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Sandin v. Conner: The Supreme Court's Narrowing of Prisoners' Due Process and the Missed Opportunity to Discover True Liberty

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SANDIN v. CONNER: THE SUPREME COURT'S NARROWING OF PRISONERS' DUE PROCESS AND THE MISSED OPPORTUNITY TO DISCOVER TRUE LIBERTY

> [F]reedom . . . under government is to have a standing rule to live by, common to every one of that society . . . a liberty to follow my own will in all things, where the rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man. . . .[1]

INTRODUCTION

The Fourteenth Amendment of the United States Constitution reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."[2]

Imagine a convicted prisoner in a maximum security prison in Hawaii. One day, without warning or explanation, prison authorities remove the prisoner from his normal holding cell and place him into solitary confinement without any notice or hearing. Instead of being confined to a cell for twelve hours a day, the prisoner is confined, alone, twenty-four hours a day, with the exception of a brief exercise period. Common sense should dictate that the prison officer, a State agent, has deprived the prisoner of a liberty interest without due process of law. However, a plain reading of the Supreme Court's recent decision in *Sandin v. Conner*[3] defies that common sense perception.

Prior to 1970, the judiciary rarely interfered with the states' administration of their prison systems.[4] In the absence of constitutional

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1 JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT § 22 (J.W. Gough ed., Basil Blackwell 1966) (1690).

2 U.S. CONST. amend. XIV, § 1.

3 115 S. Ct. 2293 (1995).

4 *See, e.g.*, William Babcock, *Due Process in Prison Disciplinary Proceedings*, 22 B.C. L. REV. 1009, 1009 (1981); Charles H. Jones, Jr. & Edward Rhine, *Due Process and Prison Disciplinary Practices: From* Wolff *to* Hewitt, 11 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 44 (1985) (noting that the Warren Court's treatment of judicial review of prison administration did not mirror its tendency to increase the rights of criminal defendants).

safeguards, state prisoners' rights were largely subject to the whims of individual prison officials.[5] However, during the late 1960s and 1970s, the Supreme Court, in order to curtail potential arbitrary and vindictive treatment of prisoners, began to limit the unchecked discretion of prison officials by expanding procedural due process rights.[6] Prior to this period, the Supreme Court had no established body of law to provide guidance to prisoners seeking to invoke the Due Process Clause directly, because the Court had not yet recognized the due process interests of prisoners.[7] To fill this void, the Court relied largely on state-created positive law to define interests protected by the federal Due Process Clause instead of reading such interests into the Clause itself. As a result, the federal courts were inappropriately drawn into day-to-day prison administration due to the mandatory character of individual state regulations.[8] The *Conner* decision has remedied this problem by vastly narrowing the ability of prisoners to draw upon state positive-law sources to create protectible due process interests. However, by limiting what functionally has been the prisoners' only route to due process protections during the last two decades, the *Conner* decision has left a litany of arguably compelling interests defenseless in the face of unfettered administrative discretion.

Part I of this Note details the historical development of the prisoners' procedural due process doctrine, focusing primarily on the Court's dependence over the last twenty years on state-level positive-law sources to define constitutionally protected liberty interests. Part II focuses on the majority and dissenting opinions in *Sandin v. Conner* itself. Part III argues that the *Conner* opinion narrows prisoner liberty-interest jurisprudence into virtual non-existence. Part III also calls for the Supreme Court to implement a new balancing test to determine protected liberty interests by balancing the harm inflicted on prisoners against the need for orderly prison administration.

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5 *Cf.* Meachum v. Fano, 427 U.S. 215, 231 (1976) (Stevens, J., dissenting) (At one time, "[t]he penitentiary inmate was considered 'the slave of the state.'") (citation omitted).

6 *See, e.g.*, Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1175 (1984) ("[T]he Supreme Court itself has felt compelled to enter what it previously regarded as a closed system, to impose constraints on the way institutional officials treat their charges.").

7 "Direct" readings of the Due Process Clause, for the purposes of this Note, connote situations in which the Court finds a protected liberty interest inherent in the meaning of the Due Process Clause itself. As discussed *infra* part I.B, most of the Court's prisoners' due process jurisprudence involves liberty interests that arise from state positive-law sources.

8 *See infra* part I.B.

I
GENERAL OVERVIEW OF PRISONERS' PROCEDURAL DUE PROCESS

A. Early Background: The Developments in Procedural Due Process Jurisprudence Leading to The State-Authorization Approach

1. Goldberg v. Kelly:[9] *An Expansionist Approach to Procedural Due Process*

In *Goldberg v. Kelly*, the Supreme Court found that welfare recipients had the constitutional right to a hearing before their benefits could be terminated.[10] This decision represented a radical departure from the Court's previous doctrine—the Right-Privilege distinction.[11] Under this doctrine, state-authorized benefits were privileges, not rights, and could be terminated without process. The Court explicitly discarded this approach,[12] instead finding that trial-type procedures were required before the statutorily authorized benefits could be terminated.[13] Because the state had conceded that the recipients did have a due process interest in their benefit payments, the procedural posture of *Goldberg* allowed the Court to focus on what process was due, rather than defining the origin of the interest itself. Although the Court did not explicitly hold that the removal of welfare benefits implicated the Due Process Clause,[14] the decision as to what type of process was due rested heavily on the Court's recognition of the weight of the individual's interest.[15] The Court balanced the recipient's interest in not having benefits terminated against the govern-

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9 397 U.S. 254 (1970). The movement towards extended procedural due process protection began in the property context. Rubin, *supra* note 6, at 1062; *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-9, at 685-86 (2d ed. 1988) (stating that during the 1970s the Court came to the aid of citizens who had become increasingly dependent on the state machinery to safeguard their property rights and individual liberty by insuring that this machinery was not run in an arbitrary fashion); 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, 482 (1984) (stating that the *Goldberg* decision "triggered an explosion in due process litigation. . . .").

10 *Goldberg*, 397 U.S. at 261.

11 *See* Rubin, *supra* note 6, at 1061-62. The Supreme Court's pre-*Goldberg* approach viewed state authorized benefits or protections as privileges instead of rights. Under this approach, due process was not required before the termination of a benefit. *Id.* at 1053-60 (describing different rationales that the Court used to sidestep the wooden rights/privileges dichotomy).

12 *Goldberg*, 397 U.S. at 262.

13 For a thorough discussion on the qualitative and temporal implications of various types of procedural protections see Henry J. Friendly, *"Some Kind of Hearing"*, 123 U. PA. L. REV. 1267, 1299-1304 (1975).

14 The question of whether recipients had an interest under the Due Process Clause was not before the *Goldberg* Court. The respondent, the City of New York, had conceded the point. *Goldberg*, 397 U.S. at 260 n.7; *see* Rubin, *supra* note 6, at 1063.

15 *Goldberg*, 397 U.S. at 262-63.

ment's interest, finding that the pre-deprivation procedures were necessary.

The *Goldberg* decision was profoundly important. *Goldberg* "signaled the Court's willingness to extend due process protections to the daily operations of virtually every state and federal administrative agency, and thus to a vast range of government benefits that had not been explicitly protected by due process prior to that time."[16] However, the potential breadth of the *Goldberg* decision quickly prompted the Court to reconsider its procedural due process doctrine. *Goldberg*'s failure to explicitly enunciate the origin of the protected interest allowed the Court, in subsequent due process decisions, to curtail its due process jurisprudence by limiting the range of protected interests.

2. *The Supreme Court's Retreat from the* Goldberg *Approach to a Positivist Standard of Review*

The overwhelming flood of litigation that followed in the wake of *Goldberg* prompted the Supreme Court to retract the expansive procedural due process doctrine it enunciated in that case.[17] The retraction occurred in *Board of Regents of State Colleges v. Roth*, which involved an alleged denial of due process for a property interest.[18] *Roth* addressed the right of teachers in the state university system to continued employment.[19] Instead of following *Goldberg*'s focus on *when*

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16 Rubin, *supra* note 6, at 1063. Professor Tribe explains the Court's willingness to expand its procedural grasp as a response to the new dependence of some citizens on the increasingly pervasive welfare system. TRIBE, *supra* note 9, § 10-9, at 686. The Court was influenced by Charles Reich's seminal article, *The New Property*, 73 YALE L.J. 733 (1964), which addressed the "new property" created by government dispensing wealth benefits to citizens. According to Professor Tribe:

> Perhaps responding to the alienation and affront to human dignity which such complete dependence [on the welfare system] and vulnerability might induce in circumstances where no alternative source of relief was available, the Court ultimately rejected much of what remained of the rights-privileges distinction. For the first time, the Court recognized as entitlements interests founded neither on constitutional nor on common law claims of right but only on a *state-fostered* (and hence justifiable) expectation . . . which was derived from "an independent source such as state law". . . . [The new statutory entitlements served] to surround the "core" of liberty and property interests with a periphery activated, unlike the core, *only by affirmative state choices*, but secure, once activated, against destruction without due process of law.

TRIBE, *supra* note 9, § 10-9, at 686 (emphasis added) (quoting Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)) (citations omitted).

17 *See, e.g.*, Herman, *supra* note 9, at 482-84; *see also* Rubin, *supra* note 6, at 1067 (arguing that the Burger Court's response to the expansive nature of the Warren Court's doctrines was to limit rather than overrule those doctrines).

18 408 U.S. 564 (1972).

19 Under the applicable state law, teachers had no tenure rights until they served four years of year-to-year employment. The teacher in *Roth* worked for one of the required four

process was required,[20] the *Roth* Court focused on *whether* a right existed at all.[21] *Goldberg*'s interest-balancing test remained in the due process calculus, but only as a second tier of analysis to determine the type of procedures required after a threshold inquiry established the existence of a right.[22]

After *Roth*, to establish the existence of a right, at least in the property context,[23] a person seeking due process relief had to show that his or her entitlement was created "by existing rules or understandings that stem from an *independent source such as state law*."[24] Although the Court recognized the importance of continued employment to a teacher and conceded that it might be wise policy for states to authorize pre-termination hearings by statute,[25] it nevertheless held that Roth's one year appointment "secured absolutely no interest in re-employment" and accordingly was afforded no due process protection.[26] Professor Susan Herman explains the significance of *Roth*'s approach:

> By introducing this definitional stage into due process analysis, the [*Roth*] Court embraced the idea that the protection provided by the

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years under a contract that included an exact termination date and did not give any explicit right to renewal. *Id.* at 566-67.

20 *See supra* part I.A.1.

21 The *Roth* Court explicitly rejected the district court's interest balancing as the first inquiry of a due process analysis. *Roth*, 408 U.S. at 570-71. The Court clarified that the threshold due process question did not depend on a balancing of the interests, no matter how major the concern involved. Instead, the determinative inquiry depended on "the nature of the interest at stake." *Id.* at 570-71 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

The *Roth* approach "represented a marked change from *Goldberg*. . . ." Rubin, *supra* note 6, at 1066. It also signalled a departure from the general balancing approach that began with Cafeteria & Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961) (finding no constitutional rights only after a balancing of the individual's and State's interests). The *Roth* opinion has received criticism from commentators for its virtually unsupported departure from interest balancing to determine what deprivations qualify for due process protections. *See, e.g.*, Herman, *supra* note 9, at 491.

22 *Roth*, 408 U.S. at 570-71.

23 The *Roth* Court did not limit a person's liberty interest to state authorized interests or understood expectations. It identified a number of liberty interests that require due process regardless of state law. *Roth*, 408 U.S. at 572. In *Roth* the Court found that the plaintiff's interest in continued employment did not constitute a liberty interest. However, the Court stated there would be instances where it would find a liberty interest. The Court cited, as examples, many cases where it found a liberty interest because an employee's dismissal was for a cause that would bring his reputation into question or similarly place a stigma "that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573-74. The Court's concern for State action arbitrarily placing a "stigma" on a person will reappear in its prison disciplinary jurisprudence. *See infra* notes 69-70 and accompanying text.

24 *Roth*, 408 U.S. at 577 (emphasis added). *Compare with* Perry v. Sindermann, 408 U.S. 593 (1972) (holding that a teacher may be able to receive due process protection of tenure rights on an implied contractual basis).

25 *Roth*, 408 U.S. at 578-79.

26 *Id.* at 578.

> due process clause is limited. State interference with those interests considered to be within the sphere of "life, liberty, or property" would trigger a right to procedural fairness; those interests thought to fall outside the definition would receive no procedural protection. In *Goldberg v. Kelly* and other cases before *Roth*, it had seemed that certain interests might command due process protection because of their weight or impact on the individual. But *Roth* rejected the weight of the interest as a criterion for determining when procedural fairness is required. According to *Roth*, the weight of the interest, or grievousness of the loss, was significant only in the second stage of a bifurcated analysis. From the outset, then, the Court's new due process theory seemed to acknowledge the possibility that an individual might suffer a grievous loss due to arbitrary government action but, because his interest failed to satisfy the threshold definition of liberty or property, have no right to procedural due process.[27]

Decided on the same day as, and cited by, the *Roth* opinion,[28] *Morrissey v. Brewer* was one of the first Supreme Court decisions expanding prisoners' due process rights.[29] *Morrissey* addressed whether the conditional freedom a prisoner received from a state-authorized parole program could be revoked without due process.[30] For the first time the Supreme Court found a liberty interest that arose "neither on constitutional nor on common law claims of right but only on a state-fostered (and hence justifiable) expectation."[31] The *Morrissey* opinion articulated two distinct lines of reasoning to support a prisoner's due process claim. First, because the right at issue would not

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27 Herman, *supra* note 9, at 491-92 (citations omitted).

28 *Roth*, 408 U.S. at 570-71.

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

30 *Morrissey*, 408 U.S. at 481.

31 TRIBE, *supra* note 9, § 10-9, at 686; *Morrissey*, 408 U.S. at 481. The Court's analysis of whether a liberty interest existed in the prisoner's right to parole became the only citation to support the Court's first movement towards a positivist approach to procedural due process in *Roth*, 408 U.S. at 571 (decided the same day as *Morrissey*); *see* Rubin, *supra* note 6, at 1066. *But see* Herman, *supra* note 9, at 505 (arguing that *Morrissey* showed little concern with the content of state law).

Subsequent, possibly revisionist, Supreme Court precedent concerning parole rights, indicates that the right in *Morrissey* arose from the state's statutorily authorized granting of parole. In Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1 (1979), the Court held that the mere fact that a state created a parole system and established a right to fair procedures in the initial parole hearing did not create a liberty interest. *Id.* at 9-11. The two cases address benefits that are only subtly different: the granting of parole (*Greenholtz*) and the revocation of granted parole (*Morrissey*). Both deal with the conditional freedom from prison. Nevertheless, the "implicit promise" that parole would not be revoked unless the prisoner's conduct did not comport with the conditions of parole motivated the Court in *Morrissey*. *Morrissey*, 408 U.S. at 482. Unlike its decision in *Morrissey*, the *Greenholtz* Court did not find an implied promise in parole release decisions. The fine line-drawing of the *Morrissey/Greenholtz* distinction illustrates the arbitrary nature of the Court's state-authorization approach and the irrelevance of individual harm to the inquiry.

have existed except for a state's initiative, *Morrissey* marked the first occasion where the Court recognized a state-authorized liberty interest in the prison context.[32] At the same time, the Court recognized a residuum of prisoners' constitutionally protected liberty. As the Court observed,

> the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a "grievous loss" on the parolee and often on others. It is hardly useful any longer to try to deal with this problem in terms of whether the parolee's liberty is a "right" or a "privilege." By whatever name, the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. Its termination calls for some orderly process, however informal.[33]

The Court concluded by holding that due process required procedural safeguards,[34] although less than those required to obtain an initial conviction, before parole could be revoked. Although the state was not required to provide parole programs, once it did, due process safegnarded its arbitrary removal.[35]

Morrissey simultaneously signalled the end of one wooden approach to prisoners' due process and the beginning of another. The Court's recognition of a liberty interest in *Morrissey* was motivated by the "grievous harm" inflicted on the prisoner. However, the *Morrissey* Court's reliance on sub-constitutional positive law sources became a shortcut, repeatedly utilized until *Conner*, for finding liberty interests without giving content to the Due Process Clause itself.[36]

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32 The term "state authorization" indicates situations where the Court bases its liberty interests analysis solely on whether the language of a positive source of law creates a right.

33 *Morrissey*, 408 U.S. at 482.

34 *Morrissey* requires the following safeguards during a parole revocation hearing:

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

408 U.S. at 489. These procedures fall short of the full trial-type procedures held necessary in *Goldberg*. *See supra* note 13 and accompanying text.

35 TRIBE, *supra* note 9, § 10-9, at 688.

36 Ironically, the *Morrissey* fact pattern, where state positive-law sources created a prisoner's interest in the ultimate release from incarceration, appears to be one of the few situations that will satisfy the *Conner* decision's new "atypicality" threshold. See discussion *infra* part II.B.2.

B. State-Authorization: The Supreme Court's Positivist Approach to Prisoners' Procedural Due Process

1. Wolff v. McDonnell

Wolff v. McDonnell represents the high-water mark of Supreme Court jurisprudence concerning the procedural due process rights of prisoners.[37] In *Wolff*, the Supreme Court established the minimum due process rights guaranteed to a prisoner in a disciplinary hearing before statutorily authorized good-time credits could be withdrawn.[38] As in *Morrissey*, the liberty interest in *Wolff* stemmed from a state positive-law source and its relation to the timing of a prisoner's ultimate liberation.[39] As the *Wolff* Court noted,

> the Constitution itself does not guarantee good-time credit. . . . But here the State itself has not only provided a statutory right to good time but also specifies that it is to be forfeited only for serious misbehavior. . . . [T]he prisoner's interest has real substance and is sufficiently embraced within Fourteenth Amendment "liberty" to entitle him to those minimum procedures appropriate under the circumstances and required by the Due Process Clause to insure that the *state-created right is not arbitrarily abrogated.*[40]

Although the Court, in dicta, did recognize that prisoners should have similar protections in disciplinary hearings resulting in punitive confinement,[41] the Court's due process analysis, until *Conner*, focused on preventing "*arbitrary* abrogations" of state created rights by prison officials.[42]

After *Wolff*, at least in the prison context,[43] the Court shifted its liberty interest analysis to a positivist approach matching its property

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37 418 U.S. 539 (1974).

38 *Id.* at 554-55. Good-time credits, where authorized by state statute, are dispensed to prisoners as a reward for good behavior. They are created as "days" off of a prisoner's sentence. They are usually rewarded on an escalating scale, where the amount dispensed increase with higher amounts already received. *See* Babcock, *supra* note 4, at 1011 n.21.

39 *Wolff*, 418 U.S. at 558. *See also* TRIBE, *supra* note 9, § 10-9, at 688 (stating that *Wolff* held that "when a state chooses to offer prisoners a shortened jail sentence by permitting the accumulation of credits for good behavior, the revocation of a prisoner's 'good-time' credits as a punishment for misconduct is valid only if carried out in a manner satisfying the obligations of procedural due process.").

40 *Wolff*, 418 U.S. at 557 (emphasis added).

41 *Id.* at 571 n.19 (emphasis added); *see infra* part III.D (discussing *Wolff*'s footnote 19).

42 *See* Herman, *supra* note 9, at 499-501 (1984) (detailing and criticizing the movement of the Court towards positivism in its prisoner liberty rights decisions); *see also* Rubin, *supra* note 6, at 1073 ("The case that initiated the movement toward a positive law definition of 'liberty' was probably *Wolff v. McDonnell* . . . ."). *See infra* part III.B; *see also* TRIBE, *supra* note 9, § 10-10, at 697-98.

43 Professor Herman suggests that the positivist approach to liberty rights is generally limited to prisoners' rights cases. This phenomenon may result because normally patently unconstitutional deprivations of liberty, such as confinement in a jail, are basic elements of

interest jurisprudence.[44] Following *Wolff*, the Court, rather than invoking the Due Process Clause to create some sort of federal standard of rights, instead used it merely to insure the fair administration of existing state laws. This positivist approach, in which the magnitude of harm experienced by the individual is irrelevant in the liberty interest inquiry, came to its fullest fruition in *Meachum v. Fano*.[45]

2. Meachum v. Fano: *The Removal of the Individual Interest from the Liberty Interest Analysis*

The paradigmatic example of the Supreme Court's state-authorization approach to prisoners' liberty interests was *Meachum v. Fano*. In *Meachum*, the Court found that any interest a prisoner had in being transferred from a medium-security facility to a maximum-security facility did not merit procedural protection under the Due Process Clause.[46] The Court reasoned that because the relevant regulations did not include sufficiently mandatory language constraining official discretion, the prison officials were free to transfer prisoners even if the transfer resulted in a substantial adverse impact.[47] Accordingly, the Court refused to require *Wolff*-type safeguards for prison transfers under the Massachusetts regulatory scheme.[48]

The *Meachum* Court harmonized its decision with *Wolff* on the grounds that the "liberty interest protected in *Wolff* had its roots in

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a prison sentence and allowable by virtue of a lawful conviction. As Professor Herman explains:

> It is only in circumstances where the state has the acknowledged substantive power to deprive an individual of a freedom we might recognize as "liberty" that procedural issues arise. For this reason, cases involving prisoners are the primary forum for discussion of procedural due process protection of liberty interests. With respect to prisoners, the state is generally acknowledged to have not only the power to restrict the forms of freedom listed above, but power over the quintessential freedom—freedom from physical restraint.

Herman, *supra* note 9, at 503 (footnote omitted).

44 *Id.* at 488-500. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (finding property rights of a student suspended from high school depended on the Court's analysis of state statutory scheme while a liberty interest was found with no reference to authorizing state law).

45 427 U.S. 215 (1976). Professor Herman places enough import in *Meachum*'s treatment of prisoners' liberty interest that she refers to it as "the *Meachum* doctrine." Herman, *supra* note 9, at 523.

46 *Meachum*, 427 U.S. at 223-24. *See* TRIBE, *supra* note 9, § 10-10, at 694-95; *see also* Olim v. Wakinekona, 461 U.S. 238, 244-48 (1983) (extending *Meachum* to interstate prisoner transfer even if it involves the inconvenience of great distance or an ocean crossing).

47 *Meachum*, 427 U.S. at 225 ("That life in one prison is much more disagreeable than in another does not in itself signify that a Fourteenth Amendment liberty interest is implicated when a prisoner is transferred to the institution with the more severe rules.").

48 *Id.* The Court rejected the notion that any substantial deprivation imposed by prison authorities triggers procedural due process protection, on the grounds that it would make the federal courts arbiter of a wide variety of discretionary decisions that have traditionally and correctly been in the purview of prison administrators. *Id.* at 224-25 (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)).

state law."[49] The Court reasoned by virtue of the prisoner's lawful conviction that prison administrators possessed the ability to adversely affect the prisoner's living conditions.[50] Convicted after a fair trial, "the criminal defendant has been constitutionally deprived of his liberty to the extent that the State may confine him and subject him to the rules of its prison system so long as the conditions of confinement do not otherwise violate the Constitution."[51] Under *Meachum*'s strict requirements, by constructing statutes conferring broad decisionmaking discretion on officials, a state "may eliminate any liberty interest, and thus escape any minimum procedures requirement, by statutory negation or by not specifying positive criteria for decision."[52] Thus, as long as the officials avoided trenching on interests protected directly by another constitutional provision (such as the First or Eighth Amendments to the Constitution), any quantum of harm was permissible as long as the state legislature had the foresight to draft vague regulations that avoided cabining the discretion of prison officials.

Despite its explicit disregard of the prisoners' interest in the liberty analysis, *Meachum*'s approach of requiring entitlements created by local positive law sources became the linchpin of the Court's liberty interest jurisprudence. As Professor Cynthia R. Farina describes, "once entitlement analysis became available as a way to think about liberty as well as property interests, its power as an analytic framework was almost irresistible."[53] However, the entitlements analysis had serious flaws. Under a strict entitlements analysis, a prisoner could invoke due process protections on relatively insignificant matters of prison regulation so long as the regnlatory language limiting the prison officials' discretion was mandatory. Because, under *Meachum*'s approach,

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49 *Id.* at 226. This analysis is applicable to the issue that was in front of the *Wolff* court, namely good-time credits, which were statutorily authorized. However, this does not extend to the protection necessary before imposing punitive confinement. *See* Herman, *supra* note 9, at 510-11.

50 The *Meachum* Court stated:

> [A]s we have said . . . prison officials [under the applicable state statutes] have the discretion to transfer prisoners for any number of reasons. Their discretion is not limited to instances of serious misconduct. As we understand it no legal interest or right of these respondents . . . would have been violated by their transfer whether or not their misconduct had been proved in accordance with procedures that might be required by the Due Process Clause in other circumstances. Whatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, it is too ephemeral and insubstantial to trigger procedural due process protections . . . .

Meachum, 427 U.S. at 228.

51 *Id.* at 224. Such "other" violations of the Constitution recognized by the Court in the prison context include the First, Eighth, and Fourteenth (Equal Protection Clause) Amendments. Sandin v. Conner, 115 S. Ct. 2293, 2302 n.11 (1995).

52 Rubin, *supra* note 6, at 1076; *see also* Tribe, *supra* note 9, § 10-10, at 695-97 (discussing the Court's unwillingness to extend liberty entitlements).

53 Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J. L. & FEMINISM 188, 193 (1991).

the severity of harm was irrelevant to the due process analysis,[54] courts were drawn into day-to-day management of prisons under the rubric of due process.[55] In response, the Supreme Court in *Kentucky Department of Corrections v. Thompson*[56] restricted the range of language that, through the state-authorization approach, could implicate due process concerns. The *Thompson* decision foreshadowed *Conner*'s narrowing of the state-authorization approach, the linchpin of the prisoner due process inquiry, by looking to the character of harm inflicted before the state-authorization approach can apply.

3. Kentucky Department of Corrections v. Thompson

By the time the Court handed down the *Thompson* opinion, the state-authorization approach had backfired. Although it had initially allowed the Court to avoid opening a Pandora's box of new rights through direct interpretations of the Due Process Clause in early cases like *Roth* and *Wolff*, it also caused the courts to become inundated with section 1983 suits filed by prisoners claiming that statutory and regulatory language, addressing seemingly unimportant issues, had created liberty interests.[57] The *Thompson* Court responded by heightening the mandatory language requirement for invoking a positive-law source for a liberty interest.

Thompson involved state and prison regulations that permitted prison officials to refuse to allow certain personal visitation rights to prisoners. The relevant statute enumerated a non-exhaustive list of situations where visitation privileges might be restricted.[58] Thus, under the *Meachum* approach, the Court should have found that the prison officials could not deny visitation privileges without some process. The Court, however, disagreed.

Although the *Thompson* Court did find that the underlying statutory language did create "substantive predicates" to guide the decisionmaker that had previously been sufficient to give rise to a liberty interest, the Court held that the language at issue did not satisfy the

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54 *See, e.g.*, Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461 (1989). As the *Thompson* majority observed:

> The fact that certain state-created liberty interests have been found to be entitled to due process protection, while others have not, is not the result of this Court's judgment as to what interests are more significant than others; rather, our method of inquiry in these cases always has been to examine closely the language of the relevant statutes and regulations.

Id.

55 *See Conner*, 115 S. Ct. at 2298 (state-authorization approach no longer required showing of "grievous loss").

56 490 U.S. 454 (1989).

57 *See supra* note 17 and accompanying text.

58 *Thompson*, 490 U.S. at 457 n.1 (quoting Commonwealth of Kentucky Corrections Policies and Procedures § 403.06 (1981)).

heightened standard necessary to implicate the Due Process Clause.[59] Under this newly heightened standard, in order to create a legitimate prisoner interest, the statutory language must have contained "relevant *mandatory language that expressly requires the decisionmaker to apply* certain substantive predicates in determining whether an inmate may be deprived of the particular interest in question."[60]

The *Thompson* decision was the Supreme Court's last word on the state-authorization approach prior to its decision in *Conner.* The Court recognized that its dependence on state positivist language had drawn the due process analysis away from focusing on the harm inflicted on the individual, and instead required federal courts to repeatedly sift through broad regulatory schemes for finite language intended to guide prison officials rather than to create enforceable prisoner rights.[61] The logical alternative was to limit the relevance of statutory language to the due process analysis and instead look to the interest of the individual. Although the Court consistently maintains that due process interests "may arise from two sources—*the Due Process Clause itself* and the laws of the States,"[62] the Court's interpretations of the Due Process Clause under the state-authorization doctrine seriously undermine the contention that prisoners can receive due process protections for many serious interests without relying on the state-authorization process.

C. The Supreme Court's post-*Wolff* Invocation of the Due Process Clause Itself as an Origin of Prisoners' Liberty Interests

As previously described, after *Wolff* the Supreme Court's prisoners' liberty interest analysis largely focused on the existence of positivist sources of state law to create liberty interests protected by due process.[63] Under *Meachum,* a "grievous harm" or a "substantial deprivation" alone was, in the Court's analysis, insufficient to trigger due process protection.[64] Prisoners attempting to directly invoke the Due Process Clause had to show that their confinement was so irregular that the "conditions or degree of confinement to which the prisoner [was] subjected [were not] *within the sentence imposed upon him.*"[65] This has proved a difficult burden.

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59 *Thompson,* 490 U.S. at 463-65.

60 *Thompson,* 490 U.S. at 464 n.4 (emphasis added).

61 *See* Sandin v. Conner, 115 S. Ct. 2293, 2299-2300 (1995).

62 Hewitt v. Helms, 459 U.S. 460, 466 (1983) (emphasis added).

63 *See supra* part I.B.

64 *See, e.g., Thompson,* 490 U.S. at 460 (quoting Meachum v. Fano, 427 U.S. 215, 224 (1976)).

65 Montayne v. Haymes, 427 U.S. 236, 242 (1976) (emphasis added); *see* Hewitt v. Helms, 459 U.S. 460, 468 (1983) (no process due if deprivation "is well within the terms of

There are only two post-*Wolff* decisions in which claimants satisfied the "within the sentence" test and got the Court to enunciate liberty interests originating in the Due Process Clause itself. These cases are *Vitek v. Jones*[66] and *Washington v. Harper*.[67] In both cases, however, the Supreme Court preceded its discussion of the Due Process Clause's direct invocation with extensive discussions of procedural due process protections required by the state-authorization approach.[68]

In *Vitek*, the Court found that a Nebraska state prisoner had a liberty interest rooted in state law against being transferred involuntarily to a mental hospital. After finding an interest worthy of protection under the state-authorization approach, the Court went on to find that the Due Process Clause itself required procedures before such a transfer could occur. The Court found that the additional restrictions on the prisoner's containment coupled with the "stigmatizing consequences of a transfer to a mental hospital" infringed the residuum of liberty, recognized in *Morrissey*, that the prisoner retained subsequent to a lawful conviction.[69] The Court explained that such an imposition "visited on the prisoner [is] *qualitatively different* from

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confinement ordinarily contemplated by a prison sentence."); *see also Thompson*, 490 U.S. at 460-61 (citing *Hewitt* and *Meachum*).

Justice Marshall in his dissent in *Thompson* criticized the "within the sentence" approach to direct interpretations of the Due Process Clause. He referred to the test as vague because "a typical prison sentence says little more than that the defendant must spend a specified period of time behind bars. . . . [I]n practice this [standard] crystallizes only on those infrequent occasions when a majority of the Court happens to say so." *Id.* at 460-67 (Marshall, J., dissenting).

As discussed below, *see infra* part III, the *Conner* decision's "atypicality" standard appears to implement the same character of vague, restrictive standards as a threshold to rights authorized "by the laws of the States." This added threshold makes sense as a barrier to invoking state positive law as a source of interests worthy of protection because such sources are often intended merely to provide guidance rather than mandate conduct. However, this Note argues that the limitation of the state-authorization approach necessitates that the "within the sentence" test should no longer pose a barrier to direct readings of the Due Process Clause itself. The Court, before *Conner*, had used the state-authorization approach as a vehicle to provide due process protection without engaging in the difficult task of directly interpreting the Due Process Clause. Now that it has abandoned this crutch, the Court must retool its due process inquiries to focus on the "grievous loss" inflicted on individual prisoners regardless of whether the character of the harm is one that is *possibly* conceivable under the "within the sentence" standard.

66 445 U.S. 480 (1980).

67 494 U.S. 210 (1990).

68 *Harper*, 494 U.S. at 219-21; *Vitek*, 445 U.S. at 488-90. *See also* Farina, *supra* note 53, at 193 n.19 (noting that in both *Vitek* and *Harper* the Court "first identifies in detail a state law liberty entitlement" before adding "a cursory assurance that the Due Process Clause itself also generates a liberty interest.").

69 *Vitek*, 445 U.S. at 491-94. The Court took specific notice in this discussion that the prisoner had heen convicted of robbery. *Id.* at 491. The Court does not refer to the character of the offense or the duration of the sentence as relevant to its analysis under the Due Process Clause. However, as discussed *infra* note 124 and accompanying text, the *Conner* Court took specific notice of Conner's underlying offenses and the duration of his sen-

the punishment *characteristically suffered* by a person convicted of crime."[70]

Harper, like *Vitek*, involved treatment of prisoners for mental illness. *Harper* dealt with the administration of antipsychotic medication. The *Harper* Court began its analysis by finding that the relevant state law "undoubtedly confer[red] . . . a right to be free from the *arbitrary* administration of antipsychotic medication."[71] Although the Court found that Harper had a liberty interest created by state law, the Court found that the procedures prescribed by that law were sufficient and complied with in the instant case.[72] The Court continued its analysis by stating "[w]e have no doubt that, *in addition to* the liberty interest created by the State's Policy, [Harper] possesses a significant liberty interest . . . under the Due Process Clause of the Fourteenth Amendment."[73] However, the Court found that "the Due Process Clause confers upon respondent no greater right than that recognized under state law."[74] Thus, Harper had received all the process due.

In determining that Harper had a liberty interest cognizable under both the state-authorization approach and the Due Process Clause itself but which did not require any procedural protections beyond those prescribed by the state law, the Court evaluated the prisoner's right "in the context of the inmate's confinement."[75] The Court determined that the state's statutorily prescribed procedures properly recognized "both the prisoner's medical interests and the State's interests, [thus] meet[ing] the demands of the Due Process Clause."[76]

Thus, in both instances where the Court read the Due Process Clause itself as requiring procedural protections in the prison context, it did so while relying heavily on a state-authorization analysis. In both *Vitek* and *Harper*, the deprivations at issue were related to mental

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tence in its analysis. It is an open question whether due process varies by duration of sentence and character of underlying offenses.

70 *Vitek*, 445 U.S. at 493 (emphasis added). As discussed *infra* part III.C, the application of a true "qualitatively different" standard might aid the Court in its evaluation of prisoner deprivations under the Due Process Clause.

71 *Harper*, 494 U.S. at 221 (emphasis added) (citing Hewitt v. Helms, 459 U.S. 460, 471-72 (1983)).

72 *Id.* at 221-22.

73 *Id.* at 221.

74 *Id.* at 222.

75 *Id.*

76 *Id.* at 222-23. Upon finding a liberty interest worthy of protection, the *Harper* Court concentrated on the evaluation of the constitutionality of the state regulations. *See id.* at 223-28. Because this Note argues that liberty interests should largely be grounded in the inherent liberty of the individual independent of the existence of state regulations, this analysis is irrelevant to the subject matter of this Note and is therefore excluded from discussion.

health. Further, the Court reserved direct readings of the Due Process Clause to those instances it deemed inherently unrelated to regularly imposed penal confinement. For more ordinary punishments, such as disciplinary confinement and disciplinary revocation of privileges, the Court has refused to rely directly on the Due Process Clause and instead has relied on the state-authorization approach. No decision of the Court suggests that, in the absence of a state-authorization approach, prisoners would be able to invoke due process protection for even extreme or arbitrary deprivations of these rights because such deprivations, in the Court's view, are "well within the terms of confinement ordinarily contemplated by a prison sentence."[77] Under this framework, *Conner*'s drastic limitation of the state-authorization approach may exact dramatic and inherently unjust consequences on prisoners' rights.

D. Summary of General Overview

The Court's approach to procedural due process was transformed during the 1970s.[78] The Court's early approach, reaching its pinnacle in *Goldberg*, found interests protected by due process through a balancing of individual and state interests. This balancing approach could create interests based solely on the degree of potential harm to an individual's interests.[79] This expansive approach invited a flood of litigation which prompted the Court to shift to a positivist methodology. Under this new positivist approach, grievous harm alone no longer implicated the Due Process Clause. Instead, a person seeking due process protection had to show a "mutually explicit understanding" to support a liberty or property right.[80] The most commonly recognized source of these understandings was the positive-law embodied in state enactments.[81]

Although the positivist approach allowed federal due process guarantees to vary depending on a particular state's law, the Court, following *Wolff*, repeatedly applied it to prisoner due process issues. In *Thompson*, the Court responded to the flood of challenged state statutes and regulations by restricting the type of language that could create the "understanding" necessary to invoke due process protection. The Court strayed from the state-authorization approach to find protected interests in the Due Process Clause itself in only a few ex-

77 Hewitt v. Helms, 459 U.S. 460, 468 (1983); *see also* Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460-462 (1989) (detailing the limited direct readings of the Due Process Clause that the Court has been willing to undertake and the interest-neutral nature of the state-authorization approach).

78 *See supra* part I.A.

79 *See supra* part I.A.

80 *See supra* part I.C.

81 *See supra* part I.C.

treme instances. Even in these limited instances, the Court found a concurrent state-authorized liberty interest before commencing a Due Process Clause analysis.[82] Thus, the Court avoided creating a body of law whose due process vitality drew its origin from the Due Process Clause itself by instead reviewing state positive law sources. The *Conner* decision, which dramatically limits the applicability of the state-authorization approach, potentially leaves prisoners without any source of viable precedent to draw upon in making a due process claim against prison officials.

II
SANDIN V. CONNER

A. Facts and Procedural Background

The facts surrounding Conner's section 1983 claim provided the Supreme Court with an ideal opportunity to overturn nearly twenty years of unquestioned precedent that spawned from dictum in *Wolff* that recognized a liberty interest, protected by the Due Process Clause, in a prisoner's right to remain free from punitive confinement.[83] DeMont Conner was convicted of murder, kidnaping, robbery, and burglary.[84] Conner received an indeterminate sentence of thirty years to life and was housed in Hawaii's Halawa Correctional Facility, a maximum security state prison.[85]

The relevant incident occurred in August of 1987. Following subjection to a strip search, which included an inspection of the rectal area, Conner directed angry and foul language at the inspecting prison officer. Eleven days later, Conner received notice that he had been charged with disciplinary infractions. The charges included " 'high misconduct' for using physical interference to impair a correc-

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82 *Id.*

83 Even both dissenting opinions take the position that Conner in this instance did not appear to be denied the process that was due. The only right under *Wolff* denied to Conner was the qualified right to call witnesses. As discussed *infra* text accompanying notes 214-17, a call for witnesses may be properly refused when the projected testimony is not relevant to the matter in controversy. This was the factual determination made by the district court. *See Conner*, 115 S. Ct. at 2303-04 (Ginsburg, J., dissenting). Additionally, Conner himself, upon being released from punitive confinement, requested to be put into protective custody which has some similarities to the conditions of punitive confinement. The majority noted this fact in its holding. *See infra* note 124.

84 *Conner*, 115 S. Ct. at 2295. As discussed *infra*, the *Conner* majority may have weighed the character of Conner's original sentence in evaluating his due process interests. Such an analysis places too many variables in the due process calculus. This Note argues, *infra* part III.B, that prisoners' rights should depend on the treatment of prisoners in general, and not rest on finite distinctions between initial sentences.

85 *Conner*, 115 S. Ct. at 2295.

tional function, and 'low moderate misconduct' for using abusive or obscene language and for harassing employees."[86]

Conner's disciplinary hearing occurred on August 28, 1987. The committee refused Conner's request to present witnesses at the hearing. Under Hawaii's disciplinary hearing statutes, a disciplinary committee is bound to make a finding of guilt if the charge is supported by "substantial evidence."[87] The committee found Conner guilty and sentenced him to the statutory maximum of thirty days in disciplinary segregation in the Special Holding Unit for the high misconduct charge, and four hours segregation for each of the remaining charges, to be served concurrently with the primary sentence.[88]

Conner sought administrative review within fourteen days of the committee's decision as prescribed by Hawaii's statutes.[89] Before the

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86 *Id.* at 2295-96.

87 The full text of the pertinent regulation reads:

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

Haw. Admin. Rule § 17-201-18(b)(2) (1983) (emphasis added). As discussed *infra* part II.B, despite the mandatory character of the regulation's language on this matter, *Conner*'s holding suggests that prison officials could impose punitive segregated confinement based on silence alone. Furthermore, a plain reading of *Conner*'s holding indicates that punitive confinement could be imposed *ex parte.* Because there is no liberty interest, no process is due before punishment is imposed.

88 *Conner*, 115 S. Ct. at 2296. It is important to note that the maximum sentence was a finite time. Other states allow infractions classified as "high misconduct" under the Hawaii statutory scheme to be punished with sentences of a much longer duration. The Court's opinion does not address this fact. The language of the opinion indicates that duration of the confinement is irrelevant to the existence of a liberty interest that triggers due process protection.

This case is also unusual in that the sentencing committee did not remove good-time credits as part of Conner's sentence. Good-time credit removal usually occurs hand-in-hand with the imposition of punitive confinement. The absence of good-time credits from this case enabled the Court to sever the liberty interest created by footnote 19 of *Wolff* in disciplinary hearings resulting in punitive confinement, *see supra* note 39 and accompanying text, from the remainder of the case. As discussed *infra*, the Court does not address the problem underlying footnote 19 of the *Wolff* decision—that the due process required in a hearing where the issue of whether good-time credits are to be removed can only be decided after the committee finds the prisoner guilty. If the answer is yes, then states will have to provide due process procedures under *Wolff* whenever they anticipate the possibility of removing good-time credits as a punitive sentence, whether they are ultimately removed or not. Both the imposition of disciplinary confinement and the removal of good-time credits usually stem from the same disciplinary hearing. Thus, in states that do remove good-time credits, some prisoners will receive *Wolff* rights in hearings that only result in the imposition of disciplinary confinement. *See generally* Babcock, *supra* note 4 (discussing state regulations that are interpreted as giving rise to *Wolff* protections).

89 *Conner*, 115 S. Ct. at 2296. *See also* Haw. Admin. Rule § 17-201-20(a) (1983). As discussed *infra* part II.B, the Court has eliminated the liberty interest created by footnote

deputy administrator could review the guilty finding on the high misconduct charge,[90] Conner filed a complaint under 42 U.S.C. § 1983 seeking injunctive relief, declaratory relief, and damages for, among other things, a deprivation of procedural due process. The district court granted summary judgment in favor of the prison officials.[91]

The United States Court of Appeals for the Ninth Circuit reversed the district court judgment. The court, following *Thompson's* reasoning, found that the Hawaii prison regulations created a nondiscretionary duty to refrain from imposing disciplinary confinement on prisoners without an admission of guilt or presentation of substantial evidence.[92] Having found a state-authorized liberty interest in a disciplinary hearing resulting solely in solitary confinement, the Court of Appeals held that Conner should have been afforded the pre-deprivation procedures enunciated in *Wolff*.[93]

The Supreme Court, in a 5-4 opinion authored by Chief Justice Rehnquist, reversed.[94] The Court could have reversed the court of appeals by concluding that the relevant Hawaii regulations did not satisfy the heightened mandatory language requirement necessary under *Thompson* to create a liberty interest.[95] However, the Court instead chose to eliminate the issue at hand by vastly narrowing the availability of the state-authorization approach, which had served as the core of prisoner due process for the prior twenty years.

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19 of the *Wolff* decision. If, however, this result is overturned in the future, it is an open question what curative effects a timely administrative review would have on a prisoner's post-deprivation section 1983 suit. *See, e.g.*, Walker v. Bates, 23 F.3d 652, 660 (1994) (Mahoney, J., dissenting) (suggesting that a timely post-deprivation administrative review should, as sound public policy, be construed as eliminating an injury for the purpose of section 1983 suits).

90 "[T]he deputy administrator found the high misconduct change unsupported and expunged Conner's disciplinary record with respect to that charge." *Conner*, 115 S. Ct. at 2296. However, the appeal occurred nine months after the initial appeal and well after Conner had completed his 30 day maximum sentence in punitive confinement. *Id.*

91 *Id.*

92 *Id.* at 2296-97.

93 *Id.* at 2297; *see also supra* part I.B.1.

94 Justices O'Connor, Scalia, Kennedy, and Thomas joined the majority opinion. There were two separate dissents. One was by Justice Ginsburg with Justice Stevens joining. The other was by Justice Breyer with Justice Souter joining.

95 The court of appeals drew a negative inference from the language that stated "disciplinary action *shall* be based upon more than mere silence. A finding of guilt shall be made where: (1) The inmate or ward admits the violation or pleads guilty. (2) The charge is supported by substantial evidence." Haw. Admin. Rule § 17-201-18(b)(2) (1983) (emphasis added). Under a strict state-authorization reading, the only right apparently created is the right against imposition of punishment for mere silence. The two enumerated reasons that follow could be construed as requiring punishment when present, but not as necessary elements for punishment. In other words, the statute does not address the issue of whether punishment can be imposed on evidence that falls somewhere between silence and substantial evidence.

B. Majority's Analysis: The Evisceration of the State-Authorization Approach

1. *Treatment of Prior Precedent*

The Court conducted a review of the state-authorization approach's history in the context of prison liberty interests. Its analysis began with *Wolff v. McDonnell.* The Court described *Wolff*'s recognition of a prisoner's entitlement to state-authorized good-time credits as grounded in the fact that the interest was one of "'real substance.'"[96] The Court next discussed *Meachum*,[97] which it described as providing a fuller treatment of liberty interests than *Wolff.* The Court noted that dicta from *Meachum* enhanced the primacy of state law in the due process inquiry. The Court elaborated, saying that "by focusing on whether state action was mandatory or discretionary, the Court in later cases [put] ever greater emphasis on this somewhat mechanical dichotomy."[98] The Court described the transformation of this dichotomy into practice as coming to "full fruition" in *Hewitt v. Helms.*[99]

In *Hewitt*, the Court found that Pennsylvania prison regulations had mandatory predicates sufficient to create a liberty interest in a prisoner's right to remain free from administrative process.[100] The *Conner* majority began its discussion of *Hewitt* by reiterating its rejection of an inmate's right to stay within the general prison population under the Due Process Clause as applied through the "within the sentence" standard discussed in *Thompson.*[101] The *Conner* majority identified *Hewitt* as the point at which the state-authorization approach derailed:

> Instead of looking to whether the State created an interest of "*real substance*" comparable to the good time credit scheme of *Wolff*, the

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96 *Conner*, 115 S. Ct. at 2297 (internal citations omitted) (quoting Wolff v. McDonnell, 418 U.S. at 557 (1976)) (emphasis added). The *Conner* Court characterized as dicta language in *Wolff* that, in a footnote, authorized procedural due process protection for disciplinary hearings resulting in disciplinary confinement. *Conner*, 115 S. Ct. at 2301; *Wolff*, 418 U.S. at 571 n.19; *see also* discussion *infra* part III.D.

97 427 U.S. 215 (1976).

98 *Conner*, 115 S. Ct. at 2298.

99 *Id.* The Court first addressed Greenholtz v. Inmates of Nebraska Penal Correctional Complex, 442 U.S. 1 (1979). *Greenholtz* involved a discretionary parole scheme where a state statute set discretionary parole dates at the time of the minimum term of imprisonment, minus any expired good-time credits. The statute ordered release of prisoners unless one of four specific conditions were shown. *Id.* at 11. The *Greenholtz* majority, according to the *Conner* opinion, "accepted the inmates' argument that the word 'shall' in the statute created a legitimate expectation of release absent the requisite finding that one of the justifications for deferral existed." *Conner*, 115 S. Ct. at 2298.

100 459 U.S. 460, 472 (1983). Justice Stevens, in dissent, criticized the majority's dismissal of the harm inflicted as irrelevant to the liberty interest analysis. *Id.* at 482 (Stevens, J., dissenting).

101 *Conner*, 115 S. Ct. at 2298; *see supra* part I.B.3 (discussing *Thompson*'s treatment of *Hewitt*'s "within the sentence imposed" standard).

> [*Hewitt*] Court asked whether the State had gone beyond issuing mere procedural guidelines and had used "language of an unmistakably mandatory character" such that the incursion on liberty would not occur "absent specified substantive predicates."[102]

The Court criticized the state-authorization approach's application, after *Hewitt*, as no longer hinging procedural due process rights on a showing of a "'grievous loss'."[103] The *Conner* majority noted that this predicament has forced courts to wrestle "with the language of intricate, often rather routine prison guidelines to determine whether mandatory language and substantive predicates created an enforceable expectation that the state would produce a particular outcome with respect to the prisoner's conditions of confinement."[104] As a result, prisoners were "encouraged . . . to comb regulations in search of mandatory language on which to base entitlements to various state-conferred privileges."[105]

The Court noted that the state-authorization approach as applied in *Hewitt* confused the lower courts and caused them to draw "negative inferences from the mandatory language in the text of prison regulations."[106] Although the Court conceded that such interpretative methods "may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public,"[107] it distinguished prison regulations by stating that they are "primarily designed to guide correctional officials in the administration of a prison."[108] The Court noted that the state-authorization approach to prisoner liberty-interest jurisprudence was particularly onerous in light of its use in negative-implication jurisprudence where the liberty interest depends on statutory authorization, but the procedures due are determined independently by the courts.[109]

The Court next identified two undesirable effects produced by *Hewitt*'s removal of a grievous harm requirement from the creation of

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102 *Conner*, 115 S. Ct. at 2298 (quoting *Hewitt*, 459 U.S. at 471-72).

103 *Conner*, 115 S. Ct. at 2298 (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

104 *Id.* The Court cited *Olim* and *Thompson* as specific examples of what it considered a misguided state-authorization approach. *Id.* at 2299.

105 *Id.* at 2299.

106 *Id.*

107 *Id.*

108 *Id.*

109 *Id.*; *see also* Mathews v. Eldridge, 424 U.S. 319 (1976) (describing 3-step balancing procedure to determine what process is due under the Due Process Clause once a liberty or property interest has been identified). This portion of the opinion may be a subtle revival of Justice Rehnquist's plurality opinion in Arnett v. Kennedy, 416 U.S. 134 (1974). In that case, Justice Rehnquist argued that if the origin of a liberty or property interest originates from a statutory scheme, then the process due should also be drawn from that statute. This so-called "bitter with the sweet" approach was never adopted by a majority of the Court.

due process interests.[110] The first danger purportedly created by the state-authorization approach was that it discouraged states from codifying prison management procedures in the interest of uniform treatment.[111] As the majority theorized, "States may avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel."[112]

The second danger that the Court saw as stemming from *Hewitt*'s approach was the involvement of federal courts in the day-to-day management of prisons.[113] The *Conner* majority observed that the state-authorization approach, relying on mandatory language in state statutes and regulations as the primary source of protected liberty interests, had drawn the federal courts into the management of minute and seemingly insignificant issues of prison life.[114] In light of these concerns, the Court prescribed a new foundational requirement to be met before state positive-law sources may give rise to interests requiring due process protections.

2. *The Addition of the "Atypicality" Foundational Requirement to the State-Authorization Approach*

The Court's new positivist approach to defining prisoner liberty interests began with a call to return to the precepts forwarded in *Wolff* and *Meachum*.[115] Retaining some portion of the state-authorization

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110 *Conner*, 115 S. Ct. at 2299-2300.

111 There is some sense to this notion. Commentators from all sides have criticized the state-authorization approach. *See* Herman, *supra* note 9, at 528-74; Rubin, *supra* note 6, at 1082-1131. However, the Court's decision to virtually abandon looking to positive-law sources for liberty interests leaves two basic alternatives. The first is to recognize that the Court is unwilling to intrude, to any meaningful extent, on prison administration in order to find due process rights. The second is to recognize that the prisoner's retained liberty has substantive meaning and to recognize rights originating from the Due Process Clause itself. This is the approach taken by the dissenting justices in *Conner*, *see infra* part II.C.1 & 2, and is eloquently described by Justice Marshall in his dissent to *Thompson*, *see infra* part III.B.

112 *Conner*, 115 S. Ct. at 2299. The Court's concern with the State's ability to displace liberty interests seems misplaced here because its ultimate holding still allows state-authorization, but merely imposes an additional "atypical" harm requirement.

113 *Id.*; *see also Hewitt*, 459 U.S. at 470-71; *Wolff*, 418 U.S. at 561-63.

114 *Conner*, 115 S. Ct. at 2299-2300 (providing a shopping list of cases where the federal courts have been drawn into day-to-day prison management under the gnise of the Due Process Clause because of mandatory state regulatory langnage).

115 *Id.* at 2300. The Court noted that its abandonment of "Hewitt's methodology" did not "technically" overrule any of its prior holdings. The Court specifically noted that in *Wakinekona* and *Thompson* it did not find a liberty interest, and in *Hewitt* the Court determined that the prisoner had received all the process due. *Id.* at n.5. The dictum of *Wolff*'s footnote 19 notwithstanding, this contention seems a little misguided given that the issues were decided on a state-authorization basis. The Court never reached a pure Due Process inquiry in those cases. It does seem clear, however, under *Conner*'s heightened standard combined with the Court's past rejections of rights emanating from the Due Process Clause itself, that the present Court would not have found a liberty interest in any of those cases.

approach, the Court recognized that "States may under certain circumstances create liberty interests which are protected by the Due Process Clause."[116] However, the Court noted that these instances were generally limited to "freedom from restraint, which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force, nonetheless imposes *atypical and significant* hardship on the inmate in relation to the *ordinary incidents* of prison life."[117]

The Court rejected Conner's assertion that "any state action taken for a *punitive* reason encroaches upon a liberty interest under the Due Process Clause even in the absence of a state regulation."[118] Reiterating its boilerplate language from previous decisions that prisoners do not sacrifice all constitutional privileges at the prison gate, but do suffer a retraction of such benefits " 'justified by the considerations underlying our penal system,' "[119] the Court rejected Conner's claim because his punitive confinement "did not present the type of *atypical, significant* deprivation in which a state might conceivably create a liberty interest."[120] The Court offered no citation or example of what an "atypical, significant deprivation" or the "ordinary incidents

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116 *Conner*, 115 S. Ct. at 2300 (citing Board of Pardons v. Allen, 482 U.S. 369 (1987)).

117 *Id.* (emphasis added) (citing Vitek v. Jones, 445 U.S. 480 (1980) (involving transfer to mental institution); Washington v. Lee, 494 U.S. 210 (1990) (holding that independent of any state-authorized interest, prisoner had interest in remaining free of involuntary administration of psychotropic drugs)). This approach was argued before, but not decided by the Court, in *Thompson*. Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 461 n.3 (1989).

Thus, under the Court's analysis, there are two ways in which the prisoner can suggest that a liberty interest exists. The first is a state-authorized right, generally limited from freedom from "restraint," that it is so unexpected that it is not within the sentence imposed. The second stems from the Due Process Clause itself. Regarding the first avenue, as Justice Marshall noted in his dissent in *Thompson*, *see infra* note 162 and accompanying text, the "within the sentence" standard is so vague that if broadly construed, it gives the Court free-wheeling discretion to find or deny liberty interests without any analysis of the degree of loss to the prisoner or the arbitrariness of the treatment. The "freedom from restraint" line that the *Conner* Court draws seems to bear Justice Marshall's fears out. As to the second avenue, the Court, while recognizing a residuum of liberty that a prisoner retains upon entering prison, *see supra* note 88, has yet to identify a situation where it is implicated.

118 *Conner*, 115 S. Ct. at 2300 (emphasis added). The Court refused this contention as a flat rule. What the Court does not address is whether the punitive character of a deprivation has any effect on the liberty interest calculus. As discussed *infra* part III.D, an approach that would take into account the degree of harm and whether it has the effect of stigmatizing the prisoner by singling him out for punishment should affect the due process analysis. In such an analysis, state statutes or regulations would be relevant to determining the arbitrariness of the action or the amount of stigma that results, but would neither be a necessary nor determinative factor.

119 *Conner*, 115 S. Ct. at 2301 (quoting Jones v. North Carolina Prisoners Labor Union, 433 U.S. 119, 125 (1977) (quoting Price v. Johnson, 334 U.S. 266, 285 (1948))).

120 *Id.* at 2301 (emphasis added).

of prison life" might entail.[121] However, the Court's analysis of Conner's claim indicated that it would not look to state law to implicate due process concerns unless the deprivation at issue is so uncharacteristic that it is beyond what a prisoner would expect upon being sentenced to prison. The degree of harm or arbitrariness of treatment, considered irrelevant by *Meachum*,[122] remained outside of the Court's analysis under the "atypicality" standard because that standard looks to the general character of the confinement rather than to any detrimental effects of individual applications.[123] Thus, as long as a punishment is constitutionally permissible in some circumstances, the irrationality or arbitrariness of a specific application appears irrelevant under an atypicality analysis.

The Court examined Hawaii's confinement regulatory scheme in its entirety in determining that Conner's confinement did not satisfy this new "atypicality" standard. The majority observed, "at the time of Conner's punishment, disciplinary segregation, with *insignificant exceptions*, mirrored those conditions imposed upon inmates in administrative segregation and protective custody. . . . Thus, Conner's confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction."[124] Under this analysis, the Court concluded that the conditions of Conner's confinement were not so "atypical" as to create a liberty interest.[125] Having deter-

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121 Although the Court does not cite any case in support of its new "atypicality" standard, it appears to draw upon the "within the sentence" standard from *Montayne*, relied upon by the majority in *Thompson*, *see supra* note 65. As argued *infra*, the vagueness of initial convictions should render them inadequate as the foundation of procedural due process interests. If the Court is to give any real meaning to prisoners' procedural due process, it must look to the individual's interest. Although this is decreased by an initial conviction, it is not obliterated by it. *See* discussion *infra* notes 195-99 and accompanying text.

122 *See supra* note 54.

123 *See* discussion *supra* part I.B.2.

124 *Conner*, 115 S. Ct. at 2301 (emphasis added). The Court did not indicate what result would be reached if punitive confinement were the only type of segregative confinement authorized. Indeed, the Hawaii administrative confinement regulations had been repealed by the time the *Conner* opinion was written. *Id.* at n.7. If the state segregative scheme is essential in making a liberty interest determination, then the Court's opinion seems to leave liberty interests well within the manipulation of state legislators. State legislators, in order to defeat a possible liberty interest in prisoners housed in punitive confinement, could create discretionary administrative confinements that would dilute the prisoners' interests.

The dissenting opinions, discussed *infra* part II.C, take issue with the majority's minimalization of the differences between punitive confinement, segregative confinement, and protective confinement.

125 The Court noted that Conner himself requested that he be placed in protective custody after he had been released from disciplinary segregation. The Court stated that although "a prisoner's subjective expectations [are not] dispositive of the liberty analysis, it does provide some evidence that the conditions suffered were expected within the contour of the actual sentence imposed." *Conner*, 115 S. Ct. at 2301 n.9. As the dissent argues, *see infra* notes 128-29, there is a distinction between protective custody and punitive confine-

mined that "neither the Hawaii prison regulation in question, nor the Due Process Clause itself,"[126] created any liberty interest, much less one deserving the protections of *Wolff*, the Court concluded that the regime to which Conner was subjected was "*within the range of confinement* to be *normally expected* for one serving an indeterminate term of 30 years to life."[127]

C. The *Conner* Dissents

1. *Justice Ginsburg's Dissent*

Justice Ginsburg, with Justice Stevens joining, dissented from the majority's holding that the Due Process Clause *itself* did not provide Conner a liberty interest meriting Due Process protections. According to Justice Ginsburg, "[d]isciplinary confinement as punishment for 'high misconduct' not only deprives prisoners of privileges for protracted periods; unlike administrative segregation and protective custody, disciplinary confinement also *stigmatizes them and diminishes parole prospects.*"[128] Further, Justice Ginsburg maintained that this stigmatizing effect required due process protection. Justice Ginsburg rejected the majority's contention that because the State expunged Conner's record, it removed any long-term consequences that might have implicated a liberty interest at the initial disciplinary hearing. Justice Ginsburg reasoned, "One must, of course, know at the start the character of the interest at stake in order to determine *then* what process, if any, is constitutionally due. 'All's well that ends well' cannot be the measure here."[129]

Justice Ginsburg completely rejected the state-authorization approach. She noted that such a practice puts constitutional rights in

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ment, and the expungement procedure is irrelevant to the due process analysis. Furthermore, as discussed *infra* note 200 and accompanying text, hinging an individual's liberty interest on the entirety of a prison regulation scheme causes the availability of protections to vary from state-to-state and remain in the purview of the state legislature instead of the courts.

126 *Conner*, 115 S. Ct. at 2302.

127 *Id.* (emphasis added). This last sentence, as discussed more fully, *infra* part III.A, raises some interesting questions. If a prisoner really expects to spend a thirty day period in solitary confinement without any pre-deprivation process, when does that expectation fade? What if the original sentence is only for 30 days and it is spent entirely in solitary confinement? What if there are consecutive punitive sentences for multiple disciplinary violations? It seems that, under the Court's reasoning, there could be an endless chain of arbitrary sentences without any process until the sentences affected the timing of a prisoner's ultimate release from prison. This narrow reading of state-authorization, combined with the high burden placed on prisoners to directly invoke the Due Process Clause, leave the prisoner without any due process for some potentially serious and stigmatizing deprivations of interests. *See infra* part III.C.

128 *Conner*, 115 S. Ct. at 2302-03 (Ginsburg, J., dissenting) (emphasis added) (citing Meachum v. Fano, 427 U.S. 215, 234-235 (1976) (Stevens, J., dissenting)).

129 *Id.* at 2303 n.1 (Ginsburg, J., dissenting).

the hands of state legislators and encourages vague statutes and regulations designed to avoid constitutional scrutiny, instead of tightly cabining prison officials' discretion to provide guidance in prison administration.[130] Justice Ginsburg also criticized the approach as rendering constitutional liberty interests dependent on the strength of a particular positive law source. She criticized such a result as "not resembl[ing] the 'Liberty' enshrined among 'unalienable Rights' " with which all persons are " 'endowed by their Creator.' "[131] Justice Ginsburg questioned whether there could ever be a violation satisfying the "atypicality" requirement that did not simultaneously violate the Due Process Clause directly. She noted that the majority offered no examples where this might occur, and accordingly left "consumers of the Court's work at sea, unable to fathom what would constitute an 'atypical, significant deprivation,' and yet not trigger protection under the Due Process Clause."[132]

2. *Justice Breyer's Dissent*

Justice Breyer, joined by Justice Souter, wrote an extensive dissent disagreeing with the majority's findings on both the state-authorization approach, and stressing the importance of preventing arbitrary, punitive confinements which, he argued, should trigger inherent protections from the Due Process Clause itself.

a. *Justice Breyer's Disagreement with the* Conner *Majority's Holding*

Justice Breyer began his dissent by reviewing the Court's previous two-pronged approach to prison liberty analysis. As he recounted, "this Court traditionally has looked either (1) to the nature of the deprivation (how severe, in degree or kind) or (2) to the State's rules governing the imposition of that deprivation (whether they, in effect, give the inmate a 'right' to avoid it)."[133] On the *Conner* facts, Justice Breyer believed a liberty interest existed under both prongs.

Justice Breyer determined that under existing precedent, Conner's confinement represented a "fairly major change" in Conner's conditions and therefore amounted to a deprivation of a constitutional liberty interest irrespective of state law.[134] However, Justice

130 *Id.* at 2303 (Ginsburg, J., dissenting).

131 *Id.* (quoting the Declaration of Independence) (citing Meachum v. Fano, 427 U.S. 215, 230 (1976) (Stevens, J., dissenting)) (" '[T]he Due Process Clause protects [the unalienable liberty recognized in the Declaration of Independence] rather than the particular rights or privileges conferred by specific laws or regulations.' ").

132 *Conner*, 115 S. Ct. at 2303 n.2 (Ginsburg, J., dissenting).

133 *Id.* at 2304 (Breyer, J., dissenting) (citing Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460-61, 464-65 (1989)).

134 *Id.* at 2305.

Breyer also interpreted the regulations as sufficiently cabining the authority of the officials to create a state authorized liberty interest. Under Justice Breyer's interpretation, the Hawaii prison rules "(1) impose[d] a punishment that is substantial, (2) restrict[ed] its imposition as a punishment to instances in which an inmate has committed a defined offense, and (3) prescribe[d] nondiscretionary standards for determining whether or not an inmate committed that offense."[135] Justice Breyer argued that where these factors are present, the pre-*Conner* procedural due process doctrine enabled the court to determine whether a right was substantial enough to require procedural protections. In his view, therefore, a drastic change of the state-authorization approach was unnecessary.

b. *Argument for Retaining the "Cabining of Discretion" Test for Defining Liberty Interests*

Justice Breyer addressed what he perceived as the majority's chief concern prompting the articulation of the atypicality standard: the federal courts' involvement in the day-to-day management of prisons through constitutional due process review of "trivial" rights.[136] While agreeing with the majority's concern, Justice Breyer disagreed with the majority's imposition of "atypicality" as a foundational requirement to establishing a liberty interest. Justice Breyer explained that if the new requirement was meant as a radical change to prior law, "its generality threatens the law with uncertainty, for some lower courts may read the majority opinion as offering significantly less protection against deprivation of liberty, while others may find in it an extension of protection to certain 'atypical' hardships that preexisting law would not have covered."[137]

Justice Breyer presented three sets of considerations to support his conclusion that a vast revision of the state-authorization approach was unnecessary. He divided privileges sought by prisoners to be covered by the state-authorization approach into three categories: (1) interests that invoke the Due Process Clause in the absence of positive state law cabining discretion;[138] (2) "a broad middle category of imposed restraints or deprivations that, considered by themselves, are

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135 *Id.* at 2305-06.

136 *Id.* at 2306.

137 *Id.* It is doubtful in reality that lower courts would construe the *Conner* majority opinion as expanding prisoner rights in any area. In fact no reported lower court decision in the aftermath of *Conner* has held that the "atypicality" standard has expanded prisoner rights while many have interpreted the decision as representing a dramatic cutback on prisoner due process. *See infra* note 167.

138 *Conner*, 115 S. Ct. at 2306 (Breyer, J., dissenting) (citing Vitek v. Jones, 445 U.S. 480, 491-94 (1980); Washington v. Harper, 494 U.S. 210, 221-22 (1990); Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

neither obviously so serious as to fall within, nor obviously so insignificant as to fall without, the [Due Process] Clause's protection";[139] and (3) matters that happen to be the subject of prison regulations that are so insignificant as to be lawful within the context of prison confinement.[140]

Justice Breyer identified this so-called "middle category" as the most difficult to evaluate. He suggested that this difficulty prompted the Court to develop an additional liberty standard that looked to state law for guidance in determining liberty interests. Justice Breyer postulated that unlike free citizens, convicted prisoners are much more at the mercy of local rules restraining their individual liberty. The need to look to local rules is therefore increasingly important because they govern matters that are:

> more likely of a kind to which procedural protections historically have applied, and where they normally prove useful, for such rules often *single out* an inmate and condition a deprivation upon the existence, or nonexistence, of particular facts. . . . It suggests . . . [when] the inmate will have thought that he himself, through control of his own behavior, could have avoided the deprivation, and thereby have believed that (in the absence of his misbehavior) the restraint fell outside the "sentence imposed" upon him.[141]

According to Justice Breyer, this rule allows local positivist sources of law "to separate those kinds of restraints that, in general, are more likely to call for constitutionally guaranteed procedural protection, from those that more likely do not."[142]

Justice Breyer described his third classification as so unimportant as to "clearly fall[ ] *outside* [the] middle category."[143] Recognizing that some prison regulations that cabin discretionary authority in a manner sufficient to create a liberty interest "may amount simply to an instruction to the administrator about how to do his job, rather than a guarantee to the inmate of a 'right' to the status quo,"[144] Justice Breyer argued that "this Court has never held that comparatively unimportant prisoner 'deprivations' fall within the scope of the Due Process Clause even if local law limits the authority of prison administrators. . . ."[145] Abandoning the wooden approach of a pure state-authorization doctrine, Justice Breyer suggested letting the courts determine which interests create rights "without the help of the more

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139 *Id.*

140 *Id.* at 2307.

141 *Conner*, 115 S. Ct. at 2307 (Breyer, J., dissenting) (citations omitted).

142 *Conner*, 115 S. Ct. at 2307 (Breyer, J., dissenting).

143 *Id.*

144 *Id.* at 2308.

145 *Id.*

objective 'discretion-cabining' test."[146] This was a burden that he postulated the courts were well-equipped to undertake.[147] In concluding this section of his dissent, Justice Breyer suggested, "the problems that the majority identifies suggest that this Court should make explicit the lower definitional limit, in the prison context, of 'liberty' under the Due Process Clause—a limit that is already implicit in this Court's precedent."[148]

c. *Justice Breyer's Application of his Discretion-Cabining Approach to the* Conner *Facts*

Justice Breyer opened his analysis of the *Conner* facts by noting that the Supreme Court and every Circuit Court of Appeals had recognized that punitive segregation could deprive an inmate of a constitutionally protected liberty interest.[149] Justice Breyer disagreed with the majority's assertion that the expungement of Conner's record "transform[ed] Conner's segregation for a violation of a specific disciplinary rule into a term of segregation under the administrative rules."[150] Justice Breyer's analysis treated the expungement as irrelevant to the liberty interest inquiry. Furthermore, he found that Conner suffered a significant deprivation under disciplinary rules that sufficiently restricted prison official discretion. Therefore, without reaching whether Conner received sufficient process, Justice Breyer found "that Conner was deprived of 'liberty' within the meaning of the Due Process Clause."[151]

III
ANALYSIS. A CALL FOR SUBSTANTIVE MEANING TO PRISONERS' LIBERTY INTERESTS

The *Conner* decision has knocked down the "house of cards" that the positivist state-authorization approach had constructed following *Morrissey*.[152] Prior to *Conner*, the Supreme Court utilized the state-authorization approach as a device to provide constitutional protection for injuries without inquiring into what liberty interests the Due Process Clause itself created.[153] As a surrogate to what the federal Due

146 *Id.*
147 *See id.* at 2308.
148 *Id.* (collecting cases).
149 *Id.* at 2308-09 (collecting cases). *See also infra* part III.D.
150 *Conner*, 115 S. Ct. at 2309 (Breyer, J., dissenting).
151 *Id.* (Justice Breyer noted that the record on appeal did not contain any explanation of how the witnesses he wanted to call could have provided any relevant evidence). Justice Ginsburg reached the same conclusion in her analysis. *Id.* at 2304 (Ginsburg, J., dissenting); *see supra* notes 129-32 and accompanying text.
152 *See supra* notes 96-112 and accompanying text.
153 *See supra* notes 96-112 and accompanying text.

Process Clause truly entailed, the Court acted as the final insurer of the proper administration of state prison regulations. Instead of evaluating the gravity of harm suffered to determine when process was necessary, the Court factored in the degree of harm inflicted to determine what process was due.[154] *Conner*'s "atypicality" requirement now demands an inquiry into the character of the harm inflicted as an additional foundational element before it will look to local positivist sources of law for liberty interests worthy of constitutional protection.[155] *Conner* was silent as to what quantum of harm would satisfy the "atypicality" standard. Equally important, the *Conner* decision perpetuated the Court's general resistance to directly reading the Due Process Clause without support from a positive source of law. Thus, *Conner* has functionally removed the only approach that has historically provided prisoners meaningful due process because of its illogical reliance on individual state law, and showed no inclination to fill the resulting gap in due process protection with any sort of uniform federal standard drawing its justificatory force from the Due Process Clause.

This Note argues that *Conner*'s narrowed approach to positivist law as an independent creator of protected liberty interests, combined with its general refusal to read the Due Process Clause directly, reduces prisoners' due process rights to an unacceptable level. *Conner*'s holding renders prisoners susceptible to virtually unlimited prison official discretion over substantial interests that should invoke the Due Process Clause on their own weight. Accordingly, this Note suggests that the Court fill the gap left by its limiting of the state-authorization approach by reading the Due Process Clause directly to create a federal standard of rights based on a balancing of individual prisoner interests against the needs of prison administration. The prisoners' interests analysis should focus on the gravity of harm imposed by an official action and the degree to which its imposition raises the spectre of arbitrary treatment. Balancing the prisoners' interests against the recognized preference, when possible, for discretion in prison administration, will simultaneously accommodate the needs of prison officials while refocusing the liberty interest analysis on its most logical objective—protecting the rights of the individual.

A. Predicative Analysis of the *Conner* Holding and its Likelihood of Delivering Meaningful Due Process to Prisoners

After *Conner*, there remain two categories of interests that may give rise to constitutionally protected liberty interests: the Due Process

154 *See supra* notes 116-25 and accompanying text.
155 *See supra* notes 117-25 and accompanying text.

Clause itself and local positive law sources.[156] The latter, after *Conner*, appears to be limited to interests historically recognized by the Court as associated with the ultimate liberty from penal restraint.[157] This narrowing of state-authorization limits state positive law to creating liberty interests that comport with a concept of "liberty" conceived when the Constitution was written. Such a narrowing fails to acknowledge that society's concept of "liberty" has changed due to the individual's reliance on, and vulnerability to, an administrative state that could not have been anticipated by the Framers.[158] As discussed above,[159] the Court has not, in the decisions since *Morrissey*, relied solely on the Due Process Clause, without a co-existent positive law source, as grounds for finding a constitutionally protected liberty interest.[160]

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156 *See supra* note 65.

157 *See Conner*, 115 S. Ct. at 2300 (explaining state created liberty interests will be "generally limited to freedom from restraint. . . ."). *See also* Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 97 (1982) (detailing Coke's view of liberty in the Fifth Amendment as "freedom from physical custody"); Rubin, supra note 6, at 1175-76 (suggesting that criminals should be able to avail themselves of procedural protections more now than in the past when harsher treatment of prisoners was standard prison practice). *But see* Bulger v. United States Bureau of Prisons, 65 F.3d 48, 50 (5th Cir. 1995) (applying *Conner* to hold that even loss of ability to accrue good-time credits automatically does not trigger a liberty interest since it will not " 'inevitably affect the duration of his sentence.' ") (quoting *Conner*, 115 S. Ct. at 2302).

158 Professor Rubin suggests a solution that would allow the Court to follow the past and adjust to the present:

> Since virtually all recent due process cases involve administrative agencies, the Court does not have to abandon the received tradition; the basic problem is simply to translate a protection developed for judicial trials into the administrative context. And since the terms liberty and property are used in the Constitution in connection with that protection, there is no reason to rely upon contemporary interpretations of their literal meaning when analyzing administrative action. The Court could determine what the effect of this language was in its original context, and then interpret it to achieve the same effect in administrative cases. In other words, modern procedural due process issues lend themselves to assessment by analogy. Rather than starting from first principles and then resorting to textual literalism in their application, the Court could start from existing doctrine and develop new solutions by an incremental approach that is more congenial to the case-law method.

Rubin, *supra* note 6, at 1046; *see also* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring) (arguing that due process is a "living principle" that can evolve).

159 *See supra* part I.C.

160 *See supra* note 115. Were the Court to find a protectible liberty interest for prisoners, it would be in these cases which involve interference with ultimate liberty. *Id.*; *see also Conner*, 115 S. Ct. at 2302 (supporting the contention that state-authorization will now also generally apply only to freedom from restraint cases); Easterbrook, *supra* note 157, at 97 (noting that historically the Court only found liberty interests grounded in freedom from physical restraint). Even in this context, the Court will now strictly require mandatory language over substantive predicates. In evaluating Conner's claim that his disciplinary hearing had an effect on his parole standing, the Court explained that "[t]he chance that a finding of misconduct will alter the balance [of parole likelihood] is simply too attenuated

Conner's functional removal of the state-authorization approach leaves an impermissible gap in prisoners' rights. Given the Court's prior precedents, it is virtually impossible for a prisoner to successfully invoke the Due Process Clause directly;[161] the only remaining avenue for a prisoner to receive due process protection in a post-*Conner* world would be to pass the new state-authorization approach narrowed by the "atypicality" standard. This standard suffers from the same vagueness as does the "within the sentence" standard enunciated in *Montayne* and used by the Court in its direct analysis of the Due Process Clause. Justice Marshall, in his dissent in *Thompson*, criticized the "within the sentence" threshold as inapplicably vague because a typical prison sentence does little more than specify the amount of time to be served behind bars.[162] Thus, almost any deprivation can conceivably be construed as "within the sentence" of an initial conviction. Such vagueness renders it impossible to derive any coherent doctrine from either the "within the sentence" or the "atypicality" thresholds. Under either test, it appears that as long as a punishment is one that in some circumstances may be justifiably imposed, it is "an ordinary incident of prison life."[163] Therefore, any instance of such a punishment, regardless of extent or the arbitrariness of its imposition, is not "atypical" and is permissible under a due process analysis. Such treatment does not comport with our society's concept of fairness, even in the prison context, and should not be construed as permissible.[164]

Indeed, if placement in 24 hour-a-day solitary confinement without any process does not satisfy the "atypicality" standard, it is hard

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to invoke the procedural guarantees of the Due Process Clause." *Conner*, 115 S. Ct. at 2302. The Court noted that a similar claim was rejected under the state-authorization doctrine in *Meachum*. *Id.*

161 *See* Herman, *supra* note 9, at 534. Professor Herman suggests that, under the *Meachum* state-authorization doctrine, "prisoners have no constitutionally protectible liberty interest in decisions affecting the length or conditions of their incarceration unless state law creates such an interest." *Id.* *A fortiori*, prisoners have no such interests after *Conner* which narrowed the *Meachum* doctrine.

162 *Thompson*, 490 U.S. at 466-67 (Marshall, J., dissenting).

163 *See supra* part II.B.2.

164 Professor Farina discusses *Meachum*'s dismissal of the prisoner's expectation of fairness:

> When the *Meachum* [C]ourt dismisses "[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself" as "too ephemeral and insubstantial to trigger procedural due process protections," it implies a view of "expectation" that seems to have little to do with psychological reality. In addition, the doctrine ignores even some formally expressed constraints on behavior. . . . Most broadly, the doctrine is wilfully blind to the background understanding—shared by citizens, legislators and administrators alike—that regulatory programs have comprehensible, identifiable objectives and that government officials are given power that they might pursue those objectives, not that they might indulge their personal predilection or caprice.

Farina, *supra* note 53, at 228 (citations omitted).

not to feel Justice Ginsburg's puzzlement as to what deprivation could satisfy this standard without independently invoking the Due Process Clause itself.[165] Such a paradox, combined with the Court's general unwillingness to directly read the Due Process Clause, seems to leave few deprivations in a post-*Conner* environment that will prompt the Court to require due process constraints on the discretion of prison officials.[166] As one lower court quickly commented after *Conner*,

> the consequence of taking [*Conner*] at its word . . . is to arm prison authorities, who have heretofore possessed uncircumscribed powers over the inmates within their custody only to a limited extent, with now-unrestrained power to punish those inmates by arbitrary reassignment to the meaningfully more restrictive environment of segregated confinement. And it appears that can be done by a correctional official for no reason at all—even out of sheer vindictiveness. . . . That result—*which effectively treats wrongful commitment to segregation as an inherent consequence, a sort of assumed risk, of being in prison* to begin with—strikes this Court as one more befitting a totalitarian regime than our own, and it is hard to credit that outcome as flowing from a principled Supreme Court decision.[167]

This opinion, if an accurate forecast of the federal courts' reaction to *Conner*, defeats Justice Breyer's contention that the majority's addition of the "atypicality" requirement did not "significantly revise current [prisoners' procedural due process] doctrine. . . ."[168] This forecast also raises deep constitutional concerns. There must be a point where a prison official's action, even if under the rubric of generally accepted prison practices, becomes so inherently arbitrary or out of proportion with our ideas of liberty that due process concerns are implicated.

A narrow interpretation of *Conner* limits it to its unusual circumstances. The *Conner* Court looked to the totality of Hawaii's prison

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165 *See supra* note 132 and accompanying text.

166 *See supra* note 160.

167 Leslie v. Doyle, 896 F. Supp. 771, 773-74 (N.D. Ill. 1995) (emphasis added) (footnote omitted). The court reluctantly based its decision on what it considered a plain reading of *Conner* and invited counsel for the plaintiff to bring the case to the appellate level to test its interpretation. *Id.* at 774; *see also* Orellana v. Kyle, 65 F.3d 29, 31-32 (5th Cir. 1995) ("[I]t is difficult to see that any other deprivations in the prison context, short of those that clearly impinge on the duration of confinement, will henceforth qualify for constitutional 'liberty' status.") (footnote omitted), *cert. denied*, 116 S. Ct. 736 (1996).

168 *Conner*, 115 S. Ct. at 2306 (Breyer, J., dissenting); *see also* Pratt v. Rowland, 65 F.3d 802, 807 (9th Cir. 1995) ("*Sandin* represents a significant departure from the Court's § 1983 prisoner Due Process methodology. . . ."); Orellana v. Kyle, 65 F.3d 29, 32 (5th Cir. 1995) (scope of prisoners liberty interests "has been dramatically narrowed."); Williams v. Moore, 899 F. Supp. 711, 712-13 (D.D.C. 1995) (stating that *Conner* "has significantly altered the legal landscape with respect to prisoners' liberty interests."); Nichols v. Ramos, No. 95-C-4009, 1995 WL 472776, at * 2 (N.D.Ill. Aug. 8, 1995) ("*Conner* has set a lower limit to prisoners' liberty interests under the Constitution."); *but see* Jones v. Moran, 900 F. Supp. 1267, 1274 (N.D. Cal. 1995) (conceiving the effect of *Conner* as adding a threshold test).

regulatory scheme to evaluate the "atypicality" of Conner's deprivation.[169] The Court does not answer how relevant the existence of non-disciplinary confinements, the duration of Conner's sentence, and the severity of the underlying offenses for which Conner was convicted, were to its Due Process Clause analysis.[170] Its reiteration of such factors in this case and in prior treatments of prisoners' due process[171] raises the question whether due process fluctuates among prisoners in different prisons and between prison institutions in different states.[172] If the duration of a punitive confinement sentence is relevant to whether due process protections are necessary in each instance, then courts will be forced to develop some sort of arbitrary line. The result of such arbitrary line-drawing will be that one day there is no due process interest and the next day one has magically appeared.[173]

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169 *Conner*, 115 S.Ct. at 2301.

170 *Id.* ("Conner's confinement did not exceed similar, but totally discretionary confinement in either duration or degree of restriction."); *id.* at 2302 ("The regime to which [Conner] was subjected . . . was within the range of confinement to be normally expected for one serving an indeterminate term of 30 years to life.") (footnote omitted).

171 *See supra* notes 96-127 and accompanying text.

172 The first cases commenting on *Conner* have taken different stances on the importance of the totality of the prison confinement schemes. *Compare* Gotcher v. Wood, 66 F.3d 1097, 1101 (9th Cir. 1995) (remanding for further proceedings because record on totality of prison confinement schemes was not as complete as the one before the *Conner* Court), *petition for cert. filed*, 64 U.S.L.W. 3605 (1996); Jones v. Moran, 900 F. Supp. 1267, 1272-73 (N.D. Cal. 1995) ("The [*Conner*] Court's comparison of conditions of confinement in Halawa's SHU to the conditions of other levels of confinement in Hawaii prisons suggests that the significance of a particular type of deprivation may vary from one state's prison to another."), *with* Ishaaq v. Compton, 900 F. Supp. 935, 939 (W.D. Tenn. 1995) ("After . . . [*Conner*], mere confinement to segregation, punitive or administrative, and mere transfers do not constitute 'atypical and significant hardships' . . . and thus cannot amount to the deprivation of a liberty interest."); Sack v. Canino, No Civ. A. 95-1412, 1995 WL 498709, at *1 (E.D. Pa. Aug. 21, 1995) (without analyzing totality of Pennsylvania prison scheme, concluded that 30 days in disciplinary confinement did not satisfy "atypicality" test); Steimel v. Fields, Nos. 92-3274-Des, 93-3190-Des, 1995 WL 530610, at *4 (D. Kan. Aug. 21, 1995) ("lesser penalties" such as segregative confinements "do not require the application of due process protections").

This Note suggests, *infra* notes 200-01 and accompanying text, that the totality of the country's prison practices should be taken into account to determine a national standard of prison rights that are not hinged on the norms of an individual institution or the positive law language of a particular state. Such an approach would allow the development of a national standards of rights that is based partially on the totality of the states legislatures' impression of what is liberty.

173 This process has already begun. *Compare* Lee v. Coughlin, 902 F. Supp. 424, 431 (S.D.N.Y. 1995) ("376 days in SHU imposed an atypical and significant hardship" creating a liberty interest), *with* Zamakshari v. Dvoskin, 899 F. Supp. 1097, 1108 (S.D.N.Y. 1995) (analyzing the effect of *Conner* on cases involving disciplinary confinement for periods over 30 days is unclear, but recommending that 60 day confinement is within *Conner's* scope). Some circuit courts have attempted to resolve this question by remanding to the district court for an atypicality analysis. *See, e.g.*, Whitford v. Boglino, 63 F.3d 527, 537 (7th Cir. 1995) (reversing and remanding case of 6 month segregation); Acker v. Maxwell, 61 F.3d 909 (9th Cir. 1995) (same) (unpublished).

If such finite factors are indeed relevant, the liberty interest analysis would be cast in a shroud of uncertainty where the success of all invocations of due process rights would depend on narrow details surrounding a prisoner's confinement. Although such an approach would give courts the discretion to find rights in extreme circumstances without running afoul of *Conner*, it would also engender unpredictability because it does not give guidance to prison officials as to what behavior is permissible. Further, such an approach does not comport with the concept of a national standard of due process rights that would logically seem inherent in the existence of a *federal* Due Process Clause.

To hinge the due process analysis on positivist state law at all allows states to manipulate a supposedly inherent right through discretion-tolerant legislation. As the *Conner* majority observed, such a result encourages legislatures to draft broad regulations to avoid constitutional scrutiny.[174] This has the corollary effect of causing constitutional rights to vary across state lines.[175] Instead of focusing constitutional analysis on statutory or regulatory language that most prisoners have probably never laid eyes on,[176] the Court should strike out to establish standards that simultaneously accommodate the dignity of the individual by preventing the arbitrary infliction of punishment, and suit the needs of penitentiary administration. Professor Rubin, commenting on how to formulate a federal standard for minimum due process procedures, wrote:

> [m]ore general guidance in formulating criteria can be obtained from the underlying values that due process serves. The basic value is to avoid the oppressiveness of particularized decisionmaking. This suggests the rough but significant idea that particular action should be allowed only insofar as it is necessary to carry out the state's established goal.[177]

Prison officials have a recognized interest in maintaining institutional order.[178] Any action taken to further this goal should be balanced against the harm it inflicts on the prisoner's dignity as an individual.

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174 *Conner*, 115 S. Ct. at 2299 (state-authorization approach allowed legislatures to "avoid creation of 'liberty' interests by having scarcely any regulations, or by conferring standardless discretion on correctional personnel.").

175 *See, e.g.*, Herman, *supra* note 9, at 574-75 ("The anomalous results of [the state authorization approach] are all too clear: procedure is carefully doled out where it is least necessary; identical deprivations of freedom are treated differently, depending on how the state characterizes the deprivation; the meaning of due process varies from state to state.").

176 *See Thompson*, 490 U.S. at 466-67 (Marshall, J., dissenting); *see also* Farina, *supra* note 53, at 228 (criticizing past precedent for conceiving of prisoner expectations and other institutional expectations as not reflecting psychological reality).

177 *See* Rubin, *supra* note 6, at 1158.

178 *See infra* notes 214-17 and accompanying text.

B. Individual Dignity as a Measure of "Grievous Harm" for a New Due Process Liberty Interest Analysis

The Supreme Court in *Goldberg v. Kelly* promised to give real meaning to the Due Process Clause. *Goldberg* thrust the Court between the individual and government officials who necessarily exercised sweeping powers over the individual's everyday life.[179] *Roth* and the cases that followed refused to acknowledge the as-yet-untapped wellspring of interests within the protection of the Due Process Clause in order to fulfill *Goldberg*'s goal of maintaining the individual's ability to protect his place in society. Instead, the *Roth* Court relied primarily on sub-constitutional law. Such an approach is inconsistent with the concept of "liberty." As Professor Farina argues,

> [p]recisely because we understand the essence of the Bill of Rights and 14th Amendment to be [a] constraint on simple-majoritarian positive law, a doctrine that makes constitutional protection contingent upon the terms of such law is deeply disturbing. . . . The phrase 'life, liberty, or property' *must* possess intrinsic meaning that is not dependent on positive law.[180]

However, a sampling of the commentary surrounding the Supreme Court's attempts to define what constitutes "liberty" illustrates why the Court clung so long to a positivist approach.[181]

While most commentators decry the positivist approach, few offer a coherent and facially applicable alternative. Despite such difficulties, the Court has taken a major step towards the elimination of a positivist approach to liberty interests. Having done so, the Court must take the next step and begin to aggressively read the Due Process Clause itself to provide rights to prisoners in order to prevent grievous harms from being inflicted on them without at least some minimum process.[182] Otherwise, prison officials will be able to deprive prisoners of substantial rights "for any reason whatsoever, or for no reason at all."[183] As Justice Marshall wrote, "[o]ne need hardly be cynical about prison administrators to recognize that the distinct possibility of retaliatory or otherwise groundless deprivations . . . calls for a modicum of procedural protections to guard against such behavior."[184] A due pro-

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179 Farina, *supra* note 53, at 198.

180 *Id.* at 200-01.

181 *See e.g.*, Rubin, *supra* note 6, at 1152, 1173-74 (a federal standard is difficult to formulate in "government-run institutions" due to the absence of common law precedents and the novelty of due process standards in the context of institutions, but this does not mean that such a standard could not be articulated).

182 *See, e.g.*, Herman, *supra* note 9, at 572 (noting that a grievous loss requirement is a frequently suggested alternative to the positivist approach stemming from the *Roth* two-step analysis).

183 *Thompson*, 490 U.S. at 466 (Marshall, J., dissenting).

184 *Id.* at 470 (Marshall, J., dissenting).

cess construct that does not give effect to such concerns cannot be reconciled with a national notion of "liberty" safeguarded by the Federal Due Process Clause.

As Justice Ginsburg argued in her dissent in *Conner*,[185] that "liberty," in the prisoners' due process context, should derive its meaning and protections from the principles embodied in Justice Stevens's dissent in *Meachum* and Justice Marshall's dissent in *Thompson*. These dissents criticize the state-authorization approach and advocate an alternative that would prevent uninhibited state actions that arbitrarily inflict a "grievous harm" on the individual. "Liberty" is not something that should be doled out at the whim of state legislators. Rather, it guarantees "the preservation of the individual from the tyranny of the collective, the freedom of each to exist as an autonomous being, uncoerced (except as necessary for the maintenance of societal order) by the majority's sentiments of appropriate or reasonable behavior."[186] Of course a prisoner's rights are curtailed upon incarceration, but as Justice Stevens wrote:

> "The restraints and the punishment which a criminal conviction entails do not place the citizen beyond the ethical tradition that accords respect to the dignity and intrinsic worth of every individual. 'Liberty' and 'custody' are not mutually exclusive concepts."
>
> . . . .
>
> It demeans . . . the concept of liberty [ ] itself to ascribe to [the *Morrissey*] holding nothing more than a protection of an interest that the State has created through its own prison regulations. For if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases.[187]

The Supreme Court has expressed a willingness in prior decisions to avoid punishing a prisoner in a fashion that would stigmatize him or defeat his expectation that he would not be punished absent some affirmative misconduct on his part.[188] Few would contest that adding process, in an endeavor such as prison disciplinary hearings, would result in a decrease of erroneous deprivations.[189] Although enhanced

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185 *See supra* part II.C.1.

186 Farina, *supra* note 53, at 208 (citing Charles Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964)).

187 *Meachum*, 427 U.S. at 232-33 (Stevens, J., dissenting) (footnote omitted) (quoting United States ex rel. Miller v. Twomey, 479 F.2d 701, 712-13 (7th Cir. 1973)).

188 Washington v. Harper, 494 U.S. 210, 221 (1990); Hewitt v. Helms, 459 U.S. 460, 473-74 (1983); Vitek v. Jones, 445 U.S. 480, 492 (1980) (quoting Addington v. Texas, 441 U.S. 418, 425 (1979)); Board of Regents of State Colleges v. Roth, 408 U.S. 564, 573-74 (1972).

189 Many procedures that serve dignitary interests can he provided at a small cost or inconvenience to prison administration. Two examples from *Wolff* are 24 hour notice of the charges pending against a prisoner and a written statement of the disciplinary board's

accuracy is not alone enough to implicate the Due Process Clause, additional procedures also may result in preserving the dignity of individuals that is intertwined with our societal concept of liberty. As Justice Frankfurter eloquently expressed in his concurrence to *Joint Anti-Facist League v. McGrath*,[190] "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling . . . that justice has been done."[191] In such cases, the Court should actively wield the Due Process Clause to require such procedural protections. As Professor Laurence Tribe explains,

> both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one.[192]

If one goal of imprisoning convicted criminals is indeed to rehabilitate, then, for major disciplinary actions, a prisoner should be informed of the reasoning behind the disciplinary action to provide a reference for reformation of conduct and, when possible, to give him a chance to defend or deny his conduct. For a prisoner, learning why a punishment is imposed may " 'fill[ ] a potentially destructive gap in the individual's conception of himself.' "[193] Therefore, the prisoner should have:

> a protected right . . . at the minimum, to maintain whatever attributes of dignity are associated with his status in a tightly controlled society. It is unquestionably within the power of the State to change that status, abruptly and adversely; but if the change is sufficiently grievous, it may not be imposed arbitrarily.[194]

Of course, the need to maintain order within prison walls tempers the scope of rights to which a convicted prisoner may lay claim

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findings. *See* Wolff v. McDonnell, 418 U.S. 539, 563-64 (1974). Both can be produced at a low cost and yet go a long way to serving the dignitary function discussed *infra* note 206 and accompanying text. Administrative cost, however, is still a factor in determining what procedural protections may be afforded to a protected liberty interest.

190 Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123 (1951) (Frankfurter, J., concurring).

191 *Id.* at 171-72.

192 TRIBE, *supra* note 9, § 10-7, at 666; *see also* Farina, *supra* note 53, at 214 ("To wreak harm on the individual without meaningfully consulting him because it is cheaper, or quicker, or simply less bother not to involve him, is to reduce him to an instrument in the service of efficiency or inertia.").

193 Farina, *supra* note 53, at 215 (quoting Frank Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* NOMOS: DUE PROCESS 127 (J. Roland Pennock & John Chapman eds., 1977).

194 Meachum v. Fano, 427 U.S. 215, 234 (1976) (Stevens, J., dissenting).

and the process that he can receive when a liberty interest is implicated.[195] Nevertheless, the concept of "liberty," amorphous as it may be,[196] commands that there must be a point, in the balancing of the interests of the individual and the government, where a prison official's ability to arbitrarily injure a prisoner by depriving him of privileges implicates the Due Process Clause, regardless of the existence of local positive law sources.[197]

C. *Mathews v. Eldridge*: A Guideline for Developing a National Standard of Federal Due Process Guarantees Through a Balancing of Individual and Institutional Interests

This Note suggests that the Court should transform its liberty interest inquiry into a balancing of the "grievous harm" created by a prison official's actions and the interests of safe, cost-effective prison administration.[198] State-authorization, post-*Conner*, could remain where the right itself would not be present "but for" a state's affirmative action. However, these situations are rare.[199] Additionally, state law can serve as a guideline as to what is reasonable to expect as a right. Under a balancing analysis, the laws across state boundaries could have persuasive, but not determinative, effect on the Supreme Court's analysis.[200] The power to create liberty interests will largely be

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195 *See, e.g.*, *Meachum*, 427 U.S. at 233 (Stevens, J., dissenting).

196 *See* Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring) (due process should be a living principle not confined to past instances); *see also* Hewitt v. Helms, 459 U.S. 460, 484 (1983) (Brennan, J., concurring) (identifying "liberty" in the prison context is more difficult than in the world at large).

197 Consider as an illustrative example the *Conner* regulatory scheme. Under the Court's holding, there does not appear to be any limit to the amount of time that Conner, without any process whatsoever, could be restricted to 24 hours a day confinement for the entirety of his sentence because disciplinary confinement as a punishment, at least under the Hawaii scheme, never implicates a due process interest. *See* Sandin v. Conner, 115 S. Ct. 2293, 2302 (1995); *see also supra* note 95.

198 *See* Rubin, *supra* note 6, at 1174-75. Professor Rubin, in attempting to articulate the opposite ends of the spectrum involved in articulating a federal standard of minimum due process for the administration of institutions, wrote:

> institutional administrators must be afforded discretion in their day-to-day activities. . . . To require that every supervisory action follow predefined rules and be accompanied by procedural protection would . . . make the institution impossible to operate. . . .
>
> At the other extreme, granting supervisors absolute discretion would violate most people's notion of fair treatment. . . . [T]his prohibition on unfettered discretion has been extended to prisons.

Id.

199 One such situation is the one faced by the Court in *Morrissey*. As discussed *supra* part I.A.2, the Court has held that there is no inherent right to parole, but once the state affirmatively establishes a parole system, it must provide procedures before parole is revoked.

200 *See* Rubin, *supra* note 6, at 1159 (proposing a federal standard that looks to state law in general, rather than the particular governmental action under review, to allow fair decisionmaking while respecting overarching social policy considerations).

vested in the courts which, through reference to the national will of the country as represented by state legislatures, and the expectations that regulations tend to give effect to,[201] create a uniform standard of liberty interests that is consistent across state lines. Thus, under the courts' guidance, prison officials can retain discretion over the day-to-day incidents of prison management to the extent such discretion is consistent with meaningful due process protection of important interests.[202]

Balancing in the due process context is not a new concept. Indeed, the Court's pre-state-authorization approach to due process took the form of a balancing test of the individual and the government interests without an independent entitlement analysis.[203] Under the state-authorization regime, courts balanced the equities of challenged procedures to determine the second tier analysis of "what process is due" under *Mathews v. Eldridge*.[204] The three factors identified by the *Mathews* Court to determine the procedures afforded to an established liberty or property interest provide a transferable framework to an interest-defining analysis. The *Mathews* factors are:

> first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of ad-

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Justice Breyer alluded to such a use of state law in his *Conner* dissent. In Justice Breyer's view, state law

> suggests, other things heing equal, that the matter [addressed by state positive law] is more likely of a kind to which procedural protections historically have applied, and where they normally prove useful, for such rules often *single out* an inmate and condition a deprivation upon the existence, or nonexistence, of particular facts.

Conner, 115 S. Ct. at 2307 (Breyer J., dissenting). While this analysis makes a lot of sense, it seems counterintiutive to hinge rights, which may have such a common understanding on a national scale, on whether an *individual* state legislature has addressed them. Under the approach proposed by this Note, regulations would be read on a national scale in order to determine what common understandings have been established over time between society and the individual prisoner.

201 *See* Rubin, *supra* note 6, at 1159.

202 Farina, *supra* note 53, at 226 ("nature and extent of discretion might affect the *type* of process afforded, but the presence of discretion would not signal whether process is useful at all.").

203 *See* Herman, *supra* note 9, at 573-74. This pre-state authorization balancing originated from Justice Frankfurter's concurrence in Joint Anti-Facist Refugee Comm. v. McGrath, 341 U.S. 123, 149-74 (1951) (Frankfurter, J., concurring). Criticizing mechanical approaches to due process analysis, Justice Frankfurter's approach considered

> the precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alteruatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

Id. at 163.

204 424 U.S. 319 (1976).

> ditional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.[205]

To apply a *Mathews*-type analysis to define protected interests, courts would evaluate the prisoner's interest, including the right to be free from arbitrary or vindictive deprivations. Instead of abstract inquiries into unfairness to the individual in relation to his initial conviction as applied by the "within the sentence" standard, a *Mathews*-type right-defining analysis would look to the treatment of the individual in reference to our societal concepts of liberty and fairness.[206] Such an approach would also establish a minimum floor of procedural guarantees that could be applied uniformly across the country, a concept that comports with our understandings of constitutional rights.

The second and third prongs of the *Mathews* balancing approach would weigh the value of added procedures combined with the individual's interests, against the governmental need to retain control over prison administration and the costs of additional procedures in fashioning the process due. Not all procedures that give effect to a prisoner's dignity interest are expensive. Some procedures required by the Court merely provide notice to the prisoner of what he has done wrong and give him a chance to explain his side of the story.[207] As Justice Breyer's dissent in *Conner* suggests, courts, under the state-authorization approach, have traditionally eliminated what they deem as trivial interests by concluding that the prisoner received all the process due and thus refuse to require additional procedures.[208] The

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205 *Id.* at 335 (citing Goldberg v. Kelly, 397 U.S. 254, 263-71 (1970)).

Although *Mathews* dealt with a property interest, its test is frequently applied to determine prison liberty interests. It is nothing new to intermingle property and liberty due process. *Id.* at 333 (citing Wolff v. McDonnell, 418 U.S. 539, 557 (1974)); *see also* Hewitt v. Helms, 459 U.S. 460, 473 (1983) (conducts *Mathews* balancing to determine prisoner's rights); *Wolff*, 418 U.S. at 557 ("analysis as to liberty parallels the accepted due process analysis as to property"); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW, § 13.8, at 530-32 (5th ed. 1995); Herman, *supra* note 9, at 500-02 (explaining that the Supreme Court's approach to liberty and property interests converged around the time of the *Wolff* decision); *but see* Rubin, *supra* note 6, at 1138-39.

206 *See* Vitek v. Jones, 445 U.S. 480, 493 (1980) (looking to whether consequences visited on prisoners are qualitatively different from the punishment characteristically suffered by a person convicted of a crime); *see also* Sandin v. Conner, 115 S. Ct. 2293, 2300 (1995) (citing *Vitek*); Rubin, *supra* note 6, at 1175-76 ("focusing on the atypicality of the decision . . . avoids the practical difficulties of imposing procedural requirements on day-to-day activities. A standard based on individual interest, which would direct attention to the harshness of the punishment regardless of its generality, is significantly less workable in the institutional context.").

207 *See supra* note 189.

208 *See, e.g.*, Hewitt v. Helms, 459 U.S. 460, 477 (1982); *see also* Washington v. Harper, 494 U.S. 210, 222 (1990) (although court found state authorized rights and interests di-

proposed balancing approach would adopt the spirit of such a valuation of competing interests to determine rights, while simultaneously discarding the fiction of an entitlement prerequisite that led to the rise of positivism in constitutional jurisprudence. This shift in analysis would allow judges to afford due process protections that common sense and common perceptions of "liberty" demand.[209]

D. *Wolff* Reexamined: A Rare Example of Interest Balancing Under the State-Authorization Approach

Although *Wolff*'s holding dealt with the procedures required before state-authorized good-time credits could be revoked, the Court, in a footnote, provided for similar protections in disciplinary hearings that result in the imposition of disciplinary confinement. The relevant language of the footnote reads:

> 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.* The deprivation of good time and imposition of 'solitary' confinement are reserved for instances where serious misbehavior has occurred. This appears a realistic approach, for it would be *difficult* for the purposes of procedural due process *to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue.* The latter represents a major change in the conditions of confinement and is *normally* imposed only when it is claimed and proved that there has been a major act of misconduct. Here, 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. We do not suggest, however, that the procedures required by today's decision for the deprivation of good time would also be required for the imposition of lesser penalties such as the loss of privileges.[210]

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rectly invoking the Due Process Clause, the state statute prescribed all process constitutionally due).

209 *See* Herman, *supra* note 9, at 574.

210 Wolff v. McDonnell, 418 U.S. 539, 571-72 n.19 (1974) (emphasis added).

The extension of minimum procedural guarantees to disciplinary hearings where punitive confinement is a possible punishment was not at issue in *Wolff.* The language of footnote 19 suggests that this protection does not stem from the Constitution or any state-authorization (as was the case with good-time credits). Rather, the Court added procedural safeguards to all major disciplinary hearings because it would be too difficult to determine, at the outset, whether the hearing would result in the removal of good-time credits (requiring procedural safeguards), punitive segregation, or both. Although these procedures had been widely adopted by state legislatures, *see generally* Babcock, *supra* note 4 (analyzing the effect of *Wolff* on due process in prisons), the *Conner* Court distinguished the *Wolff* dicta because the Hawaii statutory scheme did not contain the same overlapping of procedures as was present in *Wolff. See supra* note 96.

Although the extension of procedural protection to disciplinary hearings resulting in disciplinary confinement hinged partly on its linkage to good-time credits in the relevant statutory scheme, the Court's extension of protection also clearly depended on the degree of harm imposed on the prisoner, the expectations of the prisoner as to when he could be seriously punished, and the danger of arbitrary treatment.

Having held that inmates possess a liberty interest, the Court next addressed the issue of the applicable standards for determining when a state may adversely effect that interest.[211] The Court balanced the inmate's liberty interest against the interests of the state prison system. The Court concluded that although a state must provide some due process protection,[212] the circumstances of a prison disciplinary hearing did not require as heightened a degree of protection as that afforded to parole hearings by *Morrissey*.[213]

The Court balanced the prisoner's interest at issue against the government's interest in maintaining control over prison administration and concluded that the state's interest in maintaining security militated against granting absolute rights to retained or appointed counsel, and against an absolute right to confront and cross-examine adverse witnesses.[214] As the Court stated,

> The reality is that disciplinary 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. Re-

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211 *See Wolff*, 418 U.S. at 558-72. The *Wolff* Court's two tiered approach to prisoner's due process rights mirrors the approach used in the property context in Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972). *See* discussion *supra* part I.C.2.

212 *Wolff*, 418 U.S. at 564-65.

213 According to the *Wolff* Court:

> For the prison inmate, the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee.... The deprivation of good time is unquestionably a matter of considerable importance. The State reserves it as a sanction for serious misconduct, and we should not unrealistically discount its significance....
>
> In striking the balance that the Due Process Clause demands, however, we think the major consideration militating against adopting the full range of procedures suggested by *Morrissey* for alleged parole violators is the very different stake the State has in the structure and content of the prison disciplinary hearing.

Id. at 560-61.

The *Wolff* decision established two absolute rights. First, the Court required that the prisoner receive written notice of the charges at least twenty-four hours prior to the hearing. *Id.* at 563-64. Second, the Court mandated that following the hearing, the inmate must receive a "written statement of the factfinders as to the evidence relied upon and the reasons for the disciplinary action taken." *Id.*

214 *Id.* at 567-68. The State's interest in maintaining security is in the forefront of the Supreme Court's concern in many decisions relating to the prison disciplinary system. *See* Diane E. Wolf and Timothy R. Yee, *Project: Twenty-Third Annual Review of Criminal Procedure: United States Supreme Court and Court of Appeals 1992-1993*, 82 GEO. L.J. 1365, 1368 (1994).

> taliation is much more than a theoretical possibility; and the basic and unavoidable task of providing reasonable personal safety for guards and inmates may be at stake, to say nothing of the impact of disciplinary confrontations and the resulting escalation of personal antagonism on the important aims of the correctional process.[215]

Thus, in the Court's view, if inmates were allowed to exercise these rights in all circumstances, "there would be considerable potential for havoc inside the prison walls."[216] However, the Court did recognize qualified rights to counsel and to call witnesses when doing so would not be unduly hazardous to institutional safety or correctional goals.[217]

Wolff's interest-balancing approach to disciplinary hearings that result in punitive confinement is instructive because it demonstrates the possibility of simultaneously giving effect to the individual prisoner's liberty interests and to the needs of prison administration. The Court's willingness and ability to forge an accommodation in the disciplinary hearing context, simultaneously one of the most confrontational aspects of prison administration and yet one of the most "ordinary incidents" of prison discipline, should be equally applicable in most other areas of prison administration. Sometimes the courts will find that a prisoner's interest is insufficient compared to the need for discretion in prison administration, but at a minimum, the courts will recognize that prisoners do have rights upon entering the prison, and that a prison official's discretion is not unfettered.

CONCLUSION

Sandin v. Conner has brought prison context procedural due process back full circle to its pre-*Goldberg* era position. Strictly read, the decision accords prison officials virtually the same unfettered discretion they enjoyed until the 1960s. The Court's retraction of its prison-

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215 *Wolff*, 418 U.S. at 562.

216 *Id.* at 567.

217 *Id.* at 566. The Court was wary of excessively limiting the discretion of prison officials in an area that could have serious safety and institutional consequences. The Court explained:

> The operation of a correctional institution is at best an extraordinarily difficult undertaking. Many prison officials, on the spot and with the responsibility for the safety of inmates and staff, are reluctant to extend the unqualified right to call witnesses; and in our view, they must have the necessary discretion without being subject to unduly crippling constitutional impediments.

Id. at 566-67. Affording a prisoner twenty-four hours written notice of a charge and a written statement of findings is good policy and fairly easy to provide. *See generally* Michael A. Guzzo, Note, *The Written Statement Requirement of* Wolff v. McDonnell*: An Argument for Factual Specificity*, 55 FORDHAM L. REV. 943 (1987) (suggesting that *Wolff* written statements must be fairly extensive in order to provide an adequate record for administrative or judicial review); *see also* discussion *supra* accompanying notes 151-56.

context due process jurisprudence in *Conner* was largely motivated by its dependence on positivist sources of state law to authorize federal constitutional rights. This resulted in the federal court system being drawn in to measure fairly minute interests on a constitutional scale.

The retraction of the positivist approach should not, however, signal the end of due process within the prison walls. It is time for the Supreme Court to recognize that there exist interests so important to a prisoner's individual liberty that the Court must protect them under the direct command of the Due Process Clause. Although the interests of prison administration must, of course, remain in the prison due process analysis, the Court stands as the only true protector of a prisoner "against [the] arbitrary action of government."[218] Although the due process liberty interest has proven one of the most difficult for the Court to ascribe any meaningful content, the Court's failure to accept its role of defining its scope is tantamount to refusing its chief duty as interpreter of the Constitution.

Philip W. Sbaratta†

218 Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

† I would like to thank my parents for their unwavering love and support, Professor Cynthia Farina, and the Note Office of the *Cornell Law Review.*

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Richard D. Geiger, B.S., J.D., Assistant Dean and Dean of Admissions
Harry B. Ash, B.S., M.S., Director for Development and Public Affairs

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Kathryn Abrams, B.A., J.D., Professor of Law (on leave 1995-96)
Gregory S. Alexander, B.A., J.D., Professor of Law (on leave Spring 1996)
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Fred A. Bernstein, B.A., J.D., Visiting Assistant Professor of Law (Spring 1996)
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Gary J. Simson, B.A., J.D., Professor of Law
Katherine Van Wezel Stone, B.A., J.D., Professor of Law
Barry Strom, B.S., J.D. Senior Lecturer (Clinical Studies)
Robert S. Summers, B.S., LL.B., William G. McRoberts Research Professor in the Administration of the Law (on leave Spring 1996)
Michele Taruffo, B.C.L., Visiting Professor of Law (Fall 1995)

Winnie F. Taylor, B.A., J.D., LL.M., Professor of Law
Sjef van Erp, LL.M., Visiting Professor of Law (Fall 1995)
David Wippman, B.A., M.A., J.D., Associate Professor of Law
Charles W. Wolfram, A.B., LL.B., Charles Frank Reavis Sr. Professor of Law

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W. David Curtiss, A.B., LL.B., Professor of Law
W. Tucker Dean, A.B., J.D., M.B.A., Professor of Law
W. Ray Forrester, A.B., J.D., LL.D., Robert S. Stevens Professor of Law
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Rudolf B. Schlesinger, LL.B., Dr. Jur., William Nelson Cromwell Professor of International and Comparative Law
Gray Thoron, A.B., LL.B., Professor of Law

Elected Members from Other Faculties

Calum Carmichael, Professor of Comparative Literature and Biblical Studies, College of Arts and Sciences
Paul R. Hyams, Associate Professor of History, College of Arts and Sciences