Applicant Details

First Name	**David**
Last Name	**Wechsler**
Citizenship Status	**U. S. Citizen**
Email Address	**dew327@nyu.edu**
Address	**Address** Street **70 Morton Street** City **New York** State/Territory **New York** Zip **10014** Country **United States**
Contact Phone Number	**9175477737**

Applicant Education

BA/BS From	**Cornell University**
Date of BA/BS	**May 2017**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 19, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Annual Survey of American Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Katzmann, Gary
Gary_Katzmann@cit.uscourts.gov
212-264-2842
Samaha, Adam
adam.samaha@nyu.edu
212-998-2660
Kaufman, Brett
bkaufman@aclu.org
(212) 549-2603

This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am a litigation associate at Paul, Weiss, and I write to apply for a clerkship in your chambers for the 2024 term. I have focused my legal studies on the intersection of law, technology, and civil liberties, working with the ACLU and Policing Project during law school. My goal is to utilize this education to ensure that technology be harnessed for the public good, and I believe clerking in your chambers would be great mentorship for such a career.

Enclosed please find my resume, law school transcript, undergraduate transcript, and writing sample. My writing sample is a bench memorandum I wrote during my judicial internship at the U.S. Court of International Trade. My recommenders are Judge Gary Katzmann, ACLU Senior Staff Attorney Brett Kaufman, and Professor Adam Samaha. I was a judicial intern for Judge Katzmann, a clinical intern for Brett Kaufman, and a three-time student of Professor Samaha.

Thank you for your consideration.

Respectfully,

David Wechsler

DAVID WECHSLER
70 Morton Street, Apt. 1. New York, NY 10014
917-547-7737
david.wechsler@law.nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
J.D., *cum laude*, May 2021
Unofficial GPA: 3.65
Honors: *Ann Petluck Poses Memorial Prize* (designated by Dean for outstanding work in clinical course)
Annual Survey of American Law, Managing Editor
Activities: Suspension Representation Project, Advocate
Advanced Technology Law and Policy Clinic, Participant

CORNELL UNIVERSITY, Ithaca, NY
BS in Policy Analysis and Management, May 2017
Cumulative GPA: 3.94
Honors: Policy Analysis and Management Outstanding Senior
Activities: Teaching Assistant, Introduction to Policy Analysis
Cornell Daily Sun, Staff Writer

EXPERIENCE

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, New York, NY
Litigation Associate, October 2021-Present

POLICING PROJECT AT NYU LAW, New York, NY
Legal Fellow, August 2020-May 2021
Researched and presented on various legal and policy issues related to technology and policing, including facial recognition software, predictive policing, and gang databases.

GUNDERSON DETTMER STOUGH VILLENEUVE FRANKLIN & HACHIGIAN LLP, New York, NY
Summer Associate, Summer 2020 (Offer extended)
Rotated through the intellectual property and corporate groups.

AMERICAN CIVIL LIBERTIES UNION, New York, NY
Clinical Intern (Speech, Privacy, and Technology Project), August 2019-December 2019
Co-wrote litigation memo evaluating Fourth Amendment issues arising from law enforcement's use of a novel form of technology-enhanced surveillance.

THE HONORABLE GARY KATZMANN, U.S. COURT OF INTERNATIONAL TRADE, New York, NY
Judicial Intern, Summer 2019
Drafted questions for oral arguments, prepared bench memorandum, and aided in drafting opinion on case regarding an antidumping duty order as it relates to a consumer product. Provided feedback to clerks on draft opinions.

GOLDMAN, SACHS & CO, New York, NY
Investment Banking Division, Real Estate, Gaming and Lodging, June 2017-August 2018; **Intern**, Summer 2016

ADDITIONAL INFORMATION

Serve as mentor to high school student through iMentor program. New York State High School Golf Champion and NYC Marathon Finisher. Overly optimistic fan of New York sports teams (Mets / Jets / Knicks).

Name: David E Wechsler
Print Date: 07/02/2021
Student ID: N11255623
Institution ID: 002785
Page: 1 of 2

New York University
Beginning of School of Law Record

Degrees Awarded

Juris Doctor 05/19/2021
School of Law
Honors: cum laude
Major: Law

Fall 2018

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Jacob Victor			
Torts	LAW-LW 11275	4.0	B
Instructor: Christopher Jon Sprigman			
Procedure	LAW-LW 11650	5.0	B
Instructor: John Sexton			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Decision by Algorithm			
Instructor: Katherine J Strandburg			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Jacob Victor			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B+
Instructor: Adam M Samaha			
Criminal Law	LAW-LW 11147	4.0	A
Instructor: Rachel E Barkow			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Decision by Algorithm			
Instructor: Katherine J Strandburg			
Survey of Intellectual Property	LAW-LW 12469	4.0	B
Instructor: Christopher Scott Hemphill			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2019

School of Law
Juris Doctor
Major: Law

Art Law	LAW-LW 10122	4.0	A-
Instructor: Amy M Adler			
Constitutional Law	LAW-LW 11702	4.0	A-
Instructor: Adam M Samaha			
Technology Law and Policy Clinic	LAW-LW 12148	3.0	A
Instructor: Brett Kaufman Jason Michael Schultz			
Technology Law and Policy Clinic Seminar	LAW-LW 12149	3.0	A
Instructor: Brett Kaufman Jason Michael Schultz			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
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Negotiation	LAW-LW 11642	3.0	CR
Instructor: Dina R Jansenson			
Property	LAW-LW 11783	4.0	CR
Instructor: Shitong Qiao			
Income Taxation	LAW-LW 11994	4.0	CR
Instructor: Laurie L Malman			
Supreme Court Seminar	LAW-LW 12064	2.0	CR
Instructor: Troy A McKenzie Yaira Dubin Sina Kian			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	57.0	57.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A
Instructor: Stephen J Schulhofer			
First Amendment Seminar	LAW-LW 11824	2.0	A
Instructor: Burt Neuborne			
Fashion Law and Business	LAW-LW 12131	3.0	A
Instructor: Douglas Arthur Hand, Jr.			
Ethics in Government: Investigation and Enforcement	LAW-LW 12211	2.0	B+
Instructor: Ellen N Biben Linda Lacewell			
Constitutional Interpretation Seminar	LAW-LW 12253	2.0	A
Instructor: Adam M Samaha			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	70.0	70.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	5.0	A
Instructor: Marcel Kahan			
Federal Courts and the Federal System	LAW-LW 11722	4.0	A
Instructor: Helen Hershkoff			
Advanced Technology Law and Policy Clinic	LAW-LW 12429	3.0	A
Instructor: Brett Kaufman Jason Michael Schultz			
Advanced Technology Law and Policy Clinic Seminar	LAW-LW 12430	2.0	A-
Instructor: Brett Kaufman Jason Michael Schultz			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	84.0	84.0

Staff Editor - Annual Survey of American Law 2019-2020
Managing Editor - Annual Survey of American Law 2020-2021
Ann Petluck Poses Memorial Prize

Unofficial

Name:	**David E Wechsler**
Print Date:	**07/02/2021**
Student ID:	**N11255623**
Institution ID:	**002785**
Page:	**2 of 2**

End of School of Law Record

Unofficial

David Wechsler
Cornell University
Cumulative GPA: 3.94

Fall 2013

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro to Psychology		A	3	
Writing Seminar: Greek Mythology		A	3	
Intro to Policy Analysis		A+	4	
Entrepreneurship Speaker Series		A-	1	
Intro to Microeconomics		A	3	

Dean's List

Spring 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Empirical Research		A	3	
Writing Seminar: True Stories		A-	3	
Population and Public Policy		B+	3	
Intermediate Microeconomics		A-	4	

Fall 2014

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Teaching Apprenticeship		A+	3	
Statistics for PAM Majors		A	4	
Intro to American Government and Politics		A	4	
Economics of the Public Sector		A	4	
Introduction to Sociology		A-	3	

Dean's List

Spring 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Intro to Environmental Psychology		CR	3	
Corporations, Shareholders, and Public Policy		A	3	
Cost-Benefit Analysis		B+	4	
Multiple Regression Analysis		A	4	
Empirical Research		A	3	

Dean's List

Fall 2015

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS

Behavioral Public Policy		B+	3	
Empirical Research		A	3	
Financial Accounting Principles		A+	3	
Neighborhoods, Housing, and Urban Policy		A	3	
Introduction to Oceanography		A+	3	

Dean's List

Spring 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Czech Language		A-		
European Integration: How and Why		A-		
Ideas Behind Politics: Communism, Post-Communism, and Civil Society in Czech Republic				
Comprehending the Holocaust		A-		
Prague as a Living History		A		

This semester was at the Charles University in Prague as part of the Cornell Abroad program. The grades from this semester are not included in my Cornell cumulative GPA, per Cornell rules.

Fall 2016

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Law of Internet and E-Commerce		A	3	
Robot Ethics		A-	3	
Empirical Research		A	3	
Regulating Financial Institutions		A+	3	
Racial/Ethnic Identity Development		A	3	
Intro to Bio: Ecology and the Environment		A-	3	

Dean's List

Spring 2017

COURSE	INSTRUCTOR	GRADE	CREDIT UNITS	COMMENTS
Empirical Research		A	3	
Mathematics and Politics		A-	3	
Economics of Risky Health Behaviors		A+	4	
Evolving Families and Challenges to Public Policy		A	3	
Adolescence and Youth Development		A	3	

Dean's List

United States Court of International Trade
One Federal Plaza
New York, NY 10278

CHAMBERS OF
Gary S. Katzmann
JUDGE

Dear Judge,

I write on behalf of David Wechsler, who has applied to your Chambers for a law clerk position. David worked for me as an intern in the summer of 2019. I am pleased to support his application with great enthusiasm and without reservation. Indeed, I have encouraged him to seek a clerkship. He will be an outstanding law clerk.

I write with the perspective of some 16 years on the bench, serving twelve years as an Associate Justice on the Massachusetts Appeals Court and, now nearly four years as a Judge on the United States Court of International Trade. David graduated from Cornell University in 2017, with a B.A. in Policy Analysis and Management (and a distinguished 3.94 GPA). Prior to law school, he worked for more than one year in the Investment Banking Division of Goldman, Sachs and Company, managing due diligence as an advisor to clients in complex sales. In 2018, David entered the New York University School of Law.

In the summer of 2019, it was my good fortune that David worked for me as a judicial intern. That his product was outstanding is all the more impressive because he came to Chambers with having just completed his first year of law school. I assigned him a very challenging international trade case, requiring navigation of a complex administrative record, analyzing

numerous briefs, and mastering a myriad of difficult issues of substantive law, jurisdiction and procedure. Extraordinarily conscientious, David was totally thorough in his research and writing – indeed, going above and beyond. His college and work experience no doubt contributed to his comfort with detail and complex records and arguments. He showed tremendous capacity to parse complicated questions. He did an excellent job drafting questions that were sent to the attorneys in advance of oral argument. He also wrote a comprehensive bench memorandum that set out the questions carefully and in a balanced way addressed the positions of the litigants. David writes clearly and concisely. His memorandum was very useful to me as I considered how the case should be adjudicated. I truly valued our discussions.

Wonderfully efficient, David is a self-starter who has the quiet confidence to ask questions. He embraced suggestions and welcomes feedback. He will turn around a draft without delay. I was so impressed with David's work that I asked him to review drafts in other cases not his own. Earnest and humble, an engaging conversationalist, collegial and a true team player, David quickly became a valued member of Chambers. We were all sorry to see him leave when the summer ended.

Quite apart from his academic excellence in law school, David has taken on many activities that will only enhance his work as a law clerk. He has been a research assistant for a professor and has been named Managing Editor of Solicitations for the Annual Survey of American Law. I have been impressed by David's hope that he can apply his legal training for the betterment of the community. That is more than an aspiration, as demonstrated by his involvement as an advocate for the Suspension Representation Project on behalf of students in New York City public schools, and by his service during the coming year as a Student Legal Fellow for the NYU Policing Project.

It does not take long in conversation with David to understand that he has wide-ranging interests and curiosity. He is also well-rounded– not simply a sports fan, he is in fact a high school golf champion and participant in NYU's Deans' Cup Basketball Team. His enthusiasm lifts the spirits of all around him.

I am confident that David will be a leader in the years ahead in the best and broadest traditions of the legal profession. I think that his will be an outstanding career. I am pleased to recommend David Wechsler for a judicial clerkship with great enthusiasm and without reservation. I am happy to chat further. Please do not hesitate to contact me at (212) 264-1757.

Very truly yours,

Gary S. Katzmann

Judge

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

David Wechsler is applying for a clerkship in your chambers, and I write to recommend him enthusiastically and without reservation. David is a standout legal thinker with an impressive range of skills, and he is exceptionally well-prepared to be a superb law clerk. Nearly no other applicant enjoys the same collection of analytical precision, poise, and ability to work cooperatively in a team. David will be an unswervingly dedicated and able law clerk. I respectfully recommend that you interview and hire him before someone else does.

David was a student of mine in two large classes plus a seminar. He was terrific in each setting, and got even better each year. In my course for first-year students, Legislation and the Regulatory State, we examine technical doctrine as well as systemic legal questions. We study how courts grapple with statutory language, legislative history, canons of construction, agency regulations, and constitutional claims within particular case settings—yet we also explore how various legal institutions interact with each other and the rest of society. Only exceptionally adept students, such as David, can achieve thorough understandings of both the technical legal elements and the system-wide facets of the course. David was remarkably comfortable with the issues from the start. He was an unerringly prepared and wonderfully reliable participant throughout the semester. All of the above observations hold for his work in my Constitutional Law course during the following autumn. The complexity level in that course is higher still, given the ground that we cover. We study not only constitutional structure and interpretive methods, but also a mix of rights claims. David responded with hard work, a constructive attitude, and remarkable thoughtfulness. His ability to communicate sharp ideas in a welcoming manner was much appreciated.

In our seminar on Constitutional Interpretation during the present academic year, I was able to spend more time with David's ideas about law. The seminar is capped at twenty students and is divided into two parts: foundational ideas about constitutional interpretation, then cutting-edge scholarship on a range of narrower topics. The first part includes short student writings on classic works of scholarship as source material for classroom discussions; the second part involves live discussions with guest authors. David excelled in both parts. His ideas were sophisticated and incisive, and he repeatedly volunteered probing questions for our guest scholars. In his final paper, David considered the developing theory and practice of originalism over the last several decades, and the sometimes surprising connections to progressive or liberal causes during recent years. His writing demonstrated broad knowledge and daring analytical effort, in exploring claims that our constitutional system has become preoccupied with "effective labeling" and has allowed the text to become a "springboard for fringe ideas." I valued greatly David's ability to refine his thinking over time, and to join together his ideas about law, interpretive methods, and broader forces in society beyond courtrooms. He received the top score in the seminar for his participation and writings combined.

As David's electronic record indicates, my experience with him is not exceptional. David has excelled in a range of law school courses and employment experiences. He will start his career as an attorney this coming autumn at one of the nation's leading law firms, he already has developed a special acuity with intellectual property, and he interned with both the ACLU and a judge who is a leading light on the Court of International Trade. Add to all of that David's experiences with banking, policing, and technology issues, he stands out for his dedication and breadth of commitment to law and its proper role in social life. He will take a clerkship as seriously as he has conducted his other pursuits, and he will stand out in that position as well.

Perhaps less obvious from the file is David's solid temperament and relaxed personality. Conscientious and responsive, diligent and quick, David looks for ways to improve everyone's performance. I saw this in the classroom with his fellow students, and in his work as a lead organizer for a law journal symposium on gun regulation reform in which I will participate this spring. David is friendly, intelligent, and efficient—a welcome combination that is, perhaps, too difficult to find in young lawyers. He can juggle many tasks and topics while treating everybody around him with respect. Anyone would be thrilled to join David in the workplace.

As a former law clerk, as an attorney, and as a law professor, I understand the important duties and responsibilities associated with a clerkship. In my judgment, David Wechsler has all of the intelligence, training, skill, and dedication to be a truly excellent law clerk. I hope that you will be convinced of David's ability and commitment to serving your court, and I respectfully recommend that you interview and hire him.

Please contact me at the cellphone number below if I can be of further assistance.

Sincerely,
Adam M. Samaha
773 355 1016 (cell)

Adam Samaha - adam.samaha@nyu.edu - 212-998-2660

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

National Office
125 Broad Street, 18th floor
New York NY 10004
(212) 549-2500
aclu.org

September 3, 2020

RE: David Wechsler, NYU Law '21

Your Honor:

It is my pleasure to strongly recommend David Wechsler for a clerkship in your chambers. In my eight years as an attorney for the American Civil Liberties Union and my six years as a teacher in the NYU Technology Law & Policy Clinic, I have had the privilege of supervising an extraordinarily talented group of legal fellows, interns, and law students. Among them, David stands out, particularly for his creative legal thinking and outstanding legal writing abilities. Based on these qualities and my own past experiences as a judicial clerk for three different federal judges, I am confident that he has what it takes to be a wonderful law clerk.

During David's semester in the clinic under my supervision, he very much impressed me and my ACLU colleagues with a truly fantastic project. David and a partner were assigned to work with ACLU staff attorneys to prepare a full litigation memorandum concerning a potential mass aerial surveillance program over an American city. Specifically, David conducted factual and legal research and reconsidered precedential opinions addressing aerial surveillance in light of the Supreme Court's recent decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018). As fortune would have it, just weeks after David and his partner put the finishing touches on their memorandum—which addressed standing, state action under 42 U.S.C. § 1983, and the merits of Fourth and First Amendment claims, among other smaller issues—the City of Baltimore voted to implement a system just like the one their memorandum had contemplated. Because of the excellent work David and his partner did in putting together a comprehensive 50-page litigation plan, the ACLU was poised to file a lawsuit on an unusually fast timeline, and we thanked the students publicly for their efforts at the end of our initial brief.

David's assignment was a real challenge. It required creative approaches to distinguishing old, seemingly on-point precedent holding various types of aerial surveillance of public places unconstitutional. It required a deepread of (and many in-depth discussions with ACLU staff attorneys about) *Carpenter*, in addition to recent judicial and academic applications of it, and a projection of how its conclusions could support claims in our potential lawsuit. And it required an analytical approach that was broad enough to cover various potential aerial surveillance systems without

knowing which, if any, would ultimately be at issue. Despite these challenges, the work was an unqualified success.

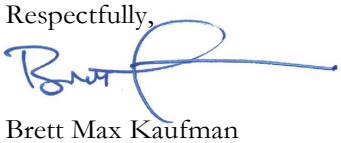
Moreover, David had very little familiarity with Fourth Amendment law (and ACLU positions on those issues) coming into the project, but was able to prepare himself for deep engagement in a relatively short time frame—no doubt, the ideal type of training for a future law clerk. He threw himself into academic scholarship and reams of old cases to first think through, outline, and discuss our potential arguments, then to draft fair-handed and honest analysis evaluating the strengths and weaknesses of our arguments. Not only did he get up to speed quickly, but he became fluently conversant in the issues, and participated in complex discussions with his partner, me, and my ACLU colleagues about the arguments we were considering, often challenging our assumptions or bringing to light complications or arguments we hadn't fully considered. Building off of this experience, he applied to become and was accepted as a year-long legal fellow in the NYU School of Law's Policing Project beginning next fall.

As a former appellate and district court clerk, I know how much a top-notch writing ability—clarity, organization, thoroughness, and readability—is prized in chambers. Having supervised David on a complex writing project, I am confident he is a smart bet to produce organized, thoughtful, high-quality work on a rigorous timeline as a clerk. His drafts were carefully argued and thought-through, not to mention cleanly presented and accurately cited (no doubt helped by his experience on the *Annual Survey of American Law*). In addition, I was especially struck by David's receptiveness to criticism, and his advanced ability to productively implement comments from me and others. Having to defend his work to subject-matter experts at the ACLU as a professional colleague, rather than simply a student, was an experience that was at once humbling and confidence-building for David. I know from our private supervisory conversations that he learned tremendously from these experiences, which made him extremely excited about becoming a lawyer, and about the unique and rewarding experience of being a law clerk.

Finally, our clinic does not focus only on output; rather, we consistently emphasize process. David was consistently engaged in our class discussions about lawyering, ethics, and the interaction of law and technology. In particular, he led a quite memorable and well-prepared session about various forms of algorithmic decision making (including a fair assessment of their benefits and perils), with concrete examples, excellent classroom prompts, and a knack for facilitating discussion. Little wonder, then, that David was one of the most active and helpful contributors to other students' workshops of their own clinical projects. He regularly demonstrated that he had deeply engaged with their work and had put in time to think about ways to improve it, all while remaining modest and even-keeled. These are the marks of an excellent colleague, and David was indeed respected and admired by his colleagues and his teachers.

Thank you for your consideration of David. I strongly recommend that you hire him as your clerk. If I can offer any further information or be of assistance in any way, please do not hesitate to contact me by email or phone.

Respectfully,



Brett Max Kaufman
Senior Staff Attorney, ACLU Center for Democracy
Adjunct, NYU Technology Law & Policy Clinic
125 Broad Street—18th Floor
New York, New York 10004
212.549.2603 | bkaufman@aclu.org

My writing sample is an excerpt from a 2019 bench memorandum sent to the Honorable Judge Gary S. Katzmann during my judicial internship at the U.S. Court of International Trade. In the memorandum I recommend the scope of an antidumping duty order for corrosion resistant steel excludes a consumer product that incorporates such steel in its manufacturing process. I changed the names of the parties and deleted several footnotes for brevity. Judge Gary S. Katzmann has approved the use of this bench memorandum as a writing sample.

NATURE OF THE CASE

This case involves issues of proper scope interpretation. Plaintiff Company X ("Company X") imports finished pool kits and pool walls (collectively, "pool products") from Canada to the United States that are ready to construct into above ground pools with no further modification by customers. Company X requested a scope inquiry clarifying that its pool products, partially made from corrosion resistant steel ("CORES"), did not fall within the antidumping duty order for CORES from Italy and the People's Republic of China ("China"). After reviewing Company X's request, the U.S. Department of Commerce ("Commerce") determined that Company X's pool products were mixed-media items -- products that are merely combinations of subject and non-subject merchandise -- and no published guidance existed to overcome the presumption that mixed-media items fall within the scope of Commerce's Final Order ("Order"). Thus, Company X's products were subject to the antidumping duty. Company X now challenges the scope ruling of Commerce, arguing that the plain language of the Order does not cover downstream items like their pool products and a mixed-media analysis does not apply. Thus, they should not be subject to the antidumping duty order.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516(a)(1)(B)(i): "[t]he court shall hold unlawful any determination, finding or conclusion [by Commerce] found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Substantial evidence includes "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting Consol. Edison Co. of New York v. NLRB, 305 U.S. 197, 229 (1938)). In undertaking this analysis, the

court grants "'significant deference to Commerce's interpretation of a scope order.'" Mid Continent Nail Corp. v. United States, 725 F.3d 1295, 1300 (Fed Cir. 2013) ("Mid Continent") (quoting Global Commodity Group LLC v. United States, 709 F.2d 1134, 1138 (Fed Cir. 2013)). But to support its findings, Commerce must also "explain the standards that it applied and demonstrate a rational connection between the facts on the record and the conclusions drawn." Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

BACKGROUND

A. Legal and Regulatory Framework of Scope Determinations Generally

"When participants in a domestic industry believe that competing foreign goods are being sold in the United States at less than their fair value, they may petition Commerce to impose antidumping duties on importers." Mid Continent, 725 F.3d at 1297–98 (citing 19 U.S.C. § 1673a(b)). If Commerce determines that "the subject merchandise is being, or is likely to be sold in the United States at less than its fair value," and the ITC determines a domestic industry is injured as a result, Commerce issues an antidumping duty order. See 19 U.S.C. § 1673d(a), (b). Once the order is issued, importers may ask for scope rulings, seeking to clarify the scope of the order as it relates to their particular product. See generally 19 C.F.R. § 351.225.

Commerce often must determine whether a product is included within the scope of an antidumping duty order because it necessarily writes scope language in general terms. See 19 C.F.R. § 351.225(a). Commerce's determinations concerning a particular product are made in accordance with its regulations. See 19 C.F.R. § 351.225. Although "Commerce is entitled to substantial deference with regard to its interpretation of its own antidumping duty orders," King Supply Co. v. United States, 674 F.3d 1343, 1348 (Fed Cir. 2012) (citing Tak Fat Trading Co. v. United States, 396 F.3d 1378, 1382 (Fed Cir. 2005)), "the question of whether the unambiguous

terms of a scope control the inquiry, or whether some ambiguity exists, is a question of law" that the court reviews de novo. Meridian Prods., LLC v. United States, 851 F.3d 1375, 1382 (Fed Cir. 2017) (citing Alleghany Bradford Corp. v. United States, 28 CIT __, __, 342 F. Supp. 2d 1172, 1183 (2004)). "The question of whether a product meets the unambiguous scope terms presents a question of fact reviewed for substantial evidence." Novosteel SA v. United States, 284 F.3d 1261, 1269 (Fed Cir. 2002)).

The framework for determining the scope of an order is set forth in the Department's regulations. See 19 C.F.R. § 351.225(k). The court has established that Commerce should engage in a three-step analysis to determine whether merchandise falls within the scope of an order, providing:

> First, Commerce examines the language of the order at issue. If the terms of the order are dispositive, then the order governs . . . Second, if the terms of the order are not dispositive, Commerce must then determine whether it can make a determination based upon the factors listed in 19 C.F.R. § 351.225(k)(1). . . . These factors are "the descriptions of the merchandise contained in the petition, the initial investigation, and the determinations [of Commerce] (including prior scope determinations) and the Commission." 19 C.F.R. § 351.225(k)(1). . . . If a Section 351.225(k)(1) analysis is not dispositive, Commerce then applies the five "Diversified Products" criteria as specified in 19 C.F.R. § 351.225(k)(2).

Polites v. United States, 35 CIT __, __, 755 F. Supp. 2d 1352, 1354–55 (2011).

The Federal Circuit has held that for the plain meaning in a scope determination to be dispositive, it must be "supported by substantial evidence, considering the § 351.225(k)(1) criteria, in view of the record as a whole -- including evidence that [certain merchandise] was excluded from Commerce's and the Commission's investigations." A.L. Patterson, Inc. v. United States, 585 Fed. Appx. 778, 784 (Fed Cir. 2014) ("Patterson"). The Federal Circuit continued, "[e]ven when merchandise is facially covered by the literal language of the order, it may still be outside the scope if the order can reasonably be interpreted so as to exclude it." Id.

B. Legal Framework for Scope Rulings Involving Mixed-Media Items

Mixed-media items are items in which otherwise subject merchandise is packaged and imported together with non-subject merchandise. Whether a mixed-media item falls within the scope of an order is subject to a specialized analysis distinct from the traditional scope analysis discussed above. While the mixed-media analysis overlaps with a traditional scope analysis, it is used as the scope test only when Commerce must determine whether potentially subject-merchandise included within a mixed-media item is subject to an order. However, before Commerce engages in a "mixed-media" analysis, it must make a threshold inquiry: whether the item as imported in its assembled condition qualifies as a mixed-media item in the first instance. See Maclean Power, L.L.C. v. United States, 43 CIT __, __, 359 F. Supp. 3d 1367. The Federal Circuit defines "mixed-media" in the context of scope rulings as a set of products that are "merely a combination of subject and non-subject merchandise, and not a unique product." Walgreen Co. v. United States, 620 F.3d 1350 (Fed Cir. 2010). Helpful in this initial phase is evaluating whether the subject merchandise can be identified and utilized separately from the mixed-media item. Id. If this initial inquiry is satisfied, Commerce then engages in a two-step framework the Federal Circuit provided in Mid Continent governing Commerce's scope analysis of mixed-media items.[1]

C. Factual and Procedural History of the CORES Order

[1] First, Commerce determines whether the potentially subject merchandise included within the mixed-media item is within the literal terms of the antidumping duty order. Mid Continent, 725 F.3d at 1302. In the second step, if neither the text of the order nor its history "indicate [ ] that subject merchandise should be treated differently on the basis of its inclusion within a mixed-media item," then "a presumption arises that the included merchandise is subject to the order." Id. at 1304. The presumption that the mixed-media item is within the scope of the order applies unless Commerce identifies "published guidance issued prior to the date of the original antidumping order [ ] that provides a basis for interpreting the order contrary to its literal language." Id. at 1304

United States Steel Corporation, Nucor Corporation, Steel Dynamics Inc., California Steel Industries, ArcelorMittal USA LLC, and AK Steel Corporation ("Petitioners") filed antidumping and countervailing duty petitions on June 3, 2015 with Commerce and the ITC requesting the initiation of investigations with respect to imports of certain CORES products from China, the Republic of Korea, India, Italy, and Taiwan ("Petition"). See Certain Corrosion-Resistant Steel Products from China, India, Italy, Korea, and Taiwan: Determinations, 81 Fed. Reg. 47,177 (July 20, 2016) ("ITC Investigation"). On June 30, 2015, Commerce initiated the antidumping and countervailing duty investigations on CORES products from these areas, and on June 2, 2016, Commerce published determinations. Id. On July 15, 2016, the ITC issued a notice of its affirmative finding that an industry in the United States is materially injured by reason of imports of certain CORES products from China, India, Italy, Korea, and Taiwan. Id. On July 25, 2016, Commerce issued antidumping and countervailing duty orders on these products. Order, 81 Fed. Reg. at 48,391, 48,389, App. I. The scope of the Order covers, in pertinent part, "steel products, either clad, plated, or coated with corrosion resistant metals." Id.

D. Factual and Procedural History of this Case

The products under consideration in Company X's scope ruling request are finished pool products made of steel and non-steel components. While subject CORES from China and Italy is used to produce part of Company X's pool products, the steel undergoes further processing and manufacturing in Canada. Pl.'s Br. at 2. Company X explains that, as a result of its Canadian manufacturing, the steel satisfies the requisite tariff shift from subheading 7210.70 (flat-rolled products of steel) to 9506.99.550 (swimming pools and parts thereof) and thus is a Canadian origin product for customs purposes. Id. Company X's pools are imported as a finished goods kit. Id. at 3. When imported (in multiple boxes due to size constraints), the pools have all the parts

necessary to be assembled into an above ground pool. Pl.'s Br. at 2; Def.'s Br. at 5. Each pool is packaged together and exported on the same U.S. Customs and Border Protection ("CBP") form 7501. Id.

***

On November 28, 2017, Company X filed a scope ruling request with Commerce to determine whether its finished pool products are subject to the Order. On May 10, 2018, Commerce issued a scope ruling to Company X stating that its pool products fell within the scope of the Order. Commerce reasoned that its practice for evaluating products in which potentially subject merchandise is included in a larger product is governed by the Federal Circuit's decision in Mid Continent and that the inclusion of CORES in Company X's pools did not bring it outside the scope of the Order. See Final Scope Ruling. Plaintiff Company X filed a complaint against the United States ("the Government") challenging Commerce's final scope determination on July 16, 2018.

DISCUSSION

I. Company X's Pool Products Do Not Fit Within the Plain Language of the Scope of the Order

a. The Scope of the Order Does Not Cover Downstream Products

Company X argues that the Department's Final Scope Ruling failed to consider the plain language of the Order in applying the antidumping duty for CORES from China and Italy on its finished pools and finished pool walls because the pool products were neither specifically included nor reasonably interpreted to be included under the Order, as required by Duferco Steel, Inc. v. United States ("Scope orders may be interpreted as including subject merchandise only if they

contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it."). 296 F.3d 1087, 1089 (Fed. Cir. 2002)). Pl.'s Br. at 10. Thus, Commerce's determination was not based upon substantial evidence or otherwise in accordance with law. Id.

Company X draws a parallel to A.L. Patterson, Inc. v. United States, 585 Fed. Appx. 779 (Fed. Cir. 2014), arguing that fully finished end-products, like its pools and pool walls, were never intended to be included by the Petitioners as part of the scope of the investigation. Pl.'s Br. at 16. In Patterson, the Federal Circuit considered whether the scope of an order includes merchandise facially covered by the terms of the antidumping order, but which had not been a part of the underlying investigation. The court ultimately rejected Commerce's determination that steel *coil* rods imported from China fell within the scope of an antidumping order on steel rods because coil rods were a distinct product in a different domestic industry than the steel *threaded* rods the ITC investigated. Id. Instead, evidence showed that Patterson's coil rods were physically distinguishable from the steel threaded rods that were the focus of the original petition, the petition neither mentioned coil rods nor any of the uses of coil rods, no domestic producers of coil rods were included in the description of the domestic threaded rod industry, and there was no evidence that at the time of the petition coil rods were interchangeable with threaded rods or intended to be subject to the duties. Id.

Company X points out that like in Patterson, there is nothing in the record of the original investigation that demonstrates that fully finished end-products were intended to be included by Petitioners as part of the scope of the investigation. Pl.'s Br. at 16. This argument is persuasive when examining the language of the Order. While the Order thoroughly details the chemical content of the subject merchandise and intended uses, nowhere does it state that the scope covers

finished products such as cars, appliances or pools. In Patterson, review of the record as a whole included evidence that coil rods were excluded from the ITC and Commerce's investigations. Patterson, 585 Fed Appx. at 784. Because no evidence showed that when the petition was filed it intended to include or mention coil rods, the record did not support a finding that they were covered by the Order. Similarly, Company X argues that because the record here evinces no evidence of consideration of downstream products within the Petition filed with Commerce or the ITC investigation, they are reasonably interpreted to be excluded from the scope of the Order. Pl.'s Br. at 17. Company X's argument is buttressed by the producers of CORES filing the Petition, not domestic producers of above ground pools. As Company X highlights, the entities affected by the purported dumping are those who produce the raw input of CORES, not finished products. Pl.'s Reply at 11–12. Furthermore, the ITC questionnaires for the preliminary phase of the original investigation only collected pricing data for mill sheet products, not downstream items. See ITC Investigation. Thus, Commerce's determination that Company X's product fell within the scope of the Order is not supported by substantial evidence.

The Government tries to distinguish Patterson by pointing out that in this case, the CORES used in Company X's finished pool products is specifically covered by the Order, whereas in Patterson no part of the coil rod was under the Order. The Government contends that because the CORES components fall within the plain language of the scope of the Order, considering other sources in determining the plain meaning of the Order is inconsistent with Mid Continent's guidance that Commerce should consider the (k)(1) sources as part of the first step of a mixed-media analysis only if it identifies an ambiguity in an Order's plain language. Def.'s Br. at 17. Here, as the Government argues, Company X's pools fall directly within the language of the Order, because Company X's pool walls undergo the "further processing" that the Order encompasses.

Def.'s Br. at 18 (citing the Order: "Subject merchandise also includes corrosion-resistant steel that has been further processed in a third country, including but not limited to annealing, tempering, painting, varnishing, trimming, cutting, punching and/ or slitting or any other processing that would not otherwise remove the merchandise from the scope of the Order"). But the Government does not explain why the pool walls were merely processed as opposed to substantially transformed, as Company X argues. Instead, they simply state that "the further processing Company X's CORE[S] components undergo is not to such an extent that the CORE[S] becomes physically distinguishable as a separate product or is transformed into a different product, like the steel threaded rods in Patterson." Def.'s Br. at 18. However, in Patterson the coil rods were not considered separate from the scope of the Order because of their physical attributes, but instead because it was a distinct product occupying a different market from the thread rods. So too here are the pool walls a distinct product. Thus, the Government's argument that the "processing" Company X's CORES undergoes keeps it within the scope of the Order is unavailing.

Furthermore, Company X demonstrates that downstream products were never considered as part of the ITC's injury analysis despite 19 U.S.C. § 1673 requiring an injury determination prior to the imposition of antidumping duties. Instead, the ITC's injury investigations were focused on pricing data for CORES and other raw inputs, not fully finished products like Company X's pools and pool walls. See Company X's Initial Scope Request, P.R. 1, at 9; P.R. 4, at Att. 7. Nowhere in the Government's brief does it address the critical requirements of an injury determination. Company X persuasively argues that allowing Commerce to include downstream products would "frustrate the purpose of the antidumping laws because it would allow Commerce to assess antidumping duties on products intentionally omitted from the ITC's injury investigation." Pl.'s Reply at 15 (quoting Wheatland Tube Co. v. United States, 161 F.3d 1365, 1371 (Fed. Cir. 1998)).

While one could imagine an argument that domestic producers of CORES are injured by the use of CORES from China and Italy as an input for Company X's pools, the Government does not consider this possibility, nor did Commerce address it. Instead, its briefing to this court is devoid of any evidence on the record of injury to a domestic industry or sales at less than fair value. Thus, Commerce's decision is not in accordance with the law.

Finally, Company X compares the minimal manufacturing process required for CORES to the elaborate process its pools necessarily go through as evidence that the pools are not subject to the Order. Pl.'s Br. at 17. While such a difference is not dispositive, it is further evidence that the Order did not consider fully finished downstream products within its scope. Furthermore, as with the injury determination, the Government fails to address these differences. See generally Def.'s Br.

The Government further contends that the Petition and ITC Final Determination specifically discussed the use of CORES in many applications, including construction applications similar to Company X's use (CORES is used "in the manufacture of automobile bodies, in appliances, and in commercial and residential buildings and other construction applications."). Final Scope Ruling. Thus, the Government argues Commerce reasonably determined that the (k)(1) sources indicate that it was contemplated during the investigations that CORES would continue to be subject merchandise if included within larger products like Company X's finished pool products. Def.'s Br. at 15–16. However, the Government relies on no authority for the proposition that discussing end-uses of products includes those end-uses within the scope of the order. Without such authority, the passing references to the type of finished products produced from subject CORES cannot be interpreted as proof that the parties contemplated that finished products would be subject to the scope of the Order. Furthermore, accepting such an argument may lead to absurd

and perverse outcomes. If the court were to adopt Commerce's interpretation of the Order to include all downstream products, then an array of finished consumer products which includes CORES inputs would be covered by the Order. Such products covered would include automobile bodies, automobiles and trucks, appliances, industrial equipment, and more. Surely this result is not what Commerce intended when drafting the Order.

***

d. The Government Does Not Explain Why Company X's Products Are Mixed-Media Products, Subject to the Mid Continent Analysis

The Government's main argument relies on Mid Continent, 725 F.3d 1295 and states that as a mixed-media item, Company X's pools fall under the scope of the Order based on the two-step framework laid out by the Federal Circuit. Def.'s Br. at 21–22. In Mid Continent, the court considered whether subject merchandise (nails) packaged and imported with non-subject merchandise (assorted household tools) as a part of a mixed-media tool kit was subject to an antidumping order that in terms covered the nails. The court held that the nails remained within the scope of the order yet noted "Commerce has historically treated the answer to this question as depending on whether the mixed-media item is treated as a single, unitary item, or a mere aggregation of separate items." Id. at 1298. In this case, Commerce did not take the initial step of proving that the pool walls are not unique products. Mixed-media items, as defined by Walgreen Co. v. United States, are a set of products that are "merely a combination of subject and non-subject merchandise, and not a unique product." 620 F.3d 1350, 1355 (Fed. Cir) (emphasis added). Walgreen dealt with whether the packaging of tissue paper in gift bag sets took the tissue paper out of the scope of the Final Order for cut-to-length sheets of tissue paper. Id. The Walgreen court emphasized the tissue paper retained its individual character despite being packaged with the rest

of the gift bag sets in holding that the gift sets were not unique products and the tissue paper was subject to the order. Id. at 1357. Such an analysis makes intuitive sense. When a product subject to an antidumping duty order retains its individual character, the underlying purpose behind the order is not defeated. Here, however, the Government never determines Company X's products are "merely a combination of subject and non-subject merchandise" before applying Mid Continent.

Company X brings to our attention a case this court recently decided -- Maclean Power -- which dealt with a similar issue. 43 CIT __, __, 359 F. Supp. 3d 1367 ("Maclean"). In Maclean, this court determined that helical spring lock washers ("HSLW") incorporated within pole line hardware fell outside the scope of the HSLW order. Id. In so doing, this court warned that "Commerce put the cart before the horse" and held that "[b]efore applying the various guidance in Mid Continent, Commerce was first required to address the pole line hardware in its assembled condition." Maclean Power 43 CIT __, __, 359 F. Supp. 3d at 1372, N.3. The court distinguished the HSLW from the nails in Mid Continent by noting:

> "[A] tool box retains its essential character when it excludes nails, as do the nails by themselves. But the HSLWs at issue here are not alleged to be imported for use in anything other than the pole line hardware. The pole line hardware cannot perform their intended functions without the HSLWs, or the remainder of their components functioning together."

Id. at 1373.

Thus, just as the HSLW lost its essential function when incorporated into the pole line hardware, so too does the subject CORES when incorporated into Company X's pool products. Even if Commerce's Mid Continent analysis was sufficient to show that Company X's product fell within the order, its determination was still not in accordance with law because it did not address whether its product was a mixed-media item or unique product in the first place. Company X also

demonstrates that Commerce's past precedent includes finding that subject merchandise incorporated into a larger product constitutes non-subject merchandise, see e.g., Final Scope Determination Regarding Refrigerant Distributor Assemblies Manufactured and Imported by Danfoss LLC (Nov. 10, 2016) (holding that the order covers pipe and tube, but does not extend to further manufactured composite goods consisting of copper pipe and tube combined with other non-copper pipe and tube elements). Such a ruling provides further evidence that downstream products, distinct from mixed-media items, do not fall within the Order.

In its brief, the Government does not discuss the "unique product" distinction anywhere. By simply jumping into the mixed-media analysis, the Government fails to explain why Company X's pools should be considered a mixed-media item or grapple with the precedent laid down in Walgreen or Maclean. In this case, the record evidence shows that Company X's pools and pool walls are single unitary items, not mixed-media goods consisting of independently packaged items sold together as a set. Thus, by failing to consider the record as a whole before applying Mid Continent, Commerce's Final Scope Ruling was unsupported by substantial evidence in the underlying record.

Applicant Details

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Applicant Education

BA/BS From	**Fairleigh Dickinson University**
Date of BA/BS	**September 2019**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 18, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Columbia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Stone Moot Court Foundation Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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March 1, 2022

The Honorable Lewis Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a third-year student at Columbia Law School, and I have served as an Essays Editor on the *Law Review*. I write to apply for a clerkship in your chambers beginning in 2024 or in any year thereafter.

I hope to pursue a career in litigation. By serving as a clerk, I aim to gain both grounding in the practical realities of the federal court system and a deep knowledge of a wide variety of substantive legal issues. At Columbia, I have honed my research, writing, and collaborative skills by working as a research assistant to two professors, a teaching assistant for Contracts and Corporations, as a mediator at the Columbia Mediation Clinic, and as an extern both in The Honorable Paul A. Engelmayer's chambers in SDNY and at NYLAG. My note, *Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic*, has been published in the October 2021 issue of the *Columbia Law Review*. As noted on my transcript, I have received a Best-in-Class award in Evidence during the Fall 2020 semester. I believe that my work experience as well as my research and writing skills have prepared me well for a clerkship in your chambers.

Enclosed please find my resume, law school transcript, undergraduate transcript, and a writing sample. Also enclosed are letters of recommendation from Professors Eric Talley (et2520@columbia.edu, (212) 854-0437), Paul Schechtman (paul.shechtman@bracewell.com, (917) 796-5123) and Avery Katz (ak472@columbia.edu, (212) 854-0066). Additionally, The Honorable Paul A. Engelmayer, for whom I worked as an extern, has offered to serve as a reference and can be contacted at (212) 805-0268. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Avi Weiss

AVI WEISS

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EDUCATION

Columbia Law School, New York, NY
Juris Doctor expected May 2022

Honors: Harlan Fiske Stone Scholar (2019–2020)
James Kent Scholar (2020–2021)
Best in Class, Evidence

Note: *Binding the Bound: State Executive Emergency Powers and Democratic Legitimacy in the Pandemic*, 121 Colum. L. Rev. 1853 (2021)

Activities: *Columbia Law Review*, Essays Editor
Mediation Clinic
Teaching Assistant to Professor Avery Katz (Contracts, Fall 2020)
Teaching Assistant to Professor Eric Talley (Corporations, Spring 2022)
Research Assistant to Professor Eric Talley (Summer 2020)
Research Assistant to Professor Zohar Goshen (2021–2022)
Society for the Advancement of Law and Talmud, President
First Generation Professionals

Fairleigh Dickinson University, Teaneck, NJ
Bachelor of Arts, with a specialization in Business, received September 2019

Major: Individualized Studies, with specialization in Business

Honors: Dean's List (All Semesters)

EXPERIENCE

NYLAG Veterans Practice, New York, NY
Extern Fall 2021
Assisted veterans with researching, drafting, and filing their service-connected disability claims and discharge upgrade cases.

Cravath Swaine & Moore, New York, NY
Summer Associate Summer 2021
Conducted legal research and drafted legal memoranda and briefs relating to merger and corporate governance litigation. Drafted tax provisions for mergers, stock offerings, and credit agreements.

Hon. Paul A. Engelmayer, U.S. District Court, S.D.N.Y., New York, NY
Judicial Extern Spring 2021
Conducted legal research. Drafted memoranda of law and judicial opinions in cases relating to civil procedure, contracts, securities, and criminal law. Cite checked opinions.

New York State Office of the Attorney General, New York, NY
Intern, Real Estate Finance Bureau July 2020 – August 2020
Reviewed real estate offering plans and amendments for compliance with the Martin Act, including condominiums, homeowner associations, cooperatives, and timeshares. Communicated with developers' counsel regarding deficiencies in filings. Researched trial issues for the Enforcement Division. Attended all Enforcement and Review Division meetings.

Law Offices of B. David Schreiber, Cedarhurst, NY
Legal Intern October 2018 – August 2019
Served as sole intern at very busy boutique law firm focusing on real estate law. Assisted with all transactions including managing client communications, writing and editing documents, attending closings, and drafting the closing statements.

INTERESTS: Hiking in CO, AZ, UT and the Canadian Rockies; reading history, economics, and science fiction

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CLS TRANSCRIPT (Unofficial)

02/18/2022 11:15:38

Program: Juris Doctor

Abraham Weiss

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	
L9239-1	Mediation Clinic	Carter, Alexandra	4.0	
L9239-2	Mediation Clinic - Fieldwork	Carter, Alexandra	3.0	
L9522-1	Reading Group: The Essential Meaning of the Rule of Law	Merrill, Thomas W.	1.0	
L6822-2	Teaching Fellows	Talley, Eric	4.0	

Total Registered Points: 16.0

Total Earned Points: 0.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6293-1	Antitrust and Trade Regulation	McCrary, Justin	3.0	B+
L6670-2	Columbia Law Review Editorial Board		1.0	CR
L6169-2	Legislation and Regulation	Kessler, Jeremy	4.0	A-
L6274-1	Professional Responsibility	Kent, Andrew	3.0	A
L6695-1	Supervised JD Experiential Study	Pauley, Rachel S.	2.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6536-1	Bankruptcy Law	Morrison, Edward R.	4.0	A
L6670-1	Columbia Law Review		0.0	CR
L6238-1	Criminal Adjudication	Shechtman, Paul	3.0	A
L6661-1	Ex. Federal Court Clerk - SDNY [Minor Writing Credit - Earned]	Radvany, Paul	1.0	CR
L6661-2	Ex. Federal Court Clerk - SDNY - Fieldwork	Radvany, Paul	3.0	CR

Total Registered Points: 11.0

Total Earned Points: 11.0

UNOFFICIAL

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6670-1	Columbia Law Review		0.0	CR
L6231-1	Corporations	Talley, Eric	4.0	A-
L6241-1	Evidence	Shechtman, Paul	3.0	A+
L6675-1	Major Writing Credit	Merrill, Thomas W.	0.0	CR
L6683-1	Supervised Research Paper	Merrill, Thomas W.	3.0	A
L6822-1	Teaching Fellows	Katz, Avery W.	4.0	CR

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6133-3	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	CR
L6108-3	Criminal Law	Liebman, James S.	3.0	CR
L6256-1	Federal Income Taxation	Raskolnikov, Alex	4.0	CR
L6679-1	Foundation Year Moot Court	Strauss, Ilene	0.0	CR
L6121-19	Legal Practice Workshop II	Askanase, Eric S.	1.0	CR
L6118-1	Torts	Blasi, Vincent	4.0	CR

Total Registered Points: 16.0

Total Earned Points: 16.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-4	Legal Methods II: Financial Methods for Lawyers	Talley, Eric	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-4	Civil Procedure	Huang, Bert	4.0	B+
L6105-5	Contracts	Katz, Avery W.	4.0	A
L6113-2	Legal Methods	Sovern, Michael I.	1.0	CR
L6115-19	Legal Practice Workshop I	Askanase, Eric S.; Neacsu, Dana	2.0	P
L6116-2	Property	Balganesh, Shyamkrishna	4.0	B+

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 86.0
Total Earned JD Program Points: 70.0

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Best In Class Awards

Semester	Course ID	Course Name
Fall 2020	L6241-1	Evidence

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	2L
2019-20	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0
Voluntary	8.0

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Fairleigh Dickinson University Unofficial Transcript Page 1 of 1

Abraham Weiss
58 Buttell Ave.
Lakewood NJ 08701

DATE: 09/19/19
Current Level...:
Current Major...:
Current Minor...:

Current Special.:

Id Number....: 1822675

Course	Title	Grd	R	Crs Att	Crs Cmpt	Grade Points

****
* BA - Bachelor of Arts Degree Awarded on 09/19 *
* Majors Minors Specializations *
* ---|---|--- *
* Individualized Studies Business *
****

Fairleigh Dickinson University Unofficial Transcript

Abraham Weiss
58 Buttell Ave.
Lakewood NJ 08701

DATE: 09/19/19
Current Level...:
Current Major...:
Current Minor...:

Current Special.:

Id Number....: 1822675

Course		Title	Grd	R	Crs Att	Crs Cmpt	Grade Points
		TALMUDICAL ACADEMY					
		Intro Talmud Survey C			0.00	3.00	0.0000
		Intro Talmud Intensive C			0.00	6.00	0.0000
		Intro Talmud Intensive B			0.00	6.00	0.0000
		Intro Talmud Intensive a			0.00	6.00	0.0000
UNIV	1001	Transitioning to Univer Life			0.00	1.00	0.0000
UNIV	1002	Prep for Professional Life			0.00	1.00	0.0000
		Beginning Talmud Survey			0.00	3.00	0.0000
		Introductory Ethics C			0.00	1.00	0.0000
		Beginning Codes A, B & C			0.00	6.00	0.0000
		Beginning Ethics A, B & C			0.00	3.00	0.0000
		Introductory Codes A, B & C			0.00	6.00	0.0000
		Beginn. Talm. Survey A, B & C			0.00	9.00	0.0000
		Beginn. Talm. Intens. A, B & C			0.00	18.00	0.0000
		Introductory Talmud Survey a			0.00	3.00	0.0000

Term 17/NF (G) Totals: 0.00 72.00 0.00 GPA = 0.00
UNOFFICIAL TRANSCRIPT Cumulative Totals: 0.00 72.00 0.00 GPA = 0.00

BUSI	3210	Career Management Seminar	A		3.00	3.00	12.0000
ECON	1121	Macroeconomics	A		3.00	3.00	12.0000
ENGL	1111	*Literature and Composition I			0.00	3.00	0.0000
MATH	1131	*College Mathematics I			0.00	3.00	0.0000
BIOL	1001	*Principles of Modern Biology			0.00	3.00	0.0000
		*STRAIGHTERLINE					

Term 18/NS (G) Totals: 6.00 15.00 24.00 GPA = 4.00
UNOFFICIAL TRANSCRIPT Cumulative Totals: 6.00 87.00 24.00 GPA = 4.00

BUSI	2430	Seminar in Busi/ 21st Century	A		3.00	3.00	12.0000
BUSI	2460	Corporate Governance	A		3.00	3.00	12.0000
MGMT	3111	Management and Labor	A		3.00	3.00	12.0000
BIOL	2051	*Biology of Nutrition			0.00	3.00	0.0000
MIS	1135	*Introduction to Computers			0.00	3.00	0.0000
		*STRAIGHTERLINE					

Term 18/N1 (G) Totals: 9.00 15.00 36.00 GPA = 4.00

Fairleigh Dickinson University Unofficial Transcript Page 2 of 2

Abraham Weiss
58 Buttell Ave.
Lakewood NJ 08701

DATE: 09/19/19
Current Level...:
Current Major...:
Current Minor...:

Current Special.:

Id Number....: 1822675

Course		Title	Grd	R	Crs Att	Crs Cmpt	Grade Points
UNOFFICIAL TRANSCRIPT Cumulative Totals:					15.00	102.00	60.00 GPA = 4.00
ENGL	2209	Business Communications	A		3.00	3.00	12.0000
ECON	1122	Microeconomics	A		3.00	3.00	12.0000
Term 18/NF (G) Totals:					6.00	6.00	24.00 GPA = 4.00
UNOFFICIAL TRANSCRIPT Cumulative Totals:					21.00	108.00	84.00 GPA = 4.00
Academic Standing for Term 18/NF: HONORS LIST - 02/20/19							
UNIV	2002	Global Issues	A		3.00	3.00	12.0000
UNIV	2001	Cross Cultural Perspectives	A		3.00	3.00	12.0000
ENGL	1112	*Literature & Composition II			0.00	3.00	0.0000
		*STRAIGHTERLINE					
Term 19/NS (G) Totals:					6.00	9.00	24.00 GPA = 4.00
UNOFFICIAL TRANSCRIPT Cumulative Totals:					27.00	117.00	108.00 GPA = 4.00
SPCH	1155	Public Speaking	A		3.00	3.00	12.0000
Term 19/N1 (G) Totals:					3.00	3.00	12.00 GPA = 4.00
UNOFFICIAL TRANSCRIPT Cumulative Totals:					30.00	120.00	120.00 GPA = 4.00

TOTALS: CRED.ATT = 30.00 CRED.CPT = 120.00 GRADE.PTS = 120.00 GPA = 4.00

****
* BA - Bachelor of Arts Degree Awarded on 09/19 *
* Majors Minors Specializations *
* ---------- ---------- ---------- *
* Individualized Studies Business *
****

Fairleigh Dickinson University Unofficial Transcript

Abraham Weiss
58 Buttell Ave.
Lakewood NJ 08701

DATE: 09/19/19
Current Level...:
Current Major...:
Current Minor...:

Current Special.:

Id Number....: 1822675

Course	Title	Grd	R	Crs Att	Crs Cmpt	Grade Points

BA - Bachelor of Arts Degree Awarded on 09/19

Majors	Minors	Specializations
Individualized Studies		Business

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I write with tremendous enthusiasm to recommend Mr. Abraham (Avi) Weiss, a rising third-year student at Columbia Law School, in connection with his application for a judicial clerkship in your chambers. I have known Mr. Weiss since the summer of 2020, across multiple capacities. He has excelled in each, combining a curious mind, a respectful temperament, and a fertile intellect. I have no doubt that he has the makings of a superb clerk and (after that) an accomplished lawyer. He is a student leader and a trustworthy sounding board, and he has earned my strong and unreserved recommendation.

I first met Avi in the late spring of 2020, when I was recruiting research assistants for a significant empirical project in corporate governance. Although he had not been a student of mine, Avi came highly recommended by one of my colleagues at Columbia (Avery Katz). This project was a challenging one, and it required students to read, understand, and then categorize thousands of corporate governance documents in an effort to audit (and correct) a major corporate governance database in the United States surrounding public companies. Avi was one of over two dozen research assistants working on the project, some of whom were law school graduates. Within weeks, he quickly emerged as the most careful, comprehensive, and responsive of the entire group. His work was invariably on time, unassailably accurate, and a model for all of us. I quickly elevated him through the ranks to become a senior research assistant for the project, and it is largely through his efforts that we were able to complete (and publish in a high-profile journal) our analysis this past fall. He is easily one of the most reliable, careful, and skilled research assistants I have had the pleasure of employing in my entire 25-year career. These traits carry over well to standard expectations for judicial clerks – should you hire him, I have no doubt that they will cause him to shine in that environment as well.

Having been amply rewarded by Avi's service as a research assistant, I subsequently was pleased to see that he was enrolled in my corporations class in the fall of 2020. Because of the pandemic, this was a challenging course to teach, and it required interacting in a hybrid format involving both remote and live students. Avi was excellent in the class, both when cold-called and when volunteering information and insights. His contributions were consistently and notably (but not surprisingly) some of the best in the class. His performance in the course was excellent; his final grade for the class was an A-, and it is important for me to add that this unadorned grade obscures the fact that Avi's exam was at the very top of the A- group. Excruciatingly (for him and me), he missed out on an A by literally hundredths of a (normalized) point. If our mandatory curve did not require me to draw a somewhat artificial cutoff right at his score, his exam in particular would have been deserving of the top categorical score of A. (And I treat it as such.)

Many of Avi's considerable intellectual traits and attention to detail have won both praise and notice by his classmates as well. He has become one of the editorial leaders of the Columbia Law Review, and I hear from his colleagues that he has quickly become one of the most dependable and insightful members of the editorial board.

All these (considerable) talents aside, Avi is a delight to work with. He is respectful, witty, thoughtful, and generous. He cares about his profession and the world, and he seems to have cultivated a set of strong and loyal friendships amongst his classmates (not to mention his professors). I expect I will work to stay in touch with him long after he graduates.

For the foregoing reasons, Mr. Weiss has won my strong recommendation, with no reservations whatsoever.

If you have any questions about this exceptional candidate, please do not hesitate to contact me at the email address and number above.

Sincerely,

Eric L. Talley
Sulzbacher Professor of Law

Eric Talley - etalley@law.columbia.edu

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I write to recommend Avi Weiss for a clerkship. Avi was my student in Evidence in the Spring of 2021 and received the highest grade in a class of 200 students; he got 99 points out of 100 on the exam. As you will see from his transcript, his high grade in my class was not aberrant; he is a Stone Scholar and an Essays Editor on the Law Review.

I have gotten to know Avi outside of class and have talked with him about his upbringing and aspirations. He grew up in the orthodox Jewish Community in New Jersey, where life centered around religious studies. The thought of obtaining a law degree (or pursuing any graduate studies) was unimaginable. But with financial assistance from his wife's family, he decided to leave full-time Talmud studies behind and attend to law school. I am confident that he will be a first-rate law clerk and lawyer.

Avi has a keen sense of humor and is appropriately modest. He is not afraid to voice his opinions, but will not overstep his role. His road to Columbia is "unorthodox" but his path forward in the law is bright. I recommend him to you wholeheartedly.

Sincerely,

Paul Shechtman
Partner
PS/wr

Paul Shechtman - paul.shechtman@bracewell.com - 9177965123

March 01, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Re: Avi Weiss

Dear Judge Liman:

I am writing on behalf of Avi Weiss, a rising 3L at Columbia Law School, whom I recommend to you with my fullest enthusiasm in connection with his application for a judicial clerkship for either the 2021-22 or 2022-23 term. My recommendation, which is based on having Avi as a student in my small section of first-year Contracts in the fall 2019 semester, on his serving as my teaching assistant in the same course this past Fall 2020 semester, and on my having read and commented on multiple drafts of his law review note, is without any reservation whatsoever. He is one of a handful of top students I have taught over the course of my 30-year career as a law professor to whom I have given this top recommendation.

(Please note: I am in the unparalleled position this year of having three students who I am giving my top recommendation; you may also receive applications for the other two students as well. All three are outstanding, but of them, Avi has the strongest writing skills, has demonstrated the highest level of intellectual curiosity, and has the strongest command of business law and practice. This last attribute should make him a particularly attractive candidate for judges whose caseload includes a substantial commercial component)

I first met Avi in fall 2019 when he took my introductory class in Contracts. This was a small discussion-based class of 33 students, most of whom participated in class discussion on a regular basis, and who all wrote several short memos for me over the course of the term, in addition to a take-home final exam. Avi was the second strongest student in this class, easily earning an A grade; and his performance on the memos — which asked the students to apply the course material to a variety of short writing assignments similar to those they might be asked to produce in legal practice — was far and away the strongest in the class. He was one of the most thoughtful contributors to class discussion; and was a regular visitor at weekly office hours, where he routinely posed astute and sophisticated questions.

I was also struck during this first semester by Avi's unusual intellectual curiosity. His academic background (business major at an urban campus where a majority of students are commuters, and the first person in his family to pursue a professional degree) was perhaps not as broad as that of some of his peers; but he took being at Columbia as the occasion to make up for studies he had not had a chance to undertake previously. At the same time that he was taking the full 1L course load, he was regularly asking me and his other teachers for reading recommendations in social science fields such as economics, history, and even jurisprudence; and he regularly came by outside of class to talk about these readings, and about ideas in general.

For all these reasons, I was delighted when Avi submitted his application to serve as a teaching assistant in my contract class for fall 2020; and I hired him without hesitation. As you surely know, this last semester was especially challenging for both law students and professors because of the constraints of the COVID pandemic. My section was taught in remote format and comprised students living across four different time zones. For that reason, I hired a larger number of TA's than usual — six in total to assist with a group of 39 1Ls — and relied on them to a greater extent than I usually do to lead review sessions, mentor students, and help manage classroom discussion using the Zoom platform. This group of TA's rose to the occasion and repaid my trust with a higher level of performance and resourcefulness than I had seen in any previous year. But Avi led the way in terms of professionalism, organization, and generosity in offering his time to the 1Ls. In addition, in a semester where it was very tempting to cut corners, Avi kept me focused with questions that made sure that I covered the material with adequate depth. If he felt I had oversimplified an explanation, he made sure to let me know, tactfully and collegially — and he was usually right.

My high regard for Avi's intellectual standards subsequently led me to serve as an unofficial second advisor to his law review note, which analyzed how various US states made use of emergency executive powers during this past year's COVID pandemic. It wasn't my field of expertise, but the topic was timely and fascinating, and Avi's scholarly ambition and expositional clarity made it a rewarding project for me to participate in. I was very pleased when this well-written and important paper was selected for publication in the upcoming December issue of the Columbia Law Review.

There's one last thing I should mention to put Avi's achievements in perspective and to further highlight his intellectual capacities. Namely, he was a little slower out of the gate than other top students in terms of first-semester grades; while he was a top performer in my class, his other fall exams were merely very good. (And then in the second semester, the entire school switched over to pass-fail grading due to Columbia's forced transition to remote instruction.) In my judgment, Avi's first-semester transcript should be read in light of his relatively narrow academic experience before coming to Columbia. There is no doubt in my mind that at this point in his law school career, he has progressed to the point where he is performing at the absolute top level; and I expect him to continue to do so going forward,

I feel fortunate to have taught and worked with Avi in all of these settings and privileged to be able to act as his mentor and

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recommender. Every year I have numerous students who I expect to be excellent lawyers someday; but there are only a few whom I can identify from the start as lawyers to whom I would recommend clients. Because of his thoughtfulness, intellectual rigor, and professionalism, I expect Avi Weiss to be such a lawyer. For these reasons, I recommend him to you with my warmest enthusiasm and urge you to give his application the fullest possible consideration.

If you have any additional questions in regard to this recommendation, please feel free to contact me via telephone (212-854-0066) or e-mail (ak472@columbia.edu).

Yours very truly,

Avery W. Katz

Avery Katz - ak472@columbia.edu - 212-854-0066

AVI WEISS
Columbia Law School '22
(929) 441-8381
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WRITING SAMPLE

This writing sample is my Note, *Binding the Bound: State Executive Emergency Power and Democratic Legitimacy in the Pandemic*, which was published in the December book of the Columbia Law Review. I argue that the state executive emergency power regime that governors have utilized to battle the pandemic grapples with the inherent tension between technocratic agility and democratic legitimacy. Drawing on a novel fifty-state survey, I show 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. In Part III, I suggest 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.

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

Avi Weiss

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 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 non-

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 (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 Tr. (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* 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").

scientific 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 governors and more stringent lockdowns, conservatives decried "authoritarian" executive orders.[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 plaintiffs alleging that the governors' emergency actions exceeded the statutory authority granted to them by the state legislatures.[18]

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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, eighty-two percent of Democrats believed state lockdowns were constitutional but only forty-two percent 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").

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 Tr. (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 . . . .").

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).

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 future similar emergencies, 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 and 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, 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]

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19. See infra notes 140–145 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. Note that this piece 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.

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 Posner & Adrian Vermeule, The Executive Unbound 34–41 (2010).

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.

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 winning control of the emergency response.[37]

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

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28. See Michael A. Genovese, Democratic Theory and the Emergency Powers of the President, 9 Presidential Stud. Q. 283, 284–85 (1979) (on file with the *Columbia Law Review*) ("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.").

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.

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 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 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 thus 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 recounting representative interactions between the legislature

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. Ginsberg & Huq, supra note 22, at 61–62.

42. Id.

43. Harvey Mansfield, Is the Imperial Presidency Inevitable?, N.Y. Times (Mar. 11, 2011) (reviewing Eric Posner & Adrian Vermeule, The Executive Unbound (2010)), 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), https://www.lawfareblog.com/executive-unbound-after-madisonian-republic-eric-posner-and-adrian-vermeule/ [https://perma.cc/BS3H-CZYJ].

45. See also 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.

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.

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, the controversy surrounding the MSEHPA illustrates the tension between technocratic governance and democratic input in a public health emergency, and the careful balance between power and constraint 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."[56] The governor, either in

48. See supra note 33 and accompanying text.

49. For a discussion of governors' constitutional emergency powers, 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 74–79 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. FBI, supra note 52.

54. See James G. Hodge, The Evolution of Law in Biopreparedness, 10 Biosecurity and Bioterrorism: Biodefense Strategy, Prac., and 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. 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].

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.[57] After the governor declared 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."[58] During the emergency, administrative public health authorities would have the power to compel people to submit to examination,[59] quarantine,[60] treatment, and vaccination.[61]

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.[62] Additionally, the Act granted the legislature the power to override the governor's declaration of the state of emergency but only after sixty days.[63] 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.[64] 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 government power to declare a state of emergency and mandate quarantine and vaccination.[65] The Association of American Physicians and Surgeons protested that the Act would give governors the power to "create a police state by fiat."[66] The Center for Law and the Public's Health, the primary drafter of the bill, received thousands of comments from the public.[67]

In response to this storm of criticism, the drafter released a second, revised version of the bill in December of 2001, now labeled as a "draft for discussion,"[68] 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."[69] 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

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57. Id.

58. Id. § 303(a)(1).

59. Id. § 502(a).

60. Id. § 503(a).

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

62. Id. § 305(b).

63. Id. § 305(c).

64. Lawrence O. Gostin, At Law: Law and Ethics in a Public Health Emergency, The Hastings Center Report, March–October 2002, at 9, 10.

65. 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).

66. Ronald Bayer & James Colgrove, Public Health vs. Civil Liberties, 297 Sci. 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). Cf. 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).

67. Gostin, supra note 64, at 10.

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

69. Bayer & Colgrove, supra note 66, at 1811.

allowed an *immediate* override by a majority vote.[70] The drafter 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.

2. *Older Emergency Power Statutes*

Notwithstanding continued criticism and debate,[71] the MSEHPA had a strong influence on many states' introduction or update of public health emergency statutes over the following years.[72] Some states, however, refused to pass new legislation based on the MSEHPA and kept their antiquated statutes.[73] In these statutes too, 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."[74] 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.[75]

Massachusetts also has not passed a statute granting the governor public health emergency powers based on the MSEHPA,[76] and instead it relies on the Civil Defense Act (CDA) of 1950 for executive power in an emergency.[77] The Act was passed at the beginning of the Cold War in response to the Soviet military threat[78] and grants the governor power to 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."[79] 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

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70. 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/4RZ6-SCAG] ("[*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 . . . .") (emphasis added).

71. See Annas, supra note 68, 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").

72. 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 68, at 60 ("The drafters . . . continue to grossly overstate their support.").

73. See Annas, supra note 68, at 60.

74. 35 Pa. Cons. Stat. § 7102 (2020).

75. Id. § 7301.

76. 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.").

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

78. 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].

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

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[80]—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 of 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 in coping with the disaster.[81] Five states only explicitly allow suspension of regulations.[82] Eight states do not grant the governor the power to suspend statutes or regulations in a public health emergency.[83] 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.

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80. See generally Eleanor E. Mayer, 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).

81. 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.

82. 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).

83. 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); Mass. Ann. Laws ch. 31, § 5 (LexisNexis 2021); 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 § 44-146.16–44-146.17 (2021); Wyo. Stat. Ann. § 35-4-101 (2021) (granting the department of health only "the power to prescribe rules 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 durations on states of emergency or the suspension of statutes, after which—in most cases—the governor can unilaterally renew the state of emergency.[84] Thirteen states have not placed any time limits on states of emergency.[85] Nine states do not grant the governor the power to renew a state of emergency after its expiration without legislative approval.[86] 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.[87] 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 (with the majority allowing both houses to do so).[88] Five condition a governor's renewal of a declaration of emergency on legislative concurrence.[89] Four require, or allow the legislature to request, a special session of the legislature when the governor declares a state of emergency.[90] 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.

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84. See Ala. Code § 31-9-8(a) (2021); Ark. Code Ann. § 12-75-107(b)(2)(A) (2021); Colo. Rev. Stat. § 24-33.5-704(4) (2021); Del. Code tit. 20, § 3115(c) (2021); Fla. Stat. § 252.36(2) (2021); Ga. Code Ann. § 38-3-51(a) (2021); Idaho Code § 46-1008(2) (2021); Ind. Code § 10-14-3-12(a) (2021); Iowa Code § 29C.6(1) (2021); La. Stat. Ann. § 29:768 (2020); Me. Rev. Stat. Ann. tit. 37-B, § 743(2) (2021); Md. Code Ann. Pub. Safety § 14-107(a)(3) (West 2021); N.H. Rev. Stat. Ann. § 4:45(II)(a) (2021); N.J. Stat. Ann. § 26:13-3(b) (West 2021); N.M. Stat. Ann. § 12-10A-5(D)(2) (West 2021); N.Y. Exec. Law § 29-a(2)(a) (McKinney 2021); N.C. Gen. Stat. § 166A-19.21(c)(1) (2021); Okla. Stat. tit. 63, § 6405(B) (2021); 35 Pa. Cons. Stat. Ann. § 7301(c) (2021); 30 R.I. Gen. Laws § 30-15-9(b) (2021); S.D. Codified Laws § 34-48A-5 (2021); Tenn. Code Ann. § 58-2-107(2) (2021); Tex. Gov't Code § 418.014(c) (2021). The statutes of California, Connecticut, Hawaii, and Illinois place a time limit on the suspension of statutes, but do not explicitly allow the governor to renew the suspension unilaterally. See Cal. Gov't Code § 8627.5(b) (2021); Conn. Gen. Stat. § 28-9 (2021); Haw. Rev. Stat. § 127A-14(d) (2021); 20 Ill. Comp. Stat. Ann. 3305/7 (West 2021). 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) (2021).

85. See Ariz. Rev. Stat. § 26-303 (2021); Ky. Rev. Stat. Ann. § 39A.180 (West 2021); Mo. Ann. Stat. § 44.100 (West 2021); Neb. Rev. Stat. § 81-829.40 (2021); Nev. Rev. Stat. § 414.070 (2021); N.D. Cent. Code § 37-17.1-05 (2021); Ohio Rev. Code Ann. § 5502.22 (2021); Or. Rev. Stat. § 401.192 (2020); Vt. Stat. Ann. tit. 20, § 9 (2021); Va. Code § 44-146.17 (2021); W. Va. Code Ann. § 15-5-6 (LexisNexis 2021); Wyo. Stat. Ann. § 35-4-115 (2021); Civil Defense Act, ch. 639, § 5, 1950 Mass. Acts 523.

86. See Alaska Stat. § 26.23.020(c) (2021); Kan. Stat. Ann. § 48-924(b)(3) (West 2021); Mich. Comp. Laws Ann. § 30.403(3) (West 2021); Minn. Stat. § 12.31(2)(b) (2020); Mont. Code Ann. § 10-3-302(3) (West 2021); S.C. Code Ann. § 25-1-440(a)(2) (2021); Utah Code § 53-2a-206(4)(b) (2021); Wash. Rev. Code § 43.06.220(4) (2021); Wis. Stat. § 323.10 (2021).

87. 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); ALM Spec. L. ch. S31 § 5 (LexisNexis 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).

88. See Ariz. Rev. Stat. § 26-303(F) (2021); Ark. Code Ann. § 12-75-107(c)(1)(A) (2021); Cal. Gov't Code § 8629 (2021); Colo. Rev. Stat. § 24-33.5-704(4) (2021); Fla. Stat. § 252.36(2) (2021); Ga. Code Ann. § 38-3-51(a) (2021); Idaho Code § 46-1008(2) (2021); Ind. Code § 10-14-3-12(a) (2021); Iowa Code § 29C.6(1) (2021); Kan. Stat. Ann. § 48-924(6) (West 2021); Me. Rev. Stat. Ann. tit. 37-B, § 743(2) (2021); Md. Code Ann., Pub. Safety § 14-107(a)(4)(i) (West 2021); Mo. Ann. Stat. § 44.100.1(2) (West 2021); Mont. Code Ann. § 10-3-303(4)(c) (West 2021); Neb. Rev. Stat. § 81-829.40(3) (2021); Nev. Rev. Stat. § 414.070 (2021); N.H. Rev. Stat. Ann. § 4:45(II)(c) (2021); N.Y. Exec. Law § 29-a(4) (McKinney 2021); N.D. Cent. Code § 37-17.1-05(3) (2021); Okla. Stat. tit. 63, § 6405(C) (2021); Or. Rev. Stat. § 401.192(4) (2020); 35 Pa. Cons. Stat. § 7301(c) (2021); 30 R.I. Gen. Laws § 30-15-9(b) (2021); Tex. Gov't Code § 418.014(c) (2021); Utah Code § 53-2a-206(2)(a)(iii) (2021); W. Va. Code Ann. § 15-5-6(b) (LexisNexis 2021); Wis. Stat. § 323.10 (2021). Louisiana allows either house to override by majority vote. See La. Stat. Ann. § 29:768(B) (2020). 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) (2021).

89. Alaska Stat. § 26.23.020(c) (2021); Mich. Comp. Laws Ann. § 30.403(4) (West 2021); Mont. Code Ann. § 10-3-303(1)–(3)(a) (West 2021); S.C. Code Ann. § 25-1-440(a)(2) (2021); Wash. Rev. Code Ann. § 43.06.220(4) (2021).

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

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.[91] Inherent time limits make sure 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, and 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.[92] 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 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 future similar emergencies.

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."[93]

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.[94] 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

91. 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.

92. The only exception is Kentucky. See Ky. Rev. Stat. Ann. § 39A.100 (West 2021).

93. See supra note 88. 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) (West 2021) ("Such orders may be revoked at any time by concurrent resolution of the legislature."); N.Y. Exec. Law § 29-a(4) (McKinney 2021) ("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).

94. 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 ACLU, supra note 65.

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 in cases of emergencies that are both chronic and rapidly changing. Section II.A discusses how COVID-19 upset 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,[95] and all states responded similarly in the early days of the outbreak. [96] 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.[97] These differences of opinion increased over time and were highly correlated with political affiliation.[98]

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."[99] The legislature wishes to represent the concerns of their constituents in the crafting of a policy response.[100] This disagreement over the governor's response (for

95. 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 eighty-one percent of survey respondents believed COVID-19 "has created a national emergency" as of March 2020).

96. 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.").

97. Id.

98. 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] . . . .").

99. 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*).

100. 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)* (quoting Indiana State Senator Sue Glick as saying: "We're not attempting to hold government hostage . . . [w]hat 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.") [hereinafter Davies, Governor Sues Legislature]; 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] ("In a sign of mounting frustration over Washington's COVID-19

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.[101] 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.

In a *public health* emergency, in which the outcome is heavily dependent on citizens' willingness to endure lockdowns,[102] submit to contact tracing,[103] 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.[104] 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.[105] 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."[106]

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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 Tribune (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.").

101. 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.").

102. 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").

103. 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).

104. 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)).

105. 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, see 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] (noting 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").

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

When people perceive that the methods for enacting and carrying out the law are procedurally just, they are more likely to regard the outcome as legitimate, even if it is unfavorable to them.[107] Procedurally just decisionmaking depends in significant part on the concerns of all citizens being represented in all phases of the process.[108] 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.[109]

This is especially the case in the United States, where there is "a tradition of prioritizing individualism over government restrictions,"[110] and trust in information provided by state governments about COVID-19 has declined significantly since the start of the pandemic.[111] This environment of distrust creates an even greater challenge for governments attempting to implement public health recommendations in future long-duration public health emergencies, a challenge which can be mitigated by the procedural legitimacy of democratic input.[112]

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.[113] 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

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107. Tyler, supra note 105, 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)).

108. 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 omitted) (quoting Gerald S. Leventhal)); id. at 120 (listing studies finding representation to be an important factor in procedural fairness).

109. See Waldron, supra note 106, 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.").

110. 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*).

111. 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).

112. 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.").

113. 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*) ("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.'").

to criticize the response, as the ultimate arbiter of public health policy will be the governor.[114] 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.[115] This high-profile dissension clearly reduces the perceived legitimacy of the executive's actions in the emergency.

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 which 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,[116] with various geographic areas flaring up with consecutive waves, at least until a viable vaccine is found and widely distributed.[117] The legitimacy of government by executive order, where the particulars of the government response are in dispute, is further eroded as government 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,[118] it does not follow that the decisionmaking within that legal framework carries the democratic legitimacy of standard deliberative lawmaking.[119] It is clear that even the more modern statutes were not intended to apply to chronic emergencies such as COVID-19, with unilateral decisionmaking going on for over a year, or to responses such as social distancing regulations or mass lockdowns.

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114. Cf. Sarah A. Binder, 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.").

115. Professor Neal Devins has made a similar argument to explain the radical anti-abortion laws passed by state legislatures following *Roe v. Wade*:

> [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.

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 114, 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").

116. 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.").

117. 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 . . . .")

118. 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).

119. Tom Ginsburg & Mila Versteeg, The Bound Executive: Emergency Powers During the Pandemic 39 (Va. Pub. L. & Legal Theory, Research Paper No. 2020-52, 2020), https://ssrn.com/abstract=3608974 (on file with the *Columbia Law Review*) ("We note that the mere fact that there is a statutory basis for executive action does not necessarily amount to effective legislative oversight.").

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."[120] 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.[121]

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.[122] Over time, as the mechanics of transmission became clear, experts have come to believe that this is a "false dichotomy," and there are targeted interventions that can be implemented without a full lockdown.[123] 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,[124] economists debated the broader economic tradeoffs,[125] and epidemiologists and economists argued whether we should be considering

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120. 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").

121. 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)).

122. 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://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.").

123. See 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." (quoting Angela Rasmussen)).

124. 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 then, "as many as [fifty] different research groups make predictions" of COVID-19 deaths).

125. 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, 1:36 PM), 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").

tradeoffs at all.[126] People disagreed on how to determine which services were essential,[127] and some worried about the distributional effects of hindering the operation of small businesses while increasing the market share of large multinational corporations.[128] After breakthroughs in vaccine development, there were ethical and practical decisions to be made about vaccine allocation.[129]

The decisions being 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.[130] These judgment calls are unavoidably entangled with politics and legislative priorities.[131] 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."[132] 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."[133] Avoiding deliberative input with simplistic admonitions to "follow the science," severely undermines the public perception of legitimacy, even if it advances the cause of technocratic agility.[134] To ensure public trust in future emergencies, and more importantly, to protect

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126. 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*) (observing that the difference between the approaches of epidemiologists and economists regarding whether to weigh trade-offs "is already shaping government responses to the pandemic").

127. 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*) (contrasting the different approaches of American and Western European cities with regard to school closures in pandemic hotspots).

128. 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*) (noting that during the pandemic "cash that once went into local hands will be redirected to Amazon and Walmart").

129. 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").

130. 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?sref=htOHjx5Y (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 [https://perma.cc/EMJ3-GDTJ] ("Denunciations of that sort cast the lockdown debate as a straightforward battle between a pro-human and a pro-economy camp. But the actual trade-offs are not straightforward.").

131. 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.").

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

133. 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").

134. 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.").

emergency powers from legislative pushback, state statutes (at least in some of the more divided and polarized states[135]) 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 will examine.

C. *COVID Showdowns and Legislative Pushback*

Governors' actions during the pandemic have been the subject of dozens of lawsuits throughout the United States. In some states, such as Illinois,[136] Michigan,[137] Pennsylvania,[138] and Wisconsin,[139] 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 their 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,

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135. See supra notes 16–17 and accompanying text; infra notes 136–145 and accompanying text.

136. 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 thirty 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].

137. 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). 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 (EPGA), which did not limit the duration of the state of emergency, see 135 Mich. Comp. Laws Ann. § 10.31(2). See 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 EPGA as unconstitutional under the Michigan Constitution. See Midwest Inst. of Health, PLLC v. Governor of Mich., 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 Michigan (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.").

138. 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—here 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").

139. 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.").

despite the strenuous objections of governors.[140] For example, Republican lawmakers in Kentucky passed—and then overrode Governor Beshear's veto on—a bill that ends the governor's emergency orders after thirty days, requires permission of the state's attorney general to suspend existing statutes, and bars the governor from making any changes to election laws.[141] Pennsylvania lawmakers successfully evaded Governor 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.[142] Republicans in Michigan attempted to force a hard sunset on emergency orders on Governor Whitmer by attaching it to a COVID-19 funding bill.[143] This trend transcends the familiar COVID-19 political paradigm, as Republicans in Indiana overrode Republican Governor Holcomb's veto to pass a bill allowing the legislature to call itself into special sessions to unilaterally revoke the governor's emergency orders,[144] and even some Democratic legislators in New York have sought to repeal Democratic Governor Cuomo's emergency powers entirely.[145]

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—deliberating, negotiating, compromising—representing the constraints of the populace preventing policy overreach. Allowing the legislature a simple veto on specific orders of the legislature, such as the law passed in Indiana does, is constitutionally questionable.[146] 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

140. 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 (last updated Apr. 22, 2021) (on file with the *Columbia Law Review*) ("Across the country, lawmakers in 37 states have introduced more than 200 bills or resolutions this year to clip the emergency powers of governors . . . .").

141. 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, requires permission of the separately-elected attorney general before suspending existing statutes and bars the governor from altering election laws during an emergency.").

142. 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*).

143. Niedzwiadek, supra note 10.

144. Davies, Governor Sues Legislature, supra note 100.

145. 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*) (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").

146. 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.").

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. The next Part explores a solution inspired by the Congressional Review Act that achieves a balance between responsive agility of rule by executive order, while still preserving substantive deliberation and compromise within the legislature and between the legislature and the executive.

III. A SOLUTION MODELED ON THE CONGRESSIONAL REVIEW ACT

As Part II has shown, 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 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.[147] 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.[148]

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.[149] 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."[150] Since the New Deal, Congress had inserted legislative veto provisions into over 200 statutes.[151] However, the constitutionality of the legislative veto was controversial,[152] and presidents soon began to resent the interference of Congress in administrative matters.[153]

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147. See generally Gillian 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").

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

149. 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).

150. Id. at 276.

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

152. 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).

153. See Fisher, supra note 149, at 282–85.

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[154] violated Article I of the Constitution, which requires Congress to legislate through bicameral legislation that is presented to the president for veto.[155] The legislative veto, without presentment and often by one house of Congress, was thus rendered unusable, notwithstanding its efficiency.

In response to *Chadha*, Congress in 1996 passed the Congressional Review Act (CRA) as a reassertion of power over agency rulemaking.[156] The CRA attempts to split the difference between the legislative veto and normal legislative procedures,[157] for the purpose of increasing regulatory accountability.[158] 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 Accounting Office (GAO) and Congress for review.[159] For a major rule, defined as one that agencies have found has a significant effect on the economy,[160] 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.[161] Major rules go into effect a minimum of sixty days after Congress receives the report or the publication of the rule in the Federal Register (whichever is later).[162] 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 it is "necessary because of an imminent threat to health or safety or other emergency."[163]

The CRA is designed to ensure efficient procedure in Congress.[164] 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.[165] 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)."[166] 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.[167] To expedite passage in the Senate, the resolution is not subject to points of order or motions to amend, postpone, or

154. 8 U.S.C. § 1254(c)(2) (1976) (repealed 1996).

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

156. Larkin, Reawakening, supra note 151, at 197–98.

157. Id.

158. 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).

159. 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).

160. 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).

161. Id. § 801(a)(2)(A).

162. Id. § 801(a)(3)(A).

163. 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." See also id. §§ 801(a)(5), 808(1) for two other exceptions to suspension.

164. "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 158, at 722 (quoting 142 Cong. Rec. 8198 (1996) (joint statement of Sens. Nickles, Reid & Stevens)).

165. 5 U.S.C. § 802(a)–(b).

166. Id. § 802(a).

167. Id. § 802(c).

proceed with other business, and debate is limited to ten hours, divided equally between those in favor and those opposed.[168]

A majority of both houses must pass a resolution of disapproval before presenting it to the President for his signature or veto.[169] If the President vetoes the resolution, Congress can overrule the veto with a two-thirds majority.[170] The CRA precludes judicial review of any "determination, finding, action, or omission under this chapter."[171] Once a joint resolution of disapproval has been passed, the rule is treated as if it had never taken effect.[172] Rules voided by a resolution "may not be reissued in substantially the same form."[173]

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.[174] 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.[175] 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.[176] After President Bush was sworn in, Republicans passed a resolution of disapproval of the ergonomics standard in March 2001.[177] 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.[178]

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,[179] 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.[180] A statute that can only be used to repeal a few

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168. Id. § 802(d). This effectively prevents the possibility of a filibuster. See Finkel & Sullivan, supra note 158, at 722. The Act specifies procedure for the Senate, but not the House. See infra note 184 and accompanying text.

169. 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).

170. Id. at 5.

171. 5 U.S.C. § 805.

172. Id. § 801(f).

173. 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 158, at 709.

174. 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).

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

176. Id. at 191–94.

177. See id. at 198–99.

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

179. 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).

180. See Cohen & Strauss, supra note 159, 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 175, 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).

"midnight rules" passed in the last presidential election hardly fills the 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.[181] 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.[182] 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.[183] Second, the CRA should apply the expedited procedure requirements to the House as well as the Senate.[184] 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.[185]

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.[186] During a pandemic, legislatures will meet even less frequently.[187] Relying on the state legislature to initiate a quick reaction to 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.[188]

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

181. Rosenberg, supra note 180, at 1084.

182. Id.

183. Id. at 1085.

184. Id.

185. Id.

186. 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.").

187. 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.").

188. See Rosenberg, supra note 180, at 1084–85.

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.[189] 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 in case doubts are raised regarding the governor's or legislature's 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 allowing 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.[190] 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 that time, the decree must be approved by parliament, otherwise the decree expires.[191]

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

189. 5 U.S.C. § 802(d)(2) (2018).

190. 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").

191. Griglio, supra note 1, at 56.

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.[192] 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 has argued, 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 than legislative gridlock.[193] 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 hold televised sessions,[194] will further increase the accountability of the legislature.

Recent history also suggests that legislatures tend to act quickly in times of peril. Witness the TARP bailout in 2009,[195] or the CARES Act in March 2020.[196] 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 decide on a response that draws on the needs of their constituents and presents a united front to 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

192. See William N. Eskridge, Jr. & John Ferejohn, The Article I, Section 7 Game, 80 Geo. L.J. 523, 529–30 (1992) (showing that where 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).

193. See D.J. Flynn & Laurel Harbridge, How Partisan Conflict in Congress Affects Public Opinion, 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.").

194. 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).

195. 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.").

196. 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.").

the legislature has been left with no substantive input on policy decisions and trade-offs 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 while at the same time encouraging oversight, deliberation, and compromise by conditioning effectiveness on the approval of the legislature.

Applicant Details

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Date of BA/BS	**December 2018**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 31, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Moot Court Board (Journal Equivalent)**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Moot Court Board**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

March 08, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am a third-year law student at New York University School of Law, and I am writing to apply for a 2024-2025 term clerkship, or any subsequent term, with your chambers. As a law student, I am a staff editor on NYU's Moot Court Board in the Casebook Division and published a moot court problem in NYU's Moot Court Casebook in December 2021. After law school, I will be a 2022-2023 term clerk for the Honorable Judge Stetson, U.S. District Court for the Eastern District of Texas. After clerking, I will be working as an associate at Weil, Gotshal & Manges.

My writing samples include a Motion for Preliminary Order of Forfeiture, drafted during my internship at the U.S. Attorney's Office for the Northern District of Texas, and a Motion for Summary Judgment, written for an academic writing assignment as part of NYU's Government Civil Litigation Externship at the Southern District of New York.

I have enclosed my resume, unofficial law school and undergraduate transcripts, and writing samples. NYU will submit my letters of recommendation from Assistant United States Attorney Rachael Jones (214-274-0989, my supervisor at the U.S. Attorney's Office) and Professors Shirley Lin (347-583-8901), Jonathan Harris (646-220-5045, professor I worked with as a TA), and James Orenstein (202-296-3585, 646-334-2490) separately. Professor Daniel Capra (212-636-6855) has also agreed to serve as a reference.

I would greatly appreciate the opportunity to interview with you. My contact information is listed below. Thank you very much for your consideration, and I hope to hear from you soon.

Respectfully,

/s/ Sarah A. Winslow
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EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
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Honors: Moot Court Board (Journal Equivalent), Casebook Division, *Staff Editor*
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Texas Law Society, Co-President and Co-Founder
Domestic Violence Advocacy Project, Courtroom Advocates Project, Coordinator & Advocate
NYU Law Revue, Producer and Cast Member

THE GEORGE WASHINGTON UNIVERSITY, Washington, DC
B.A. in Political Science, with a minor in Music, *summa cum laude*, December 2018
GPA: 3.97
Honors: Honors in Political Science
Outstanding Academic Achievement Award – *awarded to top 2% of all undergraduate students*
Steiner & Myers Scholar – *music scholarship*
John Morgan Prize – *honors top two graduating seniors in political science who plan to study law*
Activities: Undergraduate Writing Preceptor, Professor Megan Davis, Philosophies of Disability
The George Washington University Singers, Member and Section Leader

EXPERIENCE

WEIL, GOTSHAL & MANGES L.L.P., Dallas, TX
Associate, Fall 2023

THE HON. CHRISTINE STETSON, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, Beaumont, TX
Law Clerk, August 2022 – August 2023

VINSON & ELKINS L.L.P., Dallas, TX
Summer Associate, Summer 2021
Drafted and prepared litigation documents involving difficult legal questions and litigation strategy for shareholder class actions and contract disputes. Wrote memoranda analyzing banking regulations, property interests in the context of bankruptcy matters, and the implications of a regulatory opinion for Texas energy sectors. Drafted responses to discovery requests. Assisted in drafting a petition for certiorari to the Supreme Court of the United States.

U.S. ATTORNEY'S OFFICE FOR THE NORTHERN DISTRICT OF TEXAS, Dallas, TX
Legal Intern, Summer 2020
Drafted briefs and memoranda for charging decisions, sentencing guidelines, and other complex legal questions for the Criminal, Civil, and Appellate Divisions. Analyzed the parameters of criminal forfeitures and relevant conduct under federal sentencing guidelines. Provided wide range of litigation support in preparation for trials and hearings.

REYES | BROWNE | REILLEY, Dallas, TX
Legal Assistant, Summer 2019 and Summer 2017
Managed mass torts cases at small litigation boutique law firm. Prepared discovery documents, reviewed client files. and provided litigation support. Worked directly with clients through all stages of litigation.

STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C., Washington, DC
Professional Development Intern and Docketing Intern, September 2017 – May 2019
Supported associates in fulfilling their CLE requirements and assisted in the attorney evaluation process at intellectual property law firm. Arranged legal training courses and completed projects for Talent Management department heads. Conducted document review, intake for the patent prosecution process, and docketed incoming correspondence.

ADDITIONAL INFORMATION

Additional employment as FOIA intern at the U.S. Department of Labor in Washington, DC (2017), intern for Congressman Dennis Ross in Washington, DC (2016) and Congressman Pete Sessions in Washington DC and Dallas, TX (2016). Enjoy playing piano, performing in choir, and yoga. Favorite quarantine hobbies: virtual game nights, cooking with family, and morning walks.

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Page: 1 of 2

New York University
Beginning of School of Law Record

Fall 2019

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Rachel E Barkow			
Procedure	LAW-LW 11650	5.0	B
Instructor: Burt Neuborne			
Contracts	LAW-LW 11672	4.0	B
Instructor: Clayton P Gillette			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Class, Gender, Politics, and			
Instructor: Stephen Holmes, David M Golove			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2020

School of Law
Juris Doctor
Major: Law

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Due to the COVID-19 pandemic, all spring 2020 NYU School of Law (LAW-LW.) courses were graded on a mandatory CREDIT/FAIL basis.
--

Constitutional Law	LAW-LW 10598	4.0	CR
Instructor: Daryl J Levinson			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Shirley Lin			
Legislation and the Regulatory State	LAW-LW 10925	4.0	CR
Instructor: Emma M Kaufman			
Torts	LAW-LW 11275	4.0	CR
Instructor: Barry E Adler			
1L Reading Group	LAW-LW 12339	0.0	CR
Topic: Class, Gender, Politics, and			
Instructor: Stephen Holmes, David M Golove			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2020

School of Law
Juris Doctor
Major: Law

Corporations	LAW-LW 10644	4.0	B
Instructor: Robert Jackson			
Complex Federal Investigations Seminar	LAW-LW 11517	2.0	A
Instructor: James Orenstein			
Marden Competition	LAW-LW 11554	1.0	CR
Evidence	LAW-LW 11607	4.0	A+
Instructor: Daniel J Capra			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Jonathan F Harris			
State Constitutional Law Seminar	LAW-LW 12775	2.0	A-
Instructor: Roderick M Hills, Jeff S. Sutton			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	44.0	44.0

Spring 2021

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff, Arthur R Miller			
Advanced Trial Simulation	LAW-LW 11138	2.0	A-
Instructor: David R Marriott, Evan R Chesler			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A-
Instructor: Nathan Maxwell Crystal			
Teaching Assistant	LAW-LW 11608	1.0	CR
Instructor: Jonathan F Harris			
Government Civil Litigation Externship-Southern District	LAW-LW 11701	3.0	A-
Instructor: David Joseph Kennedy, Seungkun Kim			
Government Civil Litigation Externship - Southern District Seminar	LAW-LW 11895	2.0	A-
Instructor: David Joseph Kennedy, Seungkun Kim			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	58.0	58.0

Fall 2021

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	B+
Instructor: Andrew Weissmann			
Basic Bankruptcy	LAW-LW 11460	4.0	CR
Instructor: Arthur Joseph Gonzalez			
Attacking & Defending Corporate Transactions: A Delaware Law Primer	LAW-LW 12709	2.0	B+
Instructor: Randall Baron, Lori W. Will			
Class Actions Seminar	LAW-LW 12721	2.0	B+
Instructor: Jed S Rakoff			

	AHRS	EHRS
Current	12.0	12.0
Cumulative	70.0	70.0

Spring 2022

School of Law
Juris Doctor
Major: Law

Issues in SEC Enforcement Seminar	LAW-LW 10386	2.0	***
Instructor: Walter Ricciardi			
Moot Court Board	LAW-LW 11553	1.0	***
Federal Courts and the Federal System	LAW-LW 11722	4.0	***
Instructor: David M Golove			
Property	LAW-LW 11783	4.0	***
Instructor: Gregory Ablavsky			
The Elements of Criminal Justice Seminar	LAW-LW 12632	2.0	***
Instructor: Preet Bharara			

	AHRS	EHRS
Current	13.0	0.0

Unofficial

Name:	**Sarah A Winslow**
Print Date:	**01/28/2022**
Student ID:	**N12035804**
Institution ID:	**002785**
Page:	**2 of 2**

Cumulative	83.0	70.0

Staff Editor - Moot Court 2020-2021

End of School of Law Record

Unofficial

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The GPA on this transcript is TRUNCATED to two decimal places, whereas the official transcript is ROUNDED. Also, the official Law School transcript is rounded to three decimal places.

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If you have questions about this transcript, please call (202) 994-4900.

Transfer Credit Institution Credit Transcript Totals

Transcript Data

STUDENT INFORMATION

Student Type: Continuing Student

Curriculum Information

Current Program

College: Columbian Coll of Arts & Sci

Major: Political Science

Minor: Music

DEGREE SOUGHT

Awarded: Bachelor of Arts **Degree Date:** 01/10/19

Institutional Honors: summa cum laude

Departmental Honors: Departmental Honors

Curriculum Information

Primary Degree

Major: Political Science

Minor: Music

NON-GW HISTORY **-Top-**

SP14-SP15: Advanced Placement Exam Credit

Subject	Course	Title	Grade	Credit Hours	Quality Points	R
HIST	1310	Intro to American History	TR	3.000		0.00
HIST	1311	Intro to American History	TR	3.000		0.00
MATH	1231	Single-Variable Calculus I	TR	3.000		0.00

UW	1099	Variable Topics	TR	3.000		0.00

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	0.000	0.000	12.000	0.000	0.00	0.00

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INSTITUTION CREDIT -Top-

Term: Fall 2015

College: Columbian Coll of Arts & Sci
Major: Political Science
Student Type: First Time Freshman
Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
ASTR	1001	Main Campus	01	Stars/Planets/Life in the Univ	A	4.000	16.00		
MUS	1091	Main Campus	01	University Singers	P	1.000	0.00		
MUS	1101	Main Campus	01	Elements of Music Theory	A	2.000	8.00		
PSC	1002	Main Campus	01	Intro-American Politics & Govt	A	3.000	12.00		
PSC	1003	Main Campus	01	Intro-International Politics	A	3.000	12.00		
SOC	1003	Main Campus	01	Intro to Criminal Justice	A	3.000	12.00		

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	15.000	60.00	4.00
Cumulative:	16.000	16.000	16.000	15.000	60.00	4.00

This is NOT an Official Transcript

Term: Spring 2016

College: Columbian Coll of Arts & Sci
Major: Political Science
Student Type: Continuing Student
Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
CHEM	1004	Main Campus	01	Contemporary Sci-Nonsci Majors	A	3.000	12.00		
LSPA	1029	Main Campus	01	Yoga	P	1.000	0.00		
LSPA	1059	Main Campus	01	Cycling	P	1.000	0.00		
MUS	1091	Main Campus	01	University Singers	P	1.000	0.00		
MUS	1102	Main Campus	01	Comprehensive Musicianship I	A	3.000	12.00		
PSC	1001	Main Campus	01	Intro to Comparative Politics	A	3.000	12.00		
UW	1020	Main Campus	01	University Writing	A-	4.000	14.80		

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	13.000	50.80	3.91
Cumulative:	32.000	32.000	32.000	28.000	110.80	3.96

This is NOT an Official Transcript

Term: Fall 2016

College: Columbian Coll of Arts & Sci
Major: Political Science
Student Type: Continuing Student
Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
COMM	1041	Main Campus	01	Interpersonal Communication	A	3.000	12.00		
MUS	1091	Main Campus	01	University Singers	P	1.000	0.00		
MUS	3127	Main Campus	01	Music History II: Tonal Era	A	3.000	12.00		
PHIL	2124W	Main Campus	01	Philosophies of Disability	A	3.000	12.00		
PSC	2212	Main Campus	01	State & Urban Policy Problems	A	3.000	12.00		
PSC	2366	Main Campus	01	Russian Politics	A	3.000	12.00		

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	16.000	16.000	16.000	15.000	60.00	4.00
Cumulative:	48.000	48.000	48.000	43.000	170.80	3.97

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Term: Spring 2017

College: Columbian Coll of Arts & Sci
Major: Political Science
Student Type: Continuing Student
Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
LGAF	6218	Hall of States/GSAS	01	Judicial Politics	A	3.000	12.00		
MUS	1091	Main Campus	01	University Singers	P	1.000	0.00		
MUS	1106	Main Campus	01	Intro to Musical Performance	A	3.000	12.00		
MUS	3126	Main Campus	01	MusHisI:Antiquity/EarlyBaroque	A	3.000	12.00		
PSC	2120W	Main Campus	01	Freedom in American Thought	A	3.000	12.00		
SOC	1001	Main Campus	01	Introduction to Sociology	A	3.000	12.00		

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA

Current Term:	16.000	16.000	16.000	15.000	60.00	4.00
Cumulative:	64.000	64.000	64.000	58.000	230.80	3.98

This is NOT an Official Transcript

Term: Fall 2017

College: Columbian Coll of Arts & Sci
Major: Political Science
Student Type: Continuing Student
Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
IAFF	2091	Main Campus	01	East Asia-Past and Present	A-	3.000	11.10		
LSPA	1031	Main Campus	01	Conditioning with Weights	P	1.000	0.00		
MUS	1511	Main Campus	01	Piano	A	1.000	4.00		
MUS	2106	Main Campus	01	Mus Histry III:20 Cent Art Trd	A	3.000	12.00		
PSC	2101	Main Campus	01	Scope & Methods in PSC	A	3.000	12.00		
PSC	2214	Main Campus	01	US Constitutional Law/Politc I	A	3.000	12.00		
PSC	2439	Main Campus	01	International Political Econ	A	3.000	12.00		

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	17.000	17.000	17.000	16.000	63.10	3.94
Cumulative:	81.000	81.000	81.000	74.000	293.90	3.97

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Term: Spring 2018

College: Columbian Coll of Arts & Sci
Major: Political Science
Student Type: Continuing Student
Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
MUS	1091	Main Campus	01	University Singers	P	1.000	0.00		
MUS	1512	Main Campus	01	Piano	A	2.000	8.00		
PSC	2219	Main Campus	01	US Political Parties/Politics	A	3.000	12.00		
PSC	2224	Main Campus	01	Policy in the Cyber Age	A	3.000	12.00		
PSC	2377	Main Campus	01	Comp. Pol. of the Middle East	A	3.000	12.00		
PSC	2987	Internship 1	01	Internship: Political Science	P	3.000	0.00		

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	11.000	44.00	4.00
Cumulative:	96.000	96.000	96.000	85.000	337.90	3.98

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Term: Fall 2018

College: Columbian Coll of Arts & Sci
Major: Political Science
Student Type: Continuing Student
Academic Standing: Good Standing
Additional Standing: Dean's List

Subject	Course	Campus	Level	Title	Grade	Credit Hours	Quality Points	Start and End Dates	R
HLWL	1109	Main Campus	01	Human Sexuality	A	3.000	12.00		
ITAL	4100	Main Campus	01	The Italian American Experienc	A	3.000	12.00		
MUS	1091	Main Campus	01	University Singers	P	1.000	0.00		
MUS	1512	Main Campus	01	Piano	A-	2.000	7.40		
PHIL	1062	Main Campus	01	Philosophy and Film	A	3.000	12.00		
PSC	2987	Internship 1	01	Internship	P	3.000	0.00		

Term Totals (Undergraduate)

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Current Term:	15.000	15.000	15.000	11.000	43.40	3.95
Cumulative:	111.000	111.000	111.000	96.000	381.30	3.97

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TRANSCRIPT TOTALS (UNDERGRADUATE) **-Top-**

	Attempt Hours	Passed Hours	Earned Hours	GPA Hours	Quality Points	GPA
Total Institution:	111.000	111.000	111.000	96.000	381.30	3.97
Total Non-GW Hours:	0.000	0.000	12.000	0.000	0.00	0.00
Overall:	111.000	111.000	123.000	96.000	381.30	3.97

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RELEASE: 8.7.1

NYU | LAW

SHIRLEY LIN
Acting Assistant Professor

NYU School of Law
Lawyering Program
245 Sullivan Street
New York, NY 10012-1301
P: 347 583 8901
slin@law.pace.edu

May 28, 2021

RE: Sarah Winslow, NYU Law '22

Your Honor:

I am writing to express my strong support for Sarah Winslow's application for a clerkship in your chambers. Having clerked for the Honorable Denny Chin of the U.S. Court of Appeals for the Second Circuit, I believe that Sarah would be a terrific candidate to assist in the work of your chambers.

The Lawyering Program is a key part of the first-year curriculum at NYU. It is a year-long course in which students study the actual practice of law, looking closely at the interactive, fact-sensitive, and interpretive work that is fundamental to excellent advocacy. In our course, students engage not only in the traditional legal research and writing tasks that most law schools emphasize, but also practice skills typical of most real-world legal practice. Through simulations, discussions, and collaborative critique of their work, our students develop skills in legal research and writing, client interviewing, counseling, negotiation, and oral advocacy. Because of the relatively small size of the class (28 students) and the frequency of one-on-one interactions, I can offer a well-informed perspective on Sarah's skills and strengths.

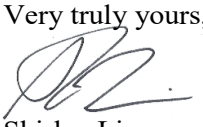
From the start of the course, Sarah demonstrated her excellent communication skills, enjoying the exercise of an impromptu oral argument. Sarah's briefs were clear, well organized and researched, and persuasive. For example, during her 1L fall semester, Sarah thoroughly engaged with a gender discrimination simulation to uncover the weaknesses of the client's case, which most students unfortunately tend to gloss over or spin despite the non-advocacy nature of the office memorandum to be drafted. Sarah enjoyed the legal research process and diligently incorporated my feedback in a final draft that highlighted the nuanced nature of her analysis. At the end of the semester, Sarah volunteered to participate in a live "fishbowl-style" mediation, she was thoroughly prepared and settled the case favorably on behalf of her client.

Sarah was always well prepared for Lawyering, making insightful contributions during class and small-group meetings. In the final unit, which consisted of a full brief addressing two questions of constitutional and criminal law, her brief provided cogent arguments in opposition to a motion to dismiss. Sarah then delivered a very compelling live argument that capped off the simulation that reflected her passion for litigation. For these reasons, I was pleased to see Sarah join the Moot Court Board as a staff editor, and during her first-year summer intern in the U.S. Attorney's Office for the Northern District of Texas.

Sarah has gone on to assume leadership roles in the Texas Law Society and Federalist Society, and volunteer with the Domestic Violence Advocacy Project. She was a dynamic presence in class, drawing from her prelaw background working for a boutique firm litigating mass torts and products liability. Because of her keen interest in litigation, Sarah also thrived as a teaching assistant in Lawyering this year, and I have no doubt she will do well as an associate this summer at Vinson & Elkins. Sarah is adept at juggling heavy workloads successfully, as she maintained a GPA in the top 2% of students as well as two jobs while attending George Washington University.

I am confident that Sarah would be an collaborative, insightful, and hard-working clerk. If you have any questions or require any additional information, please do not hesitate to contact me at (347) 583-8901 or (after June 1, 2021) slin@law.pace.edu.

Very truly yours,



Shirley Lin

James Orenstein
(646) 334-2490
jamie.orenstein@gmail.com

June 14, 2021

RE: Sarah Winslow, NYU Law '22

Your Honor:

Sarah Winslow has asked me to write a letter in support of her application to serve as your law clerk, and I am happy to do so. Sarah was a student in my "Complex Federal Investigations" seminar in the fall of 2020 and earned a grade of A.

My seminar is a challenging one: the assigned readings – mostly unedited cases, statutes, policy statements, and other primary source materials – are voluminous, and I don't tease out in advance of classroom discussions what the students should focus on. Instead, over the course of the semester I expect the students to learn to assimilate information and think like lawyers who investigate, prosecute, and defend crimes committed by organized groups. Classroom discussions focus on the ways the authorities we read shape the incentives and behaviors of all the players in the criminal justice system. The final exam confronts the student with the hypothetical facts of a single long-term investigation and asks the student to make and explain strategic choices for the prosecutor and the investigative subjects.

A member of the seminar who learns merely to cite the case or statute that stands for a particular rule we have studied cannot achieve the success Sarah did. Instead, it requires the ability to independently analyze large amounts of information and synthesize it to form a sensible response, it requires excellent writing ability, and it requires strong time management skills. The fact that Sarah was so successful in my seminar suggests that she possesses many of the same qualities I sought as a judge when hiring my own law clerks.

I also encourage substantive classroom discussion in my seminar, and Sarah impressed me with her contributions. Unlike some students who spoke often to earn credit for classroom participation without contributing much of substance, when Sarah spoke – as she did on a regular basis – it was clear that she had mastered the assigned reading and was thinking carefully about it. I greatly appreciated her contributions to our classroom discussions.

Finally, while I do not know Sarah other than from having had her join my seminar this year, her resume bolsters the impression she made on me. It shows an inquiring mind with a wide

array of interests, a lawyer with a genuine interest in the law, a self-starter, and a leader. I expect that you will find Sarah will be an excellent law clerk.

Please do not hesitate to contact me if I can provide further information, and best of luck in selecting your law clerks.

Very truly yours,

/s/ *James Orenstein*

James Orenstein

NYU | LAW

JONATHAN HARRIS
Acting Assistant Professor

NYU School of Law
Lawyering Program
245 Sullivan Street, C36
New York, NY 10012
O: 212 998 6240
C: 646 220 5045
jonathanharris@nyu.edu

June 14, 2021

RE: Sarah Winslow, NYU Law '22

Your Honor:

I am writing to express my strong support for Sarah Winslow's application to serve as a judicial law clerk. Based on my familiarity with Sarah and her work from her time as a teaching assistant in my year-long Lawyering course (2020-2021), I recommend her enthusiastically and without reservation.

Sarah was one of four teaching assistants in my class of 28 students. The Lawyering Program is a key part of the first-year JD curriculum at NYU. It is a year-long course in which students study the actual practice of law, looking closely at the interactive, fact-sensitive, and interpretive work that is fundamental to excellence in practice. Teaching assistants play a critical role in the course, working closely with students, often one-on-one, to focus on details in legal research and writing. Sarah's application to be a teaching assistant was one of the first I received and I could tell she would thrive in the position.

Sarah certainly thrived and was one of my top teaching assistants. Her strong work ethic and dedication to improving students' advocacy skills were apparent. Sarah quickly provided thoughtful feedback on students' performances in simulations and writing assignments and came to me when she believed certain students needed extra attention. She went above the call of duty by providing substantive feedback on how to restructure sentences and sections of arguments. Multiple students commented to me on how helpful Sarah's written feedback was in improving their legal writing, as well as her willingness to meet with them one-on-one outside of class time. And, not coincidentally, those students that had Sarah as their teaching assistant became some of my strongest. Sarah likewise showed her facility with the tools of legal research to assist students in refining their searches and using different platforms to ensure that an appropriate number of sources were checked.

In helping to improve students' research and writing, Sarah showed how skilled she has become in those areas. There is no way to teach these skills as effectively as she did without having a solid grasp of the nuances of efficient research and compelling writing.

Sarah was also a true pleasure to work with and put our students first. She volunteered, without my suggesting it, to arrange social events for our students on Zoom during both semesters. Sarah also took the initiative to organize a reasoning-by-analogy presentation for our students; this is probably the most critical concept that I teach in Lawyering. And she utilized her leadership on the Moot Court Board to ensure that our students got to witness a

virtual oral argument before they attempted their own. Sarah always asked how she could help in class and stayed afterward to strategize with me about how to make future lessons more effective for students. I also learned that she is one of her class’s most important leaders and has spoken up about the need to have more women voices in the leadership of student organizations.

I was a clerk for Judge James Graves, Jr. of the U.S. Court of Appeals for the Fifth Circuit and I know how important it is to have cordial and healthy relationships in work settings as intimate as a judge’s chambers. I am certain that Sarah would work well with other clerks, staff, and of course, Your Honor.

I highly recommend Sarah based on her initiative, enthusiasm for the law, strong research and writing skills, effective editing abilities, conscientiousness, and commitment. If you have questions or would like additional information, please do not hesitate to contact me at jonathanharris@nyu.edu or at (646) 220-5045.

Warm regards,

Jonathan Harris
Acting Assistant Professor
NYU Lawyering Program

U.S. Department of Justice
United States Attorney
Northern District of Texas

1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699

Main: 214.659.8600
Fax: 214.659.8809

May 26, 2021

To Whom It May Concern:

It is my honor and privilege to discuss Sarah Winslow's work for me during her internship in consideration of a judicial clerkship. Sarah worked in our Dallas office as a law intern during the summer of 2020 after her first year of law school.

During her internship, she worked on a variety of projects and, in particular, completed three lengthy projects for me: a sentencing memorandum, a significant post guilty plea motion, and a research memorandum. The sentencing memorandum required an overnight turnaround due to a late filing by the defense. Sarah eagerly volunteered and did a fantastic job. Her work was thoughtful and well written, and I made very few edits. The post guilty plea motion involved a significant amount of research and analysis. Her research was thorough and on point, and she showed remarkable attention to detail when she synthesized the research into written form. Her analysis of the law to the facts was precise and relevant. Her research memorandum was thorough and helpful. Overall, her work for me was excellent.

For all of these reasons I recommend her for a judicial clerkship. Please feel free to contact me with any questions. I can be reached by cellular telephone at 214-274-0989 or email at Rachael.jones@usdoj.gov. Thank you for your consideration of Sarah.

Sincerely,

L. Rachael Jones
Assistant United States Attorney

WRITING SAMPLE OF SARAH WINSLOW
NEW YORK UNIVERSITY SCHOOL OF LAW
J.D. CLASS OF 2022

Motion for Summary Judgment, based on an actual case from several years ago, prepared as a writing assignment for New York University School of Law's Government Civil Litigation Externship in the Southern District of New York.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROBERT CARVAJAL, Plaintiff, - against - HUGH DUNLEAVY, in his Individual and Official Capacities, DON MIHALEK, in his Individual and Official Capacities, TIMOTHY RAYMOND, in his Individual and Official Capacities, TOM RIZZA, in his Individual Capacity, DANIEL HUGHES, in his Individual Capacity, TREVA LAWRENCE, in his Individual Capacity, JOHN TANI, in his Individual Capacity, and DON MCGEE, in his Individual Capacity, Defendants.	FILED ELECTRONICALLY 07 Civ. 0170 (PAC) (JCF)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

SARAH A. WINSLOW

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PRELIMINARY STATEMENT

Plaintiff Robert Carvajal ("Carvajal," or "Plaintiff") brings this suit under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) against eight United States Secret Service agents ("Secret Service," or "Defendants") in their individual capacities who executed a lawful search warrant at his apartment. Compl. § I, 1. On February 9, 2004, Plaintiff, whose brother was the target of the search, unfortunately was wounded when two Secret Service agents shot him during the execution of the warrant. The agents observed Plaintiff, armed with a handgun, move toward other agents and an open apartment window, ignoring repeated verbal commands from the agents to stop moving and get down on the ground. Def.'s Statement of Undisputed Material Facts Pursuant to Local Civil Rule 56.1 ¶¶ 31-32 [hereinafter Def.'s Facts]. As a result, two agents had to discharge their weapons. *Id.* at ¶¶ 34, 37.

Plaintiff alleges that Defendants used excessive force in violation of his Fourth and Fourteenth Amendment rights. However, Plaintiff has failed to demonstrate that there is a genuine question of *material* fact with respect to the shooting. Rather, the undisputed facts show that, under the circumstances, the two agents who discharged their weapons are entitled to qualified immunity as a matter of law. Thus, Defendants move for summary judgment pursuant to Fed. R. Civ. P. 56.

BACKGROUND

I. The Investigation into Joseph Carvajal and the Expectation of Finding Firearms During the Search

Plaintiff's brother, Joseph Carvajal ("Joseph"), was the subject of a Secret Service investigation into a counterfeiting and narcotics distribution conspiracy. Def.'s Facts ¶ 1. The Secret Service became involved after Joseph's co-conspirator, Mark Crump, was arrested and began cooperating with law enforcement as an informant. *Id.* at ¶¶ 1-2. Crump participated in a

series of recorded telephone conversations and in-person meetings with Joseph, monitored by the Secret Service. *Id.* at ¶ 3. These conversations revealed incriminating details about Joseph's criminal scheme and an attempted purchase of a firearm. *Id.* Plaintiff was present for at least one of these meetings between Joseph and Crump. *Id.* at ¶ 4.

Plaintiff and Joseph reside in an apartment located at 70 East 115th Street, Apt. 6D. *Id.* at ¶¶ 5-6. In early February 2004, Defendant SA Mihalek obtained an arrest warrant for Joseph and a search warrant for Plaintiff and Joseph's apartment (Apt. 6D), as well as for an apartment belonging to their co-conspirator, Todd Blunt, in the same building (Apt. 16D). *Id.* at ¶¶ 6-7. In preparation for the search, SA Mihalek ran a criminal history check on all of the suspects, revealing that Joseph had an "extensive criminal history involving three violent felony convictions for armed robbery, all with a weapon, one involving a machinegun silencer, two other arrests involving . . . resisting arrest charges, . . . one with a reckless endangerment charge, all with convictions." *Id.* at ¶ 9.

Joseph's criminal history with firearms was consistent with information that SA Mihalek had uncovered during the counterfeiting investigation, which included statements from Crump that Joseph had access to and used firearms in the course of the conspiracy, and sometimes carried them on his person. *Id.* at ¶ 10. Additionally, several of the taped conversations included Joseph discussing the use of various specific firearms, including a ".45, Beretta, Luger, various guns." *Id.* at ¶ 11. As a result, SA Mihalek expected to encounter up to three guns in the apartment and informed the agents who were to be involved in the execution of the warrants of this possibility on the morning of the search, explaining that tshey needed to be "extra careful" due to this safety risk. *Id.* at ¶¶ 12, 17.

II. The Execution of the Warrants

On February 9, 2004, at approximately 6:00 AM, SA Mihalek led a team of approximately twenty Secret Service agents to execute the search and arrest warrants. *Id.* at ¶ 8. The "entry team" of agents who would be conducing the search of Plaintiff's apartment included, among others, SAs Mihalek and Rizza. *Id.* at ¶ 21. SA Mihalek knocked on Plaintiff's door three times, announcing each time, "Police with a warrant, open the door." *Id.* at ¶ 27. When there was no response, an agent opened the door with a battering ram after three strikes. *Id.* at ¶ 28.

Two of the agents on the entry team, including SA Rizza, entered Plaintiff's apartment and headed to the left, toward the kitchen/dining room area of the apartment. *Id.* at ¶ 29. SA Mihalek, standing at the entryway, then saw "two individuals in the back of the apartment, one individual in front holding a gun, the other individual in the back holding a large object," which turned out to be a printer. *Id.* at ¶ 30. SA Mihalek later learned that it was Plaintiff carrying the gun and Joseph carrying the printer. *Id.*

While SA Mihalek observed the two individuals, the agents on the entry team were yelling "police, get down, or words to that effect." *Id.* at ¶ 31. However, Plaintiff and Joseph did not comply with these commands. Instead, SA Mihalek saw Plaintiff, carrying the gun, and Joseph, carrying the printer, move toward the kitchen/dining room area where the first two agents had just entered. *Id.* at ¶ 32. There was also an open window in that area of the apartment. *Id.* at ¶ 33. Upon seeing the armed individuals move towards his fellow agents, SA Mihalek fired one shot at Plaintiff—the person holding the gun. *Id.* at ¶ 34. Plaintiff and Joseph then moved out of SA Mihalek's view and into the kitchen/dining room. *Id.* at ¶ 35. SA Rizza, one of the agents in the kitchen/dining room area, then fired two shots at Carvajal. *Id.* at ¶¶ 36-37. SA Mihalek then entered the kitchen/dining room area, where he found Plaintiff and Joseph lying on the floor. *Id.* at ¶ 38.

Joseph, uninjured, was taken into custody and removed from the apartment; agents with medical training attended to Plaintiff, who appeared to be injured and was subsequently taken to a hospital by ambulance. *Id.* at ¶¶ 39-41. Meanwhile, the agents positioned outside the apartment complex had heard the gunshots during the search and looked up toward Plaintiff's apartment, noticing two falling objects—one white and one black—which turned out to be the gun and printer that Plaintiff and Joseph had been holding and, presumably, had been thrown out the open apartment window by one of them. *Id.* at ¶¶ 42-43.

ARGUMENT

I. The Undisputed Facts Show that SAs Mihalek and Rizza Are Entitled to Qualified Immunity and Summary Judgment

Plaintiff's complaint alleges a constitutional violation related to the shooting during the execution of the warrants. However, the undisputed material facts show that SAs Mihalek and Rizza acted objectively reasonably, and they are thus entitled to qualified immunity. Moreover, since qualified immunity provides a shield from litigation, rather than a defense, a finding of qualified immunity means there is no genuine issue for trial in this case and summary judgment must be granted for Defendants.

A. *Legal Standard for Summary Judgment*

Summary judgment must be granted when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Although the court must resolve disputed facts in favor of the non-moving party, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Id.* at 56(e). Thus, "[t]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return

a verdict for that party," and summary judgment may be granted "if evidence is merely colorable or is not sufficiently probative." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

B. *Legal Standard for Qualified Immunity*

Qualified immunity is intended to protect public officials from harassing, expensive, or unjustified litigation so they can execute their official duties without such hindrances. Qualified immunity thus affords generous protection to public officials to shield them from liability for civil damages, entitling them to qualified immunity if "'(1) their conduct does not violate clearly establish constitutional rights, *or* (2) it was objectively reasonable for them to believe their acts did not violate those rights.'" *Martinez v. Simonetti*, 202 F.3d 625, 633-34 (2d Cir. 2000) (quoting *Weyan v. Okst*, 101 F.3d 845, 857 (2d Cir. 1996)). The second prong of the doctrine protects the actions of public officials whenever "the objective reasonableness test is met," broadly interpreted to be met "if officers of reasonable competence *could* disagree on the legality of the defendant's actions." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995) (emphasis added).

In claims alleging excessive force, courts have held that "the question for the purpose of qualified immunity is 'whether a reasonable officer could have believed that the use of force alleged was objectively reasonable in light of the circumstances.'" *Id.* at 425 (citations omitted). For a plaintiff's claim to survive this analysis, they must show that "no reasonable officer would have made the same choice. *Id.* at 426. In these claims, the doctrine protects "all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (per curiam).

Qualified immunity is not a mere "defense" to litigation; rather, it provides *immunity* from litigation. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("The entitlement is an *immunity from suit* rather than a mere defense to liability . . . ."); *see also Saucier v. Katz*, 533 U.S. 194, 200

(2001) ("Qualified immunity is 'an entitlement not to stand trial or face the other burdens of litigation.'") (quoting *Mitchell*, 472 U.S. at 511). Thus, the question of whether a defendant is entitled to qualified immunity should be resolved at the early stages of litigation. *See, e.g.*, *Hunter*, 502 U.S. at 227 ("[W]e have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation."); *see also Saucier*, 533 U.S. at 200 ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expenses of trial are avoided where the defense is dispositive.") As such, summary judgment is appropriate when qualified immunity is successfully raised as a defense. *See Cartier v. Lussier*, 955 F.2d 841, 844 (2d Cir. 1992) ("The Supreme Court has expressly encouraged the use of summary judgment when qualified immunity is raised as a defense . . . as a means to quickly extricate government officials from defending insubstantial suits."). Summary judgment is particularly appropriate in cases where "the factual record is not in serious dispute," meaning the "ultimate legal determination whether . . . a reasonable police officer should have known he acted unlawfully is a question of law better left for the court to decide." *Lennon*, 66 F.3d at 42 (citing *Warren v. Dwyer*, 906 F.2d 70, 76 (2d Cir. 1990)).

C. *SAs Mihalek and Rizza Acted Objectively Reasonably*

The undisputed material facts show that SAs Mihalek and Rizza acted objectively reasonably under the doctrine of qualified immunity. The investigation into Joseph Carvajal demonstrated a serious, cognizable risk that at least one of the occupants of Plaintiff's apartment would be armed with a gun during the execution of the warrants. SA Mihalek assessed this safety risk well prior to the actual execution of the warrant through information such as Joseph's criminal history check, statements made by Mark Crump, and recorded conversations between Crump and Joseph. Def.'s Facts ¶ 3, 9-11. Accordingly, SA Mihalek communicated this risk to his agents who

would be executing the warrant with him, including SA Rizza. *Id.* at ¶ 17. With good reason, all agents on the entry team entered Plaintiff's apartment that day on high alert, aware of the fact that they could be immediately met with gunfire.

Thus, when SA Mihalek entered Plaintiff's apartment in the dark hours of the morning, only to immediately see two figures holding what he observed to be a gun and a large object, this situation was escalated. Faced with what he perceived to be imminent danger of death or serious bodily harm to himself and his fellow agents and informed with the prior knowledge that this *exact* scenario was likely, verbal commands were given for Plaintiff and Joseph to get down and stop what they were doing. *Id.* at ¶ 31. Unfortunately, SA Mihalek saw Plaintiff and Joseph instead ignore the commands and move toward the kitchen/dining room area where other agents were, as well as in the direction of an open window. *Id.* at ¶ 32. At this moment, SA Mihalek acted in accordance with his training—he fired one shot toward Plaintiff, the individual observed to have a gun, who appeared to either be attempting to escape through the open window or, worse, attempting to advance, armed, on the agents in the other room. *Id.* at ¶ 34. Just seconds later, SA Rizza fired two shots at Plaintiff from the kitchen/dining room upon witnessing Plaintiff's attempted escape or advancement on him. *Id.* at ¶ 37.

All of these things happened in a matter of seconds, and the court must consider this timeframe in evaluating whether SA Mihalek and SA Rizza's actions "w[ere] objectively reasonable in light of the circumstances." *Lennon*, 66 F.3d at 420. The two agents were each faced with what they reasonably perceived to be an imminent threat of death or serious bodily harm from an armed figure almost immediately upon entering Plaintiff's apartment—a threat that they knew was a possibility from the investigation into Joseph Carvajal even before they set foot into the apartment.

II. Plaintiff's Asserted Factual Disputes Are Immaterial

Plaintiff notably disputes certain aspects of Defendants' account of what happened. However, these facts are immaterial, so even resolving them in Plaintiff's favor where warranted could not change the conclusion that SAs Mihalek and Rizza acted objectively reasonably.

First, Plaintiff denies holding a gun during the execution of the search warrant. Pl.'s Statement of Undisputed Material Facts ¶ 70 [hereinafter Pl.'s Facts]. However, the truth of whether Plaintiff was *actually* holding a gun during these events is not a material fact. Rather, the material fact is whether SA Mihalek reasonably *believed* Plaintiff was holding a gun. As the Second Circuit in *Loria v. Gorman*, 306 F.3d 1271, 1282 (2d Cir. 2002), states, "if the officer reasonably believed that his actions did not violate the plaintiff's rights, he is entitled to qualified immunity even if that belief was mistaken." *See also Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (recognizing that law enforcement officials who reasonably but mistakenly draw conclusions should not be held personally liable). This is because, as explained in *Nimely v. City of New York*, 414 F.3d 381, 390-91 (2d Cir. 2005) (quoting *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 762 (2d Cir. 2003)), "[i]n all cases, the reasonableness of the officer's decision to use force in effectuating a seizure 'depends only upon the officer's knowledge of circumstances immediately prior to and at the moment that he made the *split-second* decision to employ deadly force." (emphasis added). Here, under the circumstances, SA Mihalek's belief that Plaintiff was armed was reasonable, even if it *was* mistaken. The search took place in the dark hours of the early morning, decreasing visibility in the apartment. When combined with the fact that SA Mihalek had good reason to believe that someone in the apartment could be armed and dangerous, his perception that Plaintiff was holding a gun was reasonable.