

## CHAPTER THREE

### *Connecticut's Constitution as a Safeguard for Liberty*

In the *Harvard Law Review* of January 1977, Associate Justice of the United States Supreme Court William J. Brennan, Jr., published a seminal article that revolutionized the process by which civil rights and civil liberties are protected in the United States. A former trial, appellate, and state supreme court judge in New Jersey, Brennan had been appointed to the Court in 1957 by President Eisenhower. During his distinguished tenure he established himself as a staunch advocate and defender of individual rights and liberties. In his majority or dissenting opinions, Justice Brennan frequently defended the rights of political, religious, and racial minorities. He was also known for firmly defending the constitutional rights of persons accused of a crime. Like Justices William O. Douglas and Hugo Black, Justice Brennan will be remembered as a true civil libertarian.

In the *Harvard Law Review*, Brennan articulated a legal argument that, to a large extent, contributed to the revitalization and reactivation of state constitutions. After serving twenty years on the U.S. Supreme Court, Brennan had arrived at the conclusion that the federal courts were deficient with respect to the preservation of human rights and liberties. The conservative trend in federal judicial rulings, precipitated by the appointment of conservative judges to the federal bench during the six-year Nixon presidency, was a troubling development to Justice Brennan. In his view, the federal judiciary had become far too conservative in its

interpretation of the Bill of Rights and the due process and equal protection provisions of the Fourteenth Amendment. In the interest of preserving the civil rights and civil liberties of the American people, Brennan endorsed what was essentially a new legal strategy.

Rather than challenging state laws perceived to be in violation of the U.S. Constitution in federal court, Brennan urged attorneys involved in cases pertaining to civil liberties and civil rights to argue their cases in state courts and to employ state constitutions as a basis for defense. Justice Brennan noted that state constitutions often contained similar and even identical rights to those articulated in the federal constitution, including freedom of speech, press, and religion, as well as broad protection for the rights of the accused. By utilizing state constitutions, civil liberties cases would necessarily have to be argued in state courts. By law, state supreme court judgments cannot be appealed to the United States Supreme Court for further review. State supreme courts would therefore have the final word as to interpretation of state constitutions.

Justice Brennan had considerable confidence in the ability of state supreme courts to render judgments that would protect civil rights and liberties. Brennan cited a small but promising body of recent casework that indicated a clear libertarian trend emerging from state supreme courts. Political dynamics among the states during this time accounted for the libertarian posture of many state supreme court judges. State governorships and state legislatures had over many years come under the control of the Democratic Party. As a result, many state judicial bodies were staffed with moderate and liberal judicial appointees. There was thus more support for civil rights and liberties in state judicial rulings.

Brennan also argued that state supreme courts in their interpretation of state constitutional provisions (in particular those clauses protecting civil rights and civil liberties) were empowered to expand liberties beyond the standard established by federal courts. As Brennan explained, nothing in law or custom prevented a state supreme court from interpreting a state constitution in a fashion that provided broader protection than that afforded by the federal constitution and federal courts. He argued that the

American system of federalism, with two tiers of government and two levels of constitutional law, allowed for such flexibility. Thus, freedom of speech as protected in state constitutions could be interpreted by state supreme courts in a more liberal and generous fashion compared to the interpretation of free speech established by the U.S. Supreme Court using the federal constitution.

Justice Brennan's call for a new legal strategy seems closely related to the increased utilization of state constitutions in cases involving the preservation of civil rights and liberties. Although this trend was well established prior to the mid-nineteen-seventies, Brennan's *Harvard Law Review* article served to accelerate this bold experiment in constitutional law. How the Connecticut Constitution has been employed in recent years with respect to civil liberties and civil rights cases is discussed in the following body of state judicial rulings.

*Sheff v. O'Neill*, 238 Conn. 1 (1996)

The Connecticut Constitution was recently utilized for the purpose of advancing civil rights in the highly controversial 1996 *Sheff v. O'Neill* decision. The ruling attracted national media coverage and, in the view of some legal experts, had the potential to trigger a national trend. The issue brought before the court in this case involved educational equality.

Milo Sheff, along with seventeen school children, all residents of Hartford and two adjacent towns, brought suit against the state of Connecticut claiming that their rights under the state constitution had been denied. The plaintiffs' legal argument was based on Article I, sections 1 and 20 of the state constitution, which guarantees to residents of Connecticut equality before the law and protection from racial discrimination, and Article VIII, section 1, which guarantees free public education to every child residing in the state. It was argued that such sections, read conjointly, were intended to provide equal educational experiences for all school children, regardless of race and place of residence. It was Sheff's contention, therefore, that such provisions in the state constitution required the state, not the local communities, to assume responsibility for educational conditions in Connecticut. The plaintiffs

contended that being required to attend Hartford public schools severely deficient in resources and educational quality deprived them of their constitutional rights. Lawyers for Sheff pointed to the educational disadvantages experienced by African American and Latino students isolated in urban school districts. The problem of ethnic isolation was compounded by the fact that such students were also from economically deprived backgrounds. The Hartford school system was, therefore, essentially a segregated school system in which poor, minority school children did not receive the same educational benefits as more affluent white students in suburban school districts. Facts presented in the *Sheff* case demonstrated that during the 1991-92 school year, 25.7 percent of the public school population statewide consisted of minority students. However, 92.4 percent of Hartford students were members of minority groups, particularly African American and Latino. Among fourteen of Hartford's twenty-five elementary schools, less than 2 percent of the student population was white.

Evidence was overwhelming that Hartford's school system was severely segregated, and that minority children attending Hartford's public schools were receiving a less than equal education compared to white children in Connecticut's suburban schools. The legal question was whether the state or the city of Hartford was responsible for ensuring an equal educational experience. Did the state of Connecticut have a constitutional obligation to correct a system of unequal local education?

Historically, local public education in Connecticut has been the responsibility of local governments; individual communities and local boards of education have routinely been responsible for the management of public schools. Local property taxes have served as the principal source of revenue for supporting public schools, and local boards of education have considerable (but not total) discretion regarding the structure and content of local school curriculums. Lawyers for Sheff, however, advocated that the time had arrived for the state to assume responsibility for educating children. Some communities, according to Sheff's lawyers, were simply incapable of managing this particular policy area. A shift in policy responsibility was urged and the state constitution, it was argued, provided the legal justification.

Educational disparities documented in the *Sheff* case also raised the issue of whether the state had a responsibility to correct a system of *de facto* segregation (segregation that exists not as a result of state law or policy, but as a result of economic or social conditions). There was no legal precedent requiring a state government to correct a system of *de facto* segregation.

Precedent established in federal judicial rulings clearly required state intervention in instances of *de jure* segregation (segregation resulting from state law), but courts have historically not required state remedies in instances of *de facto* segregation. In the view of the courts, segregation as a result of economics or cultural and social preferences is unavoidable. Hence, the state government does not assume responsibility for eradicating this form of segregation. Conversely, if segregation occurred as a result of state law, the state would be responsible for rectifying the injustice.

The plaintiffs in *Sheff*, however, argued that even though educational segregation was more *de facto* than *de jure*, the state of Connecticut had a constitutional responsibility to desegregate the public school system. Lawyers for Sheff argued that equal public education for all school children was the responsibility of state, not local, government. Therefore state remedies were required despite the root cause of segregated conditions.

*Sheff v. O'Neill* was initially heard in state superior court, with Judge Harry Hammer presiding. Judge Hammer did not support the plaintiffs' contentions and issued a widely publicized ruling in favor of the state. According to Judge Hammer, the state of Connecticut was under no legal obligation to guarantee an equal public school education, since there was no evidence which demonstrated that the state was responsible for poor educational conditions in the Hartford schools. Judge Hammer's ruling essentially followed precedent established by federal law.

The plaintiffs appealed the ruling to the state appellate court, which transferred the case to the Connecticut Supreme Court. The supreme court reversed the superior court ruling and sided with Sheff. The Connecticut Supreme Court's decision was based on a broad and bold interpretation of the state constitution:

For the purposes of the present litigation, we decide that the scope of the constitutional obligation expressly imposed on the state by article eighth, sec 1, is informed by the constitutional prohibition against segregation contained in article first, section 20. Reading these constitutional provisions conjointly, we conclude that the existence of extreme racial and ethnic isolation in the public school system deprives school children of a substantially equal educational opportunity and requires the state to take further remedial measures.<sup>1</sup>

In the view of the state supreme court, it mattered little if the state equalized educational resources between urban and suburban school districts, as financial relief alone could do little to alleviate a racially segregated educational system. Racial segregation compounded by poverty deprived students of an equal education, and the language of the state constitution required the state to intervene. The fact that the state did not intentionally segregate students failed to relieve it of the constitutional obligation to desegregate public school districts. According to the court, "Racial and ethnic segregation has a pervasive and invidious impact on schools, whether the segregation results from intentional or from unorchestrated demographic factors. . . . Our state constitution, as amended in 1965, imposes on the state an affirmative obligation to respond to such segregation."<sup>2</sup>

The supreme court did note, however, that while elements of segregation could be traced to the state legislature's creation of public school districts, there was no intent on the part of the legislature to racially segregate Connecticut's public schools. The ruling in *Sheff* constituted a groundbreaking precedent in two ways. First, a landmark school desegregation case was decided based on the wording of a state constitution; and second, educational segregation defined as *de facto*, rather than *de jure*, required state action and remedies.

*State of Connecticut v. Marsala*, 216 Conn. 150 (1990)

The rights of the accused and the principle of "due process" have also been extended in Connecticut as a result of recent

rulings based on the Connecticut Constitution. This is most evident in the 1990 ruling of *Connecticut v. Marsala*, a case similar to *Sheff* only in that the state constitution was interpreted by the court in a fashion that advanced the scope of a right beyond that provided by the federal constitution and federal courts. In this case, the issue of admissible evidence in a criminal trial was brought before the Connecticut Supreme Court.

Marsala, who had been convicted on narcotics charges, appealed on the grounds that the trial court did not deny the admissibility of damaging evidence that, in his view, was seized by the police in violation of the "exclusionary rule." The exclusionary rule, fashioned by the United States Supreme Court, states that evidence obtained without a valid search warrant is inadmissible in court. In the Marsala case, evidence obtained on the basis of a defective search warrant had in fact been admitted into trial. But rather than suppress the evidence, the trial court concluded that it was legally admissible under the "good faith" exception to the exclusionary rule. This exception was established by the United States Supreme Court in the controversial case of *United States v. Leon*, 468 U.S. 897 (1984). In the Leon case, the Supreme Court ruled that in some instances, evidence obtained during a police search can be admitted into trial even if the search warrant is technically defective. In *Leon*, a search warrant was issued by a federal magistrate in the absence of reliable probable cause. Rather than suppressing the seized evidence, which consisted of narcotics and narcotics-related paraphernalia, the Supreme Court took the position that despite deficiencies in the warrant, the police had nevertheless acted in "good faith" while conducting the search and confiscating the evidence. Thus, if police officers, acting in "good faith," seize incriminating evidence on the basis of a technically deficient warrant, such evidence can be admitted into trial.<sup>3</sup>

Rather than appeal his conviction under the federal constitution, Marsala based his appeal on Article I, section 7 of the Connecticut Constitution: "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause supported by oath or

affirmation.” It was Marsala’s contention that the Connecticut Constitution mandated that evidence obtained illegally was inadmissible in court and that therefore such provisions prohibited the admissibility of evidence seized under a defective search warrant. Lawyers for Marsala contended that the “good faith” exception to the exclusionary rule was not embraced by the Connecticut Constitution, even though the federal constitution allowed such an exception.

The Connecticut high court agreed with Marsala’s argument, and reversed the trial court’s verdict. The Connecticut Constitution, it was concluded, unlike the federal constitution, did not allow for a “good faith” exception. In the view of the Connecticut Supreme Court, search warrants cannot be technically deficient and probable cause must be present for a judge or magistrate to issue the warrant. Clearly, the state supreme court interpreted the state constitution more liberally than federal courts had interpreted the federal constitution, and subsequently afforded more rights to persons accused of a crime:

We have frequently relied upon decisions of the United States Supreme Court interpreting the fourth amendment, as well as other amendments to the United States constitution, to define the contours of the protections provided in the various sections of the declaration of rights contained in our state constitution. We have also, however, determined in some instances that the protections afforded to the citizens of this state by our own constitution go beyond those provided by the federal constitution, as that document has been interpreted by the United States Supreme Court.<sup>4</sup>

The state supreme court also cited the landmark Connecticut ruling of *Horton v. Meskill*, 172 Conn. 615 (1977): “Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law.”<sup>5</sup> After extensive analysis, the

court concluded: "We hold that the good faith exception to the exclusionary rule does not exist under Connecticut law."<sup>6</sup>

The rulings in *Marsala* and *Sheff* suggest that the Connecticut Constitution affords more rights and liberties to the residents of Connecticut, compared to the federal constitution. In *Marsala*, the state supreme court ruled that the Connecticut Constitution maintained higher standards than the federal constitution with respect to the admissibility of incriminating evidence in a criminal trial, thereby affording more rights to persons accused of a crime. In *Sheff*, the state supreme court concluded that the state constitution contained a right to an equal education and that the state had a legal obligation to desegregate school districts, regardless of the nature of the segregation. Both rulings represent radical departures from rulings based on the federal constitution and underscore how important the state constitution has become with regard to preserving and advancing the rights and liberties of Connecticut residents.

*State of Connecticut v. Stoddard*, 206 Conn. 157 (1988)

With the Connecticut Supreme Court's rejection of the "good faith" doctrine as part of Connecticut's legal code in 1990, it should come as no surprise that two years prior to *Marsala* the high court had also taken exception to the United States Supreme Court's position that police had no formal obligation to inform a suspect in custody of attempts by his or her lawyer to establish contact for the purpose of offering legal counsel. Once again, the state supreme court articulated the position that the state constitution affords more protection than the federal constitution for persons accused of a crime.

Robert Stoddard appealed his felony conviction on the grounds that his rights to legal counsel and protection from self-incrimination under the state constitution had been violated while under interrogation as a murder suspect. While in custody, Stoddard made incriminating statements that directly contributed to his conviction. Stoddard's attorney had repeatedly attempted to establish phone contact with his client during the police interrogation, but to no avail. On four separate occasions, Stoddard's lawyer was

informed by police that his client was not even in custody: "We have no record of him being here." Stoddard eventually waived his rights to a lawyer and confessed to the murder. His confession was obtained in the absence of legal counsel, without Stoddard having been made aware of his lawyer's repeated attempts to establish contact.

Federal constitutional law offered little protection for Stoddard, as the United States Supreme Court had previously ruled in *Moran v. Burbine*, 475 U.S. 412 (1986) that the due process requirements of the federal constitution did not obligate police to notify a suspect of his lawyer's efforts to establish contact for counseling purposes. Stoddard's conviction, therefore, could not be appealed on the basis of federal constitutional law.

In the absence of adequate federal constitutional protection, Stoddard pursued a state constitutional strategy and waged an appeal based on the due process clause of Article I, section 8 of the Connecticut Constitution:

No person shall be compelled to give evidence against himself, nor be deprived of life, liberty, or property without due process of law, nor shall excessive bail be required nor shall excessive fines be imposed.

The challenge facing the Connecticut Supreme Court in the Stoddard case was whether or not the due process clause of the state constitution required police to notify a suspect in custody and under interrogation of his lawyer's attempts to establish communication, although the United States Supreme Court examining similar provisions in the federal constitution had not reached this conclusion.

The state supreme court in *Stoddard* ruled that the state constitution did in fact provide broader protection than the federal constitution. Article I, section 8 of the Connecticut Constitution received a broad interpretation by the state supreme court:

In light of both the historical record and our due process tradition, we conclude that a suspect must be informed promptly of timely efforts by counsel to render pertinent

legal assistance. Armed with that information, the suspect must be permitted to choose whether he wishes to speak with counsel, in which event interrogation must cease, or whether he will forego assistance of counsel, in which event counsel need not be afforded access to the suspect. The police may not preclude the suspect from exercising the choice to which he is constitutionally entitled by responding in less than forthright fashion to the efforts by counsel to contact the suspect.<sup>7</sup>

The Connecticut Constitution, as demonstrated in *Stoddard*, provides substantially broader protection than the federal constitution with respect to due process guarantees. Of note is the emphasis placed by the state supreme court on Connecticut's long tradition of and commitment to protecting the rights of the accused. The court in *Stoddard* referenced the fact that Connecticut was the first state in the nation to establish the office of public defender, well before the landmark federal ruling of *Gideon v. Wainwright*, 372 U.S. 335 (1963). The *Stoddard* case further underscores the vitality of the Connecticut state constitution as we enter the twenty-first century, as well as the state's impressive commitment to the civil rights and liberties of Connecticut residents. This commitment was apparent in a controversial 1986 decision regarding the rights of indigent women to secure an abortion.

*Doe v. Maher*, 515 A2d. 134 Conn. Super. (1986)

Does the state of Connecticut have a constitutional obligation to fund abortions for women who could not be able to afford them otherwise, and whose health is at risk? Does the state constitution protect the right to an abortion above and beyond the protection afforded by the federal constitution? The United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) ruled that state laws prohibiting abortion violated a woman's constitutional right to privacy and liberty. Despite legal challenges by moral conservatives, this ruling has remained the law of the land for close to thirty years. At the same time, however, the United States

Supreme Court has never ruled that federal funds must be made available to indigent women unable to pay for abortion services. In light of the federal ruling, a Connecticut superior court in *Doe v. Maber* (1986) was faced with the difficult task of deciding whether the Connecticut Constitution provided greater opportunities for indigent women to secure an abortion beyond what had thus far been decided in federal court. Did the state constitution, in addition to protecting the basic abortion right, guarantee the use of Medicaid funds to pay for the abortion procedure?

At issue was a state regulation regarding the use of public funds for abortion procedures. State-funded abortions for indigent women were permissible under Connecticut statute, but only when considered "necessary because the life of the mother would be endangered if the fetus were carried to term." The issue became more complex, however, when a woman with a range of medical problems, albeit not life threatening, sought state support for an abortion.<sup>8</sup> Thus, the question that emerged was whether the state constitution protected the rights of an indigent woman with medical problems to have an abortion. At what point should Medicaid funds become available for indigent women with health problems who seek an abortion?

Adhering to the argument of Justice William Brennan that state constitutional rights may potentially be interpreted in a broader fashion compared to the federal constitution, the state superior court ruled that the state of Connecticut did have an obligation to provide Medicaid funding for indigent women with extreme and complicated medical problems who were in need of abortion services.

The superior court in its ruling discussed at some length the long history in Connecticut of government support for the poor. The court noted 350 years of public support for those unable to afford medical services: "From 1650, the year of the earliest recorded code of our state, to the present, the state's legislative bodies have directed that the colony, the state and/or their political subdivisions pay for the medical care of the indigent."<sup>9</sup> The ruling also cited the expert testimony of the state's official historian, Christopher Collier: "We have a continuous unbroken tradition in Connecticut from the middle of the seventeenth

century right down to the present that the public will be responsible for all medical care and other needs of the poor in the state of Connecticut. . . . Right from the start the care was to be fully supported by the public.”<sup>10</sup>

The superior court then discussed the constitutional foundation of the case, with a focus on the constitutional rights to privacy that are contained within the Connecticut Constitution. The Constitution, in the view of the court, offered very broad protection for privacy and the abortion right. In the court’s view, the right to privacy, which includes the right to procure an abortion, is an implied yet very important right: “It is absolutely clear that the right of privacy is implicit in Connecticut’s ordered liberty. . . . Surely the state constitutional right to privacy includes a woman’s guaranty of freedom of procreative choice.” The state superior court identified key components of the Connecticut Constitution in which the privacy right is located, including the constitution’s preamble, the preface to Article I, the “Declaration of Rights,” and the due process clause found in Article I, section 10.

According to the court, in view of the state’s long commitment to meeting the needs of the poor and state constitutional protections for privacy and abortion, the state of Connecticut could not reasonably deny an indigent woman with medical problems the necessary funding to secure an abortion. State obligation to care for the medical needs of the poor, combined with a constitutional right to privacy, required the state to pay for the abortions of poor women whose health was at risk:

Whatever the analysis and no matter how tight and opaque the state’s blindfold become, the excepting from the medicaid program of one single medical procedure which is absolutely necessary to preserve the health of the woman (the medically necessary abortion) constitutes an infringement of the right of privacy at least under the constitution of the state of Connecticut.<sup>11</sup>

The superior court did not, however, limit its ruling to the privacy provisions of the state constitution. In the court’s view, the equal protection provisions also supported abortion rights for

Medicaid recipients. In drawing its conclusions, the court relied upon a broad interpretation of the equal protection provisions found in Article I, sections 1 and 20, as well as the equal rights amendment passed in 1974, which is located in the fifth amendment. Thus, it was the confluence of a long history of public support for indigents, a broadly interpreted right to privacy, and the constitutional right to equal protection under the law that led the court to support Medicaid funding for medically necessary abortions. *Doe v. Maher* (1986) was a broad ruling indeed, and it is apparent that the right to abortion as contained within the Connecticut constitution is substantially broader and more extensive compared to the right to abortion under the federal constitution.

*Horton v. Meskill*, 172 Conn. 615 (1977)

*Grace v. Meskill*, 172 Conn. 615 (1977)

Two companion cases, *Horton v. Meskill* and *Grace v. Meskill*, both decided in 1977, were to a large extent foundation cases for the revolution in state constitutional law that followed. In both cases the state supreme court issued rulings based on the Connecticut Constitution that significantly broadened rights beyond those guaranteed under the federal constitution. Generally speaking, the Connecticut Supreme Court ruled that the state constitution guarantees all children a basic and fundamental right to equal education.

Serious disparity in educational spending at the local level was the core issue in *Horton* and *Grace*. With property tax as the primary source of revenue for local public education in Connecticut, wealthier communities with higher property values were contributing more money to their children's education than were less wealthy towns. The state supreme court noted how such a system for financing public school education resulted in vast differences in available funding:

The wide disparities that exist in the amount spent on education by the various towns result primarily from the wide disparities that exist in the taxable wealth of the

various towns; the present system of financing education in Connecticut ensures that, regardless of the educational needs or wants of children, more educational dollars will be allotted to children who live in property-rich towns than to children who live in property-poor towns.<sup>12</sup>

The court buttressed its observation with hard data and examples based on the 1972-73 school year. Per-pupil operating expenses in Darien, West Hartford, Greenwich, and Weston were recorded at \$1570.47, \$1443.10, \$1428.99, and \$1332.79 respectively, while in the less wealthy communities of Canton and Lisbon, per-pupil expenditures were \$945.15 and \$669.94, a marked contrast indeed. The state average in 1972-73, as noted by the court was \$1054.70. In the view of the court, property wealth directly affects the depth and breadth of educational services offered by a local community. Curriculum diversity, resources for the learning disabled, school facilities, teacher salaries, library holdings, and instructional technology are all, according to the court, directly affected by the amount of dollars a local community is able to contribute to the educational process.

Supported with an array of facts regarding the severe disparity in per-pupil expenditures, the court then turned to the more difficult question of whether the Connecticut Constitution required the state to take steps designed to equalize educational expenditures. Was the current system of funding public elementary and secondary education in violation of the state constitution? Were the constitutional rights of those children living in less wealthy communities infringed by the current system for financing local education?

The state supreme court concluded that Connecticut's funding system did conflict with key provisions of the state constitution. A financing policy based almost exclusively on local property values adversely affected the constitutional rights of school children in less wealthy communities across Connecticut. In the court's words:

It suffices to note that the exhaustive finding of facts amply supports the conclusions of the court that the

present legislation enacted by the General Assembly to discharge the state's constitutional duty to educate its children, depending, as it does, primarily on a local property tax base without regard to the disparity in the financial ability of the towns to finance an educational program and with no significant equalizing state support, is not "appropriate legislation" (article eighth, sec 1) to implement the requirement that the state provide a substantially equal educational opportunity to its youth in its free public elementary and secondary schools.<sup>13</sup>

In several sections of the state constitution, the court found firm justification for its ruling. Article I, sections 1 and 20, guarantees equal rights to the citizens of Connecticut, as well as equal protection under the law. Moreover, the court cited Article VIII, section 1, which guarantees a system of "free public elementary and secondary education" to all residents of the state, which implies equality in education, as well as section 4 of Article VIII, which requires equal treatment in the operation of the state's public school fund. According to this section of the state constitution, the fund "shall remain a perpetual fund, the interest of which shall be inviolably appropriated to the support and encouragement of the public schools throughout the state, and for the equal benefit of all the people thereof."

Thus, the state supreme court ruled that Connecticut's system of financing elementary and secondary education was in direct violation of various equality provisions of the state constitution. The *Horton* and *Grace* decisions proved to be instrumental in guiding the court in the controversial *Sheff v. O'Neill* ruling approximately twenty years later.

The *Horton* and *Grace* rulings demonstrate that state constitutions within the framework of our federal system offer considerable promise for civil libertarians and civil rights activists. Indeed, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), a case similar in facts but based on the federal constitution and argued before the United States Supreme Court, the court concluded that a state was not under a federal constitutional requirement to equalize educational expenditures among communities.

Clearly, the *Horton* and *Grace* rulings represent a notable departure from the federal court's position on this issue.

The five cases described above are examples of recent state constitutional developments in Connecticut. Of course, the Connecticut Supreme Court does not automatically expand civil liberties and civil rights above the level afforded under federal law. But more often than not, especially in matters pertaining to the civil liberties and civil rights of Connecticut citizens, the high court in recent years has been very protective of and sensitive to matters of individual freedom and social justice.

One of the beauties of American federalism is that the states, in some cases, can thwart the centralizing tendencies of national power. This was one of the express intentions of our country's founding fathers. State sovereignty, in the view of James Madison and others, would potentially limit and constrain the authoritarian and anti-libertarian tendencies of the national government. Given the rulings reviewed here, it is difficult to deny that this has indeed been a large part of the function of Connecticut state courts. State supreme courts, along with state superior courts, are currently exerting more influence than perhaps any other organ of American government in the interest of advancing, preserving, and defending those principles so eloquently articulated by Thomas Jefferson in the Declaration of Independence: equality, life, liberty, and the pursuit of happiness. These are the central and fundamental ideals of the American republic, and the Connecticut Supreme Court appears committed to maintaining these principles for future generations.

As our nation enters the new millennium, it is apparent that state courts have become instruments for the preservation of civil liberties and civil rights. There is a touch of irony in this development, for a mere thirty years ago, the term "states' rights" was practically synonymous with racial discrimination and oppression of human rights. Not long ago, the American people looked to the federal courts and the federal constitution, not state courts or state constitutions, for protection of civil liberties and civil rights. *Brown v. Board of Education*, 347 U.S. 483 (1954), which ended public school segregation, *Mapp v. Ohio*, 367 U.S. 643 (1961),

which extended the exclusionary rule to the states, thus protecting citizens from arbitrary and illegal police searches, *Baker v. Carr*, 369 U.S. 186 (1962), which ruled that malapportioned legislative districts constituted a justiciable issue, *Gideon v. Wainwright*, 372 U.S. 335 (1963), which extended the right to legal counsel to indigents, and *Miranda v. Arizona*, 384 U.S. 436 (1966), which protected persons from self-incrimination have all been decisions issued by the United States Supreme Court based on provisions in the federal constitution. The names of United States Supreme Court Justices during this period were as recognizable as the cases themselves. Earl Warren, Hugo Black, William Douglas, William Brennan, and Thurgood Marshall symbolized the nation's desire for social justice, political equality, human dignity, and personal freedom.

Under today's federal system, however, the rights of Americans continue to be protected under relatively obscure state constitutions, in rulings issued by equally obscure and low profile state supreme court judges. The Connecticut Constitution of 1965 and the names of those who sit on the high court in the state capital mean little to the average Connecticut taxpayer. Yet this is the document, and these are the judges, that keep alive the ideals and spirit of the Declaration of Independence. The perspective of the chief justice of the Connecticut Supreme Court, Robert J. Callahan, regarding the current vitality of the Connecticut Constitution is presented in the following Profile and Perspective interview.

## *Profile and Perspective*

Robert J. Callahan  
Chief Justice, Connecticut Supreme Court  
Chamber of Chief Justice, March 11, 1999

*What is your legal background, and when were you appointed to the Connecticut Supreme Court?*

I received my undergraduate degree from Boston College and my law degree from Fordham University. I was appointed to the circuit court in 1970, the court of common pleas in 1974, the superior court in 1976, and the Connecticut Supreme Court in 1985. I was appointed chief justice in 1996.

*How long is your term on the Supreme Court?*

Eight years.

*How do you define your role as chief justice of the Connecticut Supreme Court and what are your major priorities?*

My role is part administrator, part writer of judicial opinions and maker of decisions. I am not really required to be a consensus builder, as judges have their own opinions, write their own decisions, and tend to go their own way. Forming a consensus on judicial issues is not part of my job. Essentially, my main job is to make sure that the court is administered properly, to make sure that opinions are issued on time, and to do my own decision making and opinion writing.

*How do you feel about the fairly recent strategy of using state constitutions for the purpose of protecting equal rights and liberties?*

I think state constitutions do have a place. The federal constitution of course is only a minimum and states should be allowed to interpret their state constitutions in ways that they were intended for. State constitutions can have special meaning to states and courts need to recognize this. State courts can interpret state constitutions

in ways that are different from the federal constitution. But frankly, I don't think that the recent interpretations that differ from the federal constitution are really all that world shaking as to create a serious lack of uniformity throughout the country. Yes, there are certain nuances in state constitutions that offer more protection to people compared to the federal constitution. Sometimes, however, components of state constitutions are stretched for the purpose of achieving an ideological predetermined result that is not necessarily justified. We have a case that sets up various tests to determine whether the state constitution differs from the federal constitution, and many times I think those tests are stretched to arrive at a predetermined conclusion by the writer of the opinion—at times by the writer of the majority opinion and at times by the writer of the minority opinion.

*Generally speaking, though, you do think that using state constitutions to protect rights is a positive development?*

Yes, I do think it is a positive development, but at times I'm a little ambivalent about it, particularly when I see what I think is a misuse of the state constitution. But generally yes, it is a positive development. If state constitutions didn't have any different or special meaning compared to the federal constitution, they would basically be useless pieces of paper.

*So you don't have any real problems with a non-uniform system of civil liberties?*

No, I don't, and as I said, the differences between federal and state constitutional law are not all that world shaking. Where this does show up is mainly in nuances regarding criminal law, but even then there is not such a great departure from federal law. But some states do have different and unique histories and they should be allowed to arrive at their own conclusions concerning the meaning of their state constitutions.

*A while ago, the Hartford Courant featured a special section on state constitutional law, including some discussion of emerging "pockets of liberty" across the land.<sup>14</sup> Do you think this is a positive development?*

Yes, I think this is positive.

*A number of textbooks now identify state supreme courts as opposed to the federal courts as being in the forefront of advancing rights and liberties in America. Does it trouble you that the state courts have jumped out ahead of the federal courts in this area of law?*

No, this is not troubling at all. The fact that the state courts are doing this under their state constitutions goes back to my previous statement that this is a positive development. State courts are certainly as capable as the federal courts in defining rights and liberties.

*Justice William Brennan's article in the Harvard Law Review, Volume 30, January 1977, is really what started and contributed to this new trend.*

Yes, and when I went to appellate judges school, when I first sat on the state supreme court fourteen years ago, there was a lot of talk at the various seminars that state courts should step into the breach where the federal courts seemed to be backing off on some rights and liberties.

*The Connecticut Supreme Court has seven judges, and five normally sit on a case. Would you say that there are discernible and predictable voting blocs on the Connecticut Supreme Court, like those that have been noted on the United States Supreme Court?*

There are not discernible and distinct voting blocs, although I can predict how certain judges will vote on certain issues. But generally, I couldn't predict how a majority vote is going to turn out from one case to the next. I don't really discern clear voting blocs on this court.

*You don't see ideology as driving the orientation of judges?*

Well, I'm not willing to go so far as to say that. Ideology does not "drive" voting behavior, but I do think that ideology can affect viewpoints and how judges look at certain things. This comes from one's background I suppose.

*Studies of the United States Supreme Court have discovered very clear voting blocs. Justices Brennan and Marshall, for example, voted together ninety percent of the time, while Justices Burger and Rehnquist often seemed to form a conservative bloc.*

Yes, we too have certain judges who can be predicted to vote a certain way. Justice Berdon, for instance, is very liberal and I can normally predict where he is going on certain issues. He is quite liberal in the area of criminal law. I, however, have a different background. I was once a prosecutor and I tend to be conservative. But we really don't have a solid and predictable bloc of votes on this court.

*Do you feel court reform is needed in Connecticut, and if so, in what respect?*

There has been a lot of court reform over the course of the past eight to twelve years. We have been given more resources, and we have done some very innovative things. Overall, the court is in much better shape now compared to fifteen years ago. There is, however, one thing that I would still like to see reformed in Connecticut, and that is the individual *voir dire*. The *voir dire* is the process by which jurors are selected for criminal and civil cases.

In my opinion, this process takes far too long. In some instances the *voir dire* actually takes longer than the trial itself. In any typical murder case in Connecticut it normally takes two to three weeks to select a jury. Sometimes it takes as long as two to three months to select a jury, with twelve to fifteen hundred jurors interviewed at great length. I recall sitting for days and days during the *voir dire* listening to the same questions over and over.

*Generally the court has enough resources to operate effectively?*

Yes, the legislature has recently authorized more judges, which will allow us to cut down on the civil jury docket. The last time I looked, the docket had about 25,000 cases. But we can now assign judges to handle the very complicated civil cases, which in turn will help move the civil cases along and help reduce the docket. This has helped a great deal.

*Has the creation of the state appellate court in the mid-nineteen eighties helped?*

Yes. We really couldn't run the judiciary without the intermediate appellate court. This has helped tremendously.

*What do you see as the emerging controversial issues within the context of the Connecticut legal system as we enter the twenty-first century?*

One of the things that will be a big issue, certainly within the next twenty-years, is the question, "What is a family?" What will be the definition of a nuclear family? Family issues involving homosexuals will certainly involve complicated legal issues in the years ahead. Also, there will be legal complications involving new methods of conception. There are now surrogate mothers. This can contribute to legal complications. We had a case of a couple who employed a surrogate mother. After fourteen years of marriage the couple decided to divorce. The father claimed it was his child, and not his wife's because a surrogate mother gave birth to the child. What do you do in an instance like this? Nobody ever thought of these issues and their legal aspects, but there will be more of them in the future. Another complex legal issue emerging involves DNA testing. I listened to a geneticist explain how accurate DNA testing really is and how DNA testing can be used to predict diseases even when the baby is unborn. This raises questions. What happens if tests reveal that the unborn child will eventually have muscular dystrophy? 1) Do you have to tell the parents? 2) If you don't tell the parents, is it medical malpractice? 3) Can insurance companies require an abortion if the pregnancy is within the legal abortion stage, especially if the company is going to have to pay for the care of the child after birth? These are the types of complex legal issues that are going to have to be resolved by the courts in the next century.

*And you think it will fall within the province of the court to define these issues?*

Yes. I don't know who else can really deal with such complex issues. The legislature would be more than willing to let the courts initially deal with these issues.

*Finally, what will be your legacy as the chief justice of the Connecticut Supreme Court? What will the "Callahan Era" be remembered for?* Common sense, I hope, particularly in the area of criminal law. In the past, the court had really stretched the meaning of the consti-

tution to the point where decisions did not make much common sense. There would be overwhelming evidence of guilt, but due to relatively minor violations of the constitution that did not in any way affect the verdict, the court would overturn the case. In recent years, we have gotten somewhat away from that trend, and we are once again restoring some common sense to our rulings while still keeping within the proper constitutional parameters.

*That suggests a somewhat more conservative approach to legal issues?*  
Probably so.

*Is there anything else that you think students should know about our state constitution or the state supreme court?*

Yes. It is very important for students to know about our state courts. The federal courts only handle about two percent of all the cases in this country, while state courts handle approximately ninety-eight percent of the cases. Students need to know and understand their state courts, and one would hope that it would be a subject taught in school. We figured out once that our state courts in Connecticut touch the lives of 2.1 million people. As plaintiffs, defendants, jurors, witnesses, and in many other ways, over two million people have some sort of contact with the state courts over the course of a given year.