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What FEMA Should Do After Puerto Rico:
Toward Critical Administrative
Constitutionalism

Yxta Maya Murray*

The 200th anniversary of the 1819 Supreme Court decision McCulloch v. Maryland offers scholars a special opportunity to study the shortcomings of the federal The Robert T. Stafford Disaster Relief and Emergency Assistance Act, as they were revealed by FEMA’s failures in Puerto Rico during and after Hurricane Maria. Under Article I, Section 8 of the Constitution, as it has been interpreted by McCulloch, a law passed by Congress must be necessary and proper for executing its powers. In light of the expansive capacities allotted for disaster relief under the Stafford Act, and the catastrophic failure of FEMA to provide meaningful aid to vulnerable populations in Puerto Rico in the Fall of 2017, scholars of race and class justice are faced with a melancholy-inducing reminder: Even a well-drafted law passed by Congress for the betterment of the general welfare may be “necessary,” but not rise to the level of “proper.” Meaningfully, the test for propriety here grows out of by McCulloch’s demand that laws cohere to the “letter and spirit” of the Constitution, as well as anti-subordination interpretations of the Fifth and Fourteenth Amendments that require equal protection to be pursued in light of the lived experience of vulnerable and minority populations.

Why is the Stafford Act improper under anti-subordination principles? Though the Stafford Act enables the marshaling of immense federal powers to come to the succor of U.S. disaster

* Professor, Loyola Law School. Thank you to Professor David Schwartz for inviting me to deliver this paper at the University of Wisconsin Law School in November 2018. Thank you also to Sophia Z. Lee, Allan Ides, and Karl Manheim.

victims and forbids discriminatory allotment of aid relief, it was not able to ensure that the territory of Puerto Rico received help that was equal to that experienced by citizens in Houston and Florida during the September 2017 hurricane season. This failure came about because the Stafford Act failed to provide sufficient instruction or direction in how to implement the act in ways conscious of race, class, age, and physical ability difference.

In this paper, I study evidence of the Stafford Act’s raced, disablist, and classed impropriety, but (unsurprisingly) pull away from any suggestion that it should be struck down under Article I or the test created McCulloch v. Maryland. Instead, I argue that the propriety of the law—that is, its future execution in light of the demands of race, disability, and class justice in disaster situations—will require that FEMA embrace its role as an equal distributor of disaster aid under the Stafford Act. In so doing, I maintain that FEMA agents should embrace what scholars such as Gillian Metzger, Sophia Z. Lee, and Karen Tani describe as “administrative constitutionalism,” and constitutional “norm entrepreneurship.” FEMA agents may do so by recognizing that they cannot distribute equal protection of the Stafford Act without recognizing victims’ race, gender, ability, and class differences, otherwise described as “intersectionality” by critical race scholar Kimberlé Crenshaw.

In this paper, I draw upon the work of administrative constitutionalists such as Metzger, Tani, and Lee, as well as that of William Eskridge and John Ferejohn. In my encouragement of joining administrative constitutionalism with anti-subordination critical theories, I use the term “critical administrative constitutionalism” and argue that FEMA’s adoption of this ethic is necessary if future execution of the Stafford Act is ever to be truly proper.

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I. INTRODUCTION

Under Article I of the Constitution, the United States possesses a federal government of considerable powers. Article I’s listed powers bind Congress’s enactments, as they mandate that federal statutes find “affirmative[] authorization” from the Constitution. Clause eighteen of Article I’s section eight grants Congress authority to pass laws that are “necessary and proper” to fulfill its powers. Chief Justice Marshall, in the early 19th century decision of McCulloch v. Maryland, established a three-prong test to determine whether congressional legislation was “necessary and proper.” The law must have a legitimate end, an appropriate means, and comply with the “letter and spirit” of the Constitution.

As scholars such as David Schwartz observes, an ideological conflict between enumerationists and what he calls capable federalists has ensued in the 200 years since McCulloch was decided. The strictest enumerationism – Jeffersonian enumeration – would interpret the Necessary and Proper Clause as confining the range of Congressional power to those that are granted explicitly by Clauses 2 through 17 of Article I, Section 8. However, modern enumerationists, responding to McCullough v. Maryland’s more liberal interpretation of the clause, call for congressional acts to be tethered to enumerated

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9. U.S. CONST. art. I, § 8, cl. 18. Article I, section eight of the Constitution provides that “[t]he Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing [enumerated] Powers. . .” Id.
11. Id.
powers by a means-end test\textsuperscript{15} or forbidden to express “great powers” that are not enumerated.\textsuperscript{16} Capable federalists, on the other hand, see the “necessary and proper” clause as leveraging a broad congressional authority to enact general welfare legislation that advances the interests of the nation, redresses states’ institutional failures, and promotes interstate harmony.\textsuperscript{17} Within this constitutional culture, then, a scholar who finds that a Congressional law lacks necessity and/or propriety will be taking sides in this debate. For the purposes of this paper, an advocate who argues that a federal law may be necessary but is not proper will find herself in the camp that wages for Congressional limitation. Indeed, she may find herself speaking in the same language of a very strict, perhaps Jeffersonian, interpreter of Article I, Section 8’s delegation of powers, even if she sides with the ethics and values of capable federalists like Professor Schwartz.

But what if this accusation is nevertheless true? What if the law is – in very important ways – necessary but not proper because it does not fulfill the “letter and spirit”\textsuperscript{18} of the Constitution’s principle of equality? And what, exactly, would this accusation mean?

In this paper, I will attend to this question as it relates to the federal Robert T. Stafford Disaster Relief and Emergency Assistance Act (“The Stafford Act”),\textsuperscript{19} under which the Federal Emergency Management Agency operates when the President declares a disaster.\textsuperscript{20} As I recount in a previous article titled “FEMA Has Been a Nightmare”: Epistemic Injustice in Puerto


\textsuperscript{17} Schwartz, supra note 12, at 580.

\textsuperscript{18} See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

\textsuperscript{19} 42 U.S.C. §§ 5121-5207 (2012); See also Aileen M. Marty, Hurricane Katrina: A Deadly Warning Mandating Improvement to the National Response to Disasters, 31 NOVA L. REV. 423, 446 (2007) [hereinafter, Deadly Warning].

\textsuperscript{20} See 42 U.S.C. 5170a (1)-(2) (2012).
2019 WHAT FEMA SHOULD DO 169

Rico, 21 2017’s Hurricane Maria, and the notorious and lethal failures of the federal response to its victims in Puerto Rico, reveal that the Stafford Act’s execution in Puerto Rico created a race, class, and disability-rights catastrophe that is at odds with the Constitution’s promise of equal protection: 22 Independent interviews that I conducted in November 2017, as well as a review of contemporary news reports, reveal that Federal Emergency Management Agency (FEMA) agents failed to get adequate supplies to Puerto Rican victims of Maria because they did not take care to tailor their aid to Puerto Ricans’ culture, demographics, language, problem with poverty, health problems, and life ways. 23 Part of the outrage caused by the failed Puerto Rico response comes not only from the fact that so many people died, but that the Puerto Rican aid effort paled in comparison to the effective and “deep life-saving mission[s]” 24 that took place in comparatively wealthier and whiter Houston not only a month before. 25 That is, more privileged mainland communities received aid that proved far more extensive and useful than that experienced by the devastated communities in Puerto Rico. 26

Why did this happen? Looking at the problem from a statutory level, we see that the Stafford Act, which authorizes FEMA agents to deliver services to disaster victims, was not “proper” from a race and class justice reading of the “letter and spirit” of Fifth Amendment’s equal protection principle: 27 The Stafford Act makes insufficient mention of the ways in which FEMA actors must take into account intersectionality when implementing the act – that is, allocating life-saving assistance to disaster victims. 28 Intersectionality is the famous term coined by Kimberlé Crenshaw in 1989, 29 and elaborated by many other critical race, feminist, ability, and queer legal scholars 30 to

23. See infra text accompanying notes 136-46.
24. See infra note 103.
25. See infra text accompanying note 103.
26. See infra text accompanying note 40.
28. See infra notes 172-89.
29. See, e.g., Crenshaw, supra note 6, at 1249 (addressing language intersectionality).
30. See infra notes 224-31.
describe the ways in which poor, rural, queer, disabled, women and/or people of color may embody different sources of oppression, and thereby deviate from the assumed norm of a white, male, middle-class, straight person who is not experiencing disability. Critical race feminists advocate treating intersectional oppressions as problems of unequal protection.

As an apparent consequence of a failure to bake in intersectional consciousness into Stafford powers of protection, and (as a consequence) FEMA culture, thousands of people have died in Puerto Rico in the months since the storm, whereas the contemporaneous storm-caused losses in Houston and Florida, while tragic, were far less extreme. Some observers have charged a denial of equal protection of the laws resulting from this asymmetry, though current constitutional law appears to

33. On queer intersectionality, and of multidimensionality, see infra notes 224-31.
35. On gender and intersectionality, see Crenshaw, infra note 50.
36. On race and the varieties of intersectionality see supra notes 29-35.
37. Id.
39. See infra notes 147-51.
41. See infra notes 160-65.
foreclose any real relief. Nevertheless, from a race liberationist perspective, the Stafford Act is necessary, but it is not proper: The Stafford Act could only be properly coherent with the “letter and spirit” of the Constitution if it recognized the crucial and complex realities of race and class difference, and made specific suggestions for how to implement the Act in light of these dynamics, so that disaster aid is rendered equally to majority and minority communities.

Three objections immediately crop up upon making this argument, however. The first counterargument observes that, if we accuse the Stafford Act of McCulloch impropriety, we seem to be speaking in the language of enumerationism, and arguing that the Stafford Act should be struck down. Yet if 2017 taught us anything, it was that natural disasters can create cataclysms that imperil life and property to such a degree that it would be madness to strike down a law that allows the federal government to respond to these catastrophes with its resources. Many people horrified at the U.S.’s devastation in 2017 and 2018 from hurricanes and wildfires will appreciate the liberality of McCulloch v. Maryland and even find themselves enthusiastic adopters of capable federalism in order to defend the Stafford Act.

The second problem is subtler: Upon observing that the Stafford Act makes no or limited mention of race, class, gender, or sexuality, we may next query whether, if it had, this language would have made any real difference in the Puerto Rican relief roll-out? It turns out that the Stafford Act does contain mentions of disability and of the elderly, and these were two of the populations most injured by the storm and FEMA’s failures during and after September 17. As a consequence, we may

42. See infra notes 201-02. For other possible avenues of legal redress, see infra note 170 (detailing a claim that the FEMA actions should be set aside as arbitrary and capricious under the Administrative Procedure Act.
43. See supra note 11.
44. See supra notes 13-16.
45. See infra note 98.
46. Id.
47. See supra note 10.
48. See supra note 17.
49. See infra note 155.
conclude that a federal law that covers problems of this magnitude (natural disasters and the perils they present to the entire U.S. community) will face steep obstacles to qualifying as “proper” from a race and class justice perspective. What efforts would Congress have to make, for example, to write a law that would ensure that poor, elderly people of color with diabetes and in wheelchairs receive meaningful care in the event of a level 4 hurricane? Natural disasters create problems with so many dimensions and moving parts, and it is difficult to conceive of our current Congress, which has experienced recent, paralyzing gridlock, from creating a precise, sensitive, and effective statute that might have helped one of the U.S.’s most vulnerable populations.

The third objection would hold that such fine-tuning of bureaucratic decision-making and implementation discretion is better left to the agency itself; after all, a desire to capitalize on agency expertise and agents’ nuts and bolts knowledge of disaster preparedness would constitute the reason for Congress’s delegation of the Stafford powers to the President. The argument that the Stafford Act is itself “improper” seems to raise the specter of the nondelegation doctrine, which some have described as “dead.” Alternatively, the argument can be seen as a wild extrapolation of the rule that agencies must not interpret statutes in ways that create “serious” violations of Constitutional

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50. See Crenshaw, supra note 6, at 1242, 1246-249. (recounting inadequacies of well-intentioned exceptions Congress enacted to the Marriage Fraud Act in order to address needs of vulnerable and immigrant victims of domestic violence).

51. See, e.g., infra note 155.


54. John H. Ely, Democracy and Distrust 131-33 (1980); Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 315 (2000) (“It is often said that the nondelegation doctrine is dead.”). See also id.: “[T]he doctrine was once used to require Congress to legislate with some clarity; so as to ensure that law is made by the national legislature rather than by the executive.”
law, which Cass Sunstein has described as a nondelegation canon.\textsuperscript{55} Arguing that the Stafford Act’s omissions of the word “intersectionality” allow it to be interpreted by FEMA in ways seriously violative of the Constitution requires several leaps of faith.\textsuperscript{56}

For these reasons, it seems that we must look to bodies other than Congress or the courts to make the Stafford Act “proper” within the meaning of race and class justice. This will require that federal administrative protocols be executed by agency actors with a greater alertness to anti-subordination concerns. That is, FEMA must fill in the “letter and spirit” gaps in the law. However, a review of FEMA Administrator Brock Long’s response to FEMA’s 2017 failures, as well as FEMA training materials, reveals that this responsive culture does not exist currently in the Agency.\textsuperscript{57} If FEMA has any interest in preventing future needless death and a concomitant ripple-effect of public distrust,\textsuperscript{58} this must now change.

To this end, I look to the theory of administrative constitutionalism\textsuperscript{59} described by scholars Gillian Metzger,\textsuperscript{60} Sophia Z. Lee,\textsuperscript{61} William Eskridge and John Ferejohn,\textsuperscript{62} and Karen Tani.\textsuperscript{63} As Metzger explains, administrative

\begin{footnotes}
\footnote{55. See Sunstein, supra note 54, at 316. ("Administrative agencies are not permitted to construe federal statutes in such a way as to raise serious constitutional questions; if the constitutional question is substantial, Congress must clearly assert its desire to venture in the disputed terrain.").}
\footnote{56. After all, the argument that intersectionality concerns are constitutional concerns remains for the most part a tenet found only in legal theory. See Montoya, supra note 38.}
\footnote{57. See infra note 255-59.}
\footnote{58. See Epistemic Injustice in Puerto Rico, supra note 21, at 62-63 (describing distrust).}
\footnote{59. My previous article, Epistemic Injustice in Puerto Rico (2018) (on file with author), ends with a conclusion that such administrative constitutionalism is the next step forward. See id. at 70 (discussing work of Metzger). In this article, I flesh out that argument.}
\footnote{60. See Metzger, supra note 5, at 1900.}
\end{footnotes}
constitutionalism is the “elaboration” of “new constitutional understandings by administrative actors.” After Puerto Rico, FEMA agents must be taught to recognize that they distribute constitutional goods in a disaster situation: They must be schooled to recognize that their failures to tailor aid efforts to intersectional concerns will prevent them from distributing aid equally under the Fifth Amendment’s equal protection clause.

A transformation of training and culture is necessary to put that recognition into play. As I adumbrate in this paper, this conversion will require an agency engagement with theories of intersectionality that arise from critical race theory, feminist theory, queer legal theory, disability theory, and rural legal theory. The Agency must also be trained in critical race and feminist legal theory’s methods – that is, narrative method and self-critique – in order to introduce to agents the stories of difference that have to be absorbed for intersectional dynamics to penetrate agency protocol.

Thus, fixing Stafford Act “impropriety” through administrative constitutionalism also requires enriching the theory itself: Karen Tani’s work, among others, reveals that agency actors have responded to feminist and race liberationist theory and consciousness before; we may call upon the theory and the practice to push harder in this direction, so that FEMA actors are persuaded to absorb intersectional awareness created by critical race theory and the narrative and self-critique methods that it created. Making the Stafford Act “proper,” then, will require that we move toward a Critical Administrative Constitutionalism, which adopts narrative-rich and self-critical race and class liberationist legal theories.

In Section II of this paper, I describe the Stafford Act and its enactment. In Section III, I recount what happened before,

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64. See Metzger, supra note 5, at 1900.
65. See text accompanying infra note 202 (observing that “the Agency could itself recognize” that its failure to acknowledge different cultures can create an equal protection problem under the Stafford Act).
66. See, e.g., supra notes 31-35.
67. For a discussion of CRT’s narrative method and self-critique practices, see infra notes 224-31.
68. See, e.g., infra notes 211-12 (detailing the work of Sophia Lee).
69. See infra notes 214-18.
during, and after Hurricane Maria. In Part IV, I describe the ways in which Maria and its aftermath revealed the improprieties of the Stafford Act – that is, its failure to recognize intersectional concerns, and racial narratives – but then also query whether additional language in the act would have been enough to make this law “proper.” In Part V, I turn to the theory of administrative constitutionalism, and describe how it contains the influence and dynamics necessary to transform the Stafford Act into a “proper” document from a race and class standpoint. I also observe that the theory itself may be enlarged and empowered by its energetic engagement with critical race, feminist, rural, disability rights, and queer legal theory and methods, which include the gathering of narratives from vulnerable communities and the engagement of self-critique. In Section VI, I turn to Brock Long’s recent letter of July 2018, wherein he sets forth a plan to improve FEMA in light of its Puerto Rican failures. I demonstrate that Long’s document reveals that FEMA does not now possess the necessary culture to render the Stafford Act “proper.” A review of FEMA training documents reveals the same problem. I end, in Section VII, with a call to infuse the Agency with intersectional consciousness, heightened through its absorption of race, class, gender, and other narratives. Further, to the extent that this encouragement seems Quixotic on account of the scabrous race and class politics that motivate the current Presidential administration, I call in Section VIII for an engagement with these ethical values through the phenomenon described by Jennifer
Nou, Rosemary O’Leary, Eric Posner, Daniel Hemel, and John Michaels as “bureaucratic resistance from below.”

II. THE STAFFORD ACT

In the following section, I describe the Stafford Act’s enactment, its provisions, and its apparent surface-level legitimacy under McCulloch v. Maryland. In the section following, I describe what happened in Puerto Rico during Hurricane Maria. In that analysis, I show how the Stafford Act

70. Jennifer Nou, Bureaucratic Resistance From Below, YALE J. ON REG. NOTICE & COMMENT (Nov. 16, 2016), http://yalejreg.com/nc/bureaucratic-resistance-from-below-by-jennifer-nou/ [https://perma.cc/838Z-JTQV] (“It is thus the right time to ask what levers of resistance are available to civil servants. These levers may be especially attractive to those faced with one of several prospects: top-down orders to carry out illegal tasks, suppress information, or doctor technical documents.”).

71. ROSEMARY O’LEARY, THE ETHICS OF DISSENT: MANAGING GUERRILLA GOVERNMENT xi (2nd ed. 2014) (“This book is about guerilla government. Guerilla government is my term for the actions taken by career public servants who work against the wishes – either implicitly or explicitly communicated – of their superiors.”).

72. Eric Posner, Are There Limits to Trump’s Power?, N.Y. TIMES (Nov. 10, 2016), https://www.nytimes.com/2016/11/10/opinion/are-there-limits-to-trumps-power.html [https://perma.cc/EK25-88W7] (“The greatest constraint on Mr. Trump may be the federal bureaucracy. If he directs the F.B.I., I.R.S. or Department of Homeland Security to harass his political opponents, civil servants will probably not cooperate — indeed, they may blow the whistle.”).


75. See Nou, supra note 70. (“It is thus the right time to ask what levers of resistance are available to civil servants. These levers may be especially attractive to those faced with one of several prospects: top-down orders to carry out illegal tasks, suppress information, or doctor technical documents.”); See O’Leary, supra note 71. (“This book is about guerilla government. Guerilla government is my term for the actions taken by career public servants who work against the wishes – either implicitly or explicitly communicated – of their superiors.”).
was revealed, through that disaster, as being improper from a race and class reading of its incoherence with the “letter and spirit” of the Constitution.

A. THE STAFFORD ACT’S ENACTMENT

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act) was passed by Congress in 1974. Congress enacted this legislation out of recognition of the need for the provision of emergency services during a disaster and reconstruction of devastated areas afterwards. Jimmy Carter established FEMA by Executive Order in 1979, but Congress has “lent its approval of the agency and ratified its activities both by appropriations and by amendments to” the Stafford Act. The Stafford Act constitutes a Congressional authorization to the President to “provide technical assistance to the States,” and to provide funds for disaster aid.

B. THE STAFFORD ACT’S PROVISIONS

The Stafford Act grants FEMA the authority to respond to disasters when the President declares a disaster. Under the Stafford Act, the President (upon request by a state or territory’s governor), may declare a major disaster, and then direct any Federal agency to use its resources “in support of State and local assistance response and recovery efforts, including precautionary evacuations,” as well as to “coordinate all disaster relief efforts.”

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82. See 42 U.S.C. § 5170a(1)-(2) (2012).
assistance (including voluntary assistance) provided by Federal agencies, private organizations, the state, and local governments. 84 FEMA operates under the auspices of the Department of Homeland Security, 85 and was “[c]reated . . . to coordinate all disaster relief efforts at the federal level;” 86 thus, it constitutes such an agency.

Under the Stafford Act, the President may also provide technical and advisory assistance to affected State and local governments for the performance of essential community services and the provision of health and safety measures. 87 The President may assist State and local governments in the distribution of medicine, food, and other consumable supplies, and emergency assistance, and provide accelerated Federal assistance and Federal support where necessary to save lives, prevent human suffering, or mitigate severe damage, even in the absence of a specific request. 88

In the dispatch of its aid efforts authorized by the President’s triggering of the Stafford Act, FEMA may use experts and consultants, 89 and prioritize the hiring of local entities and individuals for “assistance activities.” 90 Further, upon the

84. 42 U.S.C. § 5170a(1)-(2) (2012).
85. Erin J. Greten & Ernest B. Abbott, Representing States, Tribes, and Local Governments Before, During, and After A Presidentially-Declared Disaster, 48 URB. LAW. 489, 491 (2016) (“FEMA provides the disaster assistance programs discussed in this Article under the authority of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended (Stafford Act) as authorized in the Homeland Security Act of 2002, as amended (the Homeland Security Act) and delegated by the Secretary of Homeland Security in DHS Delegation No. 9001.1.”).
86. See Deadly Warning, supra note 19, at 447; see also Organizational Chart – May 2018, FEMA, https://www.fema.gov/media-library-data/1525368177262-9e999c9c401044058306a9a0a228c48/FEMAOrgChart.pdf [https://perma.cc/WG6F-TUDW] [hereinafter, FEMA ORGANIZATIONAL CHART].
87. See FEMA ORGANIZATIONAL CHART, supra note 86.
88. Id.
89. 42 U.S.C. § 5149(b)(2) (2012) (allowing responding federal agencies “to employ experts and consultants in accordance with the provisions of section 3109 of such Title, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such Title relating to classification and General Schedule pay rates.”).
90. 42 U.S.C. § 5150(a) (2012) (“In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.”).
declaration of a disaster, the President “shall appoint a Federal coordinating officer” who shall coordinate organizations for the administration of relief, including the Red Cross, the Salvation Army, and “other relief or disaster assistance organizations, which agree to operate under his advice or direction.”91 This Coordinating Officer shall also “take such other action” he deems necessary to “assist local citizens and public officials” in obtaining assistance.92

C. AT FIRST GLANCE, THE STAFFORD ACT LOOKS “NECESSARY AND PROPER” UNDER MCCULLOCH V. MARYLAND

At this point in the analysis, the Stafford Act appears a legitimate expression of Congressional authority under Article I, Section 8, clause 1.93 It seems perfectly acceptable under the necessary and proper clause and McCulloch v. Maryland’s interpretation of that provision: The Act possesses the legitimate end of serving the general welfare by aiding people during a disaster, an appropriate means of empowering the president to engage agencies to fulfill such aid and distribute resources necessary for that aid, and it seems to comply with the “letter and spirit” of the Constitution, which provides Congress with the power to enact legislation to promote the general welfare.94

My research does not reveal any challenges to Congress’s power to enact the Stafford Act. Some scholars appear a little unclear about the reliability of Congress’s authority to enact the Stafford Act but do not inveigh against it.95 Even those who argue

93. See Harrison, supra note 15, at 1102, 1104.
94. See id. at 1102-106.
95. See Tucker & Bragg, III, supra note 79 at 861. (“The federal government has no inherent police power. However, it may act pursuant to an expressly enumerated power in the Constitution in situations that also permit simultaneous exercise of state police power. Nevertheless, the federal government plays an important role in efforts to recover from natural disasters, especially through various coordination activities and through fiscal relief for disaster victims. The federal government acts in these situations through FEMA.”).
against expanded FEMA authority over disasters do not contest the Stafford Act’s essential legitimacy. It is possible that an enumerationist of the “Great Powers” stripe might argue that saving lives in this way is a great power, and thus beyond the ability of Congress to legislate absent Constitutional amendment. However, under current environmental pressures, which have seen the United States scalded and pummeled by fire and flood throughout 2017-2018, it appears that the no real argument against the Stafford Act based on Article I could succeed. Most people seems ready to agree that the Stafford Act is a necessary and proper law to fulfill Congress’s power of serving the general welfare.

Nevertheless, from a race and class justice perspective, the Stafford Act is not “proper” because it is not consistent with the “letter and spirit” of Constitution’s promise of equal protection. The Act insufficiently guides FEMA agents to distribute aid in ways that are conscious of intersectional problems, which have create an unequal distribution of disaster aid between poor and minority communities like those in Puerto Rico and those in Houston and Florida, as the 2017 hurricane season revealed.

96. Ross C. Paolino, Is It Safe to Chevron “Two-Step” in A Hurricane? A Critical Examination of How Expanding the Government’s Role in Disaster Relief Will Only Exacerbate the Damage, 76 GEO. WASH. L. REV. 1392, 1394 (2008) (“This Essay examines whether FEMA can interpret the Stafford Act to respond to the post-Katrina call for a broader federal role in disaster relief. In answering this inquiry in the negative, this Essay maintains that such an empowering interpretation will not receive Chevron deference. Moreover, despite FEMA’s inept response to Hurricane Katrina, increasing federal disaster power is not the solution, as the federal government already possesses the necessary power to effectively respond to natural disasters.”).

97. See supra text accompanying note 16.


99. See supra note 11.


101. See text accompanying infra notes 172-92.

102. See infra note 164-66.
III. FEMA'S FAILURE TO RESPOND ADEQUATELY TO THE SUFFERING IN PUERTO RICO CAUSED BY HURRICANE MARIA

In this section, I will relay the facts of Hurricane Maria’s devastation of Puerto Rico, and the ways in which FEMA response failed to meet the needs of Puerto Ricans because of Agency ignorance of aid problems rooted in intersectionality.

On September 6, 2017, mere days after FEMA rendered a “deep” and successful “life-saving mission” to recently storm-wrecked Houston,103 Category 5 Hurricane Irma hovered north of San Juan, Puerto Rico.104 The island caught large gusts of rain and 100-mile-per-hour winds.105 Four people were killed by Irma on Puerto Rico.106 Two-thirds of the island’s recipients of electricity lost power.107 34 percent of the islanders were cut off from clean water supplies.108

Ten days later, on September 16, at 2:00 P.M. Atlantic Standard Time, the National Weather Service classified an African easterly wave moving across the tropical Atlantic Ocean as a tropical depression moving 700 miles east-southeast of the Lesser Antilles.109 By September 17th, at 5 P.M., Maria intensified to 75 mph, with sustained winds.110 The Service issued another advisory warning that the hurricane would achieve landfall on Wednesday, September 20, by midday.111 FEMA


105. Id.

106. Id.

107. Id.

108. Id.


110. Id.

111. See What’s Happening, supra note 104.
installed a Federal Coordinating Officer and an Incident Management Assistance Team at the FEMA Distribution Center,\textsuperscript{112} perhaps in Caguas,\textsuperscript{113} which is in Puerto Rico’s central mountain range,\textsuperscript{114} but more likely in San Juan.\textsuperscript{115} On Wednesday, September 20, Maria made landfall on the island nation of Dominica, creating enormous destruction.\textsuperscript{116} President Trump issued an emergency declaration for Puerto Rico and the Virgin Islands.\textsuperscript{117} FEMA installed urban search and rescue and canine teams and a “logistics package” on Puerto Rico.\textsuperscript{118} The rest of FEMA and federal personnel were located on St. Croix, in the Virgin Islands.\textsuperscript{119}

On September 20, Hurricane Maria slammed into Puerto Rico at 6:15 a.m., south of Yabucoa Harbor.\textsuperscript{120} It possessed maximum winds that reached 155 miles per hour, making it a level 4 Hurricane, though just three miles short of Category 5 intensity.\textsuperscript{121} 30 inches of rain fell and all island power was lost.\textsuperscript{122} The U.S. Department of Defense issued a press release promising that 430 National Guardsmen from the Virgin Islands would be “called up” and that another “390 brought in from other states for support will shelter in place to help in first

\begin{itemize}
\item \textsuperscript{112}Overview of Federal Efforts to Prepare for and Respond to Hurricane Maria, FEMA (Oct. 31, 2017), https://www.fema.gov/blog/2017-09-29/overview-federal-efforts-prepare-and-respond-hurricane-maria [https://perma.cc/9N7C-72C9] [hereinafter, \textit{Overview of Federal Efforts}].
\item \textsuperscript{113}Id. Though 11 distribution centers were installed eventually on the island, see Rafael Bernal, \textit{FEMA: Puerto Rico situation has “improved significantly”}, THE HILL (SEPT. 28, 2017), http://thehill.com/homenews/administration/352977-fema-puerto-rico-situation-has-improved-significantly [https://perma.cc/K529-Q4PR], FEMA identifies the Caguas center as a main portal. See \textit{Fema Distribution Center Caguas Puerto Rico }, FEMA, https://www.fema.gov/media-library/assets/videos/148945 [https://perma.cc/25B6-RUFL].
\item \textsuperscript{114}See \textit{Welcome to Puerto Rico}, http://welcome.topuertorico.org/city/caguas.shtml [https://perma.cc/ULK6-GXTC].
\item \textsuperscript{115}See infra text accompanying notes 143-44 (describing how FEMA stayed in San Juan).
\item \textsuperscript{116}See \textit{What’s Happening}, supra note 104.
\item \textsuperscript{117}See \textit{Overview of Federal Efforts}, supra note 112.
\item \textsuperscript{118}Id.
\item \textsuperscript{119}Id.
\item \textsuperscript{121}See \textit{What’s Happening}, supra note 104.
\item \textsuperscript{122}Id.
response.” President Trump declared “that a major disaster exists” in Puerto Rico and ordered Federal assistance to Commonwealth and local recovery efforts, triggering FEMA relief exercises to be performed under the powers vested by the Stafford Act.

On September 21, 3,500 federal personnel were “on the ground,” according to the FEMA website’s timeline, though it is unclear how many investigators were sent to Puerto Rico as opposed to St. Croix. We do know that two FEMA search and rescue teams were engaging in “reconnaissance” activities then. FEMA’s distribution center possessed 274,000 meals, 25 generators, and more than 500 cots. On September 22, 7,000 federal employees, including 250 FEMA investigators, were “on the ground in Puerto Rico and U.S. Virgin Islands.”

National Guard Bureau had 1,600 service members “in the U.S. Virgin Islands and Puerto Rico.” 70 Federal law enforcement officers traveled to San Juan, and three Alcohol, Tobacco and Firearms response teams also made their way to the island.

But the aid effort began to stumble. On September 25, FEMA tweeted that more than 10,000 federal staff had landed in Puerto Rico and the Virgin Islands, but it was unclear who was where; moreover, this number in no way equaled the 31,000

125. FEMA is administered via the powers conferred by the Stafford Act. 42 U.S.C. § 5195 (2012). 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, 448 (2008) (“When catastrophic natural disasters occur, the principal federal statute providing assistance to state and local governments, as well as to individuals, is the Stafford Act. Under the Stafford Act, FEMA is the federal agency principally charged to care for Americans who are victims of natural disasters.”).
126. See Overview of Federal Efforts, supra note 112.
127. Id.
128. Id.
129. Id.
130. Id.
131. See Overview of Federal Efforts, supra note 112.
federal employees who were doing recovery in Houston “days” after Hurricane Harvey hit on August 25;\textsuperscript{132} and the more than 40,000 federal personnel who sped to Florida four days after Hurricane Irma hit on September 10.\textsuperscript{133}

On September 29, President Trump seemed to signal that aid would not be easy to deliver to Puerto Rico when he complained to reporters that Puerto Rico was surrounded by water.\textsuperscript{134} And then, on September 30, he tweeted that Puerto Ricans were ungrateful for the aid that they were allegedly receiving: “[T]hey want everything to be done for them when it should be a community effort. 10,000 Federal workers now on Island doing a fantastic job,” he wrote.\textsuperscript{135}

Were they doing a “fantastic job?” FEMA responders, in fact, were engaged in an uninspired effort that often failed the people of Puerto Rico because agents had no concept of the island’s intersectional dynamics. Among the many problems plaguing the relief roll out,\textsuperscript{136} federal responders did not take into


\textsuperscript{134} Eliza Redman, Trump on Puerto Rican crisis: ‘This is an island surrounded by water, big water, ocean water,’ BUS. INSIDER (SEPT. 29, 2017), http://www.businessinsider.com/trump-puerto-rico-hurricane-maria-island-water-2017-9 [https://perma.cc/B87F-G7ZS].


consideration the special needs of rural, mountain communities.\textsuperscript{137} Agents who had made it Puerto Rico appeared to remain in the safety of San Juan, Puerto Rico’s capital;\textsuperscript{138} it is not clear whether many FEMA and other responders’ reported confinement to San Juan resulted from a confusion about who would do what in the midst of the general chaos and also a command structure that has been famous for its weaknesses since Hurricane Katrina.\textsuperscript{139} It may also be possible that the presence of various military personnel and different agency responders and volunteers imbued agents with “pluralistic ignorance,”\textsuperscript{140} that is, the dulling of their imperative to venture past the safety of San Juan to find victims in the island’s mountain regions; here, many victims would go weeks without aid.\textsuperscript{141} In any event, on October 9, 2017, Rachel Maddow reported that FEMA officials had asserted that it was “not [their] job to distribute food and water in Puerto Rico.”\textsuperscript{142} She also reported that FEMA agents appeared to be laying low in San Juan,\textsuperscript{143} a claim backed up Norbert Figueroa, a Puerto Rican architect and blogger whom I interviewed in November of 2017.\textsuperscript{144} News accounts and other interviews that I conducted with survivors and responders additionally revealed the host of other intersectional factors that were ignored by FEMA agents and so led to a spiraling series of increasingly dangerous and lethal

\begin{footnotesize}
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\item See, e.g., infra notes 143-44.
\item See id.
\item See Deadly Warning, supra note 19, at 430 (observing that “[g]overnment officials took insufficient actions or made poor decisions in the days immediately before and after landfall.”);
\item at 434-35 (observing a problem post-Katrina of coordination between FEMA and the Department of Health and Human Services.).
\item KAREN S. JOHNSON-CARTEE, NEWS NARRATIVES AND NEWS FRAMING: CONSTRUCTING POLITICAL REALITY 36 (2005).
\item “Nearly three weeks after Hurricane Maria, FEMA has not delivered food or water to the [rural area] of Aibainito.”
\item See Epistemic Injustice, supra note 21, at 42 (saying “they made a hub” in San Juan).
\end{enumerate}
\end{footnotesize}
feedback effects of the storm. Specifically, these news accounts and interviews revealed that FEMA sent to Puerto Rico personnel that 1) did not speak Spanish, 2) used technology to communicate with victims even though poor Puerto Ricans did not have access to intelligent devices and the power grid had been down since September 20, 3) gave out food boxes containing items laden with sugar and salt to victims with heart disease and diabetes, and 4) could not foresee that the elderly would constitute an especially vulnerable population, who would die as a result of lack of care and power – often when their ventilators and other medical equipment failed as a result of power loss.145 That is, along with rural identity, FEMA agents failed to recognize the importance of other intersectional factors such as language, poverty, disability, and elder status.146

These mistakes contributed to a catastrophe with a climbing death toll: Though President Trump claimed a “low” body count of 16 people on October 3,147 this number would later be raised to 64,148 and then, in December of 2017, to an unofficial count of 1,052,149 which was then raised to between 800-8,000 in May of 2018 by a Harvard study,150 and approximately 2,975 by the

145. See Nishant Kishore et al., Mortality in Puerto Rico after Hurricane Maria, 379 NEW ENG. J. MED. 162, 165-66 (2018) ("Considerable disruptions to medical services were reported . . . across all categories irrespective of remoteness, with 31% of households reporting an issue . . . . The most frequently reported problems were an inability to access medications (14.4% of households) and the need for respiratory equipment requiring electricity (9.5%).").

146. See supra notes 31-35 (discussing intersectional status that touch on these identities).


148. Id.

149. Id.

150. See Kishore et al, supra note 145; see also Sheri Fink, Puerto Rico’s Hurricane Maria Death Toll Could Exceed 4,000, New Study Estimates, N.Y. TIMES (MAY 29, 2018), https://www.nytimes.com/2018/05/29/us/puerto-rico-deaths-hurricane.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=first-column-region&region=top-news&WT.nav=top-news [https://perma.cc/7TFU-3D87] ("Because the number of households surveyed was relatively small in comparison to the population’s size, the true number of deaths beyond what was expected could range from about 800 to more than 8,000 people, the researchers’ calculations show.").
Puerto Rican government in August of 2018. The majority of these casualties were caused by “interruptions” to health care. Interruptions were caused by “disruptions in basic utilities,” such as electricity, and also appear have been exacerbated by shock and confusion over the federal government’s failure to help the elderly and those in rural communities, communicate to residents in an understood language, provide nontoxic food (and water) that was sufficient in quantity, and use available communication systems instead of Twitter. As proof of this exacerbation, one of my interviewee relayed that aides to patients in eldercare institutions fled—a reaction that was seen throughout the island, which disgorged a rapid mainland exodus of 73,000 to over 200,000 souls by October. This self-evacuation contributed to loss of life: New York Magazine reported that some hospital deaths were caused by a paucity of staff and the


152. See Kishore et al. supra note 145.

153. Id. at 169: (“Chronically ill patients are particularly vulnerable to disruptions in basic utilities, which highlights the need for these patients, their communities, and their providers to have contingency plans during and after disasters.”).

154. See Epistemic Injustice, supra note 21, at 26-27 (rounding up complaints against FEMA agents).

155. Id. at 30 (during the interview with Professor María Jimenez Colón, she stated, “they never came back”).

156. Mark Moore, Thousands have fled Puerto Rico for Florida since Hurricane Maria, N.Y. POST (Oct. 26, 2017), [https://nypost.com/2017/10/26/thousands-have-fled-puerto-rico-for-florida-since-hurricane-maria/](https://nypost.com/2017/10/26/thousands-have-fled-puerto-rico-for-florida-since-hurricane-maria/) (“Since Oct. 3rd, more than 269,000 individuals have arrived in Florida from Puerto Rico through @FlyTPA @MCO and @iflymia”). See also e.g., Sara Ruiz-Grossman, The Ones They Left Behind: A Puerto Rican Family Still Torn Apart Months After Maria, HuffPOST (Feb. 8, 2018), [https://www.huffingtonpost.com/entry/puerto-rican-families-separated-hurricane-maria-months-later_us_5a7a3d7ee4b07af4e81ee579](https://www.huffingtonpost.com/entry/puerto-rican-families-separated-hurricane-maria-months-later_us_5a7a3d7ee4b07af4e81ee579) (“An exact number of how many people left the island due to the damage is not available yet, but more than 200,000 Puerto Ricans have sought refuge in Florida alone. Many were families like the Núñez family, forced to only send some members away — a child after a school lost power, or a sick spouse after a hospital wasn’t running — not knowing when, or where, they’d reunite.”).

Harvard study reflected that the death toll waxed into the thousands because “many households also reported problems with closed medical facilities (8.6%) or absent doctors (6.1%).”

Meanwhile, there was a growing social recognition that Puerto Rico was not receiving equal protection of the laws. CNN reported that Texas received a deployment of 31,000 FEMA investigators and National guardsmen, and a FEMA supply of 3 million meals and 3 million liters, and Florida received 40,000 federal personnel, including 2,650 FEMA staff, and 6.6 million meals and 4.7 million liters of water, whereas 10,000 federal responders were distributed across Puerto Rico and the Virgin Islands. As I relate in Epistemic Injustice in Puerto Rico, complaints about inequality were also made by my interviewees, who were resident Professor Maria Jimenez Colon, L.A.-based nurse Sophia Hau Yau, Brooklyn-based nurse Roxanna Garcia, and resident Norbert Figueroa. Further, news outlets like Politico lambasted an apparent “double standard,” which

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158. See Kishore et al, supra note 145, at 166.

159. See Levenson, supra note 133.

160. Epistemic Injustice, supra note 21, at 29 ("... and they cannot just walk in and start giving instructions without any special consideration for the reality of our circumstances, which may be different from what they find in Texas. But the law does not distinguish between Texas and Puerto Rico.") (statement of Maria Jimenez Colon).

161. Id. at 35 ("You know, all the citizens should be equal, but that’s not what I’m seeing. They’re not putting enough effort in Puerto Rico compared to the other states where there have been disasters.") (statement of Sophia Hau Yau, RN).

162. Id. at 39 ("The [reason why this went down so badly is] socioeconomic discrimination, mostly because of Puerto Rico’s position prior to the hurricane. It was already 70 billion [dollars in] debt, and the U.S. didn’t feel the need to invest in something that’s already messed up to begin with. FEMA’s own data shows a ... discrepancy between [their treatment of Texas after Harvey and Puerto Rico.]") (statement of Roxanna Garcia, RN).

163. Id. at 43 ("I don’t want to say, ‘hey there is discrimination.’ Personally, I will say yes, there was some. But I don’t have anything to substantiate that. It’s all perspective. It’s what I’m seeing compared to the response to other places like states, [such as Texas or Florida,], which was active and supportive. But the message and the actions from the government was versus [Texas or Florida.]") (statement of Norbert Figueroa).

would later be borne out when death tolls from Houston and Florida came out, at the highest, in the low hundreds.165

But perhaps the greatest expression of this anxiety came on September 29, when San Juan Mayor Carmen Yulin Cruz expressed the frustration and anguish caused by a growing awareness that a shocking and deadly kind of discrimination was taking place: During a press conference she said, “We are dying here,” and “I cannot fathom the thought that the greatest nation in the world cannot figure out logistics for a small island . . . I am asking the President of the United States to make sure somebody is in charge that is up to the task of saving lives . . . [I]f we don’t get the food and water into peoples’ hands what we are going to see is something close to a genocide.”166

IV. THE STAFFORD ACT IS IMPROPER BECAUSE IT DOES NOT CONTAIN ANY RECOGNITION OF INTERSECTIONALITY, A LACUNA THAT PROVED LETHAL AND PROMOTED INEQUALITY IN THE AFTERMATH OF HURRICANE MARIA

FEMA’s devastating and unequal response was caused by the Agency’s failure to recognize intersectionality: agents did not perceive, or respond to, the fact that many Puerto Ricans spoke Spanish, experienced poverty, disability, high blood pressure, and diabetes, did not possess technology or technological training, and lived without adequate transportation in mountainous communities.167 In Epistemic Injustice, I describe how these forms of cognitive blindness constituted acts of what philosopher Miranda Fricker describes as epistemic injustice, particularly, testimonial injustice: This form of offense occurs when people in power do not regard vulnerable populations as source of

165. See Moravec, supra note 40; Mains, supra note 40 (describing the 90 deaths suffered in Florida due to 2017 Hurricane Irma).


knowledge or authority, though Fricker maintains that we may train ourselves out of the habits of testimonial injustice by listening to narratives and committing to self-critical cognitive practices. In Puerto Rico, if Agency actors had gathered narratives before and during the disaster, they would have had necessary information to implement the act in ways that respond adequately to the victims. Perhaps they would also have raised their own consciousnesses, and not idled away in San Juan, seemingly embroiled in pluralistic ignorance. But they did not.

Why not? One reason may be that the Stafford Act contains insufficient mandates to become aware of, or respond to,

168. Id. at 64. As Fricker explains, testimonial injustice exists where a person “is wronged ‘in their capacity as a subject of social understanding’” — for example, where a person giving testimony, on account of discrimination, is understood by a hearer not to be credible.” Id. “Testimonial justice may be active or passive: It may either exist in the habits of listening to a person give testimony, or, it may occur ‘preemptively,’ where the person ‘is never solicited; so the speaker is silenced by the identity prejudice that undermines her credibility in advance. Th...
the intersectional problems experienced by subordinated communities. This omission renders the Act “improper” from a race and class reading of the letter and spirit of the Constitution’s promise of equal protection.\textsuperscript{171}

It must be said that there are some citations of intersectional factors in the Act: While there is no specific mention of “gender,” “poverty,” “women,” or “sexual orientation,” the Stafford Act does provide that disaster assistance be distributed without discrimination on the basis of race, color, religion, nationality, sex, age, disability, English proficiency, or economic status.\textsuperscript{172} There is a provision for unemployment assistance for low-income migrants and seasonal workers who find themselves in need after a disaster.\textsuperscript{173} In addition, applications of public housing assistance are giving priority,\textsuperscript{174} low-income people who have been deprived of “nutritious food” may be eligible for allotments for as long as the President deems it necessary,\textsuperscript{175} and low-income people may also be eligible for legal assistance.\textsuperscript{176} Disabled people receive attention: Those whose homes have been rendered inaccessible are eligible for housing assistance,\textsuperscript{177} the FEMA administrator must distribute information in ways that can be accessed by people with disabilities,\textsuperscript{178} mass evacuation plans that are implemented must address the needs of the elderly and disabled,\textsuperscript{179} and the Administrator shall appoint a disability

an agency’s technical analyses and judgments involving the evaluation of complex scientific data within the agency’s technical expertise.” League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d 1122, 1130 (9th Cir. 2010). See also Ctr. For Biological Diversity v. U.S. E.P.A., 90 F. Supp. 3d at 1197. While the “logistics” argument may not be scientific per se, it does engage the technical expertise of FEMA actors. Nevertheless, the cognitive blindness that FEMA agents demonstrated here could be seen by many rational actors as an expression of arbitrariness and capriciousness. See Epistemic Injustice, supra note 21 at 48 (describing Cass Sunstein’s concept of cognitive unavailability).

\textsuperscript{171} See supra note 38 (noting that critical race feminists see a state failure to engage intersectionality as a problem of equal protection).
\textsuperscript{172} 42 U.S.C. § 5151 (2012).
\textsuperscript{173} 42 U.S.C. § 5177(a) (2012).
\textsuperscript{174} 42 U.S.C. § 5153 (2012).
\textsuperscript{175} 42 U.S.C. § 5179(a)-(b) (2012).
\textsuperscript{176} 42 U.S.C. § 5182 (2012).
\textsuperscript{177} 42 U.S.C. § 5174 (2012).
Further, the Administrator shall embark upon national training programs that seek to, among other things, prepare readiness for populations with “special needs,” including the elderly. Also, the Act calls for the Administrator to take into account population groups with limited English proficiency when planning for an emergency or major disaster, ensure that information is made “available” to these groups, and to create a “clearinghouse of model language assistance programs and best practices for State and local governments in providing services related to a major disaster or emergency.”

So what’s the problem? For all of these citations of intersectional characteristics, Maria proved that the Stafford Act is still not proper from a race and class liberationist perspective, because it did not guide federal actors on how to distribute aid conscious of those characteristics. The Stafford Act does not contain provisions recognizing how race, class, and their manifold consequences – disease, lack of technology – prove key factors in disaster responses and Stafford Act implementation. For example, the Stafford Act could establish that “nutritious food” needed to be defined with poverty and its correlates of diabetes and hypertension in mind. The Stafford Act could have also been written to inform FEMA coordinators and inspectors that they have a duty to do more than just distribute applications for aid, or stay in place in their resource centers, but rather, must tailor the delivery of medical care, housing, and water to people who are outside of metropolitan areas – which would add rural intersectional consciousness to the Act. In addition, requiring the Administrator to “ensure” that information would be made available to victims in their languages

183. See Epistemic Injustice, supra note 21, at 12 (describing problems of hypertension and diabetes in Puerto Rico).
184. See id. at 34 (quoting Sophia Hau Yau, RN, as saying “People would wait for 20 hours for help [from FEMA, by standing in lines. And] all they got when they got into the gate were an application and 2 bottles of water.”).
185. See id.
186. See generally supra note 32 (citing work on rural intersectionality).
and to create a “clearinghouse” does not also “ensure” that agents speak the population’s language when it communicates with them in life-saving situations, nor does not mandate that they work reasonably hard to discover ways to get translators to help.

There are other, more audacious, interpolations that might have also been included. The Stafford Act could require that every single person in DHS be trained about the phenomenon of unconscious bias, how to recognize it, and how to combat it within themselves and in others when engaged in their job of disaster assistance. Further, while the Stafford Act provides that aid will not be distributed discriminatorily, the Act could have set forth what that means precisely: The Act could have established that in its training protocols agents would learn that “discrimination” exists when they assume that everyone lives exactly the same way, and that discrimination also occurs when the agents fail to acquire on-the-ground narratives about the language spoken, the living patterns, and the sites of particular vulnerability (elderly, the disabled) and react to that information, rather than staying in safe harbor of cities. In general, the Act could require that FEMA engage in narrative gathering about subordinated communities that experience predictable heavy weather, hurricanes, fires, etc., before disasters befall those areas. As I will discuss in a bit these suggestions would require a recognition of critical race theory’s famous narrative method within the Act itself.

A proviso is in order here: I recognize that the level of statutory specificity that I am calling for seems at odds with the ordinary practices of legislative codification, and imposes duties that are not necessarily supported by our legal culture. It is true that some legislatures have taken pains to require that actors

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190. See, e.g., infra notes 246-48 and accompanying text.
191. See text preceding infra note 222.
192. See infra note 226.
193. See, e.g., c.f., Zelig v. Cty. of Los Angeles, 27 Cal. 4th 1112, 1128 (2002) (“[P]olice officers...like other persons, generally may not be held liable in damages for failing to take affirmative steps to come to the aid of, or prevent an injury to, another person. As a rule, one has no duty to come to the aid of another.”).
exercise special care to tailor their judgment to specific populations where the dangers at stake are considered exigent. For example, a 2018 California Assembly Bill addressing opioid addiction provides that the Heroine and Public Education program shall engage “educational themes and messages that are tailored to appeal to different target audiences, and us[e] culturally and linguistically appropriate means.”\textsuperscript{194} And North Carolina’s Public Health Law provides that anti-diabetes programs “shall be tailored to the population the entity serves and must establish measurable goals and objectives.”\textsuperscript{195} Nevertheless, I acknowledge my critique of the Stafford Act does push in a race- and class-conscious, lived experience-conscious, duty-filled direction that requires Congress to make specific uses concerning implementation – and thus contrasts with most legislative action. As such, my suggestions here are of a piece with other CRT complaints about federal laws’ inattention to the granular aspects of intersectionality, made most famously by Kimberlé Crenshaw about the domestic waiver enacted by Congress to the marriage fraud provision of the Immigration and Nationality Act, which failed to recognize the lived impediments experienced by immigrant women.\textsuperscript{196}

But other dilemmas also abound: Even if this language had been included in the Act, would this create equality during disaster aid roll outs? As noted above, the Act does contain mandates against discrimination,\textsuperscript{197} and it provides forms of assistance for poor people, migrants, seasonal workers, and disabled and elderly people, and people with special needs.\textsuperscript{198} Yet during Hurricane Maria, all of this turned out to be so much palaver that did not stop thousands of deaths of people with intersectional identities.\textsuperscript{199}

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196. See Crenshaw, supra note 6, at 1248 (“Tina Shum, a family counselor at a social service agency, points out that ‘[t]his law sounds so easy to apply, but there are cultural complications in the Asian community that make even these requirements difficult. . . . Just to find the opportunity and courage to call us is an accomplishment for many.’”).
198. See supra notes 172-78.
199. See supra note 150.
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Perhaps, then, the Stafford Act could really only be made proper if it the people saddled with the job of executing it determined to do so in a way that demonstrated a real commitment to equal justice. After all, the whole point of delegation to agencies is to ensure that complex problems be dealt with by experts. So endowed with the resources and proficiency to accomplish this fine-tuned work, the Agency itself stands in the best position to make the constitutional commitment to equally distribute disaster aid to poor and intersectional communities. Though the judiciary now, through its interpretation of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, and its failure to recognize a constitutional claim based on most state failures to aid, indicates that misbegotten aid distribution does

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200. See supra note 53.


202. In *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 195 (1989), the Supreme Court held that the Due Process Clause of the Fourteenth Amendment imposed no affirmative obligation on a state to protect an individual from harm. The Court, however, recognized an exception: The guarantee of due process might impose such an obligation when the government has taken action that renders the individual “more vulnerable” to harm than he or she would otherwise have been. *Id.* at 200-201. It is possible that this exception is triggered here, given that the government, in essence, created a reasonable expectation that it would provide competent and effective aid to all victims of natural disasters. In failing to meet that expectation, it made Puerto Ricans “more vulnerable” to harm caused by Maria than they would have been in the absence of that expectation. See Olympia Duhart, *Blowing the Lid Off: Expanding the Due Process Clause to Defend the Defenseless Against Hurricane Katrina*, 13 TEX. WESLEYAN L. REV. 411, 430 (2007). Yet, given the Supreme Court’s reluctance to extend *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), beyond its established contexts, see *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017) (refusing to extend Bivens beyond its established contexts), and given the Court’s aggressive approach to the qualified immunity defense, see, e.g., *White v. Pauly*, 137 S. Ct. 548 (2017); *Mullenix v. Luna*, 136 S. Ct. 305 (2015), it seems unlikely that the Court would endorse a *Bivens* remedy here. The seeds of such a claim are evident, however, and perhaps on these facts a foundation could be laid for a future jurisprudence of due process. Surely when FEMA represented to the public that it went “deep” into the “life-saving mission” in Texas on late August, see *FEMA: We Are ‘Deep Into the Life-Saving Mission’ in Texas*, NBC (Aug. 27, 2017), https://www.nbcnews.com/meet-the-press/video/fema-we-are-deep-into-the-life-saving-mission-in-texas-1033616451604 [https://perma.cc/7XH6-K77S], it created a reasonable expectation in Puerto Ricans of aid and protection that would be timely, logistical, and addressed to the needs of that specific community. Instead, FEMA leadership and its agents exacerbated the risk of harm to Puerto Ricans by displaying a callous disregard for the realities of Puerto Rico, and thus arbitrarily depriving Puerto Ricans of their constitutionally protected rights of life, liberty, and property.
not raise equal protection problems, the Agency could itself recognize that it does. It could embrace its role as a possessor of a constitutional duty, under the Fifth Amendment’s equal protection clause, to give equal in fact disaster aid to poor and minority communities. In doing so, it would have to take care to absorb intersectional realities, and narratives, of those communities.

Having learned from Puerto Rico, then, that is what the Agency should be prepared to do in the future: Embrace an intersectional consciousness, and engage in narrative gathering, as an agentic expression of its duties under the equal protection clause of the Fifth Amendment.

That is, the Agency should begin to embody a critical administrative constitutionalism.

V. FEMA SHOULD LIVE OUT THE LETTER AND SPIRIT OF EQUAL PROTECTION IN THE EXECUTION OF ITS AID EFFORTS BY EMBODYING CRITICAL ADMINISTRATIVE CONSTITUTIONALISM

In this section, I will adumbrate the theory of administrative constitutionalism, discuss the ways in which critical race theory and other anti-subordination theories may be joined with that theory in a critical administrative constitutionalism enterprise, and engage its possible applications by FEMA actors under the auspices of the Stafford Act.

A. THE THEORY OF ADMINISTRATIVE CONSTITUTIONALISM

Administrative constitutionalists recognize that agency actors may live out the principles of due process and equal protection in the way that they interpret and execute their duties. In this section, I refer to the scholars Gillian Metzger, William Eskridge and John Ferejohn, Sophia Z. Lee, and Karen Tani, who have done much to invent this theory. As Metzger explains, “administrative constitutionalism . . . encompasses the elaboration of new constitutional understandings by administrative actors, as well as the construction (or ‘constitution’) of the administrative state through structural and substantive measures.” She also describes this as constitutional “norm entrepreneur[ship].” Eskridge and Ferejohn similarly describe administrative constitutionalism as small constitutionalism, or “small c” dynamics that shape administrative decisions, wherein agency decisionmakers engage “political pressures” that lead to “higher-level deliberation” – such as in the case of the EEOC’s 1972 decision that pregnancy discrimination was sex discrimination.

Lee teaches us that administrative constitutionalism involves “[a]dministrators creatively extend[ing] or narrow[ing] court doctrine in the absence of clear, judicially defined rules.” In her book, THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT, she recounts how, in the 1960’s, the National Labor Relations Board’s Howard Jenkins and other agents began to push for a “liberal workplace constitution” that would construe unions’ acts of racial discrimination as unfair labor practices. She also details how, in the 1970’s, NLRB Chairman Edward

203. See Metzger, supra note 5, at 1900.
205. See Lee, supra note 61, at 801-02.
206. See supra note 63.
207. Metzger, supra note 5, at 1900.
208. Id. at 1905.
209. See Eskridge & Ferejohn, supra note 204, at 31.
210. See Lee, supra note 61, at 801-02.
Miller pursued a vision of administrative power that was constrained by the Constitution’s guarantees of equality, and so prohibited the Board from, either directly or indirectly, sanctioning private discrimination.\footnote{192}{Id. at 179.}

Karen Tani traces administrative constitutionalism’s “rights pioneer[ing]”\footnote{193}{See An Administrative Right, supra note 63, at 1854.} and, like Lee, illustrates it through historical incident. She finds this brand of constitutionalism in the 1930’s example of the Social Security Administration’s A. Delafield Smith, who “preached” that poor relief was a “matter of right,” and codified this understanding of human rights in training guides for local welfare workers.\footnote{194}{See Welfare and Rights, supra note 63, at 319 (“Drafted primarily by professional social workers with the clearance of lawyers, these guides enumerated rights apart from a basic guarantee of income support that, with the creation of federal-state welfare programming, were now established in law. These included the right to submit a formal application for assistance, the right to receive fair treatment, the right to spend support payments freely, and the right to keep private one’s reliance on the state.”).}

As this example illustrates, Tani has demonstrated the ways in which anti-racist and anti-classist consciousness motivated administrative constitutionalism. Furthermore, she has also documented the ways in which feminist consciousness, and women’s use of “rights language”\footnote{195}{See An Administrative Right, supra note 63, at 1902.} influenced the U.S. Department of Education’s efforts to eradicate sexual violence on campuses through its issuance of “Revised Guidance” communications in 2001,\footnote{196}{Id. at 1864.} and its “Dear Colleague” letters that it sent in 2011.\footnote{197}{Id. at 1874.} Tani notes that these administrative developments were linked to insights about rape culture developed by theorists such as Catharine MacKinnon and anthropologist Peggy Sanday.\footnote{198}{Id. at 1870.} That is, Tani’s work teaches us that race liberationist thought, and feminist legal theory and feminist consciousness, penetrated administrative processes to create legal change.\footnote{199}{Id. at 1900-901 (“Thanks in large part to OCR’s efforts, numerous colleges and universities have now translated . . . [a] natural law claim into something more like positive law.”).}

Other important work on administration constitutionalism, and its potential for creating new rights, will be found in Bertrall L. Ross II, Embracing Administrative Constitutionalism, 95
B. JOINING ADMINISTRATIVE CONSTITUTIONALISM WITH CRT’S COMMITMENT TO RACE AND CLASS AND OTHER INTERSECTIONAL FORMS OF JUSTICE, AND ITS AFFILIATED METHODS OF NARRATIVE GATHERING AND SELF-CRITIQUE

In the context of Puerto Rico and hurricane Maria, we see that there is a need to further the work of introducing anti-subordination thought—specifically, critical race feminism, queer legal theory, and disability theories, and their engagements with intersectionality—into the theory of administrative constitutionalism. In order to guard against the epistemic harms that ravaged the people of Puerto Rico in September of 2017, moreover, there is also a need to incorporate this body of theory’s two key and related practices, being engaging narrative method and committing to self-critique, into the concept of administrative constitutionalism and its embodiment.

In a post-Maria United States, administrative constitutionalism would require that Agency actors elaborate a new constitutional understanding that failure to provide disaster aid equally to poor minority communities and wealthier and whiter ones is a violation of their duties to provide equal protection of the laws under the Stafford Act. Such a comprehension would have to accompany a recognition of the meaning and effects of intersectionality as it pertains to disaster impact and response.

B.U. L. REV. 519, 564 (2015) (“supplementing judicial constitutionalism with constitutional experimentation between administrative and judicial constitutional applications can lead to adaptation that is more responsive to changing societal contexts”) and Max Isaacs, LGBT Rights and the Administrative State, 92 N.Y.U. L. REV. 2012, 2038 (2017) (“agencies are justified in their robust enforcement of LGBT rights where these rights have been underenforced in the judicial and legislative branches.”).

220. See supra notes 31-36.
221. See infra notes 224-31.
222. See supra notes 160-65 (observing that this is the community’s interpretation of what happened).
223. See id. (detailing how intersectionality ignorance led to disaster).
“Intersectionality,” or what is sometimes also called “multidimensionality,” is a concept rooted in a critical race feminist consciousness, and it comes equipped with a method, that of narrative gathering and dispersal. Critical theories of race, gender, disability and sexuality resist “univocal” stories of law and justice, and foster, instead a “multivocal” practice that seeks out the underclass’s full participation in law. Importantly, its practitioners have long worried about training themselves out of the patterns of epistemic injustice that Miranda Fricker writes about, as they engage in storytelling as well as interrogations of their own assumptions in energized engagements of self-critique, so as to “avoid [the] cultural imperialism that perpetuates the supracies promoted by the colonial power.”
This critical administrative constitutionalism would mandate, then, that FEMA’s agents challenge their own assumptions, come to grips with their own colonial points of view, and begin to gather multivocal narratives about vulnerable populations’ life ways and intersectional problems and dynamics in order to best plan for the next disaster and ensure that equal protection be delivered to vulnerable victims.

A review of the Stafford Act and FEMA policies reveals that there are spaces already within the law where this kind of work could be done during a disaster, and before it happens.

1. How Could FEMA Actors Engage With Critical Administrative Constitutionalism under the Stafford Act?

Narrative gathering and the cultivation of intersectional consciousness may proceed in the direct aftermath of a disaster under The Stafford Act: As mentioned above, the law permits federal agencies to use experts and consultants, and to prioritize the hiring of local people when responding to a disaster. These local people, consulted in the immediate fallout of a natural event, could tell federal responders who needs help, and how to help them, thus alerting agents to intersectional issues of which they might be unaware.

Once there has been a disaster declaration, the Stafford Act also requires that the President appoint a federal coordinating officer to operate in the affected area and to coordinate with

233. See id.
234. See supra notes 227-28 and accompanying text.
235. See supra notes 89-90.
236. See 42 U.S.C. § 5149(b)(2) (2012) (allowing responding federal agencies “to employ experts and consultants in accordance with the provisions of section 3109 of such title, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.”); 42 U.S.C. § 5150(a) (“In the expenditure of Federal funds for debris clearance, distribution of supplies, reconstruction, and other major disaster or emergency assistance activities which may be carried out by contract or agreement with private organizations, firms, or individuals, preference shall be given, to the extent feasible and practicable, to those organizations, firms, and individuals residing or doing business primarily in the area affected by such major disaster or emergency.”).
organizations that agree to operate under his advice or direction, as well as take other action he deems necessary to provide local citizens and public officials with assistance. Narrative gathering in real time would qualify as such “coordination.” In addition, FEMA has a program where it permits local individuals and government organizations to apply for funding for specific hazard mitigation projects once a disaster has been declared; with some outreach, this program could transform into a measure by which FEMA operatives discover critical information, through narrative acquisition, about who needs what when and how to get it to them. Again, the gathering and absorption of these narratives would help increase intersectional consciousness and dispel the epistemic injustice and pluralistic ignorance and unconscious bias that worked so disastrously in Puerto Rico.

Information gathering may also be engaged in before disasters strikes under current FEMA’s existing “Pre-Disaster Mitigation Grant Program,” which “awards planning and project grants and provides opportunities for raising public awareness about reducing future losses before disaster strikes.” Further, FEMA has an extensive training program, including a Diversity Awareness Course and a Civil Rights and FEMA

240. 42 U.S.C. § 5143(b)(4) (2012). Again, according to the FEMA website, on Sept. 17, “FEMA had an FCO [Federal Coordinating Officer] and Incident Management Assistance Team co-located with key staff from the Caribbean Area Division at the FEMA Distribution Center in Puerto Rico, who would remain in place throughout the storm’s potential landfall.” Overview of Federal Efforts to Prepare for and Respond to Hurricane Maria. FEMA. https://www.fema.gov/blog/2017-09-29/overview-federal-efforts-prepare-and-respond-hurricane-maria [https://perma.cc/U32B-NZF7].
242. See supra note 168 and accompanying text (defining testimonial injustice).
243. See supra note 140 and accompanying text (addressing pluralistic ignorance).
244. Pre-Disaster Mitigation Program, FEMA. https://www.fema.gov/pre-disaster-mitigation-grant-program [https://perma.cc/9Y9J-CDEA].
245. Id.
Disaster Assistance course,\textsuperscript{247} which, if adapted to critical race theory concerns, could introduce FEMA agents to the concepts of intersectionality, strenuous self-critique, and narrative gathering.\textsuperscript{248}

The type of critical administrative constitutionalism that I am calling for raises a high standard for satisfaction, and one that would take a great deal of energy and commitment to fulfill. FEMA’s culture, training, and procedures would have to change to accommodate intersectional consciousness and critical narrative gathering.

A review of FEMA’s self-analysis post-Maria, and its training protocols, however, reveal that this goal is very far from happening right now.

VI. FEMA BEARS NO SIGN OF EMBRACING CRITICAL ADMINISTRATIVE CONSTITUTIONAL CULTURE OR DUTIES

The federal government has not risen to this challenge of critical administrative constitutionalism in the wake of Hurricane Maria. While the Department of Homeland Security can be criticized for many forms of false consciousness or even bad faith,\textsuperscript{249} here I will focus on how FEMA’s resistance to attending to the problems of intersectionality, gathering narratives, critiquing its own assumptions, and changing its own culture, are


reflected in a memo issue in July of 2018 by Administrator Long. They are also revealed in FEMA training documents that are still in use.

A. LONG’S JULY REPORT

Since Maria, FEMA Administrator Brock Long and his agency have not embraced race and class consciousness in a way called for by this paper. In a report issued on July 12, 2018, Administrator Long admitted that that “[t]he response to the hurricanes demonstrated the need for emergency managers at all levels to improve collaboration with the critical infrastructure sectors.”250 FEMA also acknowledged that it had not made a Puerto Rico disaster plan that figured in the problems with the electrical grid or the territory’s poverty;251 and it observed that it “could have better leveraged open-source information and preparedness data, such as capability assessments and exercise findings, for Puerto Rico and the U.S. Virgin Islands.”252 It further recognized that it needed to “revise the National Response Framework . . . to emphasize stabilization of critical lifelines and coordination across critical infrastructure sectors,”253 as well as to work with “whole community partners” in the future.254

Yet Long emphasized additionally that “[t]hose closest to the impacted areas are the true first responders during any emergency or disaster”255 and suggested that the way forward required that FEMA “simplif[y] its process.”256 More troublingly, FEMA indicated that its logistics problems in Puerto Rico reflected poorly on local Puerto Rican government, who should have taken up the reins: “FEMA provided logistical coordination to move

251. Id. at 10 (“plans did not address insufficiently maintained infrastructure (e.g., the electrical grid) . . . . In addition, they did not address financial liquidity challenges facing the Territorial government”).
252. Id. at vi.
253. Id. at vii.
254. Id.
255. See AFTER-ACTION REPORT, supra note 250, at ii.
256. Id. at iii.
and distribute commodities from staging areas to survivors in Puerto Rico, supplementing a role that should largely be managed and coordinated at the state or territory level.” The report also indicated that the public should not depend so much on the agency in times of disaster: “The work of emergency management does not belong just to FEMA. It is the responsibility of the whole community, federal, [state, local, tribal and territorial governments], private sector partners, and private citizens to build collective capacity and prepare for the disasters we will inevitably face.” This statement was interpreted by some observers as “urging communities in harm’s way not to count so heavily on FEMA in a future crisis.”

While the report’s authors did recommend that FEMA “[b]roaden” its “capability to quickly get teams on the ground to stage and deliver key commodities to disaster survivors, even in the most remote locations,” and promises that it is “working with whole community partners to improve risk management and strengthen capabilities,” it says it will do this by adopting “a new assessment methodology that requires all states, territories, tribes, and major urban areas to use standard, outcome based language to set objectives and assess their current capabilities against those objectives.”

FEMA’s emphasis on territory responsibility and its secondary status as an aid provider fail the standard that I am calling for here, in that FEMA is not embracing its constitutional status as an affirmatively equal deliverer of disaster aid. In addition, its future emphasis on simplification and standardization cuts in the opposite direction to which the agency

257. Id. at viii.
258. Id. at 50.
260. See AFTER-ACTION REPORT, supra note 250, at viii.
261. Id. at 13.
262. See supra discussion accompanying notes 200-04.
should now pivot – that is, towards comprehending the complexity of victim identity. Also, FEMA’s report contains no recognition of the race and class traumas of the FEMA response in Puerto Rico: A review of the report reveals that there is no mention of “race,” “class,” “sexuality” “colonialism,” “elderly,” or “gender.” There are two mentions of the word “disability,” but they refer only to one mention of the Disability Coordinator’s acronym and a footnote reference to “disability integration.”

Further, the report’s emphasis on territories’ responsibilities to be their own saviors fails to recognize the poverty and deprivation that colonialism wreaks upon territories and that can prohibit their acting as effective responders in the wake of disaster. It seems to blame the victim, as it were. The report also does not recognize that the bleak difference between the response in Puerto Rico and those in Houston and Florida is felt by many Puerto Ricans and other Americans to constitute a deprivation of equal protection of the laws: There is simply no recognition of the deep trauma caused by this discrimination. And, finally, there is no protocol mentioned for the acquisition of key narratives that would educate FEMA about vulnerable populations.

**B. THE EDUCATIONAL MATERIALS ALSO DO NOT REFLECT A CULTURE OF CRITICAL ADMINISTRATIVE CONSTITUTIONALISM**

FEMA provides training for emergency responders through its Emergency Management Institute (EMI). The EMI supports FEMA by “improving the competencies of the U.S. officials in Emergency Management at all levels of government to prepare for, protect against, respond to, recover from, and

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263. See *Epistemic Injustice*, supra note 21, at 26-27 (rounding up complaints against FEMA agents).
264. See *AFTER-ACTION REPORT*, supra note 250, at 51.
265. *Id.* at 15 n.g.
266. See supra notes 255-59 and accompanying text.
267. See Levenson, supra note 133.
268. See supra notes 160-64 and accompanying text.
mitigate the potential effects of all types of disasters and emergencies on the American people.”\(^{270}\) It trains “Federal, State, local, tribal, volunteer, public, and private sector officials” who respond to disasters.\(^{271}\) In so doing, it supports the execution of the National Incident Management System (NIMS), the National Response Framework (NRF), the National Disaster Recovery Framework (NDRF), and the National Preparedness Goal (NPG).\(^{272}\)

In this section, I will only analyze FEMA’s “Civil Rights and FEMA Disaster Assistance” and “Diversity Awareness” courses, as they seem the two most inclined to create space to train for the issues I write about in this paper. Neither course inculcates the epistemic values\(^{273}\) of critical race and class consciousness in the ways described by Karen Tani, for example, when she described how Social Security Administration’s A. Delafield Smith, “preached” that poor relief was a “matter of right,” and taught this philosophy in training guides for local welfare workers.\(^{274}\) That is, these courses insufficiently train agents in the type of critical administrative constitutionalism called for by this paper.

**1. FEMA’s Civil Rights Course**

FEMA’s Civil Rights course reveals that the Agency conceives of diversity fairness in terms of inter-state members’ civil rights to equal accommodation\(^{275}\) without specifying that

\(^{270}\) Id.
\(^{271}\) Id.
\(^{272}\) Id.
\(^{273}\) Miranda Fricker argues that testimonial injustice may be countered by practicing “actively . . . bring[ing] critical thought to bear on [one’s] . . . internalized habits of hearer response in order to shake them up sufficiently to effect any adjustment.” See Fricker, supra note 169, at 84. Such “shaking up” could be experienced in training through exposing students to tales of race, class, disability, gender, sexuality, and other injustice and introducing the practice of self-critique.

\(^{274}\) See Welfare and Rights, supra note 63, at 319 (“Drafted primarily by professional social workers with the clearance of lawyers, these guides enumerated rights apart from a basic guarantee of income support that, with the creation of federal-state welfare programming, were now established in law. These included the right to submit a formal application for assistance, the right to receive fair treatment, the right to spend support payments freely, and the right to keep private one’s reliance on the state.”).

\(^{275}\) See IS-0021.18 Civil Rights and FEMA Disaster Assistance 2018, FEMA, https://emilms.fema.gov/IS0021.18/curriculum/1.html [https://perma.cc/Z8KG-HC5D]
wealthier states and poorer ones, and states and territories, together enjoy equal forms of protection provided by the Stafford Act. In addition, it does not impress upon its agents the ethic that aid is a “matter of right,” as A. Delafield Smith once taught welfare workers that poverty aid was a human rights concern.\textsuperscript{276} Further, the course does not teach its agents about intersectionality or the importance of narratives, and focuses more on treating victims of disasters with “respect”\textsuperscript{277} than on training agents on how to best distribute aid equally.

First, there is no FEMA course on the meaning of equal protection and disaster aid, and no teachings about how equality requires that different communities be given equal aid despite their differences.\textsuperscript{278} For FEMA, fairness means allowing everyone equal entry to the accommodations provided by the Agency\textsuperscript{279} — that is, that female, minority, disabled, or other victims of aid be able to enter disaster recovery centers like anyone else, and, once there, be treated with an “empathetic and fair manner.”\textsuperscript{280} FEMA training also teaches that minority victims should not be “[d]enied a service or benefit, [d]enied access to or participation in a service or program although found eligible, [p]rovided a different service, or [have] the service . . . provided in a different manner.”\textsuperscript{281} “Denial” here does not seem to mean a meaningful denial — such as that occurs when a FEMA

\textsuperscript{276} See Welfare and Rights, supra note 63, at 319.
\textsuperscript{277} See supra note 275 (Civil Rights: A Guiding Principle, panel 5 of 85. See also Protecting Civil Rights Through You Interactions, panel 37 of 85 states “By treating each person fairly and with respect, you demonstrate FEMA’s commitment to providing programs, services, and benefits to every eligible person fairly and without discrimination.”).

\textsuperscript{278} See supra note 248.

\textsuperscript{279} The problems with “sameness” have long been noted, for example, by feminist theorists. See, e.g., Keith Cunningham-Parmeter, (Un)equal Protection: Why Gender Equality Depends on Discrimination, 109 Nw. U. L. Rev. 1, 3 (2015) (“Even though women have enjoyed formal equality under the law for decades—a central goal of sameness feminism—the glass ceiling remains stubbornly difficult to break.”).

\textsuperscript{280} See supra note 275 (Civil Rights: A Guiding Principle, panel 5 of 85. See also Protecting Civil Rights Through You Interactions, panel 37 of 85 states “By treating each person fairly and with respect, you demonstrate FEMA’s commitment to providing programs, services, and benefits to every eligible person fairly and without discrimination.”).

\textsuperscript{281} Id. (Discrimination, panel 20 of 85).
agent cannot conceive that certain foods will be poisonous to diabetic victims. Rather, a plain reading of “denial” would find the term to mean an outright, even intentional, refusal to give a service that is demanded by an “eligible” person of color or other minority. Further, there are lesson that FEMA contractors not racially or sexually harass victims, that minority communities not be deprived of disaster recovery centers, that agents “take the initiative” to cross language hurdles (a lesson that failed in Puerto Rico in the Maria aftermath), and that written information be made available in non-English languages and made accessible with those with visual impairments – but not that agents do the deep and often difficult work to fathom the real needs of diverse communities in order to offer them equivalent aid – that is, to engage in narrative gathering and difficult, intersectionality-minded, self-critique.

While there is one mention in the lesson that an agent “put [themselves] in the survivor’s place and to really look and see how would [they] like to be treated,” plus a reminder that there

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282. See Epistemic Injustice, supra note 21, at 38 (quoting Roxanna Garcia as saying “People shouldn’t be eating that food — especially with diabetes.”).

283. Id. at 42 (quoting Norbert Figueroa as saying “They were too slow, as in, there were places up in the mountains where weeks — weeks, weeks! — from the hurricane [people living there] still had not seen anyone—not a single government official had gone there to their community or to check on the conditions or anything.”).

284. See supra note 275 (Civil Rights: A Guiding Principle, panel 5 of 85. See also Protecting Civil Rights Through You Interactions, panel 37 of 85).

285. Id. (Examples of Discrimination, panel 23 of 85 states “A FEMA contractor makes racially insensitive remarks or attempts to sexually harass an applicant seeking assistance.”).

286. Id. (“Members of a minority community must travel many miles to reach a food and water distribution site.”).

287. See id. (Working with LEP Populations, panel 53 of 85 states “It is important to take the initiative to find out what language barriers exist in the local area and be ready to address them.”).

288. See Epistemic Injustice, supra note 21, at 27 (quoting Maria Jiménez Colón as saying “We haven’t encountered many FEMA inspectors who speak Spanish.”).

289. See supra note 275 (Accessible Information for LEP Individuals (2 of 2), panel 55 of 85).

290. See id. (Accessible Information for People with Visual Impairments, panel 58 of 85).

291. See id. (Civil Rights: A Guiding Principle, panel 5 of 85 provides a statement by Martelle Chapital-Smith, Equal Rights Officer).
is no “one size fits all”\textsuperscript{292} approach to aid distribution, there is no real suggestion that agents investigate and imagine the lives of vulnerable victims so as to understand how best to help them. The few lessons in self-review ask agents only to, in the event of a complaint, “consider whether something in your behavior might have led to the perception of unfair treatment and, if so, how you can improve that perception in the future.”\textsuperscript{293} Throughout, the emphasis in the lesson is that everyone get treated the same.\textsuperscript{294}

There is, however, one promising panel in the Civil Rights course, titled \textit{Self Assessment}.\textsuperscript{295} This panel prompts students to ask themselves whether they assess their own attitudes and biases, try to understand the situation of the people they interact with, seek to learn local demographics in the field, and work to be “proactive” in their efforts to be inclusive.\textsuperscript{296}

This is the closest the FEMA Civil Rights training course comes to inculcating critical administrative constitutionalism, and could be the foundation upon which real teachings on intersectionality, self-critique, and narrative gathering may be built.

\section*{2. FEMA’s Diversity Awareness Course}

The Diversity Course is no primer on critical race theory, but, like the “Self Assessment” page of the Civil Rights course, it does contain spaces upon which training in critical administrative constitutionalism could be based. For example, the course teaches agents that diversity “influence[s] how we perceive others

\begin{itemize}
  \item \textsuperscript{292} \textit{See id. (Nondiscrimination Concepts, panel 26 of 85 states “People with disabilities do not all require the same assistance and do not all have the same needs. Different types of disabilities affect people in different ways. Preparations should be made for individuals with a variety of functional needs, including individuals who use mobility aids, require medication or portable medical equipment, use service animals, need information in alternate formats, or rely on a caregiver.”).}
  \item \textsuperscript{293} \textit{See id. (What If Your Own Actions Are in Question?, panel 79 of 85).}
  \item \textsuperscript{294} \textit{See supra note 275 (E is for Expectations, panel 40 of 85 states “To ensure that members of the public are treated impartially, it is important to approach each situation with the same expectations for everyone.”).}
  \item \textsuperscript{295} \textit{See id. (Self Assessment, panel 81 of 85).}
  \item \textsuperscript{296} \textit{Id.}
\end{itemize}
and their behaviors, as well as how others perceive us,” and instructs that appreciating diversity “[h]elps us to plan for and respond to the needs of a diverse survivor population.” Furthermore, it quotes a disaster survivor who says “if you don’t understand or take the time out to try to understand [diverse populations’] culture and what makes them tick, your services may, although be needed, may not be wanted,” and also teaches that “[p]eople who are culturally or geographically isolated may have greater risk and be disproportionately vulnerable to disaster.” And it offers the observation that “[v]aluing diversity helps us foster community-based resiliency by... [l]earning from local leaders, and community members of different cultural groups about their values, family norms, traditions, community politics, etc., ideally before a disaster strikes.”

However, these are all vague suggestions for how recognizing diversity can be “helpful,” instead of inculcating a value system like A. Delafield Smith’s. The message also gets muddled because it is mixed in with hortatory celebrations of FEMA employee diversity and tolerance at that workplace – a good principle, certainly, but one which should be dealt with separately, so that the critical lessons on victim vulnerability and diversity can be focused on in its own pedagogy. And, when it does make a concrete suggestion that agents should be “curious... [because] curiosity expands your current assumptions, breaks down cultural barriers, and builds awareness, appreciation, and understanding of differences among people,” no real lessons in how this works in a disaster context are given. The course also sets an extremely low bar – instead of training agents in how to better comprehend the critical realities of

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298. See id. (Diversity Benefits, panel 17 of 73).
299. See id. (Understanding the Communities We Serve, panel 19 of 73).
300. See id. (Disaster Impact and Cultural Diversity, panel 20 of 73).
301. See id. (Promoting Community-Based Resiliency Through Diversity, panel 21 of 73).
302. See supra note 214 and accompanying text.
303. See supra note 297 (Awareness and Acceptance of Difference, panel 35 of 73).
304. See id. (Overcoming Boundaries, 40 of 73).
vulnerable populations in disaster contexts, it schools them in “disability etiquette” (“no need to shout or speak loudly”) and not to call people names that qualify as anti-disability hate speech, and not to call queer people names that are also hate speech and that I will not repeat in this article, but which are recited in the course. I am not suggesting that anti-hate lessons should not given here, but more is required.

In sum, FEMA training made available online does not demonstrate that FEMA responders are now being trained adequately in self-critique, intersectional consciousness, narrative gathering, and, thus, creative critical administrative constitutionalism. But it does contain a few tools with which we can create a critical, liberationist, disaster relief culture.

VII. WHERE TO GO FROM HERE?

In order for FEMA to correct course, and embrace a critical administrative constitutionalism that recognizes the Agency’s duty to provide equal disaster aid to vulnerable communities through an active engagement with intersectionality, self-critique, and narrative gathering, it needs to make several changes now:

First, FEMA should stop blaming Puerto Rico for its own suffering, and recognize instead its own equally protective duty to meaningfully distribute aid to vulnerable populations during disaster.

Second, and relatedly, it should recognize itself as a first priority responder in cases of subordinated communities, so as to embrace its status as an equal distributor of meaningful aid.

Third, it needs to recognize intersectionality in its preparation for the future and its creation of methodology for crisis responses.

305. See id. (Disability Etiquette, 53 of 73).
306. See id. (Language to Avoid, 54 of 73).
308. See supra notes 266-68 and accompanying text.
309. See supra note 255 (quoting FEMA report declining this status).
310. See text accompanying supra notes 66-67.
Fourth, it needs to create protocols for gathering narratives of vulnerable populations subject to disasters before and after the catastrophe.\textsuperscript{311}

Fifth, it needs to draw its responders and resources from vulnerable, affected, communities, so that such narratives and insight may be deployed.\textsuperscript{312}

Sixth, it must inculcate a culture of active self-assessment that is in keeping with the culture cultivated by critical race theory.\textsuperscript{313}

Seventh, it must build upon the above-mentioned spaces within its extant training that makes room for these dynamics.\textsuperscript{314}

In so doing, FEMA may model its new training protocols based on the many works of diversity training that incorporate the lessons of intersectionality and narrative: Examples of this may be found in the work of Frank Rudy Cooper,\textsuperscript{315} Peggy Li,\textsuperscript{316} Claudia Meyer and her team,\textsuperscript{317} Emma Kowal, Halyey Franklin,

\begin{footnotesize}
\begin{enumerate}
\item See supra note 240 (finding spaces within the Stafford Act to implement narrative gathering).
\item See text accompanying supra note 236 (discussing the engagement with people on the ground as experts and consultants).
\item See supra note 230 (discussing the need to interrogate one’s own assumptions).
\item See supra text accompanying notes 240-45 (making recommendations on how to do so).
\item Frank Rudy Cooper, "Who’s the Man?: Masculinities Studies, Terry Stops, and Police Training, 18 COLUM. J. GENDER & L. 671, 732 (2009) (engaging intersectionality to critique and make suggestions about police training) ("If masculinist training is the problem, anti-masculinist training may provide an essential answer—adjusting the behavior of cadets and police officers.").
\item Peggy Li, Hitting the Ceiling: An Examination of Barriers to Success for Asian American Women, 29 BERKELEY J. GENDER L. & JUST. 140, 166 (2014) ("An understanding of implicit bias and intersectionality can assist businesses in recruiting a representative class of Asian American women and avoiding future liability.").
\item Claudia Meyer et al., Diversity Training For Community Aged Care Workers: An Interdisciplinary Meta-Narrative Review, 43 EDUC. GERONTOLOGY 365, 374 (2017) ("Access and equity policy should reflect the broad nature of diversity rather than just a few characteristics.").
\end{enumerate}
\end{footnotesize}
318. Emma Kowal, Hayley Franklin & Yin Paradies, Reflexive Antiracism: A Novel Approach To Diversity Training, 13 ETHNICITIES 316, 317 (2013) (“This article explores the two major critiques of diversity training – essentialism and the elicitation of negative emotions – and proposes the alternative approach of reflexive antiracism. This approach addresses critiques of diversity training by drawing on insights from critical race theory, social psychology, whiteness studies and literature on intersectionality, and through incorporating the concepts of constructivism, racialisation and identity formation. We provide examples of this approach from a diversity training course that two of the authors present.”).


321. Nicole R. Robinson, Developing a Critical Consciousness for Diversity and Equity Among Preservice Music Teachers, 26 J. OF MUSIC TEACHER EDUC. 16 (2017) (describing a “professional development session . . . designed to increase a degree of critical consciousness for diversity and equity among preservice music teachers. It was organized into three sessions: understanding ‘Access,’ understanding ‘Intersectionality,’ and understanding ‘Myths, Misconceptions, and Misdirections’ of music in urban schools.”).

322. See Crenshaw, supra note 6.


326. Berta Esperanza Hernández Truyol, Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement, 25 COLUM. HUM. RTS. L. REV. 369, 433 (1994) (“embrac[ing] the acceptance that we are black latinas/os, white latinas/os, mestizas/os, indias/os, and chinas/os; muslim, christian, santeras/os and jews; male and female; lesbian/gay and heterosexual; rich and poor; physically able and physically
participate in LatCrit engagements, and many other writers of intersectional literature.

VIII. AND NOW FOR THE LIFTED BROW

Reader, do not fear: I understand that my calls to make the Stafford Act “proper” by infusing critical administrative constitutionalism throughout the hierarchies of FEMA seems insanely aspirational during an era when Brock Long appears deeply beholden to a President who offers emotional supports to white supremacists, mocks handicapped people, tweeted about Puerto Rican ingratitude when people were dying, and then denied the death toll estimate of approximately 3,000 people in September of 2018.
But that does not mean that we should not ask FEMA to rise to the challenge that it failed to meet during and after Hurricane Maria. Maybe these efforts will come from the top. It is also conceivable that Puerto Rican representatives may effectively lobby agency nabobs to help change FEMA’s culture and commitments. But, in seeking a method that is more in line with the bottom-up strategy of critical race feminism, we might do well to channel the work of Jennifer Nou, Rosemary O’Leary, Eric Posner, Daniel Hemel, John Michaels.

333. I thank Miriam Seifter for this suggestion. Her work in this field is exemplary. See Miriam Seifter, States As Interest Groups In The Administrative Process, 100 VA. L. REV. 953, 955-56 (2014) (“[S]tate involvement in federal regulation has been operationalized through a largely overlooked universe of ‘state interest groups’—myriad associations of state officials that lobby federal agencies and consult on pending federal rules and policies, advancing the ‘state’ view.”). See also Maggie McKinley, Petitioning And The Making Of The Modern Administrative State, 127 YALE L.J. 1538, 1539 (2018) (documenting the general phenomenon of petitioning).

334. See, e.g., Debora L. Threedy, Legal Archeology And Feminist Legal Theory: A Case Study Of Gender And Domestic Violence, 29 WOMEN’S RTS. L. REP. 171, 172-73 n.11 (2008) (“Bottom-up theorizing is also a feature of feminist legal theory, critical race theory, queer theory, and other outsider jurisprudence.”).

335. See Nou, supra note 70 (“It is thus the right time to ask what levers of resistance are available to civil servants. These levers may be especially attractive to those faced with one of several prospects: top-down orders to carry out illegal tasks, suppress information, or doctor technical documents.”).

336. See O’Leary, supra note 71, at xi (“This book is about guerilla government. Guerilla government is my term for the actions taken by career public servants who work against the wishes – either implicitly or explicitly communicated – of their superiors.”).

337. See Posner, supra note 72 (“The greatest constraint on Mr. Trump may be the federal bureaucracy. If he directs the F.B.I., I.R.S. or Department of Homeland Security to harass his political opponents, civil servants will probably not cooperate — indeed, they may blow the whistle.”).

338. See Hemel, supra note 73 (“What checks and balances might prevent President Trump from taking [illegal or at least abysmal] executive actions . . . ? . . . [T]he Department of Homeland Security. By this, I don’t mean the Secretary of Homeland Security—Trump would want to pick a loyalist for that post. I mean the Department of Homeland Security rank-and-file—the hundreds of thousands of DHS employees whose active participation would be necessary to implement Trump’s policy (even if they have no formal say in the matter under the Constitution.”).

339. See Michaels, supra note 74 (“Consider the civil service. Our professional, politically insulated civil service is ostensibly well positioned to limit presidential overreaching.”).
Marie-Amélie George, and Arden Rowell and clamor for this awakening as a form of “bureaucratic resistance from below.” Individual FEMA workers could resolve to teach themselves and each other how to engage their jobs in the spirit of critical administrative constitutionalism by learning about intersectionality, engaging in self-critique and consciousness raising, and gathering narratives of subordinated and at-risk populations before, during, and after a disaster. Their engagement would lead to lessons on how best to serve vulnerable populations, take a creative, ambitious stance toward their job, and in so doing fulfill the spirit of equal protection embodied in “letter and spirit” of the Constitution.

It remains the case, however, that many impediments to this level of bureaucratic change exist, such as the ways that administration heads fashion vertical culture and power structures through subdelegations censorious self-regulation.

340. Marie-Amélie George, Bureaucratic Agency: Administering the Transformation of LGBT Rights, 36 YALE L. & POL’Y Rev. 83, 98 (2017) (“At first blush, bureaucratic resistance appears to introduce inconsistency into law, but it in fact may make the legal system more internally coherent.”).


342. See Nou, supra note 70 (“It is thus the right time to ask what levers of resistance are available to civil servants. These levers may be especially attractive to those faced with one of several prospects: top-down orders to carry out illegal tasks, suppress information, or doctor technical documents.”); see O’LEARY, supra note 71, at xi (“This book is about guerilla government. Guerilla government is my term for the actions taken by career public servants who work against the wishes—either implicitly or explicitly communicated—of their superiors.”).

343. See, e.g., Jennifer Nou, Subdelegating Powers, 117 COLUM. L. REV. 473, 509 (2017) (“...new political appointees can revoke delegations to subordinates no longer expected to share their preferences.”).

344. Elizabeth Magill, Agency Self-Regulation, 77 GEO. WASH. L. REV. 859, 860 (2009) (describing “a ubiquitous phenomenon: administrative agencies routinely ‘self-regulate.’ That is, they limit their options when no source of authority requires them to do so. They voluntarily constrain their discretion.”).
punishment,\textsuperscript{345} and the inculcation of “role perception”\textsuperscript{346} that shrinks at leveraging a rebellious critical race bureaucratic practice so inconsistent with contemporary Presidential and FEMA mores. The response to such challenges will have to come from the current generation of civil servants who have discovered that being loyal to their agency and to their country can require their resistance, dissent, and the courage to embark upon a new way of thinking and working.\textsuperscript{347}

To that end, even small organizing and consciousness-raising efforts at the bureaucratic level could have far reaching influence, if engaged energetically and deeply. Something as seemingly modest as a weekly discussion or book group held by two or three agents could achieve an ever-widening circle of persuasion. If we look to other historical examples for inspiration, we see that in 1980’s eastern Germany, “tiny circles” of peace activists committed to denuclearization “quickly came to channel a wider discontent with the ideological constrains imposed by the regime. Prayers for peace were necessarily prayers for an end to Cold War divisions . . . [and] [b]y 1987 a so-called ‘Church from Below’ challenged the official consistory structure of the Protestant Church.”\textsuperscript{348}

Furthermore, one of the initiations of the woman of color political movement began with a few women meeting together in the Dorchester, Massachusetts living room of a political activist


\textsuperscript{346} Mariissa Martino Golden, \textit{What Motivates Bureaucrats? Politics and Administration during the Reagan Years} 22 (2000) (“The concept of role perception is thus meant to capture a civil service ethic, code of conduct, and sense of duty that lead career civil servants to be responsive to their Presidential principals.”).


named Demita Frazier: In 1974, Frazier, Beverly Smith, and Barbara Smith met to talk about “radical economics” and creating a Boston chapter of the National Black Feminist Organization. They wound up creating the Combahee River Collective, which put out its famous Statement articulating the importance of recognizing the complexities of Black female identity. As Frazier later recounted in an interview: “It was a moment of power because I think we all recognized very quickly in that meeting in my living room that we were at the precipice of something really important. That was literally how it started, sitting in someone’s living room. . .”

Thus, the history of grass roots social change movements can create a path for the future of FEMA’s embrace of critical administrative constitutionalism and bureaucratic resistance from below.

IX. CONCLUSION

Article I, Section 8 of the Constitution requires that Congress enacts laws that are necessary and proper for the exercise of its permissible powers. 200 years ago, the Supreme Court in McCulloch v. Maryland established the test for when necessity and propriety could be found to exist, including the requirement that Congressional laws be “consist[ent] with the letter and spirit of the Constitution.” The Stafford Act, enacted by Congress in 1974, appears initially a necessary and proper expression of its powers to regulate the general welfare under

349. Duchess Harris, Black Feminist Politics from Kennedy to Clinton 9 (2009).
350. Id. at 11.
351. Id. at 7 (“Its widely circulated ‘Combahee River Collective Statement’ helped to lay the foundation for feminist of color organizing in the 1980s and the 1990s.”).
352. Id. at 11.
353. See U.S. CONST. art. I, § 8, cl. 18. Article I.
355. Id.
Furthermore, no one appears to be arguing that it is not.\footnote{See McCulloch, 17 U.S. (4 Wheat.) at 421.}

But the Stafford Act is improper under a race and class justice reading of the “letter and spirit” of the Constitution’s promise of equal protection because it does not account sufficiently for intersectionality.\footnote{See supra notes 95-96.} There is an inadequate attendance in the law to questions of race, class, gender, poverty, disability, rural, and elder status.\footnote{See supra notes 170-90 and accompanying text.} Nevertheless, the Stafford Act does contain some anti-discrimination provisions, and these appear to have done nothing to prevent a significant chasm between the aid rendered to Houston and Florida versus Puerto Rico.\footnote{Id.} In sum, the Stafford Act appears to fail the tests of McCulloch, but we may suspect that the addition of yet more language into the Act may not be sufficient currently to render the law “proper.”

It seems that FEMA must take responsibility, then, if the Stafford Act is to be executed in a way that properly coheres with the letter and spirit of constitutional equal protection guarantees. To do so, FEMA must embrace its independent role as a deliverer of constitutional goods, that is, disaster aid allocated to vulnerable people. The theory of administrative constitutionalism creates a context for such an awakening to occur, but the lessons of critical race theory, from where “intersectionality’s” insights were developed, must be absorbed in this engagement. This development would require both a transformation of FEMA culture and also, perhaps, of the theory of administrative constitutionalism itself. FEMA should consider its future in light of a critical administrative constitutionalism, and give aid to vulnerable populations within a culture and a practice that recognizes intersectionality, self-critiques, and avidly gathers narratives.

\footnote{See Levenson, supra note 133.}