F. GARY HONULIK *v.* TOWN OF GREENWICH ET AL.
(SC 18046)

Rogers, C. J., and Norcott, Katz, Vertefeuille, Zarella, McLachlan and Beach, Js.

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Kevin M. Greco filed a brief for the Silver Shield Association as amicus curiae.

Richard Blumenthal, attorney general, *Gregory T. D'Auria*, associate attorney general, and *Robert Deichert* and *Jane R. Rosenberg*, assistant attorneys general, filed a brief for the state of Connecticut as amicus curiae.

Opinion

ROGERS, C. J. The plaintiff, F. Gary Honulik, has filed a motion requesting that we reconsider the judgment previously rendered in this appeal; see *Honulik* v. *Greenwich*, 290 Conn. 421, 963 A.2d 979 (2009); to determine whether the panel of this court that decided the appeal lacked jurisdiction over it. The appeal was argued on April 15, 2008, and the opinion disposing of it was officially released on February 24, 2009.[1] In his motion, the plaintiff claims that the judgment was rendered without subject matter jurisdiction because Justice Schaller, a member of the panel and the author of the majority opinion, reached the age of seventy, the constitutionally mandated age of retirement,[2] prior to the release of the opinion, thereby rendering him ineligible to continue to deliberate or to otherwise participate in the disposition of the appeal. More specifically, the plaintiff argues that General Statutes § 51-198 (c),[3] which authorizes Supreme Court justices who have reached the mandatory age of retirement to complete work on appeals they heard prior to retiring, is unconstitutional because it contravenes article fifth, § 6, of the constitution of Connecticut, as amended by article eight, § 2, of the amendments.[4] We disagree and, accordingly, deny the relief requested in the motion insofar as it is based on the plaintiff's jurisdictional claim.

Section 51-198 (c) provides in relevant part that "[a] judge of the Supreme Court who has attained the age of seventy years may continue to deliberate and participate in all matters concerning the disposition of any case which the judge heard prior to attaining said age, until such time as the decision in any such case is officially released." This provision was adopted by the legislature in the wake of this court's opinion in *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, 252 Conn. 912, 914E, 746 A.2d 1257 (1999), wherein some members of the court expressed, in dicta,[5] a belief that Supreme Court justices constitutionally were required to cease all work on matters pending before them once they reached the age of seventy.[6] The state constitutional provision at issue, article fifth, § 6, as amended by article eight, § 2 of the amendments, provides in relevant part that "[n]o judge shall be eligible to hold his office after he shall arrive at the age of seventy years . . . ." The provision is of long-standing pedigree, dating to the constitution of 1818.[7] The plaintiff argues that the legislative authorization for a retired justice to complete work he or she commenced preretirement conflicts with this provision. The resolution of the plaintiff's claim requires us to determine whether a justice who turns seventy and continues to work on appeals on which he or she sat prior to turning seventy, until those appeals are resolved fully, is "hold[ing] his office" within the meaning of article fifth, § 6, of the state constitution.[8]

In considering this question, we are guided by well established principles. This court has a "duty to construe statutes, whenever possible, to avoid constitutional infirmities . . . ." *Denardo* v. *Bergamo*, 272 Conn. 500, 506 n.6, 863 A.2d 686 (2005). Accordingly, we begin with a strong presumption of constitutionality. "[I]n evaluating [a] . . . challenge to the constitutionality of [a] statute, we read the statute narrowly in order to save its constitutionality, rather than broadly in order to destroy it. We will indulge in every presumption in favor of the statute's constitutionality . . . ." (Internal quotation marks omitted.) *State* v. *Indrisano*, 228 Conn. 795, 805, 640 A.2d 986 (1994). Consistent with this presumption, "when called upon to interpret a statute, we will search for an effective and constitutional construction that reasonably accords with the legislature's underlying intent." (Internal quotation marks omitted.) *State* v. *Floyd*, 217 Conn. 73, 79, 584 A.2d 1157 (1991). "It is an extreme act of judicial power to declare a statute unconstitutional. It should be done with great caution and only when the case for invalidity is established beyond a reasonable doubt." *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 300, 957 A.2d 407 (2008) (*Borden*, *J.*, concurring). "It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained." (Internal quotation marks omitted.) *Snyder* v. *Newtown*, 147 Conn. 374, 390, 161 A.2d 770 (1960), appeal dismissed, 365 U.S. 299, 81 S. Ct. 692, 5 L. Ed. 2d 688 (1961). Accordingly, "where a statute reasonably admits of two constructions, one valid and the other invalid on the ground of unconstitutionality, courts should adopt the construction which will uphold the statute even though that construction may not be the most obvious one." *Adams* v. *Rubinow*, 157 Conn. 150, 153, 251 A.2d 49 (1968).

The plaintiff's claim mainly requires us to interpret article fifth, § 6, of the state constitution. "[I]n *State* v. *Geisler*, 222 Conn. 672, 685, 610 A.2d 1225 (1992), we set forth six factors that, to the extent applicable, are to be considered in construing the contours of our state constitution so that we may reach reasoned and principled results as to its meaning.[9] These factors are: (1) the text of the operative constitutional provision; (2) holdings and dicta of this court and the Appellate Court; (3) persuasive and relevant federal precedent; (4) persuasive sister state decisions; (5) the history of the operative constitutional provision, including the historical constitutional setting and the debates of the framers; and (6) contemporary economic and sociological considerations, including relevant public policies.[10] Id. Although, in *Geisler*, we compartmentalized the factors that should be considered in order to stress that a systematic analysis is required, we recognize that they may be inextricably interwoven. . . . [Moreover], not every

Geisler factor is relevant in all cases." (Internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 157. Accordingly, our analysis of article fifth, § 6, of the state constitution is informed by those *Geisler* factors that are relevant to the analysis, which are to some degree intertwined.

Because the text of article fifth, § 6, of the state constitution does not elaborate as to what, precisely, constitutes "hold[ing] . . . office," we turn first to our own jurisprudence for guidance in interpreting that phrase. Although this case presents us with the first challenge to the constitutionality of § 51-198 (c), this court, on multiple occasions, has been asked to consider whether a very similar statute, General Statutes § 51-183g, which authorizes postretirement and postresignation actions of Superior Court judges, is constitutionally infirm. Section 51-183g provides: "Any judge of the Superior Court may, after ceasing to hold office as such judge, settle and dispose of all matters relating to appeal cases, as well as any other unfinished matters pertaining to causes theretofore tried by him, as if he were still such judge."

Section 51-183g, in various incarnations whose differences are of no import here, has been part of our statutory law since 1885. See Public Acts 1885, c. VIII. Shortly after the provision's passage, its constitutionality was challenged as being "beyond the power of the legislature . . . ."[11] *Johnson* v. *Higgins*, 53 Conn. 236, 237, 1 A. 616 (1885). This court disagreed. In *Johnson*, a trial judge, subsequent to resigning his office,[12] had acted pursuant to § 51-183g by signing a finding and statement of rulings for purposes of appeal. We concluded that the trial judge's action properly was authorized by the new statutory provision. Id. The court emphasized that it was not aware of authority denying the legislature the power to authorize the actions contemplated by the statute, and relied further on the fact "that [s]imilar legislation, and of more embracing scope, has for many years been operative, unchallenged, in reference to the judicial power of justices of the peace."[13] Id.

The holding of *Johnson* later was extended in *Todd* v. *Bradley*, 97 Conn. 563, 117 A. 808 (1922). In that case, it was claimed that, in light of article fifth, § 6, of the state constitution, a trial judge who had ceased to hold office by virtue of turning seventy lacked the power to make a finding for purposes of appeal. Id., 564. Relying on *Johnson*, this court concluded that the precursor to § 51-183g properly authorized the trial judge's act. Id., 566–71. Together, *Johnson* and *Todd* established that the legislature may permit a resigned or retired judge to complete unfinished matters "after ceasing to hold office as such judge"; General Statutes § 51-183g; without offense to the constitution. More specifically, a retired judge, in completing unfinished matters, is not by virtue of those acts holding office as contemplated

by article fifth, § 6, of the state constitution.[14]

We turn next to relevant extrajurisdictional precedent.[15] The precise question before us rarely has been the subject of judicial opinion. One case directly on point, however, held that legislation authorizing a retired justice to continue to perform judicial duties on temporary assignment did not run afoul of a constitutional mandatory retirement provision barring the "hold[ing]" of judicial office. See *Claremont School District* v. *Governor*, 142 N.H. 737, 738, 712 A.2d 612 (1998) (reh. denied July 31, 1998). Part II, article 78 of the New Hampshire constitution, which is similar to article fifth, § 6, of our state constitution, provides that "[n]o person shall hold the office of judge of any court . . . after he has attained the age of seventy years." Nevertheless, a state statute permits the chief justice of the Supreme Court of New Hampshire to assign justices "who ha[ve] retired from regular active service" to sit on temporary assignment in the event that a regular member of the court is disqualified, and grants such a retired justice, when so assigned, the powers of an active Supreme Court justice. N.H. Rev. Stat. Ann. § 490:3 (2003).

In *Claremont School District* v. *Governor*, supra, 142 N.H. 738, the defendants challenged the participation in the appeal of a retired justice, over the age of seventy, who had been assigned pursuant to N.H. Rev. Stat. Ann. § 490:3 (1997), and the Supreme Court of New Hampshire rejected that challenge. According to the court, "[a] retired judge assigned to active duty is authorized to exercise the powers of an office while serving on assignment. *He does not by virtue of the assignment*, *however*, *hold an office* . . . ." (Emphasis added; internal quotation marks omitted.) Id., 741. The court acknowledged that "the legislature ha[d] no prerogative to invest retired justices over age seventy with the panoply of powers associated with judicial office," but concluded that "it [did] have the constitutional authority to authorize limited temporary assignment of retired justices over age seventy to ensure the adequate and orderly administration of justice." Id., 742.

The decision of the Supreme Court of New Hampshire provides direct support for the notion that temporary performance of duties associated with a judicial office does not equate with holding that office.[16] Other state courts, in addressing claims pertaining to postretirement judicial activity that concededly are distinct from those at issue here and in *Claremont School District*, also have acknowledged the distinction between performance of judicial duties and status as judicial officeholder. See, e.g., *State ex rel. Wilcox* v. *District Court*, 208 Mont. 351, 358, 678 P.2d 209 (1984) ("retired district judge called in [pursuant to provision allowing for temporary assignment of retired judges] does not become a second incumbent in that office, but simply exercises the powers of a district judge on a temporary basis");

Werlein v. *Calvert*, 460 S.W.2d 398, 401 (Tex. 1970) ("A retired judge assigned to active duty is authorized to exercise the powers of an office while serving on assignment. He does not by virtue of the assignment, however, hold an office . . . .") (reh. denied December 31, 1970); *Nelson* v. *Miller*, 25 Utah 2d 277, 288, 480 P.2d 467 (1971) ("we see no constitutional conflict between mandatory retirement for age and legislative authorization for calling a judge back into service upon a 'case-to-case' basis").

Aside from the foregoing cases involving judges, additional support exists for the general proposition that simply performing duties associated with an office or position does not necessarily amount to "holding" that office or position.[17] See, e.g., *Smith* v. *Johnson*, 968 F. Sup. 439, 442 (E.D. Ark. 1997) (concluding, for purposes of determining whether right to retreat provision applied, that general services administration employee had not "held" position of custodial inspector, although he had performed duties of position for two six month periods when it was vacant); *Lowell* v. *United States*, 158 F. Sup. 704, 707–708 (Ct. Cl. 1958) (reasoning, for purposes of computing disability pay, that "there is nothing inconsistent about an officer holding or serving in a permanent rank and at the same time performing active duty in a different temporary rank" and concluding that plaintiff "held" only permanent rank); cf. *State ex rel. Nicolai* v. *Nolte*, 352 Mo. 1069, 1075, 180 S.W.2d 740 (1944) (concluding that provision in city charter that vice president of board of aldermen shall "hold" office of president in event of vacancy meant that vice president shall become president during any vacancy, not merely perform duties of president).

Finally, other courts' jurisprudence as to what constitutes an "office" is instructive. In *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393, 18 L. Ed. 830 (1867), the United States Supreme Court, in interpreting a criminal statute proscribing embezzlement by certain officials, articulated a formula to apply in determining whether a particular position constitutes an "office." According to the Supreme Court, "[a]n office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument,[18] and duties." Id. As one commentator has noted, the *Hartwell* formulation is descriptive rather than prescriptive, and contemplates a continuum. J. O'Connor, "The Emoluments Clause: An Anti-Federalist Intruder in a Federalist Constitution," 24 Hofstra L. Rev. 89, 109 (1995). Thus, "a position characterized by substantial tenure, duration, emoluments, and duties is the paradigmatic office; conversely, a position possessing none of these attributes would reside at the other end of the continuum as clearly a non-office."[19] Id.

Considering the foregoing factors in relation to a retired justice completing his previously commenced

caseload pursuant to § 51-198 (c), it appears that the retired justice's role, although embracing a limited judicial function, does not constitute holding the office of an active Supreme Court justice. First, by its very terms, the statutory authorization to act does not purport to make a new appointment, and the justice does not undergo any appointment process upon retirement. Indeed, § 51-198 (c) acknowledges that the justice has reached the age of ineligibility for appointment. Next, the authority conferred is of very limited tenure and duration—a retired justice may participate and deliberate only on pending appeals heard prior to his retirement date and timely motions for reconsideration pertaining to those appeals. Once those few remaining matters have concluded, the retired justice's work for the court is complete. In regard to emoluments, a retired justice, once he reaches the age of seventy, immediately becomes a state referee. Accordingly, he no longer receives the annual salary of a Supreme Court justice; see General Statutes § 51-47; but instead, is paid under the different compensation structure applicable to referees. See General Statutes § 52-434 (f). Additionally, he must vacate his assigned chambers at the Supreme Court to make room for his successor, and his law clerks immediately are reassigned to that successor. In other words, he lacks the emoluments of a Supreme Court justice. Finally, a retired justice's duties pursuant to § 51-198 (c) are narrow in scope. The limited acts he is authorized to perform are far outnumbered by those in which he may take no part, for example, hearing oral arguments for cases pending on the current docket, participating in or deliberating on newly argued matters, considering petitions for certification, formulating and approving internal court rules, voting on policy matters and ruling on the myriad motions filed with the court.[20] In sum, because the position of a judge acting pursuant to § 51-198 (c) allows for very limited responsibilities, carries distinct emoluments and is of minimal duration, that judge cannot be said to be "holding" the office of Supreme Court justice.[21]

In regard to history, article fifth, § 6, of the state constitution in its original form; see footnote 7 of this opinion; obviously reflected the judgment of its framers that judges, at least presumptively, were less adept at performing their duties upon reaching what was considered, at the time, to be advanced age. As explained in *Todd* v. *Bradley*, supra, 97 Conn. 569, "[t]he provision rests upon a public belief that there comes a time in the life of a man when it is better for the public interest that he be not charged with the responsibility of continuous and daily work of so complete absorption as the high judicial office calls for."[22] Although public sentiment in regard to the limitations of age assuredly has evolved,[23] we think it sufficient to say that the very limited and temporary postretirement duties authorized by § 51-198 (c) do not implicate substantially the con-

cern underlying a constitutionally mandated retirement age. As we have explained, similar provisions for justices of the peace and Superior Court judges, part of our law for the better part of two centuries, have resulted in few challenges and little controversy.

We conclude with economic and sociological considerations and public policy concerns. The desirability for society of permitting retired justices to complete work commenced preretirement scarcely can be questioned. Undoubtedly, it preserves both the integrity and efficiency of this court. The work of a Supreme Court justice often is a lengthy and unpredictable process, and therefore is not easily timed to conclude precisely on a particular date. *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 914A (*Berdon, J.*, dissenting) (noting "the logistical pressures of publishing the majority, concurrences and dissents of all justices who sat on . . . cases [on which a retiring justice sat]"). Construing article fifth, § 6, of the state constitution as the plaintiff contends would require a justice arbitrarily to cease hearing new cases at some point prior to reaching seventy, effectively cutting his or her term of office short, and without the possibility of a replacement. If a justice must cease all Supreme Court case work on the date of his seventieth birthday, then, by necessity, he is divested of the full authority and responsibility of his office many months before that date. Id., 915 (*McDonald, C. J.*, dissenting) ("[o]ur constitution does not . . . mandate a constitutional age of disqualification at sixty-nine, sixty-nine and one-half or sixty-nine and three-fourths"). Moreover, it is inevitable that in some cases, despite all good faith efforts, misjudgment as to the time required to dispose of an appeal or delay due to unforeseen difficulties will result in uncompleted cases on which retired justices sat, necessitating reassignment and/or reargument of the case or disposition by less than a full panel. In some instances, an evenly divided vote could result. Relitigation of the appeal due to the foregoing would waste judicial time and resources and, ultimately, the economic resources of the state. Conversely, rushed resolution of appeals to avoid these issues could lessen the quality of the deliberative process.[24] It is evident from the limited legislative history associated with § 51-198 (c) that these are the problems the statute was intended to prevent.[25]

On the basis of the foregoing analysis, we disagree with the plaintiff's claim that § 51-198 (c) is unconstitutional.[26] We conclude, therefore, that Justice Schaller's continued participation in the underlying appeal after reaching retirement age properly was authorized by that statute and did not affect this court's subject matter jurisdiction. Accordingly, the plaintiff's motion for reconsideration is granted but the relief requested therein, that we vacate the earlier judgment in this case for lack of jurisdiction, is denied.

In this opinion NORCOTT, VERTEFEUILLE, MCLACHLAN and BEACH, Js., concurred.

[1] The plaintiff timely filed a motion to vacate, for reconsideration and/or for reconsideration en banc on March 6, 2009. See Practice Book § 71-5. The defendants thereafter filed a joint motion in opposition to the plaintiff's motion. On May 6, 2009, we granted the motion for reconsideration en banc and ordered counsel for the parties to submit supplemental briefs addressing the jurisdictional question raised by the plaintiff's motion. Upon this court's invitation, the attorney general has filed an amicus brief addressing the question raised by the plaintiff's motion.

The plaintiff argues, and we agree, that the issues raised by the motion are matters of substantial public interest warranting en banc consideration. Accordingly, Chief Justice Rogers, Justice McLachlan and Judge Beach have been added to the panel. See General Statutes § 51-207 (a). Justices Palmer and Schaller did not participate in the decision to grant reconsideration, nor did they participate in the resolution of the jurisdictional claim addressed in this opinion. In light of the ultimate conclusion reached herein, however, Justice Schaller then participated in the reconsideration of the merits of the underlying appeal, and Judge Beach did not remain on the panel. A revised opinion on the merits of the appeal is being released simultaneously with the present opinion on the plaintiff's motion. See *Honulik* v. *Greenwich*, 293 Conn. 698, A.2d (2009). The revised opinion supersedes *Honulik* v. *Greenwich*, supra, 290 Conn. 421, which was released on February 24, 2009.

[2] Justice Schaller reached the age of seventy on November 23, 2008.

[3] General Statutes § 51-198 (c) provides: "A judge of the Supreme Court who has attained the age of seventy years may continue to deliberate and participate in all matters concerning the disposition of any case which the judge heard prior to attaining said age, until such time as the decision in any such case is officially released. The judge may also participate in the deliberation of a motion for reconsideration in such case if such motion is filed within ten days of the official release of such decision."

[4] Article fifth, § 6, of the constitution of Connecticut, as amended by article eight, § 2, of the amendments provides: "No judge shall be eligible to hold his office after he shall arrive at the age of seventy years, except that a chief justice or judge of the supreme court, a judge of the superior court, or a judge of the court of common pleas, who has attained the age of seventy years and has become a state referee may exercise, as shall be prescribed by law, the powers of the superior court or court of common pleas on matters referred to him as a state referee."

[5] Dicta are "[o]pinions of a [court] which do not embody the resolution or determination of the specific case before the court [and] [e]xpressions in [the] court's opinion which go beyond the facts before [the] court and therefore are individual views of [the] author[s] of [the] opinion and [are] not binding in subsequent cases as legal precedent." Black's Law Dictionary (6th Ed. 1990); see also *St. George* v. *Gordon*, 264 Conn. 538, 547 n.10, 825 A.2d 90 (2003), superseded by statute on other grounds as stated in *Flanagan* v. *Blumenthal*, 100 Conn. App. 255, 260, 917 A.2d 1047 (2007). The per curiam opinion in *Doyle* was issued in response to a former panel member's published objection to the court's sua sponte order for en banc consideration of an already argued but still pending appeal. *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 914B; see also Practice Book § 70-7 (b). Because the per curiam opinion addressed only issues raised by that sua sponte order and not the merits of the case as argued by the parties, it is dicta in its entirety and, therefore, nonbinding.

[6] The opinion in *Doyle* stated, without supporting citation, that "[t]he notion that one who, by virtue of the constitution is no longer a member of this court, may not participate in its decisions, is not, however, simply the view of a majority of this court as currently constituted. It has been the uniformly held and followed view of this court long before the dissenting justice or any current member of this court was appointed to it, and that view has never been questioned before." *Doyle* v. *Metropolitan Property & Casualty Ins. Co.*, supra, 252 Conn. 914E; see also id. ("this court's decisions, in cases on which justices reaching the age of seventy have sat, uniformly have been published before the particular justice's seventieth birthday"). Our current research reveals, however, that the accuracy of this assertion is suspect. For example, the official reports of this court indicate that Justice Elisha Carpenter, who was born on January 14, 1824, and turned seventy on January 14, 1894; see Appendix, 69 Conn. 731–36; remained a member of the panel on several cases that were heard prior to his seventieth birthday

but not decided until thereafter. See *Bissell* v. *Dickerson*, 64 Conn. 61, 29 A. 226 (1894) (argued January 4, 1894, decided February 19, 1894); *Park Bros. & Co., Ltd.* v. *Blodgett & Clapp Co.*, 64 Conn. 28, 29 A. 133 (1894) (argued January 4, 1894, decided February 8, 1894); *Mills* v. *Britton*, 64 Conn. 4, 29 A. 131 (1894) (argued January 3, 1894, decided February 8, 1894); *Downing* v. *Sullivan*, 64 Conn. 1, 29 A. 132 (1894) (argued January 3, 1894, decided February 8, 1894).

[7] "The constitutions of 1818 (art. [fifth], § 3) and 1955 (art. [fifth], § 8) provided that '[n]o judge or justice of the peace shall be capable of holding his office, after he shall arrive at the age of seventy years.' The constitution of 1965, in article fifth, § 6, retained the same restriction but changed the word 'capable' to 'eligible' and added the [exception allowing for prospective work by state referees] . . . ." *Florida Hill Road Corp.* v. *Commissioner of Agriculture*, 164 Conn. 360, 363, 321 A.2d 856 (1973).

[8] We conclude at the outset that the activities at issue here clearly do not fall within the exception contained in article fifth, § 6, of the state constitution that permits state referees to exercise, as prescribed by law, the powers of the Superior Court on matters that have been referred to them as state referees. See footnote 4 of this opinion. Although a Supreme Court justice, by operation of statute, becomes a state referee upon retirement for the remainder of his or her term in office as a judge; see General Statutes § 52-434 (a) (1); the completion of that justice's pending Supreme Court caseload cannot reasonably be cast as exercising a power of the Superior Court. Moreover, the statutes defining the powers of state referees do not include sitting on cases at the Supreme Court; see General Statutes § 51-50f (granting retired judges acting as state referees, after attaining age seventy, powers of Superior Court on matters referred by that court); General Statutes § 52-434 (a) (1) (authorizing Superior Court to refer civil, nonjury cases to state referees who have been designated judge trial referees by Chief Justice, as well as civil jury cases if parties consent); General Statutes § 52-434 (b) (authorizing Chief Justice to designate state referees as judge trial referees to whom criminal and civil cases and juvenile matters may be referred); General Statutes § 52-434a (a) (giving judge trial referees same powers and jurisdiction as judges of court from which proceedings have been referred); General Statutes § 52-434c (authorizing retired Supreme Court justices and Appellate Court judges who have become state referees to be designated by Chief Justice as eligible to be assigned to Appellate Court panels by Chief Judge of that court); nor do the powers of the Superior Court include deciding Supreme Court cases. See General Statutes § 51-164s; see generally chapter 882 of the General Statutes; see also *Szarwak* v. *Warden*, 167 Conn. 10, 32–33, 355 A.2d 49 (1974) (distinguishing jurisdictions of Supreme Court and Superior Court). Although Superior Court judges may be summoned to sit on panels of the Supreme Court; see General Statutes § 51-207 (b); our jurisprudence counsels that state referees are not Superior Court judges, but rather, are a sui generis type of tribunal. See *Florida Hill Road Corp.* v. *Commissioner of Agriculture*, 164 Conn. 360, 362, 321 A.2d 856 (1973).

[9] Although we typically employ a *Geisler* analysis to determine whether a provision of our constitution affords broader individual rights than an analogous provision of the United States constitution; see, e.g., *Perricone* v. *Perricone*, 292 Conn. 187, 212–13, 972 A.2d 666 (2009) (freedom of speech); *Kerrigan* v. *Commissioner of Public Health*, supra, 289 Conn. 155–57 (equal protection); we have at times considered the *Geisler* factors in interpreting language in our constitution that does not have a similar federal counterpart. See, e.g., *Moore* v. *Ganim*, 233 Conn. 557, 581, 660 A.2d 742 (1995) (addressing claim of unenumerated state constitutional obligation to provide subsistence benefits to needy citizens). We consider a structured and comprehensive approach to be helpful in either context.

[10] We also strive to achieve a workable, commonsense construction that does not frustrate effective governmental functioning, at least where such is not clearly contraindicated by application of the factors enumerated in *Geisler*. See, e.g., *Palka* v. *Walker*, 124 Conn. 121, 125–26, 198 A. 265 (1938) (construing provision empowering governor to grant reprieves after conviction until end of next session of General Assembly, and no longer, to mean that limitation upon period during which reprieve may operate runs, not from day of conviction, but from time reprieve is issued, because otherwise opportunity to pursue appeal or seek pardon from legislature could be defeated); *State* v. *South Norwalk*, 77 Conn. 257, 263, 265, 58 A. 759 (1904) (interpreting constitutional requirement that bills shall become laws unless governor returns them to legislature within "three days" for reconsideration to mean three days that legislature is in session, not three calendar days,

because legislative session is only time in which it is possible to return bills and literal interpretation would infringe governor's prerogatives).

[11] Presumably, the appellant was raising a separation of powers challenge. Article second of the Connecticut constitution provides: "The powers of government shall be divided into three distinct departments, and each of them confided to a separate magistracy, to wit, those which are legislative, to one; those which are executive, to another; and those which are judicial, to another."

[12] There is no indication from the opinion in *Johnson* that the judge had resigned his office due to age.

[13] See, e.g., Public Statute Laws of Connecticut (1833), c. XXVI, § 1 ("in case of the failure to reappoint any justice of the peace, by the General Assembly, all process, suits, matters and business, which shall have been begun or been made returnable to or before such justice of the peace, before the time of the expiration of his office, may be continued and proceeded with, by and before said justice, to final judgment and execution, and be completed in the same way as if the said justice had been re-appointed and continued in office"). When this provision was operative, justices of the peace were constitutional officers having jurisdiction over civil and criminal matters. Conn. Const. (1818), art. V, § 2. When the constitution subsequently was amended to provide for election of justices of the peace, a similar statutory provision was passed to authorize completion of work by those who failed to be reelected. See Public Acts 1851, c. XIV.

The existence of the foregoing provisions provides strong support for the court's conclusion in *Johnson* that the passage of § 51-183g did not offend the principle of separation of powers embodied in our constitution. Specifically, "a practical [contemporaneous] construction of the [constitution] given by the General Assemblies of the years immediately following 1818, in the forms which their legislation assumed . . . furnish[es] substantial aid to [our] interpretation." *Board of Water Commissioners* v. *Curtis*, 87 Conn. 506, 510, 89 A. 189 (1913). Because many members of those General Assemblies also had been members of the constitutional convention, they were unlikely, when they enacted the legislation concerning justices of the peace, to have misunderstood or wilfully ignored the constitutional mandate that they recently had helped to frame. See id., 510–11. In light of the holding in *Johnson*, which is based on the foregoing rationale, the plaintiff's argument that a statute authorizing limited judicial acts by those who recently have left judicial office derogates the principle of separation of powers is not persuasive.

Additionally, the basic principles underlying the separation of powers doctrine do not support the plaintiff's claim that § 51-198 (c) constitutes a legislative encroachment on judicial powers. "A statute will be declared unconstitutional if it (1) confers on one branch of government the duties which belong exclusively to another branch . . . or (2) if it confers the duties of one branch of government on another branch which duties significantly interfere with the orderly performance of the latter's essential functions." (Citation omitted.) *University of Connecticut Chapter, AAUP* v. *Governor*, 200 Conn. 386, 394–95, 512 A.2d 152 (1986). Thus, "[i]n the context of challenges to statutes whose constitutional infirmity is claimed to flow from impermissible intrusion upon the judicial power, we have refused to find constitutional impropriety in a statute simply because it affects the judicial function . . . . A statute violates the constitutional mandate for a separate judicial magistracy only if it represents an effort by the legislature to exercise a power which lies exclusively under the control of the courts . . . or if it establishes a significant interference with the orderly conduct of the [courts'] judicial functions." (Internal quotation marks omitted.) *State* v. *McCahill*, 261 Conn. 492, 505, 811 A.2d 667 (2002).

Here, § 51-198 (c) does not purport to remove power from the judicial branch, specifically, the Supreme Court, and to confer it upon another branch; see, e.g., *Bridgeport Public Library & Reading Room* v. *Burroughs Home*, 85 Conn. 309, 320–21, 82 A. 582 (1912) (legislative encroachment on courts' jurisdiction over charitable trusts held unconstitutional); or even upon another court, nor does the statute direct judgments to be rendered in any particular manner. Compare *State* v. *McCahill*, supra, 261 Conn. 503–504 (statute prohibiting courts from releasing certain offenders on post-conviction bail held unconstitutional), with *Macy* v. *Cunningham*, 140 Conn. 124, 131–32, 98 A.2d 800 (1953) (statute directing courts whom to appoint as successor trustees held unconstitutional). Rather, it authorizes specific individuals within the judicial branch to exercise particular judicial powers. Cf. *State* v. *Nardini*, 187 Conn. 109, 124, 445 A.2d 304 (1982) (observing, in

upholding constitutionality of Sentence Review Act, that "[t]he claim that the separation of powers provisions of the state constitution preclude the legislature from authorizing action by the judicial department which could vacate its [own] judgments is without substance"). That authorization does not encroach upon a judicial prerogative. Cf. Conn. Const., art. V, §§ 2 and 3 (granting authority to confer judicial power on individuals to executive, legislative branches). Moreover, it cannot seriously be argued that § 51-198 (c) interferes with the orderly performance of this court's essential functions by assigning it additional, nonjudicial duties. Cf. *Norwalk Street Railway Co.'s Appeal*, 69 Conn. 576, 600–603, 37 A. 1080 (1897) (statute conferring on judiciary power to regulate location, construction and operation of street railways, a legislative function, held unconstitutional). To the contrary, as we discuss subsequently in this opinion, it promotes orderly performance by permitting us to exercise our core function in the most efficient manner.

Finally, we reject Justice Katz' assertion that if this court holds that the legislature properly may authorize judicial acts by those who no longer occupy their judicial office, then, by logical extension, the legislature may authorize *anyone* to perform judicial acts. Such legislation—specifically, the provision pertaining to former justices of the peace and, later, the provision applicable to former Superior Court judges—has been part of Connecticut's statutory law for the better part of two centuries, and, in *Johnson*, more than one century ago, this court sustained its constitutionality. *Johnson* v. *Higgins*, supra, 53 Conn. 237. Nevertheless, the legislature never has sought to extend that holding by enacting provisions purporting to confer judicial powers on laypersons. Common to the older statutes and § 51-198 (c) is a legislative grant of authority to an individual who recently held a particular judicial office and, in the case of a recent retiree, one who remains a judicial officer. This court's holdings necessarily are constrained by those circumstances. Cf. *Perry* v. *Perry*, 222 Conn. 799, 815, 611 A.2d 400 (1992) (legislature's conferring to family support magistrates authority to imprison for contempt held constitutional because magistrates constitute highly trained, quasi-judicial authority subject to Code of Judicial Conduct and supervision of Judicial Review Council).

[14] We disagree with the plaintiff's argument, embraced by both dissents, that, because the actions of the trial judges at issue in *Johnson* and *Todd* were observed to be "rather clerical than judicial"; *Johnson* v. *Higgins*, supra, 53 Conn. 237; see also *Todd* v. *Bradley*, supra, 97 Conn. 567; the holdings of those cases as to the constitutionality of § 51-183g are limited to such circumstances. The language in *Johnson* indicates clearly that the court did not intend to limit its holding to clerical acts performed pursuant to the statute. The decision states specifically: "*Even if it be admitted that the act of the judge in signing the finding on appeal is a judicial act* . . . and that the act was done after he had ceased to be such judge, no authority has been brought to our attention denying the legislature the power implied in the law in question." (Emphasis added.) *Johnson* v. *Higgins*, supra, 237. Additionally, three members of this court recently declined to read *Johnson* so restrictively, relying on its holding to conclude that § 51-183g authorized a retired Superior Court judge to resentence a criminal defendant upon remand of his case following an appeal, plainly a judicial act. See *State* v. *Miranda*, 274 Conn. 727, 744–45, 878 A.2d 1118 (2005) (*Borden*, *J.*, concurring).

The other authority cited by Justices Katz and Zarella in their dissenting opinions in support of a distinction between clerical and judicial acts is no more compelling. In *Griffing* v. *Danbury*, 41 Conn. 96 (1874), this court held that a Superior Court judge lacked the power to rule on a motion for a new trial, clearly a judicial act, the day after his resignation became effective, and, in *DeLucia* v. *Home Owners' Loan Corp.*, 130 Conn. 467, 473, 35 A.2d 868 (1944), we concluded that a judge of a town court who ceased to hold office after hearing a case was not authorized to grant a motion for extension of time in which to appeal, also a judicial act. When *Griffing* was decided in 1874, however, § 51-183 was yet to be enacted, and in *DeLucia*, we held, preliminarily, that the statute, then codified at General Statutes (1930 Rev.) § 5698, did not apply to town court judges. Id., 471–72. Read together, then, the foregoing cases establish only that, *in the absence of a grant of authority from the legislature*, those no longer holding judicial office may perform only clerical, and not judicial, acts. Indeed, that point was made explicitly in *DeLucia*: "[*A*]*side from statutory authority* we have held that, as the making of a finding for an appeal is a clerical act, one might properly be made by a judge who, after hearing and deciding a case, has ceased to hold office . . . ." (Emphasis added.) Id., citing *Todd* v. *Bradley*, supra, 97 Conn. 567. Case law from other jurisdictions is in accord. See, e.g., *Goodman Investment, Inc.* v. *Swanston Equipment Co.*, 299

N.W.2d 786 (N.D. 1980) ("general conclusion is that, *absent statutory authorization*, a judge has no authority to perform judicial functions after expiration of his term of office" [emphasis added]); see also *Reimer* v. *Firpo*, 94 Cal. App. 2d 798, 800, 212 P.2d 23 (1949) (when Superior Court judge "became a member of the appellate court, his term as Superior Court judge terminated, and . . . thereafter he had no power, *except where specifically permitted to do so by statute*, to perform any judicial act as a trial judge" [emphasis added]); *Olmstead* v. *District Court*, 403 P.2d 442 (Colo. 1965) ("[g]enerally speaking, *except as it may be otherwise provided by law*, a judge's power to exercise judicial functions ceases with the expiration of his term of office" [emphasis added; internal quotation marks omitted]), superseded by statute as stated in *People* v. *Sherrod*, 204 P.3d 466, 470 (Colo. 2009).

In short, then, the foregoing case law establishes that a judge may perform judicial acts *either* (1) when holding office *or* (2) after ceasing to hold office, for a limited time, if authorized by statute. Thus, Justice Katz' characterization of the *Griffing-Johnson-Todd-DeLucia* line of cases as this court "consistently . . . interpret[ing] holding office to mean the exercise of judicial powers" is entirely inapt. We further disagree with Justice Katz' assertion that we implicitly have reasoned that "the very statute that [we declare] constitutional today was wholly unnecessary for the legislature to enact because such acts could be performed irrespective of whether an individual holds office." As we have acknowledged, this court in *Griffing* and *DeLucia* rejected that notion.

[15] Contrary to Justice Zarella's assertion, the discussion that follows clearly is not dedicated to the "nonissue" of whether, "a Supreme Court justice, upon turning seventy, no longer is permitted, by virtue of article fifth, § 6, to hold his or her office," but rather, whether a retired justice, by virtue of performing limited judicial acts, necessarily *is* holding that office.

[16] Similarly, in an advisory decision, the Supreme Judicial Court of Massachusetts opined that proposed legislation recalling retired justices for temporary judicial service would not contravene a proposed constitutional amendment providing that "upon attaining seventy years of age . . . judges shall be retired." *Opinion of the Justices to the Senate*, 362 Mass. 895, 900, 905, 284 N.E.2d 908 (1972). We consider this holding instructive, even though that court noted the different language in article fifth, § 6, of the constitution of Connecticut, namely, the bar against a judge "hold[ing] his office," and concluded that the distinction in the terms used was compelling. Id., 903. The Supreme Judicial Court's reasoning is unclear, however, given that its opinion also acknowledges that " '[r]etire' " means " 'to withdraw from office' and 'to withdraw from active service.' " Id. In short, we see no meaningful distinction between article fifth, § 6, of our state constitution and the provision at issue in *Opinion of the Justices to the Senate*.

[17] Connecticut's statutory scheme authorizing cross court participation also is consistent with this notion. A state referee, although exercising the powers of the Superior Court, does not hold the office of Superior Court judge. *Florida Hill Road Corp.* v. *Commissioner of Agriculture*, 164 Conn. 360, 362, 321 A.2d 856 (1973). Moreover, a Superior Court judge, although authorized to sit on a panel of the Supreme Court or the Appellate Court, does not, by virtue of that assignment, hold the office of Supreme Court justice or Appellate Court judge. See General Statutes §§ 51-197c and 51-198 (specifying fixed numbers of judges and justices that constitute, respectively, Appellate Court and Supreme Court).

[18] An emolument is defined as "that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites [or] [a]ny perquisite, advantage, profit, or gain arising from the possession of an office." Black's Law Dictionary (6th Ed. 1990).

[19] The *Hartwell* formulation has been invoked in myriad contexts. See, e.g., *Kennedy* v. *United States*, 146 F.2d 26, 28 (5th Cir. 1944) (to determine whether case fell within statutory bar to actions brought by officers of United States to recover fees, salary or compensation); *Thompson* v. *Whitefish Bay*, 257 Wis. 151, 159, 42 N.W.2d 462 (1950) (to determine whether municipal ordinance providing for hiring of village attorney conflicted with constitutional provision governing appointment of village officers); see also *In re Advisory Opinion in re Phillips*, 226 N.C. 772, 777, 39 S.E.2d 217 (1946) (to interpret constitutional provision against dual office holding); J. O'Connor, supra, 24 Hofstra L. Rev. 106–109 (discussing use of formula by federal administrations and Congress to determine whether proposed appointments would violate emoluments clause of United States constitution).

[20] Because we conclude herein that temporary performance of the actions contemplated by § 51-198 (c) does not amount to holding the office of Supreme Court justice, we reject the plaintiff's argument that the statute

provides for an unlawful legislative alteration of a constitutionally set term of judicial office. See, e.g., *Adams* v. *Rubinow*, supra, 157 Conn. 164–66 (public act authorizing chief court administrator to suspend probate judges indefinitely conflicted with constitutional provision of four year terms for those judges because it effectively granted power to remove judge prematurely); *State ex rel. Eberle* v. *Clark*, 87 Conn. 537, 539, 541, 89 A. 172 (1913) (appointment of police court judge by General Assembly for two years from certain date "and until his successor is duly appointed and qualified" conflicted with constitutional provision of two year terms for those judges [internal quotation marks omitted]). In short, if a retired justice temporarily exercising the limited powers authorized by § 51-198 (c) is not, by virtue of that exercise, holding office, it follows that there has been no improper extension of that justice's constitutional term of office. The cited cases clearly are distinguishable in that the statutes at issue provided for *indefinite* suspension or extension, respectively, of the *entirety* of a sitting judge's official duties.

[21] The limited role of a retired justice in completing unfinished Supreme Court matters stands in sharp contrast to the broad range of judicial duties that a state referee may perform prospectively under the enabling statutes, particularly, trying new cases on an ongoing basis, rendering judgments in those cases and exercising all of the powers and jurisdiction of the court from which the cases have been referred. See footnote 8 of this opinion. Because the position of state referee unquestionably constitutes an office, which a retired justice may hold indefinitely subject only to periodic reappointment, we agree with Justice Zarella that it was necessary to add an exception to the constitutional prohibition against judges over the age of seventy holding office before the statutes granting such broad powers to referees could be enacted. It is clear, however, that a retired justice completing his remaining work at this court is not serving in his capacity as referee, but rather, simultaneously with holding that new office, is performing the limited remaining duties associated with his former office. See *Lowell* v. *United States*, supra, 158 F. Sup. 707–708 (individual may "hold" one permanent rank while performing temporary duty in another).

Thus, the arguments by Justices Katz and Zarella that the powers of the Superior Court do not include working on Supreme Court cases and, therefore, that the legislature may not, consistent with the authority implicit in article fifth, § 6, of the state constitution, confer to state referees the power to perform such duties, are not persuasive. Article fifth, § 6, of the constitution of Connecticut begins with a general prohibition against a judge "hold[ing] . . . office" beyond age seventy, and then provides an exception to that prohibition, which the legislature may effect through appropriate legislation. Because, as we have determined, a retired justice completing his remaining work at this court is not holding the office of Supreme Court justice, it is not necessary for the statute authorizing that work to fall within the strictures of the exception contained in article fifth, § 6. Indeed, as we state explicitly in footnote 8 of this opinion, "the activities [permitted by § 51-198 (c)] clearly do not fall within the exception contained in article fifth, § 6, of the state constitution that permits state referees to exercise, as prescribed by law, the powers of the Superior Court on matters that have been referred to them as state referees." Notably, article fifth, § 6, of the state constitution contains no prohibition against a judge over age seventy performing limited, temporary judicial duties associated with his former office.

[22] At the 1818 constitutional convention, there was no debate on article fifth, § 3, the predecessor to the current article fifth, § 6, of the state constitution. See W. Horton, The Connecticut State Constitution: A Reference Guide (1993) p. 131.

[23] The current language of article fifth, § 6, of the state constitution "derives from the last sentence of [a]rticle [f]ifth, § 3, of the 1818 [c]onstitution, which stated, 'No judge or justice of the peace shall be capable of holding his office, after he shall arrive at the age of seventy years.' This provision was unchanged until 1965, when the present section [allowing for ongoing employment of retired judges as state referees] was adopted." W. Horton, The Connecticut State Constitution: A Reference Guide (1993) p. 131.

[24] In *Wolfe* v. *Yudichak*, 153 Vt. 235, 571 A.2d 592 (1989), the Vermont Supreme Court addressed an issue similar to that presented by this case, also in the context of a motion for reargument. The question presented was whether an opinion had been validly issued where the panel included a justice who had been appointed on an interim basis and had resigned before being confirmed and before the opinion was issued. Id., 252. The Vermont

Supreme Court stated: "It has long been the practice of this [c]ourt that a justice who resigns or retires from this [c]ourt after hearing a matter may participate fully in consideration of the case thereafter. This practice is grounded in the [c]ourt's inherent judicial and administrative powers as found in the Vermont [c]onstitution, [c]hapter II, § 30. It conflicts neither with the [g]overnor's power to appoint nor with the Senate's power to confirm, and relates strictly and narrowly to the [c]ourt's inherent power to complete in succeeding terms what was begun in earlier ones. . . . *This power is critical to a* [*c*]*ourt with such a high caseload that cases sometimes take a year or more for an opinion to be written. The consequence of* [*the*] *petitioner's argument is that the most difficult cases presented to this* [*c*]*ourt—those on which members of the* [*c*]*ourt have differing views—are always at risk of continuous indecision and reargument. We do not believe that we can function effectively to discharge our constitutional responsibilities under such circumstances.*" (Citation omitted; emphasis added.) Id., 253. Although the Vermont Supreme Court relied on inherent judicial power rather than statutory authorization to determine that the resigned justice's continued participation was lawful, the public policy rationale and considerations underlying the court's decision are equally applicable to Connecticut.

[25] In testifying before the judiciary committee in favor of the bill that would become § 51-198 (c), then Chief Court Administrator Robert C. Leuba explained: "This proposal would allow the Supreme Court justices who have heard cases prior to attaining the age of [seventy] to deliberate and participate in the final disposition of those cases after turning age [seventy].

"As you know, the period of time between argument of a case in the Supreme Court and the final decision on that case can be fairly lengthy. . . .

"Allowing justices who heard a case prior to attaining the age of [seventy] to participate in the decision phase after age [seventy] will allow those justices to work to full capacity as they near the mandatory retirement age." Conn. Joint Standing Committee Hearings, Judiciary, Pt. 1, 2000 Sess., pp. 6–7. In moving for passage of the bill, Representative Paul R. Doyle described it as "an issue of judicial efficiency and judicial branch efficiency"; 43 H.R. Proc., Pt. 15, 2000 Sess., p. 4983; and explained that "[t]he bottom line is here we're dealing with a Justice of the Supreme Court who has cases before him pending prior to his [seventieth] birthday. It's our interpretation to keep it very limited to . . . the cases pending before him before [seventy]. After [seventy], he simply can deal with the few matters that he may have before him and it's really judicial efficiency . . . ." Id., p. 4988.

[26] We note in closing that, even if Justices Katz and Zarella are correct that the legislature is not constitutionally authorized to confer limited judicial power, short of holding office, to recently retired justices, then it necessarily follows that the power to do so remains with the judiciary. Conn. Const., art. V, § 1; see also footnote 19 of Justice Katz' dissenting opinion. In that circumstance, this court, like the Vermont Supreme Court, could effect the same result as the legislature has through § 51-198 (c) by exercising our inherent judicial power, specifically, "to complete in succeeding terms what was begun in early ones." *Wolfe* v. *Yudichak*, 153 Vt. 235, 253, 571 A.2d 592 (1989). Viewed this way, we still would uphold the constitutionality of § 51-198 (c) as a mere legislative recognition of an existing judicial power rather than an illegal encroachment on such. See *State Bar Assn.* v. *Connecticut Bank & Trust Co.*, 145 Conn. 222, 231, 140 A.2d 863 (1958).