PAPERS†

SECURING GAY RIGHTS THROUGH CONSTITUTIONAL LITIGATION

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Thank you. Prior to the Burger Court, most constitutional litigation in the civil liberties area was pursued in the federal courts. That is where favorable decisions were most likely to be obtained, especially during the Warren Court years. With the Burger Court's increasing limitation on civil liberties and its narrow interpretation of procedural safeguards in criminal matters, however, litigators began to re-evaluate the receptivity of the federal courts to civil liberties issues.

About two years ago, Justice Brennan made a speech to the New Jersey Bar Association in which he recited a list of twenty or more cases cited by various state supreme courts since the Burger Court had been on the bench.[1] In every instance, those state supreme court cases explicitly discussed a particular criminal procedural ruling, or some similar ruling by the Burger Court, and rejected it on the grounds that they could go further under their own state constitutions in protecting individual rights, and were willing to do so. It is possible that the Burger Court actually wants to encourage this revitalization of the state court forum. Many of the things it does are perceived as an attempt to encourage a resurgence of federalism and to instill new life into the state judicial systems that, at least in the criminal procedure and civil liberties areas, had been overshadowed by the federal courts during the period of the Warren Court. And so, to a certain degree, the Burger Court's encouragement of state courts to start thinking about what they can do in the individual rights area is a constructive phenomenon. Whereas state courts had to a large extent simply taken whatever the United States Supreme Court had said on a particular issue arising under the federal bill of rights, looked at their own state constitutional analogue to the federal provision, and given the state provision virtually the same scope and effect as the Supreme Court had given the federal provision, the Burger Court altered the approach. As the Burger Court began to assign a

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1. Address by Justice Brennan (May 22, 1976).

narrower scope to the federal provisions, some of the state courts that had become more liberal in this area began to look for alternatives to the federal line.

At the oral argument for *People v. Rice*,[2] a case that the New York Court of Appeals heard a year ago, one of the judges made the comment that it was fine to go uphill with the U.S. Supreme Court, but that didn't mean the state court had to go downhill with it as well. Fortunately, the state courts have several mechanisms by which they can avoid this downhill slide. Some of the state constitutional provisions do not have quite the same language as the federal constitution. For example, in a New Jersey case involving the state's fornication statute,[3] the New Jersey Supreme Court relied on a provision in the New Jersey Constitution stating that all persons are by nature free and independent and have certain natural and inalienable rights among which are those of enjoying and defending life and liberty, and of obtaining safety and happiness. This provision is extremely broad; such a broad analogue cannot be found in the federal constitution. This is the kind of provision that the state courts can look to in their own state constitutions. Also, some state constitutions contain an explicit privacy right which either has been put there by amendment in recent years or has been implied by the state court. The Alaska Supreme Court a few years ago held that under its state constitutional right of privacy, one had the right to smoke marijuana in the privacy of one's own home.[4] Of course, no explicit privacy right exists in the federal constitution, so to the extent that a state constitution does contain an explicit right of privacy, a much stronger basis for a privacy argument can be established.

Another advantage to the state court aside from the reliance of the state court on its own constitution is its ability to decide both federal and state questions. In other words, one can litigate the federal constitutional issue in the state court as well as the state constitutional issue. If the court decides both the federal and the state claims favorably, the losing party might contemplate an appeal of the federal issue in federal court. Because no appeal of the determination of the state issue in federal court is possible, however, the likelihood of an appeal is slight, for the result of the case could not be changed.

These are some of the considerations that led litigators to start looking at the state court system again. Of course, one of the disadvantages in states with crowded dockets is the difficulty of getting into court in the first place and obtaining a hearing in an expeditious manner. One might spend several years trying to get an appellate posture in some areas under the present New York state court system, whereas the federal system is more efficient and prompt. Nonetheless, the state court system is becoming an increasingly attractive alternative to the federal courts in gay rights litigation.

Thank you.

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2. 41 N.Y.2d 1018, 363 N.E.2d 1371, 395 N.Y.S.2d 626 (N.Y. 1977).
3. State v. Saunders, 75 N.J. 200, 381 A.2d 333 (1977).
4. Ravin v. State, 537 P.2d 494 (Alaska 1975).