

# MODERN DISASTER FRAGMENTATION

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*Natural disasters test us. They exist at the intersection of nature, law, and society to show us where our systems are failing. Beyond physical damage, they magnify weaknesses in our socioeconomic and legal systems. In an attempt to leverage the lessons disasters bring, this Article analyzes the administrative institutions that govern disaster relief from the perspective of law, history, equity, and institutional design. This intersectional analysis uncovers a system fragmented by centuries of disorganization and infused with socioeconomic discrimination. Minor revisions cannot fix our federal approach to disaster relief: an institutional overhaul is required to achieve good governance.*

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## INTRODUCTION

“[D]isasters are the products of the social, political, and economic environment, as well as the natural events that cause them.”<sup>1</sup> These disasters have become the “new normal”<sup>2</sup>: the world suffered a fivefold increase<sup>3</sup> in

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1. Alice Fothergill & Lori A. Peek, *Poverty and Disasters in the United States: A Review of Recent Sociological Findings*, 32 NAT. HAZARDS 89, 89 (2004).

2. DANIEL A. FARBER & LISA GROW, THE CAMBRIDGE HANDBOOK OF DISASTER LAW AND POLICY: RISK, RECOVERY AND REDEVELOPMENT, at xxviii (Susan S. Kuo, John Travis Marshall & Ryan Rowberry eds., 2022) (ebook); see also Keith H. Hirokawa & Cinnamon P. Carlame, *Climate Dominance*, 35 GEO. ENV'T L. REV. 485, 525 (2023) (“At this point in time, it seems uncontested that the future of climate change is the human circumstance.”); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, SIXTH ASSESSMENT REPORT: WORKING GROUP 1: THE PHYSICAL SCIENCE BASIS, HEADLINE STATEMENTS FROM THE SUMMARY FOR POLICYMAKERS (2021), <https://www.ipcc.ch/report/ar6/wg1/resources/spm-headline-statements/> [<https://perma.cc/5DGM-K4LC>] (select download to access the proper PDF); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 4, 8 (2021), <https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/> [<https://perma.cc/6A5Y-VEHT>] (select “Summary for Policymakers”) (“It is unequivocal that human influence has warmed the atmosphere, ocean and land[] . . . [and is] affecting many weather and climate extremes in every region across the globe[] . . . [causing] changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones . . .”); *Fourth National Climate Assessment: Volume II: Impacts, Risks, and Adaptation in the United States, Summary Findings*, U.S. GLOB. CHANGE RSCH. PROGRAM, <https://nca2018.globalchange.gov> [<https://perma.cc/M4RE-69RU>] (last visited Oct. 12, 2024). Scholars agree. See, e.g., Rebecca Solnit, *Are We Missing the Big Picture on Climate Change?*, N.Y. TIMES (Dec. 2, 2014), <https://www.nytimes.com/2014/12/07/magazine/are-we-missing-the-big-picture-on-climate-change.html> [<https://perma.cc/MPA7-K3W4>] (describing climate change as “everything, a story and a calamity bigger than any other”).

3. See *Weather-Related Disasters Increase over Past 50 Years, Causing More Damage but Fewer Deaths*, WORLD METEOROLOGICAL ORG. (Aug. 31, 2021), <https://wmo.int/media/news/weather-related-disasters-increase-over-past-50-years-causing-more-damage-fewer-deaths> [<https://perma.cc/Y9TP-59SX>]. Estimates of increases vary slightly based on definitions of qualifying events, but all indicate an order of magnitude increase. See, e.g., INST. FOR ECON. & PEACE, ECOLOGICAL THREAT REGISTER 2020: UNDERSTANDING ECOLOGICAL THREATS, RESILIENCE & PEACE 49 fig.3.1 (2020), [https://www.visionofhumanity.org/wp-content/uploads/2020/10/ETR\\_2020\\_web-1.pdf](https://www.visionofhumanity.org/wp-content/uploads/2020/10/ETR_2020_web-1.pdf) [<https://perma.cc/3EB4-5VXM>] (identifying a tenfold increase from 1960 to 2019).

natural disasters<sup>4</sup> in the last fifty to sixty years.<sup>5</sup> In 2021, 40 percent of Americans lived in counties where climate-related disasters were declared<sup>6</sup> and 80 percent suffered from a heat wave.<sup>7</sup> Fires, floods, cyclones, extreme temperatures, drought, and sea level rise now threaten communities at what feels like an exponential rate.<sup>8</sup> In 2022, communities across the country suffered losses from eighteen natural disasters that caused more than one billion dollars in damage.<sup>9</sup> This figure fits recent trends: natural disasters breaking the one billion dollar mark increased from three annually in the 1980s to twenty-two annually in 2020.<sup>10</sup> That amounts to a yearly increase of roughly twenty billion dollars in the 1980s to about 175 billion dollars in 2020.<sup>11</sup>

This Article explores the complex distribution of power over federal disaster relief programs.<sup>12</sup> In some cases, power sharing reflects intentional

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4. Natural disasters are those that cause “[a] serious disruption of the functioning of a community or a society at any scale due to hazardous events interacting with conditions of exposure, vulnerability, and capacity, leading to one or more of the following: human, material, economic and environmental losses and impacts.” *Disaster*, UNITED NATIONS OFF. FOR DISASTER RISK REDUCTION, <https://www.undrr.org/terminology/disaster> [<https://perma.cc/MN75-4VKQ>] (last visited Oct. 12, 2024). This definition encompasses a “major disaster” sufficient to trigger a disaster relief declaration under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub L. No 93-288, 88 Stat. 143 (codified as amended in scattered titles of the U.S. Code), but without consideration of the impacted locality’s resources. See 42 U.S.C. § 5122(2); see also *id.* § 5121.

5. See INST. FOR ECON. & PEACE, *supra* note 3, at 49.

6. See Nancy J. Knauer, *U.S. Disaster Policy: Oversight Challenges and the Promise of Multi-level Governance*, 26 LEWIS & CLARK L. REV. 973, 975 (2023) (citing Sarah Kaplan & Andrew Ba Tran, *More Than 40 Percent of Americans Live in Counties Hit by Climate Disasters in 2021*, WASH. POST (Jan. 5, 2022, 1:05 PM), <https://www.washingtonpost.com/climate-environment/2022/01/05/climate-disasters-2021-fires/> [<https://perma.cc/P8ND-LRBN>]).

7. See *id.* at 975 (citing 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/> [<https://perma.cc/C2A8-KLGF>]); see also Robin Bronen, *Rights, Resilience and Community-Led Relocation: Creating a National Governance Framework*, 45 HARBINGER 25, 29 (2021) (explaining that coastal floods have increased “anywhere from 300% to more than 900% since 1970—in the number of days when these communities are inundated with ‘sunny day’ flooding caused by high tides, not storm surges”).

8. WORLD METEOROLOGICAL ORG., WMO-1316, STATE OF THE GLOBAL CLIMATE CHANGE 2022, at 7–8 (2023), [https://library.wmo.int/viewer/66214/download?file=Statement\\_2022.pdf&type=pdf&navigator=1](https://library.wmo.int/viewer/66214/download?file=Statement_2022.pdf&type=pdf&navigator=1) [<https://perma.cc/4LYW-7XSF>].

9. See *Billion-Dollar Weather and Climate Disasters: Disaster Mapping*, NAT’L OCEANIC & ATMOSPHERIC ADMIN. (2024), <https://www.ncei.noaa.gov/access/billions/mapping> [<https://perma.cc/DU4E-QHBX>] (set the year range to 2022 and press update). For more information on growing costs of disaster relief, see Colin Foard & Madalyn Bryant, *How Government Can Address Growing Disaster Costs*, THE 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> [<https://perma.cc/XC7D-QLRZ>].

10. See *Billion-Dollar Weather and Climate Disasters*, *supra* note 9 (set the year range to 1980 and press update, then set the year range to 2020 and press update).

11. See *id.*

12. Federal disaster management encompasses many disaster response and mitigation activities that are not directly addressed in this Article. For example, in addition to providing monetary support, the Federal Emergency Management Agency (FEMA) coordinates disaster

structural choices dictated by constitutional requirements<sup>13</sup> that echo the founders' preference for incremental change and distaste for monopolistic power.<sup>14</sup> In others, however, authority over the same problem is split across governmental institutions by happenstance and as the result of uncoordinated or "unsystematic" law-making efforts.<sup>15</sup> Such is the case with federal disaster management.<sup>16</sup>

Legal and policy scholars who analyze the governance impacts of power sharing refer to split authority over the same issue as "fragmentation" of power.<sup>17</sup> "Vertical fragmentation" occurs when sovereignty is divided across multiple levels of government (i.e., federal, state, local, and tribal).<sup>18</sup> "Horizontal fragmentation" exists when power is shared within the same level of government (e.g., interagency).<sup>19</sup> Fragmentation has its benefits, but

response and oversees and corresponds with the Environmental Protection Agency (EPA), the U.S. Department of Housing and Urban Development (HUD), the U.S. Department of Health and Human Services (HHS), the U.S. Army Corps of Engineers, and the American Red Cross's efforts in furtherance of Emergency Support Functions under the National Response Framework. *See, e.g., FEMA Coordinating with Partner Agencies to Prepare for Tropical Depression Bolaven*, FED. EMERGENCY MGMT. AGENCY (Oct. 8, 2023), <https://www.fema.gov/press-release/20231009/fema-coordinating-partner-agencies-prepare-tropical-depression-bolaven> [<https://perma.cc/KX6W-LWBR>].

13. *See* U.S. CONST. art. VI, cl. 2. (Supremacy Clause); *id.* art. I, § 1 (congressional powers); *id.* art. II, § 1, cl. 1 (executive powers); *id.* art. III, § 1 (judicial powers); *id.* art. I, § 7 (legislation); *id.* amend. X (reservation of powers to the states).

14. *See* THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."); *see also* RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* 32–33 (2004).

15. *See, e.g.,* Donovan Finn, *Catastrophe Is Not the End but the Beginning: Two Centuries of Evolution in U.S. Disaster Law and Policy*, in *THE CAMBRIDGE HANDBOOK OF DISASTER LAW AND POLICY: RISK, RECOVERY AND REDEVELOPMENT* 25 (Susan S. Kuo, John Travis Marshall & Ryan Rowberry eds., 2022) (ebook) ("[F]ederal disaster policies are incredibly complex, owing to the unsystematic way these policies have evolved over more than two centuries."); Margaret B. Kwoka, *An Information Commission*, 112 *Geo. L.J.* 841, 844 (2024) ("[T]here is currently no locus in government championing the people's right to access government information.").

16. For an excellent and detailed historical account of the nation's disaster policy and management, *see* Finn, *supra* note 15, at 27–46. *See also* Jessica Schultz & James R. Elliott, *Natural Disasters and Local Demographic Change in the United States*, 34 *POPULATION & ENV'T* 293, 295–97 (2013).

17. *See, e.g.,* LAZARUS, *supra* note 14, at 32–33; Susan L. Cutter, *Governance Structures for Recovery and Resilience*, in *THE CAMBRIDGE HANDBOOK OF DISASTER LAW AND POLICY: RISK, RECOVERY AND REDEVELOPMENT* 59 (Susan S. Kuo, John Travis Marshall & Ryan Rowberry eds., 2022) (ebook); William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 *N.Y.U. L. REV.* 1547, 1551 & n.9 (2007); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106089, ANNUAL REPORT: ADDITIONAL OPPORTUNITIES TO REDUCE FRAGMENTATION, OVERLAP, AND DUPLICATION AND ACHIEVE BILLIONS OF DOLLARS IN FINANCIAL BENEFITS 24 (2023) (defining fragmentation as "circumstances in which more than one federal agency (or more than one organization within an agency) is involved in the same broad area of national need").

18. *See* Cutter, *supra* note 17, at 62; *see also* Finn, *supra* note 15, at 25.

19. Allan Erbsen, *Horizontal Federalism*, 93 *MINN. L. REV.* 493, 498–503 (2008). Other forms of fragmentation exist that are also beyond the scope of this Article. For example, Professor Hari M. Osofsky makes an excellent call for "diagonal" fragmentation between

the success or failure of power sharing is entirely dependent on how it is used.<sup>20</sup> Intentional, carefully planned power sharing can greatly benefit our systems of government through the creation of clear institutional boundaries, procedures, and protections against politically motivated deregulation.<sup>21</sup> However, fragmentation resulting from lack of congressional forethought,<sup>22</sup> jurisdictional overlap,<sup>23</sup> institutional complexity,<sup>24</sup> and interagency

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multi-level governance institutions. *See generally* Hari M. Osofsky, *Is Climate Change “International”?: Litigation’s Diagonal Regulatory Role*, 49 VA. J. INT’L L. 585 (2009). *See also* FARBER & GROW, *supra* note 2, at xxxiii (exemplifying that geographic fragmentation exists when impacts stretch across land controlled by different jurisdictions).

20. Although not the focus of this Article, rich scholarship exists illustrating the virtues and vices of vertical fragmentation. *See, e.g.*, Knauer, *supra* note 6, at 985 (“U.S. disaster policy has evolved along with our understanding of federalism and the appropriate role of the federal government in managing emergency risks.”); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1265–71 (2009) (describing modes of federalism and the fragmentation each creates); *see also* Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333, 387 (2017); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 174–77 (2006) (arguing for broad overlap in federal and local spheres of environmental regulatory power); Holly Doremus & W. Michael Hanemann, *Of Babies and Bathwater: Why the Clean Air Act’s Cooperative Federalism Framework Is Useful for Addressing Global Warming*, 50 ARIZ. L. REV. 799, 816–34 (2008); Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 3–6, 14–16 (2007) (discussing “cross-jurisdictional regulatory engagement”); Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 8–11 (2006); Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENV’T L.J. 397, 447–52 (2008); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1811–13 (2008).

21. *See* NAT’L COMM’N ON THE PUB. SERV., URGENT BUSINESS FOR AMERICA: REVITALIZING THE FEDERAL GOVERNMENT FOR THE 21ST CENTURY 36 (2003), <https://ourpublicservice.org/wpcontent/uploads/2003/01/7dd93d98ebc51f44548885f502dd13a7-1414078938.pdf> [<https://perma.cc/446P-2ZL9>] (“In those areas where there is a clear and readily definable program goal, such as getting benefit checks out, the work gets done . . .”). Examples of successful interagency power sharing exist whereby Congress explicitly tasks two or more agencies with a problem and assigns agencies primary and secondary roles. For example, the Residential Lead-Based Paint Hazard Reduction Act of 1992, Pub. L. No. 102-550, 106 Stat. 3897 (codified as amended in scattered titles of the U.S. Code), directed HUD and the EPA to implement regulations requiring the disclosure of known lead-based paint hazards before the sale or lease of housing built before 1978. *See* 42 U.S.C. §§ 4852a, 4852d; *see also* Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1264–65, 1272–74 (2014) (discussing environmental programs implemented by federal agencies other than the EPA); Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1138–45 (2012) (discussing shared regulatory duties between federal agencies); Sarah E. Light, *Regulatory Horcruxes*, 67 DUKE L.J. 1647, 1674–81 (2018) (discussing the pros and cons of using horizontal and vertical fragmentation as a tool to fight deregulation).

22. *See* David A. Hyman & William E. Kovacic, *Why Who Does What Matters: Governmental Design and Agency Performance*, 82 GEO. WASH. L. REV. 1446, 1469–70 (2014).

23. *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENV’T L. REV. 1, 6–9 (2009) (discussing difficulties faced by agencies saddled with conflicting goals).

24. *See, e.g.*, Hyman & Kovacic, *supra* note 22, at 1493–94.

conflict<sup>25</sup> creates significant obstacles to effective governance.<sup>26</sup> As with all things, the devil is in the details.<sup>27</sup>

The federal disaster management system “operates within a fragmented governance structure with both vertical and horizontal elements.”<sup>28</sup> The system spreads vertically from the federal government to states, localities, and tribes<sup>29</sup> and horizontally across thirty agencies and at least thirty-two congressional committees.<sup>30</sup> At the federal level, dozens of programs contribute to a patchwork response to disaster preparedness (predisaster), relief (days and weeks following the disaster),<sup>31</sup> and recovery (the months and years that follow).<sup>32</sup> To access federal aid, disaster survivors must navigate decentralized information and apply for programs that have unique requirements, applications, and timelines.<sup>33</sup> Such complexities trap people in an institutional maze “between several systems with no clear sense of how to resolve any of the issues involved.”<sup>34</sup>

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25. *See id.* at 1458–59.

26. *See id.* at 1459 (“Profound difficulties can result when agencies do not ‘get along’ . . . [and] [e]ven when agencies get along and agree on a problem’s nature . . . they can disagree profoundly on the optimal solution and on which agency is best situated to act.”); Biber, *supra* note 23, at 6–9 (discussing difficulties faced by agencies saddled with conflicting goals); Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulatory State*, 95 MINN. L. REV. 578, 645–47 (2010) (discussing the U.S. regulatory regime’s poor coordination in combatting the 2008–09 financial crisis).

27. This sentiment has been echoed repeatedly by scholars bemoaning the organization—and disorganization—of the administrative state. As observed by Professor Amy Zegart, “[O]rganization is never neutral . . . . [T]he devil often lies in the details of agency design.” AMY B. ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 1–2 (1999).

28. Cutter, *supra* note 17, at 62.

29. *See id.*; Finn, *supra* note 15, at 25.

30. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-232, *DISASTER RECOVERY: BETTER MONITORING OF BLOCK GRANT FUNDS IS NEEDED* 5 (2019); U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-104956, *DISASTER RECOVERY: ACTIONS NEEDED TO IMPROVE THE FEDERAL APPROACH* 48 (2022); *see also* U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 24 (defining fragmentation as those “circumstances in which more than one federal agency (or more than one organization within an agency) is involved in the same broad area of national need”); *see, e.g.,* *Forms of Assistance*, *DISASTER ASSISTANCE.GOV*, <https://www.disasterassistance.gov/get-assistance/by-category-or-agency> [<https://perma.cc/4JL2-EGE4>] (last visited Oct. 12, 2024) (choose “Federal Agency” under “Find Assistance By” to see a list of federal agencies that provide disaster relief).

31. *See* Fothergill & Peek, *supra* note 1, at 96 (“The post-impact, emergency response stage of a disaster is characterized as the immediate aftermath of a disaster, typically including the first hours or days, perhaps up to one week, depending on the event.”).

32. *See id.* at 98 (“The recovery stage, typically the one-year period following a disaster, historically has implied putting a disaster-stricken community back together.”).

33. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 54–55; *see also infra* note 272 and accompanying text.

34. LESLIE PAIK, *TRAPPED IN A MAZE: HOW SOCIAL CONTROL INSTITUTIONS DRIVE FAMILY POVERTY AND INEQUALITY* 5 (2021); William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 6 (2003) (“[I]n such settings of fragmentation and jurisdictional mismatch, those opposed to regulation have numerous means strategically to exploit this complexity, while those seeking regulation are uncertain where to turn for regulatory relief.”).

This Article builds on seminal work by Professor William W. Buzbee on the threat of fragmentation in the environmental regulatory context.<sup>35</sup> Rather than environmental institutions, this Article focuses on the negative impacts of horizontal fragmentation on the federal disaster relief system, and critiques federal programs that send funding directly to individuals (“direct funding programs”). This Article does not intend to critique the administrative system writ large. Instead, it identifies what institutional improvements are necessary to achieve good governance in the disaster relief sphere.

To distinguish between beneficial administrative fragmentation and that which undermines programmatic success, this Article refers to power sharing in the administrative disaster management system as “disaster fragmentation.” This term encompasses the legal, programmatic, political, and structural fault lines that fracture U.S. disaster relief management and prevent aid from reaching those who need it most. Disaster fragmentation erects barriers to individual disaster recovery that include labyrinthine programmatic structures, unclear chains of command, conflicting cross-program requirements, opaque decision-making, funding lags, complex appeals processes, and regulatory gaps.

This Article is grounded in environmental justice theory, which studies the disparate impact of law, policy, and practices on the environments of marginalized communities.<sup>36</sup> Disaster fragmentation has a disproportionately negative impact on people of color and historically underserved communities,<sup>37</sup> who are much more likely to suffer loss of house,<sup>38</sup> community,<sup>39</sup> and life<sup>40</sup> in natural disasters than affluent, white

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35. See Buzbee, *supra* note 34, at 22–27, 49–51.

36. For a summary of the complex factors contributing to environmental injustice, see generally, RICHARD ROTHSTEIN, *THE COLOR OF THE LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017). See also Sheila Foster, *The Challenge of Environmental Justice*, 1 RUTGERS J.L. & URB. POL’Y 1, 10 (2004); LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 54–58 (2000).

37. See Robert R.M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENV’T L. & POL’Y F. 23, 23 (2012) (“Despite the best efforts of individuals and their communities, the heaviest burdens of disaster are borne by those with the least power—those who, for whatever social and economic reasons, are more exposed, more susceptible, and less resilient when disaster strikes.”); CLIFFORD VILLA, NADIA AHMAD, REBECCA BRATSPIES, ROGER LIN, CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE O’NEILL, *ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION* 527 (3d ed. 2020).

38. See, e.g., Jacob William Faber, *Superstorm Sandy and the Demographics of Flood Risk in New York City*, 43 HUM. ECOLOGY 363, 373 (2015); STEPHANE HALLEGATTE, ADRIEN VOGT-SCHILB, MOOK BANGALORE & JULIE ROZENBERG, WORLD BANK GRP, *UNBREAKABLE: BUILDING THE RESILIENCE OF THE POOR IN THE FACE OF NATURAL DISASTERS* 25–43 (2016), <https://documents.worldbank.org/en/publication/documentsreports/documentdetail/512241480487839624/unbreakable-building-the-resilience-of-the-poor-in-the-face-of-natural-disasters> [<https://perma.cc/L3K8-6VZS>].

39. See generally Ross B. Corotis & Elaine Enarson, *Socio-economic Disparities in Community Consequences to Natural Disasters*, in 1ST INTERNATIONAL FORUM ON ENGINEERING DECISION MAKING (2004); HALLEGATTE ET AL., *supra* note 38, at 25–56; Schultz & Elliott, *supra* note 16, at 296–97.

40. See, e.g., Jeffrey W. Bethel, Sloane C. Burke & Amber F. Britt, *Disparity in Disaster Preparedness Between Racial/Ethnic Groups*, 1 DISASTER HEALTH 110, 110 (2013) (noting

counterparts.<sup>41</sup> These populations are also less likely to fully recover.<sup>42</sup> Complex vulnerabilities<sup>43</sup> illustrate the difficulty of disaster management: it requires a thorough accounting of climate-fueled weather events, resources at risk, growing socioeconomic vulnerability, and complex preexisting factors.<sup>44</sup> This Article builds on a rich body of environmental and social justice literature about these disparities as it explores their historical, social, and legal underpinnings.<sup>45</sup> Increasingly, scholars are moving away from the term “environmental justice,” which refers to the movement’s goal, and

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that the mortality rate from Hurricane Katrina for Black residents was “1.7 to 4 times greater than that of white[] [residents]”); Fothergill & Peek, *supra* note 1, at 94–95 (summarizing research finding that low socioeconomic status correlates with higher risk of injury, mortality, and morbidity as the result of a natural disaster).

41. See Verchick, *supra* note 37, at 23 (“Despite the best efforts of individuals and their communities, the heaviest burdens of disaster are borne by those with the least power—those who, for whatever social and economic reasons, are more exposed, more susceptible, and less resilient when disaster strikes.”); SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., DISASTER TECH. ASSISTANCE CTR. SUPPLEMENTAL RSCH BULL., GREATER IMPACT: HOW DISASTERS AFFECT PEOPLE OF LOW SOCIOECONOMIC STATUS 8 (2017), [https://www.samhsa.gov/sites/default/files/dtac/srb-low-ses\\_2.pdf](https://www.samhsa.gov/sites/default/files/dtac/srb-low-ses_2.pdf) [<https://perma.cc/S7FH-RN6Q>]; see also Sara A. Colangelo, *Bridging Silos: Environmental and Reproductive Justice in the Climate Crisis*, 112 CALIF. L. REV. 1255 (2024) (examining the link between climate change and reproductive rights in underserved communities of color); Jena Brooker, *Climate Change Is Forcing American Women from Their Homes*, PBS PERIL & PROMISE (Apr. 18, 2022), <https://www.pbs.org/wnet/peril-and-promise/2022/04/climate-change-is-forcing-american-women-from-their-homes/> [<https://perma.cc/M4YW-C8RT>] (“80 percent of single-parent households . . . headed by women . . . have that much more of a challenge because you can’t easily apply [for federal assistance] if you’re dealing with your kids, housing issues, health issues, et cetera . . .” (citation omitted)).

42. See generally Christina Finch, Christopher T. Emrich & Susan L. Cutter, *Disaster Disparities and Differential Recovery in New Orleans*, 31 POPULATION & ENV’T 179 (2010).

43. Sociologist and Professor Kathleen Tierney identifies vulnerabilities including “income, poverty, and social class; race, ethnicity, and culture; physical ability and disability; language competency; social networks and social capital; gender; household composition; home ownership; and age” all of which can contribute to one’s “socioeconomic” status. KATHLEEN J. TIERNEY, *THE SOCIAL ROOTS OF RISK: PRODUCING DISASTERS, PROMOTING RESILIENCE* 141 (Stanford Business Books, 2014).

44. See generally Susan L. Cutter, Kevin D. Ash & Christopher T. Emrich, *The Geographies of Community Disaster Resilience*, 29 GLOB. ENV’T CHANGE 65 (2014).

45. See, e.g., Hirokawa & Carlane, *supra* note 2, at 498 (“[T]here is now extensive scholarly work examining how climate change deepens inequality by disproportionately affecting members of society who already face higher levels of vulnerability.” (citing Alice Kaswan, *Climate Adaptation and Theories of Justice*, in PHILOSOPHY, LAW AND ENVIRONMENTAL CRISIS 97 (Alain Papaux & Simone Zurbuchen eds., 2016))); Jesse M. Keenan, Thomas Hill & Anurag Gumber, *Climate Gentrification: From Theory to Empiricism in Miami-Dade County, Florida*, 13 ENV’T RSCH. LETTERS 1 (2018); see also Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEG. F. 139, 140 (“Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”); COLE & FOSTER, *supra* note 36, at 54–55 (finding that “numerous environmental hazards: garbage dumps, air pollution, lead poisoning, toxic waste production and disposal, pesticide poisoning, noise pollution, occupational hazards, and rat bites” are inequitably distributed by income or race); *Climate Justice Working Group*, WE ACT FOR ENV’T JUST., <https://weact.org/home-3-2-2-2/getinvolved/membership/cjwg/> [<https://perma.cc/FK96-LGY>] (last visited Oct. 12, 2024).



toward “environmental injustice,” which better describes the current situation.<sup>46</sup> This Article adopts this approach. The environmental injustice lens also allows the inspection of the ecology of disasters from a sociopolitical perspective, along with the socioeconomic, political, and legal influences inherent to the disaster system.<sup>47</sup>

The lenses of history and equity demonstrate that our federal disaster relief system is inherently unjust.<sup>48</sup> Disaster fragmentation exacerbates these inequities and makes disaster funding inaccessible to many who need it.<sup>49</sup> This Article considers how to best revise federal disaster funding programs from a structural perspective based on works of scholars who have addressed horizontal fragmentation in other areas.<sup>50</sup> Recommendations are explicitly informed by history, socioeconomic discrimination, and institutional governance: topics that are frequently siloed in the literature. Once these impacts are woven together, it is clear that large-scale institutional change is needed to correct programmatic failure and inequity.

Disaster fragmentation is inherently complex. To understand how to better serve disaster survivors, these complexities must be addressed together. Part I of this Article orients readers to the current state of federal individual disaster funding. To understand how history influences our current systems, Part II analyzes the founding of the administrative state,<sup>51</sup> disaster law, and the biases that history baked into these systems. Part III turns to institutional structure and analyzes how disaster fragmentation exacerbates preexisting inequities suffered by those most in need of disaster relief. Finally, Part IV suggests institutional changes to minimize disaster fragmentation and elevate equity in the disaster relief system.

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46. See, e.g., Kaitlin Kelly-Reif & Steve Wing, *Urban-Rural Exploitation: An Underappreciated Dimension of Environmental Injustice*, 47 J. RURAL STUD. 350 (2016).

47. See Fothergill & Peek, *supra* note 1, at 89. See generally Linda Lobao, *Continuity and Change in Place Stratification: Spatial Inequality and Middle-Range Territorial Units*, 69 RURAL SOCIO. 1 (2004); John Walton, *Urban Sociology: The Contribution and Limits of Political Economy*, 19 ANN. REV. SOCIO. 301 (1993).

48. See generally Michele L. Landis, “Let Me Next Time Be ‘Tried by Fire’”: *Disaster Relief and the Origins of the American Welfare State 1789-1874*, 92 NW. U. L. REV. 967 (1998).

49. See *infra* note 307 and accompanying text.

50. See, e.g., Kwoka, *supra* note 15, at 858–73 (discussing fragmentation of authority in the Freedom of Information Act context).

51. As recognized by Professor Susan E. Dudley, the term “administrative state” has been much maligned in recent years because of the politicization and resulting demonization of regulatory work. See Susan E. Dudley, *Milestones in the Evolution of the Administrative State*, 3 DÆDALUS, J. AM. ACAD. ARTS & SCI. 33, 33 (2021). See generally Alasdair Roberts, *Should We Defend the Administrative State?*, 80 PUB. ADMIN. REV. 391 (2020) (suggesting that scholars should be more careful when using politically charged terms whose definitions in academia differ from common parlance). The author of this Article use this term neutrally and interchangeably with “administrative system,” both of which refer to the federal agencies, departments, and programs that make up the executive branch.

## I. MODERN DISASTER LAW

This part provides an orientation to the current state of direct funding programs and introduces some of their inherent complexities, including how the programs work together. Opportunities for individual disaster relief exist at the federal, state, and local levels.<sup>52</sup> As discussed in Part II, they are incredibly complex “owing to the unsystematic way these policies have evolved.”<sup>53</sup> According to a recent U.S. Government Accountability Office (GAO) report on agency inefficiency, thirty federal agencies currently bear some responsibility for disaster relief.<sup>54</sup> Relief comes through low-interest loans and grants and can be dispersed directly to individuals (“direct relief”) or to states, localities, and tribes.<sup>55</sup>

Federal disaster relief is meant to supplement available private funds, including flood and homeowners insurance. After private sources are exhausted, disaster victims may apply directly to multiple federal programs to recover the full amount of their loss.<sup>56</sup> The U.S. Small Business Administration (SBA) Disaster Loan Program (DLP) and Federal Emergency Management Agency (FEMA) Individuals and Households Program (IHP) provide the lion’s share of direct relief at the federal level.<sup>57</sup> Because individuals and households may receive multiple grants, including federal grants dispersed by state and local governments, a subset of the U.S. Department of Housing and Urban Development (HUD) Community Development Block Grant program (CDBG) is also relevant.<sup>58</sup> Numerous other agencies run smaller tertiary programs.<sup>59</sup> This part discusses the complementary and competing individual assistance programs available

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52. See *supra* note 18 and accompanying text.

53. Finn, *supra* note 15, at 25. For detail about the history of disaster relief funding, see *infra* Parts II.B–C.

54. These agencies include the U.S. Department of Transportation (DOT), EPA, the National Oceanic and Atmospheric Administration (NOAA), the U.S. Department of Agriculture (USDA), the U.S. Department of Homeland Security (DHS)/Federal Emergency Management Agency (FEMA), the U.S. Small Business Administration (SBA), HUD, the U.S. Department of Interior/Bureau of Indian Affairs, the U.S. Department of the Treasury, the Department of Labor/Occupational Safety and Health Administration, the U.S. Postal Service, and the U.S. Department of Justice. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 17–18, 54.

55. See generally Finn, *supra* note 15.

56. See *infra* note 87 and accompanying text. Recovery exceeding individual or household loss is considered “duplication of benefits” and is prohibited under the Robert T. Stafford Disaster Relief and Emergency Assistance Act. 42 U.S.C. § 5155; 44 C.F.R. § 206.191 (2024).

57. See, e.g., ELIZABETH M. WEBSTER, CONG. RSCH. SERV., R46014, FEMA INDIVIDUAL ASSISTANCE PROGRAMS: AN OVERVIEW 6–13 (2024). See generally BRUCE R. LINDSAY, CONG. RSCH. SERV., R41309, THE SBA DISASTER LOAN PROGRAM: OVERVIEW AND POSSIBLE ISSUES FOR CONGRESS (2015); BRUCE R. LINDSAY, CONG. RSCH. SERV., R44412, SBA DISASTER LOAN PROGRAM: FREQUENTLY ASKED QUESTIONS (2023).

58. See generally JOSEPH V. JAROSCAK, CONG. RSCH. SERV., R46475, THE COMMUNITY DEVELOPMENT BLOCK GRANT’S DISASTER RECOVERY (CDBG-DR) COMPONENT: BACKGROUND AND ISSUES (2020).

59. See *infra* Part III.A (discussing jurisdictional overlap among diverse federal disaster relief programs).

through FEMA, SBA, and HUD. As discussed in Part II.D and Part III, the complexity of this multi-entity system creates significant hurdles to relief.

#### A. FEMA and Individual Assistance

The history of federal disaster management is a mosaic of failed reorganizations.<sup>60</sup> FEMA was created in 1979 to help people “before, during, and after disasters,”<sup>61</sup> consolidate federal disaster programs, and lead the nation in a “comprehensive emergency management system.”<sup>62</sup> The agency began as a hodgepodge of diverse programs<sup>63</sup> and has been reorganized several times in response to disaster management failures.<sup>64</sup> Despite these efforts, however, power over disaster management is still spread across the federal government.<sup>65</sup> As one participant in FEMA’s conception commented, creating an agency from existing parts is “like trying to make a cake by mixing the milk still in the bottle, with the flour still in the sack, with the eggs still in their carton.”<sup>66</sup> FEMA has also perennially struggled with conflict, scandal, and calls for the agency’s abolishment.<sup>67</sup> This hit fever pitch after Hurricane Katrina, when scholars and internal investigators claimed the agency’s failed response was “steeped in racial bias.”<sup>68</sup>

The agency’s disaster relief programs are implemented under the Robert T. Stafford Disaster Relief and Emergency Assistance Act,<sup>69</sup> (the “Stafford Disaster Relief Act”) which describes the role of the federal government as supplemental.<sup>70</sup> The Stafford Disaster Relief Act therefore authorizes the

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60. See generally Finn, *supra* note 15; Patrick S. Roberts, *FEMA After Katrina*, 137 POL’Y REV. 15 (2006).

61. *About FEMA*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/about/strategic-plan/about-fema> [<https://perma.cc/9FZJ-U3NY>] (last visited Oct. 12, 2024).

62. 6 U.S.C. § 313(b)(1); see Finn, *supra* note 15, at 27. For a discussion of disaster relief fragmentation, see Parts II–III.

63. See Finn, *supra* note 15, at 41; see also Roberts, *supra* note 60, at 18; NAT’L ACAD. OF PUB. ADMIN., *COPING WITH CATASTROPHE: BUILDING AN EMERGENCY MANAGEMENT SYSTEM TO MEET PEOPLE’S NEEDS IN NATURAL AND MANMADE DISASTERS* 14–15 (1993), <https://irp.fas.org/agency/dhs/fema/coping.pdf> [<https://perma.cc/384T-LF2K>].

64. See Roberts, *supra* note 60, at 18, 20–22; NAT’L ACAD. OF PUB. ADMIN., *supra* note 63, at 16.

65. See Finn, *supra* note 15, at 41 (observing that “even with the advent of FEMA, disaster management responsibilities remained distributed across the federal bureaucracy”).

66. NAT’L ACAD. OF PUB. ADMIN., *supra* note 63, at 16.

67. See Finn, *supra* note 15, at 41; Roberts, *supra* note 60, at 15; NAT’L ACAD. OF PUB. ADMIN., *supra* note 63, at 14–16. Following Hurricane Andrew, the National Academy of Public Administration observed that “emergency management suffers from . . . [a] lack of clear measurable objectives, adequate resources, public concern or official commitments.” NAT’L ACAD. OF PUB. ADMIN., *supra* note 63, at 87. “Currently, FEMA is like a patient in triage. The President and Congress must decide whether to treat it or let it die.” *Id.* at ix.

68. Finch et al., *supra* note 42, at 180; see also NAT’L ADVISORY COUNCIL, NATIONAL ADVISORY COUNCIL REPORT TO THE FEMA ADMINISTRATOR 11–12 (2020).

69. Pub L. No 93-288, 88 Stat. 143 (codified as amended in scattered titles of the U.S. Code).

70. 42 U.S.C. § 5122(1); see also *id.* § 5174(a)(1).

President to issue emergency<sup>71</sup> and major disaster<sup>72</sup> declarations only when an “effective response is beyond the capabilities of the State and the affected local governments.”<sup>73</sup> Once an emergency or disaster has been declared, the disaster area must be identified and a damage assessment must be performed<sup>74</sup> before impacted governments and individuals become eligible for FEMA grants.<sup>75</sup>

FEMA’s grant programs are dispersed to governments and individuals through the Disaster Relief Fund (DRF),<sup>76</sup> a no-year funding<sup>77</sup> source that is largely replenished on an ad hoc basis in response to specific incidents.<sup>78</sup> Congress appropriated 381 billion dollars to the fund between 1992 and 2021.<sup>79</sup> However, most of this money goes to programs granted to governments: FEMA used only 14 percent of its disaster funding for individual programs between 2012 and 2022.<sup>80</sup>

FEMA’s Individual Assistance (IA) framework includes multiple programs that provide different types of assistance for disaster survivors, including housing assistance, crisis counseling, unemployment assistance,

71. To justify a declaration of emergency, supplemental federal assistance must be needed to “save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe.” *Id.* § 5122(1); *see also* 44 C.F.R. § 206.35(b)(2) (2024).

72. To justify a declaration of major disaster, federal assistance must be needed to “supplement the efforts and available resources of the State, local governments, disaster relief organizations, and compensation by insurance for disaster-related losses.” 44 C.F.R. § 206.36(b)(2) (2024); *see also* 42 U.S.C. § 5170.

73. 42 U.S.C. § 5170(a) (major disaster); *see also* 44 C.F.R. § 206.36(b) (2024) (same); 42 U.S.C. § 5191 (emergency); 44 C.F.R. § 206.35 (2024) (same).

74. *See* 44 C.F.R. § 206.36(c)(2) (2024); FED. EMERGENCY MGMT. AGENCY, FEMA PRELIMINARY DAMAGE ASSESSMENT GUIDE 7–8 (2021), [https://www.fema.gov/sites/default/files/documents/fema\\_2021-pda-guide.pdf](https://www.fema.gov/sites/default/files/documents/fema_2021-pda-guide.pdf) [<https://perma.cc/3LCB-NHUR>]; FED. EMERGENCY MGMT. AGENCY, TRIBAL DECLARATIONS PILOT GUIDANCE 24–27 (2017), <https://www.fema.gov/sites/default/files/2020-04/tribal-declaration-pilot-guidance.pdf> [<https://perma.cc/U8CR-ZEEX>].

75. BRUCE R. LINDSAY, CONG. RSCH. SERV., R45238, FEMA AND SBA DISASTER ASSISTANCE FOR INDIVIDUALS AND HOUSEHOLDS: APPLICATION PROCESSES, DETERMINATIONS, AND APPEALS 9–12 (2024). Not all major disaster declarations include the provision of individual assistance. *Id.*

76. *FEMA’s Disaster Relief Fund: Budgetary History and Projections*, CONG. BUDGET OFF. (Nov. 2022), <https://www.cbo.gov/publication/58840> [<https://perma.cc/3NXN-K9YK>].

77. No-year funding does not expire with the fiscal year and can be used indefinitely once appropriated. WILLIAM L. PAINTER, CONG. RSCH. SERV., R47676, DISASTER RELIEF FUND STATE OF PLAY: IN BRIEF 4 (2023).

78. *FEMA’s Disaster Relief Fund*, *supra* note 76 (explaining that nearly 75 percent of the DRF’s funds are provided through supplementation appropriations, the rest through annual discretionary appropriations).

79. *Id.*

80. *See* U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-104956, *supra* note 30, at 11. The DRF has funding caps that can be exceeded when needed. *See, e.g.*, Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, pmb., 127 Stat. 4, 4 (codified as amended in scattered sections of 42 U.S.C.) (allowing for “supplemental appropriations” to be made “out of any money in the Treasury not otherwise appropriated” to “improve and streamline disaster assistance for Hurricane Sandy”). Congress exceeded funding caps following Hurricanes Sandy, Katrina, and Rita, and the September 11 attacks. *See* Finn, *supra* note 15, at 42.

and legal services.<sup>81</sup> The IHP is the primary source of individual funding FEMA provides.<sup>82</sup> Funding through the IHP can be used for housing—including emergency housing, repair, and reconstruction—and other needs, including personal property repair and replacement, moving, medical care, childcare, and funerals.<sup>83</sup> Each grant type has its own eligibility requirements.<sup>84</sup> Generally speaking, the application processes include registration, an on-site FEMA damage assessment, and a funding decision.<sup>85</sup> Although appeal processes for funding and damage assessment exist, they are complex and “low-income individuals rarely appeal their rejections.”<sup>86</sup>

Only those who can prove that other forms of disaster relief cannot meet their needs are eligible for the program, which means FEMA requires individuals to use private funding or apply for other programs—including SBA disaster loans—first.<sup>87</sup> Registration for the IHP requires a significant amount of documentation, including proof of citizenship or eligible residency status, social security number, current and predisaster address, insurance information, predisaster household gross annual income, and banking information.<sup>88</sup> Proof of losses often requires an on-site FEMA inspection.<sup>89</sup> For some subsets of the IHP program, including home repair and replacement, proof of home ownership is also required.<sup>90</sup> As discussed in

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81. *Individual Assistance*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/assistance/individual> [<https://perma.cc/B9WS-6AHX>] (July 12, 2024); *Individuals and Households Program*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/assistance/individual/program> [<https://perma.cc/TFL6-6CUM>] (June 11, 2024); *Programs to Support Disaster Survivors*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/assistance/individual/disaster-survivors> [<https://perma.cc/RFW7-N634>] (Apr. 12, 2024).

82. WEBSTER, CONG. RSCH. SERV., *supra* note 57, at Summary.

83. See 44 C.F.R. §§ 206.110, 206.117, 206.119 (2024).

84. *FEMA Grants*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/grants> [<https://perma.cc/2JYG-ARPX>] (May 30, 2024); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-232, *supra* note 30, at 42–43.

85. *Individuals and Households Program*, *supra* note 81.

86. AM. FLOOD COAL., TURNING THE TIDE: OPPORTUNITIES TO BUILD SOCIAL EQUITY THROUGH FEDERAL FLOOD DISASTER POLICY 8 (2020), <https://assets.floodcoalition.org/2020/08/e77e13287e90914325f82c7063666448-American-Flood-Coalition-Turning-the-Tide-Toward-Equity-8.3.2020.pdf> [<https://perma.cc/RMG9-XUU5>]; see also *id.* at 6–10 (outlining programmatic requirements those with low socioeconomic status may be unable to satisfy, including proof of homeownership, specific income requirements, proof of credit or specific credit scores, and bank account information); LINDSAY, CONG. RSCH. SERV., *supra* note 75, at 12; Davida Finger, *50 Years After the “War on Poverty”*: *Evaluating the Justice Gap in the Post-disaster Context*, 34 B.C. J.L. & SOC. JUST. 267, 270–71 (2014) (explaining the “justice gap” that exists because low-income individuals’ legal needs are not met).

87. FED. EMERGENCY MGMT. AGENCY, FP 104-009-03, INDIVIDUAL ASSISTANCE PROGRAM AND POLICY GUIDE 7 (2021) (“Some types of [Other Needs Assistance (ONA)] may only be provided if an applicant does not qualify for a disaster loan from the U.S. Small Business Administration.”); *id.* at 145 (“FEMA collaborates with the SBA in determining applicant eligibility for some types of ONA.”); *id.* at 160 (indicating that FEMA will not provide disaster victims with assistance to cover specific types of losses, including medical care and transportation); see also 44 C.F.R. § 206.191(c)–(d) (2024) (listing the sequence of delivery “in which disaster relief agencies and organizations provide assistance”).

88. FED. EMERGENCY MGMT. AGENCY, FP 104-009-03, *supra* note 87, at 71–72.

89. *Id.* at 72.

90. *Id.* at 53.

Part II.D, FEMA's individual funding requirements are prohibitively burdensome for some people.

*B. SBA's Disaster Loan Program*

The SBA's mission is to "aid, counsel, assist and protect the interests of small business concerns; preserve free competitive enterprise; and maintain and strengthen the overall economy of our nation."<sup>91</sup> Established by the Small Business Act,<sup>92</sup> the SBA DLP is rooted in economic protectionism.<sup>93</sup> Typical of loans, only "homeowner[s], renter[s], or personal property owner[s]" with repayment ability (e.g., meeting minimum income requirements) are eligible for the SBA DLP.<sup>94</sup> In some cases, collateral is required.<sup>95</sup> These loans are only available after the SBA has made a disaster declaration,<sup>96</sup> and only to individuals who lack private funding options.<sup>97</sup> Loans are administered for personal property damage (100,000 dollar cap) and to replace or repair a homeowner's primary residence (500,000 dollar cap).<sup>98</sup> In some cases DLP loans provide "other needs" assistance to cover a wide range of disaster-related costs.<sup>99</sup> To apply, claimants must provide their employment information and history, social security number, income, insurance, assets, debt amounts, tax information, as well as proof of residency or home ownership and vehicle ownership.<sup>100</sup> Like FEMA's IHP, the DLP's application requirements are disproportionately burdensome for many under-resourced individuals.<sup>101</sup>

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91. *Organization*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/about-sba/organization> [<https://perma.cc/FN86-ZQ8E>] (last visited Oct. 12, 2024).

92. 15 U.S.C. §§ 631–657.

93. *Id.* § 636(b).

94. *Physical Damage Loans*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/funding-programs/disaster-assistance/physical-damage-loans#id-home-and-personal-property-loans> [<https://perma.cc/C7TC-9NX8>] (May 30, 2024); *see also Home and Property Disaster Loans*, GOVLOANS.GOV, <https://www.govloans.gov/loans/home-and-property-disaster-loans/> [<https://perma.cc/E4GQ-PTNA>] (last visited Oct. 12, 2024).

95. *See Physical Damage Loans*, *supra* note 94.

96. LINDSAY, CONG. RSCH. SERV., *supra* note 57, at 2 n.8 (citing 13 C.F.R. § 123.3(3)(ii)-(iii) (2024)) ("The criteria used to determine whether to issue a declaration include a minimum amount of uninsured physical damage to buildings, machinery, inventory, homes, and other property. Generally, this minimum is at least 25 homes or businesses (or some combination of the two) that have sustained uninsured losses of 40% or more in any county or other smaller political subdivision of a state or U.S. possession."); *see also supra* notes 72–75 and accompanying text.

97. *See* 13 C.F.R. § 123.104 (2024); *see also supra* notes 56, 87 and accompanying text.

98. *See* 13 C.F.R. § 123.105(a)(1)-(2) (2024).

99. These include transportation, flood insurance, funerals, medical care, childcare, and cleaning. *See* 44 C.F.R. § 206.119 (2024); *see also supra* note 83 and accompanying text.

100. *See Disaster Business Loan Application*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/document/sba-form-5-disaster-business-loan-application> [<https://perma.cc/6KBR-9GWQ>] (Oct. 27, 2023) (select "Download.pdf" to access the following form: "Apply for a SBA Disaster Loan as a Homeowner or Renter").

101. *See infra* Part II.D.

*C. HUD's Community Development  
Block Grant Program*

HUD's CDBGs act as a gap-filler for community and individual needs left unmet by FEMA and the SBA.<sup>102</sup> As a result, they are often appropriated last.<sup>103</sup> The program was established under the Housing and Community Development Act of 1974<sup>104</sup> and “provides annual grants . . . to develop viable urban communities . . . principally for low- and moderate-income persons.”<sup>105</sup> Grants are administered to eligible communities, which in turn can distribute funds to individuals in need.<sup>106</sup> Although the agency has no specific disaster relief mandate,<sup>107</sup> Congress regularly provides ad hoc funding<sup>108</sup> for disaster relief CDBGs (informally called “CDBG-DRs”).<sup>109</sup> CDBG-DR has no established program within HUD. Instead, executive mandates for individual disasters typically include directive language specific to a targeted disaster, which functionally means that HUD creates a new program for each disaster, the details of which require publication and public comment prior to implementation.<sup>110</sup> Although this reactive approach provides flexibility, it also creates ambiguity, burdensome applications,<sup>111</sup> and significant lags in fund dispersal.<sup>112</sup>

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102. See JAROSCAK, CONG. RSCH. SERV., *supra* note 58, at 8.

103. *Id.*

104. Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in scattered sections of the U.S. Code).

105. See *id.* (establishing the CDBG Program); *Community Development Block Grant Program*, U.S. DEP'T OF HOUS. AND URB. DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/cdbg](https://www.hud.gov/program_offices/comm_planning/cdbg) [<https://perma.cc/CNL9-ENDE>] (last visited Oct. 12, 2024).

106. CDBGs are primarily funded to low- to middle-income communities, but others may also apply. See *State CDBG Program Eligibility Requirements*, HUD EXCHANGE, <https://www.hudexchange.info/programs/cdbg-state/> [<https://perma.cc/M6CK-YS3Y>] (last visited Oct. 12, 2024).

107. See *supra* Part I.C for more information about the legal status of the CDBG program.

108. See, e.g., Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (codified as amended in scattered sections of 42 U.S.C.).

109. See Finn, *supra* note 15, at 43; JAROSCAK, CONG. RSCH. SERV., *supra* note 58, at 1.

110. See JAROSCAK, CONG. RSCH. SERV., *supra* note 58, at 2–6; see, e.g., *CDBG-DR Laws, Regulations, and Federal Register Notices*, U.S. DEP'T OF HOUS. AND URB. DEV., [https://www.hud.gov/program\\_offices/comm\\_planning/cdbg-dr/regulations](https://www.hud.gov/program_offices/comm_planning/cdbg-dr/regulations) [<https://perma.cc/5G2S-ZELS>] (Aug. 14, 2024) (select any of the yearly events from the “Page Contents” section on the right, and then select any Federal Register notice to view an example of an agency’s mandate).

111. Communities must create action plans and solicit public participation as part of the application process, which then undergoes an often-lengthy risk assessment by HUD before funds can be dispersed. See 2 C.F.R. § 200.205 (2024); JAROSCAK, CONG. RSCH. SERV., *supra* note 58, at 6–7; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-232, *supra* note 30, at 6.

112. For example, the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (codified in scattered titles of the U.S. Code), enacted in February 2018, provided CDBG-DR funding in response to Hurricane Maria approximately five months after the storm’s September 2017 impact. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64 (codified in scattered titles of the U.S. Code). A Federal Register notice with HUD advisories governing those funds was not published until August 2018. Allocations, Common Application, Waivers, and Alternative Requirements for Community Development Block Grant Disaster Recovery Grantees, 83 Fed. Reg. 40314, 40314–25 (Aug. 14, 2018). “As of

Importantly, the Civil Rights Act of 1964<sup>113</sup> and similar provisions embedded in the Stafford Disaster Relief Act cannot be waived during emergencies.<sup>114</sup> As a result, those engaged in the “distribution of supplies, the processing of applications, and other relief and assistance activities shall [accomplish these activities] in an equitable and impartial manner, without discrimination on the grounds of race, color, religion, [national origin], sex, age, or economic status.”<sup>115</sup> In 2020, the National Advisory Council issued a report concluding that FEMA does not meet these standards.<sup>116</sup> As illustrated in Parts II.C and II.D, federal disaster relief is steeped in racial and socioeconomic bias.

Facially, these programs appear to offer significant aid, but their complexity erects barriers to individual funding. Applications for direct relief are time and document intensive,<sup>117</sup> must happen in a specific order,<sup>118</sup> and often require calls to multiple offices, English literacy, a collection of sometimes unavailable personal information, and comprehension of nuanced funding options and repayment requirements.<sup>119</sup> All of this must also happen within weeks or months of suffering loss from a natural disaster.<sup>120</sup> The next part considers the history of these programs and the administrative state generally, which begins to explain why the federal disaster management system is so complex and fails to serve those most in need.

## II. THE HISTORY OF DISASTER FRAGMENTATION

Consideration of the federal administrative system’s history is essential to understanding its current state for two reasons: (1) it helps explain current structural problems<sup>121</sup> and (2) exposes the presence of historical biases.<sup>122</sup> Because much of the federal government has “grown and evolved on an issue-by-issue . . . basis,”<sup>123</sup> it lacks institutional coherence. By and large,

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July 2020, the vast majority of CDBG-DR funding connected with Hurricanes Irma and Maria has yet to be obligated or expended.” JAROSCAK, CONG. RSCH. SERV., *supra* note 58, at 16.

113. 42 U.S.C. § 2000. For an overview of the Civil Rights Act of 1964 and its use in the environmental justice context, see Sara A. Colangelo & Abigail E. André, *Environmental Justice Before U.S. Courts*, in ENVIRONMENTAL LAW BEFORE THE COURTS: A US-EU NARRATIVE 61–66 (Giovanni Antonelli, Sara A. Colangelo, Michael Gerrard, Giancarlo Montedoro, Maurizio Santise, Luc Lavrysen & Maria Vittoria Ferroni eds., 2023).

114. *See, e.g.*, JAROSCAK, CONG. RSCH. SERV., *supra* note 58, at 15–16.

115. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, § 311(A), 88 Stat. 143, 150 (codified as amended at 42 U.S.C. § 5154).

116. NAT’L ADVISORY COUNCIL, *supra* note 68, at 12 (“Civil rights laws and legal authorities remain in effect, and cannot be waived, during emergencies. It is the opinion of the NAC that FEMA does not meet the equity requirements of the Stafford Act.”); *see also supra* note 68 and accompanying text.

117. As discussed more in Parts II.C and II.D, the documentation requirements alone assume financial and residential stability that many lack. *See infra* Parts II.C–D.

118. *See supra* notes 56, 87, 96–97 and accompanying text.

119. *See supra* notes 84, 87–90, 94–95, 100, 105–06 and accompanying text.

120. *See, e.g.*, U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-104956, *supra* note 30, at 26.

121. *See generally* Landis, *supra* note 48.

122. *See infra* Parts II.C–D.

123. NAT’L COMM’N ON THE PUB. SERV., *supra* note 21, at 36.



agency structure has also failed to evolve in response to societal change.<sup>124</sup> This hampers agencies' ability to solve novel problems and inhibits structural flexibility needed for agile regulatory responses to an ever-changing world.<sup>125</sup> As illustrated by the history of disaster law, this reactionary approach to lawmaking creates disjointed, patchy legal regimes beset by disaster fragmentation.

The administrative state also reflects the cultural priorities and political realities of previous eras, which sheds light on the inequities experienced by underserved individuals who seek federal disaster relief funding.<sup>126</sup> This section examines threads in history of administrative law and federal disaster management that explain its fragmentation and illuminate reasons why current programs perpetuate biases born long ago, particularly discrimination inherent in early decisions about who to help.

#### A. A System That Reflects the Past

The federal administrative system was created to help Congress regulate the onslaught of change brought about by the Industrial Revolution.<sup>127</sup> The government reacted to an economic system in its infancy with simplistic organization:<sup>128</sup> it created standalone agencies for emerging industrial sectors as the country began to appropriate land and natural resources, relocate rural populations to cities, and build infrastructure to support a new era of manufacturing and trade.<sup>129</sup> Early development of the administrative

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124. See JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 199–201 (Oxford Univ. Press 2019); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CAL. L. REV. 59, 69–70 (2010). See generally NAT'L COMM'N ON THE PUB. SERV., *supra* note 21.

125. See NAT'L COMM'N ON THE PUB. SERV., *supra* note 21, at 2 (“Across the full range of government activities, new demands are accelerating, and the pace of change is quickening. At the same time, the federal government has had difficulty in adapting to the knowledge-based economy and taking advantage of the significant advances in technology.”); COHEN, *supra* note 124, at 6 (“Institutional changes are slow and piecemeal, and shifts in political economy can span decades or even centuries.”).

126. See generally Colangelo & André, *supra* note 113 (discussing the history of the environmental justice movements in U.S. courts); Maxine Burkett, *Litigating Separate and Equal: Climate Justice and the Fourth Branch*, 72 STAN. L. REV. ONLINE 145, 146–49 (2020); FARBER & GROW, *supra* note 2, at xxxi (“[T]he same factors that make disadvantaged groups more vulnerable to climate change also reduce their opportunities to be heard in disaster planning and management.”).

127. Dudley, *supra* note 51, at 34 (“By 1887, Congress saw a need for delegating part of the task of regulating commerce . . . . In the decades that followed, Congress established a variety of agencies to regulate interstate trade, water and power, communications, commodity exchanges, and other areas of activity.” (citation omitted)); COHEN, *supra* note 124, at 170 (“The institutions that we now have were designed around the regulatory problems and competencies of an era in which industrialism was the principal mode of development.”).

128. See COHEN, *supra* note 124, at 172 (“[R]egulation presumed well-defined industries, ascertainable markets and choices, and relatively discrete harms amenable to clear description and targeted response.”).

129. *Id.* at 8 (citing KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* (Beacon Press 1957)).

state not only reflected a specific—and now outdated<sup>130</sup>—economic structure, but a comparably simple world. Although the administrative system has undergone some reorganization since then<sup>131</sup> and an astonishing amount of growth,<sup>132</sup> its siloed, issue-based approach to institutional organization remains.<sup>133</sup>

With few exceptions, the federal government rarely eliminates redundancies and tends to respond to new needs by creating novel programs rather than revising existing ones.<sup>134</sup> FEMA and HUD provide a good example in the disaster law context. In 1979, when HUD lost its disaster relief mandate to FEMA, it did not lose the CDBG program, through which it administered disaster relief grants.<sup>135</sup> Instead, it continued to disperse disaster relief without a congressional mandate while FEMA developed parallel grant programs that served roughly the same purpose.<sup>136</sup> This patchwork approach to institution building creates significant regulatory gaps and redundancies among “agencies and departments that have grown without logical structure.”<sup>137</sup> Antipathy for renovation of old programs also leads to obsolescence and misses crucial opportunities for interdisciplinary problem solving.

### B. Disaster Law’s Design Flaws

Federal disaster relief law developed in fits and started throughout the nineteenth and twentieth century,<sup>138</sup> largely in response to major disasters.<sup>139</sup> This reactivity made it difficult to build cohesive regulatory regimes and created a crisis-driven structure.<sup>140</sup> As a result, its effectiveness was often

130. *Id.* at 170 (“The institutions that we now have were designed around the regulatory problems and competencies of an era in which industrialism was the principal mode of development.”).

131. *See, e.g.*, NAT’L COMM’N ON THE PUB. SERV., *supra* note 21, at iii, 36–37 (describing changes to agency structure following World War II); Dudley *supra* note 51, at 39 (outlining the fall of economic regulation and rise of social regulation in the 1970s).

132. *See* WALTER A. ROSENBAUM, ENVIRONMENTAL POLITICS AND POLICY 153 (10th ed. 2017) (ebook) (discussing the “explosive[.]” growth of “[f]ederal agencies concerned with environmental affairs . . . energy, consumer protection, and worker health . . . since 1970”); Dudley, *supra* note 51, at 35 (identifying certain agencies created by the New Deal).

133. *See* Finn, *supra* note 15, at 27; NAT’L COMM’N ON THE PUB. SERV., *supra* note 21, at 36 (“The federal government is a flotilla of many distinct organizational units.”).

134. *See* NAT’L COMM’N ON THE PUB. SERV., *supra* note 21, at 36 (“Virtually every year new vessels are added to respond to the demands of the time.”).

135. *See* Finn, *supra* note 15, at 42.

136. *See id.* at 40–42.

137. NAT’L COMM’N ON THE PUB. SERV., *supra* note 21, at 1; *see also id.* at 15.

138. Much has been written about the constitutionality of federal disaster relief, but these arguments are beyond the scope of this Article. *See, e.g.*, Landis, *supra* note 48, at 975–78, 998–1003 (Spending Clause); Finn, *supra* note 15, at 28 (Commerce Clause).

139. *See, e.g.*, Act of Feb. 17, 1815, ch. 45, 1815 Stat. 211; Act of Jan. 24, 1827, ch. 3, 1827 Stat. 356; Federal Emergency Relief Act of 1933, ch. 30, 48 Stat. 55 (amended to include reconstruction loans after the Long Beach earthquake of 1933) (enacted as temporary legislation and no longer in force).

140. *See* Finn, *supra* note 15, at 27.

stymied by a disorganized,<sup>141</sup> siloed<sup>142</sup> agency structure, and disagreements about the proper role of the federal government.<sup>143</sup>

At no time in U.S. history has a single entity borne responsibility for federal disaster relief.<sup>144</sup> Responsibility for disaster relief has been spread across the federal bureaucracy since its inception and has shifted between disparate programs<sup>145</sup> since then.<sup>146</sup> Individual funding programs are the same: they emerged across three agencies between the 1930s and 1970s and remain divided.<sup>147</sup> After a century and a half of ad hoc disaster relief efforts, “federal practice of disaster assistance was finally codified into law with the Disaster Relief Act of 1950.”<sup>148</sup> Though names of agencies and their place within the administrative system have evolved,<sup>149</sup> the Department of Homeland Security (which houses FEMA),<sup>150</sup> HUD,<sup>151</sup> and the SBA all gained power to fund disaster relief around this time.<sup>152</sup>

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141. *See id.*

142. *See supra* note 133 and accompanying text.

143. Landis, *supra* note 48, at 999–1004.

144. For an excellent and detailed historical account of U.S. disaster law and policy, see Finn, *supra* note 15, at 27–46. *See also* Schultz & Elliott, *supra* note 16, at 295–97.

145. At one time or another, each of these entities were delegated some responsibility for disaster relief planning, response, and/or funding: Reconstruction Finance Corporation, Office for Emergency Management, Office of Civilian Defense, Office of Civil and Defense Mobilization, Housing and Home Finance Agency, Department of Housing and Urban Development, Department of Homeland Security, National Flood Insurance Program, National Fire Prevention and Control Administration, Emergency Broadcast System, Federal Preparedness Agency, Department of Defense, and National Earthquake Hazards Reduction Program. *See* Finn, *supra* note 15, at 32–33, 35, 37, 41, 44.

146. *See, e.g.*, Reorganization Plan No. 1 of 1958, 23 Fed. Reg. 4991 (July 1, 1958) (merging federal disaster relief and civil defense programs); Reorganization Plan No. 3 of 1978, 43 Fed. Reg. 41943 (Sept. 19, 1978); Exec. Order No. 12,127, 44 Fed. Reg. 19367 (Mar. 31, 1979); Exec. Order No. 12,148, 44 Fed. Reg. 43239 (July 20, 1979) (consolidating a variety of disaster-related functions into the newly minted FEMA).

147. *See* Small Business Act of 1953, Pub. L. No. 83-163, § 202, 67 Stat. 230, 233 (declaring that “the Government should aid and assist victims of floods or other catastrophes”); Disaster Relief Act of 1966, Pub. L. No. 89-769, § 3, 80 Stat. 1316, 1316 (codified as amended at 38 U.S.C. § 3720) (including emergency housing funds); Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, §§ 410–413 88 Stat. 143, 156–57 (codified as amended at 42 U.S.C. §§ 5177, 5179–5180) (including direct assistance to households); Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 667 (1965) (codified as amended in scattered titles of the U.S. Code). HUD was previously known as the Housing and Home Finance Agency, which was mandated with implementing the Disaster Relief Act starting in 1951. *See* Exec. Order No. 10,221, 16 Fed. Reg. 2051 (Mar. 6, 1951); *see also* Federal Disaster Relief Act of 1950, Pub. L. No. 81-875, 64 Stat. 1109. Responsibility for the Disaster Relief Act implementation shifted to FEMA when the agency was created in 1978. Reorganization Plan No. 3 of 1978, 43 Fed. Reg. 41943 (Sept. 19, 1978).

148. Schultz & Elliott, *supra* note 16, at 296.

149. *See* Exec. Order No. 8,248, 4 Fed. Reg. 3864 (Sept. 8, 1939) (establishing an “office for emergency management” within the Executive Office); Exec. Order No. 8,757, 6 Fed. Reg. 2517 (May 20, 1941) (establishing the “Office of Civilian Defense” within the Office for Emergency Management of the Executive Office).

150. 6 U.S.C. §§ 313–316.

151. *See* Finn, *supra* note 15, at 35.

152. *See id.*

Despite FEMA's creation in 1978 as the agency responsible for disaster relief,<sup>153</sup> smaller programs were spread throughout the federal government to respond to discrete challenges.<sup>154</sup> These entities all provide disaster relief funding but have different missions and mandates. As a result, they have all implemented different regulatory regimes and recovery programs. As discussed in Part I, many of these differences still exist today even though states, localities, and individuals find them difficult—if not impossible—to navigate.<sup>155</sup>

As described by Professor Donovan Finn, “[c]ongressional oversight of disaster management programs often devolves into ideological battles that hamper effective mitigation, response, and recovery.”<sup>156</sup> These battles are not new: disagreements about the federal government's role in disaster relief date to our founding, when framers believed local crises were the charge of states alone and used federal aid primarily as a political tool.<sup>157</sup> Early arguments mirror modern debates over states' rights, separation of powers, and the proper role of private industry.<sup>158</sup>

### C. Historic Bias and Disaster Relief

Direct funding for individual disaster victims has existed in some form for as long as disaster law.<sup>159</sup> For just as long, these programs have “privileged certain desperations while abandoning others.”<sup>160</sup> Masked by regulator discretion, these judgments were often informed by racial and socioeconomic bias.<sup>161</sup> Today, they are memorialized in our approach to disaster management.<sup>162</sup> This section addresses the historical underpinnings that have created a systematically unjust approach to federal disaster relief.

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153. Reorganization Plan No. 3 of 1978, 43 Fed. Reg. 41943, 92 Stat. 3788 (Sept. 19, 1978).

154. See *Green Infrastructure Funding and Technical Assistance Opportunities*, EPA, <https://www.epa.gov/green-infrastructure/green-infrastructure-funding-and-technical-assistance-opportunities> [<https://perma.cc/3Q97-4UQJ>] (Sept. 3, 2024); see also Arthur C. Nelson, *Financing City Resilience*, in *THE CAMBRIDGE HANDBOOK OF DISASTER LAW AND POLICY: RISK, RECOVERY AND REDEVELOPMENT* 192 (Susan S. Kuo, John Travis Marshall & Ryan Rowberry eds., 2022) (ebook).

155. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 54 (“GAO found that despite federal efforts to address challenges posed by this fragmentation, state and local officials reported experiencing challenges navigating multiple federal recovery programs.”).

156. Finn, *supra* note 15, at 47.

157. See CYNTHIA A. KIERNER, *INVENTING DISASTER: THE CULTURE OF CALAMITY FROM THE JAMESTOWN COLONY TO THE JOHNSTOWN FLOOD* 135 (2019) (explaining that Congress provided no aid in response to a 1793 yellow fever outbreak in Philadelphia, the nation's capital, that killed one in ten residents). *But see* Finn, *supra* note 15, at 27 (explaining that ad hoc congressional disaster relief in the early republic was linked to political objectives).

158. See Ruhl & Salzman, *supra* note 124, at 68–71; Hyman & Kovacic, *supra* note 22, at 1468–70.

159. See Landis, *supra* note 48, at 978–81.

160. *Id.* at 969.

161. See *id.* at 969–71, 1023–24.

162. See *id.* at 1027; see also *supra* note 116 and accompanying text.

Federal individual relief programs emerged in the 1930s in a wave of New Deal legislation.<sup>163</sup> These programs were reflective of the larger disaster management system and suffered from fragmented structure<sup>164</sup> and confusing requirements.<sup>165</sup> Individual relief programs developed in three silos that still exist in some form today. First, low-interest loans for private property owners were available starting in 1933.<sup>166</sup> Still administered by the SBA, these loans have always been limited to property owners meeting minimum income requirements who can prove two years of “reliable employment” and demonstrate repayment ability.<sup>167</sup> Although eligibility requirements have been revised to accommodate lower income applicants in recent years,<sup>168</sup> historically SBA loans were out of reach for many of the most vulnerable disaster victims.

1950 marked the birth of the “modern system of disaster management,”<sup>169</sup> with the creation of the DRF and the establishment of federal authority in disaster assistance.<sup>170</sup> At that time, responsibility for grant awards was split

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163. See Knauer, *supra* note 6, at 989 (“[F]ederal disaster assistance was relatively rare and completely ad hoc until the New Deal.”); Federal Emergency Relief Act of 1933, ch. 30, 48 Stat. 55 (these sections were enacted as temporary legislation during the economic emergency in 1933 and are no longer effective as part of the U.S. Code). See generally Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987).

164. Direct grant program implementation shifted from HUD to FEMA in 1978, but HUD still maintains an ad hoc grant making process under its CDBG program. See *supra* Part I.C for more information. Direct funding grant programs were updated repeatedly throughout the 1900s, including the Disaster Relief Act of 1966, Pub. L. No. 89-769, 80 Stat. 1316 (codified as amended in scattered titles of the U.S. Code) (updating the National Housing Act to address disaster relief). See also Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, 88 Stat. 143 (codified as amended in scattered titles of the U.S. Code) (promulgating the first direct relief program); Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (amending the Stafford Act to allow some grants to be used for emergency housing); Disaster Recovery Reform Act of 2018, Pub. L. No. 115-254, 132 Stat. 3438 (increasing household assistance amounts and funding new resilient community building programs).

165. See *supra* notes 33–34 and accompanying text.

166. See Federal Emergency Relief Act of 1933, ch. 30, 48 Stat. 55 (these sections were enacted as temporary legislation during the economic emergency in 1933 and are no longer effective as part of the U.S. Code). The SBA officially took over this job in 1953, Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232, and is perhaps the exception to the rule: the agency has consistently provided low-interest disaster loans to small business owners and homeowners since 1953. See Robert B. Olshansky & Laurie A. Johnson, *The Evolution of the Federal Role in Supporting Community Recovery After U.S. Disasters*, 80 J. AM. PLANNING ASSOC. 293, 295–96 (2014).

167. See Fothergill & Peek, *supra* note 1, at 99.

168. See Disaster Assistance Loan Program Changes to Unsecured Loan Amounts and Credit Elsewhere Criteria, 89 Fed. Reg. 59826 (July 24, 2024) (to be codified at 13 C.F.R. pt. 123).

169. Olshansky & Johnson, *supra* note 166, at 296; see also Aja Espinosa, *In the Eye of a Hurricane There Is Quiet: Puerto Rico’s Fight for Aid After Hurricane Maria*, 10 GEO. WASH. J. ENERGY & ENV’T L. 91, 95 (2020).

170. See Disaster Relief Act of 1950, Pub. L. No. 81-875, ch. 1125, 64 Stat. 1109, 1109–11; see also Olshansky & Johnson, *supra* note 166, at 296.

between two agencies.<sup>171</sup> One of those, HUD, continues to issue disaster grants to states, localities, and tribes through its CDBG program.<sup>172</sup> From the 1950s to mid-1970s, grants issued through an urban renewal fund were only available to governments and earmarked for reconstruction activity.<sup>173</sup> Over time, state and local mechanisms for individual grant dispersal developed, but they were only available after all other funding avenues (including FEMA, SBA, and private insurance) had been exhausted.<sup>174</sup> No steady funding stream has existed for these grants since 1979, which means they are funded through supplemental appropriations.<sup>175</sup> As a result, funding lags months or years behind need-creating disasters.<sup>176</sup>

FEMA's "direct assistance" grant programs were created in the mid-1970s<sup>177</sup> to supplement funding gaps left by SBA and private insurance. Grant applications favored homeowners and nuclear families.<sup>178</sup> Historically, these requirements excluded owners of multigenerational homes common in communities of color because they could not produce a deed first held by disaster victims' ancestors.<sup>179</sup> Until recently, FEMA guidance also stated that grants for temporary housing were only available to those who had "stable housing" predisaster, to the exclusion of some renters, shelter residents, and unhoused populations.<sup>180</sup> These programmatic preferences reflect historical bias and a perception that vulnerable populations are more likely to freeride.<sup>181</sup> Although programmatic biases of early disaster relief were born in part of practical considerations (e.g., loan administration has always concerned itself with repayment ability), racial animus informed the development of early disaster relief programs in ways that still linger.

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171. See Finn, *supra* note 15, at 35 (explaining the fragmented application of the 1950s Disaster Relief Act between the Federal Civil Defense Administration and the Housing and Home Finance Agency (HUD's predecessor)).

172. See *supra* Part I.C for a discussion of HUD's current CDBG program.

173. See 1964 Amendments to the Alaska Omnibus Act, Pub. L. No. 88-451, §§ 2-7, 51-57, 78 Stat. 505, 506-07 (developing a twenty-five million dollar urban renewal fund for qualifying reconstruction and recovery projects).

174. See *supra* notes 56, 87 and accompanying text.

175. See Finn, *supra* note 15, at 41-42.

176. See JAROSCAK, CONG. RSCH. SERV., *supra* note 58, at 15-16.

177. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 93-288, §§ 301-303, 88 Stat. 143, 146-47 (codified as amended at 42 U.S.C. §§ 5141, 5143-5144).

178. See Fothergill & Peek, *supra* note 1, at 98.

179. See *FEMA Changes Policy That Kept Thousands of Black Families from Receiving Disaster Aid*, WASH. POST (Sept. 2, 2021, 6:20 PM), <https://www.washingtonpost.com/nation/2021/09/02/fema-policy-change/> [<https://perma.cc/54HY-M7T6>].

180. Fothergill & Peek, *supra* note 1, at 102 (citing Marjorie Greene, *Housing Recovery and Reconstruction: Lessons from Recent Urban Earthquakes*, in PROCEEDINGS OF THE 3RD U.S./JAPAN WORKSHOP ON URBAN EARTHQUAKE HAZARD REDUCTION (1992)).

181. As expressed by a FEMA worker following Hurricane Hugo, "I don't care what disaster you had, you're always going to have somebody that's going to try to get something for nothing . . ." *Id.* at 101 (citing Kristen S. Miller & Catherine Simile, "They Could See Stars from Their Beds": *The Plight of the Rural Poor in the Aftermath of Hurricane Hugo* 10 (1992)).

Historians and legal scholars have written extensively about the ways in which historical biases bleed into present-day legal structures.<sup>182</sup> Direct funding programs are no exception: they reflect entrenched historical inequities that are woven into the administrative system.<sup>183</sup> Although the need for equal treatment ran through the earliest debates about disaster relief, inconsistent grants of relief were common,<sup>184</sup> and Congress was beset by concerns about precedent setting<sup>185</sup> and moral judgment.<sup>186</sup> At that time, “morality”—as defined by those in charge—was used as a litmus test for funding eligibility. Professor Michele Landis Dauber argues that reliance on perceived moral failure as a criterion for relief funding created a system embedded with judgment about claimant identity:

[T]he moral status of a claimant is mediated by both his race and the race of the dominant order. Black African claims to sovereignty or political equality are delegitimated by a racist view of desert in which characteristics ascribed to the colonized are equated with an inferior, guilty, or debased basic nature, which contrasts with the innocent, good, or advanced nature of the colonizer.<sup>187</sup>

Such racist underpinnings bothered applicants of color, which made them unfit for disaster relief in the eyes of the early republic.<sup>188</sup> Professor Richard Rothstein identifies colonial era racial ideologies as the source of racial segregation.<sup>189</sup> This reflects Professor Dauber’s recounting of the racial biases present at our country’s founding, which led lawmakers to analogize

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182. See, e.g., Landis, *supra* note 48, at 1034; ROTHSTEIN, *supra* note 36, at 17; Foster, *supra* note 36, at 10.

183. For a summary of the complex factors contributing to environmental injustice, see generally, ROTHSTEIN, *supra* note 36. See also Foster, *supra* note 36, at 10.

184. Remission of Duties, *reprinted in* 5 AMERICAN STATE PAPERS: FINANCE 698, 698 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) (stating that the Committee on Commerce and Manufactures reported in favor of relief for the merchants of Providence for teas lost in a fire, primarily because the teas were in the possession of the officers of the customs at the time of the fire, so as to distinguish that “granting relief in this case[] cannot establish a precedent dangerous to the revenue”); Landis, *supra* note 48, at 1013–14.

185. Landis, *supra* note 48, at 1009 (explaining that gaps in funding in the 1800s reflected “the fear that the appropriation would set a precedent that would obligate the federal government to provide relief in all analogous cases”).

186. See *id.* at 1018 (explaining that Congress often denied relief in cases where harm was foreseeable: “In the case of Indian attacks, it was argued that those settlers had assumed the risk of loss by ‘plac[ing] themselves in a place of danger knowingly. The Creeks were an open enemy, but the insurgents an unexpected one.” (citing 3 ANNALS OF CONG. 993 (1794) (statement of Rep. Samuel Dexter))).

187. Landis, *supra* note 48, at 1023 (citing ALBERT MEMMI, THE COLONIZER AND THE COLONIZED 52–53 (1990)).

188. *Id.* at 1023–24 (“[T]he fact that racial minorities in the American state always have a less certain possibility of success than do whites, even when facing otherwise identical exigencies.”); see also *id.* at 1024 (citing JOHN M. BARRY, RISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA 334 (1997)); Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 574 (2021) (citing ROBERT F. BERKHOFFER, JR., THE WHITE MAN’S INDIAN: IMAGES OF THE AMERICAN INDIAN FROM COLUMBUS TO THE PRESENT (1978) (documenting the creation of the “image of the Indian” in America to rationalize or justify policy)).

189. See, e.g., ROTHSTEIN, *supra* note 36, at IX.

people of color with disaster, which fed the assumption that anything they suffered was of their own making.<sup>190</sup> Left unchecked, these judgments laid the foundation of our disaster relief system, informed decisions about who was worthy of recovery, and sculpted relief funding criteria based on indicia of “model” citizenship: reliable homeowners who were employed, married, and well paid. In other words, recovery was for members of the white middle and upper classes.

These discriminatory ideologies are reflected not only in modern disaster relief systems, but disaster outcomes as well, where people of color and underserved communities tend to suffer most.<sup>191</sup> For example, in the wake of Hurricane Katrina, scholars identified race as a proxy for severe impacts and failure to recover.<sup>192</sup> Black communities in New Orleans were less likely to evacuate before the storm and disproportionately suffered flooding, death, and injury in the hurricane’s wake.<sup>193</sup> Black disaster victims frequented emergency shelters in larger numbers,<sup>194</sup> were less likely to rebuild their homes, and more likely to migrate out of state.<sup>195</sup>

By failing to protect those most vulnerable to disasters, the law perpetuates crimes born centuries ago that may not reflect contemporary values and insights.<sup>196</sup> As illustrated by the next section, historical problems have been carried to the present through descendant systems, institutions, and laws.<sup>197</sup>

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190. See Landis, *supra* note 48, at 1023 (“[T]he moral status of a claimant is mediated by both his race and the race of the dominant order. Black African claims to sovereignty or political equality are delegitimated by a racist view of desert in which characteristics ascribed to the colonized are equated with an inferior, guilty, or debased basic nature, which contrasts with the innocent, good, or advanced nature of the colonizer. Over time, . . . racist views of the colonized are entrenched in colonial social and legal systems. ‘What is actually a sociological point becomes labeled as being biological or, preferably, metaphysical. It is attached to the colonized’s basic nature.’”); see also Foster, *supra* note 36, at 10; Reese, *supra* note 188, at 574.

191. See Lisa Grow, Brigham Daniels, Doug Spencer, Chantel Sloan, Natalie Blades, M. Teresa Gómez & Sarah R. Christensen, *Disaster Vulnerability*, 63 B.C. L. REV. 957, 965 (2022).

192. See Finch et al., *supra* note 42, at 181; see also Bethel et al., *supra* note 40, at 110.

193. See Bethel et al., *supra* note 40, at 110; see also Finch et al., *supra* note 42, at 198.

194. See Bethel et al., *supra* note 40, at 110.

195. See Finch et al., *supra* note 42, at 199. See generally Keith Elder, Sudha Xirasagar, Nancy Miller, Shelly A. Bowen, Sandra Glover & Crystal Piper, *African Americans’ Decisions Not to Evacuate New Orleans Before Hurricane Katrina: A Qualitative Study*, 97 AM. J. PUB. HEALTH 124 (2007); Joan Brunkard, Gonza Namulanda & Raoult Ratard, *Hurricane Katrina Deaths, Louisiana, 2005*, 2 DISASTER MED. PUB. HEALTH PREPAREDNESS 215 (2008).

196. See Hirokawa & Carlarne, *supra* note 2, at 515 (explaining why “law provides an effective mechanism to ensure time’s domination . . . the manner in which time is processed in law forces us to understand new observations according to existing legal constructs—ones that may have made sense in the past (in light of the knowledge limitations of the time), but fail to accommodate our new insights”); Anthony Paul Farley, *Johnnie Cochran’s Panther: An Essay on Time and Law*, 33 T. MARSHALL L. REV. 51, 53 (2007) (“White time is the deferral of black freedom dreams. Each dream deferred is an interval of white time. Law is the measure of white time.”).

197. See Hirokawa & Carlarne, *supra* note 2, at 515 (“Moreover, in many cases, law provides an effective mechanism to ensure time’s domination.”).



Individual disaster relief programs are replete with examples of inherent bias and discriminatory value judgments.

#### *D. Bias and Contemporary Disaster Relief*

Inherently biased programmatic requirements reflect historical patterns. For example, FEMA bases damage assessments on property ownership, which prioritizes wealthier community members at the expense of renters, multifamily units, affordable housing, and unhoused populations.<sup>198</sup> Professors Alice Fothergill and Lori A. Peek suggest that this prioritization betrays a long-standing preference for a “nuclear family model” of disaster recovery, which rewards money to heads of households and temporary housing only to those who had “stable housing” before a disaster struck.<sup>199</sup> These biases exist in each of FEMA’s relief programs:

The Public Assistance Program most benefits communities that can afford to pay the required match and can navigate the complexities of the contracting agencies. The Individual Assistance Program is more accessible to those with time, income, and access. The National Flood Insurance Program inadvertently assists the wealthier segment of the population by serving only those who can afford to buy flood insurance.<sup>200</sup>

SBA relief programs similarly favor affluent claimants and are often only available to those with above average incomes or reliable employment.<sup>201</sup> Ironically, until this year, claimants could not apply for some of FEMA’s programs until they had first been denied an SBA loan.<sup>202</sup> These programmatic disparities have been found to widen wealth gaps between White and non-White disaster victims, which can alter a community’s racial and socioeconomic makeup post recovery.<sup>203</sup>

The stark reality is that race and socioeconomic class are reliable predictors of natural disaster impacts and recovery outcomes. Considering impacts, studies demonstrate that non-White racial identity raises the risk of natural disaster-related mortality by as much as four times,<sup>204</sup> and people of color and individuals with lower median incomes suffer impacts greater than wealthier counterparts.<sup>205</sup> Disaster recovery outcomes demonstrate biases

198. See NAT’L ADVISORY COUNCIL, *supra* note 68, at 12; Schultz & Elliott, *supra* note 16, at 297 (“[S]ocially disadvantaged residents are vulnerable not just to disasters but to disaster recoveries, which tend to direct public and private resources toward the restoration of property rather than community.”).

199. See Fothergill & Peek, *supra* note 1, at 98, 102.

200. NAT’L ADVISORY COUNCIL, *supra* note 68, at 12.

201. See Fothergill & Peek, *supra* note 1, at 99.

202. See LINDSAY, CONG. RSCH. SERV., *supra* note 75, at 13.

203. Junia Howell & James R. Elliott, *As Disaster Costs Rise, so Does Inequality*, SOCIUS, Jan.–Dec. 2018, at 1, 1–2; Christopher Flavelle, *Why Does Disaster Aid Often Favor White People?*, N.Y. TIMES (June 7, 2021), <https://www.nytimes.com/2021/06/07/climate/FEMA-race-climate.html> [<https://perma.cc/R3G6-4JU7>].

204. Bethel et al., *supra* note 40, at 110.

205. See *Wildfires Impact Minorities*, NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/where-we-work/united-states/washington/stories-in-washington/wildfires-impact-minorities> [<https://perma.cc/NAB9-48GE>] (last visited Oct. 12, 2024) (indicating that studies

that favor wealthy White claimants. Evidence also suggests that poorer victims fail to apply for funding to which they are entitled,<sup>206</sup> receive less funding overall<sup>207</sup> and are awarded funding less frequently,<sup>208</sup> do not meet eligibility requirements,<sup>209</sup> stay in emergency shelters longer,<sup>210</sup> struggle to find temporary housing,<sup>211</sup> utilize more FEMA mobile homes,<sup>212</sup> wait longer for reconstruction and repair,<sup>213</sup> and are more likely to suffer homelessness,<sup>214</sup> physical injury, and psychological harm.<sup>215</sup>

These realities illustrate patterns of vulnerability confirmed by legal scholars and social scientists. Twenty years ago, studies by Professors Luke W. Cole and Sheila R. Foster demonstrated race to be the best “predictor of exposure” to environmental hazards.<sup>216</sup> Expert analyses repeatedly confirmed these findings,<sup>217</sup> suggesting that “one’s location in the social strata often determines one’s life experiences, relationships, opportunities, and overall life chances.”<sup>218</sup> Sociologist and Professor Kathleen Tierney identifies socioeconomic factors that can magnify disaster vulnerability, including race, income, physical disability, language incompetency, gender, household composition, homeownership, and age.<sup>219</sup> Professor Fothergill goes farther, stating that “cultural ignorance, ethnic insensitivity, racial

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have shown “that racial and ethnic minorities face greater vulnerability to wildfires compared with primarily white communities”).

206. See Fothergill & Peek, *supra* note 1, at 98.

207. See Gabriella Wirasakti, *When Disaster Strikes: An Analysis of the Widening Socioeconomic Disparities Caused by Federal Relief Efforts*, 14 J. ANIMAL & ENV’T L. 83, 84 (2023).

208. “Between 2014 and 2018, FEMA analyzed 4.8 million aid registrations and discovered that the poorest renters were 23 percent less likely to receive housing help than higher-income renters.” *Id.* at 89.

209. See Fothergill & Peek, *supra* note 1, at 97–100 (discussing eligibility requirements that disadvantage non-nuclear families and renters).

210. *Id.* at 97.

211. *Id.* at 99.

212. *Id.* at 97.

213. *Id.* at 102.

214. *Id.* at 94, 99; SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., *supra* note 41, at 6–7.

215. See Fothergill & Peek, *supra* note 1, at 94–96.

216. See COLE & FOSTER, *supra* note 36, at 54–55 (finding that “numerous environmental hazards: garbage dumps, air pollution, lead poisoning, toxic waste production and disposal, pesticide poisoning, noise pollution, occupational hazards, and rat bites . . . are inequitably distributed by income or race”).

217. For a summary of the complex factors contributing to environmental injustice, see generally, ROTHSTEIN, *supra* note 36. See also Foster, *supra* note 36, at 9–11; Paul Mohai & Robin Saha, *Which Came First, People or Pollution?: Assessing the Disparate Siting and Post-siting Demographic Change Hypotheses of Environmental Injustice*, ENV’T RSCH. LETTERS, Nov. 2015, at 1, 4–14 (examining disparities in the location of pollution sources by race and economic status); DORCETA E. TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY 33–46 (2014) (same).

218. See Fothergill & Peek, *supra* note 1, at 90; see also Mari J. Matsuda, *The Flood: Political Economy and Disaster*, 36 HOFSTRA L. REV. 1, 7–9 (2007) (discussing racial and class discrimination as an explanation for exposure to environmental hazards).

219. See TIERNEY, *supra* note 43, at 141 (“[T]he effects of disasters on populations are anything but random . . . . [T]he disaster vulnerability of individuals and groups is associated with a number of socioeconomic factors . . .”).

isolation and racial bias in housing, information dissemination and relief assistance” explain the increased vulnerability of people of color that socioeconomic factors alone cannot.<sup>220</sup> Others support these findings and have identified racist zoning practices (redlining),<sup>221</sup> poor construction,<sup>222</sup> unavailability of low-income housing,<sup>223</sup> and the presence of affordable housing in disaster prone areas<sup>224</sup> as factors tied to socioeconomic status that increase disaster vulnerability.

These findings are complex, but undeniably mirror historical biases that manifest today through inequitable disaster relief systems and disaster vulnerability that is created by socioeconomic status. Without a complete audit and rooting out of the ways our history echoes through current disaster relief systems, the inequities it creates are likely to persist.<sup>225</sup> The next part demonstrates how disaster fragmentation exacerbates inequity and undermines programmatic success.

### III. DISASTER FRAGMENTATION AND AN ADMINISTRATIVE HOUSE OF CARDS

Horizontal fragmentation—power sharing within the same level of government<sup>226</sup>—plays an essential role in the organization of our government writ large. Fragmentation can be desirable. When intentionally articulated, it greases the wheels of democracy and protects institutional

220. Alice Fothergill, Enrique G.M. Maestas & JoAnne DeRouen Darlington, *Race, Ethnicity and Disasters in the United States: A Review of the Literature*, 23 *DISASTERS* 156, 169 (1999).

221. “[R]edlining limited access to federally backed mortgages based on race until the passage of the Fair Housing Act of 1968 [and] [r]esearch has shown that . . . within some urban areas, flooding losses have been concentrated in Black and low-income communities.” FED. EMERGENCY MGMT. AGENCY, GUIDE TO EXPANDING MITIGATION: MAKING THE CONNECTION TO EQUITY 3 (2020), [https://www.fema.gov/sites/default/files/2020-09/fema\\_region-2\\_guide-connecting-mitigation-equity\\_09-10-2020.pdf](https://www.fema.gov/sites/default/files/2020-09/fema_region-2_guide-connecting-mitigation-equity_09-10-2020.pdf) [<https://perma.cc/YPL4-L6XC>]; see also Jeremy S. Hoffman, Vivek Shandas & Nicholas Pendleton, *The Effects of Historical Housing Policies on Resident Exposure to Intra-urban Heat: A Study of 108 US Urban Areas*, 8 *CLIMATE* 1, 2, 9–11 (2020); *Wildfires Impact Minorities*, NATURE CONSERVANCY, <https://www.nature.org/en-us/about-us/where-we-work/united-states/washington/stories-in-washington/wildfires-impact-minorities/> [<https://perma.cc/84P7-L3CB>] (last visited Oct. 12, 2024) (discussing the disparate vulnerability of varying socioeconomic groups as it pertains to the impact of wildfires).

222. See SUBSTANCE ABUSE & MENTAL HEALTH SERV. ADMIN., *supra* note 41, at 7 (noting that people with low socioeconomic status “are more likely to live in homes that are more vulnerable to the impact of disasters . . . [due to] lower quality construction[,] older homes[,] . . . mobile homes[,]” and higher risk areas (citations omitted)).

223. *Id.* at 10.

224. See Fothergill & Peek, *supra* note 1, at 94 (observing that “affordable housing exposes the residents to greater risks of hazards because of lower quality construction”).

225. See generally Dudley, *supra* note 51, at 43–44 (summarizing executive orders instructing disaster agencies to conduct a retrospective review of programs and their success). See also NAT’L ADVISORY COUNCIL, *supra* note 68, at 12 (“Civil rights laws and legal authorities remain in effect, and cannot be waived, during emergencies. It is the opinion of the NAC that FEMA does not meet the equity requirements of the Stafford Act.”).

226. See Erbsen, *supra* note 19, at 499–500; Buzbee, *supra* note 17, at 1551. Other forms of fragmentation exist that are also beyond the scope of this Article. See *supra* note 19.

structure.<sup>227</sup> Careful structural choices dictated by the Constitution not only separate federal powers between three branches, but Articles I, II, and III delineate processes for sharing power among them.<sup>228</sup> Examples of productive fragmentation also exist at the administrative level, when power and responsibility reflect Congress' clearly articulated goals, regulator expertise, and commonsense division of labor.<sup>229</sup>

Founder James Madison saw horizontal fragmentation as a shield against minority rule: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, selfappointed, or elective, may justly be pronounced the very definition of tyranny."<sup>230</sup> Indeed, there are a multitude of good reasons why our law-making processes divide power and accept the incremental progress that results from a complex, fragmented system.<sup>231</sup> Scholars have identified a variety of benefits created by thoughtful horizontal power sharing arrangements, particularly when interagency relationships are maintained by "rule-based interfaces,"<sup>232</sup> including more holistic regulatory programs, integrated decision making, interdisciplinary collaboration, the dilution of political influence, and inoculation against judicial interference.<sup>233</sup> Horizontal fragmentation also elevates governmental transparency, public participation, and consensus building.<sup>234</sup> However, horizontal fragmentation can inarguably stymie effective governance.

When power is shared between too many entities, it can threaten institutional structure and programmatic success.<sup>235</sup> Structural problems arise from the unwieldy size of the federal administrative system,

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227. See, e.g., Knauer, *supra* note 6, at 985 ("U.S. disaster policy has evolved along with our understanding of federalism and the appropriate role of the federal government in managing emergency risks."); Bulman-Pozen & Gerken, *supra* note 20, at 1265–71 (describing modes of federalism and the fragmentation each creates); see also Light, *supra* note 20, at 387; Engel, *supra* note 20, at 174–77 (arguing for broad overlap in federal and local spheres of environmental regulatory power); Doremus & Hanemann, *supra* note 20, at 816–34.

228. See U.S. CONST. arts. I–III.

229. See Keith Bradley, *The Design of Agency Interactions*, 111 COLUM. L. REV. 745, 778 (2011).

230. THE FEDERALIST NO. 47 (James Madison).

231. See LAZARUS, *supra* note 14, at 32 (explaining that fragmentation reflects "a strong structural bias within our existing lawmaking institutions in favor of government's acting more slowly and incrementally"); Hyman & Kovacic, *supra* note 22, at 1460–63.

232. See Bradley, *supra* note 229, at 772–73, 783–87.

233. See, e.g., *id.*; Freeman & Rossi, *supra* note 21, at 1209–11; Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 79 (2010); Ruhl & Salzman, *supra* note 124, at 70–71 (promoting power sharing as a means for sharing political and economic fallout for controversial programs); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1035–36 (2011) (exploring why power sharing increases the likelihood of judicial deference).

234. See *supra* note 227 and accompanying text.

235. NAT'L COMM'N ON THE PUB. SERV., *supra* note 21, at 14 ("Decisionmaking is too often entangled in knots of conflict, clearance, coordination, and delay.").

redundancies and overlapping jurisdiction,<sup>236</sup> interagency conflict,<sup>237</sup> and political hurdles.<sup>238</sup> In the face of complex or controversial problems, fragmentation also breeds inaction and regulatory gaps.<sup>239</sup> These difficulties trickle down. As explained by Professor Julie E. Cohen, “[l]egal institutions are the mechanisms through which changes in governmentality assume concrete forms that shape the options available to social and economic participants.”<sup>240</sup> Without effective legal vehicles, those the law means to serve suffer. This section uses three examples of disaster fragmentation to illustrate the reasons why the federal government is unable to regulate equitable disaster management: (1) jurisdictional disorganization, (2) conflict, and (3) underregulation in the face of complexity.

### A. Jurisdictional Chaos

The executive branch employs millions of people<sup>241</sup> and houses over 400 individual agencies, boards, commissions, councils, and offices.<sup>242</sup> The administrative system issues thousands of regulations annually, resulting in an output that is four times greater than the volume passed by Congress.<sup>243</sup>

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236. See Buzbee, *supra* note 17, at 1550–51; U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 4, 31–83 (identifying “topic areas” where there is “fragmentation, overlap, or duplication”); NAT’L COMM’N ON THE PUB. SERV., *supra* note 21, at 36–37.

237. Hyman & Kovacic, *supra* note 22, at 1459 (“Profound difficulties can result when agencies do not ‘get along’ or have conflicting assessments of the nature and seriousness of apparent problems.” (citation omitted)).

238. See Jennifer Nou, *Intra-agency Coordination*, 129 HARV. L. REV. 421, 422 (2015) (“Organizational design choices can determine who controls the levers of influence, both formal and informal, within an administrative agency.”); see also ZEGART, *supra* note 27, at 1–2 (explaining why agency “organization is never neutral” in the intelligence context); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 468, 481 (1989) (describing how Congress “stack[s] the deck” to facilitate constituencies’ control over agencies); Hyman & Kovacic, *supra* note 22, at 1457 (suggesting that NOAA is housed in the Department of Commerce instead of the Department of the Interior because President Richard M. Nixon was angry with the Secretary of the Interior when NOAA was created); *id.* at 1458 n.49 (“The Forest Service might well be in the Interior Department today if the historic dispute between Secretary Ballinger and Gifford Pinchot had not left conservationists with a nearly pathological distrust of the department.” (quoting HAROLD SEIDMAN, POLITICS, POSITION, AND POWER: THE DYNAMICS OF FEDERAL ORGANIZATION 126 (5th ed. 1998))).

239. See Buzbee, *supra* note 17, at 1610.

240. See COHEN, *supra* note 124, at 9.

241. See PAUL C. LIGHT, VOLCKER ALLIANCE, THE TRUE SIZE OF GOVERNMENT: TRACKING WASHINGTON’S BLENDED WORKFORCE, 1984–2015, at 2 fig.1 (2017), [https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper\\_True%20Size%20of%20Government.pdf](https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf) [<https://perma.cc/3K6J-TKWV>] (estimating that nonmilitary administrative agencies employed just over four million people in 2015).

242. See *Agencies*, FED. REG., <https://www.federalregister.gov/agencies> [<https://perma.cc/HBQ2-XP AE>] (last visited Oct. 12, 2024).

243. See, e.g., Dudley, *supra* note 51, at 33–34 (“[S]cores of federal agencies issue thousands of regulations every year. The Code of Federal Regulations contains 242 volumes and more than 185,000 pages. That is four times as big as the U.S. Code of Laws passed by Congress, which contains fewer than 44,000 pages.”).

Thirty federal agencies are responsible for disaster relief and recovery.<sup>244</sup> Chief among them, FEMA operates a centralized office and ten regional offices across the country, employs over 20,000 people, and disperses an average of twelve billion dollars annually through its Disaster Relief Fund.<sup>245</sup>

The size of the administrative system is not problematic in and of itself, but difficulties inherent in managing large systems are exacerbated when the system is beset by jurisdictional redundancy, contradictory agency missions, and bureaucratic competitiveness.<sup>246</sup> Such jurisdictional chaos is commonplace in the federal disaster management system.<sup>247</sup>

Redundant delegations of power over individual funding programs have created a labyrinthine regulatory regime that many find impenetrable.<sup>248</sup> Thirty federal agencies are currently involved in disaster recovery,<sup>249</sup> including the SBA DLP,<sup>250</sup> FEMA's IHP,<sup>251</sup> HUD's CDBG disaster relief programs,<sup>252</sup> the Department of Labor's Disaster Unemployment Assistance,<sup>253</sup> the U.S. Department of Agriculture's livestock assistance programs, farm loans, Emergency Conservation Program, and Emergency Forest Restoration Program,<sup>254</sup> the Bureau of Indian Affairs' Office of Emergency Management,<sup>255</sup> and the National Oceanic and Atmospheric

244. See *supra* note 54 and accompanying text.

245. See *About Us*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/about> [<https://perma.cc/53N4-AZV5>] (last visited Oct. 12, 2024); *FEMA's Disaster Relief Fund*, *supra* note 76.

246. See Freeman & Rossi, *supra* note 21, at 1134–35 (discussing shared regulatory space across federal agencies); ROSENBAUM, *supra* note 132, at 164–65; Landis, *supra* note 48, at 1004–08 (discussing how “sectionalist” competition impacted early disaster relief efforts).

247. See NAT'L COMM'N ON THE PUB. SERV., *supra* note 21, at 36–37; see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 54.

248. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-232, *supra* note 30, at 47–50; see also NAT'L COMM'N ON THE PUB. SERV., *supra* note 21, at 14 (concluding that “[t]he structure of the federal government is outmoded. Some programs no longer have viable missions. More often, too many agencies share responsibilities that could profitably be combined.”). See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-209, DISASTER RELIEF: AGENCIES NEED TO IMPROVE POLICIES AND PROCEDURES FOR ESTIMATING IMPROPER PAYMENTS (2015).

249. See *supra* note 54 and accompanying text.

250. See generally LINDSAY, CONG. RSCH. SERV., R41309, *supra* note 57; LINDSAY, CONG. RSCH. SERV., R44412, *supra* note 57.

251. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-232, *supra* note 30, at 5. See generally WEBSTER, CONG. RSCH. SERV., *supra* note 57.

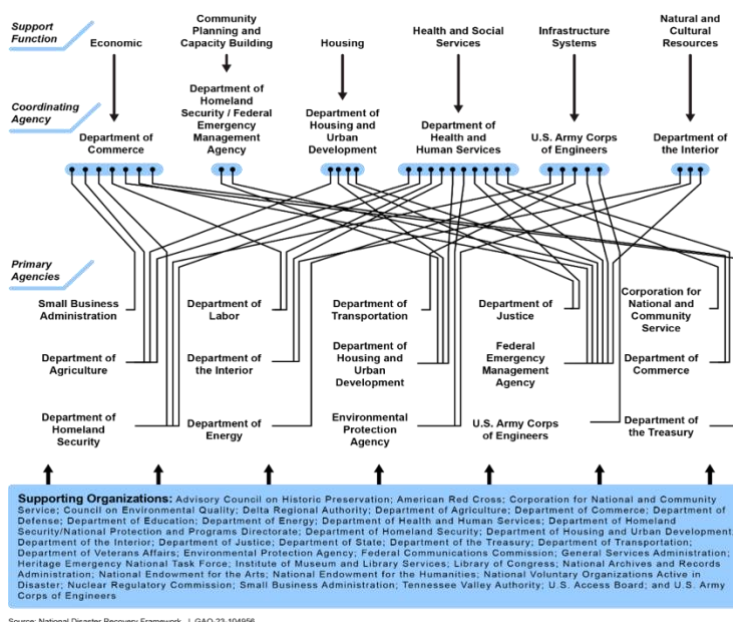
252. See generally JAROSCAK, CONG. RSCH. SERV., *supra* note 58.

253. See *Disaster Unemployment Assistance*, U.S. DEP'T OF LAB.: EMP. & TRAINING ADMIN., <https://oui.doleta.gov/unemploy/disaster.asp> [<https://perma.cc/Y9AY-QFJY>] (last visited Oct. 12, 2024).

254. *Disaster Assistance Programs*, U.S. DEP'T OF AGRIC.: FARM SERV. AGENCY, <https://www.fsa.usda.gov/programs-and-services/disaster-assistance-program/index> [<https://perma.cc/E8KC-GFVE>] (last visited Oct. 12, 2024); see also MEGAN STUBBS, CONG. RSCH. SERV., RS21212, AGRICULTURAL DISASTER ASSISTANCE 10 (2023). See generally LENNARD G. KRUGER & ALYSSA R. CASEY, CONG. RSCH. SERV., RL33816, BROADBAND LOAN AND GRANT PROGRAMS IN THE USDA'S RURAL UTILITIES SERVICE (2019).

255. See *Office of Emergency Management*, U.S. DEP'T OF INTERIOR: INDIAN AFFS., <https://www.bia.gov/bia/ojs/emd> [<https://perma.cc/PPG2-3WUC>] (last visited Oct. 12, 2024) (liaising between tribes and other disaster relief agencies in the wake of a disaster on tribal land).

Association's (NOAA) Coastal Resilience Grants program.<sup>256</sup> The following table, published by FEMA to explain the federal administrative disaster relief structure, aptly illustrates the system's size and complexity:<sup>257</sup>



These programs all have different requirements for eligibility, applications, and timelines, distinct forms of relief, separate agency communication and information management practices, and governing regulations.<sup>258</sup> In some cases—which are not always obvious—the use of one form of relief may prevent an individual's access to another.<sup>259</sup>

256. See *National Coastal Resilience Fund*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <https://coast.noaa.gov/resilience-grant> [<https://perma.cc/WS4X-DXVU>] (Aug. 20, 2024) (providing postdisaster recovery to support reconstruction that prioritizes risk reduction).

257. *The Impacts of FEMA's Strategic Plan on Disaster Preparedness and Response: Hearing Before the Subcomm. on Econ. Dev., Pub. Bldg. & Emergency Mgmt. of the H. Comm. on Transp. & Infrastructure*, 118th Cong. 19 (2023) ("According to the National Disaster Recovery Framework, each recovery support function has a designated coordinating agency along with primary agencies and supporting organizations with programs relevant to the functional area. Coordinating Agencies provided significant engagement and management for the support function. Primary agencies are designated on the basis of their authorities, resources, and capabilities as well as supporting organizations which may bring relevant subject matter expertise and technical assistances as needed.").

258. See *supra* note 33 and accompanying text; *infra* note 265 and accompanying text.

259. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 40 ("A lack of alignment can make it difficult to use programs in a complementary way. In addition, non-federal stakeholders whom the GAO interviewed identified challenges associated with using fragmented and overlapping federal broadband programs, including using programs in a complementary way.").

Applications for SBA and FEMA direct funding are administered separately but are interrelated to some extent. Inconsistencies between the two create confusion for claimants. For example, the sixty-day window for FEMA's IHP funding opens on the day of a presidential declaration,<sup>260</sup> whereas the sixty-day window for SBA's DLP claimants typically opens one day later.<sup>261</sup> Cross-agency application requirements also differ based on the type of relief sought: FEMA will provide rental assistance and grants for home repair without a claimant first being denied an SBA loan, but the agency will not consider applications for transportation, personal property, or medical care without a letter from SBA demonstrating a funding gap.<sup>262</sup> Both programs have requirements that seem inflexible based on published guidance (e.g., SBA's minimum income requirement),<sup>263</sup> but inconsistent funding decisions suggest agency discretion.<sup>264</sup> Interagency and claimant communication failures also result in application rejection for easily avoidable procedural errors.<sup>265</sup>

Jurisdictional chaos can also result in regulatory gaps. Under HUD's CDBG-DR programs, a home must suffer "real property FEMA-inspected damage[s] of at least \$8,000, personal property damage[s] of at least \$3,500, or flooding over 1 foot."<sup>266</sup> "Homeowners with a lower damage estimate [a]re ineligible for the funds,"<sup>267</sup> which makes funding awards tied to the market value of claimants' homes and belongings. This process disadvantages low-income applicants, whose belongings may fail to meet required value minimums. Because CDBG-DRs represent the last step in the multiagency application process described in Part I, these funding gaps are often left empty. Gaps like these leave disaster victims in regulatory deserts with no clear way to get out.<sup>268</sup> In most cases, gaps cannot be filled without formal agency action and program amendment, which require a regulatory or

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260. See 44 C.F.R. § 206.112(a) (2024). This window can be extended at the request of state, territory, or tribal government. *Id.* § 206.112(b).

261. See FED. EMERGENCY MGMT. AGENCY, FP 104-009-03, INDIVIDUAL ASSISTANCE PROGRAM AND POLICY GUIDE 70–71 (2021); U.S. SMALL BUS. ADMIN.: OFF. OF DISASTER ASSISTANCE, SOP-50-30-9, DISASTER ASSISTANCE PROGRAM 14 (2018).

262. Jordan Ballard, Julia Howard-Gibbon, Brenda Muñoz Furnish & Aaron Scheinwald, *Natural Disasters, Access to Justice, and Legal Services*, 17 CUNY L. REV. 1, 11 (2013).

263. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-503, DISASTER ASSISTANCE: ADDITIONAL ACTIONS NEEDED TO STRENGTHEN FEMA'S INDIVIDUALS AND HOUSEHOLDS PROGRAM 117 (2020).

264. See generally Patrick S. Roberts & Kris Wernstedt, *Decision Biases and Heuristics Among Emergency Managers: Just Like the Public They Manage For?*, 49 AM. REV. PUB. ADMIN. 292 (2019).

265. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-503, *supra* note 265, at Highlights ("By fully communicating the requirement [to first apply for an SBA disaster loan before being considered for SBA-Dependent ONA] and working with SBA to identify options to simplify and streamline this step of the IHP process, FEMA could help ensure that survivors receive all assistance for which they are eligible.").

266. AM. FLOOD COAL., *supra* note 86, at 7.

267. *Id.*

268. See PAIK, *supra* note 34, at 5.



program-level response and lengthy administrative procedures that cannot guarantee a solution.<sup>269</sup>

Since 2011, the GAO has published annual reports on redundancies and fragmentation in federal programs.<sup>270</sup> In its 2023 report, the GAO included disaster relief among twenty-six new areas where jurisdictional overlap results in inefficiency and waste.<sup>271</sup> The GAO interviewed state and local officials who observed that “meeting all of the different requirements to qualify for and appropriately manage grants from multiple agencies in response to a single disaster is not just difficult, but it requires resources, including time and staff capacity, and may result in duplicative effort[.]” and “that distinctions in the specific requirements across agencies have necessitated that [impacted individuals] repeat the same or similar steps when they apply for multiple federal programs rather than reusing or submitting the same material.”<sup>272</sup> Ultimately, the GAO recommended that federal disaster programs streamline communication about available funding, unify application processes and timelines, simplify funding requirements, prioritize disaster funding for vulnerable communities, and launch a commission to investigate program consolidation.<sup>273</sup> Although “FEMA disagreed with GAO’s characterization of the federal approach to disaster recovery as fragmented,”<sup>274</sup> there are growing calls from scholars,<sup>275</sup>

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269. See Ruhl & Salzman, *supra* note 124, at 68–71.

270. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 1.

271. See *id.* at 4, 31–83. The report also identified the following topic areas for deduplication: broadband internet access (fifteen agencies manage thirty programs); tribal economic development (seven agencies manage twenty-two programs); Native Alaskan environmental protection (thirty programs); earthquake risk and resiliency (four agencies); and falls among elderly and disabled populations (four agencies manage nine programs). *Id.* at 4–7. Interdisciplinary scholars have identified horizontal fragmentation fueled by structural problems in a variety of other subjects, including climate change, deep water drilling, technology and information, environmental justice, and food. See Ruhl & Salzman, *supra* note 124, at 63–64 (discussing the horizontal structure of agency regulation of climate change); Hari M. Osofsky, *Multidimensional Governance and the BP Deepwater Horizon Oil Spill*, 63 FLA. L. REV. 1077, 1079 (2011) (“The overlapping, but fragmented, applicable law creates conflicts over who controls which aspects of the drilling and the emergency response, and when top-down and bottom-up approaches are appropriate.”); Abigail E. André, *A Canary in A Coal Mine: What We Haven’t Learned from Deepwater Horizon and How Courts Can Help*, 33 GEO. ENV’T L. REV. 1, 8–21 (2020) (discussing complex regulatory failures in the deepwater drilling context); COHEN, *supra* note 124, at 2 (“[C]ore legal institutions are already evolving in response to the ongoing transformation in our political economy . . . .”); Mark Rutherford, *The Bureau of Environmental Justice and Change from the Top*, 37 UCLA J. ENV’T L. & POL’Y 123, 126–30 (2019) (discussing the pros and cons of California’s Bureau of Environmental Justice); Laurie J. Beyranevand & Diana Winters, *Retooling American Foodralism*, 44 AM. J.L. & MED. 489, 491 (2018) (“Even when considering a relatively discrete issue like food safety, there are ‘as many as 15 federal agencies, including the FDA and the [USDA’s Food Safety Inspection Service], collectively administering at least 30 laws.’” (quoting RÉNEE JOHNSON, CONG. RSCH. SERV., RS22600, THE FEDERAL FOOD SAFETY SYSTEM: A PRIMER, at Summary (2016))).

272. U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-104956, *supra* note 30, at 21–22.

273. *Id.* at 30–47.

274. U.S. GOV’T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17, at 55.

275. See, e.g., FARBER & GROW, *supra* note 2, at xxxi–iii.

government investigators,<sup>276</sup> government officials,<sup>277</sup> and Congress<sup>278</sup> to streamline processes.

Overlapping programs with contradictory requirements create what Professor Leslie Paik refers to as a “multi-institutional maze.”<sup>279</sup> Her analysis of the impact of complex institutional structures on vulnerable populations suggests that the complexities themselves perpetuate socioeconomic and racial disparity because they assume competencies and resources (e.g., time, literacy, transportation, lines of credit, childcare, information technology, required documentation, and political power) that many lack.<sup>280</sup> This is particularly harmful when interacting with what she calls “control institutions,” which provide essential services using processes over which individuals have no control.<sup>281</sup> Individual disaster relief programs fit this definition, and complexity within them leaves people lost in institutional quagmires without the funds needed for recovery.

Roadblocks created by institutional complexity and disaster fragmentation also entrench preexisting hardships created by racism and poverty.<sup>282</sup> These layered obstacles snowball into what scholars refer to as a cascading disaster,<sup>283</sup> which combines a string of interrelated but distinct disasters. Once tangled, the distinguishing features of individual disasters and their root causes obscure, making it impossible for institutions to sort out how to remedy one disaster without addressing the others as well.<sup>284</sup> As discussed

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276. See generally U.S. OFF. OF THE INSPECTOR GEN.: OFF. OF BLOCK GRANT ASSISTANCE, 2018-FW-0002, CMTY. DEV. BLOCK GRANT DISASTER RECOVERY PROGRAM (2018).

277. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-104956, *supra* note 30, at 19–20 (discussing challenges faced by elected officials “with navigating multiple disaster recovery programs, including the different requirements across the FEMA, HUD, and FTA grant programs; the differing time frames across programs; multiple federal authorities; and limited data sharing”). See generally U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-232, *supra* note 30; NAT'L ADVISORY COUNCIL, *supra* note 68; U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17.

278. See Disaster Assistance Simplification Act, S. 1528, 118th Cong. (2023); Disaster Assistance Simplification Act, S. 4599, 117th Cong. (2022); Disaster Survivors Fairness Act of 2023, H.R. 1796, 118th Cong (2024).

279. See generally PAIK, *supra* note 34 (analyzing multi-institutional structures governing public assistance, Medicaid, public schools, the criminal justice system, and child welfare).

280. *Id.* at 6–7; see also Simone J. Domingue & Christopher T. Emrich, *Social Vulnerability and Procedural Equity: Exploring the Distribution of Disaster Aid Across Counties in the United States*, 49 AM. REV. PUB. ADMIN. 897, 910 (2019); AM. FLOOD COAL., *supra* note 86, at 9–10 (outlining programmatic requirements that those with low socioeconomic status may be unable to satisfy, including proof of homeownership, specific income requirements, proof of credit or specific credit scores, and bank account information).

281. See PAIK, *supra* note 34, at 2.

282. See Brigham Daniels, Michalyn Steele & Lisa Grow Sun, *Just Environmentalism*, 37 YALE L. & POL'Y REV. 1, 5 n.9, 45–46 (2018); Grow et al., *supra* note 191, at 966–70.

283. Significant literature exists about the impact of cascading disasters in the disaster relief context. For a summary, see FARBER & GROW, *supra* note 2, at xxix–xxxiii.

284. See NAT'L ADVISORY COUNCIL, *supra* note 68, at 11–12 (summarizing FEMA's failure to consider equity in financial assistance relief); see, e.g., Frederica P. Perera, *Multiple Threats to Child Health from Fossil Fuel Combustion: Impacts of Air Pollution and Climate Change*, 125 ENV'T HEALTH PERSPS. 141, 142–46 (2017); Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 21, 59–60 (2006); Rebecca Hersher & Ryan Kellman, *Why FEMA Aid Is*

in Part IV, proposals for reform are generally focused on problems in one or two programs and generally fail to consider large-scale institutional solutions and complex root causes.<sup>285</sup> The next section analyzes how conflict contributes to disaster fragmentation.

### B. Interagency Conflict and Political Doldrums

Several types of conflicts exacerbate disaster fragmentation, including those arising from questions of agency power (disagreement over who is responsible),<sup>286</sup> law (disagreements over how to solve a problem),<sup>287</sup> and politics (disagreements over who has power and how should they use it).<sup>288</sup> Whether these problems are born of congressional or agency mismanagement, interagency conflict and political inefficacy weakens the federal disaster relief system and harms those reliant on its aid.

FEMA's creation was intended to consolidate power: all authorities and functions under the Disaster Relief Act of 1970<sup>289</sup> and 1974 (referred to as the Stafford Disaster Relief Act in this Article) previously implemented by HUD shifted to FEMA in 1979.<sup>290</sup> However, HUD's lost mandate has not kept Congress from using the agency to fund disaster relief. Since the early 1990s, Congress has appropriated billions of dollars<sup>291</sup> to fund most major disasters with the CDBG program.<sup>292</sup> Despite its frequency of use, Congress has never changed HUD's mission or mandates to include disaster relief.<sup>293</sup> In 2018, this gap in delegation led HUD's Office of Inspector General to fault

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*Unavailable to Many Who Need It the Most*, NAT'L PUB. RADIO (June 29, 2021, 5:01 AM), <https://www.npr.org/2021/06/29/1004347023/why-fema-aid-is-unavailable-to-many-who-need-it-the-most> [https://perma.cc/H4DE-GEGF].

285. See *infra* Part IV.

286. See Hyman & Kovacic, *supra* note 22, at 1451 (“Over the past century, many parts of the federal government have been reorganized and reconfigured. In the process, entire departments, agencies, bureaus, and commissions have been created, moved, consolidated, divided, turned upside down and inside out, or, infrequently, eliminated entirely.”).

287. See Nou, *supra* note 238, at 422 (“Organizational design choices can determine who controls the levers of influence, both formal and informal, within an administrative agency.”); see also ZEGART, *supra* note 27, at 1–2.

288. See DANIEL A. FARBER & CINNAMON P. CARLARNE, CLIMATE CHANGE LAW 245–48 (Foundation Press, 2d ed., 2023) (discussing the yo-yo adaptation policies Americans have suffered between the administrations of Presidents Barack Obama, Donald J. Trump, and Biden).

289. Pub. L. No. 91-606, 84 Stat. 1744 (codified as amended in scattered titles of the U.S. Code).

290. Reorganization Plan No. 3 of 1978, 43 Fed. Reg. 41943 (Sept. 19, 1978).

291. U.S. OFF. OF THE INSPECTOR GEN.: OFF. OF BLOCK GRANT ASSISTANCE, 2018-FW-0002, *supra* note 276, at 3 (finding that Congress appropriated forty-eight billion dollars with this program between 2001 and 2016).

292. See, e.g., Robert B. Olshansky, Laurie A. Johnson & Kenneth C. Topping, *Rebuilding Communities Following Disaster: Lessons from Kobe and Los Angeles*, 32 BUILT ENV'T 354, 361 (2006). Congress created the CDBG program through the Housing and Community Development Act of 1974, 42 U.S.C. § 5301.

293. See Olshansky & Johnson, *supra* note 166, at 298 (“[W]ith the continuing growth in disaster CDBG, the federal government has, without any overarching legislation or explicit statement of policy, significantly deepened its financial commitment to long-term recovery of communities.”).

the agency and Congress for its reliance on this ad hoc system, explaining that its lack of structure created undue complexities and burdens for grantees.<sup>294</sup>

Contradictory agency missions and statutory mandates also add to disaster fragmentation.<sup>295</sup> FEMA, SBA, and HUD have completely different missions that result in potentially contradictory world views. FEMA is tasked with comprehensive emergency management,<sup>296</sup> SBA promotes economic development,<sup>297</sup> and HUD encourages safe and affordable housing through “recovery and reconstruction projects.”<sup>298</sup> Although there is inarguably overlap between these points of view, the lens through which each regulates disaster is distinct.<sup>299</sup> As observed by Professor Richard J. Lazarus, these types of inconsistencies result in law that is “at best ineffective and at worst unwittingly destructive because of unanticipated consequences.”<sup>300</sup>

The federal administrative system is also an inherently political animal that all three branches of government try to control.<sup>301</sup> Power sharing at this scale is rife with conflict that contributes to institutional fragmentation and inefficiency. For example, NOAA—a research-driven environmental agency that administers disaster relief funds to coastal communities—is

294. See Finn, *supra* note 15, at 43.

295. See Hyman & Kovacic, *supra* note 22, at 1453 (describing the “jurisdictional chaos” arising from overlapping delegations as a perennial problem).

296. See Finn, *supra* note 15, at 40–41.

297. *Id.* at 35–36.

298. *Id.* at 38.

299. See Ballard et al., *supra* note 262, at 20–23 (describing situations where differences between FEMA and HUD’s definition of “bedroom” resulted in confusion for disaster survivors); Hyman & Kovacic, *supra* note 22, at 1459 (Professors David A. Hyman and William E. Kovacic described problems that arise when agencies have overlapping responsibilities but different points of view: “This case is a mess because the executive agency (the Department of Energy) and the independent agency (the Nuclear Regulatory Commission) have overlapping statutory responsibilities with respect to the Yucca Mountain project.” (quoting *In re Aiken Cnty.*, 645 F.3d 428, 439 (D.C. Cir. 2011))).

300. Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1181 (2009).

301. The executive branch exerts oversight, organization, and human resources powers; Congress pulls purse strings and can speed or slow political transitions through consultation and consent; and the judiciary interprets regulations and—increasingly—questions the constitutionality of the administrative state writ large. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 839 (1984), overruled by *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), the Court’s recent ruling in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024), and their implications for the administrative state are beyond the scope of this Article. See *id.* But see *Michigan v. Env’t Prot. Agency*, 576 U.S. 743, 760–61 (2015) (Thomas, J., concurring) (criticizing *Chevron*); *West Virginia v. Env’t Prot. Agency*, 597 U.S. 697, 723–24 (2022) (addressing the “major questions doctrine”); Caroline Cecot, *The Meaning of “Silence”*, 31 GEO. MASON L. REV. 515, 516–19 (2024); Craig Green, *Deconstructing the Administrative State: Chevron Debates and the Transformation of Constitutional Politics*, 101 B.U. L. REV. 619, 657–77 (2021) (examining the historical record to show a sharp pivot after President Obama’s reelection toward conservative opposition to *Chevron* deference); Lisa Heinzerling, *How Government Ends*, BOS. REV. (Sept. 28, 2022), <https://www.bostonreview.net/articles/how-government-ends/> [<https://perma.cc/6PQ9-JNA6>] (“[N]othing less than the future of the effective governance is at stake [with the likely abolishment of the *Chevron* doctrine].”).

housed in the U.S. Department of Commerce instead of the U.S. Department of the Interior because President Richard M. Nixon was angry with the Secretary of the Interior when NOAA was created.<sup>302</sup> Although administrative reform is a bipartisan issue,<sup>303</sup> the system suffers from partisan whiplash based on who holds the White House: in recent years, the Republican Party's calls to "drain the swamp"<sup>304</sup> have resulted in massive regulatory and policy rollbacks that are rebuilt when the Democratic Party takes office.<sup>305</sup> Disaster relief programs are not immune from this cycle.<sup>306</sup>

Intergovernmental conflicts exacerbate disaster fragmentation and impose regulatory uncertainty on disaster relief victims already struggling to figure out how to get what they need to recover. When programs become the subject of interagency conflict, contradictory agency approaches, or political brinkmanship, disaster victims suffer. As discussed in the next section, problems created by disaster fragmentation are made worse by the complexity of disaster relief and the collective action problems it creates.

### C. Complexity and the Regulatory Commons

Horizontal fragmentation exacerbates social ills when unsystematic power spreading results in regulatory gaps and collective inaction.<sup>307</sup> Professor Buzbee illustrates this problem with a revamp of the "tragedy of the commons," an oft-cited theory used to explain why self-interest makes the protection of common-pool resources—finite resources to which the public has unfettered access—challenging.<sup>308</sup> He analogizes stymied regulatory processes to the tragedy of the commons by illustrating that regulation of complex social problems suffer from "underinvestment, underprotection and overexploitation" due to a myriad of economic, political, and personal

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302. See *supra* note 238.

303. See Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 12 (1995) (citing PERI E. ARNOLD, MAKING THE MANAGERIAL PRESIDENCY: COMPREHENSIVE REORGANIZATION PLANNING, 1905-1980, at 26-54 (Princeton 1986)); Daniel Carpenter, *The Evolution of National Bureaucracy in the United States*, in THE EXECUTIVE BRANCH 49-50 (Joel D. Aberbach & Mark A. Peterson eds., 2005).

304. See Ted Widmer, *Draining the Swamp*, NEW YORKER (Jan. 19, 2017), <https://www.nyorker.com/news/news-desk/draining-the-swamp> [<https://perma.cc/JP8A-2Q7M>].

305. See FARBER & CARLARNE, *supra* note 287, at 245-48 (discussing the adaptation policies Americans have suffered between the Obama, Trump, and Biden administrations).

306. *Id.*

307. Maria Ponomarenko, *Our Fragmented Approach to Public Safety*, 59 AM. CRIM. L. REV. 1665, 1667-68, 1672-77 (2022) (arguing that fragmentation exacerbates the plight of unhoused populations by creating a collective action problem and responsibility vacuums); FARBER & CARLARNE, *supra* note 287, at 5-8 (discussing the collective action problem as one of the prime hurdles to global climate change management); Ruhl & Salzman, *supra* note 124, at 116-19; Buzbee, *supra* note 34, at 48-53 (discussing "regulatory commons" problem that can lead to regulatory gaps in complex regulatory settings involving numerous regulatory actors, and possible solutions for that problem).

308. Buzbee, *supra* note 34, at 15-16; see also Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 3 n.4; Thomas Dietz, Elinor Ostrom & Paul C. Stern, *The Struggle to Govern the Commons*, 302 SCIENCE 1907, 1907-10 (2003).

pressures.<sup>309</sup> Symptoms of the regulatory commons include underregulation, regulatory gaps, and collective inaction.<sup>310</sup>

Problems created by the regulatory commons are particularly acute when power is shared between agencies.<sup>311</sup> In these cases, not only are agencies likely to approach the same problem differently,<sup>312</sup> underregulation is common because “each agency, counting on others to do their part, free rides, thus leading to an ineffective combined effort.”<sup>313</sup> For example, Professor Margaret Kwoka discusses the challenges that arise when implementation of a single regulation or policy is spread across the administrative system in the context of the Freedom of Information Act<sup>314</sup> (FOIA):

[T]here is currently no locus in government championing the people’s right to access government information. As a result, we lack a meaningful public discourse promoting the public value of transparency or facilitating democratic oversight, celebrating citizens’ use of transparency laws, or framing the stakes of the debate around government transparency as a fight for the human right to information needed to hold government accountable.<sup>315</sup>

Similar examples exist in food,<sup>316</sup> biotechnology,<sup>317</sup> genetically modified foods,<sup>318</sup> consumer protection,<sup>319</sup> and environmental injustice.<sup>320</sup> Although explicit calls for consideration of environmental injustice impacts of federal actions began in the 1990s,<sup>321</sup> agency implementation has been uneven, and

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309. Buzbee, *supra* note 34, at 22–27.

310. *See generally id.*

311. *Id.* (discussing the dangers of “jurisdictional mismatch”).

312. *See supra* Parts II.A–B.

313. Ruhl & Salzman, *supra* note 124, at 71; *see also* Robert L. Glicksman, *Climate Change Adaptation: A Collective Action Perspective on Federalism Considerations*, 40 ENV’T L. 1159, 1175, 1180 (2010).

314. 5 U.S.C. § 552.

315. *See* Kwoka, *supra* note 15, at 844 (discussing fragmentation of authority in the FOIA context).

316. *See* Beyranevand & Winters, *supra* note 270, at 490–98.

317. *See, e.g.,* Bob Zhao, *Mitochondrial Replacement Therapy and the Regulation of Reproductive Genetic Technologies in the United States*, 15 DUKE L. & TECH. REV. 121, 133–37 (2017) (calling for the creation of a new federal agency to address technological advances in reproductive technology).

318. *See* Thomas O. McGarity, *Seeds of Distrust: Federal Regulation of Genetically Modified Foods*, 35 U. MICH. J.L. REFORM 403, 432–34 (2002).

319. *See* Hannah Clendening, *The Consumer Financial Protection Bureau’s Structural Integrity and a Call for Adaptive and Incremental Agency Design Policy*, 93 IND. L.J. 1279, 1283 (2018) (discussing the need for “organizational structure[s] that promote experimentation and adaptability, especially in the face of crisis and change” within the Consumer Financial Protection Bureau).

320. *See* Rutherford, *supra* note 270, at 125–30 (discussing the pros and cons of California’s Bureau of Environmental Justice).

321. *See* Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7629 (Feb. 11, 1994) (directing federal agencies to identify and address, as appropriate, the “disproportionately high and adverse human health or environment effects of its programs, policies, and activities on minority populations and low-income populations”).

no streamlined approach exists.<sup>322</sup> These shortcomings are apparent in the disaster relief context, where FEMA has underregulated for environmental injustice concerns despite repeated government-wide orders to do so.<sup>323</sup>

Professors J.B. Ruhl and James Salzman suggest that the likelihood of underregulation or inaction in the regulatory commons increases when the problems regulators shy away from are complex, novel, and urgent:<sup>324</sup>

As problems become larger in scope and complexity, crossing scales of governance and exceeding the capacity of any particular agency at any particular scale, no obvious solution to the “which agency” question presents itself. Indeed, massive problems may require an altogether different and far more flexible way of thinking about federalism in both its vertical and horizontal directions.<sup>325</sup>

Complexity breeds inaction for a variety of reasons, including a dearth of regulator primacy, obvious solutions, and political will.<sup>326</sup> Scholars identify climate change as a complex problem beset by underregulation for all these

322. See, e.g., Colangelo & André, *supra* note 113, at 64–65, 72, 75–78. Under the Biden administration, the federal government has elevated the pursuit of environmental justice by establishing new initiatives and revamping existing—and in some cases, languishing—authorities. In his first days in office, President Biden issued Executive Orders 13,985 (Advancing Racial Equity and Support for Underserved Communities Through the Federal Government) and 14,008 (Tackling the Climate Crisis at Home and Abroad). See Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021); Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). Together, these orders direct federal agencies to: “work toward proactively achieving environmental justice[,] . . . develop and implement policies and strategies that strengthen compliance and enforcement, . . . increase community engagement, and ensure that . . . 40 percent of the benefits from federal investments in climate and clean energy flow to underserved communities.” *EPA Finalizes Environmental Justice Action Plan for Land Protection and Cleanup Programs*, EPA (Sept. 30, 2022), <https://www.epa.gov/newsreleases/epa-finalizes-environmental-justice-action-plan-land-protection-and-cleanup-programs> [<https://perma.cc/RZ37-T6A3>]. EPA has also publicly identified and updated a comprehensive set of legal authorities to pursue environmental justice goals and for the first time issued guidance on cumulative impacts. See OFF. OF GEN. COUNS., EPA, EPA LEGAL TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE (2022); OFF. OF GEN. COUNS., EPA, EPA LEGAL TOOLS TO ADVANCE ENVIRONMENTAL JUSTICE: CUMULATIVE IMPACTS ADDENDUM (2023).

323. See Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994); NAT’L ADVISORY COUNCIL, *supra* note 68, at 12 (“Civil rights laws and legal authorities remain in effect, and cannot be waived, during emergencies. It is the opinion of the NAC that FEMA does not meet the equity requirements of the Stafford Act.”).

324. See Buzbee, *supra* note 34, at 22 (“The more complex, multilayered, or fragmented the legal and political setting, the more likely it is that regulatory commons dynamics will arise. The simplifying assumption of a single lawmaker or enforcer threatens to ignore an important reason regulatory challenges, especially in the environmental policy arena, often remain intractable.”).

325. Ruhl & Salzman, *supra* note 124, at 70; see also LAZARUS, *supra* note 14, at 33; Alejandro E. Camacho & Robert L. Glicksman, *Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority*, 51 HARV. J. ON LEGIS. 19, 20–21 (2014) (discussing regulatory responses to new and complex problems); Jason Marisam, *Interagency Administration*, 45 ARIZ. STATE L.J. 183, 185 (2013) (“[A]gency interconnectedness will become even more rooted in the bureaucracy over time, as regulatory problems show no sign of becoming simpler and more amenable to single-agency solutions.”).

326. See Buzbee, *supra* note 34, at 22–23 (referring to horizontal fragmentation as an example of “jurisdictional mismatch” that makes underregulation likely).

reasons: the problem has global impact<sup>327</sup> and requires long-term, interdisciplinary solutions<sup>328</sup> that would require the United States to embrace unpopular cultural change.<sup>329</sup> Climate change is also aptly categorized by many as “a ‘wicked problem’ that defies resolution because of the enormous interdependencies, uncertainties, circularities, and conflicting stakeholders implicated by any effort to develop a solution.”<sup>330</sup> Disaster relief and recovery constitute an important component of climate change management.

The socioeconomic factors that contribute to unjust disaster relief funding—including income, poverty, physical ability or disability, language incompetency, gender, household composition, homeownership, and age<sup>331</sup>—are also stunningly complex and represent just one piece of the puzzle: regulators must also grapple with institutional fragmentation as well as political and budgetary realities. To create a system that truly serves those in need requires a complete accounting of institutional design, climate change-fueled weather events, resources at risk, the growing socioeconomic vulnerability<sup>332</sup> created by these events,<sup>333</sup> and preexisting factors that increase that vulnerability and stifle resilience. As discussed in Part IV, these goals require significant institutional change.<sup>334</sup>

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327. See Alejandro E. Camacho, *Adapting Governance to Climate Change: Managing Uncertainty Through a Learning Infrastructure*, 59 EMORY L.J. 1, 17 (2009) (“Evidence suggests that the effects of global warming are already being experienced in the United States, and climate change is likely to continue for decades, even in the event of significant reduction of emissions.”); Bronen, *supra* note 7, at 28 (“However, sea levels will not stop rising at the end of this century.”).

328. See Lazarus, *supra* note 300, at 1159–61.

329. See *id.* at 1160.

330. *Id.* at 1159.

331. See, e.g., TIERNEY, *supra* note 43, at 141.

332. See Fothergill & Peek, *supra* note 1, at 90 (“Vulnerability, in the disaster context, is a person’s or group’s ‘capacity to anticipate, cope with, resist, and recover from the impact of a natural hazard.’”).

333. See Adam B. Smith, *2020 U.S. Billion-Dollar Weather and Climate Disasters in Historical Context*, CLIMATE.GOV (Jan. 8, 2021), <https://www.climate.gov/disasters2020> [<https://perma.cc/7HVQ-7ZY>] (“The number and cost of weather and climate disasters are increasing in the United States due to a combination of increased exposure (i.e., more assets at risk), vulnerability (i.e., how much damage a hazard of given intensity—wind speed, or flood depth, for example—causes at a location), and the fact that climate change is increasing the frequency of some types of extremes that lead to billion-dollar disasters.”).

334. See Livhuwani David Nemakonde & Dewald van Nierkerk, *Integrating Disaster Risk Reduction and Climate Change Adaptation in the Context of Sustainable Development in Africa*, in THE CAMBRIDGE HANDBOOK OF DISASTER LAW AND POLICY: RISK, RECOVERY AND REDEVELOPMENT 103 (Susan S. Kuo, John Travis Marshall & Ryan Rowberry eds., 2022) (ebook) (“Achieving successful integration of climate change adaptation and disaster risk reduction is likely to demand substantial institutional changes.”).



#### IV. DOES CURING DISASTER FRAGMENTATION REQUIRE A GREAT TRANSFORMATION?

In the face of increasingly complex world problems, agencies question their ability to make meaningful change.<sup>335</sup> They need institutional design that promotes interdisciplinary solutions for intersectional problems.<sup>336</sup> The flaws in the federal administrative disaster management system are not new: policymakers and scholars have been grappling with how to fix them for years. Task forces and interagency working groups have been convened,<sup>337</sup> legislation introduced,<sup>338</sup> and executive orders signed<sup>339</sup> to tackle systemic disparities and inefficiencies. Although these approaches have helped clarify what problems need to be solved, solutions have largely focused on shifts in policy rather than institutional change.<sup>340</sup> That is not to say that policymakers are blind to structural issues: several high-profile government investigations have identified fragmentation as a hurdle to effective disaster relief and called for structural change.<sup>341</sup> And yet, little has been done to address the institutional barriers identified.<sup>342</sup>

Some may argue that integrated disaster management<sup>343</sup> is possible without structural change. As Professors David A. Hyman and William E.

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335. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497 (2007). In defending its failure to regulate greenhouse gasses, the EPA argued that no “realistic possibility exists that the relief petitioners seek would mitigate global climate change and remedy their injuries.” *Id.* at 523.

336. See, e.g., Crenshaw, *supra* note 45, at 140; NAT’L COMM’N ON THE PUB. SERV., *supra* note 21, at 14; Gillian E. Metzger, *The Supreme Court, 2016 Term, Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 86–91 (2017); Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607, 1608–11 (2016).

337. See *Presidential Policy Directive/PPD-8: National Preparedness*, DEP’T OF HOMELAND SEC’Y, <https://www.dhs.gov/presidential-policy-directive-8-national-preparedness> [<https://perma.cc/58FA-DLCM>] (last visited Oct. 12, 2024); Exec. Order No. 13,632, 77 Fed. Reg. 74341 (Dec. 7, 2012); THE WHITE HOUSE COUNCIL ON ENV’T QUALITY, PROGRESS REPORT OF THE INTERAGENCY CLIMATE CHANGE ADAPTATION TASK FORCE I (2010) (“Adaptation and resilience will require action from all segments of society—the public sector, . . . the nonprofit sector and individuals. This challenge provides Federal, Tribal, State, and local governments with significant opportunities for innovation.”); FED. EMERGENCY MGMT. AGENCY, 2009 DISASTER HOUSING PLAN 6 (2009), <https://www.fema.gov/pdf/emergency/disasterhousing/FEMA2009HousingPlan.pdf> [<https://perma.cc/M3XT-LEJF>] (The National Disaster Housing Strategy recommended a multiagency Task Force which became formally known as FEMA’s National Disaster Housing Strategy).

338. See Disaster Assistance Simplification Act, S. 1528, 118th Cong. (2023); Disaster Assistance Simplification Act, S. 4599, 117th Cong. (2022); Disaster Survivors Fairness Act of 2023, H.R. 1796, 118th Cong. (2023); Environmental Justice for All Act, H.R. 5986, 116th Cong. (2020); Environmental Justice Act of 2021, H.R. 2434, 117th Cong. (2021).

339. See, e.g., Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021); Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). For an analysis of these efforts, see Anthony B. Cavender & Anne Idsal Austin, *Environmental Justice: The Evolution of a New Federal Regulatory Program*, 69 FED. LAW. 28 (2022).

340. See, e.g., *supra* notes 337–38.

341. See *supra* notes 276–77 and accompanying text.

342. See, e.g., U.S. OFF. OF THE INSPECTOR GEN.: OFF. OF BLOCK GRANT ASSISTANCE, 2018-FW-0002, *supra* note 276, at 6–8.

343. See ROSENBAUM, *supra* note 132, at 164–65 (discussing integrated management). Here, the author of this Article refers to growing programs and policies from start to finish with the same group of stakeholders, even if they represent separate entities.

Kovacic point out, there are benefits to horizontal fragmentation and agency redundancy.<sup>344</sup> For example, multiagency decision making has been shown to encourage consideration of “factors and goals that [a single agency] would otherwise downplay or ignore.”<sup>345</sup> Programs run by multiagency teams also benefit from cross-discipline expertise and diverse problem solving skills, all of which could benefit the complex problem of equitable disaster management.<sup>346</sup>

But these benefits assume well thought-out agency design and clearly articulated collaborative practices. Neither of these characteristics exist in the federal disaster management system. Its historically reactive growth has no logical organization and was heavily influenced by immediate need and political expediency rather than carefully considered delegation and intentional regulatory strategy.<sup>347</sup> As Professor Lazarus observes, even in the best of cases “sweeping law reforms in response to new information or values are very difficult to accomplish without institutional change.”<sup>348</sup>

The federal disaster relief system is ripe for change. The uptick in climate-fueled weather disasters, heat waves, and coastal flooding has increased public support for reform.<sup>349</sup> Simultaneously, social justice movements have trumpeted the inequities suffered by underserved communities during and after disasters.<sup>350</sup> On the heels of damning reports about the sufficiency of current programs, political will for significant change is growing.<sup>351</sup>

Although smaller institutional changes may remedy some problems caused by disaster fragmentation or address single-program challenges, the extent of dysfunction in the disaster relief system calls for more extreme structural reorganization. The literature is rich with creative recommendations about agency building.<sup>352</sup> Political scientists and legal scholars that study

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344. See Hyman & Kovacic, *supra* note 22, at 1460–63.

345. *Id.* at 1461; see also Bradley, *supra* note 229, at 772–73.

346. See Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78, 79–83 (2012); Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1657–59, 1676–79 (2006).

347. See *supra* Part II.

348. Lazarus, *supra* note 300, at 1180.

349. See Carolyn Kousky, Karina French, Carlos Martin & Manann Donoghoe, *The US Needs a New System for Declaring Natural Disasters and Distributing Federal Aid*, BROOKINGS INST. (July 14, 2023), <https://www.brookings.edu/articles/the-us-needs-a-new-system-for-declaring-natural-disasters-and-distributing-federal-aid/> [https://perma.cc/9M86-7FZE].

350. See, e.g., *Climate Justice Working Group*, *supra* note 45.

351. See, e.g., Disaster Assistance Simplification Act, S. 1528, 118th Cong. (2023); Disaster Assistance Simplification Act, S. 4599, 117th Cong. (2022); Disaster Survivors Fairness Act of 2023, H.R. 1796, 118th Cong. (2023).

352. See, e.g., Hyman & Kovacic, *supra* note 22, at 1468–83 (identifying seven criteria needed for agency building success, including policy coherence, credibility, capacity, resilience, and cohesion); Ruhl & Salzman, *supra* note 124, at 98–108 (discussing the best administrative structures for tackling wicked problems); Lazarus, *supra* note 300, at 1193, 1205–31 (analyzing legislative and administrative structures for tackling climate change);

institutional governance approach the task from diverse perspectives,<sup>353</sup> but tend to agree that “agencies whittling away at massive problems must be empowered to pool resources with other similarly charged agencies” and maintain formalized interagency connection in some manner.<sup>354</sup>

In light of the historical failure of disaster relief under a system siloed between so many agencies,<sup>355</sup> this part considers ways to pool resources within a single institution. Although that approach admittedly omits opportunities for collaborative interagency governance that has worked well in other cases,<sup>356</sup> similar approaches have had limited success in the disaster relief setting.<sup>357</sup> Coupled with the depth of institutional disconnection present here, more drastic institutional changes are required. Calls for large-scale change also reflect the urgency of the disaster relief problem: disaster survivors cannot wait while current administrative structures toil away to improve the system one program at a time.<sup>358</sup>

This part examines three structural changes that explicitly tackle disaster fragmentation: (1) programmatic consolidation within FEMA, (2) the creation of a new independent agency modeled after the Consumer Financial Protection Bureau (CFPB), and (3) the establishment of a commission like the Equal Employment Opportunity Commission. Each option would address some, but not all, of the criteria Professors Hyman and Kovacic suggest be applied for successful agency creation, including policy coherence, branding and credibility, capacity and capability, resilience, cohesion, and consideration of collateral effects and political implications.<sup>359</sup> These factors are informed by in-depth historical analyses and consideration of institutional governance norms.<sup>360</sup> As a result, they represent an interdisciplinary approach to institutional design that supports collaboration,

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Buzbee, *supra* note 17, at 1559–60, 1605–06, 1610 (identifying fragmentation as a hurdle to effective regulation).

353. See Engel, *supra* note 20, at 174–87 (discussing the dynamic federalism theory); Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471, 473–80 (2004) (discussing the new governance theory); Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125, 182–83 (2005) (discussing the transgovernmental networks theory).

354. Ruhl & Salzman, *supra* note 124, at 66.

355. See Finn, *supra* note 15, at 25; U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-232, *supra* note 30, at 5.

356. See, e.g., David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 957, 992 (2004); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 34–40 (1997); see also Eric W. Orts & Cary Coglianese, *Debate: Collaborative Environmental Law: Pro and Con*, 156 U. PA. L. REV. 289, 292–94 (2007).

357. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-232, *supra* note 30, at 47–48.

358. In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the Supreme Court recognized that agencies do not “resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed.” *Id.* at 524. Although that may be true, when time is of the essence, structural changes may facilitate more aggressive regulatory responses.

359. See Hyman and Kovacic, *supra* note 22, at 1468–84.

360. See *id.*

which Professors Ruhl and Salzman describe as essential for tackling complex problems like disaster relief.<sup>361</sup> Discussion of how these criteria weigh in favor of or against each proposal is included below, along with an analysis of each options' ability to cure disaster fragmentation.

*A. Consolidate Power and Bolster FEMA*

From a political perspective, the simplest cure to disaster fragmentation may be consolidation of power. As the agency mandated with the implementation and oversight of a uniform federal disaster relief regime,<sup>362</sup> FEMA is the obvious choice to receive distinct programs. Benefits are substantial: consolidation would simplify and streamline disaster relief and increase agency capacity by housing experts on distinct aspects of disaster management under one roof. However, as a remedy for disaster fragmentation, the case for consolidation is murkier. Because consolidation of disaster management would require the combination of distinct programs from thirty different agencies,<sup>363</sup> FEMA would need to develop systems to tackle interprogram redundancies, inconsistencies, and conflicts, significantly expand its budget, unify disparate office practices and programmatic requirements, and garner congressional support.

Professors Hyman and Kovacic observe barriers to institutional coherence when “agencies become, to a great extent, a collection of odds and ends.”<sup>364</sup> Federal disaster programs have evolved unsystematically over the last 200 years, “often purpose-built in the immediate aftermath of individual disasters based on hunches, politics, and available resources.”<sup>365</sup> They are governed by diverse statutes and missions and have distinct approaches to disaster relief.<sup>366</sup> SBA’s disaster loans center on economic considerations,<sup>367</sup> NOAA serves coastal community resilience,<sup>368</sup> USDA funds farmer relief,<sup>369</sup> and HUD prioritizes low- to middle-income urban centers.<sup>370</sup> Although natural disasters ostensibly connect all these programs, the reasons they were created and populations they were designed to serve are largely distinct. Consolidation also does nothing to address problems inherent in the programs being joined: each would bring its own set of structural deficiencies, funding problems, and unique programmatic shortcomings.

But consolidation has its benefits. First, a wholesale move from one agency to another could leave staff and internal programmatic structure

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361. See Ruhl & Salzman, *supra* note 124, at 112–20.

362. See Finn, *supra* note 15, at 40–41.

363. See *supra* note 54 and accompanying text.

364. Hyman & Kovacic, *supra* note 22, at 1469.

365. Finn, *supra* note 15, at 25.

366. See *supra* Parts I, III.B.

367. See *supra* note 91 and accompanying text.

368. See *About Our Agency*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <https://www.noaa.gov/about-our-agency> [<https://perma.cc/NJN6-CWAE>] (May 2, 2024).

369. See *Disaster Assistance Programs*, *supra* note 254.

370. See *Mission*, U.S. DEP’T OF HOUS. & URB. DEV., <https://www.hud.gov/about/mission> [<https://perma.cc/XF28-5428>] (last visited Oct. 12, 2024).

largely intact, building FEMA's capacity and expertise. Relocated programs would also bring their budgets, a boon for the perennially over extended FEMA.<sup>371</sup> Centralized control would cast FEMA as the arbiter of interprogram conflicts and inconsistencies, which could smooth some of the edges left by diverse missions and mandates.<sup>372</sup> Substantively, power over a consolidated agency would empower FEMA to address long-standing criticisms of the disaster relief system:<sup>373</sup> it could streamline application processes, simplify and unite common regulations, and eliminate redundancies. In essence, FEMA would finally be given the power to achieve the mission it was set in 1979: to "lead[] and support[] the Nation in a risk-based, comprehensive emergency management system."<sup>374</sup> Such consolidation would also reflect FEMA's important role in disaster response management: as the primary agency responsible for coordinating disaster response, it is already responsible for the administration of complex, multiagency efforts.

On a practical level, however, institutions are resistant to change. For example, internal government investigations have repeatedly called on Congress to rearrange disaster-related mandates for the last five years, but Congress has failed to act.<sup>375</sup> FEMA has repeatedly been asked to streamline its application processes and clarify its external communication, but no real progress has been made.<sup>376</sup> Even recent interagency collaborations between SBA and FEMA to simplify cross-agency requirements failed to result in real change.<sup>377</sup> Professor Sara Colangelo describes failures to collaborate as "a missed opportunity to share resources, foster interprofessional dialogue around intersecting challenges, and develop cross-functional solutions."<sup>378</sup> Without institutional willingness and sincere integration of existing programs, this option is likely to miss the complexity of the problem at hand.<sup>379</sup>

To maximize possible benefits, a consolidated FEMA would need structural independence.<sup>380</sup> FEMA lost its independent agency status in

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371. See Finn, *supra* note 15, at 41.

372. See Hyman & Kovacic, *supra* note 20, at 1471.

373. See *supra* notes 33–34 and accompanying text.

374. 6 U.S.C. § 313(b)(1); see also Finn, *supra* note 15, at 41. For a discussion of disaster relief fragmentation, see *supra* Part II.

375. See generally U.S. OFF. OF THE INSPECTOR GEN.: OFF. OF BLOCK GRANT ASSISTANCE, 2018-FW-0002, *supra* note 276; U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106089, *supra* note 17.

376. See *supra* notes 272–78 and accompanying text.

377. See *supra* note 134 and accompanying text.

378. Colangelo, *supra* note 41, at 22.

379. See *id.* at 41–45.

380. See Jolina C. Cuaresma, *Commissioning the Consumer Financial Protection Bureau*, 31 LOY. CONSUMER L. REV. 426, 449 (2019) ("Remarkably, there is no legally definitive set of characteristics that describes independent agencies. In fact, the U.S. Constitution makes no mention of them. The term 'independent agency' is statutorily defined only once, and even then, the term is simply defined to mean a list of government entities and 'any other similar agency designated by statute as a Federal independent regulatory agency or commission.'"). For a history of independent agencies, see Marshall J. Breger & Gary J. Edles, *Established by*

2001, when it was placed within the DHS.<sup>381</sup> As discussed in Part III.B, administrative reorganizations can muddy the waters of agency purpose when diverse mandates and missions are housed under one roof.<sup>382</sup> FEMA's independence would allow implementation of disaster management programs without any unnecessary layers of bureaucracy. Institutional features of independent agencies would promote FEMA's independence, "including requirements for bipartisan composition of multimember bodies, appointment qualifications, the ability to bypass White House review before appearing in Congress, and independent funding."<sup>383</sup> Among these, FEMA would especially benefit from diverse education requirements to foster interdisciplinary expertise for political appointees and civilian employees. The appointment of a multimember, bipartisan leadership team could also minimize backlash and include diverse educational backgrounds and directors from programs migrating from other agencies.

Significant congressional support would also be required, including approval of reorganization,<sup>384</sup> changes in FEMA's mandate within the Stafford Disaster Relief Act, and a significant expansion of the DRF. Expansion of the DRF would challenge Congress to stop relying on ad hoc reactionary spending in favor of forward leaning appropriations based on expected future need. Although these requirements are not minor, they do align with the government's historical preference for programmatic addition over elimination<sup>385</sup> and could paint a political message that suits either side of the aisle: expanded disaster relief or increased efficiency.

Without considerable strategic planning to streamline relief offerings and requirements, consolidation under FEMA would simply relocate existing disaster fragmentation inside one agency. This would be like history

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*Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1115–17 (2000). Examples of independent agencies include the Consumer Financial Protection Bureau (12 U.S.C. §§ 5491–5499); the Social Security Administration (42 U.S.C. § 901); the Office of Special Counsel (5 U.S.C. §§ 1211–1219); the Federal Housing Finance Agency (12 U.S.C. § 4511); the Office of the Comptroller of the Currency (12 U.S.C. §§ 1–16); the Commodity Futures Trading Commission (7 U.S.C. § 2(a)(2)(A)); the Securities Exchange Commission (*United States v. Baker*, 912 F.3d 297, 308 (5th Cir. 2019) ("The SEC is an independent agency with its own litigating authority.")); and the Federal Trade Commission (*Bowsher v. Synar*, 478 U.S. 714, 746 n.11 (1986) (Stevens, J., concurring) ("[I]t is quite obvious that the Comptroller General, and the General Accounting Office, have a fundamentally different relationship with Congress than do independent agencies like the Federal Trade Commission.")).

381. See Finn, *supra* note 15, at 44.

382. See *supra* Part III.B.

383. See Kwoka, *supra* note 15, at 888 (citing Charles Kruly, *Self-Funding and Agency Independence*, 81 GEO. WASH. L. REV. 1733, 1744–45 (2013)); see also MARSHALL J. BREGER & GARY J. EDLES, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 163–93 (2015); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 784–812 (2013); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971, 976 (2015).

384. See HENRY B. HOGUE, CONG. RSCH. SERV., R44909, *EXECUTIVE BRANCH REORGANIZATION 5* (2017) (discussing the President's power to redelegate versus create anew and the now-defunct presidential reorganization authority).

385. See NAT'L COMM'N ON THE PUB. SERV., *supra* note 21, at 36.

repeating itself: FEMA's early years were tumultuous due in part to the political and managerial struggles inherent in its patchwork design.<sup>386</sup> Since then, FEMA has suffered scandals and mismanagement resulting in repeated calls that the agency be dismantled.<sup>387</sup> Though politically challenging, there may be more to be said for starting from scratch.

*B. The Individual and Household Disaster Recovery Bureau*

Shortly before the 2008 financial crisis, consumer finance protections appeared in more than a dozen statutes and were implemented by seven regulators.<sup>388</sup> Then-Professor Elizabeth Warren referred to this as “fractured oversight,” and raised the alarm over the federal administrative system’s “tattered patchwork” of regulations for consumer protection.<sup>389</sup> She called for the creation of a standalone agency committed entirely to consumer protection.<sup>390</sup> In the months following the crisis—after countless Americans had lost their homes—public support and political will for an overhaul of the consumer financial protection system grew.<sup>391</sup> In 2009, President Barack Obama announced the advent of the CFPB.<sup>392</sup> Although the former President’s vision for a new agency drew criticism from the Republican Party, there was bipartisan support for a meaningful solution to protect homeowners.<sup>393</sup> The following year, the Dodd-Frank Wall Street Reform and Consumer Protection Act<sup>394</sup> (the “Dodd-Frank Act”) was born, and the CFPB turned from a dream into reality.<sup>395</sup> Since then, “the agency has obtained over \$11 billion in relief for more than 25 million consumers.”<sup>396</sup>

Climate-fueled disasters have created a similar window of opportunity for an overhaul to the federal disaster management system, particularly for

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386. See Finn, *supra* note 15, at 40–41.

387. See Roberts, *supra* note 60, at 19.

388. The Federal Trade Commission (FTC), the Board of Governors of the Federal Reserve System (“Federal Reserve”), the Office of the Comptroller of the Currency (OCC), the Federal Deposit Insurance Corporation (FDIC), the National Credit Union Administration (NCUA), the Office of Thrift Supervision (OTS), and HUD. See Cuaresma, *supra* note 380, at 438.

389. See Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY: A JOURNAL OF IDEAS (2007), <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [<https://perma.cc/6Q82-9ENT>].

390. See *id.*

391. See Marilyn Geewax, *Did the Great Recession Bring Back the 1930s?*, NAT’L PUB. RADIO (July 11, 2012, 11:52 AM), <https://www.npr.org/2012/07/11/155991507/did-the-great-recession-bring-back-the-1930s> [<https://perma.cc/TK7A-9PUX>].

392. See Remarks on Financial Regulatory Reform, 2009 DAILY COMP. PRES. DOC. 474 (June 17, 2009).

393. See 156 CONG. REC. S5870-84 (daily ed. July 15, 2010) (statement of Sen. Jon Kyl) (“All of us here support the concept of consumer protection . . .”). Representative Carolyn B. Maloney (D-NY) announced, “For the first time, consumer protection authority will be housed in one place. It will be completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority.” 156 CONG. REC. H5233-39 (daily ed. June 30, 2010) (statement of Rep. Carolyn B. Maloney).

394. Pub. L. No. 111-203, 124 Stat. 1376 (codified as amended in scattered titles of the U.S. Code).

395. *Id.*

396. *Seila L., LLC v. CFPB*, 140 S. Ct. 2183, 2187 (2020).

individual victims. Public outcries for change are growing,<sup>397</sup> and more modest bipartisan attempts at reform have already been introduced.<sup>398</sup> Importantly, the Biden administration has voiced unwavering support for administrative reforms to address equity and climate change.<sup>399</sup> This trifecta just might be enough to rebuild disaster relief management as an independent agency from the ground up.

The CFPB includes several components that would serve a streamlined disaster relief agency well. First, it has a clear and narrow mission that focuses entirely on the complex problem of individual consumer protection.<sup>400</sup> Second, it is housed alone with an independent budget.<sup>401</sup> Third, the Dodd-Frank Act requires that CFPB programs center themselves on equity based on rigorous empirical research.<sup>402</sup> Each of these are addressed in turn as they relate to individual disaster relief.

A new agency, the “Individual & Household Disaster Recovery Bureau,” could build substantial mission coherence from the ground up by focusing entirely on individual recovery. This agency would run all federal direct funding programs centrally, making individual funding programs at SBA and FEMA redundant and defunct. However, its creation would leave current state and local government-funding programs in place at FEMA and HUD.

This focus on individual need is compelling because, like the CFPB, it would create a center of advocacy for individual disaster relief victims within the federal administrative system. Individual advocacy structures could include well-defined interagency collaboration frameworks,<sup>403</sup> as well as internal organization to support administrative adjudication and independent litigation authority.<sup>404</sup> Focus is also self-protective: “The expertise of an agency, along with its ability to gather all the necessary information to utilize that expertise, is one of the bases justifying judicial deference to an agency’s interpretation of the law it administers (*Chevron*) or discretionary policymaking choices (arbitrary and capricious review).”<sup>405</sup> Within a topic

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397. See Kousky et al., *supra* note 349.

398. See Cuaresma, *supra* note 380, at 468.

399. See *supra* note 322.

400. See 12 U.S.C. § 5511.

401. See *id.* § 5497.

402. See *id.* § 5493(b)(1); S. Rep. No. 111-176, at 165 (2010) (“The Committee considers the monitoring and information gathering function to be an essential part of the Bureau’s work. The Bureau must stay closely attuned to the marketplace for consumer financial products and services in order to effectively fulfill the purposes and objectives of this title.”). Although the CFPB has suffered criticism for failing to fulfill this mandate or fully integrate it into its practices (see Diane E. Thompson, *Pay Attention! Marginalized Communities, the Consumer Financial Protection Bureau, and Regulatory Advocacy*, 82 MONT. L. REV. 343, 345–46 (2021)), the structure of the Dodd-Frank Act provides a useful sketch for how the government could better understand the impacts of disasters on historically underserved communities.

403. See Bronen, *supra* note 7, at 34.

404. See Kwoka, *supra* note 15, at 889; Cuaresma, *supra* note 380, at 453–54; Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CAL. L. REV. 141, 143–44 (2019).

405. See Kwoka, *supra* note 15, at 880 (citing *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 864–65 (1984), *overruled by Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244 (2024)); Elena Kagan, *Presidential Administration*, 114 HARV. L.



as broad and complex as disaster management, an agency focused on issues pertaining to individual relief would have a depth of expertise hard to develop under a more diffuse mandate. This remains true in light of *Loper Bright Enterprises v. Raimondo*<sup>406</sup>: agency expertise will continue to serve an essential function of the executive branch, even as the deference landscape shifts.

Agency coherence built around individual funding programs is also appealing for a host of practical reasons. Building on the foundation of knowledge created by previous programs, the Individual & Household Disaster Recovery Bureau could “build[] a staff, whose interests, training, and abilities focus narrowly on [its] duties.”<sup>407</sup> It could also build significant institutional cohesion through streamlined programmatic requirements, including a single stream application process. In this way, it would also act as a service provider for disaster relief victims and a central repository for all information about direct funding at the federal level.

To achieve this mission, Congress would need to grant the Individual & Household Disaster Relief Bureau authority that mirrors CFPB, including the power to regulate individual disaster relief, disperse grants and loans, conduct on-site damage assessments, provide guidance to disaster victims, liaise with federal- and state-run government funding programs, gather data, perform research, and issue reports.<sup>408</sup> This could take the form of entirely new legislation, but more easily could serve as an amendment to the Stafford Disaster Relief Act. The program could be funded through a committed arm of the Stafford Disaster Relief Act.

Like the CFPB, the Individual & Household Disaster Relief Bureau would benefit from an independent existence outside larger departments.<sup>409</sup> This is important for two reasons. First, to the extent needs of states, localities, and underserved individuals differ, an independent agency for individual relief would be best positioned to serve only one master. Second, independence would free the agency from political pressures tied up with state and locality funding priorities. It would not have to worry about the political machinations that can speed disaster relief to some places faster than others, and its focus could remain entirely on individual need divorced from the political power of their locality.

Funding for the Individual & Household Disaster Relief Bureau should likewise be independent from ad hoc funding practices common in federal disaster relief, which create significant lags, uneven funding over disasters,

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REV. 2245, 2374–77 (2001); see also Shoba Sivaprasad Wadhia & Christopher J. Walker, *The Case Against Chevron Deference in Immigration Adjudication*, 70 DUKE L.J. 1197, 1215–24 (2021) (detailing the expertise-based justification for *Chevron* deference).

406. 144 S. Ct. 2244 (2024).

407. See Hyman & Kovacic, *supra* note 22, at 1477–78.

408. See 12 U.S.C. §§ 5531, 5492(a), 5511, 5512(b)–(c), 5532(a); see also Michael B. Mierzewski, Beth S. DeSimone, Jeremy W. Hochberg & Brian P. Larkin, *The Dodd-Frank Act Establishes the Bureau of Consumer Financial Protection as the Primary Regulator of Consumer Financial Products and Services*, 127 BANKING L.J. 722, 728–35 (2010).

409. See generally Kwoka, *supra* note 15, at 873–82.

and political grandstanding.<sup>410</sup> Instead, Congress could financially prepare for disasters in advance. A forward-looking funding approach would invite investment in a science-driven funding model that predicts disaster-related needs based on historical data and future projections.

Congress could also use the Individual & Household Disaster Relief Bureau's creation as an opportunity to rebrand<sup>411</sup> disaster preparedness as an issue of national defense. Such a rebranding would harken back to the United States's approach to disaster preparedness after World War II, when the task fell primarily to civil defense programs.<sup>412</sup> This rebranding has the benefit of truth in advertising—natural disasters are often cited among top threats to the nation<sup>413</sup>—and it would lend bipartisan credibility and provide political cover from budget hawks.<sup>414</sup>

Finally, to build institutions that better address individual disaster relief, the government must better understand the communities most threatened by natural disasters.<sup>415</sup> The CFPB's implementing legislation, the Dodd-Frank Act, directs the CFPB to “consider the experiences and understanding of traditionally underserved consumers and communities.”<sup>416</sup> A similar research mandate would arm the Individual & Household Disaster Recovery Bureau with the credibility and capacity it needs to understand the intersectional experiences of disaster survivors from underserved communities.<sup>417</sup>

Capacity, or “the pool of knowledge and resources at the agency's disposal,”<sup>418</sup> would be greatly increased by the kind of community-driven research frequently leveraged by the environmental injustice movement.<sup>419</sup> A community-centered approach to research would empower disaster survivors to articulate what forms and methods of funding would best serve

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410. *See supra* Parts I–II.

411. *See* Hyman & Kovacic, *supra* note 22, at 1490 (“A strong brand assists an agency in obtaining healthier budgetary appropriations from Congress and in gaining greater deference from reviewing courts.”).

412. *See* Finn, *supra* note 15, at 33–36.

413. *See, e.g.*, Kousky et al., *supra* note 349; *see also* *Natural Disasters*, DEP'T OF HOMELAND SEC'Y, <https://www.dhs.gov/natural-disasters> [<https://perma.cc/8RE3-YEBT>] (Aug. 27, 2024).

414. *See* Hyman & Kovacic, *supra* note 22, at 1490.

415. The federal government is not new to this kind of research. In the wake of the 2010 Deepwater Horizon oil spill in the Gulf of Mexico, the Bureau of Ocean Energy Management hired a team of anthropologists led by Diane E. Austin to assess the social and emotional impacts of the tragedy on underserved Gulf communities. *See generally* U.S. DEP'T OF THE INTERIOR: BUREAU OF OCEAN ENERGY MGMT., BOEM 2022-021, SOCIAL IMPACTS OF THE DEEPWATER HORIZON OIL SPILL ON COASTAL COMMUNITIES ALONG THE US GULF OF MEXICO (2022), [https://espi.boem.gov/final%20reports/BOEM\\_2022-021.pdf](https://espi.boem.gov/final%20reports/BOEM_2022-021.pdf) [<https://perma.cc/NX59-FQXU>]. *See also* Colangelo & André, *supra* note 113, at 82–83 (discussing the virtues of community science).

416. *See* Thompson, *supra* note 402, at 345.

417. *See* Hyman & Kovacic, *supra* note 22, at 1492–93 (discussing CFPB's research programs); Crenshaw, *supra* note 45, at 139–40 (discussing the need to understand the compounding impact of multiple socioeconomic vulnerabilities).

418. Hyman & Kovacic, *supra* note 22, at 1493.

419. *See, e.g.*, COLE & FOSTER, *supra* note 36, at 54–58.

their recovery needs.<sup>420</sup> This approach to policy building also reflects the work of institutional governance specialists,<sup>421</sup> who posit that institutional design fails when it excludes community stakeholders.<sup>422</sup> To remedy this, political scientist Elinor Ostrom works to analyze institutional strength that, among other things, calls for a more inclusive approach to environmental policy building: one that shares data, includes face-to-face communication with regulated parties, simple conflict resolution mechanisms, and streamlines institutional structure.<sup>423</sup> Practically speaking, integration of community research could help the Individual & Household Disaster Recovery Bureau to minimize inequities in individual funding programs by building systems that work better for claimants. This could take many forms, but it would undoubtedly include flexible application processes, timelines, and documentation requirements that could be revised based on the capabilities of most vulnerable claimants.<sup>424</sup>

For all its benefits, the creation of a new agency poses serious logistical hurdles, especially when—as here—existing programs are run out of diverse programs mandated by different statutes.<sup>425</sup> Bipartisan support would be essential to unwind statutory inconsistencies, revise existing law, and reallocate power. Independent agencies are also controversial institutional structures. Opponents cite lack of oversight, unelected leaders’ power, and constitutional concerns among reasons why such agencies should not exist.<sup>426</sup> However, some of these issues were recently litigated in relation to the CFPB in *Seila Law LLC v. CFPB*.<sup>427</sup> There, the U.S. Supreme Court held that—at least for now—-independent agencies are here to stay.<sup>428</sup> Given

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420. See Bronen, *supra* note 7, at 34.

421. See Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, 100 AM. ECON. REV. 641, 642 (2010) (discussing the “general theory of individual choice that recognizes the central role of trust in coping with social dilemmas”).

422. See *id.* at 659–65.

423. See generally Dietz, Ostrom & Stern, *supra* note 308. These recommendations also mirror several of the seventeen principles of environmental justice, including the right to “mutual respect” and “self-determination,” as well as “the right to participate as equal partners at every level of decision-making.” *Principles of Environmental Justice*, UNITED CHURCH OF CHRIST, [https://www.ucc.org/what-we-do/justice-local-church-ministries/efam/environmental-justice/principles\\_of\\_environmental\\_justice/](https://www.ucc.org/what-we-do/justice-local-church-ministries/efam/environmental-justice/principles_of_environmental_justice/) [<https://perma.cc/XG6A-HS3Q>] (last visited Oct. 12, 2024); see also Hirokawa & Carlarne, *supra* note 2, at 499 (“Climate change . . . intersect[s] with individual and community senses of place and shape[s] how people create and define place, how they carry it with them, and how they reconstruct it amidst climate disruption.”).

424. Cf. Bronen, *supra* note 7, at 40 (“[C]ommunity-based monitoring provides a mechanism for community engagement and empowerment so that communities gather the critical environmental and social information to assess whether, when, and if relocation is required.”).

425. See *supra* Part III.A.

426. See, e.g., Deepak Gupta, Reactions to *Noel Canning v. NLRB*, *The Consumer Protection Bureau and the Constitution*, 65 ADMIN. L. REV. 945, 946 (2013); Joshua Ulan Galperin, *The Death of Administrative Democracy*, 82 U. PITT. L. REV. 1, 2 (2020). Compare Kagan, *supra* note 405, at 2262–63, 2331, with Daniel E. Walters, *The Administrative Agon: A Democratic Theory for a Conflictual Regulatory State*, 132 YALE L.J. 1, 14–15 (2022).

427. 140 S. Ct. 2183 (2020).

428. See *id.* at 2210.

complications inherent in either of the first two options, however, the third provides the means to protect individual interests while leaving the current structure of the disaster relief system untouched.

### C. Disaster Relief Commission

Professor Kwoka, an administrative law scholar, recently proposed the creation of an information commission to enforce FOIA's requirements on the federal administrative system: "an information commission would have the power to review the responses to FOIA requests made by other agencies in the federal government upon complaint by the requester and to issue binding orders to release records wrongfully withheld."<sup>429</sup> Reminiscent of the Equal Employment Opportunity Commission, Professor Kwoka's information commission would serve as an independent watchdog service and represent individual interests within the opaque world of federal information management.<sup>430</sup> As a cure for the impact of disaster fragmentation on individual survivors, a similar framework could protect the rights of those the current disaster management system fails to serve.<sup>431</sup>

Unlike a traditional agency, a "Disaster Relief Commission" would not implement programs. Instead, it would serve dual roles of librarian and advocate. The discrete nature of these roles would provide the Disaster Relief Commission with coherence and explicit branding. These roles would also directly serve individual disaster survivors.<sup>432</sup> To achieve that goal, Professor Kwoka suggests commissions include three characteristics that would serve a disaster relief program well: (1) procedures should be designed for use by unrepresented parties, (2) filing fees and other litigation related costs should be waived, and (3) decision-making should be expedited.<sup>433</sup>

In its capacity as a librarian, the Disaster Relief Commission would serve as an information hub or hotline, whereby subject matter experts could

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429. See Kwoka, *supra* note 15, at 873.

430. See *id.* at 873 & n.216 (identifying the EEOC, U.S. Immigration and Customs Enforcement (ICE), and U.S. Citizenship and Immigration Services (USCIS) as agencies that serve interagency watchdogs); see also *EEOC Coordination of Federal Government Equal Employment Opportunity*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/federal-sector/eeoc-coordination-federal-government-equal-employment-opportunity> [https://perma.cc/Z3JH-4CZB] (last visited Oct. 12, 2024); 8 C.F.R. § 1003.19(h)(2)(ii) (2024); AM. IMMGR. COUNCIL, SEEKING RELEASE FROM IMMIGRATION DETENTION (2019), [https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking\\_release\\_from\\_immigration\\_detention.pdf](https://www.americanimmigrationcouncil.org/sites/default/files/research/seeking_release_from_immigration_detention.pdf) [https://perma.cc/K29M-FXNY]; *Fact Sheet: Implementation of the Credible Fear and Asylum Processing Interim Final Rule*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/fact-sheet-implementation-of-the-credible-fear-and-asylum-processing-interim-final-rule> [https://perma.cc/6VEC-VRLC] (Oct. 17, 2023).

431. Although Professor Kwoka's information commission is explicitly focused on the dissemination of information in the FOIA context, the structure and function of the commission is applicable in the disaster relief context as well.

432. See Kwoka, *supra* note 15, at 877 (explaining that information commission "procedures are designed to be accessible and comprehensible to lay people").

433. See *id.* at 877-78.

provide a locus for reliable and accessible information about the ways in which individual relief programs intersect.<sup>434</sup> This would also greatly decrease the impact of disaster fragmentation on individual claimants by pooling applications, eligibility requirements, deadlines, and agency contacts in one central location. This function would also take pressure off FEMA, which currently provides a hotline service that users complain provides inconsistent information.<sup>435</sup>

The Disaster Relief Commission could also serve specific watchdog functions. From a programmatic perspective, the Disaster Relief Commission could provide regular interagency feedback about the efficacy and equity of disaster relief funding programs and monitor for consistency to guard against biased application of existing disaster relief programs. It could regularly report to Congress to address programmatic and funding concerns, including those created by duplicative applications, damage assessments, funding decisions, and appeals.

From an individual service perspective, a disaster commission could include an adjudication arm to decide funding disputes between individuals and agencies. A “Disaster Relief Adjudication Office” could supplant complex FEMA appeals processes or act as a final arbiter once intra-agency appeals have failed. Arguably, supplantation of current appeals processes—which are overly complicated and regularly fail—would provide a streamlined, transparent, and more equitable appeals process. As Professor Kwoka points out, the establishment of such a function would require rulemaking power to establish adjudication processes, independent litigation authority,<sup>436</sup> and the power to issue binding orders that interpret other agencies’ regulations when the Disaster Relief Commission concludes that funding has been wrongfully withheld.<sup>437</sup> Although this function would have potentially negative collateral effects on what Professors Hyman and Kovacic refer to as the “regulatory ecosystem,”<sup>438</sup> checks and balances are needed to help agencies meet their statutorily mandated goals.<sup>439</sup>

The creation of a Disaster Relief Commission may also be more politically viable than an agency that administers programs. It would require less legislative restructuring and funding than other options and would not eliminate existing programs or significantly diminish existing agency power. Instead, a Disaster Relief Commission would serve as a sophisticated advocate within a complex system and, when needed, police programmatic efficacy and fairness.

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434. *See id.*

435. *See* John K. Pierre & Gail S. Stephenson, *After Katrina: A Critical Look at FEMA’s Failure to Provide Housing for Victims of Natural Disasters*, 68 LA. L. REV. 443, 476 (2008).

436. *See id.* at 873 (citing Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893 (1991)).

437. *See id.* at 873–74.

438. *See* Hyman & Kovacic, *supra* note 22, at 1496–501.

439. *See* Cuaresma, *supra* note 380, at 471.

However, information commissions are unusual within the federal government.<sup>440</sup> Interagency policing is also likely to result in conflict and interagency litigation, which raises separation of powers concerns.<sup>441</sup> A Disaster Relief Commission would also serve as a Band-Aid for fragmentation rather than a means to root it out.

Natural disasters and “[c]limate change . . . intersect with individual and community senses of place and shape how people create and define place, how they carry it with them, and how they reconstruct it amidst climate disruption.”<sup>442</sup> Regardless of form, to build institutions that better address disaster relief, the federal government must better understand the communities most threatened by natural disasters. The implementation of these or other administrative structural reforms that prioritize vulnerable community impacts are ripe for further study.

#### CONCLUSION

In a continuation of recent trends, the summer of 2023 has set a slew of grim new records for natural disasters and extreme weather. These records paint a portrait of a United States altered by climate change, resource mismanagement, and systemic social injustice. The nation has never needed a well-organized federal approach to disaster management more. With the will of the public and Washington, D.C. behind reform, the time for an institutional overhaul in service of disaster victims is now.

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440. See Michael Karanicolas & Margaret B. Kwoka, *Overseeing Oversight*, 54 CONN. L. REV. 655, 696–97 (2022).

441. See Kwoka, *supra* note 15, at 873 n.217; Joseph W. Mead, *Interagency Litigation and Article III*, 47 GA. L. REV. 1217, 1278–79 (2013); see also Hyman & Kovacic, *supra* note 22, at 1459 (discussing interagency conflict); Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 661–62 (2020) (discussing judicial appeals of interagency adjudication).

442. Hirokawa & Carlarne, *supra* note 2, at 499.