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PRELIMINARY AND SUBJECT TO REVISION

ON FIRES, FLOODS, AND FEDERALISM

*Andrew Hammond**

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ABSTRACT

In the United States, law condemns poor people to their fates in states. Where Americans live continues to dictate whether they can access cash, food, and medical assistance. What's more, immigrants, territorial residents, and tribal members encounter deteriorated corners of the American welfare state. Nonetheless, despite repeated retrenchment efforts, this patchwork of programs has proven remarkably resilient. Yet, the ability of the United States to meet its people's most basic needs now faces an unprecedented challenge: climate change. As extreme weather events like wildfires and hurricanes become more frequent and more intense, these climate-fueled disasters will displace and impoverish more people. How can the United States adapt its welfare programs to assist Americans in the face of this threat?

This Article maps that uncharted territory. It contextualizes the climate crisis in our scholarly understanding of the American welfare state. It then canvasses the myriad disaster provisions in each major welfare program. Equipped with an understanding of the status quo, the Article proceeds to evaluate how federal law has fared, amid the recent spate of fires and floods. The Article attends to the role of Congress, weakened as it is by increased polarization and diminished capacity, and how the resulting delays and distortions in emergency relief have hampered the governmental response. The Article then brings state and local government into focus, and in doing so, demonstrates how assistance often excludes the most vulnerable Americans. The Article also extracts lessons from the pandemic response for climate adaptation of public benefits. The Article concludes with an agenda for how to adapt welfare programs to meet the climate crisis. That agenda starts and ends with the federal government, but it includes policies states, territories, and tribes could implement if Congress and federal agencies do nothing or not enough. The Article repurposes what we know about how the American welfare state functions now to inform what federal, state, and local government should do next.

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INTRODUCTION

Four and a half years ago, three Category 4 hurricanes—Harvey, Irma, and Maria—made landfall in the United States in less than a month. Before that, only one such powerful storm had hit the continental United States in a single season. The 2017 storms were among the five most destructive in American history.¹ After Harvey, nearly 800,000 Texans had to leave their homes because of significant flooding. Before Irma, government officials ordered the evacuation of nearly seven million Floridians. In Maria’s wake, no one in Puerto Rico had electricity for nearly two months, and power outages continued for six more. A few months later, several wildfires ravaged California, five of which were the most destructive in the Golden State’s history. Combined, the 2017 climate-fueled disasters threatened the lives and livelihoods of 47 million Americans.²

This kind of consistent, continent-wide devastation of the United States promises to be the new normal.³ And it will only get worse.⁴ The climate crisis demands adaptation.⁵ Every corner of our society, and consequently every field of law, will face different challenges from the climate crisis. This Article pursues that adaptation analysis for one area—namely, public benefits.⁶ The pressure on all

¹ FEMA, 2017 HURRICANE SEASON FEMA AFTER-ACTION REPORT 1 fig.3 (July 12, 2018), https://www.fema.gov/sites/default/files/2020-08/fema_hurricane-season-after-action-report_2017.pdf (listing the damage from top five most destructive hurricanes: Harvey, Irma, and Maria in 2017, Katrina in 2005, and Sandy in 2012).

² *Id.*

³ See Matthew Cappuci & Jason Samenow, *U.S. saw second-most billion-dollar weather disasters on record in 2021*, WASH. POST (Jan. 10, 2022) <https://www.washingtonpost.com/weather/2022/01/10/billion-dollar-disasters-2021/>; NASA, *2021 Tied for 6th Warmest Year in Continued Trend* (Jan. 13, 2022) <https://www.nasa.gov/press-release/2021-tied-for-6th-warmest-year-in-continued-trend-nasa-analysis-shows>; NOAA, *It’s official: July was Earth’s hottest month on record* (Aug. 13, 2021) <https://www.noaa.gov/news/its-official-july-2021-was-earths-hottest-month-on-record>.

⁴ See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2021: THE PHYSICAL SCIENCE BASIS SUMMARY FOR POLICYMAKERS 5 (2021), https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM.pdf (“Each of the last four decades has been successively warmer than any decade that preceded it since 1850.”). And there is evidence that climate change is causing and exacerbating disasters. See *id.* at 8 (2021) https://www.ipcc.ch/report/ar6/wg1/downloads/report/IPCC_AR6_WGI_SPM_final.pdf (stating that “[e]vidence of observed changes in extremes such as heatwaves, heavy precipitation, droughts, and tropical cyclones, and, in particular, their attribution to human influence, has strengthened since the Fifth Assessment Report (AR5)”).

⁵ See *What do adaptation to climate change and climate resilience mean?*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <https://unfccc.int/topics/adaptation-and-resilience/the-big-picture/what-do-adaptation-to-climate-change-and-climate-resilience-mean> (defining adaptation as “adjustments in ecological, social, or economic systems in response to actual or expected climatic stimuli and their effects or impacts”).

⁶ See Robert R.M. Verchick & Abby Hall, *Adapting to Climate Change While Planning for Disaster*, 2011 B.Y.U. L. REV. 2203, 2210 (2011) (identifying public benefits as part of adaptation strategies). Environmental law scholars have debated the meaning and merits of adaptation and mitigation, including whether adaptation undermines mitigation efforts. However, recent work has

levels of government to meet people's basic needs in the wake of these disasters is immense. More disaster survivors registered for government assistance in 2017 than in the previous 10 years combined.⁷ At the end of the 2019 fiscal year, Congress considered the largest annual appropriation for disaster relief for the third year in a row.⁸

Fortunately, societies already have social protection systems in place to help them meet this threat. More than a century ago, national governments began building welfare states—legal systems designed to better protect people against various risks of modern life, including unemployment, old age, and industrial accidents. Over the last hundred years, these welfare states have grown and persisted despite dramatic changes wrought by deindustrialization and globalization.⁹ To be sure, welfare states vary significantly across nations, driven in part by differences in political coalitions, social movements, and economic activity.¹⁰ But at a certain level of generality, they collectively represent a core function of government today.¹¹

But as welfare states enter a second century, are they ready for the climate crisis? As the environmental changes already underway become even more pronounced, welfare states will face more frequent demands for programs and services. The climate crisis will challenge the ability of public institutions to feed, house, and care for those displaced and deprived of necessities. In a sense, climate change and its attendant environmental catastrophes represent a new risk—or at least, a newly potent risk—of modern life.

And is the United States, the wealthiest nation on the planet, ready for this unprecedented challenge? This Article posits that the American welfare state's distinctive characteristics—including its reliance on state-administered and sometimes state-financed services and the resulting racial hierarchy—make it particularly ill-suited to meet the climate crisis. Indeed, recent events show the

suggested that the climate crisis will necessarily demand both. See, e.g., Katherine Trisolini, *Holistic Climate Change Governance: Towards Mitigation and Adaptation Synthesis*, 85 COLO. L. REV. 615 (2014); Robin Kundis Craig, “Stationarity is Dead”—*Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENV'T L. REV. 9 (2010).

⁷ FEMA, 2017 HURRICANE SEASON FEMA AFTER-ACTION REPORT (July 12, 2018), https://www.fema.gov/sites/default/files/2020-08/fema_hurricane-season-after-action-report_2017.pdf.

⁸ CONG. RSCH. SERV., THE DISASTER RELIEF FUND: OVERVIEW AND ISSUES, 17–18, figs.1 & 2 (Nov. 13, 2020), <https://fas.org/sgp/crs/homesecc/R45484.pdf>; see also CONG. RSCH. SERV., FY2019 DISASTER SUPPLEMENTAL APPROPRIATIONS: OVERVIEW (July 30, 2019), https://www.everycrsreport.com/files/20190730_R45844_bf64286a1a01398031c3eb548d3f32476e2bea80.pdf (documenting increases in federal disaster appropriations over the last several years).

⁹ See *infra* notes 38–42 and accompanying text.

¹⁰ See *id.*

¹¹ See, e.g., David Garland, *The Welfare State: A Fundamental Dimension of Modern Government*, 55 EUR. J. SOCIO. 327, 356 (2014) (arguing that “the welfare state is not a policy option that we are free to adopt or reject at will” but rather “a fundamental dimension of modern society, absolutely integral to the economic functioning and social health of industrialized capitalist societies”).

ways in which the U.S. struggles to provide basic assistance to people after climate-fueled disasters. In 2017, both California and Texas struggled to immediately implement disaster food assistance, closing eligibility in some counties before opening it in others.¹² And often federal, state, and local government cannot rely on public infrastructure, like schools or parks, to deliver benefits in-person. In Oregon, the air quality at schools was so toxic that that state needed a federal waiver to deliver sealed meals to children at their homes.¹³ After Hurricane Irma, 50,000 Floridians lined up at a park in Miami on a single day for food assistance.¹⁴ At another food site in Florida, so many people in line collapsed from heat exhaustion that police had to shut it down.¹⁵

By requiring that people apply for assistance in person, federal and state law discriminate against those who cannot stand in line for hours, like senior citizens, children, and people with disabilities—not to mention the people who care for them. That’s why New Yorkers with disabilities sued their city and state governments under the Americans with Disabilities Act.¹⁶ Yet, FEMA maintains that it cannot be sued under the Administrative Procedure Act for any discretionary benefit it provides Americans after a disaster.¹⁷ Courts routinely accept the federal agency’s defense.¹⁸ Even if FEMA could be sued, people would find it difficult to secure adequate representation. While federal law permits disaster legal services, those services are provided exclusively through volunteers from the ABA’s Young Lawyers Division.¹⁹ And states routinely refuse to permit out-of-state lawyers to provide representation to disaster survivors.²⁰

Meanwhile, Congress fails to reliably appropriate disaster relief. Following the horrific 2017 disasters across the country, Congress dithered in enacting additional appropriations.²¹ In the end, Iowa waited two months, California waited a few more, Florida waited nearly eight, and Puerto Rico waited over a year before Congress finally passed the disaster relief bill.²² This kind of governmental failure in the face of country-wide devastation is a grim vision of American governance in the coming decades. Unless we retrofit federal and state law now, more and more Americans who survive wildfires and hurricanes will go without food, shelter, and medical care.

With that sense of urgency, this Article makes three contributions. To begin, the Article analyzes how federal, state, and local government currently administer public benefits following climate-fueled disasters. Legal scholars who focus on

¹² See *infra* notes 208-212 and accompanying text.

¹³ See *infra* note 110 and accompanying text.

¹⁴ See *infra* notes 217–218 and accompanying text.

¹⁵ See *id.*

¹⁶ See *infra* notes 220–222 and accompanying text.

¹⁷ See *infra* notes 226–228 and accompanying text.

¹⁸ See *id.*

¹⁹ See *infra* notes 162-166 and accompanying text.

²⁰ See *infra* notes 168–172 and accompanying text.

²¹ See *infra* notes 194–206 and accompanying text.

²² See *id.*

poverty and inequality have paid insufficient attention to how public benefits programs drive disaster responses.²³ The Article also draws lawmaking lessons from recent examples, including but not limited to the fires in California and the storms in Florida, New York, Puerto Rico, and Texas. The Article attends to the litigation, legislation, and regulation that followed. The Article explores how these government efforts are shaped by and could further exacerbate the tiers of social citizenship that define the modern welfare state, including the exclusion of indigenous and territorial Americans.

Second, the Article incorporates lessons from the strengths and weaknesses of the American safety net's response to the COVID-19 pandemic. It lays out how Congress and state governments used existing welfare programs and created new ones in their responses to the pandemic. Specifically, the Article shows how Congress relied on and augmented longstanding programs like Medicaid, SNAP (Supplemental Nutrition Assistance Program), and unemployment insurance (UI) to help Americans make ends meet during a national emergency. The COVID-19 pandemic, while deadly and destabilizing in ways few could imagine, provoked our national government into providing unprecedented financial assistance in the first year of the pandemic. Marrying an analysis of the pandemic response with lessons learned from recent climate-fueled disasters points the way forward for further statutory fixes. The pandemic response illustrates how Congress and state governments possess significant power to ameliorate suffering and hardship.

Third, the Article concludes with recommendations on how to restructure public benefit programs to meet this daunting, planetary phenomenon. Here's a preview of the climate adaptation agenda for welfare programs laid out in detail below. First, poor people's access to these programs should not depend on the vagaries of politics on Capitol Hill or in the state houses. Instead, policymakers should decide *ex ante* who should receive what benefits before a climate-fueled disaster strikes. Second, these programs should be accessible to all people in need, not just people who can stand in line for eight hours. Third, these benefits should not evaporate at a state's borders, but travel with the people in need. This Article identifies how federal and state law should change along these lines of reliability, accessibility, and portability. In doing so, the Article presses the claim that a system of cooperative federalism cannot rise to the challenge of the climate crisis.

This Article confines its analysis to the means-tested programs that dominate the discourse of the American welfare state.²⁴ These programs also reach the most

²³ The notable exception is MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* (2013). Dauber's book charts how disaster relief helped create the New Deal welfare state, but its account is necessarily confined to the late nineteenth and early twentieth centuries.

²⁴ Means-tested programs refers to those public benefits in which eligibility is based primarily on need, in contrast to Social Security Old-Age Insurance and Medicare, access to which turns primarily on past contributions. *See, e.g.*, CONG. BUDGET OFF., *FEDERAL MANDATORY SPENDING FOR MEANS-TESTED PROGRAMS* (June 2019), <https://www.cbo.gov/system/files/2019-06/55347-MeansTested.pdf> (defining means-tested programs as those that "provide cash payments or other forms of assistance to people with relatively low income or few assets").

people. Following the changes in traditional cash assistance the 1996 welfare reform legislation, the last twenty-five years have seen significant increases in expenditures in the major means-tested public benefits.²⁵ For different reasons, the Earned Income Tax Credit (EITC),²⁶ Medicaid,²⁷ SNAP,²⁸ and Supplemental Security Income (SSI)²⁹ have grown steadily. While not for lack of trying, the Trump Administration and the 115th Congress were unable to make any long-lasting cuts, via legislation or regulation, to any of these programs.³⁰ This Article also discusses other programs whose funding and reach have deteriorated over time, such as UI, as well as programs administered by the Federal Emergency Management Agency (FEMA).³¹

²⁵ IFE FLOYD ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, TANF POLICIES REFLECT RACIST LEGACY OF CASH ASSISTANCE (Aug. 4, 2021), <https://www.cbpp.org/research/family-income-support/tanf-policies-reflect-racist-legacy-of-cash-assistance>.

²⁶ See Monica Prasad, *American Exceptionalism and the Welfare State: The Revisionist Literature*, 19 ANN. REV. POL. SCI. 187, 201 (2016) (summarizing the scholarship on the EITC as demonstrating “how the American welfare state has been surprisingly resilient in the era of neoliberalism”).

²⁷ See NFIB v. Sebelius, 567 U.S. 519, 627 (2012) (Ginsburg, J., concurring and dissenting in part) (“Expansion has been characteristic of the Medicaid program.”).

²⁸ See David Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1285–86 (2004) (detailing how “anti-hunger advocates” responded to the demands of welfare reform in the 1990s and managed to “save[] what in many respects is the best-designed means-tested program in the United States”).

²⁹ See Robert A. Moffitt, *The Deserving Poor, the Family, and the U.S. Welfare System*, 52 DEMOGRAPHY 729, 730 (2015) (arguing that U.S. social welfare spending grew from 1970 to 2006 with relatively more support for people with disabilities.)

³⁰ See Soc. Sec. Admin., Rules Regarding the Frequency and Notice of Continuing Disability Reviews: Withdrawal, 86 Fed. Reg. 40,387 (July 28, 2021) (withdrawing proposed change to additional reviews of SSI recipients); CONG. RSCH. SERV., THE EARNED INCOME TAX CREDIT (EITC): A BRIEF LEGISLATIVE HISTORY (Jan. 12, 2021), <https://sgp.fas.org/crs/misc/R44825.pdf> (discussing limited changes to EITC); Andrew Hammond, *Litigating Welfare Rights*, 115 NW. U. L. REV. 362, 401–26 (2020) (analyzing the failed efforts to cut SNAP and Medicaid between 2017 and 2020).

³¹ These programmatic confines have shaped past work. See Andrew Hammond, *Territorial Exceptionalism and the American Welfare State*, 119 MICH. L. REV. 1639 (2021) (analyzing the ways in which Americans in the five territories are left out of the typical arrangements for Medicaid, SNAP, and SSI); Hammond, *Litigating Welfare Rights*, *supra* note 30 (discussing legal implications of the federalism structure of Medicaid and SNAP); Andrew Hammond, *The Immigration-Welfare Nexus in a New Era?*, 22 LEWIS & CLARK L. REV. 501 (2018) (detailing how federal and state law excludes many immigrants and their families from Medicaid, SNAP, and SSI); Andrew Hammond, Ariel Jurow Kleiman & Gabriel Scheffler, *How the COVID-19 Pandemic Has and Should Reshape the American Safety Net*, 105 MINN. L. REV. HEADNOTES 154 (2020). To sweep in more programs, such as the National Flood Insurance Program, would overwhelm the Article. Others will bring their insights to bear on the challenges of thinking through how to adapt other legal regimes and institutions, including ones that bear directly on the well-being of poor people, in the face of a rapidly warming planet. For instance, the National Flood Insurance Program subsidizes construction in flood-prone areas. See, e.g., Christine A. Klein, *The National Flood Insurance Program at Fifty: How the Fifth Amendment Takings Doctrine Skews Federal Flood Policy*, 31 GEO. ENV'T L. REV. 285 (2019). The U.S. Department of Housing and Urban Development sells foreclosed properties in those areas. See Huo Jingnan et al., *The Federal Government Sells Flood-Prone Homes To Often*

The animating idea for this Article can be summed up in four statements. First, public benefits in the United States are an integral part of how federal, state, territorial, tribal, and local governments respond to extreme weather events. Second, climate-fueled disasters have and will become more frequent and more devastating. Third, as a result, the peculiarities and pathologies of the American welfare state, including its attendant racial hierarchy, will undermine our government's ability to respond to the ravages of the climate crisis. Fourth, there are statutory and regulatory changes that would make public benefits more reliable, accessible, and portable.

Accordingly, the Article proceeds as follows. Part I situates American anti-poverty programs in the climate crisis. Part II explains how the federal, state, and local governments use welfare programs to respond to extreme weather events. To do so, the Article dives into the thicket of federal statutes, regulations, and sub-regulatory guidance that govern these programs. Part III then details the weaknesses in the status quo, paying particular attention to the role of Congress as well as to the last decade of recovery efforts. That Part concludes with a survey of the recent legislative and regulatory response to the COVID-19 pandemic in the hope that it provides lessons for the climate crisis. Part IV launches an agenda for how government should adapt U.S. welfare programs for the rapidly changing climate, identifying possible avenues for federal, state, and local governments.

I. THE AMERICAN WELFARE STATE & THE CLIMATE CRISIS

Before we understand how the American welfare state will have to adapt to meet the climate crisis, we must first understand what the American welfare state is. This Part provides a brief sketch of the American welfare state's persistent pathologies. In a sense, the climate crisis is a new risk of modern life—or at least one that will become more frequent and more intense. Welfare programs have always been part of American disaster response—just in ways that escape traditional narratives of the welfare state.

A. The American Welfare State Today

The United States permits much higher levels of poverty than other wealthy democracies do. Of the 37 member nations in the Organisation for Economic Co-operation and Development (OECD), the United States has the highest relative poverty rate for people of working age and the fifth highest child poverty rate.³²

Unsuspecting Buyers, NPR (Sept. 13, 2021), <https://www.npr.org/2021/09/13/1033993846/the-federal-government-sells-flood-prone-homes-to-often-unsuspecting-buyers-npr->. And the U.S. Department of Agriculture subsidizes farmers in ways that increase the emission of greenhouse gases like methane. See, e.g., Trevor J. Smith, *Corn, Cows, and Climate Change: How Federal Agricultural Subsidies Enable Factory Farming and Exacerbate U.S. Greenhouse Gas Emissions*, 9 WASH. J. ENV'T L. & POL'Y 26 (2019).

³² OECD Data: Poverty Rate OECD Data: Poverty Rate, 0-17 year olds, 18-65-year-olds, Ratio,

Even though the United States has a relatively lower poverty rate among its elderly population, it still is higher than those of 28 OECD countries.³³ Considering these high levels of poverty amid unprecedented affluence, comparativists often label the United States as a prototypically residual welfare state.³⁴ These scholars point out that more so than other wealthy democracies, the United States relies on market forces, including employment-based schemes of private health care and social insurance, and only provides minimal government assistance when the private sector and family resources fail.³⁵ In that sense, the United States appears to have a weaker welfare state. In another, the American welfare state is not always less generous than those of other nations. It's just different. A closer look at the American welfare state suggests that characterizing the U.S. as a residual welfare state risks obscuring some of its key features.³⁶

First, this revisionist line of research shows how anti-government politics and concealed mechanisms of delivery obscure the character and reach of American social welfare policy—relying as it does on tax-subsidized, employer-provided benefits.³⁷ Yet, in terms of expenditures, net social spending in the United States as a percentage of GDP outstrips that of Germany, Sweden, and the United Kingdom.³⁸ By tying social provision to employment, though, the U.S. has ensured that its social spending is less progressive as a result. The American welfare state, while larger than previously thought, is comparatively less generous for those who are too young or too sick to work, not to mention those who care for them.

Second, the United States channels assistance to poor people in exceptional ways. The federal government relies heavily on its tax system to distribute transfers not just to upper- and middle-class professionals, but to poor people, especially through the EITC and the CTC.³⁹ Moreover, the United States runs SNAP, one of

2019 or latest available, <https://data.oecd.org/inequality/poverty-rate.htm>. (last accessed July 21, 2021).

³³ OECD Data: Poverty Rate, 66-year-olds and above, <https://data.oecd.org/inequality/poverty-rate.htm> (last accessed July 21, 2021).

³⁴ See GØSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990); see also Wil Arts & John Gelissen, *Three Worlds of Welfare Capitalism or More? A state-of-the-art Report*, J. EURO. SOC. POL'Y 137 (2002) (updating Esping-Andersen's study).

³⁵ See GØSTA ESPING-ANDERSEN, *POLITICS AGAINST MARKETS: THE SOCIAL DEMOCRATIC ROAD TO POWER* 233 (1985).

³⁶ See Prasad, *supra* note 26, at 201.

³⁷ See SUZANNE METTLER, *THE SUBMERGED STATE* (2011); MARIE GOTTSCHALK, *THE SHADOW WELFARE STATE: LABOR, BUSINESS, AND THE POLITICS OF HEALTH CARE IN THE UNITED STATES* (2000); see also Jacob S. Hacker, *America's Welfare Parastate*, PERSP. ON POLITICS 777, 777 (2016) (describing how this work by emphasizing “what government actually does” demonstrates “a system of social provision that is much bigger, messier, less equalizing, and less reflective of the preferences of the political left than prior scholarship indicated”).

³⁸ See Hacker, *America's Welfare Parastate*, *supra* note 37 at 778 (“Let that sink in: A larger share of the American economy is spent on social benefits than the comparable share of the Swedish economy.”).

³⁹ See, Ariel Jurow Kleiman, *Impoverishment by Taxation*, 170 U. PENN. L. REV. (forthcoming 2022); Susannah Tahk, *The Tax War on Poverty*, 56 ARIZ. L. REV. 791 (2014); Sara Sternberg Greene, *The Broken Safety Net: A Study on Earned Income Tax Credit Recipients and a Proposal*

its largest anti-poverty programs, through the U.S. Department of Agriculture.

Third, aside from the EITC, CTC, and SNAP, programs for low-income households exhibit significant variation across the fifty states, the District of Columbia, the five territories, and tribes. Federal law provides flexibility to states in structuring and administering public benefits. Some states use that flexibility to get closer to universal health insurance.⁴⁰ Others have repurposed federal funds intended for one program or population for another.⁴¹ Consequently, there are states like Massachusetts where only one in 33 residents lack health insurance, and then there are states like Texas where one in five go without.⁴² Thirty states, D.C., and Puerto Rico have their own EITCs for low-income residents,⁴³ and California is moving incrementally to a state-funded guaranteed income.⁴⁴ Therefore, in many respects, the United States does not have one welfare state; it has more than 50.

Still, that variation has a ceiling. No state in the U.S. has a safety net for poor people that approaches Canada or the U.K.'s, let alone one of the Nordic countries. Every state save Vermont must balance their budgets, and countercyclical programs and balanced budget requirements do not mix.⁴⁵ Precisely when a state faces plummeting revenue, it experiences a surge in need. Therefore, it is unlikely that any state in the union could create a social democratic infrastructure without significant and sustained federal investment. Moreover, the cooperative federalism built into these programs permits the exclusion of various groups—immigrants, tribal members, and territorial Americans—from basic assistance. For decades and to this day, Americans in the South and predominantly rural states, childless adults, immigrant Americans, Americans in the territories, and indigenous Americans experience a markedly different level of social protection.

for Repair, 88 N.Y.U. L. REV. 515 (2013).

⁴⁰ See Pakinam Amer, *How Massachusetts became a national leader on health care — and how it can lead again*, BOSTON GLOBE (Jan. 28, 2020), <https://www.bostonglobe.com/2020/01/28/opinion/how-massachusetts-became-national-leader-healthcare-how-it-can-lead-again> (describing the state's efforts, including before the Affordable Care Act, to cover all residents).

⁴¹ See generally DANIEL L. HATCHER, *THE POVERTY INDUSTRY* (2016) (offering case studies of states using funding for foster care, Medicaid, and child support for other purposes).

⁴² KATHERINE KEISLER-STARKEY & LISA N. BUNCH, U.S. CENSUS BUR. HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2019, TBL. A-3, (Sept. 15, 2020), <https://www.census.gov/library/publications/2020/demo/p60-271.html>.

⁴³ NAT'L CONF. OF STATE LEG., EARNED INCOME TAX CREDIT OVERVIEW, TBL.2 (July 9, 2021), <https://www.ncsl.org/research/labor-and-employment/earned-income-tax-credits-for-working-families.aspx>.

⁴⁴ Adam Beam, *California approves 1st state-funded guaranteed income plan*, ASSOCIATED PRESS (July 15, 2021), <https://apnews.com/article/government-and-politics-california-4fea151e0425f8188337e44a02ab8177>.

⁴⁵ See David Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2554, 2605–14 (2005) (describing how traditional theories of federalism “routinely fail to appreciate the gravity of the constraints in states’ fiscal constitutions” and then detailing those constraints).

B. American Poverty and the Climate Crisis

Poor people live in parts of the United States that are susceptible to climate-fueled disasters. A disproportionate number of poor Americans live only slightly above sea level.⁴⁶ Poorer rural areas from the South to the West are particularly exposed to wildfires.⁴⁷ While wealthy people also live in areas that are vulnerable to these catastrophes, poor people have fewer resources to modify and retrofit their homes and communities to withstand climate change, as well as fewer resources to relocate temporarily or permanently.⁴⁸ Poor people will lack the funds to sufficiently cool their homes in extreme heat, move out of floodplains, and evacuate in time before storms. Furthermore, poor people are more likely to rely on public infrastructure like working roads to live and earn a living.⁴⁹ Moreover, climate change will impoverish more Americans—destroying livelihoods, wiping out assets, and creating massive surges in need. In a study of disasters in the U.S. from 1920 to 2010, county-level poverty rates increased as people who could afford to leave the area did.⁵⁰ These interlocking relationships between poverty and the geography of climate change are even more pronounced globally.⁵¹

The elderly are especially vulnerable to climate change because many of them have exacerbating health conditions. The Environmental Protection Agency (EPA) identifies three main aspects of climate change that affect the elderly in particular:

⁴⁶ See Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV'T L. REV. 1, 20 (2016) (identifying the “disproportionate number of economically disadvantaged people living only slightly above current sea levels” as “one of the biggest” reasons the poor will bear the brunt of climate change).

⁴⁷ See Dale Kasler & Phillip Reese, “*The weakest link*”: *Why your house may burn while your neighbor’s survives the next wildfire*, THE SACRAMENTO BEE (Apr. 11, 2019); Cassandra Johnson Gaither et al., *Wildland Fire Risk and Social Vulnerability in the Southeastern United States*, 13 FOREST POL’Y & ECON. 24 (2011); Kathy Lynn & Wendy Gerlitz, *Mapping the Relationship Between Wildfire and Poverty*, USDA Forest Service Proceedings RMRS-P-41 (2006), https://www.fs.fed.us/rm/pubs/rmrs_p041/rmrs_p041_401_415.pdf (measuring community capacity in the context of wildfires).

⁴⁸ Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV'T L. REV. 1, 20 (citing Hurricane Katrina as an example).

⁴⁹ Joey Marshall et al., *Working from Home During the Pandemic: Those Who Switched to Telework Have Higher Income, Education and Better Health*, U.S. CENSUS BUREAU (Mar. 31, 2021), <https://www.census.gov/library/stories/2021/03/working-from-home-during-the-pandemic.html> (finding that in households with annual incomes of \$200,000 or more, 73.1% switched to telework compared to 12.7% of households earning under \$25,000).

⁵⁰ Leah Platt Boustan et al., *The Effect of Natural Disasters on Economic Activity in US Counties: A Century of Data* (Nat’l Bur. of Econ. Rsch., Working Paper No. 23410, 2017), https://www.nber.org/system/files/working_papers/w23410/w23410.pdf.

⁵¹ See Stephane Hallegatte et al., *Shock Waves: Managing the Impacts of Climate Change on Poverty*, WORLD BANK (2016); U.S. DEP’T OF DEFENSE, 2014 CLIMATE CHANGE ADAPTATION ROADMAP FORWARD 1 (2014) (concluding that climate change will “intensify the challenges of global instability, hunger, poverty, and conflict,” and cause “food and water shortages, pandemic disease, disputes over refugees and resources, and destruction by natural disasters in regions across the globe”).

extreme heat, extreme weather events, and poor air quality.⁵² Extreme heat and higher temperatures can increase the risk of illness or death in older adults, particularly those with congestive heart failure, diabetes, and other conditions that increase heat sensitivity.⁵³ Heat waves tend to “have the most severe impacts for the elderly and the very young, who sweat less and have a greater surface area-to-body-mass ratio.”⁵⁴ Higher temperatures have also been linked to increased hospitalizations for older people with heart and lung conditions.⁵⁵ Older adults with limited incomes who own air conditioning units may not use them during heat waves due to the high cost to operate them.⁵⁶

The elderly are also more likely to suffer storm- and flood-related fatalities. More than half of deaths resulting from Hurricane Katrina, Superstorm Sandy, and the 2018 Camp Fire in California were over age 65.⁵⁷ If an event requires evacuation, some of the most vulnerable people are older people with disabilities, with chronic medical conditions, or living in nursing homes or assisted-living facilities.⁵⁸ Furthermore, climate-fueled disasters can make it more difficult to transport patients with their necessary medication, medical records, and equipment.⁵⁹ They can also cause power outages that knock out medical equipment and elevators, leaving some people without treatment or the ability to evacuate.⁶⁰

As the climate crisis contributes to worsening air quality, the number of older adults in the ER will increase.⁶¹ Poor air quality worsens respiratory conditions common in older adults such as asthma and chronic obstructive pulmonary disorder (COPD). Air pollution can also increase the risk of heart attack in older adults, especially those who are diabetic or obese.⁶²

Children will also be particularly vulnerable in this new climate reality. The American Academy of Pediatrics identifies various climate-related threats to children: the physical and psychological effects of extreme weather events, heat stress, decreased air quality, and food insecurity.⁶³ Additionally, the report states that the social foundations of children’s mental and physical health are threatened by the effects of climate change, including community and global instability, mass

⁵² EPA *Climate Change and the Health of Older Adults*, (May 2016), <https://www.cmu.edu/steinbrenner/EPA%20Factsheets/older-adults-health-climate-change.pdf>.

⁵³ *Id.*

⁵⁴ Sheridan Bartlett, *The Implications of Climate Change for Children in Lower-Income Countries*, 18 *CHILD., YOUTH & ENV'T* 71, 73 (2008).

⁵⁵ *Climate Change and the Health of Older Adults*, *supra* note 52.

⁵⁶ *Id.*

⁵⁷ *Id.*; see also Maria La Ganga et al., *Many victims of California’s worst wildfire were elderly and died in or near their homes, new data show*, L.A. TIMES (Dec. 13, 2018).

⁵⁸ *Climate Change and the Health of Older Adults*, *supra* note 52.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Samantha Ahdoot, *Global Climate Change and Children’s Health*, 138 *PEDIATRICS* 1, 1 (2015).

migrations, and increased conflict.⁶⁴ Unchecked climate change threatens the safety and well-being of children by way of its effects on families, schools, neighborhoods, and communities, including the long-term ramifications of school closures.⁶⁵

Children are also uniquely at risk from climate-induced disasters, such as wildfires, hurricanes, and floods.⁶⁶ Such events “cause irrevocable harm to children through devastation of their homes, schools, and neighborhoods,” which, in turn, impair their physiological, cognitive, and social development.⁶⁷ According to the World Health Organization, children under five bear 88% of the burden of disease attributable to climate change.⁶⁸ Children are also “more likely than adults to perish during disasters,”⁶⁹ more likely to succumb to malnutrition, injuries, or disease in the aftermath, less likely to receive healthcare and other aid, and more likely to be subjected to exploitation or abuse.⁷⁰

As a result, the climate crisis will create significant demands on government to respond to surges in need among poor people as well as the elderly, people with disabilities, and children. The next Part explores how federal law currently structures the government response.

II. WELFARE PROGRAMS & DISASTERS: THE STATUS QUO

With some important exceptions, the federal government finances but does not administer assistance to poor Americans.⁷¹ States, territories, and tribes do. In some cases, states also contribute to the financing of these national programs. This underlying federalism of American social provision has profound implications. States and local government vary widely in their administration of public benefits.⁷² Meanwhile, the federal financing of these programs has incentivized many states to expand access, and the federal government has leveraged that fiscal federalism

⁶⁴ *Id.*; see also Francesco Agostinelli & Matthias Doepke & Giuseppe Sorrenti & Fabrizio Zilibotti, *When the Great Equalizer Shuts Down: Schools, Peers, and Parents in Pandemic Times*, 206 J. OF PUB. ECON. 104574(2022) (concluding that children living in the poorest 20% of U.S. neighborhoods will experience the most negative and long-lasting effects of school closures).

⁶⁵ *Id.*

⁶⁶ See, e.g., Kari Nadeau et al., *The impact of prescribed fire versus wildfire on the immune and cardiovascular systems of children*, 10 ALLERGY 1989 (2019); David Mills et al., *Projecting age-stratified risk of exposure to inland flooding and wildfire smoke in the United States under two climate scenarios*, 126 ENV'T HEALTH PERSP. 47077-1 (2018).

⁶⁷ Samantha Ahdoot, *supra* note 63, at 1.

⁶⁸ Ying Zhang et al., *Climate Change and Disability-Adjusted Life Years*, 70 J. ENV'T HEALTH 32, 33 (2007).

⁶⁹ U.N. CHILDREN'S FUND, CLIMATE CHANGE AND CHILDREN (2007).

⁷⁰ Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV'T L. REV. 1, 35–36 (2016).

⁷¹ The I.R.S. administers the Earned Income Tax Credit (EITC), 26 U.S.C. § 32, and the Social Security Administration administers Supplemental Security Income (SSI), 42 U.S.C. § 1381.

⁷² See *supra* notes 44–48 and accompanying text.

in recent years to improve access.⁷³ And federal law permits legal aid lawyers to sue state and local governments when they violate these program requirements.⁷⁴

Many public benefit programs in the United States have some disaster response component that offers state and local governments additional flexibility and funds. However, this dimension of welfare assistance only comes into play after the President has issued a disaster declaration for an impacted area. What follows is first a brief sketch of the procedure for those declarations and then an analysis of the statutes, regulations, and subregulatory guidance that structures how the federal, state, and local governments can use public benefit programs in response to a disaster.

A. Activating Federal Disaster Welfare Programs

The Stafford Act structures the roles federal, state, and local governments play in disaster relief.⁷⁵ In order to trigger the response and recovery provisions of the Stafford Act as well as the attendant federal welfare programs, the President must declare that a “major disaster” or “emergency” exists.⁷⁶ The major disaster declaration is more relevant for our purposes because it is not subject to any funding cap and makes impacted areas eligible for a greater array of assistance.⁷⁷ As a result, its procedure is more complicated.

A major disaster declaration turns on the President’s determination that state and local efforts cannot adequately respond to the event.⁷⁸ First, a request must be made by the governor of the affected state or the equivalent chief executive of a federally recognized tribe, Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands (CNMI), or the District of Columbia.⁷⁹ The executive of the state, tribe, or territory sends the

⁷³ See Hammond, *Litigating Welfare Rights*, *supra* note 30, at 382–87.

⁷⁴ See *id.* at 387–90.

⁷⁵ It is also the main substantive statute for FEMA. Robert T. Stafford Disaster Relief and Emergency Assistance Act, Pub. L. No. 100-707 (1988) (codified as amended in scattered sections of 42 U.S.C.).

⁷⁶ See 42 U.S.C. § 5122(1)–(2).

⁷⁷ 42 U.S.C. § 5193(b); see also CONG. RSCH. SERV., STAFFORD ACT DECLARATIONS FOR COVID-19 FAQ 1, n.2 (2020) (“Compared to emergency declarations, major disaster declarations authorize a wider range of federal assistance.”). While the President can declare an “emergency” under the Stafford Act in the manner outlined above, he can also do so *sua sponte* if he determines that primary responsibility rests with the federal government based on the Constitution or other federal law. 42 U.S.C. § 5191(b); 44 C.F.R. § 206.35.

⁷⁸ 42 U.S.C. § 5170; 44 C.F.R. § 206.36 (laying out procedure for major disaster declarations).

⁷⁹ 42 U.S.C. § 5122(4)–(5), (12); see Sandy Recovery Improvement Act of 2013, H.R. 219, 113th Cong. § 2 (2013) (amending Section 401 of the Stafford Act to allow federally recognized Indian tribal governments to pursue a declaration directly from the President); FEMA, TRIBAL DECLARATIONS PILOT GUIDANCE (2017), <https://www.fema.gov/sites/default/files/2020-04/tribal-declaration-pilot-guidance.pdf>. President Biden recently did so for the Mashpee Wampanoag Tribe following Tropical Storm Henri. See White House Briefing Room, President Joseph R. Biden, Jr. Approves the Mashpee Wampanoag Tribe Emergency Declaration (Aug. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/22/president-joseph-r->

request to the relevant Federal Emergency Management Agency (FEMA) Regional Administrator who, in turn, undertakes an evaluation of the need for federal action, called a Preliminary Damage Assessment (PDA). The Regional Administrator then submits those findings to the Secretary of Homeland Security who shares them with the President.⁸⁰

Once the President declares a major disaster, the President directs federal agencies to support state and local efforts in whatever ways authorized by federal law.⁸¹ The federal government can offer a range of assistance depending on the types requested by the state, tribal, or territorial leader and the needs FEMA identified in the initial PDA or subsequent PDA.⁸² The assistance the federal government can offer to state, territorial, tribal, and local government is grouped into three types, one of which—individual assistance—is the focus of the next Section.⁸³

B. Welfare Programs as Disaster Assistance

Following the disaster declaration, federal agencies can offer state and local government a range of public benefits for people in need. The rest of this Part analyzes disaster food assistance, unemployment assistance, other income assistance, housing assistance, medical assistance, and legal services, in turn.

1. Disaster Food Assistance

The United States is unique among wealthy democracies in the role that food assistance plays in its welfare state. In a given month, the SNAP program serves over 40 million Americans. SNAP benefits cost nearly 80 billion dollars each year.⁸⁴ Federal law allows states to deliver emergency food assistance to SNAP households in the wake of disasters. Households may seek replacement benefits for food purchased with SNAP benefits that was “destroyed in a household misfortune.”⁸⁵ However, this individualized process is inefficient following a major

[biden-jr-approves-the-mashpee-wampanoag-tribe-emergency-declaration/](#).

⁸⁰ Following the declaration, state and tribal authorities can request additional designations and cost-sharing adjustments and FEMA can make an independent recommendation of the same. 44 C.F.R. § 206.40(c)–(d); 44 C.F.R. § 206.47(b).

⁸¹ 42 U.S.C. § 5170(a)(2).

⁸² Exec. Order No. 12,673, Delegation of Disaster Relief and Emergency Assistance Functions (March 23, 1989) (delegating several functions in Stafford Act to FEMA).

⁸³ See CONG. RES. SERV., A BRIEF OVERVIEW OF FEMA’S PUBLIC ASSISTANCE PROGRAM (Mar. 8, 2021) <https://crsreports.congress.gov/product/pdf/IF/IF11529>; FEMA, HAZARD MITIGATION ASSISTANCE GRANTS (updated Nov. 1, 2021) <https://www.fema.gov/grants/mitigation/>.

⁸⁴ See FOOD & NUTRIT. SERV., SNAP DATA TABLES: LATEST AVAILABLE MONTH – JUNE 2021 STATE LEVEL PARTICIPATION AND BENEFITS, <https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap> (last accessed Sept. 22, 2021); FOOD & NUTRIT. SERV., PROGRAM INFORMATION REPORT tbl.2, (Sept. 2020), <https://fns-prod.azureedge.net/sites/default/files/data-files/Keydata-September-2020.pdf>.

⁸⁵ 7 C.F.R. § 274.6. The benefit can equal up to the value of the maximum monthly allotment

disaster. That is why some states have obtained waivers from the Food & Nutrition Service (FNS) to automatically replace benefits for all SNAP recipients in areas impacted by a disaster.⁸⁶ For instance, after Hurricane Harvey, FNS approved a request by Texas to automatically replace two months of SNAP benefits to households in the 32 declared counties.⁸⁷ Furthermore, some SNAP recipients may need additional assistance, not just because they lost food in the disaster, but because they lost income as a result of losing their job or facing disaster-related expenses. For those recipients, they may receive a supplemental benefit in addition to the replacement benefits.⁸⁸

In addition to replacement and supplemental SNAP benefits, the federal government pays for, and states administer, a separate emergency food assistance program: the Disaster Supplemental Nutrition Assistance Program (D-SNAP).⁸⁹ D-SNAP is intended to provide food assistance to households who have suffered food loss or damage as a result of a disaster and who are not currently receiving SNAP.⁹⁰ However, to create the temporary program, D-SNAP requires federal and state coordination.⁹¹ After the President has issued a major disaster declaration for individual assistance under the Stafford Act, as discussed above, a state must first request permission from the relevant federal agency to operate D-SNAP.⁹² Once granted permission, states can begin accepting D-SNAP applications during a specified period, typically seven days.⁹³

for the household. 7 U.S.C. § 2014(h)(3)(A); 7 C.F.R. § 274.6(a)(3)(iii); *see, e.g.*, CAL. DEP'T OF SOC. SERVS., EXECUTIVE SUMMARY: ALL COUNTY LETTER NO. 21-15 (Feb. 5, 2021), <https://cdss.ca.gov/Portals/9/Additional-Resources/Letters-and-Notices/ACLs/2021/21-15.pdf>; LSNC GUIDE TO CALFRESH BENEFITS, LEGAL SERVS. OF N. CAL., <http://calfresh.guide/getting-food-assistance-after-a-disaster-or-household-misfortune> (last accessed Dec. 4, 2021) (explaining that state agencies can “replace the actual value of food destroyed in a disaster such as a fire or flood” for a person already receiving SNAP).

⁸⁶ *See, e.g.*, FOOD & NUTRIT. SERV., NORTH CAROLINA DISASTER NUTRITION ASSISTANCE (Sept. 15, 2021), <https://www.fns.usda.gov/disaster/north-carolina-disaster-nutrition-assistance>.

⁸⁷ *See, e.g.*, FOOD & NUTRIT. SERV., TEXAS DISASTER NUTRITION ASSISTANCE (Feb. 24, 2021), <https://www.fns.usda.gov/disaster/texas-disaster-nutrition-assistance>.

⁸⁸ FL. BAR FOUND., FLORIDA DISASTER ASSISTANCE MANUAL FOR LEGAL SERVICES ADVOCATES (2014 ed.), <https://thefloridabarfoundation.org/wp-content/uploads/2016/10/Disaster070214Manual.pdf>. SNAP households can also receive expedited food assistance. 7 CFR § 273.2(a)(2).

⁸⁹ U.S. DEP'T OF HOMELAND SEC., DISASTER SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (D-SNAP), (Jul. 22, 2020), <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/5769#:~:text=The%20Disaster%20Supplemental%20Nutrition%20Assistance,SNAP%20in%20a%20disaster%20area>.

⁹⁰ 7 U.S.C. § 2014(h); 7 C.F.R. § 280.

⁹¹ FOOD & NUTRIT. SERV., DISASTER SNAP GUIDANCE 1 (July 2014) https://njcdd.org/wp-content/uploads/2016/08/d-snap_handbook.pdf (explaining that “the State has the primary role for planning, requesting, and operating a D-SNAP”).

⁹² Exec. Order No. 11,795, Delegating Disaster Relief Functions Pursuant to the Disaster Relief Act of 1974, 39 Fed. Reg. 25, 939 (July 11, 1974); *see also* U.S. DEP'T OF AGRIC., FNS' ROLE IN DISASTER RESPONSE (Jul 29, 2021), <https://www.usda.gov/media/blog/2019/05/10/fns-role-disaster-response> (explaining agency's responsibilities).

⁹³ DISASTER SNAP GUIDANCE, *supra* note 91, at 9 (detailing the application period).

D-SNAP has relaxed eligibility criteria compared to SNAP. A recipient simply must reside in the disaster area, purchase or plan to purchase food during the benefit period, experience an adverse effect due to the disaster, and meet a fairly generous income limit.⁹⁴ While the federal government recommends residency and income information be verified where possible and that household composition and food loss be verified if questionable, only the identity of the applicant must be verified.⁹⁵ Those who apply and qualify for D-SNAP receive a single monthly benefit, which equals the maximum monthly allotment for a household provided under SNAP.⁹⁶ Currently, that is \$535 for a household of three in the continental United States with higher benefit amounts for households in Alaska, Guam, Hawaii, and the U.S. Virgin Islands.⁹⁷ As with SNAP, the federal government pays for 100% of these benefits and half of the administrative costs.⁹⁸

As a result of these relaxed eligibility standards and the federal funding formula, D-SNAP is an integral part of disaster recovery. As mentioned above, the 2017 hurricane season was one of the most active seasons on record. Three Category 4 storms (Harvey, Irma, and Maria) made landfall in less than a month. In the wake of those disasters, over three million households in Texas, Florida, and the U.S. Virgin Islands received food assistance through D-SNAP, expedited SNAP, and replacement benefits.⁹⁹ And while D-SNAP recipients typically receive one month of benefits, the federal government has recently approved longer benefit periods, including following the 2017 storms.¹⁰⁰

D-SNAP, like many welfare programs in the U.S., excludes many Americans who live in territories or are members of tribes. Guam and the U.S. Virgin Islands have benefited from D-SNAP because the Food and Nutrition Act treats them the same as states for the purposes of SNAP.¹⁰¹ Yet, American Samoa, Puerto Rico, and CNMI do not have access to SNAP and therefore do not have access to D-

⁹⁴ *See id.* at 12–13.

⁹⁵ *See id.* at 17.

⁹⁶ U.S. DEP'T OF AGRIC., DISASTER SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (D-SNAP) FISCAL YEAR (FY) 2022 INCOME ELIGIBILITY STANDARDS, <https://fns-prod.azureedge.us/sites/default/files/media/file/FY2022-DSNAP-IncomeEligibilityStandards-reviewed.pdf> (effective October 1, 2021 through September 30, 2022).

⁹⁷ Compare *id.* tbl.1 *with* tbls. 2–4.

⁹⁸ 7 U.S.C. § 2025; *see* FOOD & NUTRIT. SERV., EXPLORING THE CAUSES OF STATE VARIATION IN SNAP ADMINISTRATIVE COSTS FINAL REPORT (June 2019) <https://fns-prod.azureedge.net/sites/default/files/media/file/SNAP-State-Variation-Admin-Costs-FullReport.pdf>.

⁹⁹ U.S. DEP'T OF AGRIC., FOOD & NUTRIT. SERV. DISASTER RESPONSE SUMMARY: FY 2017, <https://fns-prod.azureedge.net/sites/default/files/resource-files/FNS-Disaster-Response-Summary-FY17.pdf>.

¹⁰⁰ Compare DISASTER SNAP GUIDANCE, *supra* note 91, at 1 (stating that “D-SNAP provides one month of benefits to eligible disaster survivors”) *with, e.g.*, TEXAS HEALTH & HUM. SERVS., TEXAS WORKS BULLETIN 17-13 (Sept. 26, 2017) (stating that “Hurricane Harvey D-SNAP households will receive two full-months of D-SNAP allotments”).

¹⁰¹ 7 U.S.C. § 2012(r).

SNAP.¹⁰² As we will see in Part III, the federal exclusion of Puerto Rico exacerbated the island's challenges after Hurricane Maria. Similarly, D-SNAP has inconsistent and limited reach among federally recognized tribes. Some tribes choose to participate in the Food Distribution Program on Indian Reservations (FDPIR) instead of SNAP, but a household's post-disaster participation in FDPIR disqualifies them from receiving D-SNAP.¹⁰³

Furthermore, D-SNAP can only function if the ways in which most Americans purchase food are available. Like SNAP, D-SNAP relies on typical channels of food distribution. Federal law therefore allows federal and state agencies to channel other types of food assistance to people following disasters, which especially complement SNAP and D-SNAP when grocery stores cannot stay open. Following a major disaster declaration, states can get permission from FNS to release commodity foods from federal programs and send them to congregate feeding sites or directly to households.¹⁰⁴ The federal agency will then replace the commodity foods after the disaster.¹⁰⁵ After Hurricane Katrina, congregate feeding sites operated for over two months in this fashion. Ten months after the storm, some households continued to receive food directly from the government.¹⁰⁶

Federal law also allows states to waive requirements to child nutrition and school meals programs to feed more people.¹⁰⁷ After Sandy, New York was allowed to provide free meals to displaced families in New York City, regardless of income.¹⁰⁸ After Harvey, the federal government permitted impacted schools to recalculate the number of students who qualify for free and reduced meals at school.¹⁰⁹ After the wildfires in 2017, the federal government allowed Oregon to use its Summer Food Service Program to send children home with meals. Oregon sought this waiver because some of the schools where the children would eat were under air quality alerts issued by the National Weather Service.¹¹⁰ And while the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC) has no statutory disaster provision, it has been used in the past to accommodate disaster conditions with ready-to-feed infant formula and other food items that do

¹⁰² Hammond, *Territorial Exceptionalism*, *supra* note 31, at 1671.

¹⁰³ DISASTER SNAP GUIDANCE, *supra* note 91, at 12.

¹⁰⁴ FOOD RSCH. & ACTION CTR., THE FRAC ADVOCATE'S GUIDE TO THE DISASTER SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (D-SNAP) 7 (2018), <https://frac.org/wp-content/uploads/d-snap-advocates-guide-1.pdf> [hereinafter "ADVOCATE'S GUIDE TO D-SNAP"].

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ FOOD & NUTRIT. SERV., LETTER TO REGIONAL AND STATE DIRECTORS RE: DISASTER RESPONSE, GUIDANCE, FNS-GD-2014-0042, (May 9, 2014), <https://www.fns.usda.gov/cn/disaster-response>.

¹⁰⁸ *USDA Will Fund Free Meals for NYC Schools Post-Sandy*, PATCH (Dec. 3, 2012), <https://patch.com/new-york/windsorterrace/usda-will-fund-free-meals-for-nyc-schools-post-sandy-934dc124>.

¹⁰⁹ ADVOCATE'S GUIDE TO D-SNAP, *supra* note 104, at 8.

¹¹⁰ FOOD & NUTRIT. SERV., USDA PROVIDES OREGON CHILDREN IMPACTED BY WILDFIRES MORE FLEXIBLE ACCESS TO MEALS SERVICE (Sept. 7, 2017), <http://www.fns.usda.gov/pressrelease/2017/010517>.

not require refrigeration.¹¹¹

Thus, there are significant opportunities for increased federal food assistance, provided states and other local governments apply. However, many of these practices are governed only by agency guidance. USDA promulgated a final version of its proposed rule for Disaster SNAP in 2016.¹¹² The Trump Administration withdrew the proposed rule along with others, purportedly to reduce regulatory backlog.¹¹³ Part IV returns to how the federal government could create a more streamlined and equitable structure for disaster food assistance through regulation. That Part will also explore what states can do, in the absence of national lawmaking, to prepare for the next climate-induced catastrophe.

2. Disaster Unemployment Assistance

In the U.S., unemployment insurance (UI) has a racialized past and present. Members of Congress crafted the Social Security Act of 1935 to exclude domestic and agricultural workers from UI—sectors of the labor force that disproportionately employed women, Black people, and immigrants.¹¹⁴ Today, the federal government has not updated UI to address the realities of work. In many states, UI excludes people who are working gig jobs, looking for part-time work, and those who leave their jobs to care for an ill family member.¹¹⁵ These exclusions disproportionately impact women, Black people, Latinos, and immigrants.¹¹⁶

Unlike SNAP, though, the federal government does not cover the cost of unemployment benefits. Rather, the federal government contributes to funding the administration of each state's UI program, but the states finance most of the programs' benefits. States also administer the program subject to only a few federal requirements. While employers and employees contribute to these state systems via payroll taxes, states repeatedly underfund their UI programs.¹¹⁷ In most states, unemployed workers can receive up to 26 weeks of benefits at a rate of about half of their previous wages or a maximum benefit amount, whichever is higher. In

¹¹¹ ADVOCATE'S GUIDE TO D-SNAP, *supra* note 104, at 10–12.

¹¹² Supplemental Nutrition Assistance Program (SNAP): Disaster Supplemental Nutrition Assistance Program (D-SNAP), 81 Fed. Reg. 28,738 (May 10, 2016) (to be codified at 7 C.F.R. pts. 272, 274, 280).

¹¹³ 84 Fed. Reg. 47,443 (Sept. 10, 2019) (withdrawing Emergency Supplemental Nutrition Assistance for Victims of Disasters Procedures).

¹¹⁴ See CYBELLE FOX, THREE WORLDS OF RELIEF: RACE IMMIGRATION AND THE AMERICAN WELFARE STATE FROM THE PROGRESSIVE ERA TO THE NEW DEAL 250–89 (2012) (discussing these features of the Social Security Act).

¹¹⁵ See U.S. DEP'T OF LABOR: EMP. & TRAINING ADMIN., UNEMPLOYMENT INSURANCE CHARTBOOK, <https://oui.doleta.gov/unemploy/Chartbook> (updated Jan. 12, 2022); Brian Galle, *How to Save Unemployment Insurance*, 50 ARIZ. ST. L.J. 1009, 1049–53 (2018).

¹¹⁶ JOSH BIVENS ET AL., ECON. POL'Y INST., REFORMING UNEMPLOYMENT INSURANCE (June 2021), <https://files.epi.org/uploads/Reforming-Unemployment-Insurance.pdf>.

¹¹⁷ See TATIANA FOLLETT & ZACH HERMAN, NAT'L CONF. OF STATE LEG., UNEMPLOYMENT INSURANCE FUNDING OVERVIEW (Oct. 8, 2020), <https://www.ncsl.org/research/labor-and-employment/new-ui-page.aspx>.

February 2020, the average weekly benefits were about \$387 nationwide and ranged from \$215 in Mississippi to \$550 in Massachusetts.¹¹⁸ As we will see in Part III, Congress passed significant legislation to shore up these state UI programs in the face of the pandemic.¹¹⁹

The Stafford Act authorizes the federal government to let states set up Disaster Unemployment Assistance (DUA).¹²⁰ However, unlike UI, which is largely funded by the states, DUA is financed through the Disaster Relief Fund (DRF), which Congress funds with annual appropriations that carry over year to year.¹²¹ Just as D-SNAP mirrors SNAP's structure, DUA uses a similar administrative apparatus to typical, non-emergency unemployment insurance.¹²² The U.S. Department of Labor oversees the program, but state agencies implement it.¹²³ Individuals receive DUA for the weeks of unemployment during the Disaster Assistance Period (DAP). Like the benefit period of D-SNAP, the DAP begins immediately after the major disaster began. However, unlike D-SNAP, which typically lasts only a month, DUA can continue for up to 26 weeks after that date. Congress has extended DUA past the 26-week limit three times: after the September 11th terrorist attacks, after Hurricane Katrina in 2005, and after Hurricanes Irma and Maria in 2017.¹²⁴ In the most recent extension, Congress added an additional 26 weeks (up to 52 weeks total) for persons who were unemployed in Puerto Rico or the U.S. Virgin Islands as a direct result of Hurricanes Irma and Maria.¹²⁵ Unlike D-SNAP, though, the benefit levels of DUA are not uniform across the country. Rather, the benefit levels equal the prevailing weekly benefit amounts of each state's UI program and cannot exceed them.¹²⁶ While minimum weekly benefits cannot drop below half of the average benefit amount in the relevant state, DUA perpetuates significant variation in benefit levels across states and the territories.¹²⁷

¹¹⁸ See Till von Wachter, *Unemployment Insurance Reform*, 686 ANNALS AM. ACAD. POL. & SOC. SCI. 121 (2019).

¹¹⁹ See *infra* Part III.C.1.

¹²⁰ See 42 U.S.C. § 5177(a).

¹²¹ See, e.g., U.S. DEP'T OF HOMELAND SEC., FEDERAL EMERGENCY MANAGEMENT AGENCY DISASTER RELIEF FUND: FISCAL YEAR 2019 CONGRESSIONAL JUSTIFICATION (Feb. 2018), <https://www.dhs.gov/sites/default/files/publications/Federal%20Emergency%20Management%20Agency.pdf>.

¹²² See 20 C.F.R. § 625.15.

¹²³ See 20 C.F.R. §§ 625.1–30 (laying out structure and procedure of DUA).

¹²⁴ See Act of Mar. 25, 2002, Pub. L. No. 107-154, 116 Stat. 80 (codified as amended at 42 U.S.C. § 5177) (extending DUA from 26 to 39 weeks for major disaster areas in New York and Virginia); Katrina Emergency Assistance Act of 2006, Pub. L. No. 109-176, 120 Stat. 191 (codified as amended at 42 U.S.C. § 5177) (same, but for victims of Hurricanes Katrina and Rita); FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186 (extending DUA retroactively for an additional 26 weeks for unemployed persons in Puerto Rico and the U.S. Virgin Islands); see also CONG. RSCH. SERV., DISASTER UNEMPLOYMENT ASSISTANCE (DUA) 4 (Aug. 3, 2020), <https://fas.org/sgp/crs/misc/RS22022.pdf> (describing the legislation).

¹²⁵ FAA Reauthorization Act of 2018, Pub. L. No. 115-254, 132 Stat. 3186.

¹²⁶ 20 C.F.R. § 625.6(a). Federal regulations establish a different benefit formula for territories. See 20 C.F.R. § 625.6(c)–(d).

¹²⁷ See U.S. DEP'T OF LABOR: EMP. & TRAINING ADMIN., UNEMPLOYMENT INSURANCE

Like D-SNAP, DUA is available to those who are ineligible for regular state unemployment insurance. However, here, the distributive consequences are flipped. Whereas D-SNAP is potentially regressive because it does not reach people already poor enough to receive SNAP, DUA's structure is potentially progressive. That's because to qualify for DUA, a person must have lost their job or be unable to access their job as a result of a major disaster *and* that person must be ineligible for regular UI. Because UI is less likely to cover part-time workers, including those in the gig economy and those who are unemployed because they need to care for a family member, states have an opportunity with DUA to compensate for UI's patchy coverage.

3. Other Income Assistance

In addition to DUA and D-SNAP, other public benefits provide income assistance to people recovering from disasters. Like DUA and unlike SNAP, these other income assistance programs do not restrict how recipients can use this assistance. Federal law permits expedited or advanced payments to individuals who receive Social Security Old Age Insurance, SSDI, and SSI, but recipients need to request these expedited payments.¹²⁸ Moreover, in the past, Congress has occasionally allowed eligible taxpayers to elect to use their prior year's filing to calculate their current year's EITC following a major disaster.¹²⁹

Temporary Assistance to Needy Families (TANF) has played a rather minor role in providing cash assistance after disasters. As part of the 1996 welfare reform legislation, Congress established a TANF contingency fund for states to deliver additional assistance in times of increased need, but as the GAO has explained, it "has not proven to be an inviting option to states in need for several reasons."¹³⁰

PROGRAM LETTER NO. 26-20: MINIMUM DISASTER UNEMPLOYMENT ASSISTANCE (DUA) WEEKLY BENEFIT AMOUNT (June 25, 2020), https://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=7999; *see also* CTR. ON BUDGET & POL'Y PRIORITIES, POLICY BASICS: UNEMPLOYMENT INSURANCE (updated Oct. 4, 2021), <https://www.cbpp.org/research/economy/unemployment-insurance> (detailing that "before the start of the COVID-19 recession in February 2020, average weekly benefits were about \$387 nationwide but ranged from a low of \$215 in Mississippi to \$550 in Massachusetts, and were only \$161 in Puerto Rico").

¹²⁸ *See* 20 C.F.R. § 416.520 (describing "emergency advance payments" for SSI); SOC. SEC. ADMIN., RS 0281.010, PROGRAM OPERATIONS MANUAL SYSTEM (POMS): IMMEDIATE PAYMENT (IP) CRITERIA AND PROCESS (2012), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0302801010> (same for OASDI and SSDI); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-252T, HURRICANES KATRINA AND RITA DISASTER RELIEF 20 (Feb. 2007) (charting the "dramatic increase" in immediate payments in 2005 compared to 2004).

¹²⁹ Katrina Emergency Tax Relief Act of 2005, Pub. L. No. 109-73, § 406, 119 Stat. 2016, 2028; Heartland Disaster Tax Relief of 2008, Pub. L. No. 110-343, § 701, 122 Stat. 3765, 3912; Disaster Tax Relief and Airport and Airway Extension Act of 2017, Pub. L. No. 115-63, § 504, 131 Stat. 1168, 1183; *see also* CONG. RSCH. SERV., TAX POLICY AND DISASTER RECOVERY, CRS R45864 (Feb. 11, 2020) (discussing these statutory changes).

¹³⁰ *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-252T, HURRICANES KATRINA AND RITA DISASTER RELIEF 18 (Feb. 2007); *see also* Andrew Hammond, *Welfare and Federalism's Peril*, 92

Congress passed legislation to create a separate TANF emergency fund for states impacted by Katrina, but there, too, few people received assistance through that program.¹³¹ There is limited evidence that TANF plays an important role in disaster relief.¹³²

FEMA itself administers some income assistance programs. Chief among them is the Individual and Household Program (IHP).¹³³ IHP is intended for anyone “who, as a direct result of a major disaster, [has] necessary expenses and serious needs in cases in which the individuals and households are unable to meet such expenses or needs through other means.”¹³⁴ IHP is limited to 18 months following the date of the major disaster declaration.¹³⁵ The benefit amounts are set by statute at \$25,000, with FEMA adjusting the statutory cap each year based on the Department of Labor’s Consumer Price Index.¹³⁶ Right now, the IHP cap stands at \$36,000.¹³⁷ There are two categories of assistance through IHP: Housing Assistance and Other Needs Assistance (ONA). The federal government shoulders the entire cost of the former and 75% of the latter.¹³⁸ ONA can cover various expenses like loss of personal property, covering funeral costs, childcare, and other costs.¹³⁹ However, amounts of ONA assistance for each category are set beforehand by FEMA and the relevant state, territorial, or tribal government.¹⁴⁰ Housing assistance, the other category of FEMA’s Individuals and Households Program, is

WASH. L. REV. 1721, 1751–52 (2017) (discussing TANF’s post-Katrina record).

¹³¹ TANF Emergency Response and Recovery Act of 2005, Pub. L. No. 109-68, 119 Stat. 2003.

¹³² See HURRICANES KATRINA AND RITA DISASTER RELIEF, *supra* note 134, at 18–21; PUBLIC WELFARE LAW, *supra* note 23 at 844-45 (comparing TANF post-Katrina unfavorably to D-SNAP).

¹³³ 42 U.S.C. § 5174; 44 C.F.R. § 206.110(a); see also CONG. RSCH. SERV., FEMA INDIVIDUAL ASSISTANCE PROGRAMS: AN OVERVIEW 4 (Dec. 5, 2019) (describing IHP as “the primary way FEMA assists disaster survivors”); Jordan Ballard et al., *Natural Disasters, Access to Justice, and Legal Services*, 17 CUNY L. REV. 1, 6 (2013) (asserting that IHP is “the most significant source of benefits for individuals following a natural disaster”).

¹³⁴ 42 U.S.C. § 5174(a).

¹³⁵ FEMA, FP 104-009-03, INDIVIDUAL ASSISTANCE PROGRAM AND POLICY GUIDE (IAPPG) 47, n.50 (2021).

¹³⁶ 42 U.S.C. § 5174(h) (capping IHP assistance at \$25,000 to be adjusted annually by FEMA according to the Labor Department’s CPI); 44 C.F.R. § 206.110(b) (same). Congress required that FEMA establish more objective criteria for evaluating the need for assistance and clarify eligibility requirements. See Disaster Relief Appropriations, Pub. L. No. 113-2, 127 Stat. 4 (2013); 44 C.F.R. § 206.48(b).

¹³⁷ Notice of Maximum Amount of Assistance Under the Individuals and Households Program, 85 Fed. Reg. 69,340 (Nov. 2, 2020).

¹³⁸ 42 U.S.C. § 5174(g)(1)–(2); 44 C.F.R. § 206.110(i)(1)–(2).

¹³⁹ See IAPPG, *supra* note 135, at 48, fig. 4; FEMA, FACT SHEET: CRITICAL NEEDS ASSISTANCE (Sept. 1, 2020), <https://www.fema.gov/fact-sheet/critical-needs-assistance>. ONA also includes Critical Needs Assistance, which are limited, one-time \$500 payments for immediate needs such as food, water, first aid, medications, and personal hygiene items. FEMA, ONA ADMINISTRATIVE OPTION SELECT FORM, O.M.B. CONTROL NO. 1660-0061 (expires Dec. 31, 2021), https://www.fema.gov/sites/default/files/documents/fema_individuals-households_ONA-administrative-option_Form_010-0-11.pdf.

¹⁴⁰ See CONG. RSCH. SERV., FEMA INDIVIDUAL ASSISTANCE PROGRAMS: AN OVERVIEW (Dec. 5, 2019).

taken up next.

4. Disaster Housing Assistance

Both FEMA and the U.S. Department of Housing and Urban Development (HUD) administer programs that help people with the costs of housing, including affording temporary housing if their homes cannot be occupied after the disaster, repairing their homes damaged by the storm, making mortgage and rental payments, and securing new mortgages.¹⁴¹ FEMA's housing assistance through IHP, like ONA discussed above, is paid directly to eligible recipients and can cover various expenses. IHP's Financial Housing Assistance can include funds for home repairs or replacement as well as reimbursement for short-term lodging or rental housing when a recipient was displaced from their home.¹⁴² In addition, FEMA provides direct housing assistance for those survivors who otherwise lack access to housing in the impacted area.¹⁴³ For instance, FEMA provides transportable temporary housing units (TTHUs), like RVs or mobile homes.¹⁴⁴ FEMA purchases and then leases these TTHUs to eligible applicants for a limited period of time.¹⁴⁵

Along with FEMA's housing assistance, HUD provides disaster mortgage and rehabilitation assistance through its Federal Housing Administration (FHA).¹⁴⁶ Following a major disaster declaration, FHA activates a mortgagee letter—referred to as a Section 203(h) letter—that makes it easier for disaster survivors to get mortgages to buy or rebuild their homes.¹⁴⁷ To secure a Section 203(h) letter, an individual must own and occupy a single-family home that was damaged or destroyed in a presidentially declared disaster. FHA also offers rehabilitation mortgage insurance—referred to as a Section 203(k) letter—that helps impacted households secure a mortgage that includes the cost of rehabilitation, finance the rehabilitation of their existing home, and afford smaller repairs.¹⁴⁸ To secure a Section 203(k) letter, an individual must be able to make monthly mortgage payments and be rehabilitating a home that's at least a year old.¹⁴⁹ Taken together, these FEMA and HUD programs attempt to assist individuals whose homes have been damaged as a result of a disaster.

¹⁴¹ *Id.* at 5-7.

¹⁴² *See* IAPPG, *supra* note 135, at 49-51.

¹⁴³ *Id.* at 51.

¹⁴⁴ *Id.* at 50.

¹⁴⁵ *See id.*

¹⁴⁶ *See* U.S. DEP'T OF HOUSING & URBAN DEV, HUD DISASTER RESOURCES (Sept. 3, 2021), <http://hud.gov/info/disasterresources>.

¹⁴⁷ 12 U.S.C. § 1709(h); 24 C.F.R. § 203.1.

¹⁴⁸ 12 U.S.C. § 1709(k)(4); 24 C.F.R. § 203.50.

¹⁴⁹ *See* HUD, *203(h) Mortgage Insurance for Disaster Victims and 203(k) Rehabilitation Mortgage Insurance: General Program Requirements*, <https://www.disasterassistance.gov/get-assistance/forms-of-assistance/4703>.

5. Disaster Medical Assistance

Medicaid pays for health care for low-income Americans, which the federal and state governments jointly fund, but states administer.¹⁵⁰ Federal law requires that states cover certain populations and certain services through Medicaid,¹⁵¹ but states can also cover additional groups of people and provide additional services to all groups with a federal financial match.¹⁵² The federal government must provide states with matching funds, which vary in proportion to state wealth, referred to as the Federal Medical Assistance Percentage (FMAP).¹⁵³ Importantly, the Department of Health and Human Services (HHS) can provide states with some increased flexibility and support for their Medicaid program following a disaster even in the absence of a major disaster declaration, provided the Secretary has declared a public health emergency.¹⁵⁴ However, state flexibility is maximized when both the Secretary and the President declare an emergency or disaster.

Following either a public health emergency declaration or a major disaster declaration, states may temporarily revise eligibility, enrollment, and benefits for Medicaid through state plan amendments, which have minimal procedural hurdles compared to waivers.¹⁵⁵ A state can relax its income eligibility requirements for certain populations,¹⁵⁶ delay the verification process of renewals for people in affected areas,¹⁵⁷ and temporarily suspend co-payments and other costs to recipients.¹⁵⁸ For example, Puerto Rico's Medicaid plan typically only provides

¹⁵⁰ 42 U.S.C. § 1396-1.

¹⁵¹ 42 U.S.C. § 1396a.

¹⁵² *Id.* § 1396a; *see also* MACPAC, FEDERAL REQUIREMENTS AND STATE OPTIONS: BENEFITS (March 2017), <https://www.macpac.gov/wp-content/uploads/2017/03/Federal-Requirements-and-State-Options-Benefits.pdf> (enumerating state options to cover additional groups or provide additional services).

¹⁵³ 42 U.S.C. § 1396(d) *passim*.

¹⁵⁴ *See* Public Health Service Act, Pub. L. No. 78-410, 58 Stat. 682 (1944) (codified at 42 U.S.C. § 247d).

¹⁵⁵ *See* CMS: MEDICAID & CHIP COVERAGE LEARNING COLLAB., INVENTORY OF MEDICAID AND CHIP FLEXIBILITIES AND AUTHORITIES IN THE EVENT OF A DISASTER (Aug. 20, 2018), <https://www.medicaid.gov/state-resource-center/downloads/mac-learning-collaboratives/medicaid-chip-inventory.pdf>; *see also* MACPAC, ISSUE BRIEF: MEDICAID'S ROLE IN DISASTERS AND PUBLIC HEALTH EMERGENCIES, (March 2018), <https://www.macpac.gov/wp-content/uploads/2018/03/Medicaid%E2%80%99s-Role-in-Disasters-and-Public-Health-Emergencies.pdf> (discussing state options). Last year, CMS created a Medicaid State Plan Amendment template in response to all the state requests during the COVID-19 pandemic. CMS, SECTION 7 – GENERAL PROVISIONS, 7.4. MEDICAID DISASTER RELIEF FOR THE COVID-19 NATIONAL EMERGENCY, <https://www.medicaid.gov/state-resource-center/downloads/medicaid-disaster-relief-spa-template.docx> (last accessed Sept. 18, 2021).

¹⁵⁶ 42 C.F.R. § 435.218.

¹⁵⁷ 42 C.F.R. § 435.211 (Medicaid); 42 C.F.R. § 457.342 (CHIP); *see, e.g.*, CMS, Louisiana 1902(e)(14) request (Aug. 22, 2016); CMS, California Wildfires Approval Letter (Jan. 30, 2018).

¹⁵⁸ 42 C.F.R. § 447.55(b)(4) (Medicaid); 42 C.F.R. § 457.515 (CHIP); *see also* CMS, Letter to Michigan Medical Services Administration re: Section 1115 Demonstration (Dec. 21, 2020), https://www.michigan.gov/documents/mdhhs/CMS_Approval_-_Flint_Waiver_3-3-16_516241_7.pdf; CMS, Letter to Texas State Medicaid/CHIP Director (Aug. 31, 2017),

coverage for emergency services off-island, but the Centers for Medicare and Medicaid Services (CMS) allowed the territory to permit recipients to receive off-island non-emergency coverage after Hurricane Maria.¹⁵⁹ Federal law also requires that states facilitate easier Medicaid enrollment following a disaster. For instance, federal regulations require that states accept self-attestation when an applicant's documentation is unavailable due to a disaster.¹⁶⁰ Federal law also prohibits states from denying or terminating Medicaid to residents who have had to evacuate temporarily to another state.¹⁶¹ These flexibilities help to ensure that medical care can continue during a disaster.

6. Disaster Legal Services

Considering the intricacies of these different programs run by different agencies, individuals will need assistance navigating the various eligibility requirements. Fortunately, the Stafford Act includes legal services among its individual assistance categories.¹⁶² Federal regulations stipulate that these legal services are intended to help low-income individuals,¹⁶³ but only to secure benefits or make claims arising out of a major disaster.¹⁶⁴ Lawyers can help with insurance claims and home repair contracts, draw up legal documents (such as wills) lost in the disaster, and file appeals of FEMA decisions.¹⁶⁵ Unfortunately, the legal services contemplated by the Stafford Act are done exclusively by volunteers. The ABA's Young Lawyers Division provides these services pro bono pursuant to an agreement with FEMA, and these volunteer lawyers refer fee-generating cases to local lawyers.¹⁶⁶

What's more, state bars, by definition, restrict out-of-state lawyers from

<https://www.medicaid.gov/sites/default/files/CHIP/Downloads/TX/TX-17-0043.pdf>.

¹⁵⁹ CMS, Puerto Rico 1115 Demonstration Approval Letter (Nov. 28, 2017), <https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/pr/pr-disaster-relief-ca.pdf>.

¹⁶⁰ 42 C.F.R. § 435.952(c)(3).

¹⁶¹ 42 C.F.R. § 435.403(j)(3) (Medicaid); 42 C.F.R. § 457.320(e) (CHIP); 42 C.F.R. § 431.52 (authorizing payments to out-of-state providers for Medicaid services); *see also* CMS, Dear State Medicaid Directors Letter re: National Demonstration following Hurricane Katrina (Sept. 6, 2005), <https://www.medicaid.gov/Federal-Policy-Guidance/downloads/SHO-05-001.pdf>; KAISER FAM. FOUND., A COMPARISON OF THE SEVENTEEN APPROVED KATRINA WAIVERS, (Jan. 2006), <https://kaiserfamilyfoundation.files.wordpress.com/2013/01/7420.pdf>.

¹⁶² 42 U.S.C. § 5182.

¹⁶³ 44 C.F.R. § 206.164(a) (defining "low-income individuals" as "those disaster victims who have insufficient resources to secure adequate legal services, whether the insufficiency existed prior to or results from the major disaster").

¹⁶⁴ 44 C.F.R. § 206.164(e).

¹⁶⁵ 42 U.S.C. § 5182; 44 C.F.R. § 206.164; *see also* FEMA, DISASTER LEGAL SERVICES FACT SHEET (Apr. 2019) (discussing limitations on legal practice).

¹⁶⁶ 44 C.F.R. § 206.164(b) (mandating that these legal services "shall be provided free," but that "fee-generating cases shall not be accepted by lawyers operating under these regulations"); MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL EMERGENCY MANAGEMENT AGENCY AND THE AMERICAN BAR ASSOCIATION REGARDING DISASTER LEGAL SERVICES (May 2012).

representing individuals in disaster-related matters. Following Katrina, the Louisiana bar adopted a temporary rule that allowed lawyers not admitted to that state's bar to provide pro bono services to people affected by Katrina so long as they worked through a non-profit legal aid organization. Since then, roughly 20 states and territories have adopted some version of this major disaster rule, often referred to as a "Katrina Rule," and the ABA has endorsed a model rule.¹⁶⁷ For instance, after Sandy, New York adopted the ABA Model Rule.¹⁶⁸ However, some states and territories have declined to do so. The Florida Bar Association proposed a major disaster rule in 2012, but the Florida Supreme Court rejected it.¹⁶⁹ California also declined to adopt a rule following the 2017 wildfires, relying instead on attorneys admitted to California and trained by a state initiative to respond to disasters.¹⁷⁰ Puerto Rico also declined to adopt a Katrina Rule following Hurricane Maria.¹⁷¹ The Texas bar has not adopted a major disaster rule, but the Texas Supreme Court did promulgate temporary orders to allow out-of-state lawyers to practice temporarily following Hurricane Harvey in 2017 and the winter storms in 2021.¹⁷²

This overview of federal law shows that the United States maintains various types of assistance to individuals after disasters. A few patterns emerge. Some programs, like D-SNAP and DUA, are extensions or expansions of existing programs. Others are disaster-specific, like FEMA's housing assistance. And some are simply temporary allowances or waivers, like Medicaid's relaxed application procedures. Notably, the first two types of programs offer additional resources, whereas the third is simply making existing resources more accessible. These

¹⁶⁷ Am. Bar Ass'n, Resolution Adopted by the House of Delegates amending Comment [14] to Rule 5.5 of the Model Rules of Professional Conduct (Feb. 12, 2007), https://www.americanbar.org/content/dam/aba/administrative/probono_public_service/as/hundredfour.pdf; MODEL RULES OF PRO. CONDUCT R. 5.5 cmt. 14, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law/.

¹⁶⁸ RULES OF THE CT. OF APPEALS FOR THE STATE OF N.Y. § 520.11(d) (laying out procedure for "Provision of Legal Services Following Determination of Major Disaster"); *see also* STATE OF N.Y. CT. OF APP., NOTICE TO THE BAR (Nov. 14, 2012), <https://www.nycourts.gov/ctapps/news/nottobar/NottoBar111412.pdf> (implementing rule after Sandy).

¹⁶⁹ In re: Amendments to the Rules Regulating The Florida Bar (Biennial Report), 101 So. 3d 807, 808 (Fla. 2012) (per curiam).

¹⁷⁰ *See* Disaster Legal Assistance Collaborative, About Us, <https://disasterlegalservicesca.org/about-the-team/> (accessed June 23, 2021).

¹⁷¹ Carolina Bolado & Natalie Rodriguez, *'Now Is The Real Crisis': Puerto Ricans Struggle For Disaster Aid*, LAW360 (Feb. 10, 2019) (describing concerns among Puerto Rican lawyers that the civil law provenance of that territory's law would be particularly challenging for other lawyers).

¹⁷² *See, e.g.*, SUPREME CT. OF TEXAS, MISC. DKT. NO. 21-9027, EMERG. ORD. (March 5, 2021), <https://www.txcourts.gov/media/1451832/219027.pdf>; SUPREME CT. OF TEXAS, MISC. DKT. NO. 17-9101, EMERG. ORD. (Aug. 30, 2017), <https://www.txcourts.gov/media/1438820/179101.pdf>.

patterns will resurface in the rest of the Article. For now, it is important to remember that all of these programs require federal, state, and local coordination. As the next Part demonstrates, the ways in which these programs reach people on the ground are flawed and must be strengthened if the government is to meaningfully adapt public benefits for the climate crisis.

III. WELFARE'S WEAKNESSES IN THE CLIMATE CRISIS

As Part II shows, in the wake of a climate-fueled disaster, the United States relies on state and local governments to request and administer basic services. But just as a chain is only as strong as its weakest link, the American welfare state is only as responsive as its least responsive state. Furthermore, this default of cooperative federalism, by definition, excludes millions of Americans, including tribal members, residents of the territories, and immigrants. As a result, the federal government consistently struggles to deliver a forceful, coordinated response to poverty and inequality because it relies on states to implement and sometimes fund that response. As this Part will explain, these federalism arrangements make the American welfare state particularly vulnerable to the persistent and intensifying shocks of the climate crisis. Fortunately, though, the government's reliance on public benefits to combat the COVID-19 pandemic points to possible paths forward to strengthen those programs for the climate crisis.

A. Congress in Extremis

Before we see the weaknesses in relying on states and FEMA as first responders to these extreme weather events, we should consider how Congress has acted as the backstop for funding basic assistance to Americans in distress. As with other inquiries into the role of Congress, this Section explores whether Congress can still enact legislation and appropriate funds in a responsive and equitable manner during the climate crisis.

1. Diminished Congressional Capacity

Political scientists have shown how, over the last twenty-five years, Congress has become increasingly dysfunctional as the inputs of a two-party electoral system fueled by partisan polarization fail to create a workable legislative.¹⁷³ Now that no Democratic member's voting record overlaps with any Republican counterpart in their respective chamber, Congress cannot routinely reach the compromises necessary to act as a national legislature system.¹⁷⁴

¹⁷³ See THOMAS MANN & NORMAN ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED* (2012); Sarah A. Binder, *Legislating in Polarized Times*, in CONGRESS RECONSIDERED (LAWRENCE C. DODD & BRUCE I. OPPENHEIMER EDS., 11th ed. 2016).

¹⁷⁴ Compare Frances E. Lee, *How Party Polarization Affects Governance*, 18 ANN. REV. POL.

In addition to the incompatibility of polarized electoral politics and supermajoritarian bicameralism, Congress has less lawmaking capacity.¹⁷⁵ Members of Congress spend fewer days in session than they used to.¹⁷⁶ When they are on Capitol Hill, they spend more and more time fundraising.¹⁷⁷ Members of Congress routinely skip committee meetings,¹⁷⁸ and our Congressional representatives have fewer people working for them than they did fifty years ago.¹⁷⁹

Moreover, Congress lacks resources in comparison to the companies who lobby it. Corporations now spend more money lobbying Congress than taxpayers spend to fund the People's Branch.¹⁸⁰ Congress also loses its expertise to K Street. Hill staff routinely leave for more lucrative jobs in the lobbying industry,¹⁸¹ and more than half of the members of Congress who left office after 2010 now lobby Congress.¹⁸²

As Congress's capacity to function has waned, it has had to rely more on lobbyists and agencies to write legislation and expect agencies to fill in the gaps

SCI. 261 (2015) with GREGORY KOGER & MATTHEW J. LEBO, *STRATEGIC PARTY GOVERNMENT: WHY WINNING TRUMPS IDEOLOGY* (2017).

¹⁷⁵ See generally Timothy M. Lapira et al., *Overwhelmed: An Introduction to Congress's Capacity Problem*, in *CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM* (TIMOTHY M. LAPIRA ET AL. EDS. 2020) (collecting research that suggested Congress lacks the "organizational resources, knowledge, expertise, time, space, and technology...to perform its constitutional role").

¹⁷⁶ See BIPARTISAN POL'Y CTR., *HOW CONGRESS GOVERNED IN A POLARIZED ERA: 2007-2018* (Mar. 2019) (detailing how "in recent years, Congress has kept a suboptimal work schedule in Washington, which provided less time for legislating, reviewing federal programs, and fulfilling its most basic duty: funding the government.")

¹⁷⁷ See BIPARTISAN POL'Y CTR., *GOVERNING IN A POLARIZED AMERICA* 53 (2014), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/03/BPC-CPR-Report.pdf#page=54> ("From a practical standpoint, by traveling home every weekend and fundraising during most free moments while in session in Washington, members are insulated from personal contacts with those of the other party."); Lee Drutman, *Yet Another Retiring Member of Congress Complains About the Misery of Fundraising*, VOX (Jan. 8, 2016), <https://www.vox.com/polyarchy/2016/1/8/10736402/congress-fundraising-miserable>; Planet Money, *Welcome To Congress. Now Start Calling Strangers To Ask For Money*, NPR (Jan. 9, 2013), <https://www.npr.org/sections/money/2013/01/09/168958774/welcome-to-congress-now-start-calling-strangers-to-ask-for-money> (reporting on a PowerPoint slide used by the DCCC to incoming freshman urging them to spend 4 hours on "call time" every day they are in Washington).

¹⁷⁸ Luke Rosiak, *Many House members miss more than two-thirds of their committee meetings*, WASH. EXAMINER (Sept. 29, 2014), <https://www.washingtonexaminer.com/many-house-members-miss-more-than-two-thirds-of-their-committee-meetings>.

¹⁷⁹ Molly E. Reynolds *How Congress Fell Behind the Executive Branch*, in *CONGRESS OVERWHELMED* 36 (TIMOTHY M. LAPIRA ET AL. EDS. 2020).

¹⁸⁰ See Ezra Klein, *Corporations Now Spend More Lobbying Congress than Taxpayers Spend Funding Congress*, VOX (July 15, 2015).

¹⁸¹ Joshua McCrain, *Revolving Door Lobbyists and the Value of Congressional Staff Connections*, 80 J. POL. 1369 (Oct. 2018).

¹⁸² See OPENSECRETS & REMAPPING DEBATE, *REVOLVING DOOR: FORMER MEMBERS OF THE 111TH CONGRESS*, <http://www.opensecrets.org/revolving/departing.php?cong=111>; Jeffrey Lazarus et al., *Who Walks through the Revolving Door? Examining the Lobbying Activity of Former Members of Congress*, 5 INT. GRPS. & ADVOC. 82 (2016).

with regulations.¹⁸³ And what happens when Congress cannot delegate its authority? At best, Congress relies on unorthodox lawmaking.¹⁸⁴ At worst, the federal government shuts down.¹⁸⁵ There were four government shutdowns in the 1980s, but none lasted more than a day. The last three—in 2013, December 2018, and January 2018—combined to last 54 days.¹⁸⁶ While the budget and appropriations process has departed from the regular order as a site of unorthodox lawmaking for some time, in the words of Gillian Metzger, “the gap between the ideal and the real has grown much larger of late.”¹⁸⁷ While Congress enacted a budget resolution every year from 1975 to 1998, it has failed to do so seven of the last ten years.¹⁸⁸ These realities of national lawmaking in the United States risk making Congress increasingly unresponsive precisely when the people it purports to represent will need immediate and drastic action as the planet becomes more and more hostile to human life. Already we can see ways in which Congress’s current state have impeded disaster relief.

2. Congress and Emergency Appropriations

Congress’s dysfunctionality, a product of its partisan polarization and eroded capacity, can impact the degree to which it is a responsive institution—meaning its “ability to prioritize and call attention to public problems.”¹⁸⁹ This responsiveness includes its ability to put issues on the agenda and keep others off.¹⁹⁰ One type of Congressional responsiveness is the extent to which our national legislature is able to appropriate funds for various federal efforts. Looking at recent disaster relief efforts as a proxy for whether Congress will be capable of adapting welfare programs, the People’s Branch has a mixed record.

Congress has consistently appropriated emergency funds for disaster relief

¹⁸³ See Johnathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 IOWA L. REV. 1931, 1938–46 (2020); Christopher J. Walker, *Legislating in the Shadows*, 165 U. PA. L. REV. 1377, 1387–97 (2017).

¹⁸⁴ See BARBARA SINCLAIR, *UNORTHODOX LAWMAKING* (5th ed. 2016).

¹⁸⁵ See David Gamage & David Scott Louk, *Preventing Government Shutdowns: Designing Default Rules for Budgets*, 86 U. COLO. L. REV. 181, 220–24 (2015) (discussing the 2013 shutdown).

¹⁸⁶ See CONG. BUDGET OFF., *THE EFFECTS OF THE PARTIAL SHUTDOWN ENDING IN JANUARY 2019* 4–6 (Jan. 28, 2019), <https://www.cbo.gov/publication/54937>.

¹⁸⁷ Gillian Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075, 1092 (2021).

¹⁸⁸ *Id.*

¹⁸⁹ Lee Drutman & Timothy M. Lapira, *Capacity for What? Legislative Capacity Regimes in Congress and Possibilities of Reform*, in CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM 15 (TIMOTHY M. LAPIRA ET AL. EDS. 2020) (defining responsiveness as “a responsive legislature calls forth and attends to the most important public problems, prioritizing in a way that reflects the significance and urgency of the issues at hand”).

¹⁹⁰ For the political science literature on democratic responsiveness and agenda setting, see, e.g., GARY W. COX & MATTHEW D. MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* (2005); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* (1984).

since the Civil War.¹⁹¹ In the past, Congress made disaster appropriations without offsetting those funds with budget cuts elsewhere.¹⁹² Following the 2010 midterm elections, Congressional Republicans began insisting on budget offsets for any disaster relief appropriations.¹⁹³ This new climate for disaster relief on Capitol Hill explains in part why, in 2013, following Superstorm Sandy, Congress took so long to pass an appropriations bill for the affected areas.¹⁹⁴ Congress's response time for an emergency appropriation after the 9/11 terrorist attacks was seven days. For Hurricane Katrina, Congress took ten days. For Superstorm Sandy, Congress took 91.¹⁹⁵ These offsets also help explain the long delay in enacting an emergency appropriation to address the water crisis in Flint, Michigan. The Senate passed such an appropriation unanimously in May 2015, but the House stalled for over 18 months.¹⁹⁶

Congress's inability to enact disaster relief in 2018 could prove prophetic. In early September 2017, Congress made initial disaster appropriations for Florida, Puerto Rico, Texas, and the U.S. Virgin Islands' recovery efforts following multiple storms.¹⁹⁷ Hurricane Maria then struck Puerto Rico on September 20, 2017. Maria, the strongest storm to ever hit Puerto Rico, knocked out the entire power grid. Congress made another appropriation in February 2018 of supplemental funding to address damage caused by disasters in the previous year.¹⁹⁸ The widespread devastation and humanitarian crisis on the island prompted many members of Congress to call for supplemental appropriations for Puerto Rico in 2018, but the legislation went nowhere for months.¹⁹⁹

¹⁹¹ See THE SYMPATHETIC STATE, *supra* note 23, at 25 (describing how Congress passed “between 1860 and 1930 ... more than ninety separate relief measures for various fires, floods, droughts, and famines”); PATRICK S. ROBERTS, *DISASTERS AND THE AMERICAN STATE: HOW POLITICIANS, BUREAUCRATS, AND THE PUBLIC PREPARE FOR THE UNEXPECTED* 16–40 (2013) (discussing origins of federal response to disasters).

¹⁹² Carl Hulse, *Federal Austerity Changes Disaster Relief*, N.Y. TIMES (Aug. 30, 2011).

¹⁹³ *Id.*; see also Gregory W. Meeks, *A Storm in Congress: How Partisanship Impacts Disaster Response*, 53 HARV. J. LEGIS. 447, 449–51 (2016) (identifying the new Republican House majority in the 112th Congress as changing the politics of disaster relief on Capitol Hill). To be sure, as climate disasters become more common, such relief becomes more regular, making it feel more like normal budget appropriations rather than one-off major spending.

¹⁹⁴ Disaster Relief Appropriations Act of 2013, Pub. L. No. 113-2, 127 Stat. 4 (Jan. 29, 2013); see also Danshera Wetherington Cords, *An Inflection Point for Disaster Relief: Superstorm Sandy*, 35 TOURO L. REV. 926, 946 (arguing that that delay “marked a severe shift in Congressional funding for disaster relief”).

¹⁹⁵ See Cords, *supra* note 194, at 946; Meeks, *supra* note 193, at 450.

¹⁹⁶ Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, 130 Stat. 1628 (2016). See Susan Milligan, *Playing Games with a Disaster*, U.S. NEWS & WORLD REP. (Sept. 30, 2016), <https://www.usnews.com/news/articles/2016-09-30/the-partisan-politics-of-disaster-relief>.

¹⁹⁷ See Continuing Appropriations Act of 2018 and Supplemental Appropriations for Disaster Relief Requirements Act of 2017, Pub. L. No. 115-56, div. B, 131 Stat. 1129, 1137.

¹⁹⁸ See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 21101, 132 Stat. 64, 103.

¹⁹⁹ See Charley E. Willison, *Quantifying Inequities in U.S. Federal Response to Hurricane Disaster in Texas and Florida Compared with Puerto Rico*, BMJ GLOBAL HEALTH (2019); BRYNNE KEITH-JENNINGS, *CTR. ON BUDGET & POL’Y PRIORITIES, PUERTO RICO FORCED TO SLASH BASIC*

Meanwhile, the climate-fueled disasters kept on coming. Hurricane Michael, the first Category 5 hurricane to hit the United States in twenty-five years and the fourth-strongest hurricane to hit the country ever, struck Florida, causing an estimated \$25.1 billion in damage.²⁰⁰ On the other side of the country, California endured, according to the state's forestry agency, the "deadliest and most destructive wildfire season on record."²⁰¹ In 2018, 7,500 fires burned in an area of over 1.67 million acres in California. Among them, the Camp Fire on November 8, 2018 killed more people than any other in the state's history.²⁰² Then on December 22, 2018, President Trump and Congress's disputes led to the federal government shutdown.²⁰³ Lasting 35 days, it was the longest in U.S. history. When the government reopened, it still took another four months for the 2018 disaster appropriations to become law. The fight over additional funding for Puerto Rico ensnared emergency appropriations for California and Florida, not to mention Iowa, which had endured historic floods.²⁰⁴ In the end, Iowa waited two months, California waited a few more, Florida waited nearly eight, and Puerto Rico waited over a year before Congress finally passed the disaster relief bill.²⁰⁵ As then-Senate Majority Leader Mitch McConnell put it, "I believe I'm correct that this has taken longer than after any previous disaster to address the problem."²⁰⁶

Perhaps this combination of partisan polarization, Congressional inaction, and a government shutdown stretching for weeks was an aberration. The extreme weather that created the devastation was not. Congress will be tested more frequently in the coming years to provide disaster relief in a timely manner to reach people in need. It seems likely that the saga of disaster relief in 2018 and 2019 is a harbinger of things to come.

FOOD AID WHILE WAITING FOR WASHINGTON TO ACT (Mar. 6, 2019), <https://www.cbpp.org/blog/puerto-rico-forced-to-slash-basic-food-aid-while-waiting-for-washington-to-act>.

²⁰⁰ *Assessing the U.S. Climate in 2018*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Feb. 6, 2019), <https://www.ncei.noaa.gov/news/national-climate-201812>.

²⁰¹ STATE OF CAL., 2018 INCIDENT ARCHIVE, <https://www.fire.ca.gov/incidents/2018/>.

²⁰² *Id.*

²⁰³ DOTTIE ROSENBAUM, CTR. ON BUDGET & POL'Y PRIORITIES, USDA TO FUND SNAP FOR FEBRUARY 2019, BUT MILLIONS FACE CUTS IF SHUTDOWN CONTINUES (Jan. 10, 2019).

²⁰⁴ Marianne Levine, *Disaster aid stalls in Senate, as Trump revs up attack on Puerto Rico*, POLITICO (Apr. 2, 2019), <https://www.politico.com/story/2019/04/02/senate-democrats-disaster-relief-amendment-1249169>.

²⁰⁵ Press Release, Off. of Sen. Marco Rubio, After Unnecessary Delay, House Finally Passes Disaster Bill (June 3, 2019), <https://www.rubio.senate.gov/public/index.cfm/2019/6/after-unnecessary-delay-house-finally-passes-disaster-bill>; Li Zhou, *Congress finally passes \$19 billion in disaster aid*, VOX (June 3, 2019), <https://www.vox.com/policy-and-politics/2019/6/3/18647872/congress-disaster-aid-puerto-rico-donald-trump>.

²⁰⁶ Leigh Ann Caldwell & Frank Thorp V, *Republicans signal new willingness to pass disaster aid bill*, NBC (May 7, 2019), <https://www.nbcnews.com/politics/congress/republicans-signal-new-willingness-pass-disaster-aid-bill-n1003046>.

B. Delays and Disparities in Distributing Relief

This status quo of disparate disaster welfare programs and Congressional dysfunction means that FEMA, state agencies, and local governments must wait for federal funding, but then have a fair amount of flexibility in making these public benefits available. However, there are weaknesses and drawbacks in the government response. It is undoubtedly difficult to administer governmental programs that were not available to residents in an impacted area before a storm but are suddenly critical to their survival. These surges in need can easily overwhelm state and local bureaucracies tasked with distributing assistance.²⁰⁷ Nonetheless, this Section documents how disaster welfare assistance is often delayed and improperly distributed. Moreover, these programs often fail to accommodate the elderly and people with disabilities, and racial disparities persist in terms of access and generosity.

1. Delays in Distributing Relief

As discussed above, assistance to individuals following extreme weather events can sometimes be delayed on Capitol Hill—the 2018 disaster appropriations being the most recent egregious example. But delays occur at the state level, too. Delays in disaster food assistance are instructive. For instance, after Hurricane Harvey in 2017, Texas immediately distributed replacement food assistance to more than 700,000 households already receiving SNAP.²⁰⁸ But Texas waited weeks to implement D-SNAP anywhere in the state.²⁰⁹ When state officials did implement D-SNAP, they initially excluded the cities of Corpus Christi and Houston because of the “large volumes of people who would not be able to be efficiently served through a local [welfare] office.”²¹⁰ As a result, Texas closed D-SNAP eligibility in some parts of the state before it had opened D-SNAP eligibility in others.²¹¹ New

²⁰⁷ David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1442-44 (2011) (discussing this phenomenon with Hurricane Katrina).

²⁰⁸ CHARLES SMITH, TEX. HEALTH & HUM. SERVS. HURRICANE HARVEY RELIEF EFFORTS (Sept. 29, 2017), <https://www.hhs.texas.gov/file/74331/download?token=hmvorhBt> (legislative presentation to the House Appropriations Committee).

²⁰⁹ Christopher Collins, *Still No Deal Between State and Feds on Disaster Food Aid for Harvey Victims*, TEXAS OBSERVER (Sept. 6, 2017), <https://www.texasobserver.org/still-no-deal-between-state-and-feds-on-disaster-food-aid-for-harvey-victims/> (“It’s unknown why Texas hasn’t launched the emergency program yet.”).

²¹⁰ OFF. OF THE TEX. GOVERNOR, PRESS RELEASE: TEXAS EXPANDS FOOD BENEFITS FOR HARVEY VICTIMS (Sept. 11, 2017), <https://gov.texas.gov/news/post/texas-expands-food-benefits-for-harvey-victims>.

²¹¹ GOVERNOR’S COMMISSION TO REBUILD TEXAS, EYE OF THE STORM 74 (Nov. 2018), <https://www.rebuildtexas.today/wp-content/uploads/sites/52/2018/12/12-11-18-EYE-OF-THE-STORM-digital.pdf>; *Disaster Food Benefits: Key Points*, TEX. HEALTH & HUM. SERVS., <https://www.hhs.texas.gov/sites/default/files/documents/services/financial/d-snap-key-points.pdf> (listing dates available by county).

Jersey did not launch its D-SNAP program until nearly three weeks after Sandy.²¹² Even though New York implemented D-SNAP quicker than New Jersey did, some of New York City's offices remained closed because of storm damage and were thus unable to distribute the benefits.²¹³ Following the fires that struck California that same fall, the state reported that D-SNAP assistance only became available after many of the state's disaster centers were beginning to close.²¹⁴

This challenge of finding physical infrastructure to distribute assistance raises other challenges for state and local government. After Harvey and Irma, Florida and Texas experienced significant difficulties as individuals tried to apply for D-SNAP in person.²¹⁵ In Texas, people reportedly waited in line for seven or eight hours to apply for benefits.²¹⁶ Meanwhile, 50,000 people lined up at a park in Miami on a single day to receive emergency food assistance.²¹⁷ At another D-SNAP site in Florida, so many people in line collapsed from heat exhaustion that police had to shut down the site.²¹⁸ These failures are emblematic of a federal regulatory regime that insists on state and local institutions to construct a benefit access system essentially overnight and precisely when those institutions have experienced widespread destruction.

2. Disparities in Distributing Relief

These cooperative federalism arrangements also create disparities when state and local agencies distribute assistance. Considering federal law requires that individuals apply for D-SNAP assistance in person, it necessarily excludes those people with limited mobility. As a result, senior citizens and people with disabilities routinely miss out on emergency assistance. Unsurprisingly, there has been a spate of lawsuits against federal and state agencies for administering these post-disaster public benefits in ways that discriminate against and fail to accommodate people

²¹² Christopher Collins, *Still No Deal Between State and Feds on Disaster Food Aid for Harvey Victims*, TEXAS OBSERVER (Sept. 6, 2017), <https://www.texasobserver.org/still-no-deal-between-state-and-feds-on-disaster-food-aid-for-harvey-victims/>.

²¹³ Alice Hines, *After Sandy, NYC Food Stamp Centers Crowded With Hungry Families*, HUFFINGTON POST (Nov. 5, 2012), https://www.huffpost.com/entry/sandy-food-stamp-centers-nyc_n_2078862.

²¹⁴ FOOD RSCH. & ACTION CTR., CALFRESH FIGHTS HUNGER IN THE FACE OF CALIFORNIA WILDFIRES (Dec. 2017), <https://frac.org/blog/calfresh-fights-hunger-face-california-wildfires>.

²¹⁵ Christopher Collins, *Still No Deal Between State and Feds on Disaster Food Aid for Harvey Victims*, TEXAS OBSERVER (Sept. 6, 2017), <https://www.texasobserver.org/still-no-deal-between-state-and-feds-on-disaster-food-aid-for-harvey-victims/>.

²¹⁶ GOVERNOR'S COMMISSION TO REBUILD TEXAS, *supra* note 211, at 74.

²¹⁷ Glenn Garvin, *50,000 Line Up Outside Tropical Park Seeking Post-Hurricane Food Assistance*, MIAMI HERALD (Oct. 15, 2017), <https://infoweb.newsbank.com/apps/news/document-view?p=NewsBank&docref=news/1678ED9441C02690>.

²¹⁸ Monique Madan, *Food Assistance Centers Close After People Suffer Heat Exhaustion in Line*, MIAMI HERALD (Oct. 14, 2017), <https://infoweb.newsbank.com/apps/news/document-view?p=NewsBank&docref=news/1678D8E5C3957EE8>.

with disabilities.²¹⁹

Take for instance two lawsuits involving D-SNAP. Poor New Yorkers with disabilities alleged that New York State’s and New York City’s agencies violated federal and state law in administering D-SNAP over a seven-day period following Sandy.²²⁰ Specifically, the plaintiffs alleged that the state and local agencies failed to provide reasonable accommodations for individuals with disabilities.²²¹ New York decided to only allow in-person applications at one full-time site in Brooklyn and one part-time satellite site on Staten Island.²²² Floridians brought a similar lawsuit following Hurricane Irma in 2017.²²³ The day after the state was sued, Florida’s Department of Children and Families asked the U.S. Department of Agriculture to waive its in-person D-SNAP interview requirement so that elderly applicants and applicants with disabilities who had pre-registered with the state agency could apply telephonically.²²⁴ The federal government granted that waiver—the first of its kind—two weeks later.²²⁵

While these lawsuits largely involve disaster food assistance, there is a reason why there are fewer lawsuits involving FEMA. FEMA claims that it cannot be sued for any violation related to its distribution of benefits under the Stafford Act.²²⁶ Section 701(a) of the Administrative Procedure Act prohibits judicial review of “agency action is committed to agency discretion by law.”²²⁷ In various lawsuits, FEMA has argued that its actions are discretionary and therefore the agency is immune from suit when it distributes benefits after a disaster, and federal courts routinely accept that defense.²²⁸

²¹⁹ See *Disaster Preparedness and Response: The Special Needs of Older Americans: Hearing Before the S. Special Comm. on Aging*, 115th Cong. (Sept. 20, 2017).

²²⁰ See Complaint at ¶¶ 1–2, *Toney-Dick v. Doar*, No. 12-cv-9162 (S.D.N.Y. 2013) (alleging violations of the Americans with Disabilities Act, the Rehabilitation Act, the Food and Nutrition Act, and state and local law).

²²¹ *Id.*; see also *Rafferty v. Doar*, 2013 WL 3328168 (S.D.N.Y. March 5, 2013) (class action complaint).

²²² See Complaint at ¶¶ 19, 58, *Toney-Dick v. Doar*, No. 12-cv-9162 (S.D.N.Y. 2013).

²²³ *Miami Workers Ctr. v. Carroll*, No. 17-cv-24027 (S.D. Fla. Nov. 2, 2017).

²²⁴ See Letter from Liesta Sykes, Director of Economic Self-Sufficiency, Fla. Dep’t of Children & Fams., to Peggy Fouts, U.S. Dep’t of Agric. (Nov. 3, 2017), <https://www.myflfamilies.com/newsroom/docs/SupplementalNutritionAssistanceProgram-11.03.17.pdf>.

²²⁵ FLORIDA DEP’T OF CHILDREN & FAMS, USDA TO ADMINISTER TELEPHONE INTERVIEWS FOR SPECIAL NEEDS APPLICANTS UNABLE TO PREVIOUSLY INTERVIEW FOR D-SNAP (Nov. 17, 2017), <https://www.myflfamilies.com/newsroom/pressreleases/2017/20171117-DCF,%20USDA%20to%20Administer%20Telephone%20Interviews%20for%20Special%20Need%20Applicants%20Unable%20to%20Previously%20Interview%20for%20DSNAP.shtml>.

²²⁶ See *In re FEMA Trailer Formaldehyde Prod. Liab. Litig.*, 668 F.3d 281, 291 (5th Cir. 2012) (affirming the district court’s dismissal of FTCA claims); see generally 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, 478–82 (2008) (discussing challenges of suing FEMA).

²²⁷ 5 U.S.C. § 701(a)(2).

²²⁸ See, e.g., *Ridgely v. FEMA*, 512 F.3d 727 (5th Cir. 2008); *Santos v. FEMA*, 327 F. Supp.

While HHS and FEMA must comply with federal nondiscrimination statutes, which include the requirement to ensure access to their programs to persons with limited English proficiency, federal law prohibits some immigrants from accessing some of these programs.²²⁹ Only U.S. citizens and immigrants with certain legal statuses, such as Lawful Permanent Residents, can receive assistance through FEMA's Individuals and Households Program.²³⁰ These restrictions mirror other prohibitions on serving immigrant families through public benefits.²³¹ As a result, since many households are mixed-status in the United States in which citizen children are living with parents who are not "qualified aliens," those children who are, in fact, eligible for assistance do not receive it because of their parents' fear and distrust of government.²³²

Moreover, federal and state agencies sometimes distribute disaster aid in racially disparate ways. Researchers have found evidence of racial disparities in how FEMA administers IHP benefits.²³³ Some Texans alleged that FEMA's high denial rates of housing repair applications in the Rio Grande Valley reflect long-standing racist practices regarding colonias—communities along the border that have repeatedly been excluded from infrastructure investment.²³⁴ Researchers have also found that FEMA's grants in Houston following Hurricane Harvey disproportionately benefited the wealthy.²³⁵

3d 328 (D. Mass. 2018); *McWaters v. FEMA*, 436 F. Supp. 2d 802 (E.D. La. 2006); *Ass'n of Cmty. Org. for Reform Now v. FEMA*, 463 F. Supp. 2d 26 (D.D.C. 2006).

²²⁹ See 42 U.S.C. § 18116; 42 C.F.R. § 92.101.

²³⁰ See *Citizenship and Immigration Status Requirements for Federal Public Benefits*, FEMA (Sept. 2, 2021), <https://www.fema.gov/assistance/individual/program/citizenship-immigration-status>.

²³¹ The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) restricted access to Medicaid, SNAP, SSI, and TANF to U.S. citizens and "qualified aliens." Subsequent Congresses restored some immigrant eligibility, but millions of immigrants continue to be excluded from basic assistance. See ELISA MINOFF ET AL., *CTR. FOR THE STUDY OF SOC. POL'Y, THE LASTING LEGACY OF EXCLUSION* (Aug. 2021), <https://cssp.org/resource/the-lasting-legacy-of-exclusion/>.

²³² Abby Goodnough & Margot Sanger-Katz, *Medicaid Covers a Million Fewer Children. Baby Elijah Was One of Them*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/22/upshot/medicaid-uninsured-children.html>.

²³³ Simone J. Domingue & Christopher T. Emrich, *Social Vulnerability and Procedural Equity: Exploring the Distribution of Disaster Aid Across Counties in the United States*, 49 AM. REV. PUB. ADMIN. 8 (2019), <https://journals.sagepub.com/doi/full/10.1177/2378023120905439>; Junia Howell & James R. Elliot, *Damages Done: The Longitudinal Impacts of Natural Hazards on Wealth Inequality in the United States*, 66 SOC. PROBS. 448 (Aug. 14, 2018), <https://academic.oup.com/socpro/article/66/3/448/5074453?login=true>.

²³⁴ *La Union del Pueblo Entero (LUPE) et al. v. FEMA*, 141 F. Supp. 3d 681 (S.D. Tex. 2015); see also Carolina Cuellar, *Colonias Bear The Heaviest Burden When Rain Falls In The Rio Grande Valley*, TEX. PUB. RADIO (July 22, 2021), <https://www.tpr.org/border-immigration/2021-07-22/colonias-bear-the-heaviest-burden-when-rain-falls-in-the-rio-grande-valley> (discussing case).

²³⁵ Stephen B. Billings et al., *Let the Rich Be Flooded: The Distribution of Financial Aid and Distress after Hurricane Harvey* (May 30, 2019), <https://ssrn.com/abstract=3396611> (presenting evidence that "evidence that disaster assistance programs—both SBA loans and FEMA IHP grants—are regressive in allocation").

Current federal and state processes in using public benefits to respond to disasters exhibit significant flaws including delayed appropriations, improper distribution, persistent barriers to access, and racial disparities. Fortunately, some of these flaws in the status quo can be fixed. Before explaining how to do that, it is worth reflecting on what lessons the government's response to the COVID-19 pandemic offers for climate adaptation.

C. Lessons from the COVID-19 Response

The United States has endured some of the worst infection and mortality rates during the global COVID-19 pandemic,²³⁶ and some experts have suggested that a lack of consistent leadership at both the national and state level exacerbated the pandemic.²³⁷ This Section does not weigh in on that debate. Rather, it focuses on what the use of public benefits in the pandemic response might mean for future government responses to the climate crisis.

In some ways, the federal government's response to the COVID-19 pandemic tracked its response to the climate-fueled disasters discussed above. In response to the pandemic, President Trump granted major disaster declaration requests for all fifty states, D.C., and the five territories.²³⁸ It was the first time the Stafford Act was used to declare a public health disaster. And just as federal law deploys public benefits as disaster relief, the federal government similarly relied on these programs during the COVID-19 pandemic.

How the federal and state governments responded to the COVID-19 pandemic using public benefits deserves (and, in some ways, has already gotten) its own lengthy analysis.²³⁹ However, for the purposes of thinking through how the U.S. should adapt its welfare programs to meet the climate crisis, this Section elaborates on three interlocking lessons from the pandemic. First, the federal government will rely on existing programs to deliver immediate assistance. Second, as a result, the response will reinforce the racial hierarchy that structures the American welfare state. Third and finally, lawmakers, and perhaps voters, seem more willing to consider universal or quasi-universal cash benefits—which, in turn, can, but do not always, avoid the racialized pitfalls of preexisting programs.²⁴⁰

²³⁶ See COVID-19 DASHBOARD BY THE CENTER FOR SYSTEMS SCIENCE AND ENGINEERING (CSSE), JOHNS HOPKINS UNIV., <https://coronavirus.jhu.edu/map.html> (last visited Jan. 4, 2022); German Lopez, *How the US's Covid-19 death toll compares to that of other wealthy countries*, VOX (Jan. 11, 2021).

²³⁷ See, e.g., *The U.S. is Missing Key Opportunities to End the COVID-19 Pandemic*, THE COMMONWEALTH FUND (Jan. 15, 2021); The Editors, *Dying in a Leadership Vacuum*, NEW ENG. J. MED. (Oct. 7, 2020).

²³⁸ FEMA, COVID-19 DISASTER DECLARATIONS (Aug. 20, 2021), <https://www.fema.gov/disasters/coronavirus/disaster-declarations>.

²³⁹ See, e.g., Hammond, Kleiman, & Scheffler, *supra* note 31.

²⁴⁰ See Alex Rees-Jones et al., *COVID-19 Changed Tastes for Safety-Net Programs* (Nat'l Bureau of Econ. Rsch. Working Paper No. 27865, 2020), <https://www.nber.org/papers/w27865>.

1. Reliance on Existing Programs

The federal response to the COVID-19 pandemic was vast, various, and arguably inadequate. Yet, despite the wide-ranging set of policies and programs, the federal government relied heavily on existing programs to deliver assistance to Americans struggling with illness, unemployment, food and housing insecurity, and care responsibilities.²⁴¹ A look at how the federal government relied on existing food, unemployment, and medical assistance shows the path dependency of the pandemic response.

a. Food Assistance

Before COVID-19 spread throughout the United States, over 37 million Americans received SNAP benefits.²⁴² More Americans found it harder to afford food in light of the health and economic dimensions of COVID-19, including the widespread closures to limit the virus's spread. For instance, more Americans used food pantries and other charitable organizations for food assistance in early 2020 than at any time since at least 2014.²⁴³ Even if the federal government had made no changes to SNAP, use of the program would have surged, as it has in past crises.²⁴⁴ That's because SNAP is an automatic stabilizer—it covers more people and provides more assistance during economic downturns, and it contracts as the economy recovers.²⁴⁵ But Congress accelerated and amplified SNAP's impact by allowing states to make “emergency allotments” for SNAP households, thereby permitting states to give the maximum benefit to more households.²⁴⁶ Congress also

²⁴¹ See, e.g., Diane Schanzenbach & Abigail Pitts, *How Much Has Food Insecurity Risen? Evidence from the Census Household Pulse Survey*, NW. UNIV. INST. FOR POL'Y RSCH. (June 10, 2020), <https://www.ipr.northwestern.edu/documents/reports/ipr-rapid-research-reports-pulse-hh-data-10-june-2020.pdf>; Lauren Bauer, *The COVID-19 Crisis Has Already Left Too Many Children Hungry in America*, BROOKINGS INST.: THE HAMILTON PROJ. (May 6, 2020).

²⁴² FOOD & NUTRIT. SERV., SNAP: FY18 THROUGH FY21 NATIONAL VIEW SUMMARY (Sept. 3, 2021), <https://fns-prod.azureedge.net/sites/default/files/resource-files/34SNAPmonthly-9.pdf>.

²⁴³ See Marianne Bitler et al., *The Social Safety Net in the Wake of COVID-19*, Nat'l Bureau of Econ. Rsch. Working Paper No. 27796 (2020).

²⁴⁴ James P. Ziliak, *Why are so many Americans on food stamps? The role of the economy, policy, and demographics*, in SNAP MATTERS: HOW FOOD STAMPS AFFECT HEALTH AND WELL BEING (Judith Bartfeld et al. eds. 2015) (discussing reasons for SNAP's ubiquity).

²⁴⁵ Robert A. Moffitt & James P. Ziliak, *COVID-19 and the U.S. Safety Net*, 41 FISCAL STUD. 515, 544 (2020) (concluding that unlike other U.S. anti-poverty programs, “SNAP has functioned well overall as an automatic stabilizer”); see also Ariel Jurow Kleiman, Gabriel Scheffler, & Andrew Hammond, *Legislating a More Responsive Safety Net*, in COVID-19 AND THE LAW: DISRUPTION, IMPACT AND LEGACY (I. Glenn Cohen & Abbe R. Gluck eds.) (forthcoming 2022) (making the case for automatic stabilizers).

²⁴⁶ Families First Coronavirus Response Act, Pub. L. No. 16-127, § 2302(a)(1), 134 Stat. 178, 188 (2020); see also FOOD & NUTRIT. SERV., MEMORANDUM FROM JESSICA SHAHIN, SNAP ASSOCIATE ADMINISTRATOR TO SNAP STATE AGENCIES (March 20, 2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAP-COVID-EmergencyAllotmentsGuidance.pdf>.

suspended all SNAP work requirements for the duration of the emergency declaration, provided more funding to states for the administrative costs in light of the surge in need, and made additional appropriations to other nutrition programs.²⁴⁷

Congress did create a new food assistance program in response to the pandemic, but even that new program is old. Congress authorized the U.S. Department of Agriculture to allow states to create a “Pandemic EBT” program.²⁴⁸ This food assistance provided families with an amount equal to the school meals missed from school closures.²⁴⁹ Roughly 30 million children receive free or reduced-price meals at school.²⁵⁰ Pandemic EBT allowed participating states “to provide approximately \$250 to \$450 per child in grocery benefits (depending on the average number of days schools closed in the state) to make up for the meals missed in the spring of 2020.”²⁵¹ The states loaded these new benefits onto EBT cards (the same technology used for SNAP). Initially, all 50 states, D.C., and the U.S. Virgin Islands participated in Pandemic EBT. Congress extended Pandemic EBT benefits three times so that assistance could continue through Summer 2021.²⁵²

b. Unemployment Assistance

Congress also expanded the amount, duration, and scope of unemployment insurance (UI) benefits for those who lost work due to the COVID-19 pandemic.²⁵³

²⁴⁷ Families First Coronavirus Response Act, Pub. L. No. 16-127, §§ 1102, 2301(a), 2302(a)(1), 134 Stat. 178, 180, 187–88 (2020); American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1101(b), 135 Stat. 4, 15; Consolidated Appropriations Act, 2021, H.R. 133, 116th Cong. § 704; American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. § 1013 (2021).

²⁴⁸ Families First Coronavirus Response Act, Pub. L. No. 16-127, § 1101(b)–(i), 134 Stat. 178, 179–80 (2020). By late August 2020, the U.S. Department of Agriculture had approved Pandemic EBT programs in all fifty states, D.C., and the U.S. Virgin Islands. *See* U.S. DEP’T OF AGRIC., PRESS RELEASE: USDA APPROVES PROGRAM TO FEED KIDS IN IDAHO: PANDEMIC EBT NOW AVAILABLE IN ALL 50 STATES (Aug. 19, 2020), <https://www.fns.usda.gov/news-item/usda-032920>.

²⁴⁹ FOOD & NUTRIT. SERV., STATE GUIDANCE ON CORONAVIRUS PANDEMIC EBT (P-EBT) (June 2, 2020), <https://fns-prod.azureedge.net/sites/default/files/resource-files/SNAP-CN-COVID-PEBTGuidance.pdf> (explaining that the “household allotment amount will be no less than the value of school meals at the free rate over the course of five (5) school days for each eligible child in the household”); *see also* Lauren Bauer et al., *The Effects of Pandemic EBT on Measures of Food Hardship*, THE HAMILTON PROJ. (July 2020) (analyzing impact). Congress extended Pandemic EBT with an additional \$5 billion appropriation through the end of the designated public health emergency. American Rescue Plan Act of 2021, § 1101(b).

²⁵⁰ *See* ZOË NEUBERGER ET AL., LESSONS FROM EARLY IMPLEMENTATION OF PANDEMIC-EBT OPPORTUNITIES TO STRENGTHEN ROLLOUT FOR SCHOOL YEAR 2020-2021, CTR. ON BUDGET & POL’Y PRIORITIES & FOOD RSCH. & ACTION CTR. (updated Oct. 30, 2020), <https://www.cbpp.org/sites/default/files/atoms/files/10-8-20fa.pdf> [hereinafter LESSONS FROM EARLY IMPLEMENTATION OF PANDEMIC-EBT].

²⁵¹ *Id.*

²⁵² URBAN INST., STATE-BY-STATE GUIDE TO THE 2020-21 PANDEMIC EBT PROGRAM (Aug. 31, 2021), <https://www.urban.org/state-guide-pandemic-ebt>.

²⁵³ State governments also implemented their own changes to unemployment benefits. *See* NAT’L CONF. OF STATE LEG., COVID-19: UNEMPLOYMENT BENEFITS (July 16, 2020),

The CARES Act provided a \$600 per week UI supplement—called Federal Pandemic Unemployment Compensation—through July 31, 2020,²⁵⁴ followed by an additional \$300 per week payment for 11 weeks,²⁵⁵ to be paid on top of state benefits. Congress also extended the duration of benefits, providing additional weeks of federally funded support for workers who had exhausted all state benefits.²⁵⁶ Congress then extended these UI benefits twice.²⁵⁷ The stimulus bills also temporarily expanded UI eligibility. Congress provided federal funding for states to pay benefits to workers who lost hours (even if they retained their jobs). Congress also created a new program called Pandemic Unemployment Assistance (PUA) for non-employee workers otherwise excluded from UI programs.²⁵⁸

c. Medicaid

Congress financed states' costs of rising Medicaid enrollment, in part, to prevent states from cutting benefits. In the Families First Act, Congress temporarily increased the Federal Medical Assistance Percentage (FMAP) for state and territorial Medicaid programs by 6.2% until the end of the public health emergency.²⁵⁹ States had to meet various conditions to be eligible for the increased matching funds, including not imposing more restrictive Medicaid eligibility standards or procedures, increasing premiums, or terminating beneficiaries from the program involuntarily.²⁶⁰ Every state took the offered FMAP increase.²⁶¹ In part because of these policies, recent statistics document that Medicaid enrollment surged during the pandemic.²⁶²

<https://www.ncsl.org/research/labor-and-employment/covid-19-unemployment-benefits.aspx>.

²⁵⁴ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2104, 134 Stat. 281, 318–21 (2020).

²⁵⁵ Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 203, 134 Stat. 1182, 1263.

²⁵⁶ *Id.*

²⁵⁷ The Appropriations Act extension ran through March 14, 2021. Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 201, 134 Stat. 1182, 1396. The American Rescue Plan extended the UI scheme further through September 6, 2021. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 2901, 135 Stat. 4, 49.

²⁵⁸ Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, §§ 2102, 2108, 2109, 134 Stat. 281, 313–17, 328–30 (2020).

²⁵⁹ Families First Coronavirus Response Act, Pub. L. No. 16-127, § 6008, 134 Stat. 178, 208–09 (2020). Congress also provided \$178 billion in funding for medical providers. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., CARES ACT PROVIDER RELIEF FUND (JAN. 21, 2021).

²⁶⁰ Families First Coronavirus Response Act, Pub. L. No. 16-127, § 6008, 134 Stat. 178, 208–09 (2020).

²⁶¹ Nicole Huberfeld & Sidney Watson, *Medicaid's Vital Role in Addressing Health and Economic Emergencies*, in COVID-19 POLICY PLAYBOOK (Aug. 2020) https://static1.squarespace.com/static/5956e16e6b8f5b8c45f1c216/t/5f445cba4de0e201344f78d3/1598315706858/Chp13_COVIDPolicyPlaybook-Aug2020.pdf.

²⁶² *See* CTRS. FOR MEDICARE & MEDICAID SERVS., DECEMBER 2020 & JANUARY 2021 MEDICAID AND CHIP ENROLLMENT TRENDS SNAPSHOT, <https://www.medicare.gov/medicaid/national-medicare-chip-program-information/downloads/december-2020-january-2021-medicare-chip-enrollment-trend->

2. Newfound Enthusiasm for Cash

In addition to relying on existing programs, Congress showed a newfound enthusiasm for cash payments. Congress initially directed the Internal Revenue Service (IRS) to send “recovery rebate” checks of \$1,200 per person and \$500 per child to millions of American households.²⁶³ Congress then authorized additional payments of \$600 per person, including children, in late 2020 and \$1,400 per person in early 2021.²⁶⁴

Congress also temporarily modified the structure of the EITC and the Child Tax Credit (CTC). The EITC provision allowed taxpayers to use their 2019 income, rather than their 2020 income, to calculate the credit amount for 2020.²⁶⁵ This change ensured that taxpayers would not receive a smaller credit because they lost work due to the pandemic.²⁶⁶ In 2021, Congress made the CTC fully refundable and available to otherwise eligible taxpayers with no earned income. The American Rescue Plan also temporarily increased the amount of the CTC for low- and middle-income taxpayers to up to \$3,600 per child for a child under 6 and up to \$3,000 for children between the ages of 6 and 17.²⁶⁷

To sum up, Congress was willing to spend and spend big. There may be multiple reasons for this flurry of legislation. There appeared to be an understanding on Capitol Hill that the federal fiscal response to the Great Recession was insufficient.²⁶⁸ It was also a presidential election year. The response from Washington might have been different if the President, the entire House, and a third of the Senate were not up for reelection. Despite that electoral reality, Congress still dithered for months after the initial round of stimulus in early 2020, while millions of Americans got sick or were out of work. Congress passed the first four stimulus bills in a six-week period between early March and late April 2020, but then did not pass additional stimulus for eight months (and only then at end of the lame-duck session on December 27th). Nonetheless, the level of national action had a massive and measurable impact: despite the heaviest job losses since the 1930s,

snapshot.pdf.

²⁶³ 26 U.S.C. § 6428.

²⁶⁴ Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 203 134 Stat. 1182, 1263; American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9601, 135 Stat. 4, 138–44. Payments phased out for income above \$75,000 for individuals and \$150,000 for married couples.

²⁶⁵ Consolidated Appropriations Act §§ 4946–47; American Rescue Plan Act § 9626.

²⁶⁶ American Rescue Plan Act, § 9621. Congress also temporarily expanded both eligibility for and the amount of EITC for those without qualifying children by lowering the minimum age and raising the maximum age. The legislation also temporarily increased the maximum childless EITC increases from \$543 to \$1,502 in 2021.

²⁶⁷ American Rescue Plan Act, § 9611. These increases gradually phased out until the credit amount equaled the previous maximum of \$2,000 per child. These thresholds are \$75,000 for individuals and \$150,000 for married couples. *Id.*

²⁶⁸ *See, e.g.,* Michael Grunwald, *About That Next Bailout: One Big Lesson from 2009*, POLITICO (Aug. 3, 2020).

poverty went down in 2020.²⁶⁹ Another insight is that the greater extent to which climate disaster relief continues to be thought of as a localized or regional problem, the more likely appropriations will be subject to partisanship. The COVID-19 pandemic, while not hitting the country with equal force at the same time, has been national and global in scope. That might explain why the federal government was willing to craft such a forceful fiscal response.

3. Fractures Along State and Racial Lines

Despite the flurry of Congressional activity in response to the pandemic, not all the federal funds reached people in need. There are three main reasons for this, all of which reinforce our understanding of how federalism and a racial hierarchy define American social policy. These insights provide additional lessons for how to adapt welfare programs in the face of climate change.

a. Uneven State Implementation

First, the federal government's reliance on existing programs, many of which rely on state administration, meant that the implementation of pandemic-related relief across the country would necessarily be quite uneven. Some states are better than others at implementing federal welfare law. For instance, in several states including Florida, Kentucky, Michigan, and New York, agencies could not respond to the volume of applications for unemployment insurance.²⁷⁰ New Jersey asked applicants to file online before 7 a.m. or after 10 p.m. so as not to overload the system.²⁷¹ One may be tempted to explain away this state-level bungling. After all, more Americans lost their jobs in 2020 than at any time since 1939.²⁷² Perhaps this was simply an unprecedented demand on state bureaucracies. But states have routinely ignored and disinvested in their unemployment insurance systems since

²⁶⁹ Ben Casselman & Jeanna Smialek, *U.S. Poverty Fell Last Year as Government Aid Made Up for Lost Jobs*, N.Y. TIMES (Sept. 14, 2021), <https://www.nytimes.com/2021/09/14/business/economy/census-income-poverty-health-insurance.html>.

²⁷⁰ Emilee Speck, *Florida DEO limits number of people able to access CONNECT unemployment site*, CLICKORLANDO (Apr. 29, 2020), <https://www.clickorlando.com/news/local/2020/04/29/florida-deo-limits-number-of-people-able-to-access-connect-unemployment-site/>; Karolina Buczek, *Kentucky unemployment claims overload system, but state is working on a fix*, LEX 18 WASHINGTON (Apr. 2, 2020), <https://www.lex18.com/news/coronavirus/kentucky-unemployment-claims-overload-system-but-state-is-working-on-a-fix>.

²⁷¹ Megan Cassella & Katy Murphy, *States overwhelmed by previously unimaginable layoff numbers*, POLITICO (Apr. 1, 2020), <https://www.politico.com/news/2020/04/01/unemployed-workers-benefits-coronavirus-159192>.

²⁷² Sarah Chaney Cambon & Danny Douherty, *Job Losses in 2020 Were Worst Since 1939, With Hispanics, Blacks, Teenagers Among Hardest Hit*, WALL ST. J. (Jan. 8, 2021), <https://www.wsj.com/articles/job-losses-in-2020-were-worst-since-1939-with-hispanics-blacks-teenagers-among-hardest-hit-11610133434>.

the Great Recession.²⁷³ As already discussed, there are fiscal reasons why states do so. States feel little pressure to fund countercyclical programs during boom times, and due to their budget rules, they are incapable of doing so during downturns. Similar delays at the state and local levels continue to plague the Emergency Rental Assistance Program. As of last summer, 89% of that funding had not reached renters.²⁷⁴

A new program that builds on a preexisting apparatus, as Pandemic EBT (P-EBT) does with SNAP, presents additional problems. States failed to deliver food assistance to children through P-EBT because of various administrative errors.²⁷⁵ Take Tennessee. That state delivered the additional \$250 of P-EBT to households who were already enrolled in SNAP or TANF, but failed to deliver P-EBT to families not already enrolled in either program.²⁷⁶ Many children are poor enough to receive free or reduced-price school meals but do not receive SNAP or TANF, and other children would not be individually eligible for subsidized school meals but still receive them through school-wide eligibility.²⁷⁷ Failing to navigate these intricacies, Tennessee botched food assistance to 388,000 children and delayed approximately \$60 million in federal funds.²⁷⁸

States are also better at implementing certain federal programs than others. For instance, Florida could implement the COVID-related changes to SNAP, including, unlike Tennessee, direct issuance of P-EBT.²⁷⁹ But Florida's unemployment insurance system cratered.²⁸⁰ At a certain point, this level of incompetence betrays

²⁷³ U.S. DEP'T OF LABOR, STATE UNEMPLOYMENT INSURANCE: TRUST FUND SOLVENCY REPORT (2020), <https://oui.doleta.gov/unemploy/docs/trustFundSolvReport2020.pdf> (finding that 22 states were not adequately funding their UI trust funds as of early 2020).

²⁷⁴ Glenn Thrush & Alan Rappeport, *About 89% of Rental Assistance Funds Have Not Been Distributed, Figures Show*, N.Y. TIMES (Aug. 26, 2021), <https://www.nytimes.com/2021/08/25/us/politics/eviction-rental-assistance.html>.

²⁷⁵ See generally LESSONS FROM EARLY IMPLEMENTATION OF PANDEMIC-EBT, *supra* note 254 (discussing state options in implementing the new program).

²⁷⁶ See, e.g., Natalie Allison, *Tennessee Could Forfeit \$60M in Federal Food Aid for Low-Income Families During Coronavirus Pandemic*, NASHVILLE TENNESSEAN (July 30, 2020), <https://www.tennessean.com/story/news/politics/2020/07/30/tennessee-may-forfeit-60-m-pandemic-ebt-funds-applications-stall/5535427002/>.

²⁷⁷ FOOD & NUTRIT. SERV., CHILD NUTRITION PROGRAMS: COMMUNITY ELIGIBILITY PROVISION (Apr. 19, 2019), <https://www.fns.usda.gov/cn/community-eligibility-provision> (describing community eligibility as “allow[ing] the nation’s highest poverty schools and districts to serve breakfast and lunch at no cost to all enrolled students without collecting household applications”).

²⁷⁸ See, e.g., Natalie Allison, *Tennessee Could Forfeit \$60M in Federal Food Aid for Low-Income Families During Coronavirus Pandemic*, NASHVILLE TENNESSEAN (July 30, 2020), <https://www.tennessean.com/story/news/politics/2020/07/30/tennessee-may-forfeit-60-m-pandemic-ebt-funds-applications-stall/5535427002/>; Cathryn Stout, *As deadline for summer P-EBT eligibility looms, Tennessee addresses delays*, CHALKBEAT TENNESSEE (July 30, 2021), <https://tn.chalkbeat.org/2021/7/30/22602547/tennessee-eligible-pebt-application-saturday-summer-meals>.

²⁷⁹ See LESSONS FROM EARLY IMPLEMENTATION OF PANDEMIC-EBT, *supra* note 254, at 6 fig.1.

²⁸⁰ Allie Gottlieb, *Florida’s Unemployment Insurance System Breaks Down Under COVID-19*, THE REGULATORY REV. (Apr. 28, 2020).

willfulness. One of Florida Governor Ron DeSantis's advisors explained that former Governor Rick Scott's administration designed the state's online system for UI precisely to "make it harder for people to get and keep benefits so the unemployment numbers were low to give the governor something to brag about."²⁸¹ This strategy of bureaucratic disentanglement, by which a lack of capacity, obscure rules, and unwritten practices subvert statutory commands, has a long history in social welfare.²⁸² However, it is often difficult to detect whether these problems reflect the intent of policymakers or simply the complexity of administering public benefits.

b. Unwilling State Implementation

Second, while some states failed to deliver assistance because of administrative incompetence, some states failed to deliver assistance because they did not want to participate in a particular federal policy. For example, 26 states opted out of Pandemic Unemployment Assistance (PUA) before the federal government's cutoff date of September 6, 2021.²⁸³ Even though these weekly enhanced benefits of \$300 were financed by the federal government, states argued they needed to forego this funding because of a labor shortage.²⁸⁴ So far, there is no evidence that cutting off unemployment assistance did so.²⁸⁵ Yet, the consequences for people in need are stunning. Take Texas. That state's decision to cut off PUA last June meant Texas relinquished roughly \$6.5 billion in federal funding, which impacted almost a million workers—of whom 767,000 lost all UI benefits.²⁸⁶

For food assistance, some states decided not to renew emergency declarations in 2021, which cut off SNAP recipients in their states from receiving additional benefits.²⁸⁷ Furthermore, twelve states also opted out of continuing Pandemic EBT,

²⁸¹ Gary Fineout & Marc Caputo, *'It's a sh—sandwich': Republicans rage as Florida becomes a nightmare for Trump*, POLITICO (Apr. 3, 2020), <https://www.politico.com/states/florida/story/2020/04/03/its-a-sh-sandwich-republicans-rage-as-florida-becomes-a-nightmare-for-trump-1271172>.

²⁸² See Michael Lipsky, *Bureaucratic Disentanglement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 3 (1984) (defining bureaucratic disentanglement as the process by which "obligations to social welfare beneficiaries are reduced and circumscribed through largely obscure 'bureaucratic' actions and inactions of public authorities").

²⁸³ THE CENTURY FOUND., WORKERS PREMATURELY CUT OFF, (Sept. 26, 2021), https://public.tableau.com/app/profile/tcf.data/viz/WorkersPrematurelyCutoff/_4_3_workers_premature_cutoff.

²⁸⁴ See, e.g., *Iowa to end participation in federal unemployment benefit programs*, OFFICE OF THE GOVERNOR OF IOWA KIM REYNOLDS, (May 11, 2021), <https://governor.iowa.gov/press-release/iowa-to-end-participation-in-federal-unemployment-benefit-programs%C2%A0citing-strong>.

²⁸⁵ Sarah Chaney Cambon & Danny Dougherty, *States That Cut Unemployment Benefits Saw Limited Impact on Job Growth*, WALL ST. J. (Sept. 1, 2021).

²⁸⁶ WORKERS PREMATURELY CUT OFF, *supra* note 283.

²⁸⁷ See, e.g., Laura Reiley, *Some states are cutting off emergency food-assistance programs and making it harder to qualify*, WASHINGTON POST (June 18, 2021); Grant Schulte, *Ricketts Stands by Decision to Discontinue Emergency SNAP*, A.P. (Sept. 24, 2020), <https://apnews.com/article/virus->

denying additional food assistance to children.²⁸⁸ Florida refused to apply for the Summer 2021 funding for Pandemic EBT for months, delaying an additional \$820 million in federal funds for approximately 2.7 million children.²⁸⁹

These refusals and delays by state officials to draw down federal funds intended for poor residents are not new. Indeed, many of the states that refused to extend pandemic-related assistance are also states that chose not to participate in the Affordable Care Act's Medicaid expansion, even though the federal government pays nearly all of the state's costs for the first ten years.²⁹⁰ Still, the fact that so many states have willfully rejected federal funding to support its poorest residents should inform our thinking on how to adapt welfare programs for climate change.

c. *The Racialized Hierarchy of the Pandemic Response*

The third reason the public benefits response to the COVID-19 pandemic was so uneven is that relying on preexisting programs to deliver assistance perpetuates the racial hierarchy of the American welfare state. Southern states continue to deny federal assistance for their poorest residents, who are disproportionately Black and Latino.²⁹¹ Meanwhile, the default arrangement of federal-state cooperation leaves out millions, especially immigrants, people in the five territories, and tribal members.

Although Congress expanded Medicaid for COVID-19-related coverage for testing and treatment, it chose not to cover undocumented immigrants or all workers in health care settings, including home healthcare workers.²⁹² Even racial and ethnic minorities who were covered were turned away from testing and care.²⁹³

outbreak-pete-ricketts-omaha-nebraska-archive-dfb8da0712f6f4cb9307412049ab29a2.

²⁸⁸ FOOD & NUTRIT. SERV., SY 2020-2021 STATE GUIDANCE ON CORONAVIRUS P-EBT (Sept. 17, 2021), <https://www.fns.usda.gov/snap/state-guidance-coronavirus-pandemic-ebt-pebt-sy20-21>.

²⁸⁹ Lisa Marie Garza, *After delay, Florida applies for federal pandemic food aid for low-income families*, ORLANDO SENTINEL (Sept. 26, 2021) <https://www.orlandosentinel.com/news/education/os-ne-florida-pandemic-food-stamps-application-children-20210925-efpwlip3wrbkzlvjwvy3hm7pue-story.html>.

²⁹⁰ See Rachel Garfield et al., *The Coverage Gap: Uninsured Poor Adults in States that Do Not Expand Medicaid*, KAISER FAM. FOUND. (Jan. 21, 2021), <https://www.kff.org/medicaid/issue-brief/the-coverage-gap-uninsured-poor-adults-in-states-that-do-not-expand-medicaid/>.

²⁹¹ See Kelly Whitener et al., *Expanding Medicaid Would Help Close Coverage Gap for Latino Children and Parents*, GEORGETOWN UNIV. CTR. FOR CHILDREN & FAMS. (June 2021), <https://ccf.georgetown.edu/wp-content/uploads/2021/06/Expanding-Medicaid-Would-Help-Close-Coverage-Gap-for-Latino-Children-and-Parents.pdf> (relating that in Texas, 41% of Latino parents and almost 18% of Latino children are uninsured—higher than any other state); Alana Semuels, *States With Large Black Populations Are Stingier With Government Benefits*, THE ATLANTIC (June 6, 2017), <https://www.theatlantic.com/business/archive/2017/06/race-safety-net-welfare/529203>.

²⁹² Andrew Donlan, *'I Deserve to Be Respected': Home Care Workers Make Emotional Plea for Better Treatment*, HOME HEALTH CARE NEWS (Apr. 15, 2020), <https://homehealthcarenews.com/2020/04/i-deserve-to-be-respected-home-care-workers-make-emotional-plea-for-better-treatment/>.

²⁹³ Sheila Selman, *Company Apologizes for Discrimination Against Latinos at Goshen COVID-19 Testing Site*, GOSHEN NEWS (July 3, 2020); Lynn Bonner, *State Adviser: Some NC Latinos Sick*

Additionally, racial and ethnic minorities are disproportionately employed as essential workers, with Black Americans most likely to be categorized as frontline or essential workers.²⁹⁴ These workers were the most likely to be exposed to COVID-19 in the workplace.²⁹⁵

This racism and xenophobia in the federal and state governments' pandemic response extended beyond the public benefit context.²⁹⁶ Some states have denied undocumented immigrants access to vaccines²⁹⁷ or required identification in order to be vaccinated.²⁹⁸ In March 2021, Texas Governor Greg Abbott blamed, without evidence, an increase in COVID-19 infections on undocumented immigrants from Mexico.²⁹⁹ Alex Azar, President Trump's Secretary of Health and Human Services, stated publicly that disparities in COVID-19 infections and deaths among Latinos may be associated with their culture.³⁰⁰

This hierarchy also manifested in the stingier assistance provided to territories and tribes. While Congress made some efforts to mirror the public benefit expansions for states, territories and tribes still received significantly less assistance. For instance, Congress did authorize additional nutrition assistance for CNMI, Puerto Rico, and American Samoa, the three territories that federal law excludes from SNAP.³⁰¹ Yet, none of these territories benefited from the emergency

with COVID-19 Are Sent Home from Hospitals, NEWS & OBSERVER (July 16, 2020).

²⁹⁴ BUREAU OF LABOR STAT., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (July 30, 2021), <https://www.bls.gov/cps/cpsaat18.htm>; Devan Hawkins, *The coronavirus burden is falling heavily on black Americans. Why?*, THE GUARDIAN (Apr. 16, 2020), <https://www.theguardian.com/commentisfree/2020/apr/16/black-workers-coronavirus-covid-19>.

²⁹⁵ See Ruqaiyyah Yearby & Seema Mohapatra, *Systemic Racism, The Government's Pandemic Response, and Racial Inequities in COVID-19*, 70 EMORY L.J. 1419, 1463–65 (2021).

²⁹⁶ In the South, a majority of vaccine allocation sites were placed in predominantly white neighborhoods. Sean McMinn et al., *Across the South COVID-19 Vaccine Sites Missing from Black and Hispanic Neighborhoods*, NPR (Feb. 5, 2021), <https://www.npr.org/2021/02/05/962946721/across-the-south-covid-19-vaccine-sites-missing-from-black-and-hispanic-neighbor>.

²⁹⁷ William Saletan, *The GOP's Foolish Campaign Against Vaccinating Undocumented Immigrants*, SLATE (March 9, 2021), <https://slate.com/news-and-politics/2021/03/republicans-covid-vaccines-undocumented-immigrants-lies.html>.

²⁹⁸ Akilah Johnson, *For Immigrants, IDs Prove To Be a Barrier To a Dose of Protection*, WASH. POST (Apr. 10, 2021), <https://www.washingtonpost.com/health/2021/04/10/covid-vaccine-immigrants-id/>.

²⁹⁹ Noah Higgins-Dunn, *Texas Gov. Abbott Blames Covid Spread on Immigrants, Criticizes Biden's 'Neanderthal' Comment*, CNBC (Mar. 4, 2021), <https://www.cnbc.com/2021/03/04/texas-gov-abbott-blames-covid-spread-on-immigrants-criticizes-bidens-neanderthal-comment.html>.

³⁰⁰ Sarah Westwood & Sunlen Serfaty, *HHS Secretary Tells Lawmakers Lifestyles of Meat-Processing Plant Employees Worsened Covid-19 Outbreak*, CNN (May 7, 2020), <https://www.cnn.com/2020/05/07/politics/alex-azar-meat-processing-plants/index.html>.

³⁰¹ See Families First Coronavirus Response Act, Pub. L. No. 116-127, §§ 1102, 2302(a)(1), 134 Stat. 178, 180, 188; American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 1103(b), 135 Stat. 4, 16. These three territories normally receive a block grant of funding as opposed to the entitlement funding enjoyed by the rest of the United States. See Hammond, *Territorial Exceptionalism*, *supra* note 31, at 1669-72 (discussing the exclusion of these territories from safety net programs including SNAP).

allotments or increased benefits to SNAP outlined earlier.³⁰² Furthermore, Congress places funding caps on territorial Medicaid.³⁰³ Before the pandemic hit, this funding cap limited Puerto Rico to providing only ten of Medicaid's seventeen mandatory services.³⁰⁴ Congress did make additional Medicaid funding available, but at a percentage lower than that in the states.³⁰⁵ The most significant step Congress took to treat Americans in the territories on par with their fellow Americans in the fifty states was by expanding Pandemic Unemployment Assistance (PUA) to the entire country.³⁰⁶

Tribes received funding from Congress to provide access to testing and treatment, but many people living on reservations or land trusts,³⁰⁷ especially tribal members and Alaska Native people, lacked access due to decades of disinvestment in health infrastructure.³⁰⁸ Additionally, the CARES funding money was initially only disbursed to health-care facilities on reservations and other land trusts, leaving Native peoples who did not reside there without access to testing and treatment.³⁰⁹ Moreover, the 200 tribes that are not recognized by the United States did not receive any federal assistance during the pandemic.³¹⁰

Considering the pandemic response, there are at least three insights for efforts

³⁰² See BRYNNE KEITH JENNINGS & ELIZABETH WOLKOMIR, HOW DOES HOUSEHOLD FOOD ASSISTANCE IN PUERTO RICO COMPARE TO THE REST OF THE UNITED STATES?, CTR. ON BUDGET & POL'Y PRIORITIES (Jan. 15, 2020), <https://www.cbpp.org/research/food-assistance/how-does-household-food-assistance-in-puerto-rico-compare-to-the-rest-of>.

³⁰³ 42 U.S.C. § 1308(b)(1) (laying out the Medicaid annual grant formula for the territories); see, e.g., KAISER FAM. FOUND., MEDICAID FINANCING CLIFF: IMPLICATIONS FOR THE HEALTH CARE SYSTEMS IN PUERTO RICO AND USVI, (May 21, 2019), <https://www.kff.org/medicaid/issue-brief/medicaid-financing-cliff-implications-for-the-health-care-systems-in-puerto-rico-and-usvi/>.

³⁰⁴ See Fact Sheet: Medicaid and CHIP in Puerto Rico, MEDICAID & CHIP PAYMENT & ACCESS COMM'N, (2020), <https://www.macpac.gov/wp-content/uploads/2020/08/Medicaid-and-CHIP-in-Puerto-Rico.pdf>.

³⁰⁵ See Families First Coronavirus Response Act, Pub. L. No. 116-127, 134 Stat. 178 (2020). These actions raised American Samoa's FY 2020 allotment from \$12.4 million to \$86.3 million and its FY 2021 allotment from approximately \$12.7 million to \$85.6 million. See CONG. RSCH. SERV., IF11012, MEDICAID FINANCING FOR THE TERRITORIES 1 (2020).

³⁰⁶ JOHN PALLASCH, ASST. SEC'Y, U.S. DEP'T OF LABOR, ADVISORY LTR. NO. 16-20 TO STATE WORKFORCE AGENCIES, UNEMPLOYMENT INSUR. PROG. (Apr. 5, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20.pdf (relaying that the PUA "program is available in all 50 states, the District of Columbia, Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, [and] CNMI").

³⁰⁷ *Id.*

³⁰⁸ Talha Burki, *COVID-19 among American Indians and Alaska Natives*, 21 THE LANCET 325 (2021); see also Katherine Florey, *Toward Tribal Regulatory Sovereignty in the Wake of the Covid-19 Pandemic*, 63 ARIZ. L. REV. 399 (2021) (discussing the ways in which Supreme Court doctrine interfered with tribal governance in public health emergencies).

³⁰⁹ Casey Kuhn, *Why indigenous people in cities feel 'invisible' as pandemic wears on*, PBS NEWS HOUR (Feb. 23, 2021), <https://www.pbs.org/newshour/health/why-indigenous-people-in-cities-feel-invisible-as-pandemic-wears-on>.

³¹⁰ Eilis O'Neill, *Unrecognized Tribes Struggle Without Federal Aid During Pandemic*, NPR (Apr. 17, 2021), <https://www.npr.org/2021/04/17/988123599/unrecognized-tribes-struggle-without-federal-aide-during-pandemic>.

to adapt welfare programs to meet the climate crisis. First, Congress and the federal government can mitigate suffering for millions of Americans through existing programs. Second, reliance on preexisting programs, many of which rely on some state and local role, almost guarantees that the distribution of assistance will be uneven, and some elected officials at the state level will forego millions and billions of federal funds intended for their residents. Third, these preexisting programs are encoded with a racial hierarchy that ensures that people in some states, immigrants in all states, people in the five territories, and tribal members receive less assistance. Combining these insights from the COVID-19 pandemic with the earlier discussions about the challenges of Congressional capacity and state responses, the next and final Part focuses on what federal, state, and local governments can do to improve individual access to public benefits in light of the climate crisis.

IV. ADAPTING WELFARE PROGRAMS FOR THE CLIMATE CRISIS

This century will be one of fitful and then rapid transformation to adapt to life on an increasingly hostile planet. Where we live, how we work, how we move, and what we consume will change. Among these countless changes will be how our government responds to those who have been displaced and those whose livelihoods have been destroyed by our changing climate. This Part sketches possible adaptations in public benefits that will help Americans weather the wildfires and storms made more devastating by the climate crisis.

Before getting into the details, though, it is worth addressing a scholarly criticism of these prescriptions—a criticism that, frankly, can be leveled at most legal scholarship that calls for government action. Eric Posner and Adrian Vermeule have identified an “inside/outside fallacy” endemic to public law scholarship.³¹¹ According to them, this scholarship offers “deeply pessimistic accounts of the ambitious, partisan, or self-interested motives of relevant actors in the legal system” only to then “turn around and issue an optimistic proposal for public-spirited solutions.”³¹² For a few reasons, Posner and Vermeule’s critique is less persuasive here.

First, this Article predicts that policymaking on climate adaptation will align with how Congress operates.³¹³ If members of Congress are “single-minded reelection seekers,” then the increasing prevalence of climate-fueled disasters will create such consistent constituent and electoral pressure that representatives will need to respond.³¹⁴ In that way, the proposals that follow recognize those incentives

³¹¹ Eric Posner & Adrian Vermeule, *Inside or Outside the System*, 80 U. CHI. L. REV. 1743, (2013).

³¹² *Id.* at 1745; *see also, e.g.*, David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985, 1054 (2017) (agreeing that “policymakers generally work within, the limitations it imposes on new policy, and legal scholars’ tendency to ignore those limitations”).

³¹³ Posner & Vermeule, *supra* note 311, at 1763.

³¹⁴ DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION (1974); *see also* Jamie L. Carson & Jeffery A. Jenkins, *Examining the Electoral Connection Across Time*, 14 ANN. REV. POL. SCI. 25, 27 (2011) (describing “Mayhew’s notion of the electoral incentive” as “the theoretical

and build on them.³¹⁵ Many of the proposals that follow would be, from the perspective of individual members of Congress, cheap to implement, including flexibility for applications by the elderly and people with disabilities or longer eligibility windows for counties where infrastructure has yet to get back online. For the Article's more costly proposals, social science suggests that the expansion of welfare programs, with its particularized benefits and diffuse costs, may be more politically feasible than subsequent retrenchment.³¹⁶

While it is useful to tether policy proposals to political realities, the previous Parts have shown that the breadth of the climate crisis has begun to create new exigencies—ones that demands national action. Scholars have repeatedly concluded that crises help induce legislative and regulatory change.³¹⁷ Indeed, as Part III.C documents, the governmental response to the COVID-19 pandemic, while flawed, demonstrates that even in its current state, Congress can legislate quickly and comprehensively to help Americans meet basic needs during a national emergency. This Part simply applies those lessons from the pandemic response to the climate context.

Finally, some challenges, like the twin crises of the pandemic and our changing climate, are so massive that smaller scale responses cannot replace national action. Sudden societal and political change may come sooner than some might think. Mass mobilization will create a “policy window” for renewed efforts to address climate-caused displacement and devastation.³¹⁸ The choice is whether legal scholars should submit to the status quo or rather work toward new law when the status quo begins to fall apart.³¹⁹ This Article chooses the latter.

foundation for much of the contemporary research examining the U.S. Congress”).

³¹⁵ See, e.g., Avlana K. Eisenberg, *Incarceration Incentives in the Decarceration Era*, 69 VAND. L. REV. 71, 139 (2016) (making similar proposals).

³¹⁶ See PAUL PIERSON, *DISMANTLING THE WELFARE STATE? REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 131-63 (1994).

³¹⁷ See KINGDON, *supra* note 190, at 90–115; Daniel Carpenter & Jisela Sin, *Policy, Tragedy, and the Emergence of Regulation: The Food, Drug & Cosmetic Act of 1938*, 21 STUD. AM. POL. DEV. 149, 153 (2007) (“The claim that regulation follows certain critical events (either actual events or journalistic exposes) is common to historians of numerous fields of regulation.”); see also Gabriel Scheffler, *The Dynamism of Health Law: Expanded Insurance Coverage as the Engine of Regulatory Reform*, 10 U.C. IRVINE L. REV. 729, 771-73 (2020) (collecting examples of crises that led to an increased government role including in the context of financial regulation, health law, consumer law, and environmental law). *But see* Peter Conti-Brown & Brian D. Feinstein, *The Contingent Origins of Financial Legislation*, 99 WASH. U. L. REV. 145, 212 (2021) (canvassing various case studies and concluding that financial crises are not a necessary precondition for financial reform).

³¹⁸ See KINGDON, *supra* note 190, at 20; see also Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 136–37 (2016) (arguing that the history of American law suggests that mobilization is “a valuable political resource” for “the nonwealthy and other disenfranchised groups”).

³¹⁹ For the latter, see Amna A. Akbar et al., *Movement Law*, 73 STAN. L. REV. 821, 883 (2021) (criticizing much of public-facing legal scholarship for “further[ing] a form of political austerity that devastates poor and working-class people by foreclosing real change”); Austin Sarat & Susan Silbey, *The Pull of the Policy Audience*, 10 LAW & POL’Y 97, 98 (1988) (making similar

Specifically, the proposals below seek to strengthen our federal and state welfare law in ways that make public benefits more reliable, accessible, and portable. First, poor people's access to these programs should not depend on the vagaries of politics on Capitol Hill or in the statehouses. Instead, policymakers should decide *ex ante* who should receive what benefits before a climate-fueled disaster strikes. Second, these programs should be accessible to all people in need, not just people who can wait in line for eight hours. Third, these benefits should not vanish at a state's borders but rather should travel with the people in need. In attempting to instantiate these principles, the proposals below include changes to federal law as well as state and local adaptations.

A. Retrofitting Existing Federal Programs

This Section explains how the federal government could improve state and local government access to disaster welfare programs. In many ways, these proposals identify ways in which the United States can retrofit existing programs to better respond to climate-fueled disasters. Specifically, federal law should be revised in three respects to make assistance more reliable, accessible, and portable.

First, Congress should legislate in ways that additional funding kicks in automatically after disasters as opposed to waiting on future Congresses to make emergency appropriations. As discussed in Part III, Congress is finding it increasingly difficult to enact legislation and appropriate funds, sometimes delaying assistance by months or even a year. This reality of national lawmaking has dire consequences for a country that will continue to experience more frequent and more intense storms, fires, and floods. As a result, Congress should identify mechanisms that allow federal, state, and local governments to respond to surges in need without relying on the weaknesses and whims of the current Congress. The best way to do so is to legislate automatic stabilizers.³²⁰ For instance, Congress could amend the Food and Nutrition Act to allow states to automatically issue replacement and supplemental SNAP benefits following a major disaster declaration. Making these additional benefits automatic would help us avoid the odd result of people who were poor before the storm receiving less food assistance than their neighbors who receive D-SNAP after the storm.³²¹ Congress could amend the Internal Revenue Code to allow EITC recipients to use all of their prior year's

observations about sociolegal scholarship).

³²⁰ Here again, the COVID-19 pandemic is instructive. One recent study suggests that during the COVID-19 pandemic, only SNAP and UI functioned as automatic stabilizers, whereas other safety net programs "showed little buoyancy to economic downturns over the last two decades." Robert Moffitt & James P. Ziliak, *COVID-19 and the U.S. Safety Net* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27911, 2021), <https://voxeu.org/article/how-covid-19-making-us-rethink-safety-net-programmes>.

³²¹ DISASTER SNAP GUIDANCE, *supra* note 91, at 35 (identifying supplemental benefits as "provid[ing] parity between new D-SNAP households and ongoing clients, who are not eligible for D-SNAP benefits").

income to claim the EITC in the year of a disaster.³²² Congress could make similar changes so that the Social Security Administration could automatically advance payments for the elderly and people with disabilities who live in a disaster area. Congress could also rely on multiple metrics from agencies with scientific expertise like EPA or NOAA to identify when states can issue additional food assistance to children following climate-induced school closures.³²³

Second, federal law should make it easier for vulnerable Americans, like children, the elderly, and people with disabilities, to access benefits. Given how much our society relies on schools to feed children, Congress should extend Pandemic EBT to households with children in major disaster areas. Just as the COVID-19 pandemic closed schools, so too will wildfires and hurricanes. In both crises, school districts must prevent children from attending out of concern for their health, whether due to a deadly novel virus like COVID-19 or contaminated air.³²⁴ Considering that one in four children in the United States have at least one foreign-born parent, Congress should revisit exclusions of non-citizens from certain disaster welfare provisions.³²⁵ In light of their vulnerabilities to contaminated air and extreme heat, Congress should also make it easier for the elderly and people with disabilities to access assistance, whether through pre-registration and online or telephonic applications.

Third, federal law should allow assistance to follow Americans displaced by climate-fueled disasters. Federal relief should not stumble at state borders that no storm respects. Congress should amend various statutes, or alternatively, the relevant federal agencies should promulgate regulations or issue guidance that allow assistance to follow Americans who must cross state lines. Federal law should require or at least allow state agencies to accept and honor applications and existing benefits from another state. Following Hurricane Katrina, the relevant federal agency allowed individuals to use Louisiana WIC vouchers in any state to purchase diapers, infant formula, and food.³²⁶ The U.S. Department of Agriculture could promulgate a legislative rule that makes this practice available for any American

³²² See COVID-19 Earned Income Act, S. 3542 & H.R. 6762, 116th Cong. (2020); NAT'L TAXPAYER ADVOCATE, PROVIDE EARNED INCOME TAX CREDIT (EITC) RELIEF DURING NATIONAL DISASTERS, PURPLE BOOK (2021), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_PurpleBook_08_MiscRecs_54.pdf.

³²³ See Jennifer Nou, *Subdelegating Powers*, 117 COLUM. L. REV. 473, 487 (2017) (observing that the production of high-quality information is "the bureaucracy's *raison d'être*").

³²⁴ See CDC, WILDFIRE SMOKE AND CHILDREN (May 4, 2021), <https://www.cdc.gov/air/wildfire-smoke/children.htm>; Stephanie M. Holm et al., *Health effects of wildfire smoke in children and public health tools: a narrative review*, 31 J. EXPOSURE SCI. & ENV'T EPIDEMIOLOGY 1, 1 (2020), <https://www.nature.com/articles/s41370-020-00267-4.pdf> (identifying November 15, 2018 as the single-day record of school closures due to wildfires when over a million children in California had classes cancelled).

³²⁵ MIGRATION POL'Y INST., CHILDREN IN U.S. IMMIGRANT FAMILIES (BY AGE GROUP AND STATE, 1990 VERSUS 2019), <https://www.migrationpolicy.org/programs/data-hub/charts/children-immigrant-families>.

³²⁶ CONG. RSCH. SERV., FEDERAL FOOD ASSISTANCE IN DISASTERS: HURRICANES KATRINA AND RITA 5 (updated Feb. 23, 2006), <https://crsreports.congress.gov/product/pdf/RL/RL33102/3>.

whose permanent address is in a major disaster area. Similarly, states should be able to honor Medicaid benefits from other states. Of course, the challenge would be the extent to which the receiving state takes on additional, unexpected costs. However, those challenges would be minimal for benefits like SNAP in which the federal government finances 100% of the benefits. For programs like Medicaid where states contribute significant funding, the federal government could similarly cover those additional costs by raising the federal match for new arrivals. Indeed, there is proposed legislation to do just that. During the last Congress, legislation was introduced in both the House and Senate that would allow individuals forced to relocate to another state as a result of a major disaster to continue to access Medicaid with the federal government covering the entire cost.³²⁷

Relatedly, in light of the challenges Americans face in accessing assistance, they should be able to enforce federal and state law by suing the relevant agencies. Congress should amend the Stafford Act to permit Americans to sue FEMA for violations of federal law. As Part III shows, poor people have used litigation to secure meaningful relief from state welfare agencies following major disasters. Making FEMA liable for its administration of disaster benefits creates opportunities for remedial orders following disasters and may discipline the federal agency to avoid litigation in the future. Furthermore, the U.S. should no longer rely on a volunteer, ABA-led effort or alternatively for state bars or courts to approve out-of-state attorneys via “Katrina Rules” to provide crucial legal services to people in need after disasters.³²⁸ Rather, Congress should provide additional funding to the Legal Services Corporation so that grantee organizations can hire and train legal services attorneys who are already admitted to practice in the relevant state as well as consider revisiting restrictions on LSC-funded organizations to the extent that they impede this area of practice.

To be sure, some of these proposals will be costly to the federal government. But the climate crisis will put increased pressure on government spending regardless of these changes. In the last thirty years, the federal government’s appropriations to the Disaster Relief Fund, when adjusted for inflation, have increased ten-fold.³²⁹ And there will be other massive costs associated with climate change.³³⁰ The question is not whether government will have to devote more and

³²⁷ Disaster Relief Medicaid Act, H.R. 3215, 116th Cong. (2019-2020); S. 1754, 116th Cong. (2019–2020).

³²⁸ See Ballard et al., *supra* note 133, at 5–6 (describing how New York legal aid attorneys “faced a steep learning curve in new legal issues to adequately advise Sandy victims” and the “peculiarities of advocating for their clients’ appropriate disaster recovery benefits”).

³²⁹ Jeff Stein & Andrew Van Dam, *Taxpayer spending on U.S. disaster fund explodes amid climate change, population trends*, WASH. POST (Apr. 22, 2019), <https://www.washingtonpost.com/us-policy/2019/04/22/taxpayer-spending-us-disaster-fund-explodes-amid-climate-change-population-trends/>.

³³⁰ For instance, Congress and the Pentagon will need to decide what to do with the Naval Station Norfolk, the country’s (and the world’s) largest naval base. Carolyn Beeler, *What it might take to protect the world’s biggest naval base from rising seas*, THE WORLD (June 23, 2016), <https://www.pri.org/stories/2016-06-23/what-it-might-take-protect-worlds-biggest-naval-base->

more resources to adapt to the climate crisis, but what adaptations the government will prioritize. Future lawmakers will be forced to make difficult choices. If the past is any guide, though, Congress will continue to appropriate funding after extreme weather events to meet people's basic needs. These suggestions offer ways to make that process more equitable and effective.

B. State and Local Adaptation to Improve Individual Access

As this Article demonstrates, there are structural reasons why states struggle to meet surges in need. The proposals above suggest how the federal government could be more responsive in helping state and local governments respond in the wake of extreme weather events. But there is a distinct possibility that Congress does not do enough to adapt welfare programs to meet the climate crisis. In other words, it is worth considering what states should do in the absence of meaningful national action.³³¹

First, states should develop policies and practices to make assistance more reliable. For instance, states can develop pre-registration systems so that people with limited mobility need not apply in person for services. States should follow the lead of Louisiana and explore how to allow people to register for assistance before a storm strikes.³³² States should also identify ways to move human services personnel from unaffected areas in their state to impacted areas that need additional support.³³³

Absent federal leadership, states, territories, and tribes could also create working groups to identify best practices in adapting public benefit programs for the climate crisis. States, territories, and tribes could engage in interstate compacts that would allow them to send caseworkers and other social services personnel to help other states in need. These kinds of ad hoc arrangements among states occurred following Hurricanes Katrina and Rita.³³⁴ As the climate crisis intensifies, it will become harder for a state to volunteer its own personnel to another state, lest it deprive its own agencies of the resources it needs to respond to a climate-fueled disaster within its borders. But interstate compacts among states that tend to experience these extreme weather events at different points in the year could continue well into the next decade.

Second, states should continue to take advantage of any flexibility in federal

rising-seas.

³³¹ See, e.g., Robert L. Fischman, *Letting Go of Stability: Resilience and Environmental Law*, 94 IND. L.J. 689, 693 (2019) (arguing that law reform in the face of the climate crisis "must operate in a flexible, adaptive manner and provide avenues to work across jurisdictional boundaries"). Cf. Kirsten Engel, *Climate Federalism in the Time of COVID-19: Can the States "Save" American Climate Policy?*, 47 N. KY. L. REV. 115 (2020); Jonathan B. Wiener, *Think Globally, Act Globally: The Limits of Local Climate Policies*, 155 U. PA. L. REV. 1961 (2007).

³³² See *D-SNAP Pre-Registration*, LA. DEP'T OF CHILDREN & FAM. SERVS., <http://www.defs.la.gov/page/dsnap-registration>; Super, *Against Flexibility*, *supra* note 207, at 1452.

³³³ ADVOCATE'S GUIDE TO D-SNAP, *supra* note 104, at 20.

³³⁴ *Id.* (describing how several states responded to Louisiana's request for additional personnel).

law to make these programs more accessible. States should routinely file for federal waivers to improve individual access to these benefits. Specifically, states should seek to waive in-person application requirements for those individuals who cannot be reasonably expected to do so, such as the elderly or people with disabilities, and in those areas where the state's own offices are severely damaged.³³⁵ States can also consider asking for longer eligibility windows in case some parts of the state are slow to implement disaster services.³³⁶ As recoveries drag on, receiving states will need to figure out ways to streamline applications for these new residents. Differences in eligibility among states will most likely create additional administrative burdens to applicants and bureaucrats alike.

C. *Toward A New Safety Net for the Climate Crisis*

While some state and local governments will employ a variety of strategies to meet surges in need, others may seek to deny entry or assistance to new arrivals from other states or the territories. Indeed, as Part III showed with state responses to the pandemic, it appears that some states are willing to forego federal assistance to their own residents.³³⁷ This kind of state governance could have severe implications as it is likely that internal displacement in the United States and elsewhere will become an ever-present social phenomenon. Importantly, there is dusty but durable Supreme Court precedent for the proposition that the Constitution prohibits a state from barring poor people from crossing its borders or seeking services.³³⁸ Indeed, precisely because of that possibility, it will be crucial that people seeking assistance have access to attorneys who have the expertise necessary to challenge these practices. Regardless of whether volunteer junior attorneys were the appropriate way to deliver disaster legal services in years past, such an arrangement seems woefully inadequate for the increased demand and legal complexities that will arise during the climate crisis. Yet, even if there are attorneys able to represent poor people and precedent upon which those lawyers can rely, states will experiment with various policy and practices that will, in turn, test that doctrine anew.

Congress could head off these punitive state practices by equalizing benefit levels across states and shouldering more of the costs. Congress could do so by replacing some of the fiscal federalism of these programs or by funding the services for people newly arrived in the receiving state, as suggested above. Yet, these concerns about uneven and unwilling state implementation of assistance are likely to persist. In that way, this Article lends additional support to those who have argued that a new cash-based benefit like a universal basic income (UBI) would

³³⁵ See *supra* notes 208–218 and accompanying text.

³³⁶ See *id.*

³³⁷ See *supra* notes 282–287 and accompanying text.

³³⁸ See *Saenz v. Roe*, 526 U.S. 489, 500 (1999); *Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 261–62 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Edwards v. California*, 314 U.S. 160 (1941).

avoid these structural pitfalls. And perhaps the ways in which the federal government seemed willing to provide cash assistance in the COVID-19 response suggests a political opening—though we should wait to see whether the current Congress decides to make some of these changes permanent. Furthermore, moving away from state-based aid would also benefit people who are often excluded from that cooperative federalism including immigrants, people in the territories, and tribal members.

Nonetheless, what these climate-fueled disasters teach us is that while state-based aid may be structurally deficient, in-kind aid, like food distribution and temporary housing, will still be necessary. If retail food stores are unavailable and people's homes are destroyed, government will need to find ways to feed and house survivors in ways that do not rely on cash or quasi-cash benefits. As a result, it is unlikely that even a nationalized safety net, whether through existing, retrofitted programs, like SNAP, or a universal one, like UBI, will negate the need for in-kind assistance in the coming years.

CONCLUSION

All of us must adapt to Earth's rapidly changing climate. We will also judge our government's ability to do so. Considering how the United States has relied on its public benefit programs to respond to fires and floods in the past, it is likely that the United States will continue to use these programs to respond to people displaced and impoverished by climate-fueled disasters. To do that effectively, the United States will need to adapt these programs in myriad ways. This Article provides a roadmap for such new and strange terrain.

* * *