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Common Law Antecendents of Constitutional Law in Connecticut

Ellen Ash Peters
University of Connecticut School of Law

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*Ellen A. Peters**

There has been renewed interest in the last decade in the role properly to be assigned to the intent of the framers of the constitution when courts are confronted with new constitutional issues or with old issues arising in arguable new circumstances. This debate has focused on contemporaneous secondary materials, principally the Federalist Papers, that illuminate the jurisprudential scene at the time of the enactment of the Constitution of the United States. When attention is turned to state constitutions, however, such detailed jurisprudential exegeses are virtually nonexistent. Assuming that the intent of the framers, while not dispositive, is at least worthy of examination in conjunction with textual analysis of constitutional provisions, where does that leave us with regard to the interpretation of state constitutions?

Those justices sitting on state courts who are committed to assigning independent constitutional weight to our state constitutions, particularly with regard to the protection of civil rights and liberties, have urged counsel, and the academy, to search for historical data to illuminate state constitutional texts.[1] In response to these requests, two fruitful avenues of exploration have developed: an inquiry into comparative analytic techniques in the nineteenth and twentieth centuries by such outstanding jurists as Chancellor Kent and Judge Benjamin Cardozo,[2] and an inquiry into the early nineteenth century persistence of natural law despite the emergence of written constitutions.[3] This Article suggests a third inquiry which would serve as a basis for state constitutional interpretation: common law antecedents to the state constitutions. First, however, some historical background is required.

Connecticut is called the Constitution State, not because of its

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* Ellen A. Peters is the Chief Justice of the Supreme Court of Connecticut. She was formerly a member of the faculty of the Yale Law School.

[1] *See* State v. Jewett, 146 Vt. 221, 500 A.2d 233 (1985); Peters, *State Constitutional Law: Federalism in the Common Law Tradition* (Book Review), 84 MICH. L. REV. 583, 583-86 (1986).

[2] Speech delivered by Professor Donald M. Roper, during a conference entitled "In Search of a Usable Past," at Albany Law School (Oct. 15, 1988) (the speech, "New York Constitutional Jurisprudence in the Eras of Kent and Cardozo," was based on a paper written and presented during the conference).

[3] *See* Sherry, *The Early Virginia Tradition of Extra-Textual Interpretation*, 53 ALB. L. REV. 297 (1989).

contribution to the crafting of the federal constitution, but because, as early as 1638, Connecticut had promulgated an organic document of constitutional principles called the Fundamental Orders.[4] Its first functionally operative constitution, however, was the Constitution of 1818,[5] which has continued to furnish the framework for Connecticut's subsequent state constitutions. The principal purpose and achievement of the Constitution of 1818 was to establish the division of the powers of government into three distinct departments: legislative, executive, and judicial.[6] Until that time, Connecticut had operated on what is presently called a parliamentary model. Undoubtedly, the 1818 constitutional adoption of a system of government incorporating the doctrine of separation of powers had implications for the protection of individual constitutional rights. Furthermore, the Constitution of 1818 contained a bill of rights that has survived until the present time.[7] My limited knowledge of the relevant Connecticut history suggests, however, that the safeguarding of individual rights was probably not a central part of the constitutional agenda in 1818.[8]

The question posed by this history is what should be concluded from the absence of any authoritative exegesis of early Connecticut constitutional principles relating to human rights. On the one hand, it may be that constitutional issues did not engage sustained judicial interest during a period of economic growth and consolidation in a community that was relatively homogeneous in its composition and outlook. As Professor Donald Lutz has stated: "Bills of rights [in eighteenth-century America] were viewed as providing the statement of broad principles rather than a set of legally enforceable rights."[9] On the other hand, it may be that issues now labeled as constitutional were formerly subsumed under different, common law rubrics. Professor Lutz reports, in accordance with what I take to be the generally accepted wisdom, that, as a corollary to a less rights-oriented view of constitutional provisions, eighteenth-century state courts "did not worry . . . much about protecting [constitutional] rights in any substantive sense."[10] Professor Sherry suggests, however, that constitu-

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[4] Fundamental Orders of Connecticut (1638), *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES 249-52 (B. Poore ed. 1878).

[5] CONN. CONST. OF 1818, *reprinted in* 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS AND OTHER ORGANIC LAWS OF THE UNITED STATES 258-66 (B. Poore ed. 1878).

[6] *Id.* art. II, at 259.

[7] *Id.* art. I, at 258-59.

[8] Although Connecticut ratified the United States Constitution on January 9, 1788, the fifth state to do so, ratification of the federal bill of rights did not occur until 1939.

[9] Lutz, *Political Participation in Eighteenth-Century America*, 53 ALB. L. REV. 327, 331 (1989).

[10] *Id.*

tional principles were indeed being protected by invocation of natural law principles.[11] In Connecticut, at least, the latter view seems closer to the mark, particularly if one includes common law developments as an aspect of the eighteenth century's reliance on natural law. If the Connecticut experience is any guide, we should cast a wider net to discover the variety of ways in which substantive rights were protected in state courts in the early years.

In Connecticut constitutional law, it is well established that several rights now denominated as constitutional had well-recognized common law antecedents. For example, Connecticut has had a common law right to protection against double jeopardy at least since 1807. In the case of *State v. Woodruff*,[12] the court assumed that no criminal defendant could be twice put into jeopardy, but held that the right to be tried by a single jury did not, despite the defendant's objection, preclude a retrial after a hung jury. It is only in the latter half of the twentieth century that this concept has been called a right of due process.[13] Similarly, by the late eighteenth century, Connecticut had established a criminal defendant's right to legal counsel[14]—a century and a half before *Gideon v. Wainwright*.[15]

This multi-faceted constitutional heritage implies that there may be other areas in which common law cases might presage the protection of individual rights that we now associate with constitutional law. In Connecticut, the opinions of the Connecticut Supreme Court were reported as early as 1785. Even a cursory examination of the state reports for the years 1785 and 1818 lends considerable support to the proposition that constitutional principles were indeed being vindicated regularly, in a substantive sense, in Connecticut's early years.

The court considered many issues during this period. On free speech, in *Beers v. Strong*,[16] the court held, in an action on the case for libel, that a verdict for the plaintiff should be sustained: the accusation of having suborned perjury being actionable because the verdict had ascertained that the words "were spoken maliciously, and with intent

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[11] *See* Sherry, *supra* note 3, at 298.

[12] 2 Day 504, 506-07 (Conn. 1807).

[13] Kohlfuss v. Warden, 149 Conn. 692, 695, 696, 183 A.2d 626, 628 (1962), *cert. denied*, 371 U.S. 928 (1962).

[14] State v. Stoddard, 206 Conn. 157, 164-66, 537 A.2d 446, 451-52 (1988) ("By the end of the eighteenth century, the Connecticut legislature had . . . assured that any person charged with a crime was 'entitled to every possible privilege in making his defence, and manifesting his innocence, by the instrumentality of counsel.'" (quoting 2 Z. SWIFT, A SYSTEM OF LAWS OF THE STATE OF CONNECTICUT 399 (1796)).

[15] 372 U.S. 335 (1963).

[16] 1 Kirby 12 (Conn. 1786).

to defame."[17] To avoid censorship, the court, in *Knowles v. State*,[18] construed a sign statute narrowly so as to avoid criminal sanctions for "the mere exhibition of a work of art."[19] On freedom of religion, in *Ecclesiastical Society of South-Farms v. Beckwith*,[20] the court declared insufficient an action on covenant seeking to resolve a dispute between a church and its duly designated minister. Counsel for the defendant minister premised a demurrer in part on the proposition that "the whole matter is merely spiritual. It is only whether the defendant has taught the best scripture doctrine; which is a matter the court can never take cognizance of."[21] The court agreed, construing the defendant's undertaking as overall performance of his pastoral obligations, the particular content of which the court declared to be "too general" to be "traversable."[22] Perhaps because of the dominance of the common law forms of pleading, these cases reached "constitutional" results by reference to ordinary common law explication.

Another "constitutional" issue with which the common law courts dealt repeatedly was the legality of searches and seizures. In *Frisbie v. Butler*,[23] a justice of the peace had issued a warrant

> to search all suspected places and persons that the complainant thinks proper, to find his lost pork, and to cause the same, and the person with whom it shall be found, or suspected to have taken the same, and have him to appear before some proper authority, to be examined according to law.[24]

By virtue of this warrant, the defendant Frisbie was arrested and eventually ordered to pay eighteen shillings "as treble damages, to the complainant, and a fine of [six shillings] to the town-treasurer."[25] The court overturned this judgment, both because of defective averments in the complaint and because of the terms of the warrant: "[T]he warrant in the present case, being general, to search all places, and arrest all persons, the complainant should suspect, is clearly illegal . . . ."[26] Because of the defects in the complaint, the court found error in the judgment, while reserving, for another day, the question of how far the illegality of the warrant "vitiates the pro-

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[17] *Id.* at 13.
[18] 3 Day 103 (Conn. 1808).
[19] *Id.* at 107.
[20] 1 Kirby 91 (Conn. 1786).
[21] *Id.* at 95.
[22] *Id.* at 98.
[23] 1 Kirby 213 (Conn. 1787).
[24] *Id.* at 214.
[25] *Id.*
[26] *Id.* at 215.

ceedings upon the arraignment."[27] A few years later, in *Grumon v. Raymond*,[28] a similarly overbroad warrant was held to sustain a damages action in trespass, for unlawful arrest and imprisonment, both against the issuing magistrate and the officer who had executed the illegal warrant.

Many cases explored aspects of what we now encompass within due process: the limits of personal jurisdiction;[29] the division of responsibility between judge and jury;[30] and the right to unbiased jurors.[31] The court limited the classes of those who could legally make arrests without written warrants[32] and defined the process required for criminal arraignments.[33] In *Palmer v. Allen*,[34] the court held that even body attachment in an action of debt did not allow a defendant to be arrested and committed without a mittimus:[35] "[I]n *Connecticut*, such is her constitution, and such her laws, and system of jurisprudence, from her infancy, that no man's person shall be imprisoned, unless by judgment of court, or the direction and order of a magistrate."[36] *Mumford v. Wright*[37] expressed doubt about "[h]ow far an *ex post facto* law can operate, to impair contracts."[38]

The court's concern with protection from self-incrimination led it repeatedly to enforce the right of a criminal prisoner to exclude from evidence a confidential statement given to the state's attorney.[39] In the case of witnesses, while the court recognized a similar right against

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[27] *Id.*

[28] 1 Conn. 39 (1814).

[29] *See, e.g.*, Stoyel v. Westcott, 3 Day 349 (Conn. 1809); Bulkley v. Starr, 2 Day 552 (Conn. 1807); Brinley v. Avery, 1 Kirby 25 (Conn. 1786); Whiting v. Jewel, 1 Kirby 1 (Conn. 1786).

[30] State v. Green, 1 Kirby 87 (Conn. 1786).

[31] Smith v. Ward, 2 Root 302 (Conn. 1795); Tweedy v. Brush, 1 Kirby 13 (Conn. 1786).

[32] Wrexford v. Smith, 2 Root 171 (Conn. 1795); Knot v. Gay, 1 Root 66 (Conn. 1774).

[33] Meacham v. Austin, 5 Day 233 (Conn. 1811).

[34] 5 Day 193 (Conn. 1811), *rev'd*, 11 U.S. (7 Cranch) 550 (1813).

[35] Mittimus is defined as

> [t]he name of a precept in writing, issuing from a court or magistrate, directed to the sheriff or other officer, commanding him to convey to the prison the person named therein, and to the jailer, commanding him to receive and safely keep such person until he shall be delivered by due course of law.

BLACK'S LAW DICTIONARY 904 (5th ed. 1979).

[36] *Palmer*, 5 Day at 196. Although body execution was legal, concerns about involuntary servitude implicitly led the court to take every opportunity to narrow the boundaries of the statute permitting this practice. *See, e.g.*, Smith v. Huntington, 2 Day 562 (1807); Huntington v. Jones, 1 Kirby 33, 35 (Conn. 1786) (ruling "[t]he provision of law for assigning debtors in service being an abridgement of personal liberty, requires caution in exercise and is not to be enlarged by implication").

[37] 1 Kirby 297 (Conn. 1787).

[38] *Id.* at 298.

[39] *See* State v. Thomson, 1 Kirby 345 (Conn. 1787); State v. Phelps, 1 Kirby 282 (Conn. 1787).

self-incrimination, it left room for judicial authority to define the scope of this right.[40]

My examination of this thirty years of judicial protection of individual rights does not purport to be exhaustive. A closer look at all the cases would probably unearth further support for common law enforcement of "constitutional" rights. Notably, few of the relevant holdings occur in appeals from judgments in criminal cases, despite the fact that such appeals were undoubtedly available. The typical context is a tort action for misuse of process, or false imprisonment, or even trespass. The common law trappings of the cases undoubtedly explain why the court's opinions resonate in common law terms. Nonetheless, the case law demonstrates a striking resemblance between some of the "constitutional" issues with which we struggle today and some of the "common law" issues with which the court struggled two hundred years ago.

On reflection, it is not surprising that constitutional principles and common law rules should share a common history. In defining and enacting constitutional bills of rights, state and national constituencies would, of course, have drawn upon the experience of the common law. While the natural law aspects of the common law may have come under siege in the early part of the nineteenth century, the common law retained its capacity for flexibility and adaptation to changing societal needs.

In modern terms, appellate courts develop bright lines to distinguish between rights that are constitutional and those that are "merely" statutory, evidentiary, or otherwise rooted in the common law. Appeals courts do this, principally in order to limit the scope of their review, and to add finality to trial court determinations. In pursuit of these entirely salutary purposes, courts must guard against allowing nomenclature to obscure the role that common law courts and principles have played in the history of the development of constitutional principles. Just as the precepts of the common law influence the style of constitutional adjudication in common law courts,[41] so common law case law itself is part of our "usable past."

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[40] *See* Grannis v. Branden, 5 Day 260, 272-73 (Conn. 1812).

[41] *See* Peters, *supra* note 1, at 592-93 (discussing the "role of federal precedents in the formulation of state Constitutional law").