

July 2019

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Yxta Maya Murray

Loyola Law School, Los Angeles

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Recommended Citation

Yxta M. Murray, *What FEMA Should Do After Puerto Rico: Toward Critical Administrative Constitutionalism*, 72 Ark. L. Rev. 165 (2019).
Available at: <https://scholarworks.uark.edu/alr/vol72/iss1/6>

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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.¹ In light of the expansive capacities allotted for disaster relief under the *Stafford Act*,² 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.³*

*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.

1. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 324 (1819).

2. 42 U.S.C. §§ 5121-5207 (2012).

3. See *McCulloch*, 17 U.S. (4 Wheat.) at 421.

victims and forbids discriminatory allotment of aid relief,⁴ 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.”⁵ 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.⁶

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.

4. 42 U.S.C. § 5151 (2012).

5. See, e.g., Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900, 1920 (2013).

6. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

I. INTRODUCTION

Under Article I of the Constitution, the United States possesses a federal government of considerable powers.⁷ Article I's listed powers bind Congress's enactments, as they mandate that federal statutes find "affirmative[] authoriz[ation]" from the Constitution.⁸ Clause eighteen of Article I's section eight grants Congress authority to pass laws that are "necessary and proper" to fulfill its powers.⁹ Chief Justice Marshall, in the early 19th century decision of *McCulloch v. Maryland*,¹⁰ 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.¹¹

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.¹² 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 8.¹³ However, modern enumerationists, responding to *McCullough v. Maryland's* more liberal interpretation of the clause,¹⁴ call for congressional acts to be tethered to enumerated

7. See U.S. CONST. art. I, § 8 cls.1-17. See also *Marbury v. Madison*, 5 U.S. 153, 176 (1803) (the "powers of the legislature are defined, and limited . . ."); *Printz v. U.S.*, 521 U.S. 898, 919 (1997) (Our "Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, . . .").

8. Michael K. Sabers, *Well, It Depends on What Your Definition of "Unconstitutional" Is: The Eighth Circuit's Misinterpretation of Flores in Christians v. Crystal Evangelical Free Church*, 44 S.D. L. REV. 432, 452–53 (1999) (citing Laurence H. Tribe, *American Constitutional Law* § 5-2 at 298 (2nd ed. 1988)).

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.*

10. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

11. *Id.*

12. David S. Schwartz, *A Question Perpetually Arising: Implied Powers, Capable Federalism, and the Limits of Enumerationism*, 59 ARIZ. L. REV. 573, 581 (2017).

13. *Id.*; Calvin H. Johnson, *The Dubious Enumerated Powers Doctrine*, 22 CONST. COMMENT. 25, 26 (2005).

14. 17 U.S. (4 Wheat.) at 413-16.

powers by a means-end test¹⁵ or forbidden to express “great powers” that are not enumerated.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.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”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”),¹⁹ under which the Federal Emergency Management Agency operates when the President declares a disaster.²⁰ As I recount in a previous article titled “*FEMA Has Been a Nightmare*”: *Epistemic Injustice in Puerto*

15. John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1104 (2011) (“The Necessary and Proper Clause is about means-ends connections”).

16. See, e.g., William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1751 (2013); Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012); Schwartz, *supra* note 12, at 646.

17. Schwartz, *supra* note 12, at 580.

18. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

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*].

20. See 42 U.S.C. 5170a (1)-(2) (2012).

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 scholars³⁰ to

21. Yxta Maya Murray, *Epistemic Injustice in Puerto Rico* (2018), Legal Studies Paper No. 2018-34 Willamette L. Rev. (forthcoming) [hereinafter, *Epistemic Injustice*].

22. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

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.

27. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

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,³¹ rural,³² queer,³³ disabled,³⁴ women³⁵ and/or people of color³⁶ 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.³⁷ Critical race feminists advocate treating intersectional oppressions as problems of unequal protection.³⁸

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,³⁹ whereas the contemporaneous storm-caused losses in Houston and Florida, while tragic, were far less extreme.⁴⁰ Some observers have charged a denial of equal protection of the laws resulting from this asymmetry,⁴¹ though current constitutional law appears to

31. On poverty as a form of intersectionality, *see, e.g.*, Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 20 (2016) (describing “the intersectionality of poverty, homelessness, and other marginalized traits”).

32. On rural intersectionality, *see, e.g.*, Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 433-34 (2007).

33. On queer intersectionality, and of multidimensionality, *see infra* notes 224-31.

34. Rangita de Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women and Children with Disabilities Within an Interrelated Web of Human Rights*, 18 PAC. RIM L. & POL’Y J. 293, 294 (2009) (“women and children living with disabilities face multiple forms of discrimination on the bases of their gender, age, disability and other identities”).

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.*

38. Jean Montoya, *What’s So Magic(al) About Black Women? Peremptory Challenges at the Intersection of Race and Gender*, 3 MICH. J. GENDER & L. 369, 395 (1996) (arguing for the “treat[ment of] intersectional status the same way race and gender are treated under equal protection analysis.”).

39. *See infra* notes 147-51.

40. *See* Eva Ruth Moravec, *Texas officials: Hurricane Harvey Death Toll at 82, ‘Mass Casualties Have Absolutely Not Happened,’* THE WASHINGTON POST (SEPT. 4, 2017), https://www.washingtonpost.com/national/texas-officials-hurricane-harvey-death-toll-at-82-mass-casualties-have-absolutely-not-happened/2017/09/14/bff3ffea-9975-11e7-87fc-c3f7ee4035c9_story.html?utm_term=.004c3be54bbd [https://perma.cc/RX6Q-UA8N]; Alexa Mains, *2017 Atlantic Hurricane Season By The Numbers: An Extremely Active Season*, WEATHER BUG (OCT. 7, 2018), <https://www.weatherbug.com/news/2017-Atlantic-Hurricane-Season-By-The-Numbers-An> [https://perma.cc/KN83-URGA] (describing the 90 deaths suffered in Florida due to 2017 Hurricane Irma). For comparison, *see* estimated toll of over 4,000 (and an estimate of 8,000) in Puerto Rico, *infra* notes 146-51.

41. *See infra* notes 160-65.

foreclose any real relief.⁴² 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”⁴³ 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.⁴⁴ 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.⁴⁵ Many people horrified at the U.S.’s devastation in 2017 and 2018 from hurricanes and wildfires⁴⁶ will appreciate the liberality of *McCulloch v. Maryland*⁴⁷ and even find themselves enthusiastic adopters of capable federalism in order to defend the Stafford Act.⁴⁸

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 17.⁴⁹ 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.⁵⁰ 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?⁵¹ 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,⁵² 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.⁵³ The argument that the Stafford Act is itself “improper” seems to raise the specter of the nondelegation doctrine, which some have described as “dead.”⁵⁴ 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

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.

52. See Sheryl Gay Stoldberg and Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (JAN. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html> [<https://perma.cc/VVX8-DJ86>].

53. Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 474-475 (2017) (One reason that Congress delegates to agencies in order to “exploit their superior expertise”); Jonathan Bendor & Adam Meirowitz, *Spatial Models of Delegation*, 98 AM. POL. SCI. REV. 293, 294 (2004) (noting that such exploitation is one motivation for delegation); J. Bendor, A. Glazer & T. Hammond, *Theories of Delegation*, 4 ANN. REV. POL. SCI. 235, 264 (2001) (describing the “gains” of “tapping” expertise).

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.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.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.⁵⁷ If FEMA has any interest in preventing future needless death and a concomitant ripple-effect of public distrust,⁵⁸ this must now change.

To this end, I look to the theory of administrative constitutionalism⁵⁹ described by scholars Gillian Metzger,⁶⁰ Sophia Z. Lee,⁶¹ William Eskridge and John Ferejohn,⁶² and Karen Tani.⁶³ As Metzger explains, administrative

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.")

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.

57. See *infra* note 255-59.

58. See *Epistemic Injustice in Puerto Rico*, *supra* note 21, at 62-63 (describing distrust).

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.

60. See Metzger, *supra* note 5, at 1900.

61. See Sophia Z. Lee, *Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present*, 96 VA. L. REV. 799, 801-2 (2010).

62. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 31 (2010).

63. Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 DUKE L.J. 1847, 1854 (2017) [hereinafter, *An Administrative Right*]; Karen M. Tani, *Welfare and Rights Before the Movement: Rights as a Language of the State*, 122 YALE L.J. 314, 320-23 (2012) [hereinafter, *Welfare and Rights*].

constitutionalism is the “elaboration” of “new constitutional understandings by administrative actors.”⁶⁴ 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.⁶⁵

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.⁶⁶ The Agency must also be trained in critical race and feminist legal theory’s methods – that is, narrative method and self-critique⁶⁷ – 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,⁶⁸ reveals that agency actors have responded to feminist and race liberationist theory and consciousness before;⁶⁹ 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,

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,⁷⁰ Rosemary O’Leary,⁷¹ Eric Posner,⁷² Daniel Hemel,⁷³ and John Michaels⁷⁴ as “bureaucratic resistance from below.”⁷⁵

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.”).

73. Daniel Hemel, *President Trump vs. the Bureaucratic State*, YALE J. ON REG.: NOTICE & COMMENT (Feb. 18, 2016), <http://yalejreg.com/nc/president-trump-vs-the-bureaucratic-state-by-daniel-hemel/> [<https://perma.cc/3M2W-H9WB>] (“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).”).

74. Jon Michaels, *Administrative Checks and Balances in the Trump Administration*, JUST SECURITY (Nov. 11, 2016), <https://www.justsecurity.org/34327/presidents-arent-foxhole-administrative-checks-balances-trump-administration/> [<https://perma.cc/Z5PK-H44N>] (“Consider the civil service. Our professional, politically insulated civil service is ostensibly well positioned to limit presidential overreaching.”).

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 1974.⁷⁶ 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.⁷⁷ Jimmy Carter established FEMA by Executive Order in 1979,⁷⁸ but Congress has “lent its approval of the agency and ratified its activities both by appropriations and by amendments to” the Stafford Act.⁷⁹ The Stafford Act constitutes a Congressional authorization to the President to “provide technical assistance to the States,”⁸⁰ and to provide funds for disaster aid.⁸¹

B. THE STAFFORD ACT’S PROVISIONS

The Stafford Act grants FEMA the authority to respond to disasters when the President declares a disaster.⁸² Under the Stafford Act, the President (upon request by a state or territory’s governor), may declare a major disaster,⁸³ 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

76. Pub. L. No. 93-288, 88 Stat. 143 (1974) (codified at 42 U.S.C. §§ 5121-5207 (2000)).

77. Jillian L. Morrison, *Post-Disaster Contracting: An Examination of the Costs Associated with the Stafford Act’s Local Contracting Preference and Implementation Proposals to Maximize Community Revitalization*, 37 PUB. CONT. L.J. 687, 696–97 (2008).

78. *About the Agency*, FEMA, <https://www.fema.gov/about-agency> [https://perma.cc/5MPS-5AZQ].

79. David G. Tucker & Alfred O. Bragg, III, *Florida’s Law of Storms: Emergency Management, Local Government, and the Police Power*, 30 STETSON L. REV. 837, 861-62 (2001).

80. 42 U.S.C. § 5131(b) (2012).

81. 42 U.S.C. § 5131(b) (2012); *see also* Tucker & Bragg, III, *supra* note 79, at 861-62, 873.

82. *See* 42 U.S.C. § 5170a(1)-(2) (2012).

83. 42 U.S.C. § 5170 (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/1525368177262-9a9f9cbc941044058306af9a0a228c48/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

91. 42 U.S.C. § 5143(a), (b)(3) (2012).

92. 42 U.S.C. § 5143(b)(4) (2012).

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.⁹⁶ 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.⁹⁷ 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.⁹⁸ 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"⁹⁹ of Constitution's promise of equal protection.¹⁰⁰ The Act insufficiently guides FEMA agents to distribute aid in ways that are conscious of intersectional problems,¹⁰¹ 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.¹⁰²

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.

98. Somini Sengupta, *2018 Is Shaping Up to Be the Fourth-Hottest Year. Yet We're Still Not Prepared for Global Warming*, N.Y. TIMES (AUG. 9, 2018), <https://www.nytimes.com/2018/08/09/climate/summer-heat-global-warming.html> [<https://perma.cc/U324-5PT9>].

99. See *supra* note 11.

100. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

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-wracked 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

103. "We are deep into the life-saving mission," Brock Long told Chuck Todd on Meet the Press on August 27, 2017. 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/4R4C-VNY6].

104. Robinson Meyer, *What's Happening With the Relief Effort in Puerto Rico?*, THE ATLANTIC (OCT. 4, 2017), <https://www.theatlantic.com/science/archive/2017/10/what-happened-in-puerto-rico-a-timeline-of-hurricane-maria/541956/> [https://perma.cc/4MUT-V2PK] [hereinafter, *What's Happening*].

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. See *Major Hurricane Maria - September 20, 2017*, NATIONAL WEATHER SERVICE (SEPT. 20, 2017), <https://www.weather.gov/sju/maria2017> [https://perma.cc/7X34-7DUJ].

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,¹¹² perhaps in Caguas,¹¹³ which is in Puerto Rico's central mountain range,¹¹⁴ but more likely in San Juan.¹¹⁵ On Wednesday, September 20, Maria made landfall on the island nation of Dominica, creating enormous destruction.¹¹⁶ President Trump issued an emergency declaration for Puerto Rico and the Virgin Islands.¹¹⁷ FEMA installed urban search and rescue and canine teams and a "logistics package" on Puerto Rico.¹¹⁸ The rest of FEMA and federal personnel were located on St. Croix, in the Virgin Islands.¹¹⁹

On September 20, Hurricane Maria slammed into Puerto Rico at 6:15 a.m., south of Yabucoa Harbor.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.¹²¹ 30 inches of rain fell and all island power was lost.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

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, *Overview of Federal Efforts*].

113. *Id.* Though 11 distribution centers were installed eventually on the island, see Rafael Bernal, *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 *Fema Distribution Center Caguas Puerto Rico*, FEMA, <https://www.fema.gov/media-library/assets/videos/148945> [<https://perma.cc/25B6-RUFL>].

114. See WELCOME TO PUERTO RICO, <http://welcome.topuertorico.org/city/caguas.shtml> [<https://perma.cc/ULK6-GXTC>].

115. See *infra* text accompanying notes 143-44 (describing how FEMA stayed in San Juan).

116. See *What's Happening*, *supra* note 104.

117. See *Overview of Federal Efforts*, *supra* note 112.

118. *Id.*

119. *Id.*

120. See *What's Happening*, *supra* note 104; *Hurricane Maria*, NATIONAL HURRICANE CENTER (SEPT. 17, 2017), <https://www.nhc.noaa.gov/archive/2017/al15/al152017.discus.006.shtml?> [<https://perma.cc/H6PV-H5ZV>].

121. See *What's Happening*, *supra* note 104.

122. *Id.*

response.”¹²³ President Trump declared “that a major disaster exists” in Puerto Rico and ordered Federal assistance to Commonwealth and local recovery efforts,¹²⁴ triggering FEMA relief exercises to be performed under the powers vested by the Stafford Act.¹²⁵

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.¹²⁶ We do know that two FEMA search and rescue teams were engaging in “reconnaissance” activities then.¹²⁷ FEMA’s distribution center possessed 274,000 meals, 25 generators, and more than 500 cots.¹²⁸ On September 22, 7,000 federal employees, including 250 FEMA investigators, were “on the ground in Puerto Rico and U.S. Virgin Islands.”¹²⁹ National Guard Bureau had 1,600 service members “in the U.S. Virgin Islands and Puerto Rico.”¹³⁰ 70 Federal law enforcement officers traveled to San Juan, and three Alcohol, Tobacco and Firearms response teams also made their way to the island.¹³¹

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

123. See Juanita Philip & Jessica Barnett, *National Guard Plans Relief Efforts as Hurricane Maria Slams Puerto Rico*, DEPT. OF DEFENSE (SEPT. 20, 2017), <https://www.defense.gov/News/Article/Article/1318026/national-guard-plans-relief-efforts-as-hurricane-maria-slams-puerto-rico/> [<https://perma.cc/RT4P-UV2T>].

124. *President Donald J. Trump Approves Puerto Rico Disaster Declaration*, WHITEHOUSE.GOV (SEPT. 21, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-approves-puerto-rico-disaster-declaration-2/> [<https://perma.cc/G2Z6-HEJA>].

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 25,¹³² and the more than 40,000 federal personnel who sped to Florida four days after Hurricane Irma hit on September 10.¹³³

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.¹³⁴ And then, on September 30, he tweeted that Puerto Ricans were ungrateful for the aid that they *were* allegedly receiving: “[They] 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.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,¹³⁶ federal responders did not take into

132. “We are deep into the life-saving mission,” Brock Long told Chuck Todd on Meet the Press on August 27, 2017, 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/PZ6K-CTHR>].

133. Eric Levenson, *3 storms, 3 responses: Comparing Harvey, Irma and Maria*, CNN (SEPT. 27, 2017), <https://www.cnn.com/2017/09/26/us/response-harvey-irma-maria/index.html> [<https://perma.cc/AX5H-XUP2>].

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>].

135. Lisa Marie Segarra, *Donald Trump: Puerto Rico Wants ‘Everything to Be Done for Them,’* TIME (SEPT. 30, 2017), <http://time.com/4963903/donald-trump-puerto-rican-leaders-want-everything-to-be-done-for-them/> [<https://perma.cc/L4T3-2UW6>]; Donald Trump (@realDonaldTrump), TWITTER (SEPT. 30, 2017, 4:29 AM), <https://twitter.com/realDonaldTrump/status/914089888596754434> [<https://perma.cc/BDT6-83TX>].

136. Alexia Fernández Campbell & Umair Irfan, *Puerto Rico’s deal with Whitefish was shady as hell, new records show*, VOX (NOV. 15, 2017), <https://www.vox.com/policy-and-politics/2017/11/15/16648924/puerto-rico-whitefish-contract-congress-investigation> [<https://perma.cc/ND2L-PQ5W>]. Six days after landfall, Puerto Rico’s power company, PREPA, contracted with Whitefish Energy Holdings to restore energy to Puerto Rico’s electrical grid, but Whitefish failed at its task. *Id.* Then, FEMA issued a \$30M contract with Bronze Star LLC to supply blue tarps to the island, but the supplies did not show up. See Tami Abdollah & Michael Biesecker, *Big contracts, no storm tarps for Puerto Rico*, SUNSENTINEL, (Nov. 28, 2017), <http://www.sun-sentinel.com/business/fl-bz-florida-company-storm-tarps-20171128-story.html> [<https://perma.cc/2VCX-2WWC>].

consideration the special needs of *rural, mountain communities*:¹³⁷ Agents who had made it Puerto Rico appeared to remain in the safety of San Juan, Puerto Rico's capital;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.¹³⁹ It may also be possible that the presence of various military personnel and different agency responders and volunteers imbued agents with "pluralistic ignorance,"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.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."¹⁴² She also reported that FEMA agents appeared to be laying low in San Juan,¹⁴³ a claim backed up Norbert Figueroa, a Puerto Rican architect and blogger whom I interviewed in November of 2017.¹⁴⁴

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

137. See, e.g., *infra* notes 143-44.

138. See *id.*

139. 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"); *id.* at 434-35 (observing a problem post-Katrina of coordination between FEMA and the Department of Health and Human Services.).

140. KAREN S. JOHNSON-CARTEE, *NEWS NARRATIVES AND NEWS FRAMING: CONSTRUCTING POLITICAL REALITY* 36 (2005).

141. Samantha Schmidt & Arelis R. Hernandez, *Trapped In the Mountains, Puerto Ricans Don't See Help, or a Way Out*, WASH. POST (OCT. 1, 2017), https://www.washingtonpost.com/national/trapped-in-the-mountains-puerto-ricans-dont-see-help-or-a-way-out/2017/10/01/7621867e-a647-11e7-ade1-76d061d56efa_story.html?utm_term=.5a7c6437320c [https://perma.cc/8PE7-TJPJ].

142. Rachel Maddow, *FEMA: Not Our Job to Distribute Food and Water in Puerto Rico*, MSNBC (OCT. 9, 2017), <http://www.msnbc.com/rachel-maddow/watch/d-block-puerto-rico-1067297859792?playlist=associated> [https://perma.cc/DKL3-A9XQ].

143. *Id.* ("Nearly three weeks after Hurricane Maria, FEMA has not delivered food or water to the [rural area] of Aibanito.")

144. See *Epistemic Injustice*, *supra* note 21, at 42 (saying "they made a hub" in San Juan).

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).

147. Frances Robles et al., *Official Toll in Puerto Rico: 64. Actual Deaths May Be 1,052*, *N.Y. TIMES* (DEC. 9, 2017), <https://www.nytimes.com/interactive/2017/12/08/us/puerto-rico-hurricane-maria-death-toll.html> [<https://perma.cc/6SW8-GFUU>].

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®ion=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 2018.¹⁵¹ The majority of these casualties were caused by “interruptions” to health care.”¹⁵² Interruptions were caused by “disruptions in basic utilities,” such as electricity,¹⁵³ 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.¹⁵⁴ As proof of this exacerbation, one of my interviewee relayed that aides to patients in eldercare institutions fled¹⁵⁵—a reaction that was seen throughout the island, which disgorged a rapid mainland exodus of 73,000 to over 200,000 souls by October.¹⁵⁶ This self-evacuation contributed to loss of life: New York Magazine reported that some hospital deaths were caused by a paucity of staff¹⁵⁷ and the

151. *Puerto Rico Increases Hurricane Maria Death Toll to 2,975*, BBC (AUG. 29, 2018), <https://www.bbc.com/news/world-us-canada-45338080> [<https://perma.cc/3UVR-XV9Q>].

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 Maria 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://perma.cc/EPG9-NANV>] (estimating more than 73,000 Puerto Rican residents fled to Florida); Florida SERT (@FLSERT), TWITTER (DEC. 21, 2017), <https://twitter.com/FLSERT/status/943919645714731015> [<https://perma.cc/72WV-ED8B>] (“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.huffpost.com/entry/puerto-rico-families-separated-hurricane-maria-months-later_us_5a7a3d7ee4b07af4e81ee579 [<https://perma.cc/AD87-NVPN>] (“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.”).

157. Mattahias Schwartz, *Maria’s Bodies*, N.Y. MAGAZINE (DEC. 22, 2017), <http://nymag.com/daily/intelligencer/2017/12/hurricane-maria-man-made-disaster.html> [<https://perma.cc/KLT5-Q8W9>] (“At least two patients died at a hospital near San Juan when

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%).”¹⁵⁸

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.¹⁵⁹ 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,¹⁶⁰ L.A.-based nurse Sophia Hau Yau,¹⁶¹ Brooklyn-based nurse Roxanna Garcia,¹⁶² and resident Norbert Figueroa.¹⁶³ Further, news outlets like Politico lambasted an apparent “double standard,”¹⁶⁴ which

there weren't enough staff on hand to operate the pumps, a doctor who was present told me.”).

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).

164. Danny Vinik, *How Trump favored Texas Over Puerto Rico*, POLITICO (MAR. 27, 2018), <https://www.politico.com/story/2018/03/27/donald-trump-fema-hurricane-maria-response-480557> [<https://perma.cc/8GNK-L5U5>].

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).

166. See Jeremy B. White, ‘Something close to genocide’: San Juan mayor Carmen Yulin Cruz begs for more Puerto Rico relief, THE INDEPENDENT (SEPT. 29, 2017), <https://www.independent.co.uk/news/world/americas/us-politics/puerto-rico-crisis-latest-san-juan-genocide-mayor-beg-carmen-yulin-cruz-aid-relief-a7975021.html> [<https://perma.cc/XM9S-U28R>].

167. *Epistemic Injustice*, *supra* note 21, at 26-27.

knowledge or authority,¹⁶⁸ 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.¹⁶⁹ 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?¹⁷⁰ 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. Thus purely structural operations of identity power can control whose would-be contributions become public, and whose do not.” *Id.*

169. On Fricker’s commitment to storytelling as a way to escape the harms of epistemic injustice, see *Epistemic Injustice*, *supra* note 21 at 65; MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND ETHICS OF KNOWING 148-51 (2009). On her commitment to self-critique, see *id.* at 84; *Epistemic Injustice*, *supra* note 21, at 64-65.

170. It *could* be argued that FEMA agents were simply being negligent in their administration of the Stafford Act, and that any legal response should rely upon a lawsuit seeking to have a court set aside FEMA’s decision as “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A) (2012); see also *Ctr. For Biological Diversity v. U.S. E.P.A.*, 90 F. Supp. 3d 1177, 1197 (W.D. Wash. 2015). A court will find that an administrative agency has acted arbitrarily and capriciously if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Dioxin/Organochlorine Ctr. v. Clarke*, 57 F.3d 1517, 1521; see also *Motor Vehicle Mfr. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 44 (1983).

Did FEMA fail to take into consideration an “important aspect of the problem?” *Id.* at 43. FEMA may reply that did not so fail, but was operating within the straightened circumstances occasioned by a hurricane season that had already seen two major storms hit the United States and its territories, and that it was simply doing its best with the resources available to it and, yes, the logistics that created such high obstacles. There is a good chance that such an argument would be agreed with by courts. The standard of review is “highly deferential, presume[s] the agency action to be valid and requires affirming the agency action if a reasonable basis exists for its decision.” *Kern Cnty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006) (internal punctuation omitted). Courts will affirm the agency’s decision if it articulates a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfr. Ass’n*, 463 U.S. at 43. The court’s deference will be “highest when reviewing

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.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.¹⁷² There is a provision for unemployment assistance for low-income migrants and seasonal workers who find themselves in need after a disaster.¹⁷³ In addition, applications of public housing assistance are giving priority,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,¹⁷⁵ and low-income people may also be eligible for legal assistance.¹⁷⁶ Disabled people receive attention: Those whose homes have been rendered inaccessible are eligible for housing assistance,¹⁷⁷ the FEMA administrator must distribute information in ways that can be accessed by people with disabilities,¹⁷⁸ mass evacuation plans that are implemented must be address the needs of the elderly and disabled,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).

171. *See supra* note 38 (noting that critical race feminists see a state failure to engage intersectionality as a problem of equal protection).

172. 42 U.S.C. § 5151 (2012).

173. 42 U.S.C. § 5177(a) (2012).

174. 42 U.S.C. § 5153 (2012).

175. 42 U.S.C. § 5179(a)-(b) (2012).

176. 42 U.S.C. § 5182 (2012).

177. 42 U.S.C. § 5174 (2012).

178. 42 U.S.C. § 5196f(a)(2)(b) (2012).

179. 7 U.S.C. § 321a(b)(5) (2012).

coordinator.¹⁸⁰ 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.¹⁸¹ 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.”¹⁸²

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.¹⁸³ 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,¹⁸⁴ or stay in place in their resource centers,¹⁸⁵ 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.¹⁸⁶ In addition, requiring the Administrator to “ensure”¹⁸⁷ that information would be made available to victims in their languages

180. 6 U.S.C. § 321b (2012).

181. 6 U.S.C. § 748(b)(2)(A)(v) (2012).

182. 42 U.S.C. § 5196f(a)(1)-(3) (2012).

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).

187. See 42 U.S.C. § 5196f(a)(2) (2012).

and to create a “clearinghouse”¹⁸⁸ 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,¹⁸⁹ 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 protocols¹⁹⁰ 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,¹⁹¹ these suggestions would require a recognition of critical race theory’s famous narrative method¹⁹² 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.¹⁹³ It is true that *some* legislatures have taken pains to require that actors

188. See 42 U.S.C. § 5196f(a)(3) (2012).

189. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 335 (1987).

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.”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.”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 ukases 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.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,¹⁹⁷ and it provides forms of assistance for poor people, migrants, seasonal workers, and disabled and elderly people, and people with special needs.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.¹⁹⁹

194. Assemb. B. 2174, Cal. Leg., 2017—18 Reg. Sess. (Cal. 2018).

195. N.C. GEN. STAT. § 130A-221.1 (2014).

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.’”).

197. 42 U.S.C. § 5151 (2012).

198. See *supra* notes 172-78.

199. See *supra* note 150.

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.²⁰⁰ 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*,²⁰¹ and its failure to recognize a constitutional claim based on most state failures to aid,²⁰² indicates that misbegotten aid distribution does

200. See *supra* note 53.

201. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

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.

Note, however, that the President and federal legislators would enjoy absolute immunity. See *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982); *Eastland v. U. S. Servicemen's Fund*, 421 U.S. 491, 503 (1975). I am indebted for help from my colleague and friend, Allan Ides.

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,²⁰³ William Eskridge and John Ferejohn,²⁰⁴ Sophia Z. Lee,²⁰⁵ and Karen Tani,²⁰⁶ 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.”²⁰⁷ She also describes this as constitutional “norm entrepreneur[ship].”²⁰⁸ 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.²⁰⁹

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.”²¹⁰ 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.²¹¹ She also details how, in the 1970’s, NLRB Chairman Edward

203. See Metzger, *supra* note 5, at 1900.

204. See WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 31 (2010).

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 & FERREJOHN, *supra* note 204, at 31.

210. See Lee, *supra* note 61, at 801-02.

211. SOPHIA Z. LEE, *THE WORKPLACE CONSTITUTION FROM THE NEW DEAL TO THE NEW RIGHT* 137-38, 148 (2014).

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.²¹²

Karen Tani traces administrative constitutionalism's "rights pioneer[ing]"²¹³ 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.²¹⁴ 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"²¹⁵ influenced the U.S. Department of Education's efforts to eradicate sexual violence on campuses through its issuance of "Revised Guidance" communications in 2001,²¹⁶ and its "Dear Colleague" letters that it sent in 2011.²¹⁷ Tani notes that these administrative developments were linked to insights about rape culture developed by theorists such as Catharine MacKinnon and anthropologist Peggy Sanday.²¹⁸ 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.²¹⁹

212. *Id.* at 179.

213. *See An Administrative Right, supra* note 63, at 1854.

214. *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.").

215. *See An Administrative Right, supra* note 63, at 1902.

216. *Id.* at 1864.

217. *Id.* at 1874.

218. *Id.* at 1870.

219. *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 intersectionality²²⁰ — 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*,²²¹ 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.²²² Such a comprehension would have to accompany a recognition of the meaning and effects of intersectionality as it pertains to disaster impact and response.²²³

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,”²²⁴ is a concept rooted in a critical race feminist consciousness,²²⁵ and it comes equipped with a method, that of narrative gathering and dispersal.²²⁶ Critical theories of race, gender, disability and sexuality resist “univocal” stories of law and justice,²²⁷ and foster, instead a “multivocal”²²⁸ 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 storytelling²²⁹ as well as interrogations of their own assumptions in energized engagements of self-critique,²³⁰ so as to “avoid [the] cultural imperialism that perpetuates the supremacies promoted by the colonial power.”²³¹

224. Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 309-10 (2001) (“Multidimensionality ‘recognize[s] the inherent complexity of systems of oppression . . . and the social identity categories around which social power and disempowerment are distributed.’ Multidimensionality posits that the various forms of identity and oppression are ‘inextricably and forever intertwined’ and that essentialist equality theories ‘invariably reflect the experiences of class- and race-privileged’ individuals. Multidimensionality, therefore, arises out of and is informed by intersectionality theory.”).

225. Richard Delgado, *Rodrigo’s Reconsideration: Intersectionality and the Future of Critical Race Theory*, 96 IOWA L. REV. 1247, 1257-259 (2011) (linking all three concepts).

226. See INTRODUCTION TO CRITICAL RACE FEMINISM 3 (Adrien Katherine Wing eds., 1997) (“CRT’s critique of society thus often takes the form of storytelling and narrative analysis — to construct alternative social realities and protest against acquiescence to unfair arrangements designed to benefit others.”); see also Delgado, *supra* note 225.

227. See, e.g., Philip N. Meyer, *Introduction: Will You Please Be Quiet, Please? Lawyers Listening to the Call of Stories*, 18 VT. L. REV. 567, 570 (1994) (“Our communities are multivocal. The law, however, speaks univocally, and systematically excludes the voices and stories of those who ought to be included in the community of authoritative speech. The study of stories provides models for a legal discourse that can achieve a multivocal community.”).

228. *Id.*

229. On Fricker’s commitment to storytelling as a way to escape the harms of epistemic injustice, see *Epistemic Injustice*, *supra* note 21, at 65; FRICKER, *supra* note 169, at 148-51.

230. See Robert S. Chang & Natasha Fuller, *Performing LatCrit*, 33 U.C. DAVIS L. REV. 1277, 1289 (2000) (describing the “importance of self-reflection and self-critique to protect against inadvertent reenactments of the kinds of subordination we claim to be working against.”). On Fricker’s commitment to self-interrogation, see FRICKER, *supra* note 169, at 64-65.

231. Pedro A. Malavet, *Outsider Citizenships and Multidimensional Borders: The Power and Danger of Not Belonging*, 52 CLEV. ST. L. REV. 321, 327 (2005).

This *critical* administrative constitutionalism would mandate, then, that FEMA's agents challenge their own assumptions,²³² come to grips with their own colonial points of view,²³³ and begin to gather multivocal narratives about vulnerable populations' life ways and intersectional problems and dynamics²³⁴ 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,²³⁵ the law permits federal agencies to use experts and consultants, and to prioritize the hiring of local people when responding to a disaster.²³⁶ 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 area²³⁷ and to coordinate with

232. See *supra* notes 230-31.

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.").

237. 42 U.S.C. § 5143(a) (2012).

organizations that agree to operate under his advice or direction,²³⁸ as well as take other action he deems necessary to provide local citizens and public officials with assistance.²³⁹ Narrative gathering in real time would qualify as such “coordination.”²⁴⁰ 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.²⁴¹ Again, the gathering and absorption of these narratives would help increase intersectional consciousness and dispel the epistemic injustice²⁴² and pluralistic ignorance and unconscious bias that worked so disastrously in Puerto Rico.²⁴³

Information gathering may also be engaged in before disasters strikes under current FEMA’s existing “Pre-Disaster Mitigation Grant Program,”²⁴⁴ which “awards planning and project grants and provides opportunities for raising public awareness about reducing future losses before disaster strikes.”²⁴⁵

Further, FEMA has an extensive training program, including a Diversity Awareness Course²⁴⁶ and a Civil Rights and FEMA

238. 42 U.S.C. § 5143(b)(3) (2012).

239. 42 U.S.C. § 5143(b)(4) (2012).

240. 42 U.S.C. § 5143(b)(4) (2012). Again, according to the FEMA website, on Sept. 17, “FEMA ha[d] 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>].

241. *Hazard Mitigation Grant Program*, FEMA, <https://www.fema.gov/hazard-mitigation-grant-program> [<https://perma.cc/MQU8-R3JY>].

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 Grant Program*, FEMA, <https://www.fema.gov/pre-disaster-mitigation-grant-program> [<https://perma.cc/9Y9J-CDEA>].

245. *Id.*

246. *IS-20.18: Diversity Awareness Course 2018*, FEMA, <https://training.fema.gov/IS/courseOverview.aspx?code=IS-20.18> [<https://perma.cc/6L3S-PF9V>].

Disaster Assistance course,²⁴⁷ which, if adapted to critical race theory concerns, could introduce FEMA agents to the concepts of intersectionality, strenuous self-critique, and narrative gathering.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,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

247. *S-21.18: Civil Rights and FEMA Disaster Assistance*, FEMA, <https://training.fema.gov/IS/courseOverview.aspx?code=IS-21.18> [<https://perma.cc/HVF3-9K6R>].

248. See *FEMA Emergency Management Institute, List of Independent Study Courses*, FEMA, <https://training.fema.gov/is/crslist.aspx> [<https://perma.cc/Z5BR-AR9K>].

249. See, e.g., Rachel Cleetus, *Ignoring the Role Climate Change Plays in US Disasters Helps No One*, COMMON DREAMS (MAR. 16, 2018), <https://www.commondreams.org/newswire/2018/03/16/ignoring-role-climate-change-plays-us-disasters-helps-no-one> [<https://perma.cc/AR7R-SZ8C>] (“The Federal Emergency Management Agency (FEMA)—the government’s disaster first responder—has scrubbed references to “climate change” from its four-year strategic plan released late yesterday.”); Michael Taylor, *Climate Change in the Caribbean – learning lessons from Irma and Maria*, THE GUARDIAN (OCT. 6, 2017), <https://www.theguardian.com/environment/2017/oct/06/climate-change-in-the-caribbean-learning-lessons-from-irma-and-maria> [<https://perma.cc/3YZ8-Q3BU>] (“Scientific analysis shows that the climate of the Caribbean region is already changing in ways that seem to signal the emergence of a new climate regime. Irma and Maria fit this pattern all too well.”).

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

250. See FEMA, 2017 HURRICANE SEASON FEMA AFTER-ACTION REPORT iii (July 12, 2018), <https://www.fema.gov/media-library-data/1531743865541-d16794d43d3082544435e1471da07880/2017FEMAHurricaneAAR.pdf>. [https://perma.cc/65W5-CVNB] [hereinafter, AFTER-ACTION REPORT].

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.”²⁵⁷ 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.”²⁵⁸ This statement was interpreted by some observers as “urg[ing] communities in harm’s way not to count so heavily on FEMA in a future crisis.”²⁵⁹

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,”²⁶⁰ 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.”²⁶¹

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.²⁶² 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.

259. Frances Robles, *FEMA Was Sorely Unprepared for Puerto Rico Hurricane, Report Says*, N.Y. TIMES (JULY 12, 2018), <https://www.nytimes.com/2018/07/12/us/fema-puerto-rico-maria.html> [<https://perma.cc/A73L-EUKW>]; Emily Atkin, *The Troubling Failure of America’s Disaster Response*, NEW REPUBLIC (JULY 17, 2018), <https://newrepublic.com/article/149899/troubling-failure-americas-disaster-response> [<https://perma.cc/B3HE-267F>] (“Trump’s FEMA wasn’t ready for last year’s record-breaking hurricane season, and it wants the public to know that it’s not ready for another one.”).

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.²⁶³ 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 acronym²⁶⁴ and a footnote reference to “disability integration.”²⁶⁵

Further, the report’s emphasis on territories’ responsibilities to be their own saviors²⁶⁶ 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 Florida²⁶⁷ is felt by many Puerto Ricans and other Americans to constitute a deprivation of equal protection of the laws.²⁶⁸ 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).²⁶⁹ 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

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.

269. *Emergency Management Institute Mission*, FEMA, <https://training.fema.gov/mission.aspx> [<https://perma.cc/Q4E4-Y4GP>].

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 values²⁷³ 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 accommodation²⁷⁵ 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.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”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.²⁷⁸ For FEMA, fairness means allowing everyone equal entry to the accommodations provided by the Agency²⁷⁹ – 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.”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.”²⁸¹ “Denial” here does not seem to mean a meaningful denial – such as that occurs when a FEMA

(*Civil Rights Act, As Amended*, panel 8 of 85 states “Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination in programs and activities receiving Federal financial assistance based on: Race. Color. National origin.”).

276. See *Welfare and Rights*, *supra* note 63, at 319.

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.”).

278. See *supra* note 248.

279. The problems with “sameness” have long been noted, for example, by feminist theorists. See, e.g., Keith Cunningham-Parmeter, (*Unequal 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.”).

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.”).

281. *Id.* (*Discrimination*, panel 20 of 85).

agent cannot conceive that certain foods will be poisonous to diabetic victims²⁸² or that people live in remote mountain communities.²⁸³ 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”²⁸⁴ person of color or other minority. Further, there are lessons that FEMA contractors not racially or sexually harass victims,²⁸⁵ that minority communities not be deprived of disaster recovery centers,²⁸⁶ that agents “take the initiative” to cross language hurdles²⁸⁷ (a lesson that failed in Puerto Rico in the Maria aftermath),²⁸⁸ and that written information be made available in non-English languages²⁸⁹ and made accessible with those with visual impairments²⁹⁰ – 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,”²⁹¹ plus a reminder that there

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 Your 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”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.”²⁹³ Throughout, the emphasis in the lesson is that everyone get treated the same.²⁹⁴

There is, however, one promising panel in the Civil Rights course, titled *Self Assessment*.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.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.

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

292. 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.”).

293. See *id.* (*What If Your Own Actions Are in Question?*, panel 79 of 85).

294. 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.”).

295. See *id.* (*Self Assessment*, panel 81 of 85).

296. *Id.*

and their behaviors, as well as how others perceive us,”²⁹⁷ and instructs that appreciating diversity “[h]elps us to plan for and respond to the needs of a diverse survivor population.”²⁹⁸ 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,”²⁹⁹ and also teaches that “[p]eople who are culturally or geographically isolated may have greater risk and be disproportionately vulnerable to disaster.”³⁰⁰ 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.”³⁰¹

However, these are all vague suggestions for how recognizing diversity can be “helpful,” instead of inculcating a value system like A. Delafield Smith’s.³⁰² 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.³⁰³ 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.³⁰⁴ The course also sets an extremely low bar – instead of training agents in how to better comprehend the critical realities of

297. See *FEMA IS-0020.18: Diversity Awareness Course 2018*, FEMA, <https://emilms.fema.gov/IS0020.18/curriculum/1.html> [<https://perma.cc/887U-77XX>] (*Diversity Definition*, panel 7 of 73).

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”)³⁰⁵ and not to call people names that qualify as anti-disability hate speech,³⁰⁶ 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.³⁰⁷ 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.³⁰⁸

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.³⁰⁹

Third, it needs to recognize intersectionality in its preparation for the future and its creation of methodology for crisis responses.³¹⁰

305. *See id.* (*Disability Etiquette*, 53 of 73).

306. *See id.* (*Language to Avoid*, 54 of 73).

307. *See id.* (*Offensive vs. Non-Offensive Language Related to LGBTQIA*, panel 65 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.³¹¹

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

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

Seventh, it must build upon the above-mentioned spaces within its extant training that makes room for these dynamics.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,³¹⁵ Peggy Li,³¹⁶ Claudia Meyer and her team,³¹⁷ Emma Kowal, Halyey Franklin,

311. See *supra* note 240 (finding spaces within the Stafford Act to implement narrative gathering).

312. See text accompanying *supra* note 236 (discussing the engagement with people on the ground as experts and consultants).

313. See *supra* note 230 (discussing the need to interrogate one's own assumptions).

314. See *supra* text accompanying notes 240-45 (making recommendations on how to do so).

315. 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.").

316. 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.").

317. 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.").

and Yin Paradies,³¹⁸ Ellen K. Pao,³¹⁹ Kate Hanigan,³²⁰ and Nicole Robinson,³²¹ not to mention the writings of Kimberlé Crenshaw,³²² Darren Hutchinson,³²³ Frank Valdes,³²⁴ Angela Harris,³²⁵ Berta Esperanza Hernández Truyol,³²⁶ scholars who

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.”).

319. Pao seeks to form solutions to the dearth of women of color in tech through creative intersectional strategies. See Ellen K. Pao, *True Diversity is Intersectional*, MEDIUM (MAY 26, 2016), <https://medium.com/projectinclude/true-diversity-is-intersectional-2282b8da8882> [<https://perma.cc/9GZS-SQ9W>].

320. Kate Hanigan, *Implications of Gender and Racial Intersectionality in the K-8 Classroom* 7 (2017) (graduate theses and dissertation, University of Portland) <https://pilotscholars.up.edu/cgi/viewcontent.cgi?article=1047&context=etd> [<https://perma.cc/6CW2-E7V7>] (“intersectional awareness is associated with positive perceptions of diverse groups and social justice activism, which might be considered essential dispositions of culturally responsive teachers.”).

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.

323. Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 291 (2001); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 9-10 (1999); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 566 (1997).

324. Francisco Valdes, *Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship; or, Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1451 (1998) (intersectionality, and its related concept of multidimensionality (which more specifically encompasses masculinities and queerness), “balanc[e] human complexity and social heterogeneity in a scholarship of antisubordination solidarity.”).

325. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 615 (1990) (describing multiple consciousness).

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) (“embrace[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,³²⁷ 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 beholden³²⁸ to a President who offers emotional supports to white supremacists,³²⁹ mocks handicapped people,³³⁰ tweeted about Puerto Rican ingratitude when people were dying,³³¹ and then denied the death toll estimate of approximately 3,000 people in September of 2018.³³²

challenged; and so onFalseLatinas/os, because of our many components, have lived multidimensionallyFalse”); Berta Esperanza Hernández-Truyol, *Borders (En)Gendered: Normativities, Latinas, and a LatCrit Paradigm*, 72 N.Y.U. L. REV. 882, 883-85 (1997); Berta Esperanza Hernández-Truyol, *Latina Multidimensionality and LatCrit Possibilities: Culture, Gender, and Sex*, 53 U. MIAMI L. REV. 811, 812-15 (1999).

327. Francisco Valdes, *Poised at the Cusp: LatCrit Theory, Outsider Jurisprudence and Latina/o Self-Empowerment*, 2 HARV. LATINO L. REV. 1, 55 (1997) (noting that “[t]he symposium authors generally agree that these interrogations require LatCrit theorists to employ cross-disciplinary analysis as well as critical concepts like multiplicity, multi-dimensionality and intersectionality, which come from outsider legal scholars.”).

328. Chuck Ross, *FEMA Chief Defends Trump Tweets, Dings San Juan Mayor [Video]*, DAILY CALLER (SEPT. 13, 2017), <http://dailycaller.com/2017/09/30/fema-chief-defends-trump-tweets-dings-san-juan-mayor-video/> [<https://perma.cc/9C6L-5ZGC>] (“FEMA administrator Brock Long defended a series of tweets from President Trump blasting San Juan’s mayor for criticizing the relief efforts following Hurricane Maria. In an interview on CNN, Long suggested that Carmen Yulin Cruz, the mayor of Puerto Rico’s capital city, has failed to connect with a command center FEMA set up on the island to help with the relief effort.”).

329. See Michael D. Shear and Maggie Haberman, *Trump Defends Initial Remarks on Charlottesville; Again Blames ‘Both Sides,’* N.Y. TIMES (AUG. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-press-conference-charlottesville.html> [<https://perma.cc/2NCJ-XLW6>].

330. John Berman, *Trump mocks reporter with disability*, CNN (JUNE 25, 2019), <https://www.cnn.com/videos/tv/2015/11/26/donald-trump-mocks-reporter-with-disability-berman-sot-ac.cnn> [<https://perma.cc/QZ5A-YFMB>].

331. See *supra* note 135.

332. Alexander Mallin & Nataly Pak, *Trump Casts Doubt on Puerto Rico Hurricane Death Toll: ‘3000 People Did Not Die,’* ABC NEWS (SEPT. 13, 2018), <https://abcnews.go.com/Politics/trump-3000-people-die-puerto-rico-hurricanes-blames/story?id=57796141> [<https://perma.cc/NRC5-MJXW>] (“3000 people did not die in the two hurricanes that hit Puerto Rico,” Trump said in a tweet. “When I left the Island, AFTER the storm had hit, they had anywhere from 6 to 18 deaths. As time went by it did not

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.³³³ But, in seeking a method that is more in line with the bottom-up strategy of critical race feminism,³³⁴ we might do well to channel the work of Jennifer Nou,³³⁵ Rosemary O'Leary,³³⁶ Eric Posner,³³⁷ Daniel Hemel,³³⁸ John Michaels,³³⁹

go up by much. Then, a long time later, they started to report really large numbers, like 3000'.") (quoting Trump's Twitter account).

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,³⁴⁰ and Arden Rowell³⁴¹ and clamor for this awakening as a form of “bureaucratic resistance from below.”³⁴² 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 subdelegations³⁴³ censorious self-regulation,³⁴⁴

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.”).

341. Arden Rowell, *Environmental Lawmaking Within Federal Agencies and Without Judicial Review*, 32 J. LAND USE & ENVTL. L. 567, 573 (2017) (“Bureaucratic resistance has a long tradition in the administrative state. Resistance—or what Rosemary O’Leary picturesquely calls ‘guerrilla government’—arises when career public servants work against the wishes of their superiors.”).

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,³⁴⁵ and the inculcation of “role perception”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.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 constraints 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.”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

345. Cf., Adam Goldman & Michael S. Schmidt, *F.B.I. Agent Peter Strzok, Who Criticized Trump in Texts, Is Fired*, N.Y. TIMES (AUG. 13, 2018), <https://www.nytimes.com/2018/08/13/us/politics/peter-strzok-fired-fbi.html> [<https://perma.cc/7GQW-FWXA>].

346. MARISSA MARTINO GOLDEN, 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.”).

347. See Jennifer Nou, *Bureaucratic Exit and Loyalty under Trump*, TAKE CARE (JAN. 9, 2018), <https://takecareblog.com/blog/bureaucratic-exit-and-loyalty-under-trump> [<https://perma.cc/S4HY-D7HY>] (“Loyal civil servants are exercising voice through petitions, rogue Twitter accounts, and public demonstrations.”); *Hundreds Of Current And Former Epa Employees Protest Trump’s Nominee In Chicago*, CHIC. TRIB. (FEB. 6, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-trump-epa-protest-chicago-20170206-story.html> [<https://perma.cc/9MYH-JB63>].

348. Charles S. Maier, *Civil Resistance and Civil Society: Lessons from the Collapse of the German Democratic Republic in 1989*, in CIVIL RESISTANCE AND POWER POLITICS: THE EXPERIENCE OF NON-VIOLENT ACTION FROM GANDHI TO THE PRESENT 267 (2009).

named Demita Frazier: In 1974, Frazier, Beverly Smith, and Barbara Smith met to talk about “radical economics”³⁴⁹ and creating a Boston chapter of the National Black Feminist Organization.³⁵⁰ 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.³⁵¹ 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. . . .”³⁵²

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.³⁵³ 200 years ago, the Supreme Court in *McCulloch v. Maryland* established the test for when necessity and propriety could be found to exist,³⁵⁴ including the requirement that Congressional laws be “consist[ent] with the letter and spirit of the Constitution.”³⁵⁵ The Stafford Act, enacted by Congress in 1974,³⁵⁶ 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.

354. *See* *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

355. *Id.*

356. Pub. L. No. 93-288, 88 Stat. 143 (1974) (codified at 42 U.S.C. §§ 5121-5207 (2000)).

McCulloch.³⁵⁷ Furthermore, no one appears to be arguing that it is not.³⁵⁸

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.³⁵⁹ There is an inadequate attendance in the law to questions of race, class, gender, poverty, disability, rural, and elder status.³⁶⁰ 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.³⁶¹ 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.

357. See *McCulloch*, 17 U.S. (4 Wheat.) at 421.

358. See *supra* notes 95-96.

359. See *supra* notes 170-90 and accompanying text.

360. *Id.*

361. See Levenson, *supra* note 133.