unlikely that the Court would find denial of parole an atypical, dramatic departure implicating due process.²⁰³ Therefore, unless the Court distinguishes future cases involving disciplinary confinement,²⁰⁴ then the transfer of an inmate to a mental hospital,²⁰⁵ the administration of medication without consent,²⁰⁶ and possibly a general ban on visitation²⁰⁷ may be the only punishments imposing "atypical and significant hardships" relative to ordinary prison life. Because, however, each of these severe deprivations would give rise to liberty interests under the Due Process Clause directly and irrespective of state law, a court would have no reason to employ the "atypical and significant hardship" analysis.²⁰⁸ As a result of this overlap, the concept of state-created liberty interests (which previously had triggered procedural protection for restraints and deprivations not qualifying for independent Due Process Clause protection) may

198. See *Vitek*, 445 U.S. at 493-94.

199. *Sandin*, 115 S. Ct. at 2301.

200. See *id.* at 2303 n.2 (Ginsburg, J., dissenting) (recognizing that Court's new standard does not clarify what deprivations would be "atypical and significant" without triggering direct Due Process Clause protection).

201. See *id.* at 2295.

202. See *Boston*, *supra* note 181, at 6 (stating that "prison regulation permanently forbidding all visits to some or all prisoners" would implicate Due Process Clause independently (citing *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 465 (1989))).

203. See *id.* (observing that denial of parole, although "significant," is not "atypical").

204. See *id.* (stating that Court's narrow holding in *Sandin* left room to distinguish future disciplinary segregation cases).

205. See *Vitek v. Jones*, 445 U.S. 480, 493-94 (1980) (finding liberty interest in avoiding involuntary commitment to mental hospital arose under Due Process Clause directly).

206. See *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (holding that inmate possessed liberty interest, under Due Process Clause, in avoiding involuntary administration of antipsychotic drugs).

207. See *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 465 (1989) (Kennedy, J., concurring) (expressing view that prison regulation permanently forbidding visits would implicate Due Process Clause independently).

208. See *supra* notes 205-07.

cease to exist after *Sandin*.²⁰⁹ The Court in *Sandin* sought to "reexamine the circumstances under which state prison regulations afford inmates a liberty interest protected by the Due Process Clause."²¹⁰ Unfortunately, its new standard may well result in the elimination of state-created interests altogether. If so, then only the most serious forms of discipline will entitle prison inmates to the bare minimum procedural protection against arbitrary or erroneous decisions.

C. Additional Considerations

The Supreme Court in *Sandin* stated that its former standard "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."²¹¹ For the Court, this situation did not comport with its long-held view that federal courts should give "appropriate deference and flexibility" to states in routine prison matters.²¹² In *Sandin*, the Court appeared to narrow substantially the kinds of due process claims an inmate may bring in federal court.²¹³ Nevertheless, although the Court's former standard needed revision for other reasons,²¹⁴ *Sandin* was not necessarily a sound case in which to address these policy concerns.

As the dissenting Justices recognized, even if the Court had affirmed the Ninth Circuit's opinion, two important factors hinted that Conner's case probably would have failed on remand to the District Court.²¹⁵ First, according to the prison adjustment committee's report, Conner was found guilty of misconduct based on his own admissions of initially failing to comply with the strip search.²¹⁶ Second, there was no indication in Conner's affidavits or otherwise that the witnesses he wished to call would have contributed

209. See *Sandin*, 115 S. Ct. at 2306 (Breyer, J., dissenting) (opining that rationale adopted by majority potentially riddles existing law with uncertainty regarding reach of protected liberty interests).

210. *Id.* at 2295.

211. *Id.* at 2299.

212. See *id.* (indicating that oversight by states as opposed to federal judicial oversight is necessary to address complexities associated with running daily prison operations).

213. See *supra* notes 197-210 and accompanying text.

214. See *supra* notes 160-65 and accompanying text.

215. See *Sandin*, 115 S. Ct. at 2303 (Ginsburg, J., dissenting) (observing that, as presented, record did not show that Conner was denied due process); *id.* at 2310 (Breyer, J., dissenting) (noting improbability of Conner withstanding petitioner's renewed motion for summary judgement under second prong).

216. See *id.* at 2310 (Breyer, J., dissenting). According to the adjustment committee's report, its finding of guilt was based on Conner's own statements that he was hesitant to comply while he was strip-searched, that he turned around, "eyed-up" the guard whom he disliked, and that he used profanity. See *id.* (Breyer, J., dissenting).

evidence relevant to his claim.²¹⁷ Thus, under the second prong inquiry regarding whether Conner had in fact received adequate procedures, the prison would have prevailed on a renewed motion for summary judgment, unless Conner somehow had shown that his witnesses would have presented a material disputed fact.²¹⁸

Despite these considerations, the Court used *Sandin* to create a potentially sweeping standard rather than wait for a case with better facts. By leaving fewer questions open, a different case would have provided far more instruction to lower courts left with the task of applying the "atypical and significant hardship" approach.

IV. RECOMMENDATIONS

Two policy considerations factored heavily in the Supreme Court's decision to modify its prison due process doctrine in *Sandin v. Conner*. First, the standard for reviewing inmate claims should not discourage states from drafting regulations that curtail the discretion of prison officials to impose arbitrary discipline;²¹⁹ and second, comparatively insignificant prison matters should not be subject to due process scrutiny in federal courts.²²⁰ In *Sandin*, the Justices unanimously agreed to both propositions²²¹ but disagreed substantially about whether solitary confinement was a "comparatively insignificant" prison matter.²²² Without engaging in subjective line-drawing, there is no perfect method for distinguishing minor punishments from

217. See *id.* (Breyer, J., dissenting); see also *id.* at 2303-04 (Ginsburg, J., dissenting) ("[A] call for witnesses is properly refused when the projected testimony is not relevant to the matter in controversy." (citing *Wolff v. McDonnell*, 418 U.S. 539, 566 (1974))).

218. See *id.* at 2304 (Ginsburg, J., dissenting).

219. See *id.* at 2299 (recognizing that alternative standard may interfere with state's attempts to codify prison regulations).

220. See *id.* at 2299-2300 (indicating that issues surrounding daily operations of prisons would be handled best by states).

221. The majority opinion and Justice Breyer's dissenting opinion explicitly supported both policy goals. See *id.* (Rehnquist, C.J., O'Connor, J., Scalia, J., Kennedy, J., and Thomas, J.); *id.* at 2306 (Breyer, J., and Souter, J., dissenting). Justice Ginsburg's dissent argued strongly against the Court's former approach for its flawed incentives to states. See *id.* at 2303 (Ginsburg, J., with Stevens, J., dissenting). By maintaining that liberty interests derive directly from the Due Process Clause and by placing disciplinary segregation in that protected category, it is unlikely that Justice Ginsburg would have found an inmate to possess a liberty interest in avoiding the deprivation of a tray lunch as opposed to a sack lunch. See *id.* at 2302-04 (Ginsburg, J., and Stevens, J., dissenting); *id.* at 2299-2300 (finding that trivial claims, including right to receive tray lunches, have proliferated in federal courts (citing *Burgin v. Nix*, 899 F.2d 733, 735 (8th Cir. 1990))).

222. Compare *id.* at 2301-02 (finding that disciplinary segregation was not "atypical and significant" relative to ordinary prison life), with *id.* at 2302 (Ginsburg, J., dissenting) (concluding that Conner's disciplinary segregation "effected a severe alteration in the conditions of his incarceration" (citing *id.* at 2309 (Breyer, J., dissenting))), and *id.* at 2305 (Breyer, J., dissenting) (maintaining that disciplinary segregation "worked a fairly major change in Conner's conditions").

major ones.²²³ Any workable approach to this problem must be faithful to the underlying purpose of the Due Process Clause itself: fairness.

A. A Balancing Approach

The fundamental difficulty with the Supreme Court's analysis of prison due process questions extends far beyond *Sandin*'s "atypical and significant hardship" standard. *Sandin* is merely the Court's latest attempt to recast the first prong of *Roth* and prevent most claims from reaching the second prong's factual inquiry.²²⁴ The first prong, however, is inherently problematic. By inquiring whether the prisoner is entitled to any due process as a threshold matter, the first prong forces courts to apply either due process in principle or no due process at all.²²⁵ This "all-or-nothing" approach fails to consider that due process is a flexible concept that necessarily must account for the relative importance of the interests involved.²²⁶ On the one hand, criminal defendants are afforded a "full panoply" of procedures because their interest in a fair outcome greatly outweighs the state's interest in law and order.²²⁷ Prisons, on the other hand, reasonably can justify not providing inmates with confrontation, cross-examination, and counsel rights in the interest of institutional safety and order.²²⁸ Nevertheless, prisons realistically can and do achieve a substantial degree of fairness in the presentation of facts by providing minimal procedures like the right to call witnesses.²²⁹ The second prong of *Roth*, unlike the first-prong threshold, allows for this

223. See Boston, *supra* note 181, at 8 (perceiving that subjective line-drawing, which Court's "atypical and significant hardships" standard essentially encourages, is undesirable).

224. See *supra* notes 29-34 and accompanying text.

225. See *supra* notes 30-32 and accompanying text.

226. See *Sandin*, 115 S. Ct. at 2309 (Breyer, J., dissenting) ("[D]ue process' itself is a flexible concept, which, in the context of a prison, must take account of the legitimate needs of prison administration when deciding what procedural elements basic considerations of fairness require."); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.").

227. See *Sandin*, 115 S. Ct. at 2309 (Breyer, J., dissenting) (explaining that amount of process due in prison context "is not the full blown procedure accompanying criminal trials").

228. See *Wolff v. McDonnell*, 418 U.S. 539, 567-70 (1974) (holding that right to confrontation, cross-examination, and counsel are not required in prison disciplinary context). "If confrontation and cross-examination of those furnishing evidence against the inmate were to be allowed . . . there would be considerable potential for havoc inside the prison walls." *Id.* at 567.

229. See *id.* at 567 ("Rules of procedure may be shaped by consideration of the risks of error and should also be shaped by the consequences which follow their adoption.") (citations omitted). In most cases, a prison can achieve a somewhat balanced evaluation of the facts by providing written notice, a statement of factual findings, and the rights to call witnesses and to present documentary evidence. See *id.* at 563-66.

possibility by balancing the exigencies of prison administration against the inmate's interest in fair discipline.²³⁰ For this reason, the Court should dispense with the first prong altogether, leaving the second prong balancing test as the only due process inquiry.²³¹

Applying *Sandin*, lower courts must ask whether a deprivation is "atypical and significant" enough to proceed to the second prong.²³² If courts instead simply weighed the competing interests to determine whether due process applied under the circumstances,²³³ the Supreme Court's primary policy concerns²³⁴ still largely would be served. The second prong has proven capable of preventing due process from attaching to minor prison matters.²³⁵ In fact, an examination of cases in which the state-created deprivation at issue did reach the second prong reveals that the Court, since *Wolff*, always has found the state's procedures adequate under the circumstances.²³⁶ As for the cases the Court previously dispatched under the first prong, they probably would not have differed in outcome had the Court used only the second prong.

Moreover, although eliminating the first-prong threshold may increase the number of prison due process claims brought in federal court in the short-run, the long-term effects of a balancing approach

230. See Herman, *supra* note 1, at 570-74 (proposing abandonment of first-prong threshold of *Roth*).

231. See *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961) ("[W]hat procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.").

232. See *Sandin*, 115 S. Ct. at 2300 (detailing approach to be taken by courts in deciding whether inmate had been deprived of protected liberty interest).

233. See Herman, *supra* note 1, at 573 (discussing effect of eliminating first-prong inquiry).

234. See *supra* notes 219-20 and accompanying text.

235. See *Sandin*, 115 S. Ct. at 2309 (Breyer, J., dissenting) (noting that second prong limits federal court intervention in ordinary prison matters).

236. See *Hewitt v. Helms*, 459 U.S. 460, 477 (1983) (holding that, despite liberty interest in avoiding administrative segregation, inmate received process due under circumstances); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 16 (1979) (finding that, although parole statute created liberty interest, state's procedures comported with requirements of due process). In *Board of Pardons v. Allen*, 482 U.S. 369 (1987), although the Court found that the inmate did have a liberty interest in avoiding parole denial, there was no second prong issue raised concerning whether the process given was sufficient. See *id.* at 380.

The Court in *Sandin* noted that because *Hewitt* and *Greenholtz* were disposed under the second prong, its decision did not "technically" require overruling any of its prior holdings. See *Sandin*, 115 S. Ct. at 2300 n.5. This is inaccurate, however, because *Allen* in fact was decided under the first prong alone, never reaching the second prong. Thus, *Allen* stands out as the only case the Court truly needed to overrule in remaining consistent, but did not. Mystifyingly, the Court in *Sandin* cited to *Allen* in support of the proposition that "[s]tates may under certain circumstances create liberty interests which are protected by the Due Process Clause." *Id.* at 2300. Yet there was nothing unique about *Allen* to distinguish it from any of the Court's other prison due process cases, raising the question of whether the Court's pre-*Sandin* approach still persists "under certain circumstances." See Boston, *supra* note 181, at 7 (recognizing inconsistency raised by Court's citation to *Allen*).

eventually would offset that disadvantage. First, as is true under the first prong, summary judgment would preclude trivial claims under the second prong if a court were to determine that no genuine factual dispute existed.²³⁷ Second, a balancing approach might encourage states to draft more progressive regulations limiting the discretion of prison officials to punish inmates arbitrarily. By providing their own safeguards against arbitrary prison discipline, states generally would administer discipline more fairly and simultaneously would avoid the cost of defending inmate due process claims in federal court.

Finally, because the second prong balances both the institutional and individual interests at stake when assessing a particular deprivation, procedural rights surely would receive more honest consideration than the first prong presently allows.²³⁸ Some have suggested that the Burger-Rehnquist Courts, when applying the second prong, generally have overvalued the prisons' financial and logistical burdens²³⁹ and have underestimated the importance of procedural fairness to prisoners.²⁴⁰ Assuming this is true, a balancing approach at least would force lower courts to assess an individual's interests at all, for these interests often receive no consideration under the current two-prong test.²⁴¹

237. See *Sandin*, 115 S. Ct. at 2310 (Breyer, J., dissenting) (pointing to summary judgment as important legal mechanism for keeping trivial prison claims out of federal courts). Summary judgment requires a genuine issue of material fact between the parties. See FED. R. CIV. P. 56. In the prison context, the Due Process Clause does not require procedures unless there is a genuine factual dispute between the parties as to the inmate's guilt. See *Sandin*, 115 S. Ct. at 2310 (Breyer, J., dissenting). This, in turn, provides legal protection against the meritless prison case, of which Conner's claim may be one. See *id.* (Breyer, J., dissenting). Had the Supreme Court found that due process applied and thus remanded Conner's case to the district court, the adjustment committee probably would have motioned for summary judgment on a new ground, namely the second prong. See *id.* (Breyer, J., dissenting). If Conner could not show a genuine issue of material fact, that being how his witnesses would have raised doubt as to his guilt, then his case would have been unsuccessful. See *id.* (Breyer, J., dissenting) (noting that nonmovant "must set forth specific facts showing that there is a genuine issue for trial" (citing FED. R. CIV. P. 56(e))). Therefore, summary judgment applies to the second prong balancing approach in the same way that it applies to the first prong. Moreover, it still would apply to limit federal court prison claims if the first prong were abandoned.

238. See Herman, *supra* note 1, at 573-74 (recognizing that balancing test at least would eliminate threshold requirement of first prong, which often prevents individual interests from being considered at all). Professor Herman also noted that a balancing approach would permit judges to use common sense in determining which deprivations deserve procedural protection, see *id.* at 574, because, if the first prong were eliminated, the rigid application of a threshold test no longer would constrain judges' ability to provide due process where it truly is necessary.

239. See *id.* at 573 (commenting that, in its second prong balancing approach, Burger Court often overvalued states' financial concerns).

240. See *id.* at 574 (observing that procedural safeguards, even in prison context, are not nearly as burdensome on states—"nor as futile"—as Supreme Court maintained).

241. See *id.* (noting that, under present first prong threshold test, procedural values and individual interests receive little consideration).

B. An Example: Solitary Confinement

Under a balancing test, the ultimate question would be whether an individual reasonably expected to receive certain procedural safeguards under the circumstances.²⁴² In the case of inmate violence, for instance, a court probably would find that the state's interest in achieving immediate calm and security greatly outweighs an inmate's expectation of receiving a hearing.²⁴³ The exigencies of such situations require prisons to take swift and decisive action, whether punitive or administrative in nature, rather than wait until a guilty finding is properly established.²⁴⁴ Most courts view arbitrary official conduct, if undertaken in good faith, as incidental to effective prison management.²⁴⁵

The balance would begin to shift, however, when the inmate remains segregated in solitary confinement after the urgency of the incident dissipates. The inmate's interest in a fair assessment of the facts grows over time, but the prison's interest in taking prompt action without procedural burdens decreases.²⁴⁶ Indeed, at some point, the prison shares the inmate's interest in an accurate result because the state theoretically has no legitimate interest in punishing innocent prisoners.²⁴⁷ When it deems the inmate's interest sufficient, a court expects the prison to have provided some combination of written notice of the charges brought, a hearing at which the inmate is informed of the prison's evidence, and an opportunity for the inmate to testify, present documentary evidence, and produce witnesses.²⁴⁸ The state would prevail if the procedures it actually

242. See *id.* (suggesting that balancing test could consist simply of asking whether individual reasonably expects to receive specific procedural safeguards under the circumstances).

243. See *United States ex rel. Miller v. Twomey*, 479 F.2d 701, 717 (7th Cir. 1973) (finding that, in case of vicious attack by one inmate on another, state interest in prompt, decisive action outweighed inmate interest in due process). Justice Stevens, then a judge on the Seventh Circuit, authored the *Twomey* decision.

244. See *id.* (stating that state is not obligated to "pause and assess responsibility for the dispute before taking action").

245. See *id.* ("Some mistakes and some arbitrary [official] conduct are inevitable incidents of effective management of large groups of confined human beings.").

246. See *id.* at 717-18 ("In cases involving major rule infractions for which the punishment is severe, after the immediate crisis is past, the relative importance of the inmate's interest in a fair evaluation of the facts increases and the state's interest in summary disposition lessens . . .").

247. See *id.* at 718 (observing that, in the long run, state's interest in just and fair result is same as inmate's because neither has valid interest in treating innocent inmate as guilty).

248. See *Wolff v. McDonnell*, 418 U.S. 539, 563-67 (1974) (describing procedures to which inmate is entitled under Constitution).

provided equals or exceeds those required under the circumstances.²⁴⁹

Reducing the current two-prong approach to a single balancing test probably would not change the outcome of most due process cases,²⁵⁰ for even a "full panoply" of procedural protections would not necessarily help an inmate prevail on the merits.²⁵¹ In whatever quantity, procedural safeguards merely increase the likelihood of an accurate result.²⁵² A balancing approach, when compared to the "atypical and significant hardship" threshold required by *Sandin*, would acknowledge more effectively the relative, non-absolute nature of procedural due process.

CONCLUSION

In *Sandin v. Conner*, the Supreme Court found that thirty days in solitary confinement was not an "atypical and significant hardship" relative to ordinary prison life. The Court's creation of a new approach for analyzing prison administrative and disciplinary actions is more important than its holding. Without additional criteria for determining whether a particular deprivation meets the new first prong threshold, lower courts and practitioners are left with a very narrow example of how the Court intends its new standard to function. At the same time, the Court's new approach may signal the end of prison due process insofar as severe, but not the most extreme, forms of punishment are concerned. Because due process is a matter of degree and not absolutes, a balancing approach would strike a more appropriate equilibrium between prisoners' rights and deference to state prison administrators.

249. See *Sandin v. Conner*, 115 S. Ct. 2293, 2303 (1995) (Ginsburg, J., dissenting) (noting that Conner's case would not have succeeded if procedures provided by state were adequate under circumstances); *Hewitt v. Helms*, 459 U.S. 460, 477 (1983) (holding that inmate received process due under circumstances); *Greenholtz v. Inmates of Neb. Penal & Correctional Complex*, 442 U.S. 1, 16 (1979) (finding state provided sufficient procedures).

250. See 1 MUSHLIN, *supra* note 2, at 434 (stating that altering tests for analyzing due process questions does not necessarily change result in any particular case).

251. See *id.* (explaining that guarantee of procedural safeguards is no guarantee of success on merits of claim).

252. See *id.* (observing that procedural safeguards serve only to increase likelihood of accurate result in given case).