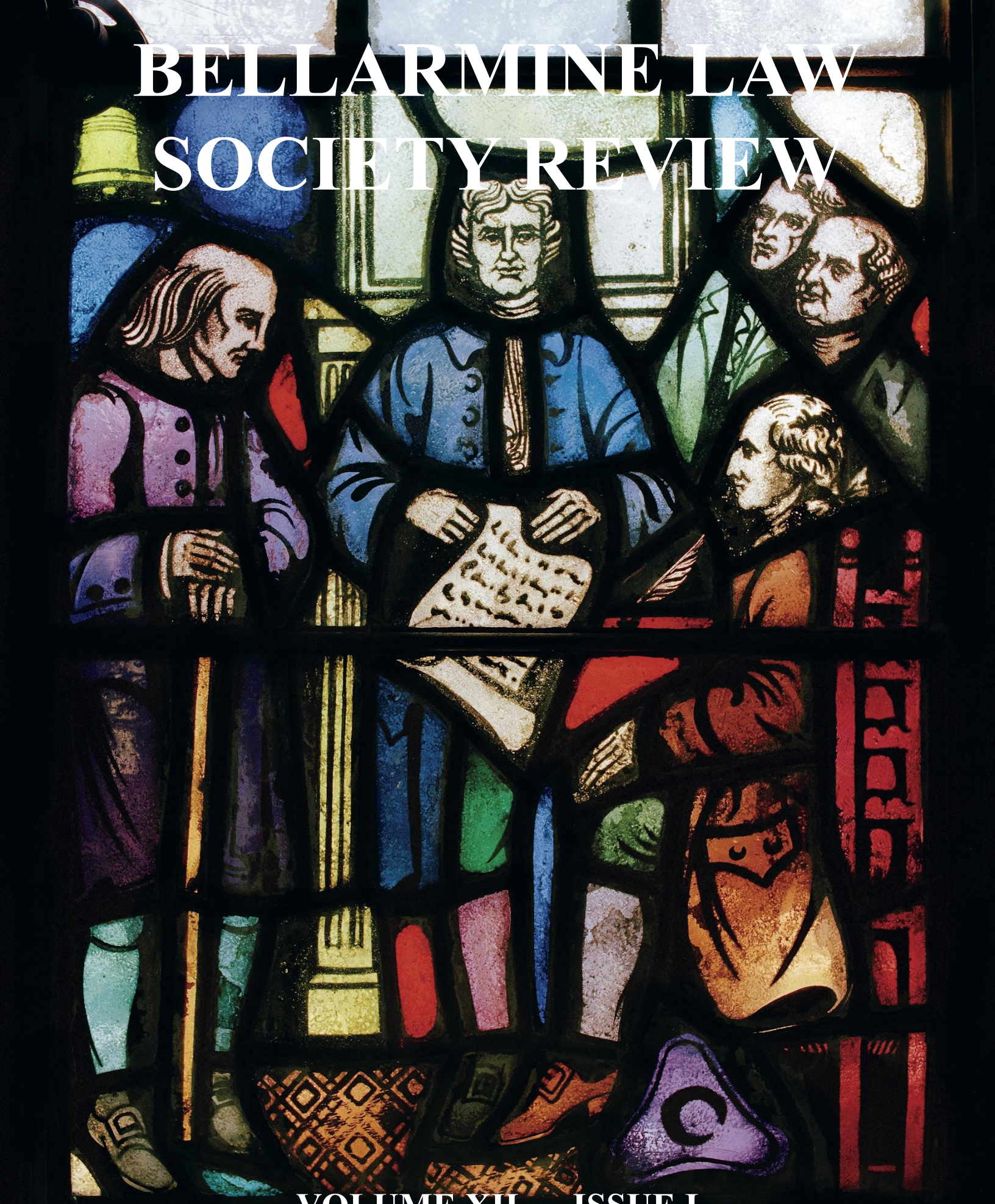
BELLARMINE LAW SOCIETY REVIEW



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Cover art courtesy of the Boston College Office of University Communications.
The stained glass depicts the signing of the Declaration of Independence.

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EDITOR'S NOTE:
VOLUME XII OF THE *BELLARMINE LAW SOCIETY REVIEW*

REBECCA SHAN [*]

In the first issue of the *Bellarmine Law Society Review's* twelfth volume, three undergraduate contributors explore a range of topical issues through the lens of legal analysis. First, Rose Kiefer analyzes the impact of U.S. boardroom gender quotas in the workplace, incorporating facets of legal, economic, and social theory to examine the future efficacy of these policies. In our second article, Grace Mendes presents a thorough study of energy legislation and the energy market through a focused consideration of California's history with renewable technologies, especially solar power. Finally, Christopher Siegert surveys the history of the Writ of Habeas Corpus and its relevance to the federal government's past usage of the Suspension Clause. As always, many thanks are due to each of these accomplished and capable authors for their rigorous research and the insight that their articles provide on a diversity of legal issues.

As is the case with most spring issues of the *Bellarmine Law Society Review*, this issue marks the departure of our editor in-chief, Dennis Wieboldt, who assisted with the production of this issue in his *emeritus* capacity. During the 2019-2020 academic year, Wieboldt joined the *Review*, and upon assuming the editor in-chief position during the 2020-2021 academic year, successfully transitioned the *Review* to an online, open-access journal. Since completing this transition, the *Review* has experienced a significant increase in domestic and international readership, a true testament to the value that undergraduate scholarship can bring to legal discourse. On behalf of the entire Editorial Board, my thanks and well-wishes are due to Wieboldt as he embarks on the next phase in his academic journey as an M.A. student in twentieth-century American history at Boston College.

[*] Rebecca Shan is the Editor in-Chief of the *Bellarmine Law Society Review*.

Bellarmine Law Society Review

Volume XII | Issue I Article 1

Gender Quotas and Equity in Corporate Boardrooms: A Legal, Economic, and Social Analysis

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GENDER QUOTAS AND EQUITY IN CORPORATE BOARDROOMS: A LEGAL, ECONOMIC, AND SOCIAL ANALYSIS

ROSE KIEFER [*]

Abstract: Adopted by countries like France, Norway, and Germany, gender quotas have been enacted as a measure to ensure equal opportunity for women in the corporate environment. Today, an increasing number of states in America have turned to gender quotas to remediate the inequity present in corporate boardrooms. In 2018, for example, Senate Bill 826 was passed in California to resolve inequitable female boardroom representation amongst public companies, specifically those headquartered in California. On the surface, gender quotas seem to promote equality in the workplace, but a closer analysis reveals that they may be doing more harm for women than good. This paper analyzes the impact of boardroom gender quotas through a legal, economic, and social lens, and addresses the efficacy of these quotas for the future.

Introduction

We learn at a young age that humans are "creatures of habit," that is, we gravitate towards what we know and seek comfort in redundancy. Although understandable, this notion can (and unfortunately has) been the Achilles' heel of humankind, especially with reference to implementing social reforms. Over the past decade, the world has experienced this dynamic relationship between the necessity of change and the difficulty of implementation. In particulate, a variety of social movements, most of which bear economic and gendered undercurrents, have forced us to face disturb systems of injustice in order to facilitate progress.

One of the most prominent examples of injustice that has come to light in the last decade is gender inequality. For centuries, women have struggled to find equal footing with their male counterparts due to the reproduction of "systemic dimensions of discrimination."[2] Fortunately, however, twenty-first-century movements have provoked a newfound sense of

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[2] Coleen Sheppard, "Systemic Discrimination and Gender Inequality: A Life Cycle Approach to Girls' and Women's Rights," in *Confronting Discrimination and Inequality in China: Chinese and Canadian Perspectives*, eds. Erroi P. Mendes and Sakunthala Srighanthan (Ottawa: University of Ottowa Press, 2009), 232-344.

urgency, making it clear that it is necessary to move away from traditionally patriarchal approaches to social and business governance. As such, conversations about gender equality have become more frequent and more impactful, raising awareness and allowing women to achieve positions in society once considered impossible, or at least highly unlikely. With this relatively newfound ability to exercise their power, women are realizing how valuable their impact is on local, regional, national, and international communities.

The strides that have been made towards gender equality in the United States recently have been substantial. Nevertheless, it would be ignorant to suggest that complete equality has been achieved, or perhaps ever will be. In the corporate sector, the twenty-first century's valuation of a woman's voice and point of view is at an all-time high, but that is not to say the corporate space is void of wrongdoing. In 2019, only 27% of Fortune 500 board members were women, and, in 2016, the U.S. was ranked in the bottom half of countries with the most female boardroom representation.[3] To increase female boardroom representation, gender quotas have been implemented, though they have been met with great contempt. In spite of this objections, corporations have begun to understand the advantage of having a diverse leadership team; in fact, attaining some level of gender diversity has become "the new frontier in corporate governance."[4]

Since their emergence, boardroom gender quotas have been met with mixed emotions. Even many women have asked whether these quotas have been introduced for the sake of gender equity or corporate public-relations value. While it is certainly disheartening that many women have expressed distrust with government regulations requiring board-room equity, this distrust is equally justified. Indeed, it is difficult for many women to believe that the system once working against them is now magically working for them. Collectively, women have learned the hard way that they must proceed with caution.

To many, the implementation of gender quotas seems like a rejection of how far women advanced in society. For a culture where women are now able to be successful entrepreneurs, CEOs, professional athletes, or even astronauts, why must we pass new

[3] *Statistia*, "Share of Female Board Members in Fortune 500 Companies, 1995 to 2019," April 27, 2021, https://www.statista.com/statistics/691204/share-of-women-board-members-fortune-500/; Felix Richter, "Infographic: The Countries with the Most Women in the Boardroom," *Statista Infographics*, May 23, 2016, https://www.statista.com/chart/4871/the-countries-with-the-most-women-in-the-boardroom/.

[4] Sandeep Gopalan and Katherine Watson, "An Agency Theoretical Approach To Corporate Board Diversity," *San Diego Law Review* 52 (March 2015): 1.

statues that promote gender equity? The answer can be traced back in American history, one that demonstrates how long women have been fighting for equal representation in public spaces. Consequently, after reviewing the relevant history, we will employ legal, economic, and social frameworks to assess the short- and long-term implications of gender-based quotas, remaining mindful of the nuances of gender inequality that have and still affect women today.

History: 1920-1950

Following the women's suffrage movement, twentieth-century lawmakers had a stronger inclination than ever confront and remediate the injustices experienced by women. Ratified in 1920, the Nineteenth Amendment to the Constitution was a major step towards recognizing the voice and value of women in the United States. Legalizing a woman's right to vote, the Nineteenth Amendment was one of the first national initiatives that explicitly promoted gender-based equality. Despite the benefits of this change, however, the aftermath of the Nineteenth Amendment's ratification is also important to analyze, especially because the ability to exercise the right to vote was an unknown territory of power for women. Indeed, during the November 1920 election, women's turnout was lower than men's, and politicians began to realize that the "incorporation of women as full equals in the electoral process would take decades."[5] This response to the Amendment reveals how stratified a woman's fight was: *de jure* equality was not synonymous with newfound freedom to *de facto* vote. All things considered though, the Amendment did set a strong precedent, one that proved to women that persistence works, and they would be heard. This mindset alone fueled the continuous re-engineering of the prescribed female role over the remainder of the twentieth century.

History: 1960-1990

By the end of the twentieth century, the Nineteenth Amendment was no longer the only piece of legislation from which women could reap benefits. Embracing the power of femininity, the women's rights movement invigorated the country. Protests, marches, and campaigns influenced a the passage of many new pieces of legislation, including the 1963

[5] Corder, J. Kevin and Christina Wolbrecht. "Did Women Vote Once They Had the Opportunity?" *Americanbar.org*, October 21, 2021, https://www.americanbar.org/groups/public_education/publications/insights-on-law-and-society/volume-20/issue-1/did-women-vote-once-they-had-the-opportunity-/.

Equal Pay Act, which catalyzed a panoramic embargo on the oppression of women. The Act, requiring "that men and women in the same workplace be given equal pay for equal work," attempted to sanitize the work of monetary hierarchy that had been practiced by most to all companies.[6]

Only a year later, the enactment of Title VII of the Civil Rights Act facilitated a monumental shift in gender equity. Seeking to reform a woman's experience in the corporate realm, Title VII formally prohibited "employment discrimination based on sex, giving women the ability to challenge the actions of employer or potential employers."[7] This piece of legislation was refreshing and rewarding for women in the workplace and supporters of women's rights more broadly. Three years later, due to an executive ordered signed by President Lyndon B. Johnson, the obligations enforced by Title VII extended to government contractors and women in the federal workforce. On paper, these back-to-back federal actions made the workplace seem like a place of universal equity, value, and respect. Unfortunately, the mere passing of legislation does not always provide an sufficient impetus to change social outlooks.

Of course, male attitudes behind closed doors did not immediately align with the female-forward legislation of the 1960's. Indeed, widening the circle of responsibility in the office endangered male-centric power-complexes. This was abundantly clear in the workplace, greatly affecting women and creating another facet of animosity that impeded the progress which had been made. From a distance, however, companies seemed to be leaning into progressivity. In 1985, Fortune 500 companies across the country, on average, elected their first female directors; but, a vast number of these women were grandfathered into the role, appointed after the death of their husbands or fathers.[8] Women started to question whether or not companies were using subterfuge in order to attain clout with the market, or if they were appointing women to high-caliber positions because of merit. This poignant question extended into the twenty-first century and is still grappled with today.

History: 2000-2021

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[6] *United States Equal Opportunity Employment Commission*, "Equal Pay/Compensation Discrimination," https://www.eeoc.gov/equal-paycompensation-discrimination.

[7] Donna Batten, "Women's Rights," 442.

[8] David F. Larcker and Brian Tayan, "Pioneering Women on Boards: Pathways of the First Female Directors," *Stanford Closer Look Series*, September 3, 2013, https://www.gsb.stanford.edu/sites/default/files/publication-pdf/cgri-closer-look-25-boards-social-media.pdf.

Among other systemic problems, twenty-first century activists have taken a keen interest in women's rights, especially by evaluating the efficacy of past legislation and making decisions about the necessity of future legislation based on such analysis. On a national scale, this contemporary celebration of femininity has led to an increasingly confident population of women that preaches the importance of understanding the burdens of the past. While the adoption of colloquialisms like "Girlboss" is one measure of how far women have come, the participation in movements like Me Too, first started in 2006, is equally as compelling. Harnessing strength to guide female survivors of sexual abuse and harassment towards achieving an empowered, independent headspace, the movement is not alone in its feat to spread general awareness and attack symptoms of imbedded gender-based injustice.

Efforts are also being directed towards improving the status of women in corporate environments, exemplified by the creation of campaigns like '50/50 Women on Boards.' Seeking to challenge and hold the workplace accountable, this is an advocacy movement that helps facilitate the equal representation of women on corporate boards. The campaign itself addresses the void of female leadership in the business world. Aiming to have the male-to-female ratio equalized, 50/50 WOB makes it very clear that its mission is not to overcompensate for the lack of female representation, but to appoint women to boardrooms based on the same standards used to evaluate men.

In early 2018, Governor Jerry Brown of California introduced the Senate Bill 826, the first piece of legislation to be passed in the United States mandating that women be on the boards of publicly traded companies. Aimed at expediting the long-overdue process of women being appointed to boardroom positions, the bill offers unparalleled insight for understanding the corollaries of gender quotas in the United States. Recognizing that "all-male boards of directors in America's top corporations are becoming a thing of the past," the S.B. 826 was signed into law to increase female leadership and ensure equitable boardroom representation.[9] Mandating that boardrooms of California-headquartered public companies become 50% women by 2021, S.B. 826 was signed into law by Governor Brown with the hopes of improving social and economic facets of the corporate environment of

[9] Patricia Brown Holmes, "Regulating Gender Composition in Corporate America," *GP Solo* 37, no. 2 (March-April 2020): 1.

these well-known companies.[10] Considering California's politically progressive nature, a lack of surprise to this legislation's passage is not unusual, just as arguments that S.B. 826 is a "virtue signaling" piece of legislation are not unusual.[11] An academic dissection of this bill and the implications of gender quotas provides an accurate estimation of the hindrances women are facing in 2021.

Historically, discourse around race, class, and gender have been exceptionally polarizing. While the dichotomous stances on these topics still exist, they have most certainly evolved in their own ways. The introduction of gender quotas, both nationally and internationally, has revealed two contemporary thought processes, both of which acknowledge legal, economic, and social facets of this systemic issue. By examining the various repercussions of these quotas, we can analyze their duality and offer a respectful and sustainable path forward.

Analysis: Pro-Quota

In 2016, American women only accounted for 12% of corporate boardroom positions.[12] While this metric has gradually started to improve, rising to 26.5% in 2020, getting a seat at many well-regarded corporate boards has been a continuously difficult feat for most women.[13] Countries like Norway, Finland, and France were among the first countries to impose quotas to increase the equitability of the boardroom, and, in turn, their percentage of female boardroom representation has risen at a substantially faster rate. Though some argue that the upward maturation of these countries' statistics is not organic, the active commitment to diversify corporate leadership boards through government-mandated quotas has been a successful "diversity management" tactic.[14]

Quotas have proven to change the gender dynamic of the boardroom more so than "voluntary models" that allow nature to 'run its course' and assume female representation will rise on its own. They have also been repeatedly praised for their "life-jacket" nature: on one hand, they ease companies into creating a more equitable leadership team by mandating

[10] Holmes, "Regulating Gender Composition," 1.
[11] Holmes, "Regulating Gender Composition," 1.
[12] Felix Richter, "Infographic: The Countries with the Most Women in the Boardroom," *Statista Infographics*, May 23, 2016, https://www.statista.com/chart/4871/the-countries-with-the-most-women-in-the-boardroom/.
[13] *Catalyst*, "Women on Corporate Boards (Quick Take)," November 5, 2021, https://www.catalyst.org/research/women-on-corporate-boards/.
[14] Erika Collins, "Global Diversity Initiatives," 987.

change in the present so that over time, the appointment of women to directing boards will become a more unconscious decision. On the other hand, quotas increase female exposure in the boardroom, allowing women to "build up work experience and network mechanisms" that they can pass along to women in lower-level positions that are interested in obtaining a seat on the company's board in the future.[15] Ultimately, the quotas gently ensure company growth and adaptability, two traits that are correlated with a corporation's current and future success.

Following in the footsteps of countries like Norway, Finland, and France, states like California, Washington, Colorado, Pennsylvania, Massachusetts, New Jersey, Michigan, Ohio, Illinois, and Hawaii have started to draft legislation that prioritize female boardroom presence. Despite arguments that condemn the tardiness of these policies, "corporations are [finally] paying attention" and realizing how muscular the female perspective truly is; these quotas are "good for the bottom line" of large corporations and uplift women in business, celebrating their plethora of talents and distinct leadership capabilities.[16]

After the passing of California's S.B. 826, the "[s]hare of female board members in Fortune 500 companies" jumped from 22.5% in 2018 to 27% in 2019, a significant 4.5% increase that reflects more progress than ever before.[17] Questions around whether this jump can be partially attributed to the passing of Governor Brown's policy can be answered using recent statistics revealing the number of Fortune 500 companies per state. Out of the thirty-eight states that house the headquarters of Fortune 500 companies, California tied with New York for the most headquarters (53). Considering the mandates of S.B. 826, the increase in Fortune 500 female boardroom representation between 2018 and 2019 is partially due to the progressive measure taken by the large and economically powerful state of California. These statistics speak to the efficacy of gender quotas in the United States thus far and provide incentive for other states to pass similar pieces of legislation.

Based on research conducted in 2018 regarding the female role in corporate leadership, quotas are praised because they ensure gender equality is not being achieved by "adding new

[15] Marcus Noland and Tyler Moran, "Study: Firms with More Women in the C-Suite Are More Profitable," *Harvard Business Review*, February 8, 2016, https://hbr.org/2016/02/study-firms-with-more-women-in-the-c-suite-are-more-profitable.
[16] Gopalan and Watson, "An Agency Theoretical Approach To Corporate Board Diversity," 2.
[17] *Statista Research Department*, "Share of Female Board Members in Fortune 500 Companies, 1995 to 2019," April 27, 2021, https://www.statista.com/statistics/691204/share-of-women-board-members-fortune-500/.

board seats" for women, but rather through a process where "existing members are being replaced."[18] While replacing these seats can cause inter-gender contempt, it allows companies to put greater thought into the female candidate they are promoting and challenges the idea that quota-based appointments make women appear as "tokens" to the company as opposed to qualified professionals.[19]

Other analyses have recognized the economic benefits of gender quotas. Downstream implications of these quotas improve a company's financial performance and the nation's overall economic well-being. Indeed, an economic motivation seems to underlie the passing of California's S.B. 826, as well as other similar pieces of legislation in other states. Increasing the female boardroom demographic is also a "business case to increase shareholder value" as there seems to be an understood "relationship between boardroom heterogeneity and firm performance" and, therefore, the overall success of the company.[20] Additionally, studies have shown that companies with relatively more female board members "outperform companies with all-male boards with respect to earnings per share, return on equity, and stock performance."[21] Understanding that gender parity cannot be met in the short-term is also important in realizing the economic benefits of gender statues. Additionally, social implications cannot be neglected when studying economic trends.

The same year that California's new law was passed, the state reported $2.721 trillion GDP, a metric that made the state alone "the fifth largest economy in the world."[22] Through a policy-making lens, California's ability to produce this outstanding of a metric while simultaneously adapting to an impactful legislative statute is revelatory of S.B. 826's positive ramifications. In a study conducted by the world-renowned consulting firm Mckinsey & Company, gender diversity is used as a basis on which to analyze the likelihood of a company outperforming its competitor. Data from 2019 concludes that a company with a more diverse boardroom and executive team has a 25% chance of outperforming a

[18] Mich J. Gender, "The Plight of Women in Positions of Corporate Leadership in the United States, the European Union, and Japan: Differing Laws and Cultures, Similar Issues," 284.
[19] Gender, "The Plight of Women," 284.
[20] Carly J. Trainor, "The Business Case for Boardroom Heterogeneity," 451.
[21] Christopher J. Riley, et al., "An Equal Protection Defense of S.B. 826." *California Law Review* 12 (July 2020): 1.
[22] Reily, et al., "An Equal Protection Defense," 1.

company that does not prioritize these diversification efforts; in other words, the study emphasizes that "diversity wins."[23]

Despite the economic benefits of gender diversity on corporate boards, questions remain about whether these well-intentioned mandates pass the test of constitutional validity in the United States. The principal legal concerns in this area regard Equal Protection Clause violations, or more specifically, the equal protection claims of the states seeking to implement boardroom diversity legislation.[24] In a majority of cases, decisions about the legality of these statutes are made on precedent. When questioning statues used to increase boardroom gender diversity, like S.B. 826, many legal precedents have been referenced, though one of the most poignant from *Califano v. Webster*, a case regarding a provision in the Social Security Act. In *Califano*, the Supreme Court ruled that if a "provision's purpose was to redress society's longstanding disparate treatment of women," then the favorable treatment can be considered justified.[25] This ruling set a powerful legal precedent and has acted as an articulate defense for legislation aimed to achieve gender heterogeneity.

Analysis: Anti-Quota

Contemporary discourse around topics of injustice have made it clear that one of the most condemnable offenses is to participate in "performative activism," or, "activism done to increase one social [or economic] capital rather than one's devotion to the cause."[26] Issues that are systemic in nature require advocacy that is fueled by one's sincere interests; an absence of this devotion minimizes the strength of one's contribution to a respective cause and ultimately creates more harm than good. On a global scale, gender quotas have been advertised as pro-women legislation. Leveraging on the idea that the quotas finally offer women a sense of equal representation in the boardroom, many cases have framed S.B. 826-esque pieces of legislation as measures aimed at eliminating symptoms of systemic gender inequality in the workplace. Understanding the importance of an equitable boardroom, many

[23] Sundiatu Dixon-Fyle, et al., "Diversity Wins: How Inclusion Matters." *McKinsey & Company*, November 12, 2021, https://www.mckinsey.com/featured-insights/diversity-and-inclusion/diversity-wins-how-inclusion-matters.
[24] Riley, Christopher J., et al. "An Equal Protection Defense of SB 826." *California Law Review*, 12 July 2020, https://www.californialawreview.org/equal-protection-defense-sb826/.
[25] Lauren Kim, "Mandating Women: Defending S.B. 826 and Female Quotas in the Corporate Workplace," *Loyola of Los Angeles Law Review* 53, no. 3 (May 2020): 688.
[26] "Active Citizen Blog - Performative Activism," *Wisconsin Union*, November 1, 2020, https://union.wisc.edu/get-involved/wud/alternative-breaks/active-citizen-blog/performative-activism/.

women have questioned the social, legal, and economic rationale used to justify the passing of gender quotas, believing that there is a more cavalier undertone to the quotas that make them performative actions.

In corporate America, there seems to be a universally-held respect for those that are able to rise the ranks and earn a top tier position. This makes sense, as it is indicative of hard work, grit, and always trying to be the best version of yourself—staples of the long-lived American Dream.[27] In a *Los Angeles Times* article, author Anastasia Boden underscores this notion that gender quotas will and have compromised the respect awarded to women that have climbed to the top of the ladder on their own. Indeed, she writes, the quotas "add a handful of women to corporate boards," which challenges the "broader goal of equality-which requires not equal numbers, but equal dignity for women."[28] In short, quotas are far less innocuous than legislators think, and they impose residual effects that drive women to raise valid questions about the true intentions of these statues. A common concern is that gender quotas are rooted in motivations to improve the reputation of the company rather than dismantle systemic issues of gender inequality. This uncertainty strips women of all corporate worthiness and transforms them into mere means by which public corporations can better their image. This imposes adverse effects of discrimination, including that even if a policy is "neutral on its face applying equally to all individuals," it can still have "disproportionately harmful effects upon some groups in society."[29] Essentially, quotas act as a hindrance to women in the working world. They help companies check diversity boxes on their yearly reports and foster a further sense of distrust between women and their respective workplace.

Although quotas are not the best way to realize gender equality within corporate environments, there is still a looming disparity between men and women that must be addressed. According to data gathered in 2020, 53.72 million women held full-time working positions in the United States; of this population of women, only 26.5% of women held

[27] *Gender and the Economy*, "The Debate about Quotas," July 29, 2019, https://www.gendereconomy.org/the-debate-about-quotas/.
[28] Anastasia Boden, "Op-Ed: Setting Quotas on Women in the Boardroom Is Probably Unconstitutional. It Also Doesn't Work," *Los Angeles Times*, July 8, 2019, https://www.latimes.com/opinion/op-ed/la-oe-boden-quotas-women-corporate-boards-unconstitutional-20190708-story.html.
[29] Sheppard, "Systemic Discrimination and Gender," 234.

boardroom positions.[30] While quotas could potentially cure this gap, they would be doing so while simultaneously working against these companies in the long run. In an attempt to satisfy quota regulations, large corporations are replacing male-occupied seats with "qualified female members, while others did not."[31] Those that did not will face the consequences of hiring "unqualified or under qualified executive board members," which will ultimately lead to a decline in the company's performance, a caveat that most proponents of gender quotas fail to acknowledge.[32]

Economically speaking, quotas have posed alternate burdens. The announcement of California's S.B. 826 prompted the market to go down 1.2%, which highlights costly consequences of the bill. In response to its passing, companies have realized that there is a substantially higher expense associated with scouting qualified female boardroom candidates since the supply is extremely limited.[33] In a different vein, the consequence of justifying gender quotas with economic principles promotes a very one-dimensional, unconcerned discourse. For example, several studies have revealed that firms are only compliant with mandates like S.B. 826 because they believe that appointing more women to their boards will provide "economic benefits to the firm."[34] A faculty member at the Kellogg School of Management, Northwestern's business school, even deemed efforts to diversify board gender a "business imperative," a very sterile characterization to say the least.[35] Upon dissecting these economic motivations, women are left feeling like tools to inflate corporate numbers rather than the valuable boardroom members that they are.[36]

While the social and economic reverberations of gender quotas are compelling, the legal disdain for them that has been expressed in the courtroom is just as poignant. In fact, many corporations have started to question the constitutionality of the quotas. In a recent

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[30] "Full-Time Employed Women - Number in the U.S. 1990-2020," *Statista*, January 25, 2021, https://www.statista.com/statistics/192354/number-of-full-time-employed-women-in-the-us-since-1990/; *Catalyst*, "Women on Corporate Boards."
[31] Julia Glen, "Affirmative Action: The Constitutional Approach to Ending Sex Disparities on Corporate Boards," *Minnesota Law Review* 101 (May 2017): 2089.
[32] Glenn, "Affirmative Action," 2089.
[33] Daniel Greene, et al., "Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826," *Journal of Corporate Finance* 60 (February 2020): 11.
[34] Gender, "The Plight of Women," 284.
[35] Victoria Medvec Adeline, "What Will It Take to Get More Women on Boards?" *Kellogg Insight*, May 10, 2019, https://insight.kellogg.northwestern.edu/article/what-will-it-take-to-get-more-women-on-boards.
[36] "California's Gender Board Quota Legislation Is Likely Unconstitutional," *Columbia Business Law Review*, August 13, 2019, https://journals.library.columbia.edu/index.php/CBLR/announcement/view/191.

case, *Meland v. Padilla,* the plaintiff filed suit against California's secretary of state, Alex Padilla, arguing that the state's gender quota legislation violated the Fourteenth Amendment's Equal Protection Clause by "prohibiting actions by states that deprive individuals of civil rights."[37] Creighton Meland, shareholder of OSI Systems, Inc., in California, claimed that the statue, requiring public companies to "add a female member by the end of 2019 and two more female board members by the end of 2021," was discriminatory on the basis of sex.[38] The court found Meland lacking in standing to successfully pursue his claim, stating that in the instance the plaintiff cast a vote to appoint a "male board member nominee, there is nothing in S.B. 826 preventing him from casting a vote in favor of that nominee."[39] While the court ruled that Meland's civil and voting rights were not harmed, the foundation of his suit reveals valid frustrations regarding the arbitrary nature of workplace gender quotas.

Looking Ahead: Women and Boardroom Diversity

Looking forward, the relative infancy of American gender quotas should provide more solace than panic. Gleaning insights from statues that are currently in place, the most mature of them being California's S.B. 826, it is imperative that we capitalize on the malleability of our future and continue to direct our energy towards attaining equality in corporate boardrooms. Whether it means implementing more quotas or less formal guidelines on a state level, it is increasingly clear that there is not a singular conspicuous solution that can be created to rid corporate boardrooms of gender inequality. That said, experience has proven itself to be the best teacher, even in the most trivial of cases. It is necessary that we continue to analyze the social, economic, and legal aftermaths of active quotas in order to proceed in an informed way and discern whether or not quotas are truly the best medication for curing the gender disproportionality of boardrooms.

Assuming that quotas are the best course of action, we must recognize that for any type of solution to be curated, a detailed exploration of the problem at hand must occur. Gender quotas in twenty-first-century America are far too blunt, and their lack of tailoring

[37] Michael Hatcher and Weldon Latham, "States Are Leading the Charge to Corporate Boards: Diversify!" *The Harvard Law School Forum on Corporate Governance*, May 12, 2020, https://corpgov.law.harvard.edu/2020/05/12/states-are-leading-the-charge-to-corporate-boards-diversify.
[38] Meland v. Padilla, US Dist. Ct. E.D. California (2020), 2:19-cv-02288-JAM-AC.
[39] Meland v. Padilla.

makes them as a blanket solution to a multi-tiered problem. Instead of combating gender inequality in the corporate space, they have "inadvertently reinforced antiquated stereotypes" that have historically haunted women. Therefore, gender quotas cannot fully rectify the problem of boardroom inequity because they are not sufficiently able to respond to the systemic nature of this problem.[40]

The best way to improve current and future gender quotas would be to refine them based on industry. Detailed analyses of various industries' histories and demographics would allow legislators to accurately gauge whether or not quotas would have a positive or negative impact. California's S.B. 826, along with more recent legislation in Illinois (H.B. 3395), are far too all-encompassing as they target every publicly traded corporation in their respective states. Unfortunately, one size does not fit all when it comes to quotas. And, in order to produce the best results, legislators must pinpoint which industries have been inherently more biased towards women.

In 2019, the top five male-dominated industries in the United States were civil engineering, computer programming, construction, driver/sales workers, and mechanical engineering. Considering the lack of female representation in these fields, implementation of a quota system does not seem sustainable for the functionality of these businesses, as counterintuitive as that may seem. These industries lack female representation as it is, and, therefore, it is unrealistic to assume that creating an equal boardroom in a matter of years would be possible (let alone beneficial to the company's performance). Instead, states could turn to investing in public-awareness programs for these particular industries, illuminating to the public that female representation in male-dominated industries would challenge gender inequality. Refining quotas by sector would pave a longer road to achieving an equitable boardroom; however, it is a far more considerate approach than enforcing a crude gender quota, the only specification being that the company be publicly listed.

Consideration of a company's size and status would also help legislators ascertain whether or not quotas would be successful. As previously mentioned, American quotas are targeting a very large range of companies, the only requirement being that the company must be publicly traded. What many fail to recognize when analyzing this requirement is that not

[40] Anastasia. "Op-Ed: Setting Quotas on Women in the Boardroom Is Probably Unconstitutional."

all publicly traded companies are the same size or hold the same status. In California alone, the state's gender quota affects both Apple, arguably the most powerful company in the world earning $274.52 billion in 2021, and Molina Healthcare, which is a fraction of Apple's size and has significantly less notoriety.[41]

Despite the tremendous chasm between these two companies, they are both obligated to follow the same set of regulations laid out in S.B. 826. Even though these companies are both objectively successful, they should not be held to the same standards when it comes to maintaining and achieving an equitable boardroom. In a sense, imposing quotas upon companies like Apple, Facebook, or Walt Disney is meaningless, as unfortunate as that may sound. Companies of this caliber have realized their success far before they were obligated to abide by a gender-forward legislation, making prioritization of gender equity in their boardrooms more of a task than a need. Although it is important for companies with this level of fame to promote the importance of gender equality, their prior success is enough to conclude that their prioritization of an equitable boardroom is more performative than anything.

Instead, legislative energy should be funneled into smaller profile, publicly traded businesses, and the startup ecosystem. Though inherently more progressive in nature than their tenured counterparts, legally mandating that younger companies appoint an equal number of male and female board members will condition them to weigh the social repercussions of their actions early-on and enable them to realize the supremacy of an equitable boardroom.[42] Quotas targeting a smaller and/or more youthful demographic of companies will ingrain an important set of social values that will increase these companies' "freedom of choice" later on.[43] With this increased respect for gender equality, these companies will set themselves apart in the relevant social and economic metrics.

While it is difficult to predict the future, it is possible that the tensions around gender quotas will dwindle as time progresses. A plethora of qualified, well-educated young women will continue to saturate the corporate space from various institutions, including Boston

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[41] "California's Leading Companies, by Revenue 2021," *Statista*, July 9, 2021, https://www.statista.com/statistics/312707/california-s-top-companies-by-revenue/.
[42] Richard H. Thaler and Cass R. Sunstein, "Nudge versus Boost: How Coherent Are Policy and Theory?" *University of California San Diego*, https://pages.ucsd.edu/~mckenzie/Grune-Yanoff&Hertwig2016Minds&Machines.pdf.
[43] Thaler and Sunstein, "Nudge versus Boost."

College. This should increase inter-gender competition and challenge the idea that woman can be merely a means for reaching a gendered equilibrium in the boardroom. Instead, a focus on a woman's respective skill set and educational credentials will finally allow her to distinguish herself amongst peers and competitors of both genders.

Bellarmine Law Society Review

Volume XII | Issue I Article 2

Analyzing "Sunny" California: A Study of the Role of Solar Energy Subsidies in the Golden State

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ANALYZING "SUNNY" CALIFORNIA:

A STUDY OF THE ROLE OF SOLAR ENERGY AND SUBSIDIES IN THE GOLDEN STATE

GRACE MENDES [*]

Abstract: With a reputation for mild climate and progressive politicians, it is not surprising that California is at the forefront of the push towards renewable energy, particularly solar energy. But is solar really the energy panacea public opinion makes it out to be? Taking California as an explanatory microcosm, this article delves into the state's own history with energy legislation and the energy market, as well as the consequences to the public psyche when energy is mismanaged. The article then explores the logistics and statistics of California solar production, while raising questions about the efficacy, extent, and direction of state and federal involvement in the process. This article ultimately concludes that in order to continue progress in the sphere of renewable energy, the focus of the movement should shift away from increasing solar construction and focus instead on increased solar access and the development of high capacity solar storage.

Introduction

In an age dominated by concerns about climate change, it seems like everyone is grasping at ways we can reduce our carbon footprint; people all over the nation are going vegan, ditching plastic grocery bags, and purchasing Prii[2] in an effort to counteract the effects of global warming. One of the most exciting solutions for western states, particularly California, is the prospect of solar energy. All across the state, miles and miles of black solar panels are being installed at light speed, and, just as quickly, policies incentivizing the use of solar are accelerating rapidly. But is this clean energy source really the cure-all enthusiasts hope it will be?

This paper examines the ambitious goals California has for its future in renewable energy, as well as successes and failures of the steps it has taken in its efforts to achieve them. By first charting the stages and effects of the California Energy Crisis, this paper will

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[2] "Toyota Announces the Plural of Prius," *Toyota USA Newsroom*, February 20, 2011 pressroom.toyota.com/toyota-announces-the-plural-of-prius/. "Prii" is the official plural of "Prius", according to Toyota

lay out the conditions that contributed to California's extensive development of solar technology. In addition, it will outline the current projects the state and federal governments are investing in solar energy projects. Additionally, it will also map out the causes of concern with regard to widespread deployment of solar panels, specifically ways in which the efficacy of solar can be increased in more thoughtful ways than just placing solar panels wherever there is space. It will analyze battery storage, subsidized solar technology development, and the incentives provided to commercial and residential customers for installing solar systems. This paper will ultimately conclude that California's current policy path is inefficient, and, by divesting certain funds toward other projects, how California can more effectively incentivize the use of solar energy.

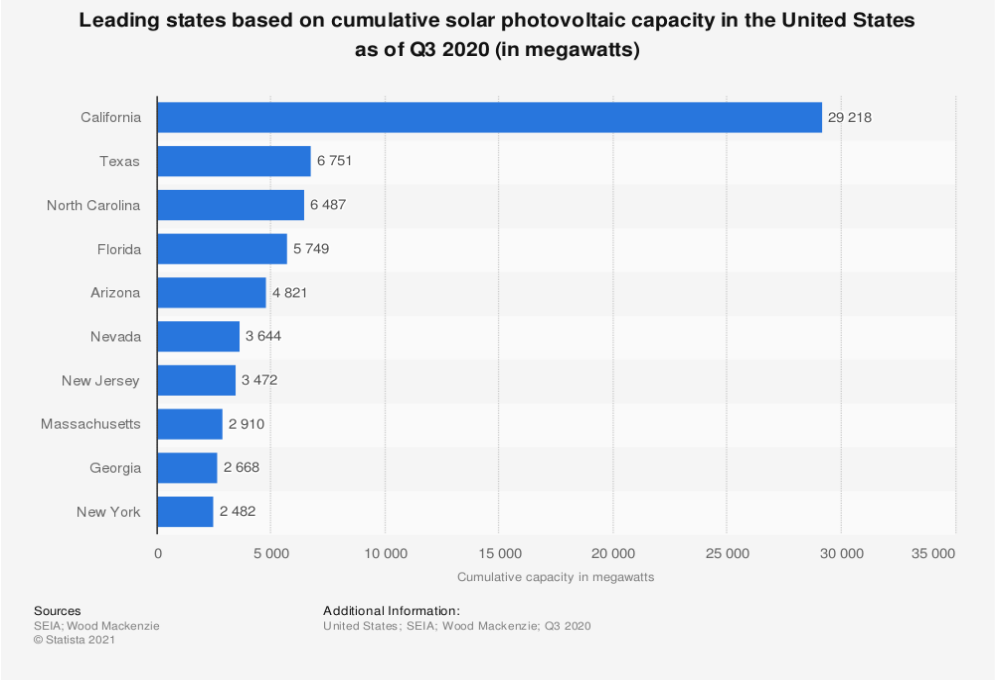
History

California represents a unique microcosm in the rapidly approaching future of renewable energy. Starting in 1974 with Californian politicians Charles Warren and Al Alquist, the two men co-authored the Warren-Alquist Act, which created the California Energy Commission. The commission was born out of a tense energy industry and the increasing demand for electricity, as well as the mounting concern with environmental impacts.[3] California has long been a state concerned with the environment, and with the authority of the CEC, California had the power as to set its own standards for sustainability where the federal government was lagging on.[4] Ever since, the renewable market has exploded, and California is the sustainable energy market par excellence. Seemingly determined to master renewable energy, California's ambition has surpassed the rest of the country by leaps and bounds. As of 2020, California is nearly five times ahead of the rest of the rest of the country in terms of solar capacity[5]; this increase is the result of a decade's worth of the state's efforts to increase its reliance on solar power.

[3] "45 Years of Energy Leadership: A Look Back at the CEC," *Youtube*, uploaded by CalEnergyCommission, December 7, 2020, https://www.youtube.com/watch?v=z8-1eOb5iDo.

[4] Four years later, Congress eventually passed two important pieces of legislation: the Public Utility Regulatory Policies Act (PURPA) and the Energy Tax Act. PURPA was created to encourage energy conservation as well as set the groundwork for net metering. It also permitted independent power producers the ability to interconnect with their local utility. The Energy Tax Act on the other hand, was the first statute to offer tax credits to consumers who invested in renewable energy for their homes.

[5] Madhumitha Jaganmohan, "U.S. Solar PV Capacity by Key State 2020," *Statista*, January 27, 2021, www.statista.com/statistics/183531/renewables-in-the-us-leading-states-in-pv-capacity/.



In 2006, the state passed AB 32, or the California Global Warming Solutions Act.[6] This was the first nationwide program to attempt a long-term, comprehensive approach to address climate change in a way that would also boost the economy. In creating a law that required a steep reduction in the emission of greenhouse gases, California set a precedent across the country. The act included an executive order from Governor Arnold Schwarzenegger that provided rebates to residents who invested in installing renewable energy technology, particularly in solar. Termed The California Solar Initiative, it aimed to install 1,940 MW of new solar generation capacity by 2016. The initiative worked so well that the state exhausted its incentives two years early, and the program surpassed its production target. Ahead of schedule and riding this success, Governor Jerry Brown signed the 2015 Clean Energy and Pollution Reduction Act, which stated that California must produce half of its power from renewable sources by 2030. The act has since been updated to strengthen these targets; California now aims for 50% renewable energy by 2030 and 100% renewable energy by 2045. By all accounts so far, California seems to be on track.

However, it has not always been a smooth transition for the state. In order to get the ball rolling in 2006, California had to first survive its 2001 energy crisis. In 1995, the

[6] "AB 32 Global Warming Solutions Act of 2006," California Air Resources Board, September 28, 2018, www2.arb.ca.gov/resources/fact-sheets/ab-32-global-warming-solutions-act-2006

California Public Utility Commission (CPUC), which sets consumer energy rates, determined the long-established system of energy regulation in the state was "fragmented, outdated, arcane and unjustifiably complex,"[7] and resultingly voted in December to deregulate the state's electricity industry, opening it up to competition. On September 23, 1996, Governor Pete Wilson signed the deregulation bill, AB1890. This legislation required utility companies to turn over control of their transmission lines to an independent agency, thus incentivizing them to sell their generating plants to private companies. This move towards deregulation was supported by three major privately held utility companies—Southern California Edison, Pacific Gas & Electric, San Diego Gas & Electric—in the form of $4.3 million in lobbyists and $1 million on political campaigns.[8] Ideally, this reform would give customers lower rates, revitalize the slowing economy, and pave the way forward for other states. Legislators also hoped that the new rules would end the monopoly the three big utility companies had over the energy market.

Unfortunately, these lofty ideals led to devastating consequences. The law required utility companies to freeze their rates until they had completed the sale of their assets. Additionally, it required them to buy power in an open market auction for electricity, where rates were set by the highest bidders. In this auction, certain trading companies such as Enron took their newly purchased plants off the market "for maintenance" on days of peak demand and then sold power at premium prices. On top of these market manipulations, that summer also saw a drought and unusually high temperatures which caused the demand for electricity to spike. Unfortunately, however, there had been no new generation plants built in almost a decade. As a result, wholesale prices jumped, and with their rates frozen as part of the deregulation legislation, utility companies were unable to pass these increasing costs on to their customers. By 2000, California was facing an unprecedented energy emergency. In the summer of 2000, California suffered its largest scheduled blackout since World War II, and such blackouts continued all summer. The crisis continued through the winter, and on January 17, 2001, Governor Gray Davis officially declared a state of emergency. California was forced to buy power from out of state suppliers at an incredibly high price, nearly

[7] "Frontline: California – Timeline, Blackout," Public Broadcasting Service, www.pbs.org/wgbh/pages/frontline/shows/blackout/california/timeline.html.
[8] "Frontline: California – Timeline, Blackout."

bankrupting the three main utility companies. Pacific Gas & Electric filed for Chapter 11 after failing to pay the $9 billion they owed to their more than 10,000 creditors – which at the time was the largest ever bankruptcy involving a utility.[9] Utility companies could no longer purchase power on behalf of their customers, and in order to bail them out, the state had to step in. To do this, the California Department of Water Resources was tasked with buying power. It would not be until 2003 that this temporary measure was lifted.

Eventually, on November 13, 2003, Governor Davis announced the end of the state of emergency that he had delcared nearly three years earlier, effectively ending the energy crisis. In those three years, the emergency authority had allowed the state to buy energy from the insolvent utility companies and permitted the CEC to streamline the application process for new plants. By the time the state of emergency was lifted, California had granted licenses for 38 new plants, totaling 14GW of production power. Following the end of the crisis, companies like Enron were investigated by the Federal Energy Regulatory Commission and were forced to pay reparations. While market prices eventually returned to normal and California recovered, the memory of this crisis and its consequences still looms in the minds of many. Nearly two decades later, solar has changed significantly, but as it has gotten less expensive and more accessible, the market has once again started to deregulate. This time, it is not a result of any legislation, but rather because residential and commercial solar installation is now an option. The original crisis can be partly blamed on inefficient government activities, and the failure to act immediately or efficiently. Now the question is, what is the best way for California to reach its ambitious renewable energy goals without slipping into another energy crisis.

Analysis

While the pursuit of a clean, green future is certainly a noble and worthwhile goal, it is one that needs to be approached more judiciously than it is at present. A huge contributor to the California energy crisis was a gap between supply and demand of energy; ever since, California has done everything it can to ramp up energy production through solar power. With the reputation of "sunny California," people were convinced that laying down a few more black panels to trap sunshine would solve all the energy problems. In reality, it's not

[9] "Frontline: California – Timeline, Blackout."

quite as simple. While solar energy is promising, it has some serious drawbacks that the general public often turns a blind eye. Two of the biggest drawbacks are variability and storage.

Solar energy is not a source of constant supply, rather it is diurnal; there are around 12 hours where there is no sunlight striking the solar panels to produce power. Additionally, there are times when solar is not at its full capacity, such as on cloudy days or during the winter season. As such, solar is not a very reliable source of power on its own. This is where statewide, governmental neglect of other renewable sources can become detrimental. Solar can be easily supplemented by other renewable sources; data from the California Independent Supply Operations (CAISO) shows that on days when solar output is low, wind tends to pick up the slack.[10] Wind is going to be crucial to diversifying California's power sources, but it is being overshadowed by California legislators' captivation with solar power.

The other significant technical problem with solar is that it is incredibly challenging to store. California is certainly capable of generating more power than it uses, an excess known as curtailment. In March 2021, the monthly solar and wind curtailment was 341,959 MWh.[11] For perspective, that amount of electricity could power almost 88 million homes if used all at one time. The caveat is as implied: used all at once. The reason the monthly curtailments are so high is because renewable energy storage is inadequate. Having a high curtailment is not only inefficient; it can also be quite dangerous. If too much energy is produced, it stands the chance of flooding the grid. This oversupply could lead to blackouts and delays in energy delivery, and overloaded grids are also dangerous to repair. Unfortunately, as of right now, California has neither the number of batteries needed nor the technology to efficiently store solar power in the long term.[12] That is not to say that the current system is completely inefficient; it actually works quite well on a small scale, such as replacing one natural gas plant. The Moss Landing Power Plant, for instance, was formerly a natural gas plant that was recently converted to a solar facility with an

[10] "California's Renewable Energy Problem," *YouTube*, uploaded by Real Engineering, May 25, 2019, https://www.youtube.com/watch?v=h5cm7HOAqZY

[11] "Managing Oversupply," *California ISO*, April 11, 2021, www.caiso.com/informed/Pages/ManagingOversupply.aspx.

[12] The most commonly used battery, made of lithium, is simply not designed for long term storage.

unprecedented 567MW capacity of battery storage.[13] The hope is that, with such a large storage capacity, the converted plant will be able to supply power at peak times when solar generation drops off, there will no longer be a need to supplement renewable energy with natural gas during peak time. However, the days when solar power is reliably capable of this lay ahead in the future.

The CAISO website provides an interactive breakdown of the supply, demand, and prices of the statewide electrical grid being generated in real time.[14] Taking a look at the graph of demand for Saturday, May 8, 2021, demand begins to climb around 4:00pm (16): people may be headed back home from wherever they spent the day and are ready to shower, turn on their appliances, and enjoy their Saturday night. Turning attention to the supply graph, one can see all the different supply sources, but for our purposes, electricity from hydroelectric, imports, coal, and others have been blocked out. Peak demand is approached around 7:00pm (19); at this point, solar generation drops off for the night, and natural gas begins to increase proportionately in order to pick up the slack. Assuming a baseline of about 2,300 MW coming from nuclear power, we can clearly see we are going to need at least 6,000 additional MW of battery storage. Providing this kind of storage is no small task. Once again for perspective, the Moss Landing Power Plant, which is just now being converted into a solar facility, is reported to come with a price tag of $80 million[15] and can only store 567 MW. Therefore, Moss Landing is, at best, a small step in the right direction; if California is

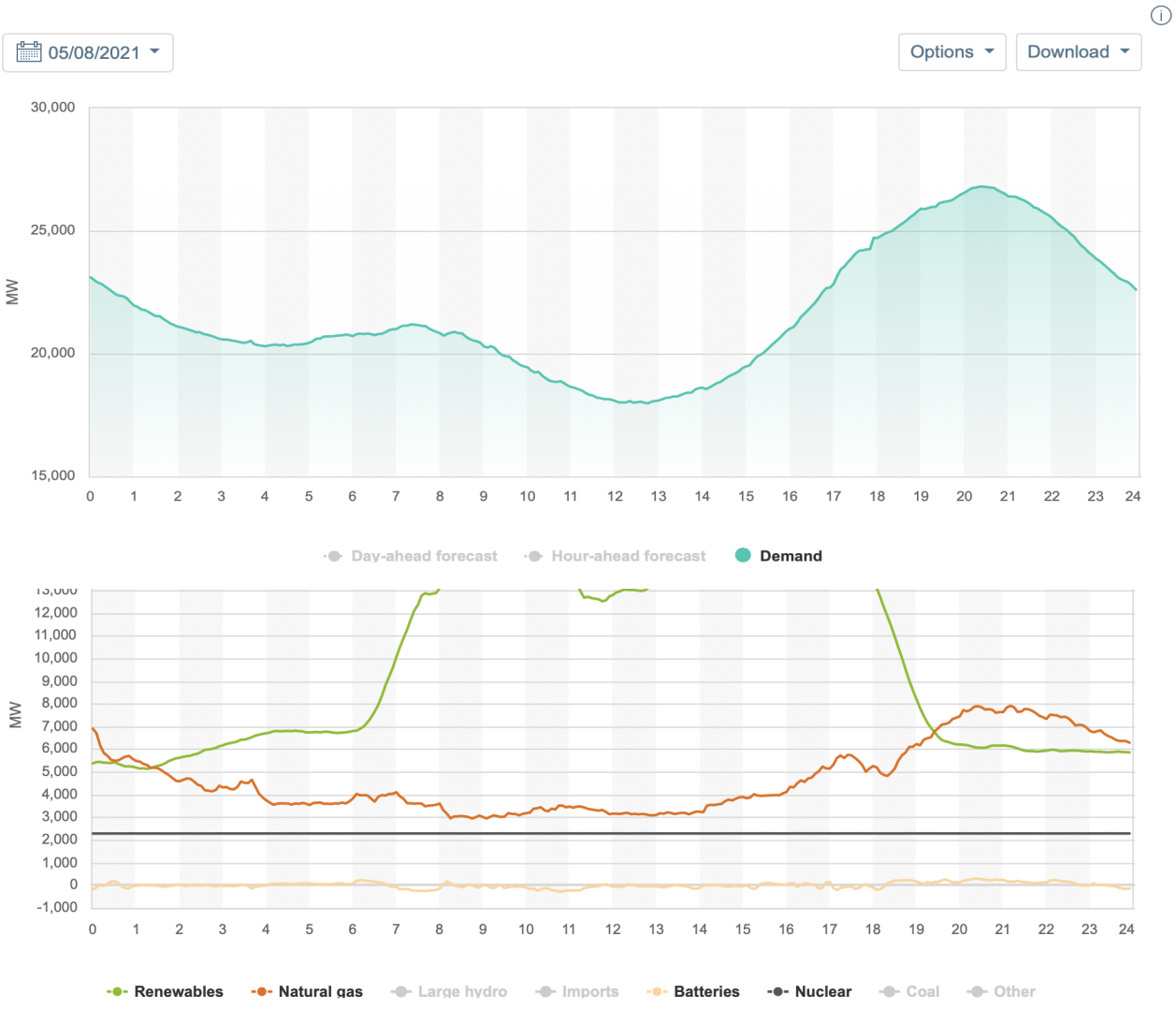
[13] "California's Renewable Energy Problem," *Youtube*, uploaded by Real Engineering, May 25, 2019, https://www.youtube.com/watch?v=h5cm7HOAqZY

[14] "Today's Outlook," *California ISO,* May 8, 2021, www.caiso.com/TodaysOutlook/Pages/default.aspx.

[15] J.D. Morris, "Monterey Bay Power Plant Now a Record-Breaking Battery Project to Ward off Blackouts," *San Francisco Chronicle*, January 16, 2021, www.sfchronicle.com/business/article/Monterey-Bay-power-plant-now-a-record-breaking-15872503.php.

to reach its goal of being 100% reliant on renewable energy sources by 2045, this serious storage problem will need to be solved, and soon.

Another misconception about solar is the idea that these new plants and solar installations are going to create "green jobs," so the government should be funding as many promising start-ups as possible. While this idea is alluring, government subsidies of these green entrepreneurs is not the solution many hoped it would be. In August of 2011, Solyndra, a solar panel manufacturer based in Fremont, California, filed for bankruptcy, and while unfortunate, it should have been unremarkable, except for the fact that it had been the recipient of about $535 million in federal loans.[16] The company had received its first batch



[16] "Green Jobs: Should the U.S. Government Invest in Green Jobs?" *Issues & Controversies*, Dember 27, 2011, www.icof.infobaselearning.com/recordurl.aspx?ID=2032.

of loans from the Obama administration in March 2009, and, by January 2011, Solyndra needed an additional $75 million from private investors. Even then, the company had still gone bankrupt by August of that same year. This development sparked huge controversy as emails began to surface from the White House that reflected the administration's lack of confidence in the company from the beginning. The President had planned to visit Solyndra's plant in May of 2010, but many officials voiced their concerns that it might not be a wise idea to be seen publicly endorsing a company on the brink of failure. One advisor said of the visit, "Hope [Solyndra] doesn't default [on its loans] before then."[17] The failure of Solyndra would go on to spark a big question: should the government actually be financing companies developing solar technology?

Proponents of federal investment into solar development assert that the private sector is simply too impatient to wait for start-ups to get on their feet; the development of ground-breaking technology in any industry is not the straight path developers might pitch, and private investors want secure returns. The developers need funding at each stage of the development, including the hiccups, and, traditionally, that funding has come from the government. Additionally, in not developing and supporting American companies, the government sacrifices jobs that could be held domestically instead of importing overseas solar technology. Also, proponents know that anything that can be done to wean the U.S. off the whims of fossil fuels abroad will be a good thing; the sooner the U.S. can reliably produce its own power in ways that are both economically and environmentally sustainable, the better. In order to get there though, solar developers need government subsidies.

Even so, critics argue that the government is actually a very poor judge of the viability of companies. Despite receiving immense funding, Solyndra ultimately proved unsuccessful, and the 1,100 jobs it created disappeared along with it. This suggests that not only is the government not good at determining the strengths and weaknesses of a business, but by subsidizing weak enterprises, it negatively interferes with operations of the free market. If a company can produce a product that is truly viable, they will be able to secure their own venture capital from private investors. By injecting an unnatural element into the natural process of the free market, the government hinders the invisible hand in a way that

[17] "Green Jobs: Should the U.S. Government Invest in Green Jobs?"

results in net harm: with Solyndra, 1,100 people lost their jobs and the parties making loans collectively lost $610 million.

That said, the government is not currently planning on pulling funding from nationwide investments based on solar technology. President Biden recently released a $4 trillion plan to address widespread problems across the U.S., and embedded in it is an emphasis on tackling climate change.[18] While most of the emphasis is focused on an increased use of electric cars,[19] President Biden's plan suggests creating a $100 billion program to update and modernize the electric grid to make it more reliable and less susceptible to blackouts, like those that recently devastated parts of Texas. The plan also intends to build more transmission lines from wind and solar plants to large cities. It also proposes the creation of a "Clean Electricity Standard,'" which is essentially a federal mandate requiring that a certain percentage of electricity in the United States be generated by zero-carbon energy sources like wind and solar power. However, that mandate would have to be enacted by Congress, where its success is uncertain at best; similar efforts to pass such a mandate have failed multiple times over the past 20 years. While the plan seems optimistic, at this time there are not many details suggesting the logistics of how this energy panacea plan is going to be enacted. President Biden is attempting to cover a lot of ground with this resolution, so it is not surprising that he does not have all the kinks worked out yet. However, it is worth remembering that the last time there was a political attempt to "revamp an antiquated system" without a well-thought out plan all three of California's major utilities were nearly wiped out.

Nonetheless, the DOI recently approved a 350 MW, $550 million solar facility called the Crimson Solar Project, which will be built on 2,500 acres in southeast California.[20] Announced May 3, 2021, the project will be a part of the Desert Renewable Energy Conservation Plan, which the DOI hopes will streamline the transformation of 10.8 million acres of public land in the California desert into renewable energy development facilities.

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[18] Jim Tankersley, "Biden Details $2 Trillion Plan to Rebuild Infrastructure and Reshape the Economy," *The New York Times*, March 31, 2021, www.nytimes.com/2021/03/31/business/economy/biden-infrastructure-plan.html.

[19] The plan proposes spending $174 billion to encourage the manufacture and purchase of electric vehicles by granting tax credits and other incentives to companies that make electric vehicle batteries in the United States instead of China, with the goal of reducing the price tags on vehicles.

[20] Morgan Conley, "Interior Dept. Greenlights $550M Calif. Solar Project," *Law360*, May 3, 2021, https://www.law360.com/california/article.

The project is supposed to create 650 construction jobs and 40 jobs in operations and maintenance over the facility's 30-year lifetime, all of which will be temporary: the DOI notes that the project will most likely only create 10 permanent jobs. The project is supposed to be up and running by the end of May 2021, suggesting a certain degree of urgency. The exciting part of the project is that, in addition to the 350 MW of generation capacity, the facility is also planning to have 200 MW of storage.[21] This design is encouraging because it suggests that the government is considering storage capacity in addition to generation capacity, and it is taking steps to utilize California's enormous curtailment, not add to it.

While the Crimson Solar Project is a huge endeavor that will provide power to thousands of California residents, it is important to also consider what solar generation will actually look like at the residential level. For as much as California has marketed solar as the energy source of the future, the state of California actually no longer offers residents tax credits for installing solar panels. As such, customers often confuse the federal solar tax credit for the nonexistent state one. The Solar Investment Tax Credit (ITC) was executed in 2006, and, since then, has helped the national solar industry grow by more than 10,000%.[22] The ICT currently provides a 26% tax credit for solar systems installed in either commercial or residential properties. Moving forward, it will give 23% in 2023, eventually being phased out for residential properties by 2024. The program was originally set to phase out by 2022, but Congress passed a two year delay in the phasedown in 2020. This program has been crucial in increasing residential and commercial access to solar systems, and, by all accounts, has accomplished the goals it set out to achieve. But, as much success as this program has had, it seems to have one big problem: only those who can afford to install solar can take advantage of the credits. The average cost to install solar panels in California as of May 2021 is about $2.91 per watt, which when multiplied by the average sized system, 5 kW, translates to an average price of $14,550.[23] Thereby, the people who have the most to gain by installing

[21] Scott Dawson, "Re: Battery Storage at Crimson Solar," Message to Grace Mendes, May 8, 2021. Scott Dawson is the Director of Permitting at Sonoran West Solar Holdings, LLC, the sponsor contact for the Crimson Solar Project.
[22] "Solar Investment Tax Credit (ITC)," *SEIA*, www.seia.org/initiatives/solar-investment-tax-credit-itc. The program has an average annual growth of 50% over the last decade alone.
[23] "How Much Do Solar Panels Cost in California in 2021?" *EnergySage*, May 8, 2021, www.energysage.com/local-data/solar-panel-cost/ca/. With ICT credits, the number comes down to an average of $10,767. While solar technology will get increasingly cheaper, it is important to remember that the ICT will give decreasing credits before it is completely phased out in two years.

solar— low-income electric customers— are prevented from doing so because they cannot afford the upfront costs of installation.

However, where there is currently a lack of support from the state and federal governments, certain nonprofit organizations in California have instituted their own programs for low-income families. The Single-Family Affordable Solar Homes Program, or SASH, is one such program. Managed by the Oakland-based nonprofit GRID Alternatives, SASH supplies fixed, up-front, capacity-based incentives to qualified low-income homeowners to try and offset the initial cost of a solar electric system. In order to be eligible for the benefits, applicants must own and live in their home, have a household income that is at or below 80% of the area median income (AMI), live in a home defined as "affordable housing" by California Public Utilities Code 2852, and receive electrical service from PG&E, SCE, or SDGE.[24] The incentive itself offers $3 per watt and strives to not only promote sustainable energy, but also provide job training and employment opportunities in the solar economy as well as reducing costs across the board for qualified participants. The program has been fairly successful; a total of 9,264 PV[25] systems have been installed, generating almost 30 MW of solar capacity and conferring about $132.3 million in incentives. The Program Administrators of the General Market CSI Program manage a similar program for multifamily homes, appropriately named, MASH, with similar success: it is expected to produce 59.8 MW of solar capacity and has supplied $162.3 million in incentives towards 480 projects across the state.[26] Between the two programs, they have incorporated tens of thousands of tenant units into a more sustainable energy system, both economically and environmentally.

The benefits of such programs are better understood when compared to a state like Texas, whose energy market is formally deregulated. Much like California, Texas offers no state subsidies for installing solar, but, as a result of deregulation, there are also no programs incentivizing landlords to make solar PV systems available, especially not to those residing

[24] California Public Utilities Commission, "CSI Single-Family Affordable Solar Homes (SASH) Program," www.cpuc.ca.gov/general.aspx?id=3043.
[25] Photovoltaic is one of two solar systems; the other is solar thermal. PV has photovoltaic cells that capture energy straight from sunlight, while thermal uses the sun's rays to heat water to move a turbine. PV is the more effective system these days, as its capacity and efficiency passed thermal around 2012.
[26] California Public Utilities Commission, "CSI Multifamily Affordable Solar Housing (MASH) Program," www.cpuc.ca.gov/general.aspx?id=3752.

in affordable multifamily housing. Also as a result of deregulation, the Texan electricity industry is run by the free market, which has its advantages. Consumers can choose their own providers and competition amongst retail providers keeps prices low. Cecilia Turchetti charts the fiscal differences between being an electricity consumer in Texas and being an electricity consumer in California:

> The average monthly consumption in kilo-watt per hour ("kWh") in Texas is around 1,112, and residential bills for that usage averaged around $122.47, around 11c per kWh. Quotes for 1000 kWh are as low as 7.5c in areas such as Houston, putting bills as low as seventy-five dollars without including the cost of energy transmission, which was no more than ten dollars per billing cycle. In California, the monthly average was 554 kWh, with an average bill for that usage at $101.49, or 18c per kWh.[27]

While this seems like a great reason to live in Texas instead of California, especially as a low-income individual, these numbers actually only offer short term benefits. Texas customers lack opportunities to benefit from PV power over time, so they will continue to depend on their chosen utility company and pay their monthly rates. In California, on the other hand, customers have ever increasing access to solar systems, which decreases reliance on utility companies and places power usage in the hands of the consumers. Furthermore, Californians are increasingly adopting a system of net metering, a process by which consumers sell their excess power back to the grid, which will further lower total costs. So, despite the upfront costs in California seeming considerably less advantageous, the long haul seems to favor individual access to solar systems, especially for low-income customers.

Conclusion and Implications

Like any problem worth solving, what to do about solar energy in California is a problem that does not have one clear-cut solution. But, there are actions that can be taken so that California can meet its goals as efficiently as possible. I argue that while it is not necessary to fund further solar development nor construction, it is necessary for the federal government to subsidize solar access because it can then set the necessary conditions solar systems need to meet, which can prevent an energy crisis and make solar power available to low-income consumers.

[27] Cecilia Turchetti, "Here Comes the Sun: Bringing Efficiency and Renewable Energy Solutions to Affordable Housing in the U.S," *Georgetown Environmental Law Review,* 32, no. 399 (Winter 2020): 414.

As exciting as it is to think that soon California will be totally reliant on renewable power and that much of that power will be solar, the most efficient way to do that is not by installing even more solar generation plants wherever there is space. While part of the reason the early 2000's Energy Crisis occurred was that there was a gap between skyrocketing demand and frozen supply, that is just not a problem we will have to face again. We are not only meeting our demand for electricity, but we are oversupplying by thousands and thousands of MW per day. As California strives to meet its goals, our astronomical curtailment will only continue to climb higher as we recklessly expand commercial sized generation, and it is just not economically or practically effective. Individual residential and commercial PV installation is more than sufficient to meet the demand of the grid; so, the answer is not more generation facilities, it is investing in more storage facilities. The solar storage industry creates just as many, if temporary, jobs as solar installation, and is only marginally more expensive (though no doubt battery prices will continue to fall as development improves) while making the statewide grid more stable than increased generation. With more stability, blackouts are significantly less likely, and California can make use of its enormous curtailment instead of letting it go to waste.

That said, it is inefficient for the state to finance loans to solar technology developers. It is tempting to want to throw money at the technology sector to develop the next big thing as fast as possible; but, as cases like Solyndra show, the government is not necessarily the best judge of the strengths and weaknesses of innovators. As it is, the CEC invests approximately $130 million annually through the Electric Program Investment Charge (EPIC) for electric system research and development projects.[28] While unlikely that the government could, or should, pull all funding, it is worth considering whether this is an overly generous amount. Investing in the solar future is an incredibly lucrative venture, and as solar technology continually becomes better, it will continue become more competitive. In turn, solar energy will push out coal and natural gas for purely economic reasons. With coal and natural gas on their way out, those former sponsors of fossil fuel power will need to invest towards the next big thing, likely renewable energy. As such, the free market is more than capable of selecting the best, most efficient hardware of the future without much governmental intervention.

[28] California Public Utilities Commission, *Self-Generation Incentive* Program, www.cpuc.ca.gov/sgip/.

The government should also be subsidizing access to solar and reforming their application process, potentially by making programs like SASH and MASH, stewards of federal funding. The main problem with these programs is that they are out of money and are being phased out as a result of necessity, not because they are obsolete. By furthering these programs, the government can fund specific income-based incentives. These can not only increase access to solar, but also set specific regulations to take advantage of the incentives, thereby managing with a degree of certainty that solar is efficiently installed in a deregulating market. However, to ensure that the incentives are not abused, it might be worth adding that the incentives received are proportional to the energy efficiency of the system in order to discourage excessive energy consumption.[29] Federal policy makers might also consider adding to these policies a program like the CPUC's Self-Generation Incentive Program (SGIP). While in its current form it does not support solar systems, SGIP provides rebates for other renewable energy systems while also supporting the installation of storage systems.[30] This could be a really useful program to appropriate because, by coupling tax credits for installing solar in low-income areas with rebates for solar storage, California can incentivize a more efficient expansion of the solar industry without full regulation.

After the crisis in the early 2000's, Enron executives were put on trial for a variety of crimes including wire, securities, and mail fraud, as well as money laundering and conspiracy. During the trial, S. David Freeman, the Chairman of the California Power Authority, testified to a conversation he had in 2000 with Kenneth Lay, the CEO of Enron. Lay ridicules the efforts to stop the malicious practices of energy wholesalers, saying: "In the final analysis, it doesn't matter what you crazy people in California do, because I got smart guys who can always figure out how to make money."[31] While Lay's remark is certainly haunting, it reminds us that, while the problem seems to have been fixed through legislation that ensures something like the energy crisis will never happen again, the private sector has influence and power. Clever, greedy, and without clear regulations, companies

[29] Alexande Ritschel and Greg P. Smestad, "Energy Subsidies in California's Electricity Market Deregulation," *Energy Policy*, October 28, 2022, www.sciencedirect.com/science/article/pii/S0301421502001970?via%3Dihub.
[30] California Public Utilities Commission, "Self-Generation Incentive Program," www.cpuc.ca.gov/sgip/
[31] "Testimony of S. David Freeman." *Commerce.senate.gov*, May 3, 2003, web.archive.org/web/20060301072016/commerce.senate.gov/hearings/051502freeman.pdf.

are more than capable of squeezing the market and putting the greater good in danger once again. In that same testimony, Freeman states very poignantly:

There is one fundamental lesson we must learn from this experience: electricity is really different from everything else. It cannot be stored, it cannot be seen, and we cannot do without it, which makes opportunities to take advantage of a deregulated market endless. It is a public good that must be protected from private abuse. If Murphy's Law were written for a market approach to electricity, then the law would state 'any system that can be gamed, will be gamed, and at the worst possible time.' And a market approach for electricity is inherently gameable. Never again can we allow private interests to create artificial or even real shortages and to be in control.[32]

Electricity is a public good that must be protected from private abuse. As California charges headfirst into a renewable future, Americans must not forget the lessons of the past. Additionally, while deregulation is not something to be feared, it is not something to be taken lightly either. As the energy industry enters unprecedented times and Americans reach for a fully renewable tomorrow, it is important to remain realistic. Solar is an unparalleled energy alternative because, unlike other renewable options, solar can be influenced by consumer choice; it has been uniquely developed directly for the customer. Unlike hydroelectric, wind, or geothermal energy, solar energy is an energy source that consumers can also be generators of; while customers cannot put an entire wind farm on their property, they can install solar panels. As such, solar has the singular ability to make individuals feel like they have a hand in the energy industry, and this promotes an important mindset going forward. The reason solar is such an essential step is because people are more aware that they are living on borrowed time, and regardless of the things that divide people, the solution will require collective action. Even so, it is just as imperative to not get carried away by this sense of unity; people can save themselves not with more solar, but smarter solar. By focusing on subsidizing low-income solar deployment and increasing quantities of solar storage, Americans give themselves the best chance of not only meeting their sustainability goals but also exceeding them.

[32] "Testimony of S. David Freeman." *Commerce.senate.gov*, 3 May 2003, web.archive.org/web/20060301072016/commerce.senate.gov/hearings/051502freeman.pdf.

Bellarmine Law Society Review

Volume XII | Issue I Article 3

From the Magna Carta to the MCA: The Development of the Right to Habeas Corpus for Enemy Combatants of the United States

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FROM THE MAGNA CARTA TO THE MCA:

THE DEVELOPMENT OF THE RIGHT TO HABEAS CORPUS FOR ENEMY COMBATANTS OF THE UNITED STATES

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Abstract: The Writ of Habeas Corpus is one of the foremost rights entrenched in the Common Law System. However, the courts' varying interpretations of the "Suspension Clause" of the American Constitution have resulted in a varied protection of this right in cases where claimants are found to be enemy combatants to the United States. To begin, this article will detail the history of the writ of habeas corpus. Then, it will offer a reflection on the instances where the Supreme Court has considered the government's proper use of the Suspension Clause, first in the Civil War and next in World War II. Finally, this article will analyze the Supreme Court's decisions in three landmark post-9/11 cases, *Rasul v. Bush* (2004), *Hamdi v. Rumsfeld* (2004), and *Boumediene v. Bush* (2008), assessing how the court balanced competing standards set forth during the Civil War and World War II.

Introduction

In *Federalist 84*, Alexander Hamilton asserts that "the establishment of the writ of habeas corpus, the prohibition of ex post facto laws…are perhaps greater securities to liberty and republicanism than any [Constitution] contains."[2] Habeas corpus, Latin for "that you have the body," one of the most important rights granted to Americans under the Constitution, allows for a detainee to appeal to the courts that their imprisonment is unlawful. This provision protects against improper government interference into the lives of individuals, and grants individuals the right to check government power through the judicial system.[3] In this way, the right of habeas corpus prevents individuals from serving unlawful jailtime. Article I, Section 9, Clause 2 of the U.S. Constitution asserts, "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or

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[2] Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers* (Redditch, UK: Read Books Ltd, 2018).

[3] Jonathan Kim, "Habeas Corpus," *Legal Information Institute*, June 2017, https://www.law.cornell.edu/wex/habeas_corpus.

Invasion the public Safety may require it."[4] This instance is the only time where the U.S. Constitution explicitly mentions "the Writ of Habeas Corpus." It is paired with the so-called "Suspension Clause," which provides for certain instances in which this right can be suspended, those being "in Cases of Rebellion or Invasion." The rationale behind the Suspension Clause is that the government's role to protect "public safety" outweighs the individual's claim for false imprisonment in times when national security is threatened. However, the Constitution provides no further explanation of what the Writ of Habeas Corpus entails or who is authorized by the Suspension Clause.

Questions concerning the right to habeas corpus have plagued American politics throughout its 245-year history, with tensions most often arising during times of war. The most prominent instances of the Suspension Clause's use include the Civil War, World War II, and most recently September 11th and the "War on Terror." Through the exploration of cases which address the rights of enemy combatants of the United States during times of war, one can achieve a full understanding of the Supreme Courts shifting jurisprudence. Throughout its history, the Supreme Court has, at times, supported the rights of enemy combatants to habeas corpus in the name of individual liberties. However, in other instances like World War II, the right has been abridged. Thus, the Supreme Court's shifting interpretations have led to a murky understanding of U.S. domestic courts' jurisdiction to hear habeas corpus claims from enemy combatants. To understand the scope and complexity of this legal clause, it is important to start at the beginning, with the first instance of the Writ of Habeas Corpus in Common Law.

Historical Analysis of Habeas Corpus Claims by Enemy Combatants of the United States

The Magna Carta, penned in 1215, was Europe's first constitution and the first legal document to establish the rights of those subject to the King of England. Clause 39 of the Magna Carta formalized the Writ of Habeas Corpus as it asserts that: "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or

[4] U.S. Const. art. I, § 9 cl. 2

deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land."[5]

Here, the precedent for the Writ of Habeas Corpus in the United States Constitution can be found, as the U.S. adopted the British Common Law system. Directly following the ratification of the U.S. Constitution, the First Congress passed the Judiciary Act of 1789, which granted Federal Courts the "power to grant writs of *habeas corpus* for the purpose of inquiry into the cause of commitment."[6] In 1830, Chief Justice John Marshall delivered the majority opinion in *Ex parte Tobias Watkins* in which the court held that the term habeas corpus "is used in the Constitution, as one which was well understood [...] for the purpose of inquiring into the cause of commitment."[7] Thus, the court held that habeas corpus must be understood in the context of the time in which it was established. Here, the understanding of habeas corpus as a "well understood" right, suggests that the right is known and possessed by all. The insinuation of universal possession supports claims that the right may not be denied to enemy combatants. This position would prove to have long-lasting effects regarding the proper suspension of the right.

The writ of habeas corpus and the Suspension Clause appear in Article I, Section 9 of the U.S. Constitution. Section 9 of the Constitution sets forth the powers denied to Congress. In addition, the right to habeas corpus differs from the explicit rights granted in the Bill of Rights, as its only mention is in the extreme conditions when the right may be legally abridged. Understanding habeas corpus as an assumed right lends credence to those who reject the government's ability to deny habeas corpus to enemy combatants, as a universally granted right may not be exclusionary. Though the Suspension Clause does not explicitly declare who holds the power to suspend the writ of habeas corpus, its location within the Constitution has led the majority of scholars to hold it as a power granted to Congress, not the Executive.[8] Until very late in the Constitutional Congress, the Suspension Clause was located within Article 3, which would have made it a power of the judiciary. On September

[5] "British Library Treasures in Full: Magna Carta - English Translation," *Magna Carta*, last updated September 2007, https://www.bl.uk/treasuresmagnacarta/translation/mc_trans.html.
[6] U.S. Congress, *An Act to Establish the Judicial Courts of the United States*, 1st Cong., 1st session, *Congressional Record* 11, Group 1, 82 § 14 https://www.loc.gov/law/help/statutes-at-large/1st-congress/session-1/c1s1ch20.pdf.
[7] *Ex Parte Tobias Watkins*, 28 U.S. (3 Pet.) 193, 201 (1830).
[8] Amy Barrett and Neal Katyal, "Interpretation: The Suspension Clause," The National Constitution Center, accessed April 15, 2021, https://constitutioncenter.org/interactive-constitution/interpretation/article-i/clauses/763.

12, 1789, just five days before the final draft of the Constitution was signed, the Suspension Clause was moved to Article I.[9] In this way, the Suspension Clause was made a power of the Legislature.

Abraham Lincoln challenged the scope of the Suspension Clause at the outset of the Civil War. On April 27, 1861, less than two weeks after the South's secession, President Lincoln sent an executive order to General Winfield Scott in which he asserted: "You are engaged in suppressing an insurrection against the laws of the United States. If at any point […] you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally, or through the officer in command at the point where resistance occurs, are authorized to suspend that writ."[10] With this sweeping authorization, General Scott and his army responded to the rumors that General Robert E. Lee would soon be invading Maryland. In order to suppress this potential threat, Union forces began to arrest prominent Baltimore County elites, one of whom was plantation owner John Merryman.

Soon after his arrest, Merryman was imprisoned at Fort McHenry. He then sent word to his lawyers, who petitioned for the writ of habeas corpus to the U.S. Circuit Court for Baltimore on the grounds that he was arrested without a warrant and denied due process. Merryman was issued the writ, and the court called General Cadwalader to explain Merryman's arrest. Cadwalader denied the court's request, asserting that President Lincoln granted him the authority to arrest Merryman when he suspended the writ of habeas corpus. Chief Justice Rodger Taney, who also served on the U.S. Circuit Court, held that President Lincoln had no authority under the Constitution to suspend habeas corpus, citing both the clause's location within Article I and the writ's historical origin as rationale. Taney asserted that if Lincoln had the right to suspend habeas corpus, then the Constitution "conferred upon him more regal and absolute power over the liberty of the citizen, than the people of England have thought it safe to entrust to the crown."[11] Thus, as is revealed by Taney's opinion, the

[9] Tor Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, or the United States Constitution and the War on Terror*, 74 Fordham L. Rev. 1475 (2005). , Available at: https://ir.lawnet.fordham.edu/flr/vol74/iss3/11

[10] "Order from President Abraham Lincoln to General Winfield Scott Suspending the Writ of Habeas Corpus, April 27, 1861," U.S. Capitol Visitor Center, accessed April 16, 2021, https://www.visitthecapitol.gov/exhibitions/artifact/order-president-abraham-lincoln-general-winfield-scott-suspending-writ-habeas.

[11] Bruce Ragsdale, "Ex Parte Merryman and Debates on Civil Liberties During the Civil War," Federal Judicial Center, 2007: 4, https://www.fjc.gov/history/cases/famous-federal-trials/ex-parte-merryman-habeas-corpus-during-civil-war.

powers under the Suspension Clause must be granted to Congress in order to safeguard individual liberties.

Despite Taney's opinion, Lincoln largely ignored the Court's ruling and continued to arrest individuals suspected of joining the insurrection or those who criticized his practice. One journalist, Frank Key Howard, the grandson of "the Star-Spangled Banner" writer Francis Scott Key, was imprisoned at Fort McHenry for fourteen months for criticizing Lincoln's behavior.[12] As is evident during times of war when national security becomes the most important issue for the nation, the expansion of the Executive's power, though at times met with pushback, is largely accepted as necessity. Consequently, the rights of individuals are abridged at times in order to guarantee liberty and justice for all.

At the height of the Civil War, on March 3, 1863, Congress passed *An Act relating to Habeas Corpus, and regulating Judicial Proceedings in Certain Cases*, which formally enacted the Suspension Clause, asserting that President Lincoln "whenever, in his judgment, the public safety may require it, is authorized to suspend the privilege of the writ of habeas corpus in any case in the United States, or any part thereof."[13] Despite the Act, there was still substantial discord between Lincoln and Congress at this time, as Lincoln held that he did not need Congressional authorization to suspend the writ. Scholars such as George Sellery of the University of Wisconsin have attempted to capture the motives behind Congress' actions in passing the bill. Sellery explained in his 1907 dissertation that, in drafting the bill, Congressmen were determined not to comment on the illegality of Lincoln's previous suspension. As a result, Sellery asserts that Congress' "phraseology is not accidental […] The long acquiescence of Congress in the President's suspension of the privilege of the writ coupled with its formal enactment in the Habeas Corpus Act that the President is authorized to suspend were, in truth, recognition by Congress of the President's right to suspend."[14] Here, Sellery suggests that Congress' authorization of the suspension of habeas corpus, though a legal necessity under the Constitution, was a "recognition" of the right of the

[12] Frank Key Howard, *Fourteen Months in American Bastiles*, 3rd ed. (Baltimore, MD: Kelly, Hedian & Piet, 1863), 7.
[13] Abraham Lincoln, *An Act Relating to Habeas Corpus, and Regulating Judicial Proceedings in Certain Cases. By the President of the United States - A Proclamation*. General Orders. No. 315, September 17, 1863 (Washington: War Department, Adjutant General's Office, 1863)
[14] George Clarke Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress* (Chicago, IL: University of Chicago, 1907), 264-265.

President "to suspend." Though current scholars tend to believe that the President has no authority under the Suspension Act, it is helpful to recognize this pattern of Congressional "acquiescence" to the Executive concerning the suspension of the writ of habeas corpus. A similar relationship between the Executive and the Legislature has appeared during other times of national security crises such as the passing of *Authorization for the Use of Military Force* in 2001 and *the Military Commissions Act of 2006*, both of which were a direct result of the 9/11 terrorist attacks.

After the Habeas Corpus Act of 1863 was made law, questions concerning the procedural nature of the Suspension Clause died down. Even so, more issues arose surrounding the writ of habeas corpus during the Civil War, most notably in the case of *Ex parte Milligan* (1866). In October of 1864, Lambdin Milligan of Indiana was arrested and tried by a military court for conspiracy against the government, aiding the rebels, inciting insurrection, disloyal practices, and violating the laws of war. He was arrested after the government learned of a plot that he and his co-conspirators devised to free Confederate POWs from a Union arsenal. Though Milligan had never served in the U.S. Armed Forces and the Indiana judicial courts were operational, a military tribunal found him guilty and sentenced him to death.[15] Milligan and his co-conspirators petitioned for habeas corpus, and on April 3, 1866 the Supreme Court issued a ruling in favor of Milligan.

The courts' opinion, written by Justice Davis, holds that the Constitution is the law for both the rulers and the citizens of the United States in times of war and in times of peace. Davis asserts that the laws of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed." Moreover, though the Constitution allows for the suspension of habeas corpus, "it does not say after a writ of habeas corpus is denied a citizen, that he shall be tried otherwise than by the course of the common law."[16] At the time, the court's ruling in *Milligan* was seen by some Republicans as having the potential to undermine Reconstruction efforts in the South.[17] Since then, however, it has been championed by civil liberty advocates such

[15] Bruce Ragsdale, "Ex Parte Merryman and Debates on Civil Liberties During the Civil War," 19.
[16] John P. Frank, "Ex Parte Milligan v. The Five Companies: Martial Law in Hawaii," *Columbia Law Review* 44, no. 5, (September 1944): 639, https://doi.org/10.2307/1117929.
[17] Peter J. Barry, "Ex Parte Milligan: History and Historians," *Indiana Magazine of History* 109, no. 4 (2013): 355–79, https://doi.org/10.5378/indimagahist.109.4.0355.

as John P. Frank as "a bulwark for the protection of the civil liberties of every American citizen."[18] In the face of potential backlash during times of war, the Supreme Court defended the rights of American citizens to a fair trial. Thus, the *Milligan* ruling would prove to have the most long-lasting effects on the relationship between the judicial process and American citizens found to be enemy combatants.

The Supreme Court's decision in *Ex parte Milligan* came into question during World War II in the case of *Ex parte Quirin*. In *Quirin,* eight German saboteurs, all of whom had previously spent time in the United States, and one of whom was a naturalized American citizen, were arrested after landing on the U.S. mainland in U-boats with Nazi uniforms, explosives, and cash.[19] The saboteurs later revealed that the German government was compensating them in exchange for their services, which designated them as unlawful enemy combatants in the eyes of the government. After the arrest of Quirin and his co-conspirators, President Roosevelt issued Proclamation 2561 on July 2, 1942, entitled, "Denying Certain Enemies Access to the Courts of the United States" in which he asserted:

> Whereas, the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage, or other hostile or warlike acts, should be promptly tried in accordance with the Law of War; […] and to the jurisdiction of military tribunals.[20]

As a result of this proclamation, the German saboteurs were tried by military tribunal and appointed Colonel Kenneth Royall as their defense attorney. Royall sent a writ of habeas corpus to the Supreme Court "to test the constitutionality and validity of the President's Order and the President's Proclamation," and on July 27, 1942 the Supreme Court agreed to hear the case.[21] Their decision to was met with mixed feelings from the media. Some outlets denounced the court for getting involved in the war, while others such as *The New York Times* and *The Washington Post* praised the court for its defense of the Constitution.[22] While

[18] Frank, "Ex Parte Milligan v. The Five Companies," 639.
[19] Andrew Kent, "Judicial Review for Enemy Fighters: The Court's Fateful Turn in Ex Parte Quirin, the Nazi Saboteur Case," *SSRN Electronic Journal*, 2012: 161, https://doi.org/10.2139/ssrn.2189037.
[20] Brad Luebbert, "The Laws Will Fall Silent : Ex Parte Quirin, a Troubling Precedent for Military Commissions." (University of Louisville, 2010): 42, https://doi.org/10.18297/etd/864.
[21] Leubbert, 53.
[22] Michal R. Belknap, "Alarm Bells from the Past: The Troubling History of American Military Commissions," *Journal of Supreme Court History* 28, no. 3 (2003): 300–322, https://doi.org/10.1111/1540-5818.00068.

it is clear that the tides of war brought forth with them a patriotic fever that accepted the President's authority to safeguard national security, there was still substantial opposition to potential government infringement on civil liberties.

The question before the court was how to balance national security interests during a time of war with the right to due process guaranteed by the Constitution. Professor Andrew Kent of Fordham University explained in a 2013 Vanderbilt Law Review article that the "Defense counsel framed the court access issue as an unconstitutional attempt by the President to suspend habeas corpus in an area where no martial law could prevail because it was far from the front lines."[23] In response to this argument, the government's prosecution contended that military tribunals were authorized for "enemy belligerents," and that the Constitution granted these saboteurs no rights. The Court sided with the government's prosecution, allowing for the military tribunal, and outlined its reasoning in a full opinion delivered three months after its *per curium* opinion. It explained that *Quirin* differed from *Milligan* because while Milligan did conspire for the Confederacy, he was not "a part of or associated with the armed forces" of the Confederacy, so he was "a non-belligerent, [and thus] not subject to the laws of war."[24] In addition, the Court held that despite one defendant's status as a naturalized American citizen:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.[25]

Here, the Court rejected citizenship status as a grounds for excusing "the consequences of a belligerency." In this way, the Court in *Quirin* more fully delineated between the rights granted to citizens and those deemed enemy combatants.

The rights granted to enemy combatants under the U.S. Constitution was further defined in another World War II case brought to the Supreme Court, *Johnson v. Eisentrager* (1950). In this case, twenty-one German soldiers who were captured by U.S. forces in China after

[23] Kent, "Judicial Review for Enemy Fighters," 165.
[24] Anthony F Renzo, "A Call to Protect Civilian Justice: Beware the Creep of Military Tribunals," *American Constitution Society for Law and Policy*, February 2008, 16.
[25] *Ex Parte Quirin,* 317 U.S. 1, 38 (1942).

the German High Command's unconditional surrender on May 8, 1945, petitioned the District Court of the District of Columbia for the writs of habeas corpus.[26] Their petition asserted that they had been denied the rights granted to them under the Fifth Amendment, Article I and III of the Constitution, and the Geneva Convention. The U.S. government's response asserted that non-resident enemy aliens during times of war do not have the right to access the U.S. courts, and that the *Quirin* ruling denied enemy aliens the writ of habeas corpus. In a 6-3 decision, the Supreme Court denied Eisentrager et al. their petition. The Court held that because the petitioners were held and tried in an Allied prison, the case was outside the jurisdiction of the United States, so the petitioners did not possess any constitutional rights to habeas corpus.[27]

Writing for the majority, Justice Robert Jackson asserted that "the nonresident enemy alien, especially one who has remained in the service of the enemy, does not have even this qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy."[28] Moreover, the Court clarified the provisions granted to resident aliens, making clear that "in extending constitutional protections beyond the citizenry, […] it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." In *Johnson v. Eisentrager*, the Court more fully defined the constitutional rights of enemy aliens, ruling that the jurisdiction of the Court and the alien's residency status determine their eligibility for the writ of *habeas corpus.* Evidently, this ruling seems to contend with *Quirin*, in which the Court denied the writ of *habeas corpus* to Germans detained on U.S. soil, one of whom, Hans Haupt, was a naturalized American citizen.

The distinction between the rights of citizens, enemy combatants, and citizen enemy combatants is complex and constantly disputed. The jurisprudence of the Court regarding these rights has shifted throughout American history. At some points in the case of *Milligan*, for example, due process has been secured in the face of pressing national security matters, while at other times like in *Quirin*, national security has taken precedence over individual rights. In his dissent in *Hamdi v. Rumsfeld* (2004), Justice Antonin Scalia explained that the

[26] *Johnson v. Eisentrager*, 339 U.S. 763, 765-766 (1950).
[27] Dawinder S. Sidhu, *Shadowing the Flag: Extending the Habeas Writ Beyond Guantanamo*, 20 Wm. & Mary Bill Rts. J. 39 (2011), https://scholarship.law.wm.edu/wmborj/vol20/iss1/347
[28] *Johnson v. Eisentrager*, 339 U.S. 763, 766 (1950).

Court's lack of attention to the unique case of Herbert Hans Haupt, the American citizen-turned German saboteur, "was not this Court's finest hour."[29] In this way, the specific nature of the different national security threats that the nation faces has a large effect on how the courts rule in cases of habeas corpus petitions from enemy combatants. During the Civil War, the judiciary was more sympathetic towards petitioners like Merryman and Milligan; however, when faced with as large of a threat to national security as World War II, the courts tended to abridge the rights of enemy combatants in favor of executive power. Justice Jackson asserted in *Eisentrager* that "Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to war-time security."[30] This opinion which Justice Jackson accurately captured regarding the necessity of an energetic Executive who has "power over enemy aliens" during times of war became nearly unilateral following the national tragedy on September 11, 2001.

The War on Terror and Modern Habeas Corpus Claims

At approximately 8:46 AM on September 11, 2001, the first plane, American Airlines flight 11, hit the North Tower of the World Trade Center. Shortly thereafter, a second plane hit the South Tower and a third was crashed into the Pentagon in Arlington, VA. The news of the hijacking sent shockwaves throughout the country, as the security of American life and travel was stripped away. Responses from the Bush Administration and Congress were prompt. Bush asserted in his address to the nation on the night of the tragedy, "These acts shatter steel, but they cannot dent the steel of American resolve."[31] A week later on September 18, 2001, Congress passed the "Authorization for the Use of Military Force" (AUMF) with only one congresswoman voting nay to the joint resolution, which reads:

> The President is authorized to use all necessary and appropriate force against those nations organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts

[29] Scalia, *Hamdi v. Rumsfeld* (Scalia, J., dissenting), 542 U.S. 507 (U.S. Supreme Court 2004).
[30] "Johnson v. Eisentrager, 339 U.S. 763 (1950)." (774)
[31] George Bush, "Statement by the President in Address to the Nation," The White House, September 11, 2001, https://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010911-16.html.

> of international terrorism against the United States by such nations, organizations or persons.[32]

As a result of the AUMF, the War on Terror began, and with it came unprecedented power for the Executive to "use all necessary and appropriate force" against anyone deemed to have a connection with the September 11th attacks. As expected, in times of national security crisis, the legislature tends to grant the Executive the necessary powers to protect the nation, though sometimes at the cost of individual liberties.

The sole congresswoman who voted against the AUMF, Barbara Lee, expressed her apprehensions during debate on the House Floor, warning that the unilateral powers granted to President Bush would result in an unnecessary and prolonged war mimicking Lindon B. Johnson's involvement in Vietnam. As a result, Lee instructed "[a]s a member of the clergy so eloquently said, 'As we act, let us not become the evil that we deplore.'"[33] In this example, Lee's comments somewhat foreshadow the events that would come in the wake of 9/11. The United States engaged itself in a long-drawn-out war, with no clear enemy or end in sight. Moreover, highly dubious activities took place involving the treatment of detainees targeted by the AUMF, most often occurring at the Guantanamo Bay Detention Facility.

The Bush Administration's practices at Guantanamo, such as depriving prisoners the ability to appeal their cases to the judiciary and isolating prisoners in solitary confinement, reveals how the posture of the United States changed rapidly following 9/11. Permitted by the precedent of *Quirin,* the Bush Administration operated military tribunals in Guantanamo independent from the judicial branch and detained about 640 individuals following the military invasion of Afghanistan. The Bush Administration also believed the detainees to be unlawful enemy combatants, which would exempt their sentencing from the Geneva Convention's prohibition of indefinite sentences.[34] Moreover, the government held that because the Guantanamo Bay Prison Facility was located on a naval base within the sovereign territory of Cuba, they would apply the precedent set by *Johnson v. Eisentrager*

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[32] U.S. Congress, Senate, *Authorization for the Use of Military Force,* S.J. Res. 23. 107th Cong., 1st sess., Senate Introduced September 18, 2001, https://www.govinfo.gov/content/pkg/BILLS-107sjres23enr/pdf/BILLS-107sjres23enr.pdf

[33] Mike Ryan, "Rep. Barbara Lee's Speech Opposing the Post 9-11 Use of Force Act," *Nuclear Age Peace Foundation* (blog), September 14, 2001, https://www.wagingpeace.org/rep-barbara-lees-speech-opposing-the-post-9-11-use-of-force-act/.

[34] Michael C. Dorf, "The Detention and Trial of Enemy Combatants: A Drama in Three Branches," *Political Science Quarterly* 122, no. 1 (2007): 47–58, 49, https://www.jstor.org/stable/20202808.

that enemy aliens detained outside U.S. soil do not have access to the judicial system.[35] Nevertheless, the rights of detained enemy combatants came into question multiple times during the height of the Bush Administration's War on Terror.

The case which first considered the rights of those detained at Guantanamo Bay was *Rasul v. Bush* (2004). In *Rasul*, fourteen Kuwaitis and Australians were captured in Afghanistan and sent to Guantanamo without a hearing or any charges filed against them. They petitioned for a writ of habeas corpus, once again leading the Supreme Court to decide whether Federal Courts had the jurisdiction to review petitions of habeas corpus from detainees at Guantanamo Bay.[36] Diverging from its previous ruling in *Eisentrager*, the Supreme Court held in *Rasul* that federal courts did have proper jurisdiction over the Guantanamo Bay. The Court reached this conclusion after framing the jurisdictional question as "whether the habeas statute [28 U.S.C.§ 2241] confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[37] In answering this question in the affirmative, the Court provided the following rationale of the differences between *Eisentrager* and *Rasul* in order to extend the jurisdiction of federal courts:

> Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against this country; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[38]

As a result of the differences between *Rasul* and *Eisentrager*, the legality of detention at Guantanamo Bay began to erode. The Court's peculiar interpretation of the differences between the two cases rests on the petitioners not being "nationals of countries at war with the United States." Here, the Court seems to make a false equivalency between World War II, when the U.S. was engaged with enemy states, and the War on Terror, when the President

[35] Ryan McKaig, "Aid and Comfort: Rasul v. Bush and the Separation of Powers Doctrine in Wartime," *Campbell Law Review* 28, no. 1 (2005): 123, 125-127.
[36] Sidhu, *Shadowing the Flag: Extending the Habeas Writ Beyond Guantanamo*, 49.
[37] Ekeland, *Suspending Habeas Corpus: Article I, Section 9, Clause 2, or the United States Constitution and the War on Terror,* 1505
[38] Stevens, *Rasul v. Bush* (Opinion of the Court), 542 U.S. 466 (2004).

was authorized under the AUMF to engage in conflict against those connected with 9/11. The AUMF did not, however, authorize the President to use force against a specific nation, only terrorist groups. As a result, the nationalities of the petitioners in *Rasul* should not have carried as much weight because despite their nationalities, they still may have been involved with terrorist organizations. In the end, though, the Court held that enemy combatants detained at Guantanamo Bay retained the right to petition the federal courts for a writ of habeas corpus.

On the same day that the Supreme Court issued its ruling in *Rasul v. Bush*, it also issued a ruling on *Hamdi v. Rumsfeld* (2004). The case involved Yaser Esam Hamdi, who was detained in Afghanistan by an American ally, the Northern Alliance, then handed over to Americans and held at Guantanamo Bay after being designated an enemy combatant. Born in Louisiana, Hamdi was a citizen of the United States under the 14th Amendment; however, due to his status as an enemy combatant, he was denied council, not given a formal charge, and held indefinitely.[39] The U.S. government contended that despite his citizenship, he could still be detained according to his status as an enemy combatant due to the precedent set in *Ex parte Quirin.* Justice Sandra Day O'Connor delivered the opinion of the Court, conceding on two points to the government. First, she acknowledged that the Constitution did not bar citizens from being held in military detention. Second, she held that the AUMF allowed for the detention of enemy combatants.[40] Nonetheless, Justice O'Connor condemned the behavior of the Bush Administration, asserting that "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."[41] In this way, although the Supreme Court allowed the government to hold U.S. citizens deemed enemy combatants in military custody, they did so under scrutiny of the judiciary.

In an effort to balance the right to due process of American citizens with national security interests, the Court set forth a balancing test using the same procedure as outlined in *Mathew v. Eldridge* (1976). As a result, American citizens deemed enemy combatants would be granted the right to council and must "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a

[39] Luebbert, "The Laws Will Fall Silent," 106.
[40] Dorf, "The Detention and Trial of Enemy Combatants," 51.
[41] O'Connor, *Hamdi v. Rumsfeld* (Opinion of O'Connor, J.), 542 U.S. 507 (2004).

neutral decisionmaker."[42] Overall, the Court in *Hamdi* attempted to balance national security with individual rights. Its effort to not infringe upon the power of the Executive resulted in a stern denouncement and an acknowledgment of the legality of the government to hold American citizens in military detention. Despite the court being handcuffed by the precedent set in *Quirin*, it was still able to protect U.S. citizens' rights more adequately than before, as it limited the unchecked power of the Executive. Thus, while civil liberties in *Hamdi* were not protected much past providing a test for the judiciary to deem the legality of an abridgment of due process, this was an important step in checking the Executive's power during national security crises.

In contrast with their initial stance of allowing for Executive energy during times of threats to national security, the Supreme Court delivered a series of substantial blows to Executive power following the *Rasul* and *Hamdi* rulings. In *Hamdan v. Rumsfeld* (2006), the Supreme Court held that the AUMF and the more recent Detainee Treatment Act of 2005 did not give the President the authority to establish military commissions to try detainees and that military commissions could not be used under any circumstances without congressional approval.[43] In addition, the Court asserted that "whether or not Hamdan is properly classified a prisoner of war, the commission convened to try him was established in violation of […] Common Article 3 of the Third Geneva Convention because it had the power to convict based on evidence the accused would never see or hear."[44] As a result, the Court narrowed the scope of *Ex Post Quirin* and *Johnson v. Eisentrager,* upon which the Bush Administration had relied for precedent in previous cases like *Rasul* and *Hamdi*. Instead, as Michael Dorf of Cornell University explained, "the *Hamdan* Court asserted the primacy of what it deemed 'the seminal case of *Ex parte Milligan.*'"[45] Consequently, the federal government's power was substantially curbed because of *Hamdan* and, in an effort to restore this power, Congress passed the *Military Commissions Act of 2006* (MCA). Thus, the Supreme Court's judgment in *Hamdan* can be seen as a departure from its previous holding in relation to enemy combatants' rights, as it seemed to ignore the precedents it had

[42] O'Connor, 542 U.S.
[43] Michael C Dorf, "The Orwellian Military Commissions Act of 2006," n.d., 10. (11)
[44] "Hamdan v. Rumsfeld - Brief (Merits)," October 21, 2014, https://www.justice.gov/osg/brief/hamdan-v-rumsfeld-brief-merits.
[45] Dorf, Michael C., "The Orwellian Military Commissions Act of 2006" (2007). *Cornell Law Faculty Publications*. Paper 55, 11. http://scholarship.law.cornell.edu/facpub/55

previously cited and reverted back to the Court's rationale from the 19th century Civil War cases.

On October 17, 2006, President Bush signed the MCA into law following a 65-34 vote in the Senate.[46] As a result of the MCA, Congress formally granted the President the power to "establish military commissions for areas declared to be under martial law or in occupied territories should circumstances so require."[47] Moreover, Section 7 of the MCA, entitled "Habeas corpus matters" reads:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[48]

In restricting the ability of the judiciary to fulfill their role of considering petitions for writs of habeas corpus as designated under the Judiciary Act of 1789, the MCA abridges the rights of those designated enemy combatants. Moreover, as Dorf explains, under the MCA "the President could make his own determination that a permanent resident alien is an unlawful enemy combatant, order that permanent resident alien detained and tortured within the United States, and no court would have jurisdiction to hear any complaint filed on that alien's behalf challenging the lawfulness of his custody and treatment."[49] Thus, in the wake of the MCA signing, many civil liberties advocates denounced it as unconstitutional. Regardless, the tides of patriotism and the salience of national security allowed for the bill

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[46] "S. 3930 (109th): Military Commissions Act of 2006," *GovTrack*, accessed April 19, 2021, https://www.govtrack.us/congress/votes/109-2006/s259.
[47] U.S. Congress, Senate, *Military Commissions Act of 2006*, S.3930, 109th Congress, introduced in Senate September 22, 2006, https://www.loc.gov/collections/military-legal-resources/?q=pdf/PL-109-366.pdf.
[48] *Military Commissions Act of 2006*, § 7.
[49] Dorf, "The Orwellian Military Commissions Act of 2006," 16.

to be rushed through Congress with minimal debate, and led to its acceptance by many as a necessary provision.[50]

Despite this, in 2008 the Supreme Court heard the case *Boumediene v. Bush,* which directly challenged the legality of the MCA. After an initial rejection, the Court eventually granted the *certiorari* and heard the case in December of 2007. On June 12, 2008 Justice Kennedy delivered the opinion of the court, which ruled in favor of Boumediene in a 5-4 majority.[51] The Court held that the petitioners had a "constitutional privilege of habeas corpus," and because "the DTA's procedures for reviewing detainees' status are not an adequate and effective substitute for the habeas writ, MCA §7 operates as an unconstitutional suspension of the writ."[52] In this way, the MCA was struck down as unconstitutional, as the Court did not to submit to the notion that "the Constitution necessarily stops where *de jure* sovereignty ends."[53] Thus, the Court's opinion, though slightly narrow in its respect to the treatment of enemy combatants in general, restricted the U.S. government's ability to deny those designated enemy combatants at Guantanamo Bay Prison the writ of habeas corpus.

In reviewing these post-9/11 cases, it becomes clear that the Bush Administration's motivations for using the Guantanamo Bay Prison involved the freedom it granted them to act beyond the jurisdiction of the U.S. judicial system.[54] The Supreme Court's decision in *Boumediene* maintained the trend in the early 2000s of the Courts reigning in the Executive's persistent abridgment of civil liberties in the interest of national security. After *Boumediene*, the designated enemy combatants held at Guantanamo Bay now have a legal right to petition U.S. domestic courts for habeas corpus relief. However, *Boumediene* and cases like it narrowed the scope, as their rulings on jurisdiction only pertain to Guantanamo. The question still remains on what rights are extended to enemy combatants held outside the U.S. and Guantanamo.[55] Evidently, Justice Black's critique contained in his dissent in *Johnson v. Eisentrager* still remains true: "The Court is fashioning wholly indefensible doctrine if it permits the executive branch, by deciding where its prisoners will be tried and imprisoned,

[50] Neal Kumar Katyal, "Hamdan v. Rumsfeld: The Legal Academy Goes to Practice," *Harvard Law Review* 120, no. 65 (2006): 104.
[51] *Boumediene v. Bush / Odah v. United States,* 553 U.S. 723 (2008)
[52] *Boumediene v. Bush / Odah v. United States,* 553 U.S. 723 (2008)
[53] "Boumediene v. Bush: Leading Case," *Harvard Law Review* 122, no. 1 (November 2008): 395, 397.
[54] "Boumediene v. Bush: Leading Case," *Harvard Law Review,* 402.
[55] Sidhu, "Shadowing the Flag: Extending the Habeas Writ Beyond Guantanamo," 43.

to deprive all federal courts of their power to protect against a federal executive's illegal incarcerations."[56]

The history of United States military conflicts has brought with it not only domestic concerns about national security but also more fundamental questions regarding the rights extended to those deemed enemy combatants. The progression of Supreme Court opinions throughout the Civil War, World War II, and the War on Terror reveals a variation in its jurisprudence. More importantly, however, this progression reveals the important role of the courts in balancing and even restraining the energy of the President in times of war. During World War II, the Courts tended to err on the side of minimal restraint. After the events of the Vietnam War and other drawn-out armed conflicts though, the Court returned to a Civil War Era interpretation of the writ of habeas corpus, aiding in the protection of civil liberties (specifically in Guantanamo Bay). The Court's decisions in the early 2000s seem to cast aside precedent set in World War II in favor of returning to the Civil War-era interpretations. Thus, as is revealed by the cases examined above, the Supreme Court has varied substantially in its treatment of some of the most undesired people to American citizens: enemy combatants.

[56] *Johnson v. Eisentrager*, 339 U.S. 763 (1950).