Brooklyn Law Review

Volume 72 | Issue 4 Article 3

2007

Upsetting the Balance: Ignoring the Separation of Powers Doctrine in Council of New York v. Bloomberg

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NOTES

Upsetting the Balance

IGNORING THE SEPARATION OF POWERS DOCTRINE IN *COUNCIL OF NEW YORK V. BLOOMBERG*

I. INTRODUCTION

A power shift occurred in New York State governments during the winter of 2006, albeit without much fanfare and without the benefit of a constitutional convention or amendment. Instead, the New York Court of Appeals[1] ("Court") issued its opinion in *Council of New York v. Bloomberg*, a case arising out of a clash between the New York City Council ("Council") and Mayor Michael Bloomberg.[2] The ruling may have resolved the conflict, but it also challenged pervasive notions concerning the roles of coordinate branches of government under the doctrine of separation of powers.

Governmental authority in the United States, both nationally and locally, is carefully allocated among distinct departments to promote democracy and efficient governance.[3] Conflicts between branches emerge when one branch interferes with, circumvents, or ignores another branch's inherent authority, as delineated in the pertinent jurisdiction's foundational document.[4] Contravention of the intended allocation of governmental powers undermines democratic principles by condoning a non-ratified reapportionment of

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[1] The Court of Appeals is the State's highest court. GERALD BENJAMIN, *Structures of New York State Government*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK 57, 65 (1997).

[2] 846 N.E.2d 433 (2006) [hereinafter *Bloomberg*].

[3] *See* discussion *infra* Part II.A.

[4] Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 695 (2006).

power.[5] In order to ensure its advantages for democratic governance, the doctrine of separation of powers obliges each branch of government to operate within its delegated authority and in accordance with the system of checks and balances adopted under the applicable foundational document, whether it be the federal or a state constitution or a city charter.[6] Each department owes due deference toward coordinate branches to the extent reflected by these organizing principles.[7]

The distinct roles ascribed to individual governmental departments enable qualitatively different risks to the existing balance of power and engender unique responsibilities for the preservation of established delegation of authority. For example, when other branches of government encroach upon the function of the law-making body, not only is the accepted structure of government subverted, but also the power of the people's most directly representative body is diminished.[8] (The rise of ever-stronger executive branches in American politics has recently highlighted this issue.[9]) Further, special responsibility for the resolution of interbranch power struggles is conferred to the judiciary as a result of its "province and duty . . . to say what the law is."[10] Tension inevitably arises when this coequal branch wields the power of judicial review—

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[5] *See* BENJAMIN, *supra* note 1, at 57 ("[A]rriving at an appropriate balance among these institutions is one of the most significant decisions that faces constitution makers.").

[6] This Note accepts this essentially formalist conception, which has been adopted by many scholars and judges. *See* Bruce G. Peabody & John D. Nugent, *Toward a Unifying Theory of the Separation of Powers*, 53 AM. U.L. REV. 1, 13 (2003). It is also consistent, however, with a "functionalist" approach, at least where the exercise of deference contributes to more efficient interbranch relations. *See id*.

[7] BRADFORD P. WILSON, *Separation of Powers and Judicial Review*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT 63, 73-74 (1994) ("The weight of each of the various parts in the constitutional balance depends on what the Constitution delegates to it . . . .").

[8] *See* CHARLES O. JONES, SEPARATE BUT EQUAL BRANCHES: CONGRESS AND THE PRESIDENCY 4 (1995) (maintaining the preeminent place of the legislative branch: "Congress is the centerpiece of democracy").

[9] The topic of presidential encroachment upon the province of Congress has received particularly widespread attention during the administration of George W. Bush. *See, e.g.*, Jeffrey Rosen, *Power of One*, THE NEW REPUBLIC, July 24, 2006, at 8; Andrew Sullivan, *We Don't Need a New King George: How Can the President Interpret the Law as If It Didn't Apply to Him?* TIME, Jan. 23, 2006, at 74. *See also* John Yoo, *How the Presidency Regained Its Balance*, N.Y. TIMES, Sep. 17, 2006 at D15 (offering a favorable view of a more robust presidency). For commentary on the evolution of increasingly powerful state executives, see Rogan Kersh et al., *"More a Distinction of Words Than Things": The Evolution of Separated Powers in the American States*, 4 ROGER WILLIAMS U. L. REV. 5, 28-40 (1998).

[10] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

to be the final arbiter of statutory meaning and constitutional interpretation (including in cases concerning the constraints of separated powers).[11] Thus, the judiciary bears a heightened responsibility to respect coordinate branches when exercising this ultimate power.

The *Bloomberg* dispute involved a failure of both the Mayor and the state's judiciary to act in accordance with the principles embodied by the doctrine of separation of powers.[12] The outcome of the case illustrates how such failures can result in a shift in the existing balance of power and a potentially less representative government.[13] After a breakdown in the apparatus of applicable checks and balances, litigation between the Council and Mayor Bloomberg led to the decision by the state's highest court expanding executive power at the expense of legislatures across New York State.[14]

The conflict began in earnest when the Mayor refused to enforce a local law, enacted by an override of his veto, on the grounds that he believed the law was invalid.[15] The measure would have barred the City from entering into contracts for goods or services unless the contractor extended the same benefits to its employees' domestic partners as it offered to employees' spouses.[16] The Mayor initiated a legal challenge, arguing that the law was preempted by state law and violated the City Charter, and sought a temporary restraining order to stay its implementation.[17] Despite being denied the motion, the Mayor declined to follow the law's directive.[18] The matter was ultimately resolved when the Court affirmed the dismissal of a mandamus proceeding initiated by the Council to enjoin the Mayor to enforce the law.[19] The Court's decision undercut the customary procedures for determining a law's validity, effectively denying the Council an evidentiary hearing to support its case.[20] The *Bloomberg* precedent effects a shift in

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[11] HARVEY C. MANSFIELD, *Separation of Powers in the American Constitution*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT, *supra* note 7, at 3, 14.

[12] *See infra* Part IV.

[13] *Id.*

[14] *See Bloomberg*, 846 N.E.2d at 433.

[15] *See* Sabrina Tavernise, *Judge Rules Bloomberg Must Carry Out Equal Benefits Law He Vetoed*, N.Y. TIMES, Nov. 9, 2004, at B3.

[16] *Id*.

[17] Roy L. Reardon & Mary Elizabeth McGarry, *Cases Decided on Clergy Sexual Abuse, Domestic Partner Benefits*, N.Y. L.J., Mar. 10, 2006, at 3, col. 1.

[18] *Id*.

[19] *Bloomberg*, 846 N.E.2d at 435.

[20] *Id*. at 445 (Rosenblatt, J., dissenting).

the balance of power in New York State and may well embolden state and local executives to embrace unilateral action when facing similar conflicts.[21]

To set the stage for a discussion of how the *Bloomberg* decision undermines the principles of separation of powers, Part II of this Note will briefly outline the purposes and operation of the doctrine in American political theory, including special consideration of the application of the doctrine in the state and local contexts. In Part III, the background, procedural history, and ultimate resolution of the *Bloomberg* case will be analyzed. A critical look at the case's likely detrimental impact will be discussed in Part IV. Finally, Part V will present two ways in which these harmful effects might be avoided or mitigated.

II. SEPARATION OF POWERS

The American political heritage demonstrates an unwavering practice of organizing governments that implement the doctrine of separation of powers. The benefits of this system, recognized by the Founding Fathers and their successors, go beyond the checking function most often associated with the doctrine. This structure, in which distinct departments exercise their particular delegated powers while operating within the constraints of their individual authority, was also selected as the one most conducive to good governance. The advantages that flow from this arrangement and the institutional safeguards that govern interbranch relations will be considered in this section, along with a comparative view of the doctrine as it operates in the state constitutional context.

A. The Advantages of Separation of Powers

The early American statesmen formed governments of distinct departments separated by functional roles.[22] Drawing mainly from Montesquieu and Locke, the Framers of both the federal and state constitutions divided the power of their respective governments among the now-familiar legislative,

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[21] *See infra* Part IV.A.

[22] Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 211 (1989).

executive, and judicial branches.[23] The system adopted by the Founders expanded upon existing conceptions of mixed governments, which sought balance in part by institutionalizing existing social divisions.[24] Rather than merely assuring that various interests received some voice in the government, the Framers recognized that the fundamental principle of popular sovereignty demanded that the new system vest each branch with power derived from the people as a whole.[25] Thus, they formed a complex arrangement of departments organized by core roles and responsibilities, but one that represented a "balance of *constitutional* orders or powers, blended with a constitutional differentiation of functions."[26]

The Founders advanced two main categories of advantages of the divided government structure they proposed, one predominantly cautionary and one more effectual.[27] First, by dividing government operations into separate functional departments, proponents argued that consolidation of power would be institutionally deterred.[28] Second, enhanced efficiencies and more varied constituency representation would be achieved through functional specialization and compartmentalized institutional roles.[29]

1. The Diffusion of Power

Primarily, the separation of powers doctrine is an instrument to diffuse power throughout the government.[30] Preventing the accumulation of authority within any individual or body lessens the opportunity for abuse of power and political oppression.[31] This benefit follows both as a matter of structure as well as in the operation of departments carrying out

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[23] *See* MANSFIELD, *supra* note 11, at 5-10.

[24] WILSON, *supra* note 7, at 72-73.

[25] Casper, *supra* note 22, at 216.

[26] WILSON, *supra* note 7, at 73 (quoting HERBERT J. STORING, WHAT THE ANTI-FEDERALISTS WERE FOR 62 (1981)).

[27] MANSFIELD, *supra* note 11, at 10. These categorical distinctions have been described as "negative" and "positive" functions of the doctrine. Peabody & Nugent, *supra* note 6, at 22.

[28] *See* discussion *infra* Part II.A.1.

[29] *See infra* Part II.A.2.

[30] MANSFIELD, *supra* note 11, at 3.

[31] JAMES W. CEASER, *Doctrines of Presidential-Congressional Relations*, *in* SEPARATION OF POWERS AND GOOD GOVERNMENT, *supra* note 7, at 89, 93.

logically interrelated roles.[32] In a nation of laws where different bodies are responsible for law making, law enforcement, and adjudication, the people have recourse against a rogue branch of government that attempts to exert its power improperly, through the checking functions of the other branches.[33] Thus, for example, legislatures have the primary power to enact laws, but it is the executive who has the responsibility of enforcement, and only the judiciary may apply the laws in specific cases and controversies.[34] In addition to the inherent safeguard of this general division of labor, overreach from one office would be countered by the natural jealousies of coordinate branches.[35] As James Madison succinctly put it in one of the numerous *Federalist Papers* addressing the separation of powers, "Ambition must be made to counteract ambition."[36] It is this acknowledged tendency to resist the efforts of counteracting branches' attempts to test the boundaries of granted power that provides an inherent checking function in a divided system.[37]

2. Promoting the Effectiveness of Government

The second group of benefits that results from separation of powers derives from the efficiency advantages gained by allocating specific powers to departments uniquely suited to them.[38] Among these advantages are the wider array of personalities who may be gainfully exploited in successful governance,[39] the ability of diverse departments to represent a wider array of interests,[40] and the positive effects of multiple constituency representation.[41] When each branch is tailored to its role within the overall scheme, the result is a whole that can

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[32] *Id*. at 92-93.

[33] *See, e.g.*, THE FEDERALIST NO. 47, at 324-27 (James Madison) (Jacob E. Cooke ed., 1961) (describing Montesquieu's warning that there can be no liberty when the same body may exercise the distinct powers of the executive, legislator, and judge).

[34] Carl Levin & Elise J. Bean, *The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance*, 16 HOFSTRA L. REV. 11, 18 (1987).

[35] THE FEDERALIST NO. 51 (James Madison), *supra* note 33, at 347-48 ("[Branches would be restrained] by so contriving the interior structure of the government, as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.").

[36] *Id*. at 349.

[37] MANSFIELD, *supra* note 11, at 11.

[38] TOM CAMPBELL, SEPARATION OF POWERS IN PRACTICE 19-26 (2004).

[39] CEASER, *supra* note 31, at 93-94.

[40] *Id*.

[41] Peabody & Nugent, *supra* note 6, at 22-23.

be, at once, stable, cautious, and wise while also energetic, responsive, and adaptive.[42] As Bruce G. Peabody and John D. Nugent wrote in their recent article, "[S]eparation of powers ties different functions and traits essential for governance and different kinds of power to distinct institutions in order to promote accountability, effective policymaking and administration, and political legitimacy, among other goals."[43]

B. The Role of Checks and Balances and the Interplay of Government Branches

A divided government's organizational structure does more than allocate broad functional roles to various departments; it also establishes the mechanisms that delineate how and to what extent the branches interact in the day-to-day operations of government.[44] Despite some of the overheated rhetoric from some of the Founding Fathers,[45] a rigid compartmentalization into legislative, executive, and judicial functions was never anticipated.[46] Rather, interplay among branches was expected and encouraged, to the end of achieving the most responsible and representative exercise of power.[47] These interactions are largely taken into account within the framework of the Constitution.[48] They are managed through carefully selected forms of checks and balances, such as the

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[42] MANSFIELD, *supra* note 11, at 12-13.

[43] Peabody & Nugent, *supra* note 6, at 34.

[44] MANSFIELD, *supra* note 11, at 11.

[45] *See, e.g.*, THE FEDERALIST NO. 47 (James Madison), *supra* note 33, at 324 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."), NO. 48, at 333 (James Madison) ("The legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex."); John Adams, Letter to Jefferson (Mar. 1, 1789), 14 PAPERS OF THOMAS JEFFERSON 599 (Julian P. Boyd ed. 1955), *quoted in* Leslie Southwick, *Separation of Powers at the State Level: Interpretations and Challenges*, 72 MISS. L.J. 927, 942 (2003) ("That greatest and most necessary of all Amendments, the Separation of the Executive Power, from the Legislative, . . . [w]ithout this our Government is in danger of being a continual struggle between a Junto of Grandees, for the first Chair.").

[46] CEASER, *supra* note 31, at 94-95.

[47] THE FEDERALIST NO. 48 (James Madison), *supra* note 33, at 332 ("I shall undertake in the next place, to shew that unless these departments be so far connected and blended as to give to each a constitutional controul over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice be duly maintained.").

[48] Peabody & Nugent, *supra* note 6, at 26.

President's veto power, the Senate's confirmation power, and the House's impeachment power in the federal Constitution.[49]

These checks and balances work at the frontiers of each branch's authority and define the manner in which each branch may assert itself into the workings of the others, as contemplated by the founding document.[50] Some commentators perceive this interaction as a limited sharing of allocated powers that improves decision-making, albeit at some cost to efficiency.[51] Even those who adhere to the idea that robust interplay has a largely positive effect on governance concede that the systemic checks help define undue encroachment so that the branches can legitimately defend themselves.[52] Ultimately, then, checks and balances provide specific parameters of the constitutional constraints on power of any one department operating in the traditional area of another.[53]

C. Separation of Powers in State Constitutions

State constitutions also embody the separation of powers doctrine via their establishment of divided governments. It has been noted, however, that an analysis tailored to the state's individual context is appropriate.[54] This is partly because the details of power allocation within state governments differ from those of the federal government, but a distinctive analysis also may be necessary due to the historical context of a state constitution's origin and evolution.[55]

While states are under no obligation under the federal Constitution to observe any particular formulation of separated powers,[56] all fifty state constitutions reflect the same basic tripartite structure as the federal model.[57] And many explicitly

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[49] *Id*.

[50] *See* CEASER, *supra* note 31, at 94-97.

[51] *Id*. at 95-96.

[52] *See* MANSFIELD, *supra* note 11, at 13.

[53] Peabody & Nugent, *supra* note 6, at 26.

[54] *See generally* Jim Rossi, *Institutional Design and the Lingering Legacy of Antifederalist Separation of Powers Ideals in the States*, 52 VAND. L. REV. 1167 (1999); G. Alan Tarr, Symposium Article, *Interpreting the Separation of Powers in State Constitutions*, 59 N.Y.U. ANN. SURV. AM. L. 329 (2003).

[55] Tarr, *supra* note 54, at 340.

[56] Bush v. Gore, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) ("[T]he distribution of powers among the branches of a State's government raises no questions of federal constitutional law . . . .").

[57] RICHARD BRIFFAULT, *Principal Provisions of State Constitutions: A Brief Overview*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK, *supra* note 1, at 21, 21.

provide for a strictly distinct allocation of powers among three branches.[58] For example, Kentucky's first constitution provided:

> § 1. The powers of government shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: those which are legislative to one, those which are executive to another, and those which are judiciary to another.
>
> § 2. No person, or collection of persons, being of one of these departments, shall exercise any power properly belonging to either of the others, except in the instances herein expressly permitted.[59]

Other states' constitutions, like the federal Constitution, simply imply separation principles through organizational structure.[60] This fundamental difference could inform a court's evaluation of the propriety of certain government interactions.[61] An incursion by one branch into the arena of another in a state governed by a provision like that in Kentucky's constitution might be subject to more stringent scrutiny than one occurring in a state where the separation of powers doctrine is merely implied.[62]

States have also adopted their own systems for allocating and constraining power, and shaped their own approaches for governing the interplay of government branches. Such controls may include idiosyncratic limitations on legislative authority, organizational complexities, and uncommon checks and balances compared to those at the federal level.[63] For example, many states divide executive duties into separate offices, such as that of a state attorney general, secretary of state, and treasurer.[64] Line item[65] and

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[58] Some forty state constitutions currently include explicit separation language. Tarr, *supra* note 54, at 337.

[59] KY. CONST. art. I, §§ 1, 2 (1792). The text remains largely unchanged today. KY. CONST. §§ 27, 28 (1891). It has been suggested that this language came from Thomas Jefferson, who drafted a 1783 proposed constitution for Virginia that is nearly identical. *See* Southwick, *supra* note 45, at 940-44.

[60] *See supra* note 58.

[61] *Id*. at 338.

[62] *Id*.

[63] *Id*. at 337-38.

[64] *Id*. at 338.

[65] Richard Briffault, *The Item Veto in State Courts*, 66 TEMP. L. REV. 1171, 1171 (1993).

legislative vetoes[66] are examples of measures that regulate interbranch relations which are, for now, unique to states.[67]

Beyond such textual interpretation, there is perhaps a more fundamental distinction to be drawn between the state and federal perspective arising from the principles of sovereignty and federalism.[68] This difference follows from the fact that all federal authority came at the acquiescence of the sovereign states.[69] Thus, the federal Constitution confers powers to the federal government, whereas states' constitutions marshal plenary power, and are therefore fundamentally documents of limitation.[70] Consequently, restrictions upon state legislatures are commonly found in state constitutions that would be unnecessary to keep Congress' limited powers in check.[71] In this manner, for example, a state may rely less on interbranch checks than on more direct constraints of legislative authority.[72]

Another factor to bear in mind when analyzing state government organization is the change in prevailing attitudes toward state governments. Although the Antifederalists, for example, were profoundly concerned by an encroachment on state sovereignty,[73] local legislatures were not considered to present a similar threat to liberty.[74] Direct representation by a "legislative assembly composed of one's friends and neighbors, which met briefly and was subject to annual popular election" did not warrant the same degree of vigilance or institutional safeguards.[75] Thus, state constitutions in the 18th and early 19th centuries rarely exhibited the "delicate balance"

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[66] Tarr, *supra* note 54, at 337.

[67] Both of these mechanisms have proven problematic at the federal level: a presidential line item veto and a congressional legislative veto were struck down in *Clinton v. City of N.Y.*, 524 U.S. 417, 420-21 (1998), and *INS v. Chadha*, 462 U.S. 919, 959 (1983), respectively, as violating the separation of powers under the federal constitution.

[68] *See* Tarr, *supra* note 54, at 329.

[69] 16 AM. JUR. 2D *Constitutional Law* § 5 (1998).

[70] Tarr, *supra* note 54, at 329-30.

[71] *Id.*; *see also* RICHARD BRIFFAULT, *State Constitutions in the Federal System*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK, *supra* note 1, at 3, 9-19.

[72] Tarr, *supra* note 54, at 329-30.

[73] Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 1261, 1276 (1989).

[74] Tarr, *supra* note 54, at 334.

[75] *Id*.

enshrined in the federal Constitution.[76] Rather, strong legislatures and comparatively weak, often appointed, executives were the norm.[77] Whereas it has come to be accepted in the federal context that "none of the several departments is subordinate, but that all are coordinate, independent, and coequal,"[78] this was rarely the situation established by early state constitutions.

Over time, however, state constitutional reform brought forth a more equitable distribution of power among governmental departments.[79] Populist reforms of the 19th century[80] and the rise of stronger executives in the early 20th century resulted in considerably more balanced state governments.[81] Many of the measures that advanced this more balanced organization were adopted for essentially the same purpose as the checks and balances incorporated in the federal Constitution—to constrain abuses of power by single factions within the government.[82] This state constitutional evolution toward government in counterpoise may be viewed as a further tacit endorsement of the separation doctrine.[83]

However similar to the federal system a state's government may appear, when analyzing a case implicating the separation of powers doctrine, the state's constitutional history and the development of its political institutions are paramount to the analysis.[84]

D. The Separation of Powers Context of Council of New York v. Bloomberg

The events surrounding the New York Court of Appeals decision that is the subject of this Note involve both state and

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[76] For example, the governor under New York's first constitution has been described as "a mere 'sentinel' who had virtually no relationship to the actual daily business of governing New York." John T. Buckley, *The Governor—From Figurehead to Prime Minister: A Historical Study of the New York State Constitution and the Shift of Basic Power to the Chief Executive*, 68 ALB. L. REV. 865, 869 (2005).

[77] Tarr, *supra* note 54, at 334.

[78] 16A AM. JUR. 2D *Constitutional Law* § 246 (1998).

[79] Tarr, *supra* note 54, at 334-35.

[80] For example, in a number of states reformists provided for direct election of previously appointed officials, such as governors, and imposed a plethora of restrictions on legislatures. *See id*.

[81] *See, e.g.*, Buckley, *supra* note 76, at 868-76.

[82] These included direct election of executive offices and judicial seats, as well as restrictions on legislative action on certain subjects. Tarr, *supra* note 54, at 334-35.

[83] BENJAMIN, *supra* note 5, at 57.

[84] Rossi, *supra* note 54, at 1240.

local governmental organization, as established by the Constitution of the State of New York and the New York City Charter. Although this conflict primarily concerned a municipal governmental dispute, the separation of powers principles at issue implicate both state and city foundational documents. This follows both because the City is organized under powers granted by the state constitution[85] and because the state constitution establishes a unified system for all courts in the state.[86] There is no judicial branch represented in the New York City Charter.[87] Thus, state courts adjudicated the matter, and the Court of Appeals' holding is binding across the state. This section will first discuss separation of powers as reflected in New York State history and law, and then will outline the governmental organizational framework pertinent to *Bloomberg*.

1. Separation of Powers and the New York State Constitution

The Constitution of New York State reflects a number of the concepts discussed in the previous section. For example, it implicitly separates governmental power into three main branches, but uses no explicit language in establishing the division,[88] and it features a somewhat dispersed executive branch in that the governor, attorney general, and comptroller are independently elected officials.[89] Despite these checks, over the history of the state, the governor's office has evolved into a quite powerful post through constitutional change.[90] One of the most significant redistributions of power in the state came when New York amended its constitution to grant the governor a preeminent role in setting the state's budget.[91]

Legal challenges involving the budgetary process illustrate the New York Court of Appeals' view on the operation

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[85] *See infra* Part II.D.2.

[86] N.Y. CONST. art. VI, § 1(a) (McKinney 2006).

[87] *See* LaGuardia v. Smith, 41 N.E.2d 153, 155 (N.Y. 1942). *See generally* N.Y. CITY CHARTER (2004).

[88] BENJAMIN, *supra* note 5, at 57-58.

[89] ROBERT F. WILLIAMS, *New York's State Constitution in Comparative Context*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK, *supra* note 1, at 29, 36-37. Also notable is the role of the lieutenant governor, who is elected with the governor but presides over the state senate with a casting vote. BENJAMIN, *supra* note 5, at 58, 64.

[90] *See generally* Buckley, *supra* note 76.

[91] *Id*. at 884-85.

of separation of powers issues in New York State.[92] The Court's opinions evidence the kind of tailored analysis appropriate in the state context.[93] The amendment, enacted in 1928, gave New York's executive the exclusive power to draft budget legislation.[94] The legislature was thereafter restricted to four responses to a governor's proposed budget: to "(1) approve the comprehensive budget . . .; (2) eliminate or (3) reduce proposed appropriations; or (4) add appropriations, but only if done separately and distinctly, and only if referring to a single object or purpose."[95] Because the budgeting function is so fundamentally intertwined with policymaking, legislative-executive clashes over the new process began making their way up to the Court of Appeals almost immediately, and they continue to do so.[96]

In adjudicating the early budget cases, the Court unsurprisingly ratified the idea that a constitutional reallocation of power was permissible and binding on the governmental departments.[97] A recent contribution to the Court's separation of powers jurisprudence comes from *Silver v. Pataki*.[98] In that case, the legislature attempted to pass legislation outside the budget process to circumvent the governor's power to exercise line-item vetoes of appropriations within the budget.[99] In one measure for example, the lawmakers conditioned the release of appropriated funds to build a prison on the inclusion of on-site facilities for inmate educational and other services.[100] The Court invalidated the legislative acts because they infringed on the governor's constitutional power to have his budget provisions accepted or rejected but not altered.[101] The Court, however, acknowledged that the extent to which policymaking power accompanied the transfer of budgeting authority was a closer question, and opined that certain nonfiscal items would be inappropriate

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[92] Buckley, *supra* note 76, at 886.

[93] *See* discussion *supra* Part II.C.

[94] Buckley, *supra* note 76, at 883.

[95] *Id*. at 885 (citing N.Y. CONST. art. VII, § 4).

[96] *See, e.g.*, People v. Tremaine, 168 N.E. 817 (N.Y. 1929); Pataki v. N.Y. State Assembly, 824 N.E.2d 898 (N.Y. 2004).

[97] *Id*. at 889 (citing *Tremaine*, 168 N.E. at 825).

[98] Pataki v. N.Y. State Assembly (consolidating Silver v. Pataki), 824 N.E.2d 898, 902-03 (N.Y. 2004).

[99] *Id*.

[100] *Id*.

[101] *Id*. at 904-05.

subjects of a governor's budget appropriation.[102] Thus, despite its obligation to uphold the executive budgeting amendment, the Court recognized the tension operating against an interpretation of separated powers that ceded a natural role of the legislative body to another department.[103] The Court also declared its continuing reluctance to draw a bright line delineating gubernatorial and legislative powers.[104] *Silver v. Pataki* exemplifies the kind of customized separation of powers analysis that must be employed at the state level.[105] The case continues the Court's acknowledgment of the relevance of the separation of powers doctrine, as embodied by the state constitution, to the analysis of interdepartmental conflicts.[106]

2. The New York State Constitution's Home Rule Article and the New York City Charter

The doctrine of separation of powers is also applied in some local governments. Although many towns, villages, and small cities are organized around largely administrative bodies, others reflect the structure of larger governmental entities.[107] The New York City Charter, adopted pursuant to the state constitution's provision for "home rule," governs local government organization and administration.[108] The Charter

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[102] *Id*. at 909. The Court hypothesized, for example, that a governor may not impose a retirement age on firefighters by making appropriations to fire departments conditioned on acceptance of the rule or otherwise subvert state statutes in an appropriations bill. *Id*. at 907.

[103] *See* Buckley, *supra* note 76, at 902-04 (contrasting the widely differing positions taken by the plurality, concurrence, and dissent on demarcating the governor's power of appropriation).

[104] *Pataki*, 824 N.E.2d at 910.

[105] For a contemporaneous account of the impact of this litigation on New York State separation of powers doctrine, see generally The Committee on State Affairs, *The New York State Budget Process and the Constitution: Defining and Protecting the "Delicate Balance Of Power*," 58 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 345 (2003).

[106] For New York State Court of Appeals decisions rooted in the separation of powers, see, for example, Saratoga County Chamber of Commerce, Inc. v. Pataki, 798 N.E.2d 1047, 1049 (N.Y. 2003); Bourquin v. Cuomo, 652 N.E.2d 171, 173 (N.Y. 1995); Clark v. Cuomo, 486 N.E.2d 794, 797 (N.Y. 1985).

[107] Richard C. Schragger, *Can Strong Mayors Empower Weak Cities? On the Power of Local Executives in a Federal System*, 115 YALE L.J. 2542, 2544-45 (2006); EDWARD N. COSTIKYAN & MAXWELL LEHMAN, RESTRUCTURING THE GOVERNMENT OF NEW YORK CITY 56-57 (1972).

[108] ADRIENNE KIVELSON, WHAT MAKES NEW YORK CITY RUN? 19 (The League of Women Voters of the City of N.Y. Educ. Fund 3d ed. 2001).

distributes power between two distinct departments, which have been granted limited authority.[109]

Article 9 of the New York State Constitution ("Home Rule") sets forth the state legislature's power to create local governments, with the stated purpose of establishing democratic, self-governing bodies that are responsive to local matters.[110] The Home Rule article largely cedes control of regional matters to the localities.[111] By this provision, the New York State Constitution grants specific powers to localities, allows the state legislature to grant additional ones, and constrains State interference with certain local issues.[112] Specifically, the Home Rule article confers self-government upon the people of a local jurisdiction through a representative legislative body.[113] But provision for the formation of local governments is only vaguely stated: "[t]he legislature shall provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges, and immunities granted to them by this constitution."[114] Thus, localities have considerable flexibility in certain areas, including the organization of local government.[115]

Pursuant to the authority granted by the Home Rule article, the Charter of the City of New York establishes two branches of government and assigns them particular functions.[116] The mayor is the "chief executive officer of the city."[117] The City Council is "vested with the legislative power of the city."[118] This legislative role is underscored by the succeeding sentence: "Any enumeration of powers in this charter shall not be held to limit the legislative power of the council, except as specifically provided in this charter."[119] In fact, the Charter provides explicit protection of allocated

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[109] N.Y. CITY CHARTER §§ 3, 21.

[110] N.Y. CONST. art. IX, § 1.

[111] *Id*.

[112] *Id*. §§ 1-3; *see* RICHARD BRIFFAULT, *Intergovernmental Relations*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK, *supra* note 1, at 155, 156.

[113] N.Y. CONST. art. IX, § 1(a).

[114] *Id*. § 2(a).

[115] BRIFFAULT, *supra* note 112, at 156-57.

[116] N.Y. CONST. art. IX, §§ 1, 2(c)(1); N.Y. CITY CHARTER §§ 3, 21.

[117] N.Y. CITY CHARTER § 3.

[118] *Id*. § 21.

[119] *Id*.

authority by requiring any law that diminishes the powers vested in a city official to be ratified by the voters.[120]

There is ample justification to apply the separation of powers doctrine under the New York City Charter. The clear expression of representative self-determination in the Home Rule article along with the explicit allocation of powers and the protections accorded the two branches in the Charter strongly suggest the relevance of the doctrine. The courts of New York State have almost universally subscribed to this view, and have assumed that separation principles apply to municipal organizations when adjudicating related matters.[121]

III. *COUNCIL OF NEW YORK V. BLOOMBERG*

The circumstances surrounding *Bloomberg* are notable for the example of unilateral executive action, but this case will also be remembered for the presumptuousness of the judicial response and the disruption in the operation of separation of powers doctrine in New York State the Court sanctioned.[122] Indeed, the very fact that the judiciary upended traditional procedures for adjudicating the validity of a local law to resolve this interbranch conflict may be seen as an affront to the democratic principles inherent to the workings of divided government.[123]

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[120] A local law must be submitted for referendum if it "[a]bolishes, transfers or curtails any power of an elective officer." *Id*. § 38(5); *see also* N.Y. MUN. HOME RULE LAW § 23(2)(f) (McKinney 1994) (same).

[121] Mayor of N.Y. v. Council of N.Y., 789 N.Y.S.2d 860, 862 (Sup. Ct. 2004); Under 21 Catholic Home Bureau for Dependent Children v. City of N.Y., 482 N.E.2d 1, 4-5 (N.Y. 1985). *But see* LaGuardia v. Smith, 41 N.E.2d 153 (N.Y. 1942); Jennings v. N.Y. City Council, 814 N.Y.S.2d 890 (Table), No. 111597/05, 2006 WL 140399 (Sup. Ct. 2006). The *LaGuardia* and *Jennings* courts rejected the doctrine's applicability in the case of a municipality because a city within New York State is not a sovereign entity, but rather operates solely on authority granted by the State. *LaGuardia*, 41 N.E.2d at 155-56; *Jennings*, 2006 WL 140399, at *3-4. Neither court explains precisely why the City's lack of sovereignty is fatal to establishing a subordinate government of separated powers. Indeed, as discussed in Part II.C, it was the sovereign states that granted the powers allocated in the U.S. Constitution (in which the separation of powers doctrine, of course, is firmly rooted). *See also* Recent Decisions, 42 COLUM. L. REV. 1217-21 (1942) (suggesting, in the wake of *LaGuardia*, that even if the doctrine does not apply to cities, the form of New York City's government under its charter implies a vigorous independence of its two branches).

[122] *See* Brief for the Brennan Ctr. for Just. at N.Y. Univ. Sch. of Law as Amicus Curiae Supporting Petitioner at 10, Council of N.Y. v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006) (No. 115214/04), 2005 WL 3818168 [hereinafter Brennan Ctr. Brief].

[123] *See infra* Part IV.A.

A. The Ill-Fated Equal Benefits Law

On May 5, 2004, the New York City Council passed The Equal Benefits Law ("EBL"), which prohibited the City from entering into certain contracts with companies that fail to provide employees' domestic partners the same benefits received by employees' spouses.[124] Similar measures had been adopted in Los Angeles, San Francisco, and Seattle.[125] Mayor Bloomberg, while generally supportive of expanding rights afforded to domestic partners, vetoed the measure.[126] He was concerned about the negative effect of the law on the City's finances, and stated that he did not want "to use the city's buying power to legislate social issues."[127] The Council overrode the veto by a vote of forty-one to four.[128] Claiming the ordinance was preempted by local, state, and federal laws, the Mayor instigated a declaratory judgment action to have the law invalidated.[129] Additionally, to avoid "confusion and uncertainty on the part of contractors who would be unsure as to the validity of the law or the rules under which the City's procurement system was operating," the Mayor moved for a temporary restraining order to stay implementation of the law until a decision was made.[130]

Up to this point in the developing quarrel, the checks and balances incorporated in the Charter operated along familiar lines. Despite a shared belief in a laudable end, the two branches of city government disagreed on the propriety of this particular means.[131] The Mayor declined to sign the law he opposed, and exercised his veto pursuant to the City Charter.[132] The Council duly overrode his veto, thereby automatically

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[124] *See* New York, N.Y., Local Law No. 27 (2004), *available at* http://www.nyccouncil.info/pdf_files/bills/law04027.pdf; NEW YORK, N.Y., CITY ADMIN. CODE § 6-126 (2005) (New York Legislative Serv. 2005), *invalidated by* Council of N.Y. v. Bloomberg, 791 N.Y.S.2d 107 (App. Div. 2005), *aff'd*, *Bloomberg*, 846 N.E.2d 433. The ordinance affected any contractor who entered into agreements with the City amounting to over $100,000 over a year period. *Id*.

[125] Epstein Becker & Greene, P.C., & Robyn Rudeman, *Domestic-Partner Benefits: The Trend Continues*, N.Y. EMP. LAW LETTER, Aug. 2004.

[126] *Id*.

[127] Sabrina Tavernise, *Council Will Seek to Reinstate Law Giving Partners Benefits*, N.Y. TIMES, Mar. 17, 2005, at B4.

[128] Local Law No. 27.

[129] *See Bloomberg*, 846 N.E.2d at 436.

[130] Brief of Respondent at 9, Council of N.Y. v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006) (No. 115214/04), 2006 WL 499294.

[131] *Id*. at 7.

[132] *See* N.Y. CITY CHARTER § 37.

enacting the law.[133] Next, the Mayor pursued his unquestioned right to contest the law's validity through an established legal vehicle: an action for declaratory judgment.[134] Both parties' actions fell within the conception of New York State's separation of powers framework; the same cannot be said, however, for what came after.

B. The Article 78 Proceeding and Appeals

Although the New York Supreme Court[135] refused the Mayor's request to stay implementation of the EBL, the Mayor nevertheless refused to enforce the law, unilaterally proclaiming it to be invalid.[136] The Mayor declared instead his intent to comply with the laws he felt preempted the EBL.[137] In response, the Council filed an Article 78 proceeding in the nature of mandamus to compel[138] on October 26, 2004, the day the EBL was to take effect.[139]

On November 8, 2004, the New York Supreme Court granted the Council's request based on the presumption of validity accorded to legislative enactments,[140] and ordered the Mayor to enforce the law,[141] but the Mayor still refused to comply and filed an appeal.[142] Four months later, the Appellate

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[133] *Id*. ("If after such reconsideration the votes of two-thirds of all the council members be cast in favor of repassing such local law, it shall be deemed adopted, notwithstanding the objections of the mayor.").

[134] Reardon & McGarry, *supra* note 17, at 3.

[135] In New York State, the Supreme Court is the trial court. FREDERICK MILLER, *New York State's Judicial Article: A Work in Progress*, *in* DECISION 1997: CONSTITUTIONAL CHANGE IN NEW YORK, *supra* note 1, at 127-28.

[136] Reardon & McGarry, *supra* note 17, at 3.

[137] *Id*.

[138] Article 78 of the New York Civil Practice Law and Rules ("CPLR") governs the special proceedings that are used to bring any action formerly brought under the writs of mandamus, prohibition, or certiorari. Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C7801:1, at 25 (1994). When a body or officer fails "to perform a duty enjoined upon it by law . . . an Article 78 proceeding in the nature of mandamus is generally the appropriate remedy, provided that the relief is sought to compel the performance of an official duty that is clearly imposed or mandated by statute . . . ." 6 N.Y. JUR. 2D *Article 78 and Related Proceedings* § 47 (1997). The petitioner must demonstrate a "clear legal right" to the relief sought. *Id*. § 72.

[139] New York, N.Y., Local Law No. 27 (2004).

[140] *See Bloomberg*, 846 N.E.2d at 436.

[141] Tavernise, *supra* note 15, at B3. The judgment was entered December 1, 2004. *See* Council of N.Y. v. Bloomberg, 791 N.Y.S.2d 107, 109 (App. Div. 2005).

[142] Brief of Petitioner-Appellant at 14, Council of N.Y. v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006) (No. 115214/04), 2005 WL 3818161 [hereinafter Council's Brief].

Division reversed the Supreme Court's judgment and dismissed the proceeding, finding that the lower court had erred by not addressing the issue of the validity of the EBL raised by the Mayor.[143] While admitting that "[a]n article 78 proceeding is not the remedy for adjudicating the validity of legislative enactments," the Appellate Division held that the law's validity should have been addressed.[144] The court also stated that not considering the merits of the case would defeat "a principal purpose of bringing the writ of mandamus, i.e., obtaining a prompt, due resolution of the controversy."[145] In the decision's succeeding two short paragraphs, the court found that the EBL was preempted by a state law that provides that government contracts must be granted to the lowest responsible bidder and by the federal Employee Retirement Income Security Act ("ERISA").[146]

The Council appealed this ruling, arguing both that the Appellate Division erred in addressing the validity of the law, and also that the EBL was not preempted by either statute.[147] On February 14, 2006, the New York State Court of Appeals, in a four-to-three split decision, affirmed the dismissal, effectively invalidating the law on the same grounds as the court below.[148]

C. Discussion and Analysis of the Court of Appeals' Decision

The Court divided on the issue of whether the validity of the law was appropriately raised as a defense to the Article 78 proceeding.[149] It had been consistently held by the Court that an Article 78 proceeding is not an appropriate vehicle to

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[143] *Council of N.Y.*, 791 N.Y.S.2d at 109.

[144] *Id*. at 109 (quoting Giuliani v. Council of N.Y., 181 Misc. 2d 830, 834 (N.Y. Sup. Ct. 1999)). The rule limiting the scope of Article 78 proceedings is well-settled law outside certain exceptions, such as challenges of quasi-legislative acts by governmental agencies, *see* N.Y. City Health and Hosp. Corp. v. McBarnette, 639 N.E.2d. 740 (N.Y. 1994), and challenges based on as-applied unconstitutionality, *see* Kovarsky v. Hous. & Dev. Admin. of the City of N.Y., 286 N.E.2d 882 (N.Y. 1972). *See also infra* note 150.

[145] *Council of N.Y.*, 791 N.Y.S.2d at 109.

[146] *Id*. at 109-10. The primary state statute considered was section 103(1) of the New York General Municipal Law (the "competitive bidding statute"), and the court specified section 1144(a) and (c)(2) of ERISA as preempting the EBL. *Id*. at 110.

[147] A discussion of the Majority's preemption analysis is postponed until Part III.C.2, following a critique of the controversial procedural issue in Part III.C.1.

[148] *Bloomberg*, 846 N.E.2d at 435.

[149] Reardon & McGarry, *supra* note 17, at 3.

challenge the validity of a law.[150] However, the *Bloomberg* Majority distinguished previous cases where it was the petitioner who challenged a law's validity; here, the respondent raised the issue as a defense.[151] The Court reasoned that because a writ of mandamus should never be granted to force the government to perform an illegal act, a court could rule on a law's validity when raised in this context.[152] The Majority then proceeded to affirm the Appellate Division's holding that state and federal statutes preempted the EBL.[153]

The dissenting judges found the ruling to be an unacceptable encroachment upon legislative authority.[154] Rejecting the idea that, even when denied a restraining order, the Mayor could choose to ignore legislative enactments upon his own determination that a law is invalid, they maintained, commensurate with the general rule, that an Article 78 proceeding was an inadequate vehicle for a decision on the law's validity.[155] Establishing this new precedent, they concluded, represented a clear violation of separation of powers.[156] It "skews the roles of the legislative and executive branches" by allowing the Mayor to "infringe upon the legislative powers reserved to the City Council" and "to determine, in the first instance, whether a law is valid, and thereby clothe the executive with not only legislative but judicial powers."[157] As reported in the *New York Law Journal*,

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[150] As the *Bloomberg* Dissent noted, "[A] petitioner who challenges the validity of legislation may not proceed by article 78 but must bring a declaratory judgment action . . . . That is the law. Cases to this effect are legion." *Bloomberg*, 846 N.E.2d at 443 (Rosenblatt, J., dissenting). *See, e.g.*, Save the Pine Bush, Inc. v. Albany, 512 N.E.2d 526, 529 (N.Y. 1987); Bd. of Educ. v. Gootnick, 404 N.E.2d 1318, 1319 (N.Y. 1980); Press v. County of Monroe, 409 N.E.2d 870, 873 (N.Y. 1980); Solnick v. Whalen, 401 N.E.2d 190, 195 (N.Y. 1980); Lakeland Water Dist. v. Onondaga County Water Auth., 248 N.E.2d 855, 857 (N.Y. 1969).

[151] *Bloomberg*, 846 N.E.2d at 436-37. The Majority cited two cases allegedly supporting this proposition, one from 1936 and the other from 1900. *Id.*; *see* Carow v. Bd. of Educ. of the City of N.Y., 6 N.E.2d 47 (N.Y. 1936); People *ex rel.* Balcom v. Mosher, 57 N.E. 88 (N.Y. 1900). The Dissent noted that no language in either opinion constituted such a holding of the Court. *Bloomberg*, 846 N.E.2d at 444 n.6 (Rosenblatt, J., dissenting). Further, the cited cases predate the consolidation of writ practice under N.Y. C.P.L.R. § 7801 and the subsequent case law on Article 78 proceedings. *See infra* notes 160-71 and accompanying text.

[152] *Bloomberg*, 846 N.E.2d at 436-37.

[153] *Id.* at 435; *see* discussion *infra* Part III.C.2.

[154] *Id*. at 442-44 (Rosenblatt, J., dissenting).

[155] *Id*. at 444.

[156] *Id*. at 446.

[157] *Id.* at 444.

"[t]o the dissent, the question was not merely one of procedure, but of constitutional dimension."[158]

1. The Procedural Issue

The Dissent did not reach the preemption issue, but rather recommended the resumption of the previously initiated action for declaratory judgment.[159] This was not a mere procedural formality; it was an explicit recognition of the inadequacy of an Article 78 special proceeding to resolve challenges to the validity of legislative enactments.[160] The history and purpose of Article 78 proceedings supports this position.

New York codified the common law writ practice in 1921, and consolidated the procedure for these orders under Article 78 of the former Civil Practice Act in 1937.[161] Pursuant to this Act (and its successor, Article 78 of the CPLR), petitions for the major common law writs must be brought in a special proceeding as defined by the Article.[162] The purpose of establishing a unified procedure was to provide a simplified and expeditious method by which a petitioner could assert a right to relief.[163] Because most of these matters involve relatively straightforward assertions of a legal right,[164] Article 78 cases are heard as "special proceedings."[165] Generally, a special proceeding entails limited opportunity for discovery[166] and presentation of evidence[167] compared with an action. In a simple Article 78 proceeding, the court, having received the

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158 Reardon & McGarry, *supra* note 17, at 3.

159 *Bloomberg*, 846 N.E.2d at 447 (Rosenblatt, J., dissenting).

160 *Id.* at 446 ("This distinction between Article 78 and declaratory judgment is critical and must be maintained if we are to preserve proper methods of constitutional analysis. This goes to more than form. In the case before us, it implicates separation of powers.").

161 6 N.Y. JUR .2D, *Article 78 and Related Proceedings* § 1 (1997).

162 *Id*. The Article comprises petitions for the writs of mandamus, certiorari to review, and prohibition. *Id*.

163 Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C7801:1, at 25 (1994).

164 DAVID D. SIEGEL, NEW YORK PRACTICE 904 (3d ed. 1999).

165 N.Y. C.P.L.R. § 7804(a) (McKinney 1994). For general rules governing special proceedings, see *id.*, art. 4.

166 *Id.* § 408 (McKinney 2001) (requiring leave of court for disclosure in most circumstances); SIEGEL, *supra* note 164, at 914,

167 N.Y. C.P.L.R. § 7804(d); SIEGEL, *supra* note 164, at 940 ("Most Article 78 proceedings are resolved on papers alone," but if there is a triable issue of fact, then a trial should be held.).

parties' papers, disposes of the case as it would a motion for summary judgment.[168] However, the CPLR accommodates cases that require a more fully developed record.[169] For example, a court must determine if there is a triable issue of fact warranting an evidentiary hearing.[170] In fact, a full panoply of options is available to a court hearing an Article 78 matter—including conversion to an action for declaratory judgment.[171]

This kind of simplified procedure, involving only a handful of petitions, affidavits, and pleadings is ill suited to the practice of judicial review. Yet the Appellate Division relied on nothing more when it declared the EBL invalid.[172] A limited proceeding without an evidentiary hearing is inconsistent with the standard of review employed to challenge legislative acts.[173] Statutes are accorded presumptive validity in New York State.[174] In order to prevail on a claim that a law is facially invalid, a challenger must "prove beyond a reasonable doubt" that in "'any degree and in every conceivable application' the law suffers wholesale constitutional impairment."[175] A factual record developed from a full hearing should thus be seen as the bare minimum of due process when New York courts undertake the act of judicial review. As the *Bloomberg* Dissent noted, application of this stringent burden is substantially undermined—and the presumptive validity of legislative acts compromised—when a court decides the issue summarily and without the benefit of a record.[176] "This distinction between article 78 and declaratory judgment is critical . . . ."[177] Had the

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[168] Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C7804:9, at 664 (1994); *see* N.Y. C.P.L.R. § 409(b) (McKinney 2001).

[169] *See, e.g.*, N.Y. C.P.L.R. § 7804(d).

[170] *Id.* § 7804(h) ("If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith."). "The 'forthwith' directive is consistent with the summary nature and purpose of Article 78 proceedings and, in effect, creates a trial preference." Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C7804:9, at 664 (1994).

[171] N.Y. C.P.L.R. § 103(c) (McKinney 2003).

[172] *Bloomberg*, 846 N.E.2d at 445 (Rosenblatt, J., dissenting).

[173] *Id.* at 446.

[174] 20 N.Y. JUR. 2D *Constitutional Law* § 60 (2005). Municipal ordinances are granted the same deference. Lighthouse Shores, Inc. v. Town of Islip, 359 N.E.2d 337 (N.Y. 1976).

[175] *See, e.g.*, Moran Towing Corp. v. Urbach, 787 N.E.2d 624, 627 (N.Y. 2003) (citations omitted); Cohen v. State, 720 N.E.2d 850, 852 (N.Y. 1999) (quoting McGowan v. Burstein, 525 N.E.2d 710, 711 (N.Y. 1998)).

[176] *Bloomberg*, 846 N.E.2d at 446 (Rosenblatt, J., dissenting).

[177] *Id.*

matter been litigated under the Mayor's original declaratory judgment action, the Council would almost certainly have had the opportunity for a full hearing to proffer evidence in support of its case.[178] The Appellate Division and Court of Appeals failed to require the development of a record, which would be essential to properly adjudicating the legality of the EBL under a standard of presumptive validity.

2. The Preemption Issue

The Majority confidently asserted that no record was necessary because the matter turned "entirely on issues of law, not of fact."[179] However, it then proceeded to make factual assumptions and narrow constructions of law in its analysis of the preemption issue with regard to New York's competitive bidding statute and federal ERISA legislation.[180]

a. The Competitive Bidding Statute

The competitive bidding statute was enacted by New York State to impose fiscal discipline on public expenditures and to prevent "favoritism, improvidence, fraud and corruption in the awarding of public contracts."[181] It provides that all public works contracts over a certain cost threshold "shall be awarded . . . to the lowest-responsible bidder . . . except as otherwise expressly provided by an act of the legislature"[182]

To rebut the statute's alleged preemption of the EBL, the Council first relied on a legislative provision that it argued fell within the exception clause.[183] This enactment—an implementing statute of a constitutional Home Rule provision—allows localities to regulate the "wages or salaries, the hours of work or labor, and the protection, welfare and

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[178] The merits of the preemption arguments inveighed against the EBL turn on controverted material facts, as discussed *infra* in Part III.C.2. Although it is possible that the trial court could have summarily dismissed the case against the Council, it seems unlikely if the facts were viewed in the light most favorable to it, as required by the applicable standard. *See id.*

[179] *Bloomberg*, 846 N.E.2d at 437.

[180] *Id*. at 438-42.

[181] *See* N.Y. State Chapter, Inc. v. N.Y. State Thruway Auth., 666 N.E.2d 185, 190 (N.Y. 1996).

[182] N.Y. GEN. MUN. LAW § 103(1) (McKinney 1994). For commentary on who qualifies as a "responsible bidder," see 27 N.Y. JUR. 2D *Counties, Towns & Municipal Corps.* § 1357 (2001).

[183] Council's Brief, *supra* note 142, at 30-38.

safety of persons employed by any contractor or subcontractor performing work, labor or services for it."[184] The Council believed the EBL, by merely "set[ting] certain terms and conditions upon which New York City will choose to do business with private contractors," fit comfortably within this granted power and thus was consistent with the text of the competitive bidding statute's exception.[185]

In addition, based on data from other major cities with similar laws, the Council asserted that the economic costs of enacting the EBL would be de minimis, and the law would ultimately yield financial benefits to the City.[186] Thus, despite a possible small increase in costs for City-contracted services due to a reduction in the number of eligible bidders, the Council anticipated financial gains overall.[187] Therefore, the Council argued, the EBL did not counteract the fiscal purpose of the competitive-bidding statute.[188]

Finally, the Council sought refuge in a similar established exception to the lowest-responsible bidder requirement: actions for the purpose of bringing economic benefits to the contracting authority.[189] While the Council

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[184] N.Y. MUN. HOME RULE LAW § 10(1)(ii)(a)(10) (McKinney 1994); *see* N.Y. CONST. art. IX, § 2(c)(ii)(9); *see also* N.Y. CITY CHARTER § 30 (granting the Council powers to review city contracting policies and practices, including "fair employment practices of city contractors").

[185] Council's Brief, *supra* note 142, at 31-32 (citing McMillen v. Browne, 200 N.E.2d 546 (N.Y. 1964)). In *McMillen*, the Court used similar language in upholding the imposition of a local minimum wage law for city contractors. *McMillen*, 200 N.E.2d at 548.

[186] Council's Brief, *supra* note 142, at 38-42. The City argued that providing equal benefits would enable employers to recruit the best and brightest employees; also, the State Comptroller testified to the Council that a reduction in public healthcare costs could result, as more employers would be likely to extend health insurance coverage to domestic partners. *Id*. at 39-40.

[187] *Id.* at 31-42.

[188] *Id*. As for the anti-corruption rationale for the competitive bidding law, the intent was to prevent fraud in the contracting process in the form of quid pro quo favoritism and other "sweetheart deals" by governmental procurement officials. Frank Anechiarico & James B. Jacobs, *Purging Corruption from Public Contracting: The "Solutions" Are Now Part of the Problem*, 40 N.Y.L. SCH. L. REV. 143, 145-46 (1995). Indeed, the target of this facet of the law in New York City would be the Mayor's office, which has the authority to choose among contractors to the extent that discretion is allowed. *See generally id.* The Mayor did not contend that the EBL was preempted on these grounds, Reply Brief for Petitioner-Appellant at 22-23, Council of N.Y. v. Bloomberg, 846 N.E.2d 433 (N.Y. 2006) (No. 115214/04), 2005 WL 3818163 [hereinafter Council's Reply Brief], yet the Majority implausibly suggested such general provisions as the EBL risked favoritism on the part of the Council in the awarding of contracts, *Bloomberg*, 846 N.E.2d at 438 ("[T]he municipality could design its requirements to match the benefit structure of the bidder it favored.").

[189] *See* N.Y. State Chapter, Inc., v. N.Y. State Thruway Auth., 666 N.E.2d 185, 190 (N.Y. 1996) (determinative question was whether the public authority's labor

readily admitted that a primary motivation to pass the EBL was to pursue social change, it always maintained that "procuring cheaper, higher quality goods and services for the City" was another basic objective.[190] Since the EBL arguably promoted such benefits that advance the same interests as embodied by the competitive bidding statute, the laws were not in conflict.[191] The Court of Appeals flatly rejected the Council's assertions in this regard without providing a basis for doing so.[192]

b. ERISA

The Court's finding that the EBL was preempted by ERISA was based on the following broad provision of the federal act: "'[ERISA] shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan [described herein].'"[193] The Council argued, first, that the nature of the EBL excluded it from ERISA preemption as construed by both New York and federal courts, and, second, that the Council's enactment fell within the "market participant" exception.[194]

In *Chesterfield Associates v. New York State Department of Labor*, the New York Court of Appeals upheld the state agency's compensation calculation method in its enforcement of New York State's prevailing wage law (which compels contractors engaged in public works to pay their employees a prevailing wage).[195] The Court cited *Burgio and Campofelice, Inc. v. New York State Department of Labor*, a Second Circuit case that held "ERISA does not preempt the . . . [prevailing wage] law because it does not mandate a particular set of benefits."[196] The *Burgio* opinion quoted the U.S. Supreme

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agreement "had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes").

[190] Council's Brief, *supra* note 142, at 7.

[191] *Id.* at 29-31.

[192] *Bloomberg*, 846 N.E.2d at 439 ("[T]he Council cannot and does not seriously assert that the 'purpose and likely effect' of the law is to make the City's contracts cheaper or their performance more efficient."). Evidently the Council's arguments that the EBL would both yield better performance and ultimately protect the public fisc fell on deaf ears. *See* Council's Brief, *supra* note 142, at 41-42.

[193] 29 U.S.C. § 1144(a) (2000).

[194] Council's Brief, *supra* note 142, at 44-46.

[195] Chesterfield Assocs. v. N.Y. State Dep't of Labor, 830 N.E.2d 287 (N.Y. 2005).

[196] *Id*. at 290 n.4 (citing Burgio & Campofelice, Inc. v. N.Y. State Dep't of Labor, 107 F.3d 1000, 1007 (2d Cir. 1997)).

Court: "Preemption does not occur, however, if the state law has only a 'tenuous, remote, or peripheral' connection with covered plans . . . ."[197] The EBL did not require particular benefits or any type of plan; it did not even mandate that all employers provide the equal benefits it championed, merely that contractors who opted to bid for city contracts over $100,000 do so.[198] The Council contended, therefore, that the law was not preempted by ERISA because it did not regulate any particular benefit and had only a peripheral effect on covered plans.[199] The Majority ignored this line of reasoning entirely and only directly addressed the Council's market participant exception argument.[200]

A market participant exception to ERISA may exist when a state or its subdivision acts as a participant in the marketplace.[201] The exception applies when such an entity acts to advance its proprietary interests, but not when it acts as a regulator.[202] The Council's argument here echoed that of its position on the competitive bidding statute in that economic interests did in part underlie the motivation to pass the EBL.[203] The Court in *Bloomberg*, however, narrowly construed the market participant exception, restricting its application to instances where the state acts exclusively for the purpose of protecting a proprietary interest, with "*no interest* in setting policy."[204] The Majority's view is that even if the Council had a

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[197] *Burgio*, 107 F.3d at 1008 (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 100 n.21 (1983)). The *Burgio* court further stated that areas of traditional state regulation are not preempted unless there is an indication of congressional intent. *Id.* (citing N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995)).

[198] New York, N.Y., Local Law No. 27 (2004).

[199] Council's Brief, *supra* note 142, at 44-45.

[200] *See Bloomberg*, 846 N.E.2d at 441.

[201] *See, e.g.*, Building & Constr. Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc., 507 U.S. 218, 226-27 (1993) (commonly referred to as *Boston Harbor*).

[202] *Id*.

[203] Council's Brief, *supra* note 142, at 46-52.

[204] *Bloomberg*, 846 N.E.2d at 442 (quoting *Boston Harbor*, 507 U.S. at 229) (emphasis added). Despite the borrowed phrase from *Boston Harbor*, the Court's absolutist position is not supported by the Supreme Court's opinion. The quote was taken from a section comparing a state's market influence with that of a private entity; it reads in full, "These distinctions are far less significant when the State acts as a market participant with no interest in setting policy." *Boston Harbor*, 507 U.S. at 229. Nowhere did the Supreme Court hold that the state's purpose must be utterly devoid of a regulatory purpose when it operates in conjunction with an economic one. As the Council noted, the Ninth Circuit upheld the San Francisco law analogous to the EBA under the market participant exception. Council's Brief, *supra* note 142, at 49-50

legitimate economic basis for enacting the provision, the ERISA preemption exception would be unavailable because the EBL also had a social policy purpose.[205] This interpretation of the market participant exception is needlessly restrictive when it precludes any law that contains a non-fiscal component. It is also unclear how a court should evaluate the "purity" of a legislature's motivation given the often unwieldy deliberative process.

The persuasiveness of most of the Council's arguments against preemption turns on findings of fact, including the purposes and likely effects of the EBL. As such, the Court's willingness to uphold the Appellate Division's dismissal of the petition without providing an opportunity for a full evidentiary hearing may be seen as an egregious encroachment on the rights of the City Council.[206]

IV. REPERCUSSIONS OF *BLOOMBERG*

Disputes between executive and legislative bodies in New York governments are inevitable as political actors pursue their own agendas, but the *Bloomberg* ruling has changed the ground rules for these conflicts. Although the ultimate outcome of *Bloomberg* may or may not have been just (a full hearing could well have ended with the same result), the case is likely to be remembered for the presumptuous judicial response to the dispute and the potential adverse effects of the Court's ruling. The Court's decision disturbs the balance of power between the legislatures and executives under its jurisdiction.[207] Given its extraordinary power of judicial review, the judiciary plays a special role in maintaining the power

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(citing Air Transp. Ass'n v. City & County of San Francisco, 992 F. Supp. 1149 (N.D. Cal. 1998)).

[205] *Bloomberg*, 846 N.E.2d at 441-42.

[206] This is not to say that the Court necessarily ought to have granted the Council's requested relief. While it is plausible that the uncertainty over either case for preemption would be sufficient to defeat the "clear right" standard applicable to a mandamus proceeding, it is far less certain that the presumptive validity accorded legislative acts would be overcome. Neither the Appellate Division's two paragraphs nor the somewhat lengthier consideration by the Court of Appeals seemed to apply the stringent standard of review that would apply in a declaratory judgment action, *see supra* Part III.C.1, or even one appropriate for dismissing an Article 78 petition, in which all factual inferences should be taken in the petitioner's favor. *See* Council's Reply Brief, *supra* note 188, at 15 (citing 511 W. 32nd Owners Corp. v. Jennifer Realty Co., 773 N.E.2d 496 (N.Y. 2002)).

[207] *See Bloomberg*, 846 N.E.2d at 444 (Rosenblatt, J., dissenting).

balance among governmental branches.[208] *Bloomberg* provides an example of how an ill-considered decision can effect a shift in the governmental balance of power. It is an especially troubling case because the alteration of established judicial procedure was both unnecessary and unjust.

A. The Separation of Powers Issues

The *Bloomberg* decision signals a significant shift of power from legislatures to executives in New York State. This transgression of separation of powers was precipitated by the failure of the customary checks and balances to manage an interbranch conflict, and ratified by a high court decision that burdens one branch to the benefit of another. In effect, the Court legitimated the Mayor's unilateral (in)action in direct opposition both to the Council's overriding veto as well as to the Supreme Court's denial of the temporary restraining order.[209] Although the Court's later holding vindicated the Mayor's view that the EBL was invalid, the Mayor's refusal to enforce a duly enacted law disrupted the law-making machinery instituted by the City Charter.[210] By deciding that the EBL was preempted without the benefit of an evidentiary hearing, the Appellate Division and Court of Appeals strayed from customary procedures for determining the validity of a challenged enactment.[211] In light of the foreseeable detrimental effects of taking this extraordinary judicial action, the Courts failed to observe a proper respect for the separation of powers doctrine.[212] The assertion of unwarranted authority by the executive and the abnegation of the responsibility of both the executive and the judiciary to act with deference to coordinate branches threaten to undermine the capacity of legislative bodies in the state to represent their constituents.

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[208] *See* Cohen v. State of New York, 720 N.E.2d 850, 854 (N.Y. 1999) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) ("The courts are vested with a unique role and review power over the constitutionality of legislation.").

[209] *Bloomberg*, 846 N.E.2d at 437 ("Where a local law *seems to the Mayor* to conflict with a state or federal one, the Mayor's obligation is to obey the latter . . . .") (emphasis added).

[210] *See id.* at 443 (Rosenblatt, J., dissenting).

[211] *See supra* Part III.C.1.

[212] Brennan Ctr. Brief, *supra* note 122, at 10.

1. How New York's Legislative Bodies Have Been Weakened by *Bloomberg*

Bloomberg is a case in which the usual mechanisms that govern the boundaries of interbranch action failed. First, the Council's power to override a mayoral veto was nullified when the Charter's provision for automatic enactment was annulled by the Mayor's refusal to enforce the law. Mayor Bloomberg objected to the EBL on both policy and legal grounds.[213] Those two different bases invoke separate courses of action within the Mayor's granted authority, the veto[214] and a legal challenge.[215] The executive branch has no special authority to ignore a law that furthers a policy with which the executive disagrees; rather, he or she has a sworn duty to uphold and execute the law.[216] In this case, after the Council overrode the veto and the court denied him an injunction, the Mayor went beyond any right or remedy available to his office by refusing to implement the EBL, enacted by the veto override.[217] He defied the system of checks and balances by acting on his unilateral judgment of the EBL's legal status.[218]

By sanctioning this executive branch overreach, *Bloomberg* subverted the existing power balance between the Mayor's office and the Council.[219] Allowing New York courts to address the validity of a law as a defense in an Article 78 proceeding grants *de facto* executive officeholders an extra-constitutional alternative to thwart legislative will.[220] By

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[213] Tavernise, *supra* note 127.

[214] N.Y. CITY CHARTER § 37.

[215] *Bloomberg*, 846 N.E.2d at 442 (Rosenblatt, J., dissenting) ("An executive is authorized to bring a declaratory judgment action challenging an enactment's constitutionality . . . .").

[216] *Id.* at 443.

[217] *Id*. at 447.

[218] A contrary view of the propriety of executive action upon an independent determination of a law's validity is contemplated in Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81 (1993). Paulsen argues that a conception of separation of powers that subordinates executive authority to judicial review is inconsistent with the granting of executive powers that may be exercised without regard for legal precedent or justification, such as the ability to pardon or veto legislation for any reason whatsoever. *Id*. at 81-83. However, this Note takes the position that this tension dissolves when these "extraordinary" powers are understood to be the very mechanisms of the doctrine that define each branch's authority in a balanced system of carefully allocated power. *See* discussion *supra* Part II.B.

[219] Winnie Hu, *Mayor Need Not Enforce Certain Laws, Court Rules*, N.Y. TIMES, Feb. 15, 2006, at B3 (citing legal experts).

[220] Council's Brief, *supra* note 142, at 16-17.

simply refusing to administer an enactment and mounting a legal defense to actions initiated by the legislative branch, an executive can at least delay and possibly evade implementing a policy. Imagine the Court in *Bloomberg* decided the case in the Council's favor. Then, the Mayor's inaction would have "illegally" affected city contracting transactions for over a year. As a practical matter, the beneficial inducement effect of the law over that time period would never be realized, and the indirect financial gains anticipated from the measure further delayed. Not only might significant costs result, but more fundamentally it would represent a failure of the democratic process to carry out the people's bidding.[221]

By encouraging this very course of action, *Bloomberg* augments the power of executives in the state at the expense of legislative bodies. "As things turned out, the Court of Appeals gave executive officials of the local and state governments of New York a significant procedural advantage for the resolution of disputes with legislative bodies over allegedly invalid legislation."[222] Executives may now sit back and do nothing while preparing to meet legal action initiated by the legislative body, thereby placing an added burden on the legislative branch simply to have its enactments put into effect.[223] The executive would thereby force the legislature to expend additional resources merely to exercise its granted powers.[224] Such executive recalcitrance saps the full effectiveness of the legislative body. In some cases, it can be expected that legislators will be deterred altogether from undertaking a legal battle over a contested enactment due to the expense. Thus, the will of the legislative body, and its constituents, may at times be utterly thwarted.

While it is true that an executive may pay a political price for opposing popular measures in this manner, the effectiveness of this check varies with the timing of the election cycle and the relative importance of the pertinent issue in the

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[221] Brennan Ctr. Brief, *supra* note 122, at 6.

[222] Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C7801:5, at 4-5 (Supp. 2007).

[223] *See Bloomberg*, 846 N.E.2d at 443 (Rosenblatt, J., dissenting) ("[I]t should not be necessary for [the Council] to start a lawsuit saying, in effect, 'We've passed the law and really meant it . . . .'").

[224] Moreover, there appears to be little cost for executives who adopt this approach. If they eventually are unsuccessful in the courts, the likely effect would be no more than an order to enforce the law from that point forward. While they may pay a price at the polls (assuming their position is an unpopular one, since a supermajority of legislators opposed it), the result is still, at best, justice delayed.

voters' decision-making process. Others might defend an executive's ability to act on his or her own legal determination as a desirable means by which to counteract an improvident exercise of legislative power. Regardless of the wisdom of this approach, such executive encroachment into legislative power is inconsistent with the separation of powers embodied in the state constitution. Governors in New York have the express obligation to enforce the laws that have been put into effect by a veto override.[225] The same, of course, goes for New York City mayors under its charter.[226]

2. The Nature of the Harm Threatened

The harmful effects of *Bloomberg* arise from the increased risk that legitimate enactments of law may be delayed or indeed never see the light of day. When a legitimate law-making process is hampered, the public loses the full force of its most representative voice, and when such laws are erroneously stuck down, this voice is not only weakened, but completely silenced.

This danger may be enhanced by judicial error or bias. When courts address the validity of a law in limited proceedings, the result may well be that some enactments will be struck down that might not have been had their proponents received a full hearing. It is at least arguable that this was the result in *Bloomberg*.[227] The same result could also occur if a judiciary that is sympathetic to the executive's position improperly intrudes upon the political sphere under the pretext of assessing a law's validity in order to stifle legislative action and the people's will.

Another detrimental effect of this failure to respect the separation of powers is a heightening of interbranch tensions. As discussed above, the *Bloomberg* precedent increases the likelihood for similar acts of executive encroachment in the future. Beyond the practical burdens placed on legislative bodies to have their laws enforced, increased frustration and animosity between branches are predictable results. Adversarial relations between the legislative and executive bodies are damaging to good governance, as the branches must

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[225] N.Y. CONST. art. IV, § 7.

[226] N.Y. CITY CHARTER § 37.

[227] *See supra* Part III.C.2.

work together to work at all.[228] Recognition of this potential for unhealthy conflict warrants the exercise of greater deference.

B. Bloomberg*'s Heedless and Dangerous Precedent*

What is remarkable about *Bloomberg* is that there was no need to levy this insult upon the separation of powers doctrine. Because mandamus relief should be granted only when the petitioner is due a clear legal right, there is no reason why the instant courts could not have dismissed the Council's petition and let the declaratory judgment action deal with the issue of the EBL's validity separately. As one state court has cautioned, "[the] Petitioner's right to obtain an order of mandamus rests in the sound discretion of the court . . . and the court's power should be exercised cautiously when to do so will interfere with the functions of co-equal branches of government."[229] The Court's abuse of Article 78 procedure in this case was unnecessary, unfair, and, notwithstanding the disposition of this case, may well exacerbate inefficiencies in similar adjudication.

1. The Judiciary's Unnecessary Procedural Shortcut

The Court's decision in *Bloomberg* was unwarranted because an unequivocally appropriate recourse existed to resolve the dispute—to restore the Mayor's original declaratory judgment action.[230] The Court need not have decided the law's validity in order to dismiss the mandamus petition; instead, it could have based the dismissal on the failure of the Council to establish that it had a "clear legal right" to relief.[231] Thereafter, the declaratory judgment action on the preemption issue could resume. The only justification given for the course taken, by both the Appellate Division and the Court of Appeals, was the interest of efficiency, to dispense with the case without further

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[228] *See* Peabody & Nugent, *supra* note 6, at 22-23. The authors comment that a benefit of incorporating multiple government actors in the decision-making process is the encouragement of consensus-building; the downside, of course, is that fractious relations can interfere with the operation of government. *See id*. at 14-15 (discussing some scholars' critique of divided government leading to "needless institutional conflict, division, and gridlock").

[229] Williams v. Bryant, 395 N.Y.S.2d 552 (App. Div. 1977).

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

[231] *See supra* note 138.

proceedings.[232] This argument turns the concept of Article 78 expediency on its head, however. Streamlining of the writ practice was not intended to relieve court dockets, but rather to benefit claimants pursuing their rights in the face of governmental abuse or inaction.[233] Placing writ practice within the purview of special proceedings was a recognition that, for many cases, a ruling on the papers was all that was needed, not that it was all that was due.[234] Thus, courts are instructed to convert Article 78 and other special proceedings into full actions whenever appropriate, and hearings on issues of material fact are to be held whenever they arise.[235] Reinstating the Mayor's action for declaratory judgment would have been consistent with this policy.

Nor can it persuasively be argued that there is a danger in maintaining the status quo rule. The Majority in *Bloomberg* asserted that validity must be examined in a mandamus case lest a truly detestable (and clearly unconstitutional) act be perpetrated upon the people.[236] They proffered an example of a legislature that passes a law requiring racial segregation in public schools, and argued that it would be absurd to preclude a court from striking such a law, even in an Article 78 setting.[237] Even if one considers such an extreme case (which could only arise if a legislative supermajority rammed through such an odious, obviously unconstitutional, or patently dangerous measure), one would expect that an executive need only move for a temporary restraining order, as Mayor Bloomberg did for the EBL.[238] The difference is that in the hypothetical scenario, the court would be certain to grant the motion, and any potential harm would be averted.[239]

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[232] Council of N.Y. v. Bloomberg, 791 N.Y.S.2d 107, 109 (App. Div. 2005); *Bloomberg*, 846 N.E.2d at 437-38.

[233] SIEGEL, *supra* note 167, at 904 ("A special proceeding is a quick and inexpensive way to implement a right."). *See also* Rockwell v. Morris, 211 N.Y.S.2d 25 (App. Div. 1961).

[234] SIEGEL, *supra* note 167, at 904-05.

[235] *Id*. at 905.

[236] *Bloomberg*, 846 N.E.2d at 436-37.

[237] *Id*. at 437.

[238] *Id*. at 443 (Rosenblatt, J., dissenting).

[239] If this nefarious conspiracy had infected the judicial branch as well, then—and only then—would the author agree that unitary action by the executive is warranted. The distinction lies in the degree of harm threatened and the true incompatibility of the offensive enactment with existing bodies of law (rather than a mere debatable inconsistency). The hypothetical is far from the scenario in *Bloomberg*, however, or any other likely to arise.

2. The Injustice of the Court's Ruling

The procedural shortcut taken by the *Bloomberg* Court inflicted an unfair disadvantage on the City Council for the act of vigilantly pursuing its rights. If the Council had not filed the Article 78 petition in response to the Mayor's refusal to enforce the law, it would likely have had a full evidentiary hearing on the validity of the EBL in the previously filed declaratory judgment action.[240] Instead, as a petitioner seeking mandamus to compel, it was inappropriately put in the position of defending the law's validity in a limited proceeding.[241] The Court effectively punished the party seeking that the rule of law be observed.[242] This decision will undoubtedly deter a legislative body from employing the mandamus writ (which in some circumstances would be the appropriate vehicle) to achieve this purpose. Instead, if the executive simply refuses to act at all (as is now undeniably the best strategy), the legislative body will have to seek a declaratory judgment if it wants to ensure it receives a full hearing. This is problematic for the reasons discussed above: the remedy will necessarily be improperly delayed,[243] and the attendant costs could deter the action altogether.

3. The Courts' Flawed Efficiency Rationale

The expediency of dispensing with customary procedure in *Bloomberg* could end up being counterproductive. The Majority rejected as a "purposeless exercise" the Dissent's argument that the declaratory judgment action be resumed to consider the validity of the EBL.[244] They noted that Article 78 proceedings are designed for prompt resolution, and concluded that the issue of the EBL's validity could be decided as a matter of law.[245] This concern for judicial efficiency may be not

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[240] *See supra* Part III.C.1.

[241] Brennan Ctr. Brief, *supra* note 122, at 9-10.

[242] *See id*. at 10 (arguing that the Mayor should not be permitted to raise the validity of the EBL even as a defense because he effectively forced the Council to bring the Article 78 proceeding through his inaction).

[243] The legislative body could seek a preliminary injunction ordering the executive to comply with the law, but, as demonstrated in *Bloomberg*, there is no way to enforce such an order if the executive simply refuses to acknowledge the decision. (An Article 78 petition in the nature of a mandamus to compel compliance with the injunction springs to mind, but we can imagine what the defense would be.)

[244] *Bloomberg*, 846 N.E.2d at 437-38.

[245] *Id*. at 437.

only misapplied,[246] but also misconceived, because the holding may lead to less efficient adjudication of similar disputes.

A predictable outcome from this decision is multiplicative adjudication. The Court granted discretionary authority to courts hearing Article 78 proceedings to go beyond the scope comprehended by the CPLR.[247] Instead of deciding merely whether the petitioner has a clear legal right to an action by a body or officer under the law, courts may now opt to pass judgment on the validity of the underlying law in such a proceeding when it is raised as a defense.[248] To do so, they must first decide whether or not evidentiary hearings or conversion to a declaratory judgment action is appropriate. Presumably, in some cases, courts will decline to exercise either of these options, and this decision would be reviewable on appeal for abuse of discretion. If the determination is found to be erroneous, the likely result is remand with an order to take the necessary action. This needless delay in adjudication and potentially unnecessary involvement of the Appellate Division is an inefficient use of judicial resources.

The adjudication of a law's validity entails standards and procedures established by statutes and the common law.[249] Parties should not be able to circumvent this authority merely as a result of their defensive posture in an Article 78 proceeding. Bypassing the established process in a case such as *Bloomberg* is not supported by arguments for efficiency, fairness, or necessity. The Court has thus needlessly imposed an added burden on New York legislatures, which has the direct consequence of impeding their ability to vigorously represent the will of their constituents.

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[246] As discussed previously, the efficiency of special proceedings was primarily intended to benefit claimants, not the courts. *See* discussion *supra* Part IV.B.1.

[247] The CPLR identifies the only four questions that may be determined in an Article 78 proceeding, which relate to the purposes of the common law writs and do not include statutory review. N.Y. C.P.L.R. § 7803 (McKinney 1994).

[248] *Bloomberg*, 846 N.E.2d at 437.

[249] *See supra* Part III.C.1.

V. PROSPECTS FOR MITIGATING *BLOOMBERG*'S DELETERIOUS EFFECTS

The Court of Appeals' decision in *Bloomberg* cannot be appealed and is not likely to be revisited any time soon.[250] Therefore, executives in New York have the Court's imprimatur to act upon their unilateral decisions concerning the validity of laws, and trial courts have been given an invitation to bypass previously established procedures to adjudicate those disputes. As an immediate response, this Note urges these actors to exercise deference to legislatures by foregoing those paths. A more forceful solution to the problem would be for the state legislature to amend the CPLR to preclude adjudication of a law's validity without providing an opportunity for a full and fair hearing (subject to the usual threshold standard of summary judgment).

A. Deference of Coordinate Branches

The separation of powers doctrine is not an end to itself, but the means to ensure the best, most representative government possible.[251] Government actors can only properly advance this goal by refraining from encroachment upon coordinate branches.[252] These restraints on power do not render governmental branches powerless to influence coordinate branches; they may pursue both political and legal avenues of advocacy and redress. But actions that breach the accepted limits on power, as put forth in foundational documents, are offensive to democratic rule and should not be embarked upon.

In the case of the EBL, Mayor Bloomberg is not to be faulted for asserting his good faith position that the law was preempted by the state and federal statutes. An executive ought to pursue his or her interests vigorously, but every government officer is irrevocably obligated to uphold the rule of law. Mayor Bloomberg overstepped the power imbued in the executive office by ignoring the law after the veto override and

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[250] There are no issues of federal law implicated that would permit an appeal in federal court. *See* MARK DAVIES, MARIANNE STECICH & RISA I. GOLD, NEW YORK CIVIL APPELLATE PRACTICE § 2.2 (West 1996).

[251] *See* discussion *supra* Part II.A.

[252] *See, e.g.*, 16A AM. JUR. 2D *Constitutional Law* § 250 (1998) (addressing both federal and state contexts).

the denial of the temporary injunction.[253] At that point, the legislative and judicial branches had spoken, and the Charter's mandate allowed the Mayor no discretion to act to the contrary, at least until the courts had an opportunity to address the matter in litigation.[254] However, there is no mechanism in the current system that can force this compliance—nothing more, that is, than the deference owed to a popularly elected, coordinate branch of government.[255] As Justice Burger wrote, the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[256]

Similarly, in cases and controversies implicating the separation of powers, the judiciary ought to adopt the deferential posture of a coequal branch of government.[257] Going forward, New York courts may yet adhere to this constraint by refusing to follow the course set in *Bloomberg*. Although they are required to consider the validity of a statute when the issue is raised as a defense in an Article 78 proceeding, they have the authority under the CPLR to take whatever measures may be necessary to assure that triable issues of fact receive a full hearing.[258] This power includes converting the proceeding to an action for declaratory judgment.[259] By doing so, the court would simply utilize the statutory means to settle these disputes. This includes application of the standards and presumptions normally afforded legislative enactments. Legislatures and

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[253] *Bloomberg*, 846 N.E.2d at 447 (Rosenblatt, J., dissenting) ("Just as a judicial 'injunction must be obeyed until modified or dissolved, and its unconstitutionality is no defense to disobedience' . . . , duly enacted legislation must be enforced by the executive branch and its alleged invalidity is no defense." (quoting Metro. Opera Assoc., Inc. v. Local 100, Hotel Employees & Rest. Employees Int'l Union, 239 F.3d 172, 176 (2d Cir. 2001))).

[254] *Id*.

[255] *See* Southwick, *supra* note 45, at 935 (quoting U.S. v. Lopez, 514 U.S. 549, 578 (1995) (Kennedy, J., concurring) ("[T]he 'absence of structural mechanisms to require those officials to [restrain from encroachment], and the momentary political convenience often attendant upon their failure to do so,' leads to temptation . . . .")). In *Lopez*, Justice Kennedy argued that this lack of safeguards may justify judicial intervention when one of the political branches failed to maintain the constitutional balance. *Lopez*, 514 U.S. at 577-78 (Kennedy, J., concurring).

[256] INS v. Chadha, 462 U.S. 919, 951 (1983).

[257] Peabody & Nugent, *supra* note 6, at 40. However, other problems arise when judicial deference is exercised in favor of one branch over another. *See* Neal Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2321 (2006).

[258] *See* N.Y. C.P.L.R. § 7804(h) (McKinney 1994).

[259] *See id*. § 103(c); Kovarsky v. Hous. and Dev. Admin. of the City of N.Y., 286 N.E.2d 882, 885-86 (N.Y. 1972).

their constituents are owed nothing less, regardless of the procedural context in which the challenge arises.

Because of its unique role as final arbiter of what the law is, the judiciary occupies a singular place within our system of divided government.[260] This special role is highlighted in the face of executive-legislative branch conflicts. To this extent, judicial review somewhat belies the theory that no branch is superior to the others.[261] While this power has been controversial since the time of *Marbury v. Madison*, it is beyond question that there is an expectation that the judiciary bears an enhanced responsibility to maintain and uphold separation of powers principles.[262]

However, in their ambitious re-articulation of separation of powers theory, Peabody and Nugent expressed great wariness of the judiciary's role in resolving such disputes.[263] Nevertheless, they recognize its appropriateness in some circumstances, and advocate a deliberate approach.[264] They recommend, first, that courts resist early intervention, in order to allow the parties to negotiate a resolution or at least "to construct an adequate record for judges to assess."[265] Second, where the political system has run its course and courts find themselves adjudicating these conflicts, the judiciary "should attempt self-consciously to address how its ruling will affect the various levels at which the separation of powers operate."[266] The Majority in *Bloomberg* failed to act with anything remotely resembling this degree of care. At a

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[260] *See, e.g.*, Cohen v. State of N.Y., 720 N.E.2d 850, 854 (N.Y. 1999) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)).

[261] *See generally* Robert J. Reinstein & Mark C. Rahdert, *Reconstructing* Marbury, 57 ARK. L. REV. 729 (2005). In the federal context, see *United States v. Nixon*, 418 U.S. 683, 703-04 (1974) ("[T]he Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.").

[262] MANSFIELD, *supra* note 11, at 14; 16A AM. JUR. 2D *Constitutional Law* § 250 (1998); *see also Cohen*, 720 N.E.2d at 854-55; WILSON, *supra* note 7, at 82-83.

[263] Peabody & Nugent, *supra* note 6, at 36-38. This prudence is premised in part on their belief that among the salutary effects of distributed powers are the opportunities afforded for negotiations and compromise between branches. *Id.* at 39-40. It also rests upon the conclusion that courts often lack the requisite competence to ascertain the true nature of core functions of the coordinate branches. *Id*. at 39.

Others have advocated the use of litigation for legislative-executive clashes, where appropriate. *E.g.*, CAMPBELL, *supra* note 38, at 15-16 (noting the utility of an authoritative third-party mediator to avoid acrimonious conflicts); Garry, *supra* note 4, at 689 (arguing for a more active judicial role in enforcing constitutionally mandated separation of powers).

[264] Peabody & Nugent, *supra* note 6, at 40-42.

[265] *Id*. at 40.

[266] *Id*.

minimum, appropriate deference would include the adherence to established procedures of adjudication and standards of review that were abandoned in this case.

B. Legislative Action

The state legislature could easily address the concerns raised in this Note by amending the New York Civil Practice Law and Rules. By revising the procedures for adjudicating the validity of legislative acts, they could ensure that those defending the validity of enactments receive a full and fair hearing. A codification of the existing common law rule that a petitioner may not challenge the validity of a law in an Article 78 proceeding[267] could be modestly augmented by a rule that requires courts to convert such a proceeding to an action for declaratory judgment, upon a motion by the petitioner, when the validity of the underlying law is raised as a defense. This legislative fix would merely provide that in this particular situation conversion would be a matter of right for the petitioner.

Legislating a procedural rule change to remedy a perceived injustice perpetuated by the judiciary is not a novel approach. One precedent for such a legislative "overruling" can be found in Congress' 1992 Civil Rights Act.[268] In *Ward's Cove Packing Company v. Atonio*, the Supreme Court altered its allocation of the burden of proof in disparate-impact discrimination claims under Title VII of the 1964 Civil Rights Act.[269] Previous to the ruling, a defendant employer had the onus of proving that an employment practice was based solely on a legitimate neutral consideration, but in *Ward's Cove* the Supreme Court placed the burden on the plaintiff to prove that the employer's proffered justification was invalid.[270] Congress reacted by using its legislative powers to set forth by statute the requirements necessary for making a case of employment discrimination in the absence of proof of intent.[271] The New York State legislature could take a similar step to ensure that

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[267] *See supra* note 150 and accompanying text.

[268] CAMPBELL, *supra* note 38, at 161-63.

[269] 490 U.S. 642 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1071, *as recognized in* Raytheon Co. v. Hernandez, 540 U.S. 44, 52-53 (2003).

[270] CAMPBELL, *supra* note 38, at 162; *see Ward's Cove*, 490 U.S. at 659-60.

[271] CAMPBELL, *supra* note 38, at 12; *see also* Civil Rights Act of 1991, § 105, 105 Stat. 1071 (codified at 42 U.S.C. § 2000e-2(k) (2000)).

judicial procedure ensures fairness in the adjudication of legislative validity. The fact that legislative bodies are the ones aggrieved by this decision ought to provide sufficient motivation for such a response.

VI. CONCLUSION

The constitutions (and charters) organizing government structure reflect careful choices of power allocation. Especially in the states, these foundational documents have been the focus of various amendments as the people have sought to improve the protections and the efficiencies of the political systems under which they live.[272] Government officers swear to uphold these embodiments of the peoples' will, and are thus obliged to heed their guiding principles. Both the executive and judicial branches in the *Bloomberg* conflict failed to respect the separation of powers doctrine. The Mayor's refusal to enforce the Equal Benefits Law in the face of both the Council's overriding veto as well as a court judgment was an act in excess of his authority.[273] But the Court's conduct was even more damaging.[274] When interbranch conflicts require judicial intervention, courts must tread carefully because they are entrusted with the ultimate authority to say what the law is and what the constitution demands.[275]

The *Bloomberg* decision highlights important issues to be considered when the machinery underlying the separation of powers breaks down. The system of checks and balances governs the interplay among the departments and proscribes limits for each branch's proper exercise of power. The effectiveness of these mechanisms depends on the good faith efforts of political actors to observe and respect the limitations imposed by separated government.[276] Each department owes due deference toward coordinate branches to the extent reflected by these organizing principles, thereby ensuring enactment of the democratic will tempered by procedural and structural safeguards.

Unfortunately, both the executive and, especially, the judicial branches involved in the EBL dispute failed to

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[272] *See supra* Part II.C.
[273] *See supra* Part IV.A.
[274] *Id*.
[275] *See supra* Part IV.B.
[276] *See supra* Part II.A.

recognize, or failed to heed, their implied obligations under the doctrine of separation of powers. Although the EBL may not have fared any better as a result of these breaches of due deference, the Court of Appeals has ratified Mayor Bloomberg's extra-legal disobedience to the benefit of New York State's executive officeholders. The Court's ruling ignored long-standing precedent that ensured the presumption of validity accorded to legislative bodies by allowing the issue to be conclusively determined in a limited special proceeding.[277] In doing so, it effected a significant shift in the balance of power established by the state's constitution.[278] What is worse is that this affront to democratic principles was entirely gratuitous.[279]

In *Bloomberg*, the Court not only failed to exhibit adequate deference to coordinate branches by adhering to established adjudicative procedures, but compounded the harm by inviting the state's courts to follow suit. These courts should decline this invitation unless precautions are taken to assure a full and fair hearing. Should the current state of affairs impair the ability of law-making bodies in the state to perform their duties, the New York State Legislature should amend the civil practice rules to ensure that limited proceedings are not exploited to circumvent due consideration of the validity of their enactments.

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[277] See *supra* note 150 and accompanying text.

[278] *See supra* Part IV.A.

[279] *See supra* Part IV.B.

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