

ARTICLES

U.S. DISASTER POLICY: OVERSIGHT CHALLENGES AND THE PROMISE OF MULTI-LEVEL GOVERNANCE

by
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U.S. disaster preparedness and response policy now plays an increasingly central role in the lives of many Americans. The COVID-19 pandemic and the strong uptick in extreme weather events have placed a heightened burden on our emergency management resources. In 2021, it seemed that hardly a week went by without a new emergency declaration as we battled devastating wild-fires and drought in the West and catastrophic flooding and storms in the East. To further complicate matters, these unrelenting weather-related disasters played out within the context of an unprecedented and multi-year public health crisis—the COVID-19 pandemic. This Article examines the history and structure of U.S. disaster policy with a special emphasis on the oversight challenges present in its multi-tier and multi-sector governance structure. It draws on lessons from past disasters and insights from multi-level governance (MLG) theory to promote ways to ensure that U.S. disaster policy is effective, efficient, and equitable.

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INTRODUCTION

U.S. disaster preparedness and response policy now plays an increasingly central role in the lives of many Americans.¹ The COVID-19 pandemic and the strong uptick in extreme weather events have placed a heightened burden on our emergency management resources.² In 2021, it seemed that hardly a week went by without a new emergency declaration, as we battled devastating wildfires and drought in

¹ This Article uses the term “U.S. disaster policy” to encompass all federal policy that involves preparedness, response, and recovery activities for disasters that are human-made and naturally occurring. At the federal level, such policy is often referred to as “emergency management” or “preparedness and response” policy.

² The National Academies of Sciences, Engineering, and Medicine defines an “extreme event” as “[a] weather or climate event that is rare at a particular place (and, sometimes, time of year) including, for example, heat waves, cold waves, heavy rains, periods of drought and flooding, and severe storms.” NAT’L ACADS. SCIS., ENG’G, & MED., COMM. EXTREME WEATHER EVENTS

the West and catastrophic flooding and storms in the East.³ To further complicate matters, these unrelenting weather-related disasters played out within the context of an unprecedented and multi-year public health crisis—the COVID-19 pandemic.⁴ This Article examines the history and structure of U.S. disaster policy with a special emphasis on the oversight challenges present in its multi-tier and multi-sector governance structure. It draws on lessons from past disasters and insights from multi-level governance (MLG) theory to promote ways to ensure that U.S. disaster policy is effective, efficient, and equitable.⁵

In 2021, an estimated 40% of Americans lived in a county that experienced a disaster declaration due to climate-related extreme weather, such as floods, fires, hurricanes, mudslides, and severe storms.⁶ Eighty percent of Americans experienced a heat wave.⁷ A total of 724 people died as a result of weather disasters in 2021, and many more lost their homes and livelihoods.⁸ The National Oceanic and Atmospheric Administration (NOAA) has kept track of the cost of weather disasters since 1980.⁹ NOAA estimates that the cost of weather-related disasters in 2021 exceeded \$150 billion.¹⁰ It reported that there were 20 weather-related disasters in 2021 with

& CLIMATE CHANGE ATTRIBUTION, *ATTRIBUTION OF EXTREME WEATHER EVENTS IN THE CONTEXT OF CLIMATE CHANGE*, at xviii (2016).

³ Zach Levitt & Bonnie Berkowitz, *Cold, Heat, Fires, Hurricanes and Tornadoes: The Year in Weather Disasters*, WASH. POST, <https://www.washingtonpost.com/nation/interactive/2021/weather-disasters-2021/> (Dec. 17, 2021, 12:30 PM).

⁴ Dave Lawler, *Two Years of COVID-19*, AXIOS (Dec. 5, 2021), <https://www.axios.com/pandemic-timeline-two-year-anniversary-216f74e0-0512-4d4f-8227-717614775dbb.html>.

⁵ Multi-level governance (MLG) theory emerged in the 1990s in the context of European integration. Liesbet Hooghe & Gary Marks, *Unraveling the Central State, but How? Types of Multi-Level Governance*, 97 AM. POL. SCI. REV. 233, 234 (2003). It studies governance structures with shared decision-making at different levels of government, including subnational and supranational actors, along with nongovernmental. *Id.* MLG theory has obvious relevance to federal systems. Katherine A. Daniell & Adrian Kay, *Multi-Level Governance: An Introduction*, in *MULTI-LEVEL GOVERNANCE: CONCEPTUAL CHALLENGES AND CASE STUDIES FROM AUSTRALIA* 3, 5 (Katherine A. Daniell & Adrian Kay eds., 2017). In particular, MLG theory provides a useful model for U.S. disaster policy that is organized across all levels of government (federal, state, and local) and across sectors.

⁶ Sarah Kaplan & Andrew Ba Tran, *More Than 40 Percent of Americans Live in Counties Hit by Climate Disasters in 2021*, WASH. POST, <https://www.washingtonpost.com/climate-environment/2022/01/05/climate-disasters-2021-fires/> (Jan. 5, 2022, 9:11 PM).

⁷ *Id.* Sarah Kaplan & John Muyskens, *The Past Seven Years Have Been the Hottest in Recorded History, New Data Shows*, WASH. POST (Jan. 13, 2022, 11:00 AM), <https://www.washingtonpost.com/climate-environment/2022/01/13/global-temperature-record-climate-change/>.

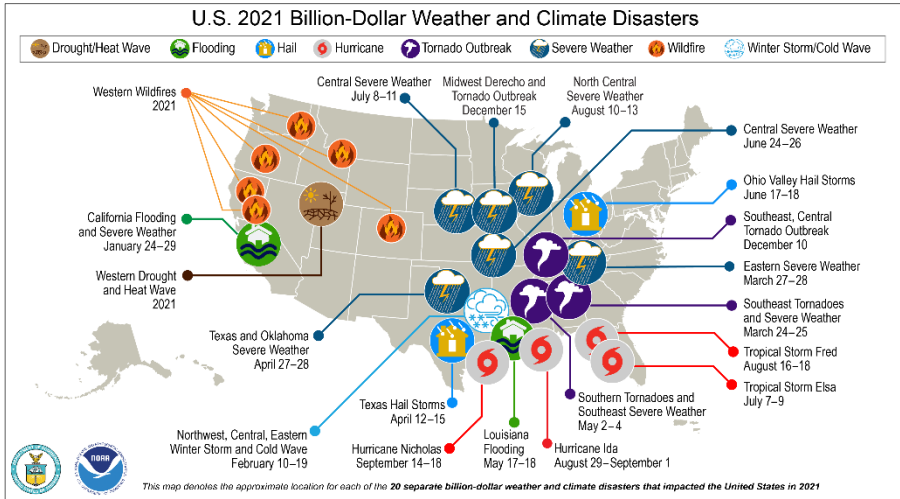
⁸ *Billion-Dollar Weather and Climate Disasters*, NAT'L CTRS. ENV'T INFO., <https://www.ncdc.noaa.gov/billions/events> (choose “2021” in both “Begin Year” dropdown and “End Year” dropdown) (last visited Jan. 2, 2023).

⁹ *Id.*

¹⁰ The cost estimates and “loss assessments do not take into account losses to natural capital

losses of \$1 billion or more.¹¹ Looking back over the four decades between 1980 and July 2022, on average, there were 7.7 billion-dollar disasters per year.¹²

Figure 1. NOAA Map of 2021 Billion-Dollar Weather & Climate Disasters¹³



These extreme weather-related disasters unfolded during the second year of the global COVID-19 pandemic.¹⁴ The secretary of the U.S. Department of Health and Human Services (HHS) declared a public health emergency due to the novel coronavirus on January 31, 2020,¹⁵ and President Donald Trump declared a national emergency on March 13, 2020.¹⁶ By April 2020, every state in the union was under a federal disaster declaration for the first time in the history of the United States.¹⁷

or assets, healthcare related losses, or values associated with loss of life.” *Calculating the Cost of Weather and Climate Disasters*, NAT’L CTRS. ENV’T INFO., <https://www.ncei.noaa.gov/news/calculating-cost-weather-and-climate-disasters> (Apr. 21, 2022).

¹¹ *Billion-Dollar Weather and Climate Disasters*, *supra* note 8.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*; cf. Alessandra Jerolleman, Shirley Laska & Julie Torres, *Lessons from Concurrent Disasters: COVID-19 and Eight Hurricanes*, NAT. HAZARDS CEN. CTR., <https://hazards.colorado.edu/quick-response-report/lessons-from-co-occurring-disasters> (last visited Jan. 2, 2023) (discussing the confluence of the 2020 hurricane season with the first year of the COVID-19 pandemic).

¹⁵ *Determination that a Public Health Emergency Exists*, U.S. DEP’T OF HEALTH & HUM. SERVS. (Jan. 31, 2020), <https://www.phe.gov/emergency/news/healthactions/phe/Pages/2019-nCoV.aspx>.

¹⁶ Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

¹⁷ *Id.*; Justine Coleman, *All 50 States Under Disaster Declaration for First Time in U.S. History*, HILL (Apr. 12, 2020, 4:31 PM), <https://thehill.com/policy/healthcare/public-global-health/>

Despite having effective vaccines widely available in the first half of 2021, the COVID-19 pandemic showed little signs of abatement, as the virus was able to find ample hosts among the significant percentage of the American population that stubbornly refused to get vaccinated.¹⁸ New variants of the coronavirus, such as Delta and Omicron, continued to cause alarming spikes in cases and hospitalizations.¹⁹ By May 2022, a little over two years since the first reported case of COVID-19 in the United States, over 1 million Americans had died from the virus—a toll that would have been unfathomable at the onset of the pandemic.²⁰

The COVID-19 pandemic exposed deep fractures in our national disaster policy. It also revealed an abiding truth about disasters and inequality—the burdens of the pandemic have not fallen evenly across American society.²¹ In the early days of the pandemic, the Trump administration turned a blind eye to its clearly delineated responsibilities under the carefully drawn national pandemic plans that had been in place since 2005.²² U.S. disaster policy classifies a pandemic as a “catastrophic incident” that requires swift and strong leadership from the federal government because

492433-all-50-states-under-disaster-declaration-for-first (reporting that within a 22-day period, President Trump “declared a major emergency in all 50 states and most territories”).

¹⁸ Saad B. Omer, Regina M. Benjamin, Noel T. Brewer, Alison M. Buttenheim, Timothy Callaghan, Arthur Caplan, Richard M. Carpiano, Chelsea Clinton, Renee DiResta, Jad A. Elharake, Lisa C. Flowers, Alison P. Galvani, Rekha Lakshmanan, Yvonne A. Maldonado, SarahAnn M. McFadden, Michelle M. Mello, Douglas J. Opel, Dorit R. Reiss, Daniel A. Salmon, Jason L. Schwartz, Joshua M. Sharfstein & Peter J. Hotez, *Promoting COVID-19 Vaccine Acceptance: Recommendations from the Lancet Commission on Vaccine Refusal, Acceptance, and Demand in the USA*, 398 LANCET 2186, 2186 (2021).

¹⁹ Nate Rattner, *U.S. Covid Cases Rise to Pandemic High as Delta and Omicron Circulate at Same Time*, CNBC, <https://www.cnbc.com/2021/12/29/us-covid-cases-rise-to-pandemic-high-as-delta-and-omicron-circulate.html> (Dec. 29, 2021, 5:46 PM).

²⁰ The first case of COVID-19 in the United States was reported on January 20, 2020. Michelle L. Holshue, Chas DeBolt, Scott Lindquist, Kathy H. Lofy, John Wiesman, Hollianne Bruce, Christopher Spitters, Keith Ericson, Sara Wilkerson, Ahmet Tural, George Diaz, Amanda Cohn, LeAnne Fox, Anita Patel, Susan I. Gerber, Lindsay Kim, Suxiang Tong, Xiaoyan Lu, Steve Lindstrom, Mark A. Pallansch, William C. Weldon, Holly M. Biggs, Timothy M. Uyeki & Satish K. Pillai, *First Case of 2019 Novel Coronavirus in the United States*, 382 NEW ENG. J. MED. 929, 929 (2020); Doug Donovan, *U.S. Officially Surpasses 1 Million COVID-19 Deaths*, JOHNS HOPKINS UNIV. & MED. (May 17, 2022), <https://coronavirus.jhu.edu/from-our-experts/u-s-officially-surpasses-1-million-covid-19-deaths>.

²¹ Emily Mendenhall & Clarence C. Gravlee, *How COVID, Inequality and Politics Make a Vicious Syndemic*, SCI. AM. (Aug. 26, 2021), <https://www.scientificamerican.com/article/how-covid-inequality-and-politics-make-a-vicious-syndemic1/>; Brea L. Perry, Brian Aronson & Bernice A. Pescosolido, *Pandemic Precarity: COVID-19 Is Exposing and Exacerbating Inequalities in the American Heartland*, 118 PROC. NAT’L ACAD. SCI., Feb. 23, 2021, at 1.

²² Nancy J. Knauer, *The Federal Response to COVID-19: Lessons from the Pandemic*, 73 HASTINGS L.J. 49 (2022).

a pandemic can quickly overwhelm the capabilities of state and local authorities.²³ The pandemic plans detailed specific steps that should be taken by the federal government to monitor and contain the virus and then mitigate its spread.²⁴ Instead of rising to the occasion, however, the Trump administration downplayed the severity of the pandemic, advanced false and dangerous treatments, and fomented a pugilistic form of federalism that pitted state against state in the rush to secure essential medical supplies.²⁵

U.S. disaster policy is highly complex and dynamic with respect to (1) the types of incidents it covers, (2) the support it provides, and (3) the way it disperses power among various government and nongovernmental actors. First, U.S. disaster policy does not only cover “natural” disasters.²⁶ It also covers intentional and accidental human-made disasters.²⁷ Accordingly, disaster policy encompasses both industrial accidents, such as the Deepwater Horizon oil spill, and terrorist attacks, such as 9/11. In this way, U.S. disaster policy embraces an “all hazards” model that strives for interoperability across all domestic disasters, whether natural or human-made.²⁸

²³ U.S. disaster policy, as expressed in the National Response Framework (NRF), identifies catastrophic incidents as uniquely the responsibility of the President. U.S. DEP’T OF HOMELAND SEC., THE NATIONAL RESPONSE FRAMEWORK 3 (4th ed. 2019) [hereinafter NRF]. Specifically, the NRF provides that “[r]egardless of the type of incident, the President leads the Federal Government response effort to ensure that the necessary resources are applied quickly and efficiently to large-scale and catastrophic incidents.” *Id.* at 34. The NRF further provides that a national catastrophic incident would “require the extraordinary means of mobilizing and prioritizing national resources to alleviate human suffering; protect lives and property; reduce damage to natural, cultural, and historic resources; stabilize the Nation’s economy; and ensure national security.” *Id.* at 4. The NRF also includes a cyberattack as an example of a catastrophic incident. *Id.* at 6 n.13.

²⁴ HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA 8 (2005) [hereinafter NATIONAL STRATEGY]. The National Strategy refers to a “cascade” of federal actions that are triggered by the appearance of a novel virus. *Id.*

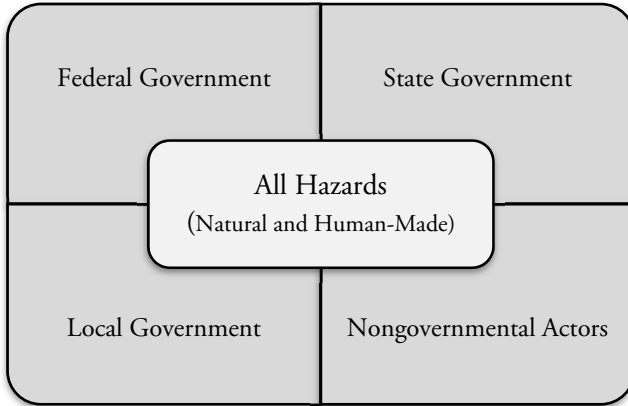
²⁵ See, e.g., Tommy Beer, *All the Times Trump Compared Covid-19 to the Flu, Even After He Knew Covid-19 Was Far More Deadly*, FORBES (Sept. 10, 2020, 10:05 AM), <https://www.forbes.com/sites/tommybeer/2020/09/10/all-the-times-trump-compared-covid-19-to-the-flu-even-after-he-knew-covid-19-was-far-more-deadly/?sh=2eb0983f9d2f>.

²⁶ The expansive reach of U.S. disaster policy is referred to as an “all-discipline, all-hazards” approach. NRF, *supra* note 23, at 3.

²⁷ *Id.*

²⁸ *Id.* “All-hazards” planning provides “an integrated approach to emergency preparedness planning that focuses on capacities and capabilities that are critical to preparedness for a full spectrum of emergencies or disasters, including internal emergencies and a man-made emergency (or both) or natural disaster.” CTRS. FOR MEDICARE & MEDICAID SERVS., FREQUENTLY ASKED QUESTIONS (FAQS) EMERGENCY PREPAREDNESS REGULATION 1 (2017), <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertEmergPrep/Downloads/FAQ-Round-Four-Definitions.pdf>.

Figure 2. Multi-Tiered “All Hazards” Model of Disaster Policy

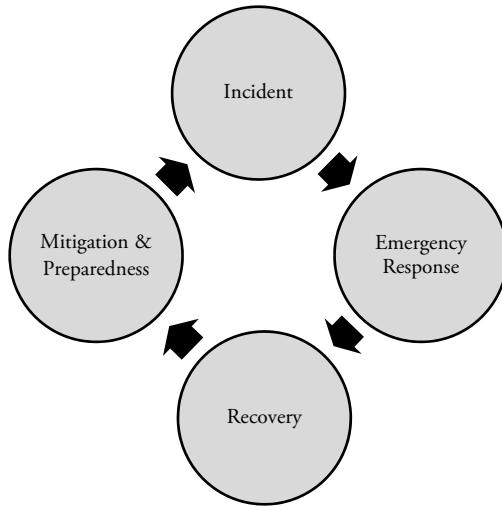


Second, U.S. disaster policy involves more than simply emergency response measures. Although we may most often think of disaster policy in terms of first responders and emergency shelters, disaster policy is comprised of three interrelated and interdependent modalities: preparedness, response, and recovery.²⁹ The emerging field of disaster law conceptualizes disaster policy as a never-ending disaster event cycle that includes periods of response, relief, recovery, and mitigation.³⁰ The response and relief efforts may be the most public and widely seen aspects of disaster policy, but, as it is clear from the chart below, each stage of the cycle is an essential part of a comprehensive program designed to manage and minimize emergency risk. This Article uses the term “disaster relief” to refer to the full gamut of assistance that is provided along the disaster event cycle.

²⁹ These stages will have different iterations depending upon the hazard. For example, in the context of pandemics, the U.S. disaster policy sequence is expressed in terms of six intervals dealing with both pre-pandemic and pandemic stages. Rachel Holloway, Sonja A. Rasmussen, Stephanie Zaza, Nancy J. Cox & Daniel B. Jernigan, *Updated Preparedness and Response Framework for Influenza Pandemics*, MORBIDITY & MORTALITY WKLY. REP., Sept. 26, 2014, at 4–5. The pre-pandemic intervals are largely devoted to threat monitoring and not every threat will progress through all of the intervals. *Id.*

³⁰ Daniel A. Farber, *Introduction: Legal Scholarship, the Disaster Cycle, and the Fukushima Accident*, 23 DUKE ENV'T L. & POL'Y F. 1, 3 (2012) (picturing “cycle of Disaster Law” with five distinct points in the cycle: disaster event, emergency response, compensation and insurance, rebuilding, and risk mitigation).

Figure 3. Disaster Cycle



Finally, U.S. disaster policy is *national* rather than *federal* in nature because it is structured around multiple tiers of governance, involving federal, state, and local actors, as well as public–private partnerships, the nonprofit sector, and private philanthropy.³¹ This dispersed power template is designed to respect foundational principles of federalism under which disaster efforts are ideally “federally supported, state managed, and locally executed.”³² It recognizes that local authorities are often best situated to assess community needs and, therefore, should take the lead in response efforts.³³ It also incorporates the longstanding American reliance on the voluntary sector and private initiative.³⁴ Despite the many positive aspects of this dispersed authority model, the resulting multi-tier and multi-sector governance structure of U.S. disaster policy also results in fragmented responsibility, competing policy objectives, and fractured oversight measures.

³¹ STAFF OF H. COMM. ON HOMELAND SEC., 110TH CONG., HOMELAND SECURITY PRESIDENTIAL DIRECTIVE 5 (Comm. Print 2007) [hereinafter HSPD-5]. Section 1 of HSPD-5 sets forth the goal “[t]o enhance the ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system.” *Id.* at 23. HSPD-5 also recognizes the important role of “the private and nongovernmental sectors.” *Id.* at 24. Specifically, it states that these actors have a role to “play in preventing, preparing for, responding to, and recovering from terrorist attacks, major disasters, and other emergencies.” *Id.*

³² NRF, *supra* note 23, at 7, 15.

³³ *Id.* at 6. The NRF provides that an “optimal” incident response is primarily led by state and local authorities “with private sector and [nongovernmental organization] engagement throughout.” *Id.* at 15.

³⁴ HSPD-5, *supra* note 31, at 24.

Disaster policy can have profound human, economic, and societal impacts.³⁵ Over the last decade, the price tag for disaster relief ballooned and then increased exponentially in response to the COVID-19 pandemic.³⁶ The prospective reach and cost of U.S. disaster policy argue strongly in favor of robust oversight measures, but its unique multi-tier and multi-sector design greatly complicates attempts to ensure transparency and accountability. This Article offers suggestions to enhance oversight measures across tiers of government and across sectors.

Part I of this Article outlines with broad strokes the basic structure of U.S. disaster policy and authorizing federal legislation. It then explores the governance structure of our national disaster policy within the context of federalism and the longstanding American reliance on the voluntary sector. Part II reminds us that the present level of federal involvement in disaster preparedness only began in the second half of the 20th century. Further, Part II provides a brief history of U.S. disaster policy, charting its beginning with the rise of cooperative federalism during the New Deal. It explains the shift in emphasis to civil defense during the Cold War, the creation of the Federal Emergency Management Agency (FEMA) in the late 1970s,³⁷ and the eventual standardization of disaster policy with the passage of the Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988.³⁸ Part III notes that disaster reform in the United States is largely reactive and tends to occur in the wake of what is perceived as a failed disaster response. It then reviews the lessons learned from: (1) the September 11 terrorist attacks, (2) Hurricane Katrina, and (3) the COVID-19 pandemic. Part IV examines the oversight challenges inherent in our multi-tier and multi-sector disaster policy. It first outlines insights from MLG theory that are applicable to U.S. disaster policy.³⁹ It then identifies numerous points for potential reform across the body of U.S. disaster policy designed to empower individuals, streamline congressional oversight, strengthen independent oversight, and encourage the use of voluntary participation agreements to coordinate governmental and nongovernmental actors around a shared commitment to disaster relief. A brief Conclusion notes that as climate change accelerates, U.S. disaster policy will

³⁵ See generally MONICA TRUJILLO, U.N. DEV. PROGRAMME, GUIDELINES FOR ASSESSING THE HUMAN IMPACT OF DISASTERS (2019).

³⁶ Jeff Stein & Andrew Van Dam, *Taxpayer Spending on U.S. Disaster Fund Explodes Amid Climate Change, Population Trends*, WASH. POST (Apr. 22, 2019, 6:00 AM), <https://www.washingtonpost.com/us-policy/2019/04/22/taxpayer-spending-us-disaster-fund-explodes-amid-climate-change-population-trends/> (detailing spending prior to pandemic); Nate Rattner & Jacob Pramuk, *The U.S. Has Spent Most of Its Covid Relief Funding, but There Are Still Billions Left to Dole Out*, CNBC NEWS, <https://www.cnbc.com/2021/12/09/covid-relief-bills-us-has-spent-most-of-coronavirus-aid-money.html> (Dec. 9, 2021, 3:41 PM).

³⁷ Exec. Order No. 12,127, 44 Fed. Reg. 19,367 (Apr. 3, 1979).

³⁸ See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208 (2018).

³⁹ See *supra* note 5 (describing MLG theory).

play an ever-increasingly important role in our everyday lives, and it is crucial that we develop mechanisms to guarantee that government actors remain accountable to the people and communities they serve.

I. U.S. DISASTER POLICY, FEDERALISM, AND THE VOLUNTARY SECTOR

The governance structure of U.S. disaster policy exemplifies core fundamental American values. It operates across a complicated intergovernmental matrix involving federal, state, and local authorities.⁴⁰ This multi-tier nature of U.S. disaster policy embodies the values of shared sovereignty and the dispersal of power that are essential to federalism. In addition to its intergovernmental focus, U.S. disaster policy incorporates significant roles for public–private partnerships, nonprofit charitable organizations, and private philanthropy. The inclusion of nongovernmental actors reflects the longstanding American reliance on the voluntary sector and private initiatives.⁴¹ It also represents a pragmatic and nimble approach to disaster relief where various institutional actors contribute to the mission in accordance with their respective competencies and capacities.⁴²

As discussed in greater detail in Part IV below, these otherwise positive attributes of a multi-tiered and multi-sector disaster policy also give rise to complicated oversight challenges that stubbornly persist even though they are periodically addressed by the legislature. This Section proceeds in three parts. It first provides an overview of U.S. disaster policy. It then discusses how principles of federalism and our historic reliance on the voluntary sector have influenced U.S. disaster policy.

⁴⁰ The multi-tier nature of U.S. disaster policy also includes tribal authorities. Heidi K. Adams, *Sovereignty, Safety, and Sandy: Tribal Governments Gain (Some) Equal Standing Under the Hurricane Sandy Relief Act*, 2 AM. INDIAN L.J. 376 *passim* (2013). The Sandy Recovery Improvement Act of 2013 amended the Stafford Act to grant federally recognized tribes the authority to request aid directly from the President. Sandy Recovery Improvement Act of 2013, Pub. L. No. 113-2, § 1110, 127 Stat. 39, 47–48 (2013). Prior to 2013, tribes had to join a major disaster request made by the governor of the state in which the tribe is geographically located. *Id.*

⁴¹ As Alexis de Tocqueville explained in *Democracy in America*, “The inhabitant of the United States learns from birth that he must rely on himself to struggle against the evils and obstacles of life: he has only a defiant and restive regard for social authority and he appeals to its powers only when he cannot do without it.” ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 180 (Harvey C. Mansfield & Delba Winfield trans., 2002).

⁴² In this way, U.S. disaster policy also represents an example of comparative institutional analysis where various government and nongovernmental actors participate according to their competence. See Nancy J. Knauer, *The COVID-19 Pandemic and Federalism: Who Decides?* 23 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 9 (2020) (applying comparative institutional analysis to U.S. disaster policy in the context of the pandemic).

A. Overview of U.S. Disaster Policy

At the federal level, U.S. disaster relief programs are spread across 17 federal agencies, including the Department of Homeland Security (DHS), the Department of Health and Human Services (HHS), the Department of Housing and Urban Development (HUD), and the Department of Transportation (DOT).⁴³ FEMA is primarily responsible for coordinating disaster relief efforts and is currently housed within DHS.⁴⁴ Funding for disaster relief comes from annual appropriations, as well as supplemental funding that Congress often enacts after a particular disaster.⁴⁵ The Stewart McKinney–Robert Stafford Act of 1988, known as the Stafford Act, provides the legislative authority for federal disaster relief.⁴⁶ Divided into seven titles, the Stafford Act establishes a federal process for declaring “emergencies” and “major disasters.”⁴⁷ It determines the appropriate level of federal response and allocates costs among federal, state, and local governments.⁴⁸ It also establishes the requirement for state and local governments to create comprehensive disaster preparedness plans and mechanisms to prepare for intergovernmental coordination during times of crisis.⁴⁹

Congress created DHS in 2002 in response to the September 11, 2001, terrorist attacks.⁵⁰ Its charge is to coordinate all domestic security efforts and unify them under one agency.⁵¹ In order to assist DHS in its policy development, President George W. Bush issued a series of Presidential Directives (HSPDs) to serve as guidance for the agency.⁵² HSPD-5 instructed the secretary of Homeland Security to establish a comprehensive national domestic incident management system.⁵³ The

⁴³ U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-797, FEDERAL DISASTER ASSISTANCE: FEDERAL DEPARTMENTS AND AGENCIES OBLIGATED AT LEAST \$277.6 BILLION DURING FISCAL YEARS 2005 THROUGH 2014 (2016), <https://www.gao.gov/assets/gao-16-797.pdf>.

⁴⁴ See *infra* text accompanying notes 249–51 (describing the creation of DHS).

⁴⁵ See, e.g., Sandy Recovery Improvement Act § 1110, at 47–48.

⁴⁶ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121(b) (2018).

⁴⁷ See generally *id.*

⁴⁸ *Id.* § 5172(b).

⁴⁹ *Id.* § 5121(b)(2).

⁵⁰ See *infra* text accompanying notes 249–51 (describing the creation of DHS).

⁵¹ Homeland Security Act of 2002, Pub. L. No. 107-296, § 101(b)(1)(D), 116 Stat. 2135, 2142 (2002). DHS started operations on March 1, 2003. Andrew Glass, *Bush Creates Homeland Security Department*, Nov. 26, 2002, POLITICO (Nov. 26, 2018, 12:00 AM), <https://www.politico.com/story/2018/11/26/this-day-in-politics-november-26-1012269>.

⁵² There are a total of 25 HSPDs. *National Security Presidential Directives [NSPD] George W. Bush Administration*, FED’N AM. SCIENTISTS, <https://fas.org/irp/offdocs/nspd/index.html> (Dec. 17, 2019). The first Homeland Security Presidential Directive created the National Homeland Security Council that was the precursor to DHS. *Id.* It was issued on October 29, 2001, shortly after the September 11 terrorist attacks. *Id.* The last HSPD addressed arctic region policy and was issued in 2009. *Id.*

⁵³ HSPD-5, *supra* note 31, at 23. Section 1 of HSPD-5 sets forth the goal “[t]o enhance the

goal was to develop a comprehensive system to manage domestic emergency incidents, specifically “to prevent, prepare for, respond to, and recover from terrorist attacks, major disasters, and other emergencies.”⁵⁴ HSPD-5 incorporates federalism concerns and refers to the creation of a national rather than a federal incident management system, recognizing that state and local authorities have pivotal roles in the disaster relief.⁵⁵ It also recognizes the important role played by “private and nongovernmental sectors.”⁵⁶ Specifically, HSPD-5 states that nongovernmental actors have a role to “play in preventing, preparing for, responding to, and recovering from terrorist attacks, major disasters, and other emergencies.”⁵⁷ Section 6 of HSPD-5 states: “The Federal Government recognizes the roles and responsibilities of State and local authorities in domestic incident management. Initial responsibility for managing domestic incidents generally falls on state and local authorities.”⁵⁸

The development of a comprehensive “all-discipline, all-hazards plan” required the consolidation and integration of all federal government domestic preparedness, response, and recovery plans.⁵⁹ This process resulted in two key policy documents: the National Incident Management System (NIMS)⁶⁰ and the National Response Plan, which have now been replaced by the National Response Framework (NRF).⁶¹ NIMS is designed to provide a comprehensive national management system for responding to domestic incidents.⁶² Adopted in 2004, it lists “saving lives, stabilizing the incident, and protecting property and the environment” as the central incident management goals.⁶³ It establishes standardized concepts, principles, and terminol-

ability of the United States to manage domestic incidents by establishing a single, comprehensive national incident management system.” *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 24.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 26. As a report from the Hudson Institute explains:

The “all-hazards” approach recognizes that preparing for one type of disaster makes emergency responders more effective at managing others. Therefore, incident planners employ a single response system that can be adapted to meet a range of potential disasters, whether natural (e.g., earthquakes, floods, droughts, wildfires, tornadoes, tropical storms and hurricanes), accidental (e.g., the disintegration of the Columbia space shuttle over many southwestern states), and deliberate (e.g., sabotage and terrorism) disasters.

RICHARD WEITZ, HUDSON INST., FEDERALISM AND DOMESTIC DISASTERS: PROMOTING A BALANCED APPROACH 19 (2006).

⁶⁰ See generally FED. EMERGENCY MGMT. AGENCY, NATIONAL INCIDENT MANAGEMENT SYSTEM (3d ed. 2017) [hereinafter NIMS].

⁶¹ See NRF, *supra* note 23, at 1.

⁶² See NIMS, *supra* note 60, at iii.

⁶³ *Id.* at 3.

ogy to help federal, state, and local authorities work together and with nongovernmental organizations to prepare for, prevent, respond to, recover from, and mitigate the effects of domestic incidents.⁶⁴ The NRF provides the “framework for all types of threats and hazards, ranging from accidents, technological hazards, natural disasters, and human-caused incidents.”⁶⁵

To ensure interoperability across all incidents and all levels of government, both NIMS and the NRF adopt a functional approach to all-hazard planning.⁶⁶ A key organizing principle of this functional approach is the series of 15 Emergency Support Functions (ESFs).⁶⁷ ESFs group governmental and some private sector capabilities into an organizational structure that categorizes the capabilities and services most likely to be needed when managing domestic incidents.⁶⁸ For example, in the case of the COVID-19 pandemic, the relevant ESF would be ESF-8 Public Health and Medical Services, under which HHS is the lead federal agency.⁶⁹

As explained in the next Section, the NRF assumes that most incidents “begin and end locally,”⁷⁰ but it carves out a greater role for the federal government in the case of catastrophic incidents that can overwhelm the capacity of state and local governments and may require countermeasures that are uniquely within the capacity of the federal government.⁷¹ The NRF also includes a series of threat-specific annexes that outline specific response plans for nine different types of incidents, including biological, cyber, food and agriculture, nuclear, and terrorist incidents.⁷²

B. Federalism

U.S. disaster policy has evolved along with our understanding of federalism and the appropriate role of the federal government in managing emergency risks.

⁶⁴ *Id.* at iii. See also HSPD-5, *supra* note 31, at 26.

⁶⁵ See NRF, *supra* note 23, at 3.

⁶⁶ *Id.* at 7.

⁶⁷ *Emergency Support Functions*, U.S. DEP’T HEALTH & HUM. SERVS., <https://www.phe.gov/Preparedness/support/esf8/Pages/default.aspx> (last visited Jan. 2, 2023).

⁶⁸ *Id.*

⁶⁹ ESF #8, titled Public Health and Medical Services, “[c]oordinates the mechanisms for assistance in response to an actual or potential public health and medical disaster or incident.” NRF, *supra* note 23, at 40. The categories in the support function “include but are not limited to the following: Public health; Medical surge support, including patient movement; Behavioral health services; Mass fatality management; and Veterinary, medical, and public health services.” *Id.*

⁷⁰ *Id.* at 6.

⁷¹ *Id.* at 6–7.

⁷² *Federal Interagency Operational Plans*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/emergency-managers/national-preparedness/frameworks/federal-interagency-operational-plans> (Apr. 30, 2021) (describing incident annexes).

The current structure of U.S. disaster policy involves government at all levels: federal, state, and local.⁷³ It assumes that state and local governments have primary responsibility for domestic localized disasters, whereas the federal government will take the lead in events of national significance and “catastrophic incidents” that would otherwise overwhelm the capabilities of state and local authorities.⁷⁴ The reliance on state and local governments for domestic localized events is consistent with the mandate of the Tenth Amendment: the federal government is one of enumerated powers, and all powers not delegated to the federal government are retained by the states, including police powers.⁷⁵

1. *Multi-Tier Structure of U.S. Disaster Policy*

As noted earlier, the Stafford Act is the primary statutory authority for federal disaster relief.⁷⁶ The Stafford Act grants the President the authority to make emergency declarations and provide disaster assistance along all the stages of the risk management cycle: preparedness, response, and recovery.⁷⁷ Federal authority under the Stafford Act is designed to supplement and support the primary activities of state and local authorities.⁷⁸ For example, the President is not authorized to declare a federal disaster unless a declaration is formally requested by a state governor.⁷⁹ The statement of congressional intent provides that the purpose of the Stafford Act is “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out *their* responsibilities to alleviate the suffering and damage which result from such disasters.”⁸⁰

FEMA is the federal agency charged with carrying out federal disaster policy and “leading and supporting the Nation in a risk-based, comprehensive emergency management system.”⁸¹ FEMA’s operations are governed by the NRF, which serves as a comprehensive guide to all types of disasters and emergencies.⁸² The NRF expressly acknowledges that the controlling principles of our national disaster policy

⁷³ See *supra* note 40 (discussing involvement of tribal nations).

⁷⁴ NRF, *supra* note 23, at 6.

⁷⁵ Briefly put, federalism is a system of shared sovereignty between the federal government and the states. Guaranteed by the Tenth Amendment, the contours of federalism are determined by U.S. Supreme Court precedent. U.S. CONST. amend. X.

⁷⁶ See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121-5208 (2018).

⁷⁷ *Id.* § 5170(a).

⁷⁸ See *id.* § 5121(b) (congressional statement of intent).

⁷⁹ *Id.* § 5170(a). An affirmative request from a governor is not required where an emergency or disaster takes place on federal property or involves a federal asset, such as the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma. *Id.* § 5171(a).

⁸⁰ *Id.* § 5121(b) (emphasis added).

⁸¹ 6 U.S.C. § 314(a)(9).

⁸² The NRF is the foundational document in U.S. disaster policy. NRF, *supra* note 23.

are “rooted in the federal system and the U.S. Constitution’s division of responsibilities between federal and state governments.”⁸³ The NRF assumes that disaster response requires “[l]ayered, mutually supporting capabilities of individuals, communities, the private sector, NGOs, and governments at all levels.”⁸⁴ This layered approach results in a multi-tier and multi-sector governance model that incorporates key roles for federal, state, and local authorities consistent with their capabilities and capacities.

As discussed in greater detail in Part IV, the multi-tier and multi-sector governance model at play in disaster policy resembles the type of MLG that political scientists have been studying in the context of the European Union, where decision-making authority around a specific policy domain is exercised at various levels of government in conjunction with third-party stakeholders.⁸⁵ In U.S. disaster policy, however, a shared governance model is dictated, at least in part, by the constitutional constraints of federalism.⁸⁶ For example, U.S. disaster policy anticipates that state and local authorities will take the lead for most domestic localized emergencies consistent with their inherent police powers.⁸⁷ In these cases, the federal government is supposed to play a mainly supporting role in terms of providing financial and logistical support and resources.⁸⁸ The goal is for emergency response efforts to be “federally supported, state managed, and locally executed.”⁸⁹ As the NRF notes, most incidents “begin and end locally and are managed and executed at the local . . . level.”⁹⁰

Not surprisingly, U.S. disaster policy carves out a greater role for the federal government in the case of a “catastrophic incident” where the capacity of state and local authorities would be overwhelmed.⁹¹ As explained in the policy documents, examples of catastrophic incidents would include Hurricane Katrina, a terrorist attack with weapons of mass destruction, and a pandemic.⁹² The NRF further defines a “catastrophic incident” as follows:

At the national level, a catastrophic incident is one of such extreme and remarkable severity or magnitude that the Nation’s collective capability to manage all response requirements would be overwhelmed, thereby posing potential threats to national security, national economic security, and/or the public

⁸³ *Id.* at 6.

⁸⁴ *Id.*

⁸⁵ *See supra* note 5 (describing MLG theory).

⁸⁶ *See NRF, supra* note 23, at 6.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 7–8, 15.

⁹⁰ *Id.* at 6.

⁹¹ *Id.* at 4.

⁹² *See id.* at ii, 4, 6.

health and safety of the Nation. A national catastrophic incident implies that the necessary resources are not available within expected timeframes for incident response. During a national catastrophic incident, decision makers would be forced to consider the landscape of requirements and prioritize resources to manage shortfalls rather than to address all needs at once. Such a situation would also require the extraordinary means of mobilizing and prioritizing national resources to alleviate human suffering; protect lives and property; reduce damage to natural, cultural, and historic resources; stabilize the Nation's economy; and ensure national security.⁹³

The enhanced role of the federal government in the case of catastrophic incidents makes sense in terms of marshaling capabilities and capacities. There are some instances where only the federal government has the means to address the threat. For example, in the case of a pandemic, the threat monitoring that occurs during the pre-pandemic intervals is international in scope and beyond the competence of state and local governments.⁹⁴ The development of medical countermeasures, such as vaccines and anti-viral drugs, would also be outside the abilities of the state and local authorities.⁹⁵

More importantly, the enhanced role for the federal government in the case of a catastrophic incident is consistent with notions of shared power and sovereignty that are at the heart of federalism. As noted in the NRF definition, increased federal responsibility for catastrophic incidents is justified by the presence of strong federal interests, such as national security or national economic interests.⁹⁶ For example, averting and managing the consequences of an attack from a terrorist group or a foreign country clearly falls within the enumerated power of the federal government to provide "for the common Defence."⁹⁷ Strong federal interests are also implicated when the scale of an incident exceeds the capacity of state and local actors to respond.

⁹³ *Id.* at 4. The NRF uses the definition of "catastrophic incident" that is contained in the Post-Katrina Emergency Management Reform Act of 2006. *Id.*; 6 U.S.C. § 701(4). The Act provides that "catastrophic incident" includes "any natural disaster, act of terrorism, or other man-made disaster that results in extraordinary levels of casualties or damage or disruption severely affecting the population (including mass evacuations), infrastructure, environment, economy, national morale, or government functions in an area." *Id.*

⁹⁴ *See, e.g.*, U.S. DEP'T OF HEALTH & HUM. SERVS., PANDEMIC INFLUENZA PLAN: 2017 UPDATE 11 (2017).

⁹⁵ *Id.* at 21–25. Although "[i]nitial responsibility for managing domestic incidents generally falls on State and local authorities," HSPD-5 provides that "[t]he Federal Government will assist State and local authorities when their resources are overwhelmed, or when Federal interests are involved." HSPD-5, *supra* note 31, at 6.

⁹⁶ NRF, *supra* note 23, at 4.

⁹⁷ U.S. CONST. art. I, § 8.

Of course, even when it is appropriate for FEMA and other U.S. government agencies to mobilize and provide assistance, states still retain considerable control over any disaster response. As noted earlier, the President must issue a major disaster or emergency declaration to authorize disaster assistance under the Stafford Act, but the President can only issue a declaration in response to a request from a state governor.⁹⁸ Once federal assistance is triggered, state bodies still retain considerable authority over the disaster response. For instance, governors “retain control of the state National Guard, and state disaster managers continue to decide what role, if any, they want FEMA to play in distributing emergency supplies.”⁹⁹

Although the response and recovery aspect of U.S. disaster policy are the most visible, U.S. disaster policy also commits considerable resources to preparedness efforts and risk mitigation. Once again, these efforts are divided across all levels of government. For example, the National Flood Insurance Program (NFIP) allows residents of communities that participate in the NFIP to purchase federally subsidized flood insurance.¹⁰⁰ The insurance is required for all federally regulated or insured loans on buildings located in high-risk areas.¹⁰¹ In exchange for participating, the communities must agree to restrict development and pass a floodplain management ordinance to reduce future flood risks to new construction in Special Flood Hazard Areas (SFHA).¹⁰² FEMA manages the NFIP and oversees the floodplain management and mapping of the SFHAs.¹⁰³

2. *Historic Understandings of Federalism*

Over the course of our nation’s history, the balance between state and federal power has been struck at different places at different points in time. As explained in greater detail in Section II, federal disaster assistance was relatively rare and completely ad hoc until the New Deal. This hands-off approach of the federal government was consistent with the then prevailing concept of dual federalism that prescribed separate and discrete categories of power where each government would have

⁹⁸ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5170(a) (2018).

⁹⁹ Richard Weitz, Senior Fellow, Hudson Inst., FEMA, DHS, and Katrina: Managing Domestic Catastrophes Better, Panel Presentation on Homeland Security: Coping with Natural and Man-Made Disasters at the Potomac Institute for Policy Studies 28 (Nov. 21, 2005) (on file with the Hudson Institute).

¹⁰⁰ NFIP was authorized by Congress in 1968 with the passage of the National Flood Insurance Act of 1968. National Flood Insurance Act of 1968, Pub. L. No. 90-448, § 82 Stat. 572, 575 (codified as amended at 42 U.S.C. § 4001(d) (2018)).

¹⁰¹ 42 U.S.C. § 4002(b)(4).

¹⁰² *Id.* § 4002(b)(3)–(4).

¹⁰³ *Id.*

its own layer of authority.¹⁰⁴ The visual cue for this type of federalism is a “layer cake” with separate, distinct, and easily identified tiers of authority.¹⁰⁵

The New Deal ushered in a new and looser view of federalism that was known as cooperative federalism.¹⁰⁶ This type of federalism is visualized as a swirling “marble cake” where federal and state power could mix and reinforce each other for the public good.¹⁰⁷ It is not surprising that this was the same time that the federal government began to assume a role in disaster policy, leading to the first standardization of federal disaster policy in 1950 with the enactment of the Federal Disaster Relief Act of 1950.¹⁰⁸ In the swirl of cooperative federalism, the federal government continued to assume greater responsibility for and control over disaster preparedness and response efforts. By the late 1960s, numerous federal agencies were involved in disaster policy,¹⁰⁹ and the National Flood Protection Act of 1968 enlisted the help of the states and localities in mitigating the flood risks while giving homeowners the opportunity to obtain federally backed flood insurance.¹¹⁰

The advent of New Federalism in the late 20th century argued for the devolution of power to the states.¹¹¹ New Federalism was first associated with the Nixon administration, and it had a direct impact on two important pieces of legislation: the Flood Disaster Protection Act of 1973 (FDPA) and Disaster Relief Act of 1974 (DRA).¹¹² The FDPA made participation in the NLIP mandatory for certain communities and the DRA carved out important roles for state and local authorities in

¹⁰⁴ Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 4 (1950) (documenting the passing of dual federalism).

¹⁰⁵ See Kevin M. Wagner, *Layer Cake Federalism*, CTR. FOR STUDY FEDERALISM, http://encyclopedia.federalism.org/index.php/Layer_Cake_Federalism (Oct. 2, 2018, 5:48 AM).

¹⁰⁶ *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 289 (1981) (stating that cooperative federalism “allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs”).

¹⁰⁷ MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* 8 (Daniel J. Elazar ed., 1966) (describing the “marble cake” system of government).

¹⁰⁸ Federal Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

¹⁰⁹ Andrew Morris, *How the Federal Government Became Responsible for Disaster Relief*, WASH. POST (Dec. 4, 2018, 6:00 AM), <https://www.washingtonpost.com/outlook/2018/12/04/how-federal-government-became-responsible-disaster-relief/>.

¹¹⁰ National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 572 (codified as amended at 42 U.S.C. §§ 4001–4131 (2018)).

¹¹¹ Judith Resnick, *Federalism's Options*, 14 YALE L. & POL'Y REV. (SYMPOSIUM ISSUE) 465, 467–69 (1996); John C. Blakeman & Christopher P. Banks, *The U.S. Supreme Court, New Federalism, and Public Policy*, in *CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY* 1, 2 (Christopher P. Banks ed., 2018).

¹¹² Flood Disaster Protection Act of 1973, 42 U.S.C. § 4002; Disaster Relief Act of 1974, 42 U.S.C. § 5121.

disaster relief.¹¹³ As President Nixon explained in a statement on the DRA, “[c]ombined with the Flood Disaster Protection Act that I signed into law on December 31, 1973, [DRA] truly brings the New Federalism to our disaster preparedness and assistance activities.”¹¹⁴

The question of how much responsibility the federal government should shoulder for disaster relief continued to provoke debate throughout the remainder of the 20th century.¹¹⁵ However, commitments to New Federalism in the context of disaster policy floundered after the September 11, 2001, terrorist attacks, which prompted a pronounced centralization of power within the federal executive branch.¹¹⁶ After the failed federal response to Hurricane Katrina, public and congressional sentiment shifted in favor of a greater role for federal authorities in disaster policy within limits. The House Committee convened to investigate the federal response to Hurricane Katrina threaded the needle of federalism carefully. It concluded: “Our investigation revealed that Katrina was a national failure, an abdication of the most solemn obligation to provide for the common welfare.”¹¹⁷ It also acknowledged that “[l]ocal control and state sovereignty are important principles rooted in the nation’s birth that cannot be discarded merely to achieve more efficient joint military operations on American soil.”¹¹⁸

C. *The Voluntary Sector*

The shared governance structure of U.S. disaster policy incorporates specific roles and responsibilities for nonprofit organizations and volunteers, reflecting the longstanding importance of the voluntary sector in the United States.¹¹⁹ Today, the

¹¹³ Flood Disaster Protection Act § 4002; Disaster Relief Act of 1974 § 5121.

¹¹⁴ Richard M. Nixon, Statement About the Disaster Relief Act of 1974 (May 22, 1974), <https://www.presidency.ucsb.edu/documents/statement-about-the-disaster-relief-act-1974>.

¹¹⁵ For example, George W. Bush’s first director of FEMA testified before Congress that FEMA was an “oversized entitlement program.” *Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations for 2002: Hearings Before the Subcomm. on VA, HUD, & Indep. Agencies, H. Comm. on Appropriations*, 107th Cong. 241 (2001) (statement of Joe Allbaugh, Dir. of FEMA) [hereinafter Statement of Joe Allbaugh]. He also said that expectations about the role of the federal government in disaster relief had “ballooned beyond what is an appropriate level.” *Id.*

¹¹⁶ See *infra* text accompanying notes 249–51 (describing the creation of DHS).

¹¹⁷ SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109-377, A FAILURE OF INITIATIVE, at x (2006) [hereinafter A FAILURE OF INITIATIVE].

¹¹⁸ *Id.* at 223.

¹¹⁹ NRF, *supra* note 23, at 3. There are also roles for private industry. *Id.* In the context of the pandemic, private industry has played a pivotal role private in developing medical countermeasures.

voluntary sector is comprised of nearly 1.8 million nonprofit organizations that employ approximately 10% of the private workforce nationwide.¹²⁰ Americans give over \$471 billion annually to charitable organizations¹²¹ and more than 63 million Americans serve as volunteers.¹²² Charitable organizations enjoy important federal subsidies, such as exemption from tax on income related to their exempt function and the ability to receive tax-deductible contributions.¹²³ Such organizations often play a vital role in responding to national and localized disasters. For example, charitable organizations received an estimated \$1.5 billion in contributions in response to the September 11, 2001, terrorist attacks.¹²⁴ They also played a significant role in Hurricane Katrina response and recovery efforts, raising \$3.27 billion in contributions.¹²⁵ In recognition of the important role played by the voluntary sector in the case of large-scale national disasters, Congress has frequently passed tax laws to provide extra incentives for charitable giving as part of disaster relief packages.¹²⁶

1. Multi-Sector Structure of U.S. Disaster Policy

The largest and perhaps best-known disaster relief organization in the United States is the American Red Cross, which is afforded a unique role under U.S. disaster policy.¹²⁷ Federal legislation expressly grants the American Red Cross, along with other charitable organizations, well-defined responsibilities in domestic disaster policy.¹²⁸ For example, the Stafford Act refers to the American Red Cross numerous

¹²⁰ INDEPENDENT SECTOR, HEALTH OF THE U.S. NONPROFIT SECTOR 7, 37 (2021) (outlining scope and breadth of the charitable sector).

¹²¹ *Id.* Charitable organizations are a subset of nonprofit organizations that qualify under § 501(c)(3) of the Internal Revenue Code. Charitable organizations enjoy two important federal tax subsidies: they are exempt from taxation on their income related to their exempt function and they are entitled to receive tax-deductible contributions. I.R.C. §§ 501(c)(3), 170(c).

¹²² The number of Americans who volunteer represents one-fourth of the adult population of the U.S. Independent Sector. *Volunteering Statistics and Trends For Nonprofits*, NONPROFITS SOURCE, <https://nonprofitsource.com/online-giving-statistics/volunteering-statistics/> (last visited Jan. 2, 2023).

¹²³ I.R.C. §§ 501(c)(3), 170(c).

¹²⁴ *Where'd the Money Go? Shady Dealings, Unaccountability Rife Among 9/11 Charities*, NBC NEWS (Aug. 25, 2011, 7:50 AM), <https://www.nbcnews.com/id/wbna44271766>.

¹²⁵ Jacqueline L. Salmon & Leef Smith, *Two-Thirds of Katrina Donations Exhausted Charities Faced with Difficult Decisions and Countless Requests as They Spend What Is Left*, WASH. POST (Feb. 27, 2006), <https://www.washingtonpost.com/archive/politics/2006/02/27/two-thirds-of-katrina-donations-exhausted-span-classbankheadcharities-faced-with-difficult-decisions-and-countless-requests-as-they-spend-what-is-leftspan/81b6c737-eb84-4aa2-b913-1b1a3f2ee54e/>.

¹²⁶ *See, e.g.*, Victims of Terrorism Tax Relief Act of 2001, I.R.C. § 2201(b)(2) (providing tax relief for the victims of the September 11 terrorist attacks and their survivors).

¹²⁷ William F. Shughart II, *Disaster Relief as Bad Public Policy*, 15 INDEP. REV. 519, 532 n.19 (2011).

¹²⁸ *See* Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5152(a) (2018).

times throughout the statute.¹²⁹ Section 403 of the Stafford Act specifically names “the American National Red Cross, the Salvation Army, the Mennonite Disaster Service, and other relief and disaster assistance organizations” as partners with federal, state, and local agencies in distributing medicine, food, and other aid to disaster victims.¹³⁰ In fact, the American Red Cross is so fully integrated throughout the Stafford Act that Congress saw fit to define the term “federal agency” to the express exclusion of the American Red Cross, thereby making it clear that the organization is not considered a federal agency for purposes of the statute.¹³¹ The fact that Congress thought it necessary to explain that the American Red Cross is not acting as federal agency speaks volumes regarding the extent to which the organization is an integral part of U.S. disaster policy.

The emphasis on charitable organizations in the Stafford Act is not surprising given that it was enacted at the end of the Reagan administration during a time of fiscal restraint and a heightened interest in volunteerism and private relief efforts.¹³² In the face of budget cuts, federal policy emphasized how the charitable community could help with “lessening of the burdens of Government.”¹³³ The period also saw an institutionalized recognition of individual volunteers with the Points of Light initiative under the administration of George H.W. Bush.¹³⁴ Given the large number

¹²⁹ *Id.* §§ 5134(c)(3), 5143, 5152(a)–(b).

¹³⁰ *Id.* § 5170b(a)(2).

¹³¹ *Id.* § 5122(9). The Stafford Act defines the term “federal agency” as “any department, independent establishment, Government corporation, or other agency of the executive branch of the Federal Government, including the United States Postal Service, but shall not include the American National Red Cross.” *Id.*

¹³² ALAN J. ABRAMSON & LESTER M. SALAMON, *THE NONPROFIT SECTOR AND THE NEW FEDERAL BUDGET 23–24* (1986) (citing the view of the Reagan administration that “a conflict exists between government and voluntary institutions and that the best way to aid the nonprofit sector is therefore to get government out of its way”).

¹³³ *Treas. Reg.* § 1.501(c)(3)–1(d)(2). The regulations include “lessening of the burdens of government” as a charitable purpose that qualifies for tax-exempt status:

Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

Id.

¹³⁴ President George H.W. Bush created the Points of Light Foundation in May 1990. *History*, POINTS OF LIGHT, <https://www.pointsoflight.org/history/> (last visited Jan. 2, 2023). In his inaugural address, President Bush invoked the image of “a thousand points of light” to call attention to the importance of volunteerism and leading to the creation of the Points of Light Foundation. *Id.* The President was authorized to establish the Points of Light Foundation as an independent nonprofit organization. *Points of Light Foundation Act*, Pub. L. No. 101-610, 104 Stat. 3180 (1990) (codified at 42 U.S.C. §§ 12661–64) (repealed 2009). President Bush created

of Americans who volunteer each year, it makes sense that U.S. disaster policy also includes distinct roles for volunteers and individual donations. For example, there is an annex to the NRF titled *Volunteer and Donations Management Support Annex* that addresses “the most efficient and effective use of unaffiliated volunteers, unaffiliated organizations, and unsolicited donated goods.”¹³⁵

Under the mandate of the Stafford Act, the American Red Cross works in partnership with FEMA on many aspects of disaster relief.¹³⁶ Its level of involvement is clear from the frequency with which it is referred to in the ESFs that help frame U.S. disaster policy. For example, ESF #6 is titled *Mass Care, Emergency Assistance, Temporary Housing, and Human Services Annex*.¹³⁷ It covers non-medical services, such as providing shelter, food, first aid, and emergency financial assistance during domestic disasters.¹³⁸ ESF #6 designates the American Red Cross as a “support agency” and lists numerous ways that it directly supports the efforts of FEMA, including providing staff to work at FEMA and help with mass care activities.¹³⁹ The American Red Cross is also specifically singled out by name and designated as a support agency under four additional ESFs: ESF #3—*Public Works and Engineering*,¹⁴⁰ ESF #8—*Public Health and Medical Services*,¹⁴¹ ESF #11—*Agriculture and Natural Resources*,¹⁴² and ESF #14—*Long-term Community Recovery*.¹⁴³

the daily Point of Light recognition for individuals engaged in outstanding service. *History, supra*. He acknowledged over 1,000 individuals over the course of his administration. *Id.*

¹³⁵ FED. EMERGENCY MGMT. AGENCY, VOLUNTEER AND DONATIONS MANAGEMENT SUPPORT ANNEX 1 (2013), https://www.fema.gov/sites/default/files/2020-07/fema_nrf_support-annex_volunteer.pdf.

¹³⁶ 42 U.S.C. § 5134(c)(3) (2018).

¹³⁷ FED. EMERGENCY MGMT. AGENCY, EMERGENCY SUPPORT FUNCTION #6—MASS CARE, EMERGENCY ASSISTANCE, TEMPORARY HOUSING, AND HUMAN SERVICES ANNEX (2016), https://www.fema.gov/sites/default/files/2020-07/fema_ESF_6_Mass-Care.pdf [hereinafter EMERGENCY SUPPORT FUNCTION #6].

¹³⁸ *Id.*

¹³⁹ *Id.* at 12.

¹⁴⁰ FED. EMERGENCY MGMT. AGENCY, EMERGENCY SUPPORT FUNCTION #3—PUBLIC WORKS AND ENGINEERING ANNEX 1 (2008), <https://www.fema.gov/pdf/emergency/nrf/nrf-esf-03.pdf>.

¹⁴¹ U.S. DEP’T OF HEALTH & HUM. SERVS., EMERGENCY SUPPORT FUNCTION #8—PUBLIC HEALTH AND MEDICAL SERVICES, https://www.fema.gov/sites/default/files/2020-07/fema_ESF_8_Public-Health-Medical.pdf.

¹⁴² U.S. DEP’T OF HEALTH & HUM. SERVS., EMERGENCY SUPPORT FUNCTION #11—AGRICULTURE AND NATURAL RESOURCES, <https://www.fema.gov/pdf/emergency/nrf/nrf-esf-11.pdf>.

¹⁴³ U.S. DEP’T OF HEALTH & HUM. SERVS., EMERGENCY SUPPORT FUNCTION #14—LONG-TERM COMMUNITY RECOVERY, <https://www.fema.gov/pdf/emergency/nrf/nrf-esf-14.pdf>. Both ESF #5 and #15 incorporate the American Red Cross by reference because they are directed at “all support organizations” under any other ESFs, which includes the American Red Cross. U.S. DEP’T OF HEALTH & HUM. SERVS., EMERGENCY SUPPORT FUNCTION #5—INFORMATION AND PLANNING

The important role played by nongovernmental actors is also highlighted in the initial DHS planning documents.¹⁴⁴ HSPD-5 specifically states:

The Federal Government recognizes the role that the private and nongovernmental sectors play in preventing, preparing for, responding to, and recovering from terrorist attacks, major disasters, and other emergencies. The Secretary will coordinate with the private and nongovernmental sectors to ensure adequate planning, equipment, training, and exercise activities and to promote partnerships to address incident management capabilities.¹⁴⁵

The umbrella organization, National Voluntary Organizations Active in Disaster (National VOAD), represents over 70 national relief organizations.¹⁴⁶ National VOAD is actively engaged in the development of disaster policy,¹⁴⁷ and it has created a technology platform, Disaster Agency Technology Response Technology (DART), to help coordinate relief efforts.¹⁴⁸ ESF #6 specifically mentions the information-sharing function of the National VOAD.¹⁴⁹ It also lists National VOAD as a “support agency” and includes its member organizations along with a description of their abilities and capacities.¹⁵⁰

2. *Historic Reliance on the Voluntary Sector*

This principle of relying on private groups and individuals during disasters and emergencies has deep historical roots in the United States. In his influential book *Democracy in America*, Alexis de Tocqueville underscored the unique and essential role that charitable organizations and associations play in the lives of Americans.¹⁵¹ As Tocqueville famously explained:

The political associations that exist in the United States form only a detail in the midst of the immense picture that the sum of associations presents there.

https://www.fema.gov/sites/default/files/2020-07/fema_ESF_5_Information-Planning.pdf (last visited Jan. 22, 2023); U.S. DEP'T OF HEALTH & HUM. SERVS., EMERGENCY SUPPORT FUNCTION #15, EXTERNAL AFFAIRS, https://www.fema.gov/sites/default/files/2020-07/fema_ESF_15_External-Affairs.pdf (last visited Jan. 2, 2023).

¹⁴⁴ See HSPD-5, *supra* note 31.

¹⁴⁵ *Id.* § 7.

¹⁴⁶ *About Us*, NAT'L VOLUNTARY ORGS. ACTIVE IN DISASTER, <https://www.nvoad.org/about-us/> (last visited Jan. 2, 2023).

¹⁴⁷ *Our Work*, NAT'L VOLUNTARY ORGS. ACTIVE IN DISASTER, <https://www.nvoad.org/our-work/> (last visited Jan. 2, 2023).

¹⁴⁸ *Disaster Agency Response Technology (DART)*, NAT'L VOLUNTARY ORGS. ACTIVE IN DISASTER, <https://www.nvoad.org/disaster-agency-response-technology-dart/> (last visited Jan. 2, 2023).

¹⁴⁹ EMERGENCY SUPPORT FUNCTION #6, *supra* note 137, at 8.

¹⁵⁰ *Id.*

¹⁵¹ TOCQUEVILLE, *supra* note 41, at 489.

Americans of all ages, all conditions, all minds constantly unite. Not only do they have commercial and industrial associations in which all take part, but they also have a thousand other kinds: religious, moral, grave, futile, very general and very particular, immense and very small; Americans use associations to give fêtes, to found seminaries, to build inns, to raise churches, to distribute books, to send missionaries to the antipodes; in this manner they create hospitals, prisons, schools. Finally, if it is a question of bringing to light a truth or developing a sentiment with the support of a great example, they associate. Everywhere that, at the head of a new undertaking, you see the government in France and a great lord in England, count on it that you will perceive an association in the United States.¹⁵²

In addition to being a unique part of our national heritage,¹⁵³ commentators have also made the case that a vibrant voluntary sector promotes democracy and pluralism¹⁵⁴ and lessens the burdens of government.¹⁵⁵ They argue that the voluntary sector plays an essential role in shaping the democratic character of contemporary American society.¹⁵⁶

Charitable organizations are thought to decentralize decision-making and further pluralism by allowing the preferences of minorities to have a greater impact on social policy.¹⁵⁷ They are also considered to have a redistribution function and, therefore, address inequality.¹⁵⁸ Despite some detractors, the voluntary sector in the

¹⁵² *Id.*

¹⁵³ PETER DOBKIN HALL, *INVENTING THE NONPROFIT SECTOR AND OTHER ESSAYS ON PHILANTHROPY, VOLUNTARISM, AND NONPROFIT ORGANIZATIONS* 2 (1992) (noting the “special character” and “crucially important function in the American polity” of the voluntary sector).

¹⁵⁴ See generally ARNAUD C. MARTS, *PHILANTHROPY’S ROLE IN CIVILIZATION* (1953). “The story of these voluntary enterprises is the story of America at its best. Our freedom to give to such institutions or not to give—in our own way and for our own reasons—is one of the significant manifestations of the American Way of Life.” Karl T. Compton, *Foreword* to ARNAUD C. MARTS, *PHILANTHROPY’S ROLE IN CIVILIZATION*, at ix, ix (1953).

¹⁵⁵ See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 13–15 (12th ed. 2019) (describing the “lessening the burdens” rationale). As noted earlier, the phrase “lessening the burdens” is a term of art defined by the IRS Regulations under § 501(c)(3). It is one of the categories under which an organization can qualify under § 501(c)(3) as a “charitable” organization that is both tax-exempt on its income related to its exempt function and entitled to receive tax-deductible contributions. Treas. Reg. § 1.501(c)(3)–1(d)(2). The regulations define the term “charitable” to include, *inter alia*, the “erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government.” *Id.* To qualify as a charitable organization on this basis, an organization must show: (i) an “objective manifestation” that the government considers the activity in question to be its responsibility; and (ii) evidence that the organization in fact lessens the government’s burden by assuming the activity. *Id.*

¹⁵⁶ HALL, *supra* note 153, at 2.

¹⁵⁷ HOPKINS, *supra* note 155, at 11 (describing “pluralism of institutions”).

¹⁵⁸ Avner Ben-Ner, *Who Benefits from the Nonprofit Sector? Reforming Law and Public Policy Towards Nonprofit Organizations*, 104 *YALE L.J.* 731, 732 (1994) (reviewing CHARLES T.

United States enjoys broad support, and it is considered to be unique in terms of its breadth and diversity.¹⁵⁹ As explained in Part II below, the voluntary sector shouldered the burden of disaster relief for the first 150 years of our nation's history with some support from state and local authorities and minimal ad hoc support from the federal government.

II. A BRIEF HISTORY OF U.S. DISASTER POLICY

Today, the fact that the federal government leads our national disaster relief efforts is taken for granted. Although there may be controversy regarding the quality or scope of its relief efforts, there is no debate over whether the federal government should play a role in disaster relief.¹⁶⁰ This was not always the case. The federal government largely eschewed responsibility for disasters and emergency incidents for the first 150 years of our nation's history.¹⁶¹ During this period of dual federalism, disaster relief was considered to fall clearly within the retained police powers of the states.¹⁶² The federal government did not begin to institutionalize its role in disaster policy until the advent of cooperative federalism and the New Deal, and FEMA was not created until 1979.¹⁶³

This Section outlines a brief history of U.S. disaster policy by focusing on four key stages in the evolution of our national disaster preparedness and response policy:

CLOTFELTER, WHO BENEFITS FROM THE NONPROFIT SECTOR? (Charles T. Clotfelter ed., 1992) (noting the “expectation that nonprofit organizations should provide some measure of charity”). See generally Charles T. Clotfelter, *The Distributional Consequences of Nonprofit Activities*, in WHO BENEFITS FROM THE NONPROFIT SECTOR? 1 (Charles T. Clotfelter ed., 1992) (describing the distributional impact of the favored status of charitable organizations).

¹⁵⁹ See CHARLES T. CLOTFELTER, FEDERAL TAX POLICY AND CHARITABLE GIVING 1 (1985) (“The nonprofit sector—as distinct from government and the for-profit sector—plays a more important role in the United States than in any other industrialized economy.”).

¹⁶⁰ When asked what sort of role the federal government should play in disaster relief for natural disasters, 89% of the people surveyed responded that the federal government should have a “major role,” which was the highest level of participation. *Government Gets Lower Ratings for Handling Health Care, Environment, Disaster Response*, PEW RSCH. CTR. (Dec. 14, 2017) <https://www.pewresearch.org/politics/2017/12/14/government-gets-lower-ratings-for-handling-health-care-environment-disaster-response/>. The only category that scored a higher level of involvement for the federal government was terrorism. *Id.* Ninety-four percent of people surveyed responded that the federal government should play a “major role” in keeping the country safe from terrorism. *Id.* But see Emily C. Skarbek, *The Chicago Fire of 1871: A Bottom-Up Approach to Disaster Relief*, 160 PUB. CHOICE 155, 156 (2014) (arguing that “[b]oth examples of government failure and economic theory suggest that federal disaster management may not be the best way of supplying relief”).

¹⁶¹ Off. of Pol’y Dev. & Rsch., U.S. Dep’t Hous. & Urb. Dev., *History of Federal Disaster Policy*, EVIDENCE MATTERS, Winter 2015, at 10.

¹⁶² See U.S. CONST. amend. X.

¹⁶³ Exec. Order No. 12,127, 44 Fed. Reg. 19,367–68 (Apr. 3, 1979).

(1) ad hoc assistance, (2) cooperative federalism, (3) civil defense, and (4) centralized federal coordination. The first Subsection describes the ad hoc nature of disaster relief that defined the first 150 years of U.S. history. The second Subsection charts the beginning of federal involvement in disaster policy during the New Deal. The next Subsection focuses on the shift toward civil defense priorities that took place during the Cold War, and the final Subsection explores the standardization of federal support for disasters and emergencies with the advent of FEMA and the Stafford Act.

A. *Early Disaster Relief*

In the early days of the United States, private charities and associations were primarily responsible for disaster and emergency relief, and they enjoyed only minimal support from state and local authorities. To the extent any federal disaster relief was forthcoming, it was provided solely on an ad hoc basis.¹⁶⁴ During the period from 1803 to 1950, Congress passed 128 separate laws dealing with disaster relief.¹⁶⁵ Some of the laws simply expressed sympathy for the affected, whereas others provided modest amounts of aid.¹⁶⁶

Congress passed the first congressional disaster appropriation in 1803 in response to a devastating fire in Portsmouth, New Hampshire, that occurred on December 26, 1802.¹⁶⁷ The fire had destroyed large areas of the Portsmouth seaport and 114 buildings.¹⁶⁸ A voluntary committee of prominent citizens was established to solicit and coordinate private contributions to fund relief efforts.¹⁶⁹ Archival letters show that Thomas Jefferson, who was in his first term as President, contributed \$100 to the relief efforts.¹⁷⁰ Jefferson's only request was that his contribution should remain anonymous.¹⁷¹ Although the relief committee eventually raised \$45,000, the disruption to the seaport was so severe that there was concern that it could threaten

¹⁶⁴ FED. EMERGENCY MGMT. AGENCY, A CITIZEN'S GUIDE TO DISASTER ASSISTANCE 3–2 (2003).

¹⁶⁵ *Id.*

¹⁶⁶ RUTHERFORD H. PLATT, DISASTERS AND DEMOCRACY 1 (1999).

¹⁶⁷ Act of Jan. 14, 1803, ch. 6, 2 Stat. 201 (providing relief to the sufferers by fire in the Town of Portsmouth).

¹⁶⁸ *Portsmouth Fire Relief Papers, 1802–1803* PORTSMOUTH ATHENAEUM, <https://portsmouthathenaeum.org/portsmouth-fire-relief-71/> (last visited Jan. 2, 2023).

¹⁶⁹ *Id.*

¹⁷⁰ Letter from Thomas Jefferson to John Langdon (Jan. 11, 1803), <https://founders.archives.gov/documents/Jefferson/01-39-02-0268>. President Jefferson wrote: “We learn by the public papers that a great calamity by fire has happened to Portsmouth, and that yourself and some others are appointed to receive contributions for the distressed sufferers and to distribute them. I take the liberty of inclosing to yourself an hundred dollars for this purpose.” *Id.*

¹⁷¹ *Id.* President Jefferson asked, “I observe the trustees say in the papers that they will make a record of the donations. I pray that in my case it may be of the sum only, without the name. the [sic] former I suppose is necessary in making up your accounts.” *Id.*

U.S. commerce.¹⁷² Private charity seemed ill-equipped to address the scope of the devastation, given that much of the population of Portsmouth was left homeless and so many buildings had been destroyed.¹⁷³ Congress passed legislation that provided relief for the merchant class by suspending bond payments for several months to allow for rebuilding.¹⁷⁴

Federal disaster relief continued on this ad hoc basis until Congress passed the Disaster Relief Act of 1950, which authorized the President to declare a federal disaster.¹⁷⁵ Even these ad hoc bills, however, were not without controversy and were often blocked.¹⁷⁶ For example, President Grover Cleveland vetoed a bill in 1887 that would have provided \$10,000 to Texas farmers experiencing a drought.¹⁷⁷ His rationale was federalism:

I can find no warrant for such an appropriation in the Constitution; and I do not believe that the power and duty of the General Government ought to be extended to the relief of individual suffering which is in no manner properly related to the public service or benefit. A prevalent tendency to disregard the limited mission of this power and duty should, I think, be steadily resisted, to the end that the lesson should be constantly enforced that, though the people support the Government, the Government should not support the people.¹⁷⁸

The successful disaster bills dealt primarily with high-profile disasters, such as the 1906 San Francisco Earthquake.¹⁷⁹ The passage of the Posse Comitatus Act in 1878 also had an influence on the type of federal disaster relief that could be offered because it prohibited the use of the federal military from being used for civilian law enforcement.¹⁸⁰ The Posse Comitatus Act continues to constrain relief efforts today.¹⁸¹ Under current law, the federal military is permitted to be used for limited disaster relief, but not law enforcement.¹⁸² National Guard troops under the control of a state governor may be used for law enforcement purposes.¹⁸³

¹⁷² PORTSMOUTH ATHENAEUM, *supra* note 168.

¹⁷³ *Id.*

¹⁷⁴ Act of Jan. 14, 1803, ch. 6, 2 Stat. 201.

¹⁷⁵ Federal Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

¹⁷⁶ HENRY B. HOGUE & KEITH BEA, CONG. RSCH. SERV., RL33369, FEDERAL EMERGENCY MANAGEMENT AND HOMELAND SECURITY ORGANIZATION: HISTORICAL DEVELOPMENTS AND LEGISLATIVE OPTIONS 4–5 (2006).

¹⁷⁷ 18 CONG. REC. 1875 (1887).

¹⁷⁸ *Id.*

¹⁷⁹ *San Francisco Earthquake, 1906*, NATIONAL ARCHIVES, <https://www.archives.gov/legislative/features/sf> (Sept. 30, 2020).

¹⁸⁰ JENNIFER K. ELSEA & R. CHUCK MASON, CONG. RSCH. SERV., RS22266, THE USE OF FEDERAL TROOPS FOR DISASTER ASSISTANCE: LEGAL ISSUES 1–2 (2012).

¹⁸¹ 18 U.S.C. § 1385.

¹⁸² *Id.*

¹⁸³ *Id.* State governments have a network of mutual assistance agreements under the auspices

B. *The New Deal*

The Great Depression unleashed a decade of severe economic hardship, lasting from 1929 until about 1939.¹⁸⁴ Between 1929 and 1933, the unemployment rate in the United States reached 25%.¹⁸⁵ The stock market lost more than half its value.¹⁸⁶ Thousands of banks went out of business, and industrial output was cut in half.¹⁸⁷

Initial attempts by the Hoover administration to provide indirect aid to struggling states and localities had little impact on the dire situation.¹⁸⁸ However, one innovation introduced by the Hoover administration is arguably the first federal disaster relief agency. Created in January 1932, the Reconstruction Finance Corporation (RFC) was originally empowered to provide loans only to private businesses and industry.¹⁸⁹ In July 1932, Congress passed the Emergency Relief Bill, which extended the authority of the RFC to provide financial support for agriculture, states, and local authorities and to make loans for repair and reconstruction after a disaster.¹⁹⁰

The following year, Franklin Delano Roosevelt was sworn in as President. In his first inaugural address, Roosevelt announced that he would ask Congress for “broad Executive power to wage a war against the emergency.”¹⁹¹ His New Deal policies and programs had an expansive view of federal power—one that was not initially shared by the U.S. Supreme Court.¹⁹² The Court blocked key components

of the Emergency Mutual Aid Compact that allows them to aid one another during an emergency by sharing state National Guard troops and other resources. Sylvia Moreno, *Many Helping Hands Ease the Pain*, WASH. POST, Sept. 7, 2005, at A14. National Guard units from 18 states besides Louisiana were deployed in the region to assist with post-Katrina recovery effort. *Id.*

¹⁸⁴ Christina D. Romer, *Great Depression*, BRITANNICA, <https://www.britannica.com/event/Great-Depression> (Aug. 23, 2022).

¹⁸⁵ David C. Wheelock, *The Great Depression: An Overview*, in FEDERAL RESERVE BANK OF ST. LOUIS, *THE GREAT DEPRESSION* xi, xi (2007), <https://www.stlouisfed.org/the-great-depression/curriculum/lesson-plans>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ For example, President Hoover created the Emergency Committee for Employment in October 1930 to help boost the economy, but it had little funding. *The Great Depression*, HERBERT HOOVER PRESIDENTIAL LIBR. & MUSEUM, <https://hoover.archives.gov/exhibits/great-depression> (last visited Jan. 2, 2023).

¹⁸⁹ Reconstruction Finance Corporation Act, Pub. L. No. 72-2, § 5, 47 Stat. 5 (1932).

¹⁹⁰ Reconstruction Finance Corporation Act § 5; Emergency Relief and Construction Act of 1932, Pub. L. No. 72-302, § 201, 520 Stat. 709 (1932).

¹⁹¹ *First Inaugural Address of Franklin D. Roosevelt*, AVALON PROJECT, https://avalon.law.yale.edu/20th_century/froos1.asp (last visited Jan. 2, 2023).

¹⁹² JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 20–21 (2010).

of Roosevelt's New Deal, such as the National Industrial Recovery Act and the Agricultural Adjustment Act, on federalism grounds.¹⁹³ Laboring under the dual federalism model of divided sovereignty, the Court required federal economic programs to respect the discrete zones of power prescribed under "layer cake" federalism.¹⁹⁴ As Roosevelt grew more frustrated, he proposed a controversial court-packing plan in 1937 that would have added one Justice to the Court for each Justice who was over the age of 70.¹⁹⁵ In the face of such radical reform, the Court upheld the National Labor Relations Act of 1935 as constitutional, ruling that Congress can use its authority under the Commerce Clause to regulate both manufacturing activities and labor-management relations.¹⁹⁶ This decision and others led to the rise of cooperative federalism where federal, state, and local authorities can be shared in a model that looks more like a marble cake.¹⁹⁷

In this new swirl of federal, state, and local authority, Congress enacted workplace protections, agricultural subsidies, unemployment insurance, and old-age benefits (Social Security).¹⁹⁸ It is not surprising that this was also the time when the federal government began to assume great responsibility for disaster relief, including risk management mitigation efforts.¹⁹⁹ When Roosevelt took office, he reinvigorated and expanded the powers of the RFC, which was already authorized to provide disaster relief.²⁰⁰ In 1933, Congress created the Tennessee Valley Authority, which was designed to not only produce hydroelectric power, but also reduce flooding in the

¹⁹³ *United States v. Butler*, 297 U.S. 1, 3 (1936) (invalidating Agricultural Adjustment Act of 1933 on federalism grounds); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (invalidating National Industrial Recovery Act of 1933).

¹⁹⁴ In *Butler*, 297 U.S. at 68, the Court stated: "The act invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."

¹⁹⁵ See SHESOL, *supra* note 192, at 261–64.

¹⁹⁶ See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹⁹⁷ John Joseph Wallis & Wallace E. Oates, *The Impact of the New Deal on American Federalism*, in *THE DEFINING MOMENT: THE GREAT DEPRESSION AND THE AMERICAN ECONOMY IN THE TWENTIETH CENTURY* 155, 156 (Michael D. Bordo, Claudia Goldin & Eugene N. White, eds., 1998) (discussing the impact of the New Deal on federalism by analyzing fiscal flows and intergovernmental grants).

¹⁹⁸ *Id.* at 167–68, 170–71.

¹⁹⁹ Although the involvement of the federal government in disaster policy is typically traced to the New Deal, John Barry's book on the Great Mississippi Flood of 1927 suggests that the involvement started sooner. See generally JOHN M. BARRY, *RISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA* (1997).

²⁰⁰ *Reconstruction Finance Corporation*, BRITANNICA, <https://www.britannica.com/topic/Reconstruction-Finance-Corporation> (Feb. 1, 2015).

region.²⁰¹ The following year, Congress gave the Bureau of Public Roads the authority to finance the reconstruction of highways and roads after a disaster.²⁰² The Flood Control Act of 1936 gave the U.S. Army Corps of Engineers increased authority to design and build flood control projects.²⁰³ Ten years later, the Flood Control Act of 1944 gave the U.S. Army Corps of Engineers greater authority over flood control and irrigation projects.²⁰⁴ The increased federal involvement was premised on power sharing not only with state and local governments, but also with nongovernmental relief organizations, such as the American Red Cross.²⁰⁵

C. *The Cold War and Civil Defense*

Despite the advent of cooperative federalism in the 1930s, federal disaster relief was not standardized until the passage of the Federal Disaster Relief Act of 1950.²⁰⁶ The Federal Disaster Relief Act standardized the threshold for federal disaster relief and introduced the concept of the now ubiquitous federal disaster declaration.²⁰⁷ The Act authorized the President to declare a major disaster and provide federal assistance in response to a request for help from a governor.²⁰⁸ This reactive nature of federal disaster relief continues to the present day, where federal disaster relief is administered on a “pull” and not “push” basis.²⁰⁹ The federal interests remain subordinate to the police power of the states, and therefore, governors must affirmatively invite federal assistance.²¹⁰

After the passage of the Federal Disaster Relief Act, the remainder of the decade was defined by the Cold War, and the principal emergency risk was nuclear war and nuclear fallout.²¹¹ Civil defense forces and programs were administered on the state

²⁰¹ Tennessee Valley Authority Act, Pub. L. No. 73–17, 48 Stat. 58 (1933) (codified as amended at 16 U.S.C. § 831).

²⁰² *Emergency Management Institute (EMI) Overview*, FED. EMERGENCY MGMT. AGENCY, <https://training.fema.gov/history.aspx> (Oct. 19, 2019).

²⁰³ Flood Control Act of 1936, Pub. L. No. 74–738, 49 Stat. 1570 (1936).

²⁰⁴ Pick-Sloan Flood Control Act of 1944, Pub. L. No. 78–534, 58 Stat. 887 (codified at 33 U.S.C. § 701-1).

²⁰⁵ See Paul M. Schoenhard, *A Three Dimensional Approach to the Public–Private Distinction*, 2008 UTAH L. REV. 635, 642 (2008).

²⁰⁶ Federal Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109 (1950).

²⁰⁷ *Id.*

²⁰⁸ *Id.* § 1109–10.

²⁰⁹ The reactive posture of the federal government came under heavy criticism post-Katrina. EXEC. OFF. PRESIDENT, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 54 (2006).

²¹⁰ There is an exception where the incident occurs on federal land or involves federal assets. Not the case for federal lands or other federal interests. 42 U.S.C. § 5171(a).

²¹¹ *Civil Defense Through Eisenhower*, NAT'L PARK SERV., https://www.nps.gov/articles/coldwar_civildefense_thru-ike.htm (Oct. 20, 2020).

and local levels across the country.²¹² Individual homeowners installed bomb shelters, and school children practiced how to “duck and cover” under their desks.²¹³ The federal government supported these activities through the Federal Civil Defense Administration (FCDA).²¹⁴ Congress also created a companion office to the FCDA that was called the Office of Defense Mobilization.²¹⁵ Located in the U.S. Department of Defense (DoD), the mission of FCDA was to oversee a quick mobilization of materials, along with the production and stockpiling of critical materials in the event of a war.²¹⁶ The two offices were merged in 1958 and became the Office of Civil and Defense Mobilization (OCDM).²¹⁷

The Cold War continued to dominate the conversation in 1961 when the Kennedy administration split off the responsibility for natural disasters that had been held by OCDM and created the Office of Emergency Planning (OEP) within the Executive Office of the President.²¹⁸ Civil defense responsibilities remained in the OCDM within the DoD.²¹⁹ Even with the newly created OEP, the federal disaster assistance following an incident was still largely the result of ad hoc appropriation bills. The heavy losses caused by Hurricane Betsy in 1965 across Florida and Louisiana ignited a national discussion regarding insurance as a form of protection against future floods and other disasters.²²⁰ These conversations resulted in the eventual passage of the National Flood Insurance Act of 1968, which created the National Flood Insurance Plan (NFIP) and introduced the notion of community-based mitigation to U.S. disaster policy.²²¹

²¹² *Id.*

²¹³ *Id.*

²¹⁴ The FCDA was created by President Truman on December 1, 1950, through Executive Order 10,186. Exec. Order No. 10,146, 15 Fed. Reg. 8557 (Dec. 5, 1950). The FCDA became an agency several weeks later with the passage of the Federal Civil Defense Act of 1950. Federal Civil Defense Act of 1950, Pub. L. No. 81–920, 64 Stat. 1245.

²¹⁵ The Office of Defense Mobilization was created by Executive Order 10,193 on December 16, 1950. Exec. Order No. 10,193, 15 Fed. Reg. 9031 (Dec. 19, 1950).

²¹⁶ *Id.*; Exec. Order No. 10,146, 15 Fed. Reg. 8557 (Dec. 5, 1950).

²¹⁷ Reorganization Plan No. 1 of 1958, Pub. L. No 85–763, 72 Stat. 861.

²¹⁸ Exec. Order No. 11,051, 27 Fed. Reg. 9683 (Sept. 27, 1962).

²¹⁹ *Id.*

²²⁰ Justin Doom, *National Flood Insurance Program in Deep Waters*, COLUM. BUS. SCH. (July 13, 2017), <https://www8.gsb.columbia.edu/articles/ideas-work/national-flood-insurance-program-deep-waters>.

²²¹ National Flood Insurance Act of 1968, 42 U.S.C. § 4001(a), (c).

D. Federal Emergency Management Agency and National Disaster Planning

By the 1970s, numerous federal agencies were involved in some aspects of disaster and emergency management efforts.²²² In 1973, the Presidential Reorganization Plan Number 2 of 1973 moved many of these functions to HUD and the Federal Disaster Assistance Administration, which oversaw disasters until it was merged into FEMA in 1979.²²³ The following year, the Disaster Relief Act of 1974 passed both houses of Congress unanimously.²²⁴ It authorized the President to establish a program of disaster preparedness, declare a major emergency, and make grants to state and local authorities.²²⁵ Representing a turn towards New Federalism, the DRA clarified that, “It is the intent of Congress, by this chapter, to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out *their* responsibilities to alleviate the suffering and damage which result from such disasters”²²⁶

Despite the attempts to consolidate federal authority over disaster relief, state governors started to lobby for the creation of an independent federal agency that would have primary responsibility for emergency management and streamline efforts.²²⁷ While these discussions were ongoing, the Three Mile Island disaster occurred on March 28, 1979, exposing a glaring lack of disaster preparedness in the context of commercial nuclear energy.²²⁸ Less than three months later, President Carter sent Congress the Reorganization Plan Number 3 of 1978, which combined preparedness, mitigation, and response activities into one independent federal agency—FEMA.²²⁹ Reorganization Plan Number 3 further provided that the FEMA

²²² These agencies included the Department of Commerce (weather and fire protection), the General Services Administration (continuity of government, stockpiling, and federal preparedness), the Treasury Department (import investigation), the Nuclear Regulatory Commission (power plants), and HUD (flood insurance and disaster relief).

²²³ Reorganization Plan No. 2 Of 1973, 38 Fed. Reg. 15,932 (Mar. 16, 1974); Exec. Order No. 12,148 3 C.F.R. 412 (1979).

²²⁴ Disaster Relief Act of 1974, 42 U.S.C. § 5121; 120 CONG. REC. 10,537 (1974) (unanimous passage in the Senate on April 10, 1974); 120 CONG. REC. 14,713 (1974) (unanimous passage in the House on May 15, 1974).

²²⁵ 42 U.S.C. § 5121(b)(2), (6).

²²⁶ 42 U.S.C. § 5121(b) (emphasis added).

²²⁷ GEORGE D. HADDOW, JAN A. BULLOCK & DAMON P. COPPOLA, INTRODUCTION TO EMERGENCY MANAGEMENT 5 (5th ed. 2014).

²²⁸ U.S. GENERAL ACCT. OFF., EMD-80-109, THREE MILE ISLAND: THE MOST STUDIED NUCLEAR ACCIDENT IN HISTORY (1980).

²²⁹ Reorganization Plan No. 3 of 1978, 43 Fed. Reg. 41,943 (June 19, 1978).

director would report directly to the President.²³⁰ The Plan also articulated four “fundamental principles”:²³¹

First, Federal authorities to anticipate, prepare for, and respond to major civil emergencies should be supervised by one official responsible to the President and given attention by other officials at the highest levels.

....

Second, an effective civil defense system requires the most efficient use of all available resources.

....

Third, whenever possible, emergency responsibilities should be extensions of federal agencies.

....

Fourth, federal hazard mitigation activities should be closely linked with emergency preparedness and response functions.²³²

After Congress reviewed and approved the plan, President Carter created FEMA by Executive Order 12127 on March 31, 1979.²³³ President Carter issued a second Executive Order 12148 on July 20, 1979, which reassigned programs and personnel to FEMA, including the civil defense functions of DoD.²³⁴ Accordingly, FEMA had a dual mission: (1) safeguard our national security and (2) coordinate

²³⁰ *Id.* In his statement accompanying Reorganization Plan Number 3, President Carter stated, “For the first time, key emergency management and assistance functions would be unified and made directly accountable to the President and Congress.” 124 CONG. REC. 18,093 (1978).

²³¹ *Id.*

²³² *Id.*

²³³ Exec. Order No. 12,127, 44 Fed. Reg. 19,367–68 (Apr. 3, 1979).

²³⁴ Reorganization Plan No. 3 at 41,944. Reorganization Plan Number 3 transferred the following agencies or functions to FEMA: National Fire Prevention Control Administration (Department of Commerce), Federal Insurance Administration (HUD), Federal Broadcast System (Executive Office of the President), Defense Civil Preparedness Agency (DoD), Federal Disaster Assistance Administration (HUD), and the Federal Preparedness Agency (GSA).

Additional transfers of emergency preparedness and mitigation functions to FEMA were:

- Oversight of the Earthquake Hazards Reduction Program (Office of Science and Technology Policy).
- Coordination of dam safety (Office of Science and Technology Policy).
- Assistance to communities in the development of readiness plans for severe weather-related emergencies.
- Coordination of natural and nuclear disaster warning systems.
- Coordination of preparedness and planning to reduce the consequences of major terrorist incidents.

comprehensive disaster relief.²³⁵ The dual nature of FEMA’s mission has caused continuing challenges to FEMA’s operations as national priorities have shifted between issues of national security and natural disasters.²³⁶

Congress revisited disaster relief in 1988 with the passage of the Stewart McKinney–Robert Stafford Act of 1988, known as the Stafford Act, which amended the Disaster Relief Act of 1974.²³⁷ As noted earlier, the Stafford Act provides the statutory authority for much of our federal disaster policy, including the basic rules governing when the President can declare a federal “emergency” or a “major disaster” after a request from the governor of the affected state or territory.²³⁸ In both cases, the declaration unlocks a cascade of federal aid and assistance, but a federal emergency is considered more limited in scope and, therefore, triggers a more limited federal response.²³⁹ The Stafford Act defines “emergency” as:

[A]ny occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.²⁴⁰

A major disaster is defined as “any natural catastrophe . . . or, regardless of cause, any fire, flood, or explosion . . . which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance . . . to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage[.]”²⁴¹

III. LESSONS FROM PAST DISASTERS

This Part discusses three disasters of national significance that sparked demands for reform after perceived failures of preparedness, response, and/or recovery. In the case of the first two disasters—September 11 and Hurricane Katrina—significant reforms were enacted shortly after the events to address the identified cause of the failure.²⁴² In the case of the third disaster—the COVID-19 pandemic—it remains

²³⁵ FED. EMERGENCY MGMT. AGENCY, *About FEMA*, <https://www.fema.gov/about/strategic-plan/about-fema> (last visited Jan. 2, 2023).

²³⁶ HOGUE & BEA, *supra* note 176, at 4.

²³⁷ Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707, § 102(a), 102 Stat. 4689 (1988) (originally enacted as Disaster Relief Act of 1974, Pub. L. No. 93-288, 88 Stat. 143) (codified as amended at 42 U.S.C. § 5121).

²³⁸ 42 U.S.C. § 5122.

²³⁹ *How a Disaster Gets Declared*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/disaster/how-declared> (Jan. 4, 2020).

²⁴⁰ 42 U.S.C. § 5122(1).

²⁴¹ *Id.* § 5122(2).

²⁴² *See infra* text accompanying notes 258, 317–324.

to be seen whether any meaningful reform will be forthcoming. In all three cases, there are common themes: inadequate preparedness; failures in communication and coordination; fraud, waste, and abuse; conflicting priorities; and federalism concerns. The cases also demonstrate the ways that disasters can amplify existing inequality.²⁴³

The reforms that followed the disasters belonged largely to three camps: (1) organizational changes, (2) policy mandates, and (3) attempts to hardwire transparency and accountability standards. For example, Congress significantly restructured FEMA and its functions after September 11 and again after Katrina.²⁴⁴ Congress also mandated the types of incidents that U.S. disaster policy should prioritize: first by declaring an “all hazards” approach post-September 11 and then by addressing the mission creep that allowed terrorism to eclipse natural disasters as the most important threat after September 11.²⁴⁵ There have also been measures that require reporting and cut bureaucratic red tape.²⁴⁶ The voluntary sector has developed the capacity to track recipients of aid to prevent double dipping and otherwise coordinate relief.²⁴⁷ As explained in greater detail in Part III.B, these reform efforts do not address the types of systemic oversight challenges made visible by the application of MLG theory because they tend to respond to specific shortcomings from past disaster responses.

A. *September 11 Terrorist Attacks*

On September 11, 2001, FEMA activated the National Response Plan, and disaster response operations proceeded in New York and Virginia within minutes of the first planes crashing.²⁴⁸ Although the National Response Plan unfolded as antic-

²⁴³ Daniel Farber, *Response and Recovery After Maria: Lessons for Disaster Law and Policy*, 87 REV. JUR. U. P.R. 751 (2018).

²⁴⁴ Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

²⁴⁵ Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No. 109-295, § 503(b), 120 Stat. 1394, 1395 (codified as amended 6 U.S.C. § 701).

²⁴⁶ The Disaster Relief Appropriations Act of 2013 requires FEMA to provide monthly reports to Congress and on the internet regarding Disaster Relief Fund spending. Disaster Relief Appropriations Act, 2013, Pub. L. No. 113-2, 127 Stat. 4, 9; 42 U.S.C. § 5121 (congressional findings); ELIZABETH M. WEBSTER, DIAN P. HORN, NATALIE KEEGAN, ERICA A. LEE, BRUCE R. LINDSAY & ANNA E. NORMAND, CONG. RSCH. SERV., R46774, THE DISASTER RECOVERY REFORM ACT OF 2018 (DRRA): IMPLEMENTATION UPDATE TABLES FOR SELECT PROVISIONS 12 (2021).

²⁴⁷ See *infra* Part IV.C.3.

²⁴⁸ *FEMA's Response to the September 11 Attacks: Hearing Before the Committee on Env't and Pub. Works*, 107th Cong. 568 (2001) (statement of Sen. Christopher Bond).

ipated, it was clear that the United States had been caught unaware and unprepared.²⁴⁹ The attacks sparked an urgent reassessment of our domestic security functions, including all of our disaster preparedness and response protocols. The searching reappraisal prioritized terrorism and resulted in the creation of the massive U.S. Department of Homeland Security.²⁵⁰ FEMA was subsumed within DHS, where it lost its status as an independent agency, and its functions were split up and spread out across DHS.²⁵¹ As explained in the following Section, the post-September 11 emphasis on terrorism is widely thought to have compromised the “all-hazards” orientation of U.S. disaster policy and thereby set the stage for the dismal federal response to Hurricane Katrina in 2005.²⁵²

The September 11 terrorist attacks were the deadliest in history.²⁵³ There were 2,977 fatalities, over 25,000 injuries, and serious long-term health consequences for first responders and others who were in or near the World Trade Center in New York City.²⁵⁴ It was also the deadliest day for first responders, with 343 members of the New York City Fire Department and 71 law enforcement officers losing their lives in the attacks.²⁵⁵ The attacks put a gaping hole in downtown New York City and destroyed surrounding infrastructure. The national economy shut down as flights were grounded and trading was suspended.²⁵⁶ The economic fallout was felt throughout the global economy.²⁵⁷

Within days of the attacks, Congress created the September 11 Victim Compensation Fund (SVC Fund), which became the largest single payor of September 11 disaster assistance.²⁵⁸ Under a no-fault scheme, the SVC Fund promised prompt

²⁴⁹ NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), https://govinfo.library.unt.edu/911/report/911Report_htm.

²⁵⁰ Homeland Security Act of 2002, Pub. L. No. 107-296, § 101(a), 116 Stat. 2135 (2002), 2142; HSPD-5, *supra* note 31, at 23.

²⁵¹ Homeland Security Act § 503.

²⁵² See discussion *infra* Section III.B; see also HADDOW ET AL., *supra* note 227, at 20.

²⁵³ David Mosca, *Hudson County Events to Commemorate 20th Anniversary of 9/11 Attacks*, NJ.COM, <https://www.nj.com/hudson/2021/09/hudson-county-events-to-commemorate-20th-anniversary-of-911-attacks.html> (Sept. 8, 2021, 1:48 PM).

²⁵⁴ *Id.*

²⁵⁵ Patrick J. Kiger, *How 9/11 Became the Deadliest Day in History for U.S. Firefighters*, HIST. (May 20, 2019), <https://www.history.com/news/9-11-world-trade-center-firefighters>; Joshua Q. Nelson, *Former FDNY Commissioner on Losing 343 Firefighters on 9/11*, FOX NEWS (Sept. 11, 2022, 10:10 PM), <https://www.foxnews.com/media/former-fdny-commissioner-firefighters-9-11>.

²⁵⁶ GAIL MAKINEN, CONG. RSCH. SERV., RL31617, THE ECONOMIC EFFECTS OF 9/11: A RETROSPECTIVE ASSESSMENT 4 (2002).

²⁵⁷ Justin Fox, *The Economic Impact of 9/11, in 10 Charts*, BLOOMBERG (Sept. 9, 2001, 3:00 AM), <https://www.bloomberg.com/opinion/articles/2021-09-09/the-economic-impact-of-9-11-in-10-charts>.

²⁵⁸ The Compensation Fund was created by Congress on September 22, 2001, as part of the

payment to survivors who waived all legal claims arising from the attacks.²⁵⁹ In less than three years from the date of its creation, the SVC Fund closed after distributing \$6.9 billion in awards and processing claims representing 97% of all eligible families.²⁶⁰ Because the SVC Fund followed then-existing state rules, surviving same-sex partners and non-marital partners, more generally, were largely precluded from receiving compensation.²⁶¹

Congress also enacted tax relief for the victims and their families. The Victims of Terrorism Tax Relief Act of 2001 was enacted on January 23, 2002.²⁶² It provided federal tax forgiveness for victims of the September 11 attacks, as well as the victims of other terrorist attacks.²⁶³ It excluded death benefits from income and provided other measures to minimize or eliminate federal tax on September 11-related benefits.²⁶⁴

Less than a month after the attacks, President George W. Bush created the Office of Homeland Security within the Executive Office of the President by Executive Order 13228 on October 8, 2001.²⁶⁵ The following year, President Bush signed into law the Homeland Security Act of 2002 on November 25, 2002.²⁶⁶ The Homeland Security Act authorized the greatest reorganization in the federal government since President Harry Truman combined the various branches of the armed forces under the DoD.²⁶⁷ It charged the DHS with four key responsibilities: (1)

comprehensive \$15 billion bailout of the airline industry. Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 401, 115 Stat. 230 (2001).

²⁵⁹ September 11th Victim Compensation Fund, 28 C.F.R. § 104 (2021). The statement by the Special Master that accompanied the Interim Final Rule characterized the Compensation Fund as “a no-fault alternative to tort litigation.” September 11 Victim Compensation Fund of 2001, 66 Fed. Reg. 66,274–75 (proposed interim final rule with request for comments Dec. 21, 2001) (to be codified at 28 C.F.R. pt. 104).

²⁶⁰ Editorial, *9/11 Fund Closes Its Doors*, N.Y. TIMES (June 18, 2004), <https://www.nytimes.com/2004/06/18/opinion/9-11-fund-closes-its-doors.html>.

²⁶¹ Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMPLE L. REV. 31, 55–56, 60–61 (2002); Nancy J. Knauer, *The September 11 Relief Efforts and Surviving Same-Sex Partners: Reflections on Relationships in the Absence of Uniform Legal Recognition*, 26 WOMEN’S RTS. L. REP. 79, 85–86 (2005).

²⁶² Victims of Terrorism Tax Relief Act of 2001, Pub. L. No. 107–134, 115 Stat. 2428.

²⁶³ *Id.*

²⁶⁴ *Id.* at 2429.

²⁶⁵ Executive Order 13,228, 66 Fed. Reg. 51,812 (Oct. 10, 2001).

²⁶⁶ Homeland Security Act of 2002, Pub. L. No. 107-296, § 601, 116 Stat. 2135, 2321 (2002).

²⁶⁷ See David Greenberg, *The Truman Show*, SLATE (June 13, 2002, 4:28 PM), <https://slate.com/news-and-politics/2002/06/what-truman-can-teach-bush-about-reorganizing-the-government.html> (noting President Bush invoked Truman’s memory when he announced his plan for DHS); see generally NATIONAL PREPAREDNESS TASK FORCE, DEP’T HOMELAND SEC. 4 (2006) (reviewing the history U.S. homeland security policies since 1917).

protect the United States from further terrorist attacks, (2) reduce the nation's vulnerability to terrorism, (3) minimize the damage from potential terrorist attacks and natural disasters, and (4) act as "a focal point regarding natural and manmade crises and emergency planning"²⁶⁸ DHS started operations on January 24, 2003, and acquired over 179,000 federal employees from more than 22 federal agencies.²⁶⁹

Within the newly created DHS, most of FEMA's pre-DHS operations were located in the Emergency Preparedness and Response (EP&R) directorate, and the head of FEMA was designated as an undersecretary of DHS.²⁷⁰ DHS was reorganized in 2005, resulting in more changes for FEMA. EP&R was eliminated, mitigation was no longer a priority, and the head of FEMA was downgraded to a director-level position.²⁷¹ After the reorganization, it is arguable that preparedness and response operations for non-terrorist disasters were as fragmented as they had been prior to the creation of FEMA in 1979.²⁷² As discussed in the next Section, the dilution of FEMA's authority is cited as one of the prime reasons behind the failed federal response to Hurricane Katrina.²⁷³

The attacks prompted an outpouring of private generosity. Thousands of individual volunteers went to the former site of the World Trade Center to help and search for survivors at what would turn out to be a considerable cost to their own health.²⁷⁴ In the month following the attack, nearly \$1 billion had been contributed to charitable initiatives.²⁷⁵ A total of \$2.8 billion was eventually contributed to relief efforts by individuals, private industry, and foundations.²⁷⁶ The largest private relief effort was conducted by the American Red Cross, which awarded \$908 million to assist victims of the September 11 attacks, including surviving family members.²⁷⁷

Given the volume of private contributions and the number of new relief organizations that popped up after the attacks, it is not surprising that there was also

²⁶⁸ 6 U.S.C. § 111(b)(1)(A)–(D).

²⁶⁹ HADDOW ET AL., *supra* note 227, at 13–14.

²⁷⁰ *Id.* at 15–16.

²⁷¹ *Id.*

²⁷² *Id.* at 16 ("This situation was very similar to the one that existed prior to the creation of FEMA in 1979.").

²⁷³ See *infra* Part III.B and text accompanying notes 302–13.

²⁷⁴ Tara Haelle, *Health Effects of 9/11 Still Plague Responders and Survivors*, SCI. AM. (Sept. 10, 2021), <https://www.scientificamerican.com/article/health-effects-of-9-11-still-plague-responders-and-survivors/>.

²⁷⁵ Diana B. Henriques, *After the Attacks; Snapshots of Confusion, Heartbreak, Compassion and Spirit*, N.Y. TIMES (Nov. 12, 2001), <https://www.nytimes.com/2001/11/12/giving/after-the-attacks-snapshots-of-confusion-heartbreak-compassion-and-spirit.html> (noting that by October 18, 2001, total amounts raised "are staggering, nearing \$1 billion").

²⁷⁶ FOUND. CTR., GIVING IN THE AFTERMATH OF 9/11, at 2 (2003), https://foundationcenter.org/gainknowledge/research/pdf/9_11update03.pdf.

²⁷⁷ *Where'd the Money Go?*, *supra* note 124.

controversy over alleged fraud, waste, and abuse.²⁷⁸ Associated Press conducted a study ten years after the attacks to examine organizations that applied for and were granted tax-exempt status by the Internal Revenue Service on the basis that they were providing September 11-related support or assistance.²⁷⁹ Dozens of the organizations eventually lost their tax-exempt status because they were unable to account for how they spent the money they had raised.²⁸⁰ Many of the organizations seemed to have been formed primarily to serve the private interests of their founders.²⁸¹

Even the American Red Cross—the largest and most respected disaster relief organization in the United States—came under fire.²⁸² The American Red Cross raised almost a billion dollars in response to the September 11 attacks, which was far in excess of its own target of \$300 million.²⁸³ The American Red Cross came under fire after it was reported that the organization planned to divert a large portion of these funds for long-term projects.²⁸⁴ This revelation prompted criticism from the media and the New York State Attorney General, as well as congressional inquiries.²⁸⁵ The American Red Cross reversed course, but its president resigned at the end of 2001.²⁸⁶

B. *Hurricane Katrina*

When Hurricane Katrina made landfall on August 29, 2005, it had been long anticipated in emergency management circles.²⁸⁷ “In 2001, FEMA categorized a major hurricane striking New Orleans as among the three most likely catastrophic disaster events to occur within the United States.”²⁸⁸ In 2004, a disaster simulation exercise called “Hurricane Pam” identified specific shortcomings and recommended corrective actions, but the funds budgeted by FEMA were ultimately reallocated by

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² Nick Carter, *Why 9/11 Was a Disaster for Charities*, GUARDIAN (Sept. 6, 2002, 9:43 AM), <https://www.theguardian.com/society/2002/sep/06/charities.september112001>.

²⁸³ *Id.*

²⁸⁴ *Red Cross Defends Handling of Sept. 11 Donations*, CNN (Nov. 6, 2001, 9:39 PM), <http://edition.cnn.com/2001/US/11/06/rec.charity.hearing/index.html>.

²⁸⁵ *Id.*

²⁸⁶ Carter, *supra* note 282.

²⁸⁷ Pierre Thomas, *Exclusive: Were the Warning Signs of Katrina Ignored?*, ABC NEWS (Sept. 12, 2005, 4:40 AM), <https://abcnews.go.com/GMA/HurricaneKatrina/exclusive-warning-signs-katrina/story?id=1117497>.

²⁸⁸ OFF. INSPECTIONS & SPECIAL REVS., U.S. DEP’T. HOMELAND SEC., OIG-06-32, A PERFORMANCE REVIEW OF FEMA’S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA, 124 (2006).

DHS to address other priorities.²⁸⁹ Despite all this advance planning, the federal response to Hurricane Katrina was an abject failure.

As Katrina was bearing down on the Gulf Coast, President Bush declared a state of emergency in selected counties in Louisiana, Mississippi, and Alabama.²⁹⁰ As a result, FEMA and DHS assumed primary responsibility for the coordination and control of the response to Katrina a day before it hit land.²⁹¹ What followed was a signal example of governmental failure.²⁹² More than 1,000 people died.²⁹³ Tens of thousands of people were displaced.²⁹⁴ Many people were stranded for days, waiting for rescue on freeway ramps, roofs, and in the Superdome.²⁹⁵ Over 200,000 homes were destroyed.²⁹⁶ The dislocation, chaos, and desperation lingered long beyond the

²⁸⁹ Thomas, *supra* note 287; *Preparing for a Catastrophe: The Hurricane Pam Exercise: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affs.*, 109th Cong. 403 (2006) (statement of Sen. Susan M. Collins, Chairman, S. Comm. on Homeland Sec. & Gov't Affs.).

²⁹⁰ Press Release, White House Off. of the Press Sec'y, *Statement on Federal Emergency Assistance for Louisiana* (Aug. 27, 2005), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/08/20050827-1.html>.

²⁹¹ Joseph B. Treaster & Abby Goodnough, *Powerful Storm Threatens Havoc Along Gulf Coast*, N.Y. TIMES, Aug. 29, 2005, at A1 ("President Bush . . . declared a state of emergency for the Gulf Coast, a move that cleared the way for immediate federal aid. . . . [FEMA] was waiting to determine where the agency would need to deploy supplies and specialized personnel."). Hurricane Katrina made landfall on August 29, 2005, with 150mph winds. *Hurricane Katrina Makes Landfall*, N.Y. TIMES (Aug. 29, 2005), <https://www.nytimes.com/2005/08/29/world/americas/hurricane-katrina-makes-landfall.html>.

²⁹² The Senate Committee on Homeland Security and Governmental Affairs concludes that "ineffective leadership, poor advance planning, and an unwillingness to devote sufficient resources to emergency management over the long term doomed them to fail when Katrina struck." S. COMM. HOMELAND SEC. & GOV'T AFFS., HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322, at 5 (2006).

²⁹³ Carl Bailik, *We Still Don't Know How Many People Died Because of Katrina*, FIVETHIRTYEIGHT (Aug. 26, 2015, 6:30 AM), <https://fivethirtyeight.com/features/we-still-dont-know-how-many-people-died-because-of-katrina/>.

²⁹⁴ For a description and analysis of Hurricane Katrina's impact and the response effort, see DOUGLAS BRINKLEY, THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST 620 (2006).

²⁹⁵ *Id.* at 456, 463.

²⁹⁶ Tatyana Deryugina, Laura Kawano & Steven Levitt, *The Economic Impact of Hurricane Katrina on Its Victims: Evidence from Individual Tax Returns*, AM. ECON. J.: APPLIED ECON., Spring 2018, at 202.

initial clean-up.²⁹⁷ Both the director of FEMA and the New Orleans police superintendent resigned their posts after the nation witnessed something that was unheard of in the United States—a complete breakdown in civil authority.²⁹⁸

In terms of economic damage, it was estimated that Hurricane Katrina caused over \$100 billion in property damage.²⁹⁹ The immediate and long-term needs of the affected communities were staggering. Like the post-9/11 tax relief act, the Katrina Emergency Tax Relief Act of 2005 made it easier for charitable organizations to qualify for federal tax-exempt status and lifted the ceiling on deduction limits.³⁰⁰ It extended deadlines, liberalized the loss rules for property owners, and allowed individuals to take withdrawals from their tax-deferred retirement accounts without triggering a penalty.³⁰¹

Many factors went into the failed response to Katrina. FEMA had recently lost its status as an independent agency and had been further reorganized in 2005.³⁰² States had followed a similar pattern and also subsumed their emergency management functions in state-level offices of homeland security.³⁰³ The location of FEMA within another agency added a second layer of bureaucracy. The focus on terrorism diverted funding from preparedness and mitigation efforts for natural disasters, representing a shift from the “all hazards approach” to a more narrow focus.³⁰⁴ Even prior to September 11, the George W. Bush administration had expressed skepticism regarding the role that the federal government should play in disasters. For example, President Bush’s first director of FEMA, Joe Allbaugh, likened FEMA to an “oversized entitlement program” in congressional testimony.³⁰⁵

²⁹⁷ Laura Bliss, *10 Years Later, There’s So Much We Don’t Know About Where Katrina Survivors Ended Up*, BLOOMBERG (Aug. 25, 2015, 8:05 AM), <https://www.bloomberg.com/news/articles/2015-08-25/8-maps-of-displacement-and-return-in-new-orleans-after-katrina>.

²⁹⁸ See Todd S. Purdum, *Storm and Crisis: Eyes on America; Across U.S., Outrage at Response*, N.Y. TIMES (Sept. 3, 2005), <https://www.nytimes.com/2005/09/03/us/front%20page/storm-and-crisis-eyes-on-america-across-us-outrage-at.html>.

²⁹⁹ Deryugina et al., *supra* note 296, at 202.

³⁰⁰ Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 301(a), 119 Stat. 2016, 2022.

³⁰¹ *Id.* § 102.

³⁰² Homeland Security Act of 2002, Pub. L. No. 107-296, § 507(b)(2), 116 Stat. 2135, 2215 (2002); HOGUE & BEA, *supra* note 176, at 1.

³⁰³ HADDOW ET AL., *supra* note 227, at 19–20.

³⁰⁴ *Id.* at 20 (reporting that “approximately 75 percent of available resources for emergency management activities were applied to terrorism”).

³⁰⁵ Allbaugh testified before Congress: “Many are concerned that Federal disaster assistance may have evolved into both an oversized entitlement program and a disincentive to effective State and local risk management. Expectations of when the Federal Government should be involved and the degree of involvement may have ballooned beyond what is an appropriate level.” Statement of Joe Allbaugh, *supra* note 115.

In response to the public and media outcry following Hurricane Katrina, both houses of Congress convened hearings, conducted investigations, and released reports that were highly critical of the federal response.³⁰⁶ In addition to identifying the root of the government's failure, the investigations also grappled with allegations of widespread fraud and abuse.³⁰⁷ The House Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina Investigation issued its report in February 2006.³⁰⁸ Its primary conclusion was that the federal response to Hurricane "Katrina was a national failure, an abdication of the most solemn obligation to provide for the common welfare."³⁰⁹ It found evidence that terrorism was sometimes prioritized to the exclusion of other disasters,³¹⁰ and witnesses opined that crucial mitigation and preparedness functions had been overlooked.³¹¹ The report concluded that governmental failure at all levels of government undermined the ability of first responders and nongovernmental actors to respond effectively to the crisis.³¹² It further found that this failure stemmed largely from "information gaps" that prevented the federal government from exercising the initiative necessary to provide aid.³¹³

The Senate Committee on Homeland Security and Governmental Affairs led a parallel investigation and hearings.³¹⁴ Its report, entitled *Hurricane Katrina: A Nation Still Unprepared*, found that four overarching factors led to the government's failure to respond to Hurricane Katrina: (1) officials did not heed long-term warning signs or fulfill their duties to prepare for disaster; (2) officials did not effectively respond to Hurricane Katrina in the days prior to and immediately after landfall; (3) systems that officials relied on to support an effective response failed; and (4) the federal government failed to exhibit effective leadership.³¹⁵ The Senate Committee

³⁰⁶ The White House also conducted its own investigation and issued its own report in 2006 titled: *The Federal Response to Hurricane Katrina: Lessons Learned*. EXEC. OFF. PRESIDENT, *supra* note 209.

³⁰⁷ A FAILURE OF INITIATIVE, *supra* note 117, at 5.

³⁰⁸ *Id.* at iii.

³⁰⁹ *Id.* at x.

³¹⁰ *Id.* at 152 (stating that federal funding to states for "all hazards" disaster preparedness needs were not awarded unless the local agencies made the purposes for the funding a "just terrorism" function).

³¹¹ *Id.*

³¹² *Id.* at 1.

³¹³ *Id.*

³¹⁴ S. COMM. HOMELAND SEC. & GOV'T AFFS., HURRICANE KATRINA: A NATION STILL UNPREPARED, S. REP. NO. 109-322 (2006).

³¹⁵ *Id.* at 2.

also made a number of recommendations, including the creation of a new emergency management entity within DHS and the adoption of a true “all hazards” approach.³¹⁶

These damning reports led the 109th Congress to pass numerous laws that recalibrated U.S. disaster policy, despite the warning from the House Select Committee that there was no stated “simple answer to improving state and federal integration.”³¹⁷ The Pets Evacuation and Transportation Standards Act of 2006 mandated that FEMA provide shelter to individuals with service animals and household pets.³¹⁸ The Pandemic and All-Hazards Preparedness Act of 2006 transferred authority over the National Disaster Medical System from DHS to HHS.³¹⁹ The Post-Katrina Management Reform Act of 2006 took direct aim at FEMA and DHS.³²⁰ It sought to address the information and leadership gaps revealed in the course of congressional investigations by detailing qualifications for a FEMA Administrator and providing new roles and regional offices that the Administrator had to fill.³²¹ The Post-Katrina Emergency Management Reform Act also tasked DHS to create a successor to the National Response Plan, which resulted in the NRF.³²² The revised NRF was designed to facilitate greater coordination between federal and other governmental and nongovernmental actors.³²³ It also provides greater autonomy for the FEMA director to communicate directly with Congress.³²⁴

³¹⁶ *Id.* at 607–08. Senators Clinton and Mikulski introduced legislation to restore FEMA to its independent status and make the director’s position a cabinet member. Gwyneth K. Shaw, *Md. Lawmakers Take Strong Stances*, BALTIMORE SUN (Sept. 18, 2005, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-2005-09-10-0509100115-story.html>.

³¹⁷ A FAILURE OF INITIATIVE, *supra* note 117, at 223. All of the bills passed with bipartisan support: The Post-Katrina Emergency Management Reform Act of 2006, The Security and Accountability for Every Port Act of 2005, The Pets Evacuation and Transportation Standards Act of 2006, The Federal Judiciary Emergency Special Sessions Act of 2005, The Student Grant Hurricane and Disaster Relief Act, The Pandemic and All-Hazards Preparedness Act, and The John Warner National Defense Authorization Act for Fiscal Year 2007.

³¹⁸ Pets Evacuation and Transportation Standards Act of 2006, Pub. L. No. 109-308, § 4, 120 Stat. 1725, 1726.

³¹⁹ Pandemic and All-Hazards Preparedness Act of 2006, Pub. L. No. 109-417, § 2801, 120 Stat. 2831, 2832.

³²⁰ Post-Katrina Emergency Management Reform Act of 2006, Pub. L. No 109-295, § 611, 120 Stat. 1394, 1395 (codified as amended 6 U.S.C. § 701).

³²¹ *Id.* §§ 503(c)(2), 507.

³²² *Id.* § 503(c)(12).

³²³ NIMS was revised after Hurricane Katrina in 2008 and then again most recently in 2017. NIMS, *supra* note 60, at iii.

³²⁴ The Post-Katrina Act requires that the DHS reconsolidate all the emergency management functions (including preparedness) into FEMA, elevates the status of FEMA within the department, protects FEMA assets from reassignment within the DHS, and gives FEMA enhanced organizational autonomy. 6 U.S.C. § 315. In addition, the Act provides for FEMA to maintain ten regional offices. *Id.* § 317(a). It adds to FEMA a National Advisory Council,

C. *The COVID-19 Pandemic*

The COVID-19 pandemic is an ongoing multi-year global public health crisis that has prompted many nations and jurisdictions to take unprecedented measures to control the novel coronavirus.³²⁵ As with Hurricane Katrina, this pandemic was also long-anticipated among disaster relief and emergency management specialists. The federal government began developing specific pandemic disaster plans in 2005 under the George W. Bush administration.³²⁶ These pandemic plans have been revised and refined under each subsequent administration and span hundreds of pages.³²⁷ The plans are clear that a pandemic qualifies as a “catastrophic incident” that requires strong federal leadership and involvement because it has the capacity to overwhelm state and local authorities and requires countermeasures that are uniquely within the power of the federal government.³²⁸

The shift to include pandemic planning within U.S. disaster policy occurred during the period post-September 11 when the United States was deeply concerned with global terrorist threats and the Iraq War.³²⁹ The impetus for the change was President George W. Bush, who was convinced of the dangers posed by a global pandemic after reading John M. Barry’s book, *The Great Influenza*, about the Spanish flu pandemic while he was on vacation at his ranch in Crawford, Texas.³³⁰ The White House released the first comprehensive pandemic plan in November 2005,

Regional Advisory Councils, a disability coordinator, a small state and rural advocate, and regional strike teams. They provide autonomy for the FEMA administrator (formerly director) to communicate directly with Congress. *Id.* § 317(e).

³²⁵ Solomon Hsiang, Daniel Allen, Sébastien Annan-Phan, Kendon Bell, Ian Bolliger, Trinetta Chong, Hannah Druckenmiller, Luna Yue Huang, Andrew Hultgren, Emma Krasovich, Peiley Lau, Jaecheol Lee, Esther Rolf, Jeanette Tseng & Tiffany Wu, *The Effect of Large-Scale Anti-Contagion Policies on the COVID-19 Pandemic*, 584 NATURE 262 (2020) (“Governments around the world are responding to the coronavirus disease 2019 (COVID-19) pandemic, caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), with unprecedented policies designed to slow the growth rate of infections.”).

³²⁶ See NATIONAL STRATEGY, *supra* note 24.

³²⁷ See, e.g., NRF, *supra* note 23, at 1 (“The NRF builds on over 25 years of federal response guidance, beginning with the Federal Response Plan, published in 1992, and the National Response Plan, published in 2004. This fourth edition of the NRF reorganizes and streamlines the previous version of the NRF, expands principles and concepts to better integrate government and private sector response efforts, and introduces the community lifelines concept and terminology.”).

³²⁸ *Id.* at 6 n.13.

³²⁹ Paul Biasco, *All the Things George W. Bush Said We Should Do to Prepare for a Pandemic that Donald Trump Ignored*, BUS. INSIDER (May 31, 2020, 8:34 AM), <https://www.businessinsider.com/george-bush-said-prepare-for-a-pandemic-that-trump-ignored-2020-5>.

³³⁰ Matthew Mosk, *George W. Bush in 2005: ‘If We Wait for a Pandemic to Appear, It Will Be Too Late to Prepare’*, ABC NEWS (Apr. 5, 2020, 1:08 AM), <https://abcnews.go.com/Politics/george-bush-2005-wait-pandemic-late-prepare/story?id=69979013>.

known as the National Strategy for Pandemic Influenza.³³¹ It was then followed a year later, in 2006, by the National Implementation Plan, which was over 200 pages long and much more comprehensive.³³² As the lead agency for public health emergencies, HHS also issued its first pandemic plan in 2005.³³³ To support these pandemic planning efforts, Congress passed the Pandemic and All-Hazards Preparedness Act (PAHPA) of 2006.³³⁴ It expanded the preparedness and response activities of HHS and created the office of the Assistant Secretary for Preparedness and Response.³³⁵ The PAHPA was reauthorized in 2019 by the Pandemic and All-Hazards Preparedness and Advancing Innovation Act.³³⁶ Both bills passed easily with bipartisan support.³³⁷

In recent years, pandemic planning has also been incorporated into protocols that address both human-made and naturally occurring biological threats. For example, the NRF has an annex on Biological Incidents that was most recently revised in 2017.³³⁸ It covers both naturally occurring biological incidents (such as pandemics) and human-made threats, as well as terrorist attacks and biological warfare.³³⁹ In 2018, the Trump White House released the National Biodefense Strategy and the

³³¹ See NATIONAL STRATEGY, *supra* note 24. President Bush requested \$7.1 billion in emergency funding from Congress. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT FISCAL YEAR 2007, at 106 (2007).

³³² HOMELAND SEC. COUNCIL, NATIONAL STRATEGY FOR PANDEMIC INFLUENZA IMPLEMENTATION PLAN (2006).

³³³ U.S. DEP'T HEALTH & HUM. SERVS., HHS PANDEMIC INFLUENZA PLAN (2005).

³³⁴ Pandemic and All-Hazards Preparedness Act of 2006, Pub. L. No. 109-417, § 201, 120 Stat. 2831, 2831. Previously, the Public Health Security and Bioterrorism Preparedness Act of 2002 gave funding to hospitals and health systems. Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Pub. L. No. 107-188, § 319C-1, 116 Stat. 594, 621. In 2004, the Project BioShield Act authorized the federal government to give incentives to the private sector to create drugs that could protect people from biological weapons and naturally occurring biological threats. Project BioShield Act of 2004, Pub. L. No. 108-276, § 319F-1, 118 Stat. 835, 836.

³³⁵ Pandemic and All-Hazards Preparedness Act § 2811.

³³⁶ Pandemic and All-Hazards Preparedness and Advancing Innovation Act of 2019, Pub. L. No. 116-22, § 701, 133 Stat. 905, 961.

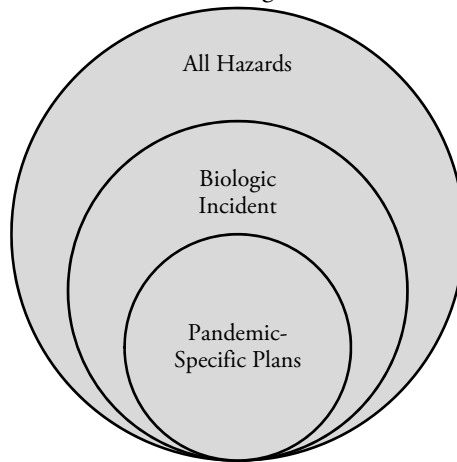
³³⁷ 152 CONG. REC. 23,402 (2006) (passing the Pandemic and All-Hazards Preparedness Act of 2006); 165 CONG. REC. H275-76 (daily ed. Jan. 8, 2019) (passing the Pandemic and All-Hazards Preparedness and Advancing Innovation Act).

³³⁸ The NRF includes a series of threat-specific appendices, including one that specifically addresses biological incidents. See U.S. DEP'T HOMELAND SEC., BIOLOGICAL INCIDENT ANNEX TO THE RESPONSE AND RECOVERY FEDERAL INTERAGENCY OPERATIONAL PLANS (2017).

³³⁹ *Id.* at 13. The annex provides that “a biological incident refers to the occurrence of cases or outbreaks involving an infectious agent that affects people, regardless of natural or deliberate cause, for which response needs have the potential to overwhelm state and local resources.” *Id.* at vii.

National Biodefense Strategy Implementation Plan, both of which specifically address the threat posed by pandemics.³⁴⁰ As a result, pandemic disaster planning in the United States now exists on three distinct levels: (1) the umbrella “all hazards” framework, where a pandemic is clearly identified as an example of a “catastrophic incident”; (2) more focused plans dealing with bio-incidents that include both human-made or naturally occurring incidents, such as pandemics; and (3) the pandemic-specific planning designed to address the unique threat posed by a novel virus. At each level of planning, it is assumed that the federal government will play a central role in preparedness, response, and recovery.

Figure 4. Levels of Pandemic Planning in U.S. Disaster Policy



Despite the many layers of detailed and complex pandemic plans, the Trump administration initially tried to tell the American people that the COVID-19 pandemic was a “black swan” event that no one could have foreseen and for which no one could have prepared.³⁴¹ The Trump administration then downplayed the severity of the pandemic and engaged in deeply conflicting and inaccurate messaging.³⁴² When it was time to go to the National Stockpile to avert or alleviate shortages, it

³⁴⁰ EXEC. OFFICE OF THE PRESIDENT, NATIONAL BIODEFENSE STRATEGY (2018), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2018/09/National-Biodefense-Strategy.pdf> [hereinafter NATIONAL BIODEFENSE STRATEGY].

³⁴¹ See, e.g., Ian Schwartz, *Trump on Coronavirus: “Nobody Could Have Predicted Something Like This,”* REALCLEAR POL. (Mar. 30, 2020), https://www.realclearpolitics.com/video/2020/03/30/trump_on_coronavirus_nobody_could_have_predicted_something_like_this.html (promoting hydroxychloroquine, a drug commonly prescribed to treat malaria, during a televised phone interview).

³⁴² *Trump Deliberately Played Down Virus, Woodward Book Says*, BBC NEWS (Sept. 10, 2020), <https://www.bbc.com/news/world-us-canada-54094559>.

became clear that a familiar mission creep had prioritized human-made biologic disasters over ones that were naturally occurring.³⁴³ The National Stockpile was ready for an anthrax attack, but not a new coronavirus.³⁴⁴ Instead of leading a robust national response to the pandemic, the federal government floundered and failed to follow its own carefully drawn pandemic plans. The result was an uneven and confusing response to the pandemic that, by default, was led largely on the state and local levels and often devolved into disputes and competition between and among jurisdictions.³⁴⁵

Early in the pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security (CARES) Act in response to the economic turmoil caused by the pandemic shutdown.³⁴⁶ With \$2.2 trillion in spending, the CARES Act was the largest stimulus spending bill in the history of the United States.³⁴⁷ The CARES Act included \$300 billion in one-time cash payments to individuals, larger unemployment benefits, and the Paycheck Protection Program that provided loans to small businesses.³⁴⁸ The CARES Act provided student loan relief and an eviction moratorium.³⁴⁹ It also allowed individuals to take withdrawals from their retirement accounts without penalty.³⁵⁰

CARES Act payments were beset with charges of fraud and waste.³⁵¹ For example, the Government Accountability Office found that the U.S. Department of the

³⁴³ See Nsikan Akpan, *U.S. Has Only a Fraction of the Medical Supplies It Needs to Combat Coronavirus*, NAT'L GEOGRAPHIC (Mar. 3, 2020), <https://www.nationalgeographic.com/science/article/us-america-has-fraction-medical-supplies-it-needs-to-combat-coronavirus>; Jon Swaine, Robert O'Harrow Jr. & Aaron C. Davis, *Before Pandemic, Trump's Stockpile Chief Put Focus on Biodefense. An Old Client Benefited.*, WASH. POST (May 4, 2020, 8:35 AM), https://www.washingtonpost.com/investigations/before-pandemic-trumps-stockpile-chief-put-focus-on-biodefense-an-old-client-benefited/2020/05/04/d3c2b010-84dd-11ea-878a-86477a724bdb_story.html.

³⁴⁴ Swaine et al., *supra* note 343.

³⁴⁵ Clary Estes, *States Are Being Forced into Bidding Wars to Get Medical Equipment to Combat Coronavirus*, FORBES (Mar. 28, 2020, 6:00 AM), <https://www.forbes.com/sites/claryestes/2020/03/28/states-have-are-being-forced-into-bidding-wars-to-get-medical-equipment-to-combat-coronavirus>.

³⁴⁶ Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. No 116-136, 134 Stat. 281 (2020).

³⁴⁷ CARES Act § 1; see Carl Hulse & Emily Cochrane, *As Coronavirus Spread, Largest Stimulus in History United a Polarized Senate*, N.Y. TIMES (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/us/coronavirus-senate-stimulus-package.html>; Andrew Taylor, Alan Fram, Laurie Kellman & Darlene Superville, *Trump Signs \$2.2T Stimulus After Swift Congressional Votes*, AP NEWS (Mar. 27, 2020), <https://apnews.com/article/2099a53bb8adf2def7ee7329ea322f9d>.

³⁴⁸ CARES Act §§ 1107, 1102.

³⁴⁹ *Id.* §§ 3508, 4024.

³⁵⁰ *Id.* § 2202.

³⁵¹ Robert Anello, *How DOJ Shows It "Cares" About CARES Act Fraud*, FORBES (Oct. 27,

Treasury had disbursed payments to almost 1.1 million individuals who were deceased for a total of approximately \$1.4 billion.³⁵² There was also considerable unemployment fraud and fraud within the Paycheck Protection Program.³⁵³ The CARES Act was followed by a second \$1.9 trillion economic stimulus bill, the American Rescue Plan Act of 2021, which continued many of the programs under the CARES Act.³⁵⁴

While Congress engaged in aggressive spending, the Trump administration largely abdicated its leadership responsibility as delineated in U.S. disaster policy.³⁵⁵ The NRF is crystal clear that the President bears ultimate responsibility for the federal response to catastrophic incidents, including pandemics.³⁵⁶ Instead of addressing the pandemic head-on, President Trump chose to deflect, minimize, and spread potentially dangerous misinformation.³⁵⁷ The abdication of responsibility for disaster relief at this level is sobering. It adds a new and urgent type of oversight challenge that asks: how can we ensure that government actors will live up to their most basic responsibility to protect the general welfare?³⁵⁸ Members of Congress have introduced bills to enhance whistleblower protections and strengthen inspectors general,³⁵⁹ but large-scale post-pandemic reforms to disaster policy have not been forthcoming.

2020, 1:25 PM), <https://www.forbes.com/sites/insider/2020/10/27/how-doj-shows-it-cares-about-cares-act-fraud/?sh=7d32676b6876>.

³⁵² Erica Werner, *Treasury Sent More than 1 Million Coronavirus Stimulus Payments to Dead People, Congressional Watchdog Finds*, WASH. POST (June 25, 2020, 8:09 PM), <https://www.washingtonpost.com/us-policy/2020/06/25/irs-stimulus-checks-dead-people-gaol/>.

³⁵³ Laura Davison, *\$90 Billion Has Been Paid in Fraudulent Pandemic Aid, Says Federal Watchdog*, FORTUNE (Sept. 1, 2021, 12:49 PM), <https://fortune.com/2021/09/01/90-billion-fraudulent-pandemic-aid-federal-watchdog-report/>.

³⁵⁴ American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4; see Lisa Hagen, *House Passes Amended Coronavirus Relief Bill, Delivers Biden First Legislative Victory*, U.S. NEWS & WORLD REP. (Mar. 10, 2021, 2:19 PM), <https://www.usnews.com/news/politics/articles/2021-03-10/house-passes-amended-coronavirus-relief-bill-delivers-biden-first-legislative-victory>.

³⁵⁵ Matthew Yglesias, *America Has No Federal Response to this Crisis*, VOX (Apr. 3, 2020, 2:00 PM), <https://www.vox.com/2020/4/3/21204489/coronavirus-response-chris-murphy>.

³⁵⁶ NRF, *supra* note 23, at 34. Specifically, it provides that “[r]egardless of the type of incident, the President leads the Federal Government response effort to ensure that the necessary resources are applied quickly and efficiently to large-scale and catastrophic incidents.” *Id.*

³⁵⁷ Meredith McGraw & Sam Stein, *It’s Been Exactly One Year Since Trump Suggested Injecting Bleach. We’ve Never Been the Same*, POLITICO (Apr. 23, 2021, 4:30 AM), <https://www.politico.com/news/2021/04/23/trump-bleach-one-year-484399>.

³⁵⁸ *America Has Let Down its Puerto Rican Citizens*, ECONOMIST (Apr. 14, 2018), <https://www.economist.com/briefing/2018/04/14/america-has-let-down-its-puerto-rican-citizens>.

³⁵⁹ See, e.g., Whistleblower Protection Improvement Act of 2021, H.R. 2988, 117th Cong. (2021); IG Independence and Empowerment Act, H.R. 2662, 117th Cong. (2021).

IV. THE OVERSIGHT CHALLENGE

U.S. disaster policy encompasses all hazards and every stage of disaster relief (i.e., response, recovery, and preparedness). It saves lives, rebuilds communities, and works to mitigate future disasters. This massive undertaking marshals resources from across all levels of government, as well as from nongovernmental actors. The result is a multi-tier and multi-sector governance structure that reflects the constraints of federalism and our historic reliance on the voluntary sector. The complex and multivariate nature of U.S. disaster policy is necessary to address the “all hazards in all places”³⁶⁰ approach, but its justified complexity also presents significant challenges when it comes to the important question of oversight.

As *Washington Post* columnist David Broder observed after Hurricane Katrina: “The failure to respond to that disaster exposed one of the few real structural weaknesses in our Constitution: a mechanism to coordinate the work of local, state and national governments.”³⁶¹ The absence of a coordinating or even mediating mechanism across different levels of government leaves space for fraud, waste, and abuse. It also invites conflicts over priorities and obscures decision-making channels. Sometimes, disaster relief efforts flounder because the various actors cannot agree who is in charge,³⁶² but in other instances, our federal government has simply failed to show up and follow its own disaster plans.³⁶³

This Part first explores the importance of oversight as part of our system of checks and balances. It then turns to the insights of MLG theory regarding the oversight challenges inherent in a multi-tier and multi-sector governance structure. As seen in the prior Part, efforts to address these challenges have been largely reactive with calls for reform following a failed or lacking disaster response. MLG provides an independent template against which to measure U.S. disaster policy. This Part concludes with a discussion of how to apply these insights and develop new oversight models that will promote effective, efficient, and equitable U.S. disaster policy.

³⁶⁰ See John B. Sorensen, *Hazard Warning Systems: Review of 20 Years of Progress*, 1 NAT. HAZARDS REV. 119, 119–23 (2000) (discussing the need for a comprehensive national warning strategy).

³⁶¹ David S. Broder, *The Right Minds for Recovery*, WASH. POST (Sept. 29, 2005), <https://www.washingtonpost.com/archive/opinions/2005/09/29/the-right-minds-for-recovery/13e011c0-3724-4c30-9a0b-8e45c3f59f3e/>.

³⁶² Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, 21 ST. JOHN'S J. LEGAL COMMENT. 527, 530 (2007).

³⁶³ Farber, *supra* note 243, at 766.

A. *Checks and Balances*

The oversight function is central to our nation's system of checks and balances.³⁶⁴ It helps ensure that a given policy or initiative complies with good governance principles, such as participation, transparency, and accountability. It also evaluates the substantive performance of a particular policy or initiative as measured by its normative goals. In the case of U.S. disaster policy, the normative goals can be expressed as effectiveness, efficiency, and equity. We want our disaster policy to be effective and save lives, property, and communities.³⁶⁵ It should also be efficient and be administered in a way to minimize fraud, waste, and abuse.³⁶⁶ Finally, it should address the distributional concerns of disasters and incorporate considerations of equity across all phases of disaster relief: preparedness, response, and recovery.³⁶⁷

In U.S. disaster policy, federal, state, and local government actors are integrated vertically around a single, yet expansive, policy domain. At each level of government, there is also horizontal integration across the different branches of government, as well as shared regulatory space within the respective executive branches.³⁶⁸ Nongovernmental stakeholders are integrated across all points, both vertically and horizontally. Along the horizontal axis there are opportunities for parallel layers of oversight at each level of government with legislative committees, auditors, inspectors general, ombudsmen, and the like. There is also judicial review and oversight at the federal and state level,³⁶⁹ as well as input from nongovernmental stakeholders, associations, private industry, the media, and voters. With respect to vertical integration, oversight efforts that attempt to cross layers of government face federalism constraints. It is effective vertical integration that poses the greatest oversight challenge.

³⁶⁴ See generally THE FEDERALIST NO. 51, at 289–90 (James Madison) (Clinton Rossiter ed., 1991).

³⁶⁵ See NIMS, *supra* note 60, at 3.

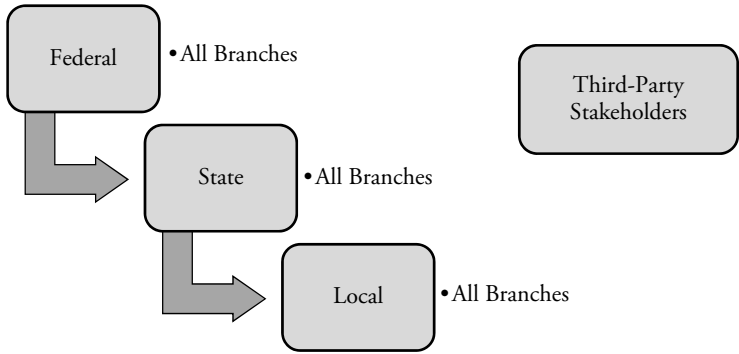
³⁶⁶ A FAILURE OF INITIATIVE, *supra* note 117, at 18.

³⁶⁷ 42 USC § 5151(a).

³⁶⁸ Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1136 (2012).

³⁶⁹ Judiciary review has been referred to as a “diagonally accountability system.” Mark Bovens, *Analysing and Assessing Public Accountability. A Conceptual Framework*, No. C-06-01, EUR. GOVERNANCE PAPERS, Jan. 16, 2006, at 21.

Figure 5. Vertical & Horizontal Integration in U.S. Disaster Policy



B. Multi-Level Governance (MLG) Theory

MLG theory was developed by political scientists in the context of European integration in the 1990s.³⁷⁰ It describes the process of shared decision-making among different levels of government and third-party stakeholders.³⁷¹ The different levels of government are organized both vertically and horizontally, often around a specific policy domain. MLG theory identifies numerous benefits related to this decentralized method of decision-making, as well as numerous challenges. For example, MLG is thought to disperse decision-making, localize expertise, empower groups disaffected with centralized control, help regional cohesion, facilitate innovation, and allow problem-solving at the appropriate scale.³⁷² On the other hand, MLG may open up space for corruption, invite fraud and waste, lead to gridlock, compromise effectiveness, facilitate blame-shifting, and obscure accountability.³⁷³

³⁷⁰ Political scientists Liesbet Hooghe and Gary Marks developed the concept of multi-level governance in the early 1990s. Simona Piattoni, *Multi-Level Governance: A Historical and Conceptual Analysis*, 31 EUR. INTEGRATION 163, 165–67 (2009). As a concept, MLG theory gained popularity beyond its original application in E.U. studies. See Adrian Kay, *Multi-Level Governance and the Study of Australian Federalism*, in MULTI-LEVEL GOVERNANCE: CONCEPTUAL CHALLENGES AND CASE STUDIES FROM AUSTRALIA 33 (Katherine A. Daniell & Adrian Kay eds., 2017) (applying MGL to Australian federal system).

³⁷¹ Liesbet Hooghe & Gary Marks, *A Postfunctionalist Theory of Multilevel Governance*, 22 BRIT. J. POL. & INT'L REL. 820, 821 (2020).

³⁷² Dorothee Allain-Dupré, *The Multi-Level Governance Imperative*, 22 BRIT. J. POL. & INT'L REL. 800, 802–03 (2020).

³⁷³ Yannis Papadopoulos, *Accountability and Multi-Level Governance: More Accountability, Less Democracy?* 33 W. EUR. POL. 1030, 1038–43 (2010).

As a concept, MLG now has considerable reach beyond its original academic and euro-centric focus. The Organization for Overseas Economic Cooperation and Development (OECD) has extensively explored and advocated for the use of MLG in policymaking in a variety of contexts, especially climate policy.³⁷⁴ MLG theory also has obvious application to the United States and other non-E.U. countries with a federal system.³⁷⁵ In the case of U.S. disaster policy, MLG theory provides a descriptive and functional narrative for our national approach to emergency management that domestically has been dictated by constitutional constraints of federalism and influenced by our longstanding reliance on the voluntary sector.³⁷⁶

Both MLG and U.S. disaster policy are premised on the belief that shared decision-making, and the dispersal of decision-making authority are positive outcomes that facilitate good governance practices. Fidelity to that goal has led U.S. disaster policy to evolve organically into the type of complex MLG system that the OECD now recommends that jurisdictions adopt for climate policy.³⁷⁷ Although MLG theory originated in the academic discipline of political science, it has broader applicability to many other fields, including law, economics, international relations, public administration, and public policy.³⁷⁸ Moreover, MLG theory has successfully bridged the theory–practice divide and is now promoted and debated by international organizations, such as the OECD, policymakers, and academics.³⁷⁹ Given the similarities between MLG and U.S. disaster policy, it is instructive to review the oversight challenges and solutions that have been addressed in MLG theory with an eye to how these insights could be borrowed and applied to U.S. disaster policy.

MLG theory recognizes that the complexity of governance structures can lead to various “gaps” that can impair functioning and lead to oversight issues.³⁸⁰ In particular, within federal systems, MLG recognizes that vertical integration can produce

³⁷⁴ Allain-Dupré, *supra* note 372, at 801–04. (“MLG approaches have gained prominence in recent years, as the OECD has shifted to greater focus on policy implementation and place-based policy approaches.”).

³⁷⁵ MULTI-LEVEL GOVERNANCE: CONCEPTUAL CHALLENGES AND CASE STUDIES FROM AUSTRALIA (Katherine A. Daniell & Adrian Kay eds., 2017) (Australia).

³⁷⁶ *E.g.*, *Bond v. United States*, 564 U.S. 211, 221 (2011) (“Federalism is more than an exercise in setting the boundary between different institutions of government for their own integrity. State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’” (quoting *New York v. United States*, 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting))).

³⁷⁷ Allain-Dupré, *supra* note 372, at 806 (using OECD work as an example in practice). Of course, climate policy and disaster mitigation is also a large part of U.S. disaster policy.

³⁷⁸ Daniell & Kay, *supra* note 5, at 4 (noting that MLG theory could serve to “bridge the boundaries of academic disciplines”).

³⁷⁹ Allain-Dupré, *supra* note 372, at 806 (using OECD work as an example in practice).

³⁸⁰ Claire Charbit, *From ‘De Jure’ To ‘De Facto’ Decentralised Public Policies: The Multi-Level Governance Approach*, 22 *BRIT. J. POL. & INT’L REL.* 809, 810–11 (2020) (identifying seven

an “accountability deficit” due to structural constitutional constraints.³⁸¹ This accountability deficit translates to numerous gaps that can compromise the delivery of collective goods and create space for maladministration and fraud, waste, and abuse. These gaps have been identified as relating to (1) information, (2) capacity, (3) funding, (4) policy, (5) administrative responsibilities, (6) objectives, and (7) accountability.³⁸² MLG theory recommends comprehensive institutional mapping as a first step in identifying and addressing these gaps.³⁸³

MLG theory proposes the use of voluntary agreements, referred to as “contracts,” to address these gaps. The contracts are binding across all levels of government and nongovernmental stakeholders.³⁸⁴ MLG notes that it is possible to structure various incentives to encourage the use of voluntary agreements, including funding conditions and performance standards.³⁸⁵ Such agreements can be specific in nature and only relate to a particular project or initiative (i.e., transactional contract), or they can be more long-term and set forth the relationships of the parties moving forward (i.e., relational contract).³⁸⁶ One shortfall of MLG theory is that it remains unclear as to how to structure effective enforcement mechanisms to hold the parties to their commitments.³⁸⁷

C. Oversight Reforms

As discussed in Part III, recent efforts to reform U.S. disaster policy have been largely reactive and focused on specific past failures. They have principally addressed gaps that exist with respect to (1) information, (2) capacity, and (3) policy, but they have not engaged in a systemic review of U.S. disaster policy, nor have they addressed the other “gaps” that are often present in multi-tier and multi-sector governance structures. This Section applies the insights of MLG theory to areas of potential reforms within U.S. disaster policy. It first discusses the points of reform available along the horizontal bands of checks and balances that exist at each layer of government, with an emphasis on the federal level. It then addresses the “accountability deficit” produced by the vertical integration and explores the ability to address this deficit through the use of relational agreements.

essential “gaps”).

³⁸¹ Daniell & Kay, *supra* note 5, at 13 (discussing the “accountability deficit”).

³⁸² Charbit, *supra* note 380 at 811 (listing the “gaps”).

³⁸³ *Id.*

³⁸⁴ *Id.* at 814.

³⁸⁵ *Id.*

³⁸⁶ *Id.* at 814–15.

³⁸⁷ *Id.* at 815.

1. *Institutional Mapping*

The first step to developing more effective oversight for U.S. disaster policy is to engage in a comprehensive institutional mapping project to delineate who is responsible for deciding particular issues (e.g., design, budget, implementation) and where there are overlaps or gaps in coordination and oversight.³⁸⁸ These gaps will most likely fall in these seven general areas: (1) information, (2) capacity, (3) funding, (4) policy, (5) administrative responsibilities, (6) objectives, and (7) accountability. Once a comprehensive institutional mapping identifies the potential gaps and overlaps, the next step is to review existing oversight functions.

2. *Horizontal Reforms at Each Level of Government*

Because of the “accountability deficit” inherent in federal systems, existing oversight functions tend to be positioned on the horizontal axis. Accordingly, structural changes regarding oversight are likely to be fruitful at each level of government, but they may not address the question of vertical integration.³⁸⁹ Instead, vertical integration is more likely to be achieved through the use of the types of contractual relationships advocated by MLG theory. Of course, under federal law the standardization of contracting methods, requirements, and standards will require structural legislative and regulatory change.

a. *Congressional Oversight*

In the United States, legislative review is the central oversight measure. It is considered an essential part of lawmaking, but, in the context of disaster relief, legislative review may be too little, too late. At the federal level, Congress exercises oversight of the executive branch through the review, monitoring, and supervision of federal agencies, programs, and policy implementation.³⁹⁰ This work is largely conducted through congressional committees, but it is also implied in other congressional activities, including appropriations and investigative hearings.³⁹¹ The authority for congressional oversight is derived from its implied powers under the

³⁸⁸ *Id.* at 811.

³⁸⁹ A FAILURE OF INITIATIVE, *supra* note 117, at 320.

³⁹⁰ *McGrain v. Daugherty*, 273 U.S. 135, 174 (1927) (“[T]he power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”).

³⁹¹ The Legislative Reorganization Act of 1946 required House and Senate committees to “exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee.” Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 136, 60 Stat. 812, 832. The Legislative Reorganization Act of 1970 permitted Senate standing committees to “review and study, on a continuing basis, the application, administration, and execution of those laws” under its jurisdiction. Legislative Reorganization Act of 1970, Pub. L. No. 91-510, § 136(a)(1)-(2), 84 Stat. 1140, 1156 (1970).

Constitution, specific legislative provisions, and congressional rules.³⁹² The congressional activity following both September 11 and Hurricane Katrina provides examples of congressional oversight, and they both highlight an inherent shortcoming in nature of congressional oversight, namely that it occurs after the fact. Moreover, congressional oversight is often fragmented with one agency sometimes being subject to oversight from numerous congressional committees.

In the context of disaster policy where missteps can cost lives, it is crucial to prioritize real-time checks and balances. Luckily, Congress has already experimented with ways to alleviate the lag time with congressional oversight. For example, the Disaster Relief Appropriations Act of 2013 requires FEMA to provide monthly reports to Congress and on the internet regarding spending from the Disaster Relief Fund.³⁹³ This level of transparency allows for real-time monitoring of U.S. disaster policy and could be enhanced to impose additional reporting obligations. Of course, additional reporting requirements could potentially impede efficiency, but they also serve as an important check on the executive and can be imposed at each level.

b. Whistleblowers and Inspectors General

An important layer of oversight is provided by individuals who act as whistleblowers and the inspectors general who hear their complaints and conduct independent oversight of federal agencies. On December 9, 2021, the U.S. House of Representatives passed two important bills that would enhance protections for whistleblowers and streamline the reporting process: the Whistleblower Protection Improvement Act of 2021 (WPIA) and the Inspectors General Independence and Empowerment Act of 2021 (IG IEA).³⁹⁴ Both bills are now part of the broader Protecting Our Democracy Act oversight bill.³⁹⁵ The WPIA is a bipartisan effort to strengthen protections for federal whistleblowers³⁹⁶ and a response to the way that the Trump administration mistreated government officials and members of its own administration.³⁹⁷ It clarifies that no federal official, including the President and Vice President, can interfere with or retaliate against a whistleblower for sharing information with Congress.³⁹⁸ It provides whistleblowers with a new legal remedy

³⁹² *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad.”).

³⁹³ Disaster Relief Appropriations Act of 2013, Pub. L. 113-2, 42 U.S.C. § 5121 (2013).

³⁹⁴ IG Independence and Empowerment Act, H.R. 2662, 117th Cong. (2021); Whistleblower Protection Improvement Act of 2021, H.R. 2988, 117th Cong. (2021).

³⁹⁵ H.R. 2988. It was passed by the House on December 9, 2021, as part of the Protecting Our Democracy Act oversight bill.

³⁹⁶ *See id.*

³⁹⁷ Press Release, H. Comm. on Oversight & Reform, House Passes Chairwoman Maloney’s IG Independence and Empowerment Act (June 29, 2021), <https://oversight.house.gov/news/press-releases/house-passes-chairwoman-maloney-s-ig-independence-and-empowerment-act>.

³⁹⁸ Whistleblower Protection Improvement Act of 2021 § 2(d)(1).

and expands the scope of the protections to cover more classes of government employees.³⁹⁹ The WPIA also clarifies that every covered federal employee has a right to communicate directly with Congress by expressly providing the right to petition Congress, furnish information to Congress, or respond to requests from Congress.⁴⁰⁰ If enacted, the WPIA would represent the first change in federal whistleblowing protections since the passage of the Whistleblower Enhancement Act of 2012.⁴⁰¹

The IG IEA addresses the operation of inspector general offices that are located in federal agencies and are authorized to “receive and investigate complaints or information from an employee . . . concerning the possible existence of an activity constituting . . . abuse of authority or a substantial and specific danger to the public health and safety.”⁴⁰² The IG IEA responds to the ways that inspectors general were mistreated under the Trump administration and provides them with protection from retaliation and removal without just cause.⁴⁰³ It also ensures that they will have the resources necessary to conduct their investigations.⁴⁰⁴

Taken together, the WPIA and the IG IEA increase protections for whistleblowers and inspectors general. However, it would be possible for Congress to incentivize whistleblowing, as it has done in the context of federal securities fraud and foreign corruption.⁴⁰⁵ Congress could also streamline the reporting requirements of inspectors general. Under current law, an inspector general is required to report “immediate[ly]” to the head of the agency any “particularly serious or flagrant problems, abuses, or deficiencies relating to the administration of programs and operations.”⁴⁰⁶ The agency head is then required to deliver the report to the appropriate

³⁹⁹ *Id.* § 3(e)(3), (f).

⁴⁰⁰ *Id.* § 2(b)(E) (amending 5 U.S.C. § 2302(b)(9) to include “the exercise of any right protected under section 7211”).

⁴⁰¹ The Whistleblower Enhancement Act of 2012, Pub. L. 112-199, 126 Stat. 1465, 112th Cong. (2012).

⁴⁰² Inspector General Act of 1978, Pub. L. No. 95-452, § 7(a), 92 Stat. 1101, 1105 (amended through Pub. L. No. 114-317 (2016)); *id.* § 5(d) (duty to keep Congress informed).

⁴⁰³ Press Release, H. Comm. on Oversight and Reform, *supra* note 397 (stating that President Trump “fired or sidelined four IGs and Acting IGs who were simply doing their jobs”).

⁴⁰⁴ IG Independence and Empowerment Act, H.R. 2662, 117th Cong. § 901(a)(D)–(b)(1) (2021).

⁴⁰⁵ Section 922 of Dodd-Frank authorizes the U.S. Securities and Exchange Commission to pay eligible whistleblowers a percentage of any monetary recovery. Pub. L. No. 111-203 § 922(b)(1), 124 Stat. 1376, 1842 (2010). In the ten years since the enactment of Dodd-Frank, whistleblowers have been paid more than \$500 million under the Dodd-Frank incentive program. Mary Jane Wilmoth, *Dodd-Frank Act: Ten Years Later and More than \$500 Million Paid to Whistleblowers*, NAT'L L. REV. (July 21, 2020), <https://www.natlawreview.com/article/dodd-frank-act-ten-years-later-and-more-500-million-paid-to-whistleblowers>.

⁴⁰⁶ Inspector General Act § 5(d).

congressional authorities within seven days.⁴⁰⁷ Of course, in the case of a disaster response or other catastrophic public health crisis, seven days can may be too long to wait. Congress could authorize inspectors general to report directly to Congress where there was a credible report of “substantial and specific danger to the public health and safety.”⁴⁰⁸ Such a reporting requirement would be consistent with the WPIA that allows individuals to contact Congress directly.⁴⁰⁹ It would preserve the independence of the inspector general because it eliminates an intermediate review by a political appointee.

c. A Disaster Ombudsman

Some federal agencies have created the position or office of Ombudsman to handle complaints from both agency employees and certain stakeholders.⁴¹⁰ The Administrative Conference of the U.S. (ACUS) has recommended the creation of ombudsman in federal agencies since 1990 and most recently renewed its recommendation in 2016.⁴¹¹ Ombudsmen can be externally facing in that they receive complaints primarily from outside the target agency or internally facing in that they receive complaints from within the agency.⁴¹² The ACUS has determined that individual ombudsmen and their offices “can and do make a distinct and beneficial contribution to government effectiveness.”⁴¹³ Although there is no general authorizing legislation, the Administrative Dispute Resolution Act has been amended to include “use of ombuds” in the definition of term “alternative means of dispute resolution.”⁴¹⁴

One of the consequences of the all-hazards approach is that 17 different federal agencies are involved in U.S. disaster policy.⁴¹⁵ Accordingly, that means there are potentially 17 different inspectors general who are expected to provide independent oversight of U.S. disaster policy. Given the complexity of the policy domain, it might be appropriate to create the office of the Disaster Ombudsman that could provide independent oversight and resolve complaints across agencies. This structure would represent a departure from the agency-based ombudsman, but there is

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* § 7(a).

⁴⁰⁹ Whistleblower Protection Improvement Act of 2021, H.R. 2988, 117th Cong. § 2(d)(1) (2021).

⁴¹⁰ U.S. Administrative Conference Recommendation 2016-5, The Use of Ombuds in Federal Agencies, 81 Fed. Reg. 94,312, 94,317 (adopted Dec. 14, 2016).

⁴¹¹ *Id.* at 94,316.

⁴¹² *Id.* at 94,317.

⁴¹³ *Id.*

⁴¹⁴ 5 U.S.C. § 571(3) (2012).

⁴¹⁵ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 43.

precedent for such approach with the U.S. Office of Special Counsel that resolves employment-related disputes across the federal executive branch.⁴¹⁶

In terms of existing agency-based ombudsmen, the Taxpayer Advocate Service (TAS) provides a useful example that could be applicable in the disaster context because the Taxpayer Advocate reports directly to Congress and the TAS has at least one local Taxpayer Advocate in each state.⁴¹⁷ The mission of the TAS is to advocate on behalf of individual and business taxpayers who are experiencing financial difficulty due to a tax problem, but TAS also addresses larger systemic concerns regarding IRS processes or procedures.⁴¹⁸ TAS has developed a Bill of Taxpayer Rights, and it reports directly to Congress.⁴¹⁹ By statute, the Taxpayer Advocate is required to submit two reports to Congress each year.⁴²⁰ The first report is submitted in June and sets forth the goals and activities planned for the upcoming fiscal year.⁴²¹ The second report is delivered in December, and it includes: (1) the ten most serious problems, (2) recommendations to solve these problems, and (3) other recommendations to improve customer service.⁴²² The reports are submitted directly from the Taxpayer Advocate to Congress without any intermediate review by agency officials.

3. *Vertical Integration Through Voluntary Agreements*

There are numerous points on the horizontal axis where oversight can be enhanced: streamlining congressional oversight, enhancing reporting responsibilities, empowering whistleblowers, strengthening the independence of inspectors general, and appointing ombudsmen. However, the vertical integration of all layers of government around a single policy domain presents a more difficult challenge. On this vertical axis, any oversight measures must consider federalism, as well as the political realities of balancing the interests of different sovereigns.

MLG theory recommends the use of voluntary agreements to strengthen vertical integration around a shared sense of mission while also imposing new levels of oversight.⁴²³ The federal government currently has in place a system of grants and

⁴¹⁶ 5 U.S.C. § 1214(a)(1)(A).

⁴¹⁷ *Local Taxpayer Advocate*, INTERNAL REVENUE SERV., <https://www.irs.gov/advocate/local-taxpayer-advocate> (Sept. 12, 2022). TAS was first created in 1979 under the name, Taxpayer Ombudsman Office. Pub. L. No. 104-168, § 101(a), 110 Stat. 1452 (1996). It is led by the Taxpayer Advocate to whom the state-level Taxpayer Advocates report directly. *Id.*

⁴¹⁸ *The Taxpayer Advocate Service Is Your Voice at the IRS*, INTERNAL REVENUE SERV. <https://www.irs.gov/advocate/the-taxpayer-advocate-service-is-your-voice-at-the-irs> (Mar. 7, 2022).

⁴¹⁹ *Id.*

⁴²⁰ *National Taxpayer Advocate Reports to Congress and Research*, INTERNAL REVENUE SERV., <https://www.irs.gov/advocate/reports-to-congress> (Aug. 10, 2022).

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ On the federal level, it is not appropriate to refer to these voluntary agreements as “contracts” because that is a defined term that statutorily refers to agreements under which the

cooperative agreements that could act as vehicles to enhance integration and address the “accountability deficit.”⁴²⁴ In fact, these grants and cooperative agreements already contain numerous requirements of participation, ranging from audit specifications to public policy pronouncements. Accordingly, they can easily incorporate the MLG insights regarding the utility of voluntary agreements.

Some of these requirements of participation apply to all federal grants and cooperative agreements, whereas others are agency- or program-specific.⁴²⁵ For example, the Stafford Act contains a strong and expansive nondiscrimination command regarding relief efforts at the site of a major disaster or emergency.⁴²⁶ It provides: “the distribution of supplies, the processing of applications, and other relief and assistance activities shall be accomplished in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.”⁴²⁷ Compliance with the nondiscrimination provision is a “condition of participation in the distribution of assistance or supplies” under the Stafford Act.⁴²⁸ These nondiscrimination protections exceed those provided under Title VI of the Civil Rights Act of 1964 that apply to recipients of federal funding but only cover “race, color, or national origin.”⁴²⁹

In the context of disaster relief, it would be possible to prescribe a set of uniform terms, provisions, and policies for all grants or cooperative agreements. These required terms would be designed to further the goals of effectiveness, efficiency, and equity, as well as address any gaps identified by the institutional mapping project. Given that disaster relief spans many agencies and is authorized under multiple statutes, however, it would not be sufficient to focus solely on the Stafford Act. For example, the Community Development Block Grant (CDBG) Program administered by HUD distributes billions of dollars in Disaster Recovery and Mitigation funds.⁴³⁰ Currently, the program does not have permanent authorization, and HUD has to tailor the available relief for each particular disaster.⁴³¹ This popular program

federal government purchases a thing of value. Federal Grant and Cooperative Agreement Act of 1977, Pub. L. No. 95-224, §§ 2(2)–5(1), 92 Stat. 3, 3–4 (1978).

⁴²⁴ Daniell & Kay, *supra* note 5, at 13 (discussing the “accountability deficit”).

⁴²⁵ Federal Grant and Cooperative Agreement Act of 1977 § 6(2), 5 (defining “cooperative agreement”). The difference between grants and cooperative agreements is the degree of federal programmatic involvement rather than the type of administrative requirements imposed. *Id.*

⁴²⁶ 42 USC § 5151(a).

⁴²⁷ *Id.*

⁴²⁸ *Id.* § 5151(b).

⁴²⁹ 42 U.S.C. § 2000d (2018).

⁴³⁰ *Disaster Block Grants: Factors to Consider in Authorizing a Permanent Program*, U.S. GOV'T ACCOUNTABILITY OFF. (May 19, 2021), <https://www.gao.gov/products/gao-21-569t>.

⁴³¹ The grants were included as part of the continuing resolution, the Extending Government Funding and Delivering Emergency Assistance Act signed into law September 30, 2021. Press Release, U.S. Dep't Hous. & Urb. Dev., HUD Allocates More than \$2 Billion to

has many supporters who have urged Congress to make the program permanent, which would represent an excellent opportunity to standardize the terms for participation with an eye toward vertical integration.⁴³²

Grants such as those available under CBDG Program and the Stafford Act provide an opportunity to enhance vertical integration but only on a project-specific basis. Under MLG theory, these would be referred to as “transactional contracts.”⁴³³ MLG theory also envisions a broader and more inclusive type of participation agreement that is referred to as “relational contracts,” under which the parties agree to and affirm certain shared values and goals.⁴³⁴ These types of participation agreements can create a sense of group cohesion and reaffirm commitment to a collective mission. In this way, they can directly strengthen vertical integration across levels of government, as well as help solidify the ideological buy-in of the voluntary sector. Participation agreements can also impose mutual transparency and accountability standards, such as public reporting requirements and performance monitoring benchmarks.

Given the large number of potential parties to such a participation agreement, it may be more desirable to develop a multi-lateral participant agreement for all entities involved in U.S. disaster policy—state and local governments and nonprofit relief organizations. Joining the agreement would be voluntary, but there could be various incentives for entities to sign on. Intangible benefits would include reputational value and increased certainty of operation. In terms of tangible benefits, it might be possible to use a multi-lateral participation agreement as a pre-screening function, such that entities who participate would be entitled to streamlined grant procedures in other contexts. The enforcement aspect of the participation agreements would be limited to soft options such as public reporting, reputational harm, and perhaps increased oversight or reporting responsibilities going forward.

The notion that all entities involved in U.S. disaster relief would voluntarily enter into a common participation agreement that sets forth common goals and standards seems especially well-suited to the emergency management community that has long been defined by a strong sense of collective purpose. The current state of partisan politics, however, greatly complicates the likelihood of this sort of concerted action. For example, the extreme polarization that has resulted from the response to the COVID-19 pandemic makes it difficult to imagine state and local

Advance Equitable Disaster Recovery, Build Climate Change Resilience (Nov. 1, 2021), https://www.hud.gov/press/press_releases_media_advisories/HUD_No_21_181.

⁴³² Carlos Martin, *Constraint and Opportunity in the US Department of Housing and Urban Development's Community Development Block Grant—Disaster Recovery Program*, BROOKINGS (Dec. 15, 2021), <https://www.brookings.edu/testimonies/constraint-and-opportunity-in-the-us-department-of-housing-and-urban-developments-community-development-block-grant-disaster-recovery-program/>.

⁴³³ Charbit, *supra* note 380, at 814 (explaining different types of contracts).

⁴³⁴ *Id.*

governments voluntarily signing up for a federally directed participation agreement—even when the topic is disaster relief.

CONCLUSION

Over the last two decades, disasters have become “more frequent, severe, and expensive.”⁴³⁵ In 2021, over 40% of Americans lived in a county that experienced a disaster declaration due to climate-related extreme weather.⁴³⁶ As climate change accelerates, U.S. disaster policy will play an increasingly important role in our everyday lives. Accordingly, it is important to ensure that our disaster policy is effective, efficient, and equitable.

The strength of U.S. disaster policy lies in its multi-level and multi-sector nature that reflects our unique federal structure and longstanding American reliance on the voluntary sector and private initiative.⁴³⁷ It makes our disaster policy nimble and responsive while resisting a one-size-fits-all approach that would fail to take into account local or regional differences. However, this dispersed authority model often results in fragmented responsibility, competing policy objectives, and fractured oversight measures.

Given that disaster policy can have such profound human, economic, and societal impacts,⁴³⁸ it is crucial that we create robust oversight measures to ensure transparency and accountability. As explained in this Article, there are numerous points for potential reform across the body of U.S. disaster policy that could help to guarantee that government actors remain accountable to the people and communities they serve who stand in harm’s way. We should start pursuing these reforms proactively today and not wait for yet another failed disaster response.

⁴³⁵ Colin Foard & Madalyn Bryant, *How Government Can Address Growing Disaster Costs*, PEW CHARITABLE TRS. (Aug. 27, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/08/27/how-government-can-address-growing-disaster-costs>.

⁴³⁶ Kaplan & Ba Tran, *supra* note 6.

⁴³⁷ HSPD-5, *supra* note 31, at 24.

⁴³⁸ See generally Trujillo, *supra* note 35.