

**THE PRISONERS’ PROPERTY DILEMMA:
THE PROPER APPROACH TO DETERMINE
PRISONERS’ PROTECTED PROPERTY
INTERESTS AFTER *SANDIN* AND *CASTLE
ROCK***

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I. INTRODUCTION

The Due Process Clause precludes the government from depriving individuals of life, liberty, or property without due process of law.¹ Although prisoners necessarily have fewer rights, they are “not wholly stripped of constitutional protections.”² Thus, the question arises: when do prisoners have protected liberty and property interests?³ While the Supreme Court has developed a test for determining when prisoners have protected liberty interests,⁴ it has not addressed their protected property interests.⁵

Though prisoners' liberty interests are more commonly discussed—incarceration is after all primarily a restriction of liberty—prisoners' property interests are also important. For

¹ U.S. CONST. amends. V, XIV, § 1. Since “due process” means the same thing in the Fifth and Fourteenth Amendments—with the Fifth Amendment restricting the federal government and the Fourteenth restricting state governments—the issues discussed in this Note apply equally to federal and state prisons. 16C C.J.S. *Constitutional Law* § 1446 (2012).

² *Wolff v. McDonnell*, 418 U.S. 539, 555 (1974). In *Wolff*, the Supreme Court explained:

Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a “retraction justified by the considerations underlying our penal system.” But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for a crime. . . . Prisoners may also claim the protections of the Due Process Clause.

Id. at 555–56 (citation omitted) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

³ *See id.* at 556 (“[T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed. . . . [T]here must be mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application.”). Some commentators argue that due to their dominated position, prisoners need extra protection of their constitutional rights. *See, e.g.*, John K. Edwards, Note, *A Prisoner's Threshold for Procedural Due Process After Sandin v. Conner: Conservative Activism or Legitimate Compromise*, 33 HOUS. L. REV. 1521, 1523 (1997) (“The uniquely subordinate position of prisoners demands assurance against the imposition of undue hardships that would further restrict the limited rights that prisoners retain.”).

⁴ *See Sandin v. Conner*, 515 U.S. 472, 484 (1995) (creating the “atypical and significant hardship” threshold test for determining prisoners' protected liberty interests).

⁵ *See Pickelhaupt v. Jackson*, 364 F. App'x 221, 225 (6th Cir. 2010) (noting that federal circuits are split on whether *Sandin* applies to determinations of prisoners' property interests).

example, a prisoner might claim a property interest in actual tangible property,⁶ a prison job,⁷ or prison education.⁸ If courts recognize such interests, then prison administrators must comply with procedural due process before depriving prisoners of their personal property, jobs, or education.⁹

The law regarding the appropriate test for determining prisoners' protected property interests is currently unsettled.¹⁰ In 1995, in *Sandin v. Conner*, the Supreme Court held that prisoners' protected liberty interests are "limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life."¹¹ In so doing, the Court rejected the approach espoused in *Board of Regents of State Colleges v. Roth* and its progeny that required finding a due process interest if a state statute or regulation created a "legitimate claim of entitlement" to something by using mandatory, rather than discretionary, language.¹² Since *Sandin*, federal circuits have split over whether to apply the "atypical and significant hardship" test to determine prisoners' property interests.¹³

Further complicating the issue, in 2005 the Supreme Court addressed the general public's protected property interests in *Town of Castle Rock v. Gonzales*.¹⁴ There the Court seemed to add

⁶ See, e.g., *Owens v. Ayers*, No. C01-3720 SI (PR), 2002 WL 73226, at *1, *2 (N.D. Cal. Jan. 15, 2002) (finding that a prisoner did not have a property interest in tobacco and lighters); *Wenzler v. Warden of G.R.C.C.*, 949 F. Supp. 399, 402 (E.D. Va. 1996) (finding that a prisoner did not have a property interest in a typewriter).

⁷ See, e.g., *Pickelhaupt*, 364 F. App'x at 226 (finding that a prisoner did not have a property interest in a prison job at a set wage); *Bulger v. U.S. Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995) (finding that a prisoner did not have a property interest in his job assignment); *Onwuazombe v. Dodrill*, No. 07Civ.873(DLC), 2008 WL 1758641, at *4 (S.D.N.Y. Apr. 16, 2008) (finding that a prisoner did not have a property interest in a prison job).

⁸ See, e.g., *Handberry v. Thompson*, 446 F.3d 335, 352 (2d Cir. 2006) (finding that prisoners did not have a property interest in any specific educational conditions).

⁹ See *infra* notes 24–26 and accompanying text.

¹⁰ See discussion *infra* Part II.

¹¹ 515 U.S. 472, 484 (1995).

¹² 408 U.S. 564, 577 (1972); see discussion *infra* Part IIA–B.

¹³ See discussion *infra* Part II.C.

¹⁴ 545 U.S. 748 (2005).

new criteria to the test for property interests.¹⁵ The Court stated that not only must a statute indicate that it is giving an entitlement to a property interest¹⁶ but that the property interest must also have an “ascertainable monetary value” and arise directly, rather than incidentally, from a government benefit or service.¹⁷ Because the Court added these criteria, its decision in *Castle Rock* has been highly criticized.¹⁸ Also, because *Castle Rock* did not involve prisoners’ rights, its applicability to questions of prisoners’ property interests is unclear. Since 2005, at least three circuits have addressed prisoners’ property interests without even mentioning *Castle Rock*.¹⁹ Thus, although the Supreme Court has addressed both the liberty interests of prisoners and the property interests of the general public, the proper approach to determine prisoners’ property interests remains uncertain.

Courts deciding on the proper test for determining prisoners’ property interests should regard two considerations. First, the fundamental differences between liberty and property interests suggest that prisoners’ property and liberty interests should be treated differently.²⁰ Second, the test adopted should address the unique concerns surrounding the prison context. In *Sandin*, the Court described these concerns as (1) to avoid disincentivizing states from codifying prison-administration regulations and (2) to avoid overinvolving federal courts in day-to-day prison management by reducing the number of prisoners’ due process claims and by assuring courts give proper deference to prison administrators.²¹

This Note argues that the best solution to the current uncertainty regarding the appropriate test to determine prisoners’ protected property interests is the *Castle Rock* approach. This approach aptly recognizes that the fundamental differences

¹⁵ See *infra* notes 93–97 and accompanying text.

¹⁶ *Castle Rock*, 545 U.S. at 765 (“If [the plaintiff] was given a statutory entitlement, we would expect to see some indication of that in the statute itself.”).

¹⁷ *Id.* at 766–67.

¹⁸ See *infra* note 96.

¹⁹ See *infra* note 98 and accompanying text.

²⁰ See discussion *infra* Part III.A.

²¹ *Sandin v. Conner*, 515 U.S. 472, 481–82 (1995).

between property and liberty interests justify using different tests for determining when such interests exist.²² Furthermore, applying the *Castle Rock* test would address the prison-specific concerns raised by the Supreme Court in *Sandin*.²³

Part II provides an overview of the current uncertainty regarding how to determine prisoners' protected property interests and introduces the considerations and policies relevant to the proper approach for such determinations. It begins by discussing the traditional approach set out in *Roth* and continues by examining the Court's rejection of the *Roth* test, at least when determining prisoners' liberty interests, in *Sandin*. Next, Part II describes the lower courts' struggle with whether *Sandin* applies to prisoners' property interests. Finally, Part II concludes by discussing the changes wrought by *Castle Rock* and their ambiguous effect for determinations of prisoners' property interests.

Part III explores considerations and policies relevant to determining the proper approach to ascertain prisoners' property interests and argues that the best solution is to apply the *Castle Rock* approach. First, this Part considers the fundamental differences between liberty and property interests and contends that because of these differences, prisoners' property interests should be determined in a property-specific manner as in *Castle Rock*. Second, this Part examines the *Sandin* Court's prison-related concerns and asserts that applying the *Castle Rock* test to determine prisoners' property interests would sufficiently address each concern.

II. BACKGROUND

When considering due process claims, courts generally apply a two-step analysis.²⁴ First, courts determine whether the benefit at issue constitutes a liberty or property interest protected by the

²² See discussion *infra* Part III.A.

²³ See discussion *infra* Part III.B.

²⁴ See Edwards, *supra* note 3, at 1532 (discussing the two elements of due process violations).

Due Process Clause.²⁵ If the benefit is a protected interest, courts then decide whether the procedure used by the government to deprive the plaintiff of that interest comports with procedural due process.²⁶ The first inquiry—specifically, what test is appropriate when determining prisoners' protected property interests—is examined in this Note.

A. THE HISTORICAL APPROACH TO DETERMINING PROTECTED PROPERTY INTERESTS

In *Board of Regents of State Colleges v. Roth*,²⁷ the Supreme Court set out the principles that would guide courts determining protected property interests for years to come.²⁸ First, the Court noted that the scope of property interests implicating procedural due process is not limited to tangible possessions: “The Court has . . . made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money.”²⁹ The Court then defined a test for determining when a given benefit amounts to a protected property interest: “[A] person clearly must have more than an abstract need or desire for [the benefit]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of

²⁵ See *id.* (listing the first element of the due process analysis as “whether a legally recognized liberty or property interest exists”).

²⁶ See *id.* (stating that the second step in the due process analysis is determining “the appropriate level of procedural safeguards that must accompany governmental deprivation of the interest”); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005) (noting that the Court did not need to address the adequacy of the procedures because no deprivation of property protected by the Fourteenth Amendment occurred); *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005) (“We need reach the question of what process is due only if the inmates establish a constitutionally protected liberty interest, so it is appropriate to address this threshold question at the outset.”).

²⁷ 408 U.S. 564 (1972).

²⁸ See Thomas W. Merrill, *The Landscape of Constitutional Property*, 86 VA. L. REV. 885, 888 (2000) (noting that in deciding the threshold inquiry of whether a protected property interest exists, the Supreme Court “has generally followed the method prescribed by *Roth*”); Joel Hugenberger, Note, *Redefining Property Under the Due Process Clause: Town of Castle Rock v. Gonzales and the Demise of the Positive Law Approach*, 47 B.C. L. REV. 773, 773–74 (2006) (noting that the Court has continued to follow *Roth*'s basic framework for determining protected property interests).

²⁹ *Roth*, 408 U.S. at 571–72.

entitlement to it.”³⁰ The Court discussed the source of a legitimate claim of entitlement, stating that “[p]roperty interests . . . are not created by the Constitution” but rather “are created and their dimensions . . . defined by existing rules or understandings that stem from an independent source such as state law.”³¹

After *Roth*, courts looked to the specific language of state statutes and regulations to determine whether they created a legitimate claim of entitlement and thus gave rise to a protected property interest.³² Moreover, courts began to use this mode of analysis—originally created for determining property interests³³—to determine the existence of protected liberty interests as well.³⁴ For example, in *Hewitt v. Helms*, the Supreme Court held that Pennsylvania prison regulations created a liberty interest for inmates to reside in the general prison population as opposed to administrative segregation.³⁵ The Court so held because the language of the prison regulations at issue was mandatory, requiring certain procedures before placing an inmate in administrative segregation, rather than discretionary.³⁶ Hence, after *Roth* and *Hewitt*, the test to determine if state law created a protected liberty or property interest was whether the statute or regulation used mandatory language, thereby creating a legitimate claim of entitlement.

³⁰ *Id.* at 577.

³¹ *Id.*

³² *See, e.g., Hewitt v. Helms*, 459 U.S. 460, 470–71 (1983), *abrogated by Sandin v. Conner*, 515 U.S. 472 (1995) (finding that the language of Pennsylvania statutes created a protected liberty interest). Looking to state law to determine if it creates a legitimate claim of entitlement is known as a “positivist” approach. *See Merrill, supra* note 28, at 922 (noting that *Roth* “endorsed a method of pure positivism in identifying constitutional property”).

³³ In fact, the *Roth* Court separates its analysis of property and liberty interests. *See Roth*, 408 U.S. at 572–78 (analyzing liberty interests in one section and property interests in another).

³⁴ *See, e.g., Hewitt*, 459 U.S. at 470–72 (determining that the language of prison regulations gave rise to a protected liberty interest); *Wolff v. McDonnell*, 418 U.S. 539, 557–58 (1974) (analyzing prisoners’ liberty-interest claim under a property-interest approach).

³⁵ *Hewitt*, 459 U.S. at 470–71.

³⁶ *See id.* at 472 (“[T]he repeated use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the State has created a protected liberty interest.”).

B. *SANDIN V. CONNER*: A NEW APPROACH TO DETERMINING PRISONERS' LIBERTY INTERESTS

In 1995, the Supreme Court altered the test for determining when state regulations create protected liberty interests for prisoners.³⁷ In *Sandin v. Conner*, a prisoner claimed that his due process rights had been violated in connection with a disciplinary hearing that led to thirty days of disciplinary segregation.³⁸ The lower court found that the prisoner had a liberty interest based on a Hawaii prison regulation that required a charge against a prisoner to be “supported by substantial evidence” in order for the prison administration to find the prisoner guilty and to take disciplinary measures like segregation.³⁹ The Supreme Court reversed, holding that the prisoner did not have a protected liberty interest.⁴⁰ In so doing, the Court rejected the mandatory-language test of *Hewitt*.⁴¹ Instead, despite acknowledging that states can create protected liberty interests,⁴² the Court stated that “these interests will be generally limited to freedom from restraint which . . . imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.”⁴³ Thus, the Court changed the focus of questions concerning prisoner liberty interests from statutory or regulatory language to the nature of the deprivation.⁴⁴

³⁷ See *Sandin v. Conner*, 515 U.S. 472, 483–84 (1995) (rejecting the *Hewitt* approach and adopting a new test); see also Deborah R. Stagner, Note, *Sandin v. Conner: Redefining State Prisoners' Liberty Interest and Due Process Rights*, 74 N.C. L. REV. 1761, 1762 (1996) (noting that the *Sandin* decision abandoned the Court's previous approach).

³⁸ 515 U.S. at 475–76.

³⁹ *Id.* at 476–77.

⁴⁰ *Id.* at 487.

⁴¹ See *id.* at 483 & n.5 (noting the Court's “abandonment of *Hewitt*'s methodology” because “the search for a negative implication from mandatory language in prisoner regulations has strayed from the real concerns undergirding the liberty protected by the Due Process Clause”).

⁴² *Id.* at 483–84.

⁴³ *Id.* at 484.

⁴⁴ See *id.* at 481–82 (noting that prior Courts focused on the language of particular regulations rather than on the nature of the deprivation, which the Court found nonsensical when determining prisoners' liberty interests).

The *Sandin* Court offered two main reasons for its new approach.⁴⁵ First, the Court opined that *Hewitt* produced “disincentives for States to codify prison management procedures” because if mandatory prison regulations afforded rights to prisoners, states might avoid that risk altogether by declining to codify prison administrative requirements.⁴⁶ Moreover, the Court stated that prison regulations are designed primarily to direct prison administration, not to bestow rights to prisoners.⁴⁷ Second, the *Hewitt* approach “encouraged prisoners to comb regulations in search of mandatory language on which to base entitlements,”⁴⁸ which resulted in federal courts becoming too involved in the day-to-day management of prisons. This overinvolvement caused an inefficient use of judicial resources and an inappropriate encroachment upon the deference due to prison administrators.⁴⁹

The expression of these concerns suggests that the *Sandin* Court was aware of and influenced by the unique attributes of prisons. In fact, the Court indicated that the mandatory-language test might still be appropriate outside of the prison context.⁵⁰ The Court therefore left the scope of its decision in *Sandin* undefined.

C. THE APPLICABILITY OF *SANDIN* WHEN DETERMINING PRISONERS’ PROTECTED PROPERTY INTERESTS

Since *Sandin*, lower courts have struggled to determine the scope of the Court’s decision and in many instances have limited its application.⁵¹ Specifically, federal circuits have split on

⁴⁵ *Id.* at 482–83.

⁴⁶ *Id.* at 482.

⁴⁷ *Id.* at 481–82.

⁴⁸ *Id.* at 481.

⁴⁹ *Id.* at 482.

⁵⁰ *See id.* at 481 (“[A] conclusion [that mandatory statutory language creates due process rights] may be entirely sensible in the ordinary task of construing a statute defining rights and remedies available to the general public.”).

⁵¹ *See, e.g.,* McQuillion v. Duncan, 306 F.3d 895, 903 (9th Cir. 2002) (“*Sandin*’s holding was limited to internal prison disciplinary regulations.”); Allah v. Seiverling, 229 F.3d 220, 224 (3d Cir. 2000) (finding that *Sandin* does not foreclose a prisoner’s right to access the courts); Ellis v. District of Columbia, 84 F.3d 1413, 1418 (D.C. Cir. 1996) (declining to apply *Sandin*’s rationale in the context of a parole determination); Mitchell v. Dupnik, 75 F.3d 517, 524 (9th Cir. 1996) (declining to apply *Sandin*’s rationale to claims of pretrial

whether to apply *Sandin's* atypical and significant hardship test to determine prisoners' property interests.⁵²

1. *Circuits That Do Not Apply the Sandin Approach.* The Fifth and Second Circuits have expressly rejected applying the *Sandin* test when determining prisoners' property interests.⁵³ In *Bulger v. United States Bureau of Prisons*, the Fifth Circuit stated: "[*Sandin*] did not instruct on the correct methodology for determining when prison regulations create a protected property interest."⁵⁴ The court then applied the *Roth* "legitimate claim of entitlement" test and determined that the inmate did not have a property interest in his prison job.⁵⁵

In *Handberry v. Thompson*, when facing a prisoner claiming a property interest in particular prison educational services, the Second Circuit also rejected applying the *Sandin* approach to prisoners' property interests.⁵⁶ The court instead followed *Roth*, considering whether the statutes and prison regulations in question contained mandatory language and thus created a legitimate claim of entitlement.⁵⁷ Though recognizing that the Supreme Court warned against use of this approach in *Sandin*, the court nonetheless declared: "*Sandin* was concerned with the proper definition of *liberty* interests, not property interests. . . . [T]his Circuit has continued to focus on the type of language used in a statute that is alleged by a party to have created a property interest."⁵⁸ Hence, the Second Circuit, like the

detainees); *Smith v. Ryan*, No. 10-108, 2011 WL 2936020, at *5 n.3 (D. Del. July 19, 2011) (considering the language of a state regulation rather than the nature of the deprivation in performing a liberty-interest inquiry based on the rationale that "[s]everal circuit courts . . . have concluded that *Sandin* only alters the liberty interest methodology applicable to the day to day management of prisons"); *Pentlarge v. Murphy*, 541 F. Supp. 2d 421, 425 (D. Mass. 2008) (declining to apply *Sandin's* test to claims of civilly committed detainees).

⁵² See *Pickelhaupt v. Jackson*, 364 F. App'x 221, 225–26 (6th Cir. 2010) (discussing the circuit split).

⁵³ See *id.* at 225 ("The Second and Fifth Circuits hold that *Sandin* does not apply to property interests.").

⁵⁴ 65 F.3d 48, 50 (5th Cir. 1995).

⁵⁵ *Id.*

⁵⁶ 446 F.3d 335, 353 n.6 (2d Cir. 2006).

⁵⁷ *Id.* at 353.

⁵⁸ *Id.* at 353 n.6 (citing *Kapps v. Wing*, 404 F.3d 105, 113–14 (2d Cir. 2005); *Sealed v.*

Fifth, has explicitly rejected *Sandin's* atypical and significant hardship test when determining prisoners' property interests.

In addition, though not explicitly discussing the applicability of the *Sandin* test to determinations of prisoners' property interests, the Third Circuit in *Burns v. Pennsylvania Department of Corrections* held that "assessment of [a prisoner's] institutional [bank] account constituted the deprivation of a protected property interest for the purposes of procedural due process."⁵⁹ That the court did not apply the atypical and significant hardship test suggests that the Third Circuit has also rejected applying the *Sandin* test in determining prisoners' property interests. Moreover, the dissent in *Burns* disagreed with the majority's decision to find a property interest in an inmate's institutional account "[i]n light of the substantial narrowing of the inmate's liberty interest in *Sandin*."⁶⁰ This dissenting opinion strengthens the inference that *Burns* represents a rejection of the *Sandin* approach when determining prisoners' property interests.

Furthermore, Third Circuit district courts have explicitly rejected application of *Sandin's* approach to prisoners' property interests.⁶¹ For example, in *Browning-Ferris, Inc. v. Manchester Borough*, the district court specifically addressed whether *Sandin's* test applies to prisoners' property interests.⁶² The court determined that it does not: "Despite *Sandin*, however, the idea that state law, including the language of the statute, regulations, etc., . . . creates a property interest remains valid [because] the Supreme court . . . has not changed this holding as *Sandin* did for liberty interest cases."⁶³ The court also reasoned that because

Sealed, 332 F.3d 51, 56 (2d Cir. 2003)). Interestingly, neither case cited by the *Handberry* court dealt with claims of prisoners.

⁵⁹ 544 F.3d 279, 291 (3d Cir. 2008).

⁶⁰ *Id.* at 293 (Hardiman, J., dissenting).

⁶¹ See *Medina v. City of Philadelphia*, No. Civ.A.03-1971, 2004 WL 1126007, at *6 n.7 (E.D. Pa. May 19, 2004) (rejecting the plaintiff's reliance on *Sandin* because his claims centered on deprivation of a property rather than liberty interest); *Browning-Ferris, Inc. v. Manchester Borough*, 936 F. Supp. 241, 247-48 (M.D. Pa. 1996) (arguing that *Sandin* should not apply to determinations of property interests).

⁶² 936 F. Supp. at 247 n.4 ("Since *Sandin* changed the analysis for liberty interests, the question becomes whether the analysis changes for property interests.").

⁶³ *Id.* at 247.

liberty and property interests are fundamentally different, they warrant different due process tests.⁶⁴

And while the Fourth Circuit has yet to consider whether *Sandin* applies to determinations of prisoner property interests, at least one district court in that circuit has held that it does not. Instead, the district court held that the *Hewitt* mandatory-language approach applied to prisoners' property interests.⁶⁵

2. *Circuits That Apply the Sandin Approach.* The Tenth Circuit has extended *Sandin*'s atypical and significant hardship test when determining prisoners' property interests.⁶⁶ Faced with a prisoner's due process claim for deprivation of property in *Cosco v. Uphoff*, the Tenth Circuit first held that *Sandin* applied.⁶⁷ Though recognizing its disagreement with the Fifth Circuit on this issue,⁶⁸ the court reasoned:

[W]e do not see how the Supreme Court could have made clearer its intent to reject the *Hewitt* analysis outright in the prison context. Indeed, if we are to avoid *Hewitt*'s "two undesirable effects" ((1) creating disincentives for states to codify prison management procedures and (2) entangling the federal courts in the day-to-day management of prisons) in the context of prison property interests and return the focus of our due process inquiry from "the language of a particular regulation" to "the nature of the deprivation" as

⁶⁴ See *id.* at 247–48 ("[A] liberty interest is more easily determinable by examining its 'nature' than a property interest, because a restraint on freedom is more easily discernible than a benefit not obtained. . . . [T]herefore state law must be examined to determine whether there is such a [property] right and under what circumstances.").

⁶⁵ See *Wenzler v. Warden of G.R.C.C.*, 949 F. Supp. 399, 402 n.1 (E.D. Va. 1996) ("[The *Hewitt*] approach has been abandoned in assessing whether an inmate has a protected liberty interest in the prison setting. But, *Sandin* has not been extended to the examination of state law for the creation of a protected property interest." (citation omitted)).

⁶⁶ See, e.g., *Steffey v. Orman*, 461 F.3d 1218, 1221 (10th Cir. 2006) (analyzing prisoners' due process claims alleging deprivation of property under *Sandin*'s atypical and significant hardship test).

⁶⁷ 195 F.3d 1221, 1223–24 (10th Cir. 1999).

⁶⁸ See *id.* at 1223 (acknowledging the Fifth Circuit's holding that *Sandin* does not apply to determinations of prisoners' property interests).

Sandin mandates, we must conclude that the Supreme Court foreclosed the possibility of applying the *Hewitt* methodology to derive protected property interests in the prison conditions setting.⁶⁹

The court further supported its decision to apply *Sandin* to property interests, asserting:

Our conclusion is further bolstered as we consider it unlikely that the Supreme Court would establish a standard in the prison setting more sensitive to property interests than liberty interests. At times the Court has defined the two interests differently. . . . At other times the Supreme Court has used the two interests analogously. . . . We do not have to decide whether the two interests are to be equally protected, but it seems appropriate to conclude that if one merited more protection than the other it would be liberty.⁷⁰

Then in 2006, the Tenth Circuit cited *Cosco* in reiterating *Sandin*'s applicability to determinations of prisoners' property interests.⁷¹ This time the court acknowledged that its position clashed with that of both the Second and Fifth Circuits.⁷²

The Seventh Circuit also seems to apply *Sandin* to determinations of prisoners' property interests.⁷³ In *Abdul-Wadood v. Nathan*, the Seventh Circuit cited *Sandin* in concluding that a prisoner who was fined fifty cents, reprimanded, and deprived of commissary privileges was not denied any protected

⁶⁹ *Id.* (citations omitted).

⁷⁰ *Id.* at 1223 n.4.

⁷¹ See *Steffey*, 461 F.3d at 1221 (“[P]roperty interest claims by prisoners are also to be reviewed under *Sandin*'s atypical-and-significant-deprivation analysis.”).

⁷² See *id.* at 1222 n.3 (recognizing that the Second and Fifth Circuits only apply *Sandin* to liberty-interest claims).

⁷³ *Cosco*, 195 F.3d at 1223 n.3 (“The Seventh Circuit appears to lean the other way, suggesting without directly holding in *Abdul-Wadood v. Nathan* that *Sandin* controls claims of *Hewitt*-based property interests in the prison setting.” (citation omitted)).

liberty or property interest.⁷⁴ The citation to *Sandin* indicates that the Seventh Circuit would apply *Sandin*'s test to determine the existence of both liberty and property interests of prisoners.⁷⁵ Shortly thereafter, the panel in *Logan v. Gillam* cited *Abdul-Wadood* as authority for its determination that *Sandin*'s atypical and significant hardship analysis "also applies to claims that prison regulation[s] create federally-enforceable property interests."⁷⁶ In addition, the court's reliance on *Sandin* in *Murdock v. Washington*, which held that a prisoner had no liberty or property interest in attending a prison cooking class,⁷⁷ further indicates that the Seventh Circuit employs *Sandin*'s test to determine prisoners' protected property interests.⁷⁸

3. *Circuits That Have Not Clearly Decided Whether to Apply the Sandin Approach.* The Sixth Circuit has not definitively decided whether *Sandin*'s test applies to determinations of prisoners' property interests.⁷⁹ On one hand, the Sixth Circuit has "suggested . . . that *Sandin* does not apply to *Hewitt*-type property interests."⁸⁰ On the other, the Sixth Circuit has acknowledged that it has cited *Sandin* in holding that a prisoner has no property interest in his prison job.⁸¹

Similarly, the Ninth Circuit has not clearly determined whether *Sandin* applies to determinations of prisoners' property interests. In *Martin v. Upchurch*, the Ninth Circuit held that a prisoner had no liberty interest in his prison job under *Sandin*⁸² and went on to say: "To the extent that [the prisoner] claims he has a property

⁷⁴ 91 F.3d 1023, 1025 (7th Cir. 1996).

⁷⁵ See *Pickelhaupt v. Jackson*, 364 F. App'x 221, 225 (6th Cir. 2010) (noting that *Abdul-Wadood* suggests that the Seventh Circuit applies *Sandin*'s test to determine prisoners' property interests); *Cosco*, 195 F.3d at 1223 n.3 (same).

⁷⁶ No. 94-3794, 1996 WL 508618, at *3 (7th Cir. Aug. 30, 1996).

⁷⁷ 193 F.3d 510, 513 (7th Cir. 1999).

⁷⁸ See *Pickelhaupt*, 364 F. App'x at 225 (noting that *Murdock* suggests that the Seventh Circuit applies *Sandin*'s test to determine prisoners' property interests).

⁷⁹ See *id.* (asserting that the Sixth Circuit has suggested, without directly holding, that the *Sandin* test does not apply to property interests).

⁸⁰ *Id.* (citing *Woodard v. Ohio Adult Parole Auth.*, 107 F.3d 1178, 1182-83 (6th Cir. 1997)).

⁸¹ *Id.* at 226 (citing *Clarkson v. Powers*, No. 00-5065, 2000 WL 1679466 (6th Cir. Nov. 2, 2000); *Perry v. Rose*, No. 99-5240, 2000 WL 191803 (6th Cir. Feb. 7, 2000)).

⁸² No. 93-16907, 1995 WL 563744, at *2 (9th Cir. Sept. 22, 1995).

interest in his prison job, and under the pre-*Sandin* liberty interest analysis, [his] due process claim regarding his job fails. . . . Similarly, [he] failed to cite to any prison regulation which mandates a particular classification.”⁸³ As other courts have recognized, this case indicates that the Ninth Circuit does not apply *Sandin* to determine prisoners’ property interests.⁸⁴ In a later case, however, a Ninth Circuit district court declared that “[t]he Ninth Circuit has not yet determined whether *Sandin* applies to a prisoner’s property claim.”⁸⁵

D. *TOWN OF CASTLE ROCK V. GONZALES*: A NEW APPROACH TO DETERMINATIONS OF PROTECTED PROPERTY INTERESTS

Although *Castle Rock* dealt with due process property interests generally rather than in the prison context, it further complicates matters by adding new criteria to the determination of property interests. The Court in *Castle Rock* held that the plaintiff did not have a property interest in police enforcement of a restraining order.⁸⁶ The Court began by examining Colorado law under *Hewitt’s* mandatory-language approach.⁸⁷ After finding that the statute was not mandatory,⁸⁸ the Court went on to assert that even if it were, it would not necessarily afford the plaintiff an entitlement to enforcement of the order.⁸⁹ Citing *Sandin*, the Court explained that “[m]aking the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people.”⁹⁰ The Court further rationalized that “[i]f [the plaintiff] was given a statutory

⁸³ *Id.* at *2 n.2.

⁸⁴ See *Pickelhaupt*, 364 F. App’x at 225–26 (noting that *Martin* suggests that the Ninth Circuit does not employ the *Sandin* test when determining prisoners’ property interests); *Cosco v. Uphoff*, 195 F.3d 1221, 1223 n.3 (10th Cir. 1999) (same).

⁸⁵ *Owens v. Ayers*, No. C01-3720 SI (PR), 2002 WL 73226, at *2 (N.D. Cal. Jan. 15, 2002).

⁸⁶ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

⁸⁷ *Id.* at 758–64.

⁸⁸ *Id.* at 760.

⁸⁹ *Id.* at 764–65.

⁹⁰ *Id.* at 765 (citing *Sandin v. Conner*, 515 U.S. 472, 482 (1995)).

entitlement, we would expect to see some indication of that in the statute itself.”⁹¹

Moreover, although the Court determined that Colorado state law did not create a property interest in the enforcement of the restraining order,⁹² the Court went on to set out additional criteria for finding protected property interests. The Court declared:

Even if we were to think otherwise concerning the creation of an entitlement by Colorado, it is by no means clear that an individual entitlement to enforcement of a restraining order could constitute a “property” interest for purposes of the Due Process Clause. Such a right would not, of course, resemble any traditional conception of property. . . . [T]he right to have a restraining order enforced does not “have some ascertainable monetary value,” as even our “*Roth*-type property-as-entitlement” cases have implicitly required. . . . [T]he alleged property interest here arises *incidentally*, not out of some new species of government benefit or service, but out of a function that government actors have always performed⁹³

This language suggests that the Court has added additional requirements to its test for protected property interests.⁹⁴ Not only must the plaintiff have a legitimate claim of entitlement to something as indicated in the statute itself, but the interest must also have an ascertainable monetary value.⁹⁵ Furthermore, the interest cannot arise incidentally from a routinely performed

⁹¹ *Id.*

⁹² *Id.* at 768.

⁹³ *Id.* at 766–67 (quoting Merrill, *supra* note 28, at 964).

⁹⁴ See Sara B. Poster, *An Unreasonable Constitutional Restraint: Why the Supreme Court's Ruling in Town of Castle Rock v. Gonzales Rests on Untenable Rationales*, 17 TEMP. POL. & CIV. RTS. L. REV. 129, 134–36 (2007) (discussing the Court's justifications for its conclusion that even if state law had entitled the plaintiff to have her order enforced, she still would not have a protected property interest).

⁹⁵ *Id.* at 134–35.

government function but rather must come from government action that more directly affects the plaintiff's rights.⁹⁶

At the very least, *Castle Rock* further complicates matters for courts already in flux over how to determine when prisoners have protected property interests.⁹⁷ While *Castle Rock* certainly did not clarify whether *Sandin* applies when determining prisoners' property interests, it did add additional tests to the determination

⁹⁶ See *id.* at 135 (noting that an interest that arises incidentally from routine government action or that is an indirect government benefit does not qualify as a protected property interest under the *Castle Rock* approach). Some commentators have criticized the *Castle Rock* decision for creating additional hurdles to the recognition of property interests. See, e.g., *id.* at 136–52 (arguing that the Court's additional requirements for protected property interests are unjustified and have worrisome implications for due process protections); Hugenberger, *supra* note 28, at 802 (“[T]he suggestion in *Castle Rock* that there is a constitutional bar to the recognition of some state-created entitlements as property appears to misunderstand the role of the Court in recognizing property for procedural due process purposes.”). These commentators particularly criticize the ascertainable-monetary-value hurdle, arguing that it directly contradicts the Court's recognition in *Roth* that property interests “extend well beyond actual ownership of real estate, chattels, or money.” *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 571–72 (1972); e.g., Poster, *supra* note 94, at 140–44 (arguing that neither *Roth* nor its progeny implicitly require property interests to have an ascertainable monetary value); Hugenberger, *supra* note 28, at 805 (arguing that the ascertainable-monetary-value requirement “contradict[s] *Roth*'s explicit language and . . . the underlying purpose of property under the Due Process Clause”). The Court may have adopted these additional hurdles in order to avoid the “positivist trap”—where courts must recognize “either too little or too much property relative to other value commitments” important to judges because state statutes either are or are not mandatory. Merrill, *supra* note 28, at 923; see *id.* at 922–33 (discussing the problem of the “positivist trap”); Hugenberger, *supra* note 28, at 806 (noting that underlying the *Castle Rock* decision is “a deep skepticism of the means and results of *Board of Regents of State Colleges v. Roth*'s positivist approach” and a fear that *Roth* would result in too many findings of property interests). The Court's description of the alleged property interest in *Castle Rock* as “vague and novel” suggests that the Court was concerned with recognizing too much property. *Castle Rock*, 545 U.S. at 766. Also, the Court's commentary regarding its “continuing reluctance to treat the Fourteenth Amendment as ‘a font of tort law’” supports the theory that the Court was concerned with recognizing too much property. *Id.* at 768 (citations omitted).

⁹⁷ The additional tests set out in *Castle Rock* were dicta because the Court had already found that Colorado state law did not give rise to an entitlement. See Michael L. Wells & Alice E. Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by Engquist v. Oregon Department of Agriculture*, 44 GA. L. REV. 161, 174 n.70 (2009) (stating that the Court suggested in dicta that the plaintiff did not meet two other requirements). This Note however assumes that courts will, out of deference to the Supreme Court, require that these additional hurdles be met before finding a protected property interest. In other words, courts *can* require that these additional hurdles be met, and this Note in essence argues that they should do so at least for determinations of prisoners' property interests. See *infra* Part III.

of property interests generally. Interestingly, at least three circuits have addressed prisoners' property interests since *Castle Rock* without even acknowledging it.⁹⁸ Therefore, in light of the circuit split over whether *Sandin's* atypical and significant hardship approach applies when determining prisoners' property interests and considering the added complications presented by *Castle Rock*, the proper approach to determine prisoners' protected property interests is highly uncertain.

III. ANALYSIS

When a prisoner files a due process lawsuit alleging the deprivation of property, courts must first determine whether a protected property interest exists. But how courts are to make this determination is unclear. Currently, courts may apply one of two tests: the Supreme Court's test for determining prisoners' liberty interests or its test for determining the general public's property interests. But which test should courts apply? This Part argues that courts should apply the Supreme Court's test for determining property interests generally—the *Castle Rock* approach. Using this approach to determine prisoners' property interests is advantageous because it recognizes that liberty and property interests are fundamentally different and thus allows courts to treat property-interest claims differently.⁹⁹ The *Castle Rock* approach also addresses the prison-specific concerns of the *Sandin* Court.¹⁰⁰

A. PROPERTY AND LIBERTY INTERESTS SHOULD BE TREATED DIFFERENTLY

In *Board of Regents of State Colleges v. Roth*, the Supreme Court recognized the fundamental difference between liberty and

⁹⁸ See *Burns v. Pa. Dep't of Corr.*, 544 F.3d 279 (3d Cir. 2008) (omitting any mention of *Castle Rock*); *Steffey v. Orman*, 461 F.3d 1218 (10th Cir. 2006) (same); *Handberry v. Thompson*, 446 F.3d 335 (2d Cir. 2006) (same).

⁹⁹ See discussion *infra* Part III.A.

¹⁰⁰ See discussion *infra* Part III.B.

property rights.¹⁰¹ The Court addressed liberty and property interests separately, applying different tests to each.¹⁰² The Court defined liberty interests broadly,¹⁰³ while cabining property interests to legitimate claims of entitlement stemming from sources other than the Constitution.¹⁰⁴ This distinction demonstrates an understanding of liberty rights as fundamental—that is, arising from the Constitution itself—and property rights as state-created.¹⁰⁵

Since *Roth*, however, this distinction has blurred. Courts now recognize that states may create liberty interests over and above those afforded by the Constitution.¹⁰⁶ Yet most liberty interests continue to stem from the Constitution while property interests remain almost exclusively state-created.¹⁰⁷

Despite the relative scarcity of state-created liberty interests, post-*Hewitt* prisoners often sought vindication of such interests in federal courts.¹⁰⁸ The growth of liberty-interest litigation resulted from the *Hewitt* Court's extension of *Roth*'s test for determining property interests to determinations of prisoners' liberty

¹⁰¹ See Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 572, 576–78 (1972) (discussing the meanings of liberty and property in the Due Process Clause).

¹⁰² *Id.*; 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, 492 (1984).

¹⁰³ *Roth*, 408 U.S. at 572.

¹⁰⁴ *Id.* at 577.

¹⁰⁵ See Edwards, *supra* note 3, at 1533 (“Property interests are recognized as a means to protect an individual’s reliance or expectation interest in maintaining rights to property against arbitrary deprivation by government. Liberty interests involve a determination of the individual’s substantive rights to exercise freedom of action without governmental restraint. Many liberty interests are considered fundamental because they constitute the necessary precondition to the enjoyment of all other rights, including property rights.”); Herman, *supra* note 102, at 531 (arguing that the major difference between liberty and property rights is that the state does not create liberty rights).

¹⁰⁶ See Edwards, *supra* note 3, at 1533 (noting that some liberty interests may be state-created). The Court began recognizing state-created liberty interests in the 1970s. *Id.* at 1533 n.68.

¹⁰⁷ See Merrill, *supra* note 28, at 948 (noting that the amount of state-created property interests “loom[s] much larger” than that of state-created liberty interests).

¹⁰⁸ In fact, the amount of prisoner liberty-interest litigation was an issue the Court was attempting to address in *Sandin*. See *Sandin v. Conner*, 515 U.S. 472, 480–83 (1995) (discussing the numerous prisoner property-interest cases that came before the Court after *Hewitt*).

interests.¹⁰⁹ Under this approach, mandatory language in prison regulations created a protected liberty or property interest.¹¹⁰

Sandin can, and should, be read as a departure from this property-based analysis of prisoners' liberty interests rather than an outright rejection of the *Roth* property test for all prisoner due process determinations. By applying an atypical and significant hardship test and refocusing the inquiry on the nature of the deprivation rather than the language of statutes and regulations, the Court in *Sandin* merely realigned the determination of prisoners' liberty interests with more traditional liberty-based tests.¹¹¹ Because liberty interests are generally fundamental, it makes more sense to examine the nature of an alleged liberty deprivation rather than the language of state statutes. This does not signify, however, that the *Sandin* Court meant to change the mandatory-language test for determining prisoners' property interests because property interests generally are state-created.¹¹²

Moreover, the Court's more recent decision in *Castle Rock* supports the proposition that property and liberty interests are fundamentally different. By adding an "ascertainable monetary value" test to determinations of protected property interests, the Court necessarily distinguished property interests from liberty

¹⁰⁹ See *supra* notes 33–34 and accompanying text; see also Edwards, *supra* note 3, at 1541 ("Court precedent over the past twenty years has clearly embraced the property mode of analysis" when determining prisoners' state-created liberty interests); Herman, *supra* note 102, at 494 (declaring that even though "[p]roperty was only a creature of state law [and] liberty was broadly defined, and [even though] there was little reason to guess that the positivist doctrine would extend to liberty in later cases," the *Roth* positivist approach was indeed extended to determinations of prisoners' liberty interests); Merrill, *supra* note 28, at 931–32 (discussing prisoner cases holding that state regulations could create positive liberty and property interests).

¹¹⁰ See *supra* notes 35–36 and accompanying text.

¹¹¹ See Merrill, *supra* note 28, at 966 (stating that by adopting an approach focused on the gravity of the deprivation, *Sandin* "engraft[ed] the old 'grievous loss' notion into the jurisprudence of positive liberty"); Hugenberger, *supra* note 28, at 788 (noting that *Sandin* "discard[ed] the positive law approach of identifying liberty interests in favor of a 'grievous loss' approach that would examine whether the alleged deprivation of liberty represent[ed] an 'atypical and significant hardship'"). The Court had rejected the grievous-loss approach over twenty years earlier in *Roth*. Herman, *supra* note 102, at 504.

¹¹² See *Browning–Ferris, Inc. v. Manchester Borough*, 936 F. Supp. 241, 247–48 (M.D. Pa. 1996) ("A liberty interest is more easily determinable by examining its 'nature' than a property interest . . .").

interests,¹¹³ thereby bolstering the conclusion that property and liberty interests are distinct and thus should be treated differently.

Finally, the uniqueness of the prison context strengthens the claim that prisoners' liberty and property interests should be treated differently. Incarceration is primarily a restraint of liberty, and property restrictions stemming therefrom are merely ancillary. For this reason, it is logical to apply a more stringent test—like the *Sandin* atypical and significant hardship test—when determining prisoners' liberty rather than property interests.¹¹⁴

Thus, the Court has recognized the fundamental differences between liberty and property interests, and these differences are more pronounced in the prison context. Determinations of prisoners' protected property interests should therefore be analyzed under a property-based approach—like that in *Castle Rock*—so long as that approach addresses the unique prison-related policy concerns elucidated by the *Sandin* Court.

B. THE *CASTLE ROCK* TEST SUFFICIENTLY ADDRESSES *SANDIN*'S PRISON-CONTEXT CONCERNS

In abandoning the mandatory-language approach to determining prisoners' liberty interests, the *Sandin* Court expressed two major prison-related concerns.¹¹⁵ First, the Court opined that the mandatory-language approach might deter states from codifying prison-management regulations.¹¹⁶ Second, the

¹¹³ See Merrill *supra* note 28, at 964–65 (arguing that an ascertainable-monetary-value test would provide a reasonable basis for differentiating property and liberty interests prior to the *Castle Rock* decision).

¹¹⁴ On the other hand, some commentators argue that because incarceration is primarily a restraint of liberty, prisoners' liberty interests need more careful protection and therefore should not be subject to a more stringent test. See, e.g., *Cosco v. Uphoff*, 195 F.3d 1221, 1223 n.4 (10th Cir. 1999) (noting that “it [is] unlikely that the Supreme Court would establish a standard in the prison setting more sensitive to property interests than liberty interests” and that “if one merit[s] more protection than the other that would be liberty”); Herman, *supra* note 102, at 553–54 (arguing that prisoners' liberty interests need more protection from the courts because prisoners' liberty is not valued by the majority).

¹¹⁵ See *supra* notes 45–49 and accompanying text.

¹¹⁶ *Sandin v. Conner*, 515 U.S. 472, 482 (1995); see also *supra* notes 46–47 and accompanying text.

Court believed that the old approach caused federal courts to become overly involved in the day-to-day management of prisons.¹¹⁷ The *Castle Rock* approach for determining protected property interests, though created outside of the prison context, sufficiently addresses these concerns.

1. *Concern of Deterring States from Codifying Prison-Management Regulations.* The *Castle Rock* test for protected property interests contains additional hurdles not present in the mandatory-language approach rejected in *Sandin*.¹¹⁸ While the approach rejected in *Sandin* would find a liberty interest if a statute contained mandatory language, the *Castle Rock* Court, citing *Sandin*, stated that even if the statutory language in question were mandatory, it would not necessarily create a protected property interest: "Making the actions of government employees obligatory can serve various legitimate ends other than the conferral of a benefit on a specific class of people."¹¹⁹ The Court further explained that "[i]f [the plaintiff] was given a statutory entitlement, we would expect to see some indication of that in the statute itself."¹²⁰ This language suggests an additional step when determining property interests because not all mandatory statutory language would necessarily create a legitimate claim of entitlement under *Castle Rock*. Instead, the language of the statute must indicate that it is creating such an entitlement.

This extra step would quell states' potential concerns that codifying prison regulations could inadvertently confer property rights upon prisoners. Because only those statutes that are mandatory and indicate that they are giving an entitlement would confer a protected property interest, states could more easily codify prison regulations without bestowing interests upon prisoners. States could even enact mandatory statutes without granting any interests, so long as these statutes did not indicate that they were giving an entitlement. Moreover, this additional step fits with the

¹¹⁷ *Sandin*, 515 U.S. at 482; see also *supra* note 49 and accompanying text.

¹¹⁸ See *supra* notes 93–96 and accompanying text.

¹¹⁹ *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 765 (2005).

¹²⁰ *Id.*

Sandin Court's recognition that prison regulations are "designed to guide correctional officials in the administration of a prison" rather than to confer benefits upon prisoners.¹²¹ Any regulations meant to guide prison officials would almost certainly omit any indication that they were giving a benefit to prisoners—a requirement of the *Castle Rock* approach.

In fact, even if a prison regulation were deemed to contain such an indication, the *Castle Rock* approach requires the prisoner to clear an additional hurdle before a court can find a protected property interest. *Castle Rock* mandates that a federally protected property interest cannot be found if the benefit arises incidentally.¹²² This hurdle therefore also recognizes that most prison regulations are meant to guide prison officials. Thus, not only would a prison regulation have to contain mandatory language and an indication that it is conferring an entitlement upon prisoners, but the entitlement would also have to arise directly from the regulation rather than incidentally from the functions performed by prison officials. The *Castle Rock* test therefore adequately addresses the *Sandin* Court's concern that a mandatory-language approach would disincentivize states to codify prison-management regulations because under *Castle Rock* it is difficult for prison regulations to create property interests.

In fact, *Castle Rock*'s approach might incentivize states to codify *more* prison-management regulations, especially compared to an approach that examines the nature of the deprivation like that in *Sandin*. As was the case before *Sandin* created confusion, states could avoid creating protected property interests for prisoners by using discretionary language in their prison regulations.¹²³ Applying the *Castle Rock* approach would increase states' abilities

¹²¹ *Sandin*, 515 U.S. at 481–82.

¹²² *Castle Rock*, 545 U.S. at 766–67.

¹²³ See Herman, *supra* note 102, at 527–28 (“[A] state can manipulate the boundaries of procedural due process protection by simply declining to confer entitlements. . . . The Court’s focus on statutory language makes it very easy for a legislature to destroy an entitlement—perhaps as easily as by changing the word ‘shall’ to ‘may’ . . .”). Because states control the language of their prison regulations, the *Castle Rock* approach also addresses the *Sandin* Court’s concern about showing proper judicial deference to prison administration. See *infra* note 138 and accompanying text.

to promulgate prison regulations without thereby creating property interests for prisoners. First, the *Castle Rock* test nearly eliminates the possibility of states inadvertently creating property interests through promulgating prison regulations. Second, and perhaps more importantly, it instructs states on how to draft their regulations to intentionally avoid creating property interests. For example, states could actively exclude any indication of an entitlement in their prison regulations to avoid creating protected property rights. Also, states could potentially avoid creating any property interests by expressly stating that their regulations are meant to guide prison officials, not to confer any entitlements upon prisoners. On the other hand, under an approach like the one espoused in *Sandin*, which examines the nature of the deprivation, states have much less guidance regarding when their actions create property interests for prisoners.

2. *Concerns Regarding Federal Courts' Overinvolvement in Day-to-Day Prison Management.* A major rationale behind the *Sandin* Court's adoption of a new approach to determining prisoners' liberty interests was its concern about the overinvolvement of federal courts in the day-to-day management of prisons that resulted from the mandatory-language approach.¹²⁴ This concern can be divided into two parts. First, the sheer number of prisoner due process claims that courts were forced to deal with under the mandatory-language approach resulted in an inefficient use of judicial resources.¹²⁵ Second, federal courts need to "afford appropriate deference and flexibility to state officials trying to manage a volatile environment."¹²⁶ The *Castle Rock* approach addresses both of these concerns.

¹²⁴ See *Sandin*, 515 U.S. at 482 (discussing the overinvolvement of federal courts in the day-to-day management of prisoners, which resulted in an inefficient use of judicial resources and an encroachment upon the deference due to prison administrators).

¹²⁵ *Id.* The Court provided examples of a number of prisoner cases it felt were especially indicative of federal courts' overinvolvement in prison management. See *id.* at 483 (listing cases involving prisoners claiming liberty interests in participating in an inmate boot camp, in a waiver of the travel limit imposed on prison furloughs, in receiving a tray lunch rather than a sack lunch, in receiving a paperback dictionary, in freedom from transfer to a smaller cell without electrical outlets, and in not being placed on a particular diet). Notably, in all of these cases liberty rather than property interests were at issue. *Id.*

¹²⁶ *Id.* at 482.

Initially, it is important to note that the Court's concern over the sheer number of prisoners' due process cases under the mandatory-language approach is probably more pressing when considering prisoners' liberty—rather than property—interests. Because incarceration is primarily a restraint of liberty, most prisoners' due process claims allege deprivations of liberty, not property.¹²⁷ Also, because property interests must be completely removed or terminated, rather than merely modified, to lead to a due process violation, claims alleging property-interest deprivations are generally limited to more serious deprivations.¹²⁸ For these reasons, the concern about excessive litigation is more relevant in the context of prisoners' liberty-interest claims. Thus, the need to adopt a threshold test—like *Sandin's* atypical and significant hardship test—to curtail the number of cases the courts receive is much less dire for cases concerning prisoners' property interests.

Furthermore, any residual concern about federal courts receiving excessive property-interest claims from prisoners is addressed by the additional hurdles of the *Castle Rock* approach. Under *Castle Rock*, a mere showing of mandatory statutory language does not automatically result in a finding of a protected property interest.¹²⁹ In addition to proving the existence of mandatory statutory language, a prisoner must also show that: the

¹²⁷ For instance, all of the cases the *Sandin* Court cited to support its proposition that federal courts were too involved in prison management under the mandatory-language approach involved alleged liberty interests. *See id.* at 483.

¹²⁸ *See Merrill, supra* note 28, at 966–67 (“Whatever may be said about engrafting the old ‘grievous loss’ notion into the jurisprudence of positive liberty, there is no indication that such doctrinal complexity is needed in the property context. In contrast to the flood of litigation by prisoners raising new liberty claims, there is no sign of increasing numbers of cases raising new property claims. This is due in part to the absence of the peculiar incentives that prisoners have to litigate. But it is also due to the fact that the Court has never expanded the definition of property beyond action removing or terminating an interest to include all limitations on official discretion to effect a modification in status. . . . Requiring that the threatened government action seek to terminate an entitlement thus helps allocate procedural due process rights to the types of claims that are most deserving of due process protection.”).

¹²⁹ *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 764–65 (2005) (stating that even if the statute at issue contained mandatory language, that would not necessarily signify that the statute granted the plaintiff a property interest).

statute indicates that it is giving an entitlement;¹³⁰ the entitlement has an ascertainable monetary value;¹³¹ and the entitlement does not arise incidentally.¹³² These additional hurdles would make it harder for a prisoner to bring a successful property-interest claim. This increased difficulty, in turn, would reduce the incentive for “prisoners to comb regulations in search of mandatory language on which to base entitlements” and ultimately reduce the number of prisoners’ property-interest claims filed.¹³³ Hence, applying the *Castle Rock* approach to determine prisoners’ prisoners protected property interests would sufficiently address the *Sandin* Court’s concern about excessive prisoner due process litigation.

The *Castle Rock* approach also addresses the *Sandin* Court’s related concern regarding the proper deference due to prison administrators. The perception of the proper role of courts in prison management has evolved over the past forty years.¹³⁴ The *Sandin* Court believed that, at least where prisoners’ liberty interests were at issue, federal courts had become too involved, and prison administrators were not being afforded enough deference.¹³⁵ Hence, the *Sandin* Court created the atypical and significant hardship threshold test in part to curb courts’ involvement in prison management.¹³⁶

The *Castle Rock* approach addresses this concern because examining prison regulations for mandatory language actually

¹³⁰ See *id.* at 765 (“If [the plaintiff] was given a statutory entitlement, we would expect to see some indication of that in the statute itself.”).

¹³¹ See *id.* at 766 (stating that an alleged property interest must have some ascertainable monetary value).

¹³² See *id.* at 766–67 (indicating that a protected property interest cannot arise incidentally from a routine government function).

¹³³ *Sandin*, 515 U.S. at 481.

¹³⁴ See Edwards, *supra* note 3, at 1535 (discussing the role of federal courts in the development of prisoner claims); Robert A. Surrette, Note, *Drawing the Iron Curtain: Prisoners’ Rights from Morrissey [sic] v. Brewer to Sandin v. Conner*, 72 CHI.-KENT L. REV. 923, 923–24 (1997) (discussing the evolution of prisoners’ rights and the federal courts’ struggle to balance deference to prison administrators with recognition of prisoners’ rights). Before the 1970s, federal courts generally abstained from reviewing prisoner complaints. *Id.* at 924. This was known as the “hands-off” doctrine. *Id.*

¹³⁵ *Sandin*, 515 U.S. at 482.

¹³⁶ *Id.*

promotes judicial restraint. Since the first step under *Castle Rock* requires a finding of mandatory statutory language,¹³⁷ federal courts inherently defer to state law. States control the promulgation of prison-management regulations and could therefore dictate, through the language of these regulations, when property interests exist.¹³⁸ Moreover, the additional hurdles created by *Castle Rock*—that the statute itself indicate that it is giving an entitlement, that the entitlement have an ascertainable monetary value, and that the entitlement not arise incidentally—would make it harder for prisoners to prove that they have protected property interests. Prison administrators would thus be afforded more deference. Therefore, although the *Castle Rock* test was created for property interests generally, it also sufficiently addresses the prison-specific concerns of the *Sandin* Court.

Finally, even where prisoners' property interests are found under the *Castle Rock* approach, the second prong of the due process inquiry still helps to address the *Sandin* Court's concern about the deference due to prison administrators. The second prong of the due process inquiry requires a determination of the procedures that must be afforded before the prisoner can properly be deprived of that interest.¹³⁹ In *Mathews v. Eldridge*, the Supreme Court set out three factors for determining what process is required:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the

¹³⁷ *Castle Rock*, 545 U.S. at 765.

¹³⁸ See Herman, *supra* note 102, at 527 ("The positivist definition of property . . . promotes the Court's interest in judicial restraint by making due process dependent on extrajudicial sources."). Because states control the language of their prison regulations, the *Castle Rock* approach, which gives states guidance on how to codify regulations without conferring property interests on prisoners, also addresses the *Sandin* Court's concern about a mandatory-language approach creating disincentives for states to codify prison regulations. See *supra* note 123 and accompanying text.

¹³⁹ See, e.g., *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (examining what process is due only after finding that the inmate had a protected interest).

Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹⁴⁰

The third factor—the government's interest—would certainly take into account the unique realities of prisons and the need for effective prison management. Also, the first factor—the private interest affected—could also account for the prison context. The property interests of prisoners could be deemed less substantial than a comparable property interest of a member of the general public.¹⁴¹ Thus, even if a court found that a prisoner had a protected property interest under the *Castle Rock* approach, the court could still address the prison-administration concerns of the *Sandin* Court in its application of the *Mathews* factors during the second prong of the due process inquiry.

IV. CONCLUSION

The Due Process Clause precludes the government from depriving individuals of life, liberty, or property without due process of law.¹⁴² This protection extends to prisoners, although their protected liberty and property interests are limited.¹⁴³ Thus, the first step in analyzing a prisoner's due process claim requires courts to determine whether the benefit allegedly denied is a protected liberty or property interest.

The proper approach to questions of prisoners' protected property interests is currently unsettled. In *Sandin v. Conner*, the Supreme Court adopted an atypical and significant hardship test for determining when prisoners have protected liberty interests.¹⁴⁴ But since *Sandin*, lower courts since have split over whether to extend this test to determinations of prisoners' property

¹⁴⁰ 424 U.S. 319, 335 (1976).

¹⁴¹ See *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) (explaining that prisoners' rights are subject to greater restrictions).

¹⁴² U.S. CONST. amends. V, XIV, § 1.

¹⁴³ *Wolff*, 418 U.S. at 556.

¹⁴⁴ 515 U.S. 472, 484 (1995).

interests.¹⁴⁵ While one circuit has explicitly extended *Sandin*'s test to such inquiries,¹⁴⁶ other circuits have explicitly rejected this approach, opting instead to use a more traditional, property-based approach like the mandatory-language test developed in *Roth* and its progeny.¹⁴⁷ And still other circuits have noted that the proper approach to determine prisoners' property interests is uncertain without settling the issue one way or the other.¹⁴⁸

More recently, the Supreme Court in *Town of Castle Rock v. Gonzales*, defined the proper approach for determining protected property interests in general. This approach adds hurdles to the mandatory-language approach of *Roth* and its progeny. Post-*Castle Rock*, property interests exist where a court finds that: the statute clearly gives rise to an entitlement; the entitlement has an ascertainable monetary value; and the entitlement does not arise incidentally.¹⁴⁹ But whether *Castle Rock* applies to determinations of prisoners' property interests is unclear. Thus, because the Supreme Court has only addressed how to determine prisoners' liberty interests and the general population's property interests, the proper approach for determining prisoners' property interests remains unsettled.

This Note has argued that courts should apply the *Castle Rock* approach and the additional tests it creates. First, adopting the *Castle Rock* approach—a test designed specifically to determine property interests—would recognize that property and liberty interests are fundamentally different and would appropriately

¹⁴⁵ See *Pickelhaupt v. Jackson*, 364 F. App'x 221, 225 (6th Cir. 2010) (explaining that federal circuits are split on whether *Sandin* applies to determinations of prisoners' property interests).

¹⁴⁶ See, e.g., *Cosco v. Uphoff*, 195 F.3d 1221, 1224 (10th Cir. 1999) (declaring that the *Sandin* test controls determinations of both liberty and property interests for prisoners).

¹⁴⁷ See, e.g., *Handberry v. Thompson*, 446 F.3d 335, 353 n.6 (2d Cir. 2006) (noting that because *Sandin* dealt with liberty interests, the Second Circuit continues to focus on statutory language when evaluating prisoners' property interests); *Bulger v. U.S. Bureau of Prisons*, 65 F.3d 48, 50 (5th Cir. 1995) (continuing to follow *Roth* because *Sandin* did not speak to property interests).

¹⁴⁸ See, e.g., *Pickelhaupt*, 364 F. App'x at 225–26 (noting that the Sixth Circuit has not clearly decided whether *Sandin* applies to property interests); *Owens v. Ayers*, No. C 01-3720 SI (PR), 2002 WL 73226, at *2 (N.D. Cal. Jan. 15, 2002) (“The Ninth Circuit has not yet determined whether *Sandin* applies to a prisoner’s property claim.”).

¹⁴⁹ 545 U.S. 748, 765–67 (2005).

align the test for determining prisoners' property interests with the test applied to determine property interests generally.

Second, the *Castle Rock* approach sufficiently addresses the prison-specific concerns expressed by the *Sandin* Court. Because of the additional hurdles to finding property interests, the *Castle Rock* approach mitigates the concern that states would be deterred from codifying prison regulations. Under *Castle Rock*, prison regulations that clearly create an entitlement do not necessarily create a protected property interest unless the entitlement also has an ascertainable monetary value and does not arise incidentally. The *Castle Rock* approach also diminishes the *Sandin* Court's concern about federal courts being overly involved in day-to-day prison management. Because cases of prisoners' alleging property deprivations are less common than those alleging liberty deprivations¹⁵⁰ and because *Castle Rock*'s additional hurdles make successful property-deprivation claims less likely, federal courts would not be burdened with excessive prisoner due process cases. In addition, the *Castle Rock* test would allow federal courts to show proper deference to prison administrators because the additional hurdles make prisoners' claims against administrators harder to prove, and an approach based on statutory language promotes judicial restraint by ceding primary control to states.

Although the law is currently uncertain about what approach to apply when determining prisoners' property interests, courts should resolve this uncertainty by applying the *Castle Rock* approach, including its additional hurdles, any time prisoners claim a deprivation of property allegedly protected by the Due Process Clause.

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¹⁵⁰ For instance, all of the cases the *Sandin* Court cited to support its proposition that federal courts were too involved in prison management under the mandatory-language approach involved alleged liberty interests. See *Sandin v. Conner*, 515 U.S. 472, 483 (1995).