SUSPENSION OF INMATE'S VISITING PRIVILEGES DOES NOT MANDATE DUE PROCESS PROTECTION: *KENTUCKY DEPARTMENT OF CORRECTIONS V. THOMPSON*, 109 S. Ct. 1904 (1989)

The fourteenth amendment's due process clause[1] protects individuals from erroneous and arbitrary government action.[2] Courts have historically denied prisoners' fourteenth amendment claims.[3] Only recently have the courts established that the Constitution[4] and various

1. The fourteenth amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV.

2. The courts have broadly interpreted the kinds of liberty interests which the fourteenth amendment protects. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1959) (the term liberty within the due process clause is not confined to bodily constraint); Meyer v. Nebraska, 262 U.S. 390, 399 (1922) (liberty includes the right to contract, to engage in a common occupation, to acquire knowledge, to marry, establish a home and raise children, to worship God and "generally enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men").

3. *See, e.g.*, Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871). In *Ruffin*, the court held that "the convicted felon has as a consequence of his crime, not only forfeited his liberty, but all of his personal rights except those which the law in humanity accords to him. He is for the time being a slave to the state." *Id.* at 796. Since *Ruffin*, courts have found that prisoners are not exempt from all freedoms granted by the Constitution. Under the first and eighth amendments, courts have upheld prisoners' constitutional rights in situations concerning racial discrimination, inmate assault, corporal punishment and restraints on the freedoms of religion and speech. *See* Cruz v. Beto, 405 U.S. 319 (1972) (restraint on religion); Cooper v. Pate, 378 U.S. 546 (1969) (religious speech); Brown v. Peyton, 437 F.2d 1228 (4th Cir. 1971) (restraint on religion); Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968) (corporal punishment); Battle v. Anderson, 376 F. Supp. 402 (E.D. Okla. 1974) (racial discrimination).

4. *See generally* Gooding, *The Impact of Entitlement Analysis: Due Process in Correctional Administrative Hearings*, 33 U. FLA. L. REV. 151 (1981). A protected liberty interest arises from the Constitution when core values such as life, liberty and property are threatened by government action. This type of analysis is called impact analysis. Impact analysis focuses on whether governmental action will result in an adverse impact on the individual. *Id.* at 155. *See also* Bounds v. Smith, 430 U.S. 817, 828 (1977) (law libraries or assistance from persons with legal training required in order to preserve inmates Constitutional right of access to the courts); Morrissey v. Brewer, 408 U.S. 471

state law sources[5] endow prisoners with a protected liberty interest.[6] Prisoners are now utilizing due process to challenge adverse changes in their conditions of confinement.[7] At the same time, however, prison officials retain broad, discretionary power to effectively operate prisons.[8] In *Kentucky Department of Corrections v. Thompson*,[9] the Supreme Court held that a Kentucky prison regulation did not limit official discretion enough to grant inmates a state-created liberty interest in visitation privileges.[10]

(1972) (termination of parole requires due process review because parolee's liberty is affected); Vitek v. Jones, 445 U.S. 480 (1981) (inmate's involuntary transfer to a mental hospital implicates a liberty interest).

5. State created liberty interests can arise from state statutes. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 710-12 (1976) (the right to operate a motor vehicle, once granted by a state motor vehicle statute, becomes a liberty interest and cannot be retracted without due process of law). Regulations promulgated by state agencies can also give rise to liberty interests. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (prison regulation created a liberty interest in good time credit).

6. *See generally* Comment, *Entitlement, Enjoyment and Due Process of Law*, 1974 DUKE L.J. 89. Entitlement analysis focuses on whether the government through statutes, administrative rules or regulations has created a protected liberty interest. A broad approach to entitlement analysis includes identification of potential sources of liberty interests, such as individual practices and expectations. *Id.* at 100. For an alternative to both impact and entitlement analysis, see Note, *Due Process Behind Bars—The Intrinsic Approach*, 48 FORDHAM L. REV. 1067 (1980). *See infra* note 65 for petitioner's alternative to entitlement analysis in *Thompson*.

7. Using entitlement analysis, the courts have found state-created liberty interests within the prison context. *See infra* notes 31-35, 41-52 and accompanying text. *See also* Wolff v. McDonnell, 418 U.S. 539 (1974) (prison regulation created liberty interest in good time credit); Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1 (1979) (Nebraska statute created a protected liberty interest in parole release); Hewitt v. Helms, 459 U.S. 461 (1983) (inmate could not be placed in administrative segregation without due process proceedings because prison regulation created a protected liberty interest in remaining in the general prison population); Brennan v. Cunningham, 813 F.2d 1 (1st Cir. 1987) (state law mandated that revocation of work release required due process).

8. *See, e.g.*, Jones v. North Carolina Prisoners' Union, 433 U.S. 119 (1977). The Court in *Jones* stated:

> courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism. Moreover, where state penal institutions are involved, the federal courts have a further reason for deference to appropriate prison authorities.

Id. at 126.

9. 109 S. Ct. 1904 (1989). Thompson was the class representative on behalf of the class of inmates at the Kentucky State Reformatory. *Id.* at 1905.

10. *Id.* at 1911. The Court found that, absent certain criteria, the Kentucky regulation did not sufficiently limit official discretion to create an expectation that a visit would occur. *Id. See infra* notes 11-20 and accompany text for a discussion of the facts and for text of the regulation in question.

In *Thompson*, prison officials suspended visitation privileges for two inmates at the Kentucky State Reformatory without affording prisoners an opportunity for a hearing.[11] These inmates brought a class action suit against the prison,[12] alleging that suspension of visiting privileges without a hearing violated the due process clause of the fourteenth amendment.[13] At the time the suit arose, two state documents regulated visiting privileges in the reformatory. First, a consent decree directed prison officials to continue an open visitation policy.[14] Second, the reformatory issued its own procedural memorandum providing that although prison officials retain discretion in the manner of visitation, they should respect the rights of inmates to have visitors.[15] The memorandum further stated that prison officials could exclude visitors if their presence would endanger or interfere with the operation of the prison.[16] The District Court for the Western District of Kentucky

11. 109 S. Ct. at 1907. In one instance, the prison denied Kenneth Bobbit's mother visitation privileges for six months because she had brought an individual to the institution who had previously been denied visiting privileges for smuggling contraband into the prison. In the second instance, the prison denied inmate Kevin Black's mother and girlfriend visitation privileges for a limited time after officials discovered contraband on Black's person immediately after a visit. *Id.*

12. Thompson brought suit under 42 U.S.C. § 1983 which provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage . . . subjects or causes to be subjected, any citizen of the United States to the deprivation of any rights privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law for redress.

13. 109 S. Ct. at 1904. *See* Thompson v. Commonwealth of Kentucky Department of Corrections, 833 F.2d 614 (6th Cir. 1987). Plaintiffs filed a motion requesting a court order requiring defendants to establish procedures that prison officials must employ before restricting visitation. These procedures include notice and hearings. *Id.* at 616.

14. 833 F.2d at 616. The consent decree addressed conditions of confinement at the two institutions. The decree provided in pertinent part: "The Bureau of Corrections encourages and agrees to maintain visitation at least at the current level with minimal restrictions . . . Defendants shall continue their open visitation policy." Kendrick v. Bland, 541 F. Supp. 21, 37 (W.D. Ky. 1981).

15. 109 S. Ct. at 1906. The policy statement of the memorandum reads in pertinent part:

> Although administrative staff reserves the right to allow or disallow visits, it is the policy of the Kentucky State Reformatory to respect the rights of the inmates to have visits in the spirit of the Court's decision and the consent decree, while insuring the safety and security of the institution.

Id.

16. *Id.* The memorandum provided a non-exhaustive list of specific reasons for excluding a visitor. The memorandum stated that prison officials could refuse admittance if the prison official had reasonable grounds to believe that the visitor presents a clear and probable danger to the safety and security of the institution or would interfere with

held that the language of the consent decree entitled prisoners to a protected liberty interest in open visitation.[17] On appeal, the Sixth Circuit affirmed and remanded, basing its decision not only on the language of the consent decree but also on the reformatory's regulations and policies.[18] The Supreme Court reversed,[19] holding that the Kentucky prison regulation did not sufficiently limit official discretion in order to give inmates a state-created liberty interest in receiving visitors.[20]

The fourteenth amendment[21] protects an individual from governmental deprivations of liberty or property without due process of law.[22] The due process clause, however, does not protect an unlimited number of liberty and property interests.[23] Rather, an individual must

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its orderly operation. *Id.* at 1907. Specifically, the list included: a past record of disruptive conduct; alcohol or drug influences; failure to show proper identification or submit to a search; if the visitor is directly related to the prisoner's criminal behavior; or if the visit is detrimental to the inmate's rehabilitation. *Id.* at 1907 n.2, citing Kentucky State Reformatory Procedures Memorandum, No. KSR 16-00-01 (issued and effective Sept. 30, 1985).

17. 109 S. Ct. at 1907. The district court found the language of the consent decree mandatory within the meaning of Hewitt v. Helms, 459 U.S. 460 (1983), because it required the continuation of an open visitation policy. *Id.* Subsequently the Supreme Court held that the plaintiffs possessed a protected liberty interest in open visitation. *Id. See infra* notes 50-56 for a discussion regarding the statute in *Hewitt.*

18. Thompson v. Commonwealth of Kentucky Department of Corrections, 833 F.2d 614, 619 (6th Cir. 1987). The Sixth Circuit concluded that the combination of the mandatory language in the consent decree and the specific criteria in the memorandum created a protected liberty interest. *Id.* The court remanded:

> for a further determination of precisely which set of regulations covers the plaintiff class, the procedures memorandum, which we find does create a liberty interest, purports to cover visits at the Kentucky State Reformatory; it is unclear from the record what set of regulations govern visits in other parts of the Kentucky system.

Id.

19. Justice Blackmun delivered the majority opinion. Chief Justice Rehnquist and Justices White, O'Connor, Scalia and Kennedy joined. 109 S. Ct. at 1906.

20. *Id.* at 1909-10.

21. *See supra* note 1.

22. Judicial review of alleged due process violations involves two issues. First, does the government action in question infringe upon an interest protected by the fourteenth amendment? Second, if it does, what procedures are due the affected party? *See, e.g.,* Ingraham v. Wright, 430 U.S. 651, 672 (1977) (applies this two part test in a corporal punishment claim).

23. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 578 (1972). In *Roth,* no state statute or university rule or policy secured a professor's interest in re-employment and the fact that plaintiff had an abstract hope and "concern" of being rehired did not create a protected interest. However, *Roth* introduced the possibility that state law could be a source of property interests protected by the fourteenth amendment.

possess a legitimate claim to a protected interest.[24] Protected interests may have independent constitutional origins which command constitutional protection.[25] Due process protections do not extend to liberty interests that the Constitution does not specifically recognize, unless individual states have created protected interests through statutes or agency regulations.[26]

In 1972, the Supreme Court began extending procedural due process rights to prisoners by protecting prisoners from arbitrary changes in their conditions of confinement.[27] Beginning with *Morrissey v. Brewer*,[28] the Court held that revocation of a prisoner's parole requires due process.[29] Focusing on the gravity of the change in prisoner's conditions of confinement due to parole revocation,[30] the Court reasoned that procedural due process must be accorded whenever a prisoner suffers such a grievous loss.[31]

Two years after *Morrissey*, the theory of statutory entitlement gradu-

24. *Id.* at 577.

25. *See supra* note 2 and accompanying text for a discussion of protected interests arising from the Constitution.

26. *See, e.g.*, Paul v. Davis, 424 U.S. 693, 710-12 (1976) (state-created liberty and property interests are entitled to due process protection). *See supra* note 5 and accompanying text for a discussion of protected liberty interests created by state law.

27. During much of the twentieth century, courts invoked the hands-off doctrine to bar inmates from the protections of the due process clause. Berger, *Withdrawal of Rights and Due Deference: The New Hands-off Policy in Correctional Litigation*, 47 U.M.K.C. L. REV. 1, 2-5 (1978). This doctrine stated that "courts are without the power to supervise prison administration or to interfere with prison rules or regulations except in extreme circumstances." Young v. Wainwright, 449 F.2d 338, 339 (5th Cir. 1971). Three justifications existed for the hands-off doctrine. First, judges did not possess the expertise in correctional matters. Second, courts lacked adequate remedies for correctional deficiencies. Third, conditions of confinement were privileges, not rights, and thus not reviewable. *See* Berger, *supra* note 27, at 2-5. *See also* Note, *Involuntary Interprison Transfers of State Prisoners after Meachum v. Fano and Montanye v. Haymes*, 37 OHIO ST. L.J. 845, 848-49 (1976), which concentrates on the concept of separation of powers as the basis for the hands-off doctrine.

28. 408 U.S. 471 (1972).

29. *Id.* at 482. The Court noted, however, that parole revocation does not permit the full panoply of rights due a defendant in a criminal trial. *Id.* at 480.

30. *Id.* The Court stated that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.* at 482. *See supra* note 4 for a discussion of impact analysis.

31. The Court based its conclusion that a parolee's loss of liberty is grievous on the fact that the liberty granted a parolee is analogous to the liberty experienced by persons who have never been convicted of a crime. 408 U.S. at 482.

ally replaced the concept that an adverse change in a prisoner's environment directly triggered the due process clause.[32] In *Wolff v. McDonnell*,[33] a statute awarded good time credit, which shortened a prisoner's term of confinement, according to a fixed formula. If prison officials found an inmate guilty of a serious breach of prison discipline, they could reduce the inmate's good time credit.[34] Based upon this statute, the Supreme Court held that prisoners possessed a state-created protected liberty interest in good time credit.[35] The Court argued that, although there is no constitutional right to good time credit, a liberty interest may be a statutory creation of the state. The opinion did not explain exactly how the statute created an entitlement to due process protection.[36] The Court did intimate, however, that entitlement hinges upon limitations of official discretion because prison officials could reduce good time credit only for serious misbehavior.[37]

The Supreme Court began to specify how a state statute creates a protected liberty interest in *Meachum v. Fano*.[38] In *Meachum*, the Court held that a Massachusetts statute did not give a prisoner the

32. Courts generally agree that *Wolff* established the use of entitlement theory in the prison context. *See, e.g.*, Baum, *Fourteenth Amendment Due Process and Interstate Prison Transfers*, 74 NW. U.L. REV. 1387 (1983). By specifically basing its holding on entitlement analysis, the *Wolff* Court abandoned impact analysis. *Id.* at 1399 n.48. *See generally* Dworkin, *Is Law a System of Rules?* in ESSAYS IN LEGAL PHILOSOPHY 25 (Summer ed. 1970) for a discussion of the possible reasons for this shift in methods.

33. 418 U.S. 539 (1974).

34. *Id.* at 546-47. The relevant prison regulation provides in part: "Disciplinary action taken and recommended may include but not necessarily be limited to the following: reprimand, restrictions of various kinds, extra duty, confinement in the Adjustment Center, withholding of statutory good time and/or extra earned good time, or a combination of the elements listed herein." *Id.* at 551 n.8.

35. 418 U.S. at 558. The Court stated that "the state having created the right to good time and itself recognizing that its deprivation is a sanction authorized for major misconduct, the prisoner's interest has real substance and is sufficiently embraced within the fourteenth amendment . . ." *Id.* at 557.

36. *Id.* However, the Court points out that the interest of prisoners in disciplinary procedures is included within the liberty protected directly by the fourteenth amendment. *Id.* at 557. *See* Preiser v. Rodriquez, 411 U.S. 475, 487 (1973) (Supreme Court considered the prisoner's claim that he had been deprived of good time credit without due process a proper subject for habeas corpus proceedings).

37. 418 U.S. at 557-58.

38. 427 U.S. 215 (1976). In order to create a protected liberty interest, *Meachum* interprets *Wolff* as requiring the presence of minimum procedures in compliance with state law or on the occurrence of specified events. For example, good time credit could only be forfeited for misconduct. *Id.* at 226-27.

right to remain in the prison of his or her original incarceration.[39] Consequently, an official decision to transfer an inmate to another institution within the state did not require procedural due process protection.[40] Focusing its statutory analysis on the degree of discretion that the statute vested in prison officials, the Court found that the statute did not create a protected liberty interest, because it did not condition transfer on the occurrence of specific events.[41] The Court concluded that when a state imposes no statutory restraints on the discretion of prison officials, a prisoner cannot justifiably expect that he will retain certain privileges absent the occurrence of specified events.[42] There-

39. 427 U.S. at 227. *Meachum* is often interpreted as rejecting all correctional applications of impact analysis. The Court stated that any "grievous loss" suffered by a prisoner as a result of an administrative decision was not sufficient to trigger due process safeguards. *Id.* at 224. The Court affirmed *Meachum* in Montanye v. Haymes, 427 U.S. 236, 242 (1976) ("as long as conditions or degree of confinement to which the prisoner is subjected is within the sentence imposed upon him and is not otherwise violative of the Constitution, the Due Process Clause does not in itself subject an inmate's treatment by prison authorities to judicial oversight"). *See generally* Note, *Procedural Due Process in Prisoners' Rights: The State Giveth and The State Taketh Away*, 57 B.U.L. REV. 387, 394-404 (1977) (discussion of *Meachum* and related cases addressing prisoners' rights).

Despite the holdings in *Meachum* and *Montanye*, several courts continued to employ impact analysis. *See* Clifton v. Robinson, 500 F. Supp. 30, 33 (E.D. Pa. 1980) (endorsement and application of impact analysis after *Montanye*). *Cf.* Muhammad v. Carlson, 845 F.2d 175, 178 (8th Cir. 1988) (although transfer to a prison's AIDS unit presented the same stigmatization as transfer to a mental hospital, it did not amount to an infringement of inmate's protected liberty interest absent statutory basis for such a finding). *But cf.* Vitek v. Jones, 445 U.S. 480 (1980) (inmates' involuntary transfer to a mental hospital constitutes the kind of grievous loss that requires due process protection, but the Court refrained from relying solely on impact analysis by finding that the state created a protected liberty interest in the same right).

40. Meachum v. Fano, 427 U.S. at 227. The Court would not go so far to hold that transfer to substantially more burdensome conditions triggered due process protection. *Id.* at 225. Some commentators have determined that the holding in *Meachum* is a return to the hands-off doctrine in inmate litigation. *See* Schwartz, *Olim v. Wakenikona: The Hands-off Doctrine Gains Further Support In Prison Transfer Decisions*, 10:2 CRIM. AND CIV. CONFIN. 144 (1984).

41. 427 U.S. at 226-28. The Court also premised its decision on several policy considerations. First, the Court concluded that the federal courts should not supervise state prisons, the administration of which is of acute interest to the states. Secondly, the Court reasoned that discretionary decision-making of prison officials is not the business of the judiciary. *Id.* at 228-29.

42. *Id.* at 228. The Massachusetts statute provides in pertinent part: "The commissioner may transfer any sentenced prisoner from one correctional institution of the commonwealth to another. . . ." *Id.* at 227 n.7, citing MASS. GEN. LAWS ANN. § 97 (West 1974). The Court found essentially no restraints on the prison official's discretion. *Id.* at 228.

fore, a statute which gives prison officials unbridled discretion and that does not violate a legal interest or right under state law fails to create a protected liberty interest.[43]

The Supreme Court, in *Greenholtz v. Nebraska Penal Inmates*,[44] introduced the possibility that the mere presence of substantive limitations on official discretion was insufficient to create a protected liberty interest. The Nebraska statute at issue in *Greenholtz* contained a fixed formula mandating that, unless certain conditions existed, a prison official must grant an inmate's request for parole.[45] The Court held that this statute created a protected expectation of parole.[46] The Court ac-

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43. *Id.* The Court refused to accept plaintiff's argument that the practice of transferring prisoners only for misbehavior created a protected liberty interest. Instead, the court held that "[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself, . . . is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer . . . for whatever reason or for no reason at all." *Id.* By indicating that only statutes and regulations could give rise to state-created liberty interest, the Court adopted a narrow view of entitlement analysis. *See* Gooding, *supra* note 4, at 155 (discussing of entitlement analysis). Despite the holding in *Meachum*, several courts have employed a broad view of entitlement analysis. *See, e.g.*, Dace v. Mickelson, 816 F.2d 1277, 1279 (8th Cir. 1987) (a prisoner's expectancy is based on a review of state rules, regulations or practice); Whitehorn v. Harrelson, 758 F.2d 1416, 1422 (11th Cir. 1985) (the court must examine the practices of the prison officials in administering the program to determine whether the practices place a restriction on official discretion). *But see* Jago v. Van Curen, 454 U.S. 14, 20 (1981) ("Mutually explicit understanding" that an inmate would secure parole release does not amount to a state-created liberty interest); Connecticut Board of Pardons v. Dumschat, 452 U.S. 458, 459 (1981) (the fact that seventy-five percent of life inmates received commutations does not create a protected liberty interest).

44. 442 U.S. 2 (1979).

45. *Id.* at 12. The Nebraska statute states in pertinent part:

> Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:
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> a. There is a substantial risk that he will not conform to the conditions of parole;
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> b. His release would depreciate the seriousness of his crime or promote disrespect for the law;
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> c. His release would have a substantial adverse effect on institutional discipline;
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> d. His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

Id., citing NEB. REV. STAT. § 83-1.114(1) (1976).

46. 442 U.S. at 12. The Court rejected respondent's argument that a presumption of release was not created because the statutory conditions for deferral were essentially predicative rather than factual. *Id.* at 13. *See infra* note 54 for application of this principle.

cepted the prisoner's argument that the use of mandatory language in connection with specifically designated criteria created a liberty interest[47] without articulating the reasons for its decision.[48] Consequently, the Court implied that statutory language of a mandatory character created a protected liberty interest.[49]

In *Hewitt v. Helms*,[50] the Supreme Court found that statutory language of an unmistakably mandatory character was dispositive when finding a state-created liberty interest regarding daily prison administration.[51] The statute at issue dictated that prison officials could place an inmate in administrative segregation only in accordance with specified criteria.[52] In *Hewitt*, the Court held that the statute endowed prisoners with a protected liberty interest to remain in the general prison

47. 442 U.S. at 13. The Court also mentioned that because the petitioner brought the action in federal court, the Court lacked the benefit of the state court's interpretation of whether the state intended to create an interest. *Id. Cf.* Olim v. Wakenikona, 461 U.S. 238 (1983) (Court based its determination, in part, on the state court's finding that prison official's discretion to transfer inmate to an out-of-state prison is unfettered). *See infra* notes 57-59 for a detailed discussion of *Olim*.

48. 442 U.S. at 12. The Court did caution, however, that the Nebraska statute was unique and that entitlement analysis must be conducted on a case-by-case basis. *Id.*

49. Courts have split on the question of whether the absence of mandatory language precludes a finding that the state has created a protected liberty interest. *See* Anderson v. Winsett, 449 U.S. 1093, 1093-96 (1981). In *Anderson*, the Supreme Court denied certiorari in a Delaware case whereby a parole release statute without mandatory language created a protected liberty interest in work release. Two Justices dissented in the denial of certiorari and proceeded to recognize the split over the issue of mandatory language in parole release statutes.

50. 459 U.S. 460 (1983).

51. *Id.* at 470-71. The Court hesitated to find a liberty interest in statutes and regulations addressing daily correctional administration and considered the everyday deprivations of prison life of little consequence when compared to release from custody involved in parole release and good time credit decisions. *Id.* at 470. Additionally, the Court believed that lower courts should refrain from assuming the role of prison officials by engaging in constant oversight and intervention in prison administration. Nonetheless, the Court concluded that the mandatory character of the statutes and regulations created a protected liberty interest. *Id.*

52. The statute provides in pertinent part:

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

population.[53] The Court found that language requiring prison officials to employ specific procedures and mandating that administrative segregation could not occur without certain substantive predicates was dispositive.[54] Explaining its reliance on mandatory language, the Court reasoned that state laws which simply impose substantive limitations and elaborate procedural requirements on an official do not create a protected liberty interest because, at the end of the process, the official may still exercise unfettered discretion.[55] The Court, however, expressed a caveat that this statute was unique and, therefore, the Court refrained from rendering mandatory language a formal requirement for the creation of a protected liberty interest.[56]

In two subsequent cases, the Court declined to find state-created liberty interests without resolving the issue of a mandatory language requirement. In *Olim v. Wakinekona*,[57] the relevant statute provided that a prison official could transfer an inmate to an out-of-state prison for any reason.[58] Consequently, the *Olim* Court held that the Hawaii

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in all cases within ten days. 459 U.S. at 470-71 n.6 (citing Title 37 PA. CODE § 95.104(b)(3) (1978)).

53. 459 U.S. at 471-72.

54. *Id.* at 471-72. Noting that the Pennsylvania statute went beyond mere procedural guidelines, the Court believed the statute was unique. *Id.* at 471. Moreover, the repeated use of "explicitly mandatory language" requiring that certain procedures "shall," "will," or "must" be provided in connection with requiring specific substantive predicates persuaded the Court that the state had created a liberty interest. *Id.* at 471-72.

55. 459 U.S. at 471. The Court pointed out that states may formulate guidelines for reasons other than protection against deprivation of substantive rights. Because states have this discretion, the Court determined that the state does not create a protected liberty interest. *Id. See also* Olim v. Wakenikona, 461 U.S. 238, 250-51 (1983) (a statute proviso that a hearing would occur prior to a prisoner's transfer did not create a protected liberty interest).

56. 458 U.S. at 471-72.

57. 461 U.S. 238 (1983).

58. *Id.* at 249. The regulation requires:

> a hearing prior to a prison transfer involving "a grievous loss to the inmate," which the Rule defines "generally" as "a serious loss to a reasonable man." . . . "[A]n impartial Program Committee" . . . must give the inmate written notice of the hearing, permit him, with certain stated exceptions, to confront and cross-examine witnesses, afford him an opportunity to be heard, and apprise him of the Committee's findings. . . .
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> The committee (which conducts the hearing) is directed to make a recommendation to the Administrator, who then decides what action to take.
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> "[The Administrator] may, as the final decisionmaker:
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> "(a) Affirm or reverse, in whole or in part, the recommendation; or
>
> "(b) hold in abeyance any action he believes jeopardizes the safety, security, or

statute did not create a protected liberty interest.[59] Because the statute made no attempt to curtail official discretion, the Court never addressed the mandatory language issue. In *Board of Pardons v. Allen*,[60] the Court held that a Montana statute, semantically identical to the statute in *Greenholtz*, created a protected liberty interest in parole release.[61] The Court, in *Allen*, found the presence of mandatory language as the key factor in the creation of a state-created liberty interest.[62] By relying on *Greenholtz*, however, the Court did not need to determine that mandatory language must be present in order to create a protected liberty interest.[63]

Kentucky Department of Corrections v. Thompson,[64] presented the Court with an opportunity to review the semantic criteria that states must include in order to create a protected liberty interest.[65] In *Thompson*, the Court explicitly endorsed the requirement of mandatory language for entitlement to due process protection.[66] Jus-

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welfare of the staff, inmate . . . , other inmates . . ., institution, or community and refer the matter back to the Program Committee for further study and recommendation.

Id. at 242-43 (footnotes omitted) (citing the Supplementary Rules and Regulations of the Correction Department).

59. 461 U.S. at 249-50.

60. 482 U.S. 369 (1987).

61. *Id.* at 381. The Montana statute provides that a prisoner eligible for parole "shall" be released when there is a reasonable probability that no detriment will result to him or the community, and specifies that parole shall be ordered for the best interests of society and when the Board of Pardons believes that the prisoner is willing and able to assume the obligations of a law-abiding citizen. *Id.* at 376-77.

62. *Id.* at 381. The Court determined that a statute demanding parole release "unless" certain findings are made is no different from a statute mandating release "if," "when" or "subject to" such findings being made. *Id.* at 378. According to the Court, both types of language create a protected liberty interest. *Id.*

63. *Id.* at 381. The Court based this comparison on the fact that the Montana statute, like the statute in *Greenholtz*, granted the official broad, subjective discretion. *Id.* *See supra* note 45 for the *Greenholtz* statute. *Cf.* Meachum v. Fano, 427 U.S. 215 (1976) (addressing a similar statute, the Court held that the absence of objective and defined criteria did not create a protected liberty interest). *See supra* notes 38-43 and accompanying text for a discussion of *Meachum*.

64. 109 S. Ct. 1904 (1989). *See supra* notes 9-20 and accompanying text for detailed outline of the facts.

65. 109 S. Ct. at 1906. The Court explained that its focus on entitlement analysis concerned the language of the relevant statute, not the relative significance of the value at stake. *Id.* at 1909.

66. *Id.* at 1910. Citing *Greenholtz*, *Hewitt* and *Allen*, the Court noted that the mandatory language requirement was implicit in earlier decisions. *Id.* *See supra* notes

tice Blackmun, writing for the majority, first reaffirmed that substantive criteria, which guide and limit official decision-making, are necessary for creation of a protected liberty interest.[67] In connection with these limitations on official discretion, the Court added that regulations must also contain explicitly mandatory language requiring that, once relevant criteria had been met, the prison official must reach a particular result.[68]

The Court then applied this standard to the Kentucky regulation governing visiting privileges.[69] The Court recognized that the reasons for which prison officials may refuse visitors sufficiently limited official discretion to satisfy the substantive predicate requirement.[70] Nevertheless, the Court found that the regulation lacked the requisite mandatory language.[71] The Court noted that the phrase "may exclude visitors" gave the prison official a residual amount of discretion permitting the official to allow or disallow visits regardless of the substantive predicates.[72] As support for this determination, the *Thompson* Court

38-63 and accompanying text for a discussion regarding the evolution of the mandatory language requirement.

67. 109 S. Ct. at 1909. While the Court stated that a state can create a protected liberty interest in several ways, the Court cautioned that "neither the drafting of regulations nor their interpretation can be reduced to an exact science. Our past decisions suggest, however, that the most common manner in which a State creates a liberty interest is by establishing 'substantive predicates' to govern official decision making." *Id.* *See supra* notes 38-43 and accompanying text for a discussion of how substantive predicates create a protected liberty interest.

68. 109 S. Ct. at 1910. The Court formulated guidelines for determining whether or not a statute, rule or regulation created a protected liberty interest in stating that "[t]he use of 'explicitly mandatory language' in connection with the establishment of specific 'substantive predicates' to limit discretion forces a conclusion that the state has created a liberty interest." *Id.* The Court indicated that the mandatory language requirement was not an open invitation for courts to search regulations to find any imperatives. *Id.* at 1910 n.4. *See infra* note 74 for the application of this principle to the *Thompson* facts.

69. 109 S. Ct. at 1910. The Court initially determined that the loss of visiting rights does not directly implicate the due process clause because the suspension of such a privilege is contemplated by an inmate's original sentence and does not otherwise violate the Constitution. *Id.* at 1908-09.

The Court rejected petitioner's plea for the Court to distinguish statutes and regulations affecting the duration or release from confinement from those governing daily administration, regardless of the language used. Believing such a finding unnecessary to rule in petitioner's favor, the Court expressed no view on the proposal and left its resolution for "another day." *Id.* at 1909 n.3.

70. 109 S. Ct. at 1910. *See supra* note 16 for the grounds on which the Kentucky regulation suggested prison officials could exclude visitors.

71. 109 S. Ct. at 1910.

72. *Id.* at 1911. The Court reasoned that, according to the language of the regula-

indicated that the introduction to the regulation reserved the right of the prison official to exercise discretion regarding visitation rights.[73] Furthermore, the Court noted that mandatory language describing visitation procedures was not relevant to its inquiry, because the procedures arose only after the officials decided to allow visitors.[74] Finding this lack of mandatory language dispositive, the Court held that the Kentucky regulation did not create a protected liberty interest.[75]

The dissent[76] criticized the majority's determination that mandatory language is an essential element in the creation of a protected liberty interest.[77] Writing for the dissent, Justice Marshall argued that once substantive criteria limit official discretion, there is no reason to assume that prison officials will disregard those criteria absent mandatory lan-

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tion, visitors need not be excluded if they fall within one of the described categories, nor must one of the described conditions exist for a visitor to be excluded. *Id.* *See supra* note 16 for text of the prison's visiting regulation.

73. 109 S. Ct. at 1911. *See supra* note 15 for text of the policy statement. In addressing the language of the consent decree, which the Sixth Circuit found sufficiently mandatory to create a protected liberty interest, the Court viewed the language as mandatory only in the sense that it prevented the state from making its regulations more restrictive than they were at the time the District Court entered the decree. The decree, however, did not limit official discretion in determining whether or not to exclude a certain visitor. 109 S. Ct. at 1911 n.5. *See supra* note 18 and accompanying text for the Court of Appeals holding. *See supra* note 14 for text of the consent decree.

74. 109 S. Ct. at 1911. The Court provided examples of mandatory language within the regulation that it considered irrelevant. For example, each inmate is allowed three separate visits per week. This directive, however, says nothing regarding admittance of any particular visitor. *Id.* at 1910-11 n.4.

75. *Id.* at 1910. The Court reasoned that the regulations lacked language sufficient for an inmate to reasonably expect to enforce the regulations against a prison official. Likewise, an inmate could not reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions. *Id.*

76. *Id.* Justice Marshall dissented, with whom Justices Brennan and Stevens joined.

77. *Id.* at 1914. In his dissent, Marshall implied that the Court should return to impact analysis, lamenting over the emasculated form of impact analysis the courts have utilized since *Montanye*. *Id.* at 1911-12. *See supra* notes 4, 28-32 for a definition of impact analysis and its application in earlier decisions. Marshall asserted that the *Montanye* impact inquiry "knows few rivals for vagueness and pliability" because the typical prison sentence provides nothing more than that an individual must spend a period of time in incarceration. *Id.* at 1912. Therefore, Marshall argued the inquiry contemplates everything and nothing at all. *Id.* at 1912. *See supra* notes 36 and 65 and accompanying text for the *Montanye* test and the majority's application of it. Marshall prefers the form of impact analysis used in *Morrissey*. *See supra* notes 27-32 for a discussion and application of impact analysis. Analyzing the facts in light of the *Morrissey* impact analysis, Marshall found that the suspension of visiting privileges constitutes a grievous loss. 109 S. Ct. at 1912.

guage.[78] Although conceding the mandatory language requirement, the dissent nonetheless believed that the majority erred in holding that such language was not present in the Kentucky regulation.[79] The dissent reasoned that the existence of twenty pages of mandatory procedures governing inmate visits trumped the caveat in the introduction.[80] Consequently, the dissent asserted that the language in the regulation created an objective expectation that prisoners could have visitors absent the occurrence of specified conditions.[81] The regulation, therefore, created a protected liberty interest.[82]

The majority's holding that the Kentucky prison regulation did not create a protected liberty interest in visitation privileges is correct for two reasons. First, the Court eliminated confusion by explicitly advocating the mandatory language requirement which was implicit in prior case history.[83] Second, although a formalistic approach to prisoners' rights gives a great deal of power to the drafters of prison regulations, the Court's two step analysis prevents abuses of this power. The Court must make sure that prison officials have not caused a prisoner to suffer adverse consequences not contemplated by his or her original sentence before reaching the question of statutory entitlement.[84] Consequently, lawmakers cannot reduce prisoners to slaves of the state by simply employing the Court's linguistic formula.[85]

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78. *Id.* at 1914. Because the criteria contained in the regulation are regularly employed in practice, Marshall contends that the inmates develop legitimate expectations worthy of due process protection. Marshall further contends that the use of the word "may" does not defeat this expectation. *Id. See supra* note 39 and accompanying text for the deference given an inmate's expectations in due process proceedings.

79. 109 S. Ct. at 1915.

80. *Id.* In light of all the sources of mandatory language contained within the Kentucky regulation, Marshall found the caveat and the word "may" as mere "boilerplate" language. *Id.* at 1916.

81. *Id.* at 1915-16.

82. *Id.* at 1916. Marshal asserts that the majority's holding cannot be reconciled with *Hewitt* because of identical semantic schemes using the word "may." *Id. See supra* notes 50-56 and accompanying text for a discussion of the language in *Hewitt.*

83. *Id.* at 1910. *See supra* notes 42-56 and accompanying text for a discussion of the evolution of the mandatory language requirement.

84. *Id.* at 1908. *See supra* note 69 for the application of the Court's first step in determining whether or not a protectable interest exists. *See supra* note 77 and accompanying text for the dissent's criticism of this method of analysis.

85. *See supra* note 39 and accompanying text illustrating how the two-step analysis prevents tyrannical abuses of power. *See also* Vitek v. Jones, 445 U.S. 478 (1980) (inmate could not be transferred to a mental hospital without due process because such transfer was not contemplated by his original sentence).

Although the *Thompson* majority does not engage in a discussion of policy, the Court's holding reflects policy considerations expressed in earlier decisions.[86] *Thompson* illustrates the Court's reluctance to penalize prison officials who take salutary steps in prison administration. The semantic standard that the Court articulates facilities this goal. Prisons are already understaffed and insufficiently funded. If every set of guidelines triggered the due process clause, the resulting procedures necessary to accompany every official decision would greatly hinder the effective daily operation of prisons. The administrative and financial burdens of holding hearings to monitor daily decision-making would also siphon valuable resources away from beneficial programs such as prisoner education and counseling. Eventually, states might refrain from placing any limits on official discretion or engaging in prison reform simply to circumvent the strictures of the due process clause. The test for entitlement to due process protection in *Thompson* allows state law-makers and prison officials to draft statutes and prison regulations aimed to improve prison conditions without transforming the details of daily prison life into protected liberty interests.[87]

The guidelines in *Thompson* recognize the need to strike the balance between the rights of prisoners and the independence of prison officials. *Thompson* narrows the source of protected liberty interests in order to keep prison administration in the hands of prison officials. The corresponding loss to the inmates, however, is not significant because *Thompson* addresses an area of daily administration where the loss of a privilege is relatively minor.[88] While the Court has held that prisoners are entitled to the fundamental rights of life, liberty and property, the Court's decision in *Thompson* preserves these fundamental rights.[89]

*Robyn Simon**

86. *See supra* notes 41, 47 and accompanying text for a policy discussion regarding judicial reluctance to usurp independence of prison officials.

87. *See* Hewitt v. Helms, 459 U.S. 460 (1983). The Court in *Hewitt* noted the irony of holding that when a State embarks on such desirable experimentation as prison reform, it thereby opens the door to scrutiny by the federal courts. Meanwhile, states choosing not to adopt such procedural provisions avoid the strictures of the due process clause entirely. *Id.* at 471.

88. *See supra* note 51 for a discussion of the policy behind the inception of the mandatory language requirement.

89. *See supra* notes 68, 69, 83 and accompanying text discussing how the decision in *Thompson* preserves prisoners' fundamental rights.

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