NON-ENFORCEMENT BY A LOCAL EXECUTIVE: LIMITATIONS OF JUDICIAL REVIEW AND CONSIDERATIONS TO RESTRAIN THE USE OF EXECUTIVE POWER

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INTRODUCTION

A headline in the *New York Times* read, "Mayor Need Not Enforce Certain Laws."[1] The first sentence of a *New York Law Journal* article proclaimed that executive officials in New York could "refuse to enforce legislative enactments they deem improper."[2] These broad proclamations of executive power stemmed from a series of events that culminated in a decision by New York's highest court upholding Mayor Michael R. Bloomberg's refusal to enforce the Equal Benefits Law because he believed it to be contrary to state and federal law.[3] The court's decision is remarkable for its willingness to support executive power coupled with its failure to explain the limitations of that support.

Mayor Bloomberg's refusal to enforce the Equal Benefits Law is only one recent example of the extent of power available to the executive. The use of executive power to refuse enforcement of legislative enactments is not new, but it has been more prevalently used and debated in the last few decades, particularly at the federal level. This Note will consider the issue of non-enforcement at the local level through an analysis of the choices made by the executive

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1. Winnie Hu, *Mayor Need Not Enforce Certain Laws, Court Rules*, N.Y. TIMES, Feb. 15, 2006, at B3.

2. John Caher, *Court Upholds Refusal to Enforce Council Law*, N.Y.L.J., Feb. 15, 2006, at 1 (col. 4).

3. *See* Council of the City of New York v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006). The Equal Benefits Law required city contractors to extend employment benefits to their employees' same-sex partners to the same extent as to their employees' spouses. *See* NEW YORK, N.Y., ADMIN. CODE § 6-126 (2007).

and judicial branches in *Council of the City of New York v. Bloomberg*.[4] A comparison of the New York Court of Appeals's choice with those made by other courts in response to non-enforcement cases supports the conclusion that the *Bloomberg* court erred by commenting on the propriety of the Mayor's choice to refuse enforcement rather than simply deciding the underlying legal issue before it, particularly in light of the cursory treatment it gave to an important issue of separation of powers. The court's reasoning fails to support the breadth of its assertions; as such, the holding should be read narrowly as a product of factors specific to the case. By analyzing the circumstances faced by Mayor Bloomberg, this Note will offer guidance to future executives faced with a similar choice.

The specific instance of non-enforcement illustrated in *Bloomberg* is a local executive's choice not to enforce a law passed by the local legislature based on that executive's interpretation of higher law. The discussion of this circumstance will draw on principles taken from other literature about non-enforcement; however, those principles must be adapted to the *Bloomberg* situation. There is a large body of literature available on the issue of non-enforcement by the President of the United States, but it is dependent on the authors' conceptions of the role of the President in interpreting the United States Constitution.[5] There is some literature regarding non-enforcement by local executives, but it focuses on the complexities raised by cases where a local executive refuses to interpret state or federal law.[6] Both sets of literature so far fail to address the *Bloomberg* situation specifically. This Note seeks to apply the non-enforcement debate to Mayor Bloomberg's choice in order to offer limiting principles for the *Bloomberg* court's broad assertion of executive power.

4. 846 N.E.2d 433.

5. *E.g.*, William P. Barr, *Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992*, 15 CARDOZO L. REV. 31 (1993); Frank H. Easterbrook, *Presidential Review*, CASE W. RES. L. REV 905 (1989); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000); Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1993); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389 (1987); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO L.J. 217 (1994); Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735 (1993); Christine E. Burgess, Note, *When May a President Refuse to Enforce the Law?*, 72 TEX. L. REV. 631 (1993).

6. *See, e.g.*, David J. Barron, *Why (and When) Cities Have a Stake in Enforcing the Constitution*, 115 YALE L.J. 2218 (2006); Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565 (2005).

Section I of this Note provides background on the topic of non-enforcement, including both judicial and academic evaluations of this executive power.[7] Section II details the actions of Mayor Bloomberg, the litigation that ensued, and the judicial resolution of the case.[8] Section III focuses on the unusual choice made by the New York Court of Appeals to affirm the propriety of Mayor Bloomberg's actions.[9] Section III's analysis concludes that the *Bloomberg* court's wide-ranging support for executive power was dictum and was not adequately supported by the court's reasoning. Section IV of this Note offers advice to state and local executives who might consider acting upon the *Bloomberg* court's affirmation of executive power and counsels them to consider the particular circumstances of Mayor Bloomberg's choice as the reason for its acceptability.[10] Section IV analyzes, in the context of *Bloomberg*, the justifications for and concerns about non-enforcement found in academic literature and judicial opinions. By demonstrating the ways in which the specific circumstances in *Bloomberg* justified the Mayor's choice, Section IV offers five factors that local executives should consider when deciding whether to enforce a law: (A) whether the executive is coordinate with the legislature which passed the law in question;[11] (B) whether the executive is confident that the law in question is invalid;[12] (C) whether the executive has an unusual stake in the dispute with the legislature;[13] (D) whether the law in question was vetoed by the executive;[14] and (E) whether non-enforcement would affect the justiciability of the underlying legal issue.[15]

I.
THE NON-ENFORCEMENT DEBATE

Views on the executive's authority not to enforce an act of Congress on the belief that the enactment is unconstitutional "span the . . . constitutional spectrum."[16] At one end of the spectrum, the

7. *See infra* notes 16–79 and accompanying text.
8. *See infra* notes 80–138 and accompanying text.
9. *See infra* notes 139–59 and accompanying text.
10. *See infra* notes 160–225 and accompanying text.
11. *See infra* notes 160–82 and accompanying text.
12. *See infra* notes 183–98 and accompanying text.
13. *See infra* notes 199–206 and accompanying text.
14. *See infra* notes 207–13 and accompanying text.
15. *See infra* notes 214–25 and accompanying text. The term "underlying legal issue" will be used throughout this Note to refer to the question of law raised by a given enactment, as opposed to the question of the appropriateness of the executive's choice to refuse enforcement.
16. Johnsen, *supra* note 5, at 9.

Ninth Circuit in *Lear Siegler, Inc., v. Lehman* condemned all non-enforcement as an absolute line-item veto power that the executive does not possess.[17] At the other end of the spectrum, Michael Stokes Paulsen presents a constitutional and historical argument to support the President's power to make independent constitutional interpretations which allow him to refuse to enforce both acts of Congress and decisions of the judiciary.[18] The continuum is filled in by scholars, judges, and Attorneys General, each with different conceptions of when the use of non-enforcement by an executive is appropriate.[19]

This Note focuses on the *Bloomberg* court's decision to broadly support executive non-enforcement and proposes limits to the appropriateness of non-enforcement by a state or local executive. Therefore, scholarship that focuses on the historical or legal justifications for the existence of the power of non-enforcement is not discussed in detail. Instead, this Note draws from judicial opinions of other jurisdictions that have considered executive non-enforcement and scholarship that formulates criteria to determine under what circumstances a state or local executive should choose not to enforce a legislative enactment.

A. Judicial Evaluations of Non-Enforcement Decisions

The judiciary has not frequently ruled on executive non-enforcement. Three cases that comment significantly on non-enforcement are discussed here because of their detailed discussion and particular relevance to this Note. The cases illustrate three different ways in which courts deal with the non-enforcement issue when it comes before them.

First, just two years prior to the New York Court of Appeals's ruling in *Bloomberg*, the California Supreme Court had occasion to consider a local executive's non-enforcement decision in *Lockyer v.*

17. Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d. 1102, 1124 (9th Cir. 1988), *reh'g granted*, 863 F.2d 693 (9th Cir. 1988), *withdrawn in part on other grounds*, 893 F.2d 205 (9th Cir. 1989); *see also* EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 66 (4th rev. ed. 1957) (discussing generally the executive's obligation to enforce duly enacted laws).

18. *See* Paulsen, *supra* note 5; *see also* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 249 (2004) (suggesting that the President has the power to ignore the mandates of an "overly assertive" judiciary).

19. *See e.g.*, Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994); Barr, *supra* note 5; Barron, *supra* note 6; Burgess, *supra* note 5; Easterbrook, *supra* note 5; Johnsen, *supra* note 5; May, *supra* note 5 Miller, *supra* note 5; Rappaport, *supra* note 5.

City and County of San Francisco.[20] The *Lockyer* court's analysis is a recent evaluation of non-enforcement by a local executive, providing a detailed analysis of the propriety of the executive's actions. The court based its condemnation of non-enforcement on the presumption of validity properly accorded to statutes.[21]

The second case discussed below, *Lear Siegler, Inc. v. Lehman*, is a federal circuit court's discussion of presidential non-enforcement.[22] It is thus important for its prominence in literature on the subject. The court took a novel and instructive approach to the non-enforcement issue by deciding the underlying legal issue in the case and then discussing non-enforcement in the context of awarding attorneys' fees.

The third case introduced below is *Van Horn v. State ex rel. Abbott*, an older case in which the Nebraska Supreme Court used language supporting limited executive non-enforcement.[23] The court determined that in order to compel enforcement, a court must rule on the underlying legal issue.

1. *Lockyer v. City and County of San Francisco*

Court proceedings in *Lockyer* were instituted in response to an act of non-enforcement by the Mayor of San Francisco, Gavin Newsom, who directed local officials to reject state law confining marriage to a "contract between a man and a woman" based on his assertion that the state law violated the equal protection clause of the California Constitution.[24] Within the context of litigation, the Mayor argued that the law was invalid based on conflict with the Federal Constitution.[25] The California Supreme Court in *Lockyer* did not reach the underlying legal issues raised by Mayor Newsom; instead, it determined that the Mayor did not have the authority to refuse to enforce a state statute based on his own constitutional objections absent a judicial determination of the enactment's invalidity.[26]

The majority opinion in *Lockyer* sets out two forceful legal arguments against non-enforcement of statutes by local officials: (1) the presumption of validity of statutes and (2) the executive's duty to

20. 95 P.3d 459 (Cal. 2004).

21. *See id.* at 475.

22. 812 F.2d 1102.

23. 64 N.W. 365, 372 (Neb. 1895).

24. *Lockyer*, 95 P.3d at 466, 468 (quoting CAL. FAM. CODE § 300 (2006)) (emphasis removed).

25. *See id.* at 492.

26. *Id.* at 463–64.

uphold the law.[27] First, the court relied on the presumption that legislative enactments are valid, describing it as "one of the fundamental principles of our constitutional system of government."[28] Second, the court likened the executive's situation to one in which a judge must follow a controlling decision despite his different personal interpretation of the issue.[29] An executive's oath of office, according to the California Supreme Court, requires him "to act within the constraints of our constitutional system" rather than upon his own judgment.[30] In addition to its doctrinal reasoning, the *Lockyer* court found that several practical considerations weighed against state and local executive non-enforcement, including the lack of legal training of most executive officials, a concern for the due process rights of individuals affected by the executive's action, and the damage caused by "haphazard" enforcement of the law.[31]

The *Lockyer* majority acknowledged the availability of two exceptions to its rule against non-enforcement. First, it allowed a narrow exception for public finance cases, in which an executive could refuse to make an expenditure of which he doubted the validity so that he might obtain a judicial determination before acting.[32] The court held, however, that non-enforcement could not typically be used to obtain pre-enforcement review of legislation. In *Lockyer*, for example, the court argued that the appropriate route to judicial review was to advise couples to whom licenses were denied to challenge the state's marriage law.[33] The *Lockyer* court acknowledged the possibility of a second exception to its rule against non-enforcement: cases where legislation was clearly unconstitutional. However, it concluded that this second exception could not apply in *Lockyer* because reasonable executives and jurists disagreed over the application of equal protection to same-sex marriage.[34]

2. *Lear Siegler, Inc. v. Lehman*

Lear Siegler, Inc. v. Lehman is perhaps the most prominent case dealing with the subject of non-enforcement. As a ruling of a United States Court of Appeals discussing a subject that has not

27. *Id.* at 475, 485–86.
28. *Id.* at 475.
29. *See id.* at 485–86.
30. *Id.* at 486.
31. *See id.* at 490–91.
32. *See id.* at 483.
33. *Id.* at 484–85.
34. *Id.* at 488.

been directly addressed by the United States Supreme Court, it is referred to often in scholarship on the subject.[35] The case arose out of an act of non-enforcement by President Reagan, who signed the Competition in Contracting Act of 1984 (CICA) but then directed the Navy not to follow certain of its provisions.[36] The President claimed that provisions of CICA, which stayed a contract award in response to a bidder complaint so that the Comptroller General could review the complaint and make recommendations, constituted an unconstitutional delegation of executive authority to a legislative official.[37] A dispute arose, and the contractor, Lear Siegler, petitioned for review by the Comptroller General. The Navy refused to stay the contracting process, and Lear Siegler filed suit to compel compliance with CICA.[38]

Though the Ninth Circuit objected strongly to the idea of executive non-enforcement, it nonetheless decided the constitutional question before it.[39] The court did not mention non-enforcement until its review of attorneys' fees awarded to the contractor. The court upheld the award of attorneys' fees based on the proposition that forcing a party to seek judicial protection of its rights constitutes acting in "bad faith."[40] The executive's actions met this definition, according to the court, because the legislature's enactment of a statute presented the executive with a clear legal duty to enforce it, and, by refusing to enforce the law, the executive forced the contractor to seek judicial protection of its rights.[41] The Ninth Circuit rejected the government's arguments that non-enforcement was justified by the executive's duties to "preserve, protect, and defend the Constitution" and to "take care that the laws be faithfully executed."[42] Calling the government's arguments "questionable support for this dubious assertion of power," the court held that the determination of whether the legislature had exceeded its authority was the responsibility of the judiciary, not the executive.[43] The

35. *See, e.g.*, Barron, *supra* note 6, at 62 n.2; Johnsen, *supra* note 5, at 14–15; May, *supra* note 5, at 901 n.158; Paulsen, *supra* note 5, at 268–71; Rappaport, *supra* note 5, at 770 n.140; Williams, *supra* note 6, at 595 n.137.

36. Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1105 (9th Cir. 1988), *reh'g granted*, 863 F.2d 693 (9th Cir. 1988), *withdrawn in part on other grounds*, 893 F.2d 205 (9th Cir. 1989).

37. *Id.*

38. *Id.*

39. *Id.* at 1125.

40. *Id.* at 1125–26.

41. *Id.* at 1120–21.

42. *Id.* at 1121 (quoting U.S. CONST. art. II, § 1, cl. 8; U.S. CONST. art. II, § 3).

43. *Id.* at 1121–23.

Ninth Circuit concluded that the executive must execute a bill once it has become law, because the executive's power in this regard ends when his veto is overridden by the legislature.[44]

3. *Van Horn v. State ex rel. Abbott*

Unlike the courts in *Lockyer* and *Lear Siegler*, the Nebraska Supreme Court in *Van Horn v. State ex rel. Abbott* did not condemn an action of executive non-enforcement.[45] In *Van Horn*, a county board in Nebraska refused to execute changes to its composition required by a new state law, claiming that the new law violated the state constitution.[46] The Nebraska Supreme Court considered and rejected the county board's objections to the law, upholding the law as constitutional; therefore, it ruled to compel the board to follow the law.[47] At the end of the opinion, the court chose to address the state's argument that the writ for enforcement should have been issued irrespective of the constitutional issues because the county board had no right to refuse to execute the statute.[48] The court responded by arguing that an unconstitutional law is void and therefore does not bind the executive, just as the United States Supreme Court in *Marbury v. Madison*[49] held that an unconstitutional law could not bind the judiciary.[50]

Although the *Van Horn* court was willing to consider the executive's objections to the law, it did not offer support for executive non-enforcement. The court discussed the issue only in the context of whether the enactment's invalidity was an acceptable defense to mandamus. The court held that it was required to assess the validity of the law because it could not compel an executive to take an unconstitutional action.[51] The court cautioned that the executive disregards a legislative act at his own peril and is justified in doing so only when the enactment is clearly unconstitutional, not merely when he doubts its validity.[52]

44. *Id.* at 1124.

45. Van Horn v. State *ex rel.* Abbott, 64 N.W. 365 (Neb. 1895).

46. *See id.* at 366.

47. *See id.* at 369–71.

48. *See id.* at 371–72.

49. 5 U.S. (1 Cranch) 137 (1803).

50. *Van Horn*, 64 N.W. at 372; *see also* Williams, *supra* note 6, at 621.

51. *Van Horn*, 64 N.W. at 372.

52. *Id.*

B. Scholarship on Executive Non-Enforcement

The literature on non-enforcement can effectively be categorized under two headings, non-enforcement at the federal level and non-enforcement at the state and local level, discussed in two subsections below. The first subsection reviews literature that addresses the subject of this Note: non-enforcement at the state and local level. State- and local-level non-enforcement has garnered little scholarly attention until recently, but the topic is now of particular salience following the actions of Mayor Bloomberg in New York and Mayor Newsom in San Francisco. The topic also has great importance because of the wide reach of state and local laws.[53]

Non-enforcement at the state and local level differs from federal non-enforcement in several respects. First, state- and local-level non-enforcement can implicate multiple levels of government simultaneously, as illustrated in *Lockyer*,[54] while non-enforcement at the federal level represents a dispute that is settled among the three branches of the federal government. Second, though the executive is unitary at the federal level, this is not the case at the state and local level.[55] Third, state- and local-level non-enforcement raises normative judgments about the value of local policymaking.[56]

While non-enforcement at the federal level differs from state- and local-level non-enforcement both in doctrinal and normative considerations, the wealth of literature on federal non-enforcement provides important insight into executive decisionmaking. The second subsection below offers competing views of the circumstances under which non-enforcement is appropriate at the federal level. These insights provide a foundation for the argument in Section IV of this Note, which presents five factors that a state or local executive should consider before choosing non-enforcement.

1. Literature Discussing State and Local Executive Non-Enforcement

State- and local-level non-enforcement differs from federal non-enforcement because the structure of the branches of government is different. While the federal executive makes enforcement decisions with respect to only federal law, local executives may make enforcement decisions with respect to state law. This

53. *See* Williams, *supra* note 6, at 567.

54. *See generally* Lockyer v. City & County of San Francisco, 95 P.3d 459 (Cal. 2004) (where dispute involved Mayor's refusal to enforce state statute).

55. This is the main focus of Professor Norman R. Williams's study of the subject. *See* Williams, *supra* note 6.

56. This is the main focus of Professor David J. Barron's study of the subject. *See* Barron, *supra* note 6.

presents a unique problem because the local executive is not coordinate with the state legislature, a problem illustrated by Mayor Newsom's refusal to enforce state marriage laws in *Lockyer*.[57] While coordinacy is relied upon in justifications for non-enforcement at the federal level, the concern that it may not exist at the state and local level does not appear to be adequately addressed in existing scholarship; this concern is a main focus of Section IV of this Note.[58]

Another relevant difference between the structure of the federal government and the structure of state and local governments is that, at the state and local level, the executive is fragmented rather than unitary. The fragmented structure of the state and local executive raises the concern that various executive actors may have different views on whether to enforce a single legislative enactment.[59] This problem presents itself in two different ways: (1) a state governor may be required to resort to the judiciary to resolve intra-executive disputes;[60] and (2) non-enforcement in one jurisdiction may have an effect on the propriety of enforcement of the same enactment in another jurisdiction.[61]

Professor Norman R. Williams, who appears to have been the first scholar to address the topic of state- and local-level non-enforcement, details the difficulties associated with non-enforcement in a fragmented executive, but ultimately concludes that the ensuing chaos is not "so disruptive as to call into question the desirability of executive review itself."[62] Professor Williams presents a theory of executive power that distinguishes "constitutional" officers, whose offices are created by the state constitution, from other executive officials, whom he terms "nonconstitutional" officers.[63] He asserts that the power of a constitutional officer is derived from and limited by the scope of his delegated authority under the constitution.[64] He then argues that the power of a non-constitutional officer with respect to non-enforcement should be determined by the legislature that established the executive office.[65] Professor Wil-

57. *See* 95 P.3d at 485–86 (discussing the Mayor's obligation to uphold duly enacted laws).

58. *See infra* notes 160–225 and accompanying text.

59. *See* Williams, *supra* note 6, at 566.

60. *See id.* at 568.

61. *See* Barron, *supra* note 6, at 2222.

62. Williams, *supra* note 6, at 648. Professor Williams is an Associate Professor of Law at Willamette University.

63. *Id.* at 637.

64. *Id.* at 639.

65. *Id.* at 624.

liams thus takes a formalistic approach to executive power, tracing power to the foundation of the executive office at issue.

State and local executive power can also be analyzed from the perspective of the effect of non-enforcement rather than the source of the power.[66] This is the approach taken by Professor David J. Barron, who argues that courts should "recognize a broader range of circumstances in which city officers may appropriately decline to enforce state statutes."[67] Professor Barron supports an expansion of policymaking at the local level, and as a result, his analysis considers the effect that actions taken by one locality will have on other localities.[68] Accordingly, Barron favors local non-enforcement when its effect is to expand the policymaking choices of local governments but not when acceptance of one city's interpretation would bind other localities to make the same choice.[69] Professor Barron, therefore, asserts that the problem in *Lockyer* is not that different cities would enforce the state marriage statutes differently, but rather that acceptance of San Francisco's constitutional claim would require other cities to follow San Francisco's enforcement choice.[70]

2. Literature Discussing Federal Executive Non-Enforcement

There is a wide body of literature debating the source and extent of the power of the executive at the federal level. Of particular relevance to this Note are the competing opinions as to when, if ever, non-enforcement by a federal executive is appropriate. If coordinacy is first placed as a requirement for state and local level non-enforcement, as Section IV of this Note argues it should be, then many of the considerations remaining for an executive faced with the decision of whether to enforce an enactment at the state or local level overlap those considerations at the federal level. Discussed below are the competing views of two scholars in the debate over federal level non-enforcement, which serve to illustrate the considerations at issue.

Professor Christopher N. May, writing about presidential non-enforcement, argues that a strong case can be made against non-

66. Barron, *supra* note 6. Professor Barron is a Professor of Law at Harvard Law School and has also published an article discussing non-enforcement at the federal level. *See* David Barron, *Constitutionalism in the Shadow of Doctrine: The President's Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61 (2000).

67. Barron, *supra* note 6, at 2221.

68. *Id.*

69. *Id.* at 2222.

70. *Id.*

enforcement under any circumstances.[71] Nevertheless, he concludes that non-enforcement can be proper if four conditions are met simultaneously: (1) the interpretation must be clear from either the text of the higher law or precedent; (2) the executive must first exhaust other means of redress; (3) non-enforcement must be the only way to ensure judicial resolution of the underlying legal issue; and (4) the executive must do everything within his power to ensure that judicial review occurs.[72] Professor May's view of the judiciary as the ultimate expositor of law is the overarching principle behind his analysis.[73] Not only is judicial review the focus of two of Professor May's four criteria, but it is also the backbone of his argument for allowing even the most limited use of executive non-enforcement. According to Professor May, judicial review provides a check against unconstitutional acts of the legislature, and non-enforcement may therefore be used "if there is no other way for judicial review to occur."[74]

Professor Dawn E. Johnsen argues for a "context-dependent approach" to the use of non-enforcement power.[75] She determines that the executive should formulate a non-enforcement policy that respects the lawmaking process and promotes the Constitution, "not simply the [executive]'s own constitutional views."[76] A policy formed according to these principles would generally presume the constitutionality of laws, so the executive would routinely enforce legislative enactments, and the judiciary would decide their constitutionality.[77] Professor Johnsen suggests six factors that an executive might use to determine whether non-enforcement is appropriate in a particular situation: (1) the clarity of the enactment's unconstitutionality; (2) the institutional competence of the

71. *See* May, *supra* note 5. Professor May is a Professor Emeritus of Law at Loyola Law School.

72. *Id.* at 988. The factors proposed for executive consideration in Section IV of this Note, which were present in the *Bloomberg* case, actually meet all four of May's criteria to some extent. *See infra* notes 160–225 and accompanying text. However, the criterion emphasized most by May—non-enforcement as the only way to judicial review—is only present in a small aspect of the *Bloomberg* case. This Note does not propose that May's stringent, judiciary-focused test is necessary for acceptance of an instance of executive non-enforcement, but the fact that the *Bloomberg* case came close to meeting May's test demonstrates its acceptability.

73. *See* May, *supra* note 5, at 987, 992, 994, 996, 1011.

74. *Id.* at 987.

75. Johnsen, *supra* note 5, at 11. Professor Johnsen is a Professor of Law at Indiana Law School and previously worked as Acting Assistant Attorney General for the Office of Legal Counsel.

76. *Id.* at 11–12.

77. *Id.* at 12.

branches regarding the underlying legal issue; (3) whether the legislature has considered the executive's legal concerns; (4) the likelihood of judicial review with and without non-enforcement; (5) the harm that would be caused by enforcement; and (6) alternatives to non-enforcement.[78] Throughout her article, Professor Johnsen points to the judiciary as the proper arbiter of most constitutional disputes but ultimately determines that in cases where the executive is "specially situated to protect important constitutional norms without undermining the integrity of the lawmaking process," non-enforcement is appropriate.[79]

II.
MAYOR BLOOMBERG'S REFUSAL TO ENFORCE

This section provides background on Mayor Bloomberg's refusal to enforce the Equal Benefits Law, a decision that led to the *Bloomberg* litigation. Subsection A describes the disagreement between the Mayor and the City Council. Subsection B details the arguments made by each party in the ensuing litigation. Subsection C discusses the judicial resolution of the issue with emphasis on the opinion written by the New York Court of Appeals.

A. The Equal Benefits Law—Passage and Non-Enforcement

The section of the New York City Administrative Code known as the "Equal Benefits Law"[80] was passed by the Council of the City of New York and was subsequently vetoed by Mayor Bloomberg in 2004.[81] The law restricted city agencies from contracting with employers who did not provide domestic partners with benefits equal to those provided to employees' spouses.[82] The law applied to a myriad of employment benefits including health, disability and life insurance; pensions; leave policies; and tuition reimbursement.[83] The rule applied to all contractors with whom the city had $100,000 or more worth of contracts per year[84] and to all employees of the contractor working within the City of New York, whether they

78. *See id.* at 13.

79. *Id.* at 60.

80. NEW YORK, N.Y., ADMIN. CODE § 6-126 (2007).

81. Council of the City of New York v. Bloomberg, 846 N.E.2d 433, 435 (N.Y. 2006).

82. NEW YORK, N.Y., ADMIN. CODE § 6-126(c)(1).

83. *Id.* § 6-126(b)(7).

84. *Id.* § 6-126(b)(4).

worked on the city contract or not.[85] It also applied to employees outside of the city if they worked directly on the city contract.[86]

The City Council was able to enact the law by overriding the Mayor's veto with an overwhelming majority.[87] The Mayor filed suit in response to the passage of the law, seeking a temporary restraining order to delay the law's effective date and a declaratory judgment that the law was invalid, but his requests were denied.[88] In response to that decision, at the time when the law was to become effective, the Mayor declared that he would "comply with controlling state laws" by refusing to enforce the Equal Benefits Law.[89] The Mayor thus prevented implementation of the law despite the court's refusal to enjoin the law from taking effect.

B. Litigation—The Parties' Arguments

The City Council, faced with the prospect that the Mayor who had vetoed its legislation would render its override of that veto moot by refusing to enforce the law, brought an Article 78 proceeding under New York law.[90] The Council's request was that a writ of mandamus be issued to compel Mayor Bloomberg to enforce the Equal Benefits Law.[91] The effective date of the law had passed, and the Mayor had not implemented its provisions. The City Council argued, therefore, that the Mayor's actions constituted an "abuse of power" that should be corrected by the court.[92] The Mayor asserted the invalidity of the Equal Benefits Law as a defense to the mandamus action, arguing that the court could not compel enforcement of an invalid enactment of the legislature.[93]

85. *Id.* § 6-126(e).

86. *Id.*

87. Brief for Petitioner-Appellant at 6, Council of the City of New York v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006) (No. 115214/04). The legislation passed by a vote of 41–4. *Id.*

88. Council of the City of New York. v. Bloomberg, 846 N.E.2d 433, 436 (N.Y. 2006).

89. *Id.*

90. An Article 78 proceeding is a special proceeding used to obtain writs of certiorari, mandamus, or prohibition. Only particular questions are allowed to be raised in an Article 78 proceeding, such as whether an official failed to perform his legal duty. The proceeding uses a special procedure set forth in the statute. *See* N.Y. CPLR §§ 7801–02 (McKinney 1994), 7803 (McKinney 1994 & McKinney Supp. 2007), 7804–06 (McKinney 1994).

91. *Bloomberg*, 846 N.E.2d at 436.

92. Brief for Petitioner-Appellant, *supra* note 87, at 15.

93. *See* Respondent's Brief at 10, Council of the City of New York v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006) (No. 115214/04).

The Council rebutted that the court should not rule on the issue of the law's validity within the Article 78 proceeding, because laws must be presumed valid unless the judiciary has invalidated them.[94] The judiciary should so invalidate laws, according to the City Council, only in proper proceedings, so as to guarantee "that the full panoply of procedural and evidentiary safeguards . . . will apply when the Judiciary examines the validity of a legislative act."[95] The City Council also argued that the law was in fact valid, contrary to the Mayor's assertions.[96] In response, Mayor Bloomberg argued that the court should rule on the validity of the enactment because the "judiciary does not turn a blind eye to the legality of the action it is being asked to compel."[97]

Mayor Bloomberg's justification for his non-enforcement decision was the invalidity of the Equal Benefits Law.[98] He argued that his actions were appropriate because they allowed the disagreement between the branches as to the enactment's legality to be resolved by the judiciary.[99] The Mayor also defended his refusal to enforce the law in part by pointing to the actions he took to prevent himself from having to choose non-enforcement.[100] The Mayor had "asked the Council to follow prior practice . . . and agree that implementation could be delayed while the courts adjudicated the law's validity, but the Council refused."[101] He had also unsuccessfully attempted to procure a court order to delay the effective date of the law in an effort to obtain adjudication on its validity before enforcement.[102] The Mayor argued that because the City Council and the court had refused to delay implementation of the law, he could choose to enforce higher law by refusing to enforce the Equal Benefits Law.[103]

The Mayor's argument asserting the invalidity of the Equal Benefits Law had two components: preemption and lack of legislative power. In his preemption argument, the Mayor claimed that the enactment violated both New York contracting law and the Federal Employee Retirement Income Security Act of 1974 (ERISA).[104] As the law was invalid based on its conflict with higher law, the

94. Brief for Petitioner-Appellant, *supra* note 87, at 18.
95. *Id.*
96. *Id.* at 3.
97. Respondent's Brief, *supra* note 93, at 12.
98. *See id.*
99. *Id.*
100. *See id.* at 8–9.
101. *Id.*
102. *Id.*
103. *Id.* at 9.
104. 29 U.S.C. § 1001; *see* Respondent's Brief, *supra* note 93, at 24–35, 49–64.

Mayor stated that he would comply with the higher law and therefore not enforce the local law.[105] On the state law question, the Mayor alleged the existence of a conflict between the local law's policy purpose and the state law's requirement that contracts be awarded to the lowest responsible bidder.[106] This argument was based on precedent under which New York courts had struck down other policy-oriented city contracting requirements that conflicted with the state's competitive bidding laws.[107] On the federal law question, the Mayor argued that ERISA specifically supersedes state and local laws regulating employee benefit plans, thus preempting the Equal Benefits Law.[108]

The Mayor's second attack on the enactment was that the legislature lacked the power to enact the law without a voter referendum.[109] The Mayor argued that the City Charter granted him discretionary power to award contracts and that the City Council's enactment usurped that power.[110] Therefore, regardless of preemption issues, the Mayor asserted that the enactment was not valid law because both the City Charter and the Municipal Home Rule Law required the legislature to obtain approval by voter referendum in order to limit the Mayor's power to select responsible bidders.[111]

C. Judicial Resolution

The New York County Supreme Court granted the City Council's petition for a writ of mandamus "under the presumption of validity."[112] The Appellate Division reversed, finding that the Mayor's defense was valid because the law was in fact preempted by state law and ERISA.[113] While the Appellate Division agreed with the City Council's contention that the "Article 78 proceeding is not the remedy for adjudicating the validity of legislative enactments," it proceeded to determine the validity of the Equal Benefits Law "[a]s a practical matter," in order to bring prompt resolution to the

105. Respondent's Brief, *supra* note 93, at 9.
106. *See id.* at 25.
107. *See id.* at 26.
108. *See id.* at 49.
109. *See id.* at 64–72.
110. *See id.* at 66.
111. *See id.* at 64 (citing Mun. Home Rule Law § 23(2)(f), New York City Charter § 38(5)).
112. Council of the City of New York v. Bloomberg, 791 N.Y.S.2d 107, 109 (App. Div. 2005) No published opinion is available for the decision of the New York County Supreme Court.
113. *Id.*

dispute.[114] The court also noted that declining to determine the validity of the law "would require the executive branch to enforce even the most patently unlawful legislation until a court order of nullification were obtained."[115] The court did not explain why such a requirement would be burdensome given that in the case of clearly unlawful legislation, the Mayor's initial effort to obtain a preliminary injunction against enforcement would presumably have been granted by the lower court. The Appellate Division addressed only the court's role in the proceeding at hand and the validity of the Equal Benefits Law; it did not discuss the propriety of the Mayor's refusal to enforce the enactment.

The New York Court of Appeals affirmed the decision of the Appellate Division by a 4-3 vote and issued an opinion with a three-part holding.[116] Part I of the discussion indicated that in a mandamus proceeding, assertion of the invalidity of the law is a valid defense.[117] Here the court indicated that it is within the Mayor's power to refuse to enforce legislation that he believes is preempted by higher law.[118] Part II explained how the Equal Benefits Law violates and is preempted by state contracting law.[119] Part III described the conflict between the Equal Benefits Law and ERISA.[120]

The Court of Appeals began its discussion in Part I by setting forth the law on mandamus proceedings. It explained that the court needed to determine the validity of the Equal Benefits Law because it could not issue a writ of mandamus that would compel the Mayor to violate state and federal law.[121] It pointed to New York precedent, which dictated that the invalidity of a law may be asserted as a defense in an action to compel enforcement.[122] The court ruled that while an Article 78 proceeding was meant to resolve legal issues quickly, it was appropriate for use in determining the validity of the Equal Benefits Law because that validity "turns entirely on issues of law, not of fact."[123] In accord with the Appellate Division's focus on practicality, the Court of Appeals pointed

114. *Id.*

115. *Id.*

116. Council of the City of New York v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006).

117. *Id.* at 436.

118. *Id.* at 437.

119. *Id.* at 438.

120. *Id.* at 440.

121. *Id.* at 436–37.

122. *Id.* at 436 (citing *In re* Carow v. Bd. of Educ. of New York, 6 N.E.2d 47 (N.Y. 1936); People *ex. rel.* Balcom v. Mosher, 57 N.E. 88 (N.Y. 1900)).

123. *Id.* at 437.

out that refusing to allow the Mayor's defense would only leave resolution of the underlying legal issue to the court in a different proceeding, an exercise which it deemed "purposeless."[124]

Nested within its discussion of the availability of the invalidity defense in a mandamus proceeding, the Court of Appeals addressed the propriety of Mayor Bloomberg's refusal to enforce the Equal Benefits Law. The court first raised the dissent's assertion that the Mayor should "follow a duly enacted law . . . unless and until a court nullifies it."[125] In response, the majority held that the Mayor's duty to enforce the law extended only to valid legislation and that the Mayor also had a duty to comply with state and federal law. Therefore, according to the majority, when a local law "seems to the Mayor to conflict with a state or federal one, the Mayor's obligation is to obey the latter, as the Mayor has done here."[126] However, the court failed to explain why the Mayor's interpretation of the higher law should supersede the Council's interpretation in order to determine whether the law in question were valid.

The New York Court of Appeals's dissent, like the majority, began with the question of whether the assertion of a law's invalidity should be an available defense in a mandamus action, but concluded that it should not.[127] Both the majority and dissent agreed that were the Mayor to challenge the validity of the enactment in court, he must do so in a declaratory judgment action, as he initially had.[128] In the declaratory judgment action, the Mayor would bear the burden of proving the enactment's invalidity.[129] According to the *Bloomberg* dissent, the Mayor should thus be precluded from asserting the enactment's invalidity as a defense to mandamus, because allowing the defense would permit the Mayor in effect to shift the burden to the legislature to sue for enforcement of enacted laws.[130]

The dissent also argued that the Mayor's claims raised questions of fact, thereby making the claims unsuitable for resolution in the Article 78 proceeding. It determined that the state law preemption claim turned on whether the Equal Benefits Law would impede competition and that the federal law preemption claim depended on whether the Equal Benefits Law would have a signifi-

124. *Id.* at 437–38.
125. *Id.* at 437.
126. *Id.*
127. *See id.* at 442 (Rosenblatt, J., dissenting).
128. *Id.* at 436 (majority opinion); *id.* at 443 (Rosenblatt, J., dissenting).
129. *Id.* at 444 (Rosenblatt, J., dissenting).
130. *Id.*

cant effect on the cost of the benefit plans.[131] The dissent stated that the burden for invalidating a legislative enactment is to prove that "every conceivable application . . . suffers wholesale constitutional impairment."[132] It insisted that this burden could not be met in the Article 78 proceeding because of the proceeding's "summary nature."[133]

The dissent's opinion on the propriety of the Mayor's choice to refuse enforcement was blended into its discussion of the permissibility of the Mayor's defense. The dissent determined that separation-of-powers principles required the Mayor to enforce the law and pursue his objections through the declaratory judgment action that he initially commenced.[134] It argued that "[a]n executive who believes that a law is unconstitutional is not powerless but must follow a process by which the judiciary—and not the executive—determines the issue in the first instance."[135] The dissent expressed concern that the Mayor's actions usurped both the judiciary's power to interpret the law and the legislature's power to make law.[136] It analogized the Mayor's refusal to enforce the law to a refusal to obey a court ruling, citing the Second Circuit for the proposition that the unconstitutionality of the ruling "is no defense to disobedience."[137] The *Bloomberg* dissent thus concluded that the request for mandamus should be granted; if the Mayor wished to challenge the law, he was entitled to pursue an appeal to his original declaratory judgment action.[138]

III.
THE *BLOOMBERG* COURT'S CHOICE

The New York Court of Appeals chose not only to allow Mayor Bloomberg's defense in the case before it, but also to further extend its support to the Mayor's initial refusal to enforce the Equal Benefits Law. This Section demonstrates that the *Bloomberg* court did not need to make a normative judgment about the propriety of non-enforcement in order to determine that Mayor Bloomberg

131. *Id.* at 445.

132. *Id.* (quoting Local Govt. Assistance Corp. v. Sales Tax Asset Receivable Corp., 813 N.E.2d 587 (N.Y. 2004)).

133. *Id.* at 446.

134. *Id.* at 442.

135. *Id.*

136. *See id.* at 444.

137. *Id.* at 447 (quoting Metro. Opera Assn., Inc. v. Local 100, Hotel Employees. & Rest. Employees. Int'l Union, 239 F.3d 172, 176 (2d Cir. 2001)).

138. *Id.* at 447.

should not be compelled to enforce the Equal Benefits Law. The court therefore should not have ruled on the permissibility of the Mayor's choice to refuse enforcement. This Section also reveals that the reasoning provided by the New York Court of Appeals in support of non-enforcement does not adequately explain why the Mayor's actions were acceptable or provide boundaries to the court's support of executive power. The court's conclusion regarding the Mayor's power was founded on the faulty assumption that the Mayor's interpretation of higher law should take precedence over the City Council's interpretation. Although the court's reasoning was flawed and arguably should not have addressed the topic at all, the court's conclusion that the Mayor's actions were an acceptable exercise of executive power is not without merit. Section IV of this Note generalizes from the circumstances of the case factors that may serve to guide future local executives in similar situations.

Both the majority and dissenting opinions in *Bloomberg* conflated the underlying legal issue they were asked to decide with the normative question of the desirability of non-enforcement. The Council sued to compel the Mayor to enforce the law, and the Mayor asked the court not to compel enforcement because the enactment was not valid law.[139] In order to resolve the legal dispute between the parties, therefore, the court was required to determine whether, in an action to compel enforcement, it would presume the enactment to be valid law for purposes of the proceeding, or whether it would consider objections to the law as grounds for denying the request for mandamus. Although both the *Bloomberg* majority and dissent located their discussion of non-enforcement within their analyses of whether to consider the Mayor's defense, the decision to allow the defense was not dependent upon the acceptance of the non-enforcement choice. The majority cited its own precedent as "repeatedly [holding] that an officer against whom a proceeding for a writ of mandamus is brought may defend on the ground that the legislation he or she has been asked to enforce is invalid."[140] The dissent disagreed, arguing that "the executive may not assail the constitutionality of a law in a lawsuit that he, in effect, provoked because he refused to apply the law in the first place."[141] Resolution of the legal issue did not require the majority or dissent to go beyond these opposing views about the availability of the Mayor's defense.

139. Brief for Petitioner-Appellant, *supra* note 87, at 1; Respondent's Brief, *supra* note 93, at 12.

140. *Bloomberg*, 846 N.E.2d at 436 (citations omitted).

141. *Id.* at 444 (Rosenblatt, J., dissenting).

Opinions from other courts faced with executive non-enforcement questions illustrate the irrelevance of the normative question to the underlying legal issue. In *Lear Siegler*, for instance, the Ninth Circuit resolved the legal question of whether a provision of CICA was constitutional without mention of the propriety of the executive's actions.[142] It was only when the court reached the question of whether the executive had acted in "bad faith" for the purpose of awarding attorney's fees that it considered the appropriateness of executive non-enforcement.[143] *Van Horn* also lends support to the argument that the judiciary need not judge the executive's non-enforcement choice. The court held that when the executive chooses non-enforcement, and the issue is brought before the court, the court must consider the validity of the statute in order to determine the obligations of the official.[144] Despite the fact that the court upheld the statute at issue in *Van Horn* to be constitutional, it did not condemn the executives' actions; rather it simply issued the writ to compel enforcement. This demonstrates that the court did not view its role to be one of judging the executive's actions. Both *Lear Siegler* and *Van Horn* demonstrate that the decision to address the non-enforcement issue is not necessary to the legal determination of whether to compel enforcement.

The *Bloomberg* majority's defense of the Mayor's choice to refuse enforcement was not only unnecessary, but the court's reasoning also inadequately supported it. The court provided two arguments to explain its support of non-enforcement, neither of which justified its conclusion. The first of the court's arguments asserted a normative judgment of what the court would like the Mayor to do when faced with a particular situation. The court accomplished this by offering a hypothetical situation of a clearly unconstitutional statute and by arguing that the Mayor should not enforce such an enactment.[145] The court's second argument relied on simple logic: when a local law conflicts with a higher law, the Mayor is obligated to obey the higher law.[146]

The court presented a hypothetical situation to illustrate the situation faced by Mayor Bloomberg in relation to the Equal Benefits Law. However, the scenario imagined by the court does not

142. Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1119–26 (9th Cir. 1988), *reh'g granted*, 863 F.2d 693 (9th Cir. 1988), *withdrawn in part on other grounds*, 893 F.2d 205 (9th Cir. 1989).

143. *Id.*

144. *See* Van Horn v. State *ex rel.* Abbott, 64 N.W. 365, 372 (Neb. 1895).

145. *See Bloomberg*, 846 N.E.2d at 437.

146. *Id.*

correctly correspond with the situation faced by Bloomberg. The court asserted that if the Mayor were faced with a statute that ordered the racial segregation of schools, he should not enforce the law.[147] In that instance, however, the Mayor would be relying not on his own opinion of the statute's validity, but instead on the pronouncement by the United States Supreme Court that racial segregation of schools violates the U.S. Constitution.[148] The conclusion that an executive should not enforce a law that has already been ruled unconstitutional by the judiciary does not determine the executive's power to refuse enforcement based on his own opinion of a law's validity. Additionally, as the *Bloomberg* dissent observed, the Mayor would not have needed to refuse enforcement in this hypothetical situation because his initial request for a declaratory judgment presumably would have been granted by the lower court.[149]

In the *Bloomberg* court's second argument, it concluded from the fact that the Mayor must comply with state and federal law that the Mayor was right to refuse to enforce the local law.[150] The court did not explain, however, why the Mayor's interpretation of higher law—and not the Council's interpretation—should control the situation. The validity of the statute was, after all, a matter of competing interpretations; if the law had been patently invalid, the New York Supreme Court would have granted the Mayor's initial request for an injunction. The *Bloomberg* majority did not distinguish between clearly invalid legislation and legislation that was invalid only in the opinion of the Mayor. Thus, the majority was able to attribute the propriety of the Mayor's actions to his duty to follow state and federal law without supplying rationale to explain whose interpretation of the higher law the executive must follow—his own, the legislature's, or the court's.

The majority seemed to assume that the Mayor's own understanding of the higher law should control. This reading of the opinion derives from the outcome reached by the court as well as the court's statement that the when the law "*seems to the Mayor*" to conflict he must follow higher law.[151] The only reasoning which appears intended to support this conclusion, however, is the court's statement that if it were to follow the Council's assertion that validity should not be considered in an Article 78 proceeding, it would be placed "in the unacceptable position of directing an officer to

147. *Id.*
148. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954).
149. *Bloomberg*, 846 N.E.2d at 443 (Rosenblatt, J., dissenting).
150. *Id.* at 437 (majority opinion).
151. *Id.* (emphasis added).

violate his or her oath of office by enforcing an unconstitutional law."[152] But this reasoning does not indicate why the Mayor's opinion of the law's constitutionality should control. One could say that the Mayor would violate his oath of office if he did not follow his own conscience as to the matter.[153] That conclusion, however, might obligate the Mayor to enforce a law he personally believed to be invalid even if the court decided otherwise, and the court did not indicate that to be its holding.[154] The court's opinion therefore appears to indicate that the Mayor should follow his own opinion above only that of the legislature. However, this formulation removes from the legislature the "presumption of validity" accorded to it by the New York Supreme Court and traditionally afforded to legislative enactments.[155]

The dissent in *Bloomberg* granted the presumption of validity to legislative enactments and did not support executive non-enforcement without a judicial determination of the law's invalidity. The *Bloomberg* dissent used the same reasoning as that of the California Supreme Court in *Lockyer*: it did not reach the question of the law's validity because it argued that the Mayor had no authority to refuse enforcement and that enforcement should therefore be compelled by the court. The dissent in *Bloomberg* asserted that an executive must "follow a duly enacted law—unless and until a court nullifies it."[156] The majority, in response to that assertion, simply stated that a law is not valid when it conflicts with higher law and that the Mayor, therefore, had no duty to enforce it.[157] While the majority preferred practicality to the dissent's formalism, both opinions stated extremes. The dissent left no room for the Mayor to act independently of the courts in any situation, while the majority placed no restrictions or qualifications on the Mayor's power to defy the will of the legislature.

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152. *Id.* at 436–37.

153. *See, e.g.*, Paulsen, *supra* note 5, at 257–62 (using the oath of office taken by the President to justify his power to refuse enforcement of a law which he believes is unconstitutional). *But see* Lockyer v. City & County of San Francisco, 95 P.3d 459, 485–86 (Cal. 2004) (rejecting this argument as advanced by city officials in San Francisco in defense of their non-enforcement actions).

154. *See* Paulsen, *supra* note 5, at 222.

155. *Bloomberg*, 846 N.E.2d at 436; *see also Lockyer*, 95 P.3d at 493; State *ex rel.* Atlantic Coast Line R.R. Co. v. State Bd. of Equalizers, 94 So. 681, 683 (Fla. 1922); May, *supra* note 5, at 988.

156. *Bloomberg*, 846 N.E.2d at 442 (Rosenblatt, J., dissenting).

157. *Id.* at 437 (majority opinion). The majority cited no judicial authority for its holding. Meanwhile, the dissent pointed only to the broadly applicable constitutional law cases of *Marbury, Kendall,* and *Youngstown*. *Bloomberg*, 846 N.E.2d at 442 n.2 (Rosenblatt, J., dissenting).

The *Bloomberg* court's broad language belies the importance of the roles of institutional actors in the interpretation of laws. Other courts, however, when faced with the issue of non-enforcement, emphasized their importance. For instance, the Florida Supreme Court framed the problem as "most important. . . . [because i]t involves the right of a branch of the government, other than the judiciary, to declare an act of the Legislature to be unconstitutional."[158] Similarly, the *Lockyer* court referred to the issue as involving "the determination of a fundamental question that lies at the heart of our political system: the role of the rule of law in [our] society."[159] The significance of the issue requires a narrowing of the *Bloomberg* court's authorization of local executive non-enforcement. The court's decision offered no guidance as to which executive officials its holding would apply in future cases, the circumstances that might make their non-enforcement permissible, or the types of laws they may decline to enforce. Section IV of this Note, therefore, analyzes the specific circumstances faced by Mayor Bloomberg that might inform the decisions of future state or local executives considering non-enforcement.

IV.
MAYOR BLOOMBERG'S CHOICE

Given that the decision of non-enforcement ultimately lies with the executive, this Section of this Note considers the choices made by Mayor Bloomberg in response to the enactment of the Equal Benefits Law. When Mayor Bloomberg's situation is analyzed in light of the existing scholarship and judicial precedent on non-enforcement, several justifications emerge for his decision to refuse to enforce the enactment. This Section seeks to extrapolate these justifications in order to provide future state or local executives with guidance in making non-enforcement decisions.

When faced with a decision of whether or not to enforce an enactment, a state or local executive should consider at least the following five factors that were present in the *Bloomberg* case and weigh in favor of the decision not to enforce: (A) an executive coordinate with the legislature that passed the law that is being considered for non-enforcement; (B) executive confidence that the law being considered for non-enforcement is indeed invalid, either based on prior court precedent or the plain text of the higher law; (C) unusual executive stake in the dispute with the legislature, such

158. *Atlantic Coast Line*, 94 So. at 682.
159. *Lockyer*, 95 P.3d at 463.

as a legislative usurpation of executive power or the possibility of personal liability for the executive; (D) veto of the proposed law by the executive; and (E) executive encouragement of justiciability. This Note argues that factors (A) and (B) are requirements for non-enforcement; an executive must be coordinate with the legislature that passed the enactment in question and confident of the enactment's invalidity before considering non-enforcement. Factors (C) through (E) are relevant but not necessary considerations; they should weigh into the executive's decision but will not necessarily be present in a situation where non-enforcement is nonetheless an appropriate choice. However, even the existence of all five factors is not dispositive because executive non-enforcement should be an option of last resort. Generally, executives should exhaust all other available options for faithful execution of their duties before considering non-enforcement.

A. Coordinacy

Mayor Bloomberg's position coordinate with the legislature that passed the Equal Benefits Law is necessary to the acceptability of his non-enforcement decision. There are several reasons that coordinate status between the legislature and executive should be required for non-enforcement. First, an executive's position coordinate to the legislature provides him with the formal authority to judge the validity of that legislature's enactments. Second, coordinacy places a normatively desirable political check to ensure that the executive does not abuse his power. Third, the coordinate status of the executive and the legislature eliminates the concern which arises in some instances of state- and local-level non-enforcement that laws will be enforced differently in different jurisdictions.

1. Coordinacy Provides the Executive with Authority over the Enactment

Mayor Bloomberg and the City Council are coordinate: they are "ordained (co-ordained) by the same authority" and neither is "subordinate (the very opposite of 'coordinate') to [the other]."[160] The City Council passes laws for the City of New York, and the Mayor executes those laws.[161] The Mayor can veto legislation, but

160. Paulsen, *supra* note 5, at 228–29; *see also* New York City Charter, Chs. 1, 2 (2004). As Paulsen notes about the federal branches, the coordinacy of the Mayor and City Council does not mean that they are of equal strength politically. They are equal in terms "of power-*relationship*, not of power-*scope*." Paulsen, *supra* note 5, at 229.

161. New York City Charter, Ch. 1, § 3, Ch. 2, §§ 21, 28.

the City Council can override that veto by a two-thirds majority.[162] In these respects, the relationship between the Mayor and City Council is similar to that between the President and Congress at the federal level, which suggests that the federal justifications for non-enforcement are applicable at the local level.

The coordinate relationship of the executive and legislature bears significantly on the authority of the executive to refuse to enforce legislative enactments. One article refers to coordinacy between the federal branches as part of the "prima facie case for independence in presidential interpretations," because the executive power is then "part of a system of checks and balances."[163] Another argues that coordinacy provides a reason to believe that the executive and legislative branches have shared power to say what the law is, each independently of the view of the other.[164] Professor Norman Williams argues that the governor's position as head of a coordinate branch of government to the state legislature "provides a sufficient justification for allowing the governor to refuse to enforce [state] laws that she believes to be unconstitutional."[165] He reasons that without the power of non-enforcement, the governor's "status as the head of a coequal branch of government would become precarious" because the legislature could enact laws that remove powers from the executive, who would be forced to comply.[166] The coordinate nature of Mayor Bloomberg's relationship to the City Council is, therefore, essential to his authority to judge the validity of laws passed by the Council.

A local executive's refusal to enforce a law is not acceptable if he is attempting to assert the invalidity of a law passed by a branch of government to which he is subordinate. The *Lockyer* court, for example, concluded that local executives did not have the power to refuse enforcement of law passed by the state legislature. The fact that the local officials were refusing to enforce state law rather than local law influenced the court's decision. It noted that the marriage issue was one of "statewide concern" and that it feared "haphazard" enforcement of state laws.[167] In another case with facts similar to those in *Lockyer*, the Supreme Court of Oregon said the

162. *Id.* at Ch. 2 § 37.

163. Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1287 (1995).

164. Paulsen, *supra* note 5, at 235.

165. Williams, *supra* note 6, at 640.

166. *Id.*

167. Lockyer v. City & County of San Francisco, 95 P.3d 459, 471, 491 (Cal. 2004).

following regarding actions of local officials refusing to enforce state laws:

> County officials were entitled to have their doubts about the constitutionality of limiting marriage to opposite-sex couples. But, marriage and the laws governing it are matters of statewide, not local, concern. Thus, the *remedy* for such a perceived constitutional problem would be either to amend the statutes to meet constitutional requirements or to direct some other remedy *on a statewide basis*.[168]

This argument suggests that the refusal to enforce state law may have been more acceptable had a state executive rather than a local executive directed it. When coordinacy is present, an invalid law can be rescinded with respect to all who are subject to its requirements and all three branches of government charged with responsibility for that law can work together to put appropriate and valid policy in place. Additionally, Professor Barron argues that when a city interprets state law in a way that would "bind every locality to follow a single course, then its interpretive independence from the state should be, as Justice Jackson wrote in a related context, 'at its lowest ebb.'"[169] When a local official refuses to enforce a law passed by his coordinate legislative counterpart, there is no effect on other localities; therefore, his actions do not raise the fragmentation and local autonomy concerns which caution against other instances of state and local level non-enforcement.

2. Coordinacy Provides a Political Check on the Executive's Power

Another reason for requiring the executive to be coordinate with the legislature is to provide a political check on the executive's power. Through its status as a coordinate branch of government, the City Council possesses the power of the purse, thus providing a check against abuse of power by Mayor Bloomberg.[170] The City Council can "increase, decrease, add or omit" any executive or capital appropriations proposed by the Mayor.[171] The Mayor has the power to veto increases and additions, though the City Council can override this veto with a two-thirds vote to restore funding.[172] Decreases and omissions to the budget are ultimately decided by the

168. Li v. State, 110 P.3d 91, 101–02 (Or. 2005).

169. Barron, *supra* note 6, at 2222 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)).

170. New York City Charter, Ch. 10 §§ 249, 254 (2004).

171. *Id.* at Ch. 10 § 254.

172. *Id.* at Ch. 10 § 255.

City Council, with no veto power reserved for the Mayor.[173] The City Council's authority to eliminate funding for programs preferred by the Mayor helps to ensure that the Mayor will be prudent in his use of executive power.

At the federal level, one scholar urges the legislature to act to restrain the executive by using its spending and impeachment powers to secure enforcement of the law and by expanding the availability of judicial review to enable the constitutional dispute between the branches to be adjudicated.[174] These suggestions illustrate various ways in which the legislature's power over a coordinate executive allows it to "effectively parry willful or errant exercises of executive interpretive power."[175] Requiring coordinacy as a prerequisite to state- and local-level non-enforcement thus ensures that the legislature will posses the political ability to restrain the executive's use of his power.

3. Coordinacy Ensures Uniform Enforcement of the Law

The requirement of coordinacy also serves to eliminate a major concern with non-enforcement by local executives: uneven enforcement of state and federal laws due to disputes between various executives as to the validity of such laws. The *Lockyer* court opined that the acceptance of non-enforcement at the local level would cause "the enforcement of statutes [to] become haphazard, leading to confusion and chaos and thwarting the uniform statewide treatment that state statutes generally are intended to provide."[176] The court added that the confusion would not be quickly resolved because lengthy litigation would be required to bring a constitutional challenge to compel enforcement.[177] The *Lockyer* court, however, was considering the actions of local executive officials refusing to enforce state law.[178] The court explained:

> [F]or, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance. Were it not so the most inextricable confusion would inevitably result, and "produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of the government."[179]

173. *Id.*
174. *See* May, *supra* note 5, at 1000–04.
175. Paulsen, *supra* note 5, at 224.
176. Lockyer v. City & County of San Francisco, 95 P.3d 459, 491 (Cal. 2004).
177. *See id.* at 492.
178. *See id.* at 491.
179. *Id.* at 490 (citation omitted).

If coordinacy is required for non-enforcement, however, only one executive has the power to refuse to enforce any given legislative enactment.

Professor Williams notes that "confusion and chaos" is the argument that "is perhaps the one shared most viscerally by many people" against non-enforcement.[180] Professor Williams acknowledges that non-enforcement at the state and local level may cause disputes between various executives, but dismisses the concern, arguing that such "disputes can be resolved either judicially or through normal political processes."[181] This concern is addressed, however, by requiring coordinacy for non-enforcement. Non-enforcement by a local or state executive who is coordinate with the legislature that passed the law is the same with respect to the uniformity of enforcement issue as is non-enforcement by the federal executive. Judge Frank Easterbrook, who sits on the United States Court of Appeals for the Seventh Circuit, argued, in an article published after *Lear Siegler* was decided, that the fear of "chaos" associated with executive non-enforcement at the federal level is misplaced because the unitary executive will give more uniform treatment to the law than will the "hydra-headed, uncoordinated judiciary," with its thousands of state and federal judges.[182] Similarly, if a state or local executive can refuse enforcement of only a law passed by the legislature with which he is coordinate, application of the law will be uniform.

B. Executive Confidence of Invalidity

In order to refuse to enforce a legislative enactment, the executive must be confident that the enactment is invalid based on the plain text of the higher law and judicial precedent. The requirement of clear invalidity as a prerequisite to non-enforcement is important to the proper functioning of the government. Many statutes are challenged as unconstitutional, and citizens, executive officials, and jurists often disagree as to the correct result.[183] The court in *Lockyer* argued that if non-enforcement based solely on the executive's own interpretation of higher law were allowed, "any semblance of a uniform rule of law quickly would disappear," and courts would be required to intervene in order to allow government to function.[184] Even the *Lockyer* court, however, admitted that a

180. Williams, *supra* note 6, at 609.
181. *Id.* at 648.
182. Easterbrook, *supra* note 5, at 918.
183. 95 P.3d at 498.
184. *Id.*

"narrow exception . . . may apply to instances in which it would be absurd or unreasonable to require a public official to comply with a statute that any reasonable official would conclude is unconstitutional."[185] The clear unconstitutionality of a law even fulfills one of Professor May's stringent safeguards against executive defiance.[186]

If the invalidity of an enactment is evident, particularly in light of prior precedent on point, executive non-enforcement can promote the rule of law rather than degrade it, because it "speeds up the process of compliance" with the higher law.[187] Mayor Bloomberg relied on court precedent invalidating laws very similar to the Equal Benefits Law for his argument that the law violated state contracting requirements.[188] The Mayor's argument rested primarily on the court's prior interpretation of Section 103 of the General Municipal Law, which "requires that all contracts over a certain dollar amount be awarded 'to the lowest responsible bidder.' "[189] In a prior case relied on by Mayor Bloomberg, the court had ruled that a city ordinance which gave preference to contractors whose employees had participated in an approved apprenticeship program was invalid because it conflicted with Section 103.[190] In *Bloomberg*, the New York Court of Appeals held that the prior case was, in fact, "the controlling authority."[191] It therefore held the Equal Benefits Law invalid because the City Council was permitted to interfere with the competitive bidding process through local legislation, even when that legislation was designed to promote a desirable end.[192] The Mayor's refusal to enforce, because it was based solidly on precedent, thus prevented the city from having to implement and then revoke an invalid law.

Moreover, if the enactment's invalidity is clear enough, the executive may arguably have a *duty* to refuse enforcement; Judge Easterbrook provides an example of such an extreme case.[193] He offers a hypothetical bill of attainder passed by Congress. The bill would require the President to execute a family, confiscate their property, and cause their descendents to be ineligible for political

185. *Id.* at 488.

186. May, *supra* note 5, at 988.

187. Easterbrook, *supra* note 5, at 928–29.

188. *See* Respondent's Brief, *supra* note 93, at 24–35.

189. *Id.* at 25.

190. *See id.* at 26 (citing Associated Builders & Contractors, Inc. v. City of Rochester, 492 N.E.2d 781 (N.Y. 1986)).

191. Council of the City of New York v. Bloomberg, 846 N.E.2d 433, 438 (N.Y. 2006).

192. *See id.*

193. *See* Easterbrook, *supra* note 5, at 922–24.

office, while removing judicial review of these actions. Judge Easterbrook argues that the President must refuse to enforce the clearly invalid enactment.[194] He also points out that if the judiciary were to review a claim of one person who was to be executed under the statute, and find that he should not be executed, the President should apply that holding to the others, regardless of whether or not they had filed suit.[195]

Even in the case of a clearly unconstitutional enactment, however, it may be preferable for the executive to avoid the enforcement decision by obtaining a court injunction invalidating the enactment so that it does not remain available for enforcement by a future executive.[196] In the case of clearly invalid legislation, the court should grant the executive's request. If it does not, or if the option of obtaining a court ruling is unavailable to the executive prior to his enforcement decision, he may refuse to enforce a law that is fundamentally unconstitutional. The Nebraska Supreme Court in *Van Horn* argued that "the courts themselves will refuse to enforce a statute, unless it is clearly repugnant to the constitution," and, therefore, the executive should do the same.[197] The court went on to assert that the "peace of the community [and] the orderly conduct of government" require that the executive refuse enforcement only when the unconstitutionality of the law in question is clear.[198]

C. Executive Stake in the Dispute

The objection of an executive to the usurpation of his powers by another branch of government is a widely accepted rationale for non-enforcement.[199] One attorney general argues that a more aggressive use of executive power may be acceptable where the execu-

194. *Id.* at 922.

195. *Id.* at 922–23.

196. *See* Johnsen, *supra* note 5, at 32 (discussing executive non-enforcement generally).

197. Van Horn v. State *ex rel.* Abbott, 64 N.W. 365, 372 (Neb. 1895).

198. *Id.*

199. *See, e.g.*, Barr, *supra* note 5, at 40 (noting that at the Constitutional Convention, James Wilson "said that one of the President's defenses to encroachments on presidential power is the President's refusal to execute those unconstitutional parts of the law"); Rappaport, *supra* note 5, at 770 (indicating that "the Constitution might contemplate an expanded presidential role based on the President's need for self-protection"); Burgess, *supra* note 5, at 657 (arguing that the President "should have the ability to protect the constitutional power of his office by refusing to enforce provisions of a constitutionally enacted law that infringe upon that power").

tive acts to protect his office because "where a law encroaches on executive power, the only effective way of challenging the law is by declining to enforce it."[200] Self-protection is not the only rationale to support this expanded role for the executive; he may also be given more power out of deference to his expertise in the area.[201]

One of Mayor Bloomberg's objections to the Equal Benefits Law was its restriction of his powers without a required voter referendum.[202] The Mayor claimed that even if state and federal law did not preempt the Equal Benefits Law, the enactment was still not valid because it restricted the broad discretion over the awarding of city contracts that the City Charter gave to the Mayor.[203] The New York Court of Appeals did not reach this objection, instead deciding the case on preemption grounds. The Mayor's refusal to enforce the law may nonetheless be more easily accepted because he was acting to protect the power of his office from legislative usurpation. The Equal Benefits Law's implication of executive powers raises the most-difficult-to-reach of Professor May's criteria: "defiance as the sole route to judicial review."[204] Although review of the statute would still have been possible if the Mayor had enforced it (presumably parties affected by the legislation would have challenged it), the petitioners in that scenario would not have had the interest of the Mayor in pursuing the executive powers implications of the enactment.

An executive might have a stake in the legal dispute in a different way than that faced by Mayor Bloomberg. For example, the *Lockyer* court excepted public finance cases from its general rule against non-enforcement, in part because in those cases the executive "frequently faced potential *personal* liability" if the expenditure were invalid.[205] Professor Barron also raises liability as a defense for non-enforcement, arguing that the possibility that a city may be sued under 42 U.S.C. § 1983 for violating the Federal Constitution strengthens the city's request for a rule allowing them to refuse en-

200. Barr, *supra* note 5, at 39; *see also* Johnsen, *supra* note 5, at 23–24 (noting that this justification for non-enforcement was endorsed separately by former Attorneys General Benjamin Civiletti and Walter Dellinger).

201. *See* Rappaport, *supra* note 5, at 770.

202. *See* Respondent's Brief, *supra* note 93, at 64.

203. *See id.* at 66.

204. May, *supra* note 5, at 992. May makes it clear, however, that he does not endorse the view that encroachment of executive power is itself a sufficient reason for non-enforcement. He argues that all four criteria he offers must be met regardless of the reason for objection to the law. *See id.* at 997.

205. Lockyer v. City & County of San Francisco, 95 P.3d 459, 483 (Cal. 2004).

forcement.[206] A state or local executive might argue that the coercive nature of the higher government authority authorizes him to seek protection from liability through non-enforcement.

D. Veto Prior to Non-Enforcement

Mayor Bloomberg vetoed the Equal Benefits Law, which was then enacted over his objection.[207] This is the appropriate course of action when an executive is presented with an enactment that he believes could not become valid law. The primary reason for advising the executive to veto a law before considering non-enforcement is so that he can attempt to work through the problem at the legislative level in the hopes that a valid law can ultimately be enacted. As Professor Johnsen notes, the "system is served far better when the enactment of an unconstitutional law is prevented, than when the [executive] unilaterally declines to enforce a law after enactment."[208] When an executive vetoes an enactment based on invalidity, he refocuses the legislative debate onto the interpretation of higher law.[209] A veto also causes the legislature to anticipate such challenges in the future and therefore routinely assess the validity of its enactments.[210]

The executive's veto alerts the legislature to the legal conflict, as Mayor Bloomberg did in his veto message.[211] When the executive uses the veto power to confront the legislature with the legal conflict, he refocuses the debate from policy to law, thereby giving the legislature an opportunity to pass a valid enactment to achieve its political objectives. The veto requirement thus satisfies another of Professor May's conditions for the limited use of non-enforcement: that the executive first exhausts all legislative means for redressing the problem.[212] The fact that Mayor Bloomberg first vetoed the Equal Benefits Law strengthened his decision to refuse enforcement because he could not be criticized for signing a law and then claiming it to be invalid. As one scholar notes, an "obligation strong enough to justify and require nonenforcement would also require a veto."[213] If the executive is aware of an enactment's

206. *See* Barron, *supra* note 6, at 2238.

207. *See* Council of the City of New York v. Bloomberg, 846 N.E.2d 433, 435 (N.Y. 2006).

208. Johnsen, *supra* note 5, at 32–33.

209. *See* Rappaport, *supra* note 5, at 775.

210. *Id.*

211. *See* Respondent's Brief, *supra* note 93, at 7.

212. *See* May, *supra* note 5, at 988.

213. Rappaport, *supra* note 5, at 771.

invalidity at the time that he passes judgment on it, he should use his veto power to prevent adoption of the legislation.

E. Justiciability

An executive considering non-enforcement should account for the impact that non-enforcement would have on the justiciability of the underlying legal issue, with the object of encouraging justiciability when possible. The impact of non-enforcement on the role of the judiciary in the interpretation of law is a concern in many theories of the proper use of executive power.[214] There are two related reasons for promoting executive encouragement of justiciability: (1) the importance of obtaining a final determination on the underlying legal issue and (2) preservation of the court's role as final interpreter of the law.

Professor May argues that non-enforcement can be acceptable only when the executive takes "all steps necessary to secure a judicial ruling as to the measure's validity."[215] It is desirable to obtain a judicial opinion on the underlying legal issue for several reasons. First, rendering the underlying legal issue nonjusticiable deprives the legislature "of the possibility of presenting its competing views in defense of the law."[216] Rendering an issue nonjusticiable affects non-government actors as well; it denies individuals affected by the enactment the opportunity to present their arguments.[217] It is also desirable to obtain a judicial opinion on the underlying legal issue so that an invalid law does not remain available for enforcement by a future executive.[218]

Mayor Bloomberg's actions did not interfere with the justiciability of the underlying legal issue; the issue was ultimately determined by the New York Court of Appeals. In fact, the Mayor first sought judicial resolution before the enactment would become effective, only resorting to non-enforcement when his request for an injunction was denied. As the *Bloomberg* court pointed out, if the Mayor had enforced the law but continued his declaratory judgment action, "the parties would make, and the courts would resolve, exactly the same arguments the parties make here, but under a dif-

214. *See, e.g.*, Johnsen, *supra* note 5, at 41; May, *supra* note 5, at 994; Burgess, *supra* note 5, at 649.

215. May, *supra* note 5, at 994.

216. Johnsen, *supra* note 5, at 12.

217. *See* Lockyer v. City & County of San Francisco, 95 P.3d 459, 491 (Cal. 2004).

218. *See* Johnsen, *supra* note 5, at 32.

ferent caption."[219] Had the Mayor not pursued the declaratory judgment, and enforced the Equal Benefits Law, affected parties still would most likely have brought the matter before the judiciary. The end result with respect to the law would likely have been the same, but the city would have changed its contracting rules to comply with the law only to have to reverse those changes when the court ultimately ruled on the issue.

Encouragement of justiciability also serves to protect the judiciary's role as interpreter of the law. The *Lear Siegler* court argued that determining the constitutionality of legislation is a judicial function and that the executive usurpation of that function violates separation of powers.[220] The court reprimanded the executive for "abus[ing] the judicial process" by "intrud[ing] upon the judiciary's essential role."[221] According to Professor Williams, the "bulk of the decisions condemning executive review do so on the ground that executive non-enforcement of statutory mandates somehow usurps the role of the judiciary in interpreting and enforcing the constitution."[222]

In *Bloomberg*, however, the power of the court was not at issue; the question was a narrower one of the balance between legislative and executive power, with both sides willing to defer to the judiciary. The New York Court of Appeals presumably would have been more critical of the Mayor's actions had they threatened the position of the court as the final interpreter of the law. After all, judges "have something of an institutional interest in the modern idea of judicial supremacy."[223] The dissent in *Bloomberg* referred to judicial power repeatedly, asserting that executive non-enforcement "would strip the judiciary of its power to determine, in the first instance, whether a law is valid, and thereby clothe the executive with not only legislative but judicial powers."[224] The majority, however, seemed unconcerned with the Mayor's actions in part because regardless of the mandamus proceeding, the court would still have final authority pursuant to the Mayor's original declaratory judgment action.[225] An executive who is in a power struggle with the

219. Council of the City of New York v. Bloomberg, 846 N.E.2d 433, 437–38 (N.Y. 2006).

220. *See* Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1125 (9th Cir. 1988), *reh'g granted*, 863 F.2d 693 (9th Cir. 1988), *withdrawn in part on other grounds*, 893 F.2d 205 (9th Cir. 1989).

221. *Id.*

222. Williams, *supra* note 6, at 591.

223. Paulsen, *supra* note 5, at 268.

224. *Bloomberg*, 846 N.E.2d at 444 (Rosenblatt, J., dissenting).

225. *Id.* at 437–38 (majority opinion).

legislature but willing to defer to the judiciary is in a stronger position from which to exercise his non-enforcement power.

CONCLUSION

This Note considers the issue of non-enforcement through an analysis of Mayor Bloomberg's refusal to enforce the Equal Benefits Law. The New York Court of Appeals erred in *Bloomberg* because it supported the Mayor's decision without providing substantial guidance as to the factors that contributed to the acceptability of the Mayor's actions. As prior case law demonstrates, the court's opinion on issues of executive power is not critical to resolution of the underlying legal issues properly before the court. In addition, the *Bloomberg* majority did not offer support for the assumption—critical to its affirmation of the Mayor's actions—that the Mayor's interpretation of state and federal law should take precedence over the interpretation offered by the City Council. This unsupported reasoning runs counter to the traditional presumption of validity accorded to statutes. The *Bloomberg* court's opinion should therefore be read narrowly, as a product of the specific circumstances of the case.

The factor that most distinguishes the *Bloomberg* case from other cases of state- and local-level non-enforcement is Mayor Bloomberg's coordinate position with the legislature that enacted the Equal Benefits Law. This Note argues that coordinacy should be a requirement for executive non-enforcement because it provides the executive with authority to refuse enforcement while ensuring both a political check on the executive's actions and uniformity in the enforcement of laws. In addition to the requirement of coordinacy, an executive must be confident of an enactment's invalidity when considering non-enforcement. A state or local executive who is confident of the invalidity of an enactment of the legislature with which he is coordinate should also consider the stake of the executive branch in the legal dispute, the availability of an executive veto to prevent enactment of the legislation, and the effect that non-enforcement would have on justiciability. In Mayor Bloomberg's case, these considerations all favor the acceptability of his non-enforcement decision.