ZARELLA, J., dissenting. I agree with much of Justice Katz' thorough dissenting opinion. I write separately, however, to highlight those portions of that opinion with which I am in agreement and to add certain key points that ultimately lead me to conclude that General Statutes § 51-198 (c)[1] is unconstitutional. In my view, § 51-198 (c), although well intentioned, fails constitutional scrutiny because it purports to grant judicial powers[2] to persons who are explicitly prohibited by our constitution from exercising them.

Article fifth, § 6, of the Connecticut constitution, 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 . . . ." This prohibition has been part of our constitution from the dawn of its adoption in 1818. See Conn. Const. (1818), art. V, § 3.[3] Since that time, our case law consistently has held that a judge who no longer holds his office is prohibited from exercising judicial powers but may perform clerical acts. Compare *DeLucia* v. *Home Owners' Loan Corp.*, 130 Conn. 467, 471–72, 35 A.2d 868 (1944) (holding that municipal judge who ceased to hold office lacked judicial power to issue order granting extension of time to appeal, which "is clearly a judicial and not a clerical act"), and *Griffing* v. *Danbury*, 41 Conn. 96 (1874) (holding that judge who resigned had no power to grant motion for new trial in case tried before him prior to resignation), with *Todd* v. *Bradley*, 97 Conn. 563, 566–68, 117 A. 808 (1922) (holding that judge who no longer held office after reaching age of seventy may perform " 'clerical' " act of making findings for purposes of facilitating perfection of appeal), and *Johnson* v. *Higgins*, 53 Conn. 236, 237–39, 1 A. 616 (1885) (holding that judge who resigned may perform "clerical" act of articulating findings in case tried to him in which judgment was rendered before resignation).

The 1965 state constitution created one exception to this prohibition. This exception permits a judge who is not "eligible to hold his office after he shall arrive at the age of seventy years" to nonetheless exercise "the powers of the superior court . . . on matters referred to him as a state referee." Conn. Const., art. V, § 6. This exception is significant for two reasons. First, the fact that this exception was necessary to empower judges who have reached the age of seventy years to exercise judicial power underscores the fact that, without such an exception, the exercise of such power is prohibited. Statements made at the 1965 constitutional convention[4] illustrate this point and demonstrate that the drafters understood the exception to be a change in the powers that state referees could exercise. Under the 1965 con-

stitution, state referees could perform judicial acts in matters referred to them, whereas their powers previously were limited to finding facts and making reports to the referring court. See *Harbor Construction Corp.* v. *D. V. Frione & Co.*, 158 Conn. 14, 16, 255 A.2d 823 (1969); see also *State* v. *Miranda*, 274 Conn. 727, 744, 878 A.2d 1118 (2005) (*Borden*, *J.*, concurring) (discussing 1965 constitutional convention and indicating that, prior to adoption of article fifth, § 6, in 1965, powers of state referees were limited to finding facts). Second, because the exception is limited in that it confers on state referees only "the powers of the *superior court*"; (emphasis added) Conn. Const., art. V, § 6; it follows that no other powers, including the powers of the Supreme Court, may be exercised by any judges who have reached the age of seventy years, including former Supreme Court justices. Stated another way, the inclusion of the singular exception to the general rule strongly suggests that it is to the exclusion of any other exceptions.[5] Thus, apart from the sole exception contained in article fifth, § 6, which this court unanimously agrees is inapplicable to the present case,[6] the constitution grants no authority to the legislature to enact laws that permit judges who are seventy years or older to engage in judicial acts.

Our constitution is "construed as a grant and not as a limitation of power . . . ." *Bridgeport Public Library & Reading Room* v. *Burroughs Home*, 85 Conn. 309, 319, 82 A. 582 (1912). Accordingly, the legislature may exercise only those powers granted to it by the constitution. See, e.g., *Norwalk Street Railway Co.'s Appeal*, 69 Conn. 576, 592, 37 A. 1080 (1897). Although article third, § 1,[7] confers legislative power on the General Assembly, such power is limited by article fifth of the constitution with respect to legislation concerning the judicial branch.[8] Because article fifth, § 6, explicitly limits the legislature's authority to delegate judicial power to judges who are seventy years or older, I conclude that the legislature was without constitutional authority to enact § 51-198 (c). Therefore, in my view, the statute is unconstitutional.

Even though the majority concedes that § 51-198 (c) does not fall within the sole exception to the constitutional limitation contained in article fifth, § 6, it nonetheless concludes that § 51-198 (c) is constitutional because, in its view, Supreme Court justices who are seventy years of age or older may engage in the judicial acts contemplated by the statute without "holding office . . . ." I find the majority's analysis and support for its conclusion to be flawed and untenable, and, therefore, I disagree with its conclusion.

The dispositive issue in the present case is whether the constitution grants the legislature the power to delegate judicial power to judges who are constitutionally ineligible to hold office because they have reached the

age of seventy. The majority skirts this issue, however, and, instead, frames the issue as whether such a judge who engages in the acts authorized by § 51-198 (c) is "hold[ing] his office" within the meaning of article fifth, § 6. (Internal quotation marks omitted.) These issues are not synonymous, and a determination of the latter does not resolve the former. There is no dispute that a Supreme Court justice, upon turning seventy, no longer is permitted, by virtue of article fifth, § 6, to hold his or her office; the text of the constitution clearly states as much. Yet, much of the majority's opinion is dedicated to deciding this nonissue. What the majority fails to do, however, is identify any authority or provide any analysis in support of its assertion that the legislature may vest individuals who do not hold judicial office with the power to perform judicial acts.

Similarly, the majority has failed to identify the constitutional source of authority that permits the legislature to enact § 51-198 (c). Instead, the majority appears to assume that such unidentified authority exists *somewhere* in the constitution because "similar" legislation concerning justices of the peace and Superior Court judges has been a part of our law since the 1800s and has "resulted in few challenges and little controversy." In my view, the lack of case law and robustly contested litigation in an area is hardly justification for declaring the constitutionality of a statute, especially in the present case, in which the "few challenges" on record do not reach the issue presented in this case.

Among the "few challenges" that are relevant to this litigation are *Johnson* v. *Higgins*, supra, 53 Conn. 236, and *Todd* v. *Bradley*, supra, 97 Conn. 563, both of which concerned the constitutionality of various incarnations of what is now General Statutes § 51-183g.[9] In *Johnson*, the court held that the legislature constitutionally may empower a judge who has resigned from his office to perform the "clerical" act of articulating findings in a case that was tried to him prior to his resignation. *Johnson* v. *Higgins*, supra, 237–38. In *Todd*, the court extended this holding to include judges who are no longer constitutionally permitted to hold their offices after reaching the age of seventy. See *Todd* v. *Bradley*, supra, 566–68.

Notably, neither *Johnson* nor *Todd* presented the court with the issue of whether a judge could validly perform a *judicial* act after leaving office. Consequently, it is not surprising that these cases have resulted in what the majority refers to as "little controversy." Indeed, the court in *Johnson* commented that the act of the judge that was challenged, namely, "[t]he signing of the finding and statement . . . [was] so far from being an illegal act that it may admit of serious question whether, even without the enabling legislation . . . the judge would . . . have [had] the power . . . to complete [such act] without reference to his term

of office." *Johnson* v. *Higgins*, supra, 53 Conn. 238.

Even though the court in *Johnson* and *Todd* never was presented with the issue of whether the legislature could constitutionally empower a former judge to perform a judicial act, the majority nonetheless interprets these cases as if they authoritatively resolve this issue. In support of this broad interpretation, the majority relies on an odd mixture of hypothetical dicta, acquiescence and the apparent failure of the plaintiff in *Johnson* to adequately brief the constitutionality of the statute at issue.[10] In my view, the constitutionality of a statute cannot be based on such hollow and tenuous grounds. The majority, however, is left with little else to justify its broad interpretation of these cases, and, without such interpretation, the majority lacks binding legal support for its conclusion that § 51-198 (c) is constitutional.

I cannot subscribe to the majority's strained interpretation of *Johnson* and *Todd*. In my view, the better reading of these cases is that they stand for the quite unremarkable proposition that retired judges have the power to perform nonjudicial functions. Under such an interpretation, § 51-183g would be adjudged constitutional only as it relates to the performance of clerical rather than judicial acts.[11] Because I cannot take the same leap as the majority in interpreting *Johnson* and *Todd*, I must agree with Justice Katz that there is no case law from our jurisdiction and no provision of our constitution that supports the majority's conclusion that a judge who no longer holds his or her office may continue to perform judicial acts.

Accordingly, I respectfully dissent.

[1] 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."

[2] It cannot be disputed that the deliberation and opinion preparation process, which necessarily requires "judicial discretion," is a judicial act. *DeLucia* v. *Home Owners' Loan Corp.*, 130 Conn. 467, 472, 35 A.2d 868 (1944).

[3] Article fifth, § 3, of the Connecticut constitution of 1818 provides in relevant part: "No judge or justice of the peace shall be capable of holding his office, after he shall have arrived to the age of seventy years."

[4] At the constitutional convention in 1965, former Connecticut Supreme Court Justice Abraham S. Bordon stated: "At the present time, a retired judge becomes a [s]tate [r]eferee. . . . A [s]tate [r]eferee has no right or power to enter a judgment after he decides the case; he may only make a recommendation to the Superior or the Common Pleas Court, which recommendation may or may not be adopted . . . . The matter has to then be referred back to the court for the passage of an order that may be important or necessary for the continuance of the case." Constitutional Committee Hearings, Resolutions and Rules of the 1965 Connecticut Constitutional Convention (August 24, 1965) p. 35.

[5] Article fifth, § 6, of the Connecticut constitution expressly permits state referees to exercise "the powers of the superior court or court of common pleas . . . ." That provision, however, is notably silent with respect to the powers of the *Supreme Court*. "[W]hen the items expressed are members of an associated group or series," we may invoke the canon of statutory construction known as expressio unius est exclusio alterius—the expression

of one thing is the exclusion of another—and infer that the item not mentioned—namely, the powers of the Supreme Court—was "excluded by deliberate choice." (Internal quotation marks omitted.) *Sastrom* v. *Psychiatric Security Review Board*, 291 Conn. 307, 319 n.15, 968 A.2d 396 (2009).

[6] See footnote 8 of the majority opinion; see also part II of Justice Katz' dissenting opinion.

[7] Article third, § 1, of the Connecticut constitution provides in relevant part: "The legislative power of this state shall be vested in two distinct houses or branches; the one to be styled the senate, the other the house of representatives, and both together the general assembly. . . ."

[8] See *Brown* v. *O'Connell*, 36 Conn. 432, 446 (1870) ("the General Assembly [has] no power or authority to organize courts, or appoint judges, by virtue of the general legislative power conferred [on it], and . . . [its] authority to do either is special, and derived from [article fifth] of the constitution [of 1818] alone; and . . . the judicial power is not conferred by the General Assembly, but vests, by force of the constitution, in the courts, when organized pursuant to the special provisions of that article").

[9] General Statutes § 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."

[10] Specifically, the majority refers to the following language in *Johnson* to support its interpretation: "*Even if* it be admitted that the act of the judge in signing the finding on appeal is a judicial act in the sense claimed by the plaintiff . . . *no authority has been brought to our attention* denying the legislature the power implied in the law in question. Similar legislation, and of more embracing scope, *has for many years been operative*, *unchallenged*, in reference to the judicial power of justices of the peace." (Emphasis added.) *Johnson* v. *Higgins*, supra, 53 Conn. 237.

[11] One major difference between §§ 51-183g and 51-198 (c) is that the acts described in § 51-183g are couched in general terms and could, but might not, encompass judicial acts; see footnote 9 of this opinion; whereas § 51-198 (c) unequivocally describes acts that include judicial acts. See footnotes 1 and 2 of this opinion.