In the Matter of Edgar A. King, as Supervisor of the Town of Northumberland, et al., Appellants, v. Mario M. Cuomo, as Governor of the State of New York, et al., Respondents.

No. 78

COURT OF APPEALS OF NEW YORK

81 N.Y.2d 247; 613 N.E.2d 950; 597 N.Y.S.2d 918; 1993 N.Y. LEXIS 1166

March 23, 1993, Argued
May 6, 1993, Decided

PRIOR HISTORY: Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered June 4, 1992, which modified, on the law, and, as modified, affirmed a judgment of the Supreme Court (Robert C. Williams, J.), entered in Albany County, granting a motion by defendants-respondents to dismiss the complaint/petition in a combined declaratory judgment action and CPLR article 78 proceeding challenging the constitutionality of the bicameral recall procedure used by the Legislature to reacquire Assembly Bill No. 9592-A of 1990 from the Governor's desk. The modification consisted of reversing so much of the judgment as dismissed the complaint/petition, and declaring that the recall procedure utilized by the Legislature with reference to Assembly Bill No. 9592-A of 1990 was constitutional.

Matter of King v Cuomo, sub nom. Matter of Seymour v Cuomo, 180 AD2d 215, reversed.

DISPOSITION: Order reversed, with costs, and judgment granted in accordance with the opinion herein.

HEADNOTES

Legislature - Recall Procedure - Return of Bill to Legislature Following Delivery to Governor - Constitutionality of Bicameral Recall Practice

1. The bicameral recall practice used by the Legislature to reacquire passed bills which have formally been sent to the Governor is unconstitutional. New York Constitution, article IV, § 7 expressly creates three routes by which a passed bill may become a law by gubernatorial action or inaction or be rejected by veto. Since the putative authority of the Legislature to recall a passed bill once it has been formally transmitted to the Governor is not found in the Constitution, the bicameral recall practice is not allowed under the Constitution. The recall practice undermines the integrity of the law-making process as well as the underlying rationale for the demarcation of authority and power in this process. Requiring that the Legislature adhere to the constitutional mandate ensures that the central law-making function remains reliable, consistent and exposed to civic scrutiny and involvement.

Courts - Justiciable Questions - Bicameral Recall Practice Authorized by Internal Rules of Senate and Assembly

2. The Judicial Branch may review the question whether the bicameral recall practice, by which the Legislature reacquires passed bills which have formally been sent to the Governor, is constitutional under NY Constitution, article IV, § 7, which prescribes how a bill becomes a law and explicitly allocates the distribution of authority and powers between the Executive and Legislative Branches. The courts do not trespass into the

wholly internal affairs of the Legislature when they review and enforce a clear and unambiguous constitutional regimen of this nature. The internal rules of the Assembly and the Senate, which reflect and even purport to create the recall practice, are entitled to respect but cannot immunize or withdraw the subsisting question of constitutional law-making power from judicial review.

Constitutional Law - Prospective Effect of Declaration of Unconstitutionality - Bicameral Recall Practice

3. In a combined CPLR article 78 proceeding and declaratory judgment action wherein the Court of Appeals held unconstitutional the bicameral recall practice by which the Legislature reacquired Assembly Bill No. 9592-A of 1990 that had been passed and formally sent to the Governor, an order compelling the Secretary of State to execute a certificate that Assembly Bill No. 9592-A became law on or about July 30, 1990, because the Governor failed to act on it within 10 days of its delivery to his desk on July 19, 1990 is not warranted. The recall practice has been in operation for over a century. It is impossible to calculate how many, and which, bills would be affected by a ritualistic approach to the relief related to the Court's declaration that the recall practice is not constitutionally authorized. In addition, despite the mitigation from the short four-month Statute of Limitations (CPLR 217), a retroactive ruling, or even a ruling with resuscitative effect, in the instant case would cause profoundly uncertain effects in particular and unwarranted disorder and confusion. Thus, the bicameral recall practice should be declared unconstitutional prospectively from May 6, 1993, the date of the Court of Appeals decision, forward.

COUNSEL: *Oliver & Oliver,* Albany *(Lewis B. Oliver, Jr.,* and *Harriet B. Oliver* of counsel), for appellants. I. Assembly Bill No. 9592-A became a law in like manner as if the Governor had signed it pursuant to New York State Constitution, article IV, § 7 because the bill was presented to the Governor on July 19, 1990, and the bill was not returned by the Governor with his objections (veto) within 10 days after it was presented to him. *(Matter of Wendell v Lavin,* 246 NY 115; *Schuyler v South Mall Constructors,* 32 AD2d 454; *People ex rel. Gilbert v Wemple,* 125 NY 485; *Oneida Sav. Bank v Tese,* 108 AD2d 1042; *City of Buffalo v Lawley,* 6 AD2d 66; *Zarrell v Gutenplan Assocs.,* 111 Misc 2d 340; *Poupore v Seguin,* 82 Misc 2d 1; *City of Rye v Ronan,* 67 Misc 2d 972; *People v Devlin,* 33 NY 269; *People ex rel. Argus Co. v Palmer,* 146 NY 406.) II. This Court should declare that Assembly Bill No. 9592-A became a law on or about July 30, 1990 because the recall procedure utilized by the Legislature in this case was not authorized by the rules of the Senate and Assembly and involved a joint resolution that was not voted upon in violation of Rules of the Assembly, rule II, § 4 (b), Rules of the Assembly, rule III, § 5 (f) and Rules of the Senate, rule VI, § 9 (e) which provide that a bill may be recalled only by a vote of the members of the Assembly and Senate. *(People v Devlin,* 33 NY 269; *New York Pub. Interest Research Group v Steingut,* 40 NY2d 250; *Matter of Board of Educ. v City of New York,* 41 NY2d 535; *Norwick v Rockefeller,* 33 NY2d 537; *Matter of Schneider v Rockefeller,* 31 NY2d 420; *Finger Lakes Racing Assn. v New York State Off-Track Pari-Mutuel Betting Commn.,* 30 NY2d 207; *People v Supervisors of Orange County,* 17 NY 235; *City of Rye v Ronan,* 67 Misc 2d 972, 40 AD2d 950; *Franklin Natl. Bank v Clark,* 26 Misc 2d 724.) III. The Secretary of State should be compelled to execute a certificate as to when Assembly Bill No. 9592-A became law or that the bill became law on or about July 30, 1990. *(Whalen v Wagner,* 2 Misc 2d 89, 3 AD2d 936, 4 NY2d 575; *Helm v Day,* 153 App Div 931; *People v Devlin,* 33 NY 269.)

Robert Abrams, Attorney-General, Albany *(Lawrence L. Doolittle, Jerry Boone* and *Peter H. Schiff* of counsel), for respondents. I. The court below properly dismissed this case on separation of powers grounds. *(Heimbach v State of New York,* 59 NY2d 891; *City of Rye v Ronan,* 67 Misc 2d 972, 40 NY2d 950; *Zimmerman v State of New York,* 76 Misc 2d 193; *Saxton v Carey,* 44 NY2d 545; *Matter of Board of Educ. v City of New York,* 41 NY2d 535; *Norwick v Rockefeller,* 70 Misc 2d 923, 33 NY2d 537; *Wein v Carey,* 41 NY2d 498; *People v Devlin,* 33 NY 269.) II. The recall procedure used by the Legislature with the concurrence of the Governor does not violate the Constitution. *(People v Devlin,* 33 NY 269; *Heimbach v State of New York,* 59 NY2d 891; *Saxton v Carey,* 44 NY2d 545; *New York Pub. Interest Research Group v Steingut,* 40 NY2d 250.) III. Both plaintiffs and the court are bound by the entries in the legislative journals. *(Heimbach v State of New York,* 59 NY2d 891; *City of Rye v Ronan,* 67 Misc 2d 972, 40 AD2d 950; *Zimmerman v State of New York,* 76 Misc 2d 193.) IV. The remedy plaintiffs seek may not be granted. *(The Pocket Veto Case,* 279 US 655; *Chevron Oil Co. v Huson,* 404 US 97; *Gager v White,* 53 NY2d 475, *cert denied sub nom. Guertin Co. v Cachat,* 454 US 1086; *Gurnee v Aetna Life*

& Cas. Co., 55 NY2d 184, 459 US 837; *Matter of McCann v Scaduto,* 71 NY2d 164.)

JUDGES: Chief Judge Kaye and Judges Simons and Titone concur with Judge Bellacosa; Judge Smith dissents in part in a separate opinion in which Judge Hancock, Jr., concurs.

OPINION BY: Bellacosa, J.

OPINION

[*250] [**951] [***919] Bellacosa, J.

The bicameral "recall" practice used by the Legislature to reacquire Assembly Bill No. 9592-A of 1990 from the Governor's desk is not authorized by article IV, § 7 of the New York State Constitution. The Constitution prescribes the respective powers of the Executive and the Legislative Branches as to how a passed bill becomes a law or is rejected. The order of the Appellate Division, therefore, should be reversed and the challenged procedure should be declared unconstitutional, but only prospectively.

Assembly Bill No. 9592-A, entitled "AN ACT to amend the agriculture and markets law, in relation to the siting of solid waste management-resource recovery facilities within agricultural districts," was passed by the Assembly and the Senate on June 28, 1990 and June 29, 1990, respectively. It was formally sent to the Governor on July 19, 1990. The next day, according to the official journals of the Legislature, the Assembly adopted a resolution, with which the Senate concurred, requesting that the Governor return the bill to the Legislature. The Executive Chamber accommodated the request on the same day.

Appellants brought their combined CPLR article 78 and declaratory judgment action seeking a ruling (1) that the method used by the Legislature to retrieve the passed bill is unconstitutional; and (2) that the passed bill, in effect, automatically became law because the Governor failed to act on it within 10 days of its delivery to his desk on July 19, 1990. Supreme Court dismissed the action and the Appellate Division modified to declare the recall practice constitutional. Appellants are before this Court by an appeal taken as of right on a substantial constitutional issue.

[*251] I.

Preliminarily, the State defendants argue that the Judicial Branch may not review the constitutionality of this recall practice, as it would be an intrusion on [**952] [***920] the inviolate roles of the separate law-making Branches. We conclude that the courts do not trespass "into the wholly internal affairs of the Legislature" *(Heimbach v State of New York,* 59 NY2d 891, 893, *appeal dismissed* 464 US 956) when they review and enforce a clear and unambiguous constitutional regimen of this nature. In *Heimbach v State of New York (supra),* by sharp contrast, the internal procedural issue involved how the Clerk of the Senate recorded and certified a roll call of votes *(compare, Matter of Board of Educ. v City of New York,* 41 NY2d 535, 538). Our precedents are firm that the "courts will always be available to resolve disputes concerning the scope of that authority which is granted by the Constitution to the other two branches of the government" *(Saxton v Carey,* 44 NY2d 545, 551; *New York State Bankers Assn. v Wetzler,* 81 NY2d 98, 102; *see also, Myers v United States,* 272 US 52, 116; *Matter of New York State Inspection, Sec. & Law Enforcement Empls. v Cuomo,* 64 NY2d 233, 239). That is precisely what is being done here *(see, Wolfe v McCaull,* 76 Va 876, 880 [1882] [constitutionality of recall procedure is a justiciable issue]).

The internal rules of the Assembly and the Senate, which reflect and even purport to create the recall practice, are entitled to respect. However, those rules cannot immunize or withdraw the subsisting question of constitutional law-making power from judicial review. Since the authority of the Legislature is "wholly derived from and dependent upon the Constitution" *(Matter of Sherrill v O'Brien,* 188 NY 185, 199), the discrete rules of the two houses do not constitute organic law and may not substitute for or substantially alter the plain and precise terms of that primary source of governing authority. The rule-making authority of article III, § 9 prescribes that "[e]ach house shall determine the rules of *its own proceedings"* (emphasis added). Contrary to the assertion of the dissent, that authorization cannot justify rules which extend beyond the Legislature's "own proceedings" and are inextricably intertwined with *proceedings* pending entirely before the Executive. These rules substantially affect Executive *proceedings* after the Legislature's proceedings, with respect to a passed bill, have formally ended by transmittal of the passed bill to the Governor's desk.

The challenged recall practice significantly unbalances the [*252] law-making options of the Legislature and the Executive beyond those set forth in the Constitution. By modifying the nondelegable obligations and options reposed in the Executive, the practice compromises the central law-making rubrics by adding an expedient and uncharted bypass. The Legislature must be guided and governed in this particular function by the Constitution, not by a self-generated additive *(see, People ex rel. Bolton v Albertson,* 55 NY 50, 55).

II.

Article IV, § 7 of the State Constitution prescribes how a bill becomes a law and explicitly allocates the distribution of authority and powers between the Executive and Legislative Branches. The key provision grants law-making authority from the People as follows:

"[e]very bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; *if he approve, he shall sign it;* but *if not, he shall return it with his objections* to the house in which it shall have originated ... *[i]f any bill shall not be returned by the governor within ten days* (Sundays excepted) after it shall have been presented to him, *the same shall be a law in like manner as if he had signed it"* (emphasis added).

The description of the process is a model of civic simplicity: (1) Approval; (2) Rejection by Veto; or (3) Approval by Inaction. The Constitution thus expressly creates three routes by which a passed bill may become a [**953] [***921] law by gubernatorial action or inaction or be rejected by veto.

The putative authority of the Legislature to recall a passed bill once it has been formally transmitted to the Governor "is not found in the constitution" *(People v Devlin,* 33 NY 269, 277). We conclude, therefore, that the practice is not allowed under the Constitution. To permit the Legislature to use its general rule-making powers, pertaining to in-house procedures, to create this substantive authority is untenable. As this Court stated in *Devlin* "[w]hen both houses have ... finally passed a bill, and sent it to the governor, *they have exhausted their powers* upon it" *(id.,* at 277 [emphasis added]). That expression and principle apply with equal force here, even though in *Devlin* the recall was attempted by only one [*253] house rather than both *(see, Wolfe v McCaull,* 76 Va 876, 883, *supra).*

When language of a constitutional provision is plain and unambiguous, full effect should be given to "the intention of the framers ... as indicated by the language employed" and approved by the People *(Settle v Van Evrea,* 49 NY 280, 281 [1872]; *see also, People v Rathbone,* 145 NY 434, 438). In a related governance contest, this Court found "no justification ... for departing from *the literal language of the constitutional provision" (Anderson v Regan,* 53 NY2d 356, 362 [emphasis added]). As we stated in *Settle v Van Evrea:*

"[I]t would be dangerous in the extreme to extend the operation and effect of a written Constitution by construction beyond the fair scope of its terms, merely because a restricted and more literal interpretation might be inconvenient or impolitic, or because a case may be supposed to be, to some extent, within the reasons which led to the introduction of some particular provision plain and precise in its terms.

"That would be *pro tanto* to establish a new Constitution and do for the people what they have not done for themselves" (49 NY 280, 281, *supra).*

Thus, the State's argument that the recall method, in practical effect and accommodation, merely fosters the underlying purpose of article IV, § 7 is unavailing *(see, New York State Bankers Assn. v Wetzler,* 81 NY2d 98, 104, *supra).*

If the guiding principle of statutory interpretation is to give effect to the plain language *(Ball v Allstate Ins. Co.,* 81 NY2d 22, 25; *Debevoise & Plimpton v New York State Dept. of Taxation & Fin.,* 80 NY2d 657, 661; McKinney's Cons Laws of NY, Book 1, Statutes § 94), "[e]specially should this be so in the interpretation of a written Constitution, an instrument framed deliberately and with care, and adopted by the people as the organic law of the State" *(Settle v Van Evrea,* 49 NY, at 281, *supra).* These guiding principles do not allow for interstitial and interpretative gloss by the courts or by the other Branches themselves that substantially alters the specified law-making regimen. Courts do not have the leeway to construe their way around a self-evident constitutional provision by validating an inconsistent "practice and usage of those charged with implementing the laws" *(Anderson v Regan,* 53 NY2d 356, 362, *supra; see also, People ex rel. Burby v Howland,* [*254] 155 NY 270, 282; *People ex rel. Crowell v Lawrence,* 36

Barb 177, *affd* 41 NY 137; *People ex rel. Bolton v Albertson*, 55 NY 50, 55, *supra).*

The New York Legislature's long-standing recall practice has little more than time and expediency to sustain it. However, the end cannot justify the means, and the Legislature, even with the Executive's acquiescence, cannot place itself outside the express mandate of the Constitution. We do not believe that supplementation of the Constitution in this fashion is a manifestation of the will of the People. Rather, it may be seen as a substitution of the People's will expressed directly in the Constitution.

[**954] [***922] The Governor has been referred to as the "controlling element" of the legislative system (4 Lincoln, The Constitutional History of New York, at 494 [1906]). The recall practice unbalances the constitutional law-making equation, which expressly shifts power solely to the Executive upon passage of a bill by both houses and its transmittal to the Executive. By the ultra vires recall method, the Legislature significantly suspends and interrupts the mandated regimen and modifies the distribution of authority and the complementing roles of the two law-making Branches. It thus undermines the constitutionally proclaimed, deliberative process upon which all people are on notice and may rely. Realistically and practically, it varies the roles set forth with such careful and plain precision in the constitutional charter. The limbo status to which a passed bill is thus consigned withdraws from or allows evasion of the assigned power granted only to the Executive to approve or veto a passed bill or to allow it to go into effect after 10 days of inaction.

Though some practical and theoretical support may be mustered for this expedient custom *(see, e.g.,* 4 Lincoln, *op. cit.,* at 501), we cannot endorse it. Courteous and cooperative actions and relations between the two law-making Branches are surely desirable and helpful, but those policy and governance arguments do not address the issue to be decided. Moreover, we cannot take that aspirational route to justify this unauthorized methodology.

The inappropriateness of this enterprise, an "extraconstitutional method for resolving differences between the legislature and the governor," also outweighs the claimed convenience (Zimmerman, The Government and Politics of New York State, at 152). For example, "[t]his procedure 'creates a negotiating [*255] situation in which, under the threat of a full veto, the legislature may recall a bill and make changes in it desired by the governor, thus allowing him to exercise *de facto* amendatory power' "(Fisher and Devins, *How Successfully Can the States' Item Veto be Transferred to the President?,* 75 Geo LJ 159, 182, quoting Benjamin, *The Diffusion of the Governor's Veto Power,* 55 State Govt 99, 104 [1982]).

Additionally, the recall practice "affords interest groups another opportunity to amend or kill certain bills" (Zimmerman, *op. cit.,* at 152), shielded from the public scrutiny which accompanies the initial consideration and passage of a bill. This "does not promote public confidence in the legislature as an institution" because "it is difficult for citizens to determine the location in the legislative process of a bill that may be of great importance to them" *(id.,* at 145, 152). Since only "insiders" are likely to know or be able to discover the private arrangements between the Legislature and Executive when the recall method is employed, open government would suffer a significant setback if the courts were to countenance this long-standing practice.

In sum, the practice undermines the integrity of the law-making process as well as the underlying rationale for the demarcation of authority and power in this process. Requiring that the Legislature adhere to this constitutional mandate is not some hypertechnical insistence of form over substance, but rather ensures that the central law-making function remains reliable, consistent and exposed to civic scrutiny and involvement.

We are satisfied also that legitimate correction of mere technical oversights or errors in passed bills may be accomplished by chapter amendments, through messages of necessity and other available mechanisms. It is no justification for an extraconstitutional practice that it is well intended and efficient, for the day may come when it is not so altruistically exercised.

Appellants are entitled, therefore, to a judicial declaration that the recall practice is not constitutionally authorized.

III.

The particular remedy and relief appropriate to this case is a critically distinct issue. Appellants seek an order compelling the Secretary of State to execute a certificate that Assembly Bill No. 9592-A became law on

or about July 30, 1990. [*256] Though the recall practice is not constitutionally [**955] [***923] authorized, neither is the mandamus relief warranted.

Despite the removal of the subject bill from the Governor's desk, logic and sound public policy do not compel or persuade us to treat the bill in this case as having been on the Executive's desk for the requisite 10 days, within the meaning of article IV, § 7. Also, the bill in question lapsed when the 1990 session of the Legislature ended, and resuscitation by judicial decree in the fashion requested would be a disproportionate remedy and would " 'wreak more havoc in society than society's interest in stability will tolerate' " *(Gager v White,* 53 NY2d 475, 483, *cert denied sub nom. Guertin Co. v Cachat,* 454 US 1086; *see also, Hurd v City of Buffalo,* 41 AD2d 402, *affd* 34 NY2d 628). Prospective application of a new constitutional rule is not uncommon where it would have a "broad, unsettling effect" *(Matter of McCann v Scaduto,* 71 NY2d 164, 178; *see also, Foss v City of Rochester,* 65 NY2d 247, 260; *City of Rochester v Chiarella,* 65 NY2d 92, 96; *Gurnee v Aetna Life & Cas. Co.,* 55 NY2d 184, 192- 193, *cert denied* 459 US 837; *Hurd v City of Buffalo,* 41 AD2d 402, *supra; New York Pub. Interest Research Group v Steingut,* 40 NY2d 250, 261). It is well established that "the courts should not act 'so as to cause disorder and confusion in public affairs even though there may be a strict legal right' " *(Matter of Hellerstein v Assessor of Town of Islip,* 37 NY2d 1, 13-14, quoting *Matter of Andresen v Rice,* 277 NY 271, 282 [declaring unconstitutional one of the oldest statutes and practices in the history of New York dating back to 1788]).

The recall practice has been in operation for over a century *(see,* 4 Lincoln, *op. cit.,* at 499-501). Between 1932 and 1980 a total of 2,131 bills were recalled; while most bills are recalled only once, in 1939, 1963, 1966, 1968 and 1976 a single bill was recalled three times and in 1977 three bills were recalled three times *(see,* Zimmerman, *op. cit.,* at 149-151; *see also,* Fisher and Devins, *How Successfully Can the States' Item Veto be Transferred to the President?,* 75 Geo LJ 159, 182). Often a bill that has been recalled is never resubmitted to the Governor *(see,* Zimmerman, *op. cit.,* at 150-151 [700 of the 2,131 bills recalled never resubmitted]). It is impossible to calculate how many, and which, bills would be affected by a ritualistic approach to the relief related to our declaration that the recall practice is not constitutionally authorized. In addition, despite the mitigation from the short four-month Statute of Limitations (CPLR 217), a retroactive ruling, or even a ruling [*257] with resuscitative effect, in the instant case would cause profoundly uncertain effects in particular and unwarranted "disorder and confusion" *(Matter of Hellerstein v Assessor of Town of Islip,* 37 NY2d, at 14, *supra).*

Accordingly, the order of the Appellate Division should be reversed, with costs, and the bicameral recall practice should be declared unconstitutional prospectively from this date forward.

DISSENT BY: Smith, J.

DISSENT

Smith, J. (Dissenting in part). The principal issue in this case is whether the procedure used by the Legislature for recalling bills which have been presented to the Governor, a procedure in use since 1865, violates article IV, § 7 of the State Constitution. The secondary issue is whether the bill in this case became a law in like manner as if the Governor had signed it. I agree with the majority's conclusion on the latter issue that the bill was not on the Governor's desk for the requisite 10 days *(see,* majority opn, at 256) and, thus, did not become a law "in like manner as if he [governor] had signed it" (NY Const, art IV, § 7). However, I disagree with the majority's conclusion, as to the primary issue, that the power of the [**956] [***924] Legislature to recall a bill that has been presented to the Governor " 'is not found in the constitution' " and, therefore, does not exist (majority opn, at 252). Because I believe that the long-standing practice by the Legislature of recalling bills fits within the constitutional authority of the Legislature to "determine the rules of its own proceedings" (NY Const, art III, § 9) and does not violate article IV, § 7 of the State Constitution, I dissent and vote to affirm that part of the Appellate Division order that so holds.

The undisputed facts follow: On June 28, 1990, the New York State Assembly unanimously voted to pass Assembly Bill No. 9592-A, entitled "AN ACT to amend the agriculture and markets law, in relation to the siting of solid waste management-resource recovery facilities within agricultural districts", and Clerk of the Assembly duly certified the bill. The next day, the Senate also passed the bill by unanimous vote. On July 19, 1990, the bill, together with the certificates of the Temporary President of the Senate and Speaker of the Assembly,

were presented to the Governor for signature. The following day, pursuant to Rules of the Assembly, rule II, § 4 (d), [1] a [*258] member who introduced the bill, Mr. Parment, moved to recall the bill from the Governor. On a form referred to as "JC-14 (To Senate) Recall of Assembly bill from Governor", the Assembly resolved, if the Senate concur, "[t]hat a respectful message be sent to the Governor requesting the return to the Assembly of Assembly bill (No. 9592-A)". Upon concurrence by the Senate *(see,* Rules of Senate, rule VI, § 9 [a]), [2] the resolution was delivered to the Governor, who complied and returned the bill to the Assembly the same day. The Legislature's practice of recalling bills from the Governor dates back to April 21, 1865.

1 Rules of the Assembly (1989-1990), rule II, § 4 (d) provides: "A motion to recall a bill from the Governor for correction may be made by or on behalf of the member who introduced the bill, under any order of business, and the votes for consideration and amendment of such bill may be taken immediately upon its return."

2 Rules of the Senate (1989-1990), rule VI, § 9 (a) provides, in part: "[R]esolutions recalling bills from or returning bills to the Governor or the Assembly, or relating to adjournment, may be introduced at any time for immediate consideration."

Rule VIII, § 8 states: "All bills recalled from the Governor for the purpose of amendment, if amended, and all Senate bills amended by the Assembly, and returned to the Senate, for its concurrence, and all bills amended by the report of a conference committee, shall be subject to the provisions of section 1 of this Rule."

Section 1 of rule VIII outlines the procedures for passage of "bills on desks".

Appellants commenced this combined CPLR article 78 proceeding and declaratory judgment action seeking, among other things, a declaration that Assembly Bill No. 9592-A became law 10 days after it was presented to the Governor, or on July 30, 1990. The complaint-petition alleged that the bill became a law "in like manner as if the Governor had signed it pursuant to New York State Constitution Article 4, Section 7, because the bill was presented to the Governor on July 19, 1990, and the bill was not returned by the Governor with his objections (veto) within ten days after it was presented to him."

Appellants argued that the procedure used by the Assembly and the Senate to recall the bill from the Governor after it was presented to him violated article IV, § 7 of the State Constitution. [3] Respondentscontended, among other things, that since [*259] the bill was recalled by the Legislature pursuant to its internal rules, and the bill was not on the Governor's desk for 10 days, it did not become law pursuant to article IV, § 7 of the State Constitution. Respondents contended further that the manner and means of presenting a bill to the Governor are matters solely within the province of the [**957] [***925] Legislature and, thus, the complaint-petition failed to state a cause of action. Supreme Court dismissed the complaint-petition, stating:

3 New York Constitution, article IV, § 7 provides, in part: "Every bill which shall have passed the senate and assembly shall, before it becomes a law, be presented to the governor; if he approve, he shall sign it; but if not, he shall return it with his objections to the house in which it shall have originated, which shall enter the objections at large on the journal, and proceed to reconsider it .... If any bill shall not be returned by the governor within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it".

"As is pointed out in *Heimbach [v State of New York,* 59 NY2d 891], *supra,* at page 893 ' "[I]t is not the province of the courts to direct the legislature how to do its work".' *[sic]* ...

"This Court declines in the particular facts in this case to intervene and interfere with the legislative procedure because to do so would interfere with the separation of powers as commented on in *Heimbach."*

The Appellate Division, Third Department, modified, on the law, by reversing so much of Supreme Court's order as dismissed the complaint-petition, declared the recall procedure utilized by the Legislature in 1990 with reference to Assembly Bill No. 9592-A constitutional, and, as so modified, affirmed (180 AD2d 215). The Court found that "nothing in the State Constitution ... either authorizes or proscribes the recall process ... [and that] specific authority is provided for each house to 'determine the rules of its own proceedings' (NY Const, art III, § 9)" *(id.,* at 217). Appellants appeal as of right (CPLR 5601 [b] [1]).

Contrary to the majority's position, the recall procedure utilized by the Legislature does not "undermine ... the integrity of the law-making process" (majority opn, at 255). Rather, it exemplifies the constitutionally authorized power of the Legislature to "determine the rules of its own proceedings" (NY Const, art III, § 9). In *Heimbach v State of New York* (59 NY2d 891, 893), this Court stated that "based upon our respect for the basic polity of separation of powers and the proper exercise of judicial restraint, we will not intrude into the wholly internal affairs of the Legislature." Here, the Legislature had in place internal rules for recalling bills which had been presented to the Governor, prior to their [*260] becoming law. Pursuant to Rules of the Assembly, rule II, § 4 (d), the Assembly prepared a printed form "JC-14" to commence recall procedures regarding Assembly Bill No. 9592-A. Using its internal procedures, the Senate concurred with the Assembly resolution to recall the bill. Again using internal rules, the Assembly forwarded the request for recall to the Governor, who, as he had done many times in the past, immediately complied with the request. There is nothing before the Court to indicate that the actions by the Legislature in recalling Assembly Bill No. 9592-A from the Governor the day after it was sent to him constituted anything other than "the wholly internal affairs of the Legislature," into which we should not intrude.

The majority's argument that since the power of the Legislature to recall a bill which has been presented to the Governor is not expressly found in the Constitution it does not exist *(see*, majority opn, at 252) must fail. Article IV, § 7 of the State Constitution, entitled "Action by governor on legislative bills; reconsideration after veto", addresses the action by the Governor on legislative bills and what gubernatorial action results in a bill becoming a law. The only reference to legislative action is in regard to reconsideration of a bill after veto by the Governor. Thus, no inference of any kind can be drawn from the omission from article IV, § 7 of a provision expressly granting recall powers to the Legislature.

Moreover, as stated, the Legislature's practice of recalling bills that have been presented to the Governor dates back to 1865. NY Constitution, article IV, § 7 has been amended several times during this period. The fact that no prohibition on the Legislature's practice of recalling bills has been added suggests that the practice was intended to be permitted.

Appellants' reliance on *People v Devlin* (33 NY 269) to support their position that the act of the Legislature in recalling Assembly Bill No. 9592-A from the Governor violates the State Constitution is misplaced. In *Devlin (supra)* the Assembly sent a bill, which had been passed by both the Senate and the Assembly, to the Governor for his [**958] [***926] approval. The next day, the Assembly, without concurrence from the Senate, requested that the Governor return the bill to the Assembly. The same day, the Governor returned the bill to the Assembly with a message stating that it was so returned upon the request of the Assembly. After several revisions by the Assembly, which were contested by the Senate, the bill [*261] was signed by the Governor. This Court concluded that based on the provisions of both the Constitution and certain statutes, the bill became the law of the State *(id.*, at 276). The Court then considered the following question:

"After the passage of a bill, in the legal and constitutional form, by both houses of the legislature, and the same has been transmitted by them to the governor, in the manner provided by the constitution, have the two houses exhausted their power over it, or can they, or can either of the said houses, without the consent of the other, recall the bill, by resolution, and revest themselves with power further to act upon it?" *(Id.*, at 276-277.)

The Court stated that if the houses of the Legislature do possess the power, "it is not found in the constitution; it is not found in the statute; it is not shown to be the custom or usage" *(id.*, at 277). The Court stated further that:

"Although each house shall determine the rules of 'its own proceedings,' no rule for such a proceeding as that of sending for a bill in the possession of the governor, has been shown to exist .... If the assembly possessed the power of recalling bills from the governor, after being passed by both houses and sent to him, it is not found in parliamentary law, and no custom of that kind is shown .... By no rule or custom shown, nor by the exercise of common reason, could one house, by their action, undo, annul or change what both had solemnly done, under their solemn legislative sanction, according to all constitutional forms, and according to their published rules and forms of law" *(id.*, at 277- 278).

Here, the bill was recalled by concurrent resolution of the Assembly and Senate and agreement by the Governor, not by a one-house recall as was the case in

Devlin (supra). In addition, Rules of the Assembly, rule II, § 4 (d) and Rules of the Senate, rule VI, § 9 specifically address the Legislature's internal procedures for recalling bills. Furthermore, the longstanding practice of recalling bills from the Governor, through concurrent resolution of the Assembly and Senate dates back to 1865. Thus, it cannot be said that the power of the Legislature to recall bills from the Governor is not grounded in the internal rules of the Legislature or in custom.

[*262] Moreover, nothing in the language of the Constitution indicates that the act of recalling a bill once it had been presented to the Governor for approval or objection, violates the Constitution. To the contrary, the State Constitution vests in the Assembly and the Senate the power to "determine the rules of its own proceedings" (NY Const, art III, § 9).

Chief Judge Kaye and Judges Simons and Titone concur with Judge Bellacosa; Judge Smith dissents in part in a separate opinion in which Judge Hancock, Jr., concurs.

Order reversed, with costs, and judgment granted in accordance with the opinion herein.