

REGULATING THE RENEWABLE REVOLUTION: REVISITING FERC’S AUTHORITY UNDER THE FEDERAL POWER ACT POST-MAJOR QUESTIONS DOCTRINE

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INTRODUCTION

As attacks on the administrative state abound, the federal government’s ability to respond to climate change is at a crossroads.¹ The Intergovernmental Panel on Climate Change has been clear about the reality of climate change—human activity is responsible for deteriorating climatic conditions, and global temperatures are on track to eclipse 1.5°C of warming as early as 2030.² Currently, the United States electric grid is undergoing a major transition³ due, in part, to massive federal investments in aging infrastructure and clean technologies⁴ and declining costs for renewable energy.⁵

As the federal agency responsible for regulating the U.S. electric grid, the

1. See generally Jake Bittle & Zoya Teirstein, *The Supreme Court Overturns the Chevron Doctrine, Gutting Federal Environmental Protections*, SIERRA CLUB (June 28, 2024), <https://www.sierraclub.org/sierra/supreme-court-overtturns-chevron-doctrine-gutting-federal-environmental-protections> (echoing climate advocates’ concerns for the future of climate regulation); Joseph Schaeffer & Jessica Deyoe, *In Memoriam: The Modern Administrative State*, LAW360 (July 8, 2024), <https://www.law360.com/articles/1855157/in-memoriam-the-modern-administrative-state> (questioning the road ahead for a post-Chevron administrative law landscape); Barry G. Rabe & Adrianna Pita, *What Does the Supreme Court’s EPA Ruling Mean for Climate Change*, BROOKINGS, at 00:09 (July 1, 2022), <https://www.brookings.edu/articles/what-does-the-supreme-courts-epa-ruling-mean-for-climate-regulation> (considering the implications of *West Virginia v. EPA* on the federal government’s ability to address climate change).

2. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C 4, 6 (2018), <http://www.ipcc.ch/report/sr15/> [hereinafter IPCC].

3. See Christopher Serkin & Michael P. Vandenberg, *Prospective Grandfathering: Anticipating the Energy Transition Problem*, 102 MINN. L. REV. 1019, 1020–21 (2018) (recognizing “profound changes” in the United States electric sector and expressing a concern about legal and regulatory changes).

4. See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (modernizing the electric grid by investing roughly \$21.3 billion in delivering clean power, \$21.5 billion to support clean energy demonstration programs, \$6.5 billion in energy efficiency and weatherization projects, and \$8.6 billion to support domestic clean energy manufacturing); Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (creating roughly two dozen tax provisions designed to incentivize the deployment of clean energy); see also EXEC. OFF. OF THE PRESIDENT, BUILDING A CLEAN ENERGY ECONOMY: A GUIDEBOOK TO THE INFLATION REDUCTION ACT’S INVESTMENTS IN CLEAN ENERGY AND CLIMATE ACTION (2023), <https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf>.

5. See INT’L RENEWABLE ENERGY AGENCY, GLOBAL ENERGY TRANSFORMATION: A ROADMAP TO 2050 8 (2019), https://www.irena.org/-/media/Files/IRENA/Agency/Publication/2019/Apr/IRENA_Global_Energy_Transformation_2019.pdf.

Federal Energy Regulatory Commission (FERC or Commission) will drive how the U.S. addresses climate change by how it incentivizes and advances the integration of renewable energy to the electric sector.⁶ FERC exercises a significant influence on the transformation of the electric grid.⁷ However, humankind⁸ is not the only stakeholder who faces an existential threat: FERC's regulatory authority over the electric grid in the face of climate change may be equally threatened by the major questions doctrine.⁹

FERC's main issue is whether implicitly addressing climate change by supporting renewable development and integration on the electric grid is one of the "extraordinary cases" that requires hesitation before FERC exerts its authority under the Federal Power Act (FPA).¹⁰ The trouble for FERC is that its circumstances mirror those of *West Virginia v. Environmental Protection Agency (EPA)*,¹¹ where the Supreme Court held that EPA overstepped its jurisdiction in crafting the Clean Power Plan's "generation shifting" program.¹² That program would have resulted in a transformation of the electric grid as a result of a major reduction in higher-emitting producers and an increase in lower-emitting producers.¹³ This would have occurred in two phases.¹⁴ First, a reduction in coal-fired power plants, paired with a simultaneous ramp-up of natural-gas-fired plants, would result in a net reduction in carbon emissions.¹⁵ The second building block of EPA's generation shifting program

6. See Richard Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1, 4 (2019).

7. See *infra* II.B.

8. See DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH: LIFE AFTER WARMING* 22 (2020) ("Climate change isn't something happening here or there but everywhere, and all at once.").

9. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022); see also Michael Warkel, *Major Questions Impede Major Progress—Rebuking the Major Questions Doctrine & West Virginia v. EPA in Minnesota*, 49 MITCHELL HAMLINE L. REV. 746, 747 (2023) ("[*West Virginia v. EPA*] does not solely affect [the Environmental Protection Agency's (EPA's)] ability to regulate but affects any executive agency that introduces large regulatory initiatives.").

10. See *West Virginia*, 142 S. Ct. at 2608 ("extraordinary cases"); Federal Power Act, 16 U.S.C. § 824(a) (2018) (providing the Federal Energy Regulatory Commission (FERC) with the jurisdiction over "the transmission of electric energy in interstate commerce").

11. 142 S. Ct. 2587 (2022).

12. *West Virginia*, 142 S. Ct. at 2626 (holding "Congress did not clearly authorize the EPA to engage in a 'generation shifting approach' to the production of energy in this country").

13. *Id.* at 2603.

14. *Id.*

15. *Id.*; *Electric Power Sector CO₂ Emissions Drop as Generation Mix Shifts from Coal to Natural Gas*, U.S. ENERGY INFO. ADMIN. (June 9, 2021), <https://www.eia.gov/todayinenergy/>

would have involved a shift from other coal and gas plants to renewable resources, such as wind and solar.¹⁶ This would have jumpstarted the renewable revolution.¹⁷

Yet, EPA lacked the sole decisionmaking authority on climate policy absent an affirmative allocation of authority by Congress.¹⁸ Under the major questions doctrine, a clear congressional authorization is necessary for agencies to take actions of vast “economic and political significance.”¹⁹ EPA’s program was struck down because the agency “‘claimed to discover in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’”²⁰ Although the electric grid and the energy provision are likely issues of vast “economic and political significance,” FERC’s regulatory history and historical use of the FPA give reason to believe that FERC is immune from major questions scrutiny for their own generation-shifting actions.²¹

This Comment analyzes FERC’s regulatory authority in light of *West Virginia* and proposes that FERC can do what EPA cannot with respect to generation shifting. Part I considers the threat of climate change and the effects of the U.S. electric sector on climate change. Part II offers a comprehensive description of FERC’s jurisdiction under the FPA. Part III assesses the major questions doctrine by analyzing the Court’s decision in *West Virginia*, the factors that invoke a major questions issue, and how federal courts have applied and may apply the major questions doctrine. Part IV articulates how FERC

detail.php?id=48296 (“coal emits significantly more CO₂ than natural gas”); Dan Lashof, Lori Bird & Jennifer Rennicks, *4 Things to Know About US EPA’s New Power Plant Rules*, WORLD RES. INST. (May 3, 2024), <https://www.wri.org/insights/epa-power-plant-rules-explained> (referring to coal as the country’s dirtiest source of electricity); Jackson Salovaara, *Coal to Natural Gas Fuel Switching and CO₂ Emissions Reduction 73* (Apr. 1, 2011) (B.A. thesis, Harvard University), <https://hepg.hks.harvard.edu/publications/coal-natural-gas-fuel-switching-and-co2-emissions-reduction-0> (noting a 58.7% per unit reduction in emissions for each coal plant retired in favor of natural gas).

16. *West Virginia*, 142 S. Ct. at 2603.

17. U.S. ENV’T PROT. AGENCY, FACT SHEET: OVERVIEW OF THE CLEAN POWER PLAN (2017), <https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html> (emphasizing the momentum towards the clean energy transition spurred on by the Clean Power Plan).

18. *West Virginia*, 142 S. Ct. at 2626 (finding that Congress did not grant EPA the authority it asserted).

19. *Id.* at 2608.

20. *Id.* at 2610 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

21. See Donald L.R. Goodson, *The Impact of West Virginia v. EPA on Challenges to FERC’s Authority Under the Major Questions Doctrine*, 4 ENERGY BAR ASS’N 10, 10 (2023) (arguing some FERC actions should not trigger the doctrine unless they are unheralded).

can implicitly regulate climate change without invoking major questions doctrine scrutiny by relying on its regulatory history as a basis to continue using § 205 and § 206 of the FPA to eliminate market barriers and support competition in energy markets.

I. THE IMPENDING CLIMATE CRISIS & THE U.S. ENERGY SECTOR

The energy sector, specifically electricity generation, represents the United States' largest emitting sector and is the main driver of the "contribution [of the United States] to climate change."²² It naturally follows that reductions in emissions from the energy sector can play a major role in combatting climate change.²³ Therefore, the link between the climate crisis and the U.S. energy sector is undeniable.²⁴

A. *What the Climate Science Tells Us*

Climate change poses an existential threat to humankind.²⁵ The impacts of climate change will vary based on differences in geographic locations and the implementation of mitigation measures.²⁶ However, one thing is certain: climate change will impact ecosystems, economies, and communities worldwide.²⁷ Its effects encompass rising temperatures, altered weather patterns,

22. Glick & Christiansen, *supra* note 6, at 3.

23. See BILL GATES, *How We Plug In*, in HOW TO AVOID A CLIMATE DISASTER: THE SOLUTIONS WE HAVE AND THE BREAKTHROUGHS WE NEED 66–97 (2021) (discussing the steps we need to take to transform the electric sector to avoid the worsts of climate change); see also JOSEPH P. TOMAIN, *ENERGY LAW IN A NUTSHELL* 4 (West Acad. Publ'g, 4th ed. 2022) (stating that the clean energy transition "means a reduction in carbon emissions").

24. Janice A. Beecher & Jason A. Kalmbach, *Climate Change and Energy*, in MIDWEST TECH. INPUT REP. 4 (2012) (recognizing the energy sector's "responsibility for climate change").

25. See Glick & Christiansen, *supra* note 6, at 2; DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH: LIFE AFTER WARMING* 22 (2020) ("Climate change isn't something happening here or there but everywhere, and all at once.").

26. See *Impacts, Risks, and Vulnerabilities*, CLIMATE ADAPT, https://climate-adapt.eea.europa.eu/en/knowledge/adaptation-information/vulnerabilities-and-risks/index_html (last visited Aug. 11, 2024) (describing how climate assessments can help different regions plan for climate change in unique and circumstance-specific ways).

27. See Philip N. Killeen, *FERC's Tether Tantrum: Why Suppressing State Support for Renewable Energy Violates the Federal Power Act and Threatens U.S. Climate Leadership*, 70 AM. U. L. REV. 271, 278 (2020); *Damage from Climate Change will be Widespread and Sometimes Surprising*, *ECONOMIST* (May 16, 2020), <https://www.economist.com/schools-brief/2020/05/16/damage-from-climate-change-will-be-widespread-and-sometimes-surprising> (noting that the risks of climate and weather are "complex functions of what, where, and who"); *The Effects of Climate Change*,

rising sea levels, and increased frequency of extreme weather events like hurricanes, floods, and droughts.²⁸

In the United States, climate change manifests in diverse ways across regions.²⁹ Devastating wildfires and the intensity and frequency of hurricanes stand out as some of the most observable U.S. climate impacts.³⁰ In the United States alone, the cost of climate and weather disasters reached \$92.9 billion in 2023.³¹ Climate change can have an operational impact on the electric grid itself.³² For example, Winter Storm Uri “caused a massive electricity generation failure” in Texas in February 2021.³³ Other weather events led FERC and the North American Electric Reliability Corporation

NAT'L AERONAUTICS & SPACE ADMIN., <https://climate.nasa.gov/effects/> (last visited Aug. 11, 2024) (“The severity of effects caused by climate change will depend on the path of future human activities.”).

28. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS 4–7 (2023) [hereinafter *Climate Synthesis Report*] https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf (outlining the observed warming and its causes, along with observed changes and impacts of global warming).

29. See generally Press Release, Off. of Sci. & Tech. Pol'y, Exec. Off. of the President, Fifth National Climate Assessment Details Impacts of Climate Change on Regions Across the United States (Nov. 9, 2023), <https://www.whitehouse.gov/ostp/news-updates/2023/11/09/fact-sheet-fifth-national-climate-assessment-details-impacts-of-climate-change-on-regions-across-the-united-states/> (highlighting the ways in which different U.S. regions experience climate change).

30. See *id.*; *Billion-Dollar Weather and Climate Disasters: Summary Stats*, NAT'L CTRS. FOR ENV'T INFO., <https://www.ncei.noaa.gov/access/billions/summary-stats/US/2023> (last visited Aug. 11, 2024) (table of disasters); Alejandra Borunda, *See How a Warmer World Primed California for Large Fires*, NAT'L GEOGRAPHIC (Nov. 15, 2018), <https://www.nationalgeographic.com/environment/2018/11/climate-change-california-wildfire/> (noting the impact of climate change on wildfires in California); Christopher Flavelle & Manuela Andreoni, *How Climate Change Turned Lush Hawaii into a Tinderbox*, N.Y. TIMES (Aug. 14, 2023), <https://www.nytimes.com/2023/08/10/climate/hawaii-fires-climate-change.html> (arguing climate change, combined with other unique weather patterns, contributed to Hawaii's recent wildfires).

31. See *Billion-Dollar Weather and Climate Disasters*, NAT'L CTRS. FOR ENV'T INFO., <https://www.ncei.noaa.gov/access/billions/time-series> (last updated July 9, 2024).

32. Jacob Knutson, *The U.S. Power Grid isn't Ready for Climate Change*, AXIOS (June 20, 2023), <https://www.axios.com/2023/06/20/us-power-grid-climate-change-extreme-weather-electricity>.

33. *The Timeline and Events of the February 2021 Texas Electric Grid Blackouts*, UNIV. OF TEX AT AUSTIN ENERGY INST. 8–9 (July 2021), <https://energy.utexas.edu/sites/default/files/UTAustin%20%282021%29%20EventsFebruary2021TexasBlackout%2020210714.pdf> (listing the contributing factors to electricity blackouts statewide).

to thoroughly investigate grid reliability improvements.³⁴ Climate change can both physically impact the electric grid and cause significant energy demand, which, in turn, can deplete overall electricity supply, causing blackouts.³⁵ In addition to those costs, global economic output is expected to decline as the world adapts to the realities of climate change.³⁶ Ultimately, any global warming in excess of 1.5°C will likely result in irreversible risks to the global economy, food output, water supply, regional conflict, and more.³⁷ Additionally, vulnerable, marginalized, and indigenous communities will be disproportionately affected by these changes.³⁸ It is imperative that the United States be a leader in the fight against climate change by supporting comprehensive climate policies, investing in resilient and reliable infrastructure, and managing the nation's electric grid efficiently and equitably.³⁹

The Biden Administration announced that climate considerations would be a central feature of the President's policy agenda as one of its first actions

34. Press Release, Fed. Energy Regul. Comm'n, FERC, NERC Release Final Report on Lessons from Winter Storm Elliot (Nov. 7, 2023), <https://www.ferc.gov/news-events/news/ferc-nerc-release-final-report-lessons-winter-storm-elliott> (calling for congressional authorization "to establish reliability rules for natural gas infrastructure").

35. See Knutson, *supra* note 32.

36. See U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT: IMPACTS, RISK, AND ADAPTION IN THE UNITED STATES 26 (2018), <https://nca2018.globalchange.gov> (stating that annual losses in some economic sectors are projected to exceed the current gross domestic product of many U.S. states); Christopher Flavelle, *Climate Change Could Cut World Economy by \$23 Trillion in 2050, Insurance Giant Warns*, N.Y. TIMES (Nov. 4, 2021), <https://www.nytimes.com/2021/04/22/climate/climate-change-economy.html> ("The effects of climate change can be expected to shave 11 percent to 14 percent off global economic output by 2050 compared with growth levels without climate change.").

37. See IPCC, *supra* note 2, at 177.

38. See U.S. ENV'T PROT. AGENCY, EPA REPORT SHOWS DISPROPORTIONATE IMPACTS OF CLIMATE CHANGE ON SOCIALLY VULNERABLE POPULATIONS IN THE UNITED STATES (2021), <https://www.epa.gov/newsreleases/epa-report-shows-disproportionate-impacts-climate-change-socially-vulnerable> (summarizing report finding that marginalized communities are particularly vulnerable to the impacts of climate change); Josie Garthwaite, *Climate Change has Worsened Global Economic Inequality*, STAN. DOERR SCH. OF SUSTAINABILITY (Apr. 22, 2019), <https://sustainability.stanford.edu/news/climate-change-has-worsened-global-economic-inequality> ("Our results show that most of the poorest countries on Earth are considerably poorer than they would have been without global warming.").

39. *The Climate Crisis: Working Together for Future Generations*, U.S. DEP'T OF STATE, <https://www.state.gov/policy-issues/climate-crisis/> (last visited Aug. 11, 2024) (discussing the United States' leadership on climate mitigation).

in office.⁴⁰ The Administration's primary climate efforts are exemplified by the Infrastructure Investment and Jobs Act⁴¹ and the Inflation Reduction Act.⁴² Both laws, at the time of their enactment, represented the largest investment in clean energy infrastructure in American history.⁴³ The Infrastructure Investment and Jobs Act primarily focuses on modernizing the electric grid, investing roughly \$21.3 billion in delivering clean power, \$21.5 billion to support clean energy demonstration programs, \$6.5 billion in energy efficiency and weatherization projects, and \$8.6 billion to support domestic clean energy manufacturing.⁴⁴ Similarly, the Inflation Reduction Act invests substantially in clean energy and clean manufacturing by creating roughly two dozen tax provisions designed to incentivize deploying clean energy.⁴⁵

The Administration has remained committed to “catalyz[ing] an American clean energy manufacturing and deployment boom” throughout its term.⁴⁶ In May 2024, President Biden announced a series of tariff increases on Chinese imports, particularly iron and steel products used in solar cells.⁴⁷

40. See Press Release, Exec. Off. of the President, Executive Order on Tackling the Climate Crisis at Home and Abroad (Jan. 27, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/> (stating that it is imperative that the United States are leaders in addressing climate change).

41. Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 429 (2021).

42. Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818.

43. See *A Guidebook to the Bipartisan Infrastructure Law*, EXEC. OFF. OF THE PRESIDENT, <https://www.whitehouse.gov/build/guidebook/> (last updated Jan. 2024); *Inflation Reduction Act Guidebook*, EXEC. OFF. OF THE PRESIDENT, <https://www.whitehouse.gov/cleanenergy/inflation-reduction-act-guidebook/> (last visited Aug. 11, 2024).

44. See *Building a Better America: A Guidebook to the Bipartisan Infrastructure Law for State, Local, Tribal, and Territorial Governments, and Other Partners*, EXEC. OFF. OF THE PRESIDENT (May 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/05/BUILDING-A-BETTER-AMERICA-V2.pdf>.

45. See *Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action*, EXEC. OFF. OF THE PRESIDENT (Jan. 2023), <https://www.whitehouse.gov/wp-content/uploads/2022/12/Inflation-Reduction-Act-Guidebook.pdf>.

46. Press Release, Exec. Off. of the President, Fact Sheet: Biden-Harris Administration Takes Action to Strengthen American Solar Manufacturing and Protect Manufacturers and Workers from China's Unfair Trade Practices (May 16, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/05/16/fact-sheet-biden-harris-administration-takes-action-to-strengthen-american-solar-manufacturing-and-protect-manufacturers-and-workers-from-chinas-unfair-trade-practices/> [hereinafter Action to Strengthen American Solar Manufacturing].

47. See *id.*

The tariffs are designed to support domestic manufacturing of solar products, with the simultaneous benefit of hampering Chinese control of the solar supply chain.⁴⁸ The U.S. solar supply chain has grown immensely in the last four years, supporting the installment of 32.4 gigawatts of solar capacity in 2023, representing a “[fifty] percent increase over 2022 installations.”⁴⁹ The tariffs represent the trend toward unilateral, executive action to address climate change and the changing energy landscape.⁵⁰

State climate policy can play an important supplemental role in federal initiatives.⁵¹ States continue to play a major role as leaders in the fight against climate change, as twenty-four states are part of the U.S. Climate Alliance,⁵² and twenty-three states have some form of 100% clean energy goals.⁵³ The

48. See *id.* But see Arianna Skibell, *The Climate Gamble Behind Biden’s China Tariffs*, POLITICO (May 14, 2024), <https://www.politico.com/newsletters/power-switch/2024/05/14/the-climate-gamble-behind-bidens-china-tariffs-00157923> (questioning whether the tariffs conflict with the Biden Administration’s climate policies by potentially slowing the transition to clean energy); Scott Waldman, Jean Chemnick & Benjamin Storrow, *How Tariffs Threaten Biden’s Climate Goals*, E&E NEWS (May 15, 2024), <https://www.eenews.net/articles/how-tariffs-threaten-bidens-climate-goals/> (“This is probably not good climate policy.”); Joe Lo, *Days After Climate Talks, US Slaps Tariffs on Chinese EVs and Solar Panels*, CLIMATE HOME NEWS (May 15, 2024), <https://www.climatechangenews.com/2024/05/15/days-after-climate-talks-us-slaps-tariffs-on-chinese-evs-and-solar-panels/> (echoing concern that the tariffs may make it more difficult for clean energy to compete against traditional energy sources).

49. See Action to Strengthen American Solar Manufacturing, *supra* note 46.

50. Sabin Center for Climate Change Law, *Climate Reregulation Tracker*, COLUMBIA L. SCH., <https://climate.law.columbia.edu/content/climate-reregulation-tracker> (last visited Aug. 11, 2024) (tracking the Biden Administration’s regulatory measures addressing climate change); Sabin Center for Climate Change Law, *Executive Orders*, COLUMBIA L. SCH., <https://climate.law.columbia.edu/content/executive-orders> (last visited Aug. 11, 2024) (collecting executive orders issued by the Trump and Obama Administrations related to climate and energy).

51. Sam Ricketts, Rita Clifton & Lola Oduyeru, *States are Laying a Road Map for Climate Leadership*, CTR. FOR AM. PROGRESS (Apr. 30, 2020), <https://www.americanprogress.org/article/states-laying-road-map-climate-leadership/> (noting the interplay between federal, state, and local climate policies).

52. See *States United for Climate Action*, U.S. CLIMATE ALL., <https://usclimatealliance.org/> (last visited Aug. 11, 2024) (bipartisan coalition of governor’s supporting climate action).

53. See *Table of 100% Clean Energy States*, CLEAN ENERGY STATES ALL., <https://www.cesa.org/projects/100-clean-energy-collaborative/guide/table-of-100-clean-energy-states/> (last visited Aug. 11, 2024) (documenting clean energy programs by state); see also Harry Stevens, *America Needs Clean Electricity. These States Show How to Do it.*, WASH. POST (Aug. 10, 2023, 11:40 AM), <https://www.washingtonpost.com/climate-environment/interactive/2023/clean-energy-electricity-sources/> (arguing that states are leading the way in America’s clean energy transition).

vast majority of the public supports these types of actions, and many American citizens demand more to combat climate change.⁵⁴ Achieving any meaningful reduction in carbon emissions to combat climate change requires a transformation of the energy system.⁵⁵

B. *The Role of the U.S. Energy Sector in the Climate Crisis*

The U.S. energy sector has historically contributed significantly to climate change due to its heavy reliance on fossil fuels like coal, oil, and natural gas for electricity generation.⁵⁶ These resources release large quantities of greenhouse gases (GHGs)—primarily carbon dioxide—that exacerbate the warming of the planet.⁵⁷ Until recently, the electric sector was the largest source of domestic GHG emissions.⁵⁸ Although U.S. GHG emissions from energy consumption have fallen by 18% over the course of the last two decades, due in large part to changes in electricity generation, major reductions are still

54. See *Public Polling on Climate Change, Briefing Series: Congressional Climate Camp*, ENV'T & ENERGY STUDY INST. (Feb. 9, 2023), <https://www.eesi.org/briefings/view/020923camp> (finding that only 16% of Americans do not believe in climate change); see also Bella Isaacs-Thomas, *Climate Change is Hitting Close to Home for Nearly 2 Out of 3 Americans, Poll Finds*, PBS NEWS HOUR (Aug. 3, 2023, 5:00 AM), <https://www.pbs.org/newshour/science/climate-change-is-hitting-close-to-home-for-nearly-2-out-of-3-americans-poll-finds> (finding that two-thirds of adults see climate change noticeably affecting their communities and believe it is a current and “growing threat in the future”); Alec Tyson, Cary Funk & Brian Kennedy, *What the Data Says About Americans’ Views of Climate Change*, PEW RSCH. CTR. (Aug. 9, 2023), <https://www.pewresearch.org/short-reads/2023/08/09/what-the-data-says-about-americans-views-of-climate-change> (recognizing public support for incentivizing wind and solar energy production and United States’ participation in international efforts to address climate change).

55. See *The World’s Energy System Must be Transformed Completely*, ECONOMIST (May 23, 2020), <https://www.economist.com/schools-brief/2020/05/23/the-worlds-energy-system-must-be-transformed-completely>.

56. See U.S. ENV’T PROT. AGENCY, *INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS* (2014), <https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks> (last visited Aug. 11, 2024).

57. See *Climate Synthesis Report*, *supra* note 28, at 4–5 (discussing the growth of GHG emissions and the corresponding observed changes and impacts).

58. See Glick & Christiansen, *supra* note 6, at 3–4 n.8 (citing U.S. ENV’T PROT. AGENCY, *SOURCES OF GREENHOUSE GAS EMISSIONS*, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Aug. 11, 2024) (noting that the electricity sector trails only the transportation sector and is responsible for more than 25% of total U.S. GHG emissions)).

needed to meet U.S. goals.⁵⁹ All models limiting warming to 1.5°C, or 2°C at worst, require immediate and sustained GHG reductions in all sectors of the economy this decade.⁶⁰ Reaching this goal requires transitioning from fossil fuels to renewable sources or other low-carbon energy alternatives like fossil fuels with carbon capture and storage.⁶¹

To limit the impacts of climate change, the U.S. electric grid requires a transformation towards cleaner and more sustainable energy sources.⁶² Shifting from fossil fuels to renewable energy sources like wind and solar energy, paired with battery storage and other technologies, can significantly reduce carbon emissions.⁶³ Fortunately, declining costs for renewable energy have gradually made them either comparable to higher-emitting resources (such as fossil fuels) or the cheaper of the two options.⁶⁴ Ongoing cost reductions, paired with federal incentives, continue to pave the way for renewable power to continue to integrate expeditiously into the U.S. energy portfolio.⁶⁵ But much more needs to be done—and fast.

II. FERC'S JURISDICTIONAL MANDATE UNDER THE FEDERAL POWER ACT

Despite no mandate to craft the U.S. response to climate change, the Commission is tasked with overseeing the implementation of an electric grid,

59. See Ian Tiseo, *Carbon Dioxide Emissions From Energy Consumption in the United States from 1975 to 2023*, STATISTA (Mar. 27, 2024), <https://www.statista.com/statistics/204879/us-carbon-dioxide-emissions-by-sector-since-1950/>.

60. See *Climate Synthesis Report*, *supra* note 28, at 20–22 (describing mitigation pathways).

61. *Id.* (describing what it will take to meet climate goals).

62. See *Reimagining and Rebuilding America's Energy Grid*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/articles/reimagining-and-rebuilding-americas-energy-grid> (June 10, 2021) (focusing on a shift towards sustainable renewable energy sources); U.S. DEP'T OF STATE & EXEC. OFF. OF THE PRESIDENT, *THE LONG-TERM STRATEGY OF THE UNITED STATES: PATHWAYS TO NET-ZERO GREENHOUSE GAS EMISSIONS BY 2050 14* (2021) (outlining U.S. climate mitigation goals, including changes to the electric sector).

63. See *Climate Synthesis Report*, *supra* note 28, at 20–22 (noting the impact of reductions in fossil fuel use).

64. See Press Release, Int'l Renewable Energy Agency, *Renewable Power Remains Cost-Competitive amid Fossil Fuel Crisis* (July 13, 2022), <https://www.irena.org/news/press-releases/2022/Jul/Renewable-Power-Remains-Cost-Competitive-amid-Fossil-Fuel-Crisis> (documenting the low cost of renewable energy compared to fossil fuels); *Renewable Energy - Powering a Safer Future*, UNITED NATIONS, <https://www.un.org/en/climatechange/raising-ambition/renewable-energy> (last visited Aug. 11, 2024) (“Falling prices make renewable energy more attractive all around . . .”).

65. See Glick & Christiansen, *supra* note 6, at 11 (“[P]ublic policy has played, and will continue to play, an important role.”).

which undeniably bears climate-related ramifications.⁶⁶ The FPA provides that the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary and in the public's interest.⁶⁷ In addition, all rates and charges demanded by public utilities in connection with the Commission's jurisdiction shall be just and reasonable.⁶⁸ Finally, the FPA provides that no public utility shall make or grant undue preference or advantage to any person or entity.⁶⁹

FERC has consistently used two primary sections of the FPA to regulate utilities and energy markets: § 205 and § 206.⁷⁰ Section 205 requires that all rates and charges for the wholesale sale and transmission of electric energy are just and reasonable and do not grant any undue preference to any person or subject.⁷¹ Section 206 operates under a similar standard; however, it is remedial in nature.⁷² Section 206 provides that if "any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential," the Commission must "determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order."⁷³ Sections 205 and 206 are the primary modes of enforcing the FPA and are often used by the Commission.⁷⁴

66. See *id.* at 5; *DOE Launches New Initiative from President Biden's Bipartisan Infrastructure Law to Modernize National Grid*, U.S. DEP'T OF ENERGY, <https://www.energy.gov/oe/articles/doe-launches-new-initiative-president-bidens-bipartisan-infrastructure-law-modernize> (Jan. 12, 2022) ("The foundation of our climate and clean energy goals is a safe, reliable, and resilient electric grid . . .").

67. 16 U.S.C. § 824(a) (2018); see also *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 355 (1956) ("[T]he purpose of the power given the Commission by 206(a) is the protection of the public interest . . .").

68. 16 U.S.C. § 824d(a).

69. *Id.* § 824d(b).

70. See Glick & Christiansen, *supra* note 6, at 14; Joel B. Eisen, *FERC's Expansive Authority to Transform the Electric Grid*, 49 U.C. DAVIS L. REV. 1783, 1791–92 (2016) [hereinafter *FERC's Expansive Authority*].

71. 16 U.S.C. § 824d.

72. See Glick & Christiansen, *supra* note 6, at 14 (giving FERC the authority to revise any unjust or unreasonable rate or charge); *FERC's Expansive Authority*, *supra* note 70, at 1792 ("The touchstone for regulatory intervention is remedying anti-competitive 'discrimination' . . .").

73. 16 U.S.C. § 824e(a).

74. See Glick & Christiansen, *supra* note 6, at 14; *FERC's Expansive Authority*, *supra* note 70, at 1792 (emphasizing the flexibility of these statutory provisions to address new developments in energy markets).

A. *Conceiving of FERC's Regulatory Philosophy—Identifying Electricity as a Product 'Clothed with a Public Interest'*

The baseline of FERC's regulatory authority derives from the fact that electric power is "clothed with the public interest."⁷⁵ As common carriers, public utilities forfeit some private rights and become subject to public regulation.⁷⁶ *Munn v. Illinois*⁷⁷ outlines this key principle: the government may regulate private property if the property at issue affects the public interest.⁷⁸ There, Midwestern grain farmers were forced to store their grain with a limited number of companies who controlled prices until they could move the grain out of Chicago.⁷⁹ Similarly, the nature of the electric sector—a natural monopoly⁸⁰—invites regulation.⁸¹

A natural monopoly occurs when a single company can supply a particular good or service to an entire market more efficiently than multiple competing firms.⁸² The electricity sector is often described as a natural monopoly because the costs associated with generation, transmission, and distribution produce a barrier to entry for new firms.⁸³ Until the late nineteenth century, electric utilities were vertically integrated, and one utility provided all of these resources, as opposed to competing in a free marketplace.⁸⁴ This framework—where one or more companies control the marketplace—mirrors the

75. TROY RULE, *RENEWABLE ENERGY: LAW, POLICY AND PRACTICE* 47 (West Acad. Publ'g, 2d ed. 2021) ("The fact that electric utilities' retail product—reliable, grid-supplied electric power—is crucial to the stability and health of modern economies makes their activities sufficiently 'clothed with the public interest' to justify subjecting them to regulation.").

76. See *Munn v. Illinois*, 94 U.S. 113, 130 (1876).

77. See *id.*

78. *Id.* at 125–28, 131–32.

79. *Id.*

80. Lauren Dunlap, Kathryne Cleary & Karen Palmer, *Electricity 101: Terms and Definitions*, RESOURCES FOR THE FUTURE (Mar. 3, 2020) [hereinafter *Electricity 101*], <https://www.rff.org/publications/explainers/electricity-101/> ("Natural monopolies occur when, for practical reasons, a service or good is only provided by one entity in a region.").

81. RULE, *supra* note 75, at 49–50 (discussing the regulatory compact implicating public utilities law).

82. *Id.* at 47.

83. *Id.* at 47–48. Generation refers to the process of creating electricity, transmission refers to the process of transporting that energy long distances from the generation site to distribution centers, and distribution is the localized delivery of energy from the distribution center to the end user. *Electricity 101*, *supra* note 80.

84. See RICHARD J. CAMPBELL, CONG. RSCH. SERV., R44783, *THE FEDERAL POWER ACT (FPA) AND ELECTRICITY MARKETS* 3 (2017). A vertically integrated utility is one that owns and controls every stage of electricity production—generation, transmission, and distribution. *Electricity 101*, *supra* note 80.

problem facing grain farmers in the nineteenth century, which gives rise to the need for public regulation.⁸⁵

One key objective of public utility regulation is to force the utility's price to be closer to the competitive price.⁸⁶ If left unregulated, the monopoly holder would inflate prices to increase profits; the regulated monopolist, on the other hand, is limited to charging reasonable prices as set by regulators.⁸⁷ The grant of a monopoly right provides economic stability to the monopolist by insulating them from the threat of competition while simultaneously requiring them to provide service.⁸⁸ This obligation to provide service is known as the duty to serve—operators of essential public services with state-granted monopoly powers must provide equal, adequate, and nondiscriminatory service to anyone requesting their services.⁸⁹ In return for fulfilling a public service, public utilities can charge a just and reasonable rate for their services.⁹⁰

The just and reasonable standard does not have a settled definition.⁹¹ For most of the twentieth century, public utility law applied the just and reasonable standard through a cost-of-service-based approach, meaning that utilities were afforded the opportunity to get a fair return on investment to cover reasonably incurred costs.⁹² In essence, the rate of return should be sufficient to support the utility's business model.⁹³ This includes what is necessary to “maintain and support [the utility's] credit and enable [the utility] to raise

85. See *Munn v. Illinois*, 94 U.S. 113, 126, 130 (1876) (“public regulation”).

86. John E. Kirshman, *The Principle of Competitive Cost in Public Utility Regulation*, 35 YALE L.J. 805, 806 (1926) (describing *Munn* and other early cases supporting public regulation of common carriers as a mode of restoring of competitive prices).

87. RULE, *supra* note 75, at 48–49.

88. Robert J. Michaels, *Electric Utility Regulation*, THE CONCISE ENCYCLOPEDIA OF ECON., <https://www.econlib.org/library/Enc1/ElectricUtilityRegulation.html> (last visited Aug. 11, 2024) (“[An electricity supplier] holds a monopoly granted by [the] government in return for which it has a legal obligation as a public utility to serve all customers in an area.”).

89. Jim Rossi, *The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1242–43 (1998).

90. RULE, *supra* note 75, at 49.

91. Steve Isser, *Just and Reasonable: The Cornerstone of Energy Regulation* 18 (Energy L. & Econ., Working Paper No. 2015-1, 2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625131 (“While the *Munn* Court accepted the common law proposition that rates be ‘reasonable,’ it refrained from any explanation of what constitutes a reasonable rate.”).

92. JOEL B. EISEN, EMILY HAMMOND, JIM ROSSI, DAVID B. SPENCE & HANNAH J. WISEMAN, *ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS* 479–89 (West Acad. Publ'g, 5th ed. 2020) [hereinafter *ENERGY, ECONOMICS, AND THE ENVIRONMENT*].

93. See *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 605 (1944).

the money necessary” to provide effective public service.⁹⁴ Therefore, the general baseline for the just and reasonable standard is that in exchange for delivering reliable and affordable electric energy and supporting the public interest, utilities are entitled to a fair and equitable return on investment.⁹⁵

The key takeaway from the historic cost-based service approach is that it was an inherently economic test.⁹⁶ It grounded the electric sector in a space focused on reliability and cost-efficiency.⁹⁷ Electric reliability and fair rates, both for the utilities and consumers, are still the central pillars of energy regulation, but as the electric grid has shifted, so has the way FERC interprets its FPA authority.⁹⁸ Now, one of the key principles of FERC’s regulatory philosophy is “enhancing competition.”⁹⁹

B. The Electric Industry in Transition—Energy Market Restructuring and Eliminating Barriers to New Entrants

The Commission has shifted its regulatory focus from ensuring just and reasonable rates for regulated monopolies to a deregulated, or restructured, competitive marketplace for the sale and transmission of electric energy.¹⁰⁰ This “impulse to restructure” was driven by a belief that regulating monopolies through a cost-of-service approach made it difficult for smaller, independent firms to enter the energy markets at any stage—generation, transmission, or distribution.¹⁰¹ Deregulating the energy market and eliminating barriers to market competition became the new cornerstone of FERC’s interpretation of the just and reasonable standard.¹⁰² FERC relied on the same statutory authority to develop a new standard of review—“[i]nstead of judging whether an individual firm’s action is unjust, unreasonable, or discriminatory, it decides whether features of the wholesale markets’ operation

94. See *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm’n*, 262 U.S. 679, 693 (1923).

95. TOMAIN, *supra* note 23, at 172 (noting the economic dimension of ratemaking).

96. *Id.*

97. *FERC’s Expansive Authority*, *supra* note 70, at 1834 (noting FERC’s jurisdiction is limited to wholesale rates and system reliability).

98. Isser, *supra* note 91, at 41 (“The shift from regulated rates to market based rates resulted in a new application of just and reasonable.”).

99. See Glick & Christiansen, *supra* note 6, at 15.

100. See generally *Restructured Electricity Market*, SCIENCE DIRECT, <https://www.sciencedirect.com/topics/engineering/restructured-electricity-market> (last visited Aug. 11, 2024); *FERC’s Expansive Authority*, *supra* note 70, at 1792 (“As the electric utility industry has transformed, FERC’s regulatory approach has as well.”).

101. See Killeen, *supra* note 27, at 284.

102. See Glick & Christiansen, *supra* note 6, at 16.

contribute to this effect.”¹⁰³

The push toward competition began with the Public Utilities Regulatory Policy Act of 1970 (PURPA).¹⁰⁴ PURPA explicitly encouraged the development and deployment of renewable resources, like wind and solar, by requiring utilities to purchase power from certain “qualifying facilities.”¹⁰⁵ Incorporating the just and reasonable standard, Congress directed FERC to promulgate rules to incentivize alternative energy resources and reduce reliance on fossil fuels.¹⁰⁶ FERC’s ultimate scheme implementing PURPA was affirmed because it was just and reasonable, benefitted the public interest by incentivizing small power producers—typically renewable resources—and served the nation by facilitating the transition away from fossil fuels.¹⁰⁷ The introduction of new technologies to the electric grid made it apparent that competition may yield more efficient and reliable outcomes for consumers.¹⁰⁸

The Commission officially embraced competition in the energy markets through the implementation of the Energy Policy Act of 1992 and Order 888.¹⁰⁹ FERC’s initiatives related to transmission also reflect the transition to competition.¹¹⁰ Historically, transmission entities bundled all services.¹¹¹ However, Order 888 required all utilities owning and operating transmission lines to file open access nondiscriminatory transmission tariffs with FERC.¹¹² This unbundled transmission required transmission services to be separated

103. *FERC’s Expansive Authority*, *supra* note 70, at 1812.

104. Public Utilities Regulatory Policies Act, Pub. L. No. 95-617, 92 Stat. 3117 (1978).

105. *See id.*; Am. Paper Inst. v. Am. Elec. Power Serv., 461 U.S. 402, 404-05 (1982) (stating the purpose of Public Utilities Regulatory Policies Act (PURPA) was to incentivize small, independent power producers).

106. *See* 461 U.S. at 402 (“Congress believed the increased use of [cogenerators and small power production facilities] would reduce the demand for traditional fossil fuels.”).

107. *See id.* at 415, 417.

108. *See* Killeen, *supra* note 27, at 284.

109. *See* Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776; Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385); TOMAIN, *supra* note 23, at 390 (documenting FERC initiatives that emphasized competition).

110. *See* Glick & Christiansen, *supra* note 6, at 21 (establishing the modern competitive structure of energy markets).

111. *See* *New York v. FERC*, 535 U.S. 1, 5 (2002) (“Although there were some interconnections among utilities, most operated as separate, local monopolies subject to state or local regulation. Their sales were ‘bundled,’ meaning that consumers paid a single charge that included both the cost of the electric energy and the cost of its delivery.”).

112. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities*, 61 Fed. Reg. 21,540 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385).

and transmission utilities to offer their competitors fair rates for use of their transmission lines.¹¹³ Order 888 is a prime example of FERC exercising its § 205 and § 206 authority.¹¹⁴ Pursuant to § 205, FERC found that the operation of the transmission market (bundled services) was unjust, unreasonable, and unduly discriminatory because it prevented certain entrants from accessing transmission lines.¹¹⁵ By using its remedial authority under § 206, FERC proposed and issued Order 888.¹¹⁶

*New York v. FERC*¹¹⁷ held that FERC properly construed its statutory mandate under the FPA.¹¹⁸ Critically, the Court grappled with the history of the energy sector in a way that is unique to FERC.¹¹⁹ It noted that the landscape of the electric industry had changed since the enactment of the FPA, when electric markets were distinctly separated into retail and wholesale markets.¹²⁰ *New York v. FERC*'s significance rests in its approval of FERC's construction of its FPA authority to restructure energy markets as more competitive.¹²¹

After Order 888, which first recognized the potential for regional transmission planning, FERC proposed the creation of Regional Transmission Organizations/Independent System Operators (RTO/ISO) in Order 2000.¹²² An RTO/ISO is a regional, independent system operator.¹²³ Although voluntary, participation in an RTO/ISO is encouraged because, in FERC's view, competition in wholesale electricity markets is the best way to provide reliable service and serve the public interest.¹²⁴ RTOs/ISOs do two key things: they serve as a grid operator by overseeing and managing transmission systems, and they also operate competitive markets for electricity by hosting competitive auctions to set wholesale prices for electricity.¹²⁵ Under

113. *See id.*

114. *See New York*, 535 U.S. at 11 (describing FERC's regulatory authority).

115. *See id.*

116. *See id.*

117. 535 U.S. 1 (2002).

118. *See id.* at 28 ("[The rulemaking] represents a statutorily permissible policy choice.") (citation omitted).

119. *See id.* at 7, 16, 23 (noting FERC's unique jurisdiction).

120. *See id.* at 16.

121. *See id.* at 10, 16.

122. Order No. 2000, *Regional Transmission Organizations*, 89 F.E.R.C. ¶ 61,285 (1999) (to be codified at 18 C.F.R. pt. 35); *see* Killeen, *supra* note 27, at 286.

123. *See* TOMAIN, *supra* note 23, at 394 (discussing the formation and operation of Regional Transmission Organizations/Independent System Operators (RTO/ISOs)).

124. *See* Order No. 2000, *Regional Transmission Organizations*, 89 F.E.R.C. ¶ 61,285 at P 101 (1999); *see also* Killeen, *supra* note 27, at 286.

125. *See* Killeen, *supra* note 27, at 286.

this new market model, competition is central.¹²⁶

FERC's oversight of the wholesale competitive energy markets is guided by several key principles, including a goal of ensuring a fair playing field by removing barriers to new technologies and promoting competition.¹²⁷ Several FERC Orders exemplify that principle. For example, Order 2222 removed barriers preventing distributed energy resources, like solar energy and battery storage, from competing in electric markets.¹²⁸ Order 2023 proposed major regulatory changes to the interconnection process.¹²⁹ The Order was a response, in large part, to the severe backlog of renewable energy projects in the interconnection queue.¹³⁰ Order 841 required the removal of barriers to energy storage resources, and it required RTOs/ISOs to "recogniz[e] the physical and operational characteristics of electric storage resources."¹³¹ Order 745 removed barriers for demand response to participate in wholesale energy markets by requiring market operators to compensate demand response providers appropriately.¹³² Order 764 eliminated rules that prevented variable resources like wind and solar from accessing the necessary transmission services.¹³³ Although not the primary purpose, these Orders have resulted in major shifts in the country's electric grid.¹³⁴

126. *See id.*

127. Glick & Christiansen, *supra* note 6, at 4.

128. *See FERC Order No. 2222 Explainer: Facilitating Participation in Electricity Markets by Distributed Energy Resources*, FED. ENERGY REGUL. COMM'N, <https://www.ferc.gov/ferc-order-no-2222-explainer-facilitating-participation-electricity-markets-distributed-energy> (June 14, 2023).

129. *See* Order No. 2023, *Improvements to Generator Interconnection Procedures and Agreements*, 184 F.E.R.C. ¶ 61,054 (2023) (to be codified at 18 C.F.R. pt. 35).

130. *See id.* at 25–26, 624.

131. Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, 162 F.E.R.C. ¶ 61,127 at PP 3, 7–8, 10–12 (2018) (to be codified at 18 C.F.R. pt. 35).

132. Order No. 745, *Demand Response Competition in Organized Wholesale Energy Markets*, 134 F.E.R.C. ¶ 61,187 at P 2 (2011) (to be codified at 18 C.F.R. pt. 35) ("We conclude that when a demand response resource participating in an organized wholesale energy market administered by an RTO or ISO has the capability to balance supply and demand as an alternative to a generation resource and when dispatch of that demand response resource is cost-effective as determined by the net benefits test described herein, that demand response resource must be compensated for the service it provides to the energy market at the market price for energy, referred to as the locational marginal price (LMP).").

133. Order No. 764, *Integration of Variable Energy Resources*, 139 F.E.R.C. ¶ 61,246, 77 Fed. Reg 41,482 (June 22, 2012) (to be codified at 18 C.F.R. pt. 35).

134. *See, e.g.*, Caroline Reiser, *FERC Rule Will Get Clean Energy onto the U.S. Power Grid Faster*, NAT. RES. DEF. COUNCIL (Dec. 18, 2023), <https://www.nrdc.org/bio/caroline-reiser/ferc->

FERC's regulatory initiatives supporting renewable energy sources have not gone without judicial scrutiny, though.¹³⁵ In one of the most impactful Supreme Court cases evaluating the FPA, the Court upheld Order 745.¹³⁶ The Court recognized that FERC's authority under the FPA is specifically designed to grant FERC the power to improve how the electric market functions.¹³⁷ More specifically, the Court held that the FPA's language grants FERC the authority over any "rules or practices that directly affect" wholesale rates.¹³⁸ Furthermore, it is within FERC's power under the FPA to take actions to reduce prices and enhance reliability in the wholesale energy market.¹³⁹

*FERC v. Electric Power Supply Association*¹⁴⁰ was a response to the Commission's efforts to eliminate barriers for demand response to participate in wholesale energy markets.¹⁴¹ Through two major orders, FERC paved the way for demand response to participate in these markets.¹⁴² First, Order 719 recognized the ability of demand response to reduce wholesale power prices and found that markets that did not allow demand response to bid into the energy markets were unjust, unreasonable, and unduly discriminatory or preferential.¹⁴³ Second, in an effort to more fully effectuate the goals of Order 719, the Commission issued Order 745, which required comparable compensation for demand response and generation providers.¹⁴⁴ This required that demand response providers be compensated at a fair price.¹⁴⁵

Writing for the majority, Justice Kagan found that since the compensation scheme in Order 745 "directly affect[s]" the wholesale rate of energy, Order

rule-will-get-clean-energy-us-power-grid-faster (drawing the connection between FERC regulatory initiatives and incentivizing renewable energy).

135. Glick & Christiansen, *supra* note 6, at 18 (discussing the Supreme Court evaluating the FPA).

136. See *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 295–96 (2016).

137. *Id.* (citation and quotation omitted).

138. *Id.* at 278.

139. *Id.* at 290.

140. 577 U.S. 260 (2016).

141. Order No. 719, *Wholesale Competition in Regions with Organized Electric Markets*, 125 F.E.R.C. ¶ 61,071 at P 8 (2008) (to be codified at 18 C.F.R. pt. 35).

142. See *id.*; Order No. 745, *Demand Response Competition in Organized Wholesale Energy Markets*, 134 F.E.R.C. ¶ 61,187 (2011).

143. Order No. 719, *Wholesale Competition in Regions with Organized Electric Markets*, 125 F.E.R.C. ¶ 61,071 at P 90 (2008) (to be codified at 18 C.F.R. pt. 35).

144. Order No. 745, *Demand Response Competition in Organized Wholesale Energy Markets*, 134 F.E.R.C. ¶ 61,187 at P 15 (2011) (to be codified at 18 C.F.R. pt. 35).

145. See *id.*

745 was within FERC's statutory authority.¹⁴⁶ This endorses a key principle of the FPA: FERC may use its statutory mandate to eliminate barriers to market competition for technologies that can improve energy markets.¹⁴⁷ The critical ripple effects of this holding suggest that under the FPA, the Commission can "facilitate the participation of new technologies" that reduce emissions and support the electric grid's transition to a cleaner future.¹⁴⁸ Others have provided a clear framework for applying this new standard: "FERC may regulate those practices which impact the wholesale markets directly or are integral to the proper functioning of the wholesale markets, but not practices that are only remote or insignificant in their connection to these markets."¹⁴⁹

In applying this standard, scholars have identified several potential factors that guide FERC's regulatory authority.¹⁵⁰ Of importance to this analysis are two ideas that may pave the way for additional regulatory action to support renewable energy development.¹⁵¹ First, FERC can address "system adequacy by regulating the quantity of inputs to the markets."¹⁵² This standard may allow FERC to "increase[] amounts of electricity generated from renewable sources" because it may be "necessary to hedge against potential outages at fossil-fuel fired plants."¹⁵³ Second, FERC may regulate "market-wide features to remedy discrimination against one resource in favor of another."¹⁵⁴ This is essentially what FERC did to facilitate demand response in Order 745.¹⁵⁵ The Commission has also acted in this manner to support energy storage resources in wholesale markets.¹⁵⁶ In short, through a series of orders designed to improve competition in wholesale energy markets, FERC has established a regulatory precedent for using § 205 and § 206 to promote the development of renewable energy growth.¹⁵⁷

146. See *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016) (emphasis removed).

147. See Glick & Christiansen, *supra* note 6, at 18.

148. *Id.* at 19.

149. *FERC's Expansive Authority*, *supra* note 70, at 1814.

150. See *id.* at 1835–43.

151. See *id.*

152. See *id.* at 1838–40.

153. *Id.* at 1840.

154. *Id.*

155. See Order No. 745, *Demand Response Competition in Organized Wholesale Energy Markets*, 134 F.E.R.C. ¶ 61,187 (2011).

156. Order No. 841, *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Notice of Proposed Rulemaking, F.E.R.C. STATS. & REGS. ¶ 32,718 (2018).

157. See generally *supra* Part II.B.

III. ARTICULATING THE MAJOR QUESTIONS DOCTRINE

In June 2022, the Supreme Court finally ushered in the major questions doctrine after several decades of hinting at limiting administrative agencies' ability to address major questions of policy.¹⁵⁸ In a landmark decision, the Court struck down EPA's "generation shifting" program in the Clean Power Plan (CPP) by noting the rule's "economic and political significance," stressing "reason[s] to 'hesitate'" when an agency claims "'to discover in a long-extant statute an unheralded power' representing a 'transformative expansion in [its] regulatory authority.'"¹⁵⁹ The new doctrine fails to provide any sort of "model of clarity" but rather establishes a "grab bag of factors" to consider before triggering the doctrine.¹⁶⁰

The major questions doctrine represents one of many ways the Court has whittled away at agency deference.¹⁶¹ Most recently, in *Loper Bright*, the Court said goodbye to the cornerstone of agency deference when it overturned *Chevron*.¹⁶² However, some form of reliance on agency decisions survives.¹⁶³ Courts may pay "careful attention" to an agency's regulatory history when that agency is exercising its applicable expertise.¹⁶⁴ While courts may now use their own "independent judgment" in reviewing agency action, the court may turn to the "agency's 'body of experience and informed judgment.'"¹⁶⁵

While the interplay between *West Virginia* and *Loper Bright* is imprecise, an agency's regulatory history certainly carries weight. One interpretation of *Loper Bright* would suggest that an independent court will be more unlikely to rely on an agency's interpretation in major questions cases. Another hint at incorporating *West Virginia's* factors into the *Loper Bright* analysis. Therefore,

158. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (discussing the precedent referencing a fledgling major questions doctrine); Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1011 (2023) ("The doctrine's roots extend as far back as 2000 and arguably before.").

159. See 142 S. Ct. at 2605, 2610 (first quoting 84 Fed. Reg. 32,523, 32,529 (2019)); then *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014); then *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000); and then *Util. Air Regul. Grp.*, 573 U.S. at 324).

160. Natasha Brunstein, *Major Questions in Lower Courts*, 75 ADMIN. L. REV. 661, 662–63 (2023).

161. *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2269 (2024) (referencing the major questions doctrine as one of the exceptions to *Chevron* deference).

162. *Id.* at 2273 ("Chevron is overruled.").

163. *Id.* at 2267 (discussing interpretative tools provided by *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

164. *Id.* at 2273.

165. *Id.* at 2265 (quoting *Skidmore*, 323 U.S. at 140).

a brief survey of major questions cases can shed light on the future of executive agencies’ “power to persuade.”¹⁶⁶ That survey suggests that while lower courts vary substantially in applying the major questions doctrine, the “economic and political significance” of an agency rule and an agency’s regulatory history drive the inquiry.¹⁶⁷

A. Documenting the Circumstances Cementing the Major Questions Doctrine in West Virginia

The major questions doctrine was formally established by the Supreme Court in its recent *West Virginia* holding.¹⁶⁸ The focal point of *West Virginia* was the Obama Administration’s CPP, which sought to reduce carbon emissions in the power sector.¹⁶⁹ The statutory justification of the CPP was § 111(d) of the Clean Air Act, which gave EPA the power to set the “best system of emission reduction” for power plants.¹⁷⁰ Traditionally, the agency set standards that required plants to reduce pollution and operate cleaner and more efficiently.¹⁷¹ However, under the CPP, the agency required that facilities reduce electricity production, subsidize clean technologies, or purchase carbon offsets.¹⁷² The agency itself referred to this as a “generation shifting program” that would transform the energy industry and spur the development of clean technologies.¹⁷³ In the end, the CPP “empower[ed] [EPA] to substantially restructure the American energy market,” leading to its demise.¹⁷⁴

The CPP, at the time, represented “the single most important step

166. *Skidmore*, 323 U.S. at 140.

167. *See* Brunstein, *supra* note 160, at 663 (“There is no one major questions doctrine in the lower courts.”).

168. *See* *West Virginia v. EPA*, 142 S. Ct. 2587, 2609–10 (2022); Deacon & Litman, *supra* note 158, at 1031–32.

169. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,665 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60) [hereinafter Clean Power Plan].

170. 42 U.S.C. § 7411(a)(1).

171. *See* 142 S. Ct. at 2599 (“Since passage of the [Clean Air] Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly.”).

172. *See id.* at 2602–03 (outlining three ways a regulated plant operator could comply with the Clean Power Plan (CPP)).

173. *See id.* at 2604 (“[T]he Clean Power Plan [will] drive a[n] . . . aggressive transformation in the domestic energy industry.” (citing *Am. Lung Ass’n v. EPA*, 985 F.3d 914, 1000 n.32 (D.C. Cir. 2021)) (alteration in original) (internal quotation marks omitted)).

174. *See id.* at 2610.

America has ever taken in the fight against global climate change.”¹⁷⁵ However, the CPP was not knocked down simply because it attempted to combat climate change; instead, EPA’s rule suffered from more mechanical defaults that, when taken together, provided reasons to hesitate.¹⁷⁶ First, the rule relied on a seldom-used provision of the Clean Air Act.¹⁷⁷ Second, implementing the rule would have resulted in a transformation of EPA’s regulatory authority.¹⁷⁸ Other factors included the financial effect on consumers, Congress’ refusal to pass legislation achieving similar goals, and scant regulatory precedent.¹⁷⁹ This hodgepodge of factors offers little guidance—creating a “know it when you see it” doctrine.¹⁸⁰

B. Seeking Patterns in the Fragmented Application of Economic and Political Significance

There is no uniform definition of what constitutes “vast economic and political significance.”¹⁸¹ As for political significance, the standard appears to include issues of “earnest and profound debate across the country.”¹⁸² For example, in a case striking down a license for nuclear waste storage, political significance turned on whether the issue had “been hotly politically contested” and was a “subject[] of public concern.”¹⁸³ Another potential indicator of political significance may include legislative history, particularly whether Congress has resisted enacting legislation substantively similar to the challenged agency action.¹⁸⁴ In *FDA v. Brown & Williamson Tobacco Corp.*,¹⁸⁵

175. Andrew Rafferty, *Obama Unveils Ambitious Plan to Combat Climate Change*, NBC NEWS (Aug. 3, 2015, 3:05 PM), <https://www.nbcnews.com/politics/barack-obama/obama-unveils-ambitious-plan-combat-climate-change-n403296> (quoting President Barack Obama).

176. Deacon & Litman, *supra* note 158, 1031–34 (discussing the legal flaws of the CPP).

177. *See* 142 S. Ct. at 2610 (examining the historical use of § 111(d) of the Clean Air Act).

178. *See id.* at 2611 (recognizing the potential “force” on the market).

179. Louis J. Capozzi III, *The Past and Future of the Major Questions Doctrine*, 84 OHIO ST. L.J. 191, 225 (2023).

180. *See* U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); Brunstein, *supra* note 160, at 693 (describing the treatment of the doctrine as a grab bag of factors).

181. *See* Brunstein, *supra* note 160, at 664 (documenting a few variations on determining what is economically significant); Deacon & Litman, *supra* note 158, at 1049 (equating political significance with “societal controversies”).

182. 142 S. Ct. at 2620 (Gorsuch, J., concurring) (citation omitted).

183. *Texas v. Nuclear Regul. Comm’n*, 78 F.4th 827, 831, 844 (5th Cir. 2023).

184. *See* 142 S. Ct. at 2610 (identifying regulatory programs that Congress had declined to enact itself as major questions); Brunstein, *supra* note 160, at 672 (involving “congressional failure to pass legislation”) (quoting *Guedes v. ATF*, 66 F.4th 1018, 1029 (D.C. Cir. 2023)).

185. 529 U.S. 120 (2000).

the Court pointed to six other statutes addressing the public health concerns of tobacco use, all precluding the type of regulatory action exercised by the FDA in regulating tobacco products.¹⁸⁶ There is no bright line rule defining political significance, but at a minimum, it likely refers to “sweeping pronouncements” on “societal controversies.”¹⁸⁷

As for economic significance, the overarching rule prohibiting regulations of a significant portion of the American economy seems clear on its face.¹⁸⁸ In practice, though, judges have varied remarkably in what they consider economically significant.¹⁸⁹ Predating the formal proclamation of the major questions doctrine, economic significance was thought to require “billions of dollars.”¹⁹⁰ This conception of economic significance likely holds.¹⁹¹ Several cases have invoked the doctrine where “billions of dollars” are involved.¹⁹² However, courts are inconsistent in evaluating whether that monetary amount reflects the required spending, economic impact, financial burdens, compliance costs, or possible fiscal benefits.¹⁹³ Furthermore, there seems to be some regional or market constraints on the economic factor, as reflected by the refusal to extend the doctrine where only nine projects in a remote part of Alaska were affected.¹⁹⁴ In addition, it is unlikely that agency action that only has millions of dollars of impact qualifies as economically significant.¹⁹⁵ While there are some guideposts, what is economically or

186. *See id.* at 125, 137, 138 (foreshadowing the major questions doctrine’s political significance factor).

187. *See BST Holdings v. Occupational Safety & Health Admin.*, 17 F.4th 604, 611 (5th Cir. 2021); Deacon & Litman, *supra* note 158, at 1049.

188. David M. Driesen, *The Political Economy of the Major Questions Doctrine* 13 (Aug. 7, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4181917 (quoting *Util. Air Reg. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

189. *See Brunstein*, *supra* note 160, at 664–65.

190. *King v. Burwell*, 576 U.S. 473, 485 (2015).

191. *West Virginia v. EPA*, 142 S. Ct. 2587, 2605 (2022) (using the phrase “billions of dollars”).

192. *See Ala. Ass’n of Realtors v. U.S. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (\$50 billion); *Texas v. United States*, 50 F.4th 498, 527 (5th Cir. 2022) (\$3.5 billion); *BST Holdings*, 17 F.4th at 617–18 (\$3 billion); *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *8 (D. Ariz. Jan. 6, 2023) (\$1.7 billion).

193. *See Brunstein*, *supra* note 160, at 664–65.

194. *Alaska Indus. Dev. & Exp. Auth. v. Biden*, 685 F. Supp. 3d 813, 835-36 (D. Alaska 2023) (refusing to extend the major questions doctrine to President Biden’s moratorium on oil and gas leasing in Arctic National Wildlife Refuge).

195. *Fed’n Ams. for Consumer Choice, Inc. v. U.S. Dep’t Lab.*, No. 3:22-cv-00243-K-BT, 2023 U.S. Dist. LEXIS 157268, at *41 (N.D. Tex. June 30, 2023) (stating \$80 million annual impact is “far short of the ‘vast economic . . . significance’” required) (citation omitted).

politically significant enough to qualify as a major question is not certain.¹⁹⁶

C. Stressing the Importance of Novelty or Lack of Historical Regulatory History

The major questions doctrine precludes “‘discover[ing] in a long-extant statute an unheralded power’ representing a ‘transformative expansion in [its] regulatory authority.’”¹⁹⁷ In other words, the historical precedent and regulatory history of an agency’s statutory interpretation provide meaningful guideposts to triggering the major questions doctrine.¹⁹⁸ Predating the formal proclamation of the major questions doctrine in *West Virginia*, the Court relied on the Occupational Safety and Health Administration’s (OSHA’s) historical use of emergency exceptions to notice-and-comment rulemaking when evaluating a COVID-19 vaccine mandate.¹⁹⁹ Noting that this statutory provision had only been used nine times in OSHA’s history, the Court concluded the mandate exceeded the agency’s authority.²⁰⁰ Similarly, in *West Virginia*, the majority heavily relied on the fact that EPA had very rarely used § 111(d) of the Clean Air Act to regulate pollution prior to the CPP.²⁰¹ The existence, or lack thereof, of a regulatory history of similar agency authority continues to be a turning point in major questions analysis.²⁰²

196. See Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 473 (2016) (discussing doctrinal uncertainty).

197. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2610 (2022) (citation omitted) (alteration in original).

198. See *Ready for Ron v. Fed. Election Comm’n*, No. 22-3282 (RDM), 2023 WL 3539633, at *10 (D.D.C. May 17, 2023) (relying on historical precedent); see also *Louisiana v. Biden*, 55 F.4th 1017, 1029–31 (5th Cir. 2022) (turning to the regulatory history). But see *Texas v. United States*, 50 F.4th 498, 527 (5th Cir. 2022) (“[H]istorical practice . . . ‘does not, by itself, create power.’”) (citation omitted).

199. Occupational Safety and Health Act, 29 U.S.C. § 652 (providing that the agency may promulgate such standards “‘reasonably necessary or appropriate to provide safe or healthful employment’”); *Nat’l Fed. Indep. Bus. v. Occupational Safety & Health Admin.*, 595 U.S. 109, 114 (2022).

200. See *Nat’l Fed. Indep. Bus.*, 595 U.S. at 114 (noting that of those nine times, only once has the rule been upheld upon judicial review).

201. See 142 S. Ct. at 2610 (noting § 111(d) as a vague, “ancillary provision” that has hardly been used).

202. See *Louisiana*, 55 F.4th at 1033; *Sweet v. Cardona*, 641 F. Supp. 3d 814, 824 (N.D. Cal. 2022); *Mayfield v. U.S. Dep’t of Lab.*, No. 1:22-cv-792-RP, 2023 WL 6168251, at *6 (W.D. Tex. Sept. 20, 2023); *GenBioPro, Inc. v. Sorsaia*, No. CV 3:23-0058, 2023 WL 5490179, at *4 (S.D. W. Va. Aug. 24, 2023); *Rest. L. Ctr. v. U.S. Dep’t of Lab.*, No. 1:21-CV-1106-RP, 2023 WL 4375518, at *13 (W.D. Tex. July 6, 2023); *Ready for Ron*, 2023 WL

Lower courts have run with Justice Roberts's explanation that the major questions doctrine turns on "the history and the breadth of the authority that [the agency] has asserted."²⁰³ In *Ready for Ron v. Federal Election Commission*,²⁰⁴ a political committee petitioning for Governor Ron DeSantis challenged the Federal Election Commission's (FEC's) conclusion that the petition was the equivalent of an in-kind contribution and could not be delivered to the Governor. In rejecting the plaintiff's major questions doctrine claim, the D.C. District Court concluded that the FEC's decision was consistent with "historical precedent."²⁰⁵ The FEC had consistently interpreted federal election campaign laws in a similar manner.²⁰⁶ Conversely, in a case challenging President Biden's executive order requiring federal contractors to be vaccinated, the Fifth Circuit struck down the mandate, finding it to be a substantially different use of the Procurement Act.²⁰⁷

The major questions doctrine is designed to prevent an administrative agency from "substantially restructur[ing]" a particular market or regulatory scheme.²⁰⁸ Substantially restructuring a market or regulatory scheme appears to be a high bar.²⁰⁹ The U.S. District Court for the Western District of Texas rejected a major questions doctrine challenge to the Department of Labor's (DOL's) rules pertaining to the wages of "tipped employee[s]," in part, because the rule "relied on the same authority . . . which has governed the industry for decades."²¹⁰ In another challenge to labor laws, a DOL regulation was upheld because it "was consistent with [DOL's] approach for

3539633, at *10; *Arizona v. Walsh*, No. CV-22-00213-PHX-JJT, 2023 WL 120966, at *7 (D. Ariz. Jan. 6, 2023).

203. See 142 S. Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); see also Brunstein, *supra* note 160, at 663–64.

204. See *Ready for Ron*, 2023 WL 3539633, at *1.

205. *Id.* at *10 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

206. See *id.* at *7–10 (discussing the agency's historical interpretation of key statutory terms).

207. See *Louisiana*, 55 F.4th at 1030, 1033 (discussing and comparing the use of the Procurement Act under other administrations this century); *Ensuring Adequate COVID Safety Protocols for Federal Contractors*, 3 C.F.R., 2021 Comp., pp. 640–43 (2021) (mandating federal contractors to get the COVID-19 vaccine); 40 U.S.C. § 101 (detailing the Procurement Act at issue).

208. See 142 S. Ct. at 2610.

209. See *id.* at 2607 (emphasizing that the CPP reflected a complete shift in regulatory approach that would require every power plant in the country to take some action).

210. *Rest. L. Ctr. v. U.S. Dep't of Labor*, No. 1:21-CV-1106-RP, 2023 WL 4375518, at *1, 13 (W.D. Tex. July 6, 2023), *appeal filed*, No. 23-50565 (5th Cir. Aug. 7, 2023).

over seven decades.”²¹¹

Although the labor laws were also defended for not invoking major questions of economic and political significance, a similar regulatory analysis was used in cases that have been the subject of serious political turmoil.²¹² For years, access to medical services for abortion and student loan forgiveness have been central to U.S. policy and legal debates.²¹³ Despite the public perception of these issues being of economic and political significance, the major questions doctrine was not triggered in two cases addressing these issues based on historical precedent.²¹⁴ In *GenBioPro, Inc. v. Sorsaia*,²¹⁵ there was a challenge to restrictions on the sale of mifepristone. The judge did not invoke the major questions doctrine, relying in part on the regulatory history of the FDA.²¹⁶ He noted that:

“[T]he seminal major questions cases all involved novel agency interpretations of long-standing ambiguous regulatory provisions as major grants of authority to reconfigure large aspects of the economy,” and, in contrast, FDA’s rule “does not ‘effect a fundamental revision of the statute, changing it from one sort of scheme of regulation into an entirely different kind.’”²¹⁷

In *Sweet v. Cardona*,²¹⁸ a class action brought by student-loan borrowers, the Ninth Circuit upheld the Department of Education’s (ED’s) use of settlement authority. The judge considered that the ED had similarly used its settlement authority at least seven other times.²¹⁹ The court did not invoke the major questions doctrine since there was a historical precedent for the agency’s assertion of authority.²²⁰

211. Brunstein, *supra* note 160, at 678; *see* *Mayfield v. U.S. Dep’t of Labor*, No. 1:22-cv-792-RP, 2023 WL 6168251, at *1–2 (W.D. Tex. Sept. 20, 2023).

212. *See Rest. L. Ctr.*, 2023 WL 4375518, at *13; *see also Mayfield*, 2023 WL 6168251, at *6.

213. *See Historical Abortion Law Timeline: 1850 to Today*, PLANNED PARENTHOOD, <https://www.plannedparenthoodaction.org/issues/abortion/abortion-central-history-reproductive-health-care-america/historical-abortion-law-timeline-1850-today> (last visited Aug. 11, 2024) (documenting the historical legal battles over abortion); Conner Reagan, *Student Loan Forgiveness: The Current Debate*, MICH. J. ECON. (Apr. 24, 2023), <https://sites.lsa.umich.edu/mje/2023/04/24/student-loan-forgiveness-the-current-debate/> (discussing the controversy over student loans).

214. *See Sweet v. Cardona*, 641 F. Supp. 3d 814 (N.D. Cal. 2022); *GenBioPro, Inc. v. Sorsaia*, No. CV 3:23-0058, 2023 WL 5490179, at *4 (S.D.W. Va. Aug. 24, 2023).

215. No. CV 3:23-0058, 2023 WL 5490179 (S.D.W. Va. Aug. 24, 2023).

216. *See id.* at *4.

217. *See* Brunstein, *supra* note 160, at 690–91 (quoting *GenBioPro, Inc.*, 2023 WL 5490179, at *4).

218. 641 F. Supp. 3d 814 (N.D. Cal. 2022).

219. *See id.* at 824–25; Brunstein, *supra* note 160, at 685.

220. *See Sweet*, 641 F. Supp. 3d at 824; Brunstein, *supra* note 160, at 685.

Lower courts' reluctance to invoke the major questions doctrine shows that agency action requires substantial economic and political effects and a departure from consistent historical regulatory authority to trigger a major questions doctrine review.²²¹ Without clear association to the economic and political significance and regulatory history factors, major questions doctrine is not a death knell to agency action.²²²

IV. RECOMMENDATIONS

Through an emphasis on FERC's regulatory history using § 205 and § 206 to promote competition and, in turn, facilitate renewable energy growth, FERC can offer a strong preemptive defense to potential major questions scrutiny.²²³ Given FERC's ratemaking authority under the FPA and the recent restructuring of energy markets to provide for increased competition, FERC can avoid implicating the major questions doctrine by creatively crafting regulatory initiatives that implicitly address climate change, emphasizing the economic benefit that renewable energy will yield in wholesale energy markets.²²⁴

FERC is unique in that its charter likely puts it on a path to inherently regulate issues of economic and political significance.²²⁵ The U.S. electric sector holds significant political and economic importance due to its critical role in powering the nation's economy and supporting various industries.²²⁶ Politically, the electric sector is subject to intense regulatory scrutiny and policymaking at both the federal and state levels.²²⁷ The sector's transition to cleaner and more sustainable energy sources is a key focus of political campaigns and is subject to fierce debate.²²⁸ For these reasons, it may fall under

221. See Brunstein, *supra* note 160, at 663–64 (introducing the factors lower courts use in major questions analysis).

222. See *id.* at 692–93 (concluding that lower courts have vast discretion in applying the major questions doctrine); Deacon & Litman, *supra* note 158, at 1050 (“Although none of the factors appear to be sufficient, by themselves, to elevate a policy to major status, it remains unclear which factors or how many factors are required to determine a policy is major.”).

223. See *supra* Part II.B.

224. See *FERC's Expansive Authority*, *supra* note 70, at 1814.

225. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2608 (2022).

226. See *supra* Part I.A.

227. See *id.*

228. See *Public Polling on Climate Change, Briefing Series: Congressional Climate Camp*, ENV'T & ENERGY STUDY INST., <https://www.eesi.org/briefings/view/020923camp> (Feb. 9, 2023) (finding that only 16% of Americans do not believe in climate change); Bella Isaacs-Thomas, *Climate Change is Hitting Close to Home for Nearly 2 out of 3 Americans, Poll Finds*, PBS NEWS HOUR (Aug. 3, 2023, 5:00 AM), <https://www.pbs.org/newshour/science/climate-change-is-hitting->

the major questions doctrine's political significance factor.²²⁹ However, in the last several years, Congress has designed major legislation to support renewable energy.²³⁰ This differs dramatically from sectors in which Congress has refused to legislate, which, in some cases, has led courts to be more willing to invoke the major questions doctrine.²³¹ On its face, the electric sector seems to be of political significance, but given the uncertainty in defining this factor, it is possible that a court may not automatically consider changes to the electric sector to be of vast political significance, depending on the totality of circumstances of any given regulation.

From an economic standpoint, the U.S. electric sector is a vital component of the nation's infrastructure, supporting economic growth and development.²³² The transition to a more diverse and sustainable energy mix presents economic opportunities, fostering innovation and investment in renewable technologies.²³³ Additionally, the electric sector plays a key role in job creation, with employment ranging from traditional energy production to emerging fields like renewable energy development and smart grid technology.²³⁴ It seems that the electric sector would be considered economically significant, but challenges may abound based on the actual monetary impact of any individual rule.²³⁵ Standards in the lower courts vary dramatically, and FERC may be able to skirt economic significance by taking action to regulate climate change step-by-step, as opposed to any one broad-sweeping regulation.²³⁶

close-to-home-for-nearly-2-out-of-3-americans-poll-finds (finding that two-thirds of adults see climate change noticeably affecting their communities and believe it is a current and "growing threat in the future").

229. *See supra* Part III.A.

230. *See* Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat. 429 (2021); Inflation Reduction Act of 2022, Pub. L. 117-169, 136 Stat. 1818.

231. *See* West Virginia v. EPA 142 S. Ct. 2587, 2610 (2022) (identifying regulatory programs that Congress had declined to enact itself as major questions); Brunstein, *supra* note 160, at 672 (involving "congressional failure to 'pass legislation'") (quoting Guedes v. ATF, 66 F.4th 1019, 1029 (D.C. Cir. 2023)); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137 (2000) (foreshadowing the major questions doctrine's political significance factor).

232. James McBride & Anshu Siripurapu, *How Does the U.S. Power Grid Work?*, COUNCIL ON FOREIGN RELS. (July 5, 2022, 11:53 AM), <https://www.cfr.org/backgrounder/how-does-us-power-grid-work> (discussing the power grid's role in powering the U.S. economy).

233. NAT'L RENEWABLE ENERGY LAB., DOLLARS FROM SENSE: THE ECONOMIC BENEFITS OF RENEWABLE ENERGY 2 (1997).

234. *See id.*

235. *See supra* Part III.B (discussing the uncertainty on what is considered economically significant).

236. *See id.*

Regardless of whether any FERC action is of political or economic significance, FERC can avoid major questions doctrine by pointing to its historical precedent under § 205 and § 206 addressing climate change through supporting renewable energy.²³⁷ FERC has used the FPA to regulate the electric sector since the early twentieth century, and in the last couple of decades, the Commission has used its authority to support renewable energy growth.²³⁸ The Commission has used the just and reasonable standard, the “directly affects” standard, and more to radically transform the electric grid.²³⁹ One would be hard-pressed to say that any action removing barriers to competition in the wholesale energy market is unheralded.²⁴⁰ Policies of this sort fit within FERC’s general pro-competitive mission of eliminating barriers to market participation for new technologies.²⁴¹ FERC should continue to use § 205 and § 206 to regulate activities that directly affect wholesale markets for the purpose of ensuring a competitive energy market.²⁴² In doing so, the Commission can implicitly provide solutions to the climate crisis without invoking the major questions doctrine triggered by EPA’s generation shifting program.

Specifically, it is possible that the agency could consider a carbon adder (essentially a carbon tax) on technologies bidding into energy markets.²⁴³ Or, the agency could issue a rulemaking that required energy projects to include the environmental analysis involved in the permitting process to transfer energy costs when bidding into the wholesale markets.²⁴⁴ Ultimately, whatever path FERC chooses, so long as it regulates activities that directly affect wholesale markets for the purpose of removing market barriers for new entrants and increasing competition in energy markets, FERC can likely avoid major questions implications since that behavior is rooted in an extensive regulatory history.²⁴⁵

237. See *supra* Part III.C (discussing the importance of an agency’s regulatory history).

238. *FERC’s Expansive Authority*, *supra* note 70, at 1814.

239. See *supra* Part II.B.

240. See *supra* Part II.B.

241. *FERC’s Expansive Authority*, *supra* note 70, at 1835–42.

242. Federal Power Act, 16 U.S.C. § 824 et seq. (2018).

243. See, e.g., Glazer, Craig, Jay Morrison, Paul Breakman, Allison Clements & Lisa C. Schwartz, *The Future of Centrally-Organized Wholesale Electricity Markets*, FUTURE ELEC. UTIL. REGUL. 47 (2017), <https://emp.lbl.gov/publications/future-centrally-organized-wholesale> (arguing that “FERC could approve a direct carbon adder to energy market dispatch if states or the federal government chose that policy approach”); Christopher J. Bateman & James T. B. Tripp, *Toward Greener FERC Regulation of the Power Industry*, 38 HARV. ENV’T. L. REV. 275, 330 (2014) (“FERC could mandate that wholesale market sales of electricity reflect and incorporate the cost of carbon.”).

244. See Glick & Christiansen, *supra* note 6, 39–44.

245. See *supra* Part II.B.

CONCLUSION

If FERC is to actively aid the fight against climate change, the Commission must be careful to frame its policies supporting renewable generation resources as exercising its obligation to remove barriers for new entrants and ensure competition in energy markets. Given FERC's ratemaking authority under the FPA and the recent restructuring of energy markets to provide for increased competition, FERC can avoid implicating the major questions doctrine by creatively crafting regulatory initiatives that implicitly address climate change and emphasize the economic benefit that renewable energy will yield in wholesale energy markets.

Since FERC has used § 205 and § 206 of the FPA consistently to remedy unjust and unreasonable market features, its strongest case to avoid major questions is to continue to use this particular authority. In addition, so long as FERC's policies "directly affect" wholesale markets, its action will fall clearly within the Commission's statutory mandate. Therefore, FERC can avoid major questions implications by using § 205 and § 206 to require wholesale markets to remove barriers for renewable resources.