"Some Measure" of Protection: Due Process in the Balance in Grmenholtz

Wendelin A. White

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"Some Measure" of Protection: Due Process in the Balance in *Greenholtz*

In this note, the author examines the recent decision of *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, in which the Supreme Court of the United States apparently dispensed with a balancing approach in deciding how much process was due in parole release determinations. Setting the case in the context of the sometimes inconsistent language in decisions on administrative due process of the last ten years, the author concludes that the Burger Court seems to be edging back uncertainly toward the old, restrictive view of due process based on a distinction between rights and privileges.

So often in the past decade has the Supreme Court of the United States tried to articulate a standard for due process in administrative contexts that one commentator has characterized the Court's recent attempts as a "due process explosion," and the results have been both widely felt and sometimes unpredictable. Ostensibly, the general approach of the Court subjects a due process claim to two stages of analysis. The Court first scrutinizes the private interest at stake, derived from common law, constitution or statute, to determine whether the claimant has been deprived of a liberty or property interest within the meaning of the due process clause. This step is a qualitative, definitional test. If the asserted interest is constitutionally protectible, the Court then applies a quantitative test, weighing the individual's interest against the interest of the state (e.g., in administrative convenience and economy) to find the amount of process due in the circumstances. In practice, when a state has

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3. The Court refined this balancing approach in Mathews v. Eldridge, 424 U.S. 319.
granted a property right, the Court refuses to find any constitutionally protected interest outside of that expressly created by the statute. On occasion, the Court has evinced a willingness to apply the same restrictive analysis to liberty interests allegedly created by the state, such as "good-time credits" for prisoners or an inmate's "right" not to be transferred from a medium- to a maximum-security prison. And in delineating the scope of due process in Nebraska parole release determinations, the Court recently demonstrated a similar willingness to manipulate the second half of the due process analysis, tipping the balance against a full measure of constitutional protection.

Inmates of the Nebraska prison system brought a class action against the Nebraska Board of Parole, claiming that the procedures employed in granting or denying parole deprived them of due process of law. The Board set up a two-stage hearing process. The first stage was an informal hearing at which the inmate appeared before the Board after it reviewed his pre- and post-confi

5. The procedures used by the Board were derived partly from statute and partly from the Board's practice. 99 S. Ct. at 2102.
6. Id.
7. Id.
8. At this stage, the inmate might present evidence, call witnesses and be represented by counsel, but he was not permitted to hear adverse testimony or cross-examine adverse witnesses. The entire proceeding was tape-recorded. Id.
the reasons for the denial. The United States District Court for the District of Nebraska agreed with the inmates that these procedures did not satisfy due process, and the Court of Appeals for the Eighth Circuit affirmed. On certiorari, the Supreme Court of the United States held, reversed: The mere existence of a parole system does not create for prisoners a constitutionally protectible liberty interest; although the particular language of the Nebraska parole statute does create a legitimate expectation of parole entitled to some constitutional protection, the procedures currently employed by the Nebraska Parole Board provide all the process that is due. Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 99 S. Ct. 2100 (1979).

The impact of Greenholtz is not confined to parole decisions. The full significance of this case emerges only when placed in the context of the recent line of due process decisions, each expressing a standard colored by its peculiar facts as well as by judicial pronouncements derived from other administrative contexts. Thus, the conflicting opinions in Greenholtz reflect the confusion in that larger development.

As the seventies began, the Court was still expanding the scope of due process. The landmark case of Goldberg v. Kelly, for example, went far toward judicializing the process required before termination of welfare benefits. In rejecting the old distinction between "rights" and "privileges," the Court held that

11. In finding that the Board's procedures did not adequately protect the inmates' "conditional liberty' interest," the district court had prescribed specific additional procedural safeguards required by the Constitution. The court of appeals found that there was also a "statutorily defined, protectible interest" but "modified the procedures required by the District Court as follows:"

(a) When eligible for parole each inmate must receive a full formal hearing;
(b) the inmate is to receive written notice of the precise time of the hearing reasonably in advance of the hearing, setting forth the factors which may be considered by the Board in reaching its decision;
(c) subject only to security considerations, the inmate may appear in person before the Board and present documentary evidence in his own behalf. Except in unusual circumstances, however, the inmate has no right to call witnesses in his own behalf;
(d) a record of the proceedings, capable of being reduced to writing, must be maintained; and
(e) within a reasonable time after the hearing, the Board must submit a full explanation, in writing, of the facts relied upon and reasons for the Board's action denying parole.

Id. at 2103 (paraphrasing Inmates of the Neb. Penal & Cor. Complex v. Greenholtz, 576 F.2d 1274, 1285 (1978)).
13. Id. at 262. In older case law, whether due process protections were required de-
welfare benefits were "a matter of statutory entitlement" whose termination involved state action adjudicating important private rights. Thus procedural protections were necessary. The amount of process due was to be determined by "the extent to which [the recipient might] be 'condemned to suffer grievous loss,'" depending "upon whether the recipient's interest in avoiding that loss outweigh[ed] the governmental interest in summary adjudication." Finding the balance in favor of the welfare recipient, the Court ordered a pretermination evidentiary hearing. The "one function" of this hearing was "to protect a recipient against an erroneous termination of his benefits," and despite the disclaimer by the Court that such a "hearing need not take the form of a judicial or quasi-judicial trial," the procedures it prescribed approximated those of a formal adversary hearing. The Court required timely and adequate notice of the hearing and the reasons proposed for the termination of benefits, opportunity to defend by confronting adverse witnesses and by

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presenting arguments and evidence orally, representation by legal counsel if the welfare recipient so chose, an impartial decisionmaker, and a statement of reasons for the final determination as well as a statement of the evidence relied on.18

Two years later, in *Morrissey v. Brewer,*19 a case involving the due process requirements of parole revocation, the Court followed and more clearly delineated the two-step analysis set out in *Goldberg* by first identifying the nature of the private interest implicated, then balancing the state’s interests against those of inmates to find the appropriate amount of process due. The Court found that a parolee had a definite and valuable, though conditional, liberty interest in maintaining his parole and held that this interest was within the protection of the fourteenth amendment.20 Significantly, the interest arose from the state’s creation of a parole system and the parolee’s reliance on maintaining his liberty so long as he lived up to specified parole conditions. After balancing the parolee’s interest, the state’s interest in returning a parole violator to prison without the burden of a new trial and society’s interest in rehabilitating the parolee,21 the Court held that an informal, prerevocation hearing was required.22 As in *Goldberg,* the Court thereby sought to assure that the decision would be “based on verified facts and that the exercise of discretion [would] be informed by . . . accurate knowledge.”23 The Court in *Morrissey* also emphasized that “fair treatment in parole revocations [would] enhance the chance of rehabilitation by avoiding reactions to arbitrariness,”24 thus rec-

18. Id. at 268-71.
20. Id. at 482.
21. Id. at 483-84.
22. The Court set forth the following “minimum requirements of due process”:
   (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a “neutral and detached” hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.

   Id. at 489.

   In a companion case to *Morrissey,* Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Court held that the same hearing requirements were applicable in proceedings to revoke probation.

   23. 408 U.S. at 484.
24. Id.

Richard Saphire points out that this quotation is one of the few references by the Court to what he calls the “inherent dignitary values” of due process. This aspect of due process, which he feels is essential to human dignity, “springs, not from the outcomes of
ognizing the implementation of fair procedures as a goal in itself apart from correctness of outcome.

Following the two-step analysis of Goldberg and Morrissey, the Court in Board of Regents v. Roth\(^2\) never proceeded beyond the first step,\(^2\) having found that a nontenured assistant professor who had brought suit against a state university, alleging that he had been denied due process when the university had decided without explanation not to renew his contract, had no constitutionally protectible interest in being rehired.\(^2\) Though the Court recognized that Roth had a property interest in his employment, that interest arose from his contract, a source independent of the Constitution; thus his entitlement was limited by the terms of that contract, which specified a one-year term.\(^2\) The court of ap-

governmental decisions . . . , but from the interaction between individuals and their government that occurs as part of the decisionmaking process. . . . [I]t is inherent in the process by which decisions are reached . . . , yet it is independent of extrinsic, substantive outcomes . . . .” Saphire, Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection, 127 U. Pa. L. Rev. 111, 120-21 (1978). Saphire suggests that “even when outcomes of decisions are viewed as unfair or unjust, the decisions may be accepted as legitimate if the processes through which they are reached respond to basic principles of self-respect and autonomy.” Id. at 124. He thus stresses procedural fairness as a due process goal in itself, apart from the often exclusively recognized goal of correct, error-free determinations.

\(^2\) 408 U.S. 564 (1972).

26. Arguably, the Roth Court shifted the emphasis in due process analysis from “the ‘weight’ . . . to the nature of the interest at stake.” Id. at 571 (emphasis in original). In deciding whether due process protection applied in the first place, the Court in Morrissey had looked to “not merely the ‘weight.’” 408 U.S. at 481 (emphasis added). The slight shift in Roth may reflect a passing from what one commentator refers to as the “impact view of due process” to the “entitlement view,” a shift portending a return to the old distinction between rights and privileges. See Comment, Two Views of a Prisoner’s Right to Due Process: Meachum v. Fano, 12 Harv. C.R.-C.L. L. Rev. 405 (1977); note 34 and accompanying text infra.

The author of the Comment explains that the entitlement view “rests on the notion that the requirement of due process presupposes the existence of an independent legal right,” such as the state law creating a parole system in Morrissey or the contract right to employment for one year in Roth. Comment, supra, at 407. The impact view, on the other hand, “stresses not the existence of a formal legal entitlement, but the presence . . . of a likelihood that [governmental] action will lead to significant adverse impact on an [individual],” such as the grievous loss of welfare benefits, with the grievousness of the loss depending on individual circumstances. The commentator favors the impact view. Id. at 406-07.

27. The Court recognized broad liberty interests but held that there were none at stake, because the university had not made “any charge against [Roth] that might seriously damage his standing and associations in his community” or “imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.” 408 U.S. at 573.

28. The Court stated:

Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of anti-
peals in *Morrissey* had similarly reasoned that because state law provided for a parolee’s return to prison at any time, a parolee had no statutory right to remain on parole. But in reversing the court of appeals, the Supreme Court did not even address that argument.

Dicta in *Roth* indicated that a tenured professor at a public university did have a constitutionally protectible interest in continued employment, yet the Court in *Arnett v. Kennedy* chose not to analogize that situation to the dismissal of a nonprobationary government employee from his position without opportunity to be heard. Instead, in a plurality opinion written by Justice Rehnquist, the Court increased its emphasis on the creation of protectible interests by sources independent of the Constitution and held that although a state statute here gave the employee an “expectancy” that he would not be fired except for cause, the same statute prescribed the procedure by which “cause” was to be determined. Thus, the “property interest” conferred was “conditioned by the procedural limitations which had accompanied the grant of that interest.” The Rehnquist opinion cast considerable doubt on *Goldberg* as a viable precedent by appearing to make the applicability of due process safeguards depend upon the legislature’s willingness to write procedural protections into the statute. In fact, the language used to those benefits.

Just as the welfare recipients’ “property” interest in welfare payments was created and defined by statutory terms, so the respondent’s “property” interest in employment at Wisconsin State University-Oshkosh was created and defined by the terms of his appointment.

*Id.* at 577-78.

In the companion case to *Roth*, *Perry v. Sinderman*, 408 U.S. 593 (1972), the Court acknowledged that rules and mutually explicit understandings could create a de facto tenure program apart from formal contractual tenure provisions and could thus support a claim of entitlement to tenure.

32. *Id.* at 151-52.
33. *Id.* at 155.
34. Rehnquist’s opinion exemplifies the “entitlement view” taken to its logical extreme. See note 26 *supra*. Justice Marshall, with whom Justices Douglas and Brennan concurred, wrote in dissent that if an entitlement “could be conditioned on a statutory limitation of procedural due process protections, . . . [i]t would amount to nothing less than a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges . . . .” 416 U.S. at 211.

Scholars commenting on the case have voiced similar criticisms. Professor Monaghan writes of Rehnquist’s “startling” opinion:

There is probably nothing inherently illogical in this approach. “Property”
both here and in Roth is hauntingly reminiscent of Justice (then Judge) Holmes' opinion in McAuliffe v. Mayor of New Bedford,35 often quoted as an example of the right-privilege distinction:36 "[t]he servant [dismissed for violating job regulations prohibiting political comment] cannot complain, as he takes the employment on the terms which are offered him."37

Six Justices disagreed with Justice Rehnquist's analysis and found that the property interest created by the statute warranted further independent inquiry into procedures required to protect that interest. As Justice White said in his partial dissent, "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition."38 Justice Powell,

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with whom Justice Blackmun concurred, agreed that Rehnquist’s view “misconceives the origin of the right to procedural due process”:

That right is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. As our cases have consistently recognized, the adequacy of statutory procedures for deprivation of a statutorily created property interest must be analyzed in constitutional terms.30

In Wolff v. McDonnell,40 the Court found that statutes could also create liberty interests. Wolff involved prison procedures for depriving inmates of “good-time credits”41 as a disciplinary measure for serious misconduct. But the opinion ignored the Arnett plurality’s recognition of statutorily created interests conditioned by procedural limitations, instead citing Powell’s concurrence,42 and returned to the reasoning of Morrissey. The Court held that since the state had created a right to good-time credits, the inmates’ interest in the credit system had “real substance” and was thus entitled to due process protection.43 The opinion did not address the question whether the state could condition the crea-

39. Id. at 167 (emphasis added) (footnote omitted).

Professor Van Alstyne criticizes this portion of Powell’s opinion, since “to speak of ‘such an interest, once conferred,’ plainly begs the question Mr. Justice Rehnquist had raised: What ‘interest’ was ‘conferred’?” Van Alstyne, supra note 13, at 465 (emphasis in original). Van Alstyne explains Rehnquist’s opinion as follows:

The suggestion is that as property interests are divisible interests (from fee simple ownership down through a license at sufferance), it is only fair that a court should look very closely to see how much property was vested in order to be careful in determining whether any of that actually vested quantum of property is sought to be taken at all. If none of the vested quantum of property is threatened by the subsequent government action, clearly the constitutional requisite of due process (as a condition of such taking) will not be applicable.

Id. at 463 (emphasis in original). In other words, the statute conferred no interest beyond that “exactly bounded . . . by the procedural provisions of [the statute,] the only source giving [the interest] any substance at all.” Id. at 465. Thus, there was no unconstitutional deprivation.

41. “Good-time credits” were created by Nebraska statute and could be earned by prisoners “for good behavior and faithful performance of duties.” Id. at 546 n.6. Accumulation of such credits reduced a prisoner’s term of confinement.
42. Id. at 558.
43. Id. at 557. The Court thus returns to an “impact view” of due process. See Comment, supra note 26, at 423.
tion of a liberty interest upon limited procedural protections. In prescribing the amount of process that was due, though, the Court settled for less than the "minimum requirements" set out in *Morrissey*, because "the deprivation of good time is not the same immediate disaster that the revocation of parole is for the parolee," and the balance of interests tipped in favor of the state.

In *Goss v. Lopez*, the twin themes of examining the statutory creation of constitutionally protectible interests and emphasizing the flexibility of due process emerged in the area of school disciplinary proceedings. *Goss* was a class action against school officials, brought by public high school students who had been suspended from school for up to ten days without a hearing. The students sought a declaration that the Ohio statute permitting such suspensions violated the due process clause. In holding that the students had property and liberty interests that qualified for constitutional protection, the Court reasoned, as in *Wolff*, that because the state had chosen to grant children the right to an education, and in fact required them to attend school, it could not withdraw that right on grounds of misconduct without affording students some due process protections.

The position of the Court in *Wolff* and *Goss* seemed to fall in with the insistence in *Goldberg* on some kind of hearing once a constitutional right to due process was found, as opposed to the theory of interests both created and limited (thus constitutionally unprotectible) by statute set out in *Roth* and *Arnett*. But the latter theory drew fresh support from two 1976 cases, *Bishop v. Wood* and *Meachum v. Fano*.

*Bishop* has been called "a clear signal to state courts and to federal district courts that they are free to halt the procedural due process revolution . . . ." In that case, a policeman classified as a "permanent employee" by a city ordinance was dismissed without the benefit of a hearing. Another ordinance pro-

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46. *Id.* at 574.
47. 426 U.S. 341 (1976).
49. *Van Alstyne*, *supra* note 13, at 466; see note 34 and accompanying text *supra*.
50. 426 U.S. at 343.
vided that a permanent employee could be discharged for such reasons as substandard work, negligence or inefficiency, and the district court judge interpreted this ordinance as granting Carl Bishop only the right to hold "his position at the will and pleasure of the city." Relying on Roth, the Supreme Court reasoned that since "the sufficiency of the claim of entitlement must be decided by reference to state law," and since under the district court's interpretation of state law Bishop was not deprived of any property interest protected by the fourteenth amendment, his dismissal was lawful.

Justice White argued in dissent, joined by Justices Brennan, Marshall and Blackmun, that the majority rested its opinion on a proposition that six Justices had "expressly rejected" in Arnett v. Kennedy. According to Justice White, "[t]he ordinance plainly grant[ed] petitioner a right to his job unless there [was] cause to fire him." Once that property right vested in the employee, "the Federal Constitution, not state law, . . . mandated the process to be applied in connection with any state decision to deprive him of it."
The Arnett plurality position prevailed again in Meachum v. Fano. 58 Meachum held that the due process clause did not “in and of itself protect a duly convicted prisoner against transfer from one institution to another,” 59 even though the transfer was predicated on prisoner misconduct and was from a medium- to a maximum-security institution. The Court distinguished Wolff on the ground that the liberty interest there had been created by the state laws regarding good-time credits, whereas in Meachum no state law conferred on prisoners a right to remain in a particular facility. 60 Thus, they had no statutorily generated liberty interest entitled to constitutional protection, and Massachusetts did not have to hold transfer hearings. 61

Meachum, then, put liberty interests in the same class with the property interests of the Roth analysis—i.e., they were created and defined exclusively by statute. In dissent, Justice Stevens criticized this reasoning:

It demeans the holding in Morrissey—more importantly it demeans the concept of liberty itself—to ascribe to that holding nothing more than a protection of an interest that the State has created through its own prison regulations. For if the inmate's protected liberty interests are no greater than the State chooses to allow, he is really little more than the slave described in the 19th century cases. I think it clear that even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore. 62

Because the majority did not address Morrissey, however, the

59. Id. at 225.
60. Id. at 226.
61. Meachum is thus another example of the “entitlement view” of procedural due process analysis. See note 26 supra. One commentator finds the “most disturbing aspect” of the case to be its “failure to consider the broader implications of its limited view of constitutionally protected liberty”:

Meachum, if followed to its extreme, would allow the state to pass a law granting some benefit while explicitly disapproving the extension of procedural protections when a benefit is deprived. . . . Moreover, . . . since any “entitlement” to benefits would be defined in terms of the specified procedures, there could be no possibility of a successful due process attack. . . . Thus the Meachum entitlement analysis places an enormous, unchecked power in the state legislature, despite the courts' clear constitutional mandate under the fourteenth amendment to oversee the use of state authority impinging on liberty or property interests.

Comment, supra note 26, at 416-17 (emphasis in original).
62. 427 U.S. at 233.
question whether a constitutionally protectible liberty interest could exist independent of state law was left open.

That issue arose in the context of parole release determinations in Greenholtz. Against the recent background of inconsistent decisions, the Court divided sharply once again. Although the Court ostensibly adhered to the two-step analysis delineated in Morrissey and followed in subsequent cases, the dichotomy of available precedent enabled the majority and the dissenters to disagree in method and value, yet arrive at nearly the same conclusion about the proper result. It is significant that the majority opinion by Chief Justice Burger begins by quoting from Roth and Meachum. Predictably, the majority found that a parole release proceeding implicates no liberty interest independent of that created by state law. The dissents, on the other hand, argued that "all prisoners potentially eligible for parole have a liberty interest of which they may not be deprived without due process, regardless of the particular statutory language that implements the parole system." All the Justices agreed that due process did not require that each inmate be afforded a formal adversary hearing but disagreed about just what due process did require.

In the first step of the inquiry—i.e., whether prisoners have a constitutionally protectible liberty interest at stake—the Court made three points. First, convicted persons have no "inherent right" to be conditionally released before the expiration of valid sentences; second, administrative decisions do not "automatically invoke due process protection"; and third, the state has no "duty" to establish a parole system. In responding to the inmates' argument, based on Morrissey, that "a reasonable entitlement is created whenever a state provides for the possibility of parole," the Court chose to distinguish Morrissey rather than meet the argument head on. According to the majority, denial of parole release and parole revocation are different, one being the denial of a conditional liberty one desires and the other, a deprivation of a liberty one has. Furthermore, to grant parole the Board must predict how the prisoner will behave, once paroled;

64. Id. at 2111 (emphasis in original).
65. Id. at 2107-08, 2110-11, 2118.
66. Id. at 2104.
67. Id. (emphasis in original).
68. Id. at 2105.
in revoking parole, the Board may base its decision on the facts of the parolee’s actual conduct during parole. Thus, the kind of decision called for in each case is qualitatively different: the former is subjective and predictive; the latter, essentially objective and factual.  

The Court accepted the inmates’ second argument, that the language of the Nebraska parole statute created a presumption that parole will be granted except for four specified reasons. This “expectancy of release” gave rise to a constitutionally protectible entitlement requiring “some measure” of predeprivation due process. But the majority emphasized that in construing the parole law of any other state the Court might reach a contrary result.

Both dissents strongly opposed the reasoning that the existence of a protectible interest in parole release arose solely from the particular language of the Nebraska statute and did not exist

69. Id. The Court saw the parole release decision as more closely akin to the highly discretionary prison transfer decision than to revocation of parole. Citing Meachum, the Court concluded that “the general interest asserted here is no more substantial than the inmate’s hope that he will not be transferred to another prison, a hope which is not protected by due process.” Id.

70. The inmates relied on the section which provides in part:

Whenever the Board of Parole considers the release of a committed offender who is eligible for release on parole, it shall order his release unless it is of the opinion that his release should be deferred because:

(a) There is a substantial risk that he will not conform to the conditions of parole;

(b) His release would depreciate the seriousness of his crime or promote disrespect for law;

(c) His release would have a substantially adverse effect on institutional discipline; or

(d) His continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date.

NEB. REV. STAT. § 83-1, 114(1) (1976), quoted in Greenholtz, 99 S. Ct. at 2106. The “presumption” that the state has created a liberty interest arises primarily from the word “shall.”

Marshall labeled the majority’s analysis of the liberty interest at stake a “gratuitous commentary,” because the Court did accept the inmates’ second argument and ultimately held that the Nebraska parole statute created a protectible entitlement. 99 S. Ct. at 2111.

71. 99 S. Ct. at 2106. In effect, the Court adheres to the entitlement view of due process. See note 26 supra.

72. We can accept respondent’s view that the expectancy of release provided in this statute is entitled to some measure of constitutional protection. However, we emphasize that this statute has unique structure and language and thus whether any other state statute provides a protectible entitlement must be decided on a case-by-case basis.

99 S. Ct. at 2106.
independently of it. Powell found the due process clause no less applicable to parole release determination than to decisions concerning the revocation of parole or probation or the rescission of good-time credits. According to Powell, once the state creates a parole system, an inmate acquires a legitimate and protectible expectation of parole upon fulfillment of certain conditions. Marshall's dissent, which Brennan and Stevens joined, similarly asserted that the mere presence of a parole system creates a constitutionally protectible liberty interest, irrespective of the specific language in the state's parole statutes. Marshall elaborated: When a person is convicted of a crime, he is deprived of this liberty interest which all individuals "normally" possess as an inherent right rather than a statutory creation. But the existence of a parole system conditions the initial deprivation and allows the prisoner to retain an interest in securing freedom. Because parole release proceedings implicate this retained interest, due process requirements must be met. Marshall further declared that the majority misapplied prior decisions since neither Morrissey nor Wolff relied upon specific terms of any statute to find protectible liberty interests. As for the distinction the majority drew between parole revocation and parole release, both Powell and Marshall averred that it has no constitutional dimension.

Having found that these inmates had an interest entitled to some protection, the majority turned next to the question of how much process was due. But the majority seemed to depart from the usual approach at the second stage of the due process analy-

73. Id. at 2110.
74. Id.
75. Id. at 2111-12.
76. Id.
77. Id. at 2112.
78. Powell argued first that whatever difference there may be in the severity of the disappointment resulting from a denial of release or from revocation should not be dispositive of the question whether due process requirements apply at all, which depends on the nature and not the weight of the interest implicated. Second, unless the Board arbitrarily grants or denies parole, even subjective and predictive evaluations make use of factual findings. Id. at 2110.

Relying on Wolff, Marshall wrote that "whether an individual currently enjoys a particular freedom has no bearing on whether he possesses a protected interest in securing and maintaining that liberty." Id. at 2113. Neither does the fact that "the administrative decision may turn on 'subjective evaluations,'" id. at 2114, in any way diminish "the interest affected by parole release proceedings," because in Morrissey, the Court had also recognized a "subjective component" in the revocation decision. Id. at 2114-15.
Rather than expressly balancing the interests of inmates against those of the state, the Court stressed the flexibility of due process and its goal of minimizing the risk of error. Because of the predictive nature of the parole release determination, the Court argued, "[p]rocedures designed to elicit specific facts, such as those required in Morrissey, Gagnon, and Wolff, are not necessarily appropriate."80 The additional procedural protections (notice, a formal hearing and a summary of the evidence) ordered by the court of appeals81 in this case "would provide at best a negligible decrease in the risk of error."82 The majority may have implicitly balanced that "negligible" interest against the interest of the state in administrative convenience, because the opinion prefaced this part of the analysis by noting the practical objection to requiring "burdensome and unwarranted" procedures in determining parole releases, for states might then "abandon or curtail parole."83 In this context, the Court concluded that the Nebraska procedures satisfied constitutional requirements.

Marshall's dissent rightly criticized the majority for "focus[ing] almost exclusively on . . . the risk of error" and failing to engage in the traditional balancing of interests to determine the amount of process due.84 As to requiring more advanced notice of the hearing date and a statement of the evidence on which the Board bases a denial of parole, Marshall suggested that the burden those requirements would impose on the Board is sufficiently light and the benefit they would afford inmates sufficiently great to warrant their adoption.85 Powell agreed as to the notice requirement only, because to him, "the report of the Board's decision . . . seem[ed] adequate."86 Both dissents concurred with the majority that due process does not require a for-

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79. See Mathews v. Eldridge, 424 U.S. 319, 335 (1976); note 3 supra.
80. 99 S. Ct. at 2107.
82. 99 S. Ct. at 2107.
83. Id.
84. Id. at 2116. Marshall quotes the three factors set forth by the Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), then argues that by ignoring the first and third factors "the Court skew[ed] the inquiry in favor of the Board." 99 S. Ct. at 2116.
85. 99 S. Ct. at 2116-17.
86. Id. at 2111. Powell contends that a prisoner's ability to prepare adequately for a hearing is substantially if not completely crippled by the Board's refusal to give notice more than a few hours in advance. Id.
mal hearing for every determination of parole release.87 By insisting on less than the maximum possible requirements, Marshall sought to show that a balance of all the relevant factors called for greater protection of an inmate’s interest in parole release. Finally, Marshall resurrected a point that Burger himself noted in Morrissey but failed to consider here: Due process also has a goal of preserving the “appearance of fairness and the confidence of inmates in the decisionmaking process.”88

However broad the implications of Greenholtz may be, the fine factual distinctions the Court drew (particularly between parole release and parole revocation) will provide ample opportunity for limiting the precedential value of this case. Unfortunately, by finding that no constitutionally protectible liberty interest in parole release exists independently of that created and defined by statute, the Burger majority has added weight to the danger posed by the Roth-Arnett-Bishop-Meachum cluster of decisions, as opposed to Goldberg and Morrissey, which had tended to require greater procedural protections in administrative contexts. Certain language in Roth and Arnett gives rise to an “entitlement” view of due process that, taken to its logical extreme, would allow the state not only to define the sole liberty and property interests entitled to due process protection but also to prescribe and limit the procedures that accompany the grant of such entitlements. Loosely construed, Greenholtz could turn the confused wavering of the recent due process decisions into a dangerous swing back to the old distinction between rights and privileges and to the notion that what the state gives it may also take away.89 Lastly, the willingness of the majority to dispense

87. Id. at 2110, 2118.
88. Id. at 2117.
The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.
99 S. Ct. 2118.
89. See note 34 supra.
Professor Saphire writes that:
[I]t is difficult to understand why the Court has developed such a highly positivistic model of procedural due process. . . .
The most credible explanation is that a majority of the Justices, striving
with a balancing approach in its analysis and concentrate on the reduction of erroneous decisionmaking fails to give full recognition to the inherent value of procedural due process as a goal in itself. Fair treatment takes on special significance in a prison context because many inmates have lost their respect for and confidence in the system. In light of the major goal of parole—to rehabilitate prisoners—this consideration seems crucial. But only if the Court limits Greenholtz to its facts can that policy prevail.

WENDELIN A. WHITE