Coates' Canons Blog: Self-Executing Constitutional Provisions

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Article: https://canons.sog.unc.edu/self-executing-constitutional-provisions/

This entry was posted on March 23, 2011 and is filed under General Local Government (Miscellaneous), Miscellaneous

This session, legislators have introduced bills (**House Bill 87**, **Senate Bill 67)** proposing to amend the North Carolina Constitution to create a right of access to public records, and to require that all meetings of public bodies be open. The law preserves existing provisions of law dealing with these subjects, and creates additional requirements for future exceptions to those laws. As of this writing, the House version has been converted to an amendment to the public records statute, but the Senate version is still framed as a constitutional amendment. An interesting aspect of the proposed constitutional amendment is that it specifically provides that it is "self-executing." What does that mean?

This blog reviews some of the existing case law on self-executing constitutional provisions, and raises questions about how the proposed amendment might be interpreted.

North Carolina courts have analyzed whether constitutional provisions are self-executing in at least two types of cases: 1) where the question is whether a constitutional provision is so complete that there is no need (and hence no authority) for legislative action on the subject; and 2) where the question is whether a person has a direct right of action under the constitution to remedy a violation of constitutional rights because there is no other adequate remedy available under state law. In these cases, the court determines whether a provision is self-executing based on the language and importance of the provision. There do not appear to be any existing constitutional provisions that explicitly state that they are self-executing. It may be useful, then, to consider these cases to determine what the inclusion of this statement in the proposed amendment might mean.

An early case examining the self-executing nature of a constitutional provision is *Kitchin v. Wood*, 154 N.C. 565 (1911). The Governor filed the lawsuit to force the legislature to levy a tax called for in the constitution. The court found that the provision created a clear obligation that the legislature was bound to fulfill. Holding in favor of the Governor's claim, the court said, "Although a constitution is usually a declaration of the fundamental law, serving either to command or restrict its creatures, it is entirely within the power of those who adopt a constitution to make some of its provisions self-executing. It is well said that 'a constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments.'"

Some cases have involved the question of whether a constitutional provision leaves room for legislative action, or is, instead, sufficiently complete to be considered self-executing. For example, our courts have held that **Article IX, Section 7 of the Constitution** (which requires that the clear proceeds of fines and forfeitures must be appropriated and used exclusively for maintaining free public schools) is *not self-executing*. As such, the courts have upheld the validity of state statutes implementing this provision of the constitution. In ***North Carolina School Boards Ass'n. v. Moore*** **(359 N.C. 474, 512 (2005))** the North Carolina Supreme Court held: "This Court has long recognized that some constitutional provisions are self-executing while others require legislative action to implement and enforce the purpose and mandates of the provision."

The current proposed constitutional amendment specifically acknowledges existing legislation on the matters covered, and allows for future legislation, which must be approved by a three-fifths vote of the legislature. So it does not appear that the "self-executing" designation is intended to mean that the provision is sufficiently complete as to foreclose legislative action on the subject.

A separate line of cases involving self-executing constitutional provisions recognizes the need to provide individuals a direct remedy to vindicate rights guaranteed under the constitution when there is no adequate remedy under other state law. These cases may be more pertinent to the proposed amendment now pending.

Our courts have recognized self-executing provisions of the constitution as providing an independent remedy, perhaps

most notably, under the provisions protecting individual rights such as free speech **(Article I, Section 4)** and the **"Law of the Land" clause (Article I, Section 19)** which guarantees equal protection and due process rights. Comparable rights guaranteed under the United States Constitution may be vindicated under specific federal statutes, including **42 U.S.C. 1983**, and **1988**, which provide remedies including damages and attorneys fees. No such statutes exist under North Carolina law, so our courts have recognized the need for a direct remedy under the state constitution. A leading case in this area is *Corum v. University of North Carolina* (330 N.C. 761 (1992)), in which the court held that a university employee could file a claim against university officials (in their official capacity) for violation of his free speech rights under the state constitution. The court held, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution. The provision of our Constitution which protects the right of freedom of speech is self-executing…Therefore, the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right." 330 N.C. at 782, citing *Sale v. Highway Commission,* 242 N.C. 612 (1955); see also, ***Amward Homes, Inc. v. Town of Cary*** **(698 S.E.2d 404(2010)**, and ***Craig ex rel. Craig v. New Hanover Bd. Of Educ*****., 185 N.C.App. 651 (2007)**.

The common law (court-created) remedy under the constitution has an important condition: it is recognized only when there is no otherwise adequate remedy under other state law (either a statute or other common law remedy). The need for judicial restraint is explained in *Corum:* "When called upon to exercise its inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right, however, the judiciary must recognize two critical limitations. First, it must bow to established claims and remedies where these provide an alternative to the extraordinary exercise of its inherent constitutional power… Second, in exercising that power, the judiciary must minimize the encroachment upon other branches of government-in appearance and in fact-by seeking the least intrusive remedy available and necessary to right the wrong." 330 N.C. at 786 (citations omitted).

If approved by the voters, the sunshine amendment to the constitution might create a direct right of action for a person who has been denied access to records or notice of meetings. Indeed, under the case law, that could be the effect of a specific statement that the law is self-executing. On the other hand, existing laws governing access to records and meetings, which the amendment explicitly acknowledges and does not repeal, currently provide remedies for failure to provide access. (See, **G.S. 132-9** and **G.S. 143-318.16** and **16A.**) Would these remedies be sufficient to constitute an adequate remedy, making the need for a common law (judge-made) remedy under the constitution unnecessary? It seems possible that they might, although they do not provide a remedy for damages, a gap that the constitution might be viewed as being intended to fill. Unless it is to provide an additional type of remedy, it is unclear what the effect of the "self-executing" language would be. Indeed, without the language, a court would likely conclude that the provision is not self-executing under the first line of cases, since it explicitly recognizes existing legislative provisions and authorizes their future modification. Furthermore, a court might find there to be less need for judicial restraint in a case where the constitutional provision explicitly says it is self-executing, and might therefore conclude that it represents a legislative intent to provide additional remedies not provided by existing statutes.

So what does it mean? It may be that existing case law provides limited guidance, but certainly, it appears that this provision would present a novel issue of statutory interpretation. Perhaps some clarification of legislative intent will emerge as the proposals work their way through the legislative process.

Links

- www.ncleg.net/gascripts/BillLookUp/BillLookUp.pl?Session=2011&BillID=H87
- www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S67v2.pdf
- www.ncleg.gov/Laws/Constitution/Article9
- appellate.nccourts.org/opinions/?c=1&pdf=MjAwNS81NjlBMDMtMS5wZGY=
- www.ncleg.gov/Laws/Constitution/Article1
- www.law.cornell.edu/uscode/text/42/1983
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