ENERGY LAW AND THE LOW-INCOME HOUSEHOLD

BY
UMA OUTKA*

Recent policy attention to high energy bills in low-income households highlights an issue that has long been marginalized in energy law. Energy burden affects millions of low-income households in the United States and contributes to home energy insecurity—experiencing or being at risk of utility disconnection. High energy burden disproportionately affects Black, Latino, and Native households.

Concern over energy burden may be new to many in policy circles, but energy insecurity in low-income households is neither a new issue nor a new policy quandary. Indeed, the longest-standing federal mechanism for preserving energy access, the Low-Income Home Energy Assistance Program (LIHEAP), recently marked its 40-year anniversary, a celebrated milestone for the critical program.

Yet home energy insecurity persists, with implications for health, education, economic stability, and safety in too many households. Only a few short years ago, the Trump White House proposed budgets eliminating LIHEAP—a sober reminder of the precarity of any program dependent on annual congressional appropriations in a polarized political environment. LIHEAP serves a vital purpose and must be ardently protected. At the same time, the persistence of energy insecurity demands broader structural accountability within energy law.

A closer look at the relationship between energy law and the low-income household helps to explain the persistence of home energy insecurity. Considering this relationship historically shows that energy insecurity has been sidelined within energy law regimes by a theoretical and practical framing of low-income energy policy as poverty law, rather than as a core concern for energy law. However

*William R. Scott Professor of Law, University of Kansas School of Law. The author is grateful to Andrew Hammond, Ezra Rosser, and all participants of the 2024 Poverty Law Conference, as well Chris Drahozal, Joel Eisen, Ann Eisenberg, Allison Glocke, Alex Klass, Richard Levy, Saru Matambanadzo, Heather Payne, Najarian Peters, Alex Platt, Tom Stacy, Danielle Stokes, Andrew Torrance, Kyle Velte, Steve Ware, and Lua Yuille for helpful comments at various stages of this project. Thanks is also due to Kyler Jackson (KU Law '22) and John Langmaid (KU Law '24) for research assistance.

understandable administratively, this alignment has isolated energy insecurity as a consideration in energy law reform.

This intertwined history presents compelling reasons to reconceive of low-income energy policy as energy law, not to displace the critical assistance provided by anti-poverty programs, but rather to reinforce it. This conceptual reorientation matters in the energy sector's current transitional moment for two key reasons. First, it opens a pathway for ensuring that substantive reforms underway at the federal and state levels structurally incorporate the needs of low-income households in energy law regimes. Second, it increases accountability for alleviating energy insecurity within energy law institutions.

I. INTRODUCTION

Recent policy attention to high energy bills in low-income households highlights an issue that has long been marginalized in energy law. Energy burden—the percentage of income used to pay basic home energy needs—is highest in low-income households.[1] High energy burden contributes to energy insecurity, putting people at risk of having utilities disconnected and forcing difficult choices between energy bills and other

[1] Energy burden is the "percentage of gross annual household income that is used to pay annual residential energy bills." APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, LIHEAP ENERGY BURDEN EVALUATION STUDY: FINAL REPORT 2 tbl.1-1 (2005), https://perma.cc/X2TP-5PZT. Federal law defines "energy burden" as a simple math equation: "the expenditures of the household for home energy divided by the income of the household." Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8622(2) (2018).

basic household needs, including food, childcare, gasoline, or home repairs. Black, Latino, and Native American households pay a substantially higher percentage of their income for energy than white households.[2] Energy insecurity affects millions of low-income households in the United States.[3]

Under the Biden Administration, the goal of energy justice was formally recognized within the U.S. Department of Energy (DOE) for the first time with the appointment of a Deputy Director for Energy Justice.[4] Energy justice means fairness both in access to benefits and protection from environmental harms associated with the energy system.[5] This new focus for the DOE aligns with other major initiatives of the Biden Administration to reduce environmental pollution in neglected and overburdened communities.[6]

Energy burden may be a new concern to many in policy circles, but energy insecurity is not a new issue for low-income households nor is it a new policy quandary. Indeed, the primary federal mechanism for

---

[2] CTR. FOR BIOLOGICAL DIVERSITY ET AL., POWERLESS IN THE UNITED STATES: HOW UTILITIES DRIVE SHUTOFFS AND ENERGY INJUSTICE 16 (2023), https://perma.cc/US4T-MN9U (detailing disparities in utility disconnection); ARIEL DREHOBL ET AL., HOW HIGH ARE HOUSEHOLD ENERGY BURDENS? AN ASSESSMENT OF NATIONAL AND METROPOLITAN ENERGY BURDEN ACROSS THE UNITED STATES 11–13 (2020), https://perma.cc/QL4Q-U43U; Jamal Lewis et al., *Energy Efficiency as Energy Justice: Addressing Racial Inequities Through Investments in People and Places*, 13 ENERGY EFFICIENCY 419, 420 (2019) ("African Americans are particularly susceptible to energy insecurity.").

[3] U.S. DEP'T OF HEALTH & HUM. SERVS., LOW INCOME HOME ENERGY ASSISTANCE PROGRAM: REPORT TO CONGRESS FOR FISCAL YEAR 2020 vii–viii (2020), https://perma.cc/8JXP-J6L4.

[4] The first Deputy Director for Energy Justice was Shalanda Baker, who went on to serve as Director of the Office of Economic Impact and Diversity and Secretarial Advisory on Equity. *The Honorable Shalanda H. Baker*, CLIMATE REALITY PROJECT, https://perma.cc/342S-5R7X (last visited Sept. 16, 2024). For more on the DOE's work focused on energy justice, see U.S. DEP'T OF ENERGY: OFF. OF ENERGY JUST. & EQUITY, https://perma.cc/H4R9-JF6G (last visited Sept. 22, 2024).

[5] The Initiative for Energy Justice, co-founded by Shalanda Baker before she joined the DOE, defines energy justice with more precision as "the goal of achieving equity in both the social and economic participation in the energy system, while also remediating social, economic, and health burdens on marginalized communities." SHALANDA BAKER ET AL., THE ENERGY JUSTICE WORKBOOK 5 (2019), https://perma.cc/3QVX-BWBY. Energy justice builds on the environmental justice movement, which extends the critique of racial and income inequality in pollution exposure and legal protection from environmental harm to ways that harms and benefits of the regulated energy system track income and racial lines. For more on this connection, see generally Clifford J. Villa, *No "Box to Be Checked": Environmental Justice in Modern Legal Practice*, 30 N.Y.U. ENV'T L.J. 157, 185–190 (2022) (situating environmental justice in relation to modern energy infrastructure disputes). *See also* Shelley Welton & Joel Eisen, *Clean Energy Justice: Charting an Agenda*, 43 HARV. ENV'T L. REV. 307, 337–38 (2019) (recommending areas of focus for future energy justice research); Uma Outka, *Fairness in the Low-Carbon Shift: Learning from Environmental Justice*, 82 BROOKLYN L. REV. 789, 790 (2017) (connecting energy justice to environmental justice origins).

[6] *See, e.g.*, Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Feb. 1, 2021), *amended by* Exec. Order No. 14,082, 87 Fed. Reg. 56861 (Sept. 16, 2022); *see also* discussion *infra* Section IV.C.

preserving energy access, the Low-Income Home Energy Assistance Program (LIHEAP)—the centerpiece of low-income energy policy in the United States—has been in place for over forty years. Household energy burden became a focal point for social and political concern in the face of volatile energy markets and rising energy prices in the late 1970s. To help ease the impact of this volatility on low-income households, Congress enacted the Home Energy Assistance Act of 1980,[7] a law designed to "make grants to States to provide assistance to eligible households to offset the rising costs of home energy that are excessive in relation to household income."[8] A year later, in 1981, Congress refined the law with the Low-Income Home Energy Assistance Act (LIHEAA)[9] to create LIHEAP, which protects energy access for millions of people to this day.[10]

Yet energy insecurity persists, with implications for health and wellbeing, education, economic stability, and safety in too many households.[11] More robust LIHEAP funding is one obvious potential response, and LIHEAP funding did indeed increase during and following the pandemic.[12] Yet even with additional funding, experts reported funds were sufficient to reach only one in six households eligible for home energy assistance.[13] In addition, only a few short years ago, the Trump White House proposed budgets that would have eliminated LIHEAP—a sober reminder of the precarity of any program dependent on annual congressional appropriations in a polarized political environment.[14] Advocates thus agree that LIHEAP must be ardently protected and strengthened—it literally saves lives.[15] At the same time, the persistence of energy insecurity demands broader structural accountability for energy justice within energy law.

---

7 42 U.S.C. §§ 8601–8612, *repealed by* Low-Income Home Energy Assistance Act of 1981, 42 U.S.C. § 8621–8630 (2018).

8 *Id.* § 8601(b).

9 42 U.S.C. § 8621 (2018).

10 NAT'L ENERGY ASSISTANCE DIRS. ASS'N & CTR. FOR ENERGY POVERTY & CLIMATE, ENERGY HARDSHIP REPORT 15 (2014).

11 *See, e.g.*, ARIEL DREHOBL & LAUREN ROSS, LIFTING THE HIGH ENERGY BURDEN IN AMERICA'S LARGEST CITIES: HOW ENERGY EFFICIENCY CAN IMPROVE LOW INCOME AND UNDERSERVED COMMUNITIES 13 (2016), https://perma.cc/J57G-NF6Y.

12 In the height of the Covid-19 pandemic, Congress appropriated $900 million in supplemental funding for home energy needs under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, Pub. L. 116–136, 134 Stat. 281, 557 (2020). According to the LIHEAP Clearinghouse, "[a]ll 50 states, the District of Columbia, five U.S [sic] territories, and almost all Native American tribes and tribal organizations that are current LIHEAP grantees received a supplemental award." *LIHEAP Funding*, LIHEAP CLEARINGHOUSE, https://perma.cc/CM9G-NUFD (last updated Aug. 23, 2024).

13 Letter from Nat'l Energy Assistance Directors' Ass'n (NEADA) et al., to Congressional Leaders (Jan. 28, 2021), https://perma.cc/HD6G-BDVY.

14 *See* LIBBY PERL, CONG. RSCH. SERV., RL31865, LIHEAP: PROGRAM AND FUNDING 33–34, tbl.B-3 (2018) (comparing Presidents' requests for funding of LIHEAP with amount authorized and appropriated by Congress).

15 *E.g.*, NAT'L ENERGY & UTIL. AFFORDABILITY COAL., LOW INCOME HOME ENERGY ASSISTANCE PROGRAM PROTECTS LIVES (2024), https://perma.cc/X8PC-XD82.

A closer look at the historical relationship between energy law and "the low-income household" helps to explain the persistence of home energy insecurity.[16] Considering this relationship shows that energy insecurity has long been sidelined within energy law regimes by a theoretical and practical framing of low-income energy policy as an extension of *poverty law*, rather than as an integral concern for *energy law*. However practical administratively, this alignment has isolated energy insecurity as a consideration in energy law reform. This isolation is reflected by the fact that low-income energy policy was mostly and conspicuously static for four decades, while the same period for the energy sector more broadly was marked by dynamic change. The contours of state and federal jurisdiction in energy law create gaps that further reinforce energy insecurity for low-income households.

Building from these observations, the historical perspective presents compelling reasons to reconceive low-income energy policy as energy law, expanding from and beyond the assistance model aligned with other anti-poverty programs. This conceptual reorientation is highly relevant to the energy sector's current transitional moment for two reasons.

First, it opens a pathway for ensuring that substantive reforms underway at the federal and state levels structurally incorporate the needs of low-income households in energy law regimes. The pandemic brought into sharper relief the tangential and precarious positioning of low-income households within energy law as many states set emergency moratoria on residential utility disconnections for nonpayment.[17] Burgeoning new funding streams and programs now focused on energy justice are the successful result of decades of advocacy, bolstered by recent research confirming energy inequities.[18] An energy justice perspective offers new ways to conceive of energy law's social justice potential, despite the field's traditional roots in macro-economic regulation.[19] As energy law evolves, repositioning low-income energy policy can help guide regulatory and clean energy transition reforms to alleviate persistent energy insecurity. Anchoring the current dynamism

---

16 The focus on "the low-income household" endures from the earliest considerations of home energy assistance by Congress. *See, e.g.*, CONG. BUDGET OFF., LOW-INCOME ENERGY ASSISTANCE: ISSUES AND OPTIONS (1981) (prepared at request of the Senate Budget Committee, discussing impact of volatile energy pricing on "low-income households").

17 RICHARD J. CAMPBELL & ASHLEY J. LAWSON, CONG. RSCH. SERV., R46401, COVID-19 ELECTRIC UTILITY DISCONNECTIONS 1, 4 tbl.1 (2020).

18 Hannah Perls, *Breaking Down the Environmental Justice Provisions in the 2022 Inflation Reduction Act* (Aug. 12, 2022), https://eelp.law.harvard.edu/ira-ej-provisions/ (tracing provisions of the Inflation Reduction Act channeling an estimated "$40 billion in direct benefits for communities with EJ concerns").

19 For some of these possibilities, see CHANDRA FARLEY ET AL., REP. NO. 12, ADVANCING EQUITY IN UTILITY REGULATION 52–53, 56 (2021), https://perma.cc/YBZ3-VD25; Gabriel Chan & Alexandra B. Klass, *Regulating for Energy Justice*, 97 N.Y.U. L. REV. 1426, 1429–32, 1506 (2022).

of energy policy innovation to an energy justice frame will require structural changes in order to be lasting.

Second, this conceptual reorientation increases accountability for alleviating energy insecurity within energy law institutions. Reconceiving low-income energy policy as energy law should supplement and enrich, not displace, the vital work LIHEAP and related programs perform in support of low-income households via the poverty law frame. My hope is that understanding the historical positioning of low-income energy policy will reinforce vigilance against the temptation to resist or reject reform efforts in the name of energy justice in favor of business as usual. The inertia of existing systems, however outmoded, is powerful. Critics will try to move on from energy justice, casting it as a fad or trend, ignoring how the underlying issues are far from new. Political posturing to undermine the legitimacy of energy and environmental justice as policy goals is already underway.[20] Greater accountability for energy insecurity within energy law institutions is needed for real and long-term reductions in low-income energy burden.

In what follows, Part II provides a brief contextual overview of household energy insecurity in the United States and related research that can inform law and policy focused on energy access. It then provides a primer on the Low-Income Home Energy Assistance Act of 1981 (LIHEAA) that created LIHEAP and related assistance programs created under other statutes close in time. This primer helps to trace how energy burden, energy insecurity, and poverty have been positioned as policy considerations largely tangential to energy law, from the origin of federal low-income home energy assistance in the 1970s until only very recently, when advocates have succeeded in drawing new policy attention to these issues at the federal and state levels. [21]

Part III expands the argument for reconceiving low-income energy policy as energy law, not to displace or alter the structure of LIHEAP and related programs as we know them today, but to hold energy law regimes more directly accountable to low-income households. The goal is not to undercut the poverty law functions of LIHEAP and related programs that provide critical assistance to low-income households every year. Rather, the aim is to more effectively address the underlying energy insecurity that creates the need for help in preserving home energy access. In arguing for this repositioning, I recognize that neither energy law nor poverty law has clear borders as fields of practice or study, and certainly

---

[20] The Heritage Foundation explicitly calls for reversing course at the federal level on environmental justice and key related energy objectives. HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 376–79, 389 (2023) [hereinafter PROJECT 2025]. Political partisanship has been a fixture in energy policy at both the federal and state levels for some time. *See* Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 696–718 (2016) (discussing the intensive partisan politics surrounding the energy sector, with a focus on climate policy).

[21] *See* discussion *infra* Section II.B.

both areas of law intersect with others in important ways. Nonetheless, surveying the common demarcations that define these fields in the literature only underscores the missed opportunity represented by the traditional positioning of home energy assistance—and of energy insecurity by extension. When low-income energy policy is understood primarily through the lens of traditional poverty law programs channeling financial assistance, the relevant legal and policy principles have little to do with energy and much more to do with the contested contours of governmental responsibility toward "the poor."[22] Energy law institutions have tended to lean on poverty law, avoiding too close a look at the persistence of energy insecurity in low-income households. To explore this dynamic, Part III considers the relationship between energy law federalism and energy insecurity and how poverty narratives shaped early conceptions of low-income energy policy.

Part IV concludes that centering low-income energy policy within energy law should bring new attention to how forces driving this transitional moment for the electricity sector—economic, political, and environmental—can be channeled to minimize home energy insecurity and, indeed, to make this goal central to energy law reform. It is widely accepted that energy access should be available to all, and in the United States, it is considered "a necessity of modern life."[23] Every person is vulnerable to extreme temperatures and other harms when utility service is disconnected, whether due to unpaid bills or an ice storm freezing natural gas lines like people experienced across Texas and the Great Plains in February 2021.[24] Ideally, legal institutions and governance regimes should be structurally responsive to this human condition in broad and realistic terms that enhance security for all.[25] The current transition has potential to expand low-income energy policy beyond the

---

[22] *See* discussion *infra* Section III.C.

[23] Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 18 (1978); s*ee also* UNITED NATIONS, THE SUSTAINABLE DEVELOPMENT GOALS REPORT 2023: SPECIAL EDITION 64 (2023), https://perma.cc/J8UC-LZF5 (Establishing a goal of affordable and clean energy by "ensur[ing] access to affordable, reliable, sustainable and modern energy for all"); EDWARD E. ZAJAC, POLITICAL ECONOMY OF FAIRNESS 127 (1995) ("[B]asic utilities are now generally considered necessities that should be provided by society as an economic right.").

[24] UNIV. OF HOUSTON HOBBY SCH. OF PUB. AFFS., THE WINTER STORM OF 2021, at 1 (2021), https://perma.cc/5NWL-DBPY (describing Texans' experience during winter storm Uri, when sixty-nine percent of Texans "lost electrical power . . . for an average of 42 hours").

[25] This perspective aligns with vulnerability theory as articulated by Martha Fineman. *See generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS (Martha Albertson Fineman & Anna Grear eds., 2013) (assessing and refining vulnerability theory); Nina A. Kohn, *Vulnerability Theory and the Role of Government*, 26 YALE J. L. & FEMINISM 1 (2014) (describing how, under Fineman's approach, policy shifts from a focus on how to distribute limited governmental resources—defining and assessing eligibility for who, individually, deserves help—to institutional reflection on the efficacy of governance structures' response to underlying reasons people need help).

mostly crisis-based intervention model that dominates today toward a more systemic and inclusive reform agenda for modern energy law.

II. HOME ENERGY INSECURITY IN LOW-INCOME HOUSEHOLDS

The energy sector connects every part of society, from the largest-scale corporate and industrial operations to the smallest scale. The focus here: the household. Energy access intimately affects domestic life—heat that keeps us warm at night in the winter, air conditioning that protect us from soaring summer heat, electricity to cook our meals, wash our clothes, and read after dark.

In dialogue with a growing literature on energy justice, this Article differentiates *home energy insecurity* from *energy poverty*.[26] The term energy insecurity used here helps to distinguish between energy access issues in the United States which, while serious and the focus of this Article, differ fundamentally from the much more extreme energy poverty people experience elsewhere in the world.[27] Globally, universal energy access has yet to be achieved.[28] The International Energy Agency estimates 760 million people worldwide still do not have access to electricity, 80 percent of whom live in sub-Saharan Africa.[29] Millions in India still have no home electricity access.[30] In the United States, by contrast, energy access is considered universally available, although

---

[26] *See, e.g.*, Rosie Day & Gordon Walker, *Household Energy Vulnerability as 'Assemblage,' in* ENERGY JUSTICE IN A CHANGING CLIMATE: SOCIAL EQUITY AND LOW-CARBON ENERGY 14 (Karen Bickerstaff et al. eds., 2013) (comparing use of terms "fuel poverty, energy poverty, energy insecurity, energy deprivation[,] and energy precariousness" and observing "energy poverty tends to be used in relation to access and affordability problems in the developing world which can take on a quite different character" than in Europe or the U.S.).

[27] *See Defining Energy Access: 2020 Methodology*, INT'L ENERGY AGENCY (Oct. 13, 2020), https://perma.cc/32BM-XBHT ("There is no single internationally-accepted and internationally-adopted definition of modern energy access. Yet significant commonality exists across definitions . . . . Electricity access entails a household having initial access to sufficient electricity to power a basic bundle of energy services—at a minimum, several lightbulbs, phone charging, a radio and potentially a fan or television . . . .").

[28] *See* MICHAËL AKLIN ET AL., ESCAPING THE ENERGY POVERTY TRAP: WHEN AND HOW GOVERNMENTS POWER THE LIVES OF THE POOR 19–57 (2018) (describing energy poverty at the global scale).

[29] INT'L ENERGY AGENCY, WORLD ENERGY OUTLOOK 2023 183 (2023), https://perma.cc/YPS5-Q6XY.

[30] INT'L ENERGY AGENCY ET AL., TRACKING SDG7: THE ENERGY PROGRESS REPORT 35 (2021), https://perma.cc/H4UV-LG7C. For discussion of barriers to energy access in India, *see* Bruce Murphy & Hannah Daly, Commentary, *Electricity in Every Village in India*, INT'L ENERGY AGENCY (June 1, 2018), https://perma.cc/D3ZZ-JMAJ (distinguishing Indian government's announcement that electricity reached every village in India for the first time in 2018 with goal of universal household electricity access); Eugenie Dugoua et al., *Geographic and Socio-Economic Barriers to Rural Electrification: New Evidence from Indian Villages*, 106 ENERGY POL'Y 278, 279 (2017) (finding socio-economic inequity, in both wealth and caste composition of villages, affected pattern of electrification progress in rural communities).

periodic loss of access and the risk of this loss—energy insecurity—are common experiences for many people.[31]

A second reason I favor the term energy insecurity here over energy poverty is that energy insecurity can affect low and even middle-income households in the United States that exceed federal poverty guidelines.[32] The U.S. Energy Information Administration (EIA) defines household energy insecurity as "the inability to adequately meet basic household energy needs" and is a measure the EIA Residential Energy Consumption Survey uses "to count households that have received a disconnection notice, have reduced or forgone basic necessities to pay energy bills, kept their houses at unsafe temperatures because of energy cost concerns, or been unable to repair heating or cooling equipment because of cost."[33] The term energy insecurity avoids suggesting that insecure energy access only affects households living at or below the poverty line.[34]

For over forty years, the LIHEAA has helped to cover energy expenses for many low-income households. Despite its longevity, however, the need for energy assistance remains as critical as ever for many low-income households.[35]

---

[31] INT'L ENERGY AGENCY ET AL., *supra* note 30, at 4. Despite the 100 percent energy access rating for the U.S., people experiencing homelessness in the U.S. commonly lack access to energy for heat, with dire consequences. *See* REBECCA STURGIS & NEIL J. DONOVAN, NAT'L COAL. FOR THE HOMELESS, WINTER HOMELESS SERVICES: BRINGING OUR NEIGHBORS IN FROM THE COLD 3 (2010), https://perma.cc/P8QZ-6BYP (observing that 44 percent of homeless people in the U.S. are "unsheltered" and at risk of frostbite and hypothermia from exposure to cold temperatures). Energy access is also not universally available on some tribal reservations—what Professor Catherine Sandoval has described as "the Native American electricity gap." Catherine J.K. Sandoval, *Energy Access Is Energy Justice: The Yurok Tribe's Trailblazing Work to Close the Native American Reservation Electricity Gap*, *in* ENERGY JUSTICE: US AND INTERNATIONAL PERSPECTIVES 166, 167 (Raya Salter et al., eds., 2018).

[32] According to the 2020 Residential Energy Consumption Survey, the greatest reported energy insecurity came from households with income less than $10,000 (57%), but it affects households earning $10,000–19,999 (47%); $20,000–39,999 (40%); $40,000–59,999 (29%); and $60,000–99,999 (20%). *In 2020, 27% of U.S. Households Had Difficulty Meeting Their Energy Needs*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY (Apr. 11, 2022), https://perma.cc/SLV2-KTCH.

[33] *U.S. Energy Insecure Households Were Billed More for Energy than Other Households*, U.S. ENERGY INFO. ADMIN.: TODAY IN ENERGY (May 30, 2023), https://perma.cc/YD3T-KZHQ.

[34] The 2024 federal poverty guideline for a four-person household is $31,200 (higher guidelines apply in Alaska and Hawaii). Annual Update of the HHS Poverty Guidelines, 89 Fed. Reg. 2961, 2962 (Jan. 17, 2024).

[35] *See, e.g.*, Letter from NEADA et al., *supra* note 13 ("Funding for [LIHEAP] is sufficient to help only about one out of six eligible households and cannot be stretched to help the newly unemployed with their growing bills, without additional funding[,]" even despite the "$900 million in supplemental funds provided for LIHEAP by the Coronavirus Aid, Relief, and Economic Security (CARES) Act" which was "able to reach only a fraction of those households that need support.").

A. Energy Insecurity in the U.S. Context

Federal low-income energy policy grew out of a basic recognition by Congress that "low-income households spend a larger proportion of their incomes on energy-related expenditures than do other households" and therefore "lose a larger proportion of their real incomes when energy prices rise."[36] For this reason, energy insecurity, and the stress in low-income households when access to energy is in jeopardy, are closely entwined with household energy burden.

Under the pressure of volatile energy markets in the 1970s, fresh political attention turned to the unpredictable and very serious effects such volatility could have on low-income households struggling to pay energy bills. It became clear, as the Congressional Budget Office (CBO) explained in a 1981 report, that the distributional impact of broader economic effects of rising energy prices would also likely affect low-income households most painfully, as energy costs caused "significant structural changes in the U.S. economy," including "employment opportunities, wages, and corporate profits."[37] Rising energy costs also affect the price of food and other goods and services households rely upon, extending the impact of rising energy costs beyond the home energy bill. As with direct energy expenses, the CBO observed in LIHEAP's inaugural year that "indirect energy expenditures consumed a greater share of the income of low-income households."[38]

As this initial introduction to LIHEAP's origins demonstrates, the issue of energy burden is not new. Indeed, the concept of energy burden emerged early as foundational to the theory and structure of federal low-income energy policy, spanning legislative antecedents of LIHEAP, its initial structure, subsequent amendments, through to LIHEAP and related programs in their modern form.[39] Importantly, however, energy burden is understood today not just in relation to price spikes due to energy market volatility, but as representing the persistent difficulty many low-income households face keeping up with energy bills month by month. High utility expenses can stem from a number of factors, including poor home insulation, inefficient HVAC systems and appliances, persistent or sudden economic hardship, increasingly common weather extremes, and higher energy use due to personal circumstances such as physical limitations or age.[40]

Recent research by the American Council for an Energy Efficient Economy (ACEEE) confirms this sobering disparity: "Low-income households spend three times more of their income on energy costs

---

[36] CONG. BUDGET OFF., *supra* note 16, at ix.

[37] *Id.* at xi.

[38] *Id.* at 14.

[39] *See discussion infra* Section III.B.

[40] DREHOBL & ROSS, *supra* note 11, at 11.

compared to the median spending of non-low-income households."[41] During the pandemic in 2020, 34 million households (27 percent of all U.S. households) "reported difficulty paying energy bills" or kept their home "at an unsafe temperature because of energy cost concerns."[42] After the worst of the pandemic was over, in 2023, the National Energy Assistance Directors' Association (NEADA) reported 17 percent of all U.S. households were unable to pay energy bills, including 22 percent of households with children and 36 percent of households earning less than $50,000 per year.[43] Household heating costs rose 17 percent in 2022 for all fuels, especially heating oil and natural gas.[44] A recent study of "payday" lending found that paying utility bills was the most common reason people sought these short-term high-interest loans.[45]

When high energy burden threatens energy access for low-income households, energy insecurity can have broad implications for the economic, social, and physical wellbeing of household members. Research documents show that a lack of access to heat and cooling in the home is associated with a wide range of health problems, including "asthma, respiratory problems, heart disease, arthritis, and rheumatism."[46] Energy insecurity increases the risk of physical and mental health problems, especially problems in children and adolescents, with implications for development in a range of measures, including academic achievement.[47]

Chronic stress is itself a serious health hazard, and stress over energy access will often be one among many compounding pressures on low-income households struggling with the costs of other necessities.[48] According to a NEADA survey, LIHEAP recipients reported going without food for a least one day (36 percent), going without medical or dental care (41 percent), and not filling a prescription or taking less than the prescribed doses of medication (31 percent) due in part to their high

---

41 DREHOBL ET AL., *supra* note 2, at iii.

42 *In 2020, 27% of U.S. Households Had Difficulty Meeting Their Energy Needs*, *supra* note 32.

43 Press Release, Nat'l Energy Assistance Directors' Ass'n, States Call for Congress to Restore Funding for LIHEAP: About 1.4 Million Households Could be Cut from the Program (Jan. 23, 2024), https://perma.cc/Y4QX-TSQ6.

44 NAT'L ENERGY ASSISTANCE DIRS'. ASS'N, ENERGY HARDSHIP REPORT 8 (2022), https://perma.cc/37C2-UQGJ.

45 DREHOBL & ROSS, *supra* note 11, at 13 (citing ROB LEVY & JOSHUA SLEDGE, A COMPLEX PORTRAIT: AN EXAMINATION OF SMALL-DOLLAR CREDIT CONSUMERS (2012), https://perma.cc/6LJS-8AKQ).

46 *Id.* (summarizing effects of high energy burden on well-being of affected low-income household members, citing multiple sources).

47 *Id.*

48 *See* CHARLES HARAK ET AL., ACCESS TO UTILITY SERVICE 4 (6th ed. 2018) ("Studies have shown that low-income families reduce their food expenditures and cut back on other necessities in order to pay higher energy bills during cold winter months."); *see also* DREHOBL ET AL., *supra* note 2, at 5 (describing mental health impacts of high energy burdens).

energy expenses.[49] Over 80 percent of households had an annual income below $20,000, with over 25 percent having experienced unemployment and 15 percent having experienced electric or gas utility disconnection in the last year.[50]

Energy burden varies regionally and between rural and more urbanized areas. ACEEE recently studied each context—rural and urban—to shed light on this variability. In assessing energy burden in large cities, researchers found that the "overwhelming majority" of low-income households, households of color, and renting households "experienced higher energy burdens than the average household in the same city."[51] In surveying forty-eight of the largest cities in the United States, ACEEE found that in over a third of those cities, energy burden is often much higher, with a quarter of low-income households facing energy burdens that exceed 14 percent, greater than higher-income households by a wide margin.[52]

When assessing energy burden in rural homes, ACEEE found that "[n]ationally, rural low-income households experience the highest energy burdens across all regions."[53] The National Association of State Energy Officials (NASEO) recently established a Rural Energy Task Force due to state concerns over rural energy burden, recognizing that of 350 counties in the United States characterized as "persistently poor," 300 of those are rural.[54] A key contributing factor is the prevalence of rural manufactured housing. ACEEE found that residents of manufactured housing, most of whom qualify as low-income, face "a median energy burden that is 42% higher than that of rural single-family homes."[55] Manufactured homes tend to consume less total energy, due to their small size, but residents spend much more per square foot because the homes tend to be extremely energy inefficient.[56] Although state or local housing codes may set energy

---

49 NAT'L ENERGY ASSISTANCE DIRS'. ASS'N, 2018 NATIONAL ENERGY ASSISTANCE SURVEY: FINAL REPORT ii (2018).

50 *Id.* at i.

51 DREHOBL & ROSS, *supra* note 11, at 3.

52 *Id.* at 3, 6; *see also* Tony Gerard Reames, *Targeting Energy Justice: Exploring Spatial, Racial/Ethnic and Socioeconomic Disparities in Urban Residential Heating Energy Efficiency,* 97 ENERGY POL'Y 549, 554–56 (2016) (finding racial/ethnic minority households more likely to have higher heating energy use intensity).

53 LAUREN ROSS ET AL., THE HIGH COST OF ENERGY IN RURAL AMERICA: HOUSEHOLD ENERGY BURDENS AND OPPORTUNITIES FOR ENERGY EFFICIENCY 18 (2018), https://perma.cc/3MH8-NJ6G.

54 DYLAN TUCKER & RODNEY SOBIN, NAT'L ASS'N OF STATE ENERGY OFFS., RURAL DATA RESOURCES FOR STATE ENERGY PLANNING AND PROGRAMS 3, 5 (2020), https://perma.cc/X4J4-SK96. The term "persistently poor" refers to a county in which "over a 30-year period, 20 percent or more of [the] population is in poverty." *Id.* at 6. According to NASEO, the HUD Code for manufactured housing was last updated in 1994. DYLAN TUCKER, MANUFACTURED HOUSING IN RURAL AMERICA: HOW STATES ARE SUPPORTING ENERGY EFFICIENT HOMES AND REDUCING ENERGY COSTS FOR RESIDENTS 4 (2021) [hereinafter MANUFACTURED HOUSING IN RURAL AMERICA], https://perma.cc/Q77K-44PQ.

55 ROSS ET AL., *supra* note 53, at 3, 39.

56 *Id.* at 39; MANUFACTURED HOUSING IN RURAL AMERICA, *supra* note 54, at 4–5.

efficiency standards for site-built homes, the same requirements do not apply to manufactured homes, which are subject to federal standards set by the U.S Department of Housing and Urban Development (HUD) that have not been updated for over 25 years, and many homes still in use were produced before even those now outdated standards went into effect.[57] According to an assessment by the U.S. Government Accountability Office, manufactured homes predating the 1976 standards were built with "little or no insulation, thin walls and roofs, uninsulated heating and cooling systems, and inefficient louvered windows."[58]

Research further shows that energy burden is characterized by disparities based on race. A 2005 U.S. Department of Health and Human Services (HHS) study of home energy assistance reported that "[o]ver half of low income households with African American householders" compared with "a third of low income households with White householders[,] have high residential and home energy burdens."[59] In 2020, ACEEE found continuing disparities when research showed that Black households have a median energy burden 43 percent higher than white households;[60] in some cities, a 2016 study found a difference of 64 percent.[61] Hispanic households have a median energy burden 20 percent higher than white households; for Native American households, the difference is 45 percent.[62]

The fact that energy insecurity is especially common for low-income people and people of color makes it a central concern for energy justice. Energy justice builds on the foundation of the environmental justice movement, protesting the disproportionate siting of polluting industrial facilities in communities of color stemming from racist zoning practices, environmental racism, and unequal enforcement of environmental law.[63]

---

[57] HUD developed and enforced standards to implement the National Manufactured Housing Construction and Safety Standards Act of 1974, applicable to manufactured homes produced after June 15, 1976. U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-848R, HOME ENERGY ASSISTANCE FOR LOW-INCOME OCCUPANTS OF MANUFACTURED HOMES 4–5 (2012); MANUFACTURED HOUSING IN RURAL AMERICA, *supra* note 54, at 2, 4. Although Congress required an update to energy efficiency standards for manufactured housing in the Energy Independence and Security Act of 2007—calling for a new standard to be set within four years—the 1994 code is still in place as of the time of this writing. MANUFACTURED HOUSING IN RURAL AMERICA, *supra* note 54. The Energy Trust of Oregon, for example, found that "nearly two-thirds of [the state's] manufactured housing stock was built before 1995," meaning even the 1994 standards did not apply. *Id.* at 9.

[58] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 57, at 4–5. Energy burden for home electricity and heating is compounded in rural areas by the cost of energy for transportation for longer commutes for work and other necessities. *See* TUCKER & SOBIN, *supra* note 54, at 3, 7.

[59] APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, *supra* note 1, at 21.

[60] DREHOBL ET AL., *supra* note 2, at 11.

[61] DREHOBL & ROSS, *supra* note 11, at 18.

[62] DREHOBL ET AL., *supra* note 2, at 11, 13.

[63] For an introduction to the environmental justice movement, see ROBERT D. BULLARD ET AL., ENVIRONMENTAL JUSTICE MILESTONES AND ACCOMPLISHMENTS: 1964–2014, at 10–11 (2014), https://perma.cc/8VUG-XM6A.

Energy justice extends the scope of concern to disparities in the regulated energy system that track income and racial lines.[64] Environmental justice research has shown that although exposure to pollution is disproportionately higher for low income people of color, the disparity is not only socioeconomic—pollution affects people of color to a greater degree irrespective of income.[65] Likewise, recent research confirms that the energy burden disparities contributing to energy insecurity exist between households along racial lines "even when income is accounted for."[66]

Additional points of differentiation also contribute to energy insecurity. For example, the median energy burden for renters is 13 percent higher than for homeowners, due largely to rental properties tending to be much less energy efficient, and having inefficient appliances, compared to homes that are owned.[67] Households with children under age five and persons depending on medical equipment report higher rates of energy insecurity due to energy burden.[68] Over 71 percent of households receiving LIHEAP have at least one such vulnerable member.[69]

---

64 For a broad introduction to energy justice, *see generally* Sandoval, *supra* note 31.

65 *See, e.g.*, Kerry Ard, *Trends in Exposure to Industrial Air Toxins for Different Racial and Socioeconomic Groups: A Spatial and Temporal Examination of Environmental Inequality in the U.S. from 1995 to 2004*, 53 SOC. SCI. RSCH. 375, 384 (2015) (finding high-income African Americans were exposed to more industrial toxins than lower-income whites); Mercedes A. Bravo et al., *Racial Isolation and Exposure to Airborne Particulate Matter and Ozone in Understudied US Populations: Environmental Justice Applications of Downscaled Numerical Model Output*, 92 ENV'T INT'L 247, 252–53 (2016) (finding strong association between high particulate matter and racially isolated census tracts, especially in the rural Midwest); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 481–82 (2018) (finding African Americans have a higher exposure to particulates beyond what would be explained by strictly socioeconomic considerations); Paul Mohai & Robin Saha, *Which Came First, People or Pollution? Assessing the Disparate Siting and Post-siting Demographic Change Hypotheses of Environmental Injustice*, ENV'T RSCH. LETTERS, Nov. 2015, No. 115008, at 15 (2015) (finding race to be an independent factor in polluting facility siting, apart from socioeconomics).

66 *See* Trevor Memmott et al., *Sociodemographic Disparities in Energy Insecurity Among Low-income Households Before and During the COVID-19 Pandemic*, 6 NATURE ENERGY 186, 189 (2021).

67 DREHOBL ET AL., *supra* note 2, at 16; DREHOBL & ROSS, *supra* note 11, at 12.

68 Memmott et al., *supra* note 66, at 188 fig.2.

69 NAT'L ENERGY & UTIL. AFFORDABILITY COAL., MAXIMIZE LIHEAP FUNDING IN 2022: UNITED STATES BY THE NUMBERS (2021), https://perma.cc/H8WM-NAEU (reporting that among households receiving LIHEAP, 40% have an elderly member, 38% have a disabled member, and 17% have a child under 6).

B. Low-Income Home Energy Assistance—LIHEAP and Related Programs

The impetus for federal low-income energy policy in the form it takes today was the dramatic rise in energy prices that accompanied the 1973 Middle East oil embargo.[70] According to a Congressional Budget Office analysis at the time, "[p]rices for energy used in homes . . . rose twice as fast, on average, as the general inflation rate between 1972 and 1980."[71] Against this geopolitical backdrop, in 1975 Congress authorized the Emergency Energy Conservation Program to assist low-income households, building on a project for which the State of Maine received federal funds to assist low-income and elderly households with winter fuel costs.[72] A Congressional Research Service account of LIHEAP's legislative history recounts how Maine's effort spurred creation of the federal Emergency Energy Conservation Program to replicate the project nationwide—"the first federal program to assist low-income households during the energy crisis."[73] Congress went on to appropriate $200 million for this purpose in 1977, 1978, and 1979.[74]

Between 1974 and 1979, home energy prices increased between 50 and 108 percent, depending on the resource.[75] In 1978, in the midst of this turmoil, Congress enacted the Public Utility Regulatory Policies Act (PURPA)[76] to encourage energy conservation, smaller power production facilities, and state regulatory practices to help assure "equitable rates" for consumers.[77] PURPA included two provisions focused on home energy insecurity. Section 113 directed state energy authorities to consider regulatory standards for termination of service,[78] specifically including when termination "would be especially dangerous to health" for a consumer who "is unable to pay," taking into "account the need to include reasonable provisions for elderly and handicapped consumers."[79] Section 114 directed state energy authorities to consider setting "lifeline rates" to

---

[70] *See* PERL, *supra* note 14, app. A at 21 (discussing the legislative history of energy assistance); *see also* CONG. BUDGET OFF., *supra* note 16, app. at 45–46.

[71] CONG. BUDGET OFF., *supra* note 16 at iii, ix (prepared at request of Senate Budget Committee).

[72] PERL, *supra* note 14, app. A at 21.

[73] *Id.*

[74] This action was taken through an amendment to the Economic Opportunity Act of 1964. CONG. BUDGET OFF., *supra* note 16, at 2, app. at 45–46.

[75] U.S. GEN. ACCOUNTING OFF., GAO/HRD-91-1BR, LOW-INCOME HOME ENERGY ASSISTANCE: A PROGRAM OVERVIEW 12 (1990).

[76] Pub. L. No. 95-617, 92 Stat. 3117, (codified at 16 U.S.C. §§ 2611–2644 (2018)).

[77] *Id.* § 101 (codified at 16 U.S.C. § 2611).

[78] *Id.* § 113(b)(4) (codified at 16 U.S.C. § 2623(b)(4)).

[79] *Id.* § 115(g) (codified at 16 U.S.C. § 2625(g)).

help preserve home energy access "for essential needs . . . of residential electric consumers" if appropriate.[80]

Soon after, the Home Energy Assistance Act of 1980 significantly increased funding to ease energy burdens for low-income households more generally, not just in cases of emergency hardship.[81] The law was repealed and replaced a year later with the LIHEAA,[82] refined to be "fiscally trimmer" and ease distribution of assistance funds.[83] In 2021, LIHEAA marked its 40th year as the centerpiece of U.S. federal low-income energy policy.

From LIHEAA's enactment in 1981 to today, LIHEAP has been the single most important federal program for low-income people struggling to afford energy for heating and cooling their homes.[84] In its modern form, LIHEAP provides federal funding through HHS to state, tribal, and territorial "grantees" which are empowered, within certain basic statutory constraints, to determine income eligibility thresholds and decide how to use funds to address low-income home energy needs.[85]

---

[80] *Id.* § 114(a) (codified at 16 U.S.C. § 2624(a)). The mandate to consider lifeline rates also applied to nonregulated utilities. *Id. But see* FERC v. Mississippi, 456 U.S. 742, 749–50 (1982) ("[N]o state authority or nonregulated utility is required to adopt or implement the specified rate design or regulatory standards."). *See also* Paul L. Joskow, *Public Utility Regulatory Policy Act of 1978: Electric Utility Rate Reform*, 19 NAT. RES. J. 787, 787–91 (1979) (discussing key provisions, including § 114 lifeline rates).

[81] *See* CONG. BUDGET OFF., *supra* note 16, at 1 (describing goals of "current program" in 1981).

[82] Low-Income Home Energy Assistance Act of 1981, Pub. L. No. 97-35, 95 Stat. 893 (1981) (codified as amended at 42 U.S.C. §§ 8621–8630).

[83] Clifford v. Janklow, 733 F.2d 534, 536 (8th Cir. 1984) (comparing the 1980 law to the 1981 law).

[84] LIHEAA defines "home energy" as any fuel used for heating or cooling in a residential dwelling. 42 U.S.C. § 8622(3) (2018); *see* A LIGHT FOR THOSE IN NEED: LIHEAP ENTERS A FIFTH DECADE OF SERVICE 3, 5 (2022), https://perma.cc/R9GH-ENYK (describing the importance of LIHEAP for low-income households facing high energy burdens).

[85] LIHEAP is administered at the HHS through the Office of Community Services within the Administration for Children & Families. Olivia Wein, *The Low-Income Home Energy Assistance Program (LIHEAP)*, in ADVOCATES' GUIDE 2020: A PRIMER ON FEDERAL AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT PROGRAMS 5–13 (2020). Although the statutory framework has remained consistent, the method for allocating and distributing LIHEAP funds among states has changed over time and differentiates between so-called "regular" funds and emergency funds. *See* PERL, *supra* note 14, at 10 (discussing funding types and formulas for allocation among states, tribes, and territories). For general funds, an initial formula (1981) for allocating funds among the states was designed with a focus on heating needs, producing a static percentage for each state, and still applies to appropriations lower than $1.975 billion. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 3, at 9. A revised formula (1984) incorporates various factors such as shifts in the eligible number of low-income households in a state and residential expenditures for heating and cooling. *Id.* For more on the legislative history of the LIHEAA funding formulas, see LIBBY PERL, CONG. RSCH. SERV., RL33275, THE LIHEAP FORMULA: LEGISLATIVE HISTORY AND CURRENT LAW (2008). An additional source of funding available for, but not typically directed to, LIHEAP by states is oil company litigation settlements. *See* U.S. GEN. ACCOUNTING OFF., HRD-88-92BR, LOW-INCOME ENERGY ASSISTANCE: STATE RESPONSES TO FUNDING REDUCTIONS 7, 11 (1988).

Eligibility for home energy assistance is based on the low-income status of a "household"—a deliberate change in the 1981 program from its antecedent, which had determined eligibility on an individual basis.[86] Under LIHEAA, a household is "any individual or group of individuals who are living together as one economic unit for whom residential energy is customarily purchased in common or who made undesignated payments for energy in the form of rent."[87] As the Vermont Supreme Court has underscored, this "concept of a fuel 'household' plays a crucial role in the federal statutory scheme because it determines whose income and assets are considered" against income eligibility criteria.[88]

State and tribal grantees must apply to HHS for LIHEAP funding each year, and the application must include sixteen assurances that enumerated statutory conditions will be met and a detailed plan for doing so.[89] The assurances represent agreements by grantees to administer LIHEAP consistent with basic limitations and rules on the use of funds, eligibility for assistance and disbursement procedures, outreach to eligible households and coordination with related programs, and public participation and procedural safeguards for applicants.[90]

Importantly, state and tribal grantees must assure that energy assistance will only be provided to households in which one or more individuals receive specified payments or benefits under other federal anti-poverty programs (like nutrition assistance or supplemental social security) or to "households with incomes which do not exceed the greater of—(i) an amount equal to 150 percent of the poverty level for such State; or (ii) an amount equal to 60 percent of the State median income."[91] At the same time, the statute expressly leaves some discretion in how LIHEAP is administered.[92]

In the 1990s, Congress sharpened the statute's focus on energy burden with amendments directing LIHEAP toward those households "with the lowest income, that pay a high proportion of household income

---

86 *See* Letter from Gregory J. Ahart, Dir., U.S. Gen. Accounting Off., to Hon. Robert H. Michel, House of Representatives, Review of Selected Aspects of Low Income Energy Assistance, Enclosure I at 5 (Sept. 15, 1980).

87 42 U.S.C. § 8622(5).

88 Dutton v. Dep't of Social Welfare, 721 A.2d 109, 110, 113 (Vt. 1998) (rejecting exclusion of elderly homeowners with a boarder from the definition of "household" under Vermont's LIHEAA implementation, finding it prevented the state from complying with LIHEAA's requirement that funds first go to those with the lowest income and ration of energy cost to income).

89 42 U.S.C. § 8624(a)–(c).

90 *Id.* § 8624(b)(1)–(16).

91 *Id.* § 8624(b)(2).

92 *See id.* § 8624(b). For example, states are free to set lower caps on income eligibility than is set out in the statute so long as no household is excluded from LIHEAP eligibility "*solely* on the basis of household income . . . [of] less than 110 percent of the poverty level for such State." *Id.* § 8624(b)(2)(B) (emphasis added). Above that floor, states are authorized to "give priority to those households with the highest home energy costs or needs in relation to household income." *Id.*

for home energy, primarily in meeting their immediate home energy needs."[93] The statute thus defines "highest home energy needs" with direct reference to energy burden—"the expenditures of the household for home energy divided by the income of the household"—and whether the household includes "members of vulnerable populations, including very young children, individuals with disabilities, or frail older individuals."[94]

Although not all low-income households have high home energy costs by percentage of their total income, the vast majority of households with high energy burdens *are* low-income.[95] The EIA highlighted this variability in its 2001 Residential Energy Consumption Survey, finding that "[o]ne tenth of the households with incomes below $10,000 have a home energy burden less than 1.6 percent, while one tenth have a home energy burden greater than 22.2 percent."[96] With Assurance 5, the statute makes clear that need must be the paramount consideration for states in distributing LIHEAP funds: the highest benefits *must* go to households with the lowest incomes, highest energy costs, and highest energy needs, taking household size into account.[97] This is especially important in light of EIA's 2020 Residential Energy Consumption Survey, which showed that the lowest income households are billed by far the most per square foot for energy usage—compare $1.31 per square foot for households with income lower than $10,000 to $0.96 per square foot for households with incomes $100,000 and up.[98]

LIHEAP funding is secured annually through congressional reappropriations and eligible applicants are *not* assured to receive funds.[99] This marks an important difference between LIHEAP and some other programs for which eligibility criteria may overlap and which may be administered alongside LIHEAP locally by the same agency.[100] According to the Sixth Circuit, this means that "[u]nlike entitlement

---

93 Human Services Amendments of 1994, Pub. L. No. 103-252, § 302, 108 Stat. 623, 657 (codified at 42 U.S.C. § 8621(a) (2018)); *see also* APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, *supra* note 1, at i (discussing the 1994 amendment).

94 42 U.S.C. § 8622(2), (4). The statute does not define the terms "very young" or "frail older," but HHS has focused on households with young children under age 5 and older adults above age 60. APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, *supra* note 1, at 5, 15 (referencing agency performance goals for the LIHEAP implementation).

95 APPLIED PUB. POL'Y RSCH. INST. FOR STUDY & EVALUATION, *supra* note 1, at 27.

96 *Id.* at iii; *see also id.* at 10 (interpreting results of EIA study).

97 42 U.S.C. § 8624(b)(5).

98 *U.S. Energy Insecure Households Were Billed More for Energy than Other Households*, *supra* note 33. One factor affecting this cost differential is renter status, as landlords may not prioritize home energy efficiency measures such as insulation and weatherization. *See id.*

99 PERL, *supra* note 14, at 6. For a record of appropriations from fiscal years 1982–2019, *see id.* at 33–34 tbl.B-3.

100 Compare, for example, the Supplemental Nutrition Assistance Program (SNAP) and Medicaid, which provide food assistance and medical assistance to very low-income people respectively. *See* Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. U.L. REV. 361, 385 (2020) [hereinafter Hammond, *Litigating Welfare Rights*] (discussing the durability of these "entitlement" programs).

programs," if the sum a state receives under LIHEAA has been distributed, "no more subsidies will be awarded regardless of an applicant's eligibility or need."[101]

The availability of LIHEAP assistance thus depends on *how much* Congress has appropriated in a given year as well as the *method* by which state and tribal grantees decide to distribute the funds they receive.[102] In fact, as the Sixth Circuit has observed, LIHEAA "places responsibility for administration of the energy subsidy program almost entirely in the hands of the state[s]."[103] Based on this structural feature of the program, in part, most courts have held that the LIHEAA creates no substantive rights that would give eligible low-income households a cause of action under 42 U.S.C. § 1983, the most common vehicle for federal civil rights claims.[104] Although the Eighth Circuit has recognized such actions,[105] the Sixth and Fourth Circuits have respectively characterized LIHEAA as "a voluntary federal-state grant program"[106] or "a mere federal-state funding statute, which gives actual assistance to the States and only indirect benefits to qualified households."[107]

---

101 Cabinet for Hum. Res. v. N. Ky. Welfare Rights Ass'n, 954 F.2d 1179, 1180 (6th Cir. 1992); *see also* Boyland v. Wing, 487 F. Supp. 2d 161, 169 (E.D.N.Y. 2007) ("LIHEAA does not establish an entitlement program . . . [because] participating states receive a lump sum to be distributed to eligible households and . . . [LIHEAA] does not prescribe a method of calculating actual benefits to be distributed among eligible households."). *Contra* Kapps v. Wing, 404 F.3d 105, 117–18 (2d Cir. 2005) (treating LIHEAP as an entitlement for eligible applicants under New York's administration of LIHEAP "*to the extent that funds are available*").

102 PERL, *supra* note 14, at 6.

103 *Cabinet for Hum. Res.*, 954 F.2d at 1182.

104 *See* Hunt v. Robeson Cty. Dep't of Soc. Servs., 816 F.2d 150, 151–53 (4th Cir. 1987) (holding LIHEAA does not create rights enforceable under 42 U.S.C. § 1983, but not addressing whether LIHEAA creates a private cause of action); *Cabinet for Hum. Res.*, 954 F.2d at 1183–84 (holding LIHEAA neither creates rights enforceable under § 1983 nor implies a private right to enforce rights under the statute). The Second Circuit declined to decide the issue, finding it was unnecessary for injunctive relief, and vacated a lower court's recognition of LIHEAP-related § 1983 claims. *Kapps*, 404 F.3d at 127, *vacating in part* 283 F. Supp. 2d 866 (E.D.N.Y. 2003). It affirmed the district court's holding that plaintiffs' due process rights were violated by New York's administration of LIHEAP. *Id.* at 111–12, 127. The same district court a couple years later, persuaded by *Hunt* and *Cabinet for Human Resources*, held that LIHEAA did not create rights enforceable under § 1983. *Boyland*, 487 F. Supp. 2d at 171.

105 *See* Clifford v. Janklow, 733 F.2d 534, 537 (8th Cir. 1984) (affirming order that required state to make LIHEAP payments to all class members who applied for benefits); Crawford v. Janklow, 710 F.2d 1321, 1326 (8th Cir. 1983) ("[T]he Low-Income Home Energy Assistance Act of 1981 created substantive rights cognizable under section 1983."); *see also* Boles v. Earl, 601 F. Supp. 737, 744 (W.D. Wis. 1985) (recognizing a cause of action did exist under § 1983, persuaded by *Crawford*).

106 *Cabinet for Hum. Res.*, 954 F.2d at 1180.

107 *Hunt*, 816 F.2d at 153. *But see Kapps*, 404 F.3d 105 (finding that New York's state laws administering LIHEAP program create protected property interest in receipt of benefits).

Critically, then, eligibility for home energy assistance does *not* assure that a household will receive needed help with energy bills. Indeed, a great many federally eligible low-income households never receive assistance. Among eligible households that applied in 1981, LIHEAP's first year, 36 percent received assistance, but that figure fell to only 13 percent in 1998.[108] According to CBO estimates, the percentage of eligible households receiving assistance has varied year by year, hovering around only 16 percent.[109] Apart from routine formula adjustments, LIHEAP has not changed its basic structure over the last 40 years. Although Congress has always appropriated funds, the recognized need for utility assistance has never come even close to being met.[110]

With that history of relative consistency, the Trump Administration's budget proposals to defund LIHEAP were a jarring reminder of the program's vulnerability to the annual appropriations process in a polarized political environment.[111] Although Congress rejected those proposals, confidence in the stability of annual LIHEAP funding was seriously shaken as low-income consumer advocates and social service agencies contemplated "a world without LIHEAP," to quote the title of a presentation at a 2017 summer policy summit of the National Association of Regulatory Utility Commissioners (NARUC).[112]

Two final structural features are important to how LIHEAP reaches households in need and is structurally isolated from energy law. First is its varied and dispersed administrative structure. Once HHS distributes regular funds to state or tribal grantees, they are commonly redistributed to "subgrantees" that review applications for home energy assistance against household eligibility criteria and ultimately authorize payment toward a low-income household's home energy bill, made directly to the

---

108 MELINDA GISH, CONG. RSCH. SERV., THE LOW-INCOME HOME ENERGY ASSISTANCE PROGRAM (LIHEAP) 2 (2001).

109 PERL, *supra* note 14, at 6. An estimated 33.3 million households were income-eligible to receive federal home energy assistance, compared with 5.2 million households that received LIHEAP funds, in FY 2020. U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 3, at vii–viii.

110 *See* PERL, *supra* note 14, at 6.

111 *Id.* at 33–34 tbl.B-3 (comparing Presidents' requests for funding of LIHEAP with amount authorized and appropriated by Congress). President Trump also sought deep cuts to other important antipoverty programs. *See* Hammond, *Litigating Welfare Rights*, *supra* note 100, at 398–425 (discussing efforts to roll back medical and food assistance under Medicaid and SNAP under the Trump Administration).

112 *See* NAT'L ASS'N OF REGUL. UTIL. COMM'RS, 2017 NARUC SUMMER POLICY SUMMIT PROGRAM 14 (2017), https://perma.cc/MNG4-339E. An analysis of LIHEAP's efficacy in 2014 noted it had, to date, received much less attention than other U.S. public assistance programs, which may have contributed to efforts to cut or eliminate it. *See* Anthony G. Murray & Bradford F. Mills, *The Impact of Low-Income Home Energy Assistance Program Participation on Household Energy Insecurity*, 32 CONTEMP. ECON. POL'Y 811, 811 (2014).

energy supplier.[113] Across the country, LIHEAP is commonly administered by county government offices or other state or local non-profit organizations focused on social services.[114] In this way, LIHEAP is structured like other federal anti-poverty programs that connect with the public at a distinctly local scale and are organizationally separate from energy regulatory institutions.

Second, funding can only be used for specified purposes—utility assistance for heating or cooling (versus other energy uses) and outreach to eligible households;[115] "low-cost residential weatherization and other cost-effective energy-related home repair;"[116] program administration, within strict limits;[117] and intervention in "energy crisis situations."[118] Grantees have discretion to define qualifying crises and eligibility criteria for these distinct funds.[119] Some states, such as Arizona, Georgia, Hawaii, and Kansas, define "crisis" primarily in terms of utility disconnection or notice of imminent disconnection.[120] Other states—Alabama, California,

---

[113] PERL, *supra* note 14, at 5. LIHEAA Assurance 7, 42 U.S.C. § 8624(b)(7) (2018), specifies procedures a state must establish if it chooses to pay home energy suppliers directly. *But see* PERL, *supra* note 14, at 6 (discussing states distributing nominal LIHEAP benefits to households).

[114] PERL, *supra* note 14, at 5. In most states, the same state department that administers Temporary Assistance for Needy Families (TANF) also administers LIHEAP. *State and Local LIHEAP Administering Agencies*, LIHEAP CLEARINGHOUSE, https://perma.cc/7UQ6-ERX6 (last visited Nov. 10, 2024). Tribes may request to receive or administer their own LIHEAP funds or receive a share of state funding. *See* 42 U.S.C. § 8623(d); *see also* PERL, *supra* note 14, at 10, 27–29 tbl.B-1 (listing states for which Tribes and tribal organizations have received allotments).

[115] 42 U.S.C. § 8624(b)(1)(A), (b)(3); *id.* § 8622(6) (defining "home energy" as a source of heating or cooling).

[116] *Id.* § 8624(b)(1)(C).

[117] *Id.* § 8624(b)(1)(D); *id* § 8624(b)(9) (limiting administrative costs to a maximum of 10 percent of funds payable to a state).

[118] *Id.* § 8624(b)(1)(B); *id.* § 8622(3) (defining "energy crisis" to mean "weather-related and supply shortage emergencies and other household energy-related emergencies"). This expansion of energy crisis intervention to include more than just weather and supply shortage emergencies was added in 1984 Amendments to LIHEAA. *See Low Income Home Energy Assistance Block Grant: Hearing Before the Subcomm. on Hum. Res. of the H. Comm. on Educ. & Lab.*, 99th Cong. 1, 5 (1986) (statement of J. William Gadsby, Assoc. Dir., Hum. Res. Div.).

[119] *LIHEAP Crisis*, LIHEAP CLEARINGHOUSE, https://perma.cc/JPJ6-VG42 (last updated Dec. 8, 2023). Administrators and courts distinguish between so-called "regular" LIHEAP and "emergency" LIHEAP; *see, e.g.*, Boyland v. Wing, 487 F. Supp. 2d 161, 164 (E.D.N.Y. 2007).

[120] *LIHEAP Crisis*, *supra* note 119. Additional emergency contingency funds may be appropriated each year and distributed at the discretion of the HHS Secretary "to meet the additional home energy assistance needs of one or more States arising from a natural disaster or other emergency." 42 U.S.C. § 8621(e). The inclusion of special emergency funds was new to LIHEAP in the 1990s. *See* PERL, *supra* note 14, at 12. Under the statute, "natural disaster" is "a weather event (relating to cold or hot weather), flood, earthquake, tornado, hurricane, or ice storm." 42 U.S.C. § 8622(7) (also leaving authority for the Secretary to include additional events). Other circumstances constituting an "emergency" include a

and Oregon, for example—define "crisis" at least partly in terms of whether the health of a household member would be endangered without energy assistance, a higher threshold.[121] In sum, the interface between this federal program and households is localized, and the substantive help available (and to whom) can vary state to state.

LIHEAP has a critical complement in the federal Low-Income Weatherization Assistance Program (WAP). Like LIHEAP, WAP originated in the 1970s to help low-income households facing higher energy costs. Congress created WAP as part of the Energy Conservation and Production Act (ECPA)[122] in 1976 "to provide financial assistance to low income persons for energy conservation measures."[123] More specifically, Congress explicitly highlighted energy burden, stating the goal "to develop and implement a weatherization assistance program to increase the energy efficiency of dwellings owned or occupied by low-income persons, reduce their total residential energy expenditures, and improve their health and safety, especially low-income persons who are particularly vulnerable such as the elderly, the handicapped, and children."[124]

WAP remains the nation's largest low-income residential energy efficiency program, with its focus on improving home efficiency in the use of energy for heating and cooling.[125] In contrast with LIHEAP, which is administered by the HHS, WAP is a program within the U.S. Department of Energy (DOE), with funding distributed similarly to grantee states and tribes.[126] In many states, the same agency or subgrantees receive and distribute LIHEAP and WAP funds.[127] As with LIHEAP, Congress must reauthorize appropriations for WAP annually, and grantees apply to DOE

significant disruption in home energy supply, a shortage of home energy resources or significant cost increase, a significant increase in utility disconnections, or a significant increase in unemployment or participation in nutrition assistance or other governmental assistance programs. *Id.* § 8622(1). Emergency funds have not been appropriated every year, and when they have been, levels have varied, often significantly. GISH, *supra* note 108, at 6 tbl.2.

121 *LIHEAP Crisis*, *supra* note 119.

122 42 U.S.C. § 6861 (2018).

123 Houston v. Williams, 547 F.3d 1357, 1360 (11th Cir. 2008). For a discussion of the early development of federal weatherization programs in the 1970s and the challenges connecting resources with low-income households in need, see *Low Income Weatherization Programs: Hearing Before the Subcomm. on Hum. Res. of the H. Comm. on Educ. & Lab.*, 96th Cong. 1–2, 4 (1980) (Statement of J. Dexter Peach, Dir., Energy & Minerals Div.).

124 42 U.S.C. § 6861(b).

125 ERIN ROSE & BETH HAWKINS, BACKGROUND DATA AND STATISTICS ON LOW-INCOME ENERGY USE AND BURDEN FOR THE WEATHERIZATION ASSISTANCE PROGRAM: UPDATE FOR FISCAL YEAR 2020, at 1 (2020).

126 42 U.S.C. § 6863(a).

127 *See State and Local LIHEAP Administering Agencies*, *supra* note 114 (reporting that the same department administers LIHEAP and WAP in 22 states).

each year.[128] The DOE reports that every dollar invested in weatherization generates "$1.72 . . . in energy benefits and $2.78 in non-energy benefits," such as "improved health, safety, and comfort" and household savings for "fewer missed work days."[129]

Together, LIHEAP and WAP comprise the primary, complementary federal mechanisms for providing home energy assistance in the United States—in effect, for decades, they have constituted federal low-income energy policy.[130]

Several structural differences between the two are worth noting and contribute to the programs' complementarity. First, weatherization measures for home energy efficiency complement bill assistance—WAP focuses on insulating low-income dwellings to *reduce* utility bills, rather than helping, as LIHEAP does, with *paying* utility bills already incurred. Weatherization improves energy affordability, while energy assistance helps preserve energy access. Although the programs are funded separately, states may allocate up to 15 percent of LIHEAP funds for energy efficiency purposes at their discretion.[131] In 2022, forty-four states used this discretion to allocate a portion of LIHEAP funds to energy efficiency.[132]

Second, the two programs are intended for a similar but not identical cohort of households. WAP defines "low income" as "at or below 200 percent of the poverty level," thus expanding the number of households technically eligible for weatherization assistance compared with utility bill assistance under LIHEAP, which is limited to households with incomes at 150 percent of the state poverty level or lower.[133]

Despite the broader income eligibility, however, most weatherization funds have historically been used to assist very low-income households. According to the DOE, the median household income for WAP clients

---

[128] 42 U.S.C. § 6864(a); *see also* 42 U.S.C. § 6863(c) (clarifying that if a state does not apply for funds, local governments or other approved entities may apply "in lieu of such state" to carry out weatherization projects).

[129] U.S. DEP'T OF ENERGY STATE & CMTY. ENERGY PROGRAMS, DOE/GO-102023-5897, WEATHERIZATION ASSISTANCE PROGRAM (2023), https://perma.cc/8WDR-F2G5.

[130] *See* MANUFACTURED HOUSING IN RURAL AMERICA, *supra* note 54, at 6 (explaining how low-income households may receive additional support, directly or indirectly, through other federal programs that are beyond the scope of this Article such as housing subsidies). Through the Rural Energy Savings Program, for example, the U.S. Department of Agriculture offers low-interest loans to help with home energy efficiency, including the retrofit or replacement of manufactured homes in defined rural areas. *See id. See* U.S. GEN. ACCOUNTING OFF., *supra* note 75, at 17–18 (exemplifying complimenting assistance programs, such as food stamps, aid to families with dependent children, and subsidized housing).

[131] LIHEAA, 42 U.S.C. § 8624(k) (2018).

[132] NAT'L ASS'N FOR STATE CMTY. SERV. PROGRAMS, WEATHERIZATION ASSISTANCE PROGRAM FUNDING REPORT PROGRAM YEAR 2022, at 11 (2022).

[133] 42 U.S.C. § 6862(7); 42 U.S.C. § 8621 (limiting LIHEAP funds to "households with incomes which do not exceed the greater of– (i) an amount equal to 150 percent of the poverty level for such State; or (ii) an amount equal to 60 percent of the State median income.").

residing in single-family homes is approximately $18,000 and only $12,000 for those living in multi-family buildings.[134] An average of 35,000 homes are improved with WAP funds annually resulting in an average of $372 in energy savings for these households.[135] A major influx of funding expanded WAP's capabilities when President Biden signed the Infrastructure Investment and Jobs Act (also called the Bipartisan Infrastructure Law, or BIL) so that weatherization is available to significantly more eligible households for the years 2022–2026.[136]

Finally, practical eligibility for weatherization assistance depends on more than just income eligibility. As the CBO recognized early on, "many households—renters and those whose homes are in need of major nonenergy-related repairs, in particular—may not be able to benefit from weatherization assistance."[137] Households that rent their homes are less likely to benefit from WAP if improvements accrue to the landlord and the physical condition of a home may limit the range of efficiency measures that are economically feasible. If repairs are necessary before weatherization can proceed, homes are often "deferred" and never receive the needed services.[138] In recognition of this longstanding barrier to assistance, the DOE established a Weatherization Readiness Fund (WRF), making 2022 the first year when WAP grantees had access to funding to help with repairs that would otherwise have resulted in deferral.[139]

Supplemental to these federal programs, some states, local governments, and utilities provide supplementary energy assistance to low-income households, including through weatherization. In 2022, every dollar for weatherization states received from DOE was leveraged by $2.11 in other funds from state or utility programs.[140] The National Conference of State Legislatures (NCSL) reports several other state methods for "bolstering federal energy assistance and weatherization." A handful of states, for example, impose "mandatory utility contribution

---

134 ROSE & HAWKINS, *supra* note 125, at 3 (median household income for each respectively, adjusted for inflation for FY 2020). The statute affords state, tribal, and territorial grantees limited discretion to determine precise eligibility considerations. *See* 42 U.S.C. § 6862(7).

135 U.S. DEP'T OF ENERGY STATE & CMTY. ENERGY PROGRAMS, *supra* note 129.

136 Pub. L. No. 117-58, 135 Stat. 429 (2021); *see also* NAT'L ASS'N FOR STATE CMTY. SERV. PROGRAMS, *supra* note 132, at 10 fig.4 (showing 2022–26 performance period for BIL funds). For a broader discussion of how energy efficiency policy can be reformed to better reduce energy use, see generally Heather Payne, *Electrifying Efficiency*, 40 STAN. ENV'T L.J. 57 (2021).

137 CONG. BUDGET OFF., *supra* note 16, at 22.

138 NAT'L ASS'N FOR STATE CMTY. SERV. PROGRAMS, *supra* note 132, at 7.

139 *Id.*

140 *Id.* at 13.

requirements to ensure continued funding for energy assistance programs independent of federal allocations." [141]

As high energy burden has received wider attention in the last few years, and as energy justice advocates have learned to navigate state public utility commission (PUC) proceedings, a growing number of states are beginning to adopt rate discounts for low-income households, with the difference typically funded through charges to other ratepayers, and other policies to reduce home energy burden. These approaches, briefly surveyed in Part IV, are in place in some states, but in many parts of the country are either new or not yet adopted.

III. RECONCEIVING LOW-INCOME ENERGY POLICY

Current transitions in the energy sector provide an opportunity to reconceive low-income energy policy, from its historic positioning as a poverty law *complement* to energy law to a central concern *within* energy law regimes. Far from undercutting the anti-poverty purpose of home energy assistance programs as they currently operate, this integration would reinforce their goals and purpose from within the legal structures that define energy access.

This section maps the contours of energy law and poverty law as they have been commonly understood as legal disciplines and fields of practice. Considering each more closely in turn underscores how their respective legal regimes—which could hardly be more structurally and functionally different—and the political economies of their development have reinforced the isolation of low-income energy policy from much of the energy sector's dynamic change. Understanding this interrelationship is important if we accept, as Khiara Bridges has urged, "the simple fact of the *indispensability of cultural change* to legal change."[142] Although energy justice is at its peak political and discursive saliency to date, enduring legal reform will depend on changing long-established norms and cultural assumptions, including deeply flawed poverty narratives, that undergird existing structures.

A. The Contours of Energy Law and Poverty Law

Considering the contours of energy law and poverty law helps to explain the isolation of low-income energy policy historically. It also reinforces why deeper integration of anti-poverty concerns within energy

---

141 Laura Shields, Nat'l Conf. of State Legislatures, *Bolstering Federal Energy Assistance and Weatherization with State Clean Energy Programs* (2020), https://perma.cc/BDT3-RS2K (last visited Feb. 2024) (these states are CA, IL, MI, MN, NJ, OR, WA, WI, and VA).

142 KHIARA BRIDGES, THE POVERTY OF PRIVACY RIGHTS 211 (2017) (discussing the "indispensability of cultural change" to legal change for Black voting rights and same-sex marriage).

law regimes can amplify the protective impact of LIHEAP and related programs and reduce the need for crisis-oriented utility assistance.

Energy law is widely considered to be cross-sectional and relatively new as the field of law it is today. Some energy law scholars trace energy law's origin "as a legal discipline" to when Congress passed the National Energy Act of 1978 and Energy Security Act of 1980 in response to the volatile energy markets of the 1970s when, this perspective holds, energy law coalesced as distinct from public utilities regulation, oil and gas law, and natural resources law.[143] Other scholars explain energy law as "overlapping eras" spanning the pre-regulatory 1800s in which common law principles of property and contract mostly governed energy resource exploitation, through changes following World War II—growth in demand, new environmental regulation, expansion of competitive energy markets—to the current context in which energy law is viewed through the lens of its impact on climate change.[144] Leading energy law treatises and textbooks historically have included little (if any) discussion of energy burden in low-income households, utility disconnections, or LIHEAP, reflecting how home energy insecurity has not been a central concern for energy law.[145]

That said, as anyone well-familiar with energy law will point out, residential utility rates and unrecovered residential utility debts are salient issues for state energy regulation. The impact of rates on residential consumers generally, which includes low-income households, is routinely addressed in state utility commission proceedings. To be sure, as addressed in Part IV, some jurisdictions have taken meaningful steps toward the integration encouraged here. For reasons discussed in what follows, however, the low-income household remains at the margins of energy law. Although Part IV shares examples of discount rates and other promising measures, generally, once rates are deemed "fair" by a state utility commission, households suffering high energy burden have been implicitly regarded as poverty law's purview.

---

143 LINCOLN L. DAVIES ET AL., ENERGY LAW AND POLICY 3–4 (2d ed. 2018); *cf.* JOSHUA P. FERSHEE, ENERGY LAW: A CONTEXT AND PRACTICE CASEBOOK 5–6, 30 (2014) (stating that "[m]odern energy law came on the scene with the Mideast Oil Crisis of the 1970s" but suggesting its "genesis" may be the "advent of electricity as a modern convenience" in the late 1800s, and presenting administrative, property, and contract law as core components of energy law).

144 JOEL B. EISEN ET AL., ENERGY, ECONOMICS AND THE ENVIRONMENT: CASES AND MATERIALS 6–8 (4th ed. 2015); *see also* Shelley Welton, *The Bounds of Energy Law*, 62 B.C.L. REV. 2340, 2390–95 (2021) (describing historical contours of energy law and arguing for reconceptualization of the field, including the need for attention to race and inequality).

145 *See generally* SCOTT HEMPLING, REGULATING PUBLIC UTILITY PERFORMANCE: THE LAW OF MARKET STRUCTURE, PRICING AND JURISDICTION (2d ed. 2021) (minimal discussion of low-income consumers); G. PHILIP NOWAK & SHARON L. TAYLOR, ENERGY LAW & TRANSACTIONS § 2.01 (David J. Muchow & William A. Mogel eds., 2023) (not addressed); DAVIES ET AL., *supra* note 143, at 514 (discussion of energy justice issues added in this edition); EISEN ET AL., *supra* note 144 (discussion of energy justice issues added in this edition); FERSHEE, *supra* note 143 (not addressed).

Poverty law, as a field, has even more contested boundaries, as the stakes involved in defining and teaching poverty law have been debated for years. In her work tracing the mid-twentieth century evolution of poverty law, Martha Davis marks the 1960s as the point when poverty law changed from being "little more than giving routine legal advice to poor people" to a broader legal movement buoyed not just by President Johnson's "War on Poverty" but also federally funded legal services, new attention to poverty law as a discipline within legal education, and newly active litigation, including appeals to the Supreme Court, in cases representing poor clients.[146] Poverty law textbooks commonly cover federal anti-poverty programs that grew out of the "War on Poverty" era along with court opinions affecting the implementation of those policies and individual rights interpreted with reference to impoverished parties.[147]

With this approach, while focusing on poverty, it has been difficult to avoid disaggregating the effect of legal doctrines and frameworks on low-income households from meaningful critique of those doctrines and frameworks. When the first poverty textbook was published in 1969, some worried about isolating economic justice implications of law as a "special" topic, rather than integrating its core concerns across all study of law. "[T]here is no such thing as 'poverty law,'" Stephen Wizner and William Resnick argued, but rather "the extension to poor people of principles established in the existing legal system."[148]

---

[146] MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 10 (John S. Covell & Heidi Meyers eds., 1993) ("Until 1965 no course on poverty law had ever been taught at a law school . . . . [B]ut from 1965 to 1974 the new poverty lawyers appealed 164 cases to the [U.S. Supreme] Court on behalf of their clients."); *see also* KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972, at 214 (2016).

[147] Stephen Wizner, *Poverty Law, Policy, and Practice*, 22 GEO. J. ON POVERTY L. & POL'Y 441, 441–43 (2015) (reviewing JULIET M. BRODIE ET AL., POVERTY LAW, POLICY, AND PRACTICE (2014)) (listing poverty law textbooks published since 1969 and characterizing them as taking this general approach).

[148] Stephen Wizner & William Resnick, 70 COLUM. L. REV. 1305, 1306–07 (1970) (reviewing PAUL H. DODYK, CASES AND MATERIALS ON LAW AND POVERTY (1969)). The first law school case book on poverty law, PAUL H. DODYK, CASES AND MATERIALS ON LAW AND POVERTY (1969), met with criticism for creating an impression that there is special law for the poor and failing to address in "a significant manner the political and economic reality of the factors underlying poverty." *Id.* at 1305–06; *cf.* JULIET BRODIE ET AL., POVERTY LAW: POLICY, AND PRACTICE (2014) (organized around themes including Welfare, with which LIHEAP is commonly associated, Housing, Health, Education, Access to Justice, but also expanding to include Criminalization of Poverty, Markets, and Human Rights). Stephen Wizner, who reviewed the Dodyk text critically, celebrated publication of the BRODIE ET AL. text as "not simply a collection of cases and materials about the legal problems of poor people" but addressing "the nature and causes of poverty and economic inequality, of social and economic policies and programs that might serve to reduce the extent and depth of poverty, and of the role of law in creating and maintaining poverty." Wizner, *supra* note 147, at 441–43. *See also* Martha F. Davis, *The Pendulum Swings Back: Poverty Law in the Old*

Along these lines, authors of a textbook (new in 2014) suggested a broader disciplinary conception of poverty law by emphasizing "the role of law, lawyers, and legal institutions in efforts to address the impact of persistent and deepening economic inequality." [149] Another expression of the breadth of the field, as Andrew Hammond frames it, is "the law generated by federal and state legislatures, agencies, and courts as lawyers, advocates, activists, and poor people challenge the rules, regulations, and practices that people with limited means and few resources inevitably encounter in their lives."[150] Ezra Rosser explains in the introduction to *The Poverty Law Canon* that poverty law generically encompasses "the law that impacts poor people or poor communities," but this broad conception tends to give way to a narrower definition centered on "the law as it relates to antipoverty programs such as welfare and food stamps."[151] The narrower definition loses scope in favor of simplicity, by excluding areas of law that facilitate exploitation of poor people or "systematic inequalities" that are reinforced in legal structures.[152]

The tendency to narrow the scope in favor of simplicity, however understandable, is not neutral in its effect. This is the very dynamic I describe as contributing to isolation of low-income energy policy from the legal structures of energy law and why centering a distinct concern for low-income households within those structures is so important. As Wendy

---

and New Curriculum, 34 FORDHAM URB. L.J. 1391, 1395 (2007) (seeing poverty law as "innately broad, global, interdisciplinary, and focused on social change"); Lillian Salinger, *Poverty Law: What Is It?*, 12 LEGAL REFERENCE SERVS. Q., no. 2, 1992, at 5, *passim* (discussing perceived boundaries of the field).

149 JULIET BRODIE ET AL., *supra* note 148 at Preface; *see also* Vanita Saleema Snow, *The Untold Story of the Justice Gap: Integrating Poverty Law into the Law School Curriculum*, 37 PACE L. REV. 642, 652 (2017) (defining poverty law as "any area of law that touches the lives of individuals living in poverty"); Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM. MITCHELL L. REV. 1057, 1058 (2009) (seeing poverty law and social justice as marginalized within law school curricula); Ruth Margaret Buchanan, *Context, Continuity, and Difference in Poverty Law Scholarship*, 48 U. MIA. L. REV. 999, 1000 (1994) (tracking "the evolution over the last thirty years of the theories of the practice of poverty law" through review of the intervening literature).

150 Andrew Hammond, *Poverty Lawyering in the States*, *in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY 216 (Ezra Rosser ed., 2019) [hereinafter Hammond, *Poverty Lawyering in the States*]; *see also* TANI, *supra* note 146, at 214 (characterizing poverty law as "a field of knowledge and practice dedicated to enforcing the rights of low-income Americans and reforming the law in their favor").

151 Ezra Rosser, *Introduction* to THE POVERTY LAW CANON: EXPLORING THE MAJOR CASES 1–2 (Marie A. Failinger & Ezra Rosser eds., 2016); *see also* Wendy A. Bach, *Mobilization and Poverty Law: Searching for Participatory Democracy Amid the Ashes of the War on Poverty*, 20 VA. J. SOC. POL'Y & L. 96, 103–04 (2012) [hereinafter Bach, *Mobilization and Poverty Law*] (describing narrower conception of "public benefits law" or a "branch of 'public regulatory law'"); Hammond, *Poverty Lawyering in the States*, *supra* note 150, at 216 ("One irrefutable area of substantive poverty law is the law regulating how government at all levels distributes public benefits and services, especially medical, food, cash, housing, and disability assistance.").

152 THE POVERTY LAW CANON, *supra* note 151, at 2.

Bach has observed, the War on Poverty programs, which LIHEAA supplemented, were premised on "a theory that poverty could be addressed primarily through services and aid" and focused almost exclusively on "individual as opposed to institutional change."[153] Too narrow a conception leaves legal structures that reinforce inequalities largely undisturbed.[154] Seriously addressing this tendency of legal institutions requires recognizing how substantive areas of law, like energy law, affect all people and building anti-poverty objectives into legal structures.

B. Energy Insecurity and Energy Law Federalism

Energy law federalism—the contours of state and federal authority over the electric power industry—has helped marginalize energy justice concerns about energy burden in low-income households. Key structural elements of energy law derive from the crafted division of federal-state regulatory powers under the Federal Power Act.[155] The Federal Power Act defines the jurisdictional contours and basic principles for electricity regulation—a response by Congress in the 1930s to the growing monopoly power of electric utilities and, more particularly, utilities' interstate monopolistic activity, which was beyond individual states' regulatory reach.[156]

The Federal Power Act and the formation of the Federal Power Commission, the predecessor of today's Federal Energy Regulatory Commission (FERC), filled this gap.[157] The risk posed by energy monopolies, of course, in the words of the Supreme Court, is "the abuse[]of [market] power."[158] Utilities, left unchecked, could charge exorbitant prices with consumers having no alternatives within the market. In the

---

153 Bach, *Mobilization and Poverty Law*, *supra* note 151, at 131 (describing the role of Community Action programs in local implementation of War on Poverty programs).

154 Davis, *supra* note 148, at 1395 (calling for "a common vocabulary and a deep understanding of the 'jurisprudence of economic equality'").

155 16 U.S.C. §§ 791–828c (2018).

156 Pub. Utils. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 90 (1927) (holding that "the interstate business" between two electric power companies "is essentially national in character" and "is therefore not subject to regulation by either of the two states"—regulation of the interstate transaction "can only be attained by the exercise of the power vested in Congress").

157 In energy law, this is commonly known as the "Attleboro gap," in reference to the Supreme Court case that highlighted the constitutional limitations on state utility regulation of interstate energy transactions. *See* New York v. FERC, 535 U.S. 1, 6 (2002).

158 *See* Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 531 (2008) (in the context of electric wholesale contracts); *see also* Apache Corp. v. FERC, 627 F.3d 1220, 1221 (D.C. Cir. 2010) (in the natural gas regulatory context, explaining that "[a]cting pursuant to its statutory authority, FERC has long sought to prevent abuses of [pipeline owners'] monopoly power").

most general sense, then, basic consumer protection has been a primary justification for regulating the electric power industry.[159]

In addition, regulating monopoly territories was seen as a way to expand the availability of electric power while minimizing inefficient and costly redundant infrastructure. Under the Federal Power Act, Congress established federal authority to regulate interstate wholesale electricity sales (such as to or between utilities) and preserved for states jurisdiction over retail sales from a utility to end consumers, whether industrial-scale users or households.[160]

Two foundational energy law principles stand out as most relevant to home energy insecurity. First is the common law principle that public utilities, when granted a monopoly service territory, have a "duty to serve."[161] That is, in exchange for protected market dominance in the sale of their product—a concession deemed justified by the strong public interest in access to electricity—a utility must accept the responsibility of ensuring electric power is generally and consistently available to all (or rather, to any who can pay for it) within the service territory.[162] This

---

[159] To this end, under President Franklin D. Roosevelt, the federal government responded to corporate abuses with a number of significant actions close in time, including the creation of the Securities and Exchange Commission in 1934 and the enactment of both the Federal Power Act to regulate interstate electricity transmission and wholesale transactions and the Public Utility Holding Company Act to prevent fraudulent use of utility holding companies, both in 1935. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78jj (2018); Federal Power Act of 1935, 16 U.S.C. §§ 791–828(c) (2018); Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803–38 (repealed 2005).

[160] *See, e.g.*, PPL EnergyPlus, LLC v. Solomon, 766 F.3d 241, 246–47 (3d Cir. 2014) (addressing the division of authority between FERC and the states under the Federal Power Act).

[161] For discussion of the historical origins of public utilities' common law "duty to serve," drawing from applications in the common carrier and other contexts and early economic theory of monopoly services, see 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, 1242–49 (1998) For more recent work on the subject, especially Part II's, discussion of "duty to serve" as part of a broader article assessing whether the "duty to serve" in the modern public utility context must include a duty–enforceable under tort law–to adapt the electric grid to predictable climate change-related harms, such as service outages in severe weather, see Jim Rossi & Michael Panfil, *Climate Resilience and Private Law's Duty to Adapt*, 100 N.C.L. Rev. 1135, 1156–58 (2022). *See also* Heather Payne, *Unservice: Reconceptualizing the Utility Duty to Serve in Light of Climate Change*, 56 U. RICH. L. REV. 603, 626 (2022) (discussing history of duty to serve and anticipating it will increasingly conflict with the principle that utility expenditures are "prudent" as climate impacts intensify and evaluating, with preference to the National Flood Insurance Program and the Price-Anderson Act, how these principles of utility regulation may be modified); CHARLES HARAK ET AL., ACCESS TO UTILITY SERVICE 15–16 (6th ed. 2018) (practical and accessible discussion of the application of duty to serve to utilities in all forms, including shareholder-owned, municipal, and cooperatives, from the consumer perspective).

[162] When a utility is granted the exclusive, or near exclusive, right to provide electricity service within a territory, the so-called "retail franchise" generally "(a) defines a geographic area, (b) prohibits retail competition for a particular set of services within that area, and (c) appoints a company to be the sole seller of those services." SCOTT HEMPLING, REGULATING

common law principle has been incorporated into statutory and regulatory regimes, with a broad focus on governing the availability of utility services—the ability to extend utility service and rules governing procedural aspects of terminating service—in both gas and electric utility contexts.[163] Although the understanding of what standard of service is required by the duty may vary to a degree, the duty to serve applies even when service in all areas may not be profitable.[164] In this sense, as some commenters have noted, the duty to serve is a generally inclusive principle, underscoring the importance of energy access to energy law.[165] In modern practice, however, it is clear that assuring even the near universal energy access—the general availability of energy services taken

---

PUBLIC UTILITY PERFORMANCE: THE LAW OF MARKET STRUCTURE, PRICING AND JURISDICTION 15 (2013). There are variations in the degree of exclusivity and nuances to utilities' ability to prevent self-generation of electricity, collective consumer generation, or avoid potential conflicts with absolute exclusivity. *See id.* at 17–30.

163 Rossi, *supra* note 161, at 1252–61; *see also id.* 1248–49 (tracing extension of the common law duty to serve to gas companies to the 1890s).

164 *See* 64 AM. JUR. 2D *Public Utilities* § 19 (2024) (stating that a public utility "may not choose to serve only the portion of the territory covered by its franchise that is presently profitable for it to serve"). So long as the overall rate of return on investment by the utility is reasonable, states' imposition of the duty to serve is permissible despite certain areas not generating a profit for the utility. *Id.* § 19 n.2. For typical statutory articulations of the duty to serve, compare Kansas and Florida statutory language. *Compare* KAN. STAT. ANN. § 66-101b (2023) ("Every electric public utility governed by this act shall be required to furnish reasonably efficient and sufficient service . . . . [and any] unjust or unreasonably discriminatory or unduly preferential rule, regulation, classification, rate, charge or exaction is prohibited and is unlawful and void."), *with* FLA. STAT. § 366.03 (2022) ("Each public utility shall furnish to each person applying therefor reasonably sufficient, adequate, and efficient service upon terms as required by the commission . . . . [and which may not] give any undue or unreasonable preference or advantage to any person or locality."). As John Kwoka has observed, it was the Rural Electrification Administration—created by Congress in 1936—that accelerated expansion of electricity service into rural areas via consumer-owned rural electric cooperatives—not shareholder-owned utilities—into areas "the 'market' would avoid or poorly serve." JOHN E. KWOKA, JR., POWER STRUCTURE: OWNERSHIP, INTEGRATION, AND COMPETITION IN THE U.S. ELECTRICITY INDUSTRY 6, 12 (1996).

165 *See, e.g.*, CHARLES M. HAAR & DANIEL W. FESSLER, THE WRONG SIDE OF THE TRACKS: A REVOLUTIONARY REDISCOVERY OF THE COMMON LAW TRADITION OF FAIRNESS IN THE STRUGGLES AGAINST INEQUALITY 15 (1986) (situating the duty to serve as, in its highest form, "a positive obligation to provide all members of the public with equal, adequate, and nondiscriminatory access"). Others take a less sanguine view of the public interest motivation for energy regulation. *See* DAVID E. NYE, ELECTRIFYING AMERICA: SOCIAL MEANINGS OF A NEW TECHNOLOGY 1880–1940, at 180–81 (1990) (calling utilities' support for state regulation as their "most effective tactic" against the trend of municipalities seeking to assert public control over local electric service); *see also* William Boyd, *Just Price, Public Utility, and the Long History of Economic Regulation in America*, 35 YALE J. ON REG. 721, 770 (2018) [hereinafter Boyd, *Just Price*] ("[R]egulated entities actively sought regulation and used it for their benefit [resulting in] [p]ublic utility regulation [that] was thus a product of rent-seeking behavior on the part of regulated firms; the idea of a general public interest was tenuous at best." (citing George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971); Greg A. Jarrell, *The Demand for State Regulation of the Electric Utility Industry*, 21 J.L. & ECON. 269, 271–72 (1978)).

for granted in the United States—does not necessarily address the experience of home energy *insecurity*, and the burden on low-income households to afford consistent energy access.

The second legal principle most relevant to energy insecurity is that utility rates must be "just and reasonable."[166] This principle characterizes a balancing of interests on both sides of an energy sale, at once advancing the highly generalized public interest in keeping energy access affordable while offering a robust and secure rate of return for utility shareholders to assure steady energy sector investment. At the federal level, the Federal Power Act assigns FERC the authority to regulate wholesale transactions, and the buyers and sellers are typically electric power producers and utilities.[167] At the state level, utility commissions are charged with translating the "just and reasonable" standard into retail consumer rates, striking a balance between the interests of utility shareholders—what they should expect to earn on their investments in the energy system—and the interest of ratepayers, including residential consumers, in reasonably priced electric power.[168] Congress took a very similar approach to structuring federal-state jurisdiction in the natural gas industry under the Natural Gas Act[169]—states regulate retail sales, such as for heat and other power needs to consumers, while wholesale sales are under federal jurisdiction.[170]

---

166 *See* Federal Power Act, 16 U.S.C. § 824d(a) (2018) ("All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.").

167 *Id.* § 824(a). How regulation of wholesale energy transactions occurs at the federal level, and how it evolved and varies regionally based on the degree of industry restructuring, is beyond the scope of this Article. However, I draw readers' attention to William Boyd's detailed discussion of FERC's role in "price making in electricity markets" in William Boyd's *Ways of Price Making and the Challenge of Market Governance in U.S. Energy Law*, 105 MINN. L. REV. 739, 782–817 (2020) [hereinafter Boyd, *Ways of Price Making*]. He shows how remote price-setting through algorithms that structure electric power dispatch with only light oversight by FERC really is a specific concern for low-income energy burden, which is affected, if indirectly, by the legal regimes that shape wholesale energy markets. *Id.*

168 *See, e.g.*, KAN. STAT. ANN. § 66-101b (2023) (assigning the Kansas Corporation Commission the power to require electric public utilities "to establish and maintain just and reasonable rates when the same are reasonably necessary in order to maintain reasonably sufficient and efficient service from such electric public utilities").

169 15 U.S.C. §§ 717–717z (2018).

170 *Id.* § 717c(a) (requiring rates to be "just and reasonable"). For a discussion of the role of FERC in "price making in natural gas markets," see Boyd, *Ways of Price Making*, *supra* note 167, at 759–82. *See also* 16 U.S.C. § 824(b) (applying the statutory provisions to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce" and stating that "[t]he Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction . . . over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce"); Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 577 U.S. 260, 266–67 (2016) (interpreting 16 U.S.C. § 824(b) as authorizing FERC to

Likewise, although the industries have practical and historical differences, principles in common with those articulated in the Federal Power Act, and at the state level in connection with electricity service, perform the same basic regulatory functions under the Natural Gas Act.

This long-standing principle—that rates must be "just and reasonable"—was incorporated into state and federal energy law frameworks from the common law.[171] It is conceptually linked to what is known within energy law as the "regulatory compact" between regulators and public utilities, under which utilities providing an essential service are understood to submit to heightened regulatory oversight in exchange for what is functionally a monopoly territory for their service and reasonable return on investment.[172]

Critically, what constitutes a "just and reasonable" rate that fairly balances utility shareholder interests against ratepayers is not simply a values-free math calculation—it is a standard that must be constructed and reconstructed again and again. As the Supreme Court has acknowledged, the "requirement that rates be 'just and reasonable' is obviously incapable of precise judicial definition."[173] Moreover, it is clear from the historical development of the "just and reasonable" principle, traced from its origins in the "just price" concept in early economic theory, that the essential transaction subject to the principle is between utility shareholders and ratepayers categorically, without specific consideration of energy burden in low-income households.[174]

This subject framing is evident despite use of the term "reasonable" by public utility economists as interchangeable with "socially optimal."[175] In a significant ratemaking case, *Federal Power Commission v. Hope Natural Gas Co.*,[176] the Supreme Court confirmed that "[t]he rate-making process . . . involves a balancing of the investor and the consumer interests."[177] There, the Court approved the Federal Power Commission's balancing and deemed the "just and reasonable" standard satisfied when

---

regulate wholesale electric energy in interstate commerce, but leaving other obligations, including "retail sales of electricity" to the States).

171 *See* Munn v. Illinois, 94 U.S. 113, 125–27, 130 (1876) (citing common law sources and commentaries to uphold state price regulation of grain elevators deemed "affected with a public interest" that justified governmental attention); LINCOLN L. DAVIES ET AL., ENERGY LAW AND POLICY 331 (2015) ("[T]he fundamental rate principles are shared by both [state and federal] regulators.").

172 For a discussion of the "Regulatory Compact" and utilities' interest in recovering costs and asset losses from ratepayers, see Charles C. Read & Marc T. Campopiano, *Climate Change, the Regulatory Compact, and Public Utility Rights*, INFRASTRUCTURE, Spring 2021, at 1, 1, 9.

173 Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1, 554 U.S. 527, 532 (2008).

174 *See* Boyd, *Just Price*, *supra* note 165, at 765–68 (discussing the origins of the "just and reasonable" standard in economic theory of "just price").

175 *See, e.g.*, JAMES C. BONBRIGHT ET AL., PRINCIPLES OF PUBLIC UTILITY RATES, at xv (2d ed. 1988).

176 320 U.S. 591 (1944).

177 *Id.* at 603.

rates set by the Commission allowed the company "to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors."[178] This list of relevant benchmarks emphasizes those measures that are specific to, and defined for presentation to regulators by, the utilities seeking rate approval (invariably to increase rates).

The same emphasis on what is a "fair" rate of return for utility shareholders, a key component of consumer rate setting, occurs in state proceedings. For example, a Pennsylvania Utility Commission analysis that is cited as exemplary in the treatise *The Regulation of Public Utilities* explains "[t]here is a range of reasonableness within which earnings may properly fluctuate and still be deemed just and reasonable . . . bounded at one level by investor interest against confiscation" and preserving capital investment in the energy system and at the other "by consumer interest against excessive and unreasonable charges for service."[179]

Historically, utilities have framed the substantive issues for consideration before public utility commissions, and parties representing ratepayers or environmental interests, even the regulators themselves, have mostly been in a responsive posture to what utilities submit.[180] In the physical and procedural forum of a ratemaking proceeding before a utility commission, there is typically a marked imbalance between the access and influence of utilities on the one hand and ratepayers on the other. This imbalance has long shaped "just and reasonable" rate determinations. As utility economist James Bonbright wrote, ratemaking encapsulates an "obvious . . . clash of individual or class interests" pitting "corporate stockholders who seek higher dividends" against "residential consumers who seek lower rates"—two sides "directly opposed to each other."[181] Indeed, in seeming confirmation of the significance a more equal playing field makes, commercial and industrial (so-called C&I) consumer classes pay a lower rate on average than residential customers, including but not limited to low-income households, who typically pay the "highest" rate.[182]

---

178 *Id.* at 605.

179 CHARLES F. PHILLIPS, JR., REGULATION OF PUBLIC UTILITIES: THEORY AND PRACTICE ch. 9 (1988) (citing *Pa. Pub. Util. Comm'n v. Bell Tel. Co. of Pa.*, 43 P.U.R.3d 241, 246 (Pa.P.U.C. 1962)).

180 Indeed, as one of the most widely available treatises on utility regulation acknowledges, "[h]istorically, public utility rate structures were developed by the companies themselves and, more particularly, by their engineers." PHILLIPS, JR., *supra* note 179, at ch. 10 (2005).

181 BONBRIGHT ET AL., *supra* note 175, at 70.

182 *See* FED. ENERGY REGUL. COMM'N, ENERGY PRIMER: A HANDBOOK OF ENERGY MARKET BASICS 40 (2024) [hereinafter FERC, ENERGY PRIMER], https://perma.cc/4P27-RAE8; *see also* Chan & Klass, *supra* note 19, at 1481 (highlighting "U.S. average prices for electricity in 2020[, which] were 13.15 cents per kilowatt-hour for residential customers, 10.59 cents per kilowatt-hour for commercial customers, and 6.67 cents per kilowatt-hour for industrial customers" (citing *Electric Power Monthly: Table 5.3. Average Price of Electricity to Ultimate*

Mapping these basic contours of energy law highlights important implications for situating energy insecurity for low-income households in the legal context. At the federal level, energy law is mostly remote from household-scale concerns. FERC's jurisdiction over wholesale energy transactions focuses the Commission's primary regulatory attention on utility- and industrial-scale firms and their relative market power. In approving wholesale rates, FERC has discretion to establish a rate-setting method so long as it "entails an appropriate 'balancing of the investor and the consumer interests.'"[183] Over time, FERC has adapted its regulatory frameworks to permit wholesale purchasers and sellers to negotiate contracts under broad FERC oversight through open access measures in both electric power and natural gas domains.

The balancing that assesses whether rates are reasonable in this context centers on the power dynamics between wholesale market participants and, for the most part, whether those markets are sufficiently competitive.[184] FERC conditions approval of market-based tariffs on whether the utility in question "lacks or has adequately mitigated market power, lacks the capacity to erect other barriers to entry, and has avoided giving preferences to its affiliates."[185] When FERC determines that a wholesale energy contract was freely negotiated, it "must presume that the rate set out" in the contract "meets the 'just and reasonable' requirement imposed by law."[186] In addition, as the National Association of State Utility Consumer Advocates stressed recently to FERC, regional transmission organizations (RTOs) and Independent Service Operators (ISOs) subject to FERC oversight increasingly make decisions that, like FERC-approved wholesale transactions, "ultimately impact a large portion of consumer bills."[187] In these ways, FERC's oversight of wholesale markets unquestionably affects affordability of

Customers, U.S. Energy Info. Admin. (May 2022))); *id.* at 1478 (noting that C&I customers have been able to negotiate "economic development rates" and that state PUCs have been "much more willing to offer special rates in the public interest because the focus, from the start, is on the overall economic benefits of such rates—even though it is not always clear that reduced industrial rates based on marginal costs are just, reasonable, and in the public interest").

183 *Morgan Stanley*, 554 U.S. 527, 532 (2008) (quoting *Hope Nat. Gas Co.*, 320 U.S. at 603).

184 Likewise, in the regulation of natural gas markets, FERC is charged with a "duty to prevent exploitation of . . . monopoly power" by market participants. *See* Process Gas Consumers Grp. v. Fed. Energy Regul. Comm'n, 177 F.3d. 995, 1004 (D.C. Cir. 1999).

185 *Morgan Stanley*, 554 U.S. at 537.

186 *Id.* at 530.

187 Nat'l Ass'n of State Util. Consumer Advocs., FERC Docket No. AD21-09-000, Opening Workshop Comments of David R. Springe (Apr. 9, 2021), https://perma.cc/VT4P-4PYH; *see also* SHELLEY WELTON, WHOLESALE ELECTRICITY JUSTICE 2 (2022), https://perma.cc/V2MA-22FX (discussing "non-obvious but critical ways" wholesale electricity markets implicate energy justice, including energy burden).

retail rates, even if that effect is indirect—household energy burden is a generalized, not specific, consideration at the federal level.[188]

At the state level, household energy burden is highly relevant to the ratemaking function of state public utility commissions, as these rates apply to retail consumers. A state commission must set retail rates that fairly compensate the utility and are just and reasonable, without undue discrimination or preference, within each customer class. The residential customer class includes low-income households along with all other households and is typically assigned a rate distinct from other customer classes, such as C&I consumers.[189] As they do in reviewing FERC ratemaking, courts generally defer to the state utility commissions in their determinations of just and reasonable retail rates.[190]

Thus, the ability of low-income households to pay a retail rate has most commonly been considered relevant in ratemaking proceedings as a *subset* of residential ratepayers generally, which again is the counterweight to utilities' interests. Ratemaking's analytical frames mesh neatly with harmful poverty narratives which, combined with norms and procedural practices shaping advocacy and decision-making in utility commissions, reinforce the structural isolation of low-income energy policy.

C. Poverty Narratives and Early Conceptions of Low-Income Energy Policy

Who "deserves" governmental help in meeting basic human needs for food, water, shelter, and energy access has long been a point of intense political tension in anti-poverty policy and advocacy. At the heart of this tension are conflicting interpretations of poverty and its social meaning. In his chronicle of the political and intellectual history of this debate within U.S. poverty law, Michael B. Katz traces the origins of the idea of

---

188 States are required to accept the reasonableness of wholesale rates approved by FERC. Thus, a state may not "second-guess the reasonableness of interstate wholesale rates" and on that basis, prevent utilities from recovering the cost of wholesale purchases through retail rates charged to consumers. Hughes v. Talen Energy Mktg., LLC, 578 U.S. 150, 165 (2016) (citing Miss. Power & Light v. Mississippi *ex rel.* Moore, 487 U.S. 354, 373 (1988); Nantahala Power & Light Co. v. Thornburg, 476 U.S. 953, 966 (1986)). In this way, the wholesale rates approved as just and reasonable by FERC indirectly affect the retail rates consumers pay for electricity. For an accessible overview of the interplay between wholesale and retail markets in electricity and natural gas, see generally FERC, ENERGY PRIMER, *supra* note 182, at 39–40 (discussing retail consumers of electricity).

189 HEMPLING, *supra* note 162, at 4 n.8 ("A utility will have multiple tariff sheets, one for each type of . . . customer (e.g., commercial, industrial or residential).").

190 *See* Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 TEX. J. OIL, GAS, & ENERGY L. 211, 232–34 (2016) (discussing deference by state courts when reviewing PUC decisions).

"deserving" and "undeserving poor."[191] The "deserving poor," he observes, is a constructed category with shifting (if consistently narrow) contours, as public policy has shown little "sympathy for poor persons throughout American history other than children, widows, and a few others whose lack of responsibility for their condition could not be denied."[192] In contrast, the purportedly "undeserving poor" have typically been judged so based on flawed assumptions that their poverty stems from some kind of individual failing "based on morality, culture, or biology."[193]

Despite clear linkages between poverty and social and economic histories entangling racism with gender discrimination, Katz shows how this emphasis on individual culpability and inadequacy has "dominated discussions of poverty for well over two hundred years."[194] In the Supreme Court's 1968 opinion in *King v. Smith*,[195] Chief Justice Warren acknowledged as much, observing that "[a] significant characteristic of public welfare programs during the last half of the 19th century in this country was their preference for the 'worthy' poor. Some poor persons were thought worthy of public assistance, and others were thought unworthy because of their supposed incapacity for 'moral regeneration.'"[196] Yet, as Khiara Bridges highlights in her work on poor

---

191 MICHAEL B. KATZ, THE UNDESERVING POOR: AMERICA'S ENDURING CONFRONTATION WITH POVERTY 1–49 (2d ed. 2013); *see also* MARTIN GILENS, WHY AMERICANS HATE WELFARE (1999) (evaluating racialized attitudes and media portrayals contributing to perceptions of "deserving" and "undeserving poor").

192 KATZ, *supra* note 191, at 3; *see also id.* at 269 ("[T]he identity of those who fall within the category [of the undeserving poor] has changed with time and circumstance.").

193 *Id.* at 2.

194 *Id.* at 269. Katz summarizes six primary theoretical explanations that have been used to answer the question "What kind of a problem is poverty?": (1) a problem of "[p]ersons": "the outcome of failings of individuals" which he sees as having been dominant among the six in public discourse; (2) a problem of "[p]laces": the result of "toxic conditions within geographic areas"; (3) a problem of "[r]esources": "the absence of money and other key resources"; (4) a problem of "[p]olitical economy": "a by-product of capitalist economies"; (5) a problem of "[p]ower": "a consequence of political powerlessness"; and (6) a problem of "[m]arkets": either the "absence of functioning markets" or a political failure to harness markets "to improve human lives." *Id.* at 268–69; *see also* MATTHEW DESMOND, POVERTY, BY AMERICA 9–23 (2023) (exploring for a general audience "the kind of problem poverty is"). For more from the sizeable literature on how poverty narratives have influenced law, see, for example, BRIDGES, *supra* note 142, at 5 (focusing on the impact of law and administrative systems shaped by poverty narratives on women's lives, dignity, and privacy), KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972 (2016) (detailing the administrative, legislative, and case law history that created the foundations for poverty law), Ann Cammett, *Deadbeat Dads & Welfare Queens: How Metaphor Shapes Poverty Law*, 34 B.C. J.L. & SOC. JUST. 233 (2014) (discussing the power and harm of racialized poverty narratives in law and social policy), and Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274 (1991) (discussing biases against single motherhood shaping law and social policy).

195 King v. Smith, 392 U.S. 309 (1968).

196 *Id.* at 320; *see also id.* at 311 (rejecting an Alabama regulation that required disqualification of otherwise eligible dependent children if their mother "cohabits" with any

mothers and privacy rights, the "moral construction of poverty" focused on individual "deficient character" contrasts with, and purports to lend credence to resistance to, "structural explanations of poverty."[197] The focus on individual responsibility for economic hardship, without consideration of structural disadvantages, of course, can readily translate into validation of the social positioning of the affluent, likewise without considering structural advantages.[198] This poverty narrative thus invites those considering from a position of economic security whether people in need *deserve* help to "safely presume that a poor person has problematic values and behavioral flaws" and that it is "these personal deficiencies—and not structural conditions" that are the source of their predicament.[199]

Poverty law jurisprudence reflects mixed perspectives on this narrative. In a memorable acknowledgement of structural inequality, Justice Brennan stressed in *Goldberg v. Kelly*[200] that "forces not within the control of the poor contribute to their poverty."[201] There, the Supreme Court held that it was a violation of the recipients' constitutional right of due process when the state of New York decided, without a hearing, that they were no longer eligible for Aid to Families with Dependent Children (AFDC).[202] The many economic, social, and historical forces contributing to modern precarity for low-income households have only intensified in the years since Justice Brennan penned those words.[203] Yet the very same year, in *Dandridge v. Williams,*[204] the Court distanced itself from the

"able-bodied man"). For more on the context and litigation of *King v. Smith* and the change of federal law undercutting the impact of the case (the replacement by Congress of AFDC with TANF in 1996), see Henry Freedman, *Sylvester Smith, Unlikely Heroine:* King v. Smith *(1968), in* THE POVERTY LAW CANON, *supra* note 151, at 69.

197 BRIDGES, *supra* note 142, at 37, 42, 45 (arguing the moral construction of poverty has been the rationale for denying poor mothers privacy rights enjoyed by other citizens, especially poor black mothers who were scrutinized through the lens of racial stereotypes).

198 *See generally* GILENS, *supra* note 191 (drawing on empirical data to discern sources of hostility among higher-income people to governmental programs designed to help low-income people).

199 BRIDGES, *supra* note 142, at 208.

200 97 U.S. 254 (1970).

201 *Id.* at 265. For discussion of *Goldberg v. Kelly*, see Melanie B. Abbott, *Dignity and Passion:* Goldberg v. Kelly *(1970), in* THE POVERTY LAW CANON, *supra* note 151, at 91–108 (relaying stories of the parties and highlighting importance and waning precedential value of the case), Stephen Wizner, *Passion in Legal Argument and Judicial Decisionmaking: A Comment on* Goldberg v. Kelly, 10 CARDOZO L. REV. 179 (1988) (including discussion of the case and of Justice Brennan's jurisprudential approach by a plaintiff-appellee's attorney in the case), and MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973, at 99–118 (1993) (discussing the case facts, the oral argument before the Supreme Court, and aspects of the Court's decision-making).

202 *Goldberg*, 397 U.S. at 261, 264 (holding that the due process clause of the U.S. Constitution afforded a right to continue receiving AFDC benefits pending an evidentiary hearing on continuing eligibility).

203 *See generally* Thomas W. Mitchell, *Growing Inequality and Racial Economic Gaps*, 56 HOW. L.J. 849 (2013) (addressing trends in economic inequality and potential in legal reform across multiple areas of law to reduce disparities).

204 Dandridge v. Williams, 397 U.S. 471 (1970).

problem, while still acknowledging it, when in deferring to the state of Maryland's family size cap for AFDC, it positioned "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs" as "not the business of the Court."[205]

Poverty law scholars have described a tension between the position that poverty is an "intractable" social problem beyond the courts' ability to address and the narrative that poverty is the result of individual failings or deficits.[206] Irrespective of this tension, the U.S. Supreme Court retreated from the protective posture of *Goldberg v. Kelly* in the years following that opinion. Notably in *Mathews v. Eldridge*,[207] on similar facts, the Court took a stance less sympathetic to the precarious living situation of people relying on federal cash assistance for survival.[208] When Congress enacted sweeping welfare reform in the mid-1990s, it even more fully embraced the deserving/undeserving distinction.[209] For example, the replacement of AFDC with Temporary Assistance for Needy Families (TANF) took a corner-stone program for public assistance and converted it from a federal cash program to a state-administered block grant structure, creating new competition between direct poverty alleviation and other public objectives.[210] Under the new structure, states were

---

[205] *Id.* at 487; *see also* Julie A. Nice, *A Sweeping Refusal of Equal Protection:* Dandridge v. Williams *(1970)*, *in* THE POVERTY LAW CANON, *supra* note 151, at 129, 129–52 (discussing *Dandridge v. Williams*); Jefferson v. Hackney, 406 U.S. 535, 551 (1972) (citing *Dandridge v. Williams* for the sentiment that problems presented by welfare programs are not business of the Court).

[206] *See* BRIDGES, *supra* note 142, at 48 (citing Thomas Ross, *The Rhetoric of Poverty: Their Immortality, Our Helplessness*, 79 GEO. L.J. 1499, 1510 (1991) (discussing this tension); *see also* Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1700–01 (1993) (contrasting these two "stories, with many variations," one "pathological," one "structural," that "compete for acceptance" (quoting JOEL F. HANDLER, REFORMING THE POOR 5–7 (1972)).

[207] Mathews v. Eldridge, 424 U.S. 319 (1976).

[208] *Id.* at 341–47, 349 (holding a person receiving Social Security disability payments was not entitled to an evidentiary hearing before termination of benefits and setting forth factors for assessing procedural due process claims); *see also* John J. Capowski, *Reflecting and Foreshadowing:* Mathews v. Eldridge *(1976)*, *in* THE POVERTY LAW CANON, *supra* note 151, at 219, 222, 225–26 (arguing that the Court's effort to distinguish *Mathews* from *Goldberg* is "neither persuasive nor empirically supported," pointing instead to changes in the court and changing social, economic, and political circumstances between 1970 and 1976 as offering explanation for the *Mathews*' divergence from *Goldberg*).

[209] *See, e.g.*, Ezra Rosser, Introduction, in HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY, *supra* note 150, at 1, 6–7 (highlighting that "[t]he future of antipoverty . . . depends in part on the degree to which the welfare debates of the 1980s and 1990s continue to define the terms of debate about assistance to the poor"); *see also* Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

[210] GENE FALK, CONG. RSCH SERV., R40946, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT: AN OVERVIEW 1, 3 (2013); *see also* Monica Bell et al., *Laboratories of Suffering: Toward Democratic Governance*, *in* HOLES IN THE SAFETY NET: FEDERALISM AND POVERTY, *supra* note 150, at 40, 40–69 (highlighting the variance in TANF implementation among different states, noting that some jurisdictions require that families be "utterly destitute" for participation).

afforded more leeway in setting eligibility requirements with an incentive to reduce the number of people receiving assistance because money "saved" by the states could be used for other purposes.[211]

In the context of low-income energy policy, courts have grappled with the same tension in interpreting relevant statutory and regulatory provisions. The 1978 U.S. Supreme Court opinion in *Memphis Light, Gas, & Water Division v. Craft*,[212] published shortly before Congress enacted LIHEAA, conveyed both the ubiquity of poverty narratives in shaping perceptions of people struggling with home energy bills and the ease with which such struggles are rendered invisible.[213] In *Memphis Light*, residential customers challenged the constitutionality of a municipal utility's disconnection policy, and the Court concluded that the customers who were billed erroneously were denied due process rights because the utility did not give adequate notice of complaint procedures or an opportunity for review of disputed bills.[214] The majority took care to contrast the protections for customers contending with a utility over a disputed bill, versus nonpayment of bills, in which case "[a] company supplying electricity . . . has a right to cut off service to a customer for nonpayment of a just service bill."[215] The Court explained, an "obvious reason" for this "common-law privilege of the utility to terminate service for nonpayment of *just charges*" is "that to limit the remedy of collection of compensation for the service to actions at law would be impracticable, as leading to an infinite number of actions to collect very small bills against scattered consumers, many of them *mere renters and financially irresponsible*."[216]

At the same time, the invisibility of low-income households' struggle with high energy burden is evident in the dissent. There, three dissenting Justices agreed the customers had a legitimate claim under state law but dissented on the due process holding.[217] They reasoned, "[s]ince *a customer can always avoid termination by the simple expedient of paying the disputed bill* and claiming a refund, it is not surprising that the real emergency case is rare, if indeed it exists at all."[218] Further, they assumed (wrongly and without support) that residential customers facing utility disconnection will have the ability to hire an attorney to assist with their consumer complaint, reasoning that "[w]hen a true emergency does present a serious threat to health or safety, *the customer will have ample*

---

211 Andrew Hammond, *Welfare and Federalism's Peril*, 92 Wash. L. Rev. 1721, 1732 (2017) (evaluating the 1996 Welfare Reform Act which replaced AFDC with TANF).

212 436 U.S. 1 (1978).

213 *Id.* at 1.

214 *Id.* at 21–22.

215 *Id.* at 9 (quoting Trigg v. Middle Tenn. Elec. Membership Corp., 533 S.W.2d 730, 733 (Tenn. App. 1975)).

216 *Id.* at 21 n.27 (1978) (emphasis added) (quoting Steele v. Clinton Elec. Light & Power Co., 193 A. 613, 615 (Conn. 1937)).

217 *Id.* at 22 (Stevens, J., dissenting).

218 *Id.* at 28–29 (emphasis added).

motivation to take the important step of consulting counsel or filing suit even if the amount of his disputed bill is small," as a "potential loss of utility service sufficiently grievous to qualify as a constitutional deprivation can hardly be too petty to justify invoking the aid of counsel or the judiciary."[219] The majority countered this point, recognizing "the predicament confronting many individuals who lack the means to pay *additional, unanticipated* utility expenses" represented by erroneous billing, but distinguished this from "just charges" which residential customers seem presumed to be able to pay if they are financially responsible.[220]

In a LIHEAP-specific opinion, the Second Circuit seemed troubled by the effect of its holding that the state of New York could, by regulation, deem "one group of the poor [to be] more in need of assistance than another."[221] The Court emphasized that the "complicated nature of the legal problems presented should not obscure the harsh choices at the human level that they represent."[222] The Court framed its conclusion favoring the state by observing, "[i]n the best of all possible worlds the needs of all would be met. Unfortunately, we do not rule in such a world and, as a consequence," the state's differentiation was permissible under the federal statute.[223]

The early alignment of low-income energy policy with poverty law may seem unsurprising, given home energy assistance links eligibility to other public assistance programs and has obvious complementarity with the administrative infrastructure of those programs.[224] Creating those administrative linkages connected low-income households with a range of supports, from utility bills to food and health care.[225] Yet this alignment also did not happen in a vacuum. Significant contestation around PURPA's lifeline rates concept was ongoing at the state level in the same window of time immediately leading up to the creation of LIHEAP. Recall

---

[219] *Id.* (emphasis added). Lack of access to legal services for low- and middle-income households is addressed further in Part IV.

[220] *Memphis Light, Gas, & Water Div.*, 436 U.S. at 21 nn.26–27 (majority opinion) (emphasis added).

[221] Rodriguez v. Cuomo, 953 F.2d 33, 34 (2d Cir. 1992).

[222] *Id.*

[223] *Id.*

[224] 42 U.S.C. § 8624(b)(2)(A) (2018) (linking eligibility for LIHEAP in households in which an individual is receiving other specified forms of federal public assistance).

[225] Community Action Agencies, which disburse funds in most states, grew out of the War on Poverty. For a discussion of the role of Community Action Agencies, see PERL, CONG. RSCH. SERV., *supra* note 14, at 5. For a scholarly account of Community Action, in dialogue with new governance theory, see generally Bach, *Mobilization and Poverty Law*, *supra* note 151, and Peter B. Edelman, *Toward a Comprehensive Antipoverty Strategy: Getting Beyond the Silver Bullet*, 81 GEO. L.J. 1697, 1710–18 (1993) (discussing the rationale for Community Action in the Economic Opportunity Act and negative reactions to them among local governments). For first-hand accounts of political and governance challenges of Community Action implementation, see generally MICHAEL L. GILLETTE, LAUNCHING THE WAR ON POVERTY: AN ORAL HISTORY (J. Todd Moye et al. eds., 2d ed. 2010).

that a few short years before Congress enacted LIHEAA, PURPA section 114 directed states to consider, without requiring, so-called lifeline rates for "essential needs" of residential consumers.[226] This provision expressly authorized states to approve "a rate for essential needs . . . which is *lower* than a rate under the standard" cost-of-service approach to rate setting.[227] Yet when states considered lifeline rates under this directive, they were controversial and far from universally adopted.[228] For example, the Ohio Supreme court did not disturb the Ohio Public Utility Commission's rejection of the concept, stating "the Commission does not believe that rates should be structured with such social considerations in mind. The redistribution of income is simply not a ratemaking function."[229] Other state commissions considered electric lifeline rates for similar reasons, some finding such rates were precluded by state law prohibitions on undue discrimination.[230]

In 1980, as the deadline approached for states to hold a hearing on lifeline electric rates, the DOE conducted a policy review of state lifeline programs, some of which pre-dated the PURPA directive.[231] The review assembled "case studies of ten implemented and ten rejected lifeline rate

---

226 16 U.S.C. § 2624(a) (2018).

227 *See id.* (emphasis added) (referencing PURPA § 111(d)(1)); *id.* § 2621(d)(1) (establishing a federal standard for state consideration based on "cost of service," so that "[r]ates charged by any utility for providing electric service to each class of electric consumers shall be designed to the maximum extent practicable to reflect the costs of providing electrical service to such class").

228 *See* U.S. DEP'T OF ENERGY, LIFELINE ELECTRIC RATES AND ALTERNATIVE APPROACHES TO THE PROBLEMS OF LOW-INCOME RATEPAYERS: CROSS PROGRAM SUMMARY 19 fig.3-1, 30–31 (1980) [hereinafter DOE, LIFELINE ELECTRIC RATES] (showing "States with Implemented and Rejected 'Lifeline' Programs" and providing an analysis of acceptance and rejection trends). For more on the arguments for and against lifeline rates and early state responses to the concept, see generally Hetie S. Parmesano & Catherine S. Martin, *The Evolution in U.S. Electric Utility Rate Design*, 8 ANN. REV. ENERGY 45, 80–83 (1983) (discussing lifeline rates rejections by states), and Ashley C. Schannauer, *Lifeline Electric Rates: Are They Unreasonably Discriminatory?*, 83 DICK. L. REV. 541, 553 (1979) (discussing early state consideration and mostly rejection of the lifeline rate concept). *See also* Chan & Klass, *supra* note 19, at 1463–70 (discussing state commission consideration of lifeline rates); Peskoe, *supra* note 190, at 257–59 (discussing early policy debate over lifeline rates); Steven Ferrey, *Solving the Multimillion Dollar Constitutional Puzzle Surrounding State "Sustainable" Energy Policy*, 49 WAKE FOREST L. REV. 121, 158–62 (2014) [hereinafter Ferrey, *Solving the Multimillion Dollar Constitutional Puzzle*] (evaluating states that have implemented targeted lifeline rates).

229 Greater Cleveland Welfare Rts. Org., Inc. v. Pub. Util. Comm'n, 442 N.E.2d 1288, 1293 (Ohio 1982).

230 *See, e.g.*, Mountain States Legal Found. v. Pub. Util. Comm'n, 590 P.2d 495, 498 (Colo. 1979) (holding targeted lifeline rates did not accord with state law directing the PUC not to grant "any preference"); Citizens Action Coal. of Ind., Inc. v. Pub. Serv. Co. of Ind., 450 N.E.2d 98, 101 (Ind. Ct. App. 1983) (holding state law "forbids a targeted lifeline rate structure").

231 *See* DOE, LIFELINE ELECTRIC RATES, *supra* note 228, at 1 (citing deadline of Nov. 9, 1980).

programs."[232] The review identified several trends. First, if a lifeline rate proposal originated from state commissions or utilities themselves, it was "more likely to be adopted than legislative initiatives."[233] Second, the DOE observed a shift in the political economy of the lifeline concept, noting that the first pre-PURPA programs were implemented close in time with the 1973 oil embargo, and there were no other assistance models focused on energy in use.[234] However, after four years had passed, lifeline rates were one feature within what by then was "a more complex policy environment" and "various alternate methods for assisting low-income people had been developed."[235] The lifeline concept, it seemed, had "lost some of its early appeal" and proposals began to be more readily rejected.[236] Finally, the review found that proposals framed as "conservation rate breaks" fared better than those framed in terms of support for low-income households.[237] This resistance to considering low-income households within energy law regimes—even when proposed lifeline rates targeted a very narrow subset of low-income households limited to "low-income, elderly individuals on fixed incomes"—undoubtedly seemed more readily justifiable with the Home Energy Assistance Act of 1980 (and LIHEAA a year later), providing a conceptually and institutionally separate pathway for households to seek assistance.[238] This approach, justified by economic efficiency arguments and perceived unfairness to other (higher income) residential consumers, mostly remains to this day. An effect, intended or not, was to isolate the low-income household from institutional energy law attention beyond abstract consideration.

As with lifeline rates, much of the early policy debate over home energy assistance centered on how to help with energy bills for low-income households while also promoting energy conservation, a national

---

232 *Id.*

233 *Id.* at 3.

234 *Id.* at 3–4.

235 *Id.* at 4.

236 *Id.*

237 *Id.* In stark contrast with the policy patchwork that resulted for the lifeline rate concept in the electricity sector, a lifeline rate for low-income telecommunications access was made universally available by the Federal Communications Commission through a federal lifeline program established in 1985. *See* ANGELE A. GILROY, CONG. RSCH. SERV., R44487, FEDERAL LIFELINE PROGRAM: FREQUENTLY ASKED QUESTIONS 1 (2017).

238 DOE, LIFELINE ELECTRIC RATES, *supra* note 228, at 11. States were more responsive to PURPA's directive regarding termination policies. *See* PURPA, 16 U.S.C. § 2625(g) (2018); 15 U.S.C. § 3204(a) (2018). Most states bar utilities from disconnecting residential service on overdue accounts during extreme cold or where a household member is dependent on electricity for medical equipment. *See Disconnect Policies*, LOW INCOME HOME ENERGY ASSISTANCE PROGRAM CLEARINGHOUSE, https://perma.cc/586F-6JUQ (July 2024) (providing general state-by-state summaries). This is likely due to the fact that missed bills typically accrue for later payment once the moratorium ends, allowing disconnection to proceed and requiring accumulated debt to still be paid or restructured into a utility payment plan. U.S. GOV'T ACCOUNTABILITY OFF., GAO/HRD-91-1BR, LOW-INCOME HOME ENERGY ASSISTANCE: A PROGRAM OVERVIEW 20–21 (1990).

priority at the time.[239] Policymakers were concerned about fuel shortages and the effect of high demand on energy costs. It soon became clear, however, that many low-income households experienced *routine* energy insecurity, not just in extreme incidents of emergency hardship or spikes in energy costs, which were the sole focus of the early home energy assistance.[240]

Three primary approaches were identified for ensuring "an adequate" —but not more than necessary—"consumption of energy by the poor."[241] These were: "(1) tie benefits to actual energy use through some type of subsidy program, (2) increase the income of the poor, or (3) make their homes more energy-efficient."[242] Lawmakers were wary of the idea of subsidizing home energy costs except in cases of crisis-level need, worrying that doing so would be an incentive to consume more energy than "the 'necessary' level, thereby leading a level of energy consumption deemed too high in terms of economic efficiency," which would be counter to energy conservation goals.[243] Concern about the *how much* help and *for whom* that shape eligibility criteria provided a ready backdrop for these considerations.

While some policymakers viewed general cash assistance as the best way to help low-income households pay energy bills alongside other home expenses,[244] correspondence between the U.S. General Accounting Office and Congress in 1980 reflected a "common concern" that funds might be directed to "individuals who were not responsible for heat, fuel, or energy costs" such as "persons living in public or subsidized housing."[245] The subtext of this concern seems to have been that such persons already received as much support as they "deserved" through the housing subsidy and other forms of public assistance—some courts later rejected states' exclusion and differential treatment of people living in subsidized housing under LIHEAP, which requires states give the highest level of benefits to those with the lowest incomes and highest ratio of energy costs

---

239 *See generally* CONG. BUDGET OFF., *supra* note 16, at 1916.

240 *Id.* at 20–21.

241 *Id.* at 19–20.

242 *Id.* at 20.

243 *Id.*

244 *Id.* at 21.

245 U.S. GOV'T ACCOUNTABILITY OFF., HRD-80-119, REVIEW OF SELECTED ASPECTS OF LOW INCOME ENERGY ASSISTANCE, Enclosure I, at 1 (1980), https://perma.cc/28CH-D2TZ. Direct cash assistance as a method of support for people struggling out of poverty had been controversial for some time by this point. *See, e.g.*, Wendy A. Bach, *Litigating in the Zeitgeist:* Rosado v. Wyman *(1970)*, *in* THE POVERTY LAW CANON, *supra* note 151, at 109, 110–12 (discussing welfare reform, progressive optimism in the late 1960s, and how "the idea of a national guaranteed annual income (GAI) faded," giving way to a "growing chorus of those who would scapegoat and stigmatize poor women, poor children, and poor communities"); KATZ, *supra* note 191, at 135–39 (discussing debate surrounding the Heineman Commission report in 1969, BENJAMIN W. HEINEMAN, PRESIDENT'S COMMISSION ON INCOME MAINTENANCE PROGRAMS, POVERTY AMID PLENTY: THE AMERICAN PARADOX (1969), which proposed a national minimum income).

to income.[246] Moreover, the prospect of direct cash assistance invited the objection that more energy than "necessary" would be used, weakening the justification for assistance and running counter to the energy conservation objective.[247] The total amount of LIHEAP funds an eligible household can receive in a year, even irrespective of continuing need, is therefore strictly limited.[248]

Thus, this vital program was always fashioned to provide energy assistance to the very lowest-income households, only periodically, in limited amounts, and often in near-crisis and crisis situations, not to be a *solution* to persistent energy insecurity and high energy burden. With WAP, Congress more directly addressed high energy burden by targeting low-income homes for energy efficiency improvements. Conceptually, this makes sense and, as a practical matter, weatherizing a home is an effective way to reduce energy bills year-round.[249] Nonetheless, as

---

[246] *See, e.g.*, Crawford v. Janklow, 710 F.2d 1321, 1323–24 (8th Cir. 1983) (holding South Dakota's "categorical exclusion" of subsidized housing residents from state administered LIHEAP funds violated LIHEAA); Clifford v. Janklow, 733 F.2d 534, 540–41 (8th Cir. 1984) (holding South Dakota's differential treatment of subsidized housing residents and failure to pay the highest level of assistance to those with highest energy costs in relation to income violated LIHEAA); Boles v. Earl, 601 F. Supp. 737, 747–48 (W.D. Wis. 1985) (granting preliminary injunction in challenge to Wisconsin's exclusion of households in subsidized housing from LIHEAP and concluding Wisconsin had shown no "rational basis for excluding all persons in subsidized housing," violating the Equal Protection Clause). *But see* Rodriguez v. Cuomo, 953 F.2d 33, 41 (2d Cir. 1992) (holding it was within states' interpretive authority under LIHEAA to "rationally determine that tenants of government subsidized housing whose heat is included in their rent do not have 'the lowest income and the highest energy costs in relation to income' in comparison with households not occupying such housing"'). For more information on the regulatory treatment of energy bills and energy efficiency in federally subsidized housing, see Steven Ferrey, *Cold Power: Energy and Public Housing*, 23 HARV. J. ON LEGIS. 33, 85–93 (1986) (discussing LIHEAP implications relevant to public housing tenants).

[247] CONG. BUDGET OFF., *supra* note 16, at 20.

[248] A plain language explanation on the HHS "Frequently Asked Questions" page informs applicants of this explicitly:

> Will LIHEAP pay for my whole utility bill?
>
> Probably not. LIHEAP is not meant to pay for all of your energy costs for the year, the season, or even the month.
>
> In many places, you can get help only with your main heating source. For example, if you heat with gas, you might get help with your gas bill but not your electric bill. Or you might get help with one bill or the other.
>
> . . . The amount of help that you get will depend on where you live (each grantee's payment levels are different), your income, your energy costs or needs, your family size, and possibly other factors. . . .
>
> It is unlikely that you will receive enough to pay your entire heating or cooling bill for the year, because LIHEAP is not designed to do that.

Id.

[249] Lewis et al., *supra* note 2 (addressing this impact as a form of restorative justice, given the multifaceted causes of energy insecurity beyond income level).

discussed in Section III.B, weatherization alone is insufficient to address the scale and scope of routine energy insecurity, as it is not an equally feasible solution for every home.[250] Further, low-income households may nonetheless struggle with high energy burden even with basic home weatherization improvements.

These observations substantiate the ongoing importance of LIHEAP and WAP while at the same time underscoring why energy law institutions must play a more active role. Energy law, in the broadest sense, has implicitly assumed that federal assistance programs will meet needs not addressed within energy law regimes. Doing so certainly makes the already highlighted complex central tasks easier. Flawed poverty law narratives centered on individual deficit or failing tend to reinforce that assumption for energy law's "just and reasonable" standard applicable to ratemaking: If a rate has been set consistent with that standard, it has been deemed "just and reasonable" for utilities and consumers alike; therefore (per the narrative) if a person is unable to pay a commission approved rate, it must be due to personal deficit or failings (the rate *is* just and reasonable, after all) and they should seek individual financial assistance through governmental anti-poverty programs or charitable organizations. This logic may then be repeated, again, in the next rate case.

The reasoning, however, is problematic in at least two respects. Factually, any assumption that the availability of LIHEAP and other external assistance programs absolves energy law of accountability for home energy insecurity is belied by the plain fact that these programs have never met the needs of millions of income-eligible households, much less non-eligible households who earn too much to qualify for assistance but nonetheless struggle to afford "just and reasonable" home energy bills.[251] Functionally, and more critically, poverty narratives implicitly blaming people with insufficient resources for their inability to pay help deflect reexamination *within energy law* of the policy assumptions that have shaped the modern understanding of what is "just and reasonable" in retail ratemaking. Likewise, they deflect reexamination of institutional structures, procedures, and norms that define whose interests are deemed relevant, and to what extent, in the day-to-day work of energy regulation. The flexibility afforded to utility commissions in setting rates provides room to revise methods to achieve desired ends, as judicial review (post-*Hope Natural Gas*) focuses on whether the "end result" of ratemaking, versus the methodology employed in setting rates,

---

250 CONG. BUDGET OFF., *supra* note 16, at 22.

251 *See United States by the Numbers*, NAT'L ENERGY & UTIL. AFFORDABILITY COAL., https://perma.cc/35ZQ-LKMF (last visited Sept. 20, 2024) (showing that only 5,391,802 low-income households received LIHEAP in 2021 compared with 34,161,280 eligible households).

is "just and reasonable."[252] As Chan and Klass have rightly noted, although utility commissions have a legal basis for addressing home energy insecurity, and an increasing number are beginning to do so, the "standard technocratic frames and broadly applicable norms" in ratemaking proceedings "obscure the social dimensions" of their decisions—that is, their impact at the household scale.[253]

In these ways, the flawed poverty narratives that have complicated the development of new anti-poverty solutions, poverty law jurisprudence, and the administration of vital public assistance programs have also seemed to justify insulating energy law institutions from asking critical questions that could make energy law regimes more responsive to the needs of the public they serve. One early observer of utility commission debate over lifeline rates put it well in 1979: "[W]hile it may be possible to avoid consciously considering social policy in the design of a rate structure, it is impossible to avoid implementing the social values inherent in their design."[254] LIHEAP's aims need stronger structural complements within energy law.

IV. LOW-INCOME ENERGY POLICY IN TRANSITION

Increased attention to energy justice is driving policy innovation with the potential to reduce energy insecurity and reshape the relationship between energy law and the low-income household. Finding effective ways to do so will complement and strengthen the poverty law functions of home energy assistance and weatherization programs. This section addresses common objections that have reinforced the energy law/poverty law divide described above. It then briefly surveys complementary approaches currently in use, but not widely available or very limited in scope, as well as recent developments reflecting advocacy focused on energy burden and its impact on low-income households. The aim is not to present an exhaustive account but to provide a view into ways, aligned with the purpose and function of home energy assistance, that the low-income household can be recentered within energy law.

---

252 *Hope Nat. Gas. Co.*, 320 U.S. at 602. *See generally* William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 841–81 (2016) (discussing how ratemaking methods can be adapted to support climate policy objectives).

253 Chan & Klass, *supra* note 19, at 1479; *see, e.g.*, PURPA § 114(a), 16 U.S.C. § 2624(a) (2018) ("No provision of this chapter prohibits State regulatory authority . . . or a nonregulated electric utility from fixing, approving, or allowing to go into effect a rate for essential needs . . . of residential electric consumers which is lower than a rate under [cost-of-service].").

254 Schannauer, *supra* note 228, at 548.

A. "Energy Law Can't Solve Poverty"

A common objection to centering low-income energy policy within energy law is that home energy insecurity stems from household inability to pay basic bills. Even eschewing flawed poverty narratives described earlier, inability to pay, the objection proceeds, is an issue much bigger than energy law. Energy law is not the place to address broader questions of income inequality—essentially, "energy law can't solve poverty." This objection is expressed in the Bonbright treatise as a critique of the "ability-to-pay criteria" in the determination of "reasonable utility rates."[255] For "general ratemaking policy," he finds, it is persuasive "that public utility rates are ineffective instruments by which to minimize inequalities in income distribution."[256] Rather than seek to address effects of insufficient household incomes through ratemaking, "alternative instruments (including public education, social security laws, progressive taxation, and possibly even some forms of subsidized public services) are better designed to accomplish this objective, on the assumption that the objective itself is desirable."[257] Whatever merit this argument may have in the abstract, the decades gone by without alternative instruments being meaningfully employed to reduce unmet need make it seem more an excuse than a rationale.

A second objection fits neatly with the first, stressing that if rates are "reasonable" within a class of residential consumers, it would be unfair to higher income consumers if rates incorporate structural protections for low-income households.[258] Although reasonable differences are permissible by law, such protections could, this argument goes, even rise to the level of "undue discrimination" within a consumer class and therefore be unlawful.[259] This objection seems to equate acknowledgement of socio-economic positioning within policy instrument design as "redistribution" of income—a characterization I reject, at the very least, in the context of modern necessities such as home energy security, as it implicitly validates a "deserving non-poor" inverse of the "undeserving poor." The same arguments could be applied to counter other energy law measures, beyond the confines of traditional

---

255 BONBRIGHT ET AL., *supra* note 175, at 71–72.

256 *Id.* at 72.

257 *Id.*; *see also* Joskow, *supra* note 80, at 805 (expressing skepticism about use of energy law to achieve "humanitarian principles"); Schannauer, *supra* note 228, at 551 (discussing this argument as it has been applied in opposition to lifeline rates).

258 *See* Schannauer, *supra* note 228, at 542–46 (discussing this argument as it has been applied in opposition to lifeline rates).

259 Both the Federal Power Act, 16 U.S.C. § 824d(b) (2018), and Natural Gas Act, 15 U.S.C. § 717c (2018), prohibit undue discrimination in the establishment of rates, and the same basic rule obtains in states. *See, e.g.*, NOWAK & TAYLOR, *supra* note 145, § 2.01 (distinguishing reasonable differences which do not constitute unlawful discrimination from any "legally unjustified disparity of treatment within a class of customers, or among different customer classes or geographical areas, is 'undue' discrimination that creates concern for regulatory commissions").

ratemaking, if they seek to alleviate home energy burden for low-income households via cross-subsidization.[260]

There will always be room for debate on the best policy, or combination of policies, to help low-income households with the myriad struggles that can come with being under-resourced in America. In my view, irrespective of alternative instruments' comparative potential *if* developed, there are several reasons why home energy assistance as it exists today needs stronger structural complements within energy law regimes and institutions.

First, the essential importance of home energy access, the harms associated with routine energy insecurity, and the extent of long-term unmet need together warrant elevating low-income energy burden as an *energy* policy priority. As described in Part III, energy access is necessary for basic health and wellbeing. The U.S. Supreme Court acknowledged this in *Memphis Light,* stressing that "the discontinuance of . . . heating for even short periods of time may threaten health and safety."[261] In addition, energy access is increasingly necessary for household participation in other basic aspects of modern life, including education and work. LIHEAA targets the portion of utility bills dedicated to heating and cooling as a subset of modern energy usage.[262] The most recent program report to Congress estimated home heating was 28 percent and home cooling was 13 percent of low-income residential energy bills.[263] LIHEAP is thus a critical program for low-income households which needs ardent protection *and* reinforcement within the energy law regimes that shape the experience of household energy insecurity to which LIHEAP responds.

Second, state utility commissions are uniquely positioned to provide such reinforcement in the public interest because of energy's importance in the home. Consumer choice for energy access is even more constrained than for other necessities. In most parts of the country, electricity (and

---

260 *See, e.g.*, LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 7 (2022) [hereinafter LSC 2022 Study], https://perma.cc/KCQ3-QBVY (providing information addressing reverse cross-subsidization arguments against rooftop solar policies); LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 22 (2017) [hereinafter LSC 2017 Study], https://perma.cc/49MH-BA5X (same); *see* sources cited *infra* note 278 (addressing reverse cross-subsidization arguments against rooftop solar policies).

261 *Memphis Light, Gas, & Water Div.,* 436 U.S. 1, 18 (1978). For this reason, Congress included protections against disconnection of utility service in the Bankruptcy Code. *See* 11 U.S.C. § 366 (2018) (providing that "a utility may not alter, refuse, or discontinue service to, or discriminate against, the trustee or the debtor solely on the basis . . . that a debt owed . . . was not paid when due"); *see also* Darby v. Time Warner Cable, Inc. 470 F.3d 573, 575 (5th Cir. 2006) (noting that these services are "necessary to meet minimum standards of living" (quoting *In re* Moorefield, 218 B.R. 795, 796 (Bankr. M.D.N.C. 1997))).

262 LIHEAA, 42 U.S.C. § 8622(6) (2018) (defining "home energy" as "a source of heating or cooling in residential dwellings").

263 U.S. DEPT. OF HEALTH & HUM. SERVS., LOW INCOME HOME ENERGY ASSISTANCE PROGRAM: REPORT TO CONGRESS FOR FISCAL YEAR 2020, at 23 (2020).

gas) is available only through the utility that has been approved by the state utility commission to operate where a household is geographically located.[264] This means that, apart from common-sense conservation (e.g., turning off lights), low-income households generally have no way to obtain more affordable utility service on their own in the ways they might seek more affordable housing or food, which are also often extremely limited.[265] It is this very constraint, of course—the assignment of utility territories—that has justified the so-called regulatory compact and state regulation of electricity rates in ways that prices for other necessities are *not* regulated. It is appropriate, as one early commenter observed, for a distinction to be made "between the fixing of prices by private industry, the interest of which is limited to the narrow concern of profit," and prices set by PUCs charged with the responsibility to implement just rates for all.[266] Protecting low-income households has long been an *element* of the affordability goal for residential rates categorically and a counterweight to utility requests for rate increases. However, more targeted attention to low-income energy burden is possible and needed in ratemaking proceedings, as well as in the context of other modern reforms.

Third, home energy insecurity is accentuated by the unmet need for low-income legal assistance. A study by the Legal Services Corporation (LSC), created by Congress in 1974 to expand low-income access to civil justice, found that roughly a third of low-income households have experienced financial difficulties resulting from the inability to pay debts or utilities.[267] According to the LSC, the unmet need is staggering: "Low-income Americans do not get any or enough legal help for 92% of their substantial civil legal problems."[268] Of people who actually seek LSC-funded legal aid for a matter, over half—71 percent—cannot receive any or enough legal help to solve their problem.[269] Poverty research shows that "utility hardship" is even "more common and persistent" and "linked to greater disadvantage than housing hardship."[270]

---

264 Paul L. Joskow & Richard Schmalensee, *Incentive Regulation for Electric Utilities*, 4 YALE J. ON REGUL. 1, 3 (1986).

265 *See, e.g.*, ANDREW AURAND ET AL., NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES 5–8 (2021), https://perma.cc/T4VK-LV44 ("Homes that are affordable to extremely low-income renters are not necessarily available to them. . . . Cost-burdened households have less to spend on other necessities, such as food, clothing, transportation, and healthcare.").

266 Schannauer, *supra* note 228, at 548 n.49.

267 LSC 2017 Study, *supra* note 260.

268 LSC 2022 Study, *supra* note 260; *see also* LSC 2017 Study, *supra* note 260 (finding the most common issues to be creditors or collection agencies and "having utilities disconnected due to nonpayment or a billing dispute").

269 LSC 2022 Study, *supra* note 260, at 19; *see also* Hammond, *Poverty Lawyering in the States*, *supra* note 150, at 215–28 (discussing the challenge for lawyers working to meet these legal needs

270 Ryan Finnigan & Kelsey D. Meagher, *Missed Housing and Utility Payments Are Common and Persistent in the United States*, CTR. FOR POVERTY & INEQ. RSCH.: POL'Y BRIEF

This is an important context for understanding the household-scale connection between energy burden and energy insecurity. Even when energy access is preserved in the immediacy of a crisis, such as through moratoria on utility shut-offs, utility debt that led to the threat of disconnection continues to accrue.[271] Soaring utility debt collection, and proposals for utility debt forgiveness, have been serious policy issues since the end of pandemic-related moratoria. Moreover, because LIHEAP can only offer limited bill assistance, high or severe energy burden readily increases household consumer debt more generally, even when utility bills are being paid before other needs. Based on the LSC data, it can be assumed that most low-income households will not have access to legal help addressing consumer debt, including utility debt.[272] This further supports the need for the structural priority of low-income households within energy law regimes.[273]

Fourth, numerous aspects of the current energy transition present great promise for reducing energy burden in the long-term, including for low-income households. But that inclusion is not guaranteed. Policy innovations for home energy efficiency, the proliferation of rooftop and community solar and distributed energy resources (DER) more broadly all have the potential to reduce energy bills at the household scale.[274] Critically, however, as advocates and scholars have emphasized, neither of these areas of innovation and policymaking *necessarily* will benefit low-income households, and without attentive policy design, could be

(Nov. 2018), https://perma.cc/UW7A-V6M2 (including a figure demonstrating the prevalence of missed housing and utility payments by year from 2004–2014).

271 *See, e.g.*, MARCUS FRANKLIN & CAROLINE KURTZ, NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE ENV'T & CLIMATE JUST. PROGRAM, LIGHTS OUT IN THE COLD: REFORMING UTILITY SHUT-OFF POLICIES AS IF HUMAN RIGHTS MATTER 30 (2017), https://perma.cc/46BH-Z7DJ (addressing effect of accumulating arrears on low-income households).

272 LSC 2022 Study, *supra* note 260, at 34 (finding 50 percent of low-income households had legal problems related to consumer issues, most commonly medical debt, followed by "having utilities disconnected," "harassment from creditors," and "falling victim to a scam").

273 There are several legal theories low-income households facing utility disconnection or insurmountable utility debt might be able to assert if they had legal representation. *See, e.g.*, Roger D. Colton & Doug Smith, *The Duty of a Public Utility to Mitigate "Damages" from Nonpayment Through the Offer of Conservation Programs*, 3 B.U. PUB. INT. L.J. 239, 248–49 (1993) (proposing how the mitigation of damages principle in law may be argued in support of low-income households struggling to pay for utility service); Roger D. Colton & Doug Smith, *Protections for the Low-Income Customer of Unregulated Utilities: Using Federal Fuel Assistance as More Than Cash Grants*, 13 HAMLINE J. PUB. L. & POL'Y 263, 263, 265, 282–83 (1992) (focused on remedies when utility in question is not regulated by a state utility commission, such as a rural electric cooperative or municipal utility).

274 *See* INT'L ENERGY AGENCY, UNLOCKING THE POTENTIAL OF DISTRIBUTED ENERGY RESOURCES: POWER SYSTEM OPPORTUNITIES AND BEST PRACTICES 3, 14 (2022) (explaining that DER includes on-site electricity generation, but also energy storage, demand response capabilities for controlling energy end uses, and related consumer (or demand) side resources).

deployed in ways that simply replicate existing disparities.[275] A commonly cited example is small-scale solar energy, for which the first wave of policies featured incentives for the households most able to invest in solar systems themselves to do so.[276] There is room for debate over the merits of first-generation policies designed to promote rooftop solar expansion—as well as for criticism of utilities that used low-income households as a proxy for their interest in protecting utility shareholders from lost revenues from solar[277]—but increasingly creative models (discussed in brief below) are emerging to connect low-income households with the benefits of solar power much more effectively than has been achieved to date. Reconceiving low-income energy policy as energy law can help center the low-income household at the heart of reforms as the energy sector evolves, not just to assure protection against rising rates—an argument that, without more, can be co-opted in service of opposition to change—but also to design inclusive structures for the clean energy transition. Part IV provides examples of emerging state models that seek to do so.

Fifth, this conceptual shift has special importance as climate change intensifies energy insecurity at the household scale. According to the EIA, 2022 "had the largest annual increase in average residential electricity spending since we began calculating it in 1984."[278] EIA attributes this record increase to "more extreme temperatures, which increased U.S. consumption of electricity for both heating and cooling, and higher fuel costs for power plants, which drove up retail electricity prices."[279] Climate scientists predict extreme weather will intensify across the United States

---

[275] *See* Melissa Powers, *An Inclusive Energy Transition: Expanding Low-Income Access to Clean Energy Programs*, 18 N.C. J.L. & TECH. 540, 555–56 (2017) (addressing the "risk of an unjust energy transition" and the ways to avoid it); Adrienne L. Thompson, *Protecting Low-Income Ratepayers as the Electricity System Evolves*, 37 ENERGY L.J. 265, 270–73 (2016) (highlighting the need to protect low-income ratepayers in state ratemaking for electric grid modernization).

[276] *See, e.g.*, SHALANDA H. BAKER, REVOLUTIONARY POWER: AN ACTIVIST'S GUIDE TO THE ENERGY TRANSITION 139–60 (2021) (addressing "solar segregation").

[277] *See, e.g.*, Alexandra B. Klass, *Regulating the Energy "Free Riders,"* 100 B.U. L. REV. 581, 583–84 (2020) (contrasting cross-subsidization and the purported concern for low-income households in the context of rooftop solar versus electric vehicle infrastructure); Peskoe, *supra* note 190, at 259–74 (explaining how the "campaign against cross subsidies, in the name of consumer protection" is a cover for being "nakedly focused on their earnings"); Troy A. Rule, *Solar Energy, Utilities, and Fairness*, 6 SAN DIEGO J. CLIMATE & ENERGY L. 115, 129–41 (2014–15) (discussing this proxy usage in the context of other utility arguments against expanded rooftop solar access).

[278] Jonathan DeVilbiss, *U.S. Residential Electricity Bills Increased 5% in 2022, After Adjusting for Inflation*, U.S. ENERGY INFO. ADMIN. (May 31, 2023), https://perma.cc/2HFP-K4X2.

[279] *Id.*; *see also* ALLISON R. CRIMMINS ET AL., U.S. GLOB. CHANGE RSCH. PROGRAM, FIFTH NATIONAL CLIMATE ASSESSMENT 2–5 to 2–40 (2023) [hereinafter USGCRP, FIFTH NATIONAL CLIMATE ASSESSMENT], https://perma.cc/J6Z3-MVMC (discussing recent data on climate change).

in the years to come.[280] According to the most recent National Climate Assessment, climate change will affect human health in wide-ranging ways, including with rising temperatures expected across the nation.[281] Recent developments bear out this risk as extreme heat events are already increasing.[282] High temperatures increase risk of illness and death, especially for the very old and the very young.[283] Indoor deaths typically occur in "uncooled environments" where air conditioning was not working, not present, or not available due to lack of electricity because of the cost of utility bills or repairs.[284]

Although warming temperatures will reduce dangerous cold in some places, these trends suggest heat-related deaths will "outweigh reductions in cold-related deaths in most regions."[285] This is prompting changes to LIHEAP administration, which has historically dedicated substantially higher home energy assistance for heating than cooling.[286] Extreme heat implicates energy justice, especially for low-income people of color living in urban heat islands where temperatures are amplified by the physical characteristics of urban buildings and infrastructure.[287]

At the same time, unpredictable extreme winter events continue to pose intense and unexpected strain on residential consumers, such as the "polar vortex" that afflicted the northern Midwest with deep subzero temperatures in 2019 and Winter Storm Uri's blackout crisis in 2021.[288] These winter extremes pose health risks for people facing energy insecurity. The National Climate Assessment reports climate risks will

---

280 USGCRP, FIFTH NATIONAL CLIMATE ASSESSMENT, *supra* note 279, at 2–16.

281 *Id.* at 2–5.

282 *See, e.g.*, WE ACT FOR ENV'T JUST., EXTREME HEAT POLICY AGENDA 2020, at 1 (2020) https://perma.cc/5T5Y-RM42 (reporting an average of more than "100 heat-related deaths and approximately 450 hospitalizations or ER visits due to extreme heat exposure per year in [New York City]"); MEAGHAN CALENDO, MARICOPA CNTY. DEP'T OF PUB. HEALTH, 2022 HEAT DEATHS REPORT 5 (2023), https://perma.cc/3SNZ-D6H7 (reporting 425 heat-related deaths in 2022, up 25 percent from the prior year).

283 USGCRP, FIFTH NATIONAL CLIMATE ASSESSMENT, *supra* note 279, at 15–6.

284 CALENDO, *supra* note 282, at 12.

285 JOHN M. BALBUS ET AL., U.S. GLOB. CHANGE RSCH. PROGRAM, FOURTH NATIONAL CLIMATE ASSESSMENT 544 (2018), https://perma.cc/42RA-YRB6; USGCRP, FIFTH NATIONAL CLIMATE ASSESSMENT, *supra* note 279, at 2–2.

286 *LIHEAP Fact Sheet*, ADMIN. FOR CHILD. & FAMS., https://perma.cc/4DX2-F6TR (last visited Sept. 21, 2024) (noting that there are now 23 states that have allocated LIHEAP funds to home cooling costs).

287 EXTREME HEAT POLICY AGENDA 2020, *supra* note 282; *see also id.* at 2–3 ("50 percent of heat-related deaths in New York City over ten years were Black/African American people. . . . 85 percent of heat stroke deaths in [New York City] happen due to heat exposure at home."); Michael B. Gerrard, *Heat Waves: Legal Adaptation to the Most Lethal Climate Disaster (So Far)*, 40 U. ARK. LITTLE ROCK L. REV. 515 (2018) (on impacts of extreme heat and legal responses).

288 *See, e.g.*, *Four States Expand LIHEAP During Polar Vortex: Utility Shutoffs Suspended*, LOW INCOME HOME ENERGY ASSISTANCE PROGRAM CLEARINGHOUSE (Feb. 1, 2019), https://perma.cc/66HU-LJ2S (detailing the expansion of LIHEAP program funding in Illinois, Indiana, Wisconsin and Minnesota following the polar vortex).

exacerbate existing inequities.[289] Likewise, as energy infrastructure is strained by climate extremes, risks associated with energy system failures, like electric power outages following storms, are felt most acutely in these groups.[290] Household energy costs are expected to rise across most of the country as energy systems adapt to growing electricity demand, heat impacts on infrastructure, and drought conditions affecting the supply of cooling water for power plants.[291]

Finally, the Trump White House budget proposals were a warning call against over-relying on the availability of LIHEAP to address the home energy insecurity. Although Congress rejected the proposals, the fact that LIHEAP was slated for defunding three times underscores the vulnerability of programs, however long-standing, that depend on annual re-appropriation.[292] Similar threats could recur in the future—indeed, political posturing is already in full swing, taking aim at Biden Administration policies designed to address energy justice. The Heritage Foundation's "2025 Presidential Transition Project" states, for example, that "[t]he next Administration should stop using energy policy to advance politicized social agendas" and that "[p]rograms that sound innocuous, such as 'energy justice,' Justice40, and DEI, can be transformed to promote politicized agendas."[293] The Project hopes the next President will "[e]liminate energy efficiency standards for appliances" and the entire Office of Energy Efficiency and Renewable Energy, which is currently engaged in energy justice work,[294] as well as the Clean Energy Corps, which seeks in part to train people in disadvantaged communities for jobs in the clean energy industry.[295] Even absent overt threats to LIHEAP, to simply maintain funding year by year requires continued advocacy.[296] Well-aligned policies that ease household need should help LIHEAP to reach more of the many eligible households not receiving utility assistance.

For all these reasons, reconceiving low-income energy policy as a central aim for energy law should support and extend the impact of low-income assistance programs administered as poverty law. Of course, doing so will not obviate the continued influence of flawed poverty narratives that shape perceptions of people struggling to pay for necessities. It also goes without saying that policy instrument design details are key to creating effective energy law reinforcements for energy

---

289 USGCRP, FIFTH NATIONAL CLIMATE ASSESSMENT, *supra* note 279, at 1–19.

290 *Id.* at 15–12.

291 *Id.* at 5–6.

292 David Sharp, *Trump Once Again Wants to Cut Energy Assistance to the Poor*, ASSOCIATED PRESS (Feb. 18, 2018, 8:41 AM), https://perma.cc/WLQ7-TC5R.

293 PROJECT 2025, *supra* note 20, at 370.

294 *Id.* at 378–79.

295 *Id.* at 386.

296 Justin Schott, *Optimizing $4 Billion of Low-Income Home Energy Assistance Program Funding to Protect the Most Vulnerable Households from Extreme Heat*, FED'N OF AM. SCIENTISTS (Apr. 4, 2024), https://perma.cc/N849-BB9B.

assistance. Still, a more responsive policy agenda within energy law does not have to "solve poverty" to do more to mitigate energy insecurity by more aggressively targeting energy burden among low-income households. Further, current developments in the energy sector—the shift to renewable energy, increasingly decentralized generation of electricity, and technology innovations in energy storage and energy efficiency—all have the potential to implicate energy burden. Whether these changes increase or relieve energy burden will depend in large part on centering this key concern within evolving energy law regimes.

B. Toward Just Rates for Low-Income Households

As discussed in Part III, the common commingling of all households within a general residential class of consumers for retail ratemaking reflects an implicit assumption within energy law institutions that if households cannot afford "just and reasonable" rates, they can seek help from LIHEAP or other state, utility, or charitable sources.[297] There are several models within energy law for departing from that assumption to variable and limited extents. These approaches are not uncontested, nor are they available to the same degree across the states. Although the details of policy instrument design are always subject to debate, the models reinforce, at minimum, the potential to alleviate home energy insecurity when low-income energy policy is reconceived as integral rather than marginal or tangential to energy law.

Lifeline Rates and Ratepayer-Funded Discounts: As noted, the lifeline rates for "essential needs" encouraged by PURPA were rejected by most states. Some states did work to implement the concept, however, and early rejections have evolved in some states to allow for variations to be implemented.[298] For example, although lifeline rates were initially rejected in Utah, a later iteration of the Public Service Commission reconsidered energy burden more closely as an appropriate consideration in defining what is a just and reasonable rate.[299] Even when a state has

---

[297] The Kansas utility commission, for example, refers low-income households to charities for assistance. *See Utility & Weatherization Related Assistance Programs in Northeast Kansas*, KAN. CORP. COMM'N, https://perma.cc/LJ2G-SVRW (last visited Sept. 21, 2024) (listing United Way, Salvation Army, and Catholic Charities as potential sources of help in addition to LIHEAP).

[298] *See generally* Chan & Klass, *supra* note 19, at 1463–70 (discussing the history of resistance against implementation of lifeline rates but highlighting Utah and Massachusetts as examples showing that variations to early efforts persevered); Ferrey, *Solving the Multimillion Dollar Constitutional Puzzle*, *supra* note 228, at 158–62 (discussing implementation of general and targeted lifeline rates in states); *see also* Gabriel Pacyniak, *Keeping All the Lights On: A Roadmap to Affordable, Universal Electricity Service in the Clean Energy Transition*, 50 ECOLOGY L.Q. 93, 149–57 (2023) (discussing the concept through the lens of human rights).

[299] *See State PBF/USF History, Legislation, Implementation: Utah*, LOW INCOME HOME ENERGY ASSISTANCE PROGRAM CLEARINGHOUSE, https://perma.cc/X8J8-RHHX (Sept. 2018) (providing detailed history and links to state docket and reports on lifeline rates).

not defined criteria for lifeline rates statewide, utilities have sometimes been allowed to establish their own discounted rate and recoup the cost from other ratepayers.[300] Where applicable, lifeline rates may be even more narrowly focused than LIHEAP in providing assistance. This can be seen, for example, in rates designed to be available only to a very narrowly defined subset of residential consumers comprised of low-income elderly and low-income disabled persons, who have tended to be viewed as "deserving" of help more readily than low-income households more generally.[301] Relatedly, utilities have also been approved for a wide range of general ratepayer surcharges and fees that are then used to provide fixed sum discounts for eligible low-income households.[302]

In contrast to LIHEAP, lifeline rates and utility programs represent measures within energy law regimes—structured by or, at minimum, approved by utility commissions—that consider the needs of low-income households with greater specificity than standard ratemaking does, if with limited scope. Where available, they reduce energy insecurity for eligible households and acknowledge the direct linkage between basic health and wellbeing and uninterrupted energy access. Although disconnection moratoria do so as well, and are critical as a result, they typically do not address the underlying issue of energy burden, when utility debts come due after moratoria conditions end. These measures could do more to address energy burden if expanded across the states and with broader eligibility criteria.

Income-Based Rates: Policies that adjust rates in response to household income disparities are available in several states. One such model, the so-called percentage-of-income payment plan (PIPP), limits home energy costs to what is estimated to be a manageable household energy burden.[303] Ohio, for instance, purportedly the first state with such a program, set the percentage at six percent of household income for each

---

300 *See, e.g.*, *State PBF/USF History, Legislation, Implementation: Arizona*, LOW INCOME HOME ENERGY ASSISTANCE PROGRAM CLEARINGHOUSE, https://perma.cc/L423-LC6G (May 2018) (providing history of utility discount programs in Arizona).

301 *See, e.g.*, Mountain States Legal Found. v. Pub. Util. Comm'n, 590 P.2d 495, 498 (Colo. 1979) (referring to the low-income elderly and the low-income disabled as "an unquestionably deserving group" but nonetheless holding lifeline rates to protect them were unlawfully preferential under Colorado law); Am. Hoechest Corp. v. Dep't of Pub. Util., 399 N.E.2d 1, 4 (Mass. 1980) (evaluating a lifeline rate for low-income elderly and concluding it was not improper where "reduced rate is afforded only to the neediest of the needy" to consider factors such as "age and income" of consumers "and the importance of the service to them").

302 *See Utility Ratepayer-Funded Programs*, LOW INCOME HOME ENERGY ASSISTANCE PROGRAM CLEARINGHOUSE, https://perma.cc/64XE-ZKTL (last visited Sept. 21, 2024) (providing table and detailed summaries of ratepayer-funded resources that vary widely across states).

303 *See* LOW INCOME HOME ENERGY ASSISTANCE PROGRAM CLEARINGHOUSE, OVERVIEW OF PERCENTAGE OF INCOME PAYMENT PLANS (PIPP) (2014), https://perma.cc/69PG-L4DM (summarizing PIPPs and "PIPP-type programs" in Ohio, Colorado, New Jersey, Nevada, Illinois, Pennsylvania, New Hampshire, and Maine).

utility bill; in Illinois, it is also set at six percent; in Nevada, the percentage is calculated as an annual credit to match the state median percentage of household energy burden, calculated each year.[304]

Recent advocacy has been effective in some states and is ongoing in others. For example, in 2020, Virginia established a PIPP by statute, expanding its eligibility coverage in 2021 and dividing responsibility for program administration between the State Corporation Commission and the Department of Social Services.[305] In 2022, California passed energy legislation that required the Public Utility Commission to study income-based rates and charges to reduce low-income energy burden beyond what existing state and federal bill assistance provides.[306] It proved highly controversial and the concept remains in debate at the Commission at the time of this writing.[307] In 2023, the Illinois Commerce Commission took its program further by approving what the National Consumer Law Center (NCLC) called "ground-breaking" discounts specifically for gas utility bills, calling the new approach "a model for commissions across the country."[308] Through rate orders for three gas utilities, the Commission adopted a tiered income-based discount to ensure affordability of no more than three percent of monthly income for heating bills.[309]

A short list of state examples notwithstanding, income-based approaches are far from the norm, and remain conceptually contested, separate and apart from policy design debates. Policy designs vary among the states utilizing the PIPP model, but the basic approach involves compensating the utility by sharing the cost of this support to low-income households across all customers. The risk of increasing home energy consumption under such policies has been raised as an objection, but also an issue that can be addressed with incentive design features.[310] In sum, states can, and some are, doing more to understand home energy insecurity, the impact of energy burden disparities, and the structural role energy law can play in averting these harms.[311] The technical details

---

304 *Id.*

305 *See* Joel B. Eisen, *Covid-19 and Energy Justice: Utility Bill Relief in Virginia*, 57 U. RICH. L. REV. 155, 185–92 (2022).

306 2022 Cal. Stat. 3034–3069 (amending CAL. PUB. UTIL. CODE § 739.1 (1994)).

307 *See, e.g.*, Jeff St. John, *California Regulator Takes Income-Based Electric Bills Off the Table*, CANARY MEDIA (Mar. 29, 2024), https://perma.cc/CH7B-MSJD (detailing the debate and stakeholder positions).

308 Press Release, Nat'l Consumer L. Ctr., Illinois Commerce Commission Approves Robust Discounted Utility Rates (Nov. 16, 2023), https://perma.cc/UNJ6-TV3F.

309 *Id.*

310 *See, e.g.*, Janine Migden-Ostrander, *Use Less, Save More: Adding a Conservation Incentive to Percentage of Income Payment Programs*, REGUL. ASSISTANCE PROJECT (Apr. 13, 2021), https://perma.cc/9R4S-9V9G (recognizing the issue of a lack of incentive and providing the creation of a conservation incentive as an option to address this concern).

311 A state-specific analysis is required to determine whether utility commissions may rely on existing regulatory authority or whether new legislative authorization is needed to undertake reforms. Conversely, where utility commissions are hesitant to act, legislation

of any income-based rate policy is obviously critical to its efficacy, and it is beyond the scope of this Article to advance any particular policy design. The essential point here is that efforts to account for energy burden disparities structurally within energy law strain toward needed complements to LIHEAP by preemptively responding to the well-documented unmet need for low-income home energy assistance.

C. Toward Centering Low-Income Households in Clean Energy Reforms

Recent developments at the federal level under the Biden Administration expressly channel clean energy investments to benefit low-income households on an unprecedented scale. Two of the most significant include President Biden's Executive Order 14008 in 2021 and the Inflation Reduction Act in 2022.

In 2021, President Biden signed Executive Order 14008, "Tackling the Climate Crisis at Home and Abroad," which charged federal agencies with assuring the clean energy transition helps "communities too often left behind."[312] The impact on energy burden is indirect in some respects and direct in others. For example, Section 212 of the Order focused on "Empowering Workers Through Rebuilding Our Infrastructure for a Sustainable Economy" has indirect impact on home energy security by reinforcing economic stability for low-income households "that have suffered as a result of economic shifts" related to energy sector transitions or "have suffered the most from persistent pollution, including low-income rural and urban communities, communities of color, and Native communities."[313] The Order charged the White House Council on Environmental Quality with developing "a geospatial Climate and Economic Justice Screening Tool" to identify "disadvantaged communities" based on low-income ("socioeconomic burden") combined with "environmental, climate, or other burdens," one of which specifically includes cost of energy.[314] Section 223 established the Justice40 Initiative to direct at least "40 percent of the overall benefits" of clean energy-related investments "to disadvantaged communities."[315] Some of this impact on home energy security is direct, as through Justice40's emphasis on reducing energy burden through access to household-scale "clean energy and energy efficiency," while some would be indirect, through clean energy "training and workforce development."[316] The Department

may be used to explicitly direct the commission to do so. *See, e.g.*, VA. CODE ANN. § 56-585.6 (2020) (discussed in Eisen, *supra* note 305, at 189–92).

312 Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7622, 7626 (Feb. 1, 2021).

313 *Id.*; *see also id.* at 7627–28 (directing federal agencies to "coordinate investments and other efforts to assist coal, oil and gas, and power plant communities"); *id.* at 7629 (expressly emphasizing "spur[ring] economic opportunity for disadvantaged communities").

314 *Id.* at 7631; *Climate and Economic Justice Screening Tool: Methodology*, COUNCIL ON ENV'T QUALITY, https://perma.cc/L3RA-BLJS (last visited Sept. 21, 2024).

315 Exec. Order No. 14,008, 86 Fed. Reg. at 7631–32.

316 *Id.* at 7632.

of Energy identified decreasing energy burden in disadvantaged communities as the number one policy priority for Justice40 implementation.[317]

In 2022, through the Inflation Reduction Act (IRA), Congress approved billions of dollars for renewable energy and energy efficiency, with some provisions focused on "low-income and disadvantaged communities."[318] One overview of environmental justice provisions in the IRA highlights numerous ways the law expressly aims to benefit low-income households by reducing energy burden, commonly through tax credits and rebates.[319] These include home energy efficiency measures and home electrification for tribes,[320] energy retrofitting in federally assisted affordable housing,[321] and—most significantly—a "low-income communities" bonus tax credit for solar and wind projects, including at the household scale,[322] as well as an historic $27 billion Greenhouse Gas Reduction Fund, to be used in part to achieve household energy savings, greenhouse gas (GHG) emissions reductions, and economic revitalization in "disadvantaged communities" and including potential benefits to both low-income and "moderate-income households."[323] In April 2024, the U.S. Environmental Protection Agency (EPA) announced $20 billion of those funds would be awarded in grants with over $14 billion—more than 70 percent—dedicated for low-income and disadvantaged communities.[324] Another $7 billion is pending, at the time of writing, to be awarded later this year through a new Solar For All program, which is expected to expand residential solar to millions of low-income households to reduce energy burden and close "the equity gap in access to solar energy."[325]

State-level developments linking low-income households with clean energy are also underway, with many preceding the Biden Administration initiatives. Numerous states, for example, with the help

---

317 *Justice40 Initiative*, OFFICE OF ENERGY JUST. & EQUITY, https://perma.cc/5WL8-ZNWT (last visited Sept. 21, 2024).

318 Inflation Reduction Act of 2022, Pub. L. No. 117–169, 136 Stat. 1818 (codified primarily in scattered sections of 42 and 26 U.S.C.).

319 Hannah Perls, *Breaking Down the Environmental Justice Provisions in the 2022 Inflation Reduction Act*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Aug. 12, 2022), https://perma.cc/3AHB-DKJL (including table of provisions and key criteria).

320 IRA, 42 U.S.C. § 18795(a) (2018); IRA, *supra* note 318, §§ 50122, 50145.

321 IRA, 26 U.S.C. § 48(e) (2018).

322 *Id.*

323 IRA, 42 U.S.C. § 18795 (2018); *see also Greenhouse Gas Reduction Fund*, U.S. ENV'T PROT. AGENCY, https://perma.cc/UH3W-8H2Z (last visited Sept. 21, 2024) (describing the purpose of the Fund).

324 Press Release, U.S. Env't Prot. Agency, Biden-Harris Administration Announces $20 Billion in Grants to Mobilize Private Capital and Deliver Clean Energy and Climate Solutions to Communities Across America (Apr. 4, 2024), https://perma.cc/TV2R-Q6XJ.

325 *See Greenhouse Gas Reduction Fund: Solar for All*, ENV'T PROT. AGENCY, https://perma.cc/DXB3-KGZ7 (last visited Sept. 21, 2024); News Release, U.S. Env't Prot. Agency, EPA and Congresswoman Valerie Foushee Highlight $7 Billion Solar for All Grant Competition at a North Carolina Press Event (July 21, 2023), https://perma.cc/EJ39-25F4 (quoting John Nicholson, U.S. Environmental Protection Agency Region 4's Chief of Staff).

of public interest advocates, have enacted community solar policies encouraging or requiring investments in community-scale solar projects for the benefit of low-income households.[326] Some states have gone further to include protections and benefits for low-income households in broader clean energy legislation.[327] Further, some states have found ways to strategically leverage federal low-income policies—LIHEAP and WAP—by developing complementary state clean energy programs.[328]

As states continue innovating in these important areas, this brief overview underscores the potential that exists and can be expanded within energy law to meaningfully complement LIHEAP and related programs in response to the persistent energy burden. In sum, to be sure, this overview conveys the hopeful magnitude of current federal investments and the long-term impact they may have on low-income home energy burden. Of all the areas of current federal focus with potential to benefit low-income households, low-income community solar and rooftop solar may be the most promising for lasting impact on energy burden. A review by the Clean Energy States Alliance of all Solar for All applications currently under review showed that if all are approved, the grants would deploy over 2,900 MW of solar capacity to serve "a total of 711,068 low-income households or residents of disadvantaged communities" across 35 states for almost $2 billion in household savings over the five-year program period (2024–29).[329]

The magnitude of this potential truly is historic. At the same time, the challenges of implementation are real. Tracing the history of low-income energy policy's isolation over the last forty years, as this Article does, is important to understanding why availability and targeted support measures within energy law remain as varied and limited as they are today. The Administration's goal for Greenhouse Gas Reduction Fund investments is to deploy projects in all 50 states, though exactly how evenly the influx of funding will interact with varied state law and policy

---

326 *See, e.g.*, BERNETA HAYNES, NAT'L CONSUMER L. CTR., COMMUNITY SOLAR: EXPANDING ACCESS AND SAFEGUARDING LOW-INCOME FAMILIES (2024), https://perma.cc/C9HU-X3XA (discussing benefits for low-income households and policy design); WILL MACHEEL & CASSANDRA LOVEJOY, NAT'L ENERGY ASSISTANCE DIRS. ASS'N & NAT'L ASS'N OF STATE ENERGY OFFS., INCLUSIVE SHARED SOLAR: THE STATE POLICY LANDSCAPE AND SELECT COMMUNITY SOLAR PROJECT PROFILES (2022), https://perma.cc/5M7X-NLCS (providing case studies from Oregon, Connecticut, and Colorado).

327 *See, e.g.*, *Energy Justice and the Energy Transition*, NAT'L CONF. OF STATE LEGISLATURES, https://perma.cc/6B7Y-2ZYA (May 3, 2022) (discussing legislation in California, Illinois, New York, Oregon, and Washington).

328 *See, e.g.*, Shields, *supra* note 141 (providing an overview of "state statutory mechanisms for creating supplemental energy assistance and energy efficiency programs").

329 VERO BOURG-MEYER & ALLIE GARRETT, CLEAN ENERGY STATES ALL., EMPOWERING TOMORROW: A PREVIEW OF STATES' GREENHOUSE GAS REDUCTION FUND SOLAR FOR ALL PROGRAMS 14, 22 (2024), https://perma.cc/5BLA-ZZ4N.

landscapes is not entirely predictable.[330] Even the now fairly common policy innovation of community solar is supported by policy in fewer than half of the states, low-income provisions are not in place in all states with community solar policies,[331] and 74 percent of the market is concentrated in just four states.[332] Future research will evaluate the efficacy and long-term benefits these important investments achieve. It is also hard to predict the potential for disruption of this progress in the second Trump administration, given conservative policy prescriptions to reverse course on energy and environmental justice.

V. CONCLUSION

Congress aligned low-income energy policy with poverty law to address energy insecurity, via help with utility bills under LIHEAA, and to address energy burden, by making homes more energy efficient with weatherization. Alongside other public assistance programs, this positioning has the benefit of certain administrative efficiencies that can reduce barriers to households receiving support across multiple programs.

At the same time, in ways complementary to traditional anti-poverty measures and LIHEAP, the long-standing unmet need for home energy assistance and other reasons offered here support reconceiving low-income energy policy as energy law. In effect, to do so is to integrate poverty law with energy law where it "impacts poor people" and "poor communities," rather than treat that impact as conceptually and structurally distinct.[333]

There is growing momentum today to expand beyond crisis-based intervention models of low-income energy policy with a structurally inclusive reform agenda for modern energy law. This reorientation matters in the energy sector's current transitional moment for two important reasons. First, it opens a pathway for substantive reforms to structurally incorporate the needs of low-income households within energy law regimes. The historical alignment of low-income energy policy with poverty law, and its modern implications, still dominates in most parts of the United States. This shift can reinforce the aims and extend the reach of LIHEAP and related programs from a different vantage point, insulated from the precarity of annual congressional appropriation

---

330 Press Release, White House, Biden-Harris Administration Announces Historic $20 Billion in Awards to Expand Access to Clean Energy and Climate Solutions and Lower Energy Costs for Communities Across the Nation (Apr. 4, 2024), https://perma.cc/3JS9-RQJ7.

331 KAIFENG XU ET AL., NAT'L RENEWABLE ENERGY LAB'Y, EXPANDING SOLAR ACCESS: STATE COMMUNITY SOLAR LANDSCAPE 9–10 (2022), https://perma.cc/79F4-HZVN.

332 REGULATORS' FINANCIAL TOOLBOX: DESIGNING LOW- AND MODERATE-INCOME (LMI) COMMUNITY SOLAR COMPENSATION PROGRAMS, NAT'L ASS'N OF REGUL. UTIL. COMM'RS 3 (2022), https://perma.cc/7PFR-3D9F.

333 THE POVERTY LAW CANON, *supra* note 151, at 1.

cycles and positioned to avoid increasing home energy burden as the energy sector evolves.

Second, it increases accountability for alleviating energy insecurity within energy law institutions. This aim aligns with an approach to policy critique premised on acknowledging the basic condition of vulnerability that all people share and charting a role for the state—through legal institutions and governance regimes—that is responsive to this human condition in broad terms, as distinct from individual needs or perceived failings.[334] Even as promising approaches expand and new approaches emerge, the historical framing of household energy needs in law, and its isolation from dynamic changes in the energy sector over the last four decades, cautions against complacency in this reform agenda. Continuing to expand income-differentiated rates at the state level, strengthening low-income consumer representation in PUC proceedings, advancing compassionate utility disconnection and debt policies, and creating access to clean energy for low-income households are all critical to a modern and inclusive clean energy system.

[334] *See* Fineman, *supra* note 25, at 13.