INTRASTATE INTERVENTIONS: THE STATE EXECUTIVE'S RESPONSE TO LOCAL NONENFORCEMENT

Rebecca D. Maller†

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† Notes Editor, *Cardozo Law Review*. J.D. Candidate (June 2015), Benjamin N. Cardozo School of Law; A.B., Bowdoin College, 2009. I would like to thank Professor Kate Shaw for her invaluable advice and guidance throughout this process; Bonnie Bogan for her thoughtfulness and attention; Jessica Bondy and the *Cardozo Law Review* editors for their amazing editing and hard work; and Melissa Stein, and my parents, Eric and Jacalyn Maller, for their patience, love, and support.

INTRODUCTION

On July 9, 2013, the American Civil Liberties Union (ACLU) and individual plaintiffs[1] filed a lawsuit[2] challenging the constitutionality of Pennsylvania's version of the Defense of Marriage Act (DOMA).[3] The lawsuit commenced almost immediately after the U.S. Supreme Court invalidated the Federal DOMA in *United States v. Windsor*.[4] Although

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1 *See generally* Trip Gabriel, *A.C.L.U. Sues Pennsylvania over Ban on Gay Marriage*, N.Y. TIMES, July 10, 2013, at A11; Rich Lord, Kate Giammarise & Monica Disare, *PA. Same-Sex Ban Challenged First Federal Case to be Filed Since Supreme Court Ruled Defense of Marriage Act Unconstitutional*, PITTSBURGH POST-GAZETTE, July 10, 2013, at A1.

2 Complaint for Declaratory and Injunctive Relief at 5–6, Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (No. 1:13-cv-1861), *available at* https://www.aclu.org/files/assets/whitewood_v._corbett_--_complaint.pdf ("Pennsylvania's exclusion of same-sex couples from marriage infringes on the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. This discriminatory treatment is subject to heightened scrutiny because it burdens the fundamental right to marry and because it discriminates based on sex and sexual orientation. . . . [T]he exclusion does not rationally further any legitimate government interest.").

3 23 PA. CONS. STAT. §§ 1102, 1704 (2014). Section 1102 defines "marriage" as "[a] civil contract by which one man and one woman take each other for husband and wife." Section 1704 explicitly covers marriage between persons of the same sex, and states that it is the "strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman." In addition, the statute states that Pennsylvania will not recognize same-sex marriages, even if valid in another state or foreign jurisdiction. See *infra* note 76, for information about the Federal DOMA. Both the Federal DOMA and Pennsylvania's state version of DOMA include a "definitions" section in which "marriage" is identified as consisting of one man and one woman and a provision that precludes recognition of same-sex marriages performed elsewhere. However, the Federal DOMA additionally defines "spouse," and construes the definitions as necessary to determine the meaning of "any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States . . . ." 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

4 133 S. Ct. 2675.

the lawsuit itself was not very controversial, two days later on July 11, 2013, the Democratic Attorney General of Pennsylvania, Kathleen Kane, one of the named defendants in the suit, announced: "'I cannot ethically defend the constitutionality of Pennsylvania's version of DOMA where I believe it to be wholly unconstitutional.'"[5] Kane's decision not to defend the law set off a chain of events—some expected and some unanticipated. As expected, the Governor of Pennsylvania, Thomas Corbett, decided that he would defend the law in place of Kane.[6] Unexpectedly, however, Montgomery County, Pennsylvania Register of Wills, D. Bruce Hanes, announced that he also believed that Pennsylvania's DOMA was unconstitutional, and that based in part on Kane's announcement,[7] he would start issuing marriage licenses to same-sex couples.[8]

This incident raised the question of what statewide executives[9] should and must do when faced with the specter of a local official who refuses to enforce a statewide law.[10] Due to a combination of factors,

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5 Press Release, Pa. Office of Att'y Gen., Attorney General Kane Will Not Defend DOMA (July 11, 2013), *available at* https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_Release/?pid=913; *see id.* (stating that, "[t]he discriminatory treatment explicitly authorized by DOMA violates both the US and Pennsylvania Constitution," and "'it is a lawyer's ethical obligation under Pennsylvania's Rules of Professional Conduct to withdraw from a case in which the lawyer has a fundamental disagreement with the client'"); *see also* Marc Levy, *Pennsylvania Attorney General Won't Defend Gay Marriage Ban*, 6 ABC ACTION NEWS (July 11, 2013, 7:46 PM), http://abclocal.go.com/wpvi/story? section=news/local&id=9169245; Brian Sims, *We're Not Done Yet. What's Next in the Fight for LGBT Rights*, GUARDIAN, Sept. 16, 2013, http://www.theguardian.com/commentisfree/2013/sep/16/pennsylvania-gay-marriage-challenge-brian-sims.

6 Emily Schultheis, *Gay Marriage Puts Tom Corbett in Bind*, POLITICO (July 11, 2013, 3:59 PM), http://www.politico.com/story/2013/07/gay-marriage-tom-corbett-pennsylvania-94032.html.

7 *See Montco Register of Wills D. Bruce Hanes on His Decision to Issue a Marriage License to a Same Sex Couple*, MAIN LINE TIMES (July 23, 2013), http://www.mainlinemedianews.com/articles/2013/07/23/main_line_times/news/doc51eecae35360b015385105.txt (announcing his belief that the Marriage Laws were unconstitutional "[b]ased upon the advice of [his solicitor] Mr. [Michael] Clarke, . . . [his] own analysis of the law and mindful of the Attorney General's belief that Pennsylvania's marriage laws are unconstitutional").

8 *See id.* ("I decided to come down on the right side of history and the law . . . ."); *see also* Maryclaire Dale, *Pennsylvania Gay Marriage Law Deemed 'Suspect' by County Official*, HUFFINGTON POST (Aug. 19, 2013, 4:48 PM), http://www.huffingtonpost.com/2013/08/19/pennsylvania-gay-marriage_n_3781645.html. After Kane declined to initiate proceedings against Hanes, Governor Corbett directed the Pennsylvania Department of Health to sue Hanes to prevent him from issuing any further marriage licenses to same-sex couples. *See* Brian X. McCrone, *Pa. Health Dept. Sues to Stop Montgomery County Official from Issuing Same-Sex Marriage Licenses*, PHILLY.COM (July 30, 2013, 12:46 PM), http://www.philly.com/philly/news/breaking/Pa_Health_Dept_sues_to_stop_Montgomery_County_official_from_issuing_same-sex_marriage_licenses.html.

9 For the purposes of this Note, "statewide executives" refers to both the governor and attorney general as those executives who are responsible for enforcing statewide laws against potential infringement by local officials or others.

10 Although Kane's decision to not defend Pennsylvania's Marriage Law appears to have influenced Hanes' decision to not enforce the law, this Note will not focus on statewide

including the structural and political variations between states, the potential for the attorney general and governor to disagree as to the constitutionality of the disputed law, and the absence of any official mandate for statewide executives who also question the law at issue in response to local nonenforcement, states lack a clear answer about what do in this scenario. A statewide executive who agrees with the local official's interpretation, but must also deal with the legal implications of nonenforcement at the local level, would benefit from a structured mechanism through which to resolve the merits of the local official's claim.

Executive nonenforcement, and the distinction between nondefense and nonenforcement,[11] most recently gained national attention when Attorney General Eric Holder, directed by President Barack Obama, refused to defend in court—but continued to enforce—the Federal DOMA.[12] Although the Obama Administration defended DOMA against previous challenges, ultimately, the President and Attorney General concluded that section three of DOMA was unconstitutional as applied to legally married same-sex couples.[13]

executives, like Kane, who decline to defend statewide laws, an area on which much of the literature in this field has focused. *See, e.g.*, William P. Marshall, Essay, *Break up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006); Katherine Shaw, *Constitutional Nondefense in the States*, 114 COLUM. L. REV. 213 (2014). Soon after Kane's announcement, other attorneys general took similar action, as reported in the national news. *See, e.g.*, Notice of Change in Legal Position by Defendant Janet M. Rainey, Bostic v. Rainey, 970 F. Supp. 2d 456 (E.D. Va. 2014) (No. 2:13-cv-00395), *available at* http://www.scribd.com/doc/201693981/2-13-cv-00395-96; Pete Williams, *Virginia Attorney General Joins Fight to Overturn State's Same-Sex Marriage Ban*, NBC NEWS (Jan. 22, 2014, 10:40 PM), http://usnews.nbcnews.com/_news/2014/01/23/22408212-virginia-attorney-general-joins-fight-to-overturn-states-same-sex-marriage-ban (describing Virginia Attorney General Mark Herring's court brief, in which he announced his belief that Virginia's ban on same-sex marriage was unconstitutional and that he would not defend it in court).

11 The use of "nondefense" refers to an executive's decision not to defend a particular law in court. This differs from "nonenforcement," which refers to a decision by an executive at either the state or local level to not enforce a law. See *infra* Part I.B for a more in-depth discussion of the distinction between the two terms.

12 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

13 *See* Press Release, U.S. Dep't of Justice Office of Pub. Affairs, Letter from the Attorney General to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Press Release, Holder], *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html ("After careful consideration, . . . the President has concluded that given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny. The President has also concluded that Section 3 of DOMA, as applied to legally married same-sex couples, fails to meet that standard and is therefore unconstitutional. . . . As you know, the Department has a longstanding practice of defending the constitutionality of duly-enacted statutes if reasonable arguments can be made in their defense . . . . [However,] [t]his is the rare case where the proper course is to forgo the defense of this statute."); *see also* Peter Baker, *For Obama, a Tricky Balancing Act in Enforcing a Law He Viewed as Invalid*, N.Y. TIMES, Mar. 29, 2013, at A17. See *infra* notes 73–79 for additional information about the *Windsor* case.

Consistent with the attention focused on *Windsor*,[14] the majority of the literature has focused on these decisions at the federal level.[15] However, after the President's pronouncement about a controversial issue with the potential to affect statewide laws, his strategy and the subsequent decision in *Windsor* sparked a nationwide debate about whether state executives across the country should emulate the President's decision and refuse to defend state laws they believe are unconstitutional.[16]

Although *Windsor* recently invigorated the debate over nondefense, decisions by local executives to refuse to enforce a state statute are not novel, particularly in the context of same-sex marriage. Local executive nonenforcement first gained prominence in 2004, when, in defiance of state law, San Francisco Mayor Gavin Newsom ordered his county clerks to grant marriage licenses to same-sex couples.[17] After California Attorney General Lockyer and three San Francisco city residents sued the mayor and city and county clerks, the California Supreme Court rendered its decision in *Lockyer v. City and County of San Francisco*,[18] holding that local officials cannot disregard statutes they believe are unconstitutional unless the judiciary has already determined that the statute is unconstitutional.[19] Local executives in Multnomah County, Oregon and New Paltz, New York followed Newsom's lead,[20] but courts in those states issued similar decisions to *Lockyer*, denying the authority of local officials to act on their independent interpretations of state statutes.[21] While these cases did not

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14 133 S. Ct. 2675.

15 Shaw, *supra* note 10, at 215–16. For examples of scholarship focused on executive review at the federal level, see, e.g., Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1989); Christopher N. May, *Presidential Defiance of 'Unconstitutional' Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865 (1994); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107 (2000); Parker Rider-Longmaid, Comment, *Take Care that the Laws Be Faithfully Litigated*, 161 U. PA. L. REV. 291 (2012).

16 For background on the origins of *Windsor*'s effect on the states, see generally Mark Sherman, *Gay Marriage's Latest Frontier: State Courts*, DESERET NEWS (Dec. 26, 2013, 11:01 AM), http://www.deseretnews.com/article/765644234/Gay-marriages-latest-frontier-state-courts.html?pg=all.

17 For background on Mayor Newsom's decision, see generally Rachel Gordon, *The Battle over Same-Sex Marriage*: *Uncharted Territory: Bush's Stance Led Newsom to Take Action*, SFGATE (Feb. 15, 2004, 4:00 AM), http://www.sfgate.com/news/article/THE-BATTLE-OVER-SAME-SEX-MARRIAGE-Uncharted-2823315.php#page-2.

18 95 P.3d 459 (Cal. 2004).

19 *Id.* at 473. See *infra* notes 95–107 and accompanying text for a more detailed description of the case.

20 *See generally Oregon County Issues Same-Sex Marriage Licenses*, CNN (Mar. 3, 2004, 2:12 PM), http://www.cnn.com/2004/US/West/03/03/same.sex.marriage; Sumathi Reddy & Andrew Metz, *Mayor Charged in Same-Sex Weddings*, BALT. SUN, Mar. 3, 2004, http://articles.baltimoresun.com/2004-03-03/news/0403030316_1_new-paltz-spitzer-jason-west.

21 *See* Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 16–17, 24 (2007). In Multnomah County, the plaintiffs included individual residents of the county, the ACLU, and the county itself, which brought suit against the Governor, Attorney General, Department of Human Services, and State Registrar. *See* Li v. State,

involve any significant legal disagreements between the governor and attorney general, more recent cases highlight the tensions that can also emerge between statewide officials.

Through conflicts over gay marriage,[22] voter identification laws,[23] and gun control regulations,[24] governors, attorneys general, and local officials across the country have publicly clashed over controversial state legislation. What options do the two often independently elected[25] representatives in the executive branch, governors and attorneys general, have when a local official defies the law and the two publicly disagree on whether the law should be enforced? Options for a state executive's response to local nonenforcement of state statutes is an area that has yet to be explored fully. This Note argues that statewide executive officials confronted with local officials who decline to enforce state laws, but who agree with the local official's interpretation that the law is unconstitutional, should have a mechanism through which to force judicial resolution of the statute's merits. These statewide officials' approach should be guided by four factors, which include: (1) whether the state's highest court has ruled on the legality of independent statutory interpretation by local executives; (2) whether the state Attorney General agrees with the local official about the constitutionality of the disputed law; (3) whether there has been a recent Supreme Court decision invalidating a substantially similar statute; and (4) whether other officials aside from the Attorney General have the power to intervene and sue to enforce state laws.

Part I provides background on the differences between the federal and state executives, the distinction between nondefense and nonenforcement, and how the role and duties of the state attorney general work in conjunction with or in contravention of those of the governor. Part II considers case studies of states that have recently dealt with issues of local nonenforcement, and explains how relevant elements involved in these cases may apply to future local

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110 P.3d 91, 98 (Or. 2005) (en banc) (holding that state statute prohibiting same sex marriage in Oregon did not violate Oregon State Constitution). In New Paltz, the village board of trustees brought suit. *See* Hebel v. West, 803 N.Y.S.2d 242 (App. Div. 2005) (holding that Mayor West's actions in performing same-sex marriages were not within scope of his oath of office to uphold constitution); *see also* People v. West, 780 N.Y.S.2d 723 (J. Ct. 2004) (reinstating criminal charges against Mayor Jason West for performing marriage ceremonies based on his independent conclusion that prohibiting same-sex couples from marrying violates New York Constitution).

22 See *infra* notes 95–153 for a more in-depth discussion of local nonenforcement of laws prohibiting same-sex marriage.

23 See *infra* note 141 for a more in-depth discussion on the conflict over state voter identification laws in North Carolina.

24 *See generally* Erica Goode, *Sheriffs Refuse to Enforce Laws on Gun Control*, N.Y. TIMES, Dec. 16, 2013, at A1.

25 All but seven states democratically elect the attorney general. *See* Shaw, *supra* note 10, at 232.

nonenforcement decisions in the states. Part III proposes four factors for state executives to use in determining how to proceed when confronted with local nonenforcement. And Part IV concludes that when certain factors considered in Part III are presented, the state attorney general should have a mechanism to initiate judicial resolution of the statute's constitutionality.[26] This mechanism will enable future state executives faced with local nonenforcement to clarify potential constitutional defects while appropriately enforcing the law according to their duties and effectuating most ably the will of the public.[27]

I. BACKGROUND: THE HISTORY OF NONENFORCEMENT AT THE FEDERAL AND STATE LEVELS

A. *The Unitary Federal Executive vs. the Fragmented and Multi-Headed State Executive*

1. The Unitary Federal Executive

On the federal level, there is still debate as to the scope of the President's authority to defy Congress and refuse to enforce a federal statute he deems "constitutionally objectionable."[28] Based on the "Take Care Clause,"[29] the President has the duty to make sure the laws are "faithfully executed."[30] Yet, he also has the duty, upon taking his oath of office, to do his best to "preserve, protect and defend the Constitution of the United States," pursuant to the Oath or Affirmation Clause.[31] The Oath Clause only contemplates the Constitution, and not statutes, as the law to which the President is bound.[32] Thus, in order for the President to carry out his responsibilities under the Clause, he must also consider

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26 In addition, although this Note discusses instances of local nonenforcement in significant detail, the focus is not on the merits of a local official's choice not to enforce, but rather, on the statewide executive's response to such a decision.

27 This Note will focus primarily on this issue in the context of same-sex marriage laws in the states; however, the framework may apply to other controversial nonenforcement decisions outside the context of same-sex marriage (such as voter identification legislation and gun control laws). The application of the framework to those scenarios is outside the scope of this Note.

28 *See* Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 8 n.12 (2000) (defining a "constitutionally objectionable" statute as one the President deems inconsistent with the Constitution based on his independent interpretation of the Constitution).

29 U.S. CONST. art. II, § 3, cl. 4.

30 *Id.*

31 U.S. CONST. art. II, § 1, cl. 7.

32 *See* Strauss, *supra* note 15, at 108–09.

anything—including statutes—and anyone who may interfere with his ability to uphold his oath.[33]

Unquestionably, the President has the authority to make an independent assessment of the Constitution and use his powers to veto a proposed statute at his discretion.[34] In addition, some argue that the President may also conclude, after carefully considering an active statute, that it is unconstitutional, and that in order to protect and defend the Constitution, he cannot enforce the statute.[35] There is broad agreement that the President's decision not to enforce cannot be selective—it cannot be a matter of disagreement on policy[36]—but ultimately, the limits of his power to not enforce a statute are still subject to dispute. However, one scholar views the Constitution as neither preventing nor affirming the President's authority to refuse to enforce laws,[37] while also deeming routine nonenforcement irreconcilable with the roles of Congress and the President in the lawmaking process.[38] Thus, the legitimacy of nonenforcement at the federal level is still controversial. On the state level, however, nonenforcement decisions implicate not only the statewide executive

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33 *Id.* at 109 ("It would be strange indeed if, having taken that oath, the President were precluded from considering what would 'preserve, protect and defend the Constitution' in the course of seeing to it that others were faithful in their performance of duty.").

34 U.S. CONST. art. I, § 7, cl. 2; *see also* Easterbrook, *supra* note 15, at 908 ("Pardons, vetoes, additions, and proposals for laws are not problematic because they do not subvert the take care clause."); Johnsen, *supra* note 28, at 12.

35 *See* Strauss, *supra* note 15, at 116 ("The President has no right to implement a statute that he can say with confidence the courts would find unconstitutional."). Strauss uses the example of a statute that grants the FBI authority to enter people's homes at night without a search warrant—a statute that would clearly violate the Fourth Amendment. *Id.* ("Faithful execution of the laws plainly includes the Constitution as authoritatively interpreted by the courts and the Supremacy Clause that entitles the Constitution to prevail."); *see also* Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA. L. REV. 1267, 1311 (1996) (finding that "if the President believes that the conditions for presidential review are satisfied, he has both the power and the duty to refuse to enforce the unconstitutional law" despite fears of impeachment). *But see* Arthur S. Miller, Essay, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 396–98 (1987) ("To say that the President's duty to faithfully execute the laws implies a power to forbid their execution is to flout the plain language of the Constitution. . . . The President does not have an item veto, . . . nor does he have the right under the Constitution to flout entire statutes. Once Congress enacts a statute, whether over a Presidential veto or with his approval, the President is duty bound to enforce it, as are other officers in the executive branch.").

36 *See* Johnsen, *supra* note 28, at 16, 19 ("For a President to choose to enforce a statute he believed was unconstitutional would constitute a dereliction of his constitutional obligation.").

37 *See id.* at 10 (contemplating that presidential nonenforcement likely depends on the specific statutory provision and context-specific circumstances).

38 *See id.* at 12 (commenting that routine nonenforcement could interfere with Congress's constitutionally authorized ability to override presidential vetoes and disincentivize the President from working with Congress to fix constitutional deficiencies in proposed bills, among other problems); *see also* Shaw, *supra* note 10, at 218 (opining that "the executive branch's refusal to *enforce* a constitutionally objectionable statute . . . is arguably a far more aggressive exercise of executive power, and one that raises significantly more difficult questions than nondefense").

branch as a whole, but also demonstrate the struggle between both top-level state officials and between the statewide executive branch and local officials.

2. The State Executive—Powers and Duties of State Attorneys General and Governors, and Conflicts at the Statewide Level

The state system mirrors the federal system of government in its division of government into the legislative, executive, and judicial branches.[39] In addition, similar to the Federal Executive, all state officers must take an oath to uphold the Federal Constitution.[40] State governments, however, are unique for their fragmented executives.[41] Unlike the federal executive, there are multiple levels of government that operate independently at the state and local levels.[42] In addition, within the majority of state executive branches, there are multiple officials who are popularly elected.[43] Structurally, this system lays the foundation for conflicts between state and local executives,[44] in particular because governors do not necessarily have direct authority over their co-state executives or local counterparts.[45] Issues of divided state opinions on enforcement present a more complex problem than those at the federal level because at the federal level, all members of the executive branch must submit to the President's position.[46] At the state

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39 *See* Norman R. Williams, *Executive Review in the Fragmented Executive: State Constitutionalism and Same-Sex Marriage*, 154 U. PA. L. REV. 565, 570 (2006) ("[E]very state has adopted a tripartite system of government with a popularly elected governor as head of the executive branch." (citing John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1221 (1993))).

40 U.S. CONST. art. VI, cl. 3.

41 *See, e.g.*, Marshall, *supra* note 10, at 2448; Williams, *supra* note 39.

42 Williams, *supra* note 39, at 574.

43 *Id.* at 573 n.31. As Williams notes, with the exception of Maine, New Hampshire, New Jersey, and Tennessee, all of the states' constitutions provide for election of multiple executive officers.

44 *Id.* at 571 ("Because of the fragmented nature of state executive power, disputes within the 'executive branch' regarding what the state constitution means are inevitable.").

45 Williams, *supra* note 39, at 577. Local counterparts would include mayors of cities or towns within the Governor's state.

46 *See* Vikram David Amar, Articles and Essays, *Lessons from California's Recent Experience with Its Non-Unitary (Divided) Executive: Of Mayors, Governors, Controllers, and Attorneys General*, 59 EMORY L.J. 469, 472–73 (2009) [hereinafter Amar, *Lessons from California's Recent Experience*] (commenting that localized authority in federal context, for instance, by administrative agency head such as the EPA or a federal prosecutor, would be "intolerably chaotic and inefficient"); *see also* Williams, *supra* note 39, at 571 (discussing the concept that because the President has significant control and authority to resolve disputes among the Federal Executive branch, these disputes are rarely highlighted to the public). Scholarship on the implications of the divided state executive on nonenforcement decisions has focused primarily on California due to its high profile same-sex marriage controversies over the past ten years. *See, e.g.*, Vikram David

level, however, often times multiple elected statewide executives, such as the governor and attorney general, or multiple officials at the statewide and local levels, cannot agree on the legality of a statute or an appropriate policy to pursue.[47] A state or local official may interpret the state or Federal Constitution differently from the governor or attorney general, and subsequently decline to enforce a state statute that statewide officials support.[48]

As previously discussed, the minimal scholarship available on nonenforcement at the state level has focused on the 2004 and 2005 instances of local executive defiance, and very little has looked at the dynamics between a statewide executive and local official, who disagree on state law enforcement policies, or between a governor and state attorney general who disagree about the best course of action in that scenario.[49] Disagreement among statewide executives is an especially pertinent factor when the statewide executive branch as a whole must determine a uniform course of action to deal with a local official that refuses to enforce a state law.

Due to instances of conflicting opinions between statewide executives, some state courts have explicitly determined which statewide executive has the authority to define a course of action.[50] For example, the California Supreme Court has held that, pursuant to the state

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Amar, *California Constitutional Conundrums—State Constitutional Quirks Exposed by the Same-Sex Marriage Experience*, 40 RUTGERS L.J. 741 (2009) [hereinafter Amar, *California Constitutional Conundrums*].

47 *See, e.g.*, Marshall, *supra* note 10 (proposing an application of the divided state executive model at the federal level); Williams, *supra* note 39, at 566 ("This fragmentation [at the state level] has serious implications for executive review at the state level.").

48 *See generally* Williams, *supra* note 39.

49 *See, e.g.*, Michael Signer, *Constitutional Crisis in the Commonwealth: Resolving the Conflict Between Governors and Attorneys General*, 41 U. RICH. L. REV. 43 (2006); *see also* Lisa-Beth C. Meletta, Note, *Non-Enforcement by a Local Executive: Limitations of Judicial Review and Considerations to Restrain the Use of Executive Power*, 63 N.Y.U. ANN. SURV. AM. L. 511, 519 (2008) ("State- and local-level non-enforcement has garnered little scholarly attention until recently, but the topic . . . . also has great importance because of the wide reach of state and local laws."). One scholar conclusively determines that the California Constitution delegitimizes a lower-level state executive official's claim to disregard state laws that he believes are unconstitutional, leaving open the question of whether a state executive head such as the Governor or Attorney General, under section 3.5 of the California Constitution, could theoretically disregard the California Constitution's directive to administrative agencies, and assert her own constitutional interpretation. *Id.*; *see also* CAL. CONST. art. III, § 3.5; Amar, *Lessons from California's Recent Experience*, *supra* note 46, at 473, 477. Amar additionally argues that a state controller should not assert his own constitutional views if they contradict the Governor's.

50 In most states, the attorney general is the state's chief legal officer; however, his role must also be reconciled with that of the governor, who must make sure that the laws are faithfully executed. Marshall, *supra* note 10, at 2452–53. Thus, there are many opportunities for conflict between governors and attorneys general. *Id.* at 2453 (listing the opportunities for conflict between governors and attorneys general, including different political parties, personal and ideological rivalries even if both are of the same political party, competition arising both from the attorney general's possible political aspirations to the governor's post and trying to gain adherents within a particular political constituency, and differing visions of each other's roles).

constitution, the Governor retains the power over the state Attorney General to determine how best to effectuate the public interest.[51] However, the court also recognized the Attorney General's power to decline to assert the Governor's preferred position and withdraw from defending a statute if it contradicts his own legal views.[52] In fact, in the 2009 California case, *Strauss v. Horton*,[53] then-Attorney General Jerry Brown filed a brief independent from that of Governor Schwarzenegger, asserting an opposing view of the California Constitution.[54] However, the court ultimately adopted the Governor's position.[55]

State law also differs as to whether the attorney general may make legal judgments independent of the governor if they are in the best interest of the public.[56] Often this depends on the numerous duties and powers afforded state attorneys general, which differ by state.[57] In

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51 People *ex rel.* Deukmejian v. Brown, 624 P.2d 1206, 1209 (Cal. 1981); *see also* CAL. CONST. art. V, § 13. For another example of a state supreme court upholding the power of the governor over the attorney general, see Wilder v. Att'y Gen., 439 S.E.2d 398, 401–02 (Va. 1994) (holding that Governor Wilder had power over Attorney General Mary Sue Terry, pursuant to statute, to appoint special counsel to represent a party with which the Governor asserted the Attorney General had a conflict of interest because the Governor's decision was not "arbitrary or capricious").

52 *See Deukmejian*, 624 P.2d at 1207; Amar, *Lessons from California's Recent Experience*, *supra* note 46, at 487–88.

53 207 P.3d 48 (Cal. 2009). Brown is a Democrat and Schwarzenegger is a Republican.

54 *See* Answer Brief in Response to Petition for Extraordinary Relief, *Strauss*, 207 P.3d 48 (No. S168047), *available at* http://www.courts.ca.gov/documents/s168047-answer-response-petition.pdf.

55 Some argue that Attorney General Brown's position (and Governor Schwarzenegger's subsequent change in position) may have had an effect on ultimately overturning provisions in California's Constitution and statutes prohibiting same-sex marriage. For background on Brown's position and its subsequent consequences, see generally Jesse McKinley, *Top Lawyer in California Urges Voiding Proposition 8*, N.Y. TIMES, Dec. 20, 2008, at A11; William Bradley, *How California's Prop 8 Anti-Gay Marriage Initiative Was Finally Defeated, Four Years Ago*, HUFFINGTON POST GAY VOICES BLOG (Aug. 28, 2013, 5:12 AM), http://www.huffingtonpost.com/william-bradley/how-californias-prop-8-an_b_3514893.html ("In the absence of Schwarzenegger and Brown defending Prop 8, its proponents had to take on the task, gaining lower court standing to do so. . . . The U.S. Supreme Court refused to hear the appeal of a federal district court ruling throwing out Prop 8. . . . The Supreme Court decided that the proponents of the initiative had no standing to appeal, thus dismissing the case before them and making clear what an important move Schwarzenegger and Brown made when they decided not to have the state defend the initiative in court."); Jessica Garrison, *Jerry Brown: Gay-Marriage Ban Should Be Invalidated*, L.A. TIMES L.A. NOW BLOG (Dec. 19, 2008, 6:50 PM), http://latimesblogs.latimes.com/lanow/2008/12/attorney-genera.html.

56 *See* Marshall, *supra* note 10, at 2456–57.

57 *See* Neal Devins & Saikrishna Prakash, *Fifty States, Fifty Attorneys General and Fifty Approaches to the Duty to Defend*, 124 YALE L.J. (forthcoming 2015) (manuscript at 123) (on file with authors) ("Though there are some commonalities, the office of the attorney general is not the same across the fifty states. . . . [W]hile most attorneys general are elected, some are appointed by the legislature or the state supreme court. . . . Several write opinions at the behest of either the legislative or judicial branches; others don't. . . . [S]ome attorneys general have authority not to defend state law after concluding that some higher law supersedes a species of state law. Other attorneys general generally must defend the validity of state law. Finally, some (but not all) have common law authority to represent the 'public interest' and challenge the constitutionality of state

general, their duties are defined based on common law and state statutes and constitutions, many of which reflect common law language.[58] While all legal power granted to attorneys general to "represent, defend, and enforce" laws on behalf of the state and the public was initially derived from the common law, the common law has also served as authority for attorneys general to protect public interests in recent instances.[59] In addition, while most states explicitly establish the attorney general's role in their constitutions,[60] the scope and permanency of the attorney general's powers vary by state. For instance, while a few states have said that their constitutions provide the attorney general with all powers at common law, and do not allow the other state branches to withdraw any of that power, most states allow power provided to attorneys general through their constitutions to be modified or circumscribed by statute.[61] In contrast to the ambiguous scope of attorneys general's power under state constitutions, most state statutes describe more specifically the attorney general's powers, particularly with regard to her duty to represent the state; some also specify whether another state officer may step in to defend state laws if the attorney general cannot fulfill this duty for any reason.[62]

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law."). Forty-three states and Guam popularly elect the attorney general; in five states, the governor appoints the attorney general (Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming). Maine and Tennessee employ alternate methods for the attorney general position. STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 12 (Emily Myers ed., 3d ed. 2013) [hereinafter STATE ATTORNEYS GENERAL].

58 *See* Scott M. Matheson, Jr., *Constitutional Status and Role of the State Attorney General*, 6 U. FLA. J. L. & PUB. POL'Y 1, 3 (1993) (elaborating on the duties of the Attorney General as consisting of legally advising the Governor, state agencies, and the legislature, both formally and informally and representing state officers in civil and criminal litigation, among other duties). One important aspect of an elected Attorney General is to be a "watchdog" over the executive branch, a function that can promote executive branch accountability, and may even affect the separation of powers between the other branches. *Id.* at 10, 11; *see also* Marshall, *supra* note 10, at 2446 (observing that dissenting views among independent state Attorneys General and their Governors may serve as an "intrabranch check on state executive power").

59 STATE ATTORNEYS GENERAL, *supra* note 57, at 27. Common law power also varies by state. *See* Devins & Prakash, *supra* note 57 (manuscript at 125). In addition to bringing legal actions in court, attorneys general must also issue their own legal opinions as to the constitutionality of state law upon request. STATE ATTORNEYS GENERAL, *supra* note 57, at 75–76. The subjects of these opinions vary from clarifying legal duties to giving legal support for the policy decisions of state agencies and officials. *Id.* at 75.

60 Forty-four states provide for the attorney general's position in their constitutions. STATE ATTORNEYS GENERAL, *supra* note 57, at 33.

61 *Id.* at 33–34. *Compare* Lyons v. Ryan, 780 N.E.2d 1098, 1106 (Ill. 2002) ("The legislature may add to the powers of the Attorney General, but it cannot reduce the Attorney General's common law authority in directing the legal affairs of the state. Thus, legislation that improperly usurps the common law powers of the Attorney General is invalid." (citation omitted)), *with* Padgett v. Williams, 348 P.2d 944, 948 (Idaho 1960) (concluding that any common law powers granted to the attorney general through the Idaho Constitution are subject to limitation by statute), *and* State v. Finch, 280 P. 910, 913 (Kan. 1929) ("We conclude that the Attorney General's powers are as broad as the common law unless restricted or modified by statute.").

62 *See* Devins & Prakash, *supra* note 57 (manuscript at 130–32).

Although state attorneys general may use their powers to represent the state in the capacity they think best, the governor's view of what is best for the state may differ from the attorney general's, particularly with regard to whether a state statute is constitutional. One scholar proposes two approaches that characterize how power should be allocated when the state executive branch has diverging views as to the constitutionality of a state statute.[63] The first uses an ethical approach, and conceptualizes the relationship between an attorney general and governor as one that mirrors the attorney-client relationship; the second proposes a structural, context-specific approach that resolves disputes in favor of the role that deserves deference in a particular context.[64] For instance, whereas policy judgments deserve the attorney general's deference to the governor, legal judgments should generally favor the attorney general.[65] Since one purpose of the office of the attorney general is to provide the governor with independent legal opinions, it seems logical that the attorney general's judgment should prevail over the governor's on disputed legal judgments.[66] However, because the distinction between legal and policy decisions is often ambiguous, in the end, a statute's legislative intent—and not the distinct roles of the attorney general or the governor—may govern the prevailing decision.[67]

3. The Authority of Local Officials to Independently Interpret State Statutes

While the balance of the power between state attorneys general and governors may not be definitively resolved, some states' highest courts have conclusively determined that local officials may not independently interpret state statutes.[68] For instance, as previously discussed, after San Francisco's Mayor Gavin Newsom attempted to assert his independent

63 Marshall, *supra* note 10, at 2462. For examples of state courts ruling in favor of Attorney General independence, see *Commonwealth* ex rel. *Hancock v. Paxton*, 516 S.W.2d 865 (Ky. 1974), *Secretary of Administration & Finance v. Attorney General*, 326 N.E.2d 334 (Mass. 1975), and *State* ex rel. *Discover Financial Services, Inc. v. Nibert*, 744 S.E.2d 625 (W. Va. 2013). But, see *Santa Rita Mining Co. v. Department of Property Valuation*, 530 P.2d 360 (Ariz. 1975) (en banc) and *Chun v. Board of Trustees of the Employees' Retirement System*, 952 P.2d 1215 (Haw. 1998) for examples of states ruling against attorney general independence. *Cf.* Perdue v. Baker, 586 S.E.2d 606 (Ga. 2003) (establishing concurrent roles for the Governor and Attorney General).

64 Marshall, *supra* note 10, at 2462, 2464.

65 *Id.* at 2464.

66 *Id.*; *cf.* Signer, *supra* note 49, at 44 (arguing that Wilder v. Attorney General, 439 S.E.2d 398 (Va. 1994), established that Virginia follows the "'statutory' . . . model of the Attorney General's powers," limiting those powers, and thus, the governor should prevail in highlighted contemporaneous conflicts between the Virginia Attorney General and Governor).

67 Marshall, *supra* note 10, at 2465 ("Some might even suggest that all law is policy-based.").

68 *See, e.g.*, Lockyer v. City & Cnty. of S.F., 95 P.3d 459 (Cal. 2004); Li v. State, 110 P.3d 91, 101–02 (Or. 2005) (en banc).

authority to interpret the state constitution, California Attorney General Bill Lockyer successfully argued that California case law regarding officials who lacked "judicial" authority and the absence of authority granted from California's constitution, among other reasons, prohibited Mayor Newsom's claim.[69]

Even if a state's highest court has not clarified the scope of local executive review[70] as California did, its Legislature may be able to provide additional clarity to state executives.[71] For example, the Legislature could pass a statute that either prohibits local officials from independent constitutional interpretation or mandates accelerated judicial review of the statute in dispute when local officials exercise the discretion to interpret state laws.[72]

B. *Nondefense vs. Nonenforcement*

As previously stated, the distinction between nondefense and nonenforcement was most recently elucidated through the Obama Administration's role in *United States v. Windsor*.[73] *Windsor* involved a lesbian couple, Edith Windsor and Thea Spyer, who married in Canada in 2007 after being together for forty years.[74] After Spyer died two years later, in 2009, Windsor received a bill for $363,053 in estate taxes because she and Spyer were not recognized as married under federal law at the time they were married; Windsor appealed and sued the federal

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69 *Lockyer*, 95 P.3d at 481–82. Although the State attempted to argue that Article III, section 3.5 of California's Constitution itself precluded Mayor Newsom's actions, the court declined to rely on that provision in rendering its decision. *Id.* at 475 ("[W]e have determined that we need not (and thus do not) decide in this case whether the actions of the local executive officials here at issue fall within the scope or reach of article III, section 3.5 . . . ."); *see* CAL. CONST. art. III, § 3.5 (stating only that "*administrative agenc[ies]* . . . ha[ve] no power . . . [to] refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional; [or] [t]o declare a statute unconstitutional . . . ." but not defining which local officials were included within that categorization (emphasis added)). *See infra* notes 95–107 and accompanying text for a more in-depth explanation of *Lockyer*.

70 Executive review has been defined as "the President's power vel non to make and act upon constitutional judgments independently of the constitutional views of other departments." Williams, *supra* note 39, at 565 n.1 (quoting Lawson & Moore, *supra* note 35, at 1280). Although Lawson and Moore use this definition to refer to the federal executive and Williams expands the definition to refer to state executive officials, I will use the term "executive review" primarily to refer to state and local officials' interpretations of state constitutions and statutes.

71 Williams, *supra* note 39, at 613–14.

72 *Id.* at 614. While some state legislatures have statutorily provided for judicial review when attorneys general dispute the constitutionality of a state statute, few consider the role of local nonenforcement in bringing the proceeding. *See infra* notes 209–10 and accompanying text.

73 133 S. Ct. 2675 (2013).

74 *See* Adam Gabbatt, *Edith Windsor and Thea Spyer: 'A Love Affair that Just Kept On and On and On*,' GUARDIAN (June 26, 2013, 11:54 AM), http://www.theguardian.com/world/2013/jun/26/edith-windsor-thea-spyer-doma.

government for a refund.[75] As the litigation progressed through the lower courts, Attorney General Eric Holder detailed in a letter to House Speaker John Boehner that he would no longer defend section 3 of DOMA[76] in its upcoming litigation before the Second Circuit Court of Appeals (and eventually the U.S. Supreme Court); however, the Executive branch would continue to enforce it.[77] Holder's decision ensured that Congress—likely House Republicans—would need to step in to *defend* DOMA in litigation.[78] Yet, because Holder continued to enforce the law, Plaintiff Edith Windsor did not receive the hundreds of thousands of dollars in tax refunds the Internal Revenue Service (IRS) would have owed her if her spouse had been male.[79]

Although Holder's approach—continuing to enforce a law while declining to defend it—has not been used very frequently,[80] his strategy has historical precedent.[81] In 1996, President Clinton announced that

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75 *Id.*

76 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675. 1 U.S.C. § 7 defines "marriage," for the purpose of determining the meaning of "any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States . . . [as] a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife"; 28 U.S.C. § 1738C gives states the right to refuse to give effect to "any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . arising from such relationship."

77 Press Release, Holder, *supra* note 13 ("Notwithstanding [the] determination [that Section 3 of DOMA is unconstitutional], the President has informed me that Section 3 will continue to be enforced by the Executive Branch. To that end, the President has instructed Executive agencies to continue to comply with Section 3 of DOMA, consistent with the Executive's obligation to take care that the laws be faithfully executed, unless and until Congress repeals Section 3 or the judicial branch renders a definitive verdict against the law's constitutionality.").

78 *See* Press Release, Office of the Speaker of the House, Statement by House Speaker John Boehner (R-OH) Regarding the Defense of Marriage Act (Mar. 4, 2011) [hereinafter Press Release, Boehner], *available at* http://www.speaker.gov/press-release/statement-house-speaker-john-boehner-r-oh-regarding-defense-marriage-act (detailing Speaker Boehner's plans to enlist the help of the House Bipartisan Legal Advisory Group to defend DOMA).

79 Neil Irwin, *The IRS Owes Edith Windsor $363,053, and Other Fiscal Consequences of the DOMA Decision*, WASH. POST WONKBLOG (June 26, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/26/the-irs-owes-edith-windsor-363053-and-other-fiscal-consequences-of-the-doma-decision. The President took this position despite the fact that every lower court that considered Ms. Windsor's case determined she was entitled to the refund. *See* Windsor v. United States, 833 F. Supp. 2d 394, 406 (S.D.N.Y.) (granting plaintiff Windsor's motion for summary judgment and "award[ing] judgment in the amount of $353,053.00, plus interest"), *aff'd*, 699 F.3d 169 (2d Cir. 2012).

80 Although this strategy has been used in the past, after *Windsor*, it is still unclear whether the strategy is completely legally sound outside the circumstances of *Windsor*, as it may be inconsistent with the prudential standing doctrine under Article III of the U.S. Constitution. U.S. CONST. art. II, § 2, cl. 1; *see Windsor*, 133 S. Ct. at 2688 ("The Court's conclusion that this petition may be heard on the merits does not imply that no difficulties would ensue if this were a common practice in ordinary cases. The Executive's failure to defend the constitutionality of an act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma.").

81 *See* Aziz Z. Huq, *Enforcing (but Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1003–05 (2012). Huq outlines three examples in which the executive branch has used this

section 567 of the National Defense Authorization Act for Fiscal Year 1996,[82] which prevented HIV-positive individuals from serving in the U.S. Armed Forces, was unconstitutional as a violation of the Equal Protection Clause[83] and that he would enforce but not defend it.[84] Unlike DOMA, however, Congress repealed the Act before it took effect, and so President Clinton did not ultimately have to follow through on his promise to enforce the law.[85]

There may be different considerations in a decision not to defend versus a decision not to enforce. One line of argument suggests that nonenforcement has much more serious constitutional implications than nondefense, and thus it should be used less often.[86] Others either conflate the two approaches or find them equally offensive.[87] Scholars have thoroughly explored the few instances of federal nonenforcement over time and posit differing views on its merits and appropriateness.[88] In the context of the states, scholars have begun to explore whether local nonenforcement at the state level is ever appropriate;[89] however, few

approach. In addition to *Windsor*, the President used this approach in regards to the subsequently outlawed "legislative veto" in *INS v. Chadha*, and a law enacted in 1943 that allowed the President to name specific federal employees as "threats to national security," and directed him to end their paid employment. President Truman complied with the law and stated that the employees should not be paid, but allowed them to keep working.

82 National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186 (1996); *see* Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 226 (Feb. 10, 1996), *available at* http://www.gpo.gov/fdsys/pkg/PPP-1996-book1/pdf/PPP-1996-book1-doc-pg226.pdf.

83 U.S. CONST. amend. XIV, § 1.

84 *See* Huq, *supra* note 81, at 1021; *see also* Jim Garamone, *DOD Delays Discharge of HIV-Positive Personnel*, U.S. DEP'T DEFENSE (Feb. 14, 1996), http://www.defense.gov/News/NewsArticle.aspx?ID=40542.

85 National Defense Authorization Act for Fiscal Year 1996 § 567, *repealed by* Act of Apr. 26, 1996, Pub. L. No. 104-134, tit. II, § 2707(a)(1), 110 Stat. 1321, 132130 (codified as amended at 10 U.S.C. § 1177 (Supp. IV 1998)).

86 *See, e.g.*, Johnsen, *supra* note 28, at 10 ("Presidential authority to decline to enforce constitutionally objectionable laws . . . has the potential to disturb the constitutional equilibrium [the Framers] established."); Shaw, *supra* note 10, at 218; Walter Dellinger, *The DOMA Decision*, NEW REPUBLIC (Mar. 1, 2011), http://www.newrepublic.com/article/politics/84353/gay-marriage-obama-gingrich-doma (explaining that "[t]here are a few, narrow circumstances in which a president is justified in announcing a unilateral decision that he will not comply with a law he believes to be unconstitutional" but that "[t]his is not such a case," and finding that the President's decision "respects the institutional roles of both Congress, which passed the law, and the judicial branch").

87 *See* Press Release, Boehner, *supra* note 78 ("The constitutionality of this law should be determined by the courts—not by the president unilaterally—and this action by the House will ensure the matter is addressed in a manner consistent with our Constitution."); Devin Dwyer, *Critics Call Obama DOMA Decision an Executive Power Grab*, ABC NEWS (Feb. 24, 2011), http://abcnews.go.com/Politics/critics-slam-obama-doma-decision-newt-gingrich-calls/story?id=12992207.

88 *See generally* Johnsen, *supra* note 28.

89 This Note focuses on local nonenforcement of statewide laws. Compare *Cooper v. Aaron*, 358 U.S. 1 (1958), for an extreme example of state executive nonenforcement of *federal* law—specifically, the Supreme Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954).

address what the statewide executive branch's response *should be* when confronted with local nonenforcement of state law. Whatever the merits of nonenforcement at any level of state government, state executives have recently had to confront local officials who decline to enforce state law. While some of the local officials' constitutional interpretations may be meritorious, local nonenforcement has almost never led to judicial resolution of a statute's constitutionality on its merits.[90] Thus, it is necessary to create an appropriate mechanism for state executives to use to force judicial resolution of the merits of a local official's claim quickly and efficiently.

II. PAST AND RECENT CASE STUDIES REGARDING LOCAL NONENFORCEMENT

In past cases dealing with local nonenforcement, state executives quashed the local official's conduct, using the courts to stop the conduct without reviewing the merits of the official's opinion.[91] Statewide executives did not need a more comprehensive framework to guide their decisions because such incidents were so infrequent[92] and the correct course of action was clear. Although scholars have proposed frameworks for the federal executive when deciding whether to disavow a federal statute,[93] there are no explicit proposals for what state

Arkansas Governor Orville Faubus ordered the Arkansas National Guard to prohibit children from entering Little Rock's Central High School, in violation of *Brown*. While there is still confusion as to whether state executives can refuse to enforce *state* statutes, the Supreme Court determined in *Cooper* that state executives like Faubus may not independently interpret the U.S. Constitution and act in ways that contravene the Supreme Court's interpretation of the Constitution. For a discussion of *Cooper* and scholarly comparison between it and the three local nonenforcement decisions in 2004, see Law, *supra* note 21 and Williams, *supra* note 39, at 612–13 ("Significantly, however, Cooper did not deny the power of state officials to enforce the Constitution, but rather only to disregard the Supreme Court's interpretation once made.").

90 *See* Law, *supra* note 21, at 38 (commenting that "most of the time, no court will ever pass on the constitutional issues" raised by a public official, "not because the claims are not justiciable or that the public official would resist a judicial determination, but rather for more practical reasons").

91 *See, e.g.*, Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 485 (Cal. 2004); Li v. State, 110 P.3d 91, 94–95 (Or. 2005) (en banc).

92 *See, e.g.*, Meletta, *supra* note 49, at 514 ("The judiciary has not frequently ruled on executive non-enforcement.").

93 In considering state executives' options for dealing with local nonenforcement, scholarship at the federal level on presidential nonenforcement provides an important analogue and specific factors that may be useful for state executives to consider when faced with local nonenforcement. One scholar posits a six-factor framework for presidential nonenforcement that considers the context surrounding the enactment of the specific statute at issue, and which emanates from three guiding principles. The three principles are: "First, how clear is the provision's constitutional infirmity?[;] Second, what effect would non-enforcement have on the prospects for judicial review of the statutory provision?[; and] Finally, does the provision encroach on executive power?" *See* Johnsen, *supra* note 28, at 44. The six factors are:

executives should do when confronted with a local official who refuses to enforce a state statute, aside from using the courts to exercise authority over the local official.[94] Most importantly, there is no uniform method through which to judge the potential merit of the local official's interpretation.

A. Lockyer, Li, *and the Legacy of the State Executive's Response to Local Nonenforcement*

The *Lockyer* decision[95] settled a controversial issue that had, up until that point, remained an open question in California: could local officials decline to enforce laws they thought were inconsistent with either the federal or state constitution? In its decision, the California Supreme Court refused to reach the substantive issue at the heart of the local nonenforcement decisions—whether denying same-sex couples the right to wed violated state and federal constitutions[96]—and instead ordered a procedural analysis of whether the local officials in San Francisco possessed the authority, within the scope of their duties, to independently interpret California's Marriage Law.[97]

> (1) How clear is the law's constitutional defect?[;] (2) Does the President possess institutional expertise relevant to resolving the constitutional issue, and what are the relative interpretive abilities of the three branches?[;] (3) Did Congress actually consider the constitutional issue in enacting the law?[;] (4) What is the likelihood of judicial review and how would non-enforcement affect that likelihood?[;] (5) How serious is the harm that would result from enforcement?[; and] (6) Is repeal of the statute or non-defense of the statute against legal challenge an effective alternative to non-enforcement?

Id. at 53.

94 Norman Williams expounds on three models by which state *courts* should assess a local official's claims of interpretive authority: first, the judicial exclusivity model confines executive review exclusively to the judiciary as a constitutional matter; second, the legislative model proposes that the legislature is best situated to determine which officials should have the authority to independently interpret the Constitution in the performance of their duties; and third, all executive officials, regardless of the level of government they occupy, have the authority and duty to independently interpret and enforce the constitution. Williams, *supra* note 39, at 568–69. Williams ultimately concludes that the legislative model is the most consistent with the structure of the states. *Id.* at 569.

95 *Lockyer*, 95 P.3d 459.

96 *Id.* at 463–64, 466 ("[A]lthough the present proceeding may be viewed by some as presenting primarily a question of the substantive legal rights of same-sex couples, in actuality the legal issue before us implicates the interest of all individuals in ensuring that public officials execute their official duties in a manner that respects the limits of the authority granted to them as officeholders. . . . [W]e emphasize that . . . our decision in this case is not intended, and should not be interpreted, to reflect any view on . . . . the substantive question of the constitutionality of the California [marriage law] . . . .").

97 The court demonstrated how the same legal issue would arise in other circumstances than gay marriage. For instance, local officials could not refuse to apply the provisions of an assault weapons restriction based on their beliefs that it violated the Second Amendment or refuse to

The controversy in *Lockyer* began with Mayor Newsom's act of nonenforcement, which included an affirmative disregard for the law. On February 10, 2004, he sent a letter to the San Francisco County Clerk and asked her to determine what changes to make to California's marriage forms and documents so that they would be more amenable to distribution on a nondiscriminatory basis, suggesting that the language on the documents should be gender neutral.[98] After making the necessary changes, the county clerk began to issue marriage licenses to same-sex couples on February 12, 2004, and issued approximately 4000 licenses to same-sex couples between then and March 5, 2004.[99] The county recorder then participated in the process by registering marriage certificates for those couples that had received licenses from the county clerk and had solemnized their marriages in a ceremony.[100]

The *Lockyer* court focused its analysis of the Mayor's and county officials' actions under the separation of powers doctrine[101] and the role of local officers in performing state functions.[102] According to the *Lockyer* court, executive officials are supposed to execute the laws whereas only the judiciary has the power to determine a statute's constitutionality.[103] Although the separation of the branches is not meant to be completely rigid, and executives and legislators may consider the constitutionality of a statute on a discretionary basis within the ambit of their respective duties, the court found that a local official on whom a ministerial[104] duty is imposed does not have the authority to disregard a statute based on a personal determination of

apply an environmental measure that restricted a property owner's ability to obtain a building permit for development that interfered with public access because they believed it was a "taking" without compensation in violation of the Fifth Amendment of the Federal Constitution. *Id.* at 462–63.

98 *Id.* at 464.

99 *Id.* at 465.

100 *Id.*

101 The separation of powers doctrine envisions the powers of each branch of government—the Legislature, the Executive, and the Judiciary—as separate and distinct, as defined by the structure of Articles I, II, and III of the U.S. Constitution. *See* INS v. Chadha, 462 U.S. 919, 946 (1983); *see also Lockyer*, 95 P.3d at 463 (stating that "the classic understanding of the separation of powers doctrine [is] that the legislative power is the power to enact statutes, the executive power is the power to execute or enforce statutes, and the judicial power is the power to interpret statutes and to determine their constitutionality").

102 *Lockyer*, 95 P.3d at 471 ("[T]he only local officials to whom the state has granted authority to act with regard to marriage licenses and marriage certificates are *the county clerk* and *the county recorder*.").

103 *Id.* at 463.

104 The *Lockyer* court defined a "ministerial" act as one "that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists." *Id.* at 473 (quoting Kavanaugh v. W. Sonoma Cnty. Union High Sch. Dist., 62 P.3d 54, 58 (Cal. 2003)) (internal quotation marks omitted).

constitutionality.[105] In addition, since marriage is a statewide rather than local matter, the court noted that state statutes that relate to marriage always trump local practices.[106] Thus, because the San Francisco local officials were found to have exceeded the scope of their ministerial authority, they were prohibited from compelling the court to rule on the constitutionality of the statute by refusing to apply it.[107]

Similar to *Lockyer*, the Oregon Supreme Court, in *Li v. State*,[108] determined that local officials could not act on their own independent interpretations of the state or federal constitutions.[109] *Li* stemmed from the actions of county officials from the Multnomah County Board of Commissioners who directed the Multnomah County Records Management Division to start issuing marriages licenses to same-sex couples who requested them.[110] While the court acknowledged that local officials did have a duty to consider state and federal constitutions when carrying out their official responsibilities, the court did not think that local officials could act outside the scope of their authority to remedy alleged constitutional defects.[111]

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105 *Id.* at 463–64; *cf.* Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 147–48, 175–76 (2005) (arguing that a broad reading of Romer v. Evans, 517 U.S. 620 (1996), would prevent states from interfering with local executive's decision as to laws that involve equal protection principles, or "'decentralized equal protection' jurisprudence").

106 *Lockyer*, 95 P.3d at 471.

107 *Id.* at 475 ("[A] local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute."). The court additionally debated whether the local officials should be classified as "administrative agencies" within the meaning of Article III, section 3.5 of California's Constitution, which would have explicitly negated the local officials' authority to refuse to apply the statute. *Id.* at 473–75. However, ultimately the court deemed that issue nondispositive in resolving the question of local officials' interpretive authority. *Id.* at 474–75. See *supra* note 52 for an additional discussion of section 3.5 and its significance for the authority of statewide executives such as the Attorney General and Comptroller to independently interpret statutes.

108 110 P.3d 91 (Or. 2005) (en banc).

109 *Id.* at 101–02 (holding that because marriage is a statewide matter, county officials did not have the authority to direct a remedy to Oregon's statute prohibiting same-sex marriages).

110 *Id.* at 95.

111 *Id.* at 101 (clarifying that although state precedent did confirm that local officials had a "duty to be mindful of the state and federal constitutions," that duty did not translate to "an implied grant of authority . . . to prescribe remedies for any perceived constitutional shortcomings in such laws *without regard to the scope of the official's statutory authority to act*"). The court additionally mentioned in dictum some ways in which local officials could "choose in vindicating . . . [their] personal constitutional vision." *Id.* at 102. First, if the local official has statutory "quasi-judicial authority," such as in the context of resolving an administrative matter regarding a specific contested case, the official could have the authority to resolve a constitutional matter. *Id.* at 101. Second, when a local official is granted the discretion to make decisions, the official could "choose *not* to act, such as when a prosecutor chooses not to prosecute a case under a statute of questionable constitutional validity." *Id.* at 102. And last, when the official does not have the discretion to decline to act, the official might choose not to exercise a statutory duty and instead let the aggrieved party initiate proceedings to resolve a "contested case decision or [seek] judicial intervention through mandamus or declaratory judgment proceedings." *Id.*

The legacy of the *Lockyer* and *Li* decisions is still ambiguous. Although a few states other than California have adopted similar reasoning to *Lockyer* when faced with nonenforcement by local officials,[112] its reach at the state level appears to be limited primarily to California cases[113] and a few cases in other states brought in the aftermath of decisions by local executives in the mid-2000s to issue licenses in violation of their states' marriage laws.[114] Although the decisions in *Lockyer* and *Li* did not involve much uncertainty among state executives as to the correct course of action, more recent instances of local nonenforcement did not result in the same uniformity of opinion within the statewide executive branch.

B. *Pennsylvania: A Case Study in Intrabranch Conflict*

Pennsylvania's Commonwealth Court recently reinvigorated *Lockyer*'s reasoning dealing with the lack of authority for local officials to exercise discretion in enforcing state laws.[115] As previously discussed, Attorney General Kane's initial decision not to defend Pennsylvania's Marriage Law spawned a state court lawsuit in addition to the one already brought in federal court by the ACLU and individual plaintiffs challenging the state's law prohibiting same-sex marriage.[116] The state lawsuit arose when Montgomery County Register of Wills Bruce Hanes announced that he would grant same-sex marriage licenses after hearing that Kane would not defend the federal lawsuit brought by the ACLU.[117] Similar to the mid-2000s cases where local executives in California,[118]

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112 *See, e.g.*, *id.* at 101–02; *see also, e.g.*, Hebel v. West, 803 N.Y.S.2d 242 (App. Div. 2005) (holding, in part, that Mayor West's actions were not within the scope of his office); Dep't of Health v. Hanes, 78 A.3d 676 (Pa. Commw. Ct. 2013).

113 *See, e.g.*, Perry v. Brown, 265 P.3d 1002, 1027 (Cal. 2011) (citing *Lockyer* in holding that "[a]lthough the Attorney General's legal judgment may appropriately guide that official's own discretionary actions, the validity or proper interpretation of a challenged state constitutional provision or statute is, of course, ultimately a matter to be determined by the courts, not the Attorney General"); Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (holding that Proposition 8 constituted a constitutional amendment rather than a constitutional revision, and thus, same-sex marriages performed before Proposition 8 was enacted were still valid); Cnty. of San Diego v. San Diego NORML, 81 Cal. Rptr. 3d 461 (Cal. Ct. App. 2008).

114 *See also Hanes*, 78 A.3d at 689 n.28, 692 n.31 (citing *Lockyer* in support of its decision to issue a writ of mandamus to compel Hanes to cease issuing marriage licenses to same-sex couples).

115 *Id.*

116 See *supra* notes 1–8 for more background on the earlier events in the 2013 Pennsylvania executive conflict over same-sex marriages. *See also* Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

117 See *Montco Register of Wills D. Bruce Hanes on His Decision to Issue a Marriage License to a Same Sex Couple*, *supra* note 7.

118 Lockyer v. City & Cnty. of S.F., 95 P.3d 459 (Cal. 2004).

New York,[119] and Oregon[120] affirmatively declined to enforce state laws prohibiting same-sex marriages, Hanes took an aggressive approach in subsequently deciding to issue marriage licenses.

Attorney General Kane's decision not to sue Hanes for failing to enforce Pennsylvania's Marriage Law, however, is the decision that generated the most controversy. In her stead, Governor Corbett directed the Pennsylvania Department of Health to sue Hanes, after which the Commonwealth Court of Pennsylvania issued a writ of mandamus that compelled Hanes and the Montgomery County Orphans Court to "cease and desist" issuing marriage licenses to same-sex couples.[121] When Hanes did not stop issuing licenses, on September 12, 2013, the court granted the Department of Health's petition ordering Hanes to stop.[122] Although Hanes subsequently ceased to issue any more same-sex marriage licenses, up until that point, Hanes had already issued 174 marriage licenses to same-sex couples.[123]

Hanes offered two arguments[124] in his favor: first, he was a judicial officer with the discretion to issue marriage licenses; second, in the alternative, even without the authority to issue the licenses, he could raise the unconstitutionality of Pennsylvania's Marriage Law as a defense in the mandamus action.[125] The court applied *Lockyer*'s reasoning in classifying Hanes' Register of Wills position as "ministerial," flatly rejecting the claim that he had any discretion to exercise quasi-judicial[126] authority. The court found that the clerk of Orphans' Court only acts in a judicial capacity when probating wills,[127] and so Hanes' duties concerning the issuance of marriage licenses were

119 Hebel v. West, 803 N.Y.S.2d 242 (App. Div. 2005).

120 Li v. State, 110 P.3d 91 (Or. 2005) (en banc).

121 Amended Petition for Review in the Nature of an Action in Mandamus at 2, Dep't of Health v. Hanes, 78 A.3d 676 (Pa. Commw. Ct. 2013) (No. 379 M.D. 2013), *available at* http://www.pacourts.us/assets/files/setting-3220/file-2886.pdf?cb=82f6f6; *see* Jenny DeHuff, *Montgomery County Register of Wills Sued to Stop Issuance of Gay Marriage Licenses*, TIMES HERALD (July 30, 2013, 1:22 PM), http://www.timesherald.com/article/JR/20130730/NEWS01/130739974.

122 *Hanes*, 78 A.3d 676.

123 Dan Clark, *State Brief Deadline in Montco Same-Sex Marriage Appeal Extended*, MAIN LINE TIMES (Dec. 27, 2013), http://www.mainlinemedianews.com/articles/2013/12/27/main_line_times/news/doc52bd8d91c50ce378495533.txt?viewmode=fullstory.

124 A third argument, which the court quickly rejected, was that the Department of Health did not have standing to petition for mandamus relief because the Department did not have either the authority or permission from Attorney General Kane to "enforce an officer's public duty." *Hanes*, 78 A.3d at 682. The court cited to an August 30, 2013 letter from Attorney General Kane, authorizing the Department of Health to sue on her behalf. *Id.* at 685–86.

125 *Id.* at 681–82.

126 "Quasi-judicial" authority is power granted to an official by the state constitution that allows an executive official to consider the constitutionality of a statute after holding "court-like" proceedings. Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 480 (Cal. 2004).

127 *See Hanes*, 78 A.3d at 684.

nonjudicial.[128] As a nonjudicial official, Hanes lacked the discretion to exercise executive review, and could neither legally determine whether the statute he was administering was constitutional nor decline to enforce the statute.[129]

In addition to determining that Hanes did not have the authority to independently interpret the Constitution, the court also found that he could not challenge the Marriage Law by asserting the statute's unconstitutionality as a defense to the Department of Health's mandamus action against him.[130] Ultimately, the court refused to consider the constitutionality of Pennsylvania's Marriage Law[131] and simply ordered Hanes to cease issuing same-sex marriage licenses based on his local role and responsibility to uphold Pennsylvania statutes.[132]

The interplay between Attorney General Kane and Register of Wills Hanes, a state executive and local official, respectively, is what made Pennsylvania's situation unique from prior state executive

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128 *Id.* at 689–90. In addition, the court held that the statutory scheme of Pennsylvania's marriage law did not give Hanes the authority to exercise independent discretion of judgment with respect to the issuance of marriage licenses. *Id.* at 689, 691 ("In this case, a clerk of courts has not been given the discretion to decide whether the statute he or she is charged to enforce is a good idea or bad one, constitutional or not. Only courts have the power to make that decision."); *see also In re* Admin. Order No. 1-MD-2003, 936 A.2d 1, 9 (Pa. 2007) (stating that the powers granted to a clerk of courts are "purely ministerial," and that "the clerk . . . has no discretion to interpret rules and statutes").

129 *Hanes*, 78 A.3d at 683–84, 689 ("The . . . statutory scheme [in Pennsylvania], outlining the applicable requirements and procedure for the issuance of a marriage license, does not authorize Hanes to exercise any discretion or judgment with respect to its provisions. Rather, the Marriage Law specifically requires Hanes to furnish and use the appropriate forms and to issue the license if the statutory requirements have been met . . . .").

130 *Id.* at 690 ("Until a court has decided that an act is unconstitutional, Hanes must [continue to] enforce the law as written, and it is not a defense to a mandamus action that the law may be unconstitutional. Only a court can arrive at that conclusion."); *see also* Hetherington v. McHale, 311 A.2d 162, 168 (Pa. Commw. Ct. 1973) (finding that the Attorney General does not have the power or authority to suspend a statute until the judiciary rules on the statute's constitutionality), *rev'd on other grounds*, 329 A.2d 250 (Pa. 1974) (holding that the statute "[c]learly, palpably and [p]lainly violate[d] the Constitution" (internal quotation marks omitted)). The court explicitly disapproved of the idea that Hanes could "take advantage of his improper action" as a defense because it would be the "functional equivalent of a counterclaim," which is not permitted in mandamus actions by Pennsylvania statute. *Hanes*, 78 A.3d at 691. Compare *Van Horn v. State*, 64 N.W. 365 (Neb. 1895) for an example of a court allowing a ministerial officer to assert a statute's unconstitutionality as a defense to a writ of mandamus that would require him to enforce a statute that he refuses to enforce. There, the court held that "[m]inisterial officers are therefore not bound to obey an unconstitutional statute, and the courts, sworn to support the constitution, will not, by mandamus, compel them to do so. It is therefore a complete answer to an application for such a writ that the statute seeking to impose a duty is violative of the constitution." *Van Horn*, 64 N.W. at 372. The court made clear, however, that such acts of nonenforcement of legislative acts are only appropriate in "clear cases of unconstitutionality." *Id.*

131 23 PA. CONS. STAT. §§ 1102, 1704, *declared unconstitutional* by Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014).

132 *Hanes*, 78 A.3d at 693 ("Even if Hanes is correct in his view that portions of the Marriage Law are unconstitutional, as noted above, the instant mandamus action is not the proper forum in which such a determination may be made.").

nonenforcement decisions. First, Kane made the relatively benign decision to step aside from defending Pennsylvania's Marriage Law.[133] Although declining to carry out her enumerated responsibilities was controversial to some Pennsylvanians,[134] Kane appeared to have been within her legal rights to do so, especially once she delegated her responsibility to the Governor's Office of General Counsel.[135] In contrast to the local officials in New York, San Francisco, and Oregon, Kane did not affirmatively decline to enforce the Marriage Law; the ACLU lawsuit prompted her decision not to *defend* Pennsylvania's Marriage Law. Her decision and subsequent statements questioning the constitutionality of the law, in turn, prompted Hanes[136] to more aggressively disregard the statute at the local level and start issuing licenses. Until the Pennsylvania federal court decision, on May 20, 2014, in *Whitewood v. Wolf*,[137] the Pennsylvania Department of Health continued to enforce the cease and desist order against Hanes.[138]

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133 *See supra* note 5. Hanes complied with the order at the time but appealed the court's decision on December 2, 2013. *See* Josh Middleton, *D. Bruce Hanes Appeals PA Court Ruling on Gay Marriage*, PHILA. MAG. G PHILLY BLOG (Dec. 2, 2013, 4:35 PM), http://www.phillymag.com/g-philly/2013/12/02/d-bruce-hanes-appeals-pa-court-ruling-gay-marriage.

134 *See, e.g.*, Juliet Eilperin, *Pa. Attorney General Says She Won't Defend State's Gay Marriage Ban*, WASH. POST POL. BLOG (July 11, 2013), http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/11/sources-pa-attorney-general-wont-defend-states-gay-marriage-ban (Rob Gleason has stated: "[It is] 'unacceptable for Attorney General Kathleen Kane to put her personal politics ahead of her taxpayer-funded job by abdicating her responsibilities.' . . . 'Pennsylvanians are left with the question, if the [sic] Kathleen Kane's political beliefs are the standard for law enforcement, what law will she ignore next?'").

135 *See infra* Part III.A.4. See generally STATE ATTORNEYS GENERAL, *supra* note 57, at 84–91 for a more comprehensive discussion of the powers of State Attorneys General, which vary by state. *See also supra* Part I.A.2.

136 *Montco Register of Wills D. Bruce Hanes on His Decision to Issue a Marriage License to a Same Sex Couple*, *supra* note 7 ("Based upon the advice of . . . [my solicitor, Michael] Clarke, my own analysis of the law and mindful of the Attorney General's belief that Pennsylvania's marriage laws are unconstitutional, I decided . . . to issue a license to the couple.").

137 992 F. Supp. 2d 410 (M.D. Pa. 2014) (holding Pennsylvania's marriage laws to be unconstitutional under both the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution).

138 However, the turn of events thus far has resulted in dire political consequences for Attorney General Kane. Daryl Metcalfe, a Pennsylvania State Republican Representative, circulated a memorandum to the members of the Pennsylvania House of Representatives calling for Kane's impeachment, and stating that he intended to file a formal impeachment resolution against her. Memorandum from Daryl Metcalfe, Representative, Pa. House of Representatives, to Pa. House Members (Oct. 21, 2013), *available at* http://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20130&cosponId=13550; *see* Jacob Gershman, *Pa. Lawmaker Calls for Impeachment of State Attorney General*, WALL ST. J. L. BLOG (Oct. 22, 2013, 3:57 PM), http://blogs.wsj.com/law/2013/10/22/pa-lawmaker-calls-for-impeachment-of-state-attorney-general; Sarah Leitner, *Pennsylvania Lawmaker Readies Impeachment Papers for Attorney General*, MEDIATRACKERS (Aug. 6, 2013), http://mediatrackers.org/pennsylvania/2013/08/06/pennsylvania-lawmaker-readies-impeachment-papers-for-attorney-general. See Press Release, Pa. Office of Att'y Gen., Attorney General Kathleen G. Kane Today Released the Following Statement in Response to Rep. Metcalfe's Impeachment Measure (Oct. 22, 2013), *available at* https://www.attorneygeneral.gov/Media_and_Resources/Press_Releases/Press_

However, prior to the conclusion of court actions in Pennsylvania, Bruce Hanes' decision and lawsuit spawned similar nonenforcement actions or contemplated actions by local officials in other states such as North Carolina, New Mexico, and Colorado.

C. *Comparison Case Studies—North Carolina, New Mexico, and Upcoming Conflicts*

1. North Carolina

The situation that recently unfolded in North Carolina regarding the state's voter-sponsored constitutional amendment banning gay marriage[139] involved a very public clash between Republican Governor Pat McCrory and Democratic Attorney General Roy Cooper[140] as to the constitutionality of the amendment.[141] Attorney General Cooper

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Release/?pid=420,
for Kane's response (calling Representative Metcalfe's statements in his memorandum calling for her impeachment, "loud, arrogant and misguided").

139 The amendment is now embodied in the North Carolina Constitution. N.C. CONST. art. XIV, § 6. North Carolina also previously had a statutory ban on same-sex marriage. N.C. GEN. STAT. ANN. § 51-1.2 (West 2014) ("Marriages, whether created by common law, contracted, or performed outside of North Carolina, between individuals of the same gender are not valid in North Carolina."). *See generally* Martha Waggoner, *Amendment One, North Carolina Gay Marriage Ban, Passes Vote*, HUFFINGTON POST (May 8, 2012, 9:13 PM), http://www.huffingtonpost.com/2012/05/08/amendment-one-north-carolina_n_1501308.html.

140 For background on the clash between McCrory and Cooper, see generally Mary C. Curtis, *North Carolina Attorney General Dislikes Laws He Must Defend*, WASH. POST SHE THE PEOPLE BLOG (Oct. 17, 2013), http://www.washingtonpost.com/blogs/she-the-people/wp/2013/10/17/north-carolina-attorney-general-dislikes-laws-he-must-defend, and David Zucchino, *In North Carolina, a Democratic State Official Speaks Out*, L.A. TIMES, Oct. 20, 2013, http://www.latimes.com/nation/la-na-nc-attorney-general-20131021,0,2375441.story#axzz2im1fn2dy.

141 North Carolina also recently passed a voter identification law, Voter Information Verification Act, 2013 N.C. Sess. Laws 2013-381, which was considered particularly restrictive by the national press and the public. *See* Teresa Wiltz, Op-Ed., *Restrictive Voting Laws Beg the Question: Is This 2013 or 1953*, GUARDIAN, Oct. 7, 2013, http://www.theguardian.com/commentisfree/2013/oct/07/north-carolina-voter-law-holder-lawsuit ("The law, which tightens voting restrictions, including requiring photo ID at the polls, is deemed by civil rights groups to [be] the most draconian yet."). McCrory and Cooper similarly disagree as to this law's constitutionality. Based on what he considered a "regressive elections bill" that would curtail voting rights by preventing access to the polls for many citizens of North Carolina, Attorney General Cooper started a petition urging Governor McCrory to veto the bill. Attorney General Roy Cooper, *Governor McCrory: Stop the Assault on Voting Rights*, CHANGE.ORG, http://www.change.org/petitions/governor-mccrory-stop-the-assault-on-voting-rights (last visited Mar. 16, 2015). Change.org petitions are organized grassroots petitions, typically for individuals to bring public attention to major national or international issues. When Governor McCrory signed H.B. 589 into law in August 2013—over Cooper's objections—Cooper continued to publically denounce the law as poor public policy while promising to defend and uphold the law pursuant to his responsibility as Attorney General. *See* John Peragine, *Taking Shots at the Laws He's Obliged to Enforce*, N.Y. TIMES, Oct. 25, 2013, at A14. However, Cooper's actions have had significant legal

expressed his personal disagreement with the law, yet stated that he would continue to both defend and enforce North Carolina's law, in spite of his reservations about it.[142] In doing so, he reaffirmed his view that his duty as Attorney General was to defend and enforce North Carolina's statute and the constitutional amendment banning same-sex marriage.[143] However, a local official, Buncombe County Register of Deeds Drew Reisinger, in a statement similar to but less forceful than Bruce Hanes' in Pennsylvania decided that based in part on the Attorney General's announcement of personal support for same-sex marriage, he was going to accept applications for same-sex marriage licenses and seek the Attorney General's approval before granting them.[144] Although Cooper expressed his disapproval with Reisinger's request at the time—causing the status of the applications to remain in question[145]—recent decisions by North Carolina district courts striking

consequences for North Carolinians—despite his technical adherence to his duties. U.S. Senator Kay Hagan of North Carolina initiated a request to the U.S. Department of Justice, requesting that the Department assess the voter identification law to make sure it was constitutional, and subsequently, U.S. Attorney General Eric Holder decided to sue the state over what he considered the unconstitutionality of the voter identification law. *See* Complaint, United States v. North Carolina, No. 13-cv-861 (M.D.N.C. Sept. 30, 2013), *available at* http://legaltimes.typepad.com/files/doj-nc-complaint.pdf. For background, see generally Michael Biesecker & Pete Yost, *Pat McCrory Vows to Fight DOJ Lawsuit Over North Carolina Voter ID Law*, HUFFINGTON POST (Sept. 30, 2013, 5:22 PM), http://www.huffingtonpost.com/2013/09/30/pat-mccrory-doj-lawsuit_n_4019093.html; David Ingram & Aruna Viswanatha, *Government Sues to Block North Carolina Voter Law*, REUTERS, Sept. 30, 2013, http://www.reuters.com/article/2013/09/30/us-usa-justice-voting-rights-idUSBRE98T13620130930; and *Justice Department Sues North Carolina Over Voter Law*, FOXNEWS.COM (Sept. 30, 2013), http://www.foxnews.com/politics/2013/09/30/justice-department-to-sue-north-carolina-over-voter-law.

142 *See* Zucchino, *supra* note 140. Cooper himself is named as a defendant in a lawsuit brought by the ACLU challenging North Carolina's ban on second-parent adoptions for same-sex couples. The ACLU additionally added marriage claims to their initial lawsuit. First Amended Complaint, Fisher-Borne v. Smith, 14 F. Supp. 3d 695 (M.D.N.C. 2014) (No. 1:12-cv-589), 2013 WL 4051175.

143 *See, e.g.*, Zucchino, *supra* note 140 ("'If I believe a law is bad for North Carolina, I will say so,' Cooper . . . said . . . . 'I have a responsibility to say so.' At the same time . . . '[i]t is the duty under the law for this office to defend the state when it gets sued—even if I personally disagree with the public policy. This office is going to follow the law.'").

144 Reisinger allowed the same-sex couples that requested licenses to fill out and sign their applications; however, he withheld his signature pending Attorney General Cooper's approval. *Buncombe County Register of Deeds Willing to Issue Same-Sex Marriage Licenses; Requests Attorney General Review*, BUNCOMBE COUNTY (Oct. 14, 2013), http://www.buncombecounty.org/governing/depts/registerdeeds/News_Detail.aspx?newsID=14169; *see also* Mitch Weiss, *North Carolina Gay Marriage Ban Challenged by County Official*, HUFFINGTON POST (Oct. 14, 2013, 7:24 PM), http://www.huffingtonpost.com/2013/10/14/north-carolina-gay-marriage-ban_n_4099068.html.

145 *See* Gautam Hathi, *Asheville Official Challenges NC Amendment 1*, DUKE CHRON., Oct. 23, 2013, at 1, *available at* http://issuu.com/dukechronicle/docs/131023_-_news (citing Cooper's office's response to Reisinger's inquiry, which stated under then-current law, "'issuance of a marriage license to a same-sex couple would be a violation of the law'"); *see also* Weiss, *supra* note 144.

down North Carolina laws prohibiting same-sex marriages[146] have overtaken any decisions as to those applications.

2. New Mexico

The same-sex marriage conflict in New Mexico also shared many important characteristics with the situations in North Carolina and in Pennsylvania. By early September 2013, clerks in seven—out of a total of thirty-three—counties in New Mexico were issuing marriage licenses to same-sex couples.[147] Because of the dearth of explicit statutory or constitutional language in New Mexico law regarding the status of same-sex marriages,[148] thirty-three clerks filed a petition with the New Mexico State Supreme Court in order to clarify whether same-sex marriage was legal in New Mexico.[149] Thus, the clerks' behavior did not necessarily affirmatively defy the law, but did hasten the process by which the issue came before the court. New Mexico's Democratic Attorney General, Gary King, who had stated his personal opposition to

146 *Fisher-Borne*, 14 F. Supp. 3d at 697–98 (holding North Carolina's laws prohibiting same-sex marriage to be almost identical to those struck down in Virginia by the Fourth Circuit Court of Appeals in Bostic v. Schaefer, 760 F.3d 352 (4th Cir. 2014), and invalidating them on similar grounds); Gen. Synod of the United Church of Christ v. Resinger, 12 F. Supp. 3d 790 (W.D.N.C. 2014) (same); *see also* Michael Biesecker & Mitch Weiss, *Judge Strikes Down NC Gay Marriage Ban*, STATE (Oct. 10, 2014), http://www.thestate.com/2014/10/10/3737056_judge-strikes-down-nc-gay-marriage.html?rh=1.

147 Dan Boyd, *NM County Clerks Ask Supreme Court to Issue Same-Sex Marriage Ruling*, ALBUQUERQUE J. (Sept. 5, 2013, 12:35 PM), http://www.abqjournal.com/258274/politics/nm-county-clerks-ask-supreme-court-to-issue-same-sex-marriage-ruling.html.

148 New Mexico is unique from other states that dealt with this issue in that it is the only state in the United States that does not have a statute or constitutional amendment that explicitly prohibits same-sex marriage. N.M. STAT. ANN. § 40-1-1 (West 2014) ("Marriage is contemplated by the law as a civil contract, for which the consent of the contracting parties, capable in law of contracting, is essential."). However, because multiple other statutes relating to marriage refer to "husband and wife" or "bride and groom," the law had never previously been interpreted to allow same-gender marriages. *See* Griego v. Oliver, 316 P.3d 865, 875–76, 889 (N.M. 2013) (finding that "a mix of gender-neutral and gender-specific terminology in the domestic relations statutes does not mean that the Legislature intended to authorize marriage between same-gender couples," but concluding that the state's statutory prohibition violated the state constitution's equal protection clause); *see also* Nick Wing, *Gary King, New Mexico Attorney General, Calls for End to State's Prohibition on Gay Marriage*, HUFFINGTON POST (July 23, 2013, 12:06 PM), http://www.huffingtonpost.com/2013/07/23/gary-king-gay-marriage-new-mexico_n_3639478.html.

149 *Griego*, 316 P.3d at 872; *see also* Warren Richey, *Same-Sex Marriage: Will New Mexico Become 15th State to Allow It?*, CHRISTIAN SCI. MONITOR (Oct. 23, 2013), http://www.csmonitor.com/layout/set/r14/USA/Justice/2013/1023/Same-sex-marriage-Will-New-Mexico-become-15th-state-to-allow-it-video. Prior to the clerks' decision to file the lawsuit, some New Mexico lower courts had ordered four clerks to issue marriage licenses. *See* Richard Gonzales, *How a County Clerk Ignited the Gay Marriage Debate in N.M.*, NPR (Oct. 22, 2013, 4:52 PM), http://www.npr.org/2013/10/22/239790062/how-a-county-clerk-ignited-the-gay-marriage-debate-in-n-m.

New Mexico's ambiguous statutory scheme that he believed did not allow same-sex marriage,[150] simultaneously advised county clerks who independently decided to issue marriage licenses to same-sex couples to stop doing so.[151] King did not sue the clerks who continued to issue licenses, but requested that the New Mexico Supreme Court decide the substantive issue of whether New Mexico's statutory scheme banning same-sex marriage was unconstitutional under New Mexico's Constitution.[152] The New Mexico Supreme Court resolved the issue on December 19, 2013, ruling that same-sex couples are permitted to marry under New Mexico law.[153]

3. Gun Control in Colorado

In a broadening of the issue of local nonenforcement, local sheriffs in Colorado took heed of the local clerks' approach in New Mexico by both bringing a lawsuit challenging the constitutionality of the gun control law at issue and simultaneously declining to enforce the disputed law.[154] This incident of local nonenforcement occurred in Weld County, Colorado, where Sheriff John Cooke—along with many other local sheriffs in Colorado counties—declined to enforce Colorado's new gun laws.[155] Nonenforcement of state criminal laws by sheriffs may be less controversial than other civil nonenforcement actions involving local officials outside of law enforcement, however,

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150 N.M. CONST. art. II, § 18; *see* Wing, *supra* note 148.

151 *See* Steve Terrell, *Roundhouse Roundup: Gary King and the Same-Sex Marriage Evolution*, SANTA FE NEW MEXICAN (June 16, 2013, 12:34 AM), http://www.santafenewmexican.com/opinion/local_columns/article_9b2272d6-2566-5d93-bc09-a52bb6e4771a.html.

152 *See* N.M. CONST., art. II, § 18; *Griego*, 316 P.3d at 871 (finding that "although none of New Mexico's marriage statutes specifically prohibit same-gender marriages, when read as a whole, the statutes have the effect of precluding same-gender couples from marrying and benefitting from the rights, protections, and responsibilities that flow from a civil marriage"); Press Release, Gary King, N.M. Att'y Gen.'s Office, Same Sex Marriage Is About Civil Rights (Sept. 20, 2013), *available at* http://www.nmag.gov (search "Same Sex Marriage Is About Civil Rights"); *Same-Sex Marriage Laws*, NAT'L CONF. STATE LEGISLATURES (Feb. 9, 2015), http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx ("Before the ruling, New Mexico was the only state without a law or constitutional provision explicitly banning or allowing same-sex marriage.").

153 *Griego*, 316 P.3d at 889 ("Denying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution.").

154 See generally Goode, *supra* note 24 for background on the sheriffs' decision.

155 *See id.*; *The Executive's Duty to Enforce the Law: Tara Grove at TEDxCollegeofWilliam&Mary*, TEDX (Apr. 6, 2014), http://tedxtalks.ted.com/video/The-Executive-s-Duty-to-Enforce-;search%3Atag%3A%22ep1406%22. The statutes at issue were COLO. REV. STAT. §§ 18-12-112, 18-12-302 (2013). Section 18-12-112 imposes mandatory background checks on gun buyers in private transactions, subject to limited exceptions. Section 18-12-302 prohibits the possession, sale, or transfer of "large-capacity" magazines, also subject to limited exceptions.

because of the wide discretion enjoyed by sheriffs in deciding whether to enforce state laws.[156] Unlike previous incidents dealing with same-sex marriage, the local officials in this case decided to sue Governor John Hickenlooper before deciding not to enforce the law.[157] Eventually, the lawsuit culminated in a ruling in Colorado Federal District Court that validated the Colorado Attorney General's guidance to law enforcement as to how the gun control measures should be enforced, and minimized the ability of law enforcement to exercise discretion.[158] But similar to the effect that Bruce Hanes' actions spurred in other states after debating the constitutionality of laws prohibiting same-sex marriage, other states have joined efforts to decline to enforce new gun laws passed after the shooting at Sandy Hook Elementary School in Newtown, Connecticut.[159]

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156 *See* Goode, *supra* note 24 (quoting a spokesman for the Colorado Department of Public Safety who commented on sheriffs' "wide discretion in enforcing state laws" and stated, "'[w]e have people calling us all the time, thinking they've got an issue with their sheriff, and we tell them we don't have the authority to intervene'"); *cf.* Heckler v. Chaney, 470 U.S. 821, 831–32, 838 (1985) (commenting that Federal Drug Administration's decision to not act to enforce law questioning the suitability of a drug used for lethal injection on humans involves balancing of factors, including whether agency resources are best spent to enforce the particular violation and mirrors prosecutorial discretion not to indict, did not violate respondents' constitutional rights and should not be subject to judicial review, as distinguished from agency's affirmative act to enforce a law, which should be subject to judicial review when individual's liberty or property rights are at stake).

157 *See* Cooke v. Hickenlooper, No. 13-cv-01300-MSK-MJW, 2013 WL 6384218, at *8, 12 (D. Colo. Nov. 27, 2013) (holding that although some of the plaintiffs did have standing to sue, the county sheriffs did not have standing to sue in their official capacity, but rather, only in their private capacity). Fifty-five out of sixty-two elected sheriffs joined the lawsuit to challenge the constitutionality of the new gun laws. On June 26, 2014, Federal District Court Judge Marcia Krieger upheld the gun control measures opposed by Colorado sheriffs. Colorado Outfitters Ass'n v. Hickenlooper, 24 F. Supp. 3d 1050, 1055 (D. Colo. 2014) (rejecting the named plaintiffs' and sheriffs' arguments, and noting "[a] law may be constitutional, but nevertheless foolish, ineffective, or cumbersome to enforce"); *see also* Kirk Mitchell & John Aguilar, *Ruling Upholds Gun-Control Laws*, DENVER POST, June 27, 2014, at A7.

158 *Colorado Outfitters Ass'n*, 24 F. Supp. 3d at 1079 ("The Plaintiffs have not provided any evidence demonstrating a reason to believe that § 18-12-302(2)(a) will not be enforced in accordance with the interpretation provided by the Attorney General. The guidance therefore serves to further limit the discretion of law enforcement officers when applying the grandfather clause.").

159 *See* Goode, *supra* note 24 (highlighting resistance from sheriffs in California, Florida, and New York). For background about the shooting, see Steve Vogel, Sari Horwitz & David A. Fahrenthold, *Sandy Hook Elementary Shooting Leaves 28 Dead, Law Enforcement Sources Say*, WASH. POST, Dec. 14, 2012, http://www.washingtonpost.com/politics/sandy-hook-elementary-school-shooting-leaves-students-staff-dead/2012/12/14/24334570-461e-11e2-8e70-e1993528222d_story.html; and *28 Dead, Including 20 Children, After Shooting Rampage at Sandy Hook School In Newtown,* HARTFORD COURANT, Dec. 14, 2012, http://articles.courant.com/2012-12-14/news/hc-police-responding-to-incident-in-newtown-20121214_1_nancy-lanza-adam-lanza-ryan-lanza.

III. ANALYSIS: CONFRONTING LOCAL NONENFORCEMENT OF STATE LAW

A. *A Mechanism for State Executives: Factors to Consider*

The states' individual circumstances are all so distinct that it seems impossible to fashion one method by which statewide executives can deal with local officials who decline to enforce state law.[160] But confronting local nonenforcement on a case-by-case basis, without appropriate structured guidance, has only led to confusion and disorder among many citizens in these states. Thus, due to the lack of clarity surrounding constitutional interpretation at the local level, a new mechanism is necessary to force resolution of a state statute's constitutionality. Although the idea is not to encourage local nonenforcement at will, this Note contends that when certain common factors are present in local nonenforcement conflicts in the states, state executives should have the authority to both resolve the conflict and the statute's constitutional merit. These factors include: the view of the state's highest court on local constitutional interpretation; whether there is agreement as to the constitutionality of the disputed law between either of the Attorney General or the Governor and the local official; whether the Supreme Court has recently invalidated a substantially similar law; and whether additional state actors have the authority to enforce the law.

1. Whether the State's Highest Court Has Already Ruled that Local Officials May Not Independently Interpret State Statutes

In states that have not definitively ruled on whether local officials may independently interpret state law, local officials may have more leeway to exercise discretion.[161] In fact, some states' highest courts have not conclusively held that a local official is forbidden from independently interpreting state statutes in all contexts.[162] And although

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160 Devins & Prakash, *supra* note 57. *But see* Williams, *supra* note 39, at 569–70 (endorsing the view that despite the differences among state constitutions, "substantial similarities exist. . . . when it comes to assessing executive review" and thus, "one can intelligibly assess state executive review as a general phenomenon").

161 *See* Williams, *supra* note 39, at 613 (commenting that although beyond the scope of that article, "one might argue that . . . local officials should be allowed to act on their own views of the state constitution until the state supreme court decides the matter, at which point they are bound by the court's decision," and arguing that allowing local officials the discretion to exercise executive review "does not necessarily entail chaos and confusion even in those situations in which the legislature allows local officials to consider constitutional claims").

162 Some courts have ruled in favor of local review in the administrative context while focusing in part on the potential for executive review of the administrative agency's decision. *See, e.g.*,

Cooper v. Aaron[163] forbids state executive officials from disregarding the U.S. Supreme Court's interpretation of the Federal Constitution, it does not necessarily prohibit executive review before the Court issues an interpretation.[164] Arguably, this principle could apply to local officials and their authority to interpret the federal or state constitution prior to the state supreme court resolving the constitutionality of the statute at issue.[165]

However, in states in which the state's highest court has ruled definitively that a local official may not exercise discretion and independently interpret state statutes, this factor is usually dispositive in determining a state executive's course of action:[166] statewide officials must sue local officials to compel them to perform their duties. Statewide officials in California,[167] Oregon,[168] and Pennsylvania[169] have used the mandamus approach to force local officials to enforce a state statute based on one or both of two factors: (1) the local official's "ministerial" role, and (2) the prohibition against alleging the unconstitutionality of a statute as a defense to a mandamus action.[170] In granting the writs, the California and Oregon Supreme Courts in *Lockyer* and *Li v. State*, respectively, focused on the local officials' ministerial roles as distinguished from more discretionary "quasi-judicial" authority. In each case, the courts found that the local clerks were ministerial officers whose authority was circumscribed by statute; thus, they did not have the judicial discretion to decline to enforce state

Cooper v. Eugene Sch. Dist. No. 4J, 723 P.2d 298, 304 (Or. 1986) ("An [administrative] agency ordinarily can interpret a statute so as to exclude unconstitutional applications before it is forced to question the statute's validity. An agency also should consider whether anyone can obtain higher executive or judicial review if the agency erroneously concludes that the statute contravenes the constitution."), *abrogated on other grounds by* Brian v. Or. Gov't Ethics Comm'n, 874 P.2d 1294 (Or. 1994).

163 358 U.S. 1 (1958).

164 *See* Williams, *supra* note 39, at 613 n.198 ("It would not violate *Cooper*, for example, for a state to decide to issue marriage licenses to same-sex couples because, in its view, the Equal Protection Clause of the Fourteenth Amendment required it, at least until the U.S. Supreme Court weighed in on the issue.").

165 *Id.* at 613; *see also* Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 493 (Cal. 2004) (citing Smith v. Indiana, 191 U.S. 138 (1903)) (commenting that whether a state officer can use the purported unconstitutionality of a state law as a reason for not enforcing the law is a matter of state law).

166 *See Cooper*, 358 U.S. 1 (holding state officials bound by U.S. Supreme Court's interpretation of the Constitution). Norman Williams notes that to allow executive review is not the same as permitting executive nonenforcement of statutes that the courts have already upheld. *See* Williams, *supra* note 39, at 612.

167 *Lockyer*, 95 P.3d at 459.

168 Li v. State, 110 P.3d 91 (Or. 2005) (en banc).

169 Dep't of Health v. Hanes, 78 A.3d 676 (Pa. Commw. Ct. 2013).

170 The *Hanes* court defined a writ of mandamus as a remedy that "exists to compel official performance of a ministerial act or mandatory duty." *Id.* at 693 (quoting Fagan v. Smith, 41 A.3d 816, 818 (Pa. 2012)).

statutes on the basis of their independent constitutional interpretations.[171]

However, even in states where courts have definitively ruled on this issue, courts may have a modicum of discretion when deciding whether to prohibit substantive review of a statute alleged by a local official to be unconstitutional. In particular, this may occur when a court determines that there are serious questions as to the statute's unconstitutionality.[172] In the context of a mandamus action, this strategy would ensure that the local official's nonenforcement action was not ineffective, and that the statute's constitutionality could be reviewed on its merits; however, the strategy has not been universally embraced.[173] Although in the most recent instance of a mandamus action to compel local enforcement, the Pennsylvania Commonwealth Court went beyond classifying Hanes' duties as ministerial, and additionally determined that he could not raise the unconstitutionality of Pennsylvania's Marriage Law as a defense to the Department of Health's mandamus action against him,[174] there is also support for the opposite view.[175] For example, in *Van Horn v.*

171 *See Lockyer*, 95 P.3d at 475 (finding that the local officials' actions that formed the basis of the lawsuit were "unauthorized and invalid" because "a local executive official, charged with a ministerial duty, generally lacks authority to determine that a statute is unconstitutional and on that basis refuse to apply the statute"). The court noted that it was unaware of any California precedent that implied that a local executive official, such as a county clerk, possessed quasi-judicial power based on the California Constitution. *Id.* at 480; *see also Li*, 110 P.3d at 101 (conceptualizing the local officials' "statutory authority to act" as the limited authority by which local officials derive the power to take actions and resolve disputed issues before them). However, the court specified that a local official's "duty to be mindful of the state and federal constitutions [does not grant] to a governmental official powers not otherwise devolved by law on that official to take actions and fashion remedies that, under any other circumstances, would constitute *ultra vires* acts." *Id.* at 101. Any remedies to address concerns of a state statute's constitutionality must be fashioned by an official with authority to either amend the unconstitutional portion of the statute or resolve the issue on a statewide basis. *Id.* at 101–02. In addition, the court hypothesized three ways government officials might effectuate their independent interpretations that a statewide law is unconstitutional. For instance, when an official has "quasi-judicial authority to resolve a legal dispute," the official may do so in the way he sees fit. *Id.* at 101. Also, an official who has discretionary powers could choose *not* to act. *Id.* at 102. And last, when the official does not have discretion, he could decline to perform his statutory duty and let the party injured by his nonperformance seek remedies through mandamus or declaratory judgment proceedings. *Id.*

172 *See Lockyer*, 95 P.3d at 500 (Moreno, J., concurring) (commenting that based on prior California case law, "when a court is asked to grant a writ of mandate to enforce a statute over which hangs a substantial cloud of unconstitutionality, the above-stated principles dictate that a court at least has the discretion to refuse to issue the writ until the underlying constitutional question has been decided").

173 *See id.*

174 *Hanes*, 78 A.3d at 692 ("[T]he constitutionality of the Marriage Law may not be raised as a defense in the instant mandamus proceedings and will not be considered by this Court.").

175 *See, e.g.*, Hodges v. Dawdy, 149 S.W. 656, 658 (Ark. 1912) ("[A] court, when called upon to grant . . . [a] writ [of mandamus], may inquire into the validity of the statute which imposes upon the officer the duty he has failed to perform."); Rhea v. Newman, 156 S.W. 154, 156 (Ky. 1913) ("Where the question whether an officer acting ministerially, who is directly responsible for his official acts, may attack a law in a mandamus proceeding, was actually before the courts, the great weight of authority is to the effect that such an officer may, in such a proceeding, justify his

State,[176] the Supreme Court of Nebraska considered the substantive claim of a ministerial officer who asserted a statute's unconstitutionality as his defense in a mandamus action. The court invoked the familiar principle expressed in *Marbury v. Madison*[177]—that a legislative act that violates the Constitution is void—and allowed the ministerial official's claim to go forward.[178] While allowing the claim to proceed on the facts of *Van Horn*, the court clarified that, in general, the disputed statute must be clearly unconstitutional, without defining specifically what clear unconstitutionality would entail.[179] When the statute meets that bar, the court noted that it would not make sense for the act to be followed until the judiciary can deem it unconstitutional because adherence to a clearly unconstitutional act would render the Constitution useless.[180] Thus, while some authority does support a local official's right to invoke a statute's unconstitutionality as a defense, there should be clear indications that the statute at issue is unconstitutional before allowing any claim by a local official to advance. One view posits that, at least in the federal context, clear unconstitutionality may be tied to both the likelihood that nonenforcement is the sole method through which the judiciary can resolve the issue and the probability that the Supreme Court would find the disputed statute unconstitutional.[181] In addition, as discussed below, this Note argues that clear indications of unconstitutionality may include the support of the Attorney General's interpretation of the same statute and a U.S. Supreme Court's interpretation of an indisputably similar statute.

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refusal to act upon the ground that the law requiring the act is unconstitutional."); Van Horn v. State, 64 N.W. 365 (Neb. 1895).

176 64 N.W. 365.

177 5 U.S. 137 (1803).

178 *Van Horn*, 64 N.W. at 372 ("Ministerial officers are . . . not bound to obey an unconstitutional statute, and the courts, sworn to support the constitution, will not, by mandamus, compel them to do so.").

179 *Id.* ("[I]n discharging the functions of their offices, ministerial officers should, of course, exercise the greatest caution on such questions. A doubt as to the validity of a statute would not justify them in disregarding it. The peace of the community, the orderly conduct of government, require that only in clear cases of unconstitutionality should they refuse obedience to legislative acts.").

180 *Id.* ("If an act must be respected until its validity is declared by the judiciary in a proper proceeding, then the constitution is utterly ineffectual. Such a proceeding can never arise until some one refuses obedience to the act.").

181 Johnsen, *supra* note 28, at 45 ("I believe that in many instances in which it is merely probable the Court would hold a provision unconstitutional and the provision is not clearly unconstitutional, the course most consistent with the Constitution would require the President to enforce the provision and leave to the courts the task of reviewing the law. On the other hand, ... when non-enforcement likely is the only way to allow for judicial resolution of the issue, non-enforcement may be appropriate even if the President cannot say that it is probable that the Court would agree with his interpretation."); *see also id.* at 46–47 ("Non-enforcement is also typically the correct response when the courts have not addressed a question, but its proper resolution is so clear that there can be no genuine dispute, and enforcing the provision would subject people to unjustifiable harm and expense.").

2. Whether the Attorney General and the Local Official Agree that the Disputed Law Is Unconstitutional

The course of action the state executive branch takes against a local official should be influenced by whether a statewide executive official, such as the Attorney General, agrees with the local official on the constitutionality of the disputed law. If the state executive branch disagrees with the local official's interpretation of the statute, its course of action in stopping the local official is clear: as discussed above, the Attorney General should initiate a mandamus action against the local official to immediately stop the local official's actions.[182]

The executive branch's course of action is more complicated when the Attorney General and Governor disagree as to the constitutionality of the law[183] or the two agree that the law is unconstitutional. When the two do not agree, and the Attorney General agrees with the local official's interpretation of the disputed law, the Attorney General's opinion[184] serves to buttress the local official's interpretive claim.[185] In a number of states, courts have held that state officials should be able to

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182 *See, e.g.*, *id.* at 45–47; *see also, e.g.*, Lockyer v. City & Cnty. of S.F., 95 P.3d 459 (Cal. 2004); Hebel v. West, 803 N.Y.S.2d 242 (App. Div. 2005); Li v. State, 110 P.3d 91 (Or. 2005) (en banc).

183 See *supra* notes 51–70 and accompanying text for a discussion as to the Attorney General's power to make legal decisions relative to the Governor's.

184 This Note focuses on the Attorney General, and not the Governor, as the state's primary enforcement figure and proper statewide executive to challenge disputed state laws for three reasons. First, the Attorney General is the state's chief law enforcement officer, and is the primary state figure to enforce state laws and represent the public interest. *See* STATE ATTORNEYS GENERAL, *supra* note 57, at 45. Second, in many states, current law regarding the power to challenge the constitutionality of state statutes specifically designates the attorney general as the statewide executive branch officer to voice her opinion and, sometimes, bring a legal proceeding on the basis of that opinion. *See infra* note 209 and accompanying text. Third, many times, the governor may not be reachable by state citizens who believe a state law is unconstitutional because of the Governor's less specific enforcement authority. Recently, in the lawsuit brought by the ACLU against Pennsylvania executive officials, Governor Corbett was able to get himself dismissed from the lawsuit by arguing that because he was not specifically responsible for enforcing or administering the state laws by which plaintiffs were affected, he was not the proper party to be sued. Brief of Defendants Governor Thomas Corbett and Secretary of Health Michael Wolf in Support of Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(1) and (6) at 11–22, Whitewood v. Wolf, 992 F. Supp. 2d 410 (M.D. Pa. 2014) (No. 1:13-cv-1861), *available at* https://www.aclu.org/sites/default/files/assets/whitewood_v._wolf_-_brief_in_support_of_def_corbetts_motion_to_dismiss.pdf. Pennsylvania Secretary of the Department of Health, Michael Wolf, replaced Governor Corbett as primary defendant in the lawsuit.

185 *See* STATE ATTORNEYS GENERAL, *supra* note 57, at 75 (discussing the function of formal written legal opinions of the Attorney General—to assist state agencies or officials who have questions regarding state laws—and stating that the Attorney General's opinion gives legal support for an agency's action). In addition, some state statutes require the Attorney General to issue opinions to local as well as state statutes. *See id.* at 75 n.4 (discussing examples of such statutes, including ALA. CODE § 36-15-1 (1975), FLA. STAT. § 16.01 (2001), and MISS. CODE ANN. § 7-5-25 (West 1997)).

follow the Attorney General's opinion,[186] with the general rule being that state officials who receive the opinion are "free to follow it or not as he or she chooses."[187] Although the Attorney General's opinion is not binding on courts, courts usually give them at least some weight, the strength of which varies by state.[188]

The Attorney General's opinion may serve as a method by which to resolve the constitutionality of a disputed statute. There is some authority to support judicial resolution of the merits of a statute when the Attorney General indicates in a written opinion that a particular statute is unconstitutional and a state officer relies on the opinion and does not enforce the act.[189] For instance, section 84-215 of the Nebraska State Code sanctions a mechanism by which the Attorney General files an action in court to determine the validity of an act when a state officer, in reliance on the Attorney General's opinion that an act is unconstitutional, declines to enforce the law.[190]

This mechanism may be unnecessary when both the Attorney General and Governor agree that a law is unconstitutional. If the state Legislature also agrees with the positions of the Attorney General, Governor, and local official, there is no need for local nonenforcement because the Legislature can act in its lawmaking role to change the disputed law. However, if the Legislature does not agree that the law is unconstitutional, the statewide executive branch, and subsequently the judiciary, will be forced to settle the dispute in some manner.

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186 *See, e.g.*, State *ex rel.* Johnson v. Baker, 21 N.W.2d 355, 364 (N.D. 1945) ("[The Attorney General has the duty to issue legal opinions to state officers, which] shall guide these officers until superseded by judicial decision . . . . [W]hen any constitutional or other legal question arises regarding the performance of an official act . . . [the state officers'] duty is to consult with the attorney general and be guided by the opinion that officer, if requested to do so, must give them. If they follow this course they will perform their duty, and even though the opinion thus given them be later held to be erroneous, they will be protected by it."); Grand River Dam Auth. v. State, 645 P.2d 1011, 1016 (Okla. 1982) (holding that an attorney general's advisory opinion has "the force and effect of a rule" because it is one of "general applicability" and of a "legislative or regulatory character" (internal quotation marks omitted)). *But see* Cummings v. Beeler, 223 S.W.2d 913, 915–16 (Tenn. 1949) (discussing the influence of the Attorney General's official opinion as to the unconstitutionality of a statute regarding funds for special election on the actions and views of the Election Commissioners, but not explicitly finding it to authorize state officials' conduct that contravenes a state statute).

187 *See* STATE ATTORNEYS GENERAL, *supra* note 57, at 78 (quoting 7 AM. JUR. 2D *Attorney General* § 11, at 14 (1997)).

188 *See* STATE ATTORNEYS GENERAL *supra* note 57, at 82.

189 *See, e.g.*, NEB. REV. STAT. ANN. § 84-215 (West 2013); *see also* Annotation, *Unconstitutionality of Statute as Defense to Mandamus Proceeding*, 30 A.L.R. 378, at VI (1924) ("[A] ministerial officer who has been advised by the attorney general of the state that a statute is unconstitutional may raise the question of the constitutionality of such statute, in mandamus proceedings to compel him to perform a ministerial duty under it.").

190 The statute provides, in the alternative, that the Attorney General does not need to bring the action in court if there is another legal action pending in state court that will resolve the constitutionality of the act at issue. § 84-215.

3. Whether There Has Been a Recent Supreme Court Decision Invalidating a Substantially Similar Statute

States should also consider whether the U.S. Supreme Court has recently determined that a substantially similar law is unconstitutional. After Supreme Court decisions, states often have to reevaluate state laws that resemble those invalidated by the Court, considering many factors in addition to whether the Court's decision is binding on them,[191] including the Court's expressed reasoning for the ruling and the structure of the statute at issue. For example, in the context of same-sex marriage, as predicted,[192] the *Windsor* case initially served as the impetus for challenges to state laws prohibiting same-sex marriage across the country.[193] In addition to state challenges in court, local nonenforcement scenarios in Pennsylvania, North Carolina, and New Mexico followed. Although a Supreme Court decision invalidating a federal law does not automatically invalidate a similar state law in many cases, some scholars have argued that at least in the federal context, presidential nonenforcement of a similar federal law to one invalidated by the Court may be appropriate and more efficient than waiting for state and local governments to comply with the Court's decree.[194]

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191 For instance, after the Court's ruling in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), some courts invalidated state laws imposing independent expenditures made by political action committees in political campaigns. *See, e.g.*, N.Y. Progress & Prot. PAC v. Walsh, 17 F. Supp. 3d 319, 322 (S.D.N.Y. 2014) ("Once it is determined that NYPPP is an independent expenditure-only organization, there is little left for the Court to do. The Court must apply the Supreme Court's binding decisions [in *Citizens United* and McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434 (2014)]."). When the Court's ruling is not necessarily binding precedent, there are a variety of possibilities as to how state and federal lower courts may interpret the Court's rulings.

192 *See* United States v. Windsor, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting) (commenting that language in the majority's opinion could be easily adapted to fit state law challenges, stating "[b]y formally declaring anyone opposed to same-sex marriage an enemy of human decency, the majority arms well every challenger to a state law restricting marriage to its traditional definition").

193 See *Marriage Litigation*, FREEDOM TO MARRY, http://www.freedomtomarry.org/litigation (last updated Mar. 3, 2015), for the state of same-sex marriage litigation across the United States. As of the time of this writing, thirty-seven states and the District of Columbia have legalized same-sex marriage. Although DOMA itself was not necessarily substantially similar to state laws prohibiting same-sex marriage, and the *Windsor* opinion explicitly negated that its ruling would directly affect state laws prohibiting such marriages, judges striking down state marriage laws have referenced the *Windsor* decision as bearing directly on how the Court's views on sexual orientation have evolved. *See* Bostic v. Schaefer, 760 F.3d 352, 374–75 (4th Cir. 2014) (opining that *Windsor* and other cases "demonstrate that . . . the Court has meaningfully altered the way it views both sex and sexual orientation through the equal protection lens"); *see also* Brian Dickerson, *Gay Marriage Ruling Leaves Supreme Court Nowhere to Hide*, DETROIT FREE PRESS (Nov. 6, 2014, 10:25 PM), http://www.freep.com/story/opinion/columnists/brian-dickerson/2014/11/06/sex-marriage-michigan-appeals-court-ban-gay/18622213.

194 *See, e.g.*, Easterbrook, *supra* note 15, at 913 ("A President may refuse to enforce a law that is 'like' one held invalid by the courts."); Johnsen, *supra* note 28, at 10 ("The President, for example,

One recent example in Nebraska exemplifies how state attorneys general may respond to perceived similarities between a statute invalidated by the Court and a similar statute in the attorney general's state. In *State ex rel. Bruning v. Gale*,[195] the Supreme Court of Nebraska found that the state's Campaign Finance Limitation Act (CFLA) was unconstitutional, soon after the U.S. Supreme Court found that a substantially similar law in Arizona was unconstitutional.[196] In *Gale*, the case was prompted by Nebraska Attorney General Jon Bruning's written opinion[197] that a court would "likely" find that Nebraska's law was unconstitutional.[198] The Nebraska Supreme Court's decision was triggered by a statutory mechanism[199] requiring the Attorney General to file suit to determine a statute's validity when certain conditions are met, and did not involve a situation in which local nonenforcement alone prompted the dispute. However, a similar mechanism which incorporated the above factors would prove valuable in eliciting a definitive response by attorneys general in other states that confront local nonenforcement of a statute that they agree is unconstitutional.

This factor was also considered (and rejected) in an earlier local nonenforcement case. In *Lockyer*, the court identified a statute's patent unconstitutionality as a possible exception to the prohibition on local executive interpretation, framing the exception as applying when the statute was clearly unconstitutional and it would be "absurd or unreasonable" for the local official to comply with the statute when a reasonable official would conclude that the statute was

promotes implementation of the Supreme Court's pronouncements by declining to enforce laws that are indistinguishable from those the Court has held unconstitutional; and at least where Congress passed the laws prior to the Court's articulation of the constitutional rule and without consideration of the constitutional issue, non-enforcement does not inappropriately interfere with Congress's lawmaking power."). Easterbrook notes that there is not a clear answer for the question of what would count as a "similar" decision, and that the President's ability to implement his own constitutional interpretation even when others disagree will likely depend on "the level of generality selected, a question to which there is no right answer." Easterbrook, *supra* note 15, at 914; *see also id.* at 928–29 (commenting on state and local compliance with Court decisions to desegregate and integrate the sexes in jury selection, and opining that "[p]residential review, executive review in general, speeds up the process of compliance with constitutional norms"); *cf.* Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973 (1985) (opining that "state judges should not feel obliged to defer to the constitutional judgments of the Supreme Court in the name of a common tradition of political morality"). Sager posits that "strategic disparity" in the decisionmaking process at the federal and state levels, including "differences in regulatory scope, the states themselves, and judicial experience" may produce dissimilar outcomes. *Id.* at 974.

195 817 N.W.2d 768 (Neb. 2012).

196 Ariz. Free Enter. Club's Freedom Club PAC v. Bennett, 131 S. Ct. 2806 (2011). The court in *Gale* noted, however, that Nebraska's statute "is not *identical* to the Arizona statute which was found to be unconstitutional." *Gale*, 817 N.W.2d at 780 (emphasis added).

197 Constitutionality of Neb.'s Campaign Pub. Funding Laws Under *Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, Neb. Op. Att'y Gen. 11003 (2011).

198 *Id.* at *3.

199 NEB. REV. STAT. ANN. § 84-215 (West 2013).

unconstitutional.[200] Ultimately, the court found that the exception did not apply in *Lockyer* because there was no related U.S. Supreme Court decision and other federal and state courts divided on statutes limiting marriage to one man and one woman, reflecting on the state of the law in 2004.[201] However, if the state of the law on same-sex marriage at the time of *Lockyer* had been less lopsided, the Court may have come to a different conclusion.

4. Whether the State Legislature or Other Official Aside from the Attorney General Has the Power to Enforce State Laws

In order to make sure that the statute at issue is properly enforced and the argument for its constitutionality is represented both prior to and during judicial resolution of the issue, the Attorney General should possess the power to authorize other state actors to sue the local official. This factor matters in particular when the state executive branch as a whole agrees with the local official's interpretation of the law but does not want to abandon its duty to uphold the law.[202] As the state's chief law enforcement officer, the Attorney General first has to decide how strictly to read her enforcement authority, and whether to affirmatively stop the local official's conduct or delegate her enforcement authority to a state or independent agency to uphold the act against the local official's actions.[203] For example, under section 204(c) of the Commonwealth Attorneys Act,[204] Pennsylvania Attorney General

200 Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 488 (Cal. 2004).

201 *Id.* at 487–88.

202 However, if attorneys general affirmatively decide to pass off the responsibility to enforce the law to another state actor, this method serves as more of a political tool for the attorneys general because regardless of *who* defends the law, it is still being defended. Thus, regardless of whether the attorney general agrees with the local official's position on the unconstitutionality of the law and does not defend the law himself, the legal mechanism to defend the law will still function similarly.

203 A similar situation may arise when the Attorney General's motivation to defend a particular law is questioned by the Legislature and the Legislature prefers to either give itself the authority to intervene or to hire outside counsel to defend the law. In North Carolina, the state Senate passed a bill that gives the Senate President Pro Tempore and the Speaker of the House standing to defend state laws being challenged in lawsuits on behalf of the North Carolina General Assembly. *See* N.C. S.B. 473 (codified as 2013 N.C. Sess. Laws 393); *see also GOP Lawmakers Don't Want to Leave Lawsuit Defense to Cooper*, WINSTON-SALEM J. (Aug. 2, 2013, 12:10 AM), http://www.journalnow.com/news/state_region/article_752fe4d6-fb29-11e2-8a81-001a4bcf6878.html (quoting House Speaker Pro Tempore Paul Stam, stating that "[w]ith all these public political statements [from Cooper], we want to have an option in case he doesn't vigorously defend the statute and the laws of North Carolina when they are taken to court" (internal quotation marks omitted)); Sharon McCloskey, *Roy Cooper v. the General Assembly: Who Defends the State?*, N.C. POL'Y WATCH (Aug. 8, 2013), http://www.ncpolicywatch.com/2013/08/08/roy-cooper-v-the-general-assembly-who-defends-the-state.

204 71 PA. CONS. STAT. § 732 (1980). Under the Commonwealth Attorneys Act, "[i]t shall be the duty of the Attorney General to uphold and defend the constitutionality of all statutes so as to

Kathleen Kane had the authority to determine that it was in the best interest of the Commonwealth for the General Counsel's office or another independent agency to defend Pennsylvania's Marriage Law.[205] Once the Attorney General does this explicitly, the state's legal office will have all of the rights and duties of the Attorney General, and can sue the local official if necessary.[206] Although this strategy solves the problem of having someone enforce the law on behalf of the state, it may create a multitude of political problems for Attorneys General in a politically divided state.[207]

IV. PROPOSAL

When a state's highest court has already determined that local officials may not independently interpret the Constitution (Factor 1), and the state's attorney general disagrees with the local official (Factor 2), any inquiry into the merits of the local official's claim usually ends. The state's Attorney General, except in exceptional circumstances,[208] will block the local official's conduct by bringing a mandamus action to force compliance from an official who refuses to stop flouting the law. On the other hand, when states leave the question of executive review open, local officials have more discretion to independently interpret statutes, and statewide executives may have less structure to guide how they resolve conflicts with local officials. However, because of the almost universal discomfort toward local nonenforcement as a practice, states rarely test the merits of the local official's interpretation. In order to satisfy concerns about the legitimacy of the local official's interpretation, there must be sufficient indicators that the official's view may have some merit: this should include factors such as the Attorney General's legal endorsement of the local official's view of the law (Factor 2) and a U.S. Supreme Court ruling that a substantially similar federal law is unconstitutional (Factor 3). If these factors are met, the disputed statute deserves a review on its merits.

Currently, most state attorneys general such as Kathleen Kane in Pennsylvania do not have a uniform legal framework to resolve local

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prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction." *Id.* § 732-204(a)(3). However, "[t]he Attorney General may, upon determining that it is more efficient or otherwise is in the best interest of the Commonwealth, authorize the General Counsel or the counsel for an independent agency to initiate, conduct or defend any particular litigation or category of litigation in [her] stead." *Id.* § 732-204(c).

205 *Id.* § 732-204(c).

206 *See, e.g.*, Dep't of Health v. Hanes, 78 A.3d 676 (Pa. Commw. Ct. 2013).

207 Pennsylvania Attorney General Kane chose this option and faced a political backlash, culminating in the threat of impeachment proceedings by the majority Republican state assembly. *See supra* note 138.

208 *See* Levy, *supra* note 5.

constitutional disputes over state laws when they agree with the local official's view. While many attorneys general do have the authority to challenge the constitutionality of state statutes,[209] as discussed above, the parameters of when and whether to bring that challenge may necessarily vary by state.[210] Furthermore, the sources of their power do not account for the effect of local nonenforcement. Although in New Mexico, the local officials were able to resolve the substantive question of whether same-sex marriage was legal without a defined mechanism, New Mexico's law did not clearly prohibit same-sex marriage,[211] and thus, local clerks were not necessarily explicitly prohibited from issuing the marriage licenses. In most scenarios, the state law is clear, and so, it is more apparent when the local officials' conduct directly conflicts with the state law.

This Note endorses a mechanism for state attorneys general to use to facilitate judicial resolution of a disputed statute's constitutionality. The mechanism would operate similarly to Nebraska's state statute,[212] which forces an Attorney General to file an action in state court to determine a statute's validity when two markers are met: first, the Attorney General must issue a written opinion about the unconstitutionality of a state statute; second, another state officer must have decided not to enforce the statute in reliance on the Attorney General's written opinion.[213] If there are other proceedings pending in the state to resolve the constitutional issue, the Attorney General need

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209 For a compilation of the sources of attorneys general's authority to challenge the constitutionality of state statutes by state, see STATE ATTORNEYS GENERAL, *supra* note 57, at 99–104, tbl.6-1. States *explicitly precluding* the attorney general's authority to challenge the constitutionality of state statutes include: Delaware, Georgia, Indiana, Iowa, Kansas, Maine, Maryland, Minnesota, Missouri, Montana, New York, Oklahoma, Pennsylvania, South Dakota, West Virginia, and Wisconsin. States providing a *statutory basis* for authority include: Alabama, Alaska, Nebraska, Tennessee, and Texas. States providing *common law* authority include: Hawaii, Louisiana, Michigan, North Dakota, Ohio, Oregon, Vermont, Washington, and Wyoming. States providing *authority through case law*, include: Arizona, California, Colorado, Connecticut, Florida, Idaho, Illinois, Kentucky, Massachusetts, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Rhode Island, South Carolina, Utah, and Virginia. Only Arkansas does not specify explicitly whether the attorney general has the authority to challenge the constitutionality of state legislation.

210 *See* Devins & Prakash, *supra* note 57 (manuscript at 133) (citing Brief of Thurbert E. Baker, et al., at 9 n.17, People *ex rel.* Salazar v. Davidson, 79 P.3d 1221 (Colo. 2002)). *Compare* TENN. CODE ANN. § 8-6-109(b)(9) (2014) (Attorney General must certify to the speaker of each house of the general assembly his opinion that a particular law is unconstitutional), *with* NEB. REV. STAT. ANN. § 84-215 (West 2013) (Attorney General must issue a written opinion that a law is unconstitutional, a state officer must refuse to enforce the law in reliance on the Attorney General's opinion, and Attorney General "shall" bring a lawsuit within ten days to determine whether the law is constitutional).

211 N.M. CONST. art. II, § 18.

212 NEB. REV. STAT. ANN. § 84-215.

213 *Id.*

not file the action.[214] However, Nebraska's statute, for example, considers neither the effect of a decision by the U.S. Supreme Court (Factor 3) nor scenarios in which the local official declines to enforce an act prior to the Attorney General issuing an opinion. A mechanism that includes a requirement that the Supreme Court must have struck down a substantially similar federal or state statute that conforms with the local official's interpretation (Factor 3) gives credence and adds an additional layer of legitimacy to the local official's argument that the law is constitutionally deficient. This requirement is also in addition to the Attorney General's agreement (Factor 2), and thus, forcing the court to resolve the constitutionality of a disputed statute would not be solely based on the local official's view.

Although this mechanism would not involve the state Legislature's point of view, the local officials' nonenforcement often stems, in part, from prolonged legislative inaction on the disputed law. When the state Legislature will not entertain repealing the state law, in some cases, it is necessary for another state actor to fill the void. Thus, it is necessary to force resolution of the statute's constitutionality when the Legislature refuses to re-consider a statute that likely has constitutional defects and there are appropriate safeguards to guarantee that that the local official's actions were not frivolous. In addition, despite the fact that many attorneys general have the authority to bring a suit challenging the constitutionality of legislation,[215] they may decline to use their power to its full extent.[216] The mechanism and factors proposed by this Note should help to bypass any political fear that may caution against either the Legislature or the Attorney General taking action to either repeal or initiate review on a clearly unconstitutional statute, respectively. In states such as Pennsylvania or North Carolina, where the populous is starkly divided ideologically, political reprisal may dissuade officials from repealing or challenging a statute that may be constitutionally defective. Thus, local nonenforcement may provide the impetus for attorneys general to take action that they may not have taken on their own. In addition, they may point to the proposed factors as support to provide legitimacy for their actions, which may not be popular politically. Citizens of the state may still vote to replace the Attorney General through the normal democratic process if they are dissatisfied with the Attorney General's views and actions. Based on these reasons, this Note proposes that attorneys general use this mechanism and

214 *Id.* ("Notwithstanding the provisions of this section, no such action need be brought by the Attorney General if there is pending in any court of the state a legal action for the purpose of testing the constitutionality of the act.").

215 *See supra* note 209.

216 Devins & Prakash, *supra* note 57 (manuscript at 132) ("But just because some [attorneys general] may file suit does not mean that all may.").

enumerated factors to efficiently and fairly resolve the constitutionality of disputed state statutes. While some states that provide authority for attorneys general to resolve constitutional disputes may choose to use or modify statutory mechanisms already established in their states, other states that provide for or do not foreclose the attorney general's authority—but do not have an explicit statutory mechanism—should adopt the mechanism proposed by this Note, either statutorily or through case law.

One concern raised over permitting substantive review of a local official's constitutional claim is that the local official would arrive at a determination and act on it without providing any due process guarantees for individuals who have an interest in upholding the act.[217] The proposed mechanism should satisfy this concern by providing for an official declaratory proceeding brought by the Attorney General and allowing an alternate entity, such as the Legislature or the state's legal office to argue in favor of enforcing the law over the Attorney General's assertion that the law is unconstitutional (Factor 4). Another concern may be that there is no need for a declaratory proceeding as to an act's constitutionality when other judicial proceedings are pending in the state that reach the substantive constitutional question.[218] However, similar to section 84-215 of the Nebraska Code,[219] the Attorney General would not need to file a declaratory action if the judiciary was already considering the constitutional claim.

If this mechanism had been available in Pennsylvania prior to Bruce Hanes' decision, the result would likely have been the same. Attorney General Kane would not have needed to bring an action to determine the constitutionality of Pennsylvania's Marriage Law, despite her opposition to the law, because of the pending ACLU lawsuit. However, in states such as New Mexico, in which there was no proceeding pending, this would have been an effective mechanism to avoid the local clerks' interim confusion and hasten the process for determining whether same-sex marriage was prohibited. Moreover, outside the context of same-sex marriage, if the state government structure remains fragmented as to provide the foundation for future intrabranch and state-local conflicts in politically divided states—for

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217 *See* Lockyer v. City & Cnty. of S.F., 95 P.3d 459, 491 (Cal. 2004) (expressing concern with local official raising constitutional claim without "evidentiary hearing or taking other measures" that "afford[ed] the affected individuals any due process safeguards and, in particular, . . . provid[ed] any opportunity for those supporting the constitutionality of the statutes to be heard.").

218 *See id.* at 503 (Kennard, J., concurring and dissenting) ("[The] determination [of the validity of the same-sex marriages already performed in California] should be made after the constitutionality of California laws restricting marriage to opposite-sex couples has been authoritatively resolved through judicial proceedings now pending in the courts of California.").

219 NEB. REV. STAT. § 84-215 (West 2013).

instance, over issues such as voter identification or campaign finance—this mechanism may be used to resolve those disagreements as well.

CONCLUSION

The problem of local nonenforcement will continue to confound both state executives and the public. However, with a legal mechanism designed to resolve statutes that are constitutionally uncertain, state executives faced with local nonenforcement should have an expeditious method by which to resolve the conflict while promoting democratic stability and dissent.