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# KATRINA AND THE RHETORIC OF FEDERALISM

Christina E. Wells\*

## I. INTRODUCTION

The public's desire to assign blame for government's inadequate response to Hurricane Katrina has largely focused on the federal government's slow and seemingly inept response to the storm.<sup>1</sup> In their own defense, federal officials cast federalism—the system that divides power among federal, state, and local governments—as the main culprit underlying their inadequate response to hurricane victims.<sup>2</sup> Had power and authority not been split among three different units of government, the argument goes, the federal government might have been able to act more quickly to save lives and prevent suffering. In effect, federal authorities claim to have been hamstrung by a federalist system that relies on states and localities as first responders.

As a consequence, some officials have called for greater federal control of disaster response and relief efforts. President Bush, for example, argued “that a challenge on this scale requires greater federal authority and a broader role for the armed forces—the institution of our government most capable of massive logistical operations on a moment's notice.”<sup>3</sup> Similarly, the White House Report regarding Katrina noted:

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1. See, e.g., Terry M. Neal, *Why, Oh Why?*, WASH. POST, Sept. 6, 2005, [http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090500482\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2005/09/05/AR2005090500482_pf.html); Todd S. Purdum, *Across U.S., Outrage at Response*, N.Y. TIMES, Sept. 3, 2005, at A5, available at <http://www.nytimes.com/2005/09/03/national/nationalspecial/03voices.html?ex=1283400000&en=aa8fe67000016b3d&ei=5090&partner=rssuserland&emc=rss>; Bob Schieffer, Commentary, *Government Failed the People*, CBS.com, Sept. 4, 2005, <http://www.cbsnews.com/stories/2005/09/06/opinion/schieffer/main818486.shtml>.

2. See, e.g., Eric Lipton et al., *Political Issues Snaled Plans for Troop Aid*, N.Y. TIMES, Sept. 8, 2005, at A5, available at <http://www.nytimes.com/2005/09/09/national/nationalspecial/09military.html?ex=1283918400&en=aa642c94881e7c01&ei=5088&partner=rssnyt&emc=rss>; Scott Shane et al., *After Failures, Government Officials Play Blame Game*, N.Y. TIMES, Sept. 5, 2005, at A2, available at <http://www.nytimes.com/2005/09/05/national/nationalspecial/05blame.html?ex=1283572800&en=1d14ebfd942a7d0&ei=5090>; Stephen M. Griffin, *Stop Federalism Before It Kills Again: Reflections on Hurricane Katrina*, Mar. 2006, <http://ssrn.com/abstract=894470>. To be sure, few people blame only federalism. Even Secretary of Homeland Security Michael Chertoff listed the federal government's deficiencies as part of the problem. *Statement by Homeland Security Secretary Michael Chertoff Before the United States House Select Committee on Hurricane Katrina*, 109th Cong. (Oct. 19, 2005) (statement of Homeland Security Secretary Michael Chertoff), available at [http://www.dhs.gov/xnews/testimony/testimony\\_0042.shtm](http://www.dhs.gov/xnews/testimony/testimony_0042.shtm). Similarly, state and local officials shoulder some of the responsibility as well. Allen G. Breed, *Who's to Blame for Katrina's Aftermath?*, BOSTON GLOBE, Aug. 19, 2006, available at [http://www.boston.com/news/nation/articles/2006/08/19/whos\\_to\\_blame\\_for\\_state\\_of\\_new\\_orleans/?p1=MEWell\\_Pos3](http://www.boston.com/news/nation/articles/2006/08/19/whos_to_blame_for_state_of_new_orleans/?p1=MEWell_Pos3).

3. President George W. Bush, *President Discusses Hurricane Relief in Address to the Nation*, (Sept. 16, 2005), <http://www.whitehouse.gov/news/releases/2005/09/print/20050915-8.html>; see also Shane, *supra* note 2, (quoting Secretary of Homeland Security Michael Chertoff as saying that “in the

Our decades-old system, built on the precepts of federalism, has been based on a model whereby local and State governments wait to reach their limits and exhaust their resources before requesting Federal assistance. . . . In other words, the system was biased toward requests and the concept of “pull” rather than toward anticipatory reactions and the proactive “push” of Federal resources.

While this approach has worked well in the majority of disasters and emergencies, catastrophic events like Hurricane Katrina are a different matter. The current homeland security environment . . . now demands that the Federal government actively prepare and encourage the Nation as a whole to plan, equip, train, and cooperate for all types of future emergencies, including the most catastrophic.<sup>4</sup>

And just recently, federal officials convinced members of Congress that the problems associated with Katrina were sufficiently associated with a lack of federal power to warrant legislation allowing the President to take control of the National Guard in the event of a natural disaster or other catastrophe.<sup>5</sup>

These calls for greater centralization of authority assume both that too much power regarding disaster preparedness and response lies with states and localities and that the lack of centralized federal power was a substantial cause of the federal government’s apparently ineffective response to the Katrina disaster. Neither assumption is wholly true. First, although federal, state, and local governments share responsibility for disaster relief and preparedness, the federal government retained substantial authority and control over such efforts prior to Hurricane Katrina.<sup>6</sup> Second, subsequent reports suggest that the biggest contributor to the government’s ineffective response to Katrina was not lack of power but, rather, the federal government’s failure adequately to exercise its existing powers.<sup>7</sup>

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future federal authorities need to take ‘more of an upfront role earlier on, when we have these truly ultracatastrophes.’”); Bill Walsh, *Plan Would Let President Take Control in Disasters*, TIMES-PICAYUNE, Oct. 22, 2005, at 2 (quoting presidential aide Frances Townsend as “considering whether there is a ‘narrow band of cases’ in which the President should take over.”).

4. FRANCES FRAGOS TOWNSEND, THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED 66 (2006).

5. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5122>; Dan Balz, *Governors Oppose Federal Control of the Guard*, WASH. POST, Aug. 14, 2006, at A2, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/08/13/AR2006081300606.html>.

6. See *infra* part III.

7. SELECT BIPARTISAN COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, 109TH CONG., FINAL REP.: A FAILURE OF INITIATIVE, 2d Sess., at 131-46 (2006), available at <http://www.gpoaccess.gov/congress/index.html> [hereinafter FAILURE OF INITIATIVE]; DEP’T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., A PERFORMANCE REVIEW OF FEMA’S DISASTER MANAGEMENT ACTIVITIES IN RESPONSE TO HURRICANE KATRINA (2006), available at [http://www.dhs.gov/interweb/assetlibrary/OIG\\_06-32\\_Mar06.pdf](http://www.dhs.gov/interweb/assetlibrary/OIG_06-32_Mar06.pdf) [hereinafter DHS PERFORMANCE REVIEW]; U.S. GOVERNMENTAL ACCOUNTABILITY OFFICE, GAO-06-442T, HURRICANE KATRINA: GAO’S PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS, RESPONSE, AND RECOVERY (2006), available at

How is it that the federal government can possess yet credibly claim (at least superficially) to be deprived of the very power that it needs to act in disaster response and relief situations? One would think that the inherent contradiction in such a state of affairs makes obvious the flaw in the federal government's arguments. Much of the answer to this conundrum lies in the system of "cooperative federalism" upon which our disaster relief and preparedness programs are built. Unlike traditional dual federalism, which envisions distinct spheres of authority, cooperative federalism involves a system in which the federal, state, and local governments share authority. This scheme of governance aims to carry out federal policy and gives state and local governments some minimal federal guidance while allowing them the adaptability to implement programs as they see fit.<sup>8</sup>

While cooperative federalism offers great flexibility and benefit to all involved, it is also subject to manipulation and abuse by federal officials. With programs created under this system, federal officials can pay lip service to federalist principles while nevertheless retaining (or consolidating) substantial power and imposing substantive policy on other governmental entities. Because such programs are thought of as "federalist," problems that arise can then be blamed on states or localities rather than seen as missteps of the federal government. The aftermath of the Katrina relief effort reveals such manipulation by federal officials—e.g., in their claims to have been hamstrung by federalism when they actually had substantial authority to act. Given this potential for manipulation, society should be wary of calls by federal officials for substantial centralization of authority simply because "federalism" failed. Decisions to alter the federal government's role in disaster relief and response should occur in the context of a concrete assessment of the Katrina relief effort's flaws rather than in response to vague assertions of failed principles.

Part II of this Article discusses the concept of cooperative federalism. Part III discusses the statutory and administrative framework that governs disaster relief and response, including the manner in which that framework fits within cooperative federalism. Finally, Part IV discusses recent findings regarding the federal government's response to the Katrina disaster and how they reflect the potential perils of cooperative federalism programs.

## II. COOPERATIVE FEDERALISM

Although "venerated" in American legal and political circles,<sup>9</sup> "federalism" is an amorphous concept. Most of us can define it on a general level

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<http://www.gao.gov/new.items/d06442t.pdf> [hereinafter GAO PRELIMINARY OBSERVATIONS] (testimony of Comptroller General David M. Walker before the Senate Homeland Security and Governmental Affairs Committee).

8. See Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668 (2001).

9. See Mark C. Gordon, *Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court*, 14 YALE L. & POL'Y REV. 187, 190 (1996) (noting that the concept "has been referred to proudly as 'Our Federalism'" and listing other glowing references).

as a form of political organization in which the system of power is divided between a central government and territorial subdivisions such as states and localities.<sup>10</sup> After that, however, there exists little agreement as to what the term federalism encompasses or should encompass. The traditional view of federalism—one often seen in Supreme Court cases—focuses on “dual federalism,” which views “each jurisdiction as a separate entity that regulates in its own distinct sphere of authority without coordinating with the other.”<sup>11</sup> Some commentators argue that this is the only version of federalism authorized by the Constitution.<sup>12</sup>

Despite this traditional view of federalism, “cooperative federalism” programs—those which share authority between various jurisdictions—have increased in popularity since the 1970s.<sup>13</sup> In such programs, the federal government sets forth minimum standards in federal statutes or regulations but leaves the states with some discretion. These programs are generally implemented in one of two ways. First, the federal government may enact a statute or regulation with minimum national standards but which allows states to enact more stringent standards.<sup>14</sup> Many federal environmental laws operate within such a framework.<sup>15</sup> Second, the federal government may implement cooperative federalism programs through monetary grants or other federal funding. In this situation, the federal government “relies on a federal regulatory agency to develop certain standards for state agencies to follow when implementing the federal statutory scheme that provides federal funding for the states.”<sup>16</sup> Federal benefits programs, such as Medicaid, are examples of funding-based cooperative federalism.<sup>17</sup>

There are said to be multiple benefits of cooperative federalism. First, cooperative federalism programs recognize that, in a country as large as the

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10. See Answers.com, Federalism: Definition and Much More, <http://www.answers.com/topic/federalism> (last visited Nov. 2, 2006).

11. Weiser, *supra* note 8, at 665. See, e.g., Alden v. Maine, 527 U.S. 706, 714 (1999) (“The federal system established by our Constitution preserves the sovereign status of the States.”); Printz v. United States, 521 U.S. 898, 919 (1996) (“[A]lthough the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’”).

12. See, e.g., Michael S. Greve, *Against Cooperative Federalism*, 70 Miss. L.J. 557, 561 (2000).

13. Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695 (2001); see also David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2546–47 (2005) (discussing flurry of “new federalism” activity in recent decade).

14. Weiser, *supra* note 8, at 668.

15. See John Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1197–98 (1995) (discussing framework of environmental laws); United States v. New York, 505 U.S. 144, 167 (1992) (describing various environmental laws that fall within a framework of cooperative federalism).

16. Weiser, *supra* note 8, at 668; see also Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205, 205–06 (1997). For in-depth discussions of the manner in which such programs work, see Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 858–62 (1998); Super, *supra* note 13, at 2571–79.

17. Weiser, *supra* note 8, at 668.

United States, federal officials cannot realistically manage policies on a national level and that state officials are in a better position to tailor federal regulatory regimes to local conditions.<sup>18</sup> Second, such programs promote interstate competition that allows citizens to choose among competing jurisdictions, ultimately resulting in “better and more efficient policies that maximize social welfare.”<sup>19</sup> Third, cooperative federalism programs promote experimentation by giving states discretion in the implementation of federal policy. Such experimentation may result in improved overall standards as states and the federal government come to see what others have done.<sup>20</sup> Finally, some argue that delegating implementation to state and local decision makers provides greater opportunity for citizen participation and, thus, greater accountability.<sup>21</sup>

Cooperative federalism (along with its constituent programs) is not, however, without its critics. Some note that such programs, especially those that attach conditions to the receipt of funds, effectively coerce the states into accepting unattractive conditions because the states are rarely in a position to refuse such funding.<sup>22</sup> Others argue that cooperative federalism programs “reduce political transparency[,] obscure political responsibility[,] and facilitate political blame-shifting” because the public can never be sure which level of government is responsible for failures in government programs.<sup>23</sup> Still others argue that because these programs require states to implement *national* policy, they entail a “concentration of political powers in the national government.”<sup>24</sup>

The debate among proponents and critics of cooperative federalism is unlikely to be resolved in the near future. Indeed, for every criticism, there seems to be a response, counter-response, and so forth in a seemingly endless loop of argument regarding the costs and benefits of cooperative federalism.<sup>25</sup> Perhaps the answer is somewhere in between the two extremes. There are benefits to shared authority—especially in a nation so large that a single government authority cannot possibly undertake certain tasks. On

18. John P. Dwyer, *The Role of State Law in an Era of Federal Preemption: Lessons from Environmental Regulation*, 60 *LAW & CONTEMP. PROBS.* 203, 203 (1997); Sarnoff, *supra* note 16, at 213; Weiser, *supra* note 13, at 1699–1700.

19. Sarnoff, *supra* note 16, at 213; Weiser, *supra* note 13, at 1700–01.

20. Weiser, *supra* note 13, at 1701–02. The notion of states as “laboratories of experimentation” comes from an earlier federalism opinion of Justice Brandeis. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

21. Sarnoff, *supra* note 16, at 214; Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 *TEX. L. REV.* 1203, 1232–33 (1997).

22. See, e.g., Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 *COLUM. L. REV.* 1911, 1935–59 (1995).

23. Greve, *supra* note 12, at 598.

24. JOSEPH F. ZIMMERMAN, *CONTEMPORARY AMERICAN FEDERALISM* 1 (1992).

25. See, e.g., Hills, Jr., *supra* note 16, at 899 (responding to Baker’s argument, *supra* note 22); Weiser, *supra* note 8, at 671 (responding to Zimmerman’s argument, *supra* note 24). There is also extensive political science literature on cooperative federalism to which these citations do not do justice.

the other hand, without vigilance, such programs may indeed be abused—either by a government official attempting to escape accountability for bad decision making or by the federal government ostensibly abiding by federalism principles while actually imposing rigid substantive policies on the states and, thus, consolidating power. As with many things, the devil is in the details rather than in the concept, which proved to be the case with the federal government’s response to Hurricane Katrina—a response that occurred largely in the context of a cooperative federalism program.

### III. THE STATUTORY AND ADMINISTRATIVE FRAMEWORK OF DISASTER RESPONSE AND PREPAREDNESS

#### A. *The Stafford Act*

The Robert T. Stafford Disaster Relief and Emergency Assistance Act (“Stafford Act”)<sup>26</sup> establishes the central statutory framework regarding the federal government’s response to disasters and emergencies in the United States. The language and structure of the law clearly embody federalism principles. Congress intended the Stafford Act to “to provide an orderly and continuing means of assistance by the Federal Government to State and local governments in carrying out their responsibilities to alleviate the suffering and damage which result from such disasters.”<sup>27</sup> Thus, the statute contemplates states and localities as having primary authority for disaster relief and response, with the federal government serving in a supplemental role. The Stafford Act further manifests federalism principles through its restrictions on federal authority. Specifically, the President may declare the existence of a “major disaster”<sup>28</sup> or an “emergency”<sup>29</sup> (with either designation triggering federal aid) only at the request of the governor of an affected state who finds that the disaster or emergency “is of such severity and magnitude that effective response is beyond the capabilities of the State and the affected local governments and that Federal assistance is necessary.”<sup>30</sup>

Once federal disaster relief and response is activated, the Stafford Act allows the President to authorize provision of certain aid depending on

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26. 42 U.S.C. §§ 5121–5206 (2006).

27. *Id.* at § 5121(b).

28. *Id.* at § 5122(2). The Stafford Act defines a “major disaster” as “any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” *Id.*

29. *Id.* at § 5122(1). The Stafford Act defines an “emergency” as “any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.” *Id.*

30. *Id.* at § 5170 (major disaster); *id.* at § 5191(a) (emergency). The Stafford Act allows the President to act in an emergency without a gubernatorial request if primarily federal interests are at stake. *Id.* at § 5191(b).

whether the declaration involves a major disaster or an emergency. Designations of major disasters can involve lending general assistance—including federal agency technical advice and advisory assistance, coordination and support efforts, the provision of health and safety information and warnings, and food and medical supplies.<sup>31</sup> In addition, essential assistance designed to “meet[ ] immediate threats to life and property” is available—including provision of equipment, personnel, medicine, and food—as well as authorization for federal personnel to perform certain tasks, such as search and rescue and debris removal.<sup>32</sup> The Stafford Act also includes a specific section allowing the use of Department of Defense (“DOD”) resources and personnel for non-law enforcement activities “essential to the preservation of life and property” if the governor of an affected state so requests.<sup>33</sup> A declaration of emergency makes available federal assistance in a form similar to general assistance under major disasters.<sup>34</sup>

Although the President has primary authority under the Stafford Act, the Federal Emergency Management Agency (“FEMA”) has long been the entity charged with coordinating the federal response to major disasters and emergencies. In fact, prior to the 9/11 terrorist attacks, FEMA was the only agency with “large-scale disaster recovery monies and budget authority.”<sup>35</sup> Statutes still locate responsibility for administering the Stafford Act and the Federal Response Plan in FEMA.<sup>36</sup> However, after the 9/11 terrorist attacks, Congress enacted the Homeland Security Act,<sup>37</sup> which created the Department of Homeland Security (“DHS”) and transferred to it all of FEMA’s functions.<sup>38</sup> Thus, FEMA has been absorbed into another agency and is no longer free standing.

At first glance, this absorption seems to detract from the federalism principles that underlie the Stafford Act’s approach to disaster relief and response. DHS’s mission is primarily to “prevent terrorist attacks within the United States; reduce the vulnerability of the United States to terrorism; minimize the damage, and assist in the recovery, from terrorist attacks that do occur within the United States; [and act] . . . as a focal point regarding natural and manmade crises and emergency planning.”<sup>39</sup> Although there is a brief nod in this description to “natural crises,” terrorism is DHS’s rather obvious focus. National security and terrorism are largely considered issues of national policy rather than matters in which state and

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31. *Id.* at § 5170a.

32. *Id.* at § 5170b.

33. *Id.* at § 5170b(c). The provision limits the use of DOD personnel and resources to ten days. *Id.* at § 5170b(c)(1).

34. *Id.* at § 5192.

35. Richard Sylves & William R. Cumming, *FEMA’s Path to Homeland Security: 1979–2003*, 1 J. HOMELAND SEC. & EMERGENCY MGMT. 1, 9 (2004). Much of FEMA’s authority came from a constantly changing combination of statutes, executive orders, and presidential directives. *Id.* at 5–7.

36. 6 U.S.C. § 317(a)(1) (2006).

37. Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended in scattered sections of 6 U.S.C.).

38. 6 U.S.C. § 313(1).

39. *Id.* at § 111(1)(A)–(D).



local governments play a significant role.<sup>40</sup> Thus, one could conclude that the creation of DHS signals an abandonment of the federalism principles of the Stafford Act. However, a closer look reveals that, even here, federalism principles play a substantial role.

Perhaps most importantly, the Stafford Act still exists and applies to natural disasters. Thus, although FEMA has been absorbed into an agency with a broader focus, the agency responsible for administering the Stafford Act<sup>41</sup> cannot simply ignore the triggering requirements discussed above, absent additional legal authority to do so. As discussed below, such authority may exist.<sup>42</sup> But, as the next section explains, even that authority exists in the context of a framework of cooperative federalism which envisions federal, state, and local officials working together in “all hazards” planning and response.

### B. *The National Response Plan*

After the 9/11 attacks, both federal law<sup>43</sup> and Homeland Security Presidential Directive Number Five (“HSPD-5”)<sup>44</sup> required the Secretary of Homeland Security to establish the National Response Plan (“NRP”)—the successor to the Federal Response Plan originally administered by FEMA.<sup>45</sup> HSPD-5 made clear that the NRP’s purpose was to “establish a single, comprehensive approach to domestic incident management . . . to ensure that all levels of government across the Nation have the capability to work efficiently and effectively together, using a national approach to domestic incident management.”<sup>46</sup> HSPD-5 also made clear that, while the NRPD was to implement national policy, it would adhere to federalism principles:

The Federal Government recognizes the roles and responsibilities of State and local authorities in domestic incident management. Initial responsibility for managing

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40. See, e.g., Ernest B. Abbott, *Homeland Security in the 21st Century: New Inroads on the State Police Power*, 36 URB. LAWYER 837, 839–40 (2004).

41. The identity of this agency is admittedly not entirely clear. Different authorities seem to locate responsibility variously in FEMA and the Department of Homeland Security. See *infra* notes 54–58 and accompanying text.

42. See *infra* notes 59–61 and accompanying text.

43. 6 U.S.C. § 312(6) (vesting responsibility in the Department of Homeland Security Secretary for “consolidating existing Federal Government emergency response plans into a single, coordinated national response plan”).

44. Press Release, The White House, Homeland Security Presidential Directive/HSPD-5 (Feb. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/02/20030228-9.html> [hereinafter HSPD-5].

45. In accordance with federal law (see *supra* note 43), the NRP consolidated several existing response plans, including the Federal Response Plan, the Domestic Terrorism Concept of Operations, the Federal Radiological Emergency Response Plan, and the Initial National Response Plan. DEP’T OF HOMELAND SEC., NATIONAL RESPONSE PLAN ix (2004), available at [http://www.dhs.gov/xlibrary/assets/NRP\\_FullText.pdf](http://www.dhs.gov/xlibrary/assets/NRP_FullText.pdf).

46. HSPD-5, *supra* note 44, at (3).

domestic incidents generally falls on State and local authorities. The Federal Government will assist State and local authorities when their resources are overwhelmed, or when Federal interests are involved. The Secretary will coordinate with State and local governments to ensure adequate planning, equipment, training, and exercise activities. The Secretary will also provide assistance to State and local governments to develop all-hazards plans and capabilities, including those of greatest importance to the security of the United States, and will ensure that State, local, and Federal plans are compatible.<sup>47</sup>

Much like the Stafford Act, federal officials envisioned the NRP as part of a framework in which the federal government would provide direction, policy goals and assistance if needed, but state and local authorities would be largely responsible for implementation of disaster relief and response efforts. Furthermore, although the NRP is technically a plan for federal officials—thus, not itself binding on the states<sup>48</sup>—HSPD-5 makes clear that state and local officials wanting to receive federal disaster preparedness grants must agree to abide by federally imposed conditions consistent with the NRP.<sup>49</sup> Such a program design is consistent with cooperative federalism.

When published in December 2004, the NRP's structure and text continued to reflect federalism notions. According to the NRP, "[i]n the vast majority of incidents, State and local resources and interstate mutual aid normally provide the first line of emergency response and incident management support."<sup>50</sup> Accordingly, the NRP contemplates that "incidents are generally handled at the lowest jurisdictional level possible. Police, fire, public health and medical, emergency management, and other personnel are responsible for incident management at the local level."<sup>51</sup> The NRP recognizes, however, that some events—termed "Incidents of National Significance"—will require greater federal coordination.

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47. *Id.* at (6).

48. DEP'T OF HOMELAND SEC., *supra* note 45, at 3 ("This plan is applicable to all Federal departments and agencies that may be requested to provide assistance or conduct operations in actual or potential Incidents of National Significance.").

49. HSPD-5, *supra* note 44, at (20) ("Beginning in Fiscal Year 2005, Federal departments and agencies shall make adoption of the NIMS a requirement, to the extent permitted by law, for providing Federal preparedness assistance through grants, contracts, or other activities. The Secretary shall develop standards and guidelines for determining whether a State or local entity has adopted the NIMS."); *see also* Abbott, *supra* note 40, at 844–45. NIMS, or the National Incident Management System, is designed to provide "a consistent nationwide template" to enable all levels of government and private actors to work together to "prepare for, prevent, respond to, and recover from domestic incidents." DEP'T OF HOMELAND SEC., NATIONAL INCIDENT MANAGEMENT SYSTEM IX (2004), *available at* <http://www.dhs.gov/xlibrary/assets/NIMS-90-web.pdf>. The NRP is based on the NIMS framework. *Id.*; DEP'T OF HOMELAND SEC., *supra* note 45, at i, 1.

50. DEP'T OF HOMELAND SEC., *supra* note 45, at 15.

51. *Id.* at 15.

The NRP defines Incidents of National Significance as “those high-impact events that require a coordinated and effective response by an appropriate combination of Federal, state, local, tribal, private-sector and nongovernmental entities in order to save lives, minimize damage, and provide the basis for long term community recovery and mitigation activities.”<sup>52</sup> Specifically, the NRP bases its definition of Incidents of National Significance on four criteria (which were originally set forth in HSPD-5):

1. A Federal department or agency acting under its own authority has requested DHS assistance;
2. State and local resources are overwhelmed and appropriate state and local authorities have requested assistance;
3. More than one Federal department is involved in responding to an incident; or
4. The President has directed the Secretary of DHS to assume responsibility for managing a domestic incident.<sup>53</sup>

The NRP locates in the Secretary of DHS the authority to declare an Incident of National Significance.<sup>54</sup> Once such an incident is declared, the Secretary is authorized to convene the Interagency Incident Management Group (“IIMG”), which is a group of experienced, “headquarters-level” personnel from multiple agencies who are to “facilitate[ ] strategic Federal domestic incident management for Incidents of National Significance” by synthesizing information, resolving conflicts among entities, and providing advice to the Secretary of DHS and the President.<sup>55</sup> The NRP also gives the Secretary of DHS the ability to designate a Principal Federal Official, whose job is to “coordinate overall Federal incident management and assistance activities across the spectrum of prevention, preparedness, response, and recovery.”<sup>56</sup>

While the declaration of an Incident of National Significance seems to centralize much activity at the federal level, the NRP still contemplates that, in many situations involving states and localities, the federalism principles which govern the Stafford Act will also operate. Thus, the NRP specifically notes that “[f]or Incidents of National Significance that are Presidentially declared disasters or emergencies, Federal support to States is delivered in accordance with relevant provisions of the Stafford Act.”<sup>57</sup>

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52. *Id.* at 3.

53. *Id.* at 4; *see also* HSPD-5, *supra* note 44, at (4).

54. DEP'T OF HOMELAND SEC., *supra* note 45, at 4.

55. *Id.* at 22.

56. *Id.* at 33.

57. *Id.* at 7.

In such instances, then, although Incidents of National Significance are involved, the NRP contemplates that federal officials, rather than taking control of the situation, will act only at the request of governors who need aid.<sup>58</sup>

There is, however, a provision in the NRP allowing the President to act even without a gubernatorial request if a catastrophic incident has occurred that requires immediate federal action. Under the Catastrophic Incident Annex to the NRP, the federal government, through the Secretary of DHS, can take an “accelerated, proactive response to a catastrophic incident.”<sup>59</sup> Such an incident is defined as:

[A]ny natural or manmade incident . . . that results in extraordinary levels of mass casualties, damage, or disruption severely affecting the population, infrastructure, environment, economy, national morale and/or government functions. A catastrophic incident could result in sustained national impacts over a prolonged period of time; almost immediately exceeds resources available to the State, local, tribal, and private-sector authorities in the impacted area, and significantly interrupts governmental operations and emergency services to such an extent that national security could be threatened. All catastrophic incidents are Incidents of National Significance.<sup>60</sup>

Upon the Secretary of DHS’s declaration of a catastrophic incident, the federal government may move resources and take action without going through the normal procedures regarding requests for assistance from state officials.<sup>61</sup>

#### IV. KATRINA, WHAT WENT WRONG, AND THE PERILS OF COOPERATIVE FEDERALISM

In any disaster of Katrina’s magnitude, mistakes and failures occur at all levels of government.<sup>62</sup> Accordingly, it would be unreasonable to conclude that the federal government is solely responsible for the needless suffering and damage that occurred. This statement is supported by several

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58. *Id.* (noting only limited presidential pre-declaration response authority to move goods closer to potentially affected area).

59. *Id.* at 339.

60. *Id.*

61. *Id.* at 44 (“Standard procedures regarding requests for assistance may be expedited or, under extreme circumstances, suspended in the immediate aftermath of an event of catastrophic magnitude.”).

62. FAILURE OF INITIATIVE, *supra* note 7, at 1 (“The Select Committee identified failures at all levels of government that significantly undermined and detracted from the heroic efforts of first responders, private individuals and organizations, faith-based groups, and others.”). Of course, as the committee’s report points out, many people did things well too, including government actors. The criticisms raised here are not meant to detract from the efforts of the thousands of individuals, including those employed by federal, state, and local governments, who worked to help people in the aftermath

investigations conducted after Katrina, which found that some states and localities were only marginally successful in implementing the NRP; that state and local officials did not effectively coordinate their responses with federal officials; and that state National Guard unit response plans were inadequate and not well coordinated with other National Guard units.<sup>63</sup> However, the Bush administration has attempted to avoid responsibility and centralize power by blaming a flawed framework of federalism. Consequently, it is reasonable to review the investigative findings regarding the federal government's response to determine if there is support for the Bush administration's claims that its response was due to the lack of adequate authority or that there was an inappropriate division of powers.

A review of those investigations shows that the federal government's poor response was *not* due to a lack of adequate authority or an inappropriate division of powers among various levels of government. Rather, federal officials' failures to understand or utilize their existing powers were substantial causes of the federal government's poor response.<sup>64</sup> For example, a bipartisan congressional committee established to investigate the federal government's response to Katrina concluded that DHS Secretary Michael Chertoff did not adequately utilize his authority under the National Response Plan.<sup>65</sup> Investigators found that Secretary Chertoff did not convene the IIMG until thirty-six hours after Katrina made landfall, even though he had the authority to do so much sooner in light of the presidential declaration of a major disaster under the Stafford Act (which made Katrina an Incident of National Significance).<sup>66</sup> Failure to convene the

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of Hurricane Katrina. Rather, they are examples of flawed decision making by government officials in charge of implementing the overall framework of disaster response.

63. DHS PERFORMANCE REVIEW, *supra* note 7, at 19–22; U.S. GOVERNMENTAL ACCOUNTABILITY OFFICE, GAO-06-643, HURRICANE KATRINA: BETTER PLANS AND EXERCISES NEEDED TO GUIDE THE MILITARY'S RESPONSE TO CATASTROPHIC NATURAL DISASTERS 10 (2006), available at <http://www.gao.gov/new.items/d06643.pdf> (Statement for the Record by Sharon Pickup, Director Defense Capabilities and Management, to the Subcommittee on Terrorism, Unconventional Threats and Capabilities, Committee on Armed Services, House of Representatives). See also FAILURE OF INITIATIVE, *supra* note 7, at 1 (noting that “[r]esponse plans at all levels of government lacked flexibility and adaptability” delaying officials' responses to the hurricane); *id.* at 183–95 (discussing “command and control” problems at all levels of government).

64. The criticisms listed in this essay represent merely a fraction of the discussion that appears in these voluminous and very thorough reports. They are merely examples. For a more detailed discussion, readers should consult the reports.

65. FAILURE OF INITIATIVE, *supra* note 7, at 132–35.

66. *Id.* Kathleen Blanco, the Governor of Louisiana, requested a declaration of emergency under the Stafford Act on August 27, 2005. President Bush granted that request on the same day. See Memorandum from Congressional Research Service to Honorable John Conyers, Jr., at 5–6 (Sept. 12, 2005), available at [http://www.house.gov/judiciary\\_democrats/crskatrinarept91205.pdf](http://www.house.gov/judiciary_democrats/crskatrinarept91205.pdf) (discussing relevant Stafford Act authorities and declarations relevant to Hurricane Katrina). On August 28, 2005, Governor Blanco also requested an expedited declaration of major disaster, which President Bush granted on August 29, 2005. *Id.* at 6–7. At the requests of the Governors of Mississippi and Alabama, the President made declarations of emergency on August 28, 2005, and of major disaster on August 29, 2005. GAO PRELIMINARY OBSERVATIONS, *supra* note 7, at 6.

IIMG earlier “robbed” federal officials “of the opportunity to receive professional advice and strategic options for proactively addressing the unfolding catastrophic disaster.”<sup>67</sup>

Secretary Chertoff similarly delayed declaring Katrina an Incident of National Significance or designating a Principal Federal Official (the person personally designated by the Secretary of DHS to direct the coordinated federal response) until August 30, although he could have made such designations as early as August 27—two days before Katrina made landfall.<sup>68</sup> Furthermore, his designation of FEMA Director Michael Brown as Principal Federal Official—despite the fact that Brown had not completed the required training—proved quite problematic.<sup>69</sup> These failures of leadership had a significant effect on the federal government’s response to Katrina. In a preliminary report, the Comptroller General noted:

No one was designated in advance to lead the overall federal response in anticipation of the event despite clear warnings from the National Hurricane Center. Furthermore, events unfolded both before and immediately after the landfall of Hurricane Katrina that made it clear that governmental entities did not act decisively or quickly enough to determine the catastrophic nature of the incident. . . .

Although the DHS Secretary designated a [Principal Federal Official] . . . , the efforts of all federal agencies involved in the response remained disjointed because the [Principal Federal Official]’s leadership role was unclear. In the absence of timely and decisive action and clear leadership responsibility and accountability, there were multiple chains of command, a myriad of approaches and processes for requesting and providing assistance, and confusion about who should be advised of requests and what resources would be provided within specific time frames.<sup>70</sup>

The investigations also found that federal agencies had not developed adequate operating plans prior to Katrina, which caused problems when coordinating with other agencies to provide support in the emergent situation.<sup>71</sup> Similarly, key federal officials lacked a competent understanding of their duties and responsibilities. For example, in accordance with the NRP,

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67. FAILURE OF INITIATIVE, *supra* note 7, at 135.

68. *Id.* at 133–35.

69. *Id.* at 135 (noting Brown’s “concerned and confused” reaction to his appointment and the fact that the NRP requires that all Principal Federal Officials complete training unless “extenuating circumstances dictate otherwise”).

70. U.S. GOVERNMENTAL ACCOUNTABILITY OFFICE, GAO-06-365R, PRELIMINARY OBSERVATIONS ON HURRICANE KATRINA: STATEMENT BY COMPTROLLER GENERAL DAVID M. WALKER ON GAO’S PRELIMINARY OBSERVATIONS REGARDING PREPAREDNESS AND RESPONSE TO HURRICANES KATRINA AND RITA 4 (2006), available at <http://www.gao.gov/new.items/d06365r.pdf>.

71. FAILURE OF INITIATIVE, *supra* note 7, at 144.

the Principal Federal Official designated several Federal Coordinating Officers, whose job is to coordinate major disasters and emergencies declared by the President under the Stafford Act and to ensure timely federal assistance to affected states and localities.<sup>72</sup> According to one report, these officials' roles and responsibilities continually shifted, which resulted in "disjointed efforts of many federal agencies involved in the response, a myriad of approaches and processes for requesting and providing assistance, and confusion about who should be advised of requests and what resources would be provided within specific time frames."<sup>73</sup> Overlap in duties and lack of understanding of agency and institutional roles was a common problem cited by the investigations.<sup>74</sup>

Perhaps most importantly, Secretary Chertoff failed to invoke the Catastrophic Incident Annex. As the bipartisan congressional committee noted, the NRP's Catastrophic Incident Annex "was specifically written for a disaster such as Katrina," and "[i]t is clear that the consequences of Hurricane Katrina exceeded all of these criteria and required a proactive response."<sup>75</sup> Had DHS invoked the Catastrophic Incident Annex, federal troops and other federal aid could have been moved to affected states days earlier and without waiting for requests from states. Instead, such troops did not arrive in significant numbers until several days after Hurricane Katrina made landfall.<sup>76</sup> As a result of the federal government treating the situation as a typical "pull" system (i.e., one in which the federal government waits for formal requests) rather than a "push" system (i.e., a proactive federal response as authorized by the Catastrophic Incident Annex), informal requests for help went ignored.<sup>77</sup> Certainly, portions of the response effectively became a push system as various agencies acted on an *ad hoc* basis, but valuable time was lost and such responses were haphazard.<sup>78</sup>

What does all of this say about the federal government's argument? To the extent that it suggests that the division of power between federal, state, and local authorities was a hindrance, there is certainly evidence that coordination among various government entities and officials was a substantial problem. But this is hardly evidence that the concept of federalism was at fault (if, indeed, there is such a thing as a unitary concept of federalism—an admittedly dubious proposition).<sup>79</sup> Rather, the evidence shows

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72. DEP'T OF HOMELAND SEC., *supra* note 45, at 65.

73. GAO PRELIMINARY OBSERVATIONS, *supra* note 7, at 11; *see also* FAILURE OF INITIATIVE, *supra* note 7, at 189.

74. FAILURE OF INITIATIVE, *supra* note 7, at 143–44 (noting that "[f]ederal agencies, including DHS, had varying degrees of unfamiliarity with their roles and responsibilities under the NRP" and NIMS.); DHS PERFORMANCE REVIEW, *supra* note 7, at 24 (noting overlap between IIMG and Homeland Security Operations Group and the lesson learned that "the role of the IIMG needs better definition."); GAO PRELIMINARY OBSERVATIONS, *supra* note 7, at 14 ("During our initial fieldwork, we found examples of how an incomplete understanding of NRP and NIMS roles and responsibilities could lead to misunderstandings, problems, and delays.").

75. FAILURE OF INITIATIVE, *supra* note 7, at 137.

76. *Id.* at 137–38.

77. *Id.* at 139.

78. *Id.*

79. *See* Gordon, *supra* note 9, at 191.

that the implementation of a program built on federalist principles was the problem. The federal response to Hurricane Katrina was a result of human errors, not failed philosophical concepts. Such failures do not, without more, justify jettisoning a longstanding federalist framework.

Similarly, it is not clear that the federal government lacked the necessary authority to act in response to Katrina. The investigations overwhelmingly focused not on the federal government's want for power, but on its failure to implement existing authority under the Stafford Act or National Response Plan—such as failure to convene or appoint appropriate officials/entities or to invoke the Catastrophic Incident Annex. The focus of these criticisms suggests that the federal government had ample ability to act and that much of the government's failures regarding Katrina resulted from confusion and lack of coordination rather than a shortage of power.

Of course, the scope of the federal government's power may require clarification. For example, federal officials claim that the Catastrophic Incident Annex applies only in situations where there is little or no notice of impending catastrophe; thus, they did not invoke it with Katrina—a situation which evolved over time.<sup>80</sup> As others note, however, while drafters of the NRP may have contemplated using the Catastrophic Incident Annex primarily in short or no notice situations, nothing in the NRP's definition of catastrophe limits the Catastrophic Incident Annex to such situations.<sup>81</sup> Nevertheless, the apparent confusion regarding the scope of the government's power certainly argues for clarification—perhaps even on a legislative level. The General Accounting Office made such a recommendation as early as 1992 after Hurricane Andrew.<sup>82</sup> What this situation does not appear to require, however, is further centralization of authority at the federal level, as at least one report specifically concluded: “Implementing a push system . . . does not require federalization of the disaster or usurping of state authority. Although a push system is a proactive response by the federal government, it still requires notification and full coordination with the state.”<sup>83</sup>

To their credit, federal officials have acknowledged many of the criticisms raised in the reports and are attempting to rectify the problems.<sup>84</sup> In fact, the federal government has reiterated the importance of federalism and the retention of state and local authorities as first responders in most instances.<sup>85</sup> But in one significant area—control over the National Guard—the federal government has sought and received centralized authority. The White House prodded Congress to amend the Insurrection

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80. FAILURE OF INITIATIVE, *supra* note 7, at App. 7 (Letter from Philip J. Perry, General Counsel, Department of Homeland Security, to J. Keith Ausbrook, Esq., Chief Counsel, House Select Bipartisan Committee on Katrina (Feb. 8, 2006)).

81. *Id.* at 131–32.

82. GAO PRELIMINARY OBSERVATIONS, *supra* note 7, at 12–13 (discussing recommendation that Congress consider giving federal agencies authority to act proactively in catastrophic disasters).

83. FAILURE OF INITIATIVE, *supra* note 7, at 136.

84. *See generally* TOWNSEND, *supra* note 4.

85. *Id.* at 67.



Act to give the President authority over National Guard troops in times of national disaster (which are normally under the control of the governor of each state).<sup>86</sup> Not surprisingly, state governors strongly opposed such federalization, arguing that the proposed law “‘violates more than 200 years of American history’ . . . [and is] part of a larger federal effort to make states ‘satellites of the national government.’”<sup>87</sup> The Bush administration, however, apparently believed this measure was necessary to rectify some of the problems associated with its response to Hurricane Katrina.

The investigations conducted after Katrina do not support the government’s argument for greater presidential authority over the National Guard. The bipartisan congressional committee, for example, acknowledged that there were significant coordination problems between federal military and National Guard troops.<sup>88</sup> However, the committee did not conclude that those problems arose because federal troops lacked sufficient centralized authority over National Guard troops (although the committee admitted to struggling with that issue during its investigation).<sup>89</sup> Rather, the committee identified as the sources of problems such things as the Secretary of Defense’s belated response in placing National Guard assets on Title 32 status (which leaves them under the control of the governors but permits uniform administration);<sup>90</sup> federal officials’ lack of insight into state National Guard capabilities (which led to lack of trust and mutual understanding);<sup>91</sup> failure of DOD and DHS adequately to define for State National Guard units the nature of appropriate military assistance to civilian authorities;<sup>92</sup> DOD’s lack of situational awareness of conditions in the affected states;<sup>93</sup> and the military’s lack of necessary personnel, training,

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86. See *supra* note 5. The Insurrection Act already gives the President authority to invoke military troops to keep order if insurrection or domestic violence is threatened. See 10 U.S.C. § 333 (2000) (prior to the amendment). The recent amendment, however, specifically gives the President the authority to call up the National Guard in times of natural disaster. *Id.* (2006).

87. Kelley Beaucar Vlahos, *Congress Debates Giving White House Broader Authority over National Guard*, Foxnews.com, Sept. 14, 2006, <http://www.foxnews.com/story/0,2933,213889,00.html>.

88. FAILURE OF INITIATIVE, *supra* note 7, at 201–31.     ◦

89. *Id.* at 15–16.

90. *Id.* at 207. The Secretary of Defense did not place the National Guard on that status until September 7 despite repeated requests by state governors as early as September 2.

91. *Id.* at 221–22. The bipartisan committee specifically found in this instance that “federalism played out in Louisiana” as part of a scenario in which Governor Blanco refused President Bush’s offer of having Army Lieutenant General Russell Honoré serve in a dual capacity as leader of Joint Task Force Katrina and a member of the Louisiana National Guard, thus making him commander of federal troops answering to the President and commander of the Louisiana National Guard troops answering to Governor Blanco. *Id.* at 206–07, 222. The committee noted that this dual response may have slowed the “active military response and contributed to tension in the state-federal relationship.” *Id.* at 222. Even here, however, the bipartisan committee noted that the failure of “DOD, governors, and other state officials to actively participate in joint planning for emergencies . . . [also] contributed to the tension.” *Id.* Furthermore, the committee noted that Honoré was not familiar with emergency procedures and personnel in affected states, and thus his appointment “would not necessarily have added anything to the response.” *Id.* Most significantly, the committee did not conclude that presidential control over the National Guard was a necessary aspect of improving the military’s slow response.

92. *Id.* at 221–22.

93. *Id.* at 223–24.

and communications equipment.<sup>94</sup> As with the other problems identified above, these are not issues that inherently result from the lack of centralized authority, but rather from human error associated with implementation of a system built on federalism. Nothing suggests that jettisoning the existing framework of federalism is necessarily the correct remedy to such problems.

The Bush administration's response to Hurricane Katrina does, however, highlight some of the potential perils of cooperative federalism programs. On the one hand, having multiple levels of government provide disaster relief and response services may be both necessary and beneficial in that it provides a protective redundancy.<sup>95</sup> But such benefits do not always occur. Critics of cooperative federalism programs argue that their format of "shared political responsibility" make it increasingly difficult for citizens to "finger the culprits for government . . . train-wrecks."<sup>96</sup> In a sense, when everyone is responsible, no one is responsible, and it becomes difficult to know which government officials are at fault for problems that result from cooperative federalism programs. As a result, officials can more easily shift blame—a phenomenon that was reflected in the federal government's response to Katrina.

The cooperative federalism at the core of disaster relief and response efforts allowed the federal government to focus blame elsewhere rather than on its own failings. Although ultimately unsuccessful on many levels, the White House succeeded in convincing the House and Senate to pass legislation giving the President authority over the National Guard in certain circumstances involving natural disasters.<sup>97</sup> There is little evidence that such a law is necessary or justified by the events that unfolded during Katrina. In fact, most of the investigatory findings suggest the opposite. But the Bush administration was able to point to Governor Blanco's refusal to voluntarily allow federal military officials to command Louisiana National Guard troops to bolster its claim that federalism hindered the federal government's response.<sup>98</sup> Despite the fact that myriad other problems

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94. *Id.* at 225–27.

95. Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 *FORDHAM L. REV.* 2133, 2142 (2006).

96. Greve, *supra* note 12, at 567; *see also* Schapiro, *supra* note 95, at 2142–43.

97. *See* John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, 120 Stat. 2083 (2006), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.5122>. Professor Greenberger argues that the new law does not grant the President additional authority but, rather, merely clarifies authority the President already had. Michael Greenberger, *Yes, Virginia: The President Can Deploy Federal Troops to Prevent the Loss of a Major American City from a Devastating National Catastrophe*, 26 *MISS. C. L. REV.* (forthcoming Mar. 2007). As a practical matter, Professor Greenberger's argument may well be true. Domestic violence often accompanies catastrophic national disasters and the Insurrection Act provided for presidential control in such cases prior to the recent amendments. *See supra* note 86. If so, such a change in the law would be little more than the kind of clarification referred to above. *See text* accompanying note 80. But the debate regarding the amendments did not proceed along these lines, instead focusing on where power ought to be located as a matter of history and principle, thus reflecting the manner in which abstract concepts of cooperative federalism can infect potentially useful discussion.

98. *See supra* note 91 for a discussion of this incident.

led to the ineffective military response, including poor preparation and execution by federal officials, the ability to legitimately claim that federalism was at fault eased the bill's passage through Congress.

The events of Hurricane Katrina may also reflect the concerns of those who fear that cooperative federalism programs will concentrate authority in the federal government.<sup>99</sup> There is little question that state and local governments implement national policy regarding disaster response and rescue. In fact, the federal government makes clear the importance of having a national policy,<sup>100</sup> especially via such tools as the NRP. To be sure, states and localities have some discretion to implement that plan, but conditional funding grants require fairly rigid adherence to federal standards.<sup>101</sup> Furthermore, state and local authorities had little input into the original development of the NRP.<sup>102</sup> As the federal government increasingly focused disaster response on terrorism after 9/11,<sup>103</sup> coupled with its enlarged law enforcement and surveillance powers generally, one could rightfully wonder whether concerns regarding federal concentration of power had merit.

Perhaps the problem here is that cooperative federalism programs do not implicate the concept of federalism or, more specifically, that such a term is not helpful in describing the relationship between the federal, state, and local governments. This is not intended to imply that one should dispense with the relationships that tend to represent what we think of as cooperative federalism. The substantial benefits of the arrangements known as cooperative federalism, coupled with their significant longevity,<sup>104</sup> suggest they are here to stay.<sup>105</sup> But the term federalism is not helpful here—especially given the lack of agreement generally regarding what that term means.<sup>106</sup> At best, the word “federalism” adds nothing to the substantive discussion regarding the failures of various government officials in response to Katrina. At worst, it obfuscates the discussion. Professors Edward Rubin and Malcolm Feeley have noted that “claims of federalism are often nothing more than strategies to advance substantive positions or, alternatively, that people declare themselves federalists when they oppose national policy, and abandon that commitment when they

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99. See *supra* note 24.

100. See *supra* note 46.

101. Abbott, *supra* note 40, at 845.

102. *Id.* After state and local authorities objected to their exclusion, DHS established a task force that included state and local stakeholders who participated in drafting a revised NRP. *Id.* at 846–47.

103. *Id.* at 847.

104. Symposia referencing cooperative federalism can be found as early as 1938. See *Symposium on Cooperative Federalism: Foreword*, 23 IOWA L. REV. 455 (1938).

105. See Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on National Neurosis*, 41 UCLA L. REV. 903, 933 (1994) (“Whether one regards our political system as cooperative, competitive, or simply a mess—whether it resembles marble cake or mush—there is little doubt that state and national powers overlap, and that national policy is regularly implemented by state officials.”).

106. See *supra* note 79.

favor it.”<sup>107</sup> Similarly, the emptiness and manipulability of the term cooperative federalism allow people to support or oppose the concept while actually having substantive agendas as their primary reasons for acting. Reliance on federalism as one’s primary argument conceals the real reason for action and short circuits beneficial discussion.

#### V. CONCLUSION

Cooperative federalism programs, like those involved in disaster relief and response, are neither all good nor all bad. They simply are what they are. As with Hurricane Katrina, whether they are successful depends largely on their implementation. In assessing such programs, one would do well to focus more on their details and less on amorphous concepts. Hurricane Katrina suggests that the framework established for disaster response and relief – one based on a framework of cooperative federalism – broke down because of implementation failures and not because anything in the system was inherently flawed. We may need to tweak aspects of this system, possibly resulting in some centralization of federal authority. But those decisions should be made with an understanding of what actually went wrong with the Katrina disasters rather than as a result of empty federalism rhetoric.

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107. Rubin & Feeley, *supra* note 105, at 948.

