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STATE CONSTITUTIONS AND LEGISLATIVE CONTINUITY IN A 9/11 WORLD: SURVIVING AN "ENEMY ATTACK"

*Eric R. Daleo**

INTRODUCTION

Six minutes after the California State Assembly approved a measure to solve the State's energy crisis, an 80,000 pound, eighteen-wheel tractor-trailer intentionally crashed into the south entrance of the state capitol at a speed of fifty miles per hour.[1] The impact caused a massive explosion with flames on the ground floor reaching as high as third-floor windows, charring inside hallways and destroying a legislative committee hearing room.[2] The truck's driver was killed instantly in "a ball of fire."[3] Inside the legislative chamber, police instructed Assembly members to evacuate, and the Assembly's loudspeaker system warned, "This is not a drill."[4] Hundreds of legislators and staff fled the state capitol in the moments following the explosion.[5]

The January 16, 2001 attack on the California State House was not perpetrated by a foreign terrorist group, but rather by Mike Bowers—a parolee despondent over the breakup of his marriage.[6] His cargo was not an explosive device, but rather cans of sweetened condensed

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1. Julie Tamaki & Carl Ingram, *Truck Driver in Capitol Crash Had History of Mental Illness, Violence*, L.A. TIMES, Jan. 18, 2001, at A3, *available at* 2001 WLNR 10547559; Mareva Brown et al., *Truck Rams Capitol: Driver Killed in Fiery Attack*, SACRAMENTO BEE, Jan. 17, 2001, at A1, *available at* 2001 WLNR 11233322.

2. Brown et al., *supra* note 1; Lynda Gledhill et al., *Truck Rams Capitol*, S.F. CHRON., Jan. 17, 2001, at A1, *available at* 2001 WLNR 5737123.

3. Tamaki & Ingram, *supra* note 1.

4. Brown et al., *supra* note 1 (internal quotation marks omitted).

5. *See id.*

6. *See* Sam Stanton, *Tapes Tell Story of Terror, Duty in Capitol Crash*, SACRAMENTO BEE, Jan. 20, 2001, at A1, *available at* 2001 WLNR 11229238.

milk slated for delivery in South Dakota.[7] Investigators believe that Mr. Bowers was not targeting legislators,[8] and no injuries were reported in the capitol.[9] "We were very lucky," California Highway Patrol Commissioner D.O. "Spike" Helmick said after the attack.[10] "It could have been a much worse tragedy."[11]

The scenario would have been much worse if Mr. Bowers had intended to target the California Legislature—if the cargo within his 80,000 pound truck was explosive and not condensed dairy. It is not a strain to imagine his truck colliding with the inner walls of the busy Assembly chamber instead of an empty hearing room. In such a scenario, Mr. Bowers could have killed many lawmakers,[12] and those casualties could have resulted in the invocation of a little-known and never-before-studied provision of the California State Constitution.

The constitutions of thirty-five American states, including California,[13] textually authorize the suspension of constitutional norms and procedural protections following an "enemy attack," or in some cases, "disaster."[14] These so-called "continuity of government" provisions have little impact on the day-to-day operations of state government. But, in the event of "enemy attack," the provisions potentially extend sweeping powers to surviving legislators to take whatever steps necessary to provide for the continuous operation of state and local governments.

Existing academic scholarship has focused on the executive branch and the governor's emergency powers to respond to disaster,[15] but states also require operational legislatures in times of crisis.[16] Following a disaster, legislatures play a critical role in repopulating top government posts (including the governorship), budgeting, lawmaking, and "checking" the executive branch in the delicate system of checks

7. Mareva Brown, M.S. Enkoji & Sam Stanton, *Driver Suffered Delusions: Prison, Mental Facilities Marked His Past*, SACRAMENTO BEE, Jan. 18, 2001, at A1, *available at* 2001 WLNR 11217186.

8. Stanton, *supra* note 6 ("[T]here was no indication that Bowers was working with anyone else or that he was targeting anyone inside.").

9. Gledhill et al., *supra* note 2.

10. Stanton, *supra* note 6 (internal quotation marks omitted).

11. *Id.* (internal quotation marks omitted).

12. *See, e.g.*, Michael Gardner, *South Bay Lawmakers Shaken by Fiery Crash*, DAILY BREEZE (Torrance, Cal.), Jan. 18, 2001, at A8 ("'If that truck had been filled with explosives I wouldn't be talking to you.'" (quoting State Senator Debra Bowen)); Gledhill et al., *supra* note 2 ("'Thank God there was nothing (explosive) in the truck or we would be toast.'" (quoting eyewitness)).

13. CAL. CONST. art. IV, § 21.

14. *See infra* notes 109–149 and accompanying text.

15. *See, e.g.*, Jim Rossi, *State Executive Lawmaking in Crisis*, 56 DUKE L.J. 237 (2006).

16. *See infra* notes 38–61 and accompanying text.

and balances. As the representative branch of state government, a functioning legislature serves as an enduring and important symbol of democracy during times when political stability is most threatened.[17]

To plan for legislative continuity, legislatures in many states have relied on continuity of government provisions to enact statutes prospectively waiving constitutional and statutory requirements and standing procedural rules during periods of emergency.[18] For example, constitutional quorum requirements as well as single-subject and other process rules—originally "designed to fix accountability and to enhance participation and deliberation"[19]—will be statutorily nullified in the event of an "attack" in eleven states.[20] Separately, eleven states have used continuity of government provisions to provide for "shadow legislatures"—authorizing a cadre of unelected and unknown members of the public to "step into the shoes" of individual legislators with full legislative powers, immunities, and voting rights—should a catastrophic attack render the elected state legislature unable to meet or proceed with business.[21]

While this Article argues that continuity of government provisions in state constitutions have modern relevance in an era of new global threats, these provisions are also significant because they provide a window into a different America. Their placement in state constitutions contributes to our understanding of the times in which they were adopted[22]—a period in the national history where "nuclear war and

17. On the evening of September 11, 2001, Americans were simultaneously touched and reassured when Republican and Democratic members of the U.S. Congress, after observing a moment of silence, stood shoulder-to-shoulder on the steps of the Capitol to sing a "spontaneous chorus" of *God Bless America*. *See* John Lancaster & Helen Dewar, *Outraged Lawmakers Vow to Keep Hill Going: Briefly Evacuated, Congress Returns to Show Resolve*, WASH. POST, Sept. 12, 2001, at A21. Radio stations across the nation "frequently [re]played" the lawmakers' "impromptu version" of the song in the week following the World Trade Center tragedy. Press Release, Media Base 24/7, Mediabase 24/7 Tracks the Trends in Music Airplay—Lee Greenwood's "*God Bless The U.S.A.*" is the Most Played Song (Sept. 20, 2001) (on file with author).

18. State constitutional continuity of government provisions are not self-executing. *See infra* notes 176–262 and accompanying text.

19. Michael E. Libonati, *The Legislative Branch*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 37, 56 (G. Alan Tarr & Robert F. Williams eds., 2006). Unlike the Federal Constitution, most state constitutions textually contain specific and detailed restrictions on lawmaking procedures. *See id.*

20. *See infra* notes 182–198 and accompanying text (discussing quorum suspension statutes).

21. *See infra* notes 199–251 and accompanying text (discussing interim legislative succession acts).

22. State constitutions have been referred to as a "cinematoscope of the times." JAMES QUAYLE DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS § 2.77 (Da Capo Press 1972) (1915), *quoted in* ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW CASES AND MATERIALS 1 n.2 (4th ed. 2006). Under the "historical-movement model," state constitutions reflect "not distinctive state political cultures but rather the political forces prevailing nationally at the time they were adopted." G. Alan Tarr, *State Constitutional Politics: An Historical Perspective*, *in*

survival [was] embraced by an entire nation as the subject of urgent debate."[23] Thus, their origins are inextricably tied to what has been described as "the story of American society under nuclear attack."[24]

The federal government, expressing a belief that state governments are critical in the "direction of supporting operations in an emergency,"[25] first proposed a model continuity of government constitutional measure to the states in 1957.[26] In a period of just seven years (1959–1966), marked by the height of the Cold War and Cuban Missile Crisis and the beginning of American involvement in Vietnam, thirty-five states amended their constitutions to add the federally proposed model provision (or variations thereof).[27] Illustrative of the spectacular speed at which these provisions were added to state constitutions, fourteen states ratified continuity of government amendments on a single day: November 8, 1960.[28] Virtually every amendment passed with little, if any, organized opposition.[29]

Though Americans may no longer fear nuclear holocaust, continuity of government planning remains a critical component of passive defense and emergency management planning.[30] The attacks of September 11, 2001, the perceived threat of foreign and domestic ter-

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CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 3, 4 (G. Alan Tarr ed., 1996). Continuity of government provisions are instructive examples of state constitutions serving as "'mine[s] of instruction for the natural history of democratic communities.'" *See* 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 413, 434 (New York, Macmillan rev. 2d ed. 1891), *quoted in* WILLIAMS, *supra*, at 1.

23. KENNETH D. ROSE, ONE NATION UNDERGROUND: THE FALLOUT SHELTER IN AMERICAN CULTURE 1 (2001).

24. GUY OAKES, THE IMAGINARY WAR: CIVIL DEFENSE AND AMERICAN COLD WAR CULTURE 8 (1994); *see also infra* notes 74–78 and accompanying text (discussing the "bunker culture" of American society that prompted the development and passage of state continuity of government provisions).

25. NAT'L SEC. RES. BD., EXECUTIVE OFFICE OF THE PRESIDENT, UNITED STATES CIVIL DEFENSE 5 (1950) ("The States are established with inherent powers and accompanying responsibility, and have clear qualifications to coordinate civil-defense operations within their boundaries, and in emergency to direct them."); *see also infra* notes 74–83 and accompanying text.

26. *See infra* note 96 and accompanying text (identifying the model federal provision).

27. *See infra* notes 109–149 and accompanying text (compiling continuity of government provisions adopted and respective years of adoption).

28. Those states include Idaho, Kansas, Maine, Maryland, Minnesota, Missouri, Nebraska, New Hampshire, New Mexico, Oregon, South Carolina, South Dakota, Utah, and West Virginia. *See* COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION: PROGRAM FOR 1961, at 33, 35 (1960); *see also infra* notes 109–149 and accompanying text.

29. *See infra* note 145 and accompanying text.

30. *See, e.g.*, NAT'L GOVERNORS ASS'N CTR. FOR BEST PRACTICES, ISSUE BRIEF: PLANNING FOR GOVERNMENT CONTINUITY 1–2 (2003) ("To mitigate the consequences of potential catastrophes ranging from terrorist attacks to natural disasters, [state] government must . . . develop and adopt Continuity of Government (COG) plans."); William H. Kincade, *Repeating History: The Civil Defense Debate Renewed*, 2 INT'L SECURITY 99, 101 (1978) (noting that a passive defense program will normally include "measures for assuring the continuity of government").

rorism against state institutions of democracy (including state legislatures), and recent natural disasters, such as Hurricane Katrina,[31] confirm the continuing relevance of (and need for) state continuity of government provisions. Following a disaster, it is important that there are public officials with legal authority to act. These provisions emphasize the need for continuity of state government and ensure the capacity of state legislators to provide leadership, direction, and authority necessary for government survival in the event of a catastrophic event.[32]

This Article advocates that today's state legislatures consider issues related to the continuity of the legislative branch of state government and update existing statutory enactments and constitutional provisions that deal with continuity in light of existing threats. Part II of this Article examines the role a state legislature assumes during a period of widespread emergency.[33] It argues that, given the plenary powers of the legislature and the symbolic qualities of the body, a functioning legislature is especially needed in periods of crisis. Part III considers the modern impediments and circumstances that might prevent a legislature from meeting or conducting business during an emergency—the potential circumstances that may one day trigger the need for activation of a state's continuity of government plan.[34] Part IV analyzes the origins, history of adoption, and modern scope of constitutional provisions authorizing legislatures to suspend provisions of state constitutions in the interest of the continuous operation of government.[35] Part V examines existing statutory enactments that have sought to address succession and procedural quandaries in a legislature where mass incapacitation has occurred.[36] The final Part of this Article advocates for the modernization of language in existing constitutional and statutory schemes and the adoption of continuity of government constitutional provisions in the fifteen states lacking any continuity planning.[37]

31. *See infra* notes 62–73 and accompanying text (cataloging potential threats and impediments that may prevent a state legislature from conducting business).

32. For a discussion on the role of state legislatures in times of crisis, see *infra* notes 38–61 and accompanying text.

33. *See infra* notes 38–61 and accompanying text.

34. *See infra* notes 62–73 and accompanying text.

35. *See infra* notes 74–175 and accompanying text.

36. *See infra* notes 176–262 and accompanying text.

37. *See infra* notes 263–297 and accompanying text.

II. THE ROLE OF STATE LEGISLATURES IN TIMES OF EMERGENCY

Just as an attack against the U.S. Congress could "result in a loss of individuals critical to governance, destroy important symbols of government, and undermine the national sense of safety and security,"[38] an attack against a state legislature could destabilize a regional political environment. Following a widespread disaster or enemy attack, the ability of state legislatures to continue to meet and transact business is critical. The Madisonian notion that states have a diminished role in times of war and danger[39] is no longer an accurate portrayal of modern circumstance. According to the federal government's emergency management plan, state governments are today the "lead in response and recovery" because state and local governments are "closest to those impacted by incidents."[40]

It can be argued that as a result of a trend in American state constitutions to grant additional powers to governors and state executive branches,[41] and given the broad scope of gubernatorial emergency powers,[42] the need for state legislatures in times of crisis has correspondingly decreased.[43] This view is deficient, however, as legisla-

38. R. Eric Petersen & Jeffrey W. Seifert, *Congressional Continuity of Operations (COOP): An Overview of Concepts and Challenges*, *in* CONTINUITY OF GOVERNMENT 1, 2–3 (Derrick J. Dreiole ed., 2007) (discussing result of possible attack against U.S. Congress).

39. *See* THE FEDERALIST NO. 45, at 227 (James Madison) (Terrence Ball ed., 2003) ("The operations of the Federal Government will be most extensive and important in times of war and danger; those of the State Governments in times of peace and security.").

40. FED. EMERGENCY MGMT. AGENCY, DEP'T OF HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK 5 (2008), *available at* http://www.fema.gov/pdf/emergency/nrf/nrf-core.pdf; *see also* FED. EMERGENCY MGMT. AGENCY, DEP'T OF HOMELAND SEC., NATIONAL INCIDENT MANAGEMENT SYSTEM 12 (draft ed. 2007), *available at* http://www.fema.gov/pdf/emergency/nrf/nrf-nims.pdf ("In the vast majority of incidents, local resources . . . will provide the first line of emergency response and incident management."). According to Eric D. Hargan, Acting Deputy Secretary of the U.S. Department of Health and Human Services, state and local government units will play a critical role in the event of a national pandemic. *See* Eric D. Hargan, *Setting Expectations for the Federal Role in Public Health Emergencies*, 36 J.L. MED. & ETHICS 8, 10 (2008) ("[L]ocal preparedness must be the foundation of pandemic readiness, because in case of a national pandemic, there is going to be no unaffected area . . . to take care of patients in affected areas; thus, . . . every local community has to make do with its own resources.").

41. For example, New Jersey's chief executive has, over time, garnered substantial power. *See* Eric R. Daleo, Note, *The Scope and Limits of the New Jersey Governor's Authority to Remove the Attorney General and Others "For Cause,"* 39 RUTGERS L.J. 393, 403–05 (2008) (documenting rise of New Jersey governor's powers from 1776 New Jersey Constitution to present day).

42. *See infra* note 44 and accompanying text (discussing the governor's emergency powers).

43. Some have argued that the power and influence of the legislative branch of state government—even in periods of non-emergency—has declined greatly. *Cf.* WILDER CRANE, JR. & MEREDITH W. WATTS, JR., STATE LEGISLATIVE SYSTEMS 5 (1968) ("[T]he status of the legislature compared to other agencies of governmental power has declined since the American Republic was established. Yet, . . . this decline is relative, not absolute. Most state legislatures may deal with matters of great importance and spend enormous sums of money—far more so than in

tures still have a defined role in budgeting, lawmaking, and "checking" the executive branch in the system of checks and balances. These responsibilities become particularly important in times of crisis.

Although state governors are clothed with considerable emergency authority,[44] the Federal Emergency Management Agency (FEMA) has noted that legislatures are still needed to serve lawmaking functions following a disaster.[45] The legislature may be needed to authorize funding of efforts to "respond to, recover from, or mitigate damage from disasters."[46] The legislature may be called on to enact or reform a wide range of state laws, including laws governing building and fire codes, infrastructure protection, and school safety, among others.[47] The legislature may also be in the best position to assure the preservation and protection of "vital government documents," including legislative and judicial records.[48] In at least one state, legislative action is required to call out the state militia.[49] And nineteen states

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Colonial times or even in the nineteenth century; but other agencies of government, such as the executive and the judiciary, have grown even more in importance, so that the power of the legislature is relatively decreased.").

44. For example, the Louisiana Governor's "strong powers . . . during times of crisis" include the power to "appropriate state funds," "call state armed forces," "convene a special legislative session," and "'issue executive orders' . . . which shall have the 'force and effect of law.'" Rossi, *supra* note 15, at 243–44 (citations omitted).

45. *See* FED. EMERGENCY MGMT. AGENCY, GUIDE FOR THE DEVELOPMENT OF A STATE AND LOCAL CONTINUITY OF GOVERNMENT CAPABILITY 2-2 (1987). One FEMA publication notes:

> Laws provide the legal authority, requirements, and proscriptions under which public officials carry out their responsibilities and democratic societies function. The legislative system is important in the preparedness phase to legislate emergency powers and authorities and must be sustained through recovery and reconstitution to provide authority for implementation of necessary government actions not otherwise authorized by the law.

Id.

46. Mass. State Senator Richard T. Moore, Managing Disasters: Suggestions for Legislative Staff, Remarks Before the National Conference of State Legislatures Communications & Leadership Professional Development Seminar (Oct. 27, 2005), *available at* http://www.senatormoore.com/news/archive/2005/10/102705-1.htm. Alabama's governor, for example, is not given appropriations authority in the event of an emergency. *See* Rossi, *supra* note 15, at 245.

47. *See* Moore, *supra* note 46.

48. *See id.*

49. *See* TENN. CONST. art. III, § 5 ("[The governor] shall be commander-in-chief of the Army and Navy of this State, and of the Militia, except when they shall be called into the service of the United States: But the Militia shall not be called into service except in case of rebellion or invasion, and then *only when the General Assembly shall declare, by law, that the public safety requires it.*" (emphasis added)). *But see* F. David Trickey, Comment, *Constitutional and Statutory Bases of Governors' Emergency Powers*, 64 MICH. L. REV. 290, 292 & n.12 (1965) (compiling fourteen state constitutional provisions "explicitly authorizing the governor to call out the national guard").

prohibit the governor from suspending the operation of laws, reserving that power instead to the exclusive province of the legislature.[50]

The legislature may also play a role in the selection and repopulation of key government posts, including the office of governor.[51] In some states, if the governor is incapacitated (but still living), the responsibility to assess the capacity of the governor's continued service falls on legislative leaders or the legislature as a body.[52] If an attack renders a governor missing, a legislature will likely be needed to decide the process for filling the resulting vacuum of power. Legislatures are also "essential" to the maintenance of a system of checks and balances during, and immediately following, periods of disaster.[53]

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50. *See* Trickey, *supra* note 49, at 293–94.

51. *See* FED. EMERGENCY MGMT. AGENCY, *supra* note 45, at 2-2 ("The order of succession for State and local chief executives under emergency conditions must be established pursuant to law.").

52. *See, e.g.*, CONN. CONST. art. IV, § 18, para. e. For example, the Connecticut Constitution provides:

> In the absence of a written declaration of incapacity by the governor and in an emergency, . . . the lieutenant-governor shall transmit to the council on gubernatorial incapacity a written declaration . . . and thereupon shall exercise the powers . . . [of] the office of governor as acting governor. The council shall convene . . . to determine if the governor is unable to exercise the powers and perform the duties of his office. If the council . . . determines by two-thirds vote that the governor is unable to exercise the powers . . . , it shall transmit a written declaration to that effect to the president pro tempore of the senate and the speaker of the house of representatives . . . . *Upon receipt by the president pro tempore of the senate and the speaker of the house of representatives of such a written declaration from the council, the general assembly shall, in accordance with its rules, decide the issue, assembling within forty-eight hours for that purpose if not in session.* If the general assembly . . . determines by two-thirds vote of each house that the governor is unable to exercise the powers and discharge the duties of his office, the lieutenant-governor shall continue to exercise the powers . . . .

Id. (emphasis added).

In New Jersey, the state's supreme court ultimately decides whether the governor is unable to discharge the duties of his office, but the legislature is tasked with initiating the action. *See* N.J. CONST. art. V, § 1, para. 8 ("Such vacancy shall be determined by the Supreme Court *upon presentment to it of a concurrent resolution declaring the ground of the vacancy, adopted by a vote of two-thirds of all the members of each house of the Legislature*, and upon notice, hearing before the Court and proof of the existence of the vacancy." (emphasis added)). For a discussion on gubernatorial incapacity, see generally Brian J. Gaines, *Gubernatorial Incapacity: A Review of Succession Provisions*, SPECTRUM: J. ST. GOV'T, Fall 2004, at 26, *available at* http://csg-web.csg.org/pubs/Documents/spec_fa04GubernatorialIncapacity.pdf.

53. *See* FED. EMERGENCY MGMT. AGENCY, *supra* note 45, at 2-2 (noting that following a disaster, legislatures are "essential to maintaining the system of checks and balances with other branches of government"); MICHAEL FREEMAN, FREEDOM OR SECURITY: THE CONSEQUENCES FOR DEMOCRACIES USING EMERGENCY POWERS TO FIGHT TERROR 10 (2003) ("The separation of powers improves the capability of one branch of government to check other branches if emergency powers are abused. In constitutional systems, . . . the different branches of government have the capability to constrain other branches."); Rossi, *supra* note 15, at 240 ("The exercise of executive emergency powers is most effectively policed by the state legislature and not courts."). No one individual should be vested with unlimited and un-policed authority. Without a legisla-

In this regard, "[s]urveillance or oversight of the administration has long been regarded as an essential function of representative assemblies."[54]

At the same time, depending on the magnitude of the disaster, a threat of anarchy may lead to the imposition of martial law throughout a state.[55] Without the clear maintenance of state leadership, and in the absence of authority universally regarded as legitimate, conflict and instability may arise.[56] In the wake of an enemy attack or disaster, it may be unclear "who the chief officers of government legitimately are."[57] On the morrow of an attack or disaster, legislators would be needed "to reassure, to inspire, to lead and give direction to the stricken people."[58] Thus, following a disaster, individual legislators would play an important symbolic role in reassuring constituents and the public of the government's capacity to respond.[59] It has been written that "[g]enuinely effective and responsive legislatures enhance the stability of democratic regimes."[60] Perhaps for this reason, the

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tive check, it may be possible for a governor or her associates to employ emergency powers "to permanently undermine individual liberties or seize greater powers within the state." FREEMAN, *supra*, at 3.

54. William J. Keefe, *The Functions and Powers of the State Legislatures*, *in* STATE LEGISLATURES IN AMERICAN POLITICS 37, 44 (Alexander Heard ed., 1966).

55. *See* Homer D. Crotty, *The Administration of Justice and the A-Bomb: What Follows Disaster?*, 37 A.B.A. J. 893, 895 (1951) ("Immediately following an atomic bombing, where the civil authorities are unable to act, comes martial law.").

56. *See* James W. Beebe, *Local Government and the H-Bomb: A New California Statute Prepares for Attack*, 44 A.B.A. J. 149, 150, 152 (1958) ("Civilian government is such an important part of American life that its existence should not be open to doubt. . . . It is important that the enemy not be able to place men in the vital positions of standby officers."); *see also* COMPTROLLER GEN., GEN. ACCOUNTING OFFICE, PUBL'N NO. LCD-78-409, REPORT TO THE CONGRESS OF THE UNITED STATES: CONTINUITY OF THE FEDERAL GOVERNMENT IN A CRITICAL NATIONAL EMERGENCY—A NEGLECTED NECESSITY 8 (1978) ("If a central authority does not exist or is essentially ineffective, the effects of the disaster and the recovery time will be much greater. The chances of anarchy and civil disturbance in an environment without a strong central authority also are greater.").

57. Jack Hirshleifer, *Some Thoughts on the Social Structure After a Bombing Disaster*, 8 WORLD POL. 206, 213 (1956).

58. Beebe, *supra* note 56, at 150 (citation omitted) (internal quotation marks omitted).

59. *See* Moore, *supra* note 46. According to Massachusetts State Senator Richard T. Moore, "When disaster strikes, legislators and legislative staff will be expected to play key roles, yet not get in the way of those executive agencies at the state and local levels charged with the primary responsibility of preparing for, responding to, recovering from and mitigating against disasters." *Id.*

60. William Mishler & Anne Hildreth, *Legislatures and Political Stability: An Exploratory Analysis*, 46 J. POL. 25, 25 (1984). A functioning and independent legislature is a symbol of developed democracy. The conventional wisdom credits legislatures "with reducing levels of political conflict, rendering conflict more manageable, and mitigating the effects of conflict on government and regime." *Id.* at 26. *But see id.* at 27 (noting that political scientists have compiled "ample evidence that political systems can survive quite nicely in the absence of legisla-

federal government has historically lobbied states to build their capability to continue government operations, including legislative operations, following an attack.[61]

III. CIRCUMSTANCES THAT MIGHT PREVENT A LEGISLATURE FROM MEETING

The twenty-first century American legislature faces a variety of threats that may interfere with its ability to meet and conduct business, e.g., domestic or foreign terrorism, enemy attack, epidemiological crisis, or man-made or natural disaster. When compared to the U.S. Capitol Building or other federal government structures, e.g., Oklahoma City's Alfred P. Murrah Federal Building, or centers of international trade, e.g., the World Trade Center, the meeting houses of state legislatures seem like less likely targets of domestic and foreign terrorism. Our first intuitions, however, may be wrong. The National Conference of State Legislatures (NCSL) has observed that security of state buildings and legislators is, in many states, a subject "of increasing concern."[62] A 2001 publication by the RAND Corporation[63] conceded that "capital buildings housing state legislatures and their

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tures and that political stability on occasion may even be enhanced by their abolition" (citations omitted)).

61. *See* OFFICE OF CIVIL & DEF. MOBILIZATION, EXECUTIVE OFFICE OF THE PRESIDENT, CONTINUITY OF GOVERNMENT: SUGGESTED STATE LEGISLATION iii (1959). As the Office of Civil and Defense Mobilization noted in 1959,

> The development of the capability by State and local governments to continue functioning in times of emergency will assure, to the greatest degree possible, that the invocation of martial law will not be necessary in the event of an attack.
>
> Military government is the antithesis of civil government. If the States, counties, and cities carry out a continuity of government program, they will make a substantial contribution toward guaranteeing that recovery of the Nation will be accomplished under the direction of civil authority. This will facilitate the maintenance of the Nation in accordance with our traditional concepts of constitutional government.

Id.

62. Kae M. Warnock, *Is the State House Safe?*, LEGISBRIEF (Nat'l Conference of State Legislatures, Denver, Col.), Feb. 2002, at 1. Two recent incidents, in particular, have renewed concerns for state house security. First, on January 16, 2001, a loaded semi-tractor trailer crashed into the side of the California Capitol Building. *See supra* notes 1–5 and accompanying text. Second, on July 16, 2007, Colorado state troopers shot and killed an armed man who tried to enter the governor's office within the capitol building. Mike McPhee, *Armed Man Killed at Capitol in Denver: Governor in His Office as Troopers Shoot Intruder, Rattling Several Tour Groups*, CONTRA COSTA TIMES (Walnut Creek, Cal.), July 17, 2007, at A15, *available at* 2007 WLNR 13782187 ("'[The gunman] said he was the emperor and he was here to take over state government,' said Evan Dreyer, [a spokesman to the governor]."). The shooting "exposed vulnerabilities that left statehouse employees rattled." Editorial, *Increased Capitol Security Sensible*, DENVER POST, Sept. 6, 2007, at 6B, *available at* 2007 WLNR 17401138. Luckily, the Colorado Legislature was not in session at the time. *See* Colleen Slevin, *Metal Detectors Removed from Capital in 2002*, AP, July 17, 2007, *available at* http://cbsdenver.com/local/state.capitol.shooting.2.560284.html.

offices . . . *could be targets*" of terrorist activity.[64] A briefing by the NCSL speculated that legislative meeting places may be "a more attractive target" because domed capitol buildings tend to "resemble[ ] the U.S. Capitol."[65] In addition, state houses may also be more attractive targets than federal buildings because of lax security. For example, the majority of state capitols do not use metal detectors,[66] state house access in many states is virtually unrestricted,[67] and at least six states do not even have visible security at state house entrances.[68] States have resisted adding additional security measures, in part because of a desire to maintain the perception that legislative and other state house activities are open to the public,[69] and perhaps out of a belief that the chance of attack against state government is remote.

State legislators, given their opportunity and responsibility to vote on sometimes controversial measures, are potential targets of domestic terrorism. In Colorado, following a 2007 state house shooting,[70] "legislative staff members told stories of feeling threatened, sometimes being threatened, by members of the public who were angry at lawmakers over policy or proposed legislation."[71]

Finally, as noted earlier, in addition to domestic and foreign threats, the ability of a legislature to assemble may be significantly hampered by the spread of pandemic disease[72] or the occurrence of a natural

63. The RAND Corporation is a nonprofit think-tank which performs research and analysis. *See* RAND Corp., About the RAND Corporation, http://www.rand.org/about (last visited Apr. 28, 2009).

64. ERIC V. LARSON & JOHN E. PETERS, RAND CORP., PREPARING THE U.S. ARMY FOR HOMELAND SECURITY: CONCEPTS, ISSUES, AND OPTIONS 101 (2001), *available at* http://www.rand.org/pubs/monograph_reports/MR1251/MR1251.Chap5.pdf (emphasis added).

65. Warnock, *supra* note 62, at 1.

66. *See* Jennifer Brown & Mark P. Couch, *Ritter Orders Security Audit Following Capitol Shooting*, DENVER POST, July 19, 2007, at 1B, *available at* 2007 WLNR 13787716.

67. *See id.* (noting that only "a few states . . . have strict procedures on access"); Suzanne Hoholik, *Security at Official Buildings Varies*, COLUMBUS DISPATCH, July 19, 2007, at 1B, *available at* 2007 WLNR 13778105 (noting that at Ohio's Statehouse "[p]eople can walk in and out, into lawmakers' offices or to legislative sessions without telling anyone who they are"); Warnock, *supra* note 62, at 1 (compiling a list of states where public access is restricted).

68. Hoholik, *supra* note 67. Those states include Alaska, Hawaii, Kansas, Maine, North Carolina, and West Virginia. *Id.*

69. *See, e.g.*, *Stateline: Capital Security*, STATE LEGISLATURES, Mar. 2007, at 11 ("'It seems that ever since 9-11, we have changed the way we live, . . . at least in terms of access to our public places. And that's unfortunate, because when you change the American way of life, you let the wrongdoers win.'" (quoting Indiana Secretary of State Todd Rokita)).

70. *See supra* note 62 (discussing the July 16, 2007 shooting in the Colorado State House).

71. Editorial, *supra* note 62 (emphasis omitted).

72. Ohio's executive branch has considered the impact of an influenza pandemic impacting the continuity of state government. *See generally Gov. Taft Leads State Agencies in Pandemic Exercise*, U.S. STATE NEWS, Nov. 30, 2006, *available at* 2006 WLNR 20813342. The governor of Ohio observed, "If a pandemic would occur, there is a likelihood that many state workers may

disaster.[73] Ultimately, such an event—even though not necessarily an intentional act of a foreign or domestic "enemy"—may interfere with legislative operations or physically prevent a legislature from meeting.

IV. CONTINUITY OF GOVERNMENT PROVISIONS IN STATE CONSTITUTIONS

A. *Recognition of the Importance of Continuity in the States*

The 1950s and 1960s marked a period of obsession on the part of the federal government and the nation's citizenry with the possibility of thermonuclear war. Illustrative of the paranoia of the period, a 1950 "plan for organizing the civil defense of the United States" noted that "[b]ecause of developments in this air-atomic age, the United States can no longer be free from the danger of a sudden devastating attack against the homeland."[74] In 1955, the federal government conducted the first test of its "ability to cope with a hydrogen-bomb attack"—the test was highlighted by President Dwight D. Eisenhower's evacuation to a secret bunker somewhere outside Washington, D.C.[75] The Library of Congress considered moving the nation's most important documents to "other areas," presumably outside the District of Columbia, to shield them from destruction in the event of an enemy

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be sick or caring for sick loved ones during an outbreak. We must plan how state government will operate under challenging circumstances." *Id.* (citation omitted) (internal quotation marks omitted).

73. In 1989, for example, an earthquake in San Francisco "threatened continuity of government." NAT'L GOVERNORS ASS'N CTR. FOR BEST PRACTICES, *supra* note 30, at 1-2. The earthquake caused the destruction of twelve city departments, prevented personnel from accessing office space, and led to the postponement of municipal court proceedings. *Id.* As the San Francisco example illustrates, an earthquake may impede the movement of individual legislators, foreclosing the opportunity to reach quorum levels and conduct legislative business following a disaster.

74. NAT'L SEC. RES. BD., *supra* note 25, at III, 1. Commentators expressed fears of the attendant dangers of new missile technology. *See, e.g.*, H. Rowan Gaither, Jr., *We Must Have Courage: Law, National Security and Survival*, 44 A.B.A. J. 425, 426 (1958) ("There have been developed weapons and systems for the delivery of these weapons which in a matter of hours, ultimately even in minutes, can destroy nations and civilizations. . . . [A] single B-52 today can deliver, on one mission, the explosive equivalent of all bombs dropped in World War II.").

75. Anthony Leviero, *"H-Bombs" Test U.S. Civil Defense; Government Is Moved to Hide-Outs; City Raid Alert Termed a Success*, N.Y. TIMES, June 16, 1955, at 1. The test involved the dispersal of the "upper echelons of the Executive branch" into "about thirty hide-outs, with President Eisenhower directing national affairs from a secret headquarters." *Id.* The test marked the first time, since the War of 1812, that the Government had left the District of Columbia. *Id.* President Eisenhower addressed the nation from his bunker: "[W]e are here to determine whether or not the Government is prepared in time of emergency to continue the function of government so that there will be no interruption in the business that must be carried on." *Id.* (internal quotation marks omitted).

attack.[76] Public corporations, such as Western Union Telegraph Company, amended their corporate bylaws to prepare for possible nuclear annihilation of their boards of directors.[77] And the terms "fallout shelter" and "bunker" entered the national lexicon with stories about preparing for nuclear attack appearing in *Good Housekeeping* and *Business Week*.[78]

The federal government's preoccupation with nuclear war and continuity of government planning would later come to be directed at state and local governments. Central planning officials came to believe that the "development of the capability by State . . . governments to continue functioning in times of emergency will assure, to the greatest degree possible, that the invocation of martial law will not be necessary."[79] Thus, in 1957, the Federal Civil Defense Administration (FCDA)[80] announced a new focus concentrated on state government survival following disaster.

The agency sought to develop "a long-range plan for building civil defense operational capability into Government at *all* levels."[81] The agency pledged to "concentrate its immediate efforts" on the "[e]stablishment by state, county and city governments of emergency lines of succession for top executives, legislators, the judiciary and key personnel."[82] The "National Plan," as this focus on state continuity planning would come to be known, focused the federal government's energies on four major objectives in "order to assist State and local governments in their preparations": the primary objective being the

76. *See Washington Maps a Plan for Atomic-Bomb Defense*, N.Y. TIMES, Oct. 28, 1951, at 133.

77. "[A]t the request of the United States Government," shareholders of Western Union Telegraph Company received proxy statements to amend the corporation bylaws "to provide that in the event of an atomic attack or other calamity resulting in casualties that reduced the Board of Directors to less than quorum a majority of the remaining Board members could fill vacancies in the Board." Beebe, *supra* note 56, at 151 n.26.

78. *See* ROSE, *supra* note 23, at 1. Perhaps best illustrative of this fact, "[i]n 1961 even *Sunset* magazine ran a story on fallout shelters tucked in among such articles as 'Transforming Leftovers: The Sauce is the Secret' and 'How to Display and Store Magazines.'" *Id.*

79. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at iii. The states were also viewed as having an important role in the event of an attack. *See supra* note 45 and accompanying text.

80. The Federal Civil Defense Act of 1950 established the FDCA as an independent federal agency charged with the task of "develop[ing] protection for the civilian population." COMPTROLLER GEN., *supra* note 56, at 1. For a brief overview of the history of federal civil defense agencies through 1978, see *id.* at 1–2.

81. *See Changes Mapped in Civil Defense*, N.Y. TIMES, Nov. 10, 1957, at 70 (emphasis added). The FCDA shifted its focus from a "crash" (immediate response) focus to one of long-term government continuity. *See id.*

82. *Id.*

"[e]stablishment of emergency lines of succession for top government executives, legislators, the judiciary, and other key personnel."[83]

In California, meanwhile, legislators were already attuned to the potential succession problems that would be posed by a successful missile attack. It was believed that California's "population centers, defense manufacturing, and military bases" made the state an "important [enemy] war target."[84] The state's geography and temperate climate would provide its citizens no quarter. One commentator noted California's "fine weather would not hinder attack from the air" and "[i]ts long coast line makes it particularly vulnerable to enemy attack launched by submarine."[85] In October 1957, at the request of the California Legislature, the State Bar appointed a special committee to "investigate the necessity for amendments to the state Constitution to assure the preservation and operation of the state government after an enemy attack and to draft any required constitutional amendments."[86] The result of these efforts was "Amendment No. 5," which appeared on the November 4, 1958 ballot.[87] Amendment No. 5 proposed to add "an enabling provision" to the state constitution authorizing the California Legislature "to adopt wartime disaster laws" and laws "providing for filling offices of legislators or governor in case of death or disabling injury of one-fifth of legislators or incumbent governor."[88] Voters approved the amendment overwhelmingly.[89]

B. Federal Influence

Perhaps inspired by California's successful effort to amend its state constitution, the federal government recognized the need for states to plan legislative succession through state constitutional amendment

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83. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at ii–iii. The remaining objectives included: the "[p]reservation of essential records"; "[e]stablishment of emergency locations for government operations"; and the "[f]ull use of all personnel, facilities, and equipment of governments for emergency operations." *Id.*

84. James W. Beebe, *Law and the H-Bomb*, 33 J. ST. B. CAL. 348, 348 (1958).

85. *Id.*

86. *Id.* at 350. The official name of the committee was "The State Bar of California Committee to Assist the Assembly Subcommittee on Impact of Enemy Attack on Economy and Constitutional Government of the State of California." *Id.* at 358 n.47.

87. PROPOSED AMENDMENTS TO CONSTITUTION: PROPOSITIONS AND PROPOSED LAWS TOGETHER WITH ARGUMENTS 10–11 (Ralph N. Kleps ed., 1958), *available at* http://traynor.uchastings.edu/ballot_pdf/1958g.pdf.

88. *Id.* at 10. The measure also provided "for [the] convening of general or extraordinary legislative sessions," for elections to fill vacancies, and for the temporary location of the capital. *Id.*

89. *See* STATE OF CAL., STATEMENT OF VOTE: GENERAL ELECTION NOVEMBER 4, 1958, at 29 (Frank M. Jordan ed., 1958) (noting amendment passed by vote of 8,247,586 "Yes" to 902,328 "No").

and set out to convince states to adopt their own provisions governing succession during enemy attack.

The federal government, through its Office of Civil and Defense Mobilization, distributed a "model" continuity of government provisions to state officials and urged each state to amend their constitutions to include the model provision.[90] The Office of Civil and Defense Mobilization, believed it was necessary to amend every state constitution in order for legislatures to have the legitimate authority to adopt statutes planning for legislative continuity.[91] Thus, the agency, "with the assistance of the Columbia Legislative Drafting Research Fund of [the] Columbia University Council for Atomic Age Studies," drafted a model continuity of government provision for states to adopt into their respective state constitutions.[92] The model provision was subsequently reviewed by the Council of State Governments, which gave the model "its full endorsement."[93] A 1959 publication by the Office of Civil and Defense Mobilization forwarded the model to the states accompanied by commentary summarizing the provision and urging its adoption.[94] States were urged to add the model provision to their constitutions.[95] The text of the model, as included in the 1959 publication, read:

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90. This is not the first time in the nation's history that the federal government sought to influence the content of state constitutions. *See, e.g.*, Eric Biber, *The Price of Admission: Causes, Effects, and Patterns of Conditions Imposed on States Entering the Union*, 46 AM. J. LEGAL HIST. 119 (2004) (discussing conditions imposed by Congress on the admission of new states since the early 1800s). Nevertheless, the adoption by states of the federally drafted continuity of government provisions may represent the first time a federal agency actively (and successfully) lobbied states to amend their respective constitutions.

91. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at 1 ("All States will undoubtedly find it necessary to modify their constitutions in order to adopt all portions. This is particularly true with respect to legislative succession. However, adoption of the suggested constitutional amendment . . . would provide ample constitutional authority for enactment of all of the legislative proposals."). Existing state constitutional provisions regulating the filling of legislative vacancies were viewed as inharmonious with legislative continuity of government planning. *See id.* at 7–8.

92. *See id.* at iii. The federal government also drafted model statutes to accompany the constitutional provisions. *See id.* In his letter of introduction, Director Leo A. Hoegh of the Office of Civil and Defense Mobilization noted that the suggested legislation was prepared "in response to the recommendations of the Conference of Governors, the National Association of County Officials, the American Municipal Association and the U.S. Conference of Mayors." LEO A. HOEGH, *Foreword* to OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61.

93. *Id.* at iv. The provision was officially included as part of the Council of State Government's program of suggested state legislation for 1959. *See* COUNCIL OF STATE GOV'TS, SUGGESTED STATE LEGISLATION: PROGRAM FOR 1959, at 50–52 (1958).

94. *See generally* OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61.

95. *See, e.g.*, JOHN D. LESHY, THE ARIZONA STATE CONSTITUTION: A REFERENCE GUIDE 124 (1993) (noting that this provision "was urged upon Arizona by the federal civil defense authorities"). The FCDA also urged states to adopt model legislation on legislative succession.

> 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 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.[96]

The model intended to grant legislatures two powers.[97] The first power—"to provide for prompt 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"—was aimed at authorizing the legislature to adopt measures aimed at "keeping the governmental machinery in operation,"[98] i.e., allowing the adoption of statutes providing for the temporary succession of legislative offices. The drafters incorporated the phrase "of whatever nature" into the model provision because they thought the language was "broad enough" to allow a legislature to also adopt succession plans for itself as well as for "judicial, executive, and administrative offices."[99] Ultimately, they believed that this language would be sufficient to allow the legislature to adopt measures aimed at repopulating itself where a mass vacancy or incapacity has occurred.[100]

The second power—"to adopt such other measures as may be necessary and proper for insuring the continuity of governmental opera-

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See infra notes 176–181 and accompanying text (discussing the FCDA's advocacy of model statutes to accompany the constitutional provision).

96. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at 177.

97. The choice was made to grant these powers to legislatures, as opposed to a grant of power to the executive or judicial branches of state government, out of respect for the plenary power of the legislative branch:

> Underlying the proposal is the assumption that on the inventiveness and sense of responsibility of the legislative branch rests the best and safest hope of a general plan for maintaining governmental operations despite the disruptions which an attack may cause. The proposal is built on and to a degree exemplifies the basic idea that in a State—constituting as it does a government of inherent powers as compared to the National Government as one of delegated powers—full power to govern resides in the legislative branch.

Id. at 7.

98. *Id.* at 8.

99. *Id.*

100. *Id.* at 1; *see also infra* notes 199–251 and accompanying text.

tions"[101]—purposefully modeled after the Federal Constitution's Necessary and Proper Clause, sought to afford a legislature the flexibility to adopt additional measures, not related to succession, but rather related to the continuity of general government operations.[102] It was intended to allow "for some modification . . . in the ordinary play of the checks and balances involved in the distribution of powers among the three coordinate branches."[103] In addition, the model's necessary and proper clause was thought to allow the legislature the means and authority to skirt other constitutional requirements in times of enemy attack.[104]

The language and spirit of the model provision was meant to limit the exercise of the legislature's use of its new emergency powers, however.[105] First, the drafters purposefully phrased the model as a grant of new power and not as a removal of limits on existing powers.[106] Second, the model only permitted deviation of constitutional requirements where conforming to those requirements would be "impracticable or would admit of undue delay," although this judgment was to be left to the legislature itself without the possibility of judicial review.[107] Third, the drafters recognized that in their use of continuity of govern-

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101. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at 177.

102. *See id.* at 9.

103. *Id.* The drafters explained: "It may well be, for example, that the Legislature will want to delegate more power to the Governor than is normally permissible and thus bring about a closer and more effective cooperation of the executive and legislative branches in the common cause of coping with the emergency." *Id.*

104. The target of the clause was purposefully all-encompassing and broad:

> In many states existing Constitutions are such that statutory provisions for governmental continuity necessitate an amendment of sufficient breadth to reach such matters as quorum requirements in the Legislature, location of the seat of government, procedural requirements for convening special sessions, privileges and immunities of public officers, their compensation and the like. So, the power granted by the amendment is broad. It could not be otherwise considering the contingency to which it is addressed.

Id.

105. *See id.* ("[T]he amendment gives no blank check to the Legislature.").

106. *Id.*

107. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at 9. The drafters noted that they intended to deny judicial review of a legislative decision deviating from requirements of the state constitution. *See id.* at 9–10 ("[T]he determination of the question whether and how far to deviate is entrusted to the judgment of the Legislature without recourse to the courts (as would have been possible if the amendment spoke in terms of 'findings' by the Legislature) . . . ."). But the drafters cautioned that a denial of judicial review "should not cause any great apprehension." *Id.* at 10 ("There is nothing novel in the idea that Legislatures may make decisions, indeed final decisions, on constitutional questions. As a matter of fact, the trend in the Supreme Court of the United States is toward a larger acceptance of the legislative judgment as to the permissible range of legislative power."

ment powers, legislators would still be constrained in their lawmaking by the Federal Constitution's minimum standards.[108]

C. *Widespread Adoption of Continuity Provisions*

A total of thirty-five states ratified varying forms of the federal model between the years 1959 and 1966.[109] Sixteen states adopted provisions identical or closely analogous to the federal model: Arizona,[110] Delaware,[111] Florida,[112] Idaho,[113] Massachusetts,[114] Montana,[115] Nebraska,[116] Nevada,[117] New Jersey,[118] New York,[119] Ohio,[120]

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108. *See* OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at 10 ("[T]he Constitution and laws of the United States . . . are unaffected by changes in the Constitutions of the States. Whatever freedom of action the Legislature of a given State may have under the proposed amendment in dealing with governmental machinery and operations, the Constitution of the United States stands guard against anything it may do in abridgment of the rights of individuals."). Thus, in the "extreme example, that a piece of state legislation might undermine or deviate from the State's own Bill of Rights, it would still have to undergo the test of the due process clause of the Fourteenth Amendment . . . ." *Id.*

109. The following is a list of the thirty-five states that adopted a "continuity of government" amendment (included next to each state is the year of ratification of the amendment): Alabama (1961); Arizona (1962); California (1966); Connecticut (1965); Delaware (1961); Florida (1964); Georgia (1964); Idaho (1960); Kansas (1960); Louisiana (1962); Maine (1960); Massachusetts (1964); Michigan (1959); Minnesota (1960); Missouri (1960); Montana (1966); Nebraska (1960); Nevada (1964); New Hampshire (1960); New Jersey (1961); New Mexico (1960); New York (1963); North Dakota (1962); Ohio (1961); Oklahoma (1962); Pennsylvania (1963); Rhode Island (1962); South Carolina (1961); South Dakota (1960); Texas (1962); Utah (1964); Virginia (1962); Washington (1962); West Virginia (1960); and Wisconsin (1961).

It should be noted that Virginia's modern state constitution was adopted in 1971, but the continuity of government provision preceded the modern constitution, having been added to the Commonwealth's 1902 constitution in 1962. *See* 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 24, 508 (1974). Also of note, although California adopted a continuity measure in 1958, prior to the federal model being distributed to the states, see *supra* notes 84–89, the language was "streamlined" in 1966, JOSEPH R. GRODIN ET AL., THE CALIFORNIA STATE CONSTITUTION: A REFERENCE GUIDE 104 (1993). The streamlined language appears to have brought the measure closer in line with the federal model.

110. *See* ARIZ. CONST. art. IV, pt. 2, § 25.

111. *See* DEL. CONST. art. XVII, § 1.

112. *See* FLA. CONST. art. II, § 6.

113. *See* IDAHO CONST. art. III, § 27.

114. *See* MASS. CONST. art. LXXXIII.

115. *See* MONT. CONST. of 1889, art. V, § 46 (1966). The language was subsequently streamlined with the adoption of Montana's new state constitution in 1972. *See* MONT. CONST. art. III, § 2; *see also* LARRY M. ELISON & FRITZ SNYDER, THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE 91 (2001) (noting that the 1972 provision was "derived from and similar to" the 1966 amendment).

116. *See* NEB. CONST. art. III, § 29.

117. *See* NEV. CONST. art. 4, § 37.

118. *See* N.J. CONST. art. IV, § VI, para. 4.

119. *See* N.Y. CONST. art. III, § 25.

120. *See* OHIO CONST. art. II, § 42.

Oklahoma,[121] South Carolina,[122] South Dakota,[123] West Virginia,[124] and Wisconsin.[125]

Four states—Kansas,[126] Maine,[127] New Hampshire,[128] and Utah[129]—added additional language to their continuity of government necessary and proper clauses. That additional language permits their legislatures "to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations *including but not limited to, the financing thereof*"—presumably to allow the incurring of debt or the suspension of constitutional rules regarding the use or appropriation of public monies. The constitutions of North Dakota[130] and Rhode Island[131] include similar financing clauses.

Some states sought to limit legislatures' powers in a variety of ways. Two states—Connecticut[132] and Louisiana[133]—adopted the federal model with the power "to provide for prompt temporary succession," but did not adopt the model's necessary and proper clause. Texas adopted both the succession and necessary and proper powers, but that state's provision bars the legislature from legislating away rights and protections contained within the Texas Bill of Rights.[134] Washington's provision specifically references constitutional restrictions that the legislature may "depart from" in times of emergency; the provision is notable for the emergency powers not enumerated and there-

121. *See* OKLA. CONST. art. V, § 63.

122. *See* S.C. CONST. art. XVII, § 12.

123. *See* S.D. CONST. art. III, § 29.

124. *See* W. VA. CONST. art. VI, § 54.

125. *See* WIS. CONST. art. IV, § 34.

126. *See* KAN. CONST. art. 15, § 13.

127. *See* ME. CONST. art. IX, § 17.

128. *See* N.H. CONST. pt. 2d, art. 5-A.

129. *See* UTAH CONST. art. VI, § 30. This provision was subsequently amended in 1972 and 1990. *See* JEAN BICKMORE WHITE, THE UTAH STATE CONSTITUTION: A REFERENCE GUIDE 87 (1998).

130. *See* N.D. CONST. art. XI, § 7. The North Dakota Constitution authorizes the legislature "to adopt such other measures as may be necessary and proper for ensuring the continuity of governmental operations including, but not limited to, waiver of constitutional restrictions upon . . . expenditures, loans or donations of public moneys." *Id.*

131. *See* R.I. CONST. art. VI, § 21 ("During said period of emergency the general assembly shall have the power to incur state debts exceeding the limitation set forth in Sections 16 and 17 of this article.").

132. *See* CONN. CONST. art. 11th, § 3.

133. *See* LA. CONST. art. XII, § 11.

134. *See* TEX. CONST. art. III, § 62 ("Article I of the Constitution of Texas, known as the 'Bill of Rights' shall not be in any manner affected, amended, impaired, suspended, repealed or suspended hereby."). This special clause was added to the Texas provision in order to ensure that the protections granted in Texas' Bill of Rights remained "definite." H. Bascom Thomas, *Referendum: Continuity of Government in Disaster*, 25 TEX. B.J. 9, 9–10 (1962).

fore not granted to the legislature by reference, namely, other constitutional provisions related to gubernatorial succession.[135]

Three states require elections to be held as soon as possible or otherwise cap the amount of time legislatures are permitted to invoke continuity powers. Michigan's provision mirrors the federal model but adds an additional requirement that elections be called "as soon as possible to fill any vacancies in elective offices temporarily occupied by operation of any legislation enacted pursuant to the [continuity of government provision]."[136] Missouri's Constitution contains similar language.[137] The Rhode Island provision caps the amount of time (two years) that powers under the provision can be exercised.[138]

Six states—Alabama, Georgia, Minnesota, New Mexico, Pennsylvania, and Virginia—adopted continuity of government provisions, but those states' provisions do not resemble the federal model. Minnesota's provision is similar to the federal model in its grant of powers to the legislature, but it is worded differently and omits language authorizing deviation from other constitutional requirements.[139] Penn-

135. *See* WASH. CONST. art. II, § 42. The relevant portion of the Washington provision provides:

> Legislation enacted under the powers conferred by this amendment shall in all respects conform to the remainder of the Constitution: Provided, That if, in the judgment of the legislature at the time of disaster, conformance to the provisions of the Constitution would be impracticable or would admit of undue delay, such legislation may depart during the period of emergency caused by enemy attack only, from the following sections of the Constitution:
>
> Article 14, Sections 1 and 2, Seat of Government;
>
> Article 2, Sections 8, 15 (Amendments 13 and 32), and 22, Membership, Quorum of Legislature and Passage of Bills;
>
> Article 3, Section 10 (Amendment 6), Succession to Governorship: Provided, That the legislature shall not depart from Section 10, Article III, as amended by Amendment 6, of the state Constitution relating to the Governor's office so long as any successor therein named is available and capable of assuming the powers and duties of such office as therein prescribed;
>
> Article 3, Section 13, Vacancies in State Offices;
>
> Article 11, Section 6, Vacancies in County Offices;
>
> Article 11, Section 2, Seat of County Government;
>
> Article 3, Section 24, State Records.

Id. (emphasis omitted).

136. MICH. CONST. art. IV, § 39 (first adopted in 1959—language later streamlined).

137. *See* MO. CONST. art. III, § 46(a) ("[E]lections shall always be called as soon as possible to fill any elective vacancies in any office temporarily occupied by operation of any legislation enacted pursuant to the provisions of this section.").

138. *See* R.I. CONST. art. VI, § 21 ("The powers granted and the laws enacted under this section shall not be effective after two years following the inception of an enemy attack.").

139. *See* MINN. CONST. art. V, § 5. The Minnesota Constitution provides:

> The legislature may provide by law for the case of the removal, death, resignation, or inability both of the governor and lieutenant governor to discharge the duties of governor and may provide by law for continuity of government in periods of emergency

sylvania's[140] and Georgia's[141] provisions are also worded differently. New Mexico's provision uses the term "disaster emergency" and requires a declaration by the President of the United States of such an emergency as well as the institution of "martial law" as preconditions for invocation of the provision.[142] Alabama's provision allows only for the interim succession of legislators and sets limitations on when they may serve.[143] Finally, Virginia's Constitution does not have a

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resulting from disasters caused by enemy attack in this state, including but not limited to, succession to the powers and duties of public office and change of the seat of government.

Id.

140. *See* PA. CONST. art. III, § 25. The Pennsylvania Constitution provides:

The General Assembly may provide, by law, during any session, for the continuity of the executive, legislative, and judicial functions of the government of the Commonwealth, and its political subdivisions, and the establishment of emergency seats thereof and any such laws heretofore enacted are validated. Such legislation shall become effective in the event of an attack by an enemy of the United States.

Id.

141. *See* GA. CONST. art. III, § 6, ¶ 2(a)(4). The Georgia Constitution affords the legislature, under the branch's "specific powers," the power to provide for "[t]he continuity of state and local governments in periods of emergency resulting from disasters caused by enemy attack including but not limited to the suspension of all constitutional legislative rules during such emergency." *Id.*

142. *See* N.M. CONST. art. IV, § 2. That provision reads:

In addition to the powers herein enumerated, the legislature shall have all powers necessary to the legislature of a free state, including the power to enact reasonable and appropriate laws to guarantee the continuity and effective operation of state and local government by providing emergency procedure for use only during periods of disaster emergency. A disaster emergency is defined as a period when damage or injury to persons or property in this state, caused by enemy attack, is of such 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. Upon the declaration of a disaster emergency the chief executive of the state shall within seven days call a special session of the legislature which shall remain in continuous session during the disaster emergency, and may recess from time to time for more than three days.

Id.

143. *See* ALA. CONST. art. IV, § 46.01. That provision provides:

The legislature may provide for the continuity of the legislature of the state of Alabama and the representation therein of each of the political subdivisions of the state in the event of an attack by an enemy of the United States, by providing for the selection of emergency interim legislators who shall be designated for temporary succession to the powers and duties but not the office of a legislator in case of such emergency. Such emergency interim legislator may serve only when the legislator in whose stead he is authorized to serve has died or is unable temporarily for physical, mental or legal reasons to exercise the powers and discharge the duties of his office, and until such time as the elected legislator is able to resume the duties of his office, or in case of a vacancy in such office a successor has been elected in accordance with section 46 of this Constitution.

Id.

traditional "continuity of government" provision, but does allow for the suspension of legislative quorum requirements in the event of an enemy attack on the "soil" of that state.[144]

All thirty-five of the amendments were adopted within a period of seven years and with little recorded opposition.[145] Presumably, ratification occurred quickly in light of pressure from the federal government,[146] as well as the fact that many states expressed a belief they were vulnerable to attack.[147] The comment accompanying Texas's 1962 continuity of government amendment exemplifies the concern of state governments at the time: "The atomic age, with its constant threat of massive destruction, especially of life, poses the serious problem of how to provide for emergency continuation of state and local governments in the event of the complete annihilation of such govern-

144. *See* VA. CONST. art. IV, § 8. The Virginia Constitution provides:

> A majority of the members elected to each house shall constitute a quorum to do business, but a smaller number may adjourn from day to day and shall have power to compel the attendance of members in such manner and under such penalty as each house may prescribe. A smaller number, not less than two-fifths of the elected membership of each house, may meet and may, notwithstanding any other provision of this Constitution, enact legislation if the Governor by proclamation declares that a quorum of the General Assembly cannot be convened because of enemy attack upon the soil of Virginia.

Id. But the provision adds a caveat as to the effectiveness of legislation passed under suspended quorum: "Such legislation shall remain effective only until thirty days after a quorum of the General Assembly can be convened." *Id.*

145. As of 1962, eighteen states ratified the amendments by "overwhelming majorities" and "[i]n no case has such an amendment failed of ratification." Thomas, *supra* note 134, at 10. Idaho's continuity of government provision, for example, was adopted with 77.2% of the vote. *See* Election Div., Idaho Sec'y of State, Idaho Constitutional Amendment History, http://www.idsos.state.id.us/ELECT/inits/hst60_70.htm (last visited Apr. 28, 2009). Provisions met similar electoral success in Minnesota and Rhode Island. *See* DEBORAH K. MCKNIGHT, MINNESOTA STATE CONSTITUTIONAL AMENDMENTS: FREQUENCY, NUMBER AND RATIFICATION RATES: AN ANALYSIS 23 (2004), *available at* http://www.house.leg.state.mn.us/hrd/pubs/mnconst.pdf (noting Minnesota's continuity of government provision passed by a vote of 974,486 in favor to 305,245 against); PATRICK T. CONLEY & ROBERT G. FLANDERS, JR., THE RHODE ISLAND STATE CONSTITUTION: A REFERENCE GUIDE 203 (2007) (noting Rhode Island's continuity of government provision passed by a vote of 96,071 in favor to 60,983 against). An editorial in *The New York Times* noted that New York's continuity of government provision had "no known opposition" in the 1963 referenda election. Editorial, *Yes on Amendments 1, 2 and 3*, N.Y. TIMES, Oct. 23, 1963, at 40; *see also* Douglas Dales, *State Will Vote on 7 Amendments*, N.Y. TIMES, Nov. 1, 1963, at 20 (noting that "[l]ittle general interest has been evoked" by ballot proposals in the year that New York's continuity of government provision was approved); *cf.* Raymond J. Arata, *Government Functions: Wartime Disaster (ACA 5)*, 34 J. COMMONWEALTH CLUB CAL. 1, 41–43 (1958) (noting technical, definitional and functional problems with California's proposed constitutional amendment but recommending a "YES" vote on the question of adopting the proposed amendment).

146. *See supra* notes 90–108 and accompanying text.

147. *See, e.g.*, Charles R. Adrian, *Trends in State Constitutions*, 5 HARV. J. ON LEGIS. 311, 336 (1968) ("The possibility of nuclear attack in the event of war has been a matter of concern for a large number of states in the 1960's.").

ment personnel who have been regularly elected or appointed."[148] The provisions were also likely adopted because of the federal government's lobbying efforts and the Council of State Government's full endorsement of the measure.[149]

D. *Application of These Provisions*

Continuity of government provisions (thankfully) have never been successfully invoked and appear to not have been interpreted by the courts.[150] The official ballot questions as presented to the electorate when the provisions were voted on, ordinarily a tool of constitutional interpretation, offer little further guidance on the meaning of these provisions.[151] Nevertheless, the plain meaning of the provisions themselves provides insight on when and in what circumstances they might apply.

In eighteen states, continuity of government provisions can only be invoked "in periods of emergency resulting from disasters caused by

148. *See* TEX. CONST. art. III, § 62 cmt.

149. *See supra* notes 90–108 and accompanying text.

150. *See, e.g.*, ROBERT M. BASTRESS, THE WEST VIRGINIA STATE CONSTITUTION: A REFERENCE GUIDE 185 (1995) (noting that West Virginia's provision "has never been invoked"); MICHAEL W. BOWERS, THE NEVADA STATE CONSTITUTION: A REFERENCE GUIDE 69 (1993) (noting that Nevada's provision "has not been subject to interpretation"); CONLEY & FLANDERS, *supra* note 145, at 203 (noting that "[t]hankfully, the Rhode Island Supreme Court has not yet had any occasion to review [Rhode Island's provision]"); ELISON & SNYDER, *supra* note 115, at 91 ("There are no cases interpreting [Montana's provision]."); SUSAN P. FINO, THE MICHIGAN STATE CONSTITUTION: A REFERENCE GUIDE 94 (1996) ("There have been no interpretations of [Michigan's provision]."); LESHY, *supra* note 95, at 124 (noting that Arizona's continuity of government provisions has "happily . . . not been invoked"); ROBERT D. MIEWALD & PETER J. LONGO, THE NEBRASKA STATE CONSTITUTION: A REFERENCE GUIDE 79 (1993) (noting that Nebraska's provision has "never been tested"); JACK STARK, THE WISCONSIN STATE CONSTITUTION: A REFERENCE GUIDE 118 (1997) (noting that Wisconsin's provision "has neither been amended nor litigated"); MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE 149 (1992) (noting that "[f]ortunately, . . . the courts have not interpreted" Maine's provision); ROBERT F. WILLIAMS, THE NEW JERSEY STATE CONSTITUTION: A REFERENCE GUIDE 72 (1990) (noting that New Jersey's provision "has not been the subject of judicial interpretation").

151. A review of official ballot questions for continuity of government provisions provides no additional insight as to how these provisions should practically operate. For example, the ballot provision in Louisiana, where voters adopted a close analogue of the federal model, read as follows:

> FOR the proposed amendment to Article II, of the Louisiana Constitution to add thereto a new Section 3, authorizing the Legislature to insure continuity of state and local government in emergency periods resulting from disasters caused by enemy attack by providing prompt, temporary succession to public offices and adoption of those measures necessary for the continuity of governmental agencies.

1962 La. Acts No. 505, § 3.

enemy attack."[152] Provisions in three states—Florida, Washington, and Wisconsin—are worded differently but have similar requirements for invocation.[153] The constitutions of Alabama and Pennsylvania do not require that a "period of emergency" even exist: in those states, there need only be "an attack by an enemy of the United States."[154] Three state constitutions—Idaho,[155] Nebraska,[156] and Oklahoma[157]—allow for invocation of continuity provisions even where an enemy attack has not yet occurred, i.e., where only the "threat" of such an attack is "imminent."

Despite the use of the phrase "enemy attack" in the majority of state constitutions, no state constitutions textually define the phrase. Nine states, however, define the term "attack" within their statutory codes. Those states define the phrase as "any action or series of actions taken by an enemy of the United States resulting in substantial damage or injury to persons or property in this state whether through sabotage, bombs, missiles, shellfire or atomic, radiological, chemical, bacteriological, biological or other [means, weapons, or methods]."[158] Other states have adopted substantially similar statutory definitions

152. *See* ARIZ. CONST. art. IV, pt. 2, § 25; CONN. CONST. art. 11th, § 3 (minor word variation); DEL. CONST. art. XVII, § 1; GA. CONST. art. III, § 6, ¶ 2(a)(4); KAN. CONST. art. 15, § 13; ME. CONST. art. IX, § 17; MASS. CONST. amend. art. LXXXIII (identical in all respects except the term "disaster" is used in the singular form); MINN. CONST. art. V, § 5; NEV. CONST. art. 4, § 37; N.H. CONST. pt. 2d, art. 5-A; N.J. CONST. art. IV, § 6, ¶ 4; N.D. CONST. art. XI, § 7; OHIO CONST. art. II, § 42; R.I. CONST. art. VI, § 21; S.C. CONST. art. XVII, § 12; S.D. CONST. art. III, § 29; TEX. CONST. art. III, § 62; W. VA. CONST. art. VI, § 54.

153. *See* FLA. CONST. art. II, § 6 (authorizing invocation "[i]n periods of emergency resulting from enemy attack"); WASH. CONST. art. 2, § 42 (authorizing invocation "in periods of emergency resulting from enemy attack"); WIS. CONST. art. IV, § 34 (authorizing invocation "in periods of emergency resulting from enemy action in the form of an attack").

154. *See* ALA. CONST. art. IV, § 46.01; PA. CONST. art. III, § 25.

155. IDAHO CONST. art. III, § 27 ("in periods of emergency resulting from disasters caused by enemy attack *or in periods of emergency resulting from the imminent threat of such disasters*" (emphasis added)).

156. NEB. CONST. art. III, § 29(1) ("in periods of emergency resulting from enemy attack upon the United States, *or the imminent threat thereof*" (emphasis added)).

157. OKLA. CONST. art. V, § 63 ("resulting from disasters caused by enemy attack *or in periods of emergency resulting from the imminent threat of such disasters*" (emphasis added)).

158. The definition of "attack" is virtually identical in the statutes of all nine states. *See* ARIZ. REV. STAT. ANN. § 38-382 (2001); ARK. CODE ANN. § 10-6-103(1) (1996); DEL. CODE ANN. tit. 29, § 1703(1) (2003); IDAHO CODE ANN. § 67-415(a) (2006); KAN. STAT. ANN. §§ 48-1203(d), -1303(a) (2004); LA. REV. STAT. ANN. § 24:63(1) (2006); S.C. CODE ANN. § 2-5-20(a) (2005); TEX. GOV'T CODE ANN. § 304.002 (Vernon 2005); W. VA. CODE § 15-7-3(a) (2004).

with slight word variations.[159] Courts routinely defer to a state legislature's interpretation of its own state constitution.[160]

The invocation of continuity of government powers may not require that the enemy attack actually occur *within* the state's political boundaries.[161] One commentator has suggested that a terrorist bombing in New York, for example, may be sufficient to trigger the South Carolina General Assembly's continuity of government powers.[162] Such an interpretation of these provisions has never been tested. Nevertheless, it seems that an invocation of emergency powers within one state, on the basis of an enemy attack in (or threat of an enemy attack against)[163] another state should be limited. Most continuity of government clauses require both: (1) that the measures passed by the legislature under the power be "necessary and proper" for insuring

159. *See, e.g.*, MICH. COMP. LAWS § 31.2(c) (2004) (defining "enemy attack" as "any attack or series of attacks by a power hostile to the United States which causes or may cause death, injury or substantial damage to the people and property in the United States by sabotage, or by the use of bombs, missiles or shells, or any other weapons of conventional, atomic, radiological, chemical, bacteriological, biological or any other nature, process or means"); OHIO REV. CODE ANN. § 161.01(D) (LexisNexis 2007) (defining "attack" as "any 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 state in any manner by sabotage or by the use of bombs, missiles, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or processes").

160. 2 FRANK P. GRAD & ROBERT F. WILLIAMS, STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 100, 128 n.118 (2006) (citing Greater Loretta Improvement Ass'n v. Boone, 234 So. 2d 665, 669–70 (Fla. 1970) (deferring to non-contemporaneous, specific legislative interpretation of the state constitution contrary to prior judicial interpretations)). *But see* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 226–27 (2002) (citing Junkins v. Branstad, 421 N.W.2d 130 (Iowa 1988) (refusing to defer to a legislature's interpretation of a state constitutional term)).

161. *But see* MICH. CONST. art. IV, § 39 (authorizing invocation "in periods of emergency only, resulting from disasters occurring *in this state* caused by enemy attack on the United States" (emphasis added)); MO. CONST. art. III, § 46(a) (same); N.M. CONST. art. IV, § 2 (authorizing invocation during "a period when damage or injury to persons or property in this state, caused by enemy attack" (emphasis added)); VA. CONST. art. IV, § 8 (authorizing the suspension of legislative quorum requirements in the event of "enemy attack *upon the soil of Virginia*" (emphasis added)). New Mexico's provision—by far the most restrictive of any state—further requires that the "damage or injury" be "of such magnitude that a state of martial law is declared to exist *in the state* and [that] a disaster emergency is declared by the chief executive officer of the United States and the chief executive officer of this state." N.M. CONST. art. IV, § 2 (emphasis added).

162. *See* COLE BLEASE GRAHAM, JR., THE SOUTH CAROLINA STATE CONSTITUTION: A REFERENCE GUIDE 94 (2007) ("Article XVII, section 12 provides for actions by the General Assembly as needed in case of enemy attack. A terrorist bombing as in New York in 2001 may trigger such action by the General Assembly . . . .").

163. *See supra* notes 155–157 and accompanying text (compiling the provisions of Idaho, Nebraska, and Oklahoma, which allow invocation of continuity of government powers when the possibility of attack is "imminent").

continuity of government; and (2) that the legislature continue to conform to the state constitution unless conformance would be "impracticable" or "admit of undue delay."[164] It seems neither necessary, proper, nor practicable for the South Carolina General Assembly to suspend quorum and bill passage requirements in the event of an enemy attack in, for example, Hawaii.[165] In such a circumstance, South Carolina would be corporeally unaffected by the attack occurring more than 4500 miles away. However, this may be a closer question if the attack occurs in a state bordering South Carolina, such as North Carolina or Georgia.

The requirement that there be an "enemy attack"—a requirement which exists in virtually every state with a continuity of government provision[166]—means that these provisions (and their resulting powers) are wholly inapplicable in the event of a biological, natural, hydrometeorological, geological, or technological disaster not resulting from an offensive attack by an enemy of the United States.[167] For example, while there is scientific consensus that a tsunami will strike the northwestern United States coast,[168] states affected by a tsunami would not be able to exercise continuity powers because the tsunami was not caused by an enemy, but rather by a series of naturally occurring

164. *See, e.g.*, S.C. CONST. art. XVII, § 12 ("The General Assembly . . . shall have the power . . . (2) to adopt such other measures as may be *necessary and proper* for insuring the continuity of governmental operations. In the exercise of the powers hereby conferred, the General Assembly shall in all respects *conform to the requirements of this Constitution, except to the extent that in the judgment of the General Assembly so to do would be impracticable or would admit of undue delay*." (emphasis added)).

165. It should also be noted that the legislatures of South Carolina, and nine other states, have statutorily adopted a definition of "enemy attack" that seems to require the enemy attack, or its resulting effects, to physically impact the state. *See* S.C. CODE ANN. § 2-5-20(a) (2005) (defining an "attack" as "any action or series of actions taken by an enemy of the United States resulting in substantial damage or injury to persons or property *in this State*" (emphasis added)); *see also supra* notes 158–159 and accompanying text.

166. *See supra* notes 152–157 and accompanying text.

167. For a comprehensive database of over 12,800 mass disasters in the world occurring from 1900 to present, see Em-Dat: The International Emergency Disasters Database, http://www.em-dat.be (last visited Apr. 28, 2009). Some scientists have reported that the global number of naturally-occurring disasters has increased dramatically in recent years. *See* Ker Than, *Scientists: Natural Disasters Becoming More Common*, LIVESCIENCE, Oct. 17, 2005, *available at* http://www.livescience.com/environment/051017_natural_disasters.html (noting that "the total natural disasters reported each year has been steadily increasing in recent decades, from 78 in 1970 to 348 in 2004"). Naturally occurring disasters cannot, in any imaginable light, be considered an "enemy attack" against a state.

168. Editorial, *One Year Later, Tsunami Lesson*, BATON ROUGE ADVOC., Dec. 26, 2005, at 6B, *available at* 2005 WLNR 25552331 ("'Scientists agree that it is not a question of if [a tsunami is capable of touching the United States] will happen on the northwest coast but a question of when.'" (quoting tsunami researcher Kate Moran)). Tsunami waves originating in Cascadia would reach Alaska in four hours time. *Id.*

events. Similarly, if a disease, not the result of bioterrorism, were to result in the mass incapacitation of a state legislature, continuity of government powers could not be employed, and constitutional quorum and other requirements could not be suspended where the constitution requires an "enemy attack" to occur.[169]

A number of states have amended their existing continuity of government clauses to address this problem by adopting an "all-hazards approach," authorizing the application of continuity powers even in the absence of an enemy attack. Louisiana, for example, amended its constitution to delete references to "attack," thus broadening the provision to cover "any emergency."[170] New York's constitution allows for the application of the continuity of government provision during "periods of emergency caused by enemy attack or by disasters (natural or otherwise)."[171] Montana[172] and Utah[173] amended their provisions to follow the all-hazards approach. These forward-thinking states allow for the continuity of state government in times of emergency even if it cannot be shown that an "enemy attack" occurred.

E. States Without Constitutional Provisions

Not every state added a continuity of government provision to its constitution. The constitutions of fifteen states—Alaska, Arkansas, Colorado, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maryland, Mississippi, North Carolina, Oregon, Tennessee, Vermont, and Wyoming—do not appear to have specific provisions allowing for continuity of government. While a number of these state constitutions

169. This has not been subject to court interpretation and no current scholarship addresses this issue.

170. *Compare* LA. CONST. of 1921, art. 2, § 3 (1962) ("in periods of emergency resulting from disasters caused by enemy attack"), *with* LA. CONST. art. XII, § 11 (1974) ("in periods of emergency"); *see also* LEE HARGRAVE, THE LOUISIANA STATE CONSTITUTION: A REFERENCE GUIDE 193 (1991) ("[Section 11] continues the substance of a constitutional amendment adopted in the civil defense-conscious 1960s that mandated and authorized the legislature to provide for government during an emergency following an *enemy attack*. The current provision was expanded to cover *any* emergency." (emphasis added) (citation omitted)).

171. N.Y. CONST. art. III, § 25 (emphasis added).

172. *Compare* MONT. CONST. of 1889, art. V, § 46 (1966) ("resulting from a disaster caused by enemy attack"), *with* MONT. CONST. art. III, § 2 (1972) ("resulting from disasters *or* enemy attack" (emphasis added)).

173. *See* UTAH CONST. art. VI, § 30 (authorizing application of the provision in circumstances where "[state and local government] operations are seriously disrupted as a result of natural or man-made disaster or disaster caused by enemy attack"). This came as a result of a 1990 amendment. *See* WHITE, *supra* note 129, at 87. The previous version "made no provision for governmental disruption by natural or man-made disaster." *Id.*

provide for the relocation of the seat of government if necessary,[174] none of these fifteen constitutions appear to authorize the legislature to suspend quorum requirements and other procedural rules that may hamper the ability of the state legislatures to meet and conduct business in times of crisis. Also, these fifteen states do not provide for mechanisms of interim legislative succession in the face of mass incapacitation. Thus, in the event of mass incapacitation of the legislature, these states would need to depart from existing constitutional requirements as to the filling of vacancies and the procedural rules without a constitutional grant of authority to do so. It is not surprising then that a report commissioned for the Maryland Emergency Management Agency in 2004 recommended that Maryland adopt a continuity of government provision of its own.[175]

V. STATUTES PROVIDING FOR CONTINUITY OF LEGISLATIVE OPERATIONS

A. *State Continuity of Government Provisions Require Legislative Action*

Constitutional continuity of government provisions were not intended to self-execute. Rather, these provisions were conceived as "enabling measure[s], *empowering the legislature* to assure, as far as possible, the continuity of governmental operations throughout the State in periods of emergency resulting from enemy attack."[176] The provisions, by their text, authorize legislatures to adopt legislation related to "the immediate establishment of lines of succession to the powers and duties (though not the title) of public offices, of whatever nature."[177]

The drafters of the model constitutional provision specifically noted that the model constitutional provision, as adopted by most states, should be regarded only as

> an *enabling measure* the purpose of which is to empower the Legislatures of the several States to insure as far as possible the continuity of governmental operations throughout the State . . . .

174. *See infra* note 291 (collecting state constitutional provisions authorizing the relocation of the seat of state government); *see also infra* note 253 (collecting statutory enactments authorizing the relocation of the seat of state government).

175. *See* UNIV. OF MD. CTR. FOR HEALTH & HOMELAND SEC., CONTINUITY OF CONSTITUTIONAL GOVERNMENT FOR THE STATE OF MARYLAND 24 (2004) (recommending an amendment to the Maryland Constitution providing for temporary succession "similar to those of other states," but not recommending the inclusion of a "'necessary and proper' clause"). At the time of this writing, Maryland has not yet adopted a continuity of government provision.

176. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at 2 (emphasis added).

177. *Id.*

> [These provisions have] no self-executing provisions; [they] require[ ] legislative action. To stimulate such action, the amendment expressly adds, coupled with the power, a duty to carry the power into execution.[178]

Federal authorities and the Council of State Governments proposed model legislation to accompany the model constitutional provision they drafted. The Council of State Governments exerted pressure on state authorities to enact the suggested legislation.[179] "Diverse groups" such as "The Conference of Chief Justices, The American Bar Association, The AFL-CIO, The American Legion, The Veterans of Foreign Wars, [and] Kiwanis [Club]" also "endorsed" the measures.[180] Interestingly, federal authorities *directly lobbied* state legislatures—sending telegrams to the governors of twenty-six states, including New York and Connecticut, urging adoption of these statutes.[181] Among other legislative enactments, this pressure resulted in the adoption of both: (1) laws suspending quorum requirements in times of crisis; and (2) laws creating a system of temporary successors. I now examine both of these forms of enactments.

B. Legislative Enactments

1. Quorum Suspension

The Federal Constitution and every American state constitution requires its legislative branch have a "quorum" or "majority of members" physically present to meet and conduct business.[182] Modern

178. *Id.* at 7.

179. *See* COUNCIL OF STATE GOV'TS, INDEX TO SUGGESTED STATE LEGISLATION 1958–1965, at 10 (1970) ("States which have not adopted the legislation are urged to give favorable consideration to its enactment.").

180. Thomas, *supra* note 134, at 10. The support by these organizations for continuity was likely based on patriotism concerns. *See, e.g.*, Gaither, *supra* note 74, at 425, 427 (calling "upon the legal profession to assume the leadership in the struggle for control of the world between the free nations and international Communism" and advocating that lawyers research issues related to "[t]he functioning of government at all levels [since it] is a matter of vital concern to us as lawyers and citizens").

181. *See States Exhorted on Civil Defense*, N.Y. TIMES, Mar. 13, 1961, at 30. Governors that received telegrams, including the governors of New York and Connecticut, were from states whose legislatures were at the time considering legislative enactments related to continuity of government. *Id.*

182. *See* U.S. CONST. art. I, § 5; ALA. CONST. art. IV, § 52; ALASKA CONST. art. II, § 12; ARIZ. CONST. art. IV, pt. 2, § 9; ARK. CONST. art. 5, § 11; CAL. CONST. art. 4, § 7(a); COLO. CONST. art. V, § 11; CONN. CONST. art. 3d, § 12; DEL. CONST. art. II, § 8; FLA. CONST. art. III, § 4(a); GA. CONST. art. III, § IV, ¶ III; HAW. CONST. art. III, § 13; IDAHO CONST. art. III, § 10; ILL. CONST. art. IV, § 6(a); IND. CONST. art. 4, § 11; IOWA CONST. art. III, § 8; KAN. CONST. art. 2, § 8; KY. CONST. § 37; LA. CONST. art. III, § 10(A); ME. CONST. art. IV, pt. 3d, § 3; MD. CONST. art. III, § 20; MASS. CONST. ch. I, § II, art. IX; MICH. CONST. art. IV, § 14; MINN. CONST. art. IV, § 13; MISS. CONST. art. 4, § 54; MO. CONST. art. III, § 20; MONT. CONST. art. V, § 10(2); NEB. CONST.

quorum requirements trace their origins to England.[183] In the absence of a quorum, transaction of legislative business must be immediately suspended.[184] State courts uniformly require strict adherence to these provisions, routinely striking down legislation passed without a quorum at the time of voting.[185]

Quorum requirements serve a variety of functions. They are modern reflections of the fact that the framers of state constitutions "have been of a cautious nature somewhat distrustful of the legislature."[186] The requirements are "deemed essential to secure fairness of proceeding, and to prevent matters from being concluded in a hasty manner, or agreed to by so small a number of the members as not to command a due and proper respect."[187]

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art. III, § 10; NEV. CONST. art. 4, § 13; N.H. CONST. pt. 2d, art. 20th; N.J. CONST. art. IV, § IV, ¶ 2; N.M. CONST. art. IV, § 7; N.Y. CONST. art. III, § 9; N.C. CONST. art. II, § 11(1); N.D. CONST. art. IV, § 12; OHIO CONST. art. II, § 6; OKLA. CONST. art. V, § 30; OR. CONST. art. IV, § 12; PA. CONST. art. II, § 10; R.I. CONST. art. VI, § 6; S.C. CONST. art. III, § 11; S.D. CONST. art. III, § 9; TENN. CONST. art. II, § 11; TEX. CONST. art. III, § 10; UTAH CONST. art. VI, § 11; VT. CONST. ch. II, § 14; VA. CONST. art. IV, § 8; WASH. CONST. art. 2, § 8; W. VA. CONST. art. VI, § 24; WIS. CONST. art. IV, § 7; WYO. CONST. art. 3, § 11.

183. The term was first used in England in the documents commissioning justices of the peace:

> The part of the document wherein the word occurs reads thus: "We have assigned you, and every two or more of you, *quorum aliquem vestrum*, A, B, C, D, etc., *unum esse volumus*,—i.e., *of whom* we will that any one of you, A, B or C, etc., shall be one." This made it necessary that certain individuals, who, in the language of the commission, were said to be of the *quorum*, should be present during the transaction of business.

LUTHER S. CUSHING, MANUAL OF PARLIAMENTARY PRACTICE: RULES OF PROCEEDING AND DEBATE IN DELIBERATIVE ASSEMBLIES 21 (1914) (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES *352).

184. *See, e.g.*, *id.* at 26 ("No business can regularly be entered upon until a quorum is present; nor can any business be regularly proceeded with when it appears that the members present are reduced below that number; . . . if, at any time, in the course of the proceedings, notice is taken that a quorum is not present . . . the assembly *must* be immediately adjourned." (emphasis added)); NAT'L CONFERENCE OF STATE LEGISLATURES, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 504, para. 3 (5th ed. 2000) ("Whenever it is observed that a quorum is not present, any member may call for the house to be counted and, if found deficient, business will be suspended."); HENRY M. ROBERT III ET AL., ROBERT'S RULES OF ORDER NEWLY REVISED § 40, at 336 (10th ed. 2000) ("In the absence of a quorum, any business transacted . . . is null and void.").

185. *See, e.g.*, Bezio v. Neville, 305 A.2d 665, 667–68 (N.H. 1973) (noting that the constitutional provision for a fixed stated quorum of thirteen members of the New Hampshire Senate is "mandatory" and "the particular actions voted upon [without adherence to the quorum requirement] were a nullity" (citing Opinion of the Justices, 153 A.2d 409 (N.H. 1959))). For similar holdings by state supreme courts, see generally *In re Opinion of the Justices*, 276 A.2d 736 (Del. 1971); *Doyle v. Hofstader*, 177 N.E. 489 (N.Y. 1931); and *Waldauer v. Britton*, 113 S.W.2d 1178 (Tenn. 1938). This requirement is true in the context of municipal governing bodies as well. *See generally Quorum and Number of Votes Required to Act*, 4 MCQUILLIN MUN. CORP. § 13.27.15 (3d ed. 2007) (collecting cases regarding municipal bodies).

186. *See* TEX. CONST. art. III, § 10 (Vernon 2007) (Interpretive Commentary) (discussing concerns particular to the Texas Constitution).

187. CUSHING, *supra* note 183, at 22; *see also* TEX. CONST. art. III, § 10 (Vernon 2007) (Interpretive Commentary) ("It has been the belief that it is necessary to make the quorum large in

Quorum requirements can inhibit virtually all legislative business from occurring where a disaster or attack has rendered a majority of legislators unable to serve. Some state constitutions provide that a quorum "is always based on the number of seats in the legislature."[188] In New Jersey, for example, the number of votes necessary to take legislative action is not impacted by vacancies or absences. The New Jersey Constitution requires "a majority of all [the legislature's] members" to be present in order to conduct business.[189] This has been construed by the New Jersey Attorney General to mean "the full membership *even if seats are vacant.*"[190] The New Jersey Constitution further requires that to pass a bill, "there shall be a majority of all the members of each body personally present and agreeing thereto."[191] Thus, twenty-one votes in the Senate and forty-one votes in the Assembly are required to pass a bill—whether or not sixty-two members of the state legislature are still living and otherwise able to attend a voting session.[192] Absent a continuity of government provision, if there are not sixty-two surviving legislators, the State of New Jersey would be unable to revise a statute or make an appropriation—its legislature unable to take action as a body.

This is true in other states as well. The Florida Constitution's provision that "a majority of each House shall constitute a quorum" has been interpreted to mean "the entire number" of which the house may be composed without deducting vacancies "from death, resignation, or failure to elect."[193] Delaware's constitution has been interpreted in a similar way.[194] The Indiana Constitution prohibits the legislature from meeting to fill a vacancy in the Office of Governor or

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order to prevent legislation from being carried through suddenly by minorities with little or no deliberation."); ROBERT ET AL., *supra* note 184, § 3, at 20 ("The requirement of a quorum is a protection against totally unrepresentative action in the name of the body by an unduly small number of persons.").

188. 2 GRAD & WILLIAMS, *supra* note 160, at 56.

189. N.J. CONST. art. IV, § IV, ¶ 2.

190. WILLIAMS, *supra* note 150, at 64 (emphasis added) (citing Formal Opinion of N.J. Attorney General, No. 3, Feb. 6, 1961).

191. N.J. CONST. art. IV, § IV, ¶ 6.

192. *See* OFFICE OF LEGISLATIVE SERVS., NEW JERSEY LEGISLATURE LEGISLATOR'S HANDBOOK 36 (2006–2007 ed.) (summarizing the votes required for various types of actions and noting that "[t]he number of votes necessary to take these actions is not affected by vacancies or absences").

193. *In re* Executive Communication of the 9th of November, A.D. 1868, 12 Fla. 653, 653 (Fla. 1868) (emphasis omitted).

194. *See* Opinion of the Justices, 251 A.2d 827, 827 (Del. 1969) (holding that a quorum refers to the number of members prescribed by law regardless of whether "one or more vacancies have occurred by reason of death, resignation, or otherwise").

Lieutenant Governor unless and until "a sufficient number of the vacancies are filled to provide a quorum of members for that house."[195]

State continuity of government provisions authorize state legislatures to adopt laws suspending quorum requirements in the event of an enemy attack.[196] Only eleven states, however, have relied on continuity of government provisions to adopt legislation suspending quorum requirements in the event of attack.[197] Legislation which suspends quorum requirements allows for the living and present legislators to transact business and approve legislation—even where the usual constitutional quorum requirements would otherwise not be satisfied. Thus, for example, if Alabama's continuity of government pro-

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195. *See* IND. CONST. art. 5, § 10(e). The full provision provides:

> Whenever there is a vacancy in both the office of Governor and Lieutenant Governor, the General Assembly shall convene in joint session forty-eight hours after such occurrence and elect a Governor from and of the same political party as the immediately past Governor by a majority vote of each house. If either house of the General Assembly is unable to assemble a quorum of its members because of vacancies in the membership of that house, the General Assembly shall convene not later than forty-eight hours after a sufficient number of the vacancies are filled to provide a quorum of members for that house.

Id.

196. *See, e.g.*, GA. CONST. art. III, § 6, ¶ 2(4) (authorizing the legislature to suspend "all constitutional legislative rules during such emergency"); NEB. CONST. art. III, § 29 (authorizing the "suspension or temporary change of the provisions of this Constitution or of general law relating to the length and purposes of any legislative session or prescribing the specific proportion or number of legislators whose presence or vote is necessary to constitute a quorum or to accomplish any legislative act or function"); NEV. CONST. art. 4, § 37 (authorizing "changes in quorum requirements in the legislature"); TEX. CONST. art. III, § 62 (authorizing the Legislature to "suspend procedural rules" that "relate to . . . the percentage of each house of the Legislature necessary to constitute a quorum"); WASH. CONST. art. 2, § 42 (authorizing the Legislature to "depart" from constitutional provisions regarding "Membership, Quorum of Legislature and Passage of Bills").

197. ALA. CODE § 29-3-13 (2008) ("In the event of an attack: (1) Quorum requirements for the Legislature shall be suspended . . . ."); ARIZ REV. STAT. ANN. § 38-386(A) (2008) ("In the event of an attack, the quorum requirement for the legislating body of the state . . . shall be a majority of the members of each body who convene for the session."); ARK. CODE ANN. § 10-6-113 (2008) ("In the event of an attack: (1) Quorum requirements for the General Assembly shall be suspended . . . ."); GA. CODE ANN. § 38-3-53 (2007) ("[T]he General Assembly . . . may suspend the operation of any and all constitutional rules governing the procedure of both the House of Representatives and the Senate as it deems necessary during the period of emergency or disaster."); IDAHO CODE ANN. § 67-425 (2007) ("In the event of an attack, (1) quorum requirements for the legislature shall be suspended . . . ."); KAN. STAT. ANN. § 48-1312 (2006) (same); LA. REV. STAT. ANN. § 24:74 (2007) (same); MONT. CODE ANN. § 10-3-606 (2007) ("If, following an enemy attack, the legislature . . . is unable to assemble a quorum . . . then those legislators . . . available for duty shall constitute the legislature . . . and quorum requirements shall be suspended."); S.C. CODE ANN. § 2-5-130 (2006) ("In the event of an attack, (1) quorum requirements for the General Assembly shall be suspended . . . ."); TEX. GOV'T CODE ANN. § 304.011 (Vernon 2005) ("In the event of an attack, the quorum requirements imposed on the legislature are suspended."); WASH. REV. CODE § 42.14.030 (2007) ("In the event of an attack, (1) quorum requirements for the legislature shall be suspended . . . .").

vision were invoked and only three members of the State House of Representatives attended a voting session—by the terms of Alabama's statutory enactment, two members of the ordinarily 105-member House could legally meet and vote to pass legislation.

It should be noted that quorum-suspending legislation would be superfluous in a number of states where the constitutional quorum requirement has been interpreted in a way to exclude vacant seats from the quorum calculation. This is also true of other states, where the express terms of the state constitutions suspend normal quorum requirements if certain pre-conditions are met.[198]

2. *Interim Legislative Succession*

Succession refers to "[t]he process established to list the order or line of those entitled to succeed one another under emergency conditions."[199] The National Governors Association's Center for Best Practices has noted that an effective continuity of government plan "establishes lines of succession of sufficient depth to ensure that officials can continue essential government functions."[200] Continuity of government provisions in state constitutions allow state legislatures to adopt provisions related to the succession of individual legislative offices in the event of mass incapacitation.

Eleven states have used continuity of government provisions to enact legislation providing for the naming of unelected "standby legislators"—who are authorized to step into the shoes of individual, duly elected legislators in the event of an attack.[201] Adopted as part of a model law proposed by federal authorities and the Council of State

198. *See, e.g.*, N.H. CONST. pt. 2d, art. 20th ("A majority of the members of the house of representatives shall be a quorum . . . . But when less than two-thirds of the representatives elected shall be present, the assent of two-thirds of those members shall be necessary to render their acts and proceedings valid."); VA. CONST. art. IV, § 8 ("A smaller number, not less than two-fifths of the elected membership of each house, may meet and may, notwithstanding any other provision of this Constitution, enact legislation if the Governor by proclamation declares that a quorum of the General Assembly cannot be convened because of enemy attack upon the soil of Virginia."). By contrast to the model continuity of government provision which was adopted in a majority of states and was intended to enable legislatures to adopt legislation providing for continuity, see *supra* notes 176–177 and accompanying text, the New Hampshire and Virginia constitutional provisions appear to be self-executing in nature.

199. FED. EMERGENCY MGMT. AGENCY, *supra* note 45, at 2-4.

200. NAT'L GOVERNORS ASS'N CTR. FOR BEST PRACTICES, *supra* note 30, at 5.

201. *See* ALA. CODE § 29-3-1 (2008); ARK. CODE ANN. § 10-6-101 (2008); DEL. CODE ANN. tit. 29, § 1701 (2007); GA. CODE ANN. § 38-3-50 (2008) (providing also for interim succession in the executive branch and in all judgeships); IDAHO CODE ANN. § 67-423 (2008); KAN. STAT. ANN. § 48-1301 (2007); LA. REV. STAT. ANN. § 24:61 (2007); OKLA. STAT. tit. 63, § 686.1 (2004); S.C. CODE ANN. § 2-5-30 (2007); TEX. GOV'T CODE ANN. § 304.001 (Vernon 2008); W. VA. CODE § 15-7-1 (2008).

Governments, these states statutorily provide for a cadre of standby legislators, formally known as "emergency interim successors," to "temporarily exercise the legislator's powers and duties if the [incumbent] legislator [is] unavailable following an [enemy] attack."[202] Notably, those designated as standby legislators are not subject to election or confirmation even though they possess the power to vote on state legislation.

The model law, triggered only "in an emergency period following an attack,"[203] provides for "'automatic' continuity of the legislative branch of a state."[204] Standby legislators provide a group of informed persons charged with the duty of repopulating the legislature in times of crisis. Assuming the incumbent and at least one of the designates survives an attack, the law ensures that: (1) that there is no need to summon volunteers during an emergency; and (2) those who are in a position to act appear to act legitimately.

a. Designation

The model law provides for emergency interim succession to the legislature and requires legislators—prior to an attack—to designate at least three emergency interim successors and specify their order of succession.[205] Although the legislator can revise her list at any time, there must always be at least three successors designated at any moment.[206] If a legislator fails to designate at least three successors, then a party leader of the same house is required to make additional designations "to achieve such minimum number."[207]

The designation becomes "effective when the legislator . . . files with the secretary of state the successor's name, address and rank in order of succession," which is then made open to the public.[208] Any changes in the order of succession will result in the secretary of state notifying the governor, the state's emergency management agency, the officials in charge of keeping the journals of the legislative bodies, "and all emergency interim successors" of such changes.[209] The offi-

202. COUNCIL OF STATE GOV'TS, *supra* note 93, at 36.

203. *Cf. id.* at 31 (stating point at which emergency interim succession applies to executive and judicial branches).

204. *Id.* at 36.

205. *Id.* at 38 ("Each legislator shall designate not fewer than three nor more than seven emergency interim successors to his powers and duties and specify their order of succession.").

206. *Id.* at 38–39 ("Each legislator shall review and, as necessary, promptly revise the designations of emergency interim successors to his powers and duties to insure that at all times there are at least three such qualified emergency interim successors.").

207. *Id.* at 39.

208. COUNCIL OF STATE GOV'TS, *supra* note 93, at 39–40.

209. *Id.* at 40.

cials in charge of the legislative branches are required to enter any information received regarding emergency interim successors into the "public journal at the beginning of each legislative session" and whenever changes or modifications are made to the succession order.[210] "Promptly" after designation, emergency interim legislative successors are required to take the same oath of office that duly elected legislators are required to take, administered by an "appropriate person."[211]

b. Eligibility, Restrictions on Service, Responsibilities

Emergency interim successors must meet the same constitutional and statutory qualifications as the incumbent legislator to be designated as an interim successor—e.g., residency, age, etc.—but designates need not meet any constitutional restrictions on dual-office holding.[212] Successors serve at the pleasure of the legislator designating them.[213] The legislature itself determines, "in accordance with its own rules," who is entitled to exercise the powers and assume the duties of successors.[214] Emergency interim successors are subject to impeachment, censure, and removal.[215] If the emergency interim successor must serve because of an attack, her service is continuous "until the incumbent legislator, an emergency interim successor higher in order of succession, or a legislator appointed or elected and legally qualified can act" and becomes available to act.[216]

Emergency interim successors have a continuing "duty"—even in times of peace—to "keep . . . generally informed as to the duties, procedures, practices and current business of the legislature."[217] Cur-

210. *Id.*

211. *Id.* ("Promptly after designation each emergency interim successor shall take the oath[s] required for the legislator to whose powers and duties he is designated to succeed. No other oath shall be required. The oath shall be administered [by any person authorized by law to administer the oath to duly elected legislators].").

212. *Id.* at 39 ("No person shall be designated or serve as an emergency interim successor unless he may under the constitution and statutes hold the office of the legislator to whose powers and duties he is designated to succeed, but no constitutional or statutory provision prohibiting a legislator from holding another office or prohibiting the holder of another office from being a legislator shall be applicable to an emergency interim successor.").

213. *Id.* ("An emergency interim successor shall serve at the pleasure of the legislator designating him or of any subsequent incumbent of the legislative office.").

214. COUNCIL OF STATE GOV'TS, *supra* note 93, at 40.

215. *See id.* at 40–41 ("All constitutional and statutory provisions pertaining to ouster of a legislator shall be applicable to an emergency interim successor who is exercising the powers and assuming the duties of a legislator.").

216. *Id.* at 40.

217. *See id.*

rently, duly elected legislators are required to "assist [the] emergency interim successors to keep themselves so informed."[218]

c. Elevation

In the event the law is invoked, emergency interim successors assume "the powers and duties, but not the office, of a legislator."[219] The successor also receives the "privileges and immunities of a legislator," presumably these "privileges and immunities" would include protection from arrest while traveling to and from a place of session and compensation for travel.[220] The maximum time the law can be invoked, and emergency interim successors can serve, is two years.[221]

A "designate" is elevated to "successor-status" where there is an "enemy attack" and that attack renders the incumbent legislator "unavailable." The use of the phrase "enemy attack" is consistent with the language of continuity of government provisions in most states.[222] "Attack" is defined in the model legislation to mean:

> [A]ny action or series of actions taken by an enemy of the United States resulting in substantial damage or injury to persons or property *in this state* whether through sabotage, bombs, missiles, shellfire, or atomic, radiological, chemical, bacteriological, or biological means or other weapons or methods.[223]

The governor of a state is authorized to convene the legislature where there is an attack, or if the governor fails to call for the legislature, the legislature automatically convenes ninety days following the attack.[224] Each emergency interim successor, "unless he is certain that the legislator to whose powers and duties he is designated to succeed or any emergency interim successor higher in order of succession will not be *unavailable*," is required to "proceed to the place of session as expeditiously as practicable."[225] An incumbent legislator is "unavaila-

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218. *Id.*

219. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at 21.

220. COUNCIL OF STATE GOV'TS, *supra* note 93, at 41. It is unclear from the model statute's text the scope of this immunity and whether the interim legislative successor would enjoy other legislative immunities such as speech and debate immunity.

221. *Id.* Some states have statutorily varied the maximum time of service. *See, e.g.*, ALA. CODE § 29-3-14 (2008) (capping service of successors to two years, that can be extended by action of Governor for additional year).

222. *See supra* notes 152–159 and accompanying text.

223. COUNCIL OF STATE GOV'TS, *supra* note 93, at 38 (emphasis added). Because of the use of the phrase "in this state," states that follow the model definition would not be able to trigger interim legislative succession statutes when a neighboring state is the subject of enemy attack—the attack must be on the state's own soil. *See supra* notes 161–165 and accompanying text.

224. COUNCIL OF STATE GOV'TS, *supra* note 93, at 40.

225. *Id.* (emphasis added).

ble" when she is absent from the emergency legislative session or "unable, for physical, mental or legal reasons to exercise her powers."[226]

d. Constitutionality

Some have expressed the view that interim legislative succession statutes could not survive scrutiny by courts. The argument against the constitutionality of these provisions is that the state constitution bestows the powers of an office only to the person elected, and thus, extending legislative powers to someone unelected likely violates existing state constitution provisions.[227] In addition, all state constitutions already provide for the filling of ordinary legislative vacancies through writs of election or other means, and the designation of emergency interim legislative successors appears contrary to these provisions.[228] Even the commentary to the model legislation admits that the premise behind interim successors "differs from usual provisions relating to the filling of legislative vacancies."[229]

There are two arguments, however, which support the constitutionality of interim successors in states where a continuity of government provision exists in the state constitution. First, interim legislative succession statutes are not laws with respect to the filling of vacancies—the successor "does not hold title to the office," but merely exercises the power and duties of the office.[230] In this way, they are not contrary to other constitutional provisions regarding the filling of legislative vacancies, which provide for the filling of *offices* and not just the granting of *powers and duties*. Second, and perhaps more convincing, these statutes are adopted under the legislature's continuity of government powers as provided in the *state constitution*, which textually enable state legislatures to adopt laws providing for legislative succession. In at least one state, Alabama, the state constitution itself textually provides for the designation of interim legislative successors.[231] As noted by the Council of State Governments, "The [state

226. *Id.* at 38.

227. Aaron Gould Sheinin, *Successor Law Catches Lawmakers Off Guard*, COLUMBIA STATE (S.C.), Jan. 23, 2005, at B1, *available at* 2005 WLNR 22946208 (summarizing the views of University of South Carolina School of Law Professor Eldon Wedlock and South Carolina State Senate President Pro Tempore Glenn McConnell).

228. *See, e.g.*, DEL. CONST. art. II, § 6 ("Whenever there shall be a vacancy in either [legislative house], by reason of failure to elect, ineligibility, death, resignation or otherwise, a writ of election shall be issued . . . and the person thereupon chosen to fill such vacancy shall hold office for the residue of the term.").

229. COUNCIL OF STATE GOV'TS, *supra* note 93, at 36.

230. *Id.* at 36–37.

231. *See supra* note 143 and accompanying text.

constitution continuity of government provision] insure[s] the validity of such legislation."[232]

In what seems to be the only judicial comment examining the constitutionality of an interim legislative succession statute, the Delaware Supreme Court advised the legislature that interim succession is a constitutional exercise of the Delaware General Assembly's powers granted under the state constitution's continuity of government provision.[233] The court reasoned that the constitution's call for writ of elections to fill vacancies "does not provide for the immediate filling of such a vacancy by operation of law," and that it does not therefore conflict with other constitutional provisions which require official action in order for succession to take place.[234]

e. Modern Use and Disuse

Despite eleven states providing for interim legislative succession by statute,[235] these unique provisions do not appear to be the subject of academic scholarship or—for that matter—a subject of discussion even among legislators in states where these provisions still carry the force of law. The problem with interim legislative succession provisions is that current legislators are either: (1) unaware of the provisions; or (2) aware of provisions providing for interim legislative successors, but fail to name legislative successors.

For example, one South Carolina newspaper reported in 2005 that—despite the South Carolina Emergency Interim Legislative Succession Act being law since 1962 and requiring legislators to generate lists of interim successors—"[n]ot a single lawmaker could be found who has actually created such a list."[236] Then-Speaker of the South Carolina House of Representatives David Wilkins believed the law to have been repealed (it was not).[237] Other legislators, including the South Carolina Senate President Pro Tempore and Senate Minority

232. COUNCIL OF STATE GOV'TS, *supra* note 93, at 37.

233. *See* Opinion of the Justices, 190 A.2d 521, 522 (Del. 1963).

234. *Id.* at 523.

235. *See supra* note 201 (collecting statutory citations of interim legislative succession acts closely following the model provision).

236. *See* Sheinin, *supra* note 227.

237. *Id.* ("'It's still on the books? How do you know if it's on the books? It might have been repealed?'" (quoting then-House Speaker David Wilkins)). When asked if he had submitted his list of interim successors, Wilkins joked, "Yeah, I've done that .... I've got it in my safe deposit box. I've got seven names because I think it will take at least that many people to do what I do." *Id.*

Leader, had never heard of the provision.[238] The effectiveness of interim legislative succession laws rely on incumbent legislators to designate successors. To the extent that legislators, like those in South Carolina, are unaware of these laws or unwilling to name designates in conformance with the law, temporary succession laws are ineffective.

In at least one state, however, legislators appear to be aware of the interim succession law and regularly name and update lists of successors. As of May 2008, approximately eighty percent of the members of Delaware's 144th House of Representatives had named the statutory minimum of three successors and "many" members opted to name the maximum seven successors.[239] Even today, members are made aware of the law by a written request from the Delaware Chief Clerk of the House at the beginning of each General Assembly asking each to designate successors.[240] Members, in practice, typically update designations when a designee has died or moved from the representative district.[241]

The Delaware House of Representatives' application and use of that state's 1961 interim succession law shows that the twenty-first-century American legislature is capable of implementing an interim succession law. Under Delaware's Emergency Interim Legislative Succession Act, a Delaware resident is eligible to be named as an interim successor if she meets the legal requirements for membership in the state legislature.[242] In practice, approximately half of the members of the 144th House of Representatives designated a spouse or a son or daughter to be a successor.[243] Others chose to designate "civic association president[s] or other leader[s] in their district."[244] And, interestingly, one member even designated the person who ran against him in the previous election.[245]

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238. *Id.* ("'You showed me something I'd never seen and never knew about.'" (quoting Senate President Pro Tempore Glenn McConnell)); *id.* ("'I thought I knew everything in [the statute book] . . . . But I guess I don't.'" (quoting Senate Minority Leader John Land)).

239. Email from JoAnn M. Hedrick, Chief Clerk of the Del. House of Representatives, to author (May 9, 2008, 09:44:39 EST) (on file with author); *see also* DEL. CODE ANN. tit. 29, § 1704 (2008) ("Each member shall designate not fewer than 3 nor more than 7 emergency interim successors to the member's powers and duties and specify their order of succession.").

240. *See* Email from JoAnn M. Hedrick, *supra* note 239.

241. *See id.*

242. *See* DEL. CODE ANN. tit. 29, § 1705 (2008) ("No person shall be designated or serve as an emergency interim successor unless the person may under the Constitution and statutes hold the office of the member to whose powers and duties the person is designated to succeed."). There is no stated requirement that the designee be of the same political party.

243. *See* Email from JoAnn M. Hedrick, *supra* note 239.

244. *Id.*

245. *Id.*

Interim legislative successors do not receive credentials, but they do receive a letter from the House member who designated them.[246] Although individual members may vary the language, the model form letter notifies the designee that she was selected as a designate "[b]ased on my great respect and confidence in your ability to serve the State of Delaware as an Emergency Interim Successor" and thanks the designee for "your acceptance of this commission."[247] The letter is presented with a copy of Delaware's Emergency Interim Legislative Succession Act along with a certificate bearing the designee's name and designating member's signature,[248] complete with "gold notary seal" and "blue and gold ribbon."[249] Designees do not take an oath of office,[250] despite a statutory requirement that they be sworn in at the time of their designation.[251]

C. *No Statutory Scheme*

Twenty-nine states appear not to have enacted suspension of quorum statutes or emergency legislative succession laws.[252] While it appears that most of these states have adopted legislation allowing the governor to declare a temporary location for the seat of government,[253] providing for a clear line of succession to the offices of gover-

246. *Id.*

247. *See, e.g.*, Letter from Gregory A. Hastings, Del. State Representative, to Mrs. Charlotte Hastings (June 26, 2007) (on file with author). The letter notes: "Remote as the necessity of calling you to action may seem, preparedness to continue our sacred democratic institutions of government . . . under any circumstances conceivable is a moral as well as legal imperative." *Id.*

248. *See, e.g.*, Certificate Designating Charlotte Hastings as Emergency Interim Successor for Rep. Gregory A. Hastings (June 26, 2007) (on file with author) [hereinafter Certificate Designating Charlotte Hastings]; Letter from Gregory A. Hastings, *supra* note 247.

249. Email from JoAnn M. Hedrick, Chief Clerk of the Del. House of Representatives, to author (May 9, 2008, 09:51:37 EST) (on file with author). The certificate is presented "[i]n appreciation of [the designee's] assumption of the responsibilities of serving as an Emergency Interim Successor." *See, e.g.*, Certificate Designating Charlotte Hastings, *supra* note 248.

250. Email from JoAnn M. Hedrick, *supra* note 239 (noting that interim successors do not take an oath and would only take an oath "upon being pressed into service as a successor").

251. *See* DEL. CODE ANN. tit. 29, § 1708 (2003) ("*Promptly after designation* each emergency interim successor shall take the oath required for the member to whose powers and duties the successor is designated to succeed." (emphasis added)).

252. Those states include: Alaska, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Utah, Wisconsin, and Wyoming. For example, the State of Oregon has "[n]o specific [continuity of government] provisions other than those concerning succession to vacant offices." KEITH BEA ET AL., CONG. RESEARCH SERV., CRS REPORT FOR CONGRESS: OREGON EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED 5 (2004).

253. *See, e.g.*, ALASKA STAT. § 44.99.007 (2008); FLA. STAT. § 22.15 (2003); 5 ILL. COMP. STAT. 195/1 (2006). In the case of Hawaii and Maine, any two members of the legislature can convene

nor and lieutenant government,[254] providing for interim succession of the executive and judicial branches,[255] and permitting the governor to acquire materials, facilities, and property for civil defense,[256] these twenty-nine states have not adopted *any* provisions to prepare for *legislative* continuity. Despite the fact that the state constitutional continuity of government provisions were intended by their drafters as "enabling measure[s]" and were not designed to be self-executing, these state legislators have taken no action.[257]

This failure to act could be crippling: The political apparatus of these states could be paralyzed in the event of a mass incapacitation or an event or disaster which prevents the state legislature from physically meeting. In Maryland, for example, if the governor and lieutenant governor are incapacitated at the same time, and the legislature is unable to meet its constitutional quorum requirements—a majority of all members in joint session—the legislature will not be able to meet and will not be able to select a new governor to lead the state during the time of crisis.[258]

This is troubling, particularly because legislators in states with constitutional continuity of government provisions have an *affirmative duty* to adopt enabling legislation. The text of most continuity of government provisions (i.e., those that follow the federal model) place an affirmative duty on state legislatures to prepare for the succession of constitutional offices, including the legislative branch, and to provide for temporary succession: Legislatures have "*the power and the immediate duty* (1) to provide for prompt temporary succession . . . and (2) to adopt such other measures as may be necessary and proper . . . ."[259]

State constitutions do not impose many duties, and the imposition of a duty in these provisions can be regarded as significant. New

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a meeting, and that meeting can occur outside the territorial borders of the state. *See* HAW. REV. STAT. § 130-3 (2006); ME. REV. STAT. ANN. tit. 1, § 761 (1989).

254. *See, e.g.*, ALASKA STAT. § 44.19.040 (2008); 15 ILL. COMP. STAT. 5/1 (2006).

255. *See, e.g.*, FLA. STAT. § 22.05 (2003); 5 ILL. COMP. STAT. 275/1-11 (2006); KY. REV. STAT. ANN. § 39D.040 (West 1998) (providing for succession in the executive branch only); MICH. COMP. LAWS § 31.10 (2004) (same); NEB. REV. STAT. § 84-1101 to -1116 (2007); 71 PA. CONS. STAT. § 779.1–.12 (1990); VT. STAT. ANN. tit. 20, § 181–192 (2001).

256. *See, e.g.*, HAW. REV. STAT. § 128-22 (2006).

257. OFFICE OF CIVIL & DEF. MOBILIZATION, *supra* note 61, at 7; *see also supra* text accompanying note 178.

258. *See* MD. CONST. art. II, § 6 ("If vacancies in the offices of Governor and Lieutenant Governor exist at the same time, the General Assembly shall convene forthwith, and the office of Governor shall be filled for the remainder of the term by the affirmative vote of a majority of all members of the General Assembly in joint session."). A recent report commissioned by a state agency noted this problem and suggested a possible amendment to the Maryland State Constitution. *See supra* note 175 and accompanying text.

259. *See supra* text accompanying note 96 (quoting the model provision).

Hampshire's constitution includes language imposing an "immediate duty" on legislators to enact continuity of government legislation.[260] The New Hampshire Supreme Court has recognized, in another context, that the continuity of government provision's affirmative duty represents one of only two duties imposed on the legislature in the state constitution—the other being the duty on the legislature to provide a public education.[261] Though not judicially enforceable, as the Supreme Judicial Court of Massachusetts has noted, the "aspirational language [of state constitutions] relies on the presumptive good faith of elected representatives" and imposes on individual legislators a "lawful obligation[ ]" to satisfy the aspirational requirement.[262] State legislators should consider continuity of government mandates in their state constitutions, which they have sworn to uphold in their oaths of office, in this light.

VI. RECOMMENDATIONS

A. Every State Should Adopt a State Constitutional Continuity of Government Provision Reflecting Modern Threats

1. States with Existing State Constitutional Provisions

The phrase "enemy attack," as it is used in the continuity of government provisions in eighteen state constitutions,[263] is outmoded and should be replaced with more universal language addressed to modern threats. Whether an "enemy" has "attacked" United States soil is no longer as clear as it may have been in the 1950s and 1960s "bunker" period, when continuity provisions were first drafted and widely adopted. In addition, meteorological, geological, and technological disasters, which may cripple a legislature's ability to meet and justify the invocation of emergency powers, may not be readily traceable back to an "enemy" source.[264]

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260. *See* N.H. CONST. pt. 2d, art. 5-A.

261. *See* Claremont Sch. Dist. v. Governor, 703 A.2d 1353, 1358 (N.H. 1997) (citing N.H. CONST. pt. II, art. 83 ("[I]t shall be the duty of the legislators . . . to cherish . . . public schools . . . .")).

262. Doyle v. Sec'y of the Commonwealth, 858 N.E.2d 1090, 1094, 1096 (Mass. 2006). An aspirational statement, such as in the case of the continuity of government provisions, is "addressed to the legislature rather than to the courts or to the general population." *See* Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974; How Did They Fare?*, 58 LA. L. REV. 389, 392 (1998). But while such a provision provides "no sanction in case of the legislature's failure to act," *id.*, it does impose a "lawful obligation[ ]" on legislators. *Doyle*, 858 N.E.2d at 1096.

263. *See supra* note 152 (collecting state constitutional provisions using the phrase "enemy attack").

264. *See supra* note 167 and accompanying text.

In today's world, as Professor Philip Bobbitt has ominously warned, attacks against nations can be "effectively disguised" given the "very small numbers of persons, operating with the enormous power of modern computers, biogenetics, air transport, and even small nuclear weapons."[265] Absent a claim of responsibility by an "enemy" of the United States, how can a state government determine that it is appropriate to invoke continuity of government powers? How are we to know with certainty that a pandemic flu or disease was the work of national enemies and not the product of God or natural biological evolution? Requiring that there be an "enemy attack" to invoke continuity powers may lead state governments down an unsatisfying or impossible path—attempting to trace disasters and disease to potentially unidentifiable sources.

A better approach is to amend existing constitutional provisions to follow the so-called "all-hazards approach" embraced by Louisiana, Montana, New York, and Utah.[266] Under this approach, continuity of government powers could be invoked because of any emergency—natural or otherwise. Enabling statutes can define "emergency" in a limited way, to ensure that these powers are not abused. At least one state—South Dakota—has worked to amend its continuity of government provision (albeit unsuccessfully) in recent years to follow this approach.[267] Other states should follow South Dakota's lead.

2. *States Without Existing Provisions*

The fifteen states that do not a have constitutional continuity of government provision must consider amending their state constitutions to add such a provision. Legislatures are needed in times of emergency to maintain the fundamental systems of checks and bal-

265. PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 811 (2002).

266. *See supra* notes 170–173 and accompanying text.

267. The South Dakota Constitutional Revision Commission considered recommending a series of changes to "eliminate archaic and confusing constitutional language dealing with the Legislature" in 2005. Joe Kafka, *Group Resumes Review of State Constitution: Findings to Be Reported to 2006, 2007 Legislatures*, ABERDEEN AM. NEWS (S.D.), Sept. 12, 2005, at A7, *available at* 2005 WLNR 14324933. Among the changes recommended was a proposal on the 2006 general election ballot to allow the legislature to provide for the temporary succession of elected and appointed officials in an emergency caused by natural or man-made disaster, modeled after the Utah continuity of government provision. Email from David Ortbahn, S.D. Legislative Research Council, to author (Mar. 5, 2008, 17:21:43 EST) (on file with author). This change was combined in one ballot question, with other changes, in "a hodgepodge of constitutional revisions" which "trie[d] to address too much." Editorial, *Amendment E, Amendment F, Measure 3—No*, ABERDEEN AM. NEWS (S.D.), Oct. 24, 2006, at A4, *available at* 2006 WLNR 18419458. The measure was ultimately defeated. *See Amendment F Rejected*, ABERDEEN AM. NEWS (S.D.), Nov. 8, 2006, at A6, *available at* 2006 WLNR 19385758.

ances and to provide legislative solutions for disaster response and recovery, and leaders are needed in the legislature to act with clear and undisputed authority.[268]

An argument could be made that continuity of government provisions in state constitutions are superfluous. In a time of emergency or war, the constitution of a state—and its mechanical process requirements, such as quorum requirements—can and should be automatically suspended whether or not there is a continuity of government provision anticipating the need for such a suspension. This view traces its origins, in theory, to Cicero's defense of Milo—"*Inter arma silent leges.*"[269] The Supreme Court has noted that the Federal Constitution is "not a suicide pact,"[270] and neither should a state constitution be a pact with the Reaper. The argument continues that if procedural rules governing legislative quorum and succession hold a state government captive and unable to accomplish necessary business during a period of emergency, such rules should be set aside—whether or not explicitly authorized by the text of the state constitution. The very survival of the state apparatus depends on a functioning government. Hence, the continued functioning of the government should trump any technical rules within a state's constitution. But such an argument is short sighted. Continuity of government provisions in state constitutions "remove any doubt as to the legitimacy of any action taken by the legislature during an emergency."[271] When disaster strikes or the nation is attacked, the rules of procedure and the lines of succession should be clear. The legitimacy of the state's officials should be undisputed. Advanced planning serves to avoid unnecessary confusion, controversy, and litigation in moments of great peril.

Another argument against adding such a provision is that it might add further clutter to the state constitution.[272] State constitutions, under this view, are "generally concerned with broad issues of governmental process and individual rights" and "hyperlegislation" has no

268. *See supra* notes 38–61 and accompanying text.

269. "Amid the arms of war the laws are silent." BLACK'S LAW DICTIONARY 1725 (8th ed. 2004).

270. *See* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 159–60 (1963) (noting that while the Federal Constitution "protects against invasions of individual rights," "in time[s] of war and national emergency," latitude should be given to ensure that functions of government are fulfilled).

271. DONALD CROWLEY & FLORENCE HEFFRON, THE IDAHO STATE CONSTITUTION: A REFERENCE GUIDE 96 (1994).

272. *See* Representative John Conyers, Jr., *Desecrating the Constitution*, 8 SETON HALL CONST. L.J. 1, 8–9 n.32 (1997) ("'We should resist the temptation to clutter up [the constitution] with amendments relating to substantive matters.'" (quoting Lon Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 465 (1954))).

place in the constitution.[273] But incorporating clear lines of succession in the blueprints of state government should not be regarded as clutter. These provisions are needed because the continuation of government during periods of crisis may require that the legislature act in a way that conflicts with technical provisions of a state constitution. Moreover, these provisions do not "legislate" so much as they enable the legislature to adopt (and continually revise) a state's continuity of government plans—as continuity of government provisions, by their very design, are not meant to be self-executing.

B. States with Constitutional Provisions Should Adopt New or Update Existing Statutory Enactments

1. Update Statutes to Conform with Updated Constitutional Provisions

Just as states must replace language in their state constitutions which limit the operation of constitutional continuity of government provisions to instances of "enemy attack,"[274] so too must states amend existing statutory enactments to replace this outmoded language. Continuity of government statutes in at least eleven states are only triggered upon an "attack" by an "enemy of the United States."[275] This language should be broadened to allow for the triggering of these statutes in circumstances of widespread disaster, even where the origins of the disaster are unclear or caused by natural events.

2. Adopt Enabling Legislation in States with No Existing Statutory Enactments

Sixteen states have ratified continuity of government provisions in their state constitutions but do not appear to have adopted the necessary implementing legislation to provide for *legislative* continuity.[276]

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273. *See, e.g.*, Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 915–16 (1996). Thompson has noted that state constitutions "do not make for easy reading":

> The Illinois Constitution, at approximately 13,200 words, is one of the smallest; the New York Constitution has over 80,000 words. By contrast, the United States Constitution has fewer than 10,000. By adding legislative provisions in with more fundamental principles and processes, a state risks diluting the importance of the more fundamental provisions. As state constitutions grow more like statutory codes, fewer citizens are aware of what provisions are found in the constitution. Nor do they care. Little useful debate and understanding therefore grows out of the provisions.

Id.

274. *See supra* notes 263–267 and accompanying text.

275. *See supra* notes 158–159 and accompanying text.

276. Those sixteen states include: (1) Connecticut; (2) Florida; (3) Maine; (4) Massachusetts; (5) Minnesota; (6) Missouri; (7) Nebraska; (8) Nevada; (9) New Hampshire; (10) New Jersey;

A constitutional continuity of government provision, standing alone, is ineffectual because these provisions are not self-executing. The drafters of these provisions intended them to enable the adoption of continuity laws and not to serve as a means of continuity planning by themselves.[277]

Ultimately, these states should take *some* action. First, legislatures in states with continuity of government provisions have an affirmative duty to enact legislation to provide for succession.[278] Second, traditional vacancy repopulation methods may not be available during times of crisis. For example, states should not rely solely on elections to repopulate a legislature following an attack or disaster. Recent scholarship has focused on the infeasibility of holding statewide elections in the wake of a disaster because of citizen displacement and inadequacies in state election capabilities.[279] Thus, it might be impossible to hold elections in the weeks or months following a statewide disaster.

3. *Annually Update Interim Successor Designation Lists and Amend Existing Laws*

Legislators in states that have interim legislative succession acts should be reminded on an annual basis to update their list of successors with their state's secretary of state. So long as these provisions are in the law books, legislators should be aware of them and should meet their statutory obligations to designate interim successors. Unlike a quorum suspension provision, these provisions are only effective if legislators continually update their designations. It will, of course, be too late after a mass vacancy occurs for a legislator to update her designations.

In states where interim legislative succession acts are followed and lists are regularly updated, legislators should consider updating existing legislative succession acts. First, as already discussed, triggering event language should be updated to reflect modern threats.[280] Second, cumbersome procedural requirements should be deleted or

(11) Ohio; (12) Pennsylvania; (13) Rhode Island; (14) South Dakota; (15) Utah; and (16) Wisconsin.

277. *See supra* notes 176–178 and accompanying text.

278. *See supra* notes 252–262 and accompanying text.

279. *See generally Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127 (2006) (arguing that holding statewide elections to repopulate government is not feasible).

280. *See supra* notes 274–275 and accompanying text (urging legislatures to replace antiquated triggering language in state statutes, e.g., the phrase "enemy attack"); *see also supra* notes 263–267 and accompanying text (urging the same update of language to constitutional provisions).

changed so that statutory compliance can be ensured. Delaware, for example, does not administer an oath of office to designees despite an express statutory requirement that an oath be administered upon designation.[281] The law should be clarified to remove this cumbersome requirement.[282] Third, immediate family members of legislators should be statutorily disqualified from being named as interim legislative successors. Half of the members of the 144th Delaware House of Representatives, for example, named spouses and sons or daughters to serve as interim successors.[283] The NCSL has noted that "[n]early half the states prohibit a legislator from hiring a relative either through statute or by constitution."[284] Prohibitions on hiring a relative should be extended to designating a relative as an emergency successor.[285] Anti-nepotism restrictions on legislators date back to the turn of the twentieth century,[286] and they exist to prevent favoritism and conflicts of interest by legislators in hiring and guide legislators to make hiring decisions based on merit instead of blood relationship.[287] If a disaster requires interim legislative successors to be pressed into service, it is critical that the newly constituted legislature have the most-qualified individuals to serve as legislative replacements and that those replacements, to the extent possible, appear to the general public to be legitimately appointed and competent to act. Restricting fa-

281. *See supra* notes 250–251 and accompanying text; *see also supra* note 211 and accompanying text (noting that the model state provision contains this requirement).

282. If the forty-one members of the Delaware House of Representatives each designated the maximum number of seven successors, 281 interim successors would need to be sworn in upon designation. Delaware's legislature should consider changing the timing of the oath requirement to require an oath only in the unlikely (and unfortunate) event that a designee is pressed into emergency service.

283. *See* Email from JoAnn M. Hedrick, *supra* note 239.

284. *See* NCSL, Ethics in Government: Nepotism Restrictions for State Legislators, http://www.ncsl.org/programs/ethics/e_nepotism.htm (last visited Apr. 28, 2009) (compiling legislative anti-nepotism laws for all fifty states).

285. It is unclear how existing anti-nepotism laws apply to interim legislative successors. To the extent that there is doubt as to how anti-nepotism laws apply to the designation of interim successors, the law should be clarified to make such a prohibition express.

286. *See* L.E. Aylesworth, *Nepotism*, 2 AM. POL. SCI. REV. 577, 577 (1908) (noting the enactment of "apparently unique" anti-nepotism laws in Oklahoma and Texas in 1908 and 1907, respectively, that apply to legislators); *see also* Richard D. White Jr., *Consanguinity by Degrees: Inconsistent Efforts to Restrict Nepotism in State Government*, 32 ST. & LOC. GOV'T REV. 108, 109 (2000) ("[N]epotism has been a way of life in American government for centuries.").

287. Anti-nepotism restrictions serve other "good government" purposes as well. *See* White, *supra* note 286, at 109 ("Modern antinepotism laws are the product of Progressive era 'good government' reforms such as recall, initiative, referendum, and direct primaries and are intended to eliminate governmental corruption and to increase efficiency. In a way, antinepotism laws are a method to eliminate another variation of 'spoils' patronage: allotting governmental jobs based on kinship rather than political cronyism.").

milial designations may serve to further this purpose and promote the legitimacy of a reconstituted government.

4. *Use Technology in Legislative Continuity Planning*

In the event of a statewide crisis or emergency, it is unlikely that legislators would be able to assemble together at the legally designated seat of government. States with continuity of government provisions should use their necessary and proper powers to adopt statutes allowing their legislature to meet by phone, over the Internet, or by other electronic means in times of emergency, natural disaster, or enemy attack in circumstances where the legislative body is prevented from physically assembling. Such legislation would be authorized by continuity of government constitutional provisions that allow legislatures "to adopt such other measures as may be necessary and proper for insuring the continuity of governmental operations."[288]

In today's electronic age, voting sessions of the legislature could be held remotely by electronic mail, instant messaging, bulletin boards, telephone conferences, video conferences, web-based conferences, or facsimile. Statutes authorizing legislative meetings by remote communications should provide for procedural rules specifically designed for use with modern communications technology. If meetings via remote communication forms are authorized, such meetings should be governed by a detailed procedural framework and parliamentary rules because existing rules of order and procedure may be inapplicable.[289]

Under current law, state constitutions and statutory provisions specify the place of meetings of legislative bodies, and when the place of the meeting has been set by law, no valid business can be held outside of that legally designated place.[290] Although a number of state constitutions allow for the site of legislative sessions to be moved in times of

288. *See supra* notes 102–104 and accompanying text (discussing the purpose of the model provision's necessary and proper clause). Connecticut and Louisiana would be unable to adopt this recommendation because their continuity of government provision does not include a "necessary and proper clause." *See supra* notes 132–133 and accompanying text.

289. *See* ROBERT ET AL., *supra* note 184, at 2 ("Efforts to conduct the deliberative process by postal or electronic mail or facsimile (fax) transmission—which are not recommended—must be expressly authorized by the bylaws and should be supported by special rules of order and standing rules as appropriate, since so many situations unprecedented in parliamentary law may arise and since many procedures common to parliamentary law are not applicable." (citations omitted)). *But see* John D. Stackpole, *Rules for Electronic (e-mail) Meetings or The E-liberative Assembly*, 42 PARLIAMENTARY J. (2001), *reprinted in* AM. INST. OF PARLIAMENTARIANS, ELECTRONIC MEETINGS 10, 10 (2002), *available at* www.aipparl.org/pdf/AIPemeet5.pdf (arguing that "electronic" meetings can be governed by existing parliamentary rules).

290. *Cf.* NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 184, § 705, para. 1.

emergency or "contagious disease,"[291] such provisions—standing alone—are inadequate measures against new global threats. These provisions appear only to provide for the physical movement of the seat of government. The physical assembly of state legislators in one central location—even in a location other than the usual seat of government—may be an impossibility by virtue of pandemic disease, a threatened or impending terrorist attack, or even a natural disaster which disrupts a state's transportation infrastructure.

Admittedly, meetings over email or phone may seem antithetical to the democratic openness of the deliberative process, and legislators can use technology to "hide deliberation from the view of the public."[292] In a case of emergency, however, remotely held meetings may be the only feasible vehicle to convene a statewide legislative body. In addition, advancements in modern technology may still allow the legislature to comply with open meeting laws and for the public to participate in the session. For example, the legislature can use technology that allows the public to call in to a meeting or listen to a radio or over the Internet simulcast.

5. *Federal Government Should Lead States in Continuity Planning*

The federal government should act aggressively, as it did half a century ago, to encourage the amendment of state constitutions and the enactment of state legislation to provide for legislative continuity of government. In the 1950s and 1960s, federal authorities drafted model constitutional provisions[293] and directly lobbied states to adopt legislation providing for emergency succession of legislators.[294] The result was the widespread adoption of constitutional and statutory provisions at spectacular speeds.[295] Today, the Federal Civil Defense Administration of the 1960s has been replaced by the highly devel-

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291. *See, e.g.*, ARK. CONST. art. 6, § 19 (providing for the relocation of government by gubernatorial proclamation where the seat of government has become "dangerous from an enemy or contagious disease"); FLA. CONST. art. II, § 2 (authorizing the governor, "in time of invasion or grave emergency," to "transfer the seat of government to another place"); KY. CONST. § 36(3) (allowing the legislature to temporarily relocate "elsewhere" by proclamation of the governor "in case of war, insurrection or pestilence"); *see also supra* note 253 (citing statutes that allow for convening of legislative sessions outside of the designated seat of government).

292. Stephen Schaeffer, Comment, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS U. L.J. 755, 755 (2004).

293. *See supra* notes 90–92 and accompanying text (discussing the federal government's influence in drafting constitutional provisions).

294. *See supra* note 181 and accompanying text (noting that federal authorities went so far as to send telegrams to the governors of twenty-six states urging adoption of continuity provisions).

295. *See supra* notes 27–28 and accompanying text (noting that thirty-five states adopted constitutional provisions in just seven years).

oped U.S. Department of Homeland Security, which is well-equipped to press states to adopt new legislation related to continuity of state government.

The federal government's responsibility to push for change and continuity planning should be shared with organizations that represent, serve, and lobby state governments. In the 1950s and 1960s, the Council of State Governments, the American Bar Association, and other groups took a lead role to push for legislative changes.[296] Today, the National Conference of State Legislatures, the Council of State Governments, the National Governors Association, and similar bodies should encourage states to reexamine their legislative continuity of government provisions. In particular, the Council of State Governments should work with the federal government to formulate and propose to the states new legislation to update the legislative enactments they originally reviewed and endorsed in 1958.[297] The National State Attorneys General Program at Columbia Law School, which has devoted considerable study to "the role of State Attorneys General in preparing for and reacting to disasters,"[298] would be uniquely qualified to provide further study on continuity of government provisions and their enforcement during times of crisis.

VII. CONCLUSION

The terrorist attacks of September 11, 2001 thrust forward issues of homeland security and renewed the relevance of one particular decades-old question: How can our government institutions and democracy survive an enemy attack? The concerns must be broader than this.

In May 2003, a panel of constitutional scholars and former lawmakers—including Professors Philip Bobbitt and Charles Fried, former U.S. Senator Alan Simpson, and former U.S. Attorney General Nicholas deB. Katzenbach—known formally as the "Continuity of Government Commission," noted that the United States Congress is the federal institution "least able to reconstitute itself after a cata-

296. *See supra* notes 179–180 and accompanying text (collecting a list of civic and advocacy groups that pressed states to adopt continuity of government amendments).

297. *See supra* note 93 and accompanying text (noting that the Council of State Governments reviewed the model continuity of government provision before states adopted it and gave the provision the Council's "full endorsement").

298. Columbia Law School, Nat'l State Attorneys Gen. Program, Disaster Planning, http://www.law.columbia.edu/center_program/ag/disasterplan (last visited May 7, 2009); *see also* Columbia Law School, Nat'l State Attorneys Gen. Program, About US, http://www.law.columbia.edu/center_program/as/AGs_About (last visited May 7, 2009).

strophic attack."[299] In its final recommendations, the Commission called for an amendment to the Federal Constitution that would give Congress the power to provide legislatively for the appointment of temporary replacements to fill vacant House seats after a catastrophic attack and to fill temporarily House and Senate seats held by incapacitated members.[300] The Commission favored "an amendment of a general nature that allows Congress to address the details through implementing legislation."[301] The Commission also advocated, not surprisingly, implementing legislation that would create a system where, in the event of a mass lawmaker casualties, temporary appointments could be made from a list drawn up in advance by an incumbent member of Congress.[302]

Though the recommendations were not enacted, they should stimulate a continuing discussion. For the most part, the Commission's recommendations mirror the existing policy choices and wisdom of the majority of American states.[303] Thirty-five state constitutions already have ratified amendments allowing their legislature to adopt measures aimed at repopulating itself when a mass vacancy has occurred.[304] At least eleven of those states have used these amendments as a springboard to enact meaningful legislation providing for "interim legislative successors" to stand in the shoes of elected legislators who are incapacitated or otherwise unable to serve when an attack has occurred.[305]

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299. CONTINUITY OF GOV'T COMM'N, THE CONGRESS: PRESERVING OUR INSTITUTIONS, THE FIRST REPORT OF THE CONTINUITY OF GOVERNMENT COMMISSION ii, v–vi (2003), *available at* www.continuityofgovernment.org/report/FirstReport.pdf. The recommendations from the report received wide national coverage and commentary. *See, e.g.*, Editorial, *Planning for the Worst*, BOSTON HERALD, June 8, 2003, at 24, *available at* 2003 WLNR 642716; Editorial, *The 28th Amendment?*, PITT. TRIB. REV., June 8, 2003, *available at* 2003 WLNR 13969675; Editorial, *Preparing for the Unthinkable*, DENVER POST, June 6, 2003, at B6, *available at* 2003 WLNR 845462.

300. CONTINUITY OF GOV'T COMM'N, *supra* note 299, at 58.

301. *Id.*

302. *Id.* at 28–29.

303. Similarities between existing state constitutional provisions and statutory enactments and the Commission's recommendations are not coincidental. Though the text of the Commission's report appears not to discuss in detail state constitutional or statutory enactments, it does include an appendix, which includes a sample of three state continuity of government constitutional provisions. *See id.* app. VII at 52–56. In addition, Norman J. Ornstein, the Continuity of Government Commission's senior counselor, revealed in 2007 that he had sought feedback on Delaware's interim legislative succession act from "many members of Congress." Council on Foreign Relations, Transcript of Following a Catastrophe—Ensuring the Continuity of Government (Nov. 7, 2007), http://www.cfr.org/publication/14742/following_a_catastrophe_ensuring_the_continuity_of_government_rush_transcript_federal_news_service.html.

304. *See supra* notes 109–149 and accompanying text.

305. *See supra* notes 199–251 and accompanying text.

The continuity of government provisions in most state constitutions, and the legislative enactments that flow from these provisions, are far from perfect and must be updated. The use of antiquated language in the constitutional provisions threatens to limit the potential invocation of emergency powers in an unnecessarily narrow way. Additionally, legislative enactments—specifically, interim legislative succession statutes—may be ineffective because of years of inattention and disuse. Legislatures across the nation should revisit legislative continuity plans, update existing provisions and enactments, and develop new and creative ways—perhaps involving the use of technology—to deal with the problem of how to continue the work of government in the moments following crisis, when a functioning government is most needed.

Continuity of Government Commission co-chairs Lloyd Cutler and Alan Simpson, in their introduction to the report bearing their Commission's recommendations, remind us that "[i]t is surely not pleasant to contemplate the possibility of future catastrophic attacks on our governmental institutions, but the continuity of our government requires us to face this dire danger directly."[306] It is, indeed, a hard pill to swallow that the great chambers that house America's state legislatures can fall victim to a terrorist bombing, pandemic disease, or natural disaster. Nevertheless, assuring continued representation and legislative operations for American states during times of crisis should remain an important policy objective in the post-9/11 world. The chaotic aftermath of a disaster is no time to begin such discussions. They must begin now.

306. CONTINUITY OF GOV'T COMM'N, *supra* note 299, at ii.