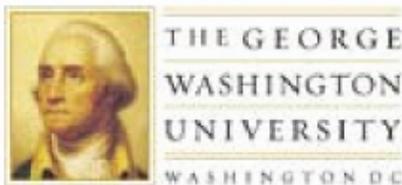


The Burger Court Opinion Writing Database

*Connecticut Board of Pardons v.
Dumschat*
452 U.S. 458 (1981)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



To: Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: The Chief Justice

Circulated: APR 17 1981

1st DRAFT

Recirculated: _____

SUPREME COURT OF THE UNITED STATES

No. 79-1997

Connecticut Board of Pardons et al., Petitioners, v. David Dumschat et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	---	--

[April —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review a judgment of the Court of Appeals holding that because the Connecticut Board of Pardons has granted approximately three-fourths of the applications for commutation of life sentences, a constitutional "liberty interest" or "entitlement" was created so as to require that Board to explain its reasons when it denies an application for commutation.¹

We reverse.

I

In 1964, respondent Dumschat was sentenced to life imprisonment for murder. Under state law, he was not eligible for parole until December 1983.² The Connecticut Board of

¹ We remanded an earlier petition in this case to the Court of Appeals for reconsideration in light of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U. S. 1 (1979). The Court of Appeals reaffirmed its prior judgment, and the case has now returned here.

² A Connecticut inmate serving a life sentence, imposed before 1971, which does not have a specified minimum term must serve a minimum of 25 years in prison, less a maximum of 5 years' good time credits, unless the Board of Pardons commutes the sentence. See Conn. Gen. Stat. Ann. § 54-125 (1960).

Effective in 1971, the sentencing judge must specify a minimum term, which may be as low as 10 years or as high as 25 years. Conn. Gen. Stat. Ann. § 53a-35 (c) (1) (1981 Supp.).

✓
 — 1, 5-8
 and stylistic

To: Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: The Chief Justice

Circulated: _____

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1997

Connecticut Board of Pardons et al., Petitioners, v. David Dumschat et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	---	--

[April —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the fact that the Connecticut Board of Pardons has granted approximately three-fourths of the applications for commutation of life sentences creates a constitutional "liberty interest" or "entitlement" so as to require that Board to explain its reasons for denial of an application for commutation.¹

I

In 1964, respondent Dumschat was sentenced to life imprisonment for murder. Under state law, he was not eligible for parole until December 1983.² The Connecticut Board of

¹ We remanded an earlier petition in this case to the Court of Appeals for reconsideration in light of *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U. S. 1 (1979). The Court of Appeals reaffirmed its prior judgment, and the case has now returned here.

² A Connecticut inmate serving a life sentence, imposed before 1971, which does not have a specified minimum term must serve a minimum of 25 years in prison, less a maximum of 5 years' good time credits, unless the Board of Pardons commutes the sentence. See Conn. Gen. Stat. Ann. § 54-125 (1960).

Effective in 1971, the sentencing judge must specify a minimum term, which may be as low as 10 years or as high as 25 years. Conn. Gen. Stat. Ann. § 53a-35 (c)(1) (1981 Supp.).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 29, 1981

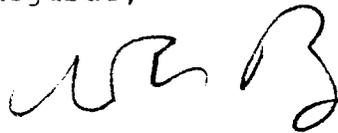
Re: No. 79-1997, Connecticut Board of Pardons v. Dumschat

Dear Bill:

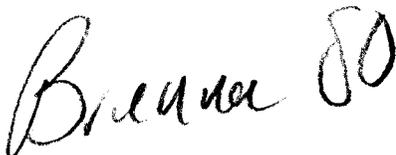
As part of the overall modifications you suggest, I could also make three of the five changes suggested in your letter of today's date concerning my April 28 tentative draft. Specifically, I would be willing (1) to change "necessarily" to "generally" at the point you indicate on page 6; (2) to move a sentence from page 7 to page 6 as you indicate; and (3) to delete the third paragraph on page 8; in order to get your vote.

With respect to the other two suggestions, as I recall the discussion at Conference, a clear majority intended that we rely in part on characteristics of commutation decisions in general. If it turns out that some other state actually imposes substantial constraints on pardon decisions, we can consider an exception in that case. I would therefore prefer not to make the second and fourth of the four specific suggestions contained in the second paragraph of your letter.

Regards,



Justice Brennan



TO: Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

1, 3, 6-8;
FOOTNOTES RENUMBERED;
STYLISTIC CHANGES

From: The Chief Justice

Circulated: _____

Recirculated: JUN 3 1981

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1997

Connecticut Board of Pardons } On Writ of Certiorari to the
et al., Petitioners, } United States Court of
v. } Appeals for the Second
David Dumschat et al. } Circuit.

[June —, 1981]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

The question presented is whether the fact that the Connecticut Board of Pardons has granted approximately three-fourths of the applications for commutation of life sentences creates a constitutional "liberty interest" or "entitlement" in life-term inmates so as to require that Board to explain its reasons for denial of an application for commutation.

I

In 1964, respondent Dumschat was sentenced to life imprisonment for murder. Under state law, he was not eligible for parole until December 1983.¹ The Connecticut Board of Pardons is empowered to commute the sentences of life inmates by reducing the minimum prison term,² and such a

FOOTNOTE
DELETED

¹ A Connecticut inmate serving a life sentence, imposed before 1971, that does not have a specified minimum term must serve a minimum of 25 years in prison, less a maximum of 5 years' good time credits, unless the Board of Pardons commutes the sentence. See Conn. Gen. Stat. Ann. § 54-125 (1960).

Effective in 1971, the sentencing judge must specify a minimum term, which may be as low as 10 years or as high as 25 years. Conn. Gen. Stat. Ann. § 53a-35 (c) (1) (1981 Supp.).

² The Board of Pardons also has the power to grant immediate release in the form of an absolute pardon, but according to the District Court,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 29, 1981

RE: No. 79-1997 Connecticut Board of Pardons v. Dumschat

Dear Chief:

Your April 28 draft almost completely takes care of my concerns about the case. I say "almost" because I'd like to make some further suggestions in the interest of removing any possible ambiguities.

First, as a general matter, you are of course correct in subjecting respondents' claim to a two-part analysis. As I understand it, you hold (and I agree) that there is "no constitutional or inherent right" to a pardon, and that furthermore, nothing in Connecticut's statutory scheme or administrative practice or regulations establishes such a right. Would it not strengthen the holding if you made crystal clear which part of the analysis you are discussing? For example, in the first full paragraph on page 6, would it not help to state: "A decision whether to commute a long-term sentence generally depends not simply on objective factfinding . . ." Similarly, on page 7, after the quotation, would it not help to add: "respondents' argument wholly misconceives the nature of the Board's decision to commute the sentence . . ." Also, since the sentence in the middle of page 7 beginning "Unlike probation, . . ." relates to the first part of your analysis, wouldn't it be better to move that sentence to page 6, after the citation to Judge Friendly's article? Finally, toward the bottom of page 8, might I suggest: "there is a vast difference between a denial of parole under the Nebraska statute and Connecticut's refusal to commute a lawful sentence."?

Second, in light of the changes you have already made, is it not advisable to delete the third paragraph on page 8, beginning "Under the Greenholtz parole determination procedure." I don't think this paragraph furthers your analysis, and I am concerned that it might be read as suggesting that your opinion for the Court in Greenholtz was not decided on constitutional grounds. Of course, as you recognize

Brennan

in other parts of Dumschat, the Greenholtz decision did rest on constitutional grounds, but only because of the "unique mandates of the Nebraska statutes."

Changes along these lines will bring me along to join your opinion.

Sincerely,

Bill

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 26, 1981

RE: No. 79-1997 Connecticut Board of Pardons v. Dumschat

Dear Chief:

I must apologize for this delayed response to your note to me of April 29. The changes you propose meet my concerns and I'll be happy to join your revised opinion when circulated. I'll also be filing the brief concurrence enclosed.

Sincerely,



The Chief Justice



REPRODUCED FROM THE COLLECTIONS OF THE MANUSCRIPT DIVISION, LIBRARY OF CONGRESS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

June 4, 1981

RE: No. 79-1997 Connecticut Board of Pardons v.
Dumschat, et al.

Dear Chief:

I agree. I am also filing the enclosed concurrence.

Sincerely,



The Chief Justice
cc: The Conference

To: The Chief Justice
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Brennan
 Mr. Justice Rehnquist
 Mr. Justice Stevens

1st DRAFT

From: Mr. Justice Brennan

SUPREME COURT OF THE UNITED STATES

Circulated: JUN 4 1981

Recirculated: _____

No. 79-1997

Connecticut Board of Pardons et al., Petitioners, v. David Dumschat et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	---	--

[May —, 1981]

JUSTICE BRENNAN, concurring.

I join the Court's opinion. Although respondents have demonstrated a statistical likelihood of obtaining the relief they request, that is not enough to create a protectible liberty interest. Rather, respondents must also show—by reference to statute, regulation, administrative practice, contractual arrangement or other mutual understanding—that particularized standards or criteria guide the State's decisionmakers. See *Leis v. Flynt*, 439 U. S. 438, 442 (1979); *Perry v. Sindermann*, 408 U. S. 593, 601 (1972); *Board of Regents v. Roth*, 408 U. S. 564, 577 (1972). The structure of the State's decisionmaking process is thus as significant as the likely result of that process. Respondents have not shown that the Board is required to base its decisions on objective and defined criteria. As in *Meachum v. Fano*, 427 U. S. 215, 228 (1976), the decisionmaker can deny the requested relief for any constitutionally permissible reason or for no reason at all. Accordingly, I agree that respondents have no protectible liberty interest in a pardon.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 20, 1981

Re: No. 79-1997, Connecticut Board of
Pardons v. Dumschat

Dear Chief,

I am glad to join your opinion for
the Court.

Sincerely yours,

P.S.
—

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

April 17, 1981

Re: 79-1997 - Connecticut
Board of Pardons v. Dumschat

Dear Chief,

Please join me.

Sincerely yours,



The Chief Justice

Copies to the Conference

cpm

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
~~Mr. Justice Marshall~~
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

From: Mr. Justice White

Circulated:  JUN 1981

Recirculated: _____

Re: 79-1997 - Connecticut Board of Pardons v. Dumschat

Justice White, concurring.

I join the Court's opinion and write separately only to observe that Justice Stevens in dissent quite inaccurately implies that Wolff v. McDonald, 418 U.S. 539 (1974) and Meachum v. Fano, 427 U.S. 215 (1976), are to be read as suggesting that state law is the only source of a prisoner's liberty worthy of federal constitutional protection. Wolff v. McDonald suggested nothing of the kind. On the contrary, the opinion in that case pointed out that although a prisoner's "rights may be diminished by the needs and exigencies of the institutional environment, [he] is not wholly stripped of constitutional protections when he is imprisoned for crime.... [he] may not be deprived of life, liberty or property without Due Process of law." 418 U.S., at 555-556. The issue in the case was the deprivation of

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 ✓ Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist
 Mr. Justice Stevens

9.1

From: Mr. Justice White

Circulated: _____

Recirculated: 9 JUN 1981

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1997

Connecticut Board of Pardons et al., Petitioners, v. David Dunschat et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	---	--

[June —, 1981]

JUSTICE WHITE, concurring.

I join the Court's opinion and write separately only to observe that neither *Wolff v. McDonnell*, 418 U. S. 539 (1974), nor *Meachum v. Fano*, 427 U. S. 215 (1976), suggested that state law is the only source of a prisoner's liberty worthy of federal constitutional protection. The opinion in *Wolff v. McDonnell* pointed out that although a prisoner's "rights may be diminished by the needs and exigencies of the institutional environment, [he] is not wholly stripped of constitutional protections when he is imprisoned for crime . . . [he] may not be deprived of life, liberty or property without Due Process of law." 418 U. S., at 555-556. The issue in the case was the deprivation of the right to good time credits, a right which was not guaranteed by the Federal Constitution but was a creation of state law. *Wolff* held that even such a liberty interest rooted in state law was entitled to constitutional protection.

Meachum v. Fano also pointed out that "the convicted felon does not forfeit all constitutional protections by reason of his conviction and confinement in prison. He retains a variety of important rights that the courts must be alert to protect." 427 U. S., at 225. The Court went on to hold that a state prisoner has no federal constitutional right protecting him against administrative transfers to another state prison. Neither did state law purport to create a liberty interest entitled to protection under the Fourteenth Amend-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 8, 1981

Re: No. 79-1997 - Connecticut Board of Pardons v...
Dumschat

Dear John:

Please join me in your dissent.

Sincerely,

J.M.

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 21, 1981

Re: No. 79-1997 - Connecticut Board of Pardons v. Dumschat

Dear Chief:

Please join me.

Sincerely,

Handwritten signature of H.A.B. (Justice Harry A. Blackmun) in cursive script.

—

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 17, 1981

No. 79-1997 Connecticut Bd. of Pardons v. Dumschat

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

LFP/lab

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 20, 1981

Re: No. 79-1997 Connecticut Bd. of Pardons v. Dumschat

Dear Chief:

Please join me.

Sincerely,



The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 1, 1981

Re: 79-1997 - Connecticut Board of Pardons
v. Dumschat

Dear Chief:

In due course I will be circulating a
dissenting opinion.

Respectfully,



The Chief Justice

Copies to the Conference

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

From: Mr. Justice Stevens

79-1997 - Connecticut Board of Pardons v. Dumschat

Circulated: JUN 2 '81

Recirculated: _____

JUSTICE STEVENS, dissenting.

"Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 18 (opinion of JUSTICE POWELL). Surely the Court stumbles whenever it implies that the source of liberty worthy of constitutional protection is "a statutory creation of the State," Wolff v. McDonald, 418 U.S. 539, 558, that it has "its roots in State law," Meachum v. Fano, 427 U.S. 215, 216, or that it "must be found in statutes or regulations," ante, at 7.

To some of us, it is "self-evident" that individual liberty has far deeper roots.¹ Moreover, the deprivation of liberty that

¹ "It is self-evident that all individuals possess the liberty interest in being free from physical restraint." Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 23 (MARSHALL, J., dissenting).

"If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 5 '81

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1997

Connecticut Board of Pardons } On Writ of Certiorari to the
et al., Petitioners, } United States Court of
v. } Appeals for the Second
David Dumschat et al. } Circuit.

[June —, 1981]

JUSTICE STEVENS, dissenting.

"Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 18 (opinion of JUSTICE POWELL). The liberty that is worthy of constitutional protection is not merely "a statutory creation of the State," *Wolff v. McDonnell*, 418 U. S. 539, 558. Surely the Court stumbles when it states that liberty "must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency" *ante*, at 7, or when it implies that liberty has "its roots in State law," *Meachum v. Fano*, 427 U. S. 215, 226.

To some of us, it is "self-evident" that individual liberty has far deeper roots.¹ Moreover, the deprivation of liberty

¹"It is self-evident that all individuals possess the liberty interest in being free from physical restraint." *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 23 (MARSHALL, J., dissenting).

"If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source.

To: The Chief Justice
 Mr. Justice Brennan
 Mr. Justice Stewart
 Mr. Justice White
 Mr. Justice Marshall
 Mr. Justice Blackmun
 Mr. Justice Powell
 Mr. Justice Rehnquist

P. 1

From: Mr. Justice Stevens

Circulated: _____

Recirculated: JUN 9 '81

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-1997

Connecticut Board of Pardons et al., Petitioners, v. David Dumschat et al.	}	On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.
---	---	--

[June —, 1981]

JUSTICE STEVENS, with whom JUSTICE MARSHALL joins, dissenting.

“Liberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action.” *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 18 (opinion of JUSTICE POWELL). The liberty that is worthy of constitutional protection is not merely “a statutory creation of the State,” *Wolff v. McDonnell*, 418 U. S. 539, 558. Surely the Court stumbles when it states that liberty “must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency” *ante*, at 7, or when it implies that liberty has “its roots in State law,” *Meachum v. Fano*, 427 U. S. 215, 226.

To some of us, it is “self-evident” that individual liberty has far deeper roots.¹ Moreover, the deprivation of liberty

¹“It is self-evident that all individuals possess the liberty interest in being free from physical restraint.” *Greenholtz v. Nebraska Penal Inmates*, 442 U. S. 1, 23 (MARSHALL, J., dissenting).

“If man were a creature of the State, the analysis would be correct. But neither the Bill of Rights nor the laws of sovereign States create the liberty which the Due Process Clause protects. The relevant constitutional provisions are limitations on the power of the sovereign to infringe on the liberty of the citizen. The relevant state laws either create property rights, or they curtail the freedom of the citizen who must live in an ordered society. Of course, law is essential to the exercise and enjoyment