

REGULATING HOMEOWNERS' DISASTER INSURANCE THROUGH FEDERAL INTERVENTION: LESSONS FROM THE AFFORDABLE CARE ACT

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ABSTRACT

One of the most impactful effects of climate change in recent years has been the increasing frequency and severity of natural disasters, even in geographic areas not previously known as disaster-prone. These disasters have caused untold property damage. Typically, the cost of rebuilding a home is assumed at least in part by private insurance companies, but many homeowners are significantly underinsured for disaster-related losses. Additionally, in areas where natural disasters are becoming increasingly frequent, private insurers have determined that it is no longer profitable to continually issue massive payouts without charging astronomical premiums, leaving many homeowners without access to financial relief. This Note argues that these circumstances call for a federal intervention. Specifically, it analogizes owning a disaster-prone home to having a preexisting health condition as defined by the Affordable Care Act. Using lessons from this analogy, this Note proposes a federal mandate requiring all homeowners to purchase natural disaster insurance and argues such a policy is achievable through Congress's taxing power. Further, this Note argues that features of the proposed mandate, such as precaution crediting and a subsidized insurance program, render it superior to previously attempted regulation of natural disaster insurance.

INTRODUCTION

In fewer than four weeks during the 2020 fire season, almost 1.5 million acres burned in California.¹ Across this area, which is roughly

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1. Christopher Flavelle, *Wildfires Hasten Another Climate Crisis: Homeowners Who Can't Get Insurance*, N.Y. TIMES, <https://www.nytimes.com/2020/09/02/climate/wildfires-insurance.html>

the size of Delaware, over ten thousand structures were damaged or destroyed.² Many were homes, leaving families displaced and forced to spend years rebuilding at considerable expense.³ Total losses, measured in “direct costs,” for the year are estimated in the billions of dollars.⁴ Although wildfires have always threatened California, the past several years have seen an increase in their scale and intensity.⁵ Cities and towns that were once safe from wildfires have gone up in flames.⁶ Thousands of homeowners are now responsible for the enormous

[<https://perma.cc/J2HA-RBFP>] (last updated Sept. 10, 2020). The fire season typically lasts from June through September, although some scientists argue that there is a second, distinct fire season that lasts from October through April. Kendra Pierre-Louis & John Schwartz, *Why Does California Have So Many Wildfires?*, N.Y. TIMES, <https://www.nytimes.com/article/why-does-california-have-wildfires.html> [<https://perma.cc/X8BL-8E9H>] (last updated July 16, 2021).

2. 2020 *Incident Archive*, CAL FIRE, <https://www.fire.ca.gov/incidents/2020> [<https://perma.cc/3HHG-BJQK>]. Delaware spans approximately 1,534,000 acres. *Inventoried Roadless Area Acreage Categories of NFS Lands Summarized by State*, U.S. FOREST SERV., https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsm8_037652.htm [<https://perma.cc/Z5Z5-PXQM>].

3. See Jill Cowan, *How Much Will the Wildfires Cost?*, N.Y. TIMES, <https://www.nytimes.com/2020/09/16/us/california-fires-cost.html> [<https://perma.cc/Q6K5-FLCV>] (last updated Oct. 16, 2020) (estimating “direct” losses due to wildfires may amount to over \$20 billion in 2020 and “in three of the past four years, including this one, fires are on track to cause damages in excess of \$10 billion”). There is a temporal lag in definitively calculating total losses due to wildfires, but a 2020 study determined that in 2018 alone, wildfires costed Californians \$102.6 billion, including \$59.9 billion in direct capital costs and healthcare expenses. *Full Cost of California’s Wildfires to the US Revealed*, UNIV. COLL. LONDON NEWS, <https://www.ucl.ac.uk/news/2020/dec/full-cost-californias-wildfires-us-revealed> [<https://perma.cc/NM4R-6FBU>] (last updated Dec. 7, 2020). At the individual level, Californians have also observed dramatic impacts on their median home values. In Butte County, the site of the Butte Fire, the median home value is \$313,000, compared to \$247,000 inside the fire boundary. Alcynna Lloyd, *This Is How Much California’s Wildfires Could Cost Homeowners*, HOUS. WIRE (Nov. 12, 2018, 12:06 PM), <https://www.housingwire.com/articles/47378-this-is-how-much-californias-wildfires-could-cost-homeowners> [<https://perma.cc/76CR-3W2Y>]. The impact can also move in the opposite direction; after the Camp Fire in Paradise, California, there was a deficit in remaining homes, causing their values to increase on average from \$264,000 to \$277,000. Deidre Woollard, *How Have the California Wildfires Impacted the Local Real Estate Market?*, MILLIONACRES, <https://www.millionacres.com/real-estate-investing/articles/how-have-the-california-wildfires-impacted-the-local-real-estate-market> [<https://perma.cc/T8F3-RADS>] (last updated Oct. 21, 2020).

4. Cowan, *supra* note 3. While 2020 cost figures remain estimations, concrete numbers from 2018 put the total economic burden of wildfires in California that year at \$148.5 billion. UNIV. COLL. LONDON NEWS, *supra* note 3.

5. See Shu Li & Tirtha Banerjee, *Spatial and Temporal Pattern of Wildfires in California from 2000 to 2019*, SCI. REPS., Apr. 22, 2021, at 1, 3, 12 (“[T]he proportion of extreme wildfires larger than 10,000 acres (40.47 km²) has increased significantly in the last two decades.”). Additionally, the study found that “the frequency and total burned area of all wildfires have increased significantly.” *Id.* at 12.

6. *Id.*

financial burdens of losing their homes.⁷ And each year, the fires' intensity and the resulting damage seem to be getting worse.⁸

The culprit is climate change: rising global temperature resulting from anthropogenic activity exacerbates the magnitude and frequency of natural disasters.⁹ Natural disasters, once rare emergencies, are increasingly an integral facet of everyday life.¹⁰ The effects are nationwide; hurricanes make landfall more frequently in the East, tornadoes ravage the Midwest, and fires scorch much of the West.¹¹ Recovery can take years, and financial wreckage only compounds with each increasingly regular disaster.¹² Insurance companies struggle to

7. *Id.*

8. See Cowan, *supra* note 3 (describing how annual losses due to wildfires on the West Coast have increased from an average of \$1 billion per year to an expected \$10 billion per year in recent years).

9. See generally JASON ANDERSON, INST. FOR EUR. ENV'T POL'Y, & CAMILLA BAUSCH, ECOLOGIC, CLIMATE CHANGE AND NATURAL DISASTERS: SCIENTIFIC EVIDENCE OF A POSSIBLE RELATION BETWEEN RECENT NATURAL DISASTERS AND CLIMATE CHANGE 2 (2006), https://ieep.eu/uploads/articles/attachments/ced7e1f4-36c3-4c83-805e-1227f3233f9d/IEEP_Ecologic_climate_change_natural_disasters.pdf [<https://perma.cc/78XU-CTQG>] (documenting the relationship between increasing greenhouse gas emissions and more frequent extreme weather events, which notably exclude "forest fires in areas of drought" because they are considered "secondary" effects); DAVID FRANCIS, LANARK HOUSE COMM'NS, & HENRY HENGEVELD, ENV'T CAN., EXTREME WEATHER AND CLIMATE CHANGE (1998), <https://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.455.4963&rep=rep1&type=pdf> [<https://perma.cc/H7V3-9J4T>] (reviewing the relationship between climate change and extreme weather); Peter Stott, *How Climate Change Affects Extreme Weather Events*, 352 SCIENCE 1517 (2016) (same).

10. See Sandra Banholzer, James Kossin & Simon Donner, *The Impact of Climate Change on Natural Disasters*, in REDUCING DISASTER: EARLY WARNING SYSTEMS FOR CLIMATE CHANGE 21, 43 (Ashbindu Singh & Zinta Zommers eds., 2014) ("With projected increases in intensity and frequency of extreme events due to climate change as well as increasing exposure and vulnerability of populations, impacts of natural hazards are most likely worsening."); see also *Number of Recorded Natural Disaster Events, All Natural Disasters, 1900 to 2019*, OUR WORLD IN DATA, <https://ourworldindata.org/grapher/number-of-natural-disaster-events> [<https://perma.cc/Q7QW-QL5F>] (displaying a chart showing the dramatic increase in the number of global natural disasters recorded over the last century).

11. Kat Eschner, *The Most Dangerous Places To Live in America that Are Prone to Natural Disasters*, CNBC, <https://www.cnbc.com/2019/07/10/billion-dollar-natural-disasters-rising-these-states-better-prepare.html> [<https://perma.cc/H89Y-TWLT>] (last updated July 15, 2019, 9:34 AM); see also Carolyn Kousky, *Informing Climate Adaptation: A Review of the Economic Costs of Natural Disasters, Their Determinants, and Risk Reduction Options*, 46 ENERGY ECON. 576, 581 (2014) (displaying a chart showing the increased economic toll of natural disasters between 2000 and 2019, which can serve as a proxy for disasters' heightened impact in recent years).

12. See UNITED NATIONS OFF. FOR DISASTER RISK REDUCTION, GLOBAL ASSESSMENT REPORT ON DISASTER RISK REDUCTION: REVEALING RISK, REDEFINING DEVELOPMENT SUMMARY AND MAIN FINDINGS 6 (2011), https://www.preventionweb.net/english/hyogo/gar/2011/en/bgdocs/GAR-2011/GAR2011_ES_English.pdf [<https://perma.cc/TN9A-XC4A>] ("[T]he extensive risks of today can become the intensive risks of tomorrow when they accumulate in places exposed to major hazards . . ."). For an example of how lengthy recovery can be, one need

respond, as the demand for financial relief exceeds the rate at which they can fulfill payouts.¹³

For homeowners, the stakes have never been higher. In 2018 alone, the U.S. government and U.S. residents collectively suffered \$91 billion in losses related to natural disasters.¹⁴ Further, in a report from CoreLogic that identified millions of homes considered high risk for natural disasters, researchers found these homeowners were collectively underinsured against those losses by tens of millions of dollars.¹⁵

This plight is similar to that of the forty-six million nonelderly individuals without health insurance prior to the passage of the Patient Protection and Affordable Care Act (“ACA”).¹⁶ The ACA reduced this number by half,¹⁷ saving millions of U.S. residents from potential permanent financial ruin due to being under- or uninsured.¹⁸ Likewise, to save a large and growing number of U.S. residents from financial ruin due to natural disasters, the federal government should intervene in the homeowner insurance market in a way comparable to the ACA.

look no further than the aftermath of Hurricane Katrina—over a decade after the event, New Orleans communities continue to struggle. Nicolette Santos, *Fourteen Years Later, New Orleans Is Still Trying To Recover from Hurricane Katrina*, ENV'T & ENERGY STUDY INST. (Apr. 26, 2019), <https://www.eesi.org/articles/view/fourteen-years-later-new-orleans-is-still-trying-to-recover-from-hurricane-katrina> [<https://perma.cc/E7MB-66R3>].

13. See, e.g., Flavelle, *supra* note 1 (“Years of megafires have caused huge losses for insurance companies . . .”).

14. Diana Olick, *Millions of Homes Are Underinsured Against Natural Disasters as Construction Costs Keep Rising*, CNBC, <https://www.cnbc.com/2019/05/03/millions-of-homes-are-underinsured-against-natural-disasters.html> [<https://perma.cc/B5X4-XD3X>] (last updated May 17, 2019, 4:20 PM). Olick cites to the National Oceanic and Atmospheric Association, which calculated “total costs” as “costs in terms of dollars that would not have been incurred had the event not taken place.” See *Overview*, NAT’L OCEANIC & ATMOSPHERIC ASS’N: BILLION-DOLLAR WEATHER & CLIMATE DISASTERS, <https://www.ncdc.noaa.gov/billions/overview> [<https://perma.cc/2AJE-G8M9>].

15. FRANK NOTHAFT, AMY GROMOWSKI, ANNETTE TIERNEY, DENISE MOORE & GUY KOPPERUD, CORELOGIC, 2019 INSURANCE COVERAGE ADEQUACY REPORT: THE EFFECTS OF UNDERINSURANCE TO THE PROPERTY ECOSYSTEM 4–7 (2019), <https://www.corelogic.com/wp-content/uploads/sites/4/downloadable-docs/2019-insurance-coverage-adequacy-report-0419-06-screen.pdf> [<https://perma.cc/J4TL-HQT4>].

16. Jennifer Tolbert, Kendal Orgera & Anthony Damico, *Key Facts About the Uninsured Population*, KAISER FAM. FOUND. (Nov. 6, 2020), <https://www.kff.org/uninsured/issue-brief/key-facts-about-the-uninsured-population> [<https://perma.cc/N6E3-S37N>].

17. See *id.* (“The number of uninsured nonelderly individuals dropped from more than 46.5 million in 2010 to fewer than 26.7 million in 2016 before climbing to 28.9 million individuals in 2019.”).

18. See discussion *infra* Part II.A (justifying the need for federal intervention into the property insurance market).

Yet, the solution should not be to have state governments forcibly relocate those living in disaster-prone regions. In fact, relocation is often impossible,¹⁹ such as in the case of the statewide housing shortage facing California.²⁰ Even outside of California, increased mass relocation will inevitably drive price hikes for real estate in the lower risk destination regions.²¹ Relocation is also impracticable from an environmental justice perspective, as it is based on the presumptions that, first, those living in disaster-prone regions *can* leave and, second, historical and systemic reasons do not impede their opportunities to retreat.²² As a result, forced relocation perpetuates cycles of poverty and abandonment,²³ whereas a new insurance regime presents the opportunity to bring newfound stability to disaster-prone communities. In other words, limiting forced relocation by providing access to insurance alleviates environmental justice concerns by empowering individuals to choose where they live.²⁴ The most effective rewritten insurance regulations will be those that include plans for long-term resiliency in the face of natural disasters, reducing the need for constant rebuilding.²⁵

19. See John Schwartz, *After a Natural Disaster, Is It Better To Rebuild or Retreat?*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/us/after-a-natural-disaster-is-it-better-to-rebuild-or-retreat.html> [<https://perma.cc/NS7Q-WEC5>] (“[S]imply saying that people should not live in a place ignores reality . . .”).

20. Flavelle, *supra* note 1.

21. See Leah Platt Boustan, Maria Lucia Yanguas, Matthew Kahn & Paul W. Rhode, *As the Rich Move Away from Disaster Zones, the Poor Are Left Behind*, GRIST (July 1, 2017), <https://grist.org/article/as-the-rich-move-away-from-disaster-zones-the-poor-are-left-behind> [<https://perma.cc/SB9N-F7EN>] (“[P]eople move away from areas hit by the largest natural disasters [I]f a county experienced two natural disasters, migration out of that county increased by one percentage point”). Migration impacting housing prices is unsurprising, as “[p]ositive or negative migration into a geographic area will have a dramatic impact on housing supply and demand.” Brad Cartier, *Housing Market Supply and Demand*, MILLIONACRES, <https://www.millionacres.com/real-estate-basics/real-estate-terms/housing-market-supply-and-demand> [<https://perma.cc/ABX5-5BYS>] (last updated June 17, 2021).

22. See *infra* Part I.A.

23. See Doug Donovan, *Poor Families Must Move Often, but Rarely Escape Concentrated Poverty*, HUB (Oct. 8, 2020), <https://hub.jhu.edu/2020/10/08/stefanie-deluca-crises-force-families-to-move-frequently> [<https://perma.cc/2D39-WFHZ>] (“[L]ow-income families are forced by urgent crises to choose the safest, most convenient locations necessary for immediate survival rather than take the time to find neighborhoods with great schools and job opportunities.”).

24. See discussion *infra* Part II.C (modeling a federal intervention whereby the federal government is able to provide financial support for rebuilding by mandating disaster insurance nationwide).

25. See Flavelle, *supra* note 1 (describing consumer groups’ and the state’s rationales for advocating for rewards based on risk mitigation).

Federal intervention into property insurance markets is not unprecedented. The federal government has multiple models upon which to draw for this initiative. The accomplishments and shortcomings of two such interventions are particularly informative. First, the Hurricane Katrina Recovery, Reclamation, Restoration, Reconstruction and Reunion Act of 2005 would have, if enacted, permitted individuals impacted by Hurricane Katrina to retroactively draw into the federal government's national flood insurance program.²⁶ This emergency approach would have been coupled with efforts at the state level; in Louisiana, for example, the state government did stop the clock on prescriptive periods, buying more time for the homeowners to file claims.²⁷ As will be discussed in Part I, this effort proved inadequate in the aftermath of what was, at the time, the most devastating natural disaster in U.S. history.²⁸ The lesson remains clear: issuing emergency legislation during an ongoing crisis will not be enough to meet the needs of those harmed.²⁹ Federal intervention during Hurricane Katrina thus demonstrates the pitfalls of a reactive, as opposed to prevention-based, approach to intervention.³⁰

26. Hurricane Katrina Recovery, Reclamation, Restoration, Reconstruction and Reunion Act of 2005, H.R. 4197, 109th Cong. (2005); *see* National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 572 (codified as amended at 42 U.S.C. §§ 4001–4129) (establishing a national flood insurance program).

27. La. Exec. Order KBB 2005-67, 31 La. Reg. 2675, 2676 (Nov. 20, 2005); *see also* State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus., 937 So. 2d 313, 316, 327 (La. 2006) (describing the order).

28. *See* Sarah Gibbens, *Hurricane Katrina, Explained*, NAT'L GEOGRAPHIC (Jan. 16, 2019), <https://www.nationalgeographic.com/environment/article/hurricane-katrina> [<https://perma.cc/TRR3-CMQA>] (“Because of the ensuing destruction and loss of life, the storm is often considered one of the worst in U.S. history.”).

29. *See* Donald C. Menzel, *The Katrina Aftermath: A Failure of Federalism or Leadership?*, 66 PUB. ADMIN. REV. 808, 810 (2006); *see also* FRANCES FRAGOS TOWNSEND, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED (2006), <https://georgewbush-whitehouse.archives.gov/reports/katrina-lessons-learned/chapter5.html> [<https://perma.cc/QCF9-GM37>] (describing an emergency response rife with inefficacies, lack of coordination between federal and local government, and communication breakdowns as contributing to the exacerbated toll Hurricane Katrina exacted upon U.S. residents).

30. *See* Mary Helen Stoltz, *Flood Damage After Katrina Could Have Been Prevented*, S&T Expert Says, MO. S&T (Aug. 24, 2015), <https://news.mst.edu/2015/08/flood-damage-after-katrina-could-have-been-prevented-st-expert-says> [<https://perma.cc/ZL8T-5GWK>] (“[E]xperts say the flooding that caused over 1,800 deaths and billions of dollars in property damage could have been prevented had the U.S. Army Corps of Engineers retained an external review board to double-check its flood-wall designs.”); TOWNSEND, *supra* note 29 (enumerating the ways in which lack of preparedness and the coordinated response systems in place led to further harm).

Further, the federal government should look to the ACA's treatment of preexisting conditions³¹ as a compelling analog for addressing disaster-prone locations. The preexisting conditions provisions faced powerful adversaries that predate their inception³²: individualism and capitalism, considered by some to be core U.S. values, arguably conflict with the notion of public responsibility for the ill.³³ The ACA transformed this dialogue to a certain extent, promoting a notion of social responsibility now embedded in the fabric of the conversations surrounding healthcare reform.³⁴ There is much to learn from this development, as the federal government must once again make the case for public responsibility—now for homes at risk of devastation by natural disasters.³⁵

Although both the Hurricane Katrina and ACA federal interventions could have been more effective, there is much to gain by analyzing their origins, motivations, implementation, and outcomes in the context of climate change's pressing threat to the insurance and housing markets.³⁶ This Note lays the foundation for such an analysis. More specifically, it argues for a new model of federal intervention, one that optimizes maximal coverage and risk prevention at minimal premiums. This new model will create a permanent infrastructure whereby the federal government subsidizes much of the costs incurred through natural disasters as an assumption of public responsibility. This intervention is not limited to property losses³⁷ caused by wildfires; instead, it will encompass all disaster-related losses so that the

31. See 42 U.S.C. § 18001(a), (d) (providing immediate access to insurance for uninsured individuals with preexisting conditions).

32. Simon F. Haeder, *How Pre-Existing Conditions Became Front and Center in Health Care Vote*, CONVERSATION (May 4, 2017, 9:26 PM), <https://theconversation.com/how-pre-existing-conditions-became-front-and-center-in-health-care-vote-77138> [<https://perma.cc/L4SZ-NGA9>].

33. See generally Martin McKee & David Stuckler, *The Crisis of Capitalism and the Marketisation of Health Care: The Implications for Public Health Professionals*, 1 J. PUB. HEALTH RSCH. 236 (2012) (describing “a [healthcare] system that is managed not for the benefit of the people but rather for the corporations and the small elite who lead them”).

34. See, e.g., Will Stone, *More than Politics on the Line for Voters with Preexisting Conditions*, NPR (Nov. 2, 2020, 5:08 PM), <https://www.npr.org/sections/health-shots/2020/11/02/928237198/more-than-politics-on-the-line-for-voters-with-pre-existing-conditions> [<https://perma.cc/3H4S-SBBT>] (describing how protections for those with preexisting conditions are now overwhelmingly supported by individuals in the United States).

35. See *infra* Part II.C.

36. See, e.g., Flavelle, *supra* note 1 (describing how the increasing severity of wildfires is intensifying crises in the insurance market and, consequently, in the real estate market).

37. Throughout this Note, “losses” refers to property losses and damages, unless otherwise specified.

government may properly benefit from a nationwide distribution of risk as an insurance provider.

Part I introduces insurance generally, discussing how it functions and why the risk analysis specifically related to disaster insurance is inextricably linked to environmental justice. This Part then focuses on current challenges in the California state legislature, demonstrating that pressing issues in the homeowner insurance market are far from historically isolated challenges. Exploring the emergency legislation following Hurricane Katrina and the preexisting conditions provisions of the ACA, this Part finally contextualizes the later discussion of how the United States has failed to respond to insurance crises in the past and what should be achieved in the future.

Part II accomplishes three objectives. First, it discusses the public policies underlying functional insurance services. Second, it addresses key constitutional questions related to the federal government's right to intervene in state homeowner insurance markets. Third, it proposes the optimal structure for a federal intervention in the homeowner insurance market. This final Section concludes with a permanent federal intervention mandating disaster insurance via a tax on property mortgages. Such a tax will facilitate the use of nationwide risk corridors, ultimately reducing the financial burdens associated with natural disasters for homeowners, insurance companies, and states alike.

I. FIRES, FLOODS, AND FEDERAL INTERVENTION: GOVERNMENTS AS INSURERS

This Part first lays a foundation for how insurance functions in the United States and then characterizes the precise nature and scope of the existing challenges within the homeowner insurance market, focusing on the current issues in the California State Legislature. Next, it offers a detailed treatment of two imperfect models of federal intervention: the reactive legislation following Hurricane Katrina and the preexisting conditions provisions of the ACA. This Part discusses the origins of these interventions, their interactions with state legislation, and where they could have been more effective. This Part ultimately demonstrates both that legislation targeting only high-risk individuals can merely scratch the surface of harm reduction and that piecemeal, state-by-state programming will result in undue burdens on select state governments, which would otherwise be eliminated through federal intervention.

A. *A Primer on Insurance and the Infeasibility of Relocation*

Insurance companies are tasked with determining the most cost-effective way to distribute estimated risks and still generate a profit.³⁸ To do so, they first estimate the risk of loss associated with what the customer—here, a homeowner—is insuring—here, a home.³⁹ Then, using an algorithm, they calculate a premium, which is the amount charged to the insured that is used by the insurer to pay for the losses covered by the insurance policy.⁴⁰ Often, there is a protection gap—the estimated replacement cost is significantly lower than the actual cost of covering the loss.⁴¹ An underinsured homeowner may be left to pay the difference, although legal remedies against the insurer exist in the event of either a bad faith act of malpractice or fraud.⁴² Any liability the insurance company assumes is typically a cost of business.⁴³ Problematically, even though the insurance company estimates the risk, it is the homeowner who may be responsible for individual losses if this estimate is wrong.⁴⁴ This is not to say the insurance company is immune from the consequences of such errors; software programs may fail to take into account demand surges (such as in the wake of natural disasters), leading to underinsurance.⁴⁵ But unlike the homeowner, the insurance company has strategies in place for offloading this risk.⁴⁶ The

38. See Romona Paden, *The Ins and Outs of Risk Assessment*, COVERAGE (Oct. 7, 2020), <https://www.coverage.com/insurance/auto/the-ins-and-outs-of-risk-assessment> [<https://perma.cc/GR5Q-5BPU>] (“The goal, of course, is to strike a balance between an insurer’s profitability and potential claims by policyholders.”).

39. *Id.*

40. *Id.*; Julia Kagan, *Insurance Premium*, INVESTOPEDIA (Sept. 10, 2021), <https://www.investopedia.com/terms/i/insurance-premium.asp> [<https://perma.cc/YY9K-BGC5>].

41. See Kenneth S. Klein, *Minding the Protection Gap: Resolving Unintended, Pervasive, Profound Homeowner Underinsurance*, 25 CONN. INS. L.J. 34, 35, 37 n.2 (2018) (defining the protection gap as “the difference between the coverage limits in a homeowner policy . . . and . . . the actual cost to replace” the “lost dwelling”).

42. See Douglas R. Richmond, *An Overview of Insurance Bad Faith Law and Litigation*, 25 SETON HALL L. REV. 74, 78, 96–103 (1994) (explaining that an insured individual may seek tort damages when their insurer violates its duty of good faith and defining bad faith).

43. See Klein, *supra* note 41, at 98–104 (describing how insurers profit by underinsuring).

44. See *id.* at 100 (“Policyholders think they are buying truly full replacement coverage while insurers know the likelihood that the coverage limits could be inadequate.”).

45. See *id.* at 64–77 (documenting the problems with insurance companies’ cost-estimating software and how chronic underestimations accrete into larger challenges).

46. See *id.* at 98 (“[B]ecause the legal landscape protects insurers from the consequence of inadequate coverage, the aspects of cost estimating that result in nominally full but actually inadequate coverage turn out to be features rather than glitches.”). In other words, insurance regulations have created a moral hazard wherein an insurer generates profit from the underinsurance of its customers. *Id.* at 98–99.

legal landscape favors insurers who underinsure, and what's more, an insurance company is able to distribute, or pool, its risk across all of its customers, such that the risks of miscalculations are, on average, generally offset.⁴⁷ As will be discussed later in this Note, the same principles of risk offloading may benefit the U.S. government as an insurer.

The resulting protection gap—impacting those whom insurers find too risky to insure—is a reality for both property and health insurance, but consequences vary between these two policy types. Historically, using a disaster insurance policy was likely to be a once-in-a-lifetime occurrence entirely outside of an individual's control.⁴⁸ Medical expenses, on the other hand, despite being moderately controlled through routine care, were likely to occur more frequently.⁴⁹ Additionally, although adverse health outcomes have only been subject to relatively minor unevenness in geographic distribution, individuals rightfully associate natural disasters with harm in discrete areas.⁵⁰ Importantly, however, climate change renders these distinctions increasingly less salient insofar as more homeowners must now routinely dip into their coverage plans, as evinced by the situation in California.⁵¹ As the gap between frequency of use narrows for the two insurance services, the inability for traditional homeowner

47. *Id.* at 98; *see also id.* at 101 n.313 (“The premise of insurance is risk-spreading among the pool of insureds . . .”).

48. *See supra* note 10 and accompanying text.

49. *See* HEALTH CARE COST INST., 2018 HEALTH CARE COST AND UTILIZATION REPORT (2020), <https://healthcostinstitute.org/annual-reports/2020-02-13-18-20-19> [<https://perma.cc/5WCK-E76X>] (finding that the average individual in the United States incurred \$5,892 in medical and pharmacy costs in 2018).

50. While the geographic distribution of health outcomes is fairly even relative to that of natural disasters, economic inequalities and environmental injustices can drive health disparities along geographic lines. *See generally* Thomas C. Ricketts, III, *Geography and Disparities in Health Care*, in GUIDANCE FOR THE NATIONAL HEALTHCARE DISPARITIES REPORT 149 (Elaine K. Swift ed., 2002) (chronicling metrics of national healthcare disparities).

51. Flavelle, *supra* note 1. This Note does not suggest that utilizing disaster insurance and health insurance would occur at the same *frequency*, as an individual may make use of their health insurance policy on a monthly or even more frequent basis. But the two forms of insurance are beginning to converge on the matter of *regularity*, which is a function of the frequency of natural disasters increasing, albeit still on a different scale.

insurance⁵² plans to deal with routine payouts starkly contrasts the progress made to improve coverage in the health insurance arena.⁵³

In insurance, the balancing act is delicate: insurance companies aim to set premiums low enough to maximize the number of low-risk customers who decide to enroll to offset the costs associated with high-risk customers, who are more likely to enroll themselves.⁵⁴ Insurance companies then try to set rate premiums high enough to cover expenses as they arise, but low enough that individuals are not deterred from enrolling.⁵⁵ In the wake of increasing natural disasters, however, this delicate balance comes under severe pressure.⁵⁶ The number of high-risk homes has increased at a rate faster than insurance companies can afford without effectuating large rate increases, which consumers cannot afford.⁵⁷ At an impasse, insurance companies are often left with only one option: to not insure homes located in disaster-prone areas.⁵⁸ In California, this has led to an insurance availability crisis, an unwelcome challenge in a state already plagued by an affordable housing shortage.⁵⁹ Worse, the majority of mortgage providers currently only provide loans that are contingent upon homeowners obtaining homeowner insurance; so if insurance companies abandon a regional market, buyers cannot finance the purchase of their homes.⁶⁰ Insurance companies are businesses. As a result, if they cannot sustain

52. This Note opts to use the phrase “homeowner insurance” in keeping with other scholarly works. *See, e.g.*, Klein, *supra* note 41, at 37 n.1 (“There is a lack of agreement regarding whether the correct generic titling of standard insurance covering the loss of a residence is ‘homeowners,’ ‘homeowner’s,’ ‘homeowners,’ or ‘homeowner’ insurance. This Article adopts the later convention—‘homeowner.’”).

53. *Compare infra* Part I.D (describing the creation of the ACA and resulting progress), *with* Flavelle, *supra* note 1 (describing insurers’ struggle to make payouts, resulting in market pullouts).

54. *See, e.g.*, SARA E. WILENSKY & JOEL B. TEITELBAUM, *ESSENTIALS OF HEALTH POLICY AND LAW* 158 (Richard Riegelman ed., 4th ed. 2020) (explaining that insurers want to set low premiums to attract low-risk customers in order to help pay for the high-risk customers who know they are likely to need the insurance and are therefore less cost motivated).

55. *See id.* (noting that insurance companies try “to charge lower premiums to attract healthy individuals who are less likely to use their benefits, and higher premiums to unhealthy individuals who are more likely to need medical care”).

56. Flavelle, *supra* note 1.

57. *See id.* (“[M]any insurance companies say their premiums are now set too low to cover the growing losses,” but that increasing premiums would “squeeze[e] homeowners.”).

58. *Id.*

59. *Id.*

60. Pat Howard, *How Much Homeowners Insurance Is Required by Mortgage Lenders?*, POL’Y GENIUS, <https://www.policygenius.com/homeowners-insurance/mortgage-lender-requirements-for-homeowners-insurance> [https://perma.cc/2W37-EQ4Y] (last updated Jan. 12, 2021).

profit margins in a given region, they have no reason to risk bankrupting themselves to the benefit of would-be homeowners or mortgage providers—thus, pulling out of an entire market is fully within insurers' purview.

Many have a knee-jerk reaction to this complex problem: people should simply relocate away from disaster-prone areas. Rebuilding over and over again in the same vulnerable region burdens the state and national economy, and, in regions where rebuilding is becoming increasingly regular, residents should similarly abandon the premises for less vulnerable areas.⁶¹ But this relocation argument is stymied by the fact that vulnerable regions are occupied largely by low-income individuals and families, many of whom are people of color and immigrants.⁶² These demographics are not random. When wealthier individuals abandon fraught landscapes for greener pastures, the market responds—prices soar in more climate-insulated destinations and plunge where environmental hazards are an imminent threat, prompting members of poor communities to occupy the most vulnerable lands.⁶³

To the extent governments consistently fail to ensure economic equality and access to subsidized housing,⁶⁴ expecting swaths of people to come up with the funds to buy into neighborhoods they cannot afford is a misguided response. Furthermore, as previously discussed, climate change is a problem that is ever increasing in scale and scope, so the number of regions impacted by disaster is only going to rise.⁶⁵ It is now mistaken to assume a community's status as "safe" is a steady condition. If the vast majority of the country will one day be

61. See Christopher Flavelle, *U.S. Flood Strategy Shifts to 'Unavoidable' Relocation of Entire Neighborhoods*, N.Y. TIMES (Aug. 26, 2020), <https://www.nytimes.com/2020/08/26/climate/flooding-relocation-managed-retreat.html> [<https://perma.cc/Q47D-ZQGB>] (discussing increased efforts to "relocat[e] entire communities away from vulnerable areas . . . amid acceptance that rebuilding over and over after successive floods makes little sense").

62. See Renee Cho, *Why Climate Change Is an Environmental Justice Issue*, STATE OF THE PLANET (Sept. 22, 2020), <https://news.climate.columbia.edu/2020/09/22/climate-change-environmental-justice> [<https://perma.cc/SWT4-U4E9>] ("[T]hese more vulnerable communities are largely the communities of color, immigrants, low-income communities and people for whom English is not their native language."). See generally Helen Adams, *Why Populations Persist: Mobility, Place Attachment and Climate Change*, 37 POPULATION & ENV'T 429 (2016) (explaining how resource limitations contribute to communities' elections to remain in vulnerable areas).

63. Boustan et al., *supra* note 21.

64. See *The Problem*, NAT'L LOW INCOME HOUS. COAL., <https://nlihc.org/explore-issues/why-we-care/problem> [<https://perma.cc/NUR3-E2S2>] (providing national data regarding the housing shortage, homelessness, housing poverty, and underfunded programs).

65. See *supra* notes 9–11 and accompanying text.

geographically vulnerable in one way or another, there will eventually be nowhere to relocate. Instead, the government should adapt its policies based on where people already live—for both those who live there by choice and those who live there by circumstance.

B. As California Burns, All Eyes on the State Legislature

States, it seems, are unable to address disaster insurance crises on their own.⁶⁶ Insurance regulation differs among states. California's state government, for example, has struggled to implement regulations that simultaneously protect residents and their homes while also maintaining a market in which insurance companies can feasibly turn a profit.⁶⁷ Further, the growing intensity and severity of fires in California have exposed key pitfalls of its regulatory scheme. Most pointedly, the California state government's failure to reach a sustainable legislative compromise on how best to insure its at-risk homes demonstrates the need for federal support.⁶⁸

The California Insurance Regulations, which are promulgated by the California Department of Insurance, are famously consumer friendly.⁶⁹ If an insurance company operating in California tries to increase rates for customers, the state is authorized “to reject or

66. See, e.g., Flavelle, *supra* note 1 (describing insurance company pullouts in California and the insufficiency of the state's “high-risk insurance program”). Other states have observed distinct, but related insurance problems. In New Jersey, for example, insurance companies are wrestling with the threat of rising sea levels. Joe Martucci & Victoria Bouloubasis, *In Atlantic City, Rising Seas Threaten an Already Struggling Industry*, PRESS OF ATL. CITY (July 12, 2021), https://pressofatlanticcity.com/news/local/in-atlantic-city-rising-seas-threaten-an-already-struggling-industry/article_6c9591a8-d371-11eb-a136-03277727293c.html [https://perma.cc/DJ88-96LR]. The South is similarly locked in a battle over who will pay for damages resulting from a barrage of natural disasters. See, e.g., Sofia Sokolove, Emily Wax-Thibodeaux, Mark Berman & Griff Witte, *Billions in Damage Across the South Prompts Focus on Who's To Blame, and Who Will Pay*, WASH. POST (Feb. 19, 2021, 8:31 PM), https://www.washingtonpost.com/national/texas-winter-storm-recovery/2021/02/19/2e30d20e-72ed-11eb-a4eb-44012a612cf9_story.html [https://perma.cc/P7P5-7HBG] (noting that “the focus . . . rapidly shift[ed] to who would pay” following a week of storms across the South).

67. See *infra* notes 81–94 (describing political turmoil resulting from clashes between insurance companies and consumer protection groups in the state).

68. See *infra* notes 89–93 (noting the collapse of proposed legislative compromises); see also *infra* Part II.C (advocating for a federal intervention based in part on the inability of any other party, including the state, to resolve the crisis).

69. Flavelle, *supra* note 1; see also CAL. CODE REGS. tit. 10, § 5 (2021) (outlining the duties of the insurance commissioner and the regulations pertaining to insurers, such as those limiting insurers' flexibility in rate-setting).

reduce” these proposed rate increases.⁷⁰ Generally, this system of regulations is effective at preventing runaway rate increases, thereby keeping insurance accessible for the maximal number of Californians.⁷¹ Earthquake insurance shows how these laws work. Until recent years, many were more likely to associate California with earthquakes than wildfires.⁷² Yet, standard homeowner insurance packages do not cover losses due to earthquakes in California.⁷³ Homeowners may purchase earthquake insurance through any insurance company that is registered with the California Earthquake Authority.⁷⁴ Even though standard homeowner insurance is required for obtaining a mortgage, earthquake insurance is not required in the state.⁷⁵

Though the earthquake insurance approach has generally garnered public support,⁷⁶ key distinguishing factors between earthquakes and wildfires render this approach too weak a response to the latter. Serious earthquakes do not occur nearly as frequently as fires do in the state,⁷⁷ so one could infer earthquakes are responsible for far less residential property damage in a given year. Additionally, with regard to earthquakes, California has taken several prophylactic

70. Flavelle, *supra* note 1; *see also* CAL. CODE REGS. tit. 10, § 2644.1 (2021) (“If the rate or proposed rate is excessive, the Commissioner shall indicate the highest rate that would not be excessive, which the insurer may adopt by amendment to its application, or the Commissioner shall reject the rate in its entirety.”).

71. *See* Flavelle, *supra* note 1 (noting California’s “[insurance] rules were designed to guard against higher rates”). While the consumer-friendly insurance market in California is presently beneficial to its residents, the increasing threat of natural disasters may make it difficult for insurance companies to fund payouts under existing rate constraints—hence the potential for inaccessible insurance in the long term. *Id.*

72. *See Main Types of Disasters and Associated Trends*, LEGIS. ANALYST’S OFF. (Jan. 10, 2019), <https://lao.ca.gov/Publications/Report/3918> [<https://perma.cc/DXF9-QX6Z>] (noting that, although “earthquakes can be some of the most destructive types of disasters” when they occur in California, earthquakes “occur[] less frequently than . . . fires,” and fires have “increase[d] in severity and frequency” in recent decades).

73. *Earthquake Insurance*, CAL. DEP’T OF INS., <http://www.insurance.ca.gov/01-consumers/105-type/95-guides/03-res/eq-ins.cfm> [<https://perma.cc/D3N4-W9FQ>].

74. *Id.*

75. *Id.*

76. *See* David C. Marlett & Carl Pacini, *Insurer Stock Price Responses to the Creation of the California Earthquake Authority*, 18 J. INS. REGUL. 80, 99 (1999) (finding a positive relationship between stock prices for insurance companies and positive press about the California Earthquake Authority).

77. LEGIS. ANALYST’S OFF., *supra* note 72. To clarify, earthquakes still have potential to cause a significant amount of property damage, *see id.* (describing earthquakes as “destructive”), despite their lesser frequency—but, in a typical recent year, more residential property damage can be attributed to fires than earthquakes simply because more fires occur in a typical recent year than earthquakes.

measures to “earthquake-proof” existing structures, moderately increasing resiliency to even high-magnitude earthquakes and decreasing risks for homeowners.⁷⁸ No preventative measures currently in place have proved much of a match for wildfires.⁷⁹ Even Governor Gavin Newsom’s \$536 million spending proposal—which was intended for a host of preventative measures such as managing vegetation, reevaluating structures for fire safety, and improving training for firefighters—has been critiqued as “unlikely to be enough to manage even 1 million acres of threatened lands in the year to come, with at least 10 million acres across California requiring fire prevention treatments.”⁸⁰

Thus, although an opt-in system is feasible in the context of earthquake insurance, the nature of the wildfire crisis demands a different approach. Hundreds of structures are damaged by fires every year in California.⁸¹ Insurance companies, now faced with huge payouts, cannot feasibly turn a profit without raising their rates—something California’s legislature greatly inhibits.⁸² With no conceivable strategy for staving off bankruptcy, insurance companies are forced to abandon entire zip codes, resulting in an insurance availability crisis that leads to both banks denying mortgages to

78. See The Field Act, CAL. EDUC. CODE § 17280.5 (West 2021) (establishing a committee to “determine whether a building . . . meets, or can be retrofitted to meet, . . . pupil safety performance standard[s]”); see also The Riley Act, CAL. HEALTH & SAFETY CODE § 19163 (West 2021) (establishing building requirements related to seismic safety). While California has made strides in seismic engineering, earthquake-proofing in the United States still severely lags behind the practice in other countries, such as Japan. See Thomas Fuller, Anjali Singhvi, Mika Gröndahl & Derek Watkins, *Buildings Can Be Designed To Withstand Earthquakes. Why Doesn’t the U.S. Build More of Them?*, N.Y. TIMES (June 7, 2019), <https://www.nytimes.com/interactive/2019/06/03/us/earthquake-preparedness-usa-japan.html> [<https://perma.cc/6X95-QBET>] (describing the political and economic barriers to achieving optimal earthquake-proofing in the United States as compared to in countries like Japan, which have enacted stricter standards).

79. Dale Kasler & Ryan Sabalow, *Why California Spends Billions but Can’t Control Its Wildfires. ‘No Simple or Cheap Solution’*, SACRAMENTO BEE, <https://www.sacbee.com/news/california/fires/article245250275.html> [<https://perma.cc/AR4E-EY5Q>] (last updated Aug. 27, 2020, 9:05 AM).

80. John Myers, *California Unveils Sweeping Wildfire Prevention Plan amid Record Fire Losses and Drought*, L.A. TIMES, <https://www.latimes.com/california/story/2021-04-08/california-wildfire-prevention-536-million-newsom-lawmakers> [<https://perma.cc/YZ69-65N2>] (last updated Apr. 8, 2021, 5:13 PM).

81. CAL FIRE, *supra* note 2.

82. Flavelle, *supra* note 1.

prospective homeowners and current homeowners defaulting on their mortgages as a result of nonrenewal or cancellation.⁸³

In 2019, California's state government addressed the crisis head on, at a great expense to insurance companies.⁸⁴ The state imposed a one-year moratorium on refusing to renew homeowner insurance policies in certain wildfire-prone regions of the state.⁸⁵ In other words, insurance companies were temporarily banned from pulling out of the market in fire-prone areas.⁸⁶ To accomplish this feat, the California government leveraged its more desirable markets—expensive homes in low-risk areas—to protect its fire-prone markets. But the moratorium significantly impacted insurance companies' profit margins, such that the state government could never make the arrangement permanent if it wanted to keep insurers in the state.⁸⁷ Facing the expiry of the emergency bill, the California government knew it needed a more sustainable replacement.⁸⁸

By the second half of 2020, the state legislature proposed a permanent law intended to serve as a compromise for consumers and insurance companies.⁸⁹ In the proposal, insurance companies were allowed to incorporate climate predictions into rate-setting calculations—essentially softening California's prior policy against rate-setting based on future projections—but in exchange, they were required to make insurance available to the regions they had previously abandoned and to offer discounted rates if consumers took

83. *Id.*; see also Katherine Chiglinsky & Elaine Chen, *Many Californians Being Left Without Homeowners Insurance Due to Wildfire Risk*, INS. J. (Dec. 4, 2020), <https://www.insurancejournal.com/news/west/2020/12/04/592788.htm> [<https://perma.cc/E9CL-Z9D6>] (“In October, California’s insurance regulator reported that insurers refused to renew 235,250 home insurance policies in 2019, a 31% increase from the prior year.”).

84. Flavelle, *supra* note 1.

85. The moratorium was triggered by a 2018 law requiring it to occur. James Bikales, *California Protects Homeowners from Having Fire Insurance Dropped — Again*, CAL MATTERS (Nov. 5, 2020), <https://calmatters.org/environment/california-wildfires/2020/11/california-homeowners-fire-insurance-dropped-again> [<https://perma.cc/AS3N-AW3N>].

86. *Id.*

87. *Cf.* Nicole Friedman, *California Bans Insurers from Dropping Homes in Wildfire Areas*, WALL ST. J., <https://www.wsj.com/articles/california-bans-insurers-from-dropping-homes-in-wildfire-areas-11575585626> [<https://perma.cc/2F44-WNNH>] (last updated Dec. 5, 2019, 8:42 PM) (“Following devastating wildfire losses in 2017 and 2018, insurers have rapidly retreated from insuring wildfire-prone properties. Insurers have declined to renew tens of thousands of home-insurance policies in areas with high wildfire risk in the past two years, including many properties that didn’t file claims.”).

88. Flavelle, *supra* note 1.

89. *Id.*; see also Assemb. B. 1816, 2019–20 Reg. Sess. (Cal. 2019) (establishing relief from certain liabilities for insurers writing insurance in high-risk zones).

precautions against fires.⁹⁰ Consumer groups successfully advocated for the rejection of the law, claiming it was too favorable to insurers.⁹¹ After the proposed law failed, California returned to its pattern of issuing a one-year moratorium to buy more time until a compromise could be reached.⁹² The state was left at a legislative impasse.⁹³ Without a viable compromise, the California housing market and hundreds of homeowners living in fire-prone areas remain in jeopardy.⁹⁴

C. *Federal Intervention Emerges in a Post-Katrina World*

California's homeowner insurance crisis is not the first time a natural disaster has laid waste to an otherwise relatively stable insurance market. The California wildfires have many predecessors—most saliently, Hurricane Katrina. The hurricane damaged or destroyed over eight hundred thousand housing units, with estimated damages at \$81 billion and estimated overall costs at over \$160 billion dollars.⁹⁵ Thousands were left homeless and without the finances to rebuild.⁹⁶ The public response to the myriad crises of health, property, and economics following Hurricane Katrina was infamously disastrous,⁹⁷ and the reaction to the underinsurance crisis was no exception. Both state and federal governments attempted to intervene in the insurance market, careful not to breach constitutional

90. Flavelle, *supra* note 1.

91. *Id.*

92. The proposed law was gutted in August 2020, *id.*, and the one-year moratorium was issued in November 2020, Press Release, Cal. Dep't of Ins., Insurance Commissioner Lara Protects More Than 2 Million Policyholders Affected by Wildfires from Policy Non-Renewal for One Year (Nov. 5, 2020), <https://www.insurance.ca.gov/0400-news/0100-press-releases/2020/release113-2020.cfm> [<https://perma.cc/5XDG-3MAA>].

93. See Flavelle, *supra* note 1 (explaining that after the law was “effectively gutted,” the insurance commissioner would focus on “working with high-risk communities to reduce their wildfire risk enough that insurers will keep offering coverage without big rate increases”).

94. *Id.*

95. Graduate Sch. of Oceanography, Univ. of R.I., *Katrina Impacts*, HURRICANES: SCI. & SOC'Y, <http://www.hurricanescience.org/history/studies/katrinacase/impacts> [<https://perma.cc/3SWA-HFR2>].

96. Seth Fiegerman, *Newsweek: Five Years After Katrina, Still Homeless*, UNITY OF GREATER NEW ORLEANS (Aug. 23, 2010), <https://unitygno.org/newsweek-five-years-after-katrina-still-homeless> [<https://perma.cc/3RGC-TSCY>].

97. See Chris Edwards, *Hurricane Katrina: Remembering the Federal Failures*, CATO INST.: CATO AT LIBERTY (Aug. 27, 2015, 2:56 PM), <https://www.cato.org/blog/hurricane-katrina-remembering-federal-failures> [<https://perma.cc/LTB7-6WN7?type=image>] (describing the “[c]ommunications [b]reakdown,” “[c]onfusion,” “[s]upply [f]ailures,” and “[a]buse” that occurred in the aftermath of Hurricane Katrina).

boundaries.⁹⁸ The passage of emergency legislation offered some temporary relief to individual homeowners, but it was far from sufficient.⁹⁹ The economic consequences of this failure are still felt today.¹⁰⁰

Decades prior to Hurricane Katrina, Congress passed the National Flood Insurance Act of 1968, which established the National Flood Insurance Program.¹⁰¹ The program was intended to serve as an alternative market for flood insurance, which insurance companies rarely offered due to the inability to set affordable premiums that would actually balance out the necessarily enormous payouts.¹⁰² For several decades, the program functioned effectively.¹⁰³ Relatively few U.S. residents dipped into the program, often opting out of flood insurance altogether and taking their chances with the risk of natural disasters.¹⁰⁴ This was even true in high-risk flooding zones where flood insurance was typically mandated but compliance was nonetheless quite low.¹⁰⁵ Even though this meant the National Flood Insurance Program could operate without overextending its budget, it also meant

98. See H.B. 1302, 2006 Reg. Sess. (La. 2006) (avoiding reference to the National Flood Insurance Program and regulation thereof); 42 U.S.C. §§ 4001–4129 (creating a national flood insurance program that did not infringe upon states’ rights); see also *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus.*, 937 So. 2d 313, 330 (La. 2006) (finding that state extensions on prescriptive periods were not preempted by the federal flood insurance program).

99. See 2006 La. Acts 802 (stopping the clock on prescriptive periods in an effort to help struggling Louisiana citizens); see also Fiegerman, *supra* note 96 (describing the lasting homelessness in New Orleans post-Katrina).

100. Fiegerman, *supra* note 96; Menzel, *supra* note 29, at 808–10. Additionally, victims of California wildfires and victims of Hurricane Katrina were both largely in low-income brackets. See *Lower Income Areas More Likely To Have Structures Destroyed in Wildfires, Fire Data Shows*, ABC (Nov. 7, 2019), <https://abc7.com/fire-wildfire-income-low/5676733> [<https://perma.cc/9XZ9-ZR2W>] (“Structures were twice as likely to be destroyed by wildfire where the median annual income was less than \$50,000 a year”); Gary Rivlin, *White New Orleans Has Recovered from Hurricane Katrina. Black New Orleans Has Not.*, TALK POVERTY (Aug. 29, 2016), <https://talkpoverty.org/2016/08/29/white-new-orleans-recovered-hurricane-katrina-black-new-orleans-not> [<https://perma.cc/7TK8-HZHF>] (noting that in the Lower Ninth Ward of New Orleans, which was heavily impacted by Hurricane Katrina, the average annual income was only \$16,000).

101. National Flood Insurance Act of 1968, Pub. L. No. 90-448, 82 Stat. 572 (codified as amended at 42 U.S.C. §§ 4001–4129) (establishing a national flood insurance program).

102. 42 U.S.C. § 4001(b).

103. CONG. RSCH. SERV., R44593, INTRODUCTION TO THE NATIONAL FLOOD INSURANCE PROGRAM (NFIP) 26 (2021), <https://fas.org/sgp/crs/homesecc/R44593.pdf> [<https://perma.cc/ZEB7-HD5F>] (“Prior to Hurricane Katrina in 2005, the [National Flood Insurance Program] had generally been able to cover its costs”).

104. See *id.* at 11 (highlighting low to moderate program enrollment even among communities where enrollment was required due to location in a high-risk zone).

105. *Id.*

a significant percentage of at-risk individuals were uninsured for disaster-related flooding.¹⁰⁶ As a result, many were left financially devastated by Hurricane Katrina.¹⁰⁷

When harm is a routine occurrence, individuals need a permanent infrastructure upon which to rely.¹⁰⁸ While this Note primarily focuses on insurance infrastructure, it is important to acknowledge the physical infrastructural failures that contributed to Hurricane Katrina's devastating impact. Mass flooding that may have not otherwise occurred resulted from improperly designed and funded levees that surrounded areas below sea level.¹⁰⁹ Levees *can* be effective—they have been in severe hurricanes in recent years.¹¹⁰ Though climate change perpetuates natural disasters, human shortcomings and oversights are as much the enemies. But Hurricane Katrina teaches that levee systems and related prevention plans are not infallible, hence the need to couple human interventions with dependable insurance programs to optimize for both resilience and recovery.

After Hurricane Katrina hit, individuals relied upon the National Flood Insurance Program as never before, evinced by its eventual plunge into billions of dollars in debt to taxpayers.¹¹¹ The program was responsible for paying out \$16.1 billion in losses, which primarily related to personal property, including homes and personal belongings.¹¹² The resulting debt, which remains today,¹¹³ suggests that a mostly nonmandatory program that only targets high-risk areas and has no effective enforcement regime will collapse when it is needed most, because it does not possess the resources for built-in resiliency to

106. *See id.* (noting that enrollment in designated high-risk flooding zones was as low as 43 percent).

107. *See* Charles Herman, *Katrina's Economic Impact: One Year Later*, ABC NEWS (Aug. 25, 2006, 11:40 AM), <https://abcnews.go.com/Business/HurricaneKatrina/story?id=2348619&page=1> [<https://perma.cc/7J4G-VF7X>] (describing unemployment, lost homes, defaulting mortgages, and other instances of financial losses).

108. *Id.*

109. Jake Bittle, *The Levees Worked in New Orleans — This Time*, CURBED (Sept. 2, 2021), <https://www.curbed.com/2021/09/levees-louisiana-hurricane-ida-managed-retreat.html> [<https://perma.cc/L3ZT-XNQ4>].

110. *See id.* (describing the success of New Orleans' levees against Hurricane Ida, a category 4 storm).

111. CONG. RSCH. SERV., *supra* note 103, at 26–27.

112. ROBERT P. HARTWIG & CLAIRE WILKINSON, INS. INFO. INST., HURRICANE KATRINA: THE FIVE YEAR ANNIVERSARY 2 (2010), <https://www.iii.org/sites/default/files/1007Katrina5Anniversary.pdf> [<https://perma.cc/R5AQ-LJAZ>].

113. CONG. RSCH. SERV., *supra* note 103, at Summary.

major blows. The infeasibility of an insurance program with this structure has become evident.¹¹⁴

States endeavored to take different approaches to post-Katrina insurance crises. The Louisiana government's response, in particular, provides a compelling example of a state-level response from which future interventions into the insurance market can draw many lessons. In Louisiana, state-level intervention post-Katrina focused on prescriptive periods.¹¹⁵ Typically, insurance companies in Louisiana assign a prescriptive period, a window of time during which customers can file claims after losses have been incurred.¹¹⁶ In Louisiana, insurance companies were generally prohibited from writing contracts with prescriptive periods of fewer than twelve months.¹¹⁷ After Hurricane Katrina, Louisiana's governor signed a series of executive orders expanding the prescriptive period for filing claims related to Hurricane Katrina.¹¹⁸ In practice, this stopped the clock for a year, so Louisiana residents impacted by the hurricane had more time to file claims with their insurance companies.¹¹⁹

In *Louisiana v. All Property and Casualty Insurance Carriers Authorized and Licensed To Do Business in the State of Louisiana*,¹²⁰ the Louisiana Supreme Court was tasked with determining both whether the state legislation—expanding the prescriptive periods—promulgated after the executive orders applied retroactively and whether it was constitutional.¹²¹ The court held the legislation applied retroactively, such that insurance companies were required to honor all claims arising out of Hurricane Katrina even if they predated the executive orders and legislation.¹²² Adversaries of the legislation,

114. Gilbert M. Gaul, *How Rising Seas and Coastal Storms Drowned the U.S. Flood Insurance Program*, YALE ENV'T 360 (May 23, 2017), <https://e360.yale.edu/features/how-rising-seas-and-coastal-storms-drowned-us-flood-insurance-program> [<https://perma.cc/7493-SFFG>] (attributing the program's debt to "improbably subsidiz[ing] thousands of risky properties . . . [and] charging them below-market premiums").

115. 2006 La. Acts 802.

116. *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus.*, 937 So. 2d 313, 317 (La. 2006).

117. 2006 La. Acts 629.

118. These orders also responded to Hurricane Rita. La. Exec. Order KBB 05-32, 31 La. Reg. 2169, 2169 (Sept. 20, 2005); La. Exec. Order KBB 05-48, 31 La. Reg. 2352, 2352 (Oct. 20, 2005); La. Exec. Order KBB 05-67, 31 La. Reg. 2675, 2675–76 (Nov. 20, 2005).

119. *All Prop. & Cas. Ins. Carriers*, 937 So. 2d at 317.

120. *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed To Do Bus.*, 937 So. 2d 313 (La. 2006).

121. *Id.* at 319, 322.

122. *Id.* at 327.

however, still questioned its constitutionality.¹²³ Citing the Supremacy Clause, insurance companies pointed out the Louisiana legislation was superseded by the federally-regulated flood insurance program.¹²⁴ The court rejected this assertion, explaining the state and federal interventions could in fact work in tandem.¹²⁵ As a result, the court clarified, the Supremacy Clause was not even triggered in this context because the state intervention made no attempt to regulate the federal program.¹²⁶

Government flood insurance programs, however, have failed taxpayers because they did not align with the nature of flooding.¹²⁷ Floods are repetitive disasters, which routinely—and at least somewhat predictably—cause large-scale property damage.¹²⁸ Existing insurance programs and extended prescriptive periods do not acknowledge this reality. Instead, they treat floods as few and far between, banking on the impractical hope that the programs can financially recover in time for the next major flooding event.¹²⁹ This reflects the same conundrum facing California: although an opt-in insurance program makes sense for relatively infrequent earthquakes, the same programs lead to an insurance availability crisis when applied to wildfires.¹³⁰ In the cases of both wildfires and floods, permanent, resilient policies must enable the government, insurance companies, and homeowners to respond effectively when losses skyrocket.¹³¹

But Hurricane Katrina is not the only example of government intervention in the insurance context. This Note next turns to how the federal government has intervened in the health insurance market and subsequently draws analogies between these two frameworks.

123. *See id.* at 319 (describing the defendants' argument that the acts violate the Supremacy Clause and Contract Clause of the Constitution).

124. *Id.* at 328.

125. *Id.* at 330.

126. *Id.* at 329.

127. *See* Ella Nilsen, *The National Flood Insurance Program Was Already \$24 Billion in Debt Before Harvey and Irma*, VOX, <https://www.vox.com/2017/8/26/16208230/hurricane-harvey-flood-damage> [<https://perma.cc/G77F-37MS>] (last updated Sept. 11, 2017, 3:08 PM) (describing how repetitive payouts to properties in frequent flooding zones drain program funding).

128. *See id.* (“[T]he [National Flood Insurance Program] . . . is designed to pay out claims over and over again in the most flood-prone areas, where some houses have been flooded multiple times.”).

129. *See id.* (referencing multiple government officials who consider the repetitive payouts accompanying major storm surges unsustainable).

130. *See supra* notes 72–80 and accompanying text (describing how the frequency of earthquakes versus wildfires influences how insurance schemes should be regulated).

131. *See* discussion *infra* Part II.C (advocating for permanent legislation).

D. The ACA as a Federal Intervention

Where access to insurance can enable an individual to rebuild their home after a natural disaster strikes, access to health insurance can protect an individual from insurmountable medical bills when health problems occur. With this in mind, the lessons taken from Hurricane Katrina regarding insurance frameworks mirror those embodied by the ACA. Here, the effectiveness of permanent programs to help people pay for routine, but significant, healthcare costs was tested in March 2010, when President Barack Obama signed the ACA into law.¹³² Within minutes of signing, the federal government faced lawsuits from thirteen states asserting the ACA was unconstitutional.¹³³ From its inception to today, the ACA has been marred in controversy.¹³⁴ Nevertheless, invaluable lessons about the cultural drivers of insurance reform have already emerged despite the ACA's relatively short lifespan.

1. *The ACA's Passage and Changing U.S. Sentiment.* At the time of the ACA's passage, the need for nationwide healthcare reform had been long apparent.¹³⁵ The rising costs of healthcare, the high number of uninsured individuals in the United States, and health disparities across states were clearly unsustainable.¹³⁶ Individuals with preexisting conditions were among those most gravely impacted by insufficient healthcare protection.¹³⁷ Routinely denied insurance, these individuals often were left to shoulder the burdens of their own healthcare costs.¹³⁸ Many remained with their employers for years solely because of

132. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 42 U.S.C.) (enacting federal healthcare reform).

133. Michael J. Graetz & Jerry L. Mashaw, *Constitutional Uncertainty and the Design of Social Insurance: Reflections on the Obamacare Case*, 7 HARV. L. & POL'Y REV. 343, 344 (2013).

134. See *id.* at 343–46 (describing the ACA's controversy following enactment and the resulting legal dispute); see also Katie Keith, *ACA Litigation Round-Up: A Status Check*, HEALTH AFFS. (Feb. 1, 2021), <https://www.healthaffairs.org/doi/10.1377/hblog20210201.561637/full> [<https://perma.cc/U4CK-FK35>] (describing recent challenges to the ACA).

135. See generally WILENSKY & TEITELBAUM, *supra* note 54, at 190–97 (chronicling flaws in the U.S. healthcare system and the historical efforts to reform it).

136. *Id.* at 190.

137. See James Roland, *The Pros and Cons of Obamacare*, HEALTHLINE, <https://www.healthline.com/health/consumer-healthcare-guide/pros-and-cons-obamacare> [<https://perma.cc/C2EZ-ZJZ4>] (last updated Aug. 16, 2019) (“A preexisting condition . . . made it difficult for many people to get health insurance before the ACA”).

138. *Id.*

healthcare coverage, fearing that fair rates would be unavailable if they pursued another professional path.¹³⁹

The enormous burden placed upon individuals with preexisting conditions reflected a culture of ableism and a refusal to assume collective social responsibility for the ill.¹⁴⁰ *Some* social responsibility was assumed by the states, which promulgated most healthcare-related regulations and structured their own Medicaid programs, with Medicare for the elderly being a notable federally-assumed exception.¹⁴¹ This perpetuated a patchwork approach to health insurance, driving adverse healthcare outcomes.¹⁴²

The ACA exemplifies a cultural shift in thinking about who should assume responsibility for the ill.¹⁴³ More specifically, there was an evident transformation in how the public perceived the risks associated with insuring individuals through a social insurance scheme.¹⁴⁴ The notion of “social insurance” is based on the principle of government intervention.¹⁴⁵ Both private and social insurance involve estimations of risks, loss predictions, and pooled risks, but a social insurance model requires a government to intervene where private insurance models cannot achieve a profit.¹⁴⁶ A social insurance model is most valuable when it makes sense to subsidize high-risk individuals through an individual mandate.¹⁴⁷

139. *At Risk: Pre-Existing Conditions Could Affect 1 in 2 Americans*, CTRS. FOR MEDICAID & MEDICARE SERVS., <https://www.cms.gov/CCIIO/Resources/Forms-Reports-and-Other-Resources/preexisting> [<https://perma.cc/29UP-PJAF>].

140. *See supra* notes 32–34 and accompanying text (describing cultural barriers to assuming public responsibility for the ill).

141. Nicole Huberfeld, *Federalizing Medicaid*, 14 U. PA. J. CONST. L. 431, 435, 437–41 (2011) (describing how regulating healthcare was a responsibility typically left to the states prior to Medicare).

142. *See, e.g.*, INST. OF MED., *CARE WITHOUT COVERAGE: TOO LITTLE, TOO LATE* 52–53 (2002) (noting that some studies in the cancer context showed those with Medicaid often fared similar or worse in cancer outcomes compared to those without health insurance).

143. Huberfeld, *supra* note 141, at 438–40 (cataloging the history of U.S. healthcare in terms of perspectives on poverty, deservedness, and a “decentralized” approach to responsibility and welfare).

144. Graetz & Mashaw, *supra* note 133, at 350.

145. *Id.*

146. *See id.* at 350–56 (explaining the role of pooled risk, which is fundamentally based on a greater risk estimation scheme).

147. *See id.* at 351 (“But there is a range of circumstances in which mandatory insurance, with subsidies to those at high risk (through some combination of tax revenues and the premiums of those with lower risks), is sound policy. This is the realm of social insurance.”).

In over nine hundred pages, the ACA rewrote the U.S. healthcare system via federal intervention.¹⁴⁸ Most relevantly, it had two major accomplishments: First, it required nearly all U.S. citizens and lawful permanent residents to purchase health insurance or else suffer a modest fine.¹⁴⁹ Second, the ACA requires insurance companies to provide coverage without individual premium underwriting for individuals with preexisting conditions.¹⁵⁰ Congress determined the preexisting conditions provisions could not exist without an individual mandate to pay for it.¹⁵¹ As a result, the individual mandate was rendered inherently critical: if the ACA were to truly capture the notion of social responsibility for the chronically ill, its funding depended upon participation from everyone else.¹⁵² Additionally, even though the ACA was projected to increase insurance premiums for thousands of individuals across the United States, it would ultimately reduce the financial burden on both the healthcare system and insurers.¹⁵³

2. *Sebelius and the Taxing Power.* The individual mandate triggered significant backlash.¹⁵⁴ Adversaries claimed it violated the Constitution.¹⁵⁵ In *National Federation of Independent Business v. Sebelius*,¹⁵⁶ the question came before the Supreme Court.¹⁵⁷ The Court evaluated the individual mandate in the context of Congress's taxing power, the Commerce Clause, and the Necessary and Proper Clause.¹⁵⁸

148. *Id.* at 343–44.

149. *No Health Insurance? See If You'll Owe a Fee*, HEALTHCARE.GOV, <https://www.healthcare.gov/fees/fee-for-not-being-covered> [<https://perma.cc/C222-8KVR>]; see also Robert S. Peck, *Understanding the Constitutional Challenges to Federal Health Care Reform*, BRIEF, Summer 2011, at 28, 28 (describing the penalty).

150. 42 U.S.C. § 18001.

151. See *id.* § 18091(2)(I) (“The [mandate] is essential to creating effective health insurance markets in which improved health insurance products that are guaranteed issue and do not exclude coverage of pre-existing conditions can be sold.”).

152. Importantly, the ACA can be contrasted with the National Flood Insurance Program, which only mandated participation from high-risk individuals and subsequently accrued massive debts. See *supra* Part I.C. This further demonstrates the necessity of a broader mandate.

153. See 42 U.S.C. § 18091(2) (summarizing the positive economic impact of the ACA).

154. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 540–42 (2012) (describing the various constitutional challenges to provisions of the ACA litigated in the Eleventh Circuit).

155. *Id.* at 540.

156. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012).

157. *Id.* at 542.

158. See *generally id.* (analyzing the ACA under these clauses in turn).

In a 5-4 decision,¹⁵⁹ the Court upheld the individual mandate as a valid exercise of Congress's taxing power, but it also stated the mandate was justifiable under neither the Commerce Clause nor the Necessary and Proper Clause.¹⁶⁰ With respect to the Commerce Clause, the Court took issue with Congress's attempts to regulate inactivity (not having insurance) and to compel activity (purchasing insurance), concluding that both goals exceeded congressional authority.¹⁶¹ But the taxing power, which allows Congress to levy taxes for the general welfare of the United States, functions differently.¹⁶² According to the Court, the "penalty"—a somewhat troublesome misnomer—associated with the individual mandate resembled a tax in all relevant respects and was calculated and collected via the same processes as other federal taxes.¹⁶³ Unlike a penalty, taxes must not be punitive. The Court found that the individual mandate's penalty never exceeded the cost of obtaining insurance—and therefore was not coercive—and was not associated with criminal consequences, so the penalty was not punitive.¹⁶⁴ Thus, the individual mandate penalty survived as a tax.¹⁶⁵

Despite the individual mandate's judicial success, it was significantly undermined five years later under the Trump administration through the 2017 Tax Cuts and Jobs Act, which eliminated the penalty for failing to comply with the mandate.¹⁶⁶ Surprisingly, the ACA remains intact and functional—at least insofar as enrollment has continued in high numbers—more than a year after the penalty was eliminated and as of this writing.¹⁶⁷ Behaviorists

159. Chief Justice John Roberts, along with Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan, held the individual mandate was a valid exercise of Congress's taxing power. *Id.* at 529, 588. Roberts, along with Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito, believed the mandate was not within the scope of the Commerce Clause or the Necessary and Proper Clause. *Id.* at 588. However, neither Scalia, Kennedy, Thomas, nor Alito concurred in Roberts's opinion, so this was not a controlling vote. *Id.* at 588. Roberts, along with Scalia, Kennedy, Thomas, Breyer, Alito, and Kagan, concurred in judging the Medicaid expansion provision unconstitutional. *Id.*

160. *Id.* at 560–63.

161. *Id.* at 558.

162. U.S. CONST. art. I, § 8, cl. 1.

163. *Sebelius*, 567 U.S. at 563–64.

164. *Id.* at 566.

165. *Id.* at 574.

166. Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017) (codified as amended in scattered sections of I.R.C.).

167. Christine Eibner & Sarah Nowak, *The Effect of Eliminating the Individual Mandate Penalty and the Role of Behavioral Factors*, COMMONWEALTH FUND (July 11, 2018), <https://www.commonwealthfund.org/publications/fund-reports/2018/jul/eliminating-individual-mandate->

contemplating this possibility prior to the repeal of the individual mandate hypothesized that such an outcome may reflect public inertia toward obtaining health insurance, uncertainty about the law, or a change in how the public perceives health risks.¹⁶⁸

For individuals with preexisting conditions, the ACA is an enormous success and a much-needed federal intervention; it not only minimizes financial strain on these individuals, but it also marks a pivot from the perception of the chronically ill as a societal burden.¹⁶⁹ Prior to the ACA, increasing insurance rates for individuals with preexisting conditions and the resulting limited employment opportunities available to these individuals was indicative of U.S. society subscribing to the notion that the chronically ill should be made to suffer consequences for the disproportionate burden they place on the healthcare system.¹⁷⁰ Today, a majority of individuals in the United States have debatably accepted the idea of public responsibility for the chronically ill.¹⁷¹

Returning to the disaster context, the ACA example invites two questions: First, can U.S. society view a higher risk of losing a home to a natural disaster as analogous to a preexisting health condition? Second, can U.S. society achieve the same cultural shift as is reflected in the ACA toward assuming public responsibility for these homes?

II. ADAPTING THE ACA FOR THE HOMEOWNER INSURANCE MARKET

This Part further elaborates on the function of insurance and utilizes the ACA as a model for understanding the objectives of insurance stakeholders and their relevant constraints. Next, this Part

penalty-behavioral-factors [<https://perma.cc/9L8P-2F87>]; see also Press Release, U.S. Dep't of Health & Hum. Servs., New HHS Data Show More Americans than Ever Have Health Coverage Through the Affordable Care Act (June 5, 2021), <https://www.hhs.gov/about/news/2021/06/05/new-hhs-data-show-more-americans-than-ever-have-health-coverage-through-affordable-care-act.html> [<https://perma.cc/FK2X-GQBG>] (announcing that a record thirty-one million people enrolled under the ACA in 2021).

168. Eibner & Nowak, *supra* note 167.

169. See *supra* notes 32–34 and accompanying text (describing cultural barriers to assuming a public responsibility for the chronically ill and how those were overcome by the ACA).

170. See *supra* notes 137–144 and accompanying text.

171. See *supra* note 34 and accompanying text; see also EHEALTH, SURVEY: ACA CONSUMERS ON THE FUTURE OF COVERAGE 6 (2019), https://news.ehealthinsurance.com/_ir/68/20198/eHealth_Survey_ACA_Consumers_on_the_Future_of_Coverage.pdf [<https://perma.cc/VLX8-PF2E>] (finding that 77 percent of U.S. residents surveyed would want to retain coverage for preexisting conditions if the ACA was revised).

proposes a specific federal intervention inspired by the ACA. This intervention consists of the U.S. federal government mandating all U.S. homeowners to acquire disaster insurance or pay a penalty affixed to their mortgage payments. This Part describes this proposal and subsequently explains both its constitutionality under Congress's taxing power and its ability to survive criticism that it would violate federalist principles.

A. Recovery, Mitigation, and Prevention: Drawing from the ACA

Protecting disaster-prone homes and individuals with preexisting conditions under parallel regulatory schemes may not be intuitive. Nevertheless, the comparison is both apt and useful. The two types of regulation are related through similar underlying market forces and the fundamental purpose of insurance generally. Even where this analogy is strained, the distinctions between disaster insurance and health insurance may be leveraged to better serve a proposed model for disaster insurance.

To begin, insurance has three fundamental purposes. First, insurance advances recovery efforts; when an individual faces a large, unexpected expense, the money paid into the insurance system can be used to help that individual recover expenses.¹⁷² Second, insurance mitigates harm—that is, financial risk—to those in the insured pool by spreading risks to lessen the burden on each individual, thereby stabilizing the risk of harm for the entire group.¹⁷³ This is best understood in the context of health insurance, wherein the majority of a medical bill is paid for by the insurance company, and the patient is responsible for only a modest deductible and copayment.¹⁷⁴ Recovery and mitigation are interrelated, but there are key distinctions—where mitigation efforts are focused on reducing an individual's burden, recovery efforts are meant to expedite the rate at which an individual

172. Robert H. Jerry, II, *Managing Hurricane (and Other Natural Disaster) Risk*, 6 TEX. A&M L. REV. 391, 407 (2019).

173. *Id.* at 407–09.

174. In addition to premiums, the insured often pays a deductible (essentially a baseline amount that the insured pays before an insurance company will pay the remaining) and a copayment, which is a fixed proportion of the cost of a particular medical service. *See* WILENSKY & TEITELBAUM, *supra* note 54, at 156–57 (describing the basic mechanics of health insurance).

returns to their “normal” state.¹⁷⁵ Third, insurance *prevents* harm.¹⁷⁶ This prong is oft neglected, but it is economically the most critical.¹⁷⁷

In the context of healthcare, prevention may mean incentivizing individuals to make healthier choices, reducing burdens on the healthcare system and, consequently, on insurance payouts.¹⁷⁸ The ACA reflects a particular philosophy on prevention: possessing health insurance itself is a preventative measure.¹⁷⁹ Individuals with health insurance are more likely to participate in preventative healthcare, such as screenings for disease, prenatal care, and annual exams, which reduces the overall burden on the healthcare system.¹⁸⁰ This was, in part, the logic of the ACA’s individual mandate—only rather than *incentivize* the healthy behavior that results from having health insurance, the ACA *required* having insurance (functionally creating healthy behavior).¹⁸¹ Prevention principles also justify guaranteed issue of health insurance for those with preexisting conditions and risk pooling more generally; having insurance decreases the likelihood that individuals with preexisting conditions will allow their conditions to linger uncared for, such that they would result in an even larger burden on the healthcare system when symptoms become increasingly severe.¹⁸² And from an infectious disease perspective, more people utilizing the healthcare system at earlier stages likely reduces the

175. See Jerry, *supra* note 172, at 409 (describing the mitigative role insurance plays by reducing the insured’s future expenses when recovering from a loss).

176. *Id.* at 408.

177. See *id.* at 408–09 (explaining the significance and particular relevance of the prevention prong to natural disasters).

178. See, e.g., Stephen R. Permut, *Health Care Reform in Delaware in the Wake of Federal Inaction*, DEL. LAW., Spring 1995, at 23, 23 (explaining how taking precautions is a way to relieve burdens on the healthcare system).

179. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 42 U.S.C.). See generally Joseph D. Freeman, Srikanth Kadiyala, Janice F. Bell & Diane P. Martin, *The Causal Effect of Health Insurance on Utilization and Outcomes in Adults*, 46 MED. CARE 1023 (2008) (demonstrating the relationship between the possession of health insurance and utilization of the healthcare system at earlier stages in care).

180. Freeman et al., *supra* note 179, at 1024 tbl.1, 1028 tbl.3.

181. See 42 U.S.C. § 18091 (requiring basic health insurance).

182. See Susan Levine, Erin Malone, Akaki Lekichvili & Peter Briss, *Health Care Industry Insights: Why the Use of Preventive Services Is Still Low*, CTRS. FOR DISEASE CONTROL & PREVENTION: PREVENTING CHRONIC DISEASE (Mar. 14, 2019), https://www.cdc.gov/pcd/issues/2019/18_0625.htm [<https://perma.cc/B8QF-C4LK>] (outlining the multitrillion dollar burden of caring for the chronically ill and highlighting the role that preventative care can play in reducing the incidence and severity of chronic illness).

spread of contagious diseases that may have otherwise spread unchecked.¹⁸³

Prior to the ACA, a key critique of health insurance was its emphasis on compensating victims for their losses—recovery and mitigation—rather than on prevention.¹⁸⁴ Health insurance, then regulated exclusively at the state level, was piecemeal.¹⁸⁵ The result, as one study examining this issue in Delaware observed, was community-level adverse health outcomes.¹⁸⁶ When the state invested more in healthcare relative to other states, its economic growth was suppressed relative to those states due to increased strains on the state's finances.¹⁸⁷ This reflects a collective action problem impacting state-level regulatory regimes across the board. Even though states stand to make long-term gains from implementing strong public healthcare regimes, no individual state will assume the burden if doing so reduces the state's ability to economically compete in the near term with states that do not implement such a regime. The resulting impasse, therefore, is best addressed at the federal level.

The federal government endeavored to resolve these interstate health and economic disparities through federal intervention. In particular, the preexisting conditions provisions of the ACA allowed individuals with these conditions to manage them more proactively.¹⁸⁸ Consequently, the ACA promoted a novel—at least at the national level—prevention-oriented approach to health insurance.¹⁸⁹

Notably, the ACA did not reduce the cost of insurance for individuals taking precautions to avoid healthcare costs—in other

183. See Rama K. Jayanti & Alvin C. Burns, *The Antecedents of Preventive Health Care Behavior: An Empirical Study*, 26 J. ACAD. MKTG. SCI. 6, 6 (1998) (“Preventative health care refers to behaviors that will prolong one’s healthy life or practices that otherwise lessen the effects of infectious disease . . .”).

184. See Nadia Chait & Sherry Glied, *Promoting Prevention Under the Affordable Care Act*, 39 ANN. REV. PUB. HEALTH 507, 508 (2018) (noting that there are calls for the ACA to increase prevention-focused measures).

185. See WILENSKY & TEITELBAUM, *supra* note 54, at 153 (explaining how the United States has no national healthcare system).

186. Permut, *supra* note 178.

187. *Id.*

188. See, e.g., Aparna Soni, Laura R. Wherry & Kosali I. Simon, *How Have ACA Insurance Expansions Affected Health Outcomes? Findings from the Literature*, 39 HEALTH AFFS. 371, 373 (2020) (summarizing some positive outcomes arising out of the Medicaid expansion for the chronically ill, many of whom were able to learn about and treat their conditions earlier).

189. *Id.* at 376.

words, making healthier choices.¹⁹⁰ To do so would contradict the notion of guaranteed issue for individuals with preexisting conditions, because many of these conditions are neither a result of unhealthy choices nor within the individuals' abilities to mitigate through alternative lifestyle choices.¹⁹¹ Rewarding healthier people is akin to punishing unhealthier ones, which undermines the theory of public responsibility for the ill.¹⁹²

The case is different, however, for natural disasters. There are a number of precautions that can be taken to reduce the magnitude of losses associated with natural disasters.¹⁹³ Insurance companies may, for example, reduce rates for individuals living in fire-prone areas if those individuals agree to reduce dry brush on their property or use fire-resistant building materials.¹⁹⁴ Ideally, the insured would save in the near-term on their rates, while the insurer would save in the long-term by reducing large payouts. Under this framework, the federal government can still guarantee issue for any homeowner living in a disaster-prone region, while simultaneously crediting these homeowners for taking steps to reduce potential losses. This framework builds upon the practice of community rating, wherein insurance companies must provide the same rates for all members in a given community or region and establish that rate based on aggregate

190. See Caroline Cournoyer, *Should Medicaid Incentivize Healthy Behavior?*, GOVERNING (Mar. 5, 2013), <https://www.governing.com/columns/col-should-medicaid-encourage-healthy-behavior.html> [<https://perma.cc/75NW-LDYF>] (describing the federal government's lack of action and interest in defining and incentivizing healthy behavior).

191. Not only are one in two Americans affected by a preexisting condition, but "15 to 30 percent of people in perfectly good health today are likely to develop a pre-existing condition over the next eight years." CTRS. FOR MEDICARE & MEDICAID SERVS., *supra* note 139. Developing such a condition can occur regardless of lifestyle choices, as is the case for many genetic diseases. See George L. Wehby, Benjamin W. Domingue & Fredric D. Wolinsky, *Genetic Risks for Chronic Conditions: Implications for Long-Term Wellbeing*, 73 J. GERONTOLOGY: MED. SCIS. 477, 477 (2017) (finding a positive relationship between genetic predisposition and worse disease outcomes for those with chronic diseases). Many circumstantial risk factors also increase the likelihood of developing a condition. *Heart Disease Risk Factors You Can't Control*, OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/heart-disease-and-stroke/heart-disease/heart-disease-risk-factors/cant-control> [<https://perma.cc/U738-9FTN>] (last updated Mar. 14, 2019) (enumerating risk factors for heart disease, such as age, that are beyond the individual's control to mitigate).

192. See *supra* notes 33–34, 140–147 and accompanying text (explaining how a desire to assume public responsibility translated into guaranteed issue for people with preexisting conditions).

193. Jerry, *supra* note 172, at 408–09.

194. Cf. *id.* at 398 n.30 (discussing California's problem with wildfires and the reasons behind it).

risk rather than underwriting based on each individual.¹⁹⁵ There is an important cost-benefit analysis here: investing in precautions requires funds and labor that not all homeowners possess, such that offering reduced premiums to those who adopt such precautions raises a valid fairness issue that must be triaged with the very real need to subsidize risk. In an ideal world, precaution crediting could be justified by using the costs insurers save in reduced payouts to help fund precautions for those who cannot implement them themselves. In other words, if precautions reduce losses, insurers save money that they can then invest in more precautions.

Guaranteed issue and precaution crediting may seem inherently contradictory—which, as discussed, is the reason only guaranteed issue and not precaution crediting was included in the ACA.¹⁹⁶ But in the disaster insurance market, the two are more compatible. Unlike in health insurance, in which assuming public responsibility for the ill drives the framework, the public responsibility impetus is weaker with regard to property ownership. In homeownership, there is a greater element of choice than is present in the healthcare system—to a certain extent, individuals have the power to choose where they live and to what degree their properties are resilient to disaster.¹⁹⁷ Additionally, property ownership is generally limited to those with economic means, but health insurance is required for all members of the population.¹⁹⁸ In this way, what may seem like a limiting principle actually creates more options for modeling disaster insurance than were available to the federal government when developing the ACA.

195. WILENSKY & TEITELBAUM, *supra* note 54, at 160.

196. See *supra* notes 190–192 and accompanying text (explaining how the ACA does not provide for a reduction in premiums on account of taking precautions because doing so would ignore the reality that many preexisting conditions do not result from unhealthy decision-making).

197. See *supra* notes 22–24 and 61–63 and accompanying text (describing, from an environmental justice perspective, the constraints many individuals face that prevent them from relocating); cf. Gina Yannitell Reinhardt, *Why People Stay in Disaster-Prone Cities*, CONVERSATION (Oct. 6, 2017, 6:28 AM), <https://theconversation.com/why-people-stay-in-disaster-prone-cities-84882> [<https://perma.cc/KVU3-FD9A>] (observing what motivates individuals to choose to live in high-risk areas despite the ability to choose otherwise).

198. And importantly, healthcare in the United States will be provided to all individuals, regardless of economic means (and the subject of whom to hold financially responsible after the fact remains controversial). James Yoo, *What Will Happen if I Go to the Hospital Without Insurance?*, HEALTHCARE INSIDER, <https://healthcareinsider.com/hospital-no-insurance-59540> [<https://perma.cc/T5VA-PJBB>] (last updated Mar. 19, 2021). Obviously, homes may be provided to those without economic means (such as through public housing), but homeownership requires at least an initial financial investment.

As previously observed, there are numerous ways to incentivize disaster preparedness and greater resiliency to property damage—thereby reducing payouts.¹⁹⁹ Given that reducing payouts is the objective of property insurers, what should be the objectives of insurance *legislation*? Effective regulatory measures perpetuate maximum coverage, fair rates, profitability, and good behavior (i.e., the prevention element).²⁰⁰ Consumers should be incentivized to reduce their own risks, while insurance companies should be incentivized to keep rates reasonable.²⁰¹ Armed with a better understanding of how health insurance and disaster insurance differ from each other, one can more readily identify which aspects of the ACA contain the most value for developing a new model of disaster insurance—namely, guaranteed issue and individual mandates.

B. *Modeling a Federal Intervention*

The model for an intervention now begins to take shape. The optimal model for disaster insurance reveals that to properly address the dual crises of underinsurance and increasing frequency of natural disasters, a permanent individual mandate for disaster insurance is necessary. This Note proposes that the federal government mandate that individual homeowners either purchase general natural disaster insurance or pay a penalty attached to mortgage payments. These reforms will maximize the number of individuals in the disaster insurance pool and accommodate geographic variation in the type of disaster encountered.

Further, under this proposal, disaster insurance would be available through private insurers as well as through a subsidized federal government program. Private insurers would not be permitted to deny non-disaster-related homeowner insurance on the basis of disaster-related risk. The program would have features designed to encourage responsible decision-making and reduce long-term costs—namely, credits for taking precautions that increase resiliency during disaster. Importantly, this proposal should not be taken in isolation or treated as the singular solution to the imminent natural disaster crisis; instead,

199. See *infra* note 216 and accompanying text (offering one proposal for incentivizing disaster preparedness through tax credits for taking precautionary measures).

200. See WILENSKY & TEITELBAUM, *supra* note 54, at 156–62 (summarizing how stakeholders, namely the insured and insurer, have differing priorities (such as the insurer needing to profit while the insured wants a fair rate) that must be balanced by regulators).

201. *Id.* at 158–61.

it should be coupled with a rigorous evaluation of localized risk levels in order to determine the discrete areas from which relocation is absolutely necessary.

An insurance crisis related to natural disasters must be addressed through an individual mandate because individuals cannot afford to assume the risks associated with rebuilding their homes.²⁰² Insurance companies, under existing models, have no feasible way to clear a profit in a disaster-prone area and cannot be compelled to participate in a market that will only bankrupt them in the long term.²⁰³ States cannot afford to bail out homeowners through emergency insurance programs, at least not without raising taxes, seeking federal aid, or failing the requirement to balance their budget with expenditures.²⁰⁴ States are often also constrained by statutory requirements that they balance their budgets with their expenditures, a requirement that does not exist at higher levels of government.²⁰⁵ Because individuals, insurance companies, and states cannot resolve this crisis on their own, the federal government must intervene.²⁰⁶ Along with implementing the individual mandate, the federal government could offer a subsidized federal insurance program.

The federal government will be unable to achieve a meaningful contribution absent *permanent* legislative action; a reactive, as-needed system is demonstrably ineffective.²⁰⁷ In the wake of Hurricane Katrina, mandating insurance enrollment on a high-risk-only basis ultimately bankrupted the program, generating billions of dollars in

202. See Cowan, *supra* note 3 (elaborating on the incredible costs associated with natural disaster losses).

203. See, e.g., Flavelle, *supra* note 1 (describing concerns about home insurance availability and long-term profitability in California due to increasing costs from wildfires).

204. See THE PEW CHARITABLE TRS., HOW STATES CAN MANAGE THE CHALLENGES OF PAYING FOR NATURAL DISASTERS 3 (2020), <https://www.pewtrusts.org/-/media/assets/2020/09/how-states-can-manage-the-challenges-of-paying-for-natural-disasters.pdf> [https://perma.cc/U9TT-D9LB] (describing how states have faced increasing pressure to pay for natural disasters with decreasing federal support despite requirements that they balance budget with expenditures).

205. See TAX POL'Y CTR., THE TAX POLICY CENTER BRIEFING BOOK 677 (2020), https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book_2021.pdf [https://perma.cc/V55J-56C7] (describing the Balanced Budget Requirements that apply to states).

206. Cf. discussion *supra* Part I.D (discussing how the ACA was a federal intervention necessitated by the growing crisis of health underinsurance).

207. Cf. discussion *supra* Part I.C (elaborating on the failures of emergency interventions during Hurricane Katrina).

debt for the federal government.²⁰⁸ This is not well suited to the increasing frequency and severity of natural disasters;²⁰⁹ because these are now regular occurrences, homeowners will benefit far more from a stable, resiliency-oriented system. The ACA is an example of such legislation.²¹⁰ If natural disasters are as routine and predictable as are trips to the hospital,²¹¹ a federal intervention should be designed with an understanding of the ongoing need for federally subsidized homeowner insurance.

Additionally, it is clear the federal government can and should mandate disaster insurance for homeowners. The litigation surrounding the ACA has answered the constitutional question of whether the federal government is authorized to install such a mandate.²¹² Congress could install a tax lower than the cost of insuring a home for those who opt out of purchasing disaster insurance when they take out a mortgage, so long as Congress seeks only to influence, not criminalize, alternative behavior.²¹³ An insurance mandate will be effective because, by increasing the number of insured persons, the premiums will be lowered and thus become more affordable for consumers who need the insurance most.²¹⁴ By increasing the size of the pool, the risk is spread across a higher number of individuals, ensuring insurance companies' bottom lines.²¹⁵ The federal government could then offer tax credits via the taxing power or

208. See *supra* notes 111–114 and accompanying text (describing how an emergency expansion to the federal flood insurance program resulted in the program generating billions in debt).

209. See *supra* notes 9–12 and accompanying text (providing evidence for the increased frequency and severity of natural disasters in regions previously unaffected).

210. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 25, 26, 42 U.S.C.); see also Phil McCausland, 'A Big Safety Net': Affordable Care Act Filled Need, Fended Off Dismantling in 2020, NBC NEWS (Nov. 28, 2020, 4:28 AM), <https://www.nbcnews.com/politics/politics-news/big-safety-net-affordable-care-act-filled-need-fended-dismantling-n1249149> [<https://perma.cc/4TT9-7LPU>].

211. See *supra* notes 9–12 and accompanying text (discussing how unchecked climate change has perpetuated worsening natural disaster scenarios of greater regularity).

212. See *supra* notes 158–165 and accompanying text (summarizing the outcome in *Sebelius*).

213. Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 566–67 (2012) (justifying the ACA's individual mandate). As a clarifying point, the mortgage providers still would mandate homeowner insurance. See *infra* note 226 and accompanying text. Only disaster-specific insurance, which is currently optional in most contexts, is covered by this penalty.

214. Cf. Alexander Lemann, *Rolling Back the Tide: Toward an Individual Mandate for Flood Insurance*, 26 FORDHAM ENV'T L. REV. 166, 204–05 (2015) (explaining, in the context of the National Flood Insurance Program, how the dynamics of risk-spreading influence who bears the associated costs).

215. *Id.*

Commerce Clause to individuals who take precautions against natural disaster-related losses, further reducing the scale of loss and the severity of the resulting consequences.²¹⁶

The scope of a mandate must be nationwide. Federally mandating disaster insurance within only certain states triggers a plethora of federalism concerns that would likely render the mandate unconstitutional.²¹⁷ It would also undermine the objective of creating risk pools large enough that costs can be efficiently distributed.²¹⁸ Even a less stringent approach wherein disaster insurance was mandated only in specified disaster-prone regions is problematic so long as defining which regions should qualify remains everchanging and arguably arbitrary.²¹⁹ Such an approach would likely politicize determinations of which regions qualify for the mandate, encouraging discrepancies in housing prices and perpetuating environmental justice concerns where the most disaster-prone regions are also the most affordable ones.²²⁰ Ultimately, as the risk gap closes with the intensifying nature of climate change, areas presently considered relatively low risk are unlikely to remain at that risk tier, and mandating protective measures now is inherently beneficial to this reality.

A nationwide mandate will eliminate these concerns. It will allow for the creation of risk corridors, meaning low-risk homeowners will subsidize the costs of payouts in high-risk areas.²²¹ With the ability to distribute their risks across state lines and into more low-risk regions, insurance companies will be in a stronger financial position to issue payouts in the wake of natural disasters without harming their

216. See *supra* notes 193–195 and accompanying text (outlining a process for precaution crediting under a disaster insurance mandate).

217. See discussion *infra* Part II.C.3 (analyzing the federalism implications of a federal intervention).

218. See WILENSKY & TEITELBAUM, *supra* note 54, at 156–62 (outlining the principles of health insurance and risk pools).

219. See *supra* notes 9–12 and accompanying text (discussing how natural disasters have transcended their traditional geographic barriers).

220. See Gustavo A. García-López, *The Multiple Layers of Environmental Injustice in Contexts of (Un)natural Disasters: The Case of Puerto Rico Post-Hurricane Maria*, 11 ENV'T JUST. 101, 107 (2018) (analyzing the key socioeconomic drivers of environmental injustice in Puerto Rico post-Hurricane Maria and noting that many of those who live in high-risk storm paths are low income).

221. See Timothy J. Layton, Thomas G. McGuire & Anna D. Sinaiko, *Risk Corridors and Reinsurance in Health Insurance Marketplaces: Insurance for Insurers*, 2 AM. J. HEALTH ECON. 66, 67 (2016) (“Risk corridors redistribute revenues from plans earning large profits to plans incurring large losses.”).

profitability due to the significant influx of money spurred by a national mandate. This, however, was the approach the ACA endeavored to undertake and formed the basis of many of the political attacks launched at the ACA.²²² But, given the lower scale of a disaster insurance mandate²²³ relative to the individual mandate under the ACA,²²⁴ it is possible a disaster insurance mandate would dodge much of the political controversy that inhibited the ACA's individual mandate.

To further facilitate the proliferation of disaster insurance, the federal government should relax restrictions that have functionally discouraged insurance companies from operating across state lines.²²⁵ This will also allow for the creation of risk corridors without forcing undue burdens upon homeowners, many of whom are already generally insured as required by their mortgage providers.²²⁶ This proposal implicates another key question: Should the federal government be able to set rates on insurance premiums and deny rate increases the way that state governments can? This would be an aggressive regulatory maneuver that would stir political controversy.²²⁷ It would, however, standardize premiums and manage increases nationally, such that fluctuations in an insurer's behavior in one state are not disruptive to another state.

As it stands, there is no policy in place that properly protects homeowners from the increasing frequency of natural disasters. Existing hands-off approaches cost homeowners and insurance companies billions and exacerbate problems of underinsurance and

222. See *supra* notes 154–165 and accompanying text (discussing the “backlash” initially faced by the ACA and the individual mandate).

223. This means that, on the national scale, total losses due to natural disasters are in lower amounts than are total healthcare expenses.

224. See *supra* notes 14–18 and accompanying text (contextualizing the stakes of the homeowner insurance crisis with ACA-related statistics).

225. The ACA permits the sale of insurance across state lines, but this is subject to certain restrictions and as a result, no insurer has opted to do so. See JENN JENSON & TRISH RILEY, NAT'L ACAD. FOR STATE HEALTH POL'Y, SELLING HEALTH INSURANCE ACROSS STATE LINES 2 (2017), <https://www.nashp.org/wp-content/uploads/2017/02/Insurance-Across-State-Lines.pdf> [<https://perma.cc/V4UD-22G3>] (“Because the ACA’s regulatory floor limits the impact of policy differences across states, insurers have less flexibility to exploit differences to create lower-cost products. In addition, federal requirements . . . may be viewed as burdensome extra steps for states and insurers.”).

226. See Flavelle, *supra* note 1 (stating that mortgage providers require their clients to purchase homeowner insurance).

227. See discussion *supra* Part II.C.3 (expounding upon the politicization of the ACA as an aggressive federal regulatory measure and describing the backlash it faced as a result).

housing shortages.²²⁸ By installing an individual mandate and funding a federal disaster insurance program, the federal government can build more resilient communities and allow individuals in the United States to continue to live wherever they wish. Continued inaction is to ignore the new reality of climate change and only perpetuate further losses.

C. *The Legal Basis for an Individual Mandate*

This Section addresses the fundamental legal principles that underlie this Note's proposal. First, it builds upon the analogy between this proposal and the ACA to conclude that an individual mandate related to disaster insurance would be a valid exercise of Congress's taxing power. Next, it situates the proposal within existing tax policy to emphasize its minimally disruptive effect. Finally, it reflects on the federalism aspects of this proposal.

1. *The Proposal and the Taxing Power.* The proposed disaster insurance mandate should draw its structure from that found in the ACA. At the time of its passage, the ACA was hotly debated; yet, the ACA has so far managed to survive even the most impassioned attacks against it.²²⁹ Related legal battles, however, have resulted in key limitations being placed on Congress's power to intervene in insurance markets. These limitations are intended to protect federalism by keeping the ACA within the purview of the Constitution.²³⁰ Understanding these restraints informs a model federal intervention into the homeowner insurance market that avoids implicating constitutional concerns. The ACA and *Sebelius* confirm that if Congress were to implement a disaster insurance mandate as a tax on taking out a mortgage, it could do so as an established, proper use of its taxing power.²³¹

228. See discussion *supra* Part I (characterizing the crisis facing homeowners).

229. The ACA has been upheld by the Supreme Court as recently as June 2021. *California v. Texas*, 141 S. Ct. 2104, 2112 (2021). For a thorough catalogue of the battles the ACA has faced over the years, see generally JONATHAN COHN, *THE TEN YEAR WAR: OBAMACARE AND THE UNFINISHED CRUSADE FOR UNIVERSAL COVERAGE* (2021) (cataloguing the history of the ACA, its impact, and the challenges it faced).

230. See generally *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (assessing concerns over the constitutionality of the ACA and the extent to which its provisions infringe upon states' rights).

231. See discussion *supra* Part I.D.2 (explaining how the Court found the ACA's individual mandate provision to be an appropriate use of Congress's taxing power). The analysis in *Sebelius* suggests another path forward for a disaster insurance mandate—this time through the Commerce Clause. Unlike in *Sebelius*, wherein the Commerce Clause could not be utilized

Congressional exercise of its taxing power is the best path forward to mandating disaster insurance. Through the taxing power, Congress may ensure that any individual taking out a mortgage on a home would be subject to a tax if the individual could not show proof of disaster insurance.

2. *The Proposal and Existing Tax Policy.* Aspects of existing tax policy currently conflict with this proposal. Specifically, the federal government has expressed a consistent preference for encouraging homeownership by granting various tax benefits based on the possession of a mortgage.²³² For example, Congress permits taxpayers to deduct portions of their mortgage interest payments in calculating their taxable income.²³³ This Note's proposal, meanwhile, may be read to punish homeownership by penalizing a homeowner who takes out a mortgage without obtaining disaster insurance. In other words, attaching the tax to mortgages affects only those who must take out a mortgage to own a home, arguably contradicting policy preferences behind the existing tax framework. Those who do not have mortgages, whether they be wealthy or indigent, would not be subject to the mandate but would still have options available to them—these include purchasing of disaster insurance through a private insurer or taking advantage of programs like the National Flood Insurance Program, which may be better equipped to support enrollees of limited means when much of its current burden will shift under the mandate. But nothing in this proposal calls for existing tax rules and regulations to be reversed. Tax deductions for home mortgage interest payments may still be granted. Though this tax allowance remains contested,²³⁴ this

because it would compel activity, 567 U.S. at 555, a disaster insurance mandate *does* regulate existing activity—either purchasing a home or taking out a mortgage—depending on how it is constructed. An individual is injecting themselves into the stream of commerce via this activity, and therefore their actions can be potentially regulated under the Commerce Clause.

232. For a summary of relevant pro-homeownership policies embedded in the Internal Revenue Code, see generally William G. Gale, Jonathan Gruber & Seth Stephens-Davidowitz, *Encouraging Homeownership Through the Tax Code*, BROOKINGS (June 18, 2007), <https://www.brookings.edu/wp-content/uploads/2016/07/20070618.pdf> [<https://perma.cc/E9T2-R3ZJ>].

233. I.R.C. § 163(h)(3).

234. Existing tax policy in this realm is subject to sharp criticism, primarily on the basis that it deprives renters of similar benefits, which can have the effect of widening racial and economic inequities. Daniel Teles & Christopher Davis, *Tax Credits for Renters Could Increase Racial and Economic Equity*, URB. INST.: URB. WIRE (Dec. 9, 2020), <https://www.urban.org/urban-wire/tax-credits-renters-could-increase-racial-and-economic-equity> [<https://perma.cc/D42N-MMZW>]. Additionally, others have argued these policies do not so much encourage homeownership as they do encourage upper-class and upper-middle-class individuals to purchase more expensive homes.

proposal does not advocate for such mortgage-based policies to be upended merely to justify its existence.

This proposal does, however, call for deviation from the policy rationale underlying these existing rules. In fact, pressing circumstances demand such deviation. The imminent severity of climate change has served as a basis for this proposal throughout, and it continues to do so here.²³⁵ Congress should apprise itself of the tools available to it and act as this Note establishes that it can.²³⁶ Further, there is little indication that this proposal, if passed, would lead to any meaningful decline in homeownership that could be said to represent a true rebuke of the federal government's pro-homeownership policy. If anything, by signaling a commitment to protecting homes from natural disasters, Congress may encourage homeownership by augmenting the accessibility of disaster insurance—not unlike how the ACA's healthcare insurance mandate encouraged individuals to engage with the healthcare system.²³⁷ The proposal is nevertheless at least facially anti-homeownership, but tax policies must confront reality: as climate change exacerbates the risks to U.S. livelihoods, Congress will increasingly develop mitigating strategies—and it may subsequently feel justified in tweaking its traditional approach.

3. *The Proposal and Federalism.* When it comes to federalism, insurance, and preexisting conditions in the healthcare context, there are other key dynamics in play. When states failed to effectively regulate health insurance, the ACA provided a federal response. Before the ACA, certain states were placed at clear disadvantages.²³⁸ Mismanaged health insurance plans, when constructed on a piecemeal basis, not only harmed these states' economies, but they also negatively impacted the health of residents and incentivized these states to make their health insurance markets inferior to those of their neighbors.²³⁹ And states' efforts to protect their residents from predatory insurers

John Iselin & Philip Stallworth, *Who Benefits from Tax Subsidies for Home Ownership?*, TAX POL'Y CTR. (Sept. 14, 2016), <https://www.taxpolicycenter.org/taxvox/who-benefits-tax-subsidies-home-ownership> [<https://perma.cc/K7XM-4NY6>].

235. See *supra* Introduction (establishing the necessity of change in light of the increasing severity and frequency of natural disasters due to climate change).

236. See *supra* Part II.C.1 (providing the constitutional basis upon which Congress can act).

237. See generally Freeman et al., *supra* note 179 (showing how participation in healthcare at earlier stages increased with possession of health insurance).

238. See Permut, *supra* note 178 (describing the distinct economic disadvantages faced by Delaware when it was left to regulate its own health insurance program).

239. See *id.* (same).

often backfired. For example, states attempted to establish statewide community rating and other forms of consumer protection.²⁴⁰ The result? Many insurers refused to sell in those states entirely.²⁴¹ These states faced the same impasse that confronts California today; if states relaxed their consumer protection laws, insurers would raise their premiums beyond affordability.²⁴² The ACA was a key stabilizer in the health insurance crisis, suggesting that where piecemeal state regulation fails, federal interventions are critical.²⁴³

But solidarity is also an issue.²⁴⁴ Despite preexisting conditions providing a strong analogy to susceptibility to natural disasters, national solidarity has not historically existed in the context of natural disasters—there have always been states that are far more vulnerable to natural disasters than others.²⁴⁵ This could provide a compelling argument for maintaining state-specific homeowner insurance regulations. The lack of solidarity, however, does not capture the full scope of the issue. This is especially true as climate change intensifies abnormal weather patterns, increasing the vulnerability of states not previously associated with adverse natural events.²⁴⁶

The same principles used to constitutionally rationalize the ACA and its protection of individuals with preexisting conditions should be used to justify a federal intervention into the homeowner insurance market on behalf of disaster-prone homes and homeowners. A mandate for U.S. homeowners can be constructed and protected under

240. BRADLEY HERRING & MARK V. PAULY, NAT'L BUREAU OF ECON. RSCH., THE EFFECT OF STATE COMMUNITY RATING REGULATIONS ON PREMIUMS AND COVERAGE IN THE INDIVIDUAL HEALTH INSURANCE MARKET 13–14 (2006), <https://aspe.hhs.gov/sites/default/files/private/pdf/75071/HIMregs.pdf> [<https://perma.cc/W7FZ-387P>].

241. LEIGH WACHENHEIM & HANS LEIDA, THE IMPACT OF GUARANTEED ISSUE AND COMMUNITY RATING REFORMS ON STATES' INDIVIDUAL INSURANCE MARKETS 2 (2012), http://www.statecoverage.org/files/Updated-Milliman-Report_GI_and_Comm_Rating_March_2012.pdf [<https://perma.cc/HQ9S-YLJK>] (concluding that insurance markets “deteriorated after the introduction of . . . [community rating],” noting that “insurance companies chose to stop selling individual insurance in the market after [community rating was] enacted”).

242. See Flavelle, *supra* note 1 (describing the insurance availability crisis in California).

243. See discussion *supra* notes 238–242 (describing the role of the ACA in overcoming problems associated with a state-by-state approach to insurance regulation).

244. See Carol C. Gould, *Solidarity and the Problem of Structural Injustice in Healthcare*, 32 BIOETHICS 541, 541 (2018) (“[H]uman solidarity . . . proposes attention to the health of distant others, as a condition of their dignity.”).

245. See *supra* note 50 and accompanying text (discussing how natural disasters, unlike adverse health outcomes, have been historically associated with specific geographic regions).

246. See *supra* notes 9–12 and accompanying text (providing evidence for the increased frequency and severity of natural disasters in regions previously unaffected).

Sebelius.²⁴⁷ This nationwide mandate will ultimately reduce piecemeal approaches to homeowner insurance regulation and create a federal floor for covering homes after the natural disasters that states will increasingly and inevitably face.

CONCLUSION

Natural disasters are increasing in frequency and severity, and neither the federal government nor states have kept up with this reality. Homeowners face untold losses, and they are often profoundly underinsured for disaster-induced losses. Furthermore, insurance companies refuse to insure homes where natural disasters are common, exacerbating a growing housing crisis. It thus is imperative that the federal government intervene by establishing a permanent legislative scheme whereby insurance against natural disasters is mandated and affordably priced. The federal government is the only entity able to subsidize the costs of such a scheme, given the lack of profitability for insurance companies and the restrictive budgeting requirements faced by the states. The federal government is constitutionally empowered to undertake this objective, and millions of individuals across the United States depend upon it doing so.

247. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574 (2012) (“The Affordable Care Act’s requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax.”).