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**THE MORE THINGS CHANGE . . . :  
SUPERFICIAL STATE CONSTITUTIONAL  
ANALYSIS AT THE NEW YORK COURT OF  
APPEALS**

James A. Gardner<sup>\*</sup>

A state's separation of powers jurisprudence generally provides a good indication of the condition of its state constitutional adjudication. Because the federal Constitution is almost entirely unconcerned with states' purely internal decisions concerning the structure of state government,<sup>1</sup> adjudication of separation of powers issues under the state constitution is fully independent of federal doctrine and occurs in something approaching its purest form. The New York Court of Appeals' decision last term in *Bourquin v. Cuomo*,<sup>2</sup> a separation of powers case, thus reveals starkly that the court's state constitutional adjudication is in poor shape.

*Bourquin* concerned the constitutionality of a 1991 Executive Order issued by then-Governor Mario Cuomo which authorized the creation of a Citizens Utility Board (CUB), a private, non-profit organization intended to represent the interests of residential utility customers in proceedings before the Public

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\* Professor of Law, Western New England College School of Law. A version of this paper was originally presented at the Conference on State Constitutional Law: Adjudication and Reform, on March 1, 1996 at the Government Law Center, Albany Law School. In the interest of full disclosure, I wish to state that the executive order upheld by the Court of Appeals in *Bourquin v. Cuomo*, a decision which I criticize below, was drafted by my wife when she was Assistant Counsel to Governor Cuomo.

1. Because no individual rights are concerned, the Fourteenth Amendment is irrelevant and there is no federal "floor" to contend with. Nor do the kinds of policy considerations that sometimes favor uniformity in the individual rights area arise here. *Cf., e.g., State v. Florance*, 527 P.2d 1202 (Or. 1974). Perhaps the only federal constitutional provision that might apply is the Guarantee Clause, U.S. CONST. art. IV, § 4, but that clause is not judicially enforceable against the states. *See Luther v. Borden*, 48 U.S. 1 (1849).

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

Utilities Commission.<sup>3</sup> The Executive Order also directed state agencies to permit the CUB to include its literature, at its expense, in up to four state mailings each year.<sup>4</sup> The Governor had originally sought legislative approval for the creation of such an entity, but upon the legislature's refusal decided to proceed independently.<sup>5</sup> The court upheld the Executive Order against a claim that it violated the separation of powers under the state constitution.

Drawing primarily on several earlier decisions, the Court of Appeals held that separation of powers requires that "the Legislature make the critical policy decisions, while the Executive Branch's responsibility is to implement those policies."<sup>6</sup> Although no statute authorized the Governor to issue this particular Executive Order, the legislature had elsewhere expressed the desire that the interests of New York consumers be protected, and had implemented that desire by creating the Consumer Protection Board and directing it to "promote and encourage the protection of the legitimate interests of consumers

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3. *Id.* at 783, 652 N.E.2d at 172, 628 N.Y.S.2d at 619. Throughout its opinion, the court treats the Executive Order as though it actually authorizes the creation of the CUB, which the court seems to view almost as though it were some kind of executive branch agency. In fact, the Executive Order makes clear that the CUB is a purely private, voluntary membership organization, *see* Exec. Order No. 141, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.141, ¶ 1 (1991), for which gubernatorial "authorization" is unnecessary. The only governmental action authorized by the Executive Order is the granting of access to state mailings. Exec. Order No. 141, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.141, ¶ 3 (1991). My analysis of the court's opinion in the following discussion treats the CUB as the Court of Appeals conceived it, even though the Court's decision may rest on a misconception of the nature of the CUB.

4. Exec. Order No. 141, N.Y. COMP. CODES R. & REGS. tit. 9, § 4.141 (1991).

5. *See, e.g.*, Frank J. Prial, *Cuomo Fosters New Opposition to Utility Rises*, N.Y. TIMES, Jan. 4, 1991, at B2; Josh Barbanel, *State Considers Consumer Board*, N. Y. TIMES, Sept. 18, 1983, at 37.

6. *Bourquin*, 85 N.Y.2d at 785, 652 N.E.2d at 173, 628 N.Y.S.2d at 620.

within the state.”<sup>7</sup> Consequently, the Court of Appeals ruled, the Governor’s action did no more than implement an officially declared legislative policy — an unremarkable example of the state executive carrying out his constitutional responsibility to execute the law.<sup>8</sup>

The court’s decision in *Bourquin* adopts an extremely expansive interpretation of executive power — far more expansive, for example, than executive power under the federal Constitution. Under the court’s approach, the Governor may “execute” the law by issuing executive orders that carry out abstractly expressed legislative policy goals not only in ways expressly directed by the legislature, but also in ways which the legislature has not directed, and in fact has actually rejected.<sup>9</sup>

Of course, there is nothing wrong with such a ruling in principle; states are free to grant their governors extremely broad powers arising from expansive notions of the reach of positive law and of what it means to execute the law. Nevertheless, the court’s decision is problematic in two ways. First, the court makes no attempt to justify this broad view of executive power. That by itself would not be so bad if it were not for the second problem: the New York Constitution is full of indications,

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7. *Id.* at 785-86, 652 N.E.2d at 174, 628 N.Y.S.2d at 621 (quoting N.Y. EXEC. LAW § 553(2)(b) (McKinney 1982)).

8. *Id.* at 785-87, 652 N.E.2d at 173-175, 628 N.Y.S.2d at 620-22.

9. *Cf. e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (stating that the President lacks authority to take action expressly considered and rejected by Congress; to do so amounts to usurpation of legislative function); *American Power and Light Co. v. Securities & Exch. Comm’n*, 329 U.S. 90 (1946) (holding that Congress may not authorize the President to act by providing direction so vague that a reviewing court is unable to determine what the legislative policy is and what agency is to implement it); *Environmental Defense Fund v. Thomas*, 627 F. Supp. 566 (D.D.C. 1986) (holding that the President cannot by executive order interfere with specific legislative directives); *Administrative Procedure Act*, 5 U.S.C. § 706 (1977) (stating that courts must set aside government actions not in accordance with law). *But see Dames & Moore v. Regan*, 453 U.S. 654 (1981) (sustaining executive order that, although not specifically authorized by Congress, is consistent with congressional policies expressed in other statutes not directly applicable).

completely ignored by the court, that gubernatorial power should be construed *narrowly*.

The Court of Appeals based its interpretation of the Governor's power on Article IV, § 1 of the New York Constitution, which provides: "The executive power shall be vested in the governor . . ." <sup>10</sup> Had the court read further into the document, it would have found that the language of Article IV is a considerable overstatement: in fact, the executive power of the state is vested not only in the Governor, but also in the Attorney General,<sup>11</sup> the Comptroller,<sup>12</sup> the District Attorneys<sup>13</sup> and the Sheriffs<sup>14</sup> -- all independently elected officials in no way answerable to the Governor. The most logical explanation for this splintering of executive power is surely a distrust of the executive -- a distrust not shared by the framers of the federal Constitution, who believed the President would be weak,<sup>15</sup> and who therefore had no qualms about vesting all executive power in a single official.<sup>16</sup>

Most state constitutions provide for a division of executive power among independently elected executive branch officials much like New York's. Typically, executive power was divided during the Progressive reform era of the late nineteenth century; by and large, these reforms reflect an extreme distrust of concentrated executive power because of its potential for corruption.<sup>17</sup> In New York, however, this distrust has considerably older roots. The 1777 constitution, after an extensive preamble reciting the offenses of the King, provided that most executive branch officials were to be appointed by the

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10. *Bourquin*, 85 N.Y.2d at 784, 652 N.E.2d at 173, 628 N.Y.S.2d at 620 (citing N.Y. CONST. art. IV, § 1).

11. *Id.* (citing N.Y. CONST. art. V, § 1).

12. *Id.*

13. *Id.* (citing N.Y. CONST. art. XIII, § 13(a)).

14. *Id.*

15. See THE FEDERALIST No. 48 (Madison).

16. During the constitutional convention, the Framers debated and rejected a proposal for a multimember executive council. See James Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 46-47, 58-60, 357, 523 (Adrienne Koch ed. 1987).

17. See, e.g., James A. Henretta, *Foreword: Rethinking the State Constitutional Tradition*, 22 RUTGERS L. J. 819 (1991).

legislature.<sup>18</sup> The 1821 constitution provided for legislative appointment of the secretary of state, comptroller, treasurer, surveyor-general and commissary-general,<sup>19</sup> and popular election of the sheriffs.<sup>20</sup> Under the 1846 constitution, legislative appointments were eliminated in favor of popular election of the secretary of state, comptroller, treasurer, attorney general, state surveyor, canal commissioners and inspectors of state prisons.<sup>21</sup> Thus, in New York the Governor was not stripped of these powers — he never had them in the first place. A plausible explanation of this history, it seems to me, is either that the powers wielded by these officials were never considered “executive” powers in New York,<sup>22</sup> or that New Yorkers were always extremely suspicious of concentrated executive power. Either way, there is a good case to be made that executive power should presumptively be narrowly construed.

Other aspects of the constitutional structure of New York government suggest caution in interpreting the powers of the Governor. For example, whereas the executive is full-time, the legislature is part-time, a potentially serious disadvantage. Likewise, the Governor’s item-veto power<sup>23</sup> gives him a substantial degree of influence over the content of legislation that might counsel against broadening his powers in other ways.

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18. N.Y. CONST. pmbl, arts. 22, 23, 26 (1777), reprinted in THE FEDERAL AND STATE CONSTITUTIONS 2623 (Francis Newton Thorpe ed. 1909) [hereinafter “Thorpe”].

19. N.Y. CONST. art. IV, § 6 (1821), reprinted in Thorpe, *supra* note 18, at 2644.

20. N.Y. CONST. art. IV, § 8 (1821), reprinted in Thorpe, *supra* note 18, at 2645.

21. N.Y. CONST. art. V, §§ 1-4 (1846), reprinted in Thorpe, *supra* note 18, at 2680-81.

22. The nature of executive power is by no means fixed and certain. For example, the prosecutorial function may be considered executive, as in the Federal Constitution, *see, e.g.*, Morrison v. Olson, 487 U.S. 654 (1988), or judicial, *see, e.g.*, MISS. CONST. art. VI, § 173 (1890) (placing state attorney general in judicial branch). *See* Scott M. Matheson, *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J. L. & PUB. POLICY 1 (1993); Stephanie A.J. Dange, Note, *Is Prosecuting a Core Executive Function?* Morrison v. Olson and the Framers’ Intent, 99 YALE L.J. 1069 (1990).

23. N.Y. CONST. art. IV, § 7.

Moreover, the Court of Appeals seems to have given no thought to the ways in which the executive order at issue in *Bourquin* altered the degree of influence exercised by the legislative and executive branches over the substance of consumer protection. The law cited by the court provided for the creation of the Consumer Protection Board, an agency subject to oversight by standing legislative committees,<sup>24</sup> and whose executive director is confirmed by the Senate.<sup>25</sup> The Governor's executive order, by contrast, created an entity wholly free from any kind of legislative oversight or control.

I do not wish to be misunderstood to say that these considerations mean that the decision in *Bourquin* was necessarily wrong. On the contrary, there might well be good explanations for the court's views and good reasons to think that the considerations I have outlined here mean something other than what I have suggested. The problem with the court's decision, however, is that it did not give any such explanations or reasons. It merely imported a set of bromides about the separation of powers from federal doctrine<sup>26</sup> and applied them to the New York constitution as though it were identical to the federal Constitution. It is disappointing that years of criticism have had no discernible impact on the court's state constitutional adjudication except in the most highly visible cases involving individual rights. When the court's separation of powers jurisprudence is as careful and self-conscious as its best individual rights decisions, then will the court have made significant progress.

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24. Both the Senate and Assembly have standing committees devoted to consumer protection. See New York Senate, Rules of the Senate, 1990, Rule VII, § 1 (establishing standing Consumer Protection Committee); New York State Assembly, Rules of the Assembly, 1989, Rule IV, § 1 (establishing standing Consumer Affairs and Protection Committee).

25. N.Y. EXEC. LAW § 551 (McKinney 1982).

26. If anything has changed in the last decade, it is that the Court of Appeals has gotten more sophisticated about hiding its reliance on federal doctrine. Compare *Bourquin*, in which the court cites directly to a federal decision only once with *Under 21 v. City of New York*, 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522 (1985), in which the court unself-consciously copies federal doctrine wholesale.