BINDING THE BOUND: STATE EXECUTIVE EMERGENCY POWERS AND DEMOCRATIC LEGITIMACY IN THE PANDEMIC

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The COVID-19 pandemic has triggered an unprecedented increase in unilateral lawmaking by governors under each state's emergency executive power statute. These actions have been met with controversy and a significant amount of resistance. This Note argues that the resistance to COVID-19 rules in the United States may be partially attributable to the way state emergency power statutes concentrate virtually all the power to enact emergency rules in the hands of governors.

As this Note demonstrates, the state executive emergency power regime, like all emergency power frameworks, grapples with the inherent tension between technocratic agility and democratic legitimacy. Drawing on a novel fifty-state survey, this Note shows how, notwithstanding the drafters' attempt to balance executive power with legislative constraint, the statutes as written effectively place all substantive decisionmaking in the hands of the governor, leaving only a binary on/off switch for the legislature to terminate the state of emergency. This consolidation of power in a chronic emergency bypasses the deliberative legislative process, increasing technocratic agility at the expense of democratic legitimacy. This Note suggests a revision to the statutes, inspired by the Congressional Review Act, that would encourage legislative deliberation through a fast-track approval process, while still preserving the prerogative of the governor to enact pandemic policy.

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INTRODUCTION

One of the side effects of the COVID-19 pandemic has been a precipitous increase in unilateral executive lawmaking across the globe.[1] While most countries directed their executive responses at the national level, the United States largely left the response to the governors of the states, with governors relying on their public health emergency powers.[2] In March of 2020, as it became clear that large-scale testing—which would have enabled containment of COVID-19—was impossible due to a confluence of technical, regulatory, and leadership failures, states shifted their strategy to mitigation, necessitating "lockdowns, social disruption, [and] intensive medical treatment."[3] On April 1, 2020, forty-seven states issued executive orders closing nonessential businesses statewide.[4] By the end of April, all

1. See Elena Griglio, Parliamentary Oversight Under the COVID-19 Emergency: Striving Against Executive Dominance, 8 Theory & Prac. Legis. 49, 49 (2020) (describing executive dominance in lawmaking in Europe during COVID-19); Eric L. Windholz, Governing in a Pandemic: From Parliamentary Sovereignty to Autocratic Technocracy, 8 Theory & Prac. Legis. 93, 94 (2020) (noting that in many countries "[l]aw-making power has been concentrated in the executive [and] the role of parliaments has been marginalized").

2. Michael Ollove, How Misinformation, Federalism and Selfishness Hampered America's Virus Response, Pew Charitable Trs. (Aug. 18, 2020), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/08/18/how-misinformation-federalism-and-selfishness-hampered-americas-virus-response/ [https://perma.cc/5SVF-MNET] (noting that the most important factor differentiating the United States' response from those of other countries was the lack of a national policy).

3. Michael D. Shear, Abby Goodnough, Sheila Kaplan, Sheri Fink, Katie Thomas & Noah Weiland, The Lost Month: How a Failure to Test Blinded the U.S. to COVID-19, N.Y. Times (Mar. 28, 2020), https://www.nytimes.com/2020/03/28/us/testing-coronavirus-pandemic.html (on file with the *Columbia Law Review*) (last updated Apr. 1, 2020).

4. Lindsay K. Cloud, Katie Moran-McCabe, Elizabeth Platt & Nadya Prood, A Chronological Overview of the Federal, State, and Local Response to COVID-19, *in*

fifty governors had declared states of emergency.[5] Immediately after declaring states of emergency, governors began enacting mitigation policies at a rapid clip,[6] including closing schools,[7] restricting travel and elective medical procedures, imposing moratoriums on eviction and foreclosure proceedings,[8] and creating vote-by-mail options for elections.[9]

These actions engendered a storm of controversy as the nation struggled with the sacrifices that were necessary to "flatten the curve."[10] Executive decisions relating to the virus quickly became tinged with nonscientific considerations, with the science being "filtered through a very thick political lens."[11] Widespread protests indicated the lack of consensus on the appropriate response, and the perceived illegitimacy of governors' orders hampered their acceptance.[12] Particularly in states with Democratic

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Assessing Legal Responses to COVID-19, at 12 (2020), https://www.publichealthlawwatch.org/s/Chp1_COVIDPolicyPlaybook-Aug2020-ee2e.pdf [https://perma.cc/GQ6E-BM7G].

5. Samuel Wonacott, All 50 States Have Active Declared Emergencies Related to the Coronavirus Pandemic, Ballotpedia News (July 29, 2020), https://news.ballotpedia.org/2020/07/29/all-50-states-have-active-declared-emergencies-related-to-the-coronavirus-pandemic/ [https://perma.cc/NTD7-CMFK].

6. Cloud et al., supra note 4, at 12 ("Once declaring an emergency, states began to issue mitigation policies at a rapid pace of just about every day.").

7. Id.

8. Id. at 12, 15.

9. E.g., N.Y. Exec. Order No. 202.23 (Apr. 24, 2020), https://www.nyla.org/userfiles/Advocacy/EO_202_23.pdf [https://perma.cc/D65J-MVH7].

10. Nick Niedzwiadek, The End of the Imperial Governorship, Politico (Apr. 14, 2021), https://www.politico.com/news/2021/04/14/governors-power-coronavirus-479386/ [https://perma.cc/AA5F-ZSWM] (reporting that "[f]iery debates over things like mask mandates and other economic restrictions were frequent"). On the meaning and origin of the phrase "flatten the curve," see Howard Markel, America's Coronavirus Endurance Test, New Yorker (Aug. 6, 2020), https://www.newyorker.com/science/medical-dispatch/americas-coronavirus-endurance-test/ (on file with the *Columbia Law Review*) (defining the term as "using social distancing to decrease the peak burden on health-care systems and to buy time for scientists and doctors to respond").

11. Peter D. Jacobson, Denise Chrysler & Jessica Bresler, Executive Decision Making for COVID-19: Public Health Science Through a Political Lens, *in* Assessing Legal Responses to COVID-19, at 61–62 (2020), https://www.publichealthlawwatch.org/s/Chp7_COVIDPolicyPlaybook-Aug2020-ffef.pdf [https://perma.cc/6AU2-V4K2].

12. See, e.g., Jamie Ballard, Are Lockdowns Unconstitutional? Most Americans Say No, YouGov (Apr. 24, 2020), https://today.yougov.com/topics/politics/articles-reports/2020/04/24/lockdowns-protest-constitutional-poll-survey-data/ [https://perma.cc/8FQL-N25Y] (showing that, in a poll of 9,000, 82% of Democrats believed state lockdowns were constitutional, but only 42% of Republicans agreed); Lois Beckett, California Governor Promises Changes to Lockdown as Protests Sweep State, Guardian (May 1, 2020), https://www.theguardian.com/us-news/2020/may/01/california-coronavirus-protests-huntington-beach-sacramento/ [https://perma.cc/9H39-S9C9] (reporting that "thousands of protesters gathered across [California] in defiance of the lockdown"); Allan Smith & Erin Einhorn, Michigan Gov. Whitmer Faces Fierce Backlash Over Strict Stay-at-Home Order, NBCNews (Apr. 14, 2020), https://www.nbcnews.com/politics/politics-news/michigan-gov-whitmer-faces-fierce-backlash-over-strict-stay-home-n1182711/ [https://perma.cc/S4TW-9WBL] (reporting that "the backlash" to Michigan's stay-at-home orders "has been immense").

governors and more stringent lockdowns, conservatives decried the executive orders as "authoritarian."[13] Protesters, many of them maskless and some of them armed, entered statehouses, inducing some state senators to wear bulletproof vests.[14] These mitigation efforts waxed and waned as hotspots flared up and subsided across the country.[15]

The controversy over the proper approach to controlling the spread of the virus only worsened as the pandemic dragged on. In a few states, legislatures initiated a full-blown showdown with the executive, either trying to impeach their governors[16] or attempting to curb the governors' emergency powers.[17] Many of these controversies ended up in court, with

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13. See, e.g., Dan McConchie, Limit Governors' Emergency Powers, Wall St. J. (Apr. 30, 2020), https://www.wsj.com/articles/limit-governors-emergency-powers-11588288560/ (on file with the *Columbia Law Review*); see also Smith & Einhorn, supra note 12.

14. See, e.g., Coronavirus: Armed Protesters Enter Michigan Statehouse, BBC News (May 1, 2020), https://www.bbc.com/news/world-us-canada-52496514/ [https://perma.cc/46PS-9YJE]; Reid J. Epstein & Kay Nolan, A Few Thousand Protest Stay-at-Home Order at Wisconsin State Capitol, N.Y. Times (Apr. 24, 2020), https://www.nytimes.com/2020/04/24/us/politics/coronavirus-protests-madison-wisconsin.html (on file with the *Columbia Law Review*) (last updated May 13, 2020); 'We're Not Afraid of Any Virus': Crowds Gathered Outside of Ohio Statehouse Protesting Coronavirus Shutdowns, Cleveland Scene (Apr. 14, 2020), https://www.clevescene.com/scene-and-heard/archives/2020/04/14/were-not-afraid-of-any-virus-crowds-gathered-outside-of-ohio-statehouse-protesting-coronavirus-shutdowns/ [https://perma.cc/LGZ2-WNMF].

15. See, e.g., Governor Andrew Cuomo, Update on New York State's Progress During the COVID-19 Pandemic (Oct. 28, 2020), https://www.governor.ny.gov/news/audio-rush-transcript-governor-cuomo-updates-new-yorkers-states-progress-during-covid-19-15 [https://perma.cc/JBS7-B6C6] (quoting Governor Cuomo as saying that "more restrictions" are imposed as soon as a "micro-cluster . . . flares up"); Richard Procter, Remember When? Timeline Marks Key Events in California's Year-Long Pandemic Grind, CalMatters (Mar. 4, 2021), https://calmatters.org/health/coronavirus/2021/03/timeline-california-pandemic-year-key-points [https://perma.cc/QA8D-TBRN] (chronicling California's "several stay-at-home orders").

16. See Teo Armus, Ohio GOP Lawmakers Are Trying to Impeach Gov. Mike DeWine Over His COVID-19 Rules. He Says They're Ignoring Reality., Wash. Post (Dec. 1, 2020), https://www.washingtonpost.com/nation/2020/12/01/ohio-impeach-dewine-covid-restrictions (on file with the *Columbia Law Review*) ("A group of four Republican state lawmakers filed a dozen articles of impeachment against DeWine on Monday, saying the governor violated state and federal laws by requiring masks in public and ordering some businesses to close."); Lisette Voytko, Pennsylvania GOP Lawmakers Incensed Over Coronavirus Response Seek to Impeach Governor, Forbes (June 16, 2020), https://www.forbes.com/sites/lisettevoytko/2020/06/16/pennsylvania-gop-lawmakers-incensed-over-coronavirus-response-seek-to-impeach-governor [https://perma.cc/Z6BX-34EW] ("Republican lawmakers in Pennsylvania introduced articles of impeachment against Democratic Gov. Tom Wolf on Tuesday, claiming his handling of the state's Covid-19 response hurt citizens financially and violated their rights.").

17. Sophie Quinton, Lawmakers Move to Strip Governor's Emergency Powers, Pew Charitable Trs. (Jan. 22, 2021), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/01/22/lawmakers-move-to-strip-governors-emergency-powers [https://perma.cc/M8VY-ZMVL] ("For this year's sessions, in at least half the states, Republicans and some Democrats have proposed limiting their governor's emergency powers in some way . . . .").

plaintiffs alleging that the governors' emergency actions exceeded the statutory authority granted to them by the state legislatures.[18]

This Note argues, based on the COVID-19 controversy, that reposing emergency power for a chronic, long-duration emergency solely in the hands of the governor raises an issue of democratic illegitimacy. This democratic illegitimacy risks curtailing citizen obedience to public health regulations and invites legislative pushback on emergency powers generally.[19] In order to maintain robust and effective emergency power statutes in all states for similar emergencies in the future, states should revise their emergency power statutes to include more substantive legislative input, while retaining as much executive agility as possible.

This Note surveys the legal background of the governors' emergency actions in the pandemic along with the ensuing legal controversy and suggests a revision to the statutes that would inject more democratic representation into executive emergency powers. Part I begins by laying out a conceptual framework for thinking about executive power in an emergency as a tradeoff between technocratic agility and democratic legitimacy, arguing for the vital importance of formal legal constraints over purely political ones. This Part then shows how the tension between technocratic agility and democratic legitimacy has motivated legislatures to balance executive power and legislative constraint in a variety of emergency power statutes, including, most importantly, the Model State Emergency Health Powers Act (MSEHPA). Part II explains how, notwithstanding this balance, the lack of substantive democratic input on the COVID-19 policy response and the public dissension this generates risks undermining public health policy and emergency powers generally. Finally, Part III offers a suggestion, inspired by the Congressional Review Act, for revising the legal approach to public health emergencies so that it can retain the agility of executive control but involve more representative democratic input.[20]

I. EMERGENCY POWERS AND LEGITIMACY

In times of emergency, citizens trade off the value of democratic participation for the increased responsiveness of centralized, immediate,

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18. See Lawsuits About State Actions and Policies in Response to the Coronavirus (COVID-19) Pandemic, 2020–2021, Ballotpedia, https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020 [https://perma.cc/YB2C-ELQW] (last visited Apr. 29, 2021).

19. See infra notes 141–146 and accompanying text; cf. Arthur M. Schlesinger, Jr., The Imperial Presidency, at xxviii (Mariner Books 2004) (1973) ("The second concern is that revulsion against inordinate theories of presidential power may produce an inordinate swing against the presidency and thereby do essential damage to our national capacity to handle the problems of the future.").

20. This Note does not take a position on any questions of public health or economic policy but is concerned only with the institutional design question of optimal equilibrium between the responsiveness of concentrated, swift decisionmaking and perceived democratic legitimacy for public health emergencies like COVID-19.

technocratic decisionmaking.[21] Historically, during times of emergency, the Roman Senate would ask the Consuls to designate a dictator with near-complete power for up to six months.[22] Similarly, Niccolò Machiavelli advocated explicitly including special provisions for emergency powers within a state's laws, writing that a state "will never be perfect unless it has provided for everything with its laws and has established a remedy for every accident and given the mode to govern it."[23]

Today, ninety percent of constitutions in force provide for emergency powers.[24] In the United States, although the Constitution does not explicitly provide for emergency power,[25] Congress has granted the president no less than 136 statutory powers that become available after the president has declared a state of emergency.[26] The last two national emergencies—the attacks on September 11, 2001, and the Global Financial Crisis in 2008—have largely been defined by unilateral executive response.[27]

All emergency power regimes, however, grapple with fears of abuse of consolidated power and democratic illegitimacy,[28] and the public health emergency powers used for the states' COVID-19 responses are not immune from this tension. This Part first sets the stage for the discussion of public health emergency powers in section I.A, which summarizes the conceptual arguments for and against formal institutional constraints on executive emergency power. Sections I.B and I.C, respectively, then show how this tension—between the rapidity and responsiveness of technocratic, top-down governance and the democratic legitimacy of legislative constraint—has animated both the controversy surrounding the modernization of the state public health emergency statutes through the MSEHPA and the sliding scale of power and constraint that is present in current executive emergency power statutes.

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21. See Babette E.L. Boliek, Agencies in Crisis: An Examination of State and Federal Agency Emergency Powers, 81 Fordham L. Rev. 3339, 3341 (2013) ("[W]hen there is imminent peril, the normal mode of agency decision making simply will not do.").

22. Tom Ginsburg & Aziz Z. Huq, How to Save a Constitutional Democracy 57 (2018).

23. Niccolò Machiavelli, Discourses on Livy 75 (Univ. of Chi. Press 1996) (1531).

24. Ginsburg & Huq, supra note 22, at 58.

25. Id. at 134; see also Schlesinger, supra note 19, at 7–10 (discussing whether the Founders would have approved of "action beyond the Constitution if necessary to save the life of the nation").

26. A Guide to Emergency Powers and Their Use, Brennan Ctr. for Just. (Dec. 5, 2018), https://www.brennancenter.org/our-work/research-reports/guide-emergency-powers-and-their-use/ [https://perma.cc/ZR3L-QUHK] (last updated Apr. 24, 2020) (listing statutes available upon declaration of national emergency).

27. Eric A. Posner & Adrian Vermeule, The Executive Unbound: After the Madisonian Republic 34–41 (2010).

28. See Michael A. Genovese, Democratic Theory and the Emergency Powers of the President, 9 Presidential Stud. Q. 283, 284–85 (1979) ("The acceptance of the Constitutional Dictatorship is a rejection of democratic rule, and if democracies are forced to repeatedly rely upon dictatorial means to sustain themselves, then the future abilities of democracies to achieve legitimacy may be in doubt.").

A. *The Executive Unbound*

Some commentators have argued that democratic constraint on the executive in an emergency is both functionally nonexistent and unnecessary. In *The Executive Unbound: After the Madisonian Republic*, Professors Eric Posner and Adrian Vermeule argue that in the modern era, where complex, unforeseen emergencies arise with increasing frequency, the only body that is actually qualified to make quick, effective decisions in the face of crises is the executive and the hierarchical—and thus more efficient—administrative state.[29] The legislative and judicial branches, on which James Madison pinned his hopes of constraining the executive, have proven unable to check emergency action.[30] Congress is hampered by information asymmetry, collective action problems, and partisan loyalties,[31] while the courts are stuck with even less information than Congress, geographic decentralization, and the "legitimacy deficit" of being unelected.[32]

Occasionally, note Posner and Vermeule, during times of popular backlash to executive power, Congress will attempt to codify the president's emergency powers into "framework statutes," attempting to constrain the executive within a legal framework, to no avail.[33] When an emergency strikes, immediate action is required. The executive steps in, often using "old statutes enacted in different circumstances, and for different reasons."[34] Legislatures stand aside while the executive handles the first wave of the crisis, and they only step in to increase the executive's power, although perhaps not as much as the executive would like.[35] Alternatively, the legislature protests the executive's action, leading to a showdown, which the executive will usually win in the court of public opinion on the strength of their political credibility as a "well-motivated" executive,[36] thus gaining control of the emergency response.[37]

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29. Posner & Vermeule, supra note 27, at 33.

30. Id. at 25.

31. Id. at 25–29.

32. Id. at 29–31.

33. Id. at 84–88. Posner and Vermeule give the examples of the War Powers Resolution (1973), with which Congress constrained use of executive force abroad, and The National Emergencies Act (1976), with which Congress imposed procedural and legislative constraints on executive declarations of emergency, among others. See id. at 85–87.

34. Id. at 44. For instance,

> Franklin Roosevelt regulated banks, in 1933, by offering a creative reading of the Trading with the Enemy Act of 1917, a statute that needless to say was enacted with different problems in mind. Likewise, . . . in 2008 . . . the Treasury Department and Federal Reserve had to [bail out AIG] through a strained reading of a hoary 1932 statute.

Id.

35. Id. at 44–46.

36. See id. at 130 (explaining the president's credibility challenge in terms of a principal–agent relationship).

37. Id. at 67–83.

Posner and Vermeule argue that the demise of Madisonian oversight is nothing to fret about. What protects American government from descending into tyranny is not the "tyrannophobia" that inspires separation of powers, which the authors argue is "at best an unnecessary and costly [safeguard], akin to placing one's house underground to guard against the risk of a meteor strike."[38] Rather, what truly constrains the executive is the system of regular elections, the party system, and American political culture.[39]

B. *The Bound Executive*

Other scholars find Posner and Vermeule's arguments on the normative uselessness of legal constraints unconvincing and argue that democratic involvement and constraint is both plausible and crucial to legitimate and effective emergency governance.[40] Firstly, Posner and Vermeule's comparison of the institutional strengths of the unbound executive and the structural weaknesses of the constraining legislature is "an 'apples to oranges' comparison of an idealized presidency and an actual legislature."[41] Executive emergency actions can be deeply flawed, and legislative constraint need not hobble an emergency response.[42]

Moreover, the credibility of the executive itself, which Posner and Vermeule view as the only real mechanism behind—and constraint on—executive action, only exists due to the formal institution of the separation of powers. "It seems that the rule of law cannot be sustained without the formality and the majesty of a system of law that people respect," a reviewer concluded.[43] As another reviewer put it, the Founders "recognized that, while the law was ineffective without politics, politics was also significantly shaped by the law."[44] Thus, according to these scholars, formal constraints

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38. Id. at 193.

39. Id. at 113–14 ("American political culture—which features deeply entrenched suspicion of the executive—forces the executive to adopt institutions and informal mechanisms of self-constraint that help enhance its credibility.").

40. Some dispute the descriptive part of the argument as well. See, e.g., Jack Goldsmith, Power and Constraint: The Accountable Presidency After 9/11, at xi (2012) ("Far from rolling over after 9/11, [Congress, the courts, and the press] pushed back far harder against the Commander in Chief than in any other war in American history."); Julian Davis Mortenson, Law Matters, Even to the Executive, 112 Mich. L. Rev. 1015, 1023–24 (2014) ("[T]o ignore occasions when Congress drove outcomes on political questions of the highest salience leaves out a huge part of the story.").

41. Ginsburg & Huq, supra note 22, at 61–62.

42. Id.

43. Harvey Mansfield, Is the Imperial Presidency Inevitable?, N.Y. Times (Mar. 11, 2011) (reviewing Posner & Vermeule, supra note 27), https://www.nytimes.com/2011/03/13/books/review/book-review-the-executive-unbound-by-eric-a-posner-and-adrian-vermeule.html (on file with the *Columbia Law Review*).

44. Benjamin Kleinerman, Book Review of *The Executive Unbound: After the Madisonian Republic* by Eric A. Posner and Adrian Vermeule, Lawfare (July 9, 2011),

of legislative oversight are both plausible within the emergency context and necessary to ensure the actual and perceived legitimacy of the executive's emergency action.[45]

The idea of executives imposing formal institutional constraints to enhance their own credibility and thus further their own policy interests dates back to the sixteenth century. Jean Bodin, a theorist of monarchy, argued that "[c]onstitutional constraints may be an indirect technique for building effective institutions and reinforcing governmental power."[46] In other words, distributing governance between the executive and the legislature co-opts resistance from within the population to the executive's policy goals.[47]

Legislatures drafting emergency power statutes can choose the extent to which the statutes allow for formal binding of the executive with legislative constraint. The next sections in this Part investigate where public health emergency statutes fit within this framework and show how drafters attempted to balance the extent of the executive's power to override statutes with legislative constraint. Part II then uses that background to identify deficiencies in legislative constraint in practice, by summarizing representative interactions between the legislature and the executive in the controversy over COVID-19 emergency actions, and explains how this has led to legislative pushback on public health emergency powers.

C. *Statutory Background*

Legislatures are aware that executives will occasionally overstep the statutory limits of their power in the heat of an emergency, and the legislature therefore enacts "framework statutes" in an attempt to confine future emergency responses within a legal framework with sufficient built-in constraints.[48] But truly unprecedented emergencies by definition do not fit within this framework, upsetting the legislature's delicate balance of power and constraint.

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https://www.lawfareblog.com/executive-unbound-after-madisonian-republic-eric-posner-and-adrian-vermeule/ [https://perma.cc/BS3H-CZYJ].

45. For more examples of scholars critiquing Posner & Vermeule's conclusions, see Ginsburg & Huq, supra note 22, at 192–97 ("Neither theory nor practice . . . supports the conclusion that a powerful executive branch will be constrained by prospective electoral pressures, or that checking institutions are exercises in futility."); Hironori Yamamoto, Inter-Parliamentary Union, Tools for Parliamentary Oversight: A Comparative Study of 88 National Parliaments 9–10 (2007), http://archive.ipu.org/PDF/publications/oversight08-e.pdf [https://perma.cc/H852-TLB4] (noting that "improv[ing] the transparency of government operations and enhanc[ing] public trust in the government, which is itself a condition of effective policy delivery," is one of the "key functions" of legislative oversight).

46. Aziz Z. Huq, Binding the Executive (by Law or by Politics), 79 U. Chi. L. Rev. 777, 805–06 (2012) (book review) (alteration in original) (quoting Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy 133 (1995)).

47. Id. at 806.

48. See supra note 33 and accompanying text.

1. *The MSEHPA Controversy.* — Public health emergency power statutes were enacted to delegate some of the legislatures' power to the executive—the governor—in an emergency, on top of the emergency response power given to them in each state's constitution.[49] In many states, these statutes were originally enacted in the mid-twentieth century, often for purposes other than public health emergencies, such as natural disasters or military invasion.[50] Even the ones that were enacted with communicable diseases in mind often did not, from the vantage point of the twenty-first century, reflect modern standards of care.[51]

The MSEHPA was an attempt to modernize these statutes, catalyzed by the 2001 Amerithrax attack, which killed five Americans and sickened seventeen others by anthrax-laced letters sent through the mail.[52] The worst biological attacks in U.S. history,[53] and the fear of worse to come, forced politicians to recognize that states' capabilities to respond to bioterrorism threats were lacking.[54] Legislators rushed to draft the MSEHPA, a new model statute for state public health emergencies.[55] Although the MSEHPA has not been completely accepted by the states,[56] the controversy surrounding the MSEHPA illustrates the tension between technocratic governance and democratic input in a public health emergency as well as

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49. See F. David Trickey, Constitutional and Statutory Bases of Governors' Emergency Powers, 64 Mich. L. Rev. 290, 290–96 (1965) (finding that all state constitutions either explicitly confer the executive power upon a governor or designate the governor as the chief executive officer of the state, and most state constitutions authorize the governor to call out the national guard to "enforce the laws, suppress insurrection, and repel invasion"). Virtually all the actions taken by governors in response to COVID-19, however, relied upon explicit statutory extensions of constitutional powers. See Benjamin Della Rocca, Samantha Fry, Masha Simonova & Jacques Singer-Emery, State Emergency Authorities to Address COVID-19, Lawfare (May 4, 2020), https://www.lawfareblog.com/state-emergency-authorities-address-covid-19/ [https://perma.cc/Z2ED-KJPX] (compiling statutory executive authority to respond to the pandemic in seventeen states).

50. See infra notes 75–80 and accompanying text.

51. See Lawrence O. Gostin, Scott Burris & Zita Lazzarini, The Law and the Public's Health: A Study of Infectious Disease Law in the United States, 99 Colum. L. Rev. 59, 106 (1999) ("[O]ld public health statutes that have not been substantially altered since their enactment are often outmoded in ways that directly reduce both their efficacy and their conformity with modern standards.").

52. See William Martin, Legal and Public Policy Responses of States to Bioterrorism, 94 Am. J. Pub. Health 1093, 1093 (2004) (describing state agency responses to the anthrax letter attacks); Amerithrax or Anthrax Investigation, FBI, https://www.fbi.gov/history/famous-cases/amerithrax-or-anthrax-investigation/ [https://perma.cc/SJ2V-DN3T] (last visited May 3, 2021) (recounting the details of the Amerithrax attack).

53. Amerithrax or Anthrax Investigation, supra note 52.

54. See James G. Hodge, The Evolution of Law in Biopreparedness, 10 Biosecurity and Bioterrorism: Biodefense Strategy, Prac. & Sci. 38, 40 (2012) ("As Congress and the Federal Bureau of Investigation (FBI) sought elusive answers to who perpetrated this national biothreat, states expressed immediate concern about their roles in responding to what many viewed as a new type of emergency.").

55. Martin, supra note 52, at 1093.

56. See infra note 73 and accompanying text.

the careful balance between power and constraint that the drafters aimed to achieve.

The first draft of the MSEHPA gave the governor vast power to act unilaterally, without legislative approval. The MSEHPA defined a "public health emergency" as including "an occurrence or imminent threat of an illness or health condition, caused by bioterrorism, epidemic or pandemic disease."[57] The governor—either in consultation with public health officials or unilaterally if necessary—could declare a state of emergency if they found that the occurrence or threat "pose[d] a substantial risk" of significant fatalities or disabilities.[58] After the governor declares a public health emergency, they could "suspend the provisions of any regulatory statute prescribing procedures for conducting State business, or the orders, rules and regulations of any State agency, if strict compliance with the same would prevent, hinder, or delay necessary action."[59] During the emergency, administrative public health authorities would have the power to compel people to submit to examination,[60] quarantine,[61] treatment, and vaccination.[62]

The draft MSEHPA also included checks—albeit limited—on the governor's power to declare a state of emergency. First, a state of public health emergency would terminate automatically after thirty days, after which the governor had to renew the declaration under the same conditions.[63] Additionally, the Act granted the legislature the power to override the governor's declaration of the state of emergency, but only after sixty days.[64] Thus, the first draft of the MSEHPA granted the governor wide-ranging powers, while giving a limited constraining role to the legislature.

The largely unrestrained nature of the governor's power under the draft MSEHPA engendered near universal opposition.[65] Protectors of civil liberties on the left, such as the ACLU, argued that the draft was "replete with civil liberties problems," among them that it failed to include adequate checks and balances on the governor's power to declare a state of emergency and mandate quarantine and vaccination.[66] The Association of

57. The Model State Emergency Health Powers Act § 104(1) (The Ctr. for L. & the Pub.'s Health at Georgetown & Johns Hopkins Univs., Oct. 23, 2001), https://www.aapsonline.org/legis/msehpa.pdf [https://perma.cc/4RZ6-SCAG].

58. Id.

59. Id. § 303(a)(1).

60. Id. § 502(a).

61. Id. § 503(a).

62. Id. § 504(a). The Act also included due process procedures whereby quarantined individuals could appeal to a court for review. Id. § 503(e).

63. Id. § 305(b).

64. Id. § 305(c).

65. Lawrence O. Gostin, At Law: Law and Ethics in a Public Health Emergency, Hastings Ctr. Rep., March–October 2002, at 9, 10.

66. See Model State Emergency Health Powers Act, ACLU, https://www.aclu.org/other/model-state-emergency-health-powers-act/ [https://perma.cc/EJ23-VVL4] (last visited May 4, 2021).

American Physicians and Surgeons protested that the Act would give governors the power to "create a police state by fiat."[67] The Center for Law and the Public's Health, the primary drafter of the bill, received thousands of comments from the public.[68]

In response to this storm of criticism, the drafters released a second, revised version of the bill in December 2001, now labeled as a "draft for discussion,"[69] to ameliorate the concerns about executive overreach and civil rights infringement. Some of the revisions were cosmetic, like changing the term "control of persons" to "protection of persons."[70] Others were more substantive: Where the previous version had allowed a legislative override only after sixty days and a two-thirds vote in both chambers of the state legislature, the new version allowed an *immediate* override by a majority vote.[71] The drafters thus indicated not only a preference for clearly delineating the scope of the governor's emergency powers in a "framework statute" but also the intention to immediately impose the constraint of a deliberative, representative body on the unilateral actions of the governor.

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67. Ronald Bayer & James Colgrove, Public Health vs. Civil Liberties, 297 Science 1811, 1811 (2002) (internal quotation marks omitted) (quoting AAPS Analysis: Model Emergency Health Powers Act (MEHPA) Turns Governors Into Dictators, Ass'n of Am. Physicians & Surgeons (Dec. 3, 2001), https://www.aapsonline.org/testimony/emerpower.htm [https://perma.cc/8CQ5-EY95]). Others took the opposite position: Governors should be empowered to act in whatever way they believe is appropriate in that specific emergency, and explicitly setting out the executive's emergency powers would excessively limit the governors' legal authority. See Ken Wing, Policy Choices and Model Acts: Preparing for the Next Public Health Emergency, 13 Health Matrix 71, 76–77 (2003). Wing based this argument on Justice Jackson's influential concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, which states that "[w]hen the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb," but "[w]hen the President acts in absence of either a congressional grant or denial of authority . . . there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." 343 U.S. 579, 637 (1952) (Jackson, J., concurring in the judgment and opinion). But see. Posner & Vermeule, supra note 27, at 111 (arguing that the *Youngstown* approach may lead to "perverse results," incentivizing the executive to act without consulting the legislature).

68. Gostin, supra note 65, at 10.

69. George J. Annas, Blinded by Bioterrorism: Public Health and Liberty in the 21st Century, 13 Health Matrix 33, 57 (2003).

70. Bayer & Colgrove, supra note 67, at 1811.

71. Compare The Model State Emergency Health Powers Act § 305(c) (The Ctr. for L. & the Pub.'s Health at Georgetown & Johns Hopkins Univs., Oct. 23, 2001), https://www.aapsonline.org/legis/msehpa.pdf [https://perma.cc/J7HU-NRAS] ("[*By a two-thirds vote of both chambers*,] the State legislature may terminate a state of public health emergency after sixty days from the date of original declaration . . . ."), with The Model State Emergency Health Powers Act § 405(c) (The Ctr. for L. & the Pub.'s Health at Georgetown & Johns Hopkins Univs., Dec. 21, 2001), https://stacks.cdc.gov/view/cdc/6562/cdc_6562_DS1.pdf [https://perma.cc/3YYY-CMK2] ("By a majority vote in both chambers, the State legislature may terminate the declaration of a state of public health emergency at any time from the date of original declaration . . . .").

2. *Older Emergency Power Statutes.* — Notwithstanding continued criticism and debate,[72] the MSEHPA had a strong influence on many states' introduction or update of public health emergency statutes over the following years.[73] Some states, however, refused to pass new legislation based on the MSEHPA and kept their antiquated statutes.[74] In these statutes as well, legislatures were careful to balance the power of the governor to unilaterally override the law with the ability of the legislature to constrain the exercise of that power.

For instance, Pennsylvania has not enacted a statute based on the MSEHPA. Its Emergency Management Services Code, enacted in 1978, does not explicitly mention public health emergencies, but rather defines a "natural disaster" as "[a]ny hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, landslide, mudslide, snowstorm, drought, fire, explosion or other catastrophe which results in substantial damage to property, hardship, suffering or possible loss of life."[75] The statute grants the governor power to suspend statutes and regulations, but places a ninety-day time limit on the declaration of a state of emergency, after which the governor must renew it. The statute also allows the legislature to override the governor's declaration of a state of emergency by concurrent resolution immediately.[76]

Massachusetts also has not passed a statute granting the governor public health emergency powers based on the MSEHPA,[77] and the state instead relies on the Civil Defense Act (CDA) of 1950 for executive power in an emergency.[78] The Act was passed at the beginning of the Cold War in response to the Soviet military threat[79] and grants the governor power to

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72. See Annas, supra note 69, at 58 ("Although the revised act is a modest improvement . . . all the fundamental problems remain."); John M. Colmers & Daniel M. Fox, The Politics of Emergency Health Powers and the Isolation of Public Health, 93 Am. J. Pub. Health 397, 398 (2003) (discussing criticism of the MSEHPA, including concerns about the lack of "objective criteria" for triggering a state of emergency and fears "that state health officers could panic governors into declaring emergencies prematurely").

73. See James G. Hodge, Lexi C. White & Sarah A. Wetter, From [A]nthrax to [Z]ika: Key Lessons in Public Health Legal Preparedness, 15 Ind. Health L. Rev. 23, 26 n.11 (2018) (noting that as of 2006, thirty-eight states had passed bills relating to the Act). But see Annas, supra note 69, at 60 ("The drafters . . . continue to grossly overstate their support.").

74. See Annas, supra note 69, at 60.

75. 35 Pa. Cons. Stat. § 7102 (2020).

76. Id. § 7301.

77. The state's Public Health Act, however, delegates power to local boards of health to control infectious diseases. See Mass. Gen. Laws Ann. ch. 111, § 6 (West 2021) ("The department shall have the power to define . . . what diseases shall be deemed to be dangerous to the public health, and shall make such rules and regulations consistent with law for the control and prevention of such diseases as it deems advisable for the protection of the public health.").

78. See Civil Defense Act, ch. 639, § 5, 1950 Mass. Acts 523.

79. Bruce Mohl, Baker's Emergency Authority a Bit Fuzzy, CommonWealth Mag. (May 22, 2020), https://commonwealthmagazine.org/state-government/bakers-emergency-authority-a-bit-fuzzy [https://perma.cc/B8FQ-E7NW].

declare a state of emergency "upon the occurrence of any disaster or catastrophe resulting from attack, sabotage or other hostile action; or from riot or other civil disturbance; or from fire, flood, earthquake or other natural causes."[80] In contrast to Pennsylvania's statute, the CDA does not grant the governor power to suspend statutes or regulations and does not include any time limits or legislative constraints on the governor's ability to declare a state of emergency.

These two statutes and the MSEHPA illustrate a pattern of power and constraint. Pennsylvania's statute and the MSEHPA both grant the governor more power, including the ability to suspend statutes and regulations, but also constrain the governor by setting a time limit on the effectiveness of the declaration and granting the legislature the ability to check this power through a concurrent veto of the declaration. The Massachusetts statute, on the other hand, does not give the governor the power to suspend statutes. Perhaps for that reason, its drafters did not feel the need to constrain the power to declare a state of emergency with time limits or legislative override.

As the next section shows, this pattern is not unique to Massachusetts and Pennsylvania. Notwithstanding differences in the details of the powers and constraints in the various state statutes—and there are many[81]—this sliding scale of power and constraint largely holds true across all states in the union.

D. *Summary of Current State Emergency Power Statutes*

This section provides a systematic summary of the public health emergency power statutes in all fifty states and shows the sliding scale of power and constraint at work in the statutes. This summary categorizes state statutes along the following three variables: (1) suspension powers, or whether governors have the power to suspend regulations and/or statutes; (2) time limits, or how long the state of emergency lasts before a governor must renew it, either on their own or with legislative approval; and (3) legislative oversight, or what power the statute gives the legislature to either approve the declaration ex ante or override the declaration ex post. The findings of this survey demonstrate that, in these framework statutes, legislatures aim to counteract executive power with both time and legislative constraints.

With regard to suspension powers, the vast majority of states—thirty-seven—allow the governor to unilaterally suspend statutes and/or regulations where compliance would prevent, hinder, or delay necessary action

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80. Civil Defense Act, ch. 639, § 5, 1950 Mass. Acts 523.

81. See generally Eleanor E. Mayer, Comment, Prepare for the Worst: Protecting Civil Liberties in the Age of Bioterrorism, 11 U. Pa. J. Const. L. 1051 (2009) (comparing different states' public health emergency power statutes and discussing their implications for citizens' constitutional rights in an emergency).

in coping with the disaster.[82] Five states only explicitly allow suspension of regulations.[83] Eight states do not grant the governor the power to suspend statutes or regulations in a public health emergency.[84] Thus, most states allow the governor to override existing laws in an emergency, while a minority only allow emergency actions within the framework of existing statutes and regulations.

States differ widely in placing time limits on states of emergency or suspensions of statutes. Most states—twenty-eight—have placed time limits of various duration on states of emergency or the suspension of statutes, after which—in most cases—the governor can unilaterally renew the state of emergency.[85] Thirteen states have not placed any time limits on states

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82. See Ala. Code § 31-9-13 (2021); Alaska Stat. § 26.23.020(g)(1) (2021); Ark. Code Ann. § 12-75-114(e)(1) (2021); Cal. Gov't Code § 8571 (2021); Colo. Rev. Stat. § 24-33.5-704(7)(a) (2021); Conn. Gen. Stat. § 28-9(b)(1) (2021); Del. Code tit. 20, § 3116(a)(2) (2021); Fla. Stat. § 252.36(5)(a) (2021); Ga. Code Ann. § 38-3-51(d)(1) (2021); Haw. Rev. Stat. § 127A-13(a)(3)–(4) (2021); 20 Ill. Comp. Stat. Ann. 3305/7(1) (West 2021); Ind. Code § 10-14-3-12(d)(1) (2021); Iowa Code § 29C.6(6) (2021); Kan. Stat. Ann. § 48-925(c)(1) (West 2021); Ky. Rev. Stat. Ann. § 39A.180(2)(b) (West 2021); La. Stat. Ann. § 29:766 D(1) (2020); Me. Rev. Stat. Ann. tit. 37-B, § 742(C)(1) (2021); Md. Code Ann., Pub. Safety § 14-107(d)(1)(i) (West 2021); Mich. Comp. Laws Ann. § 30.405(1)(a) (West 2021); Minn. Stat. § 12.32 (2020); Miss. Code. Ann. § 33-15-11(c)(1) (2021); Mo. Ann. Stat. § 44.100 1(h) (West 2021); Mont. Code Ann. § 10-3-104(2)(a) (West 2021); Neb. Rev. Stat. § 81-829.40(6)(a) (2021); N.H. Rev. Stat. Ann. § 4:47(III) (2021); N.Y. Exec. Law § 29-a(1) (McKinney 2021); N.C. Gen. Stat. § 166A-19.30(b)(4) (2020); N.D. Cent. Code § 37-17.1-05(6)(a) (2021); Okla. Stat. tit. 63, § 6403(B)(1) (2021); 35 Pa. Cons. Stat. § 7301(f)(1) (2021); 30 R.I. Gen. Laws § 30-15-9(e)(1) (2021); S.D. Codified Laws § 34-48A-5(4) (2021); Tenn. Code Ann. § 58-2-107(e)(1) (2021); Tex. Gov't Code Ann. § 418.016(a) (2021); Utah Code § 53-2a-209(3) (2021); Wash. Rev. Code § 43.06.220(2)(g) (2021); W. Va. Code Ann. § 15-5-6(7) (LexisNexis 2021).

Note that even within these thirty-seven statutes, there are some slight variations. For instance, Connecticut explicitly allows the executive not only to suspend, but to modify statutes, Conn. Gen. Stat. § 28-9(b)(1), while New Hampshire adds the power to create new statutes, N.H. Rev. Stat. Ann. § 4:47(III). On the other hand, two states—Alabama and Minnesota—word the statute in a way that implies that while the governor cannot outright suspend a statute or regulation, any statute or regulation that is inconsistent with any executive order "issued under the authority of" the emergency statute is automatically suspended, which seems to amount to the same thing. Ala. Code § 31-9-13; Minn. Stat. § 12.32.

83. See Idaho Code § 46-1008(5)(a) (2021); N.J. Stat. Ann. § App.A:9-47 (West 2021); Or. Rev. Stat. § 401.168(2) (2021); S.C. Code Ann. § 25-1-440(a)(3) (2021); Wis. Stat. § 323.12(4)(d) (2021).

84. See Ariz. Rev. Stat. § 26-303(A)(1), (E) (2021) (granting the governor the power to suspend statutes only in a wartime state of emergency); Nev. Rev. Stat. § 414-060 (2021); N.M. Stat. Ann. § 12-10A-5 (West 2021); Ohio Rev. Code Ann. § 5502.21–5502.25 (2021) (granting the "director of public safety" only the power to "adopt," "amend," or "rescind" new rules); Vt. Stat. Ann. tit. 20, § 9 (2021) (limiting suspension to licensing statutes and regulations); Va. Code § 44-146.16–.17 (2021); Wyo. Stat. Ann. § 35-4-101 (2021) (granting the department of health only "the power to prescribe rules and regulations"); Civil Defense Act, ch. 639, § 5, 1950 Mass. Acts 523.

85. See Ala. Code § 31-9-8(a); Ark. Code Ann. § 12-75-107(b)(2)(A); Colo. Rev. Stat. § 24-33.5-704(4); Del. Code tit. 20, § 3115(c); Fla. Stat. § 252.36(2); Ga. Code Ann. § 38-3-51(a); Idaho Code § 46-1008(2); Ind. Code § 10-14-3-12(a); Iowa Code § 29C.6(1); La. Stat.

of emergency.[86] Nine states do not grant the governor the power to renew a state of emergency after its expiration without legislative approval.[87] Thus, a majority of the states rein in the governor by placing a time restriction on the governor's unilateral emergency actions, after which the governor must renew them either unilaterally or by seeking approval from the legislature.

State emergency power statutes also vary widely with regard to legislative overrule of the governor's declaration of a state of emergency. The vast majority—thirty-six—have some method of legislative oversight, while fourteen do not.[88] Of the states that do have legislative oversight, twenty-seven states allow the legislature to overrule the declaration by concurrent or joint resolution at any time.[89] Five states condition a governor's renewal

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Ann. § 29:768; Me. Rev. Stat. Ann. tit. 37-B, § 743(2); Md. Code Ann. Pub. Safety § 14-107(a)(3); N.H. Rev. Stat. Ann. § 4:45(II)(a); N.J. Stat. Ann. § 26:13-3(b) (West 2021); N.M. Stat. Ann. § 12-10A-5(D)(2); N.Y. Exec. Law § 29-a(2)(a); N.C. Gen. Stat. § 166A-19.21(c)(1); Okla. Stat. tit. 63, § 6405(B); 35 Pa. Cons. Stat. Ann. § 7301(c); 30 R.I. Gen. Laws § 30-15-9(b); S.D. Codified Laws § 34-48A-5; Tenn. Code Ann. § 58-2-107(2); Tex. Gov't Code § 418.014(c). The statutes of California, Connecticut, Hawaii, and Illinois place a time limit on the suspension of statutes, but they do not explicitly allow the governor to renew the suspension unilaterally. See Cal. Gov't Code § 8627.5(b); Conn. Gen. Stat. § 28-9; Haw. Rev. Stat. § 127A-14(d); 20 Ill. Comp. Stat. Ann. 3305/7. Mississippi's statute does not require the governor to renew the state of emergency but does require that "[t]he Governor, upon advice of the director, shall review the need for continuing the state of emergency at least every thirty (30) days." See Miss. Code. Ann. § 33-15-11(b)(17).

86. See Ariz. Rev. Stat. § 26-303; Ky. Rev. Stat. Ann. § 39A.180; Mo. Ann. Stat. § 44.100; Neb. Rev. Stat. § 81-829.40; Nev. Rev. Stat. § 414.070; N.D. Cent. Code § 37-17.1-05; Ohio Rev. Code Ann. § 5502.22; Or. Rev. Stat. § 401.192; Vt. Stat. Ann. tit. 20, § 9; Va. Code § 44-146.17; W. Va. Code Ann. § 15-5-6; Wyo. Stat. Ann. § 35-4-115; Civil Defense Act, ch. 639, § 5, 1950 Mass. Acts 523.

87. See Alaska Stat. § 26.23.020(c); Kan. Stat. Ann. § 48-924(b)(3); Mich. Comp. Laws Ann. § 30.403(3); Minn. Stat. § 12.31(2)(b); Mont. Code Ann. § 10-3-302(3); S.C. Code Ann. § 25-1-440(a)(2); Utah Code § 53-2a-206(4)(b); Wash. Rev. Code § 43.06.220(4); Wis. Stat. § 323.10.

88. For the fourteen states that do not have such legislative oversight, see Del. Code tit. 20, § 3115(c) (2021); Haw. Rev. Stat. § 127A-14 (2021); 20 Ill. Comp. Stat. Ann. 3305/7 (West 2021); Ky. Rev. Stat. Ann. § 39A.180 (West 2021); Miss. Code. Ann. § 33-15-11(17) (2021); N.J. Stat. Ann. § 26:13-3(a) (West 2021); N.M. Stat. Ann. § 12-10A-5(D) (West 2021); Ohio Rev. Code Ann. § 5502.21–25 (2021); S.D. Codified Laws § 34-48A-5 (2021); Tenn. Code Ann. § 58-2-107(l)(3) (2021); Vt. Stat. Ann. tit. 20, § 9 (2021); Va. Code § 44-146.17 (2021); Wyo. Stat. Ann. § 35-4-115 (2021); Civil Defense Act, ch. 639, § 5, 1950 Mass. Acts 523.

89. See Ariz. Rev. Stat. § 26-303(F); Ark. Code Ann. § 12-75-107(c)(1)(A); Cal. Gov't Code § 8629; Colo. Rev. Stat. § 24-33.5-704(4); Fla. Stat. § 252.36(2); Ga. Code Ann. § 38-3-51(a); Idaho Code § 46-1008(2); Ind. Code § 10-14-3-12(a); Iowa Code § 29C.6(1); Kan. Stat. Ann. § 48-924(6); Me. Rev. Stat. Ann. tit. 37-B, § 743(2); Md. Code Ann., Pub. Safety § 14-107(a)(4)(i); Mo. Ann. Stat. § 44.100.1(2); Mont. Code Ann. § 10-3-303(4)(c); Neb. Rev. Stat. § 81-829.40(3); Nev. Rev. Stat. § 414.070; N.H. Rev. Stat. Ann. § 4:45(II)(c); N.Y. Exec. Law § 29-a(4); N.D. Cent. Code § 37-17.1-05(3); Okla. Stat. tit. 63, § 6405(C); Or. Rev. Stat. § 401.192(4); 35 Pa. Cons. Stat. § 7301(c); 30 R.I. Gen. Laws § 30-15-9(b); Tex. Gov't Code § 418.014(c); Utah Code § 53-2a-206(2)(a)(iii); W. Va. Code Ann. § 15-5-6(b); Wis. Stat. § 323.10. Louisiana allows either house to override by majority vote. See La. Stat. Ann.

of a declaration of emergency on legislative concurrence.[90] Four require, or allow the legislature to request, a special session of the legislature when the governor declares a state of emergency.[91] In other words, most states attempt to control the executive's emergency discretion by allowing the legislature to decide whether to approve or disapprove of the state of emergency.

Notwithstanding the substantial interstate variation even along these three variables, one finding clearly emerges from the data: The states seem to employ a sliding scale, balancing the powers of the governor to transcend the normal state law during an emergency with post-declaration oversight.[92] Inherent time limits make sure that the governor must periodically reassess (often in consultation with state public health officials) whether the facts on the ground still necessitate governing outside the framework of regular checks and balances of the legislature. Allowing the legislature to overrule the declaration ensures that the state of emergency is one that at least half of the legislature approves of. Of the eight states that do not explicitly grant the governor power to suspend either statutes or regulations during a state of emergency, five jurisdictions do not put a time limit on emergency declarations or allow the legislature to call an end to them, and even the remaining three do not employ both methods of restraining the executive. By contrast, of the forty-two states that do allow for some suspension of statutes and/or regulations, forty-one of these states employ at least one of these restraints.[93] In other words, the states that give the governor minimal emergency powers feel no need to constrain it, while the states that grant sweeping executive power also allow the legislature to rein it in.

In summary, emergency statutes emerge from legislatures grappling with the tension between the agility of technocratic, centralized emergency governance and democratic legitimacy. Most state legislatures made the decision—in line with the MSEHPA—to give the executive more

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§ 29:768(B). Connecticut, which is not included in the total above, permits a legislative committee to override a declaration only within the first seventy-two hours of the declaration or renewal. See Conn. Gen. Stat. § 19a-131a(b)(1).

90. Alaska Stat. § 26.23.020(c); Mich. Comp. Laws Ann. § 30.403(4); Mont. Code Ann. § 10-3-303(1)–(3)(a); S.C. Code Ann. § 25-1-440(a)(2); Wash. Rev. Code Ann. § 43.06.220(4).

91. Ala. Code §31-9-8(a) (2021); Minn. Stat. § 12.31(2)(b); N.C. Gen. Stat. § 166A-19.30(b) (2020); N.D. Cent. Code § 37-17.1-05(3)(b).

92. In a 2013 article, Professor Babette Boliek reached a similar conclusion with regard to state and federal *agency* emergency powers. Boliek, supra note 21, at 3339. She found that while the federal agency statutes employ a relatively liberal discretionary standard, states overall used "a rather restrictive discretionary mandate . . . plus various restraints—both *ex ante* and *ex post*." Id. at 3371. Moreover, she found that the states "almost inherently employ a sliding scale that balances statutory language . . . with post-enactment oversight." Id. Depending on the state, "the more lenient the trigger, often the more rigorous the *ex post* adoption procedures." Id. at 3378.

93. The only exception is Kentucky. See Ky. Rev. Stat. Ann. § 39A.100.

power, but guard against abuse of that power with restraints of either time limits, legislative oversight, or both. A few state legislatures made the decision to give their governors less power during a state of emergency, and therefore generally did not feel the need to impose both—or either—constraints of time limits and/or legislative oversight. The next Part argues that the balance achieved by these statutes was significantly challenged by the COVID-19 emergency, and that those challenges served to undermine the legitimacy of the executive response to the COVID-19 pandemic and threaten to hinder the response to similar emergencies in the future.

II. COVID-19 CHALLENGES THE BALANCE OF POWER AND CONSTRAINT

One mechanism that executive emergency power statutes do *not* use to constrain the executive is allowing the legislature substantive input into specific emergency actions the governor takes during a pandemic. Virtually all statutes that give the legislature power to override the executive do so by granting the legislature power to "terminate [the] state of emergency by concurrent resolution."[94]

This indicates that state legislatures, in constraining emergency powers, may have been motivated by the fear that the governor would, in an effort to consolidate power, declare a state of emergency in a situation that was not actually an emergency.[95] Perhaps more plausibly, state legislatures feared that governors would legitimately declare a state of emergency, but then continue exercising extrastatutory powers after the emergency was under control. The legislature therefore held in reserve a binary on/off switch to, by concurrent resolution, override the governor's declaration and terminate the state of emergency. Alternatively, the legislature feared that the governor would declare a legitimate state of emergency, but then enact emergency measures a majority of the legislature did not approve of. The legislature could then utilize the on/off switch by credibly threatening to terminate the state of emergency and thus forcing the executive to negotiate the details of emergency actions.

However, the on/off switch is not a useful mechanism or credible threat to influence emergency policy for emergencies that are both chronic and rapidly changing. Section II.A discusses how COVID-19 upset

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94. See supra note 89. Only two states—Kansas and New York—explicitly allow legislative overrule of specific executive orders promulgated by the governor during a state of emergency. Kan. Stat. Ann. § 48-925(b) ("Such orders may be revoked at any time by concurrent resolution of the legislature."); N.Y. Exec. Law § 29-a(4) ("The legislature may terminate by concurrent resolution executive orders issued under this section at any time."). Note that the latest version of the Kansas statute, which mandated courts to hold a hearing for challenges to school COVID-19 policies and to issue a ruling within seven days, was held unconstitutional as violating the separation of powers. See Butler v. Shawnee Mission Sch. Dist. Bd. of Educ., No. 21CV2385, 2021 WL 3011059, at *8–15 (Kan. Dist. Ct. July 14, 2021).

95. The ACLU warned that one of the problems with the first version of the MSEHPA was that, under the emergency definition, a governor could declare a state of emergency for HIV/AIDS. See Model State Emergency Health Powers Act, supra note 66.

this delicate balance of power by presenting an unexpected and unprecedented challenge to the emergency executive power regime, where a simple on/off switch is insufficient to ensure representative deliberation on policy and thus democratic legitimacy. Section II.B explains why, notwithstanding the scientific nature of the emergency, there was room for legislative deliberation on COVID-19 policy. Section II.C shows how legislative input on COVID-19 policy was pushed into performative litigation and legislative pushback, further eroding the credibility of public health restrictions and recommendations, and potentially undermining responses to future emergencies.

A. *COVID-19 Emergency Actions and the Legitimacy Deficit*

In the COVID-19 emergency, the vast majority of Americans agreed that there was a legitimate public health emergency,[96] and all states responded similarly in the early days of the outbreak. [97] However, as it became clear that the pandemic was here to stay, public opinion on the detail and substance of the response began to diverge, most prominently with respect to lockdowns, with state policy following suit.[98] These differences of opinion increased over time and were highly correlated with political affiliation.[99]

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96. See William A. Galston, Polling Shows Americans See COVID-19 as a Crisis, Don't Think US is Overreacting, Brookings (Mar. 30, 2020), https://www.brookings.edu/blog/fixgov/2020/03/30/polling-shows-americans-see-covid-19-as-a-crisis-dont-think-u-s-is-overreacting/ [https://perma.cc/DK3K-CYFL] (finding that 81% of survey respondents believed COVID-19 "has created a national emergency" as of March 2020).

97. See Thomas Hale, Tilbe Atav, Laura Hallas, Beatriz Kira, Toby Phillips, Anna Petherick & Annalena Pott, Variation in US States' Responses to COVID-19, at 15 (Blavatnik Sch. of Gov't Working Paper 2020/034, 2020), https://www.bsg.ox.ac.uk/sites/default/files/2020-08/BSG-WP-2020-034.pdf [https://perma.cc/7JGB-QKJW] ("Strikingly, all state responses moved together in the early days of the outbreak, but then began to diverge by the end of March.").

98. Id.

99. See, e.g., Anton Gollwitzer, Cameron Martel, William J. Brady, Philip Pärnamets, Isaac G. Freedman, Eric D. Knowles & Jay J. Van Bavel, Partisan Differences in Physical Distancing Are Linked to Health Outcomes During the COVID-19 Pandemic, 4 Hum. Nature Behav. 1186, 1187 (2020) (finding that "the more a county favoured Donald Trump over Hillary Clinton in the 2016 election, the less that county exhibited physical distancing"); Jonathan Rothwell & Christos Makridis, Politics Is Wrecking America's Pandemic Response, Brookings (Sept. 17, 2020), https://www.brookings.edu/blog/up-front/2020/09/17/politics-is-wrecking-americas-pandemic-response/ [https://perma.cc/W8H7-H6DW] (showing that political partisanship "is usually the most important variable" in explaining differing attitudes toward pandemic precautions and has led to excessive downplaying of COVID-19 risks on the right and unnecessary economic harm on the left); John Sides, Chris Tausanovitch & Lynn Vavreck, The Politics of COVID-19: Partisan Polarization About the Pandemic Has Increased, But Support for Health Care Reform Hasn't Moved at All, Harv. Data Sci. Rev. (Nov. 30, 2020), https://hdsr.mitpress.mit.edu/pub/yzcakqc7/release/2/ [https://perma.cc/SU9Y-7Y54] ("Partisan divides on state and local COVID policies have become even starker. There are now 25-30-point gaps between Democrats and Republicans in their support for [COVID-19 precautions] . . . .").

Under the current emergency statute regime, there is no avenue for deliberative, legislative influence on state public health policy. The legislature obviously does not wish to terminate the state of emergency by concurrent resolution and revert to regular legislative decisionmaking, as "[p]oints of order and subcommittee referrals are not the stuff of a competent emergency response."[100] The legislature, however, wishes to represent the concerns of their constituents in the crafting of a policy response.[101] This disagreement over the governor's response (for instance, over the stringency of lockdowns or whether schools should be closed) will of course be tinged with the particular political inflections of the emergency, but presumably also reflects good faith differences of opinion regarding different priorities in a response.[102] However, the statutory restriction of legislative involvement to termination of the state of emergency closes off the avenue of meaningful, substantive input and compromise on policy, as legislators cannot credibly threaten to terminate the emergency to induce the governor to negotiate on policy.

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100. Nicholas Bagley, A Warning From Michigan, Atlantic (Oct. 7, 2020), https://www.theatlantic.com/ideas/archive/2020/10/america-will-be-michigan-soon/616635/ (on file with the *Columbia Law Review*).

101. See, e.g., Tom Davies, Indiana Governor Sues Legislature Over Emergency Powers, AP (Apr. 27, 2021), https://apnews.com/article/legislature-indianapolis-health-lawsuits-coronavirus-pandemic-2e0829c81d312c7dffd7806ec78bc924 (on file with the *Columbia Law Review)* [hereinafter Davies, Governor Sues Legislature] (quoting Indiana State Senator Sue Glick as saying: "We're not attempting to hold government hostage . . . . What we're trying to do is get our seat at the table to be involved in the decision-making process, not be precluded from participation."); Paul Roberts, Bill to Speed Reopening of Businesses Draws Lots of Fans but Faces Uphill Battle, Seattle Times (Jan. 20, 2021), https://www.seattletimes.com/business/local-business/bill-to-speed-reopening-of-businesses-draws-lots-of-fans-but-faces-uphill-battle/ [https://perma.cc/L9ZJ-5EUC] (last update Jan. 21, 2021) ("In a sign of mounting frustration over Washington's COVID-19 restrictions, more than 1,500 people urged state lawmakers to support a bill that would speed the reopening of businesses and put legislators, not Gov. Jay Inslee, in charge of the process."); Torey Van Oot, Minnesota Republicans Question Governor's Coronavirus Orders, Star Trib. (Mar. 19, 2020), https://www.startribune.com/minnesota-republicans-question-governor-s-coronavirus-orders/568936222/ [https://perma.cc/5NVY-8NTP] ("Sen. Andrew Mathews, R-Princeton, said that while he appreciated the 'end goal' of curbing the virus, he worries about 'hitting the families employed at small businesses all over' his central Minnesota district.").

102. See, e.g., Benjamin Cashore & Steven Bernstein, Why Experts Disagree on How to Manage COVID-19: Four Problem Conceptions, Not One, Glob. Pol'y J. (Apr. 7, 2020), https://www.globalpolicyjournal.com/blog/07/04/2020/why-experts-disagree-how-manage-covid-19-four-problem-conceptions-not-one/ [https://perma.cc/4SWC-4VQJ] ("[E]xperts carry hidden cognitive frames about how to conceive of the problem at hand. These frames, in turn, strongly influence policy prescriptions."); Jacob Hale Russell & Dennis Patterson, Let's Put the Straw Man of Pandemic Denial Out of His Misery, STAT News (Dec. 23, 2020), https://www.statnews.com/2020/12/23/put-straw-man-pandemic-denial-out-of-its-misery/ [https://perma.cc/85HG-B6VZ] ("Much of the skepticism toward lockdowns is grounded in genuine concerns about the relative costs and benefits.").

In a *public health* emergency, in which the outcome is heavily dependent on citizens' willingness to endure lockdowns,[103] submit to contact tracing,[104] and take other precautions, the population's perception of these restrictions—and the implicit tradeoffs embedded within them—as legitimate becomes much more than an academic question.[105] Scholars have long understood that people's perception of the authority imposing an obligation as legitimate is a significant factor in popular support of, and obedience to, those obligations.[106] An executive can achieve that perception of legitimacy by having, in the words of Professor Jeremy Waldron, "the representatives of the community come together to settle solemnly and explicitly on common schemes and measures that can stand in the name of them all . . . in a way that openly acknowledges and respects . . . the inevitable differences of opinion and principle among them."[107]

When people perceive that the methods for enacting and carrying out the law are procedurally just, they are more likely to regard the outcome

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103. See, e.g., Drew Hinshaw, As Covid Cases Surge, More Public-Health Experts Say Lockdowns Aren't the Answer, Wall St. J. (Oct. 12, 2020), https://www.wsj.com/articles/public-health-experts-rethink-lockdowns-as-covid-cases-surge-11602514769/ (on file with the *Columbia Law Review*) (reporting that experts are worried about imposing further lockdowns because "the general public won't cooperate").

104. See, e.g., Colleen McClain & Lee Rainie, The Challenges of Contact Tracing as U.S. Battles COVID-19, Pew Rsch. Ctr. (Oct. 30, 2020), https://www.pewresearch.org/internet/2020/10/30/the-challenges-of-contact-tracing-as-u-s-battles-covid-19/ [https://perma.cc/M6X5-ZWVG] (noting that forty-one percent of survey respondents said "they would be not at all or not too likely" to participate in phone or text message contact tracing efforts).

105. See, e.g., Ed Yong, America's Patchwork Pandemic Is Fraying Even Further, Atlantic (May 20, 2020), https://www.theatlantic.com/health/archive/2020/05/patchwork-pandemic-states-reopening-inequalities/611866/ (on file with the *Columbia Law Review*) ("The measures that most successfully contain the virus—testing people, tracing any contacts they might have infected, isolating them from others—all depend on 'how engaged and invested the population is . . . .'" (quoting epidemiologist Justin Lessler)).

106. See, e.g., Tom R. Tyler, Why People Obey the Law 162 (2006) ("If legitimacy diminishes, so does the ability of legal and political authorities to influence public behavior and function effectively."); id. at 170 ("People generally feel that existing legal authorities are legitimate, and this legitimacy promotes compliance with the law."); Eric S. Dickson, Sanford C. Gordon & Gregory A. Huber, Identifying Legitimacy: Experimental Evidence on Compliance With Authority 31, https://huber.research.yale.edu/materials/59_paper.pdf [https://perma.cc/L9P3-7LC9] (last visited May 11, 2021) ("Foremost, we demonstrate that subordinates can be motivated to comply with an authority as a consequence of changes to her perceived legitimacy, holding constant purely instrumental motivations."). With regard to pandemic restrictions specifically, the CDC has noted that one of the challenges of a quarantine approach is that it "[r]equires excellent communication mechanisms to inform affected persons and to maintain public confidence in the appropriateness of the chosen course of action." CDC, Public Health Guidance for Community-Level Preparedness and Response to Severe Acute Respiratory Syndrome (SARS) Version 2, Supplement D: Community Containment Measures, Including Non-Hospital Isolation and Quarantine 9 (2004), https://www.cdc.gov/sars/guidance/d-quarantine/app1.pdf [https://perma.cc/2BSF-6V7J].

107. Jeremy Waldron, The Dignity of Legislation 2 (1999).

as legitimate, even if it is unfavorable to them.[108] Procedurally just decisionmaking depends in significant part on the concerns of all citizens being represented in all phases of the process.[109] Thus, precisely in times of unprecedented, multifaceted crisis, when people have strong, urgent, and indeed self-interested differences of opinion as to the weight to be given to various factors when deciding on the course of public policy, the deliberative decisionmaking of the legislature should act as a constraint on executive action.[110]

This is especially the case in the United States, where there is "a tradition of prioritizing individualism over government restrictions,"[111] and where trust in information provided by state governments about COVID-19 has declined significantly since the start of the pandemic.[112] This environment of distrust creates an even greater challenge for governments attempting to implement public health recommendations in future long-

108. Tyler, supra note 106, at 101 (finding that "fair procedures are a cushion of support against the potentially damaging effects of unfavorable outcomes"); id. at 109 ("Evaluations of authorities, institutions, and policies . . . focus on the procedures by which they function, rather than on evaluations of their decisions or policies." (citation omitted)).

109. Id. at 118 (noting that procedural justice requires representation defined as "the concerns of those affected [being] represented in all phases of the allocation process" (internal quotations marks omitted) (quoting Gerald S. Leventhal)); id. at 120 (listing studies finding representation to be an important factor in procedural fairness).

110. See Waldron, supra note 107, at 102–03 (arguing that a benefit of democratic legislative decisionmaking is that the deliberative body gains "the widest possible acquaintance" of the pros and cons of a multifaceted decision); Griglio, supra note 1, at 67 ("Legislatures . . . [e]ngaging in what is defined as 'preventative control' or 'foresight' [during the pandemic] offers the advantages of contributing to the qualitative improvement of governmental policies and programmes, and strengthening the democratic legitimacy of these decisions."); Jan Petrov, The COVID-19 Emergency in the Age of Executive Aggrandizement: What Role for Legislative and Judicial Checks?, 8 Theory & Prac. Legis. 71, 76–77 (2020) (arguing that involvement of a representative legislature in enacting COVID-19 laws increases the perceived legitimacy of the laws, thus supporting voluntary compliance); cf. Amartya Sen, "Listening as Governance," Sixteen (Apr. 10, 2020), https://sixteens.fr/2020/04/10/listening-as-governance-by-amartya-sen/ [https://perma.cc/8VWJ-ZKD7] ("The different types of hazards from which different groups suffer [as a result of the pandemic] have to be addressed, and this is much aided by a participatory democracy, in particular when . . . governmental commands are informed by listening and consultation.").

111. David Leonhardt, The Unique U.S. Failure to Control the Virus, N.Y. Times (Aug. 6, 2020), https://www.nytimes.com/2020/08/06/us/coronavirus-us.html (on file with the *Columbia Law Review*) (last updated Aug. 8, 2020).

112. See Stephanie Kulke, National Survey: Public Trust and Americans' Willingness to Vaccinate for COVID-19, Nw. (Sept. 16, 2020), https://news.northwestern.edu/stories/2020/09/national-survey-public-trust-and-americans-willingness-to-vaccinate-for-covid-19/ [https://perma.cc/S6YG-8BRR] (showing that trust in federal and state governments to deal with the pandemic had declined by over twelve percent between April and August of 2020).

duration public health emergencies, a challenge which can be mitigated by the procedural legitimacy of democratic input.[113]

Moreover, disallowing substantive legislative input in a public health emergency also places responsibility for the ultimate public health outcome squarely on the governor. Although this has the salutary effect of encouraging the governor to do as much as possible to bring the disease under control, it arguably has the unfortunate consequence of creating skewed incentives for opposition legislators. The legislature knows that any bill it passes that contradicts the governor's chosen policy, short of completely ending the emergency, will just be vetoed by the governor.[114] For legislators in these situations, there is very little "traceability" of subpar health outcomes to their stance on public health policy, and there is thus no political downside to any effort they make to criticize the response, as the ultimate arbiter of public health policy will be the governor.[115] This creates a "position-taking opportunity" for legislators to make inflammatory statements or propose radical policy choices to please their bases, without having to live with the judgment of the populace on the failure of their policies.[116] This high-profile dissension clearly reduces the perceived legitimacy of the executive's actions in the emergency.

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113. One can also assume that there is interplay between trust in procedural legitimacy with regard to economic COVID-19 measures and trust in public health recommendations. If citizens believe that governors are not at least taking their livelihoods or other needs into account when enacting shutdown orders, that presumably dilutes their trust in public health recommendations, such as mask requirements or density prohibitions, as well. See Tyler Cowen, SCOTUS, Houses of Worship, and the Pandemic, Marginal Revolution (Nov. 27, 2020), https://marginalrevolution.com/marginalrevolution/2020/11/scotus-houses-of-worship-and-the-pandemic.html [https://perma.cc/MJ8S-AD33] ("If religious people see that the rights of churches will be protected to some reasonable degree, they might be more willing to support other restrictions.").

114. See, e.g., Rick Rojas, Back in Session, State Legislatures Challenge Governors' Authority, N.Y. Times (May 8, 2020), https://www.nytimes.com/2020/05/08/us/coronavirus-state-legislatures.html (on file with the *Columbia Law Review*) (last updated May 9, 2020) ("Alan T. Seabaugh, the [Louisiana] Republican lawmaker who drafted the petition, said Mr. Edwards had left them with limited options, 'to either leave it alone or overturn the emergency declaration.'").

115. Cf. Sarah A. Binder, NYU Wagner, Can Congress Legislate for the Future? 3 (2006), https://www.brookings.edu/wp-content/uploads/2016/06/20061215.pdf [https://perma.cc/KYZ4-6Q74] ("If it is not easy to trace an observed effect back to government action and then back further to their legislator's contribution, voters are unlikely to take retribution on their member.").

116. Professor Neal Devins has made a similar argument to explain the radical anti-abortion laws passed by state legislatures following Roe v. Wade, 410 U.S. 113 (1974):

> [T]he fact that an avalanche of abortion restrictions were enacted may mean only that state legislatures saw no downside in catering to pro-life interest groups, for pro-choice interests were content to leave it to the courts to enforce abortion rights. In other words, rather than speak to extreme disapproval or political instability, *Roe* arguably created position-taking opportunities for lawmakers who would not be punished for enacting pro-life legislation.

The issue of the lack of democratic legitimacy is further exacerbated by the chronic nature of the emergency. A natural disaster or a bioterror attack is an acute catastrophe that can be expected to be dealt with over a few days, weeks, or perhaps months. On the other hand, a future pandemic may go on for years,[117] with various geographic areas flaring up with consecutive waves, at least until a viable vaccine is found and widely distributed.[118] The legitimacy of government by executive order, where the particulars of the government response are in dispute, is further eroded as governance by the governor continues for longer stretches of time.

Although the orders given by state governors during this emergency have been (mostly) legal based on the wide-ranging powers given to governors in the emergency power statutes,[119] it does not follow that the decisionmaking within that legal framework carries the democratic legitimacy of standard deliberative lawmaking.[120] It is clear that even the more modern statutes were not intended to apply to chronic emergencies such as

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Neal Devins, Rethinking Judicial Minimalism: Abortion Politics, Party Polarization, and the Consequences of Returning the Constitution to Elected Government, 69 Vand. L. Rev. 935, 959–60 (2016); cf. Binder, supra note 115, at 1–2 (explaining that because legislators seek to "take credit and . . . avoid blame," they are prone to "seek[ing] symbolic action, rather than casting votes that make substantive change").

117. See Andrew P. Feinberg, Opinion, We Had the Tools to Fight COVID-19 Before It Arrived. Next Time We Might Not Be So Lucky., Wash. Post (Jan. 3, 2021), https://www.washingtonpost.com/opinions/2021/01/03/we-had-tools-fight-covid-19-before-it-arrived-next-time-we-might-not-be-so-lucky/ (on file with the *Columbia Law Review*) ("As bad as this pandemic has been, developing a vaccine for the next one could take twice as long, or more.").

118. See William Wan & Carolyn Y. Johnson, Coronavirus May Never Go Away, Even With a Vaccine, Wash. Post (May 27, 2020), https://www.washingtonpost.com/health/2020/05/27/coronavirus-endemic/ (on file with the *Columbia Law Review*) ("In the first few years of a vaccine, global demand will far outstrip what manufacturers are able to supply. Roughly 60 to 80 percent of the world's population needs to be inoculated to reach herd immunity . . . .").

119. Many lawsuits have been filed challenging the legality of COVID-19 restrictions from a constitutional standpoint, but courts have largely upheld the restrictions. See, e.g., Laurie Sobel & MaryBeth Musumeci, Litigation Challenging Mandatory Stay at Home and Other Social Distancing Measures, Kaiser Fam. Found. (June 5, 2020), https://www.kff.org/coronavirus-covid-19/issue-brief/litigation-challenging-mandatory-stay-at-home-and-other-social-distancing-measures/ [https://perma.cc/J3PS-C447] ("Most courts to date generally have allowed stay at home orders issued during the current crisis to remain in place to protect public health, despite restrictions on individual rights such as free speech, peaceful assembly, travel, and free exercise of religion."). However, Supreme Court jurisprudence has (since Justice Amy Coney Barrett joined the Court) evolved to subject limits on free exercise of religion to strict scrutiny, placing the burden on the state to show that houses of worship should be categorized as nonessential. See generally Josh Blackman, The "Essential" Free Exercise Clause, 44 Harv. J.L. & Pub. Pol'y 637, 638 (2021) (analyzing the shift in free exercise doctrine during the pandemic since Justice Barrett joined the Court).

120. Tom Ginsburg & Mila Versteeg, The Bound Executive: Emergency Powers During the Pandemic 39 (Va. Pub. L. & Legal Theory, Rsch. Paper No. 2020-52, 2020), https://ssrn.com/abstract=3608974 (on file with the *Columbia Law Review*) ("We note that the mere fact

COVID-19, with unilateral decisionmaking going on for over a year, or to responses such as social distancing regulations or mass lockdowns.

B. *Should Democratic Legitimacy be a Focus of Public Health Policy?*

Some will argue that this Note's focus on legitimacy neglects the distinguishing quality of a public *health* emergency: It is a scientific emergency, and it follows that policy should just "follow the science."[121] This implies that emergency powers should be conceived as a legal mechanism whereby the government can simply impose the advice of epidemiologists and other public health experts on the populace. But although a world where the citizenry unquestioningly accepted the recommendations of scientific experts might be ideal, that is assuredly not the one that exists. Trust, even in scientific methods and conclusions, is inseparable from political motivations and legitimacy.[122]

Furthermore, even within the realm of scientific advice, choices obviously must be made. This can be seen clearly in the context of the COVID-19 emergency. In the beginning of the pandemic, the policy approaches were seen as two sides of a dichotomous chasm, either pursuing a herd immunity approach or complete lockdown.[123] Over time, as the mechanics

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that there is a statutory basis for executive action does not necessarily amount to effective legislative oversight.").

121. See, e.g., Mathew Mercuri, Just Follow the Science: A Government Response to a Pandemic, 26 J. Evaluation Clinical Prac. 1575, 1575 (2020) (noting that government officials around the world have responded to questions about their pandemic response by saying their decisions would "follow the science").

122. See Caitlin Drummond & Baruch Fischhoff, Individuals With Greater Science Literacy and Education Have More Polarized Beliefs on Controversial Science Topics, 114 Proc. Nat'l Acad. Scis. 9587, 9587 (2017) (finding that "more knowledgeable individuals are more likely to express beliefs consistent with their religious or political identities for issues that have become polarized along those lines"); Masha Krupenkin, Does Partisanship Affect Compliance With Government Recommendations?, 43 Pol. Behav. 451, 451 (2020) (finding that "presidential co-partisans are more likely to believe that vaccines are safe and more likely to vaccinate themselves and their children than presidential out-partisans"); Adam Rogers, Americans Trust Scientists, Until Politics Gets in the Way, WIRED (Aug. 2, 2019), https://www.wired.com/story/americans-trust-scientists-until-politics-gets-in-the-way/ [https://perma.cc/K7ZA-XZUN] ("The idea is that your partisan identity kind of trumps the role of knowledge in your beliefs." (internal quotation marks omitted) (quoting social scientist and author Cary Funk)).

123. See David L. Katz, Opinion, Is Our Fight Against Coronavirus Worse Than the Disease?, N.Y. Times (Mar. 20, 2020), https://www.nytimes.com/2020/03/20/opinion/coronavirus-pandemic-social-distancing.html (on file with the *Columbia Law Review*) (suggesting keeping vulnerable people isolated while allowing the rest of the population to contract the virus). But see Sten H. Vermund, Gregg Gonsalves, Becca Levy & Saad Omer, Letter to the Editor, The Wrong Way to Fight Coronavirus, N.Y. Times (Mar. 23, 2020), https://www.nytimes.com/2020/03/23/opinion/letters/coronavirus-quarantine.html (on file with the *Columbia Law Review*) (taking issue with Dr. Katz's herd immunity suggestion). The herd immunity approach has since been widely discredited. See, e.g., Scott Alexander, Lockdown Effectiveness: Much More Than You Wanted to Know, Astral Codex Ten (July 6, 2021), https://astralcodexten.substack.com/p/lockdown-effectiveness-much-more [https://

of transmission became clear, experts have come to believe that this is a "false dichotomy" and that there are targeted interventions that can be implemented without a full lockdown.[124] With the pandemic in its chronic phase, there were still many tradeoffs and unknowns related to public policy. For instance, epidemiologists argued about which epidemiological models to follow,[125] economists debated the broader economic tradeoffs,[126] and both argued over whether we should be considering tradeoffs at all.[127] People disagreed on how to determine which services were essential,[128] and some worried about the distributional effects of hindering the operation of small businesses while increasing the market share

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perma.cc/2A76-YT3R] ("In conclusion, the weaker Swedish lockdown in the early phase of the pandemic probably increased the death rate by a factor of two (using other European countries as a counterfactual/control) to five (using other Scandinavian countries as a counterfactual/control)."); Rafaela Lindeberg, Sweden Sees No Signs So Far Herd Immunity Is Stopping Virus, Bloomberg (Nov. 24, 2020), https://www.bloomberg.com/news/articles/2020-11-24/sweden-says-it-sees-no-signs-herd-immunity-is-stopping-the-virus (on file with the *Columbia Law Review*) ("There's little evidence that herd immunity is helping Sweden combat the coronavirus, according to the country's top epidemiologist.").

124. See Angela Rasmussen, Why Herd Immunity Is 'Dangerous' as a COVID-19 Strategy, PBS News Hour (Oct. 14, 2020), https://www.pbs.org/newshour/show/why-herd-immunity-is-dangerous-as-a-covid-19-strategy [https://perma.cc/UYP6-RWN7] ("There are a number of non-pharmaceutical interventions, such as mask-wearing, distancing, avoiding crowded gatherings, et cetera, that can be implemented without doing a full lockdown.").

125. See Jo Craven McGinty, How COVID-19 Death-Rate Predictions Have Changed Since March, Wall St. J. (Oct. 23, 2020), https://www.wsj.com/articles/how-covid-19-death-rate-predictions-have-changed-since-march-11603445400/ (on file with the *Columbia Law Review*) (reporting that, as of October 2020, "as many as [fifty] different research groups make predictions" of COVID-19 deaths).

126. Compare Robert E. Hall, Charles I. Jones & Peter J. Klenow, Trading Off Consumption and COVID-19 Deaths, 42 Fed. Rsrv. Bank Minneapolis Q. Rev. 2, 2–5 (estimating the maximum amount of consumption that a utilitarian welfare function would be willing to trade off to avoid the deaths associated with COVID-19), with Noah Smith (@Noahpinion), Twitter (Mar. 24, 2020), https://twitter.com/Noahpinion/status/1242505647217729536/ (on file with the *Columbia Law Review*) (suggesting that cost-benefit analyses inevitably miss important factors, such as "[t]he tail risk of the virus mutating into a deadlier form").

127. See Noah Feldman, Opinion, The Real Reason Epidemiologists and Economists Keep Arguing, Bloomberg (Apr. 2, 2020), https://www.bloomberg.com/opinion/articles/2020-04-02/coronavirus-why-epidemiologists-and-economists-keep-arguing (on file with the *Columbia Law Review*) (last updated Dec. 3, 2020) (observing that the difference between the approaches of epidemiologists and economists regarding whether to weigh tradeoffs "is already shaping government responses to the pandemic").

128. See Jesse McKinley & Liam Stack, Cuomo Attacks Supreme Court, but Virus Ruling Is Warning to Governors, N.Y. Times (Nov. 26, 2020), https://www.nytimes.com/2020/11/26/nyregion/supreme-court-churches-religious-gatherings.html (on file with the *Columbia Law Review)* (reporting that "[t]he legal dispute between the state and religious leaders [over the constitutionality of COVID-19 restrictions on religious services] has been animated by tensions dating to March over what secular officials consider to be an important service at a time of crisis"); Eliza Shapiro, N.Y.C. Schools May Close Again, a Grim Sign of a Global Dilemma, N.Y. Times (Nov. 12, 2020), https://www.nytimes.com/2020/11/12/nyregion/nyc-schools-coronavirus.html (on file with the *Columbia Law Review*) (last updated

of large multinational corporations.[129] After breakthroughs in vaccine development, there were ethical and practical decisions to be made about vaccine allocation.[130]

The decisions made, both in this emergency and in future public health emergencies, are judgment calls, as the dearth of knowledge precludes absolute moral or epistemic certainty.[131] These judgment calls are unavoidably entangled with politics and legislative priorities.[132] There are certainly experts who are more qualified to have strong opinions on each of these questions than the legislature is. But as Professor Nicholas Barber has said, "[t]he amateur nature of the legislature is one of its strengths."[133] Although the legislature "is a bad forum for the initial formulation or refinement of expert opinion," it is "a good forum for enabling representatives of the population to test expert opinion."[134] Avoiding deliberative

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Nov. 18, 2020) (contrasting the different approaches of American and Western European cities with regard to school closures in pandemic hotspots).

129. See James Kwak, The End of Small Business, Wash. Post (July 9, 2020), https://www.washingtonpost.com/outlook/2020/07/09/after-covid-19-giant-corporations-chains-may-be-only-ones-left/ (on file with the *Columbia Law Review*) (warning that during the pandemic "cash that once went into local hands will be redirected to Amazon and Walmart").

130. See Eric Toner, Anne Barnill, Carleigh Krubiner, Justin Bernstein, Lois Privor-Dumm, Mathew Watson, Elena Martin, Christina Potter, Divya Hosangadi, Nancy Connell, Crystal Watson, Monica Schoch-Spana, Tener Goodwin Veenema, Diane Meyer, E. Lee Daugherty Biddison, Alan Regenberg, Tom Inglesby & Anita Cicero, Johns Hopkins Bloomberg Sch. of Pub. Health, Ctr. for Health Security, Interim Framework for COVID-19 Vaccine Allocation and Distribution in the United States 8–16 (2020), https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2020/200819-vaccine-allocation.pdf [https://perma.cc/UQW4-JDSZ] (discussing allocation schemes that maximize different values, such as "fairness and justice" or "promot[ing] economic and social wellbeing").

131. See Tyler Cowen, Opinion, The Coronavirus Moralizing Has to Stop, Bloomberg (Aug. 6, 2020), https://www.bloomberg.com/opinion/articles/2020-08-06/moralizing-about-coronavirus-policy-doesn-t-help-stop-the-coronavirus (on file with the *Columbia Law Review*) ("[T]he genre of 'coronavirus moralizing' is suspect. All things considered, it might be better to ignore Covid-19 analyses accompanied by moral judgments of political leaders or systems."); Conor Friedersdorf, Take the Shutdown Skeptics Seriously, Atlantic (May 10, 2020), https://www.theatlantic.com/ideas/archive/2020/05/take-shutdown-skeptics-seriously/611419 (on file with the *Columbia Law Review*) ("Denunciations of that sort cast the lockdown debate as a straightforward battle between a pro-human and a pro-economy camp. But the actual tradeoffs are not straightforward.").

132. Cf. David Levi-Faur, Regulatory Excellence via Multiple Forms of Expertise, *in* Achieving Regulatory Excellence 225, 228 (Cary Coglianese ed., 2017) ("The separation between 'politics' and 'expertise' is not as clear as portrayed in an idealistic account of expert-based decisionmaking. Regulatory agencies are highly politicized, even if politics within these organizations seem different than in the electoral arena.").

133. N.W. Barber, The Principles of Constitutionalism 58 (2018).

134. Id. Allowing democratic input from a wider cross-section of the population avoids the limits and biases of "formal systems of knowledge creation." See, e.g., E. Glen Weyl, Why I Am Not a Technocrat, RadicalXChange (Aug. 19, 2019), https://www.radicalxchange.org/kiosk/blog/2019-08-19-bv61r6/ (on file with the *Columbia Law Review*) (arguing that "[o]nly systems that leave a wide range of latitude for broader social input can avoid" blind spots and biases of technocratic rule, which often result in "disastrous outcomes" and "widespread feelings of illegitimacy").

input with simplistic admonitions to "follow the science" severely undermines the public perception of legitimacy, even if it advances the cause of technocratic agility.[135] To ensure public trust in future emergencies, and more importantly, to protect emergency powers from legislative pushback, state statutes (at least in some of the more divided and polarized states[136]) should be modified to include more legislative deliberation and compromise over emergency action. As the statutes stand, legislative input has been relegated to public showdowns by either challenging the executive actions in court or attempting to roll back the governor's emergency powers, which the next section examines.

C. *COVID-19 Showdowns and Legislative Pushback*

Governors' actions during the pandemic have been the subject of dozens of lawsuits in the United States. In some states, such as Illinois,[137] Michigan,[138]

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135. See Jacob Hale Russell & Dennis Patterson, America's Smug Elite Is Harming Our Kids, Tablet Mag. (Apr. 19, 2021), https://www.tabletmag.com/sections/science/articles/americas-ham-fisted-elite-harming-kids-wrecking-scientific-debate-dennis-patterson-jacob-hale-russell (on file with the *Columbia Law Review*) ("This disdain for healthy skepticism, a normal part of functioning science and democracy, is corrosive to public trust and impedes the accumulation of knowledge. A climate of overconfidence makes it both more likely that we will adopt bad policy and harder to fix our missteps.").

136. See supra notes 16–17 and accompanying text; infra notes 137–146 and accompanying text.

137. Republican State Representative Darren Bailey challenged Democratic Governor J.B. Pritzker's emergency orders by arguing the Illinois Emergency Management Agency Act does not allow the governor to renew the declaration of the state of emergency after 30 days. See Verified Complaint for Declaratory Judgment and Injunctive Relief ¶¶ 21–34, Bailey v. Pritzker, No. 2020-CH-6 (Ill. Cir. Ct. Apr. 23, 2020), https://www.clearinghouse.net/chDocs/public/PR-IL-0001-0004.pdf [https://perma.cc/3VER-ERLM].

138. Michigan's Emergency Management Act requires legislative approval to extend the state of emergency past twenty-eight days. See Mich. Comp. Laws Ann. § 30.403(3) (West 2021). After the legislature declined to approve Governor Gretchen Whitmer's request for an extension of the state of emergency, Governor Whitmer relied on another statute, the Emergency Powers of the Governor Act, which did not limit the duration of the state of emergency. See 135 Mich. Comp. Laws Ann. § 10.31(2); see also Mich. House of Representatives v. Whitmer, No. 20-000079-MZ, 2020 WL 3979949, slip op. at *1–2 (Mich. Ct. Cl. May 21, 2020). The Michigan Legislature challenged these orders as ultra vires. Id. The case was eventually certified by a federal court to the Michigan Supreme Court, which—along partisan lines—struck down the Emergency Powers of the Governor Act as unconstitutional under the Michigan Constitution. See In re Certified Questions from the United States District Court, Western District of Michigan, Southern Division (Midwest Institute of Health, PLLC v. Governor), 958 N.W.2d 1, 6 (Mich. 2020); Jonathan Oosting, Riley Beggin, & Kelly House, Michigan Supreme Court Rules Whitmer Lacks COVID-19 Emergency Powers, Bridge Mich. (Oct. 2, 2020), https://www.bridgemi.com/michigan-government/michigan-supreme-court-rules-whitmer-lacks-covid-19-emergency-powers [https://perma.cc/RVG2-HA9V] ("In a 4-3 decision, the court's conservative majority ruled that a law Whitmer has cited to continue issuing emergency orders—the Emergency Powers of the Governor Act of 1945—unlawfully delegates legislative authority to the executive branch in violation of the Michigan Constitution.").

Pennsylvania,[139] and Wisconsin,[140] legislative representatives or the legislature itself brought suit against the governor. These legal controversies can be viewed as essentially legislative disagreements over COVID-19 mitigation policy, forcibly "outsourced" to the judiciary from the deliberative legislative chamber by the binary on/off switch of the emergency power statutes preventing deliberative decisionmaking on COVID-19 policy. The legislature, unable to influence policy through deliberative compromise with the governor, and not responsible in the eyes of the public for the COVID-19 response, is left in the role of the opposition. This increases polarization as legislators are incentivized to take positions to pander to their bases. Their taking this fight to court, where they are met with decisions along partisan lines, casts a pall of illegitimacy over the governor's emergency actions.

Even more concerning is the phenomenon of legislative pushback against executive emergency powers due to legislators' frustration over the sidelining of deliberative input during the COVID-19 pandemic. Legislators in at least thirty-seven states have introduced over 200 bills to increase control over the governor's emergency powers, despite the strenuous objections of governors.[141] For example, Republican lawmakers in Kentucky passed—and then overrode Governor Andy Beshear's veto on—a bill that ends the governor's emergency orders after thirty days, requires

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139. The Republican-controlled Pennsylvania legislature attempted to force an end to the state of emergency by concurrent resolution ordering the governor to terminate the state of emergency, but Governor Tom Wolf vetoed the legislation. State senators sued for a writ of mandamus ordering Governor Wolf to comply, but the Pennsylvania Supreme Court—also along partisan lines—upheld the governor's orders, ruling that any concurrent resolution which "comprises legislation or has the effect of legislating" must be subject to the veto. Wolf v. Scarnati, 233 A.3d 679, 685–89 (Pa. 2020); Benjamin Pontz, Pa. Supreme Court Sides With Governor in Dispute Over Emergency Powers, WITF (July 1, 2020), https://www.witf.org/2020/07/01/pa-supreme-court-sides-with-governor-in-dispute-over-emergency-powers/ [https://perma.cc/G5NW-VE7R] (noting that *Wolf v. Scarnati* was decided by a "5-2 margin, with the court's five Democrats in the majority and two Republicans in the minority").

140. When Governor Anthony Evers suspended in-person voting for the April 7 election, the state legislature sued the governor, claiming that the statute only allows the governor to suspend the provisions of any administrative rule, which does not extend to statutes. The court—again along partisan lines—struck down Governor Evers's suspension of in-person voting as ultra vires. See Wis. Legislature v. Evers, No. 2020AP608-OA, slip op. at 1–3 (Wis. Apr. 6, 2020); Adam Liptak, Rulings on Wisconsin Election Raise Questions About Judicial Partisanship, N.Y. Times (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/us/politics/wisconsin-elections-supreme-court.html (on file with the *Columbia Law Review*) ("In a pair of extraordinary rulings on Monday, the highest courts in Wisconsin and the nation split along ideological lines to reject Democratic efforts to defer voting in Tuesday's elections in the state given the coronavirus pandemic.").

141. Trip Gabriel, State Lawmakers Defy Governors in a Covid-Era Battle for Power, N.Y. Times (Feb. 22, 2021), https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html (on file with the *Columbia Law Review*) (last updated Apr. 22, 2021) ("Across the country, lawmakers in 37 states have introduced more than 200 bills or resolutions this year to clip the emergency powers of governors . . . .").

permission of the state's attorney general to suspend existing statutes, and bars the governor from making any changes to election laws.[142] Pennsylvania lawmakers successfully evaded Governor Tom Wolf's veto of their concurrent resolution by proposing a constitutional amendment that puts a hard sunset of twenty-one days on a state of emergency, which can only be extended by the legislature.[143] Republicans in Michigan attempted to force a hard sunset on emergency orders on Governor Gretchen Whitmer by attaching it to a COVID-19 funding bill.[144] This trend transcends the familiar COVID-19 political paradigm, as Republicans in Indiana overrode Republican Governor Eric Holcomb's veto to pass a bill allowing the legislature to call itself into special sessions to unilaterally revoke the governor's emergency orders,[145] and even some Democratic legislators in New York have sought to repeal Democratic then-Governor Andrew Cuomo's emergency powers entirely.[146]

These solutions, however, do not fix the central imbalance of emergency powers: the lack of structured, deliberative input from the legislature into substantive policy choices made by the executive. Stripping governors of all or some of their emergency powers, or putting a hard time limit on their exercise, swings the pendulum too far in the direction of democratic legitimacy, neglecting the real necessity for technocratic agility. In an emergency like a pandemic, where the situation on the ground changes rapidly, the optimal institutional design should be to have policy origination take place within the executive branch, with the legislature—through deliberation, negotiation, and compromise—representing the constraints of the populace preventing policy overreach. Allowing the legislature a simple veto on specific orders of the legislature, like the law

142. Id. ("Mr. Beshear went to court this month to block bills by G.O.P. lawmakers — one that would end a governor's emergency order after 30 days, and another that would effectively make Mr. Beshear's statewide mask mandate unenforceable. Republicans in the Legislature overrode his vetoes of the bills before he sued."); Niedzwiadek, supra note 10 ("Among other things, the laws passed by Republicans . . . place a 30-day limit on executive orders issued during a state of emergency unless ratified by the General Assembly, require[] permission of the separately-elected attorney general before suspending existing statutes and bar[] the governor from altering election laws during an emergency.").

143. Marc Levy & Michael Rubinkam, Pennsylvania Voters Impose New Limits on Governor's Powers, AP (May 19, 2021), https://apnews.com/article/pennsylvania-health-coronavirus-pandemic-government-and-politics-f5ce447986a26cca310a6639de37b5ce/ (on file with the *Columbia Law Review*).

144. Niedzwiadek, supra note 10.

145. Davies, Governor Sues Legislature, supra note 101.

146. Jesse McKinley & Luis Ferré-Sadurní, Cuomo Faces Revolt as Legislators Move to Strip Him of Pandemic Powers, N.Y. Times (Feb. 17 2021), https://www.nytimes.com/2021/02/17/nyregion/cuomo-nursing-homes-deaths.html (on file with the *Columbia Law Review*) (last updated Apr. 28, 2021) (reporting on "a vocal faction" in New York's "Democratic-controlled" legislature seeking to "fully repeal[]" Governor Cuomo's emergency powers, partially because of "a deepening fatigue . . . over Mr. Cuomo's broad use of powers, which have enabled him to control nearly every facet of the state's response to the virus").

passed in Indiana does, is constitutionally questionable.[147] A more realistic solution to this problem would insert a nonbinary method of legislative constraint, which encourages debate—albeit limited—on the people's policy preferences, into the state public health emergency regime, while still retaining—to the extent possible—the decisiveness and agility of a governor-run response.

In summary, ensuring compliance with mitigation recommendations over a long duration requires a solution that balances technocratic, responsive agility with democratic legitimacy. This is particularly the case for emergencies where costs and tradeoffs of certain solutions vary greatly among the population. It is easy to write off any opposition to mitigation efforts as cynical jockeying for political position—and a significant portion of it perhaps is. But at bottom, there are significant tradeoffs that are being made on a unilateral basis by the executive. The existing regime consolidates the power to make judgments and issue orders regarding these tradeoffs for indefinite periods of time in the office of the executive, with any substantive legislative disagreement being pushed into interminable lawsuits with judges arriving at outcomes along partisan lines. This is a recipe for manufacturing the perception of illegitimacy, and thus a deficiency in compliance and legislative pushback against emergency powers, both of which will significantly undermine executive responses to future emergencies. Part III explores a solution inspired by the Congressional Review Act that achieves a balance between maintaining responsive agility of rule by executive order and preserving substantive deliberation and compromise both within the legislature and between the legislature and the executive.

III. A SOLUTION MODELED ON THE CONGRESSIONAL REVIEW ACT

As Part II shows, a solution to the deficit in democratic legitimacy must not simply return crisis governance to the regular legislative process. Rather, it must allow the governor to retain the legislative prerogative, while granting the legislature input on substantive policy decisions. By explicitly placing the responsibility for emergency response on both the governor and the legislature, such an emergency powers regime would incentivize compromise rather than performative opposition. Luckily, a similar mechanism can be found in federal administrative law, in the Congressional Review Act (CRA). There, the executive and its administrative agencies craft rules, and Congress reserves the right, via a fast-track review process, to veto those rules. Section III.A discusses the history of the

147. Tom Davies, Plans Curbing Indiana Governor's Emergency Powers Face Doubts, AP (Mar. 6, 2021), https://apnews.com/article/public-health-legislature-health-coronavirus-pandemic-indiana-41b94e54c75c7310297b5516734f291e (on file with the *Columbia Law Review*) ("Courts would likely find that the proposals would violate the constitution by usurping the governor's authority or by coercing the governor into recalling lawmakers in order to keep intact orders issued amid an emergency situation, former state Supreme Court Justice Frank Sullivan said.").

CRA, the way the CRA works, and suggestions to improve the CRA. Section III.B suggests revisions to state executive emergency power statutes based on an improved CRA. Section III.C addresses possible concerns regarding this solution.

A. *The Congressional Review Act*

One of the more prominent debates in both politics and legal academia today is the battle over the administrative state.[148] Part of that battle is the question of legislative oversight of the administrative state. Notably, even some scholars who wish to preserve the "legacy of the New Deal" have pushed back against enhanced presidential control over the administrative state with an argument that echoes the argument of this Note. They maintain that such evolution would have the ultimately antiregulatory effect of "establish[ing] a norm of confrontation, rather than collaboration," undermining the legitimacy and function of the administrative state.[149]

From the New Deal Era through the 1980s, congressional oversight of the administrative state took the form of legislative vetoes, allowing one or both branches to veto any executive actions under the delegated power.[150] Presidents had asked Congress to delegate additional authority to the executive branch, often pertaining to executive reorganization, and "were willing to accept the legislative veto that controlled the delegation."[151] Since the New Deal, Congress had inserted legislative veto provisions into over 200 statutes.[152] However, the constitutionality of the legislative veto was controversial,[153] and presidents soon began to resent the interference of Congress in administrative matters.[154]

The controversy culminated in 1983, when the Supreme Court, in *INS v. Chadha*, decided that the legislative veto provision of the Immigration and Nationality Act[155] violated Article I of the Constitution, which requires Congress to legislate through bicameral legislation that is presented to the

148. See generally Gillian E. Metzger, 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1 (2017) (discussing "contemporary anti-administrativism" and its "parallels to the 1930s conservative attacks on the New Deal").

149. See Cynthia R. Farina, Undoing the New Deal Through the New Presidentialism, 22 Harv. J.L. & Pub. Pol'y 227, 235 (1998).

150. President Herbert Hoover originated the legislative veto as a mechanism to convince an uncooperative Congress to allow him to reorganize executive departments and agencies subject to their disapproval. Louis Fisher, The Legislative Veto: Invalidated, It Survives, 56 Law & Contemp. Probs. 273, 278–79 (1993).

151. Id. at 276.

152. Paul J. Larkin, Jr., Reawakening the Congressional Review Act, 41 Harv. J.L. & Pub. Pol'y 187, 194 n.13 (2018) [hereinafter Larkin, Reawakening].

153. See Immigr. & Naturalization Serv. v. Chadha (*INS v. Chadha*), 462 U.S. 919, 976–77 nn.12–14 (1983) (White, J., dissenting) (collecting authorities arguing for and against the constitutionality of the legislative veto).

154. See Fisher, supra note 150, at 282–85.

155. 8 U.S.C. § 1254(c)(2) (1976) (repealed 1996).

president for veto.[156] The legislative veto, without presentment and often passed by one house of Congress, was thus rendered unusable, notwithstanding its efficiency.

In response to *Chadha*, Congress in 1996 passed the CRA as a reassertion of power over agency rulemaking.[157] The CRA attempts to split the difference between the legislative veto and normal legislative procedures,[158] for the purpose of increasing regulatory accountability.[159] Thus, the CRA may present ideas on how to split the difference between technocratic governance and democratic legitimacy in an emergency.

Under the CRA, all federal agencies must submit copies of each rule, along with a report including the effective date and cost-benefit analyses, among other documents, to the Comptroller General of the General Accountability Office (GAO) and Congress for review.[160] For a major rule, defined as a rule that agencies have found would result in a significant effect on the economy,[161] the Comptroller General of the GAO has fifteen days to submit a report to Congress on the agency's compliance with relevant procedural laws when drafting the rule.[162] Major rules go into effect a minimum of sixty days after either Congress's receipt of the report or the publication of the rule in the Federal Register (whichever is later).[163] This sixty-day delay is subject to a few exceptions, notably when the President issues an executive order that the rule should take effect immediately "because of an imminent threat to health or safety or other emergency."[164]

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156. *Chadha*, 462 U.S. at 944–59. There are a few narrow exceptions. See id. at 955 n.21 and accompanying text.

157. Larkin, Reawakening, supra note 152, at 197–98.

158. Id.

159. For background on the antiregulatory sentiment and scholarship influencing the CRA, as well as the process of passing it as part of the Contract with America Advancement Act, see Adam M. Finkel & Jason W. Sullivan, A Cost–Benefit Interpretation of the "Substantially Similar" Hurdle in the Congressional Review Act: Can OSHA Ever Utter the E-Word (Ergonomics) Again?, 63 Admin. L. Rev. 707, 711–18 (2011).

160. 5 U.S.C. § 801 (2018). This includes both final and interim final rules, but certain rules are exempt. See Daniel Cohen & Peter L. Strauss, Congressional Review of Agency Regulations, 49 Admin. L. Rev. 95, 99 (1997).

161. Specifically, a major rule is defined as a rule that the Administrator of the Office of Information and Regulatory Affairs (OIRA), of the Office of Management and Budget (OMB), finds has resulted in or is likely to result in (1) an annual effect on the economy of $100 million or more; (2) a major increase in costs or prices; or (3) significant adverse effects on competition, jobs, investment, productivity, and the like. 5 U.S.C. § 804(2).

162. Id. § 801(a)(2)(A).

163. Id. § 801(a)(3)(A).

164. Id. § 801(c)(2)(A)–(D). Other exceptions to the sixty-day delay include when the rule is "(B) necessary for the enforcement of criminal laws; (C) necessary for national security; or (D) issued pursuant to any statute implementing an international trade agreement." Id. § 801(c)(2)(B)–(D). For two other exceptions to suspension, see id. §§ 801(a)(5), 808(1).

The CRA is designed to ensure efficient procedure in Congress.[165] Any member may introduce a joint resolution of disapproval of the rule in question and refer it to the relevant committee within those sixty days.[166] The resolution of disapproval must be written according to a specified mandatory text and must be applicable to the entire rule in question: "'That Congress disapproves the rule submitted by the ___ relating to ___, and such rule shall have no force or effect.' (The blank spaces being appropriately filled in)."[167] To prevent the possibility of the resolution dying in Senate committee, the Act provides that after twenty days from when the bill was referred to committee, thirty senators can file a written petition to place the resolution on the calendar.[168] To expedite passage in the Senate, the resolution is not subject to points of order or motions to amend, postpone, or proceed with other business, and debate is limited to ten hours, divided equally between those in favor and those opposed.[169]

A majority of both houses must pass a resolution of disapproval before presenting it to the President for his signature or veto.[170] If the President vetoes the resolution, Congress can overrule the veto with a two-thirds majority.[171] The CRA precludes judicial review of any "determination, finding, action, or omission under this chapter."[172] Once a joint resolution of disapproval has been passed, the rule is treated as if it had never taken effect.[173] Rules voided by a resolution "may not be reissued in substantially the same form."[174]

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165. "The procedure is expedited 'to try to provide Congress with an opportunity to act on resolutions of disapproval before regulated parties must invest the significant resources necessary to comply with a major rule.'" Finkel & Sullivan, supra note 159, at 722 (quoting 142 Cong. Rec. 8198 (1996) (joint statement of Sens. Nickles, Reid & Stevens)).

166. 5 U.S.C. § 802(a)–(b).

167. Id. § 802(a).

168. Id. § 802(c).

169. Id. § 802(d). This effectively prevents the possibility of a filibuster. See Finkel & Sullivan, supra note 159, at 722. The Act specifies procedure for the Senate, but not the House. See infra note 185 and accompanying text.

170. Presidents are presumably less likely to veto a resolution of disapproval of a rule proposed by an independent agency. See Maeve P. Carey, Alissa M. Dolan & Christopher M. Davis, Cong. Rsch. Serv., R43992, The Congressional Review Act: Frequently Asked Questions 3 (2020).

171. Id. at 5.

172. 5 U.S.C. § 805.

173. Id. § 801(f).

174. Id. § 801(b)(2).

> It remains ambiguous, however, whether Congress can use this new mechanism to, in effect, [do] to a regulation what the Russian nobles reputedly did to Rasputin—poison it, shoot it, stab it, and throw its weighted body into a river—that is, to veto not only the instant rule it objects to, but forever bar an agency from regulating in that area.

Finkel & Sullivan, supra note 159, at 709.

CRA resolutions of disapproval have only actually been used a handful of times, all of them to void "midnight regulations" in two periods of presidential transition, once under President George W. Bush and once under President Donald J. Trump.[175] In November 1999, the Occupation Safety and Health Administration (OSHA) issued a proposed ergonomics standard—rules protecting workers from jobs that can lead to musculoskeletal disorders because their physical requirements are incompatible with a worker's physical capacity.[176] The ergonomics standard faced considerable backlash from industry and the Republican-controlled Congress, and OSHA passed a revised standard in October 2000, which took effect in January 2001.[177] After President Bush was sworn in, Republicans passed a resolution of disapproval of the ergonomics standard in March 2001.[178] Similarly, in 2017, when President Trump came into office, Congress used the CRA to overturn fourteen regulations adopted in President Obama's last year in office and one adopted in 2017 by the Consumer Financial Protection Bureau.[179]

Scholars doubt the usefulness of the CRA. Critics point to the pitiful number of resolutions of disapproval that have passed, and the fact that agencies tend not to submit a significant portion of their rules entirely,[180] to show Congress's failure in attempting to increase the accountability of the administrative state. Some argue that the only parties helped by the CRA are special interests.[181] A statute that can only be used to repeal a few "midnight rules" passed in the last presidential election hardly fills the

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175. See Congressional Review Act, Ballotpedia, https://ballotpedia.org/congressional_review_act [https://perma.cc/63ZP-7KHA] (last visited July 21, 2021). "'Midnight regulation' is loosely defined as late-term action by an outgoing administration." Jack M. Beermann, Combating Midnight Regulation, 103 Nw. U. L. Rev. Colloquy 352, 352 n.1 (2009).

176. Julie A. Parks, Comment, Lessons in Politics: Initial Use of the Congressional Review Act, 55 Admin. L. Rev. 187, 190–93 (2003).

177. Id. at 191–94.

178. See id. at 198–99.

179. Paul J. Larkin Jr., The Trump Administration and the Congressional Review Act, 16 Geo. J.L. & Pub. Pol'y 505, 509 (2018).

180. This adds up to thousands of rules. See Curtis W. Copeland, Implementation of the Congressional Review Act and Possible Reforms, 40 Admin. & Reg. L. News 7, 8 (2014).

181. See Cohen & Strauss, supra note 160, at 102–03 (explaining how the resource-intensive, time-limited process of determining whether to pass a resolution of disapproval gives individual members of Congress and lobbyists the opportunity to persuade Congress to adopt the resolution); Parks, supra note 176, at 199–200. On the other hand, others point to several resolutions of disapproval which Congress introduced as a means to exert pressure on the agency to modify or withdraw the proposed rule, even though the resolution never passed. See Steven J. Balla, Legislative Organization and Congressional Review of Agency Regulations, 16 J.L. Econ. & Org. 424, 426–429 (2000) ("Despite this inaction, congressional review had an impact on the development of several rules."); Morton Rosenberg, Whatever Happened to Congressional Review of Agency Rulemaking?: A Brief Overview, Assessment, and Proposal for Reform, 51 Admin. L. Rev. 1051, 1058 (1999).

shoes of the legislative veto. It will certainly not convince Congress to grant the president sweeping powers like executive reorganization.

However, scholars have suggested ways of revising the structure and interpretation of the CRA to better achieve the professed goal of those who passed it: democratic accountability of the administrative state. Morton Rosenberg suggests the following revisions to the CRA, among others: First, instead of allowing rules to become effective sixty days after submission to the GAO unless Congress passes a resolution of disapproval, the CRA should condition the effectiveness of rules on the approval of Congress.[182] Congressional rules should automatically introduce an approval resolution on receipt of the rule, and the resolution would be discharged from committee after twenty days and be "deemed passed" ten days later.[183] But twenty percent of either house may file a petition stating that they want to look at the rule more closely, which would trigger a deeper review, followed by required deliberation and an up or down vote on the rule.[184] Second, the CRA should apply the expedited procedure requirements to the House as well as the Senate.[185] Third, any proposed rules that are subject to a floor debate and approved under the CRA should be shielded from judicial review aside from constitutional challenges.[186]

B. *Proposed Amendment to Executive Emergency Power Statutes*

This section suggests a legislative framework for emergency powers, inspired by the CRA along with the proposed revisions, that increases democratic legitimacy without excessively interfering with the agility of the emergency response. The goal of this proposed revision is to keep the origination of emergency response proposals in the hands of the executive, while preserving the right—and responsibility—of the legislature to deliberate over emergency policy, leading to a more representative and democratically legitimate response. Even during ordinary times, legislatures meet infrequently.[187] During a pandemic, legislatures will meet even less frequently.[188] Relying on the state legislature to initiate a quick reaction to

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182. Rosenberg, supra note 181, at 1084.

183. Id.

184. Id. at 1085.

185. Id.

186. Id.

187. Jim Rossi, State Executive Lawmaking in Crisis, 56 Duke L.J. 237, 246 (2006) ("Pragmatically, during ordinary times state legislatures meet infrequently and often for only a few months each year. Without a strong executive, a state may not see itself as capable of addressing an interstate crisis at all.").

188. See Continuity of Legislature During Emergency, Nat'l Conf. of State Legislatures, https://www.ncsl.org/research/about-state-legislatures/continuity-of-legislature-during-emergency.aspx [https://perma.cc/3G44-JCPF] (last updated Apr. 26, 2021) ("Due to the COVID-19 emergency, many legislatures suspended, postponed or temporarily adjourned their sessions.").

an emergency would thus likely mean an intolerable delay in changing the status quo. Therefore, the right of the executive to respond to an emergency by issuing executive orders, and even by suspending statutes and regulations in states that allow such orders, should be maintained. However, states should append to these statutes language mandating a process similar to the revised CRA suggested by Rosenberg.[189]

This revision's applicability should also only be limited to an emergency of unusually long duration, where sustained legitimacy is vital but difficult to maintain. When the executive declares a state of emergency, the governor's executive orders should be immediately effective with no additional oversight. But after a preset period—fifteen days for the sake of argument—the governor should be mandated to send copies of each executive order to each house of the state legislature.

The executive orders' continuing effectiveness would depend on affirmative approval by the legislature. The legislature would have a preset period during which they could review the executive orders. State legislatures would enact a rule automatically introducing an approval resolution as soon as they receive the copies of the executive order. After this preset period, the approval resolution would be deemed passed in both houses, regardless of whether the legislature was currently in session. Then, if a significant portion of the legislature, say forty percent, signed a petition requesting further review, the review period would be extended to grant the legislature time to review the policy. During this extended period of review, the governor's executive orders would remain in effect. This would allow for mitigation of the public health emergency while the legislature deliberates over the precise policy decisions of the governor.

After a petition for further review, a deliberation between the governor and the legislature, and within the legislature, would ensue. The state agency that advised the governor on the requirements for the executive order would then submit a document summarizing its reasoning to both houses of the legislature within the first half of the extended review period. A joint resolution of approval would then be automatically introduced after a given amount of time. Like under the CRA, deliberation on this joint resolution would be significantly sped up by procedural restraints. The resolution of approval would not be subject to points of order or motions to amend, postpone, or proceed with other business; and debate would be limited to ten hours, divided equally between those for the resolution and those against.[190] If a resolution of approval could not be passed by a majority in both houses, the executive order would be rendered void. If a resolution of approval was passed, the order would be exempted from nonconstitutional judicial review.

Alternatively, the legislature may wish to diverge from the CRA and allow recourse to judicial review so that the public can turn to the courts

189. See Rosenberg, supra note 181, at 1084–85.

190. 5 U.S.C. § 802(d)(2) (2018).

in case doubts are raised over whether the governor or legislature is abiding by the procedural rules of the revised emergency power statute. Regardless, the fact that the legislature has the right to approve the governor's policies, and that the policy tradeoffs are traceable to their decisions, will prevent the judicial showdowns over the substance of policy disagreements that have served to undermine legitimacy in the COVID-19 emergency.

Unlike under the CRA, the resolutions of approval, or petition to keep an order for an extended review period, should not need to be applicable to the entirety of the executive order as formulated by the governor. First, there is no reason why the rest of the executive order should not go into effect if the majority of legislature only disapproves of one clause. Second, the goal of this revised statute is to allow input on the details of emergency policy, and that end is better served by the legislators engaging in deliberation on only the tradeoffs they find to be unwise considering the interests of their constituents.

This solution shifts the balance of power and responsibility in the direction of the legislature, to incentivize the governor and legislature to work together on COVID-19 policy. Significantly, unless the legislature convenes to demand a longer review period, the governor's order would be deemed approved. Only if a critical mass of the legislature demanded a longer review period would a fast-track debate—ensured by bicameral procedural constraints—ensue. The legislature and the governor would then have a short period to reach a mutually agreeable solution on the specific tradeoff that the legislature finds objectionable. Once a compromise is reached, the order would be exempted from further nonconstitutional judicial review, freeing executive resources to actually manage the emergency.

C. *Can This Solution Work?*

Other countries use similar devices to maintain a balance between agile, top-down governance and democratic legitimacy in an emergency. In both Spain and Italy, the government used "decree-laws" to implement parts of its COVID-19 emergency response.[191] In these countries, the executive can enact a decree-law in case of emergency, and the decree is legally effective for a limited period of time, usually thirty or sixty days. Within

191. See Griglio, supra note 1, at 56 & n.46. Switzerland has a similar paradigm, but with a six-month time limit. See Felix Uhlmann & Eva Scheifele, Legislative Response to Coronavirus (Switzerland), 8 Theory & Prac. Legis. 115, 126 (2020); see also Patricia Popelier, COVID-19 Legislation in Belgium at the Crossroads of a Political and Health Crisis, 8 Theory & Prac. Legis. 131, 142 (2020) (explaining that under Belgian emergency law, "decrees that affect policy domains reserved to Parliament by the constitution, have to be ratified by Parliament within a reasonable time").

that time, the decree must be approved by the parliament, otherwise the decree expires.[192]

An obvious weak spot in this proposal is that this may result in political gridlock, with the legislature simply withholding approval from, say, a lockdown measure. However, it is probable that this will not result. Even lawmakers who dispute a stringent lockdown would likely be willing to change the status quo by passing a less onerous lockdown measure, such as one that is limited to more dense neighborhoods or neighborhoods with higher case rates. When both the legislature and the executive agree that a change to the status quo is necessary, the legislature will certainly pass *a* measure.[193] Optimally, the legislature will weigh the expertise provided by the executive's public health or economic experts with the short-term interests of its constituents and decide on a compromise measure between the governor's and legislature's preferences, thus quelling resistance to the measures.

Furthermore, as this Note argues, a significant incentive for counterproductive political posturing is the lack of traceability of harmful results to the legislature's policy positions, which creates a position-taking opportunity, with upside benefit to politicians pandering to more radical constituents but no significant electoral backlash among their broader constituency. Placing the final responsibility for approval with the legislature will, by making the legislature accountable for *outcomes* to all their voters, force politicians to take the scientific experts seriously, and compromise with the governor when necessary. Empirical research suggests that when legislative parties agree on a consensus issue, but disagree on the means to solve said issue, even strongly partisan voters would prefer legislative action in accordance with the opposing party's preferences over legislative gridlock.[194] In a public health emergency, with broad consensus on the issues but disagreement over the means for containing the emergency, presumably legislatures—explicitly entrusted with final approval of executive orders—will heed those voter preferences and act with the necessary haste.

One hopes that the measure of limiting deliberation to a maximum of ten hours, coupled with the tendency of modern state legislatures to

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192. Griglio, supra note 1, at 56.

193. See William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 529–30 (1992) (showing that where the status quo is "objectionable from the perspectives of both Congress and the President, and their preferences for changing the status quo run in the same direction," there will be no problem enacting a statute).

194. See D.J. Flynn & Laurel Harbridge, How Partisan Conflict in Congress Affects Public Opinion: Strategies, Outcomes, and Issue Differences, 44 Am. Pols. Rsch. 875, 885 (2015) ("Perhaps more surprising, but consistent with our expectation that the public values policy action on consensus issues, people prefer a win by the opposing party over gridlock.").

hold televised sessions,[195] will further increase the accountability of the legislature.

Recent history also suggests that legislatures tend to act quickly in times of peril. Witness the Troubled Asset Relief Program bailout in 2009,[196] or the Coronavirus Aid, Relief and Economic Security Act in March 2020.[197] This Note suggests that the extraordinary political rancor and widespread protest that accompanied the COVID-19 response may be attributed—at least partially—to the democratic illegitimacy of designing emergency governance for a chronic emergency to be centralized in the executive, with no substantive deliberative input by the legislature. In a future public health emergency, legislatures and executives working together can hopefully present a united front and decide on a response that draws on the needs of their constituents and thus ensure perception of legitimacy and acceptance by the populace.

CONCLUSION

Like all emergency power regimes, the state public health emergency power statutes partake of the tension between the agility of technocratic, centralized governance and the democratic illegitimacy of leaving the representative legislature out of the policy loop. Legislatures have attempted to calibrate the power of the governor with the constraints of termination of a state of emergency by concurrent resolution, but the fact that the legislature has been left with no substantive input on policy decisions and tradeoffs undermines the legitimacy of executive actions. This legitimacy deficit has been exacerbated by the unprecedented duration of the emergency and the high-profile showdowns between the executive and the legislature, often playing out in courts that decide the cases along political lines. In order to both enhance voluntary cooperation with government recommendations—and prevent legislative pushback against emergency powers—this Note suggests a framework modeled on the CRA that retains the efficiency of placing the burden of policy formation on the executive

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195. See Legislative Broadcasts and Webcasts, Nat'l Conf. of State Legislatures, https://www.ncsl.org/research/about-state-legislatures/legislative-webcasts-and-broadcasts.aspx [https://perma.cc/3RYN-WU9Q] (last updated July 16, 2021).

196. See David M. Herszenhorn, Bailout Plan Wins Approval; Democrats Vow Tighter Rules, N.Y. Times (Oct. 3, 2008), https://www.nytimes.com/2008/10/04/business/economy/04bailout.html (on file with the *Columbia Law Review*) (reporting that Congress passed the bill "just two weeks after the Treasury secretary, Henry M. Paulson Jr., requested the emergency bailout legislation with a warning that the American economy was at risk of the worst economic collapse since the Depression").

197. See Lauren Gambino, Trump Signs $2.2tn Coronavirus Stimulus Package Into Law, Guardian (Mar. 27, 2020), https://www.theguardian.com/us-news/2020/mar/27/washington-coronavirus-stimulus-bill-vote [https://perma.cc/Z6YT-BJ4H] ("Congress acted with unprecedented speed and bipartisanship in a moment of national crisis, negotiating the $2.2tn bill over several days in an urgent effort.").

while at the same time encouraging oversight, deliberation, and compromise by conditioning effectiveness on the approval of the legislature.