In The Courts

North Carolina's Constitution Comes of Age

by Katherine White

This regular Insight *feature focuses on how the judicial system affects public policymaking. This column examines how the N.C. Supreme Court is beginning to rely more on the state Constitution than the U.S. Constitution in defining individual rights.*

Throughout last year's fireworks celebrating the Bicentennial of the *United States* Constitution, another equally important document quietly gained attention from the North Carolina Supreme Court — the *North Carolina* Constitution. It became the constitution relied on, at least in part, in several cases involving civil rights, replacing the state Supreme Court's traditional focus on the federal Constitution.

The Court's shift is hardly revolutionary. Rather, it brings North Carolina in step with a trend that began more than 15 years ago when other states' appellate courts started looking to their own constitutions when defining the rights of individuals.[1] Syracuse University legal scholar Ronald K.L. Collins has found nearly 400 state supreme court cases since 1970 where the courts relied on state constitutions in cases involving individual rights.

This national trend has been spurred in reaction to the judicial conservatism of the present U.S. Supreme Court, which began with former Chief Justice Warren Burger's term in 1969 and which continues to carve exceptions into earlier U.S. Supreme Court decisions that expanded the protections of the U.S. Constitution. Since the Burger Court began, for example, the U.S. Supreme Court has limited earlier rules designed to protect individuals against unreasonable searches prohibited by the Fourth Amendment of the U.S. Constitution.[2] The U.S. Supreme Court also has limited the extent to which the Constitution will protect obscene materials under the the freedom of speech guarantee of the First Amendment.[3]

In North Carolina, some top judges have begun encouraging the bar to rely more on the N.C. Constitution when those lawyers make their judicial arguments. Among them is N.C. Supreme Court Chief Justice James G. Exum, Jr., who has urged North Carolina lawyers to raise state constitutional issues in their cases. "It is time, I think, that we dust off the old document, learn what we can about it, and use it where appropriate," he says.[4] That view receives approval from U.S. Supreme Court Justice William J. Brennan, who says "[E]very believer in our concept of federalism... must salute this development in our state courts." [5]

N.C. Associate Justice Harry Martin, who teaches a course on state constitutional law at UNC-CH Law School, believes that using state constitutions instead of the federal Constitution gives "the people of the individual states greater protection of their individual rights because of the way people live in the different states."

Martin points out that the Florida Constitution gives its residents greater freedom from unreasonable searches and seizures on boats, an important part of the state's tourist industry, than does the U.S. Constitution. And, he notes, the Alaska Constitution offers similar protections to passengers on

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airplanes, the main mode of travel in that state—protection that the U.S. Constitution does not extend. North Carolina's Constitution also offers some rights not mentioned in the U.S. Constitution, such as the right to an education, the right to a system of inexpensive higher education, and access to a system of open courts (see box, p. 120).

But this new focus on the N.C. Constitution lacks the wholehearted support of all North Carolina's Supreme Court justices. Justice Louis Meyer says, "We have significant legal precedent to the effect that some of our state Constitutional provisions are co-extensive with rights under the federal Constitution. With regard to these particular provisions, individual rights under the state Constitution begin at the same place and end at the same place as the comparable federal constitutional provisions. I will continue to follow this Court's prior decisions with regard to these particular comparable provisions. A thorough analysis needs to be made before the judiciary relies upon a particular provision of the state Constitution as providing rights different than those guaranteed by a comparable provision of the federal Constitution. As to whether other provisions of our state Constitution, to which this Court has not spoken, provide greater or different rights than the federal Constitution provides, my mind is open. Reliance upon provisions of our state constitutions must not become simply a method of evading federal review of our decisions."

But Justice Martin contends, "The problem in following that view is that, to me, it may demonstrate a lack of understanding—and I'm not trying to be critical of my brothers—of the federal Constitution and the state Constitution." The distinction is that state constitutions were designed to respond to the needs of individual states, Martin adds, while the U.S. Constitution responds to the needs of all 50 states.

The N.C. justices recently demonstrated their divided views in *State v. Cofield*.[6] There, the defendant challenged his conviction on second-degree rape and breaking and entering charges because of what he claimed was racial discrimination in the selection of the grand jury foreman. The defendant, who was black, raised both state and federal constitutional questions. Only three justices in the 6-1 decision wholly accepted the majority opinion written by Chief Justice Exum,[7] although five agreed on the state constitutional question.

That opinion held that both state and federal constitutional rights may have been violated when the defendant showed that blacks had been excluded from serving as foreman on the grand jury that indicted him. The case was returned to the trial court for additional hearings to determine whether there were violations of Article 1, Sections 19 and 26 of the N.C. Constitution, which guarantee equal protection under the law and prohibit discrimination on the basis of race.

Justice Meyer argued that the Court should limit its decision to the U.S. Constitution. "I find it unnecessary and unwise to proceed to any analysis of rights under the state Constitution," he wrote.[8] Conversely, Justice Mitchell disagreed with the majority discussion of any federal constitutional questions. Limiting the decision to the state Constitution, he wrote, "is final and binding, even upon the Supreme Court of the United States.... Having decided this case on an adequate and independent State ground, the Court is most unwise from any standpoint—practicality, judicial restraint or disciplined legal scholarship—to address questions concerning the Constitution of the United States."[9] Thus, five justices agreed that racial discrimination in choosing a grand jury foreman would violate the state Constitution, four justices said it would violate the U.S. Constitution, and three held that it would violate both.

Despite the internal Court debate on whether to use the state or federal constitution, a recent case raised no debate because the lawyers brought only state constitutional questions to the Supreme Court and, therefore, the Court did not look to the federal document. "The courts are not self-starters," Justice Martin explains. "We have to be cranked, and unless the lawyers raise state constitutional grounds, they're not before us. And, until the lawyers become aware that their clients may have strong rights under the state Constitution, we're limited as to what we can do about it."

In that case, a company challenged an Onslow County ordinance that regulated businesses "providing male or female companionship."[10] The idea behind the law was to regulate establishments offering "movie mates," where male customers could enjoy a movie in a private room with a hired female companion. Movie mate establishments are the latest wrinkle for providing sex at a price. They popped up after Onslow County regulated massage parlors out of business in 1978. To ensure that the operators didn't invent another way to disguise their

Provisions in the N.C. Constitution Not Found in the U.S. Constitution

Article 1, Section 15. *Education.* The People have a right to the privilege of education, and it is the duty of the State to guard and maintain that right.

Article 1, Section 18. *Courts shall be open.* All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

Article 9, Section 9. *Benefits of public institutions of higher education.* The General Assembly shall provide that the benefits of The University of North Carolina and other public institutions of higher education, as far as practicable, be extended to the people of the State free of expense.

activities as yet another unregulated business, the county commissioners simply decided to regulate all companionship enterprises and outlawed "companionship" services.

But the N.C. Supreme Court, in an opinion written by Justice Martin, decided that the term "companionship" is "broad enough to encompass both the salubrious and the salatious" and therefore might "regulate nursing homes and companions for the elderly along with movie mates, 'private room' bars, and 'dial-an-escort' services." [11] The overbroad approach of the Onslow County officials, Martin said, violated Article I, Sections 1 and 19, of the North Carolina Constitution,[12] which require that a regulation cover its objective and no more.

Where the North Carolina Constitution will take the state Supreme Court when it addresses civil rights and public policy questions is yet unclear. Simply because an argument is made under the Constitution's provisions does not mean that the Court will address the issue or decide the issue in a way that expands an individual's rights beyond those rights granted under the present U.S. Supreme Court's interpretation of the U.S. Constitution. Still, the state Constitution is available as a tool for the Court, and more lawyers are taking advantage of it.

For years, lawyers routinely turned to the federal courts because they appeared to be the best forum for constitutional questions, based on the performance of the federal and the state judiciary. But based on a series of decisions from the U.S. Supreme Court during the administrations of Presidents Nixon, Ford, and Reagan, the state courts have become much more attractive to lawyers seeking a moderate interpretation of state constitutional provisions. And with state courts like the N.C. Supreme Court actually welcoming such cases, attorneys are bringing more constitutional questions before the state judiciary — and getting results. After more than 200 years, the North Carolina Constitution has come of age.

FOOTNOTES

[1] *See* "State Courts and Civil Liberties," *State Legislatures* magazine, September 1987, pp. 28-29. *See also, The National Law Journal,* Special Section on State Constitutional Law, September 29, 1986; "The Interpretation of State Constitutional Rights," 95 *Harvard Law Review* 1324 (1982); "Judicial Federalism and Equality Guarantees in State Supreme Courts," *Publius, The Journal of Federalism,* Winter 1987, p. 51-67; and "American Constitutions: 200 Years of Federalism," *Intergovernmental Perspective* magazine, Spring 1987, pp. 3-30.

[2] In *United States v. Leon,* 468 U.S. 897, 82 L. Ed. 2d 677, 104 S.Ct. 35405 (1984), the U.S. Supreme Court allowed the introduction of evidence seized in a search where officers made a mistake in their application for a search warrant. The Court created a "good faith" exception to compliance with the Fourth Amendment guarantee. Several state courts, including New Jersey, New York, Michigan, Mississippi and Wisconsin, have

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to spend more time on the budget process as a whole."

The legislature also appears to have begun to come to grips with the special provisions abuse problem. Although the General Assembly has not eliminated non-germane special budget provisions, it has limited them—to about 50 in the three main budget bills in the 1987 session. That is the fewest number of special provisions in a regular session of the legislature since 1981, and indicates that the leadership has made progress in limiting the number of special provisions unrelated to the budget. Hipps, who has carved a niche for himself as the scourge of special provisions, thinks the reforms have worked. "Before, I had to convince people not only that I had found these awful things but also that we shouldn't have them. Now, maybe we're keeping them from happening in the first place."

The challenge for the future seems to lie in how willing the legislative leadership is to enforce the rules already on the books, particularly in discretionary areas such as the operations of the Supersub. No formal rules apply to that body, because it technically does not exist, at least on paper.

But, then, paper is the only place any effort at legislative reform exists—unless the leadership of both houses has the political will-power to back it up.

FOOTNOTES

[1] Rule 41, Permanent Rules of the 1987 Senate; and Rule 31.1, Rules of the 1987 House of Representatives.

[2] The 1971 regular session, which convened January 13 and adjourned July 21, had 160 legislative days, including 22 Saturday sessions where little or no legislation was handled. The 1983 regular session, which convened January 12 and adjourned July 22, had 137 legislative dates. The 1987 session had 135 legislative days.

[3] For more, see Ran Coble, "Special Provisions in Budget Bills: A Pandora's Box for North Carolina Citizens," N.C. Center for Public Policy Research, June 1986; "N.C. Center Says 1986 Legislature Continued Abuse of Special Provisions in Budget Bills," press release, N.C. Center for Public Policy Research, March 2, 1987; and Paul T. O'Connor, "Reforming Pork Barrel, Special Provisions, and the Appropriations Process—Is There Less Than Meets the Eye?", *North Carolina Insight*, Vol. 9, No. 3, March 1987, pp. 96-99.

[4] Rule 42.4, Permanent Rules of the 1987 Senate.

[5] Chapter 830 (HB 1515) of the 1987 Session Laws.

[6] Chapter 480 (SB 115) of the 1987 Session Laws; and House Resolution 2166, adopted August 14, 1987.

[7] Chapter 524 (HB 1628) of the 1987 Session Laws continued general budget spending at constant levels; Chapter 703 (SB 1556) continued certain special provisions related to the budget.

[8] Rule 40.1, Permanent Rules of the 1987 Senate. See also Seth Effron, "Eating High on the Hog: How the Pork Barrel Spending Process Has Changed in the Last 10 Years," *North Carolina Insight*, Vol. 10, No. 1, October 1987, pp. 19-26.

[9] Chapter 830 (HB 1515) and Chapter 873 (HB 1) of the 1987 Session Laws.

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refused to follow the *Leon* case and relied on their state constitutions to exclude evidence in criminal trials that was seized as the result of an invalid search warrant.

[3] *Miller v. California*, 413 U.S. 15, 37 L. Ed. 2d 419, 93 S.Ct. 2706 (1972). The Oregon Supreme Court rejected the *Miller* rule, reasoning that its state Constitution — written by "rugged and robust individuals dedicated to founding a free society unfettered by governmental imposition of some people's views of morality on the free expression of others" — allowed consenting adults to buy or see whatever they wanted. *Oregon v. Henry*, 302 Or. 510, 732 P2d 9 (1987).

[4] James G. Exum, "Dusting Off Our State Constitution," *The North Carolina State Bar Quarterly*, Spring 1986, pp. 6-9.

[5] William J. Brennan, "State Constitutions and the Protection of Individual Rights," 90 *Harvard Law Review* 503 (1977).

[6] 320 N.C. 297, 357 S.E.2d 622 (1987).

[7] Justice Martin and Justice Henry Frye voted to support the opinion. Justices Meyer, Burley Mitchell and Willis Whichard concurred in the result but set forth different reasons. Justice John Webb dissented.

[8] 320 N.C. at page 310.

[9] 320 N.C. at page 311.

[10] "An Ordinance Regulating Businesses Providing Male or Female Companionship," enacted June 19, 1985, and amended July 1, 1985.

[11] *Treants Enterprises, Inc. v. Onslow County*, 320 N.C. 776, 779 (1987), affirming 83 N.C App. 345, 350 S.E.2d 365 (1986). Justice Webb did not participate in the decision.

[12] Article I, Section 1 gives the people the right to "life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." Section 19 provides that no person shall be "deprived of his life, liberty, or property, but by the law of the land." To pass these requirements, a regulatory law must be rationally related to a substantial government purpose and cannot be overly broad.

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