THE EVOLUTION OF STATE CONSTITUTIONAL LAW IN CONNECTICUT

Flemming L. Norcott, Jr.*

Good afternoon and thank you for inviting me to participate in this symposium. Your topic is one that will, no doubt, elicit interesting observations from those of us on the panel, and challenging questions from the audience.

A panel discussing the hardest cases we have handled inevitably, for me, involves a discussion of the development of state constitutional law in Connecticut, and is, I believe, a timely discussion for reasons I will share with you in a moment. I have chosen to remark on two cases, decided more than a decade ago, published just over one year apart, to illustrate the points I would like to share with you today.

It is my contention that we are still in the early stages of the development of state constitutional law—an evolution that is difficult to describe while in its midst, but which is occurring nonetheless. By way of brief background, and as a backdrop to my next point, I was elevated to the Connecticut Supreme Court in 1992. Ellen Peters was Chief Justice, and I am sure many of you are aware of her scholarly contributions to the academic literature on state constitutional law. For those of you who are not, I commend to you her article on the common law and the Connecticut Constitution, published in the Albany Law Review in 1989.¹ There is probably a copy around here somewhere.

Chief Justice Peters’s book review published in the Michigan Law Review in 1986 speaks to the state of this evolution.² In her review of a collection of essays published following a national conference on developments in state constitutional law, she

---


suggested that “[t]he essays produced for the conference should indeed point state courts in the direction of a more sophisticated inquiry into the role properly to be assigned to state constitutions as they emerge from the long shadow cast, for the last sixty years, by the Constitution of the United States.”3 She went on to state that, in her estimation, “[t]he dearth of scholarly analyses, due chiefly to the preoccupation of constitutional scholars with the work of the United States Supreme Court interpreting the United States Constitution, has unquestionably increased the difficulties . . . state courts have encountered in their nascent efforts to take state constitutional rights seriously.”4

From my vantage point, joining the Connecticut Supreme Court in the early 1990s, it was an exciting time to be entertaining appeals based in state constitutional law as a justice on the highest court in the state. The Connecticut Supreme Court had recently issued its opinion in State v. Geisler,5 which was our first foray into a post-New York v. Harris6 analysis of the exclusionary rule under our state constitution. Geisler, which is still good law and the subject of continuing debate in Connecticut, cited six “tools of analysis” to use when construing “the contours of our state constitution.”7 Those tools are: (1) the text itself; (2) our own court holdings and dicta; (3) federal precedent; (4) sister state decisions or sibling approach; (5) history; and (6) economic/sociological considerations.8 The court concluded, in an opinion written by Justice Robert Berdon, that “the Harris rationale [for exclusion of evidence] falls short of the protection required under our state constitution.”9 A dissent by then-Justice Alfred Covello, now of the federal bench in Connecticut, spoke succinctly to the disagreement that was the crux of the matter.10 He noted that there were no textual distinctions between the federal and state constitutions in the case and that, in his view, reliance on the historical antecedents cited in the majority opinion was not persuasive.11 This dichotomy,
perhaps not surprisingly, still presents itself to the court in cases presenting issues based in state constitutional law.

So now we arrive at the state of state constitutional jurisprudence in 1994 when the Connecticut Supreme Court was presented in *Moore v. Ganim*\(^{12}\) with the issue of “whether, under the state constitution, the state of Connecticut has an affirmative obligation to provide its indigent residents with minimal subsistence.”\(^{13}\) At that time, Connecticut’s general assistance statute provided that case benefits were limited to nine-months duration.\(^{14}\) This durational limit was alleged to be unconstitutional as an abrogation of the state’s “affirmative obligation under the Connecticut [C]onstitution to provide its [indigent] citizens with a minimal level of subsistence.”\(^{15}\) The obligation, as asserted by three recipients whose benefits were to be terminated, was to be found in either the incorporation into the constitution of preexisting rights or by preserved unenumerated rights in the preamble to the Connecticut Constitution and/or the Declaration of Rights.\(^{16}\)

I note at this juncture that the opinion in *Moore* is 144 pages long, including a concurring opinion and one dissenting opinion.\(^{17}\) I am sure you will indulge me if I do not go into every nuance of the decision. I would, rather, like to focus on the dialogue that took place on the Court that resulted in the opinion you can yourself read in the Connecticut Reports. I previously mentioned *Geisler*, and the six tools of analysis cited therein, as that opinion established the framework, or rubric, for state constitutional analysis in subsequent cases. In *Moore* you can discern the evidence of the discussion we engaged in while conducting this analysis.\(^{18}\) We on the bench—and the case was heard en banc—were construing the same text, citing the same cases, referencing the same history, mindful of the same economic and societal issues before us, and, nonetheless, emerged with three distinct conclusions.\(^{19}\) The first, which is contained in the majority opinion I authored, states that the Connecticut Constitution does not place this burden on the state;\(^{20}\) the second,

---

\(^{12}\) 660 A.2d 742 (Conn. 1995).

\(^{13}\) *Id.* at 743.

\(^{14}\) *Id.* at 744.

\(^{15}\) *Id.* at 748.

\(^{16}\) *Id.* at 749–50.


\(^{18}\) *Moore*, 660 A.2d at 754–55.

\(^{19}\) *Id.* at 750 n.26, 744; *id.* at 771 (Peters, C.J., concurring); *id.* at 783 (Berdon, J., dissenting).

\(^{20}\) *Moore*, 660 A.2d at 744.
contained in a concurrence by Chief Justice Peters, avers that the plaintiffs may have been able to establish a claim but that they failed as a matter of proof;21 and the third, provided in a dissent authored by Justice Berdon, maintains the constitutional claim was valid.22

Crafting a majority opinion in light of the above necessitated a thorough review using all of the tools available to us as jurists. Clearly, the text of the constitution itself must serve as our most important guide. In Moore, the plaintiffs were suggesting that their constitutional protection was afforded by a reading of the preamble and Declaration of Rights.23 A clear reading of the text does not support their contention.24 Other state constitutions, containing their own unique provisions, have been construed by their own state courts consistent with their own terms.25 That left our discussion centered on a contextual analysis that focused on the historical and societal elements—or tool of analysis if you will—which were capable of more than one interpretation. In my view, as I stated in the majority opinion, the Connecticut Supreme Court had “not, to date, recognized a fundamental right under our state constitution that was not either explicitly enumerated or implied by virtue of the due process guarantee of article first, § 9.”26 Using this approach pre-Geisler, the Court had consistently concluded that it is the legislature, through statutory enactments, that creates the duty to support the poor.27 There was no reason to depart from that approach, even as the new rubric of Geisler provided a framework not previously explicitly utilized by the court. I like to think that the sharpening of our legal reasoning does not necessarily mean that old precedents fall. Rather, our jurisprudence evolves. Sometimes in ways that are observable through our opinions, sometimes in more subtle ways.

A final note about Moore: the majority opinion addresses the

21 Id. at 771 (Peters, C.J., concurring).
22 Id. at 783 (Berdon, J., dissenting).
23 Id. at 749–50.
24 See Conn. Const. pmbl; Conn. Const. art. I, § 1; Conn. Const. art. I, § 10.
25 Moore, 660 A.2d at 755–58 (discussing various state high court approaches).
26 Moore, 660 A.2d at 760; cf. Cologne v. Westfarms Assocs., 469 A.2d 1201, 1208 (Conn. 1984) (“This court has never viewed constitutional language as newly descended from the firmament like fresh fallen snow upon which jurists may trace out their individual notions of public policy uninhibited by the history which attended the adoption of the particular phraseology at issue and the intentions of its authors. The faith which democratic societies repose in the written document as a shield against the arbitrary exercise of governmental power would be illusory if those vested with the responsibility for construing and applying disputed provisions were free to stray from the purposes of the originators.”).
27 Moore, 660 A.2d at 760.
plaintiffs’ contention that “because those who qualify for such assistance are without viable alternatives to sustain themselves, human decency and morality mandate that we recognize a constitutional governmental duty to provide such assistance.”28 The legal analysis of this contention points out the inherently contradictory nature of this argument; thus, should such claims be deemed constitutional, the imposition of conditions to receive benefits could be deemed to breach the state’s obligation to provide benefits. Stated more directly, I am hesitant to impose affirmative obligations on the state where that obligation is not explicit in the language of the constitution. In keeping with the theme of this symposium—making hard decisions—I suggest to you that it might be easier to find such an obligation. However, that is not a stance that I find supported in the Connecticut Constitution.

Moving on to the second case I would like to address to illustrate my views, I turn to one of Connecticut’s seminal education cases, Sheff v. O’Neill.29 Sheff, as well as its predecessors and successors in Connecticut, had focused on a unique provision in the Connecticut Constitution that specifically provides that “[t]here shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”30 Compare and contrast this with the description of Connecticut law I just provided in my discussion of Moore, and I suspect you will quickly see the distinction between the two cases. Both cases brought to the court issues that are central to society today. Both cases present compelling arguments for state action to address the needs of members of our society who are least likely to have a voice: the indigent and the young. In Sheff, however, the text of the constitution itself provides the starting point for the court’s discussion. Today’s theme is hard choices, and I will try to briefly explain why an argument based on the text of the constitution was nevertheless so difficult.

The cases that preceded Sheff, sequentially labeled Horton I,31 Horton II,32 and Horton III,33 recognized an affirmative constitutional obligation.34 The underlying claim in each case was

28 Id. at 768.
29 678 A.2d 1267 (Conn. 1996).
30 CONN. CONST. art. VIII, § 1.
31 Horton v. Meskell, 376 A.2d 359 (Conn. 1977) [hereinafter Horton I].
33 Horton v. Meskell, 486 A.2d 1099 (Conn. 1985) [hereinafter Horton III].
34 Horton I, 376 A.2d at 374–75; Horton II, 445 A.2d at 583; Horton III, 486 A.2d at 1104–05.
that the racial and ethnic isolation of Hartford’s schools, the dramatically lower levels of achievement of students in those schools compared to surrounding towns, and the significant role the state has played in the concentration of racial and ethnic minorities in Hartford, deprived Hartford schoolchildren of their equal opportunity to a free public education.\textsuperscript{35} Keep in mind, however, that the second sentence of Article VIII, Section 1, which I read earlier, places the responsibility for implementation with the legislature.\textsuperscript{36} It was, therefore, that branch of government that the court afforded the first opportunity to fashion a remedy for the constitutional violations cited in the opinion.

As in Moore, the court engaged in analysis of the text, context, precedent, and history of the constitutional provisions at issue.\textsuperscript{37} This particular clause within the Connecticut Constitution was added in 1965, following a well-documented constitutional convention.\textsuperscript{38} At the same time, a prohibition against segregation was also added.\textsuperscript{39} Delegates to the convention cited Brown v. Board of Education\textsuperscript{40} and, through the records of the proceedings, provide clear intent for the words they used.\textsuperscript{41} Therefore in Sheff, unlike Moore, you find a basis for imposing an affirmative obligation in the words of the constitution itself, which is in turn supported by the history of those who framed those articles, and further supported by a plethora of evidence stipulated to by the parties.\textsuperscript{42}

\textsuperscript{35} See Horton I, 376 A.2d at 361; Horton II, 445 A.2d at 583; Horton III, 486 A.2d at 1101, 1104–05.
\textsuperscript{36} CONN. CONST. art. VIII, § 1 (“There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”).
\textsuperscript{37} Sheff, 678 A.2d at 1283–85.
\textsuperscript{38} See, e.g., Wesley W. Horton, The Connecticut State Constitution: A Reference Guide 144–45 (1993) (“[Article VIII, Section 1] was new in 1965 and has not been amended since. . . . There is no comparable provision in the U.S. Constitution.”).
\textsuperscript{39} Article I, Section 20, as amended by Articles V and XXI of the amendments, provides: “No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability.” CONN. CONST. art. 1, § 20; see also Sheff, 678 A.2d at 1270–71.
\textsuperscript{40} 347 U.S. 483, 493 (1954) (“Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.”).
\textsuperscript{41} See Sheff, 678 A.2d at 1283–84 (“When the convention delegates debated the desirability of [Article VIII, Section 1 and Article I, Section 20] to our state constitution, they recognized and endorsed the landmark decision in Brown v. Board of Education, declaring the unconstitutionality of ‘separate but equal’ public school education.” (citation omitted)).
\textsuperscript{42} Id. at 1289 (Berdon, J., concurring) (“This record compels the conclusion that the present state regulation of public elementary and secondary education ‘emasculate[s] the goal of substantial equality.’”).
Returning to my original hypothesis that our constitutional jurisprudence is evolving, but that it is not always clear to us where we are in that process, I offered two cases that were very tough decisions. As I stated earlier, they present critical social issues. We, however, are bound by the rule of law and everything that means to us in our work as jurists. Each opinion illuminates the next, just as Moore became a building block for the Sheff case, and so on to today. I will close by quoting one of my colleagues during the time these cases were decided. Senior Associate Justice David Borden, now a judge trial referee, was testifying at a public hearing exactly three years ago today where he was appearing as part of the judicial renomination process. When asked about the development of state constitutional law during his thirty year career as a judge on the trial court and at the appellate level, he commented on Geisler and characterized its impact in this way:

When I first came on the court, we didn’t have that. It hadn’t yet been decided. And it was more of a, kind of haphazard way.
The Court really, I think, didn’t fully explain when it did decide to recognize a broader right under the State Constitution than the Federal. I don’t think the Court did a good job of explaining why it was doing that.
But with this analysis I think we have a good, a good body of law to tell the bench, the Bar, and the public why we’re deciding under the State Constitution the way we’re deciding.43

Perhaps if I had started my remarks with David’s testimony, I would not have had to go much farther to explain my views on the development of state constitutional law in Connecticut. He stated it well, and I hope that his statement, as well as my explication, has aided your understanding. Thank you for your time and attention this afternoon.