Touro Law Review

Volume 12
Number 3 *New York State constitutional Decisions: 1995 Compilation*

Article 65

1996

Separation of Powers

SEPARATION OF POWERS

N.Y. CONST. art. III, § 1:

The legislative powers of this state shall be vested in the senate and assembly.

N.Y. CONST. art. IV, § 1:

The executive power shall be vested in the governor . . . .

COURT OF APPEALS

Bourquin v. Cuomo[1]
(decided June 13, 1995)

Pierre Bourquin, John Faso and Glenn H. Harris, along with the nonprofit corporations, Citizens for a Sound Economy, Inc. and Atlantic Legal Foundation, Inc., brought an action against both the Department of Public Service of the State of New York and then-governor Mario Cuomo, alleging that the issuance of Executive Order No. 141[2] was unconstitutional.[3] They contended that the Order was issued in violation of the separation of powers doctrine.[4] Executive Order No. 141 (hereinafter Executive Order) authorized the "creation of a private, not-for-profit corporation known as the Citizen's Utility Board (hereinafter CUB) intended, among other things, to represent the interests of residential utility customers in ratemaking and other proceedings before the Public Service Commission."[5] Shortly after the Executive Order was promulgated, Bourquin, asserting standing as a "citizen, resident and taxpayer,"[6] argued that the Order

1. 85 N.Y.2d 781, 652 N.E.2d 171, 628 N.Y.S.2d 618 (1995).

2. N.Y. COMP. CODES R. & REGS. tit. 9, § 4.141 (1995).

3. *Bourquin*, 85 N.Y.2d at 784, 652 N.E.2d at 172, 628 N.Y.S.2d at 619.

4. *Id.*

5. *Id.* at 783, 652 N.E.2d at 172, 628 N.Y.S.2d at 619. It also provided that the Board would have access to no more than four state agency mailings per year. *Id.*

6. *Id.*

violated Article III, section 1[7] and Article IV, section 1[8] of the New York State Constitution and sought a preliminary injunction to enjoin the execution of the Order.[9] The court rejected Plaintiffs' claims and found that defendants had "acted within their respective constitutional and statutory authority."[10] The appellate division reversed the supreme court's dismissal of the action and found that the Executive Order was an unconstitutional usurption of legislative authority.[11] The court of appeals reversed the determination of the appellate division and held that the governor did not exceed his authority in issuing the Executive Order and that such action did not violate the state constitutional principle of separation of powers.[12]

The court cited to both *Clark v. Cuomo*[13] and *Matter of New York State Health Facilities Assn. v. Axelrod*[14] for the

---

7. N.Y. CONST. art. III, § 1. This section provides in pertinent part: "The legislative powers of this state shall be vested in the senate and assembly." *Id.*

8. N.Y. CONST. art. IV, § 1. This section provides in pertinent part: "The executive power shall be vested in the governor . . . . " *Id.*

9. *Bourquin*, 85 N.Y.2d at 784, 652 N.E.2d at 172, 628 N.Y.S.2d at 619.

10. *Id.* at 784, 652 N.E.2d at 172-73, 628 N.Y.S.2d at 619-20.

11. *Id.*

12. *Id.* at 788, 652 N.E.2d at 175, 628 N.Y.S.2d at 622.

13. 66 N.Y.2d 185, 189-90, 486 N.E.2d 794, 797, 495 N.Y.S.2d 936, 939 (1985). In *Clark*, the court held that the executive order, establishing a program to increase voter registration by requiring certain state agencies to make voter registration forms available, did not violate the constitutional principle of separation of powers. *Id.* The court reasoned that the executive order was not inconsistent with the policy of the Legislature, which was to promote the greatest possible participation in elections, despite the Legislature's declination to enact legislation that would accomplish substantially the same result as the executive order. *Id.*

14. 77 N.Y.2d 340, 569 N.E.2d 860, 568 N.Y.S.2d 1 (1991). In this case, the court of appeals held that the Public Health Council's adoption of regulations which required "applicants seeking nursing home approval to agree that the home will admit a 'reasonable percentage of Medicaid patients' . . . defined as 75% of the rate of Medicaid nursing home admissions in the county where the home is located" was a valid exercise of the Council's legislative power, and was not in violation of the constitutional principle of separation of powers. *Id.* at 344, 569 N.E.2d at 861, 568 N.Y.S.2d at 2.

proposition that "[t]he constitutional principle of separation of powers, 'implied by the separate grants of power to each of the coordinate branches of government,' requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies."[15] Chief Judge Kaye explained the impossibility of "neatly divid[ing]" the "duties and powers of the legislative and executive branches . . . into isolated pockets."[16] The court further stressed the difficulty of segregating the governmental branches into distinct categories, and reiterated Justice Breyer's concurrence in *Plaut v. Spendthrift Farm*,[17] which provided that "[the separation of powers] doctrine does not 'divide the branches into watertight compartments,' nor 'establish and divide fields of black and white.'"[18] Furthermore, the court reaffirmed the rule announced in *Clark*, which provides that "[i]t is only when the Executive acts inconsistently with the Legislature, or usurps its prerogatives, that the doctrine of separation of powers is violated."[19]

Applying this rule, the court determined that the executive order did not act inconsistently with the Legislature nor did it usurp its prerogatives, but rather that it was merely a means to promote a "'general' legislative purpose."[20] In analogizing the present case to *Clark*, the court compared the executive orders at issue in each case, and concluded that both cases involved the creation by the governor of an entity other than that intended by

---

15. *Bourquin*, 66 N.Y.2d at 784, 652 N.E.2d at 173, 628 N.Y.S.2d at 620.

16. *Id.*

17. 115 S. Ct. 1447 (1995). In *Plaut*, the Supreme Court was faced with the issue of whether section 27A(b) of the Securities Exchange Act was in violation of the constitutional principle of separation of powers. *Id.* at 1450. Justice Scalia, writing for the majority, held that the section was unconstitutional because it violated the constitutional separation of powers doctrine by allowing federal courts to reopen final judgments. *Id.* at 1463.

18. *Id.* at 1465 (citations omitted).

19. *Bourquin*, 85 N.Y.2d at 785, 652 N.E.2d at 173, 628 N.Y.S.2d at 620 (citations omitted).

20. *Id.* at 786, 652 N.E.2d at 174, 628 N.Y.S.2d at 621.

the legislature.[21] Explaining that "[e]ach of the respective Executive Orders vests a particular entity . . . with the power to promote a broad, even 'general' legislative purpose,"[22] the court upheld the order.[23]

The court further found *Clark* to be similar to the present case in that in both cases, the Legislature reviewed, but declined to enact, bills that would achieve the objectives of the respective Executive Orders.[24] Relying on the reasoning in *Clark*, the court agreed that the failure of the Legislature to enact such a bill does not necessarily indicate that the Legislature disapproved of the program suggested by the Executive Order.[25] Furthermore, the court rejected plaintiffs' argument that "such failure should be taken as proof of hostile legislative intent."[26]

The court relied on Chief Justice Cardozo's explanation in *Matter of Richardson*,[27] when it held that a commonsensical approach should be taken when evaluating whether there has been

---

21. In *Clark*, the executive order in question created the Voter Registration Task Force. There, the Governor relied on Election Law § 3-102(13) as authority to create the Voter Registration Task Force, and relied on the following language, "the state board of elections shall have the power and duty . . . to encourage the broadest possible voter participation in election." Similarly, in *Bourquin*, the Governor found support for the executive order in article 20 of the Executive Law, which provided that the Consumer Protection Board may "promote and encourage the protection of the legitimate interests of consumers within the state." *Bourquin*, 85 N.Y.2d at 785-86, 652 N.E.2d at 174, 626 N.Y.S.2d at 621.

22. *Bourquin*, 85 N.Y.2d at 786, 652 N.E.2d at 174, 626 N.Y.S.2d at 621.

23. *Id.* at 788, 652 N.E.2d at 175, 628 N.Y.S.2d at 622.

24. *Id.* at 787, 652 N.E.2d at 175, 628 N.Y.S.2d at 622.

25. *Id.*

26. *Id.*

27. 247 N.Y. 401, 160 N.E. 655 (1928). Chief Justice Cardozo stated that "[t]he exigencies of government have made it necessary to relax a merely doctrinaire adherence to a principle so flexible and practical, so largely a matter of sensible approximation, as that of the separation of powers." *Id.* at 410, 160 N.E. at 657. In *Richardson*, the New York Court of Appeals granted an order of prohibition commanding the respondent to cease participation as a justice of the supreme court for the duration of certain hearings and investigations. *Bourquin*, 85 N.Y.2d at 787, 652 N.E.2d at 174, 628 N.Y.S.2d at 621.

a violation of the separation of powers doctrine.[28] The court adhered to this well settled and long established method of examining constitutional challenges to the separation of powers doctrine, and refused to view the Executive Order in isolation, but instead considered the policy contemplated by the Legislature.[29]

Another factor that the court considered in reaching its decision was the fact that the Executive Order in question was broadly drafted, and did not tailor its goals to specific policies.[30] For example, the court explained that the Executive Order does not "instruct the CUB to press for lower utility rates or to seek greater disclosure of the financial statutes of utility companies."[31] Distinguishing the present matter before the court from the cases in which this court has struck down executive orders or administrative regulations, the court explained that the *Matter of Broidrick v. Lindsay*,[32] *Rapp v. Carey*,[33] *Under 21, Catholic Home Bur. for Dependent Children v. City of New York*,[34] and *Boreali v. Axelrod*[35] line of cases all contained

---

28. *Id.*

29. *Id.* at 786, 652 N.E.2d at 174, 626 N.Y.S.2d at 621.

30. *Id.*

31. *Id.*

32. 39 N.Y.2d 641, 350 N.E.2d 595, 385 N.Y.S.2d 265 (1976). In *Broidrick*, the court struck down an affirmative action program for contracts in New York City because the city was acting in excess of the authority granted to it by the Legislature, in promulgating the regulation. *Id.* at 644, 350 N.E.2d at 596, 385 N.Y.S.2d at 266. The regulations included specific quotas to be complied with, instead of a percentage employment formula, which would most likely have survived constitutional scrutiny. *Id.*

33. 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978). In *Rapp*, the court of appeals invalidated an executive order requiring various state employees to file financial disclosure statements and to abstain from certain political and business activities, as an unauthorized use of executive power. *Id.* at 160, 375 N.E.2d at 746-47, 404 N.Y.S.2d at 566.

34. 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522 (1985). In *Under 21*, Chief Judge Wachtler held that an executive order, issued by the mayor of New York City, was invalid as it was an unauthorized use of his executive power. *Id.* at 359, 482 N.E.2d at 7, 492 N.Y.S.2d at 528. The executive order prohibited employment discrimination by city contractors on the basis of sexual orientation. *Id.* at 353, 482 N.E.2d at 3, 492 N.Y.S.2d at 524.

"detailed and comprehensive"[36] executive orders and regulations in contrast with the Executive Order in the case at bar, which does not.[37]

The sole dissenter in *Bourquin*, Judge Smith, agreed with plaintiffs' contention that the Executive Order was unconstitutional because it exceeded the policy of the legislature.[38] Acknowledging that this court has consistently held that when an action by the executive is merely a means of implementing a state legislative policy, such action is constitutional.[39] Judge Smith concluded that the executive order did in fact violate the principle of separation of powers under the New York State Constitution because it was in excess of the legislative policy.[40]

As *Bourquin* demonstrates, the demarcation between each governmental branch is difficult to define. However, as this case points out, so long as an action taken by one branch is consistent with the policies contemplated by the other branches, and such action does not usurp power from another branch, the action taken will survive constitutional scrutiny under the doctrine of separation of powers.

---

35. 71 N.Y.2d 1, 517 N.E.2d 1350, 523 N.Y.S.2d 464 (1987). In *Boreali*, the court of appeals struck down a code governing tobacco smoking in public places, promulgated by the Public Health Council. *Id.* at 16, 517 N.E.2d at 1357-58, 523 N.Y.S.2d at 472. The court held that the program was in excess of the Public Health Council's authority as granted by the legislature. *Id.*

36. *Bourquin*, 85 N.Y.2d at 787, 652 N.E.2d 174, 628 N.Y.S.2d 621.

37. *Id.* at 787, 652 N.E.2d at 175, 628 N.Y.S.2d at 622.

38. *Id.* at 788, 652 N.E.2d at 175, 628 N.Y.S.2d at 622. *See* Matter of New York State Health Facilities Ass'n v. Axelrod, 77 N.Y.2d 340, 569 N.E.2d 860, 568 N.Y.S.2d 1 (1991); Clark v. Cuomo, 66 N.Y.2d 185, 486 N.E.2d 794, 495 N.Y.S.2d 936 (1985).

39. *Bourquin,* 85 N.Y.2d at 793, 652 N.E.2d at 178, 628 N.Y.S.2d at 625 (Smith, J., dissenting).

40. *Id.* (Smith, J., dissenting).