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IN EVENT OF AN (AI) EMERGENCY: INTERPRETING CONTINUITY OF GOVERNMENT PROVISIONS IN STATE CONSTITUTIONS

Frazier, Kevin T.

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*Kevin T. Frazier**

"Of this I am certain: If we prepare ourselves so that a terrible attack—although it might hurt us—could not destroy us, then such an attack will never come." - Edward Teller, the "Father of the Hydrogen Bomb," in an interview with Allen Brown of This Week Magazine in 1957.

Bad actors have already used or may soon use AI to disrupt critical infrastructure,[1] influence elections,[2] and upend economies.[3] Those most concerned about the risks posed by AI argue that it is a matter of when and not if state governments will have to respond to threatened or realized acts of AI aggression. Though a litany of scholars have examined the powers governors may use in emergency situations,[4] less attention has been paid to the role of state legislatures in responding to destabilizing events.

Scholars have justified their focus on governors for practical reasons—the executive branch of state governments has been deemed the "the center of governmental response[s]" to public emergencies.[5] Two trends caution against perpetuating neglect of state legislatures. First, the legal and social bases for governors to take sweeping action

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* Kevin T. Frazier is an Assistant Professor at St. Thomas University College of Law and a Director of the Center for Law and AI Risk. He thanks Ana Baretto for her research assistance and the High Tech Law Journal Editorial Staff for their helpful guidance on this article.

[1] *See* Christian Vasquez, *DHS warns of malicious AI use against critical infrastructure*, CYBERSCOOP (Sept. 14, 2023), https://cyberscoop.com/dhs-homeland-threat-assessment.

[2] *See, e.g.*, David Klepper & Ali Swenson, *AI-generated disinformation poses threat of misleading voters in 2024 election*, PBS (May 14, 2023), https://www.pbs.org/newshour/politics/ai-generated-disinformation-poses-threat-of-misleading-voters-in-2024-election (discussing former President Trump's campaign on using generative AI).

[3] *See* Andrew Ross Sorkin et al., *An A.I.-Generated Spoof Rattles the Markets*, N.Y. TIMES (May 23, 2023), https://www.nytimes.com/2023/05/23/business/ai-picture-stock-market.html.

[4] *See, e.g.*, F. D. Trickey, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290 (1965) (analyzing the powers afforded to governors by state constitutions and statutes in the event of unrest).

[5] *Id.*

in response to emergencies eroded in many states during COVID-19.[6] *In turn, many state legislatures, by law, by popular support, or both, have amassed more authority to respond in worst-case scenarios.*[7] *Second, the likelihood of states being thrown into disarray will only increase as AI evolves and spreads;*[8] *thus, warranting a closer analysis of what powers state legislatures may exercise to restore normalcy.*

Thirty-five state constitutions contain variants of a template "Continuity of Government" (CoG) provision promulgated by the federal government at the height of the Cold War.[9] *What events may trigger these provisions, as well as what powers they afford to state legislatures, has evaded judicial scrutiny as a result of state legislatures rarely invoking the relevant provision.*[10] *It follows that the scholarly analysis of how best to interpret these important provisions should occur in the relative tranquility of the present rather than at the height of a calamity. This preemptive analysis may improve the ability of state legislatures to respond to disorder by clarifying the likely scope and duration of their powers and, ideally, by spurring amendments to clarify the provisions in advance of any such event.*

This paper serves as one (and, likely, the first) entry in an inquiry that merits immediate and robust scholarly attention. Relying on the framework set forth by the New Haven School of Jurisprudence, this paper resolves one of the most consequential ambiguities contained in CoG provisions. This framework deserves special

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[6] *See* Trip Gabriel, *State Lawmakers Defy Governors in a Covid-Era Battle for Power*, N.Y. TIMES (Apr. 22, 2021), https://www.nytimes.com/2021/02/22/us/politics/republicans-democrats-governors-covid.html.

[7] *See Legislative Oversight of Emergency Executive Powers*, NAT'L CONF. OF ST. LEGIS. (Sept. 22, 2023), https://www.ncsl.org/about-state-legislatures/legislative-oversight-of-emergency-executive-powers.

[8] *See, e.g.*, Geoff Beckwith, *Unchecked, AI Will Disrupt Government and Communities*, MASS. MUN. ASS'N (June 1, 2023), https://www.mma.org/advocacy/unchecked-ai-will-disrupt-government-and-communities/ (providing examples of AI disruption).

[9] *See* Eric R. Daleo, S*tate Constitutions and Legislative Continuity in a 9/11 World: Surviving an "Enemy Attack"*, 58 DEPAUL L. REV. 919, 920, 933–34 (2009). Some states have statues setting forth the continuity of government plans and powers. This paper does not explore those provisions. *See, e.g.*, KANSAS LEGISLATIVE RESEARCH DEPARTMENT, CONTINUITY OF GOVERNMENT PROVISIONS IN STATE CONSTITUTIONS 1–33 (May 6, 2020) (providing a list of such statutes).

[10] *See* Daleo, *supra* note 9, at 941.

consideration given its inclusion of myriad disciplines and its characterization as an "explicitly policy-oriented jurisprudence."[11]

Scholars from across the legal profession have a role in contributing to this inquiry. The incorporation of AI into legal practice imposes a responsibility on scholars to anticipate how the technology may require new doctrines, laws, and methods of interpretation. Though this paper focuses on the continuation of state governments in the wake of an AI emergency, related inquiries such as how to rethink contract law, property law, and the like upon such an emergency demand more scholarly attention. The exploration of those topics can, in turn, inform what sorts of powers state legislatures may need to exercise and for how long.

[11] Myres S. McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1, 9–10, 13 (1966).

CONTENTS

I. INTRODUCTION

> As the world moves further into an industrial and science-based civilization in which human activity changes the physical and social environments to a degree and at a velocity hardly imaginable in the past, the role of law as a clarifier of common interest and a regulator of action becomes ever more complex even as it becomes more urgent. - Professor Michael Reisman.[12]

Several AI experts warn that catastrophic harms from AI models will eventually, if not imminently, occur and wreak havoc on our economics, cultures, and governing systems.[13] The intentional use of AI by bad actors to cause harm represents one of the most pressing and tangible threats.[14] In particular, red flags have been raised about bad actors—state and non-state—deploying AI to interfere with democratic elections and disrupt day-to-day governance.[15]

What role state governments should play in regulating AI as well as responding to AI attacks has attracted increased attention from

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[12] Michael Reisman, *Theory About Law: The New Haven School of Jurisprudence*, *in* WISSENSCHAFTSKOLLEG JAHRBUCH 228, 242 (1989).

[13] *See* Case Metz, *'The Godfather of A.I.' Leaves Google and Warns of Danger Ahead*, N. Y. TIMES (May 4, 2023), https://www.nytimes.com/2023/05/01/technology/ai-google-chatbot-engineer-quits-hinton.html (discussing the concerns of Geoffrey Hinton—regarded by some as the "godfather of AI"); *see also* Ryan Heath, *AI Experts Warn of Looming Catastrophes*, AXIOS (May 2, 2023), https://www.axios.com/2023/05/02/ai-chatgpt-disasters-scenarios-harms-geoffrey-hinton (listing several AI experts who fear catastrophic outcomes induced by AI).

[14] *See* Bryce Baschuk, *Microsoft Economist Warns Bad Actors Will Use AI to Cause Damage*, BLOOMBERG (May 3, 2023), https://www.bloomberg.com/news/articles/2023-05-03/ai-will-cause-real-damage-microsoft-chief-economist-warns (reporting the views of Microsoft's Chief Economist Michael Schwarz).

[15] *See* Mekela Panditharatne & Noah Giansiracusa, *How AI Puts Elections at Risk—And the Needed Safeguards*, BRENNAN CTR. FOR JUST. (July 21, 2023), https://www.brennancenter.org/our-work/analysis-opinion/how-ai-puts-elections-risk-and-needed-safeguards; *see also How worried should you be about AI disrupting elections?*, THE ECONOMIST (Aug. 23, 2023), https://www.economist.com/leaders/2023/08/31/how-artificial-intelligence-will-affect-the-elections-of-2024.

scholars and policymakers alike.[16] This is a timely and unavoidable discussion given the likelihood, if not inevitability, of bad actors, such as China, leveraging their AI expertise to sow chaos in upcoming elections.[17] If and when such an attack occurs, what powers do state governments have to mitigate and respond to such harms?

A portion of this ongoing debate can be resolved by taking a glance at a neglected part of many state constitutions—Continuity of Government (CoG) provisions.[18] With some differences, these provisions authorize state legislatures to take extraordinary measures during emergencies. As an illustration, Article II, Section 6 of the Florida Constitution sets forth the following:

> In periods of emergency resulting from enemy attack the legislature shall have power to provide for prompt and temporary succession to the powers and duties of all public offices the incumbents of which may become unavailable to execute the functions of their offices, and to adopt such other measures as may be necessary and appropriate to insure the continuity of governmental operations during the emergency. In exercising these powers, the legislature may depart from other requirements of this constitution, but only to the extent necessary to meet the emergency.[19]

Within a seven-year period at the height of the Cold War, thirty-five states, including Florida, adopted some version of a CoG provision.[20] They did so, in part, because of pressure put on them by the Federal

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[16] *See* Billy Perrigo, *California Bill Proposes Regulating AI at State Level*, TIME (Sept. 13, 2023), https://time.com/6313588/california-ai-regulation-bill/ (summarizing a bill introduced by a California state legislator to regulate AI); *see also* Sorelle Friedler et al., *How California and other states are tackling AI legislation*, BROOKINGS (Mar. 22, 2023), https://www.brookings.edu/articles/how-california-and-other-states-are-tackling-ai-legislation/ ("From California to Connecticut and from Illinois to Texas, the laboratories of democracy are starting to take action to protect the public from the potential harms of these technologies.").

[17] *See, e.g.*, David Klepper & Ali Swenson, *AI presents political peril for 2024 with threat to mislead voters*, AP NEWS (May 14, 2023), https://apnews.com/article/artificial-intelligence-misinformation-deepfakes-2024-election-trump-59fb51002661ac5290089060b3ae39a0; Jeff Seldin, *Report: China Using AI to Mess With US Voters*, VOA (Sept. 7, 2023), https://www.voanews.com/a/report-china-using-ai-to-mess-with-us-voters/7258502.html.

[18] *See* Daleo, *supra* note 9, at 920, 933–34.

[19] FLA. CONST. art. II, § 6.

[20] *See* Daleo, *supra* note 9, at 940, 940 n.145 (detailing which states altered their constitutions accordingly).

Government to ensure that, upon an enemy attack, state and local governments would have the capacity and legal authority to appropriately respond.[21]

States, however (and thankfully), have infrequently invoked their respective CoG provisions.[22] In turn, the reach of CoG provisions has been interpreted by only a few courts.[23] It follows that the powers, limits, and responsibilities these provisions impose on states remain unsettled. The Florida provision, for example, does not explicitly define which actors qualify as enemies, what qualifies as an attack, how to determine whether a period of emergency has concluded, nor provide guidance as to what measures may be "necessary and appropriate" to maintain government operations.[24] The resolution of these weighty questions should not take place during a crisis.

This paper argues that the New Haven School of Jurisprudence is best suited to resolve ambiguities in CoG provisions. Unlike other jurisprudential frameworks, the New Haven framework conceives of the law as "a process"—the culmination of decisions that reflect "choice[s] made in response to competing demands arising from social process and having consequences for future social process."[25] This conception is particularly useful when reviewing ambiguities within CoG provisions that must be interpreted in response to whatever threats face state governments and, more broadly, the social order.

Relatedly, the framework emphasizes that the law is "one instrument that serves human beings, not the other way around."[26] This emphasis aligns with the functional aspect of CoG provisions—drafted and adopted with the purpose of restoring normalcy amid chaos.

Finally, the framework adopts a means to appraise laws in light of their functional aims: assessing the extent to which they advance the

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[21] *See, e.g.*, JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 124 (1993) (reporting that Arizona's continuity of government provision "was urged upon Arizona by the federal civil defense authorities"); *see also* Daleo, *supra* note 9, at 933 (covering efforts by the Office of Civil and Defense Mobilization to encourage state officials to amend their constitutions and take other actions to ensure the continuity of government).

[22] *See* Daleo, *supra* note 9, at 941.

[23] *See id.*; *but see infra* notes 149–51 and accompanying text (discussing two of the few cases in which courts have had an opportunity to interpret such provisions).

[24] *See* FLA. CONST. art. II, § 6.

[25] McDougal, *supra* note 11, at 2.

[26] Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA PACIFIC L. REV. 45, 51 (2010).

common interest.[27] This criteria aids interpretative inquiries by providing a basis with which to eliminate interpretations that fail to further the good of the community—a goal that motivated the adoption of CoG provisions and justifies their perpetuation.[28] This aspect of the framework also marks an improvement over alternatives because of its explicit consideration of all the relevant factors that may influence the proper interpretation of a law; comparatively, other theories often unnecessarily limit the variables they consider when analyzing a legal question.[29]

This paper proceeds in three Parts. Part II explores the origin of CoG provisions and variations in the content of those provisions. This brief overview zeroes in on the fears that rallied "overwhelming majorities" of voters to support passage of CoG provisions and on the intent of the federal government in urging passage of the provisions. Consideration of these perspectives exposes the social and political conditions that gave rise to the widespread and rapid adoption of CoG provisions—as discussed further below, many of those same conditions exist today with respect to AI. Part III provides background information on the New Haven School of Jurisprudence and sets forth its interpretative framework. Part IV includes the application of the New Haven framework to one ambiguity in CoG provisions: when the provision may be triggered. The paper concludes with a call for more analysis of CoG provisions under the New Haven framework, as well as other jurisprudential frameworks.

II. SUMMARY OF COG

Prior to diving into the content of CoG provisions as well as the ambiguities therein, a review of the social setting at the time of their adoption helps explain why thirty-five states adopted the provisions in such a short time period and with little to no public opposition.[30] And, as discussed further below, this background information assists with the application of the New Haven framework.

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[27] *See* Molly Land, *Reflections on the New Haven School*, 58 N.Y.L. SCH. L. REV. 919-20 (2013-2014) (discussing the framework's conception of the law as a "tool designed to promote human dignity and world public order.").

[28] *See id.*

[29] *See* Reisman, *supra* note 12, at 234.

[30] *See* Daleo, *supra* note 9, at 940 n.145 (detailing which states altered their constitutions).

A. *Widespread Fear of Nuclear Attack Causing Mass Casualties and Mass Destruction*

The demonstrated power of nuclear weapons at the conclusion of World War II, in conjunction with the intensification of the Cold War, gave rise to a preparedness movement focused on ensuring the preservation of American values and way of life in the aftermath of a nuclear attack.[31] In 1951, President Truman signed the Federal Civil Defense Act into law—creating the Federal Civil Defense Administration (FCDA) and reconstituting the Office of Civil and Defense Mobilization (OCDM).[32] From the outset of the Administration's operation, its leaders focused on assisting local and state governments with post-attack planning.

Upon becoming Director of the OCDM, Frank B. Ellis recounts that he promptly sent a telegraph to each governor asking them to make "preparations for the survival of civil government in a nuclear attack emergency" a matter of "highest priority."[33] The severity and likelihood of such an attack justified extreme and immediate measures—as made clear by Ellis's warning that "[t]he possibility of nuclear attack is not pleasant to reflect upon, but to ignore it is to condone national suicide if [an] attack ever comes."[34] Ellis urged lawyers to avoid an apathetic response by actively helping plan a post-attack society. He claimed that such efforts would "assure orderly conduct of emergency operations, . . . minimize the possibility of martial rule, . . . provide continuous legally designated authority, and . . . contribute a system of order as close as possible to our traditional forms."[35]

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[31] *See, e.g.*, Ernest B. Furgurson, *Dig Into the Nuclear Era's Homegrown Fallout Shelters*, SMITHSONIAN MAG. (Feb. 10, 2016), https://www.smithsonianmag.com/smithsonian-institution/dig-into-nuclear-era-homegrown-fallout-shelters-180958063/.

[32] *See* The Federal Civil Defense Act of 1950, H.R. 9798, 81st Cong. (1950); *Statement by the President Upon Signing the Federal Civil Defense Act of 1950*, HARRY S. TRUMAN LIBR., https://www.trumanlibrary.gov/library/public-papers/10/statement-president-upon-signing-federal-civil-defense-act-1950 (last visited Oct. 1, 2023); *see also* Emily Chapin, *Civil Defense During the Cold War*, MUSEUM OF THE CITY OF N. Y. (Sept. 11, 2017), https://www.mcny.org/story/civil-defense-during-cold-war. Though the name of this office changed several times, this paper refers to it as the OCDM for the sake of readability. *See* Reorganization Plan, Pub. L. No. 85-763, 72 Stat. 861 (1958) (changing the name of the office).

[33] Frank B. Ellis, *Civil Government and Nuclear Warfare*, 47 WOMEN LAW. J. 11, 11 (1961).

[34] *Id.*

[35] *Id.* at 12.

Others, including prominent lawyers, agreed.[36] Their advocacy for preparedness efforts followed a common formula: first, acknowledge the widespread and justified fears of such an attack; second, describe a hypothetical, yet plausible attack; third, reveal the extent to which civil order has failed to adjust in response to similar events; and fourth, call for preemptive efforts to ready local and state governments for operating under such conditions.[37] On the whole, these calls to action exposed the extent to which the public and high-ranking officials anticipated that administration of the law, as well as the operation of local and state government institutions, would struggle in the wake of widespread physical destruction.

By way of example, Homer Crotty, the former President of the California State Bar, penned an article in the *American Bar Association Journal* that followed that template. First, he declared that "[b]ombing by enemy aircraft is not only possible but is altogether probable."[38] Such an attack would not be insignificant. He added, "Nearly everyone expects, in the event of war, the bombing of our cities and the destruction by fire of many smaller towns."[39]

Crotty then offered an understandable and, on its face, feasible nuclear attack on Chicago. He walked through how a single bomb would "cause total destruction within a radius of one-half mile," and break the city's and, by extension, much of the state's legal administration.[40]

Next, Crotty observed that though many states and local governments had set forth basic succession plans, many more practical and important questions remained unanswered. In particular, he questioned how governments would proceed if the individual tasked with appointing the succeeding official was killed in the attack.[41] He also wondered about whether and for how long statutes of limitations would be tolled.[42] Crotty additionally queried who would have the authority to declare such extensions and, more generally, to declare

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[36] *See* Hans Klaosbrunn et al., *Report of the Special Committee on Atomic Attack*, 84 ANNU. REP. A.B.A. 601, 601-02 (1959).

[37] *See* James Warren Beebe, *Tomorrow's Weapons vs. the Constitution*, 36 S. WOMEN CAL. L. REV. 373 (1963); *see also* Kenneth Keating, *Realistic Looking Ahead: The Need for the Continuity of Government Program*, 105 WOMEN CONG. REC. A8149, A832-35 (1959).

[38] Homer D. Crotty, *The Administration of Justice and the A-Bomb: What Follows Disaster?*, 37 AM. BAR. ASSC. J. 893, 893 (1951).

[39] *Id.*

[40] *Id.* at 893–94.

[41] *See id.* at 894.

[42] *See id.*

emergencies.[43] Troublingly, such important questions had yet to be resolved, despite a relatively recent instance of an emergency attack disrupting day-to-day affairs in a major population center.

Crotty pointed to Hawaii in the aftermath of the Pearl Harbor attack as a case study of insufficient preparatory efforts.[44] In that case, Governor Joseph Poindexter responded to the surprise destruction by transferring governing power, including control of the courts, to a U.S. Army General, Walter Short.[45] General Short promptly suspended the writ of *habeas corpus* and closed the courts, among other extralegal measures; many of such measures stayed in place for more than a year.[46]

The Hawaii example led Crotty to conclude that "in too many respects the laws of our states and the rules of our courts are at the present time quite inadequate for the emergency."[47] He called on members of the legal profession, nationally and locally, to study questions related to the administration of the law and the continuation of governance.[48] Crotty's fellow member of the California State Bar, James Beebe, addressed the latter point in a similar article published seven years later.[49]

Beebe's hypothetical involved Los Angeles—he theorized that "a few well-placed hydrogen or atom bombs delivered by surprise could [leave] the residents of [the city] without any government and without any rapid means of getting one."[50] He stressed, however, that the damage to L.A. would likely constitute a small fraction of the total destruction arising from an attack.[51] Beebe cited a report published by the Industrial College of the Armed Forces that included the following estimates: more than eight million casualties across seventy-four cities on the day of the attack; another eight million deaths soon after; and twenty-five million rendered homeless.[52]

Next, Beebe repeated Crotty's concerns about manifold questions having gone unaddressed in civil defense conversations. To Crotty's discussion of statute of limitations, Beebe added the

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[43] *See id.* at 894–95.

[44] *See* Crotty, *supra* note 38 at 895.

[45] *See id.*

[46] *See id.* at 896 (internal citations omitted).

[47] *Id.*

[48] *See id.*

[49] *See generally* James W. Beebe, *Local Government and the H-Bomb: A New California Statute Prepares for Attack*, 44 A.B.A. J. 149 (1958).

[50] *Id.* at 149.

[51] *See id.*

[52] *See id.* at 149 n.2 (citing B.W. MENKE, MARTIAL LAW—ITS USE IN CASE OF ATOMIC ATTACK 32 (Industrial College of the Armed Forces, 1955)).

replacement of judges, jurisdiction and venue questions, and the post-attack reorganization of corporations.[53] More broadly, Beebe listed three significant disaster legal problems: "government (maintaining law, order, health and safety); destruction of records; [and] emergency rules of law as legal first aid for the economy."[54] He, too, maintained that martial law would not resolve these problems—an argument supported by several premises, including that "the people will respond far more willingly to civil leaders than to Army officers" and the centrality of civilian government to American life.[55] On this second point, Bebee distinguished civilian government from a *de facto* civilian government made up of volunteers.[56]

Whereas Crotty offered an example of a state that lacked sufficient continuation of government planning, Bebee pointed to a new California law as a template for other states to follow.[57] The California Legislature, upon finding and declaring that "the preservation of local government in the event of enemy attack or in the event of a state of emergency or a local emergency is a matter of statewide concern," passed legislation to allow for the appointment of up to three standby officers for each member of the applicable governing body, as well as for the chief executive, if they are not a member of the governing body.[58] The seriousness of the Legislature's intent in filling the bench of civil government leaders is indicated by its requiring that potential stand-by officials be "carefully investigated and examined as to his qualifications under oath."[59] Beebe anticipated that this law would ensure knowledgeable officials could readily and rapidly fill any gaps and mitigate the need for volunteers who lacked the training to take over a major role during a time of crisis.[60]

B. *The Impetus for and Intended Purpose of CoG Provisions*

CoG provisions arose in this unique historical setting—characterized by the public's widespread and legitimate (or at least perceived to be) fear of an imminent attack leading to immediate physical destruction of government institutions and the annihilation of the officials tasked with leading them. Such concerns also pervaded

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[53] *See* Beebe, *supra* note 49, at 150 n.7.
[54] *Id.* at 150.
[55] *Id.* at 150.
[56] *See id.*
[57] *See id.* at 151.
[58] *Id.* at 151 n.21; Cal. Gov. Code § 8638.
[59] Beebe, *supra* note 49, at 152.
[60] *See id.*

every level of government. So, it comes as no surprise that citizens in the majority of states robustly supported the adoption of some version of the template CoG provision set forth by the Federal Government.[61]

In 1959, the OCDM sent a model constitutional amendment to the states with the goal of ensuring legislative continuity in the wake of an emergency and, perhaps more importantly, with the goal of preventing the declaration of martial law.[62] Such military rule, according to the office, "is the antithesis of civil government."[63] Passage of the model provision, then, would "make a substantial contribution toward guaranteeing that recovery of the Nation [would] be accomplished under the direction of civil authority."[64] Note, however, that some observers doubted the sincerity of the Office's belief that state legislatures would play a meaningful role in responding to an emergency.[65]

Chief among the skeptics was Professor George Braden of Texas. Writing in 1972, he questioned whether the Federal Government would push a similar proposal in modern times.[66] In fact, Braden chalked the original proposal up to "a public relations push in support of such Cold War programs as air raid shelters and other civilian defense activities."[67] He also doubted the efficacy of the provision—maintaining that upon a nuclear attack, "the presence or absence of [some version of the CoG template provision] in a state constitution would have made precious little difference."[68]

The legislative history of the model CoG provision, however, cuts against Braden's speculation. As reprinted below, the provision affords state legislatures expansive powers, which aligns with the intent of the Federal Government.[69] If the Office merely intended to cajole state leaders into funding Cold War projects, then it likely did not need to dive into the institutional capacity of the three branches of state government in responding to an emergency. In other words, the Office could have merely focused on providing executive officials with

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[61] *See* Daleo, *supra* note 9, at 940.

[62] *See* EXECUTIVE OFFICE OF THE PRESIDENT OFFICE OF CIVIL & DEFENSE MOBILIZATION, CONTINUITY OF GOVERNMENT SUGGESTED STATE LEGISLATION iii (1959) [hereinafter OCDM COG].

[63] *Id.*

[64] *Id.*

[65] *See* GEORGE BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 292–93 (State of Texas, 1972).

[66] *See id.*

[67] *Id.* at 293.

[68] *Id.*

[69] *See* OCDM COG, *supra* note 62, at 7.

the powers required to act in such a situation—this focus would have grabbed headlines, as well as the attention of state leaders.

Instead, the Office made its desire to empower the state legislature clear by explaining its rationale for the CoG provision. The Office explained that it assumed "the inventiveness and sense of responsibility," or, in short, the institutional capacity of the legislative branch rendered it the branch most suited to executing "a general plan for maintaining governmental operations despite the disruptions which an attack may cause."[70] A legal basis also underpinned the Office's focus on state legislatures. The Office noted that state governments, as governments of inherent, rather than delegated powers, allocate "full power to govern" in the legislative branch.[71]

Finally, the variety and longevity of support within the Federal Government for state legislatures as primary actors in emergency scenarios further bolsters the claim that the Office viewed legislatures as critical to continuity efforts, more so than mere symbols. Consider that in 1987, nearly three decades after the issuance of the model CoG provision, the Federal Emergency Management Administration (FEMA) asserted that "[t]he legislative system . . . must be sustained through recovery and reconstitution [following a disaster] to provide authority for implementation of necessary government actions not otherwise authorized by law."[72] The Federal Government's ongoing conception of state legislatures as necessary parts of continuation of government plans lends weight to interpreting CoG provisions as functional, rather than hollow, amendments.[73]

This brief historical review lends weight to a robust reading of the template CoG provision:

> The Legislature, in order to insure continuity of state and local governmental operations in periods of emergency resulting from disasters caused by enemy attack, shall have the power and the immediate duty (1) to provide for prompt and temporary succession to the powers and duties of public offices, of whatever nature and whether filled by election or appointment, incumbents of which may become unavailable for carrying on the powers and duties of such offices, and (2) to adopt such other measures as may be necessary and proper for insuring the continuity of governmental

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[70] *Id.*

[71] *Id.*

[72] FED. EMERGENCY MGMT. AGENCY, GUIDE FOR THE DEVELOPMENT OF A STATE AND LOCAL CONTINUITY OF GOVERNMENT CAPABILITY 2-2 (1987).

[73] *See id.*

> operations. In the exercise of the powers hereby conferred the Legislature shall in all respects conform to the requirements of this Constitution except to the extent that in the judgment of the Legislature so to do would be impracticable or would admit of undue delay.[74]

The model intended for state legislatures to do more than just maintain the skeleton of a state government. Though the model did afford state legislatures authority to take actions necessary to "keep[] the governmental machinery in operation," such as adopting and enforcing succession plans, it also granted legislatures the discretion and means to "skirt other constitutional requirements in times of enemy attack" as to maintain government operations.[75] The drafters of the model limited this latter power by intentionally incorporating the "necessary and proper" language that cabins the powers of the U.S. Congress.[76] Moreover, the drafters explained that they intended for extra-constitutional action to only occur when conforming with law would be "impracticable or would admit of undue delay."[77]

Interpretative guidance offered by the Office remains valuable today. Sixteen states adopted identical or near approximations of the model CoG.[78] Four states adopted versions that explicitly allow their state legislatures to take a broader set of actions, such as the incurring of debt and appropriation of funds outside traditional strictures.[79] A minority of states, however, varied the template in substantive ways. Four altered the template to constrain legislative powers. Connecticut and Louisiana, for instance, omitted the "necessary and proper" clause—effectively reducing the provision to a grant of authority to oversee succession efforts.[80] Texas took a different approach to limiting legislative powers—retaining the "necessary and proper," but adding compliance with the Texas Bill of Rights.[81] Washington likewise prevents the state legislature from bypassing specific constitutional provisions and, by implication, significantly constrains the legislature's powers during an emergency.[82] Three states modified

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[74] *Id*. at 39.

[75] OCDM COG, *supra* note 62, at 8; Daleo, *supra* note 9, at 935.

[76] *See* Daleo, *supra* note 9, at 934-35.

[77] OCDM COG, *supra* note 62, at 9.

[78] *See* Daleo, *supra* note 9, at 936–37.

[79] *See id.* at 937 (referring to KAN. CONST. art. 15, § 13; ME. CONST. art. IX, § 17; N.H. CONST. pt. 2d, art. 5-A; and, UTAH CONST. art. VI, § 30).

[80] *See* CONN. CONST. art. 11, § 3; LA. CONST. art. XII, § 11.

[81] *See* TEX. CONST. art. III, § 62.

[82] *See* Daleo, *supra* note 9, at 937–38.

the model provision by adding details around the timing of elections and maximum duration during which the legislature can invoke any emergency powers.[83] Finally, six states adopted idiosyncratic provisions.[84]

C. *Would an "AI Emergency" Trigger CoG Provisions?*

An exhaustive list of AI-caused disasters that may trigger CoG provisions exceeds the scope of this paper.[85] This paper looks to a risk that has generated substantial concerns and would unquestionably disrupt the operations of local and state governments[86]: an AI-based manipulation of the 2024 election that renders it impossible to decipher the winners of any race. Scholars with technical backgrounds could provide a more thorough overview of the most likely means of such an attack, but here's one hypothetical:

> Mere hours from election polls opening on November 5, 2024, a YouTube video goes up depicting President Biden in the Oval Office announcing that a pending attack by the People's Republic of China on New York

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[83] *See* MICH. CONST. art. IV, § 39; MO. CONST. art. III, § 46(a); R.I. CONST. art. VI, § 21.

[84] *See* MINN. CONST. art. V, § 5; PA. CONST. art. III, § 25; GA. CONST. art. III, § 6, para. 2(a)(4); N.M. CONST. art. IV, § 2; ALA. CONST. art. IV, § 46.01; VA. CONST. art. IV, § 8.

[85] *See, e.g.*, Jonas Sandbrink, *ChatGPT could make bioterrorism horrifyingly easy*, VOX (Aug. 7, 2023), https://www.vox.com/future-perfect/23820331/chatgpt-bioterrorism-bioweapons-artificial-inteligence-openai-terrorism (discussing bioterrorism); Paul Scharre, *"Hyperwar": How AI could cause wars to spiral out of human control*, BIG THINK (Feb. 28, 2023), https://bigthink.com/the-future/hyperwar-ai-military-warfare/ (detailing war); Christian Vasquez, *DHS warns of malicious AI use against critical infrastructure*, CYBERSCOOP (Sept. 14, 2023), https://cyberscoop.com/dhs-homeland-threat-assessment/ (providing an overview of hacks of critical infrastructure facilitated by AI).

[86] Noah Giansiracusa, *How AI Puts Elections at Risk - And the Needed Safeguards*, BRENNAN CTR. FOR JUST. (July 21, 2023), https://www.brennancenter.org/our-work/analysis-opinion/how-ai-puts-elections-risk-and-needed-safeguards ("By seeding online spaces with millions of posts, malign actors could use language models to create the illusion of political agreement or the false impression of widespread belief in dishonest election narratives."); *see also* Nick Robins-Early, *Disinformation reimagined: how AI could erode democracy in the 2024 US elections*, THE GUARDIAN (July 19, 2023), https://www.theguardian.com/us-news/2023/jul/19/ai-generated-disinformation-us-elections.

> City, Dallas, and San Francisco requires the suspension of the election but only in New York, Texas, and California; at the same time, the governors of those state go live on Facebook confirming President Biden's announcement and the mayors of the targeted cities issue press releases to the same effect. Websites—allegedly for real newspapers—cover the videos and report them as fact.
>
> Hundreds of millions of Americans receive some formal indication that a high-ranking official has indefinitely postponed the election in key states due to a looming national security threat. In response, millions of would-be voters avoid the polls. A few hours into the election, the aforementioned officials post new communications disavowing the prior messages as fakes—they claim the prior messages were the product of AI tools that can generate photorealistic images and mimic voice audio.
>
> The validity of the "true" messages, though, becomes the subject of debate. The web is full of contradictory information that sparks and sustains a chaotic information environment. When polls close, turnout across the country ranges from half to three-fourths of the forecasted level of participation. One faction of Americans accept the results; another supports a re-run. The resulting unrest tanks the stock market, raises fears of war, and sparks civil unrest. Within a few days, the economy is on the edge of collapse and the legitimacy and authority of current officials is nonexistent from the perspective of members of several communities.
>
> A few days later, a group of veterans of the U.S. Armed Services operating out of Michigan claim responsibility for the disruption. They promise another "surprise" sure to "cause calamity" if the election results are not accepted.

Whether state legislatures can take emergency action in response to this incident and threat depends, in part, on the interpretation of their CoG provisions and, in particular, what "triggers" those provisions. Of states with CoG provisions, sixteen

repeat the trigger in the OCDM model; this "standard trigger" permits a state legislature to exercise certain emergency powers "in periods of emergency resulting from disasters caused by enemy attack."[87]

A subset of states have made their triggers "larger" through various changes to the model language. Six states include a broader set of causes for the disaster that gives rise to the period of emergency—on one end, there is California, which narrowly expands the cause of the disasters from "an enemy attack" to include "war-caused or enemy-caused" disasters; on the other, Oregon offers a non-exhaustive list that includes acts of terrorism and volcanic eruptions.[88] Three states—Idaho, Nebraska, and Oklahoma—allow the imminent threat of a qualifying disaster to serve as a trigger.[89] Finally, two states—Louisiana and Montana—permitted their state legislatures to take emergency actions "in periods of emergency."[90]

Other states place geographic specifications on the emergency in question—mandating that the disaster have occurred within its boundaries.[91] Two deprive the state legislature of triggering its emergency powers—delegating that task to the governor (Oregon) or the governor *and* the President of the United States (New Mexico).[92] Alabama specifies that the enemy must be an "enemy of the United States."[93]

Analyzing the text alone, the respective triggers share two features in common. First, state legislatures may not pull them in anticipation of a period of emergency but only upon the occurrence of a qualifying disaster that "results" in that emergency. Second, an "attack" by an "enemy" must cause the disaster. In the context of the above hypothetical, it is not easily discernible which state legislatures, if any, could trigger their CoG provision. By way of illustration, the New York State Assembly—one of the sixteen states that wholly copied the OCDM model—would likely not have the authority to trigger its CoG provision upon the release of the fake videos (i.e. in advance of the election).[94] For one, the identity of the actor would be unknown so, therefore, may not qualify as an "enemy." Second,

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[87] *See infra* Appendix A.

[88] *See* CAL. CONST. art. IV, § 21; *see also* OR. CONST. art. X-A.

[89] *See* ID. CONST. art. III, § 27; NEB. CONST. art. III, § 29; OK. CONST. art. V, § 63.

[90] *See* LA. CONST. art. III, § 2; MONT. CONST. art. III, § 2.

[91] *See* CAL. CONST. Cal. Const. art. IV, § 21; MICH. CONST. art. IV, § 39; MINN. CONST. art. V, § 5; MO. CONST. art. III, § 46a; N.M. CONST. art. IV, § 2; OR. CONST. art. X10-A.

[92] *See* N.M. CONST. art. IV, § 2; *see also* OR. CONST. art. 10-A.

[93] ALA. CONST amend. 159.

[94] *See* N.Y. CONST. art. III, § 25.

whether the likely disruption of an election constitutes an "attack" is unclear. And third, even if such disruption was highly likely or even inevitable, New York's trigger does not apply to imminent threats.

If some version of the above hypothetical transpires in an upcoming election cycle, then these questions will become more than thought experiments. This generation of lawyers, like those who had the foresight to imagine the calamity that a nuclear attack could bring, cannot merely hope for the best or assume that level-heads will prevail upon a worst-case scenario. Now is the time to resolve all of the ambiguities presented by the aforementioned CoG provisions. The next Part of this paper introduces the New Haven Framework as an interpretative tool suited to that task.

III. NEW HAVEN SCHOOL OF JURISPRUDENCE FRAMEWORK

This Part explores the history, guiding questions, and framework behind the New Haven School. An examination of these characteristics shows why this theory, in comparison to more conventional or common theories of jurisprudence, is tailored to the difficult interpretative task of determining when, if, and to what extent state legislatures may trigger their CoG provisions to respond to AI emergencies.

A. *Distinguishing the New Haven School from Other Jurisprudential Frameworks*

The New Haven School, according to Professor Siegfried Wiessner, "looks at possible outcomes of the decision making process on a particular issue and recommends choosing the decision that would maximize access by all to the things humans want out of life."[95] Developed by Professor Myres McDougal in the 1960s,[96] Reisman and Wiessner have expounded upon McDougal's vision; in fact, the duo has crystallized the extent to which the New Haven School differs from other theories.

Unlike natural law, the New Haven School does not characterize the law as "unchangeable" or "immutable."[97] The New Haven School approach also lends itself to many "correct" answers, whereas natural law offers only "one solution to a problem."[98] Adherents of natural law, in McDougal's opinion, fail to show

[95] Wiessner, *supra* note 26, at 51.
[96] *See* McDougal, *supra* note 11, at 1.
[97] *See* Wiessner, *supra* note 26, at 53.
[98] *See id.* at 52–53.

sufficient "concern for the close examination of decisions or the location of decisions in secular social and community processes."[99]

And, in contrast to the Legal Realists, the New Haven School does more than acknowledge that legal decisions often amount to choices by decision-makers; the latter encourages decision-makers to conceive of an expanded set of options before intentionally selecting the one most consistent with the School's goal.[100] McDougal maintained that this goal identification marked an improvement over Legal Realism.[101] Though legal realism likewise calls for the "study of factors affecting decision," absent being guided by the community's expectations, this inquiry "involve[s] enormous costs and yield[s] few benefits."[102]

Finally, though McDougal praises the theoretical contributions made by subscribers to the "historical school of jurisprudence," he faults this school for inadequately clarifying the goal of the framework.[103] He described them as embracing a "certain fatalism—what had been would continue to be"—that removed or assumed a lack of agency among legal decision-makers.[104]

In summary, the New Haven School is wholly separate from "theor[ies] *of* law" and instead serves as a "theory *about* [law.]"[105] Reisman explains the distinction: the New Haven School fits into the latter category because it "examines the data and 'mystery' of a system from a dispassionate, secular, agnostic and external standpoint."[106] More broadly, the New Haven School encourages a functional analysis of the law, as opposed to the "[c]onventional legal analysis [that] generally looks to courts, secondarily examining the work of executive branches and legislatures."[107]

And, whereas conventional theories conceive of legal decisions as ever more specific refinements of a rule, the New Haven School "conceive[s] of outcomes."[108] More to the point, the New Haven School promotes the adoption of outcomes that afford as many people as possible access to "the processes of shaping and sharing [common human] values," which would constitute a "world public

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[99] McDougal, *supra* note 11, at 10.
[100] *See* Wiessner, *supra* note 26, at 50.
[101] *See* McDougal, *supra* note 11, at 9.
[102] *Id*.
[103] *See id.* at 10.
[104] *Id.* at 10–11.
[105] Reisman, *supra* note 12, at 232.
[106] *Id.*
[107] *Id.* at 238.
[108] *Id.*

order of human dignity."[109] Reisman, McDougal, and Wiessner list a similar list of such values, including "power, wealth, enlightenment, skill, affection, well-being, respect, [and] rectitude."[110]

B. *Evaluating Laws Under the New Haven School*

Application of the New Haven School requires the use of a certain "focal lens," as labeled by Reisman.[111] For instance, the New Haven School focuses on community expectations of the law rather than the perspective of a jurist. Reisman explains that the contours of the law at any given moment in any given society depends "on the conditions for receiving of accepting law, determining whether or not it is 'legitimate,' and complying with it."[112] A corollary of that focus is a conception of the law as a process shaped and controlled by humans.

The New Haven School maintains that the law is not a mere "body of rules."[113] Scholars such as Reisman and Wiessner insist that the more appropriate definition of "law" is "those processes of decision which are both consistent with the expectations of rightness held by members of a community (authoritative decisions) and which are effective (controlling decisions)."[114] This conception facilitates the identification of rules that no longer bear the attributes of law as a result of an absence of authority or control.[115] By way of example, a decision made without authority would be "taken on entirely on the basis of naked power."[116] And, in terms of effectiveness, the New Haven School does not confine its analysis to the words on paper, but augments that analysis by examining the extent to which "flows of behavior . . . may diverge from those words."[117] This more flexible and functional approach makes room for incorporating more conceptual information, such as whether "participants in a particular situation perceive themselves in a state of crisis in which critical values are deemed to be at stake."[118]

Law as a process means that all people can theoretically help shape it; yet, the New Haven School does not assume that power and

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[109] Wiessner, *supra* note 26, at 52.
[110] Reisman, *supra* note 12, at 236; McDougal, *supra* note 11, at 15–16.
[111] Reisman, *supra* note 12, at 234–36.
[112] *Id.* at 229–30.
[113] *Id.* at 235
[114] *E.g. id.*
[115] *See id.*
[116] *Id.*
[117] Reisman, *supra* note 12, at 235.
[118] *Id.* at 238.

influence over the law is evenly distributed and equally applied.[119] Evaluating whether a law aligns with community expectations and effectively comports with those expectations requires understanding the motivations, norms, and wants of the community members in question.[120] Part of that inquiry must be analysis of the distribution and exercise of power in that community.[121] Reisman points out that many jurisprudential frameworks treat consideration of power as verboten, despite the obvious connection between power and law—even beginning law students, according to Reisman, can see "that the ambit and operation of law [is] influenced by the power process, much as the power process [is] influenced by law."[122]

In the same way that the New Haven School treats the law in the manner that aligns with its actual use and development, the theory acknowledges and addresses the functional role of the law. In Reisman's words, laws facilitate the "continuing clarification and implementation of the common interest."[123] A jurisprudence, then, should continuously clarify social goals to then assess whether a proposed law adequately furthers those goals, as well as to evaluate the quality of current laws.[124] The New Haven framework provides, per Reisman, a "theory which [can] be used for purposes of application as well as active but not capricious appraisal, development, and change."[125] Though all jurisprudential frameworks inherently have an "applicative focus," the New Haven framework diverges from the rest by providing a "criteria for the appraisal of law"—a public order of human dignity—rather than simply assuming the law is "good" or that "the absence of law [is] bad."[126]

This criteria eases the identification of "bad laws" under the New Haven framework. Exposing such laws can lead to overdue updates to the law and better align the administration of the law with community expectations. After all, bad laws do exist and, troublingly, often remain on the books for decades. Laws may carry the outdated values of one generation into the next; imposing the societal norms and goals of yesterday on those who had no means and no desire to consent to such an imposition.[127] Likewise, legal institutions may persist,

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[119] *See id*. at 229.

[120] *See id.* at 229.

[121] *See* Michael Reisman, *A Jurisprudence from the Perspective of the "Political Superior"*, 23 N. Ky. L. Rev. 605, 618-19 (1996).

[122] *See id.* at 229–30.

[123] *Id.* at 232.

[124] *See id.* at 231.

[125] Reisman, *supra* note 12, at 231.

[126] *Id.*

[127] *See id.*

despite having served their purpose or no longer having the capacity to do so. The law, then, is always a tool—to what end is a question that merits repeatedly asking.

C. *Detailing the Five Tasks of the New Haven Framework*

With the New Haven School's theoretical underpinnings and general approach to the law set forth, it is possible to enumerate the School's specific framework for making legal decisions. The New Haven framework outlines five interpretative tasks.[128] The first is goal clarification.[129] Whereas lawyers traditionally delegate goal clarification to their client and judges claim no objective other than getting the law "right," the New Haven framework "recommend[s] that all who perform decision functions examine the demands of particular actors in terms of their congruence with the common interest of the community."[130] McDougal stresses that this task should be informed by "empirical observation and analysis."[131] Wiessner adds that proper completion of this task mandates one "to look at all relevant disciplines and reservoirs of knowledge at the university level and beyond."[132] By way of example, Wiessner points to climate change mitigation as a goal that requires "this interdisciplinary, multi-method analysis."[133]

The next task is trend analysis. Reisman equates this to conducting a historical review that "examine[s] the degree to which [the goal] has been achieved in past decision."[134] Wiessner explains that this task should include discussion of "conflicting claims, the claimants, and their bases of power and their perspectives."[135] In short, this task provides the decision maker with a timeline that reveals whether decision makers and advocates have been moving toward or away from the goal over time.

The third task is factor analysis. McDougal characterizes this task as the "formulation of comprehensive theories designed to explain decision."[136] He encourages consideration of "culture, class, interest, personality, . . . exposure to crisis," and other explanatory factors.[137]

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[128] *See* Wiessner, *supra* note 26, at 48.
[129] *See* Reisman, *supra* note 12, at 241.
[130] *Id.*
[131] McDougal, *supra* note 11, at 15.
[132] Wiessner, *supra* note 26, at 49.
[133] *Id.* at 48.
[134] Reisman, *supra* note 12, at 241.
[135] Wiessner, *supra* note 26, at 49.
[136] McDougal, *supra* note 11, at 15.
[137] *Id.*

Wiessner augments McDougal's list of explanatory factors with other considerations such as "the mood of the times."[138]

The fourth task is the projection of future trends in decision. This does not amount to "presuppos[ing] that there is a determined future," notes Reisman, but rather to the use of "techniques for projecting different decision options and then examining the prospective aggregate value consequences in terms of the goals that have been clarified."[139] If done correctly and thoroughly, this task should provide jurists with recommendations to act on and alter, as necessary, to "increase the probability of the evaluation of a preferred future and minimize the eventuation of a dystopic one."[140]

Fifth, and finally, the framework calls for the invention of alternatives. When a decision maker determines that predicted decisions diverge from the stated goal, Reisman instructs that they should "explicitly explore alternative arrangements which will increase the probability of the eventuation of a desired future."[141] These alternatives should not necessarily hue toward what is feasible. McDougal encourages "[t]he cultivation of creativity and the invention" of alternatives.[142] Moreover, he instructs decision makers to consider alternatives that would lead to "the greatest production and widest distribution of all representative values of our culture."[143] This abstract task, as applied by a single decision maker, requires that they ask which values they, "as a responsible citizen of the larger community of mankind," would "recommend to other similarly responsible citizens."[144] As discussed above, such values may include "power, wealth, enlightenment, skill, affection, well-being, respect, [and] rectitude."[145]

When considered together, these tasks provide "a substantive guiding light which is open enough and flexible to allow for different outcomes," but, according to Wiessner, "is still articulable and acceptable to the highly diverse perspectives of human beings and communities around the globe."[146] Such a light is necessary to sort through the proper response to AI emergencies—given the evolving, value-laden, and potentially, calamitous development and deployment of AI. The distinguishing aspects of the New Haven School are

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[138] Wiessner, *supra* note 26, at 49.
[139] Reisman, *supra* note 12, at 241.
[140] *Id.*
[141] *Id.* at 242.
[142] McDougal, *supra* note 11, at 15.
[143] *Id.*
[144] *Id.*
[145] Reisman, *supra* note 12, at 236; McDougal, *supra* note 11, at 15–16.
[146] Wiessner, *supra* note 26, at 51.

particularly well-suited to deciding questions arising from the application of CoG provisions. Part IV of this paper walks through the aforementioned tasks to answer the question of whether the previously described AI-based election interference event would trigger the "standard" CoG provision.

IV. APPLICATION OF FRAMEWORK

When state legislatures may trigger their CoG provisions has a major impact on the extent to which those bodies can play a role in preparing for and mitigating the effects of an emergency. If the CoG "triggers" are read too narrowly, then legislatures may be unable to invoke the powers therein, even when clearly required by the situation at hand. If read too expansively, state legislatures may exploit CoG provisions to achieve aims unrelated to the maintenance or restoration of government.

This Part builds on the election interference hypothetical outlined above and walks through how a Florida state court judge may decide a challenge to the state legislature invoking powers under the applicable CoG provision. Recall that no Florida city was on the target list; that the responsible group was not based in Florida; and that Florida's CoG uses the "standard" trigger: "In periods of emergency resulting from enemy attack."[147] As an aside, this Part will not address whether such an invocation may be or would be the subject of judicial review. However, this question should join the larger set of inquiries posed by CoG provisions.[148]

A. *Goal Clarification*

Civil defense requires the creation of alternatives to those "existing and traditional ways of government" that, if rigidly adhered to during an emergency or rendered unavailable, may suffer from serious limitations with respect to responding to the emergency.[149] Insufficient support for local and state governments would undermine that defense, given that those governing authorities have the primary responsibility for and capacity to ensure basic human needs are met—

[147] FLA. CONST. art. II, § 6.

[148] *See, e.g.*, DONALD CROWLEY & FLORENCE HEFFRON, THE IDAHO STATE CONSTITUTION 102 (2011) ("Whether the emergency [referenced in Idaho's CoG provision] would have to be a bona-fide emergency and whether anything in this section is subject to judicial review is doubtful.")

[149] Joseph McLean, *Planning for Civil Defense*, 43 NAT'L MUN. REV. 278, 282–83 (1954).

access to food, shelter, family, health care, and education.[150] It follows that CoG provisions aim to "establish procedures to allow essential government functions to continue in a variety of emergency situations or catastrophic events,"[151] and, relatedly, to prevent the invocation of martial law.[152]

Though the threat of nuclear war motivated the introduction and ratification of CoG provisions, preparedness proponents at the time recognized that substantial damage could arise from a litany of causes. Joseph McLean, a consultant to Project East River—a government-sponsored study of civil defense[153]—listed some of these other sources: weapons of biological and chemical warfare that, though regarded as less damaging, could severely deplete the nation's food supply, destroy its forests, and significantly affect rural America.[154]

The importance of maintaining an operational and legitimate government in response to a wide range of disaster scenarios is reinforced by other disciplines. Public health experts, for instance, highlighted the central role of subnational government entities in rolling out COVID-19 interventions.[155] In fact, some studies determined that higher rates of trust in government among the public contributed to lower rates of COVID infection.[156] These findings demonstrate that the maintenance of stable and effective government transcends physically destructive attacks and the annihilation of public servants.

Emergency management and public policy officials have likewise highlighted the applicability of this goal to a wide range of situations. Case in point, despite state and local governments recognizing the scale of the emergency caused by Hurricane Katrina, they lacked the requisite infrastructure and response capabilities to muster a timely and adequate response.[157] There is no alternative in

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[150] *See* WILBUR COHEN & EVELYN BOYER, FEDERAL CIVIL DEFENSE ACT OF 1950: SUMMARY AND LEGISLATIVE HISTORY 11 (1951).

[151] KAN. LEGIS. RES. DEP'T, CONTINUITY OF GOVERNMENT PROVISIONS IN STATE CONSTITUTIONS, at 1 (May 6, 2020).

[152] *See* McLean, *supra* note 149, at 282–83; Ellis, *supra* note 33, at 12.

[153] *See* McLean, *supra* note 149, at 278.

[154] *See id.* at 280.

[155] *See, e.g.*, *The territorial impact of COVID-19: Managing the crisis across levels of government*, OECD (Nov. 10, 2020), https://www.oecd.org/coronavirus/policy-responses/the-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government-d3e314e1/.

[156] *See* Bernard Casey, *Covid-19: did higher trust societies fare better?*, 3 DISCOVER SOC. SCI. AND HEALTH *passim* (2023).

[157] *See Chapter Five: Lessons Learned*, THE WHITE HOUSE OF PRESIDENT GEORGE W. BUSH, https://georgewbush-

such situations other than to make sure subnational governmental entities have the personnel, plans, resources, and authority to take the necessary steps.[158] A report issued by the Bush White House following Katrina admitted that "[f]ederal officials struggled to perform responsibilities generally conducted by state and local authorities" and that "[t]he federal government cannot and should not be the nation's first responder."[159] Nevertheless, the Administration noted that some disasters may cause local and state governments to be "overwhelmed or incapacitated," thereby requiring alternative and inventive solutions.[160]

Political scientists and philosophers likewise list stable governance as an important societal goal. Norman Ornstein, for one, details the importance of an "exchange of responsibility and cooperation" between individual citizens and the community, including governing institutions.[161] He conceives of a functioning, reliable set of public institutions as part of a larger social fabric that is susceptible to fraying absent proactive and responsive maintenance.[162] The nation's founders held a similar view.

Consider that James Madison warned in Federalist No. 62 that "great injury results from an unstable government. The want of confidence in the public councils damps every useful undertaking, the success and profit of which may depend on a continuance of existing arrangements."[163] Notably, Madison's warning recognized that structural protections against instability may not suffice to sustain a stable government—consideration must also be paid to the public's perception of or confidence in the government. He listed a slew of actions that could chip away at that confidence including uncertainty about what the law may be in the future.[164] Ornstein and his frequent co-author Thomas Mann summarize that Madison and the founders regarded "[t]he actions and functions of government, a vibrant political process and system, [as] essential for the common good of a society."[165]

Modern research on the effects of governmental instability on the well-being of the public confirms the expectations of the founders.

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whitehouse.archives.gov/reports/katrina-lessons-learned/chapter5.html (last visited Oct. 4, 2023).

[158] *See id.*

[159] *Id.*

[160] *Id.*

[161] Norman Ornstein, *Introduction*, 142 DÆDALUS 6, 6 (2013).

[162] *See id.* at 8.

[163] FEDERALIST NO. 62 (James Madison).

[164] *See id.*

[165] Thomas Mann & Norman Ornstein, *Finding the Common Good in an Era of Dysfunctional Governance*, 142 DÆDALUS 15, 16 (2013).

In countries where residents lack reliable access to courts, a critical part of governance, social mobilization rates fall.[166] One researcher went so far as to conclude that "[e]ffective laws and an enabling legal environment are as critical to a healthy society as clean water."[167] Reliable government addresses more than just economic and physical needs, though. The United Nations has repeatedly declared a tight connection between the Rule of Law—a byproduct of a functioning government—and human dignity.[168]

In summary, several disciplines list a stable, credible, and efficacious government as a necessary and important component of other goals. A government lacking any of those attributes may detract from the mental, physical, social, and economic well-being of individuals and communities. The experts referenced above did not qualify their conclusions on the source of disruption to government stability—in other words, they discussed the continuity of government as a worthy ambition, whatever the circumstances.

Returning to our hypothetical—a Florida state court judge assessing whether the state's CoG provision may be invoked in response to AI-based election interference that originated in a different state and targeted other states, but caused significant uncertainty and unrest in Florida—this task tends towards a broad interpretation of the "standard" CoG trigger language. If a stable government is regarded as a prerequisite for social stability and the credibility and capacity of state legislatures contributes to that stability, then realization of that goal likely requires that the powers afforded by CoG provisions be available whenever governmental stability is in serious question.

B. *Trend Analysis*

CoG provisions have rarely been invoked to further the goal of governmental stability in the wake of a disaster.[169] Of the states with

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[166] *See* O.B.K. Dingake, *The Rule of Law as a Social Determinant of Health*, 19 HEALTH HUM. RTS. J. 295, 296 (2017).

[167] *Id.*

[168] *See, e.g.*, G.A. RES. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); United Nations, *Goal 16: Peace, Justice and Strong Institutions*, SUSTAINABLE DEVELOPMENT GOALS, https://www.un.org/sustainabledevelopment/peace-justice/ (last visited Mar. 10, 2024).

[169] *See* Daleo, *supra* note 9, at 941 ("Continuity of government provisions (thankfully) have never been successfully invoked and appear to not have been interpreted by the courts."). Research into CoG-related case law since the publication of Daleo's article uncovered a single instance of a state legislature successfully invoking its CoG provision. In *Republican State Comm. of Delaware v. Dep't of Elections*, the Delaware Chancery Court upheld the

"standard" CoG provisions, such as Florida, and of the states with triggers that explicitly apply to "imminent threats," such as Oklahoma, there have been no emergencies declared pursuant to the applicable provision and no court decisions interpreting the provision.[170] Though

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Delaware State Legislature's invocation of the state's CoG provision in response to COVID-19 and its likely effects on the 2020 election. 250 A.3d 911, 922 (Del. Ch. 2020). Note that Delaware's CoG provision differs from most others in that its trigger clause explicitly mentions "disease" as one of the qualifying causes of a period of emergency that requires the legislature to exercise extraordinary powers. *See* DEL. CONST. art. 17, § 1; *see also infra* Appendix A (setting forth the text of various CoG provisions).

[170] *See* JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION 148 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) (stating that Arizona's provision has never been invoked); *see also* WESLEY W. HORTON, THE CONNECTICUT STATE CONSTITUTION 181 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) (making no reference to an instance of interpretation or invocation of Connecticut's CoG provision); TALBOT D'ALEMBERTE, THE FLORIDA STATE CONSTITUTION 45 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) (reporting no case law on Florida's provision); FRANCIS HELLER, THE KANSAS STATE CONSTITUTION 142–43 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) (making no reference to an instance of interpretation or invocation of Kansas's CoG provision); MARSHALL TINKLE, THE MAINE STATE CONSTITUTION 171 (2013) ("Fortunately, the [Maine] legislature has not had occasion to implement this provision, and the courts have not interpreted it."); MICHAEL W. BOWERS, THE NEVADA STATE CONSTITUTION 88 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) (reporting that the Nevada provision "has not been subject to interpretation"); SUSAN E. MARSHALL, THE NEW HAMPSHIRE STATE CONSTITUTION 135 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) (discussing one case in which New Hampshire's provision was mentioned in dicta); N.J. CONST. art. IV, § VI, para. 4. (LEXIS through Nov. 8, 2022) (making no reference to an instance of interpretation or invocation of New Jersey's CoG provision); JAMES E. LEAHY, THE NORTH DAKOTA STATE CONSTITUTION 201 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) (suggesting that the North Dakota CoG provision has not been used and is redundant, if not superseded, by a subsequently enacted statute allocating the power to declare emergencies to the governor); STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION 171 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) (making no reference to an instance of interpretation of invocation of Ohio's CoG provision); PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION 215 (G. Alan Tarr ed., Oxford Univ. Press, Inc. 2011) ("Thankfully, the Rhode Island Supreme Court has not yet had any occasion to review this section."); COLE BLEASE GRAHAM, JR., THE SOUTH CAROLINA STATE CONSTITUTION 241 (G. Alan Tarr ed., 1st ed. 2011) (making no reference to an instance of interpretation of invocation of South Carolina's CoG provision); PATRICK M. GARRY, THE SOUTH DAKOTA STATE CONSTITUTION 91 (G. Alan Tarr ed., 2014) ("There has been no significant commentary or case law interpreting or

the absence of instances of interpretation and invocation of typical CoG provisions render this task difficult,[171] it may nonetheless signify that CoG provisions have indeed served that goal–contributing to governmental stability by virtue of affording legislatures the use of extraordinary powers only in extraordinary instances that threaten essential government functions.

This latter perspective aligns with fears that easily-triggered CoG provisions could facilitate runaway legislatures. Consider, for instance, the New York State Legislature's failed attempt to enlarge its membership in response to an "emergency" resulting from a federal court having declared their prior apportionment plans unconstitutional.[172] A looser trigger may have resulted in a different outcome with more prolonged uncertainty about whether an emergency existed, and, in turn, which actions the legislature could take.

The goal of a stable government was also realized when New York courts prevented New York City from citing a financial "emergency" to renege on its obligations to municipal noteholders. In *Flushing Nat'l Bank v. Mun. Assist. Corp.*, the court prevented the city from invoking the state's CoG provision to justify the city's denial of faith and credit to short-term anticipation notes.[173] Though the court acknowledged the "dire [financial] straits of the city," it contested the characterization of the city's financial troubles as the sort of emergency envisioned by the voters who ratified the CoG provision.[174] The court maintained that the "history and language [of the CoG provision] bespeak the frigid years of the Cold War and the threat of nuclear decimation."[175] The court cabined use of the CoG provision to instances in which continuity of government, "in the direct sense" was

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applying this section [of the South Dakota Constitution]."); JANICE C. MAY, THE TEXAS STATE CONSTITUTION 190 (G. Alan Tarr ed., 1st ed. 2011) (making no reference to an instance of interpretation or invocation of Texas's CoG provision); ROBERT M. BASTRESS, JR., THE WEST VIRGINIA STATE CONSTITUTION 205 (G. Alan Tarr ed., 1st ed. 2011) (reporting that West Virginia's CoG provision has never been invoked); JACK STARK, THE WISCONSIN STATE CONSTITUTION 126 (G. Alan Tarr ed., 1st ed. 2011) ("This section of the Wisconsin Constitution has neither been amended nor litigated.").

[171] *But see Republican State Comm. of Del.*, 250 A.3d (detailing a recent interpretation of Delaware's CoG provision, which differs from most CoG provision by virtue of having a more expansive trigger provision).

[172] *See In re Orans*, 15 N.Y.2d 339, 354 (1965) (Bergan, J., concurring).

[173] *See Flushing Nat. Bank v. Mun. Assistance Corp. for City of New York*, 40 N.Y.2d 731, 732–33 (1976).

[174] *See id.* at 739.

[175] *Id.* at 740.

required, such as upon the officials and their residences being "atomized in a nuclear Armageddon."[176] Given "a world and life that is a succession of emergencies, natural and manmade," the court thought it "[o]bvious" that the constitution could not be suspended upon "every emergency."[177]

In other instances, though, the goal of stable governance may have been furthered had a state legislature successfully triggered their CoG provisions. For instance, Delaware's state legislature took extraordinary steps to ensure an accurate and participatory election at the height of COVID by invoking emergency powers under the state's broad CoG provision.[178] Pursuant to that provision, the legislature may adopt "measures as may be necessary and proper for [e]nsuring the continuity of governmental operations" during "periods of emergency resulting from enemy attack, terrorism, disease, accident, or other natural or man-made disaster."[179]

If a court were to interpret a "standard" CoG provision as covering a similar set of events, then state legislatures may have been able to take necessary measures to safeguard key aspects of a stable government during an emergency. For sake of illustration, the state legislature in Florida, a state with a "standard" CoG provision, may have benefited from an expanded interpretation of its CoG trigger in light of the voting chaos wrought by Hurricane Ian in the days leading up to the 2022 midterm elections.[180]

In the same way that the Delaware legislature framed COVID-19 as an emergency that threatened the continuity of government by undermining the possibility of conducting a free and fair election,[181] the Florida state legislature may have cited the public health risks associated with voting in the aftermath of a hurricane to permit voters a range of options for participating in the election; these alternatives would have likely marked an improvement on how the Florida government actually responded—generally, by consolidating polling

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[176] *Id.*

[177] *Id.*

[178] *See Republican State Comm. of Del.*, 250 A.3d at 922.

[179] DEL. CONST. art. 17, § 1.

[180] *See* David Towriss, *How Hurricanes Threaten U.S. Elections and Why More Flexible Voting is Needed*, INT'L IDEA (Nov. 3, 2022), https://www.idea.int/blog/how-hurricanes-threaten-us-elections-and-why-more-flexible-voting-needed.

[181] *See Republican State Comm. of Del.*, 250 A.3d at 913.

places,[182] which, ironically, has been shown to decrease voter turnout.[183]

Again returning to the hypothetical, the Florida state court judge would likely see from the trends set forth above that a high bar to state legislatures invoking their CoG provisions fosters a more stable government. Yet, in response to the Delaware state legislature's successful invocation of the applicable CoG provision to ensure a free and equal election and the likely inability of the Florida state legislature to do the same, the Florida court may also see the merits of interpreting the state's CoG provision as cause-neutral—in other words, permitting the use of extraordinary powers whenever continuity of government is significantly threatened, regardless of the source of that threat.

C. *Factor Analysis*

The sparse record of CoG provisions being interpreted or invoked also hinders the comprehensiveness and thoroughness of this task. Still, consideration of the "culture, class, interest, . . . , exposure to crisis" and other explanatory factors outlined by McDougal allows for the generation of theories to explain the hesitancy of state legislatures to invoke their CoG provisions, as well as that of courts to uphold such invocations.[184] This Section focuses on the factors as they existed in the seven-year span during which thirty-five states adopted CoG provisions.[185]

1. Type of Emergency

The nuclear attack anticipated by the proponents of CoG provisions had two distinguishing aspects that justified affording state legislatures extra-constitutional powers: first, state officials could do nothing to prevent it; and second, state officials had little to no ability to predict when the attack might take place. As indicated by vivid

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[182] *See* Press Release, Governor Ron DeSantis, *Governor DeSantis Issues Emergency Executive Order to Ensure Ballot Access for Voters in Counties Severely Impacted by Hurricane Ian* (Oct. 13, 2022), https://www.flgov.com/2022/10/13/governor-desantis-issues-emergency-executive-order-to-ensure-ballot-access-for-voters-in-counties-severely-impacted-by-hurricane-ian/.

[183] *See* Peter Miller & Kevin Morris, *Florida Is Juggling an Election - and Hurricane Ian Clean-Up*, BRENNAN CTR. FOR JUST. (Oct. 26, 2022), https://www.brennancenter.org/our-work/analysis-opinion/florida-juggling-election-and-hurricane-ian-clean.

[184] McDougal, *supra* note 11, at 15.

[185] *See* Daleo, *supra* note 9, at 940, 940 n.145 (detailing which states altered their constitutions).

hypotheticals recounted by Crotty and Ellis, the American public had come to expect that the Soviet Union would and could strike at any moment.[186]

The public, as well as local and state elected officials, understood that they had limited power to alter the odds of an attack; so, they focused instead on taking whatever preparatory steps could even minimally reduce the severity of an attack. At the same time that some state governments subsidized the creation of fallout shelters,[187] CoG provisions were a sort of "bomb shelter for the government."[188]

Ratification of CoG provisions also followed unexpected demonstrations of Soviet competency and aggression—reinforcing the fear among Americans that a strike would come without warning. Patrick Conley and Robert Flanders, in studying Rhode Island's CoG provision, noted that "[i]t was enacted at the height of the Cold war, less than two weeks after the resolution of the Cuban Missile Crisis and at the outset of American involvement in Vietnam."[189] Scholars listed similar motives among voters in Ohio,[190] New Hampshire,[191] Nevada,[192] Maine,[193] and Arizona.[194]

Finally, it is worth noting that preparing for a nuclear strike was perceived as a nationwide obligation. The introduction and rapid ratification of the CoG provisions marked the first time the federal government attempted to and, for the most part, successfully lobbied states to adopt a common constitutional provision.[195] Federal guidance at a time of substantial public fear may have helped rally the voters of some state in support of the CoG provision.[196]

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[186] *See supra* Section I.A.

[187] *See* STARK, *supra* note 170, at 126 (discussing Wisconsin's subsidy).

[188] DANNY M. ADKISON & LISA MCNAIR PAMER, THE OKLAHOMA STATE CONSTITUTION 99 (2011).

[189] CONLEY & FLANDERS, *supra* note 170, at 215.

[190] *See* STEINGLASS & SCARSELLI, *supra* note 170, at 171 (referring to the time of adoption as "the height of the Cold War").

[191] *See* MARSHALL, *supra* note 170, at 135 (pointing out that the CoG provision was added "in the wake of the cold war and attendant fears of lack of governmental continuity in case of enemy attack").

[192] *See* BOWERS, *supra* note 170, at 79 (speculating that the Nevada CoG provision was ratified "during the height of the Cold War, in response, no doubt to fears of a Soviet first strike").

[193] *See* TINKLE, supra note 170, at 171 (marking that the Maine CoG provision was added "at the height of the Cold War").

[194] *See* LESHY, *supra* note 170, at 148 (detailing that the Arizona CoG provision was "approved by voters just after the Cuban missile crisis in the fall of 1962").

[195] *See* Daleo, *supra* note 9, at 933 n.90.

[196] *See* LESHY, *supra* note 170, at 168.

2. Likelihood of Emergency

A nuclear attack seemed somewhat inevitable to many Americans during the Cold War. A review of news coverage from the era suggests that "the threat of nuclear attack in the United States was perceived and treated as real."[197] Preparation for an attack became a daily ritual. Students practiced "duck and cover" drills.[198] Newspapers published instructions for responding to air raids.[199] Children, at least in New York City, received identification bracelets to expedite familial reunions upon a strike.[200]

This perceived inevitability was heightened by Americans having verifiable and numerous sources confirming the destructive power of nuclear weapons. Consider that the cover of TIME magazine in 1952 was the mushroom cloud that formed after the first denotation of an H-bomb.[201] That test, as reported in the cover story, confirmed the "force and horror of atomic weapons had entered a new dimension."[202] According to George Moore and Berwyn Moore, a fear pervaded the American public that their "existence as [they] knew it could end instantly."[203] Local and state officials shared this fear. One manifestation of that fear was governors, such as Nelson Rockefeller of New York, actively lobbying the federal government for more funding to assist families with the creation of fallout shelters.[204]

The likelihood of an attack was also confirmed by the President. In the middle of the Cuban Missile Crisis, President John F. Kennedy used a primetime national address to leave no doubts about the possibility of a nuclear strike.[205] This very real and verified threat of destruction, as discussed above, influenced the public of several states to adopt CoG provisions.

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[197] Chapin, *supra* note 32, at 3.

[198] *Id.*

[199] *See id.*

[200] *See id.*

[201] *See* Merrill Fabry, *What the First H-Bomb Test Looked Like*, TIME (Nov. 2, 2015), https://time.com/4096424/ivy-mike-history/.

[202] *Id.*

[203] George Moore & Berwyn Moore, *Threats to Our Nation, 1957-1959: A Public Health Retrospective*, NAT'L LIBR. OF MED. (2009), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2646491/.

[204] *See* Thomas Bishop, *Every Home a Fortress: Cold War Fatherhood and Family Fallout Shelter*, *in* CULTURE IN POLITICS IN THE COLD WAR AND BEYOND 1, 55 (Edwin A. Martini & Scott Laderman eds., 2020) https://www-jstor-org.libproxy.scu.edu/stable/j.ctv138wqg2 (last visited Oct. 5, 2023).

[205] *See* Martin Sherwin, *One Step from Nuclear War*, 44 PROLOGUE MAG. (2012), https://www.archives.gov/publications/prologue/2012/fall/cuban-missiles.html.

3. Scale of Emergency

The public's exposure to the destructive power of nuclear weapons and their confrontation of an attack emerging from as close as Cuba made concrete the scale of the emergency that would result from a nuclear detonation on American soil. The Voters' Guide in New Hampshire, in explaining the need for a CoG provision, flagged "that government would come to a standstill if many officers and officials of government were killed by enemy nuclear weapons."[206] A statement of opposition in the Washington State Voters Pamphlet argued against the adoption of a CoG provision, in part, because the scale of emergency would necessitate military rule "for a lengthy period of time."[207] In contrast, the Oklahoma State Legislature cited such destruction in support of its enactment of a CoG statute. The legislature contended that "recent technological developments [made] possible an enemy attack of unprecedented destructiveness, which may result in the death or inability to act of a large portion of the membership of the legislature."[208]

These descriptions of possible emergency situations indicate that the public backed CoG provisions not out of a simple concern that legislators would face logistical hurdles to governing, but rather out of a fear that legislators would not be physically present to do so. More abstractly, these factors support a theory that the American public may support extra-constitutional action by state legislatures in the event of a highly likely, unmitigable, and severe threat. Alternatively, one could cite these factors in support of a humbler theory: that the public will support emergency action by officials only when facing an imminent attack by a bad actor that, if executed, would cause physical destruction of life and property.

Going back to our hypothetical, the Florida state court judge could find support for both theories. Support for the broader theory arises from instances in which state legislators or voters, decades after the height of the Cold War, either left their CoG provisions in place or affirmatively expanded their application. Texas voters, for instance, partially expanded and partially limited their CoG provision in passing a 1983 amendment.[209] Louisiana subsequently amended their CoG provision to apply to "any emergency."[210] Members of the 1986 Rhode

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[206] MARSHALL, *supra* note 170, at 135.

[207] 1962 Washington State Official Voters Pamphlet, at 25.

[208] ADKISON & PAMER, *supra* note 188 (quoting 63 Okla. St. Ann., § 686.2).

[209] *See* MAY, *supra* note 170, at 190.

[210] W. LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION, 210 (2011).

Island Constitutional Convention left the state's CoG provision unchanged.[211] And, in 1990, Utah voters amended their CoG provision to allow the legislature to take extraordinary actions in a broader set of emergencies.[212] These actions cut against the theory that the public exclusively feared nuclear annihilation as a source of government discontinuation.

The judge, however, could also muster an argument against a broader theory. Scholars such as Peter Galie, have pointed out that the expansive powers set forth under CoG provisions would serve as an "open invitation to trump the constitution any time a crisis develops," if courts broadly interpreted "emergency."[213] Surely, then, voters did not intend for their respective state constitutions to be so easily bypassed; it follows that their support of CoG provisions should be viewed with considerable consideration paid to the unique historical context in which they emerged.

D. *Predictions*

With the first three New Haven School tasks completed, the framework now requires a prediction as to whether the Florida state court judge in our scenario would find that the AI-based election interference scenario sufficed to trigger the state's CoG provision, which applies "[i]n periods of emergency resulting from enemy attack."[214]

Though few clear trends exist with respect to interpretation of CoG provisions, the aforementioned factors, combined with the nation's current political ethos, suggest that the Florida state court judge would conclude that the provision had not been triggered. Additionally, employment of traditional tools of interpretation by the judge would support that decision.

1. Comparison of Emergencies

At a high level, AI-based election interference incidents share few of the characteristics of a nuclear attack in terms of the emergency factors set forth above. On the type of emergency, state legislatures have means to prevent or, at least, mitigate disruptions with elections. For example, they can insist on the use of paper ballots to reduce the

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[211] *See* CONLEY & FLANDERS, *supra* note 170.

[212] *See* JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION 95 (2011).

[213] PETER GALIE, THE NEW YORK CONSTITUTION 114 (2011).

[214] FLA. CONST. art. 2, § 6.

odds of results being manipulated.[215] Likewise, with some legal limitations, they can regulate political advertising to limit the use of AI in electoral contests.[216] These available tools militate against perceiving an emergency arising from an election as similarly beyond the control of the legislature as a nuclear attack by an adversary. As a result, the public (and the court) may be less willing to extend broad powers to the legislature even if the type of election inference set forth in the hypothetical seems uniquely difficult to prevent.

The likelihood of election interference today seems on par with, if not higher than, that of a nuclear attack during the Cold War. This factor would likely not influence the judge's determination on whether this emergency was the sort envisioned by the Florida public when they backed the CoG provision.

The two scenarios—chaos resulting from electoral interference and decimation by a nuclear strike—differ in terms of the scale of the emergency. The former would cause no physical impediment to the state legislature gathering and methodically working through the issues posed by a contested election and civil unrest. The latter, though, carried the potential to destroy both the legislature's meeting place, as well as a large fraction of its membership. If the court regarded the CoG predominantly as a means for staffing the legislature, rather than ensuring its credibility and legitimacy at times of crisis, then this factor could have an outsized effect on the court's decision.

On the whole, AI-based election interference poses a very different sort of emergency than a nuclear strike. Though the court may agree that restoring the capacity of the state legislature to govern amid uncertainty about who constitutes a member of that body is an emergency, there is no denying that resolving such disagreements differs from rebuilding and reconstituting the legislature upon the death of many of its members.

2. Application of Traditional Legal Frameworks

After distinguishing the hypothetical emergency from a nuclear attack, the judge might next turn to textualist and originalist frameworks to investigate whether this emergency qualified as "a

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[215] *See* Derek Tisler & Turquoise Baker, *Paper Ballots Helped Secure the 2020 Election - What Will 2022 Look Like?*, BRENNAN CTR. FOR JUST. (2022), https://www.brennancenter.org/our-work/analysis-opinion/paper-ballots-helped-secure-2020-election-what-will-2022-look.

[216] *See* Ivan Pereira, *Washington state bill would provide safeguards against 'deepfake' political ads*, ABC (Mar. 15, 2023), https://abcnews.go.com/US/washington-state-bill-provide-safeguards-deepfake-political-ads/story?id=97883652.

period of emergency resulting from an enemy attack."[217] Both would likely tend toward it not.

On the textualist front,[218] the judge would find little information on the meaning of emergency, enemy, and attack in the Florida provision itself; the provision does not define any of those terms. The judge may, however, infer the narrowness of those terms as used in CoG provisions from efforts in other states to expand the application of their CoG provisions. Briefly mentioned above, several states affirmatively amended their CoG provisions to make them available in response to emergencies caused by sources other than enemy attacks. From those amendments, the judge could glean that the "standard" trigger could only be "pulled" in a narrow set of situations.

The application of an originalist lens to Florida's CoG provisions would result in a similar conclusion.[219] Though different flavors of originalism look to different information to assess the meaning of a term, each of those variants would pull from a common history in which the emergency, the enemy, and the type of attack were abundantly clear. Few would question how voters would define those terms in the days leading up to and following the Cuban Missile Crisis—as relayed by Crotty and Ellis, the emergency was a legislature rendered incapacitated due to casualties among its members; the enemy was the Soviet Union; and, the attack was a nuclear strike.

If the judge nevertheless sought out additional support for this set of narrow definitions, she could find it in the Federal Civil Defense Act of 1950. Though "enemy" is not explicitly defined in the Act, the text refers to an "enemy of the United States" as part of its definition of "attack."[220] It is true that this phrase does not explicitly exclude the non-state actors in this paper's hypothetical—who not only live in the United States, but have also previously served in the nation's armed forces—an originalist approach to the phrase would surely foreclose such an expansive reading. Reference to the Act would also bolster a narrow definition of attack—defined as:

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[217] FLA. CONST. art. 2, § 6.

[218] *See* Cornell L. Sch., *Textualism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/textualism (last visited Oct. 5, 2023) ("[A] method of statutory interpretation that asserts that a statute should be interpreted according to its plain meaning and not according to the intent of the legislature, the statutory purpose, or the legislative history.").

[219] *See* Cornell L. Sch., *Originalism*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/originalism (last visited Oct. 5, 2023) ("[A] theory of interpreting legal texts holding that a text in law, especially the U.S. Constitution, should be interpreted as it was understood at the time of its adoption.").

[220] Federal Civil Defense Act of 1950, Pub. L. No. 920, § 3, 64 Stat. 1247.

> [A]ny attack or series of attacks by an enemy of the United States causing, or which may cause, substantial damage or injury to civilian property or persons in the United States in any manner by sabotage or by the use of bombs, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or processes.[221]

This definition makes clear that "attack" was understood as a physical action taken against the United States, its people, and its property.

Even if the judge had an inclination to afford the legislature whatever powers it required to respond to electoral chaos by broadly interpreting the CoG's trigger, that inclination would likely not overcome the weight of interpretative tools suggesting the denial of such a grant of power.

That said, documented judicial hesitance to interfere with a legislature's invocation of its CoG provision could steer the judge in the opposite direction. Courts have generally regarded emergency declarations as "a subject committed to legislative discretion."[222] The absence of prior interpretations of Florida's CoG provision may add to this hesitancy given that the judge may not want to be the first to put their thumb on the scale.[223] Popular support for the legislature's invocation could also prompt the judge—who must stand for re-election—to avoid countering the legislature's efforts.[224] Recent events may have made such support more likely. Concerns about the extensive use of emergency powers by governors in response to COVID-19 may result in making the public more supportive of the legislature taking the lead in future emergency situations.[225]

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[221] *Id.*

[222] CROWLEY & HEFFRON, *supra* note 148, at 102.

[223] *See* D'ALEMBERTE, *supra* note 170, at 45.

[224] *See Guide for Florida Voters: Judicial and Merit Retention Elections FAQ*, THE FLORIDA BAR, https://www.floridabar.org/public/faircts/votes010/votes002/#1639675092992-8d8f90a4-5e34 (last visited Oct. 5, 2023); *see also* Neal Devins & Nicole Mansker, *Public Opinion and State Supreme Courts*, 13 J. OF CONST. L. 455, 469–70 (2010) ("State supreme court justices are not passive, disconnected actors when it comes to elections; like any politician, they are motivated and willing to exert great effort to maintain their seats.").

[225] *See* Joseph O'Sullivan, *WA Lawmakers Debate Limits to Govenror's Emergency Powers After 2 Years of COVID*, SEATTLE TIMES (Feb. 1, 2022), https://www.seattletimes.com/seattle-news/politics/wa-lawmakers-debate-limits-to-governors-emergency-power-after-2-years-of-covid/ (describing efforts to limit the emergency powers afforded to the governor of Washington due to concerns about excessive use of such powers during COVID); *see also*

In summary, absent widespread public support for the legislature's invocation of Florida's CoG provision, the judge would likely find that AI-based election interference directed by U.S. citizens did not amount to a "period of emergency resulting from an enemy attack."[226]

E. *Invention of Alternatives*

The final task requires the decision-maker to "explicitly explore alternative arrangements which will increase the probability of the eventuation of a desired future."[227] The hypothetical presented here, by virtue of its differences from the emergency that would result upon a nuclear attack, unquestionably requires such exploration. Though the continuity of government would be threatened in both situations, the respective causes of discontinuation in each emergency have distinct characteristics that necessitate different solutions to preserve the common interest in a credible and effective government. In the nuclear attack emergency, continuity requires the identification of replacements for missing or deceased officials. In the election emergency, continuity requires resolution of who is the legitimate official. In this latter scenario, if the legislature had sole discretion to trigger the state's CoG provision, then those officials would likely do so—at least subconsciously—if the exercise of the resulting powers would help them and their political allies retain control.

As suggested elsewhere, an independent commission was tasked with determining whether a disaster sufficed to trigger emergency powers held by the legislature and—while on the topic—whether the governor could lower the chance of either branch exploiting those powers to serve personal or political interests instead of the common interest.[228] This commission, if made up of a diverse *and* redundant (in case of an emergency that causes significant casualties, including members of the commission) set of experts, could

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J.D. Tuccile, *New Mexico Anti-Gun Decree Follows a Dangerous Path of 'Emergency' Rule*, REASON (Sept. 13, 2023), https://reason.com/2023/09/13/new-mexico-anti-gun-decree-follows-a-dangerous-path-of-emergency-rule/ (detailing a potential instance of excessive use of emergency powers unrelated to but soon after the height of the COVID-19 pandemic).

[226] FLA. CONST. art. II, § 6.

[227] Reisman, *supra* note 12, at 242.

[228] *See, e.g.*, William Rice, *States & the Separation of Powers in Times of Emergency*, GEO. LAW, https://www.law.georgetown.edu/salpal/states-the-separation-of-powers-in-times-of-emergency/ (last visited Oct. 5, 2023) (offering several alternative mechanisms for the triggering of emergency powers).

assuage concerns about biased invocations of such powers while also possessing the institutional capacity to run through the New Haven School framework prior to reaching a decision about an emergency.

By way of example, the commission could include a dozen, if not more, members with expertise in cybersecurity, virology, democratic backsliding, etcetera. For each member, there would be two or three "alternates" ready and willing to take their place. This multidisciplinary group could also wield the authority of determining when an emergency has concluded and continuity of government is no longer in doubt. This approach would have an additional benefit of reducing the potential politicization of an emergency.[229]

A less creative alternative that would nevertheless mark an improvement on the status quo includes the creation of a formal set of criteria that would automatically trigger CoG provisions, absent a supermajority vote by the legislature. Sample triggers could include a certain percentage of the state's legislative bodies being unable to fulfill their duties, the conclusion at the end of a formal investigation that a fair and free election did not occur, and a determination that another branch of government has been rendered incapacitated.

If the hypothetical described here occurred, these alternatives would better align with the common interest in the continuity of government during times of crisis. Under the status quo, it is unclear whether the state legislature could invoke its CoG provision to quell unrest and uncertainty arising from AI-based election interference; a judge could punt the question of whether the instant emergency sufficed to trigger the provision, they could lean on tools of statutory interpretation and likely conclude that it did not, and they could bend to public pressure and find some justification for a "larger" trigger that included such electoral interference. An independent commission or a series of automatic triggers would remove this uncertainty and better equip the state legislature to act in response to catastrophic events.

V. CONCLUSION

"There is a strong tendency in time of war for many sober citizens to demand a severer, harsher, more drastic and more expeditious

[229] *See, e.g.*, John Gasper, *Make It Rain: How Politics Impacts Disaster Relief*, TEPPER SCH. OF BUS. (Mar. 1, 2018), https://www.cmu.edu/tepper/news/stories/2019/january/politics-disaster-relief.html (discussing a pattern of federal relief funds varying in amount based on the political leanings of the affected region).

enforcement of all types of police regulation than they would endure in time of peace."[230]

"The lawyer's job is to devise a means so that there will be legally constituted familiar agencies available to direct those who must solve the problems when they arise."[231]

The legal community has an obligation to assist with civil defense in light of likely, severe, and long-lasting threats to the administration of law and operation of government. During the Cold War, law schools, state bar associations, and private attorneys around the country lent their expertise and resources to local and state governments by drafting model legislation and otherwise evaluating legal responses to disaster scenarios.[232] Columbia University partnered with the Council of State Governments to draft a model constitutional amendment that aligned with the parameters set by the OCDM.[233] The American Bar Association issued a report on the topic of civil defense and urged state legislatures to adopt template amendments and legislation.[234] Finally, Depaul University authored the Records Management Act to facilitate the storing of critical information.[235]

Devastation and disarray again loom on the horizon; yet, the distinct attributes of potential disasters may render CoG provisions useless. Whether CoG provisions have become vestiges of the Cold War requires legal interpretation of several questions including, but not limited to: what constitutes a "period[] of emergency"?; who or what qualifies as an "enemy"?; what defines an "attack" by that enemy?; and, how long is "temporary" with respect to the authority afforded to officials selected to replace "unavailable" officials? Relatedly, what does it mean for an official to become "unavailable"? What measures qualify as "necessary and appropriate to insure the continuity of governmental operations," and do those measures differ from those "necessary to meet the emergency"? Finally, what marks the end of an emergency and does "during the emergency" mandate that all powers set forth by the CoG provision immediately cease at the close of the emergency?

This is just a short list of the questions that deserve scholarly attention. The application of the New Haven School of Jurisprudence to the first question suggests that a new wave of civil defense laws may

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[230] Max Radin, *Martial Law and the State of Siege*, 30 CALIF. L. REV. 634, 634 (1942).

[231] Beebe, *supra* note 49, at 150 n.8.

[232] *See* Ellis, *supra* note 33, at 12.

[233] *See id.*

[234] *See id.*

[235] *See id.*

be required. Will lawyers rise to the occasion and ensure that "legally constituted familiar" governmental authorities exist if and when an AI-induced disaster occurs?

VI. APPENDIX A

STATE	**Trigger Event for State Legislatures to Ensure the Continuity of the Government**
Alabama, ALA. CONST. amend. 159.	"[I]n the event of an attack by an enemy of the United States."
Arizona, ARIZ. CONST. art. 4, pt. 2, § 25.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
California, CAL. CONST. art. 4, § 21.	"[T]o meet the needs resulting from war-caused or enemy-caused disaster in California."
Connecticut, CONN. CONST. art. 11, § 3.	"[I]n a period of emergency resulting from disaster caused by enemy attack."
Delaware, DEL. CONST. art. 17, § 1.	"[I]n periods of emergency resulting from enemy attack, terrorism, disease, accident, or other natural or man-made disaster."
Florida, FLA. CONST. art. 2, § 6.	"In periods of emergency resulting from enemy attack."
Georgia, GA. CONST. art. 3, § 6, para. 2.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
Idaho, ID. CONST. art. 3, § 27.	"[I]n periods of emergency resulting from disasters caused by enemy attack or in periods of emergency resulting from the imminent threat of such disasters."
Kansas, KAN. CONST. art. 15, § 13.	"[I]n periods of emergency resulting from enemy disasters caused by enemy attack."
Louisiana, LA. CONST. art. 3, § 2.	"[I]n periods of emergency."
Maine, ME. CONST. art. 9, § 17.	"[I]n periods of emergency resulting from disaster caused by enemy attack."

Michigan, MICH. CONST. art. 4, § 39.	"[I]n periods of emergency . . . resulting from disasters occurring in this state caused by enemy attack on the United States."
Minnesota, MINN. CONST. art. 5, § 5.	"[I]n periods of emergency resulting from disasters caused by enemy attack in this state."
Missouri, MO. CONST. art. 3, § 46a.	"[I]n periods of emergency . . . resulting from disasters occurring in this state caused by enemy attack on the United States."
Montana, MONT. CONST. art. 3, § 2.	"[D]uring a period of emergency."
Nebraska, NEB. CONST. art. 3, § 29.	"[I]n periods of emergency resulting from enemy attack upon the United States, or the imminent threat thereof."
Nevada, NEV. CONST. art. 4, § 37.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
New Hampshire, N.H. CONST. pt. 2, art. 5-a.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
New Jersey, N.J. CONST. art. 4, § 6, para. 4.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
New Mexico, N.M. CONST. art. 4, § 2.	During periods when "damage or injury to persons or property in this state, caused by enemy attack, is of such a magnitude that a state of martial law is declared to exist in the state, and a disaster emergency is declared by the chief executive officer of the United States and the chief executive officer of this state, and the legislature has not declared by joint resolution that the disaster emergency is ended."
New York, N.Y. CONST. art. 3, § 25.	"[I]n periods of emergency caused by enemy attack or by disasters (natural or otherwise)."

North Dakota, N.D. CONST. art. 11, § 7.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
Ohio, OHIO CONST. art. 2, § 42.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
Oklahoma, OK. CONST. art. 5, § 63.	"[I]n periods of emergency resulting from disasters caused by enemy attack or in periods of emergency resulting from the imminent threat of such disasters."
Oregon, OR. CONST. art. 10-A.	"[A] natural or human-caused event that results in extraordinary levels of death, injury, property damage or disruption of daily life in this state , and severely affects the population, infrastructure, environment, economy or government functioning of this state." Qualifying events include, but are not limited to acts of terrorism, earthquakes, floods, public health emergencies, tsunamis, volcanic eruptions, and war. Requires a declaration by the governor that such an event has occurred.
Rhode Island, R.I. CONST. art. 6, § 21.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
South Carolina, S.C. CONST. art. 17, § 12.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
South Dakota, S.D. CONST. art. 3, § 29.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
Texas, TX. CONST. art. 3, § 62.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
Utah, UTAH CONST. art. 6, § 30.	"[W]hen [local and state government] operations are seriously disrupted as a result of natural or man-made disaster or disaster caused by enemy attack."

Washington, WA. CONST. art. 2, § 42.	"[I]n periods of emergency resulting from a catastrophic incident or enemy attack"
West Virginia, W. VA. CONST. art. 6, § 54.	"[I]n periods of emergency resulting from disasters caused by enemy attack."
Wisconsin, WIS. CONST. art. 4, § 34.	"[I]n periods of emergency resulting from disasters caused by enemy attack."