STUDENT ESSAY COMPETITION

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The End of Free Land:

The Commodification of Suscol Rancho and the Liberalization of American Colonial Policy

"It is just as legitimate to buy and sell a tract of land for a profit as it is a horse or a milch cow…just as long as there is fee a simple title to land, just so long will it be subject to speculation."

– William S. Green, *The Land Monopoly Question*, GREEN'S LAND PAPER, February 3, 1872.

"California is very important for me because nowhere else has the upheaval most shamelessly caused by capitalist centralization taken place with such speed."

— Karl Marx to Friedrich Adolph Sorge, Nov. 5, 1880.[1]

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[1] Karl Marx et al., Letter to Americans 1848-1895: A Selection, at 126 (1953).

Abstract: This article analyzes the processes of land commodification and the collapse of Free Land as the dominant policy framework for American settler colonial policy. Through an excavation of case records relating to an ownership dispute between Pre-Emptors and capitalists on the Suscol Rancho in Northern California, ending in US Supreme Court case Frisbie v. Whitney (1869), I show how key elements of liberal legality –the anti-redistributive state and formalism – emerged on this colonial periphery in response to a dangerous and violent contest of legalities among settlers. While Lockean "use and improvement" provided a justification for expropriating Native lands, it also justified the expropriation of the unproductive land of white landlords. To the California bar this was a disturbing result. In this way, the Suscol cases cut to the heart of the basis of property: would it be delimited by wastage or by the state? Guided by substantive concerns or form alone? Each side was willing to kill for their land and their vision of law. In the end, Suscol demanded a choice, a choice which reflected a larger transformation in American Empire.

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By the beginning of the Civil War, the colonial policy of "Free Land" had organized a generation of conquest and settlement from Iowa to California. Passed into law in 1841, the first Pre-Emption Act epitomized Jacksonian colonization policy in the United States. In brief, the Act provided for citizen householders to purchase, at the government minimum price of $1.25 per acre, up to 160 acres of Federal land after a year of use, improvement, and residence, with proof and payment taken by the Register and Receiver of the relevant land district.[2] Though only applicable to surveyed land in the original act, later statutes opened unsurveyed land to squatters. Various conditions and exceptions applied. The Act, for example, provided that "Indian title" needed to be "extinguished" at the time of settlement. Land offices enforced these conditions unevenly.

This new "Free Land" policy, a departure from the revenue-generating land offices of the Early Republic, represented a compromise between colonial squatters and imperial bureaucrats.[3] It was, in essence, a statutory legalization of adverse possession. However, squatterdom and officialdom had fundamentally different conceptions of the law. To the former, the Act was the realization of a radical, working-class push for land reform decades,

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[2] The Preemption Act of 1841, 27th Congress, Ch. 16, 5 Stat. 453 (1841); See also, Dexter, Ripley, Nickolls, & Co., The Pre-Emption Laws of the United States. Acts of 1841 and 1843. Together with Directions to the Actual Settlers (1856).

[3] Malcolm Rohrbough, The Land Office Business: The Settlement and Administration of American Public Lands, 1789-1837 (1968); Paul Frymer, Building an American Empire: The Era of Territorial and Political Expansion (2017); Julius Wilm, Settlers as Conquerors: Free Land Policy in Antebellum America (2018).

if not centuries, in the making.[4] To the latter, it was but the latest of hundreds of land statutes, the newest layer of accretion that characterized an era of detailed Congressional administration.[5] Pre-Emption was simply a way for citizens to buy public land with more steps. As described by historian Paul W. Gates, the "incongruity" between these legalities produced technical problems.[6] The rift, however, extended to the level of meaning, the normative world of law.[7] It cut to the purpose of colonization and the foundation of property itself. In this way, the Pre-Emption Law stood as the legal basis and means of a new era for American colonization in general, granting it outsized importance in the settler imagination.

For the two decades that followed the birth of "Free Land" policy, the balance of power favored the colonials, especially on the Pacific Coast, a three-week journey by sea from Washington. Oregon colonization, from which California settlement ideologically developed, was anarchic and organized by Pre-Emption and its statutory kin, the Armed Occupation Act (1842) and the Donation Land Claim Act (1850), which operated through a quasi-Lockean framework of usage, occupation, and security in the "State of Nature."[8] In California, however, Pre-Emption produced adverse titles to lands which already had multiple title claims by Mexican Californios and Americans. Indeed, "extinguishment" of Native title was not a pre-requisite of Pre-Emption, rather Pre-Emption provided a means of extinguishing Native title.[9] So too did Pre-Emption challenge the land titles of Californios, the Mexican elite of Alta California. In both cases, Pre-Emption provided a *justification* for taking land and re-allocating it to its "true" and morally worthy

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[4] M. BEER, THE PIONEERS OF LAND REFORM: THOMAS SPENCE, WILLIAM OGILVIE, THOMAS PAINE (1920); TAMARA V. SHELTON, A SQUATTER'S REPUBLIC: LAND AND THE POLITICS OF MONOPOLY IN CALIFORNIA, 1850-1900 (2013).

[5] See, WILLIAM WHARTON LESTER, DECISIONS OF THE INTERIOR DEPARTMENT IN PUBLIC LAND CASES AND LAND LAWS PASSED BY THE CONGRESS OF THE UNITED STATES TOGETHER WITH THE REGULATIONS OF THE GENERAL LAND OFFICE, Vol. 1 (1860). On the character of nineteenth-century administration in general see, JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW (2012) and NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940 (2013).

[6] See, Paul Wallace Gates, *The Homestead Law in an Incongruous Land System*, 41 AM. HIST. REV. 652-681 (1936); Sean M. Kammer, *Railroad Land Grants in an Incongruous Legal System: Corporate Subsidies, Bureaucratic Governance, and Legal Conflict in the United States, 1850-1903*, 35 L. & HIS. REV. 391-432 (2017).

[7] Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. (1983-4).

[8] See, An Act to Provide for the Armed Occupation and Settlement of the Unsettled Parts of the Peninsula of East Florida, 5 Stat. 502 (1842); An Act to create the Office of Surveyor-General of the Public Lands in Oregon, and to provide for the Survey, and to make Donations to Settlers of the said Public Lands 76-9 Stat. 496 (1850). GRAY H. WHALEY, OREGON AND THE COLLAPSE OF ILLAHEE: U. S. EMPIRE AND THE TRANSFORMATION OF AN INDIGENOUS WORLD, 1792-1859 (2010). On the anarchic nature of Oregon settlement, contemporary jurist J. Q. Thornton Wrote, "being without arms and ammunition, in the midst of savages clamorously demanding pay for their lands, and not unfrequently committing the most serious injuries, by seizing property and by taking life, in consequence of the people having neither the ability nor the right to buy." JESSY QUINN THORNTON, OREGON AND CALIFORNIA IN 1848, Vol. 2 at 37 (1849).

[9] See, e.g., GEORGE HARWOOD PHILLIPS, BRINGING THEM UNDER SUBJECTION: CALIFORNIA'S TEJON INDIAN RESERVATION AND BEYOND, 1852-1864 (2004).

owners – the American Yeoman colonist.[10] In supporting, per Genesis 3:19, those who ate bread by the sweat of their own brow, Pre-Emption had the imprimatur of moral legitimacy that outright purchase or grant did not.[11]

Heading into the Civil War, the Pre-Emption concept remained popular with the settler public and was further bolstered by the Free Soilers' beloved Homestead Act (1862) and the Justice Department's systematic escheatment of 2.8 million acres in Californio titles in the US Supreme Court between 1859 and 1862 – a campaign waged on behalf of Pre-Emptors on the public domain.[12] Far from a repudiation of Jacksonian colonization policy, the Union-Republican governments retrenched it. But not all was as it seemed, for the balance of power began to shift, at first by degrees and then in a sudden lurch. Just seven years after Free Land reached its high-water mark in 1862, the Supreme Courts of California and the United States declared Pre-Emption a dead letter, enabling the forcible ejectment of hundreds of Yeomen squatters from the lands of Suscol Rancho in Napa and Solano Counties[13] – squatters who had been encouraged to settle the land by those very courts in 1861.[14] In a contemptuous repudiation of Lockean property, and the entire moral justification for settler colonization in the Pacific, Justice Miller ruled, "There is nothing in the essential nature of [going upon the land and building and residing on it] to confer a vested right, or indeed any kind of claim to land, and it is necessary to resort to the pre-emption law to make out any shadow of such right."[15] This was a startling, if inadvertent, rebuke to the foundations of settler thought, which justified the expropriation of Native lands precisely on these grounds.

How had the legal system turned so quickly on its favored colonists? More importantly, *why* did the Pre-Emption regime crumble? And *what* legality replaced it? I endeavor to answer these questions through an analysis of case records related to the Suscol Rancho conflict – executive correspondence, administrative decisions, and judicial opinions, as well as corporate papers and contemporary newspapers. Suscol Rancho has been studied before, by

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[10] As Whaley described an 1843 case between a Pre-Emptor and an employee of the Hudson's Bay Company, "Reverend Waller positioned the case as a clash between good and evil empires, Jefferson yeomen versus monarchical hirelings… he petitioned Chief Justice Roger Taney that a hireling 'of a foreign monopoly' had no constitutional right to American land." Whaley, *supra* note 8, at 125-6.

[11] For a contemporary usage in land reform discourse see, Isaac S. Tingley, *Letter from a Young Reformer*, Young Am., Sept. 27, 1845.

[12] See, Paul Gates, *The California Land Act of 1851*, 50 Cal. Hist. Q., 395-430 (1971). For contemporary account see J. S. Black, Expenditures on Account of Private Land Claims in California, H. Ex. Doc. 84, 36th Cong. (1st Sess. 1860).

[13] Frisbie v. Whitney 76 U.S. 187 (1869); Hutton v. Frisbie 37 Cal. 475 (1869).

[14] United States v. Vallejo, 66 U.S. 541 (1861).

[15] See Frisbie v. Whitney 76 U.S. 187 (1869) at 194.

Gates, as representative of the large centralization of estates in California created by a combination of official cupidity and the manipulations of landowners.[16] In providing a re-assessment of Suscol, this article argues that Suscol should be understood within a framework of commodification – what historian Patricia Limerick termed "the evolution of land from matter to property."[17] A more fundamental transformation of land and meaning occurred at Suscol than Gates imagined, driven less by individual landowners and officials and more by the ideological force of liberalism and the global commodities market.

In some ways the answers I have found were clear and functional. It was near impossible to sell mortgages on lands with credible adverse possessors and contested titles.[18] Over the 1860s, the Suscol lands underwent a process of triple commodification – as alienable real estate, as secured debt, and as industrial wheat farms. With land, mortgages, and wheat circulating in international markets, Pre-Emption threatened the security of wealth based in land.[19] However, this essentially simple story is not sufficient in itself, for law imposes its own visions on the world. Legal historians have long shown the incongruities and contingencies of legal change and capitalist development in the nineteenth century.[20] In particular, this article converses with Horwitz's famous account of property and formalism in the Atlantic States.[21] While similar in important respects, the change of property law in California was fundamentally conditioned by the settler colonial context. This manifested in a radically different temporality than Horowitz's history – at the edge of American Empire it was not evolution but revolution that characterized legal change. Here, rights had been vested for years not centuries – if they had vested at all. The problem of violence, both between colonist and Native peoples and among colonists, was central to the Suscol

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[16] Paul W. Gates, *The Suscol Principle, Preemption, and California Latifundia*, 39 PAC. HIST. REV., 453-471(1970).

[17] PATRICIA NELSON LIMERICK, THE LEGACY OF CONQUEST: THE UNBROKEN PAST OF THE AMERICAN WEST at 27 (1987).

[18] We might call this the Primitive Accumulation argument. KARL MARX & FREDERICK ENGELS, CAPITAL: A CRITICAL ANALYSIS OF CAPITALIST PRODUCTION, 3rd Ed. At 740-757 (1889). On the mortgage market see also, JONATHAN LEVY, FREAKS OF FORTUNE: THE EMERGING WORLD OF CAPITALISM AND RISK IN AMERICA (2012). For a contemporary account see JAMES DE FREMERY, MORTGAGES IN CALIFORNIA. A PRACTICAL ESSAY (1860).

[19] For example, see, ERNEST SEYD, CALIFORNIA AND ITS RESOURCES. A WORK FOR THE MERCHANT, THE CAPITALIST, AND THE EMIGRANT (1858). On the California wheat trade see, Rodman W. Paul, *The Wheat Trade Between California and the United Kingdom*, 45 MISS. VALLEY HIST. REV., 391-412, at 394 (1958).

[20] See, e.g. RICHARD BENSEL, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900 (2000); RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA (2011); GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (Chicago: University of Chicago Press, 1997)..

[21] MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1979).

crisis. As jurist Samuel B. Clarke characterized the problem at the closing of the nineteenth century, "no one can base a title of right upon [force] alone without admitting that mere force, whether of ballots or of bullets, can to-day rightfully wipe out existing titles and confer others in their stead."[22] Like force, usage ceased to be a stable basis for property over the 1860s. The Suscol crisis revealed that "improvement" had too much potential for redistribution from large landholders to the landless. Enter a relatively new, and dreadfully unpopular, conception of property, one that disavowed the colonial past upon which it stood, and would transform the face of American Empire: Liberalism. Yet, as this article reveals, the road from waste to commodity, from Free Land to Cheap Land, was not slow, clear, or predictable, rather it was a radical disavowal of the past and the sudden birth of a new regime.

THE VALLEJO DEMESNE

The case that would mark the end the Pre-Emption regime began in 1843, in the far northern "wilderness" of the Mexican department of Alta California or, to put it more accurately, the lands of the Pomo, Wappo, Wintun, and Miwok Peoples. The recent political history of Alta California had been characterized by civil conflict between Californios, Missions, and the Mexican Government. In 1842, Manuel Micheltorena deposed Governor Juan Bautista Alvarado, architect of an abortive independence movement in 1836, the same year as the Texas Revolution. As colonial policy, and perhaps canny political maneuver, Micheltorena began the process of granting massive tracts of land (up to 11 Square Spanish Leagues) to powerful Californio families, who would hopefully prove more loyal to the regime.[23] Micheltorena granted the greater portion of Alta California's northern frontier to the Vallejo Family as their private property. Mariano Guadalupe Vallejo, who was incidentally late Governor Alvarado's uncle, received a grant to a (roughly) 100,000-acre tract bounded "on the north by lands named Tulucay [rancho] and Suisun [tribe], on the east and south by the Straits of Carquines, Ysla del a Yegua, and the Estero de Napa."[24] This tract, combined with another purchase by Vallejo, became known as the Suscol Rancho. To the west, laid Mariano's extensive Petaluma Rancho acquired

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[22] Samuel B. Clarke, *Criticisms Upon Henry George, Reviewed from the Stand-Point of Justice*, 1 Harv. L. Rev., 265-293, at 274 (1888).

[23] Maria Raquél Casas, Married to a Daughter of the Land: Spanish-Mexican Women And Interethnic Marriage In California, 1820-80 (2009).

[24] United States v. Vallejo, 66 U.S. 541, at 550 (1861).

in 1834. Mariano's brother Salvador likewise received a land grant to "Lop Yomi," the local "Indian name" meaning "town of stones," that covered the Clear Lake region, well north of Suscol, and several estates in Napa that lay between (granted from his nephew in 1838).[25] As some of the first European settlers in this waste and wilderness, Vallejo ownership was, to a great degree, nominal. Estimates differ, but the Native population stood around 150,000 in 1846, and though smallpox epidemics had exacted a large toll in Northern California, Native Peoples throughout the state outnumbered Europeans 15:1.[26] This northern borderland was no exception. What's more, contrary to European thought, the Peoples whose lands the Vallejos now "owned" had general conceptions of property quite like those of the Mexican settlers.

Before the coming of the Vallejos, Pomo tribes warred with one another over well-defined territories. As historian William J. Bauer, Jr. writes, incorporating an oral history from a Pomo man named Francisco, "One day the People from K'e bāy Cho k'lal went to K'ŏ,ŭlK'ŏy … to harvest 'grain,' likely indigenous oats or ryes, in order to make pinole. The People from the town of P'hŏ,ŏl, K'ŏy … observed the K'e bāy People harvesting grain at K'ŏ,ŭl-K'ŏy and attacked because the K'e bāy People had not asked for permission. Pomos possessed a finely tuned sense of their territory's limits. In the right circumstances borders could be fluid. It was not unheard of for People to ask for approval to use resources within another group's territory. If one did not ask for clearance or offer a payment, as appears to have occurred in Francisco's story, violence and conflict followed."[27] Through a combination of language barrier, simple prejudice, and self-interest, however, both Spanish-Mexican and American colonists conceived of this land as "unowned."[28] This was obviously a fiction. Elsewhere in the 1840s, Oregonian settlers found Native People demanding payment for their lands – a confusing situation indeed.[29] While Native definitions of place, like the town of Lop Yomi, were declared legitimate in determining the bounds of Mexican grants, Native title was a nullity in law. The Vallejos had few qualms about exercising sole dominion over this place.

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[25] H. F. Teschemacher, et al., claiming the Rancho of Lup Yomi v. the United States in Ogden Hoffman, Reports of Land Cases Determined in the United States District Court for the Northern District of California: June Term, 1853 to June Term, 1858, Inclusive at 36 (1975).

[26] Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846-1873 at 3, 50 (2016).

[27] William J. Bauer, Jr., California Through Native Eyes: Reclaiming History at 75, citations omitted (2016).

[28] See Stuart Banner, Possessing the Pacific: Land, Settlers, and Indigenous People from Australia to Alaska at 163-194 (2007).

[29] See *supra* note 8 at 37.

The Vallejos began to change the land and the people who lived on it. Over the 1840s, Mariano, commonly known as Don Guadalupe, enslaved hundreds of Miwok People, a relationship Mariano understood as benevolent and based in kinship.[30] Likewise, Salvador "improved" his Rancho and "put upon [Lop Yomi] large numbers of horses and cattle and hogs…built several houses" and cultivated "corn, beans and watermelons."[31] Salvador leased part of his land to American settlers Charles Stone and Andrew Kelsey. As historian Benjamin Madley writes, the American tenants treated the Eastern Pomo and Clear Lake Wappo as serfs that ran with the land.[32] For the next several years, Stone and Kelsey operated a brutal and lethal system of unfree labor. Scores died of starvation, exposure, disease, and, in some especially cruel cases, torture. In December 1849, with California now under American military rule and in the throes of gold mania, five Native men – Shuk, Xasis, Ba-Tus, Kra-nas, and Ma-Laxa-Qe-Tu – killed Stone and Kelsey. News of these killings triggered a punitive expedition by the US Army in San Francisco. (This was not the last time the Army would be called upon to put down a restive population on Suscol.) As Madley writes, the expedition had a "pseudo-judicial rationale for both the indiscriminate killing of California Indians…and the theft or destruction of their property" – the concept of collective guilt.[33] The flimsy legal logic for the expedition was not for lack of lawyers: Major General Persifor Smith, the engineer of the expedition, was a college-educated lawyer from Philadelphia.

The subsequent killing campaign brought with it a major figure in the commodification of the land: Captain John B. Frisbie, Esq, originally of Buffalo, New York. On May 5, 1850, Frisbie and 75 armed men set off on their expedition to from the town of Benicia to Clear Lake. It took the party ten days to cross the Vallejo demesne, and they arrived at Clear Lake on May 15. Though accounts differ as to what followed, Madley and other historians estimate the US Army detachments killed between 500 and 800 people from several Pomo and Wappo communities in a single day, one of the deadliest massacres in the bloody history of US colonization. In Captain Frisbie's own account of the slaughter, published in the *Daily Alta California*, the Army killed Native men, women, and children indiscriminately. Felled, Frisbie wrote,

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[30] Andrés Reséndez, The Other Slavery: The Uncovered Story of Indian Enslavement in America at 248 (2016). The population is simply referred to as "Suscol Indians" in *The Indians of Napa Valley*, Daily Alta California, February 1, 1860, which remarked they had been largely "swept away."

[31] See, *supra* note 25 at 34.

[32] See, *supra* note 26 at 103-144.

[33] *Id.* at 127

"as grass before the sweep of the scythe."[34] The Army promptly disputed Frisbie's account, and under pressure from fellow officers, Frisbie recanted.[35] Whether Frisbie regretted his participation in the massacre, or his retraction, is not extant, but we do know he had something else entirely on his mind as he travelled the Suscol Rancho. Frisbie looked out on the changing, bloodied landscape and saw capital.

The following Autumn, Frisbie left the military and settled in Benicia, having realized that the Suscol grant land represented a tremendous speculative opportunity. So began a new career as a booster and land speculator. He wasted little time. Quickly elevated to the office of President of Board of Directors of Benicia, Frisbie purchased ads in the *Sacramento Transcript* that ran regularly for the next year. In this advertisement, Frisbie advocated for adjacent Vallejo to be made the state capital, citing its potential for a commercial harbor, "inexhaustible" quantity of fine stone for building, "unsurpassed" topography, and "several bold mineral springs."[36] The skeptical reader did not have to take Frisbie's word for it: "The Surveyor-General of the State…having made careful reconnoisance [sic] of this place, fully confirms the facts herein set forth, and the proprietors publish them with a view of inviting public attention to the same. The subscriber is authorized to dispose of a limited number of lots upon liberal terms, and he invites the attention of capitalists and the public generally to the new city."[37] To this small, colonial town amidst princely, personal estates worked by unfree laborers – a thoroughly feudal landscape – Frisbie invited modern capital. His grand ambition of securing the capital briefly succeeded before it failed in favor of Sacramento – the Eastern portion of Alta California's Northern frontier, which had been granted to John Augustus Sutter. Despite this failure, Frisbie hit upon another speculation at the same time. He successfully courted one of the most eligible women in the state: Epiphanra "Fanny" de Guadalupe Vallejo, eldest daughter of Mariano. The two married on April 2, 1851, at the Vallejo estate.[38] It became the Frisbie estate shortly thereafter when Don Guadalupe gifted the Suscol lands to his daughter and new son-in-law. In one short year, Frisbie had gone from Captain in a killing campaign to scion of one of California's most prominent and wealthy families.

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[34] *Horrible Slaughter of Indians*, Daily Alta California, May 28, 1850.

[35] *Supra* note 26 at 129-30.

[36] *Vallejo*, Sacramento Transcript, September 16, 1850.

[37] Advertisement that ran (nearly) daily from September 16 to May 1851. "Vallejo," *Sacramento Transcript*, September 1850 to May 1851. *Id.*

[38] *Married*, Sacramento Daily Union, April 15, 1851.

Though mired in the general legal wrangling over Mexican grants throughout the 1850s, Frisbie's estates escaped the scrutiny of the Board of Land Commissioners and the Northern District Court unscathed.[39] Few seriously doubted the validity of the claim, yet it remained shadowed by litigation. Squatters circled the rich Rancho lands like vultures, hoping for a chance, however slim, of a Court voiding the claim.[40] Despite the clouded title, Frisbie alienated and leased parcels to over 150 individuals, many prominent men like former chief Justice of the California Supreme Court S. C. Hastings.[41] Frisbie's farmlands then became immensely profitable in the California wheat boom of the late 1850s. As English political economist Ernest Seyd wrote in 1858, "It is nothing unusual in California to see a wheat-field bear 60 bushels to the acre, and there are instances of 100 and 120; and the average run of good and bad yields is estimated at from 25 to 35 bushels, which is double and treble the yield in Europe and elsewhere…. These extraordinary results are obtained with comparatively little labor… and one man can easily cultivate from twenty to twenty-five acres."[42] In 1860, the *Daily Alta* estimated Frisbie's land was worth $50 an acre because of its "wonderful" grain output, the best in the state.[43] As the Frisbie-Vallejo family benefited from the economic boom, they retained social and political prominence. Don Guadalupe had been a member of the 1849 Constitutional Convention and a state senator from 1849-50; Frisbie was an active, if minor, Democratic Party functionary.[44]

Not all was well for the Frisbie estate, however. The sheer size of the property, in large part unimproved and left for cattle raising and wheat monoculture, worked by dubiously "free" Indigenous labor, and sold for speculation to other colonial grandees, drew the ire of radical settlers who viewed the family's ownership of Suscol as illegitimate, unrepublican, and fraudulent. Their strongest argument drew on Lockean usage and fit the Pre-Emption regime perfectly. Why should unfenced, unimproved land be withheld from *bona fide* settlers? And so, despite the family's social and political connections

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[39] Confirmed by the Board May 22, 1855 and Confirmed on appeal by the District Court March 22, 1860. *Supra* note 25 at Appendix 40.

[40] "While strolling over the hills last Sabbath, the writer discovered persons running to and fro – here and there – driving small stakes into the earth, which it appears were to be the boundaries of ranches, lots, &c., taken up under the impression that the land title embraced in the Suscol claim will not be confirmed." *Vallejo*, Daily Alta California, April 8, 1857.

[41] See *supra* note 16 at 460.

[42] See *supra* note 19 at 129.

[43] *Notes of a Trip to Solano County – No. 2*, Daily Alta California, July 15, 1860.

[44] Winfield J. Davis, History of Political Conventions in California, 1849-1892 (1893) at 659. Frisbie was Assemblyman from Solano from 1867-8 and vied for multiple other offices, at 624.

and the successful efforts of their lawyers in shoring up the title, the confirmation of the claim was appealed by US Attorney General Black in 1860-1. This was part of a politically motivated push to return 2.8 million acres of land from 25 disputed grants to the General Government, and therefore Pre-Emptors, who had much more voting clout than their absentee landlords.[45]

VOIDED

In December 1861, months into the Civil War, Black brought the Suscol grant before the US Supreme Court in *United States v. Vallejo*.[46] Even at this late moment the claim seemed likely to survive. The Vallejo case was distinguishable from the other 24 cases before the court. Unlike, say, the infamous Limantour case, an elaborate forgery, the Government produced no evidence for fraud in Vallejo's case – no antedating of the original grant or forged signatures. Indeed, the *genuineness* of the grant was generally accepted in California, but no original copy of the grant and patent could be found in the Mexican archives. In Washington a majority on the US Supreme Court sought to make an example of this missing form. Justice Samuel Nelson, writing for the majority, ruled against Vallejo and his 150 assigns. Given the extent of the Suscol land, Nelson ruled, the improvements were "slight" – establishing little equity by way of use and improvement. It did not accord with the prevailing moral economy of Free Land. The grant had violated conditions subsequent in the Mexican colonization laws: Suscol was too close to the coast and exceeded the maximum number of leagues in a single grant. While these may seem valid reasons for voiding a property, the Court's decision was a major reversal of law. Following the infamous *Fremont* case (1854) covering Mariposas Rancho, to which Nelson had added his signature, Mexican grants with these same deficiencies had breezed through the courts in deference to the equitable property rights of grantees.[47] How would the Court explain their obvious reversal of law?

Most damning, the Court declared, was the archival absence. The Court ruled that it would not accept a claim so deficient in form regardless of whether that lack of form was fraudulent or accidental. Nelson explained the logic of the Government's newfound formalism: "Without this guard,

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[45] See *supra* 16 at 454 and *supra* note 4 (2013) at 37-50.

[46] United States v. Vallejo, 66 US 541 (1861). Black had been replaced as Attorney General by his deputy from the land grant cases Edwin Stanton.

[47] Fremont v. U.S., 58 U.S. 542, at 560 (1854).

the officers making the grants…would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the Government without the means of information on the subject till the grant is produced from the pocket of the grantee."[48] Therefore, the entire Suscol grant – all one hundred thousand acres of it – was *voided*. No property right had existed, and therefore none could have been passed on to the assignees. Whether the majority recognized it (there was a war going on), *Vallejo* was a radical decision; on the surface, a decisive victory for the value of usage and the Pre-Emption order. The equitable stance of federal law toward grantees' property was reversed sotto voce.

This legal formalism, without shadow of fraud, earned the majority an aggrieved dissent on the dangers of property "confiscation." Justice Robert Grier, a Jacksonian Democrat, understood how radical the *Vallejo* decision really was. This was Don Guadalupe Vallejo, Grier wrote, not "some obscure person, such as…[the priest] Santillan [in the *Bolton* case]" another of Black's 25 cases where fraud was obvious and well documented.[49] Grier continued, "I cannot agree to confiscate the property of some thousand of our fellow-citizens, who have purchased under this title and made improvements to the value of many millions, on suspicions first raised *here* as to the integrity of a grant universally acknowledged to be genuine in the country where it originated."[50] As historian Paul W. Gates notes, Grier had been misled – as stated above the number of "fellow-citizens" stripped of property was nearer 150 – and the extent of improvements was debatable. As a matter of jurisprudence, however, this hardly mattered. The rights of Suscol's owners had vested – it had been, after all, *17 years*. Grier was not finished eviscerating his fellows. He accused the majority of reasoning backward from their opposition to large property holdings as such: "Now that the land under our Government has become of value these grants may appear enormous; but the court has a duty to perform under the treaty [of Guadalupe-Hidalgo], which gives us no authority to forfeit a *bona fide* grant because it may not suit our notions of prudence or propriety."[51] Furthermore, far from providing predictability and rationality the Court's formalism would throw Suscol into chaos. By default, the former Rancho entered the public domain, and was thus opened to the vultures. When news arrived from Washington, nearly 200 squatter families, clearly vindicated by

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[48] United States v. Vallejo at 556.

[49] United States v. James R. Bolton, 64 U.S. 341 (1859).

[50] Vallejo at 556-7. This was not the "correct figure," and the Justices were likely knowingly mislead as discussed in *supra* note 16 at 455.

[51] *Vallejo* at 556-7.

the nation's highest court, wasted no time in seizing the opportunity to erect dwellings on unimproved portions of the Rancho. Equity, the "right and good," had triumphed over the feudal remnant.

Vallejo's assigns and the Pre-Emptors acted simultaneously and in a manner that revealed the confused character of the Court's formalism and of the land system in general. During the Civil War, the General Government, understandably, did not have a good sense of what Federal officials in California or state officials were actually doing. At the start of 1862, state and local officials had control over how *Vallejo* would be implemented. Initially, Frisbie, Vallejo, and their prominent assigns acted in a manner the Court would have disapproved, carrying "with them blank forms" to keep the property in its current hands. While the grantees had the same Pre-Emption right to claim 160 acres as the squatters, this was not sufficient to cover their voided holdings of thousands of acres (at $50/acre a tidy sum). The Vallejo assigns therefore resolved to use state School Land Warrants to "cover" the vast remainder – a proposition of dubious legality. "Any other course would have been a serious detriment to the business interests of Solano County," the *Marysville Daily Appeal* wrote approvingly.[52] Per the formalities of the School Land Laws, the General Government granted every sixteenth and thirty-sixth section to the states for funding common schools. When those sections had adverse claims, the state could "select" suitable, alternative Federal lands. These selected lands were limited to those which had been "offered at public sale and [remained] unsold."[53] As a matter of form, these selections needed to be (1) properly surveyed lands and (2) approved by the General Land Office. The Act was drawn to limit any one individual from attaining more than 320 acres (a ½ section), but as the Surveyor General of California later wrote, "the law was drawn so that the restriction amounted to nothing."[54] At the time of drafting, a legislator later recalled, the problem was "not so much how to keep one man from getting too much, but how to get money into the school fund from that source."[55] California land officials happily sold unapproved, unoffered, and unsurveyed selections for School Lands. The state and its officials had little interest in enforcing the acreage cap. In a fee-for-service model of administration, Vallejo and his assigns were confident they could re-purchase their estates through manipulation of existing land laws.

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[52] *Suscol Rancho*, MARYSVILLE DAILY APPEAL, April 26, 1862.

[53] See *supra* note 5 (1860) at 493 – Circular to the Land Officers in the Territories June 25, 1844.

[54] SURVEYOR-GENERAL OF CALIFORNIA, STATISTICAL REPORT OF THE SURVEYOR-GENERAL OF CALIFORNIA, FOR THE YEARS 1869, 1870, 1871 at 5 (1871).

[55] *Surveyor-General's Report*, GREEN'S LAND PAPER, Jan 6, 1872.

Regardless of Frisbie's plotting, the squatters remained on the front foot. It must have seemed a grand chance to establish a truly republican distribution of land. Yet, the nation's highest court was three weeks away; the county sheriff was not. A fraught, violence atmosphere quickly developed. On Frisbie's Point Farm, Sherriff Neville attempted to enforce writs of ejectment issued against the squatters by a certain Justice Dwyer. The settlers did not go quietly. As reported for the newspapers by Mrs. John R. Price, one of the Pre-Emptors, on December 8, 1862, Neville's deputy went to eject the Martin family from Point Farm.[56] The deputy came face to face with Mrs. Martin who, genuinely or as a ruse, was "too ill to be moved." When the deputy's man refused to grant Mrs. Martin privacy, he was thrown down the stairs and a "volley of Cayenne pepper" followed. The well-spiced deputy retreated to form a *posse comitatus*. The posse, "approaching in armed array to eject a sick woman," Price wrote dryly, demanded Mrs. Martin leave so they could destroy the home. Against the advice of a panel of doctors, the posse carried the ill woman in her bed to a waiting wagon and razed the house. Price reported with horror that similar scenes attended the ejectment of the Curley family and the Hanson family, including one death. Price concluded: "so far, the instigators of all this crime have gone unpunished, for they have money to cover their tracks." Here the Pre-Emptors made a claim on *their* law, the True Constitution.

In the face of these ejectments the Pre-Emptors organized into a "Settlers' League" for their common defense and legal interest.[57] Matters only escalated. In January 1863, a month after the Martin ejectment, an ejectment on the lands of another grantee ended when the ejector, one S. Finelle, killed settler Lewis R. Cox – "blowing his brains out" – and wounded another settler in the leg.[58] In May, one Manuel Vera was accused of shooting a squatter in the leg and was duly arrested by the busy Sherriff Neville and confined in an ad hoc jail in Vallejo.[59] On the night of May 6, members of the Settlers' League "disguised by turning their coats and blacking their faces," skulked the streets of Vallejo in search of Vera.[60] The League members, the *Daily Alta California* recounted, "entered the building where Vera was confined, seized the Deputy Sherriff, and then murdered Vera, by

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[56] *Statement of Facts Relative to the Ejectments on the Suscol Rancho*, Daily Alta California, Jan 14, 1863.

[57] Reminiscent of the Pike Creak Claimants Union in J. Willard Hurst, Law and the Conditions of Freedom in the Nineteenth-Century United States (1956).

[58] *Shooting Affair at Napa from Squatting on the Suscol Ranch*, Daily Alta California, January 25, 1863.

[59] *Interior Items*, Daily Alta California, December 17, 1863.

[60] A scene straight out of E. P. Thompson, Whigs and Hunters: The Origin of the Black Act (2013).

firing their weapons coward-like, through the door of his room." Still alive after this barrage they "dispatched him," leaving no trace of their identities. Ostensibly fearing separatism, the Army responded – a faint echo of the punitive expedition of 1850. Neville, aided by 39 Light Dragoons, and by the San Francisco Detective Service, labored for the next seven months to identify the men responsible, finally arresting 16 men in an early morning ambush of December 16. In the subsequent trial, the principal, F. A. Preston, was acquitted because the prosecution could not prove his presence at the Vera lynching. A frustrated District Attorney entered "a *nolle prosequi*" for the remainder.[61] One of the leaders of the Squatter's League, and the other man to lend his name to our case, Levi H. Whitney, was briefly arrested for the murder while lobbying for the Settlers in Washington D. C. Whitney was released after the Supreme Court of the District of Columbia found no evidence to hold him.[62]

Violence continued. In June 1863, Neville and US Army detachments arrested four settlers for "trespass, cutting hay, etc."[63] The four men were tried and acquitted "there not being sufficient proof that any resistance had been made," the *California Farmer* explained. Two of the settlers then sued the Sherriff for $5,000 in damages for unlawful arrest. Weary of being branded secessionists, the Settlers' signed an oath of allegiance to the United States which they published in the paper. The writer for the *Farmer* continued: "As we have always said, if a man has a *good, clean title to his land*, one thousand, ten thousand, or a hundred thousand acres, give it to him, let him enjoy it, and protect him in it. But if that title is not good, if it is fraudulent, it then belongs to the United States, and the settlers have a right to it by law and justice, and we say give it to them."

Amidst the growing unrest, the state's large land bar got to work to resolve the impasse through administrative adjudication. The ranks of this group had grown as the California land lobbyist was becoming a feature of some prominence in the nation's capital. These lobbyists acted quickly. The first fruit of their efforts came amidst the "settler trouble" in March 1863, when they secured a special act from Congress giving the Vallejo assigns privileged Pre-Emption claims.[64] The Act called for the tract to be surveyed and "to

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[61] *Interior Items*, Daily Alta California, January 27, 1864.

[62] *A Californian Charged With Murder*, Daily Alta California, March 8, 1864.

[63] *Trouble among the Settlers on the Suscol Grant*, California Farmer, June 12, 1863.

[64] An Act to Grant the Right of Pre-emption to Certain Purchasers on the "Soscol Ranch," in the State of California, March 3, 1863 as published in William Wharton Lester, Land Laws: Regulations and Decisions, Vol. 2 (1870) at 78.

have approved plats thereof duly returned to the proper district land office," but its principle purpose was to grant Vallejo's assigns, for twelve months, the right to pre-empt their former lands for $1.25 an acre *provided* that the land "had been reduced to possession at the time of said adjudication of said Supreme Court [in *Vallejo*.]"[65] Still, the frustrated capitalists ran up against Lockean improvement. It would be up to the local Register and Receiver to determine what that possessory proviso entailed. Crucially however, this Act left unresolved the question of rights of Pre-Emptors established during the period between 1862 and 1863, after the *Vallejo* case but before Congress intervened.

THE LIBERAL TURN

Surely, the General Government's officials resolved, more formalism would help. Commissioner of the GLO James M. Edmunds dispatched a letter of instruction to the Register and Receiver of San Francisco demanding an orderly and bureaucratic administration of the Suscol claims.[66] Subsequent instructions revealed he was less than pleased with the actions of his officials. In March 1864, Edmunds admonished the Register and Receiver, insisting they "require the production of the highest evidence" as to being a *bona fide* purchaser from Vallejo, which they evidently had not done.[67] The Commissioner complained that the officers had not correctly signed affidavits and that the certificates of the Register were undated. For parties claiming to be attorneys, administrators, or executors, the Register and Receiver were to require "written evidence of [their] authority" — an affidavit was insufficient. In a fit of due process, Edmunds demanded the officers give *every* party a right to "cross-question the witnesses of others." "The testimony…must be reduced to writing, and subscribed by the witnesses in your presence, and authenticated by the certificate of the officer administering the oath." The General Land Office included blank notices to be distributed and posted to give "due and full notice" to the parties. It was an effort at bureaucratic control that resisted the government's patronage, profit-motivated form.

In this manner, the hundreds of claims to Suscol ground their way through the land bureaucracy, but beneath these surface squabbles colonial policy began to drift away from the Jacksonian regime. Indicative of these changing

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[65] "Reduced to Possession" was a legal concept much adjudicated. Placing a tenant on land, for example, counted as possession.

[66] J. M. Edmunds to Register and Receiver, April 10, 1863 in Records relating to Suscol Rancho cases, MICROFILM BANC MSS 70/67 c, Reel 2.

[67] J. M. Edmunds to Register and Receiver, March 10, 1864, in *Id.*

tides, the entire California Supreme Court was remade by the Union Party in 1863. Oscar Shafter, Lorenzo Sawyer, John Currey, Augustus L. Rhodes, and Silas Sanderson were all swept into office over a "discouraged and disorganized" Copperhead opposition.[68] The five men were remarkably similar: all were born in Vermont or New York between 1812 and 1824 and all were prominent, respectable members of the land bar. In letters to his father at the time, Shafter explained their electoral fortunes: "The people have…hitherto suffered greatly from incompetent, or dishonest, or partisan Judges, and there is a general disposition just now to select men for judicial positions with some reference to their qualifications."[69] Shafter embodied the landholding lawyer, for he himself owned an enormous Rancho in Marin County, and found liberalism an ever more attractive conception of political economy. As he wrote in the same letter, "This State is prospering beyond all parallel, and in the next ten years will take high rank in the matter of wealth and population." His fellow justices were on their way to embracing similar ideas about property. Sanderson was on his way to becoming a powerful railroad lawyer. As Shafter gossiped to a fellow lawyer in 1867, "Sanderson is getting rich as an attorney of the Central Pacific Railroad Co. With a salary of $1,000 per month, and a good practice besides."[70] After his term, former Justice Sawyer lamented the "sand-lot politics" of the "communistic mob."[71] As historian Michael Ross wrote of the elite bar during the Reconstruction period: "[Stephen] Field's great fear of debt repudiation reflected the widespread sense of uneasiness felt by men of property during the late 1860s and 1870s. Industrialists and financiers amassing great fortunes were terrified that the laboring majority might attack their property both through violence and the ballot box."[72] After all, how "improved" were their properties? After 1871, the Paris Commune loomed especially large in their legal imaginations in much the same way the Haitian revolution haunted the slavocracy. To elite jurists, the squatters of Suscol no longer had the guise of the dear People of a democratic age, but appeared menacing, a kernel of European socialism and a threat to private property in general.

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[68] Oscar Shafter & Flora Haines Loughead, Life, Diary, and Letters of Oscar Lovell Shafter Associate Justice Supreme Court of California January 1, 1864 to December 31, 1868 (1915), Letter to his Father Oct 21, 1863, at 223.

[69] *Id.*, 222.

[70] *Id.*, Letter from J. B. Crockett, at 231.

[71] John McLaren et al., Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West (1992), at 249. See also, L Przybyszewski, *Judge Lorenzo Sawyer and the Chinese: Civil Rights Decisions in the Ninth Circuit*, 1 W. L. Hist. (1988).

[72] Michael A. Ross, Justice of Shattered Dreams: Samuel Freeman Miller and the Supreme Court during the Civil War Era (2003), at 186.

Three Suscol cases were appealed up to this reconstituted Court. In *Hastings v. McCoogin* (1864), an ejectment case against a squatter, Sanderson wrote for the Court in favor of Vallejo's purchasers, noting they had "inclosed" their property "by a fence" and thereby withdrawn it from Pre-Emption.[73] Similarly in *Page v. Hobbs* (1865), Sawyer wrote that the lands were not subject to pre-emption because they had been "reduced to possession" by Vallejo's assigns. Both decisions relied on narrow constructions of the Pre-Emption laws, and a favorable reading of "the facts of possession," but did fit the current regime. In *Page v. Fowler* (1865), which involved the value of hay grown by the squatters (124 tons of it), Rhodes wrote that neither party could make a claim to land title: "The personal action cannot be made the means of litigating and determining the title to the real property, as between conflicting claimants."[75] In other words the squatters could keep the hay, and no ruling was made as to the true owner of the underlying real estate. Crucially, in all three cases the Court was loath to "redistribute" property from one party to the other, whether real (land) or personal (hay), an important articulation of the liberal principle of state neutrality.

A more confused dynamic played out in federal appeals as holdovers of the Jacksonian regime supported the squatters. Here we turn to the decisive contest. From its inception, *Whitney v. Frisbie* evinced a struggle of legalities *within* the land bar. On the initial hearing of the dispute, the Register and Receiver unsurprisingly found in favor of Frisbie; Edmunds reversed the decision and decided for Whitney and the Pre-Emptors. In May of 1866, Attorney General James Speed, reversed the Commissioner and dismissed the equitable claims of the Pre-Emptors on the grounds that no rights vested *until* the land bureaucracy performed the proper procedures: "It is not to be doubted that settlement on public lands of the United States, no matter how long continued, confers no right against the Government…It is compliance with those conditions that alone vests an interest in the land."[76] By contrast, Vallejo's claimants had a right which "no supposed equity, based upon simple settlement" could defeat.[77] The Attorney General favorably cited Justice Grier's *Vallejo* dissent to support the "superior equity possessed by all *bona fide* purchasers from Vallejo."[78] In only four years, Grier's conservative dissent

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[73] Hastings v. McCoogin 27 Cal. 84 (1864), at 86.

[74] Page v. Hobbs 27 Cal. 483 (1865), at 489.

[75] Page v. Fowler 28 Cal. 605 (1865), at 610.

[76] "Opinion of the Attorney-General in the Case of the Suscol Rancho" in *supra* note 64 at 381.

[77] *Id.*, at 284.

[78] *Id.*, at 285.

on "confiscation" had become the policy of the Justice Department. This decision was dutifully appealed to the Supreme Court District of Columbia.

Here, Justice Wylie reversed Attorney General Speed in August 1866, making the case that the law was entirely on the side of the Settler's League and that the Attorney General was simply making a political decision. Various legislative Acts had opened even unsurveyed California land to Pre-Emption, the most recent in June 1862, Wylie wrote, and this statute clearly governed when Whitney entered the quarter section in October 1862. Whitney, Wylie ruled, "made the necessary improvements and cultivation…[and] from this date, had acquired as good and valid a right to pre-empt this tract of land, as can ever be obtained by any settler prior to the completion of his title by patent. But after he had thus acquired an inchoate equitable title to the land, Congress…interposed in behalf of the *bona fide* purchasers under Vallejo, to take it away from him and sell the land to them."[79] Unlike the Attorney General, Wylie had decades of case law to support his ruling. Wylie cited *US v. Fitzgerald*, 15 Peters 407 (1841) that no reservation or appropriation could be made after a citizen had "acquired the right of pre-emption," and *Delassus v. US*, 9 Peters 133 (1835) which ruled that "no principle is better settled in this country than an inchoate title to lands is property."[80] Not only did the Attorney General rule against law, but also against colonial land policy which, Wylie wrote, was to "invite immigration, to encourage the growth of the new States."[81] In the end, Wylie ruled, Whitney "acquired a vested interest therein, which the Constitution has placed beyond the reach of even an act of Congress to take from him and grant to another."[82] Wylie's decision was a thorough defense of equitable land law. The remedy asked by Whitney was "to obtain a decree on the ground of fraud and trust, which will prohibit the defendant from obtaining from the Government a patent for the land, which in equity ought to be made to himself."[83] It was well established in equity that requesting a patent for land known to be held according to law, but without patent, by another, as Frisbie was doing by asking for a patent to Whitney's land, was a "constructive fraud."[84] The Vallejo claimants were responsible for their fraudulent "deception" of Congress.[85] Wylie duly enjoined the patent from issuing to Frisbie.

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[79] "Opinion of Mr. Justice Wylie as to the Rights of Pre-Emptors on the 'Suscol Ranch,' in *Id.* at 287.

[80] *Id*. at 288.

[81] *Id.*, at 289.

[82] *Id.*, at 290.

[83] *Id.*

[84] *Id.*, at 292. Quoting Justice Story.

[85] *Id.*, at 293.

Ten years earlier Wylie's decision likely would have persuaded the land bar. However, the squatters suddenly faced a hostile and reactionary Supreme Court that was unmoved by Wylie's careful antebellum jurisprudence. Faced with the Gordian Knot of Suscol, the Court cut to the basis of landed property itself.

THE TAMING OF PRE-EMPTION

The Court had created the mess at Suscol in 1861 with formalism, both a quite literal insistence on paper forms and a general legal impulse, and so it was perhaps fitting they used the same logic to get out of their mess in 1869. Writing for the Court, an agitated Justice Samuel Miller had clearly had enough of the "equities" of Pre-Emption no matter how well-supported by antebellum legal thought. Miller's restatement of the facts made plain his distaste for Whitney and the Settlers League in general: "Frisbie having become possessor of the legal title to the land in controversy, the complainant, Whitney, claims that he shall be compelled to convey it to him, because he has the superior equity; for this is a suit in a court of equity, founded on its special jurisdiction in matters of trust. It is, therefore, essential to inquire into the foundation of this supposed equity."[86] Despite being rejected by the land office, Miller wrote, Whitney claimed "that his intrusion on Frisbie's inclosed grounds by violence, and his offer to prove his intention to become a *bona fide* occupant of the land, create[d] an equity superior to Frisbie's, which demand[ed] of a court of chancery to divest Frisbie of his legal title and vest it in him. If there be any principle of law which requires this, the court must be governed by it."[87] Predictably, Miller found no such principle. He concluded by dismantling Lockean use and improvement as a form of property – even as enclosure was a vital fact in the case – echoing the Attorney General. In a lurch toward legal positivism, state recognition became the only legitimate source of property rights.

The redistributive potential of Pre-Emption was central to its rejection. In an 1870 case penned by Justice Chase, on the validity of a Texas contract under Confederate law, the Court ruled that "all just legislation…shall not take from A. and give it to B" a principal prefigured in *Frisbie*.[89] This neutrality was an important pillar of the liberal legality *Frisbie* represented. The *Sacramento Daily Union* described the legal development well: "[The Pre-Emption

[86] Frisbie v. Whitney, 76 U.S. 187 (1869), at 192.

[87] *Id.*, at 193.

[88] *Id.*, at 194.

[89] Legal Tender Cases 79 U.S. 457 (1870), at 580.

law's] obvious purpose is to settle the country, not to disturb settlements."[90] California, in other words, was no longer a colony and the Lockean principles of original acquisition no longer applied. No justice dissented.

The companion to the federal case at state law, *Hutton v. Frisbie* 37 Cal. 475 (1869), was decided the same year, and found the same conclusion: no rights vested in the Pre-Emptor until they had paid for, *and* received, a patent – a process entirely controlled by land officials rather than equitable principles. Writing for the majority, Justice Sawyer ruled that Congress never intended for the Pre-Emption laws to operate to redistribute lands from colonist to other colonists. Rather the laws were "intended to give those who were pioneers in the unsettled wilds of the public domain the right to purchase the unoccupied lands which they have had the courage and hardihood to settle."[91] In other words Pre-Emption was a vehicle for colonization, for the expropriation of Native lands, but inappropriate for republican government. Sawyer believed the Settlers' League was trying to benefit from the honest labor of others. Sawyer, however, *did* need to address the argument that a contract existed between a Pre-Emptor and the State. To do this he resorted to sheer sophistry. No contract existed for the simple reason that a contract provided too much right. If it was a contract, they would have to find a different result, so it was not a contract.

The two new Democratic appointments on the court, J. B. Crockett and Royal Sprague, preferred the antebellum legal formula of inchoate rights and challenged the flimsy contractual reasoning of the majority.[92] Though Crockett shared the sympathies and prejudices of the men of his class he maintained a legal commitment to the Jacksonian order in form if not substance.[93] The two Democrats defended the free land policy of Pre-Emption and the antebellum order of colonization: "[selling] to actual settlers at a very low price…has been for many years a favorite policy with the government. It was deemed advisable to sell the lands to actual settlers at a low price, and thus promote the rapid expansion of our national wealth and the speedy development of our agricultural resources, rather than to sell, for a higher price, to speculators, who would or might keep it out of the

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[90] *The Soscol Ranch Pre-Emption Rights*, Sacramento Daily Union, July 29, 1869.

[91] Hutton v. Frisbie 37 Cal. 475, at 486 (1869).

[92] They replaced Shafter and Rhodes respectively.

[93] "Instead of loafing about the cities earning a precarious living, often by questionable methods, and daily complaining of a lack of employment, let [the ungrateful wretch] go into the country and rent, if he cannot buy, a small piece of land." California Immigrant Union, All About California, and the Inducements to Settle There (1870), at 49.

market, and thus greatly retard the growth of the country."[94] Note, crucially, Crockett's changing justification of Pre-Emption: not to create an egalitarian property order, but to maximize the amount of land in the market, a liberal aim if ever there was one. The Democratic dissent marked how far the Republican transformation of property had progressed during the 1860s and how far the liberal construction of colonization had taken hold even amongst unreconstructed Democrats.

The ejectments resumed in earnest, and this time the Settlers League was broken, no doubt wondering what new world they had been thrown into.

Having successfully driven not one but two populations of people from his father-in-law's lands, Frisbie finally realized his dream of converting the land to pure capital. In 1871, he sold his lands to a corporation called the Vallejo Land and Improvement Company.[95] It was through this vehicle that Frisbie hoped to make Vallejo a rival to San Francisco in the international commodity trade. Former US Senator Milton Latham and former Governor Leland Stanford joined Frisbie as trustees, along with E. H. Green, a London capitalist and Vice President of the London and San Francisco Bank, and Faxon D. Atherton, "one of the Directors of the California Pacific Railroad," a speculative line that would link Vallejo to Sacramento.[96] At its incorporation, the company had a paper stock of $4 million and, as the *Vallejo Chronicle* breathlessly added, "an unlimited amount of capital" to draw upon.[97] This was a speculative venture of an immense scale. Like many such ventures, however, the Company failed to live up to the booster's imagination. The company's accounts from 1872-3 with the London and San Francisco Bank evince a smaller, though still significant, operation.[98] Commercial revolution it was not, but the records of the company do indicate Suscol's continued production for the booming international wheat and flour markets. To make the land pay, the Company contracted with the "Grain King," Isaac Friedlander, to ship wheat.[99] The land was now thoroughly capitalized, as were its products. In a letter of July 30, 1872, Frisbie corresponded with

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94 Hutton v. Frisbie 37 Cal. 475, at 508-9 (1869).

95 *Another Immense Corporation*, Vallejo Chronicle republished in the Stockton Independent, October 20, 1871. "The *Chronicle* asserts that they have already secured possession of nearly all the unimproved and much of the improved property of Vallejo. The object of the incorporation is to improve the facilities of that place as a railroad terminus and shipping point."

96 *A Reported Great Enterprise*, Sacramento Daily Union, October 20, 1871.

97 *Another Immense Corporation*, Stockton Independent, October 20, 1871.

98 "Vallejo Land & Development Co.: Accounts with the London and San Francisco Bank, 1872-3," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

99 Rodman Wilson Paul, *The Great California Grain War: The Grangers Challenge the Wheat King,* 27 Pac. Hist. Rev. (1958), at 331-349.

a local bank to loan "money on wheat" for grain of "no 1 quality and in a good warehouse."[100] On this "wheat loan," as Latham recorded one month later on August 30, 1872, the Vallejo Company secured $80,000.[101] No such loan would have been possible with the cloud of squatter title or Native title hanging over the wheat harvest. It had taken two decades, but Frisbie had finally converted the Suscol Rancho into capital.

CONCLUSION

In that same year of 1872, former Commissioner of the General Land Office Joseph S. Wilson (1860-1, 1866-71) sat down to describe and analyze the changes in property and colonization he had overseen. Writing in a new weekly called *Green's Land Paper*, named after its editor William S. Green, who was a major dealer in swamp lands, Wilson's legal history appeared as "The National Domain – Historical Outline," published in four parts from April 3 to May 1, 1872.[102] Wilson's history was not striking for its analytical ability, though its conclusion was clear and could be summarized in a single sentence: The story of the public domain was the journey from Feudalism to Liberalism. To write this history, Wilson followed the chain of title, beginning with a slog through the English crown grants of the seventeenth century. After a tedious accounting, Wilson concluded "It will be observed that these grants from the Crown were frequently in conflict with and overlapped each other. Not only a want of geographical knowledge, but a disregard of prior grants, often led the capricious mind of the Stuart dynasty to annul their own solemn public acts, and to ignore rights acquired under those acts."[103] Stuart arbitrariness was hardly an original theme, but it established the character of the *ancien régime* – irregular, confused, and productive of injustice. Under American law, by contrast, "Vested rights acquired under former jurisdictions have ever been held sacred."[104] Anticipating the reader's objection, Wilson acknowledged the rather large exception to this sacred policy in the following section titled, "Indian Usufructuary Interests," which were of course founded upon "different principles" that demanded "far different treatment."

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[100] Outgoing from John B. Frisbie, July 30, 1872, and Letter to John B. Frisbie, August 2, 1872, "Letters to Vallejo Land & Development Co., 1872," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

[101] Milton S. Latham to J. K. Duncan, Esq. Aug 30, 1872, "Letters to Vallejo Land & Development Co., 1872," Vallejo Land and Improvement Company records, BANC MSS 78/134 c, The Bancroft Library, University of California, Berkeley.

[102] Joseph S. Wilson, *The National Domain*, Green's Land Paper, April 3, April 10, April 24, May 1, 1872.

[103] Joseph S. Wilson, *The National Domain*, Green's Land Paper, April 10, 1872.

[104] Joseph S. Wilson, *The National Domain*, Green's Land Paper, May 1, 1872.

To discuss these, "different principles" Wilson employed an extended quotation from *Johnson v. McIntosh* (1823) to deal with the unique rights of conquest. As Chief Justice Marshall wrote, "Conquest gives a title which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be respecting the original justice of the claim…." However, Wilson wanted to deal with the problem of violence: Did *Johnson* "involve the right of *forcibly* dispossessing [Indians] of that occupancy? This issue has never yet been presented." Wilson provided his answer in a suggestive combination of Locke and the contemporary critique of land monopoly:

> The American people deeply deplore and reprobate the destruction of the Indian tribes, in spite of the utmost efforts of the General Government; but still, the popular insight detects an underlying infraction of the great law of humanity, of common justice, in the Indian monopoly of the continent. As action and re-action are equal and reciprocal no less in the moral than in the physical world, it is not at all surprising that this great fundamental wrong in the social arrangements of our race has been productive of unhappy consequences, or that these have fallen with especial weight upon the heads of their unconscious agents and instruments.[105]

In other words, there *was* a right of violent redistribution, a substantive justification for conquest. Of course, like the courts dealing with Suscol, this idea *needed* immediate repudiation and disavowal for a liberal like Wilson who, as he had insisted mere inches of newspaper column to the left, held property rights sacred. How did Wilson resolve this obvious problem for himself? Well, here he returned to the opening theme of his narrative, to something called "Feudalism," but which was increasingly taking on several incompatible and unorthodox meanings. To the Stuarts, Wilson added "Indian monopoly," escheat, wastage, real actions, tenure, conditional estates, and use rights of all kinds. In an attempt at conclusion, he wrote, "The failure of the first aristocratic efforts at colonization upon the basis of feudalistic social organization now appears as an event giving decisive advantage to the development of freedom."[106] The ultimate legal manifestation of freedom was "allodial tenure," estates with no conditions, which transferred immediately upon grant from the State. Fee simple had emerged as the ultimate achievement of property law. Wilson ended, "It will be seen, from

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[105] *Id.*

[106] Joseph S. Wilson, *The National Domain*, Green's Land Paper, May 1, 1872.

the facts recited, that the liberal principles embodied in our great public-land policy have reconstructed, to a great extent, the legal basis of our social order, by liberalizing the ideas of land ownership. The General Government set this glorious example, and the justice and expedience of its policy in this respect are now universally admitted."

The reader might rightly suspect I have skipped the part of the history where Wilson discussed his own actions or the conflict over California land titles. I have omitted this for the simple reason that Wilson did not discuss it. He was, of course, quite aware of how property law had developed on the Pacific Coast – at that moment he was also writing an advertisement to European investors to purchase railroad lands in western Oregon – but it made no sense in the Liberal regime which had *arrived*, outside of historical time.[107] To tie this regime to history – to blood and morality and crisis – would be to discredit it, and so, like in *Frisbie* and in Locke, Wilson conjured a discontinuity in historical time. This was not a legal change marked by careful technicalities accreted over time, as in Horowitz, but a convulsion in legal thought. Capitalist development fundamentally transformed property in California, and by natural extension the American settler form. Free Land had been replaced by a new term, quite popular in *Green's Land Paper:* Cheap Land. Suscol revealed this slippage, and only in examining a "New Country," a colony, could such a rupture be directly observed and then disavowed.

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Kyle DeLand

[107] Joseph S. Wilson, Railroad Lands in Western Oregon: For Sale at Low Rates and on Liberal Terms: Extraordinary Inducements to Emigrants (1872).

MICHAEL BANERJEE*

California's Constitutional University:

Private Property, Public Power, and the Constitutional Corporation, 1868–1900

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INTRODUCTION

It is well known that the University of California is the world's foremost public university.[1] Indeed, in a 2020 interview with the University's president, the chairman of the University of California Board of Regents, the University's governing body, could remark in passing, "obviously, we're

* Ph.D. student in Jurisprudence and Social Policy (on clerkship leave), UC Berkeley School of Law. I would like to express my gratitude to a number of (natural) persons. My doctoral advisors, Christopher Tomlins and Dylan Penningroth, have been a constant source of support and intellectual energy since I began my studies in Berkeley Law's Jurisprudence and Social Policy Program in 2019. The archivists at the University of California at Berkeley's Bancroft Library and the University of Vermont's Billings Library were exceedingly helpful, patient, and accommodating. Benjamin Leong, an undergraduate at UC Berkeley, provided excellent research assistance in the summer of 2022, made possible by Sabrina Soracco, Linda von Hoene, and UC Berkeley's SURF-SMART research program. Daniel Farber, Stanley Katz, Stephen Galoob, John Aubrey Douglass, Jonathon Booth, and Ming-hsi Chu provided incisive comments on an early draft. Illuminating comments from the participants of the 2022 Max Planck Summer Academy for Legal History in Frankfurt, Germany, the 2022 History of Education Doctoral Summer School in Madrid, Spain, and the 2023 Boston-Area Legal History Colloquium greatly improved the paper. Without Haris Durrani's encouragement, this paper would not have been submitted. Justice George Nicholson, editor of *California Legal History*, exhibited great patience during the editing process. Finally, my mother has discussed this project with me nearly every day for the last four years and those conversations continually invigorated my interest in the University of California's legal history. In that time, she has been subjected to much more in the way of university legal history than anyone rightly deserves, and this article is therefore dedicated to her. All errors are my own.

[1] *See* "UC Berkeley remains the No. 1 public university in the world," Berkeley News (Nov. 3, 2022), https://news.berkeley.edu/2022/11/03/uc-berkeley-remains-the-no-1-public-university-in-the-world/.

a *public* university."[2] Two years later, in his end-of-the-year message, the University's president would thank the members of the University for making it "the best public research university system in the world."[3] What is less well known is that the University is the private property of the California Regents, who are non-public constitutional officers making law and leading an independent branch of California government. Proprietary government persists in twenty-first-century California, although legal historians have long thought this governmental scheme to have been eradicated in the United States.[4] What is more, this proprietary governmental scheme springs, surprisingly, from the ultimate public authority: the People of California themselves. Upon further investigation, the world's foremost public university turns out not to be so obviously public after all.

The University of California Board of Regents was established by the California Legislature through the Organic Act of 1868, which provided that "[t]he general government and superintendence of the University shall vest in a Board of Regents, to be denominated the 'Regents of the University of California,' who shall become incorporated under the general laws of the State of California."[5] In addition to the general government and superintendence of the University, the Regents were also to take "custody of the books, records, buildings, and all other property of the University."[6] Further, "[t]he Regents and their successors in office, when so incorporated, shall have power, and it shall be their duty, to enact laws for the government of the University, to elect a President of the University and the requisite number of professors."[7] However, "[n]o member of the Board of Regents, or of the University, shall be deemed a public officer by virtue of such membership, or required to take any oath of office, but his employment as such shall be held and deemed to be exclusively a private trust."[8]

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[2] *Meet UC's Next President, Michael V. Drake, M.D.*, YouTube (July 10, 2020), https://www.youtube.com/watch?v=LqHdoQUJTbQ, at 00:22:00 (spoken emphasis maintained).

[3] *An end of Year Message from UC President Michael V. Drake*, YouTube (Dec. 22, 2022), https://www.youtube.com/watch?v=09znyzVjBUY, at 00:00:23.

[4] On the present-day jurisprudential puzzle posed by the proprietary rights of public bodies, *see* Seth Davis, *The Private Rights of Public Governments*, 94 Notre Dame L. Rev. 2091 (2019).

[5] *An Act to create and organize the University of California*, 1867–68 Cal. Stats. ch. 244 § 11 [hereinafter, "Organic Act"].

[6] Id. § 12.

[7] Id. § 13.

[8] Organic Act, § 11. On the deceptively difficult question of who are members of the university, *see* Terry F. Lunsford, *Who are Members of the University Community?*, 45 Denv. L.J. 545 (1968). In the Middle Ages, "the term 'members of the university', or 'privileged persons', included not only graduates and scholars, but also all college servants, and members of certain trades which served the university, such as stationers and bookbinders, cooks, caterers and innkeepers, and carriers." W. A. Pantin, Oxford Life in Oxford Archives 59 (1972). Today, it is unclear who constitutes the membership of the university. While "the connection between [t]rust and [c]orporation is very ancient," it is outside of the scope of this paper. Maitland, "Trust and Corporation," *in* State, Trust and Corporation 94 (David Runciman & Magnus Ryan, eds., 2003). Nonetheless, the trust is treated in the discussions of the 1868 Organic Act and the 1879 California Constitution, *infra*.

The People of California then incorporated this private, proprietary governmental scheme into the 1879 California Constitution, which proclaimed that "[t]he University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic Act creating the same."[9] Thus, the Regents, whose members were non-public officers, became a constitutional corporation, perpetually endowed with lawmaking powers and the University's government and property. Through the occupation of their office—"the formal position[] from which governance is conducted"[10]—the Regents owned the government and property of the University, including an undulating and overlapping kaleidoscope of constitutional powers. As legal historian Frederic William Maitland wrote, "ownership and rulership are but phases of one idea,"[11] and the Regents' portfolio—or, rather, its "estate"[12]—expressed both phases in equal measure. By transforming the University from a legislative corporation to a constitutional corporation, which could be changed only by the People themselves, Californians created a constitutional university.

Constitutional corporations are corporations chartered directly by the sovereign People via constitutional provision. These corporations take written constitutions as their charters. "The people, in their political capacity, are the corporators"[13] of these corporations, which, having "received the sanction of the constitution . . . [have] become a part of the fundamental law."[14] Such corporations might include the legislative, executive, and judicial

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[9] CAL. CONST. art. IX, § 9 (1879) (emphasis in original). The 1918 amendment to this provision removed explicit reference to the Organic Act and stated that the University was "to be administered by the *existing corporation* known as 'The regents of the University of California,' with full powers of organization and government," which would appear to indirectly reference–and thereby incorporate—the Organic Act. *Id.* (as amended, Nov. 5, 1918) (emphasis supplied). The 1918 provision also mandated that "[s]aid corporation shall be vested with the legal title and the management and disposition of the property of the university and of property held for its benefit." *Id.* Thus, the 1918 amendment sustained and reaffirmed the Regents in their "existing" form—that is, as a corporation whose members were non-public officers—and "vested" this corporation "with the legal title and management and disposition of the property of the university."

[10] Karen Orren, *Officers' Rights: Toward a Unified Field Theory of American Constitutional Development*, 34 L. & SOC'Y REV. 873, 874 (2000).

[11] FREDERIC WILLIAM MAITLAND, TOWNSHIP AND BOROUGH 31 (1898).

[12] Maitland notes that "[f]ew words have had histories more adventurous than that of the word which is the *State* of public and the *estate* of our private law, and which admirably illustrates the interdependence that exists between all parts of a healthily growing body of jurisprudence." Frederic William Maitland, "Editor's Introduction," *in* OTTO GIERKE, POLITICAL THEORIES OF THE MIDDLE AGES xxv (Frederic William Maitland, trans., 1900 (1958)). *See also* NATASHA WHEATLEY, THE LIFE AND DEATH OF STATES: CENTRAL EUROPE AND THE TRANSFORMATION OF MODERN SOVEREIGNTY 11–12 (2023) ("Put succinctly, the 'historical rights' of the estates became the historical rights of states.").

[13] Regents of the University of Michigan v. Detroit Young Men's Society, 12 Mich. 138, 163 (1863 MI) (Manning, J., dissenting).

[14] Auditor General v. Regents of the University of Michigan, 83 Mich. 467, 468 (1890 MI) (Champlin, C.J.).

departments of the state and federal governments. These corporations are unmediated "expression[s] of the will of a whole people"[15]; special repositories of sovereign volition. They are corporations brought into legal existence directly by the People themselves. As David Ciepley notes, "[j]ust as a sovereign king could issue a corporate charter to found a government with a legally limited (charter-limited) jurisdiction, so could a sovereign people."[16] In short, "a constitutional corporation," as the Michigan Supreme Court put it in 1911, is "the highest form of juristic person known to the law."[17] Because the People created the University, it was the creature of the People rather than a creature of the legislature.[18] "[W]hat the state may create it may destroy—or regulate."[19] However, the People's creations may only be destroyed by the People themselves. Between 1879 and 1900, Californians worked out the purpose and delineated the power of their constitutional university, established by the People as a constitutional corporation, through constitutional corporate law.

In arguing that the California Regents are non-public constitutional officers leading an independent branch of California government and that the Board of Regents holds the world's foremost public university as its private property,[20] the article revives the concepts of the constitutional corporation—a corporation chartered directly by the sovereign People—and the constitutional university—a university that is itself a constitutional corporation. The Regents are, to quote the aforementioned Michigan

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[15] Alexis de Tocqueville, 1 Democracy in America 247 (1862 (1990)).

[16] David Ciepley, *Democracy and the Corporation: The Long View*, 26 Ann. Rev. Pol. Sci. 1, 10 (2023).

[17] Auditor General v. Regents, *supra* note 14, at 450. Other courts adopted the term *constitutional corporation*, as well. *See, e.g.*, State ex rel. Black v. State Board of Education, 196 P. 201, 205 (1921 ID) (Budge, J.).

[18] Some nineteenth-century observers believed that even those universities that would be considered private today were public by dint of their legislative creation. New York politician Samuel B. Ruggles considered Columbia College, "[f] ounded by a temporal sovereign," to be "solely the creature of the State." "Samuel B. Ruggles States the Case for the Appointment of Wolcott Gibbs," 1854, *in* 1 American Higher Education: A Documentary History 454 (Richard Hofstadter & Wilson Smith, eds., 1961 (1970)). John Whitehead writes that, to Ruggles, Columbia's "trustees were merely agents entrusted with the interests of the community." John S. Whitehead, The Separation of College and State: Columbia, Dartmouth, Harvard, and Yale, 1776–1876 160–61 (1973).

[19] Grant McConnell, Private Power and American Democracy 129 (1966).

[20] Grant McConnell argued in his 1966 book that state constitutions tend to collect power in private hands. *See id.* at 194 (state constitutional arrangements "surrender the peculiar functions of government to private hands over which many who must feel government power can have no influence"). In arguing that the Regents are non-public officials, who, in their corporate capacity own the University as its private property, this paper might provide support for McConnell's argument, if only in one state. More recently and topically, Christopher Newfield has lamented what he calls "privatization" whereby university "control shifts from public officials to private interests." Christopher Newfield, The Great Mistake: How We Wrecked Public Universities and How We Can Fix Them 20 (2016). As we shall see, Newfield's own university, the University of California, might not have been as "public" as he suggests it once was. *See id.* at 21 (comparing Clark Kerr's complaints about extramural governmental influence in University of California affairs in the early 1960s to present-day extramural private influence in public university affairs more generally).

Supreme Court case more fully, "the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the Legislature."[21] The Regents are imbued with every bit as much sovereignty as are the California legislature, executive, and judiciary. This article is the very first to explore these concepts in any depth[22] and the very first to unearth lawmaking by non-public constitutional officers.[23] It is also the first to argue

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[21] Auditor General v. Regents, *supra* note 14, at 450. Justice James Wilson wrote in 1785 that "States are corporations or bodies politick of the most important and dignified kind," James Wilson, "Considerations on the Bank of North America" (1785), *in* 3 THE WORKS OF THE HONOURABLE JAMES WILSON 408 (Bird Wilson, ed., 1804), striking a chord similar to that which the Minnesota Supreme Court struck in its 1928 rebuttal that the *Auditor General* "dictum . . . ignores the fact that the state itself is a political corporate body." State v. Chase, 175 Minn. 259, 265 (1928) (Stone, J.) (quotation omitted). David Runciman would restate this proposition as a question at the turn of the century. *See* David Runciman, *Is the State. Corporation?* 35 GOVERNMENT & OPPOSITION 90 (2000).

[22] The term *constitutional university* was coined by University of Michigan law professor William P. Wooden in a 1957 case-review article published over 100 years after the University of Michigan became the world's first constitutional university in 1850. *See* William P. Wooden, *Recent Cases*, 55 MICH. L. REV. 728, 729 (1957) (reviewing the Utah Supreme Court case of *University of Utah v. Board of Examiners*, 4 Utah 408 (1956)). Another case-review article only briefly discusses the constitutional corporation. See P. W. Viesselman, *Legal Status of State Universities*, 2 DAKOTA L. REV. 309 (1928). The term *constitutional corporation*, meaning a corporation established by constitution, was coined in the 1890s in Michigan. *See* Weinberg v. Regents of the University of Michigan, 97 Mich. 246, 249 (1893) (Montgomery, J.) ("It is contended on behalf of the defendants that the statute does not apply to the Regents of the University of Michigan; that the university buildings are not built at the expense of the state, nor are they contracted for on behalf of the state, within the meaning of the statute; that they are constructed by a constitutional corporation which may sue and be sued, and has power to take and hold real estate for the purpose which is calculated to promote the interests of the university."). Prior to 1893, American courts used the term *constitutional corporation*, albeit infrequently, to refer to corporations that comported with the applicable law and constitution. Gifford v. Livingston, 2 Denio 380, 387 (Ct. Corr. Err. N.Y. 1845) ("But the actual judgments given by the Supreme Court and by this Court in that case can only be sustained upon the supposition that such associations were legal and constitutional corporations, so as to be taxable as corporate stock at the place where the office of the association was located, and by the corporate name."); First Div. of St. Paul & P.R. Co. v. Parcher, 14 Minn. 297, 323 (1869) (Berry, J.) ("No greater nor other franchises have been bestowed by the state than the St. Paul & Pacific Railroad Company, a legal and constitutional corporation, possessed.").

Several works discuss the constitutional university but do not argue that it is a world-historic development. See EDWIN DURYEA, THE ACADEMIC CORPORATION: A HISTORY OF COLLEGE AND UNIVERSITY GOVERNING BOARDS 159–60 (Don Williams, ed., 2000); JOHN S. BRUBACHER, THE COURTS AND HIGHER EDUCATION 76–78, 134 (1971) (discussing Sterling v. Regents of the University of Michigan, 110 Mich. 369 (1896)); MALCOLM MOOS & FRANCIS E. ROURKE, THE CAMPUS AND THE STATE 22–34 (1959) (discussing constitutional corporation); EDWARD C. ELLIOTT & M. M. CHAMBERS, THE COLLEGES AND THE COURTS: JUDICIAL DECISIONS REGARDING INSTITUTIONS OF HIGHER EDUCATION IN THE UNITED STATES 134–45 (1936) (discussing constitutionally independent corporations); DAVID SPENCE HILL, CONTROL OF TAX-SUPPORTED HIGHER EDUCATION IN THE UNITED STATES 71–77 (1934) (discussing higher-educational developments in California).

A few articles discuss constitutional-university autonomy. Joseph Beckham's 1978 article on constitutionally autonomous governing boards provides a helpful survey of relevant cases. *See* Joseph Beckham, *Constitutionally Autonomous Higher Education Governance: A Proposed Amendment to the Florida Constitution*, 30 U. FLA. L. REV. 543, 546–55 (1978). Another pair of articles discuss the University of California's "autonomy" but do not shed light on the constitutional university or constitutional corporation. *See* Caitlin M. Scully, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927 (1987); Harold W. Horowitz, *The Autonomy of the University of California under the State Constitution*, UCLA L. REV. 23, 25 (1977).

[23] Some scholars have addressed the related phenomenon of legislative delegation of lawmaking authority to private groups. *See* JAMES WILLARD HURST, LAW AND ECONOMIC GROWTH: THE LEGAL HISTORY OF THE LUMBER INDUSTRY IN WISCONSIN 1836–1916 92 (1984) (discussing "the characteristic nineteenth-century reliance upon delegation of public functions to private hands"); Jonathan Lurie, *Private Associations, Internal Regulation, and Progressivism: The Chicago Board of Trade, 1880–1923, as a Case Study*, 16 AM. J. LEG. HIST. 215, 218 (1972) (arguing that Chicago Board of Trade was private association exercising extensive self-government); MCCONNELL, *supra* note 19, at 147 ("Often, for example, the exercise of licensing powers is delegated to 'private' associations, even though the coercive power involved is that of a state."); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 220 (1937) (discussing "law-making by private groups under explicit statutory delegation").

that the constitutional university represents a world-historic innovation, a novel and peculiarly American university. Six centuries after the first universities were established,[24] western Americans invented a new kind of university, chartered directly by the sovereign People. Legislative universities may be destroyed by the legislature; constitutional universities may be destroyed only by the sovereign People.[25] Californians remade the university, which was characterized by an "unbroken continuity,"[26] by reformulating the ancient, direct connection between university and sovereign.

The constitutional university is a supremely powerful legal creature that has been hiding in plain sight for 173 years, as discussed below. These universities enact laws for their government,[27] exercise the police power,[28]

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[24] *See* Duryea, *supra* note 22, at 5.

[25] *See* Brubacher, *supra* note 22, at 77 (describing transfer of government of University of Michigan from Michigan legislature to Michigan Regents through 1850 Michigan Constitution); Thomas McIntyre Cooley, Michigan: A History of Governments 324 (1906) (noting, under 1850 Michigan Constitution, "the board [of Regents] was given complete control of the university and its funds, to the exclusion of legislative dictation"). The constitutional university has endured, although "[s]tate constitutions have little of the sacredness of the federal document," McConnell, *supra* note 19, at 193, and even through the nineteenth century's " 'era of permanent constitutional revision' in the states." See G. Alan Tarr, Understanding State Constitutions 94 (1998 (2000)) (quoting Daniel T. Rodgers, Contested Truths: Keywords in American Politics since Independence 93 (1987)).

[26] Charles Homer Haskins, The Rise of the Universities 24 (1923 (1972)); *see also* Helene Wieruszowski, The Medieval University 5 (1966) ("As the direct descendant of the medieval *studium* the modern university looks back to more than seven hundred years of a continuous history."); Walter Rüegg, "Foreword," *in* 1 A History of the University in Europe: Universities in the Middle Ages xx (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992) (noting that the university "is . . . the only European institution which has preserved its fundamental patterns and its basic social role and functions over the course of history."); James Axtell, Wisdom's Workshop: The Rise of the Modern Research University 2 (2016), (noting that the university is "one of the very few European institutions that have preserved their fundamental patterns and basic social roles and functions over the course of history.").

[27] "The regents shall have power, and it shall be their duty to enact laws for the government of the university." Minn. Territorial Stats. c. 28, § 9 (1851). The California legislature used nearly the same language in the California Organic Act of 1868, which established the University of California and was incorporated by reference into the California Constitution of 1879: "The Regents and their successors in office, when so incorporated, shall have power, and it shall be their duty, to enact laws for the government of the University." Organic Act, § 13. The U.S. Supreme Court determined in 1934 that the California Regents' enactments were state statutes. That Court wrote that, "by the California Constitution the regents are, with exceptions not material here, fully empowered in respect of the organization and government of the University, which, as it has been held, is a constitutional department or function of the state government." Hamilton v. Regents of the University of California, 293 U.S. 245, 257 (1934) (Butler, J.). Therefore, "[i]t follows that the [Regents'] order making military instruction compulsory is a statute of the state within the meaning of section 237(a), [Judicial Code] 28 USCA s 344(a)." *Id.* at 258.

Constitutional universities are not the only universities that legislate. For example, the Texas Commission of Appeals, an appellate tribunal created in 1879 "intended to relieve the [Texas] Supreme Court of a portion of its caseload," James L. Haley, The Texas Supreme Court: A Narrative History, 1836–1986 95 (2013), observed that "[s]ince the board of regents" of the University of Texas, created by the Texas legislature, "exercises delegated powers, its rules are of the same force as would be a like enactment of the Legislature, and its official interpretation placed upon the rule so enacted becomes a part of the rule." Foley v. Benedict, 122 Tex. 193, 199–200 (Tex. Com. App. 1932) (Sharp, J.) (citations omitted). Universities are not the only corporations that legislate, although university legislation might be the only corporate legislation that carries "the same force as would . . . a like enactment of the Legislature." Ciepley writes that, as a general matter, a corporate "charter also grants jurisdictional autonomy to this government—the right to legislate, that is, to set rules (by-laws and work rules, for example)." Ciepley, *supra* note 16, at 6.

[28] Williams v. Wheeler, 23 Cal.App. 619, 623 (1st Dist. 1913) (Richards, J.); Wallace v. Regents of the University of Cal., 75 Cal.App. 274 (1925) (Tyler, P.J.). *See also* Sweinbjorn Johnson, *When the Importer Is a State University, May the Government Collect a Duty?*, 27 Mich. L. Rev. 499, 519–20 (1929) (arguing that the state university "has been *endowed with a portion of the police power of the state*." (emphasis preserved)).

unilaterally reject unconstitutional legislation,[29] take property by eminent domain,[30] and incorporate inferior corporations.[31] That is, these modern universities exercise a great deal of "positive authority,"[32] reminiscent of their medieval predecessors. Their legal powers and capacities paint a picture of modern "scholastic authority"[33] quite different from the common, enervated, and nebulous descriptions of "autonomy."[34] The constitutional universities represent a signal American contribution to the world history of universities. They tend to rank among the best universities in the world,[35] and they developed first in the American west. The history of the constitutional university demonstrates a forgotten vision of state-university relations that is ripe for recovery.

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[29] *See* Black v. Board of Education, *supra* note 17, at 205.

[30] *See* Mich. Const. art. XIII §4 (1908) ("The regents of the University of Michigan shall have power to take private property for the use of the University, in the manner prescribed by law."); People v. Brooks, 224 Mich. 45 (1923) (McDonald, J.) (dismissing writ of certiorari for meritless challenge to Regents' exercise of eminent domain power for the purpose of constructing a club and dormitory for law students). Interestingly, non-constitutional universities also exercise this power. *See* Russell v. Trustees of Purdue University, 201 Ind. 367 (1929) (Willoughby, J.) (Trustees of Purdue University, a creature of the legislature, empowered to exercise the right of eminent domain as a state institution). The transfer of private property for scholarly use finds expression in the university's early history. In 1300, pursuant to "a time-honored custom claimed by the university [of Oxford]," King Edward I "requested that the burgesses surrender to the scholars any houses that had once been utilized by clerks." Pearl Kibre, Scholarly Privileges in the Middle Ages 271 (1962). At Paris in 1245, the scholars passed statutes regulating the price of rent. An uncooperative landlord risked having "his dwelling… interdicted for five years, that is, he would be forbidden to rent his house to scholars during that period." Pearl Kibre, *Scholarly Privileges: Their Roman Origins and Medieval Expression*, 59 Am. Hist. Rev. 543, 559–60 (1954). Strikingly, some contemporary jurists held that "the scholar's right to expel a smith or anyone living in his house who should disturb him in his studies was one of the peculiar privileges of a scholar." *Id.* at 560–61. One scholar "related that he had expelled a certain weaver living near the Collège du Vergier at Montpellier because the weaver sang in such a loud voice that he interfered with the students' study." *Id.* at 561. Crucially, this expulsion (what we might today call an eviction or taking) "was justified… because of the public utility which abides in scholars." *Id.* at 561 (citation omitted).

[31] *See* People ex rel. Regents of the University of Michigan v. Pommerening, 250 Mich. 391, 396 (1930) (Wiest, C.J.) ("In 1924, under the provisions of Act No. 84, Pub. Acts 1921, and as a creature of the Board of Regents, a nonprofit corporation was organized for the declared purpose of 'The furtherance in general of the physical betterment of the students at the University of Michigan….'"). The power of incorporation was long held by universities. Blackstone noted that the University of Oxford held this power through its Chancellor: "In this manner the chancellor of the univerfity of Oxford has power by charter to erect corporations; and has actually often exerted, it in the erection of feveral matriculated companies, now fubfifting, of tradefmen fubfervient to the ftudents." 1 Blackstone's Commentaries ch. 18. On Ciepley account, universities that may incorporate inferior corporations would be understood as "sovereign or semisovereign." Ciepley, *supra* note 16, at 6.

[32] Richard Hofstadter & Walter P. Metzger, The Development of Academic Freedom in the United States 11 (1955 (1965)).

[33] Kibre, *supra* note 30, at 290.

[34] *See*, *e.g.*, John Aubrey Douglass, The California Idea and American Higher Education: 1850–1960 Master Plan 69 (2000) (discussing the constitutional universities' "unusual level of autonomy").

[35] *See* David Labaree, A Perfect Mess: The Unlikely Ascendency of American Higher Education 133–34 (2017). Three (Michigan, Minnesota, and California) of the five public universities that Roger Geiger includes in "the select group" of research universities on which he focuses in his 1986 monograph are constitutional universities, which were chosen because "they led all others in the quality of their faculties as judged by their academic peers." Roger L. Geiger, To Advance Knowledge: The Growth of American Research Universities, 1900–1940 v, 3, 6 (1986). Tellingly, these are the exact same five state universities that Edwin Slosson visited as he prepared his famous 1910 volume, although he chose them through the proxy of the Carnegie Foundation rankings of annual expenditures. Edwin E. Slosson, Great American Universities ix (1910). Julie Reuben includes only two public universities—Michigan and California—in her study of eight elite universities, selected for "their leadership in the development of the research university during the late nineteenth and early twentieth centuries, and because of the contributions of the intellectuals who were associated with these institutions." Julie A. Reuben, The Making of the Modern University: Intellectual Transformation and the Marginalization of Morality 9 (1996).

Western American universities occupy a special place in the history of the American university. Frederick Rudolph writes that

> [t]he American state university would be defined in the great Midwest and West, where frontier democracy and frontier materialism would help to support a practical-oriented popular institution. The emergence of western leadership in the movement stemmed in part from the remarkable rapidity with which western states were populated and from the accelerated speed with which their population grew.[36]

In this way, Rudolph follows Frederick Jackson Turner, who made the same observation half a century earlier. Turner argued that the midwestern state universities, "shaped under pioneer ideals," gathered vocational, collegiate, applied, and professional studies in a single university.[37] "Other universities do the same thing," Turner wrote, "but the headsprings and the main current of this great stream of tendency come from the land of the pioneers, the democratic states of the Middle West."[38] Roger Geiger argued that the midwestern and western state universities constituted a group of central importance—along with the colonial colleges to the east and the research universities established in the last third of the nineteenth century—to the rise of the American research university.[39] Legal historian Lawrence Friedman cited two constitutional universities—the Universities of California and Idaho—as examples of outstanding state universities in his discussion of the importance of states in America's federal system.[40] The western colleges and universities were also the first in the nation to offer coeducational instruction, although sometimes unevenly, as in the famous case of Clara Foltz, discussed below.[41]

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[36] Frederick Rudolph, The American College and University: A History 277 (1962 (1990)).

[37] Frederick Jackson Turner, "Pioneer Ideals and the State University," *in* The Frontier in American History 258 (1977 (1920)). These pioneer ideals included conquest, discovery, individualism, and democracy. *See id.* at 245–49. Roger Geiger might add dynamism and egalitarianism to Turner's list, *see* Geiger, *supra* note 35, at 243, and some might refer to these "pioneer ideals" as "educational populism," Tom Slayton, "UVM, Carl Borgmann, and the State of Vermont, *in* The University of Vermont: The First Two Hundred Years 283 (Robert V. Daniels, ed., 1991). For a recent and critical appraisal of Turner's ideas, *see* Greg Grandin, The End of the Myth: From the Frontier to the Border Wall in the Mind of America 113–31 (2019).

[38] *Id.*

[39] *See* Geiger, *supra* note 35, at 3.

[40] *See* Lawrence M. Friedman, A History of American Law 505 (1973 (2005)).

[41] *See* Barbara Miller Solomon, In the Company of Educated Women: A History of Women and Higher Education in America 43 (1985); Bruce A. Kimball, The "True Professional Ideal" in America: A History 228 (1992); Duryea, *supra* note 22, at 158. Coeducational universities fit into and fueled the general openness of nineteenth-century western American society. *See* Elizabeth D. Katz, *Sex, Suffrage, and State Constitutional Law: Women's Legal Right to Hold Public Office*, Yale J. L. & Feminism 137, 174 (2022) ("The Western Territories were on the cutting edge of granting women political rights."); *see also id.* at 144 ("One crucial reason for Midwestern advances in women's officeholding was women's early acceptance into higher education."); Jacques Barzun, From Dawn to Decadence: 500 Years of Western Cultural Life 1500 to the Present 611 (2000) (noting women's right to vote in western United States).

While historians of the university have noticed that the nineteenth-century universities in the west were special, they have missed what made a subgroup of these universities unique in world history. They have generally not noticed that a select group of universities in the American west were constitutional universities.[42] Even when historians have recognized that some western universities were constitutional universities, these historians tend to view them as "unique among state universities."[43] The constitutional university was not simply unique among state universities in the United States. When the People of Michigan established the country's first constitutional university in 1850, as discussed below, such a university existed nowhere else.

Although it represents a novel legal foundation, the constitutional university fits comfortably in the lineage of the ancient universities, generally established by either sovereign king or sovereign pope. For this reason, more medieval European material appears below than one might expect to find in an article about a nineteenth-century American university. Rather than compile this material in a background section or the like, it has been introduced where relevant because this is hardly background material. It cannot be avoided in a history of universities and corporations, even that of a university corporation as youthful and American as the University of California. I hope that this article will serve, among other things, as an introduction for generalists interested in the questions, challenges, and rewards of university legal history.

The article shows that the constitutional university represents at once continuity and discontinuity.[44] Along the way, the article also challenges some prevailing ideas about (1) constitutional law, such as the idea that the tripartite

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[42] Duryea's discussion of state universities' corporate foundations comes close to linking the constitutional university's striking geographical contours but he does not make this connection explicitly. *See* DURYEA, *supra* note 22, at 158–60.

[43] HOWARD H. PECKHAM, THE MAKING OF THE UNIVERSITY OF MICHIGAN 1817–1992 35 (Margaret L. Steneck & Nicholas H. Steneck, eds. 1967 (1994)). John Whitehead includes only a laconic discussion of the constitutional university in his study of state-university relations at four early-American colleges. *See* WHITEHEAD, *supra* note 18, at 136–37. In his April 2023 book, Timothy Kaufman-Osborne describes the provisions of the California Constitution that address the University of California, and even points out that the Regents are a corporation, but does not discuss the world-historic character of this provision. *See* TIMOTHY V. KAUFMAN-OSBORN, THE AUTOCRATIC ACADEMY: REENVISIONING RULE WITHIN AMERICA'S UNIVERSITIES 197 (2023).

[44] In writing a legal history, one must acknowledge the challenge presented by what medievalist Brian Tierney called "[t]he characteristic problem in studying the history of ideas": the fact that "patterns of words (encoding patterns of ideas) often remain the same for centuries; but, as they are applied in different social and political contexts, they take on new meanings." BRIAN TIERNEY, RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT 1150–1650 ix (1982). However, this "characteristic problem" is, as we shall see, leavened by the countervailing fact that "the word-patterns do not entirely lose their original connotations." *Id.*

separation-of-powers framework is exemplary for state constitutions,[45] and (2) corporation law, including that "[c]orporations in the United States are all creatures of the states, literally legal persons created and recognized by *state* governments."[46] Indeed, if it is true that American constitutions have corporate content, then the separation-of-powers debate may be restated in corporate terms. This is because the concept of equality might be unknown to the corporation. As the University of Oxford argued during a struggle with the City of Oxford in the 1640's, "where two Corporations live together, there is a necessity that one of them be subordinate to ye other, for it cannot be expected that they should live together peacably, if they be of equall power, and independent; as this very place hath found heretofore by bloody experience."[47] If American constitutions contain corporate content, and if corporations cannot be equal to one another, then the separation of co-equal branches of government might be further complicated.

Californians—rather than the State of California—created their constitutional university in 1879. Proprietary constitutional government persists in the relationship of the Regents to the University, where ownership and rulership continue to converge in twenty-first-century California. The Regents possess "both public power and private right, power over persons, right in things."[48] At the same time, this confluence of ownership and rulership helps to highlight (1) the forgotten, "agential"[49] sovereign People[50]

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[45] *See* Jonathan L. Marshfield, *America's Other Separation of Powers*, 73 Duke L.J. (forthcoming, 2023). On the distinctiveness of state constitutionalism, *see* Tarr, *supra* note 25, at 6–28, 121.

[46] Jessica L. Hennessy & John Joseph Wallis, "Corporations and Organizations in the United States after 1840," *in* Corporations and American Democracy 74 (Naomi R. Lamoreaux & William J. Novak, eds., 2016) (emphasis in original). American jurists have long espoused this view. Nineteenth-century treatise writer John Dillon wrote that "[c]orporations, however, as the term is used in our jurisprudence, do not include States, but only derivative creations, owing their existence and powers to the State acting through its legislative department." John F. Dillon, 1 Commentaries on the Law of Municipal Corporations § 31 (1872 (1890)).

[47] Pantin, *supra* note 8, at 96 (quoting Oxford University Archives, SP. E. 8. 16.)

[48] Maitland, *supra* note 11, at 30.

[49] Daniel Lee, Popular Sovereignty in Early Modern Constitutional Thought 305 (2016).

[50] The sovereign People were once "a practical reality," as Christian Fritz has shown. Christian G. Fritz, American Sovereigns: The People and America's Constitutional Tradition Before the Civil War 12 (2008). The sovereign People directly established corporations in the nineteenth-century American west. While early Americans inherited "the idea that some positive act of the sovereign was necessary to create corporate status," this idea has been lost. James Willard Hurst, The Legitimacy of the Business Corporation 1780–1970 8–9, 15 (1970). Today, some corporation law scholars seem to either conflate or confuse the sovereign with the state. *See*, *e.g.,* Ciepley, *supra* note 16, at 5 ("At American independence, the British king's right of chartering corporations passed to the colonial legislatures and then, under the Union, to the federal and state legislatures, with state legislatures today generally delegating the task of chartering to an office of the secretary of state."); Elizabeth Pollman, *Corporate Personhood and Limited Sovereignty*, 74 Vand. L. Rev. 1727, 1729 (2021) (corporations are "artificial persons created by the state"); Elizabeth Pollman, *Reconceiving Corporate Personhood*, Utah L. Rev. 1629, 1633 (2011) ("After independence, royal charter was no longer required for incorporation; that authority subsequently resided in each state."); Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 William & Mary Quart. 51, 51 (1993) ("With independence, the legislatures acquired the power to incorporate, which in Britain was a prerogative of the crown."). Kaufman-Osborn repeats this view throughout his newly released book. *See* Kaufman-Osborn, *supra* note 43, at, *e.g.*, 40, 41, 46, 50.

and (2) that state and corporation are, according to Maitland, "but phases of one idea"[51] and that "there seems to be a genus of which State and Corporation are species."[52] Chief Justice John Marshall wrote in 1811 that "[t]he United States of America will be admitted to be a corporation."[53] Francis Lieber wrote in 1830 that "[a]ll the American governments are corporations created by charters, viz. their constitutions."[54] Maitland wrote in 1901 that "the American State is, to say the least, very like a corporation: it has private rights."[55] In 2017, political theorist David Ciepley argued that "the [federal] Constitution should be seen as a popularly issued corporate charter."[56] This article intervenes at a moment in which scholars have been inquiring into the university's corporate foundations and the relationship between state and corporation anew.[57] The relationship between state and corporation blurs into identity in the constitutional corporation. The constitutional corporation is Maitland's missing link, without which he could not see that state and corporation form a single species.[58]

The constitutional university shows that the universally accepted idea that corporations are "artificial persons created by the state"[59] does not capture all American corporations. To the extent that the concession theory holds that "[t]he corporation is, and must be, the creature of the State," it is mistaken.[60]

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[51] Maitland, *supra* note 11, at 31.

[52] Maitland, *supra* note 12, at ix; *see also* Nikolas Bowie, *Corporate Personhood v. Corporate Statehood*, 132 Harv. L. Rev. 2009, 2015 (2019) ("When these [colonial American] corporations disembarked, they then served as the colonies' first governments."); David Ciepley, *Is the U.S. Government a Corporation?: The Corporate Origins of Modern Constitutionalism*, 111 Am. Pol. Sci. Rev. 418 (2017); Andrew Fraser, *The Corporation as a Body Politic*, 57 Telos 5, 7 (1983) (explaining that "[t]he corporation, in short, was shorn of its identity as a body politic" in the nineteenth century).

[53] Dixon v. U.S., F.Cas. 761, 763 (Cir. Ct. D. Va. 1811) (Marshall, C.J.).

[54] 3 Encyclopaedia Americana 547 (Francis Lieber, ed., 1830).

[55] F. W. Maitland, "The Crown as Corporation," *in* State, Trust and Corporation 46 (David Runciman & Magnus Ryan, eds., 2003).

[56] Ciepley, *supra* note 52, at 419. *See also* Ciepley, *supra* note 16, at 10 ("The US Constitution is not a written 'social contract,' as widely held, but a popularly issued corporate charter, or 'constitutional charter.' " (quoting The Federalist, No. 49)).

[57] For example, on March 14, 2023, political philosopher Philip Pettit's *The State* was published. Philip Pettit, The State (2023). On April 7, 2023, political theorist Timothy V. Kaufman-Osborne's book, entitled *The Autocratic Academy: Reenvisioning Rule within America's Universities*, was released. Kaufman-Osborn, *supra* note 43. In June 2023, political theorist David Ciepley published his article, entitled "Democracy and the Corporation: The Long View." Ciepley, *supra* note 16, at 2.

[58] Maitland was reluctant to admit that the state was a corporation because "certain uncomfortable things followed" from this admission, such as the fact that, "if the state were a corporation, some account would have to be given of how it came to be." Runciman, *supra* note 21, at 98–99; *see also* Tierney, *supra* note 44, at 26 (noting that "the underlying perception that the structure of a *universitas* could provide a model for the structure of the state is an old one," and that this "point was made long ago by Gierke and Maitland" and is now "part of the conventional wisdom of all who deal with these matters"). More recent scholars maintain Maitland's distinction. In Natasha Wheatley's 2023 book on the Habsburg Empire, she maintains the distinction between state and corporation. *See* Wheatley, *supra* note 12, at 283 ("Enduring collective legal entities like states and corporations are sometimes called 'fictional persons' or 'artificial persons.'").

[59] Pollman, *supra* note 50, at 1729 (citation omitted).

[60] Maitland, *supra* note 12, at xxx.

Mistaken though it may be, this theory is so enamoring that scholars who seem to know it to be underinclusive nevertheless allow it to lead them astray. One such scholar wrote in a book about academic corporations that "[t]he central feature of governance comes into focus when one considers a board's relationship with the general society. First and fundamentally, it holds its office and assumes its responsibilities on the basis of an act of public government: a charter or a statute or constitutional provision."[61] A constitutional provision is no act of government at all; rather, such a provision brings government into existence. An American concession theory would therefore conceptualize incorporation as either a direct or indirect grant of authority from the sovereign People.

In what follows, the term *Regents* is deployed to refer both to the Regents as a unified corporate body and to the non-public constitutional officers that make up that body. This, I believe, is correct "corporation grammar,"[62] and, in exchange for some ambiguity, the reader is rewarded with a greater appreciation of the multidimensional meaning of corporate personhood. The term, at times, denotes "the all of unity" and, at other times, denotes "the all of plurality"[63]; at times it "disguish[es]," and at times, it "reconcile[s] the manyness of the members and the oneness of the body."[64] Indeed, Maitland writes, "[t]he property of a corporation is unquestionably its property, and are we to be angry whenever a noun in the singular governs a verb in the plural? If so, we had better not read medieval records, for even *universitas* [Latin for "corporation"] is sometimes treated as a 'noun of multitude.' "[65] If so, we ought not to read nineteenth-century University of California records either.

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[61] Duryea, *supra* note 22, at 2.

[62] Edward H. Warren, *Safeguarding the Creditors of Corporations*, 36 Harv. L. Rev. 509, 510 n. 1 (1923).

[63] Maitland, *supra* note 11, at 22.

[64] Maitland, *supra* note 12, at xxvii. Clark Kerr's famous appellation for the modern American university—the "multiversity," replacing the combining form *uni* with *multi*, Clark Kerr, The Uses of the University 5 (1963 (2001))—can be seen as a modern attempt to underscore the University's "Manyness," which "has its origin in Oneness," Otto Gierke, Political Theories of the Middle Ages 9 (Frederic William Maitland, trans., 1900 (1958)).

[65] Maitland, *supra* note 11, at 13 (quoting Gierke, Genossenschaftsrecht, ii 49). *See also* Paddy Ireland, *Capitalism without the Capitalist: The Joint Stock Company Share and the Emergence of the Modern Doctrine of Separate Corporate Personality*, 17 J. Leg. Hist. 41, 45–48 (1996) (discussing nineteenth-century English references to corporation as "it" and "they").

Plaque embedded in sidewalk at University of California at Berkeley, at the intersection of Center Street and Oxford Street, Berkeley, CA (June 24, 2022). Photo Credit: Michael Banerjee.

Underneath the above pictured plaque, declaring that the University of California is "property of the Regents," is a surprisingly deep and ironic legal history. "Irony and nostalgia play[ing] fundamental roles in the study of academics,"[66] this article draws out both characteristics of the University's legal history, with nostalgia running into irony and irony running into nostalgia.

First, I discuss the University's first decade under the Organic Act of 1868, which established the University of California. Second, I discuss the Constitutional Convention of 1878, out of which came the California Constitution of 1879 and the creation of California's constitutional university. Third, I discuss the legal development of California's constitutional university up to 1900 before concluding.

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[66] WILLIAM CLARK, ACADEMIC CHARISMA AND THE ORIGINS OF THE RESEARCH UNIVERSITY 20 (2006). For a defense of historical irony as an explanatory tool, *see* SHELDON ROTHBLATT, THE REVOLUTION OF THE DONS: CAMBRIDGE AND SOCIETY IN VICTORIAN ENGLAND 5 (1968 (1981)).

PART I: THE LEGISLATIVE UNIVERSITY, 1868–1879

Clark Kerr, who was then president of the University of California, wrote in 1963 that

> Heraclitus said that "nothing endures but change." About the university it might be said, instead, that 'everything else changes, but the university mostly endures'—particularly in the United States. About eighty-five institutions in the Western world established by 1520 still exist in recognizable forms, with similar functions and with unbroken histories, including the Catholic church, the Parliaments of the Isle of Man, of Iceland, and of Great Britain, several Swiss cantons, and seventy universities. Kings that rule, feudal lords with vassals, and guilds with monopolies are all gone. These seventy universities, however, are still in the same locations with some of the same buildings, with professors and students doing much the same things, and with governance carried on in much the same ways.[67]

In what follows, I will argue that Kerr's own university actually represents a wholly new kind of university, unique in the world and peculiar to the American west.

Before the creation of the world's first constitutional university in Michigan in 1850, universities were established in five ways: papal bull, royal charter, imperial decree, legislative enactment, and prescription.[68] What would become California's wholly new constitutional university was itself initially created in a typical way: through legislation.[69] The Organic Act of 1868 formed the University of California by unifying the Congregationalist, classically liberal College of California with the technical Agricultural, Mining, and Mechanical Arts College.[70] The California Legislature passed

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[67] KERR, *supra* note 64, at 115.

[68] *See* Walter Rüegg, *"Themes," in 1 A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN THE MIDDLE AGES* 7 (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992). The University of Cambridge, for example, is an ancient corporation by prescription. *See* The King v. The Chancellor, Masters and Scholars of the University of Cambridge, 1 Strange 557, 557 (1722) ("To this [mandamus] they [the University] return, that the University of Cambridge is an ancient university, and a corporation by prescription, consisting of a chancellor, masters and scholars, who time out of mind have had the government and correction of the members, and for the encouragement of learning have conferred degrees, and for reasonable causes have used to deprive."); Frederic William Maitland to Henry Sidgwick, 1893, *in* THE LETTERS OF FREDERIC WILLIAM MAITLAND 106–10 (C. H. S. Fifoot, ed., 1965). On prescription generally, *see* Edward Cavanagh, *Prescription and Empire from Justinian to Grotius*, 60 HIST. J. 273 (2017).

[69] MOOS & ROURKE, *supra* note 22, at 19 (noting that "[m]ost state universities are also creatures of the legislature rather than the constitutions").

[70] *See* Verne A. Stadtman, "Higher Education," *in* THE CENTENNIAL RECORD OF THE UNIVERSITY OF CALIFORNIA 304 (Verne A. Stadtman, ed., 1967); John Aubrey Douglass, *Creating a Fourth Branch of State Government: The University of California and the Constitutional Convention of 1879*, 32 HIST. EDUC. QUART. 31, 34 (1992) (describing the "Congregationalist-leaning College of California"); In re Royer's Estate, 123 Cal. 614, 621–22 (1899) (Chipman, J.) ("The property previously belonging to the College of California, now the site of the university, was conveyed to the state for the benefit of the state university…." (internal quotations omitted)). For an illuminating recapitulation of the Organic Act's passage, *see* WILLIAM WARREN FERRIER, ORIGIN AND DEVELOPMENT OF THE UNIVERSITY OF CALIFORNIA 603–04 (1930).

the Act to take advantage of the 1862 Morrill Act grants.[71] The Act charged a corporation, "to be denominated the 'Regents of the University of California' " and incorporated under California law, with "enact[ing] *laws* for the government of the University."[72] The Act was based on the 1837 legislation establishing the University of Michigan, which afforded a great deal of power to the governing body of that university,[73] and on the Dartmouth College charter.[74] The Regents consisted of twenty-two members: six *ex-officio* members, including the California Governor and Lieutenant-Governor; eight gubernatorial appointees; and eight honorary members selected by the fourteen other members.[75] Both the appointed and honorary members served sixteen-year terms.[76] The Regents were incorporated under California law on June 18, 1868, when

> a certificate properly executed by the governor, lieutenant governor, and superintendent of public instruction was filed in the office of the secretary of state, certifying that, in pursuance of the provisions of the [Organic Act of 1868], they, 'three of the persons indicated in and by such enactment as trustees and directors of the corporation thereby directed to be created, have associated ourselves together for the purposes mentioned in and by said enactment, and to form a corporation for such purpose by the name and style designated in and by said enactment, which is the "Regents of the University of California."[77]

A classic definition of *corporation* is "a conjunct or collection in one body of a plurality of persons," and "the most significant feature of the personified

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[71] *See* Report of the Board of Regents of the University of California 6 (1872). For a recent, critical account of the Morrill Act, *see* Robert Lee & Tristan Ahtone, *Land-Grab Universities: Expropriated Indigenous Land is the Foundation of the Land-Grant-University System*, High Country News (March 30, 2020), https://www.hcn.org/issues/52.4/indigenous-affairs-education-land-grab-universities.

[72] Organic Act, § 13 (emphasis supplied). This kind of language is quite ordinary for nineteenth-century university charters—royal, legislative, and constitutional—in the United States and elsewhere in the common-law world. *See*, *e.g.*, An Act to Establish a College at Newark, Laws of the State of Delaware, chp. 257 § 1 (University of Delaware Charter) (February 5, 1833) (empowering the college's self-perpetuating Board of Trustees "to make by-laws as well for the government of the college, as their own government"); Royal Charter of McGill University (July 6, 1852) ("And We do by these presents, for Us, Our Heirs, and Successors, will, ordain, and grant, that the Governors of the said College, or the major part of them, shall have power and authority to frame and make statutes, rules, and ordinances touching and concerning the good government of the said College"); An Act to Incorporate the University of the Territory of Washington, Wash. Terr. Laws, https://leg.wa.gov/CodeReviser/documents/sessionlaw/1861pam1.pdf (January 29, 1862) ("The regents, shall have power to enact ordinances, by-laws and regulations, for the government of the University."). But the effect of this language is radically different when incorporated into a constitutional text, which is to lodge ultimate legal authority in the university itself.

[73] *See* Douglass, *supra* note 70, at 37 (describing the creation of California's Organic Act). *See also* William B. Cudlip, The University of Michigan: Its Legal Profile x (1969) (timeline including description of 1837 legislation forming the University of Michigan); Horowitz, *supra* note 22, at 25.

[74] *See* In re Royer's Estate, *supra* note 70, at 621, discussed *infra*.

[75] *See* Organic Act, § 11.

[76] *See id.*

[77] Lundy v. Delmas, 104 Cal. 655, 658–59 (1894) (per curiam) (quoting June 18, 1868, incorporation certificate), discussed *infra*.

collectives and corporate bodies was that they projected into past and future, that they preserved their identity despite changes, and that therefore they were legally immortal."[78] The Regents, as a corporation, "were that 'plurality' in succession, braced by Time and through the medium of Time."[79] The plurality sustained over time was emphasized in both the Organic Act of 1868 and the California Constitution of 1879.[80]

Section 11 of the Act read, in relevant part, as follows:

> The general government and superintendence of the University shall vest in a Board of Regents, to be denominated the "Regents of the University of California," who shall become incorporated under the general laws of the State of California by that corporate name and style. The said Board shall consist of twenty-two members, all of whom shall be citizens and permanent residents of the State of California.

The Regents is not a "what" but a "who." Although university historian Hastings Rashdall asked "what is a university,"[81] he could just as easily have asked "who is the university?"[82] After all, "the word 'university' means merely a number, a plurality, an aggregate of persons. *Universitas vestra*, in a letter addressed to a body of persons, means merely 'the whole of you'; in a more technical sense it denotes a legal corporation or juristic person."[83] In other words, it describes a collective nominated to exist as a single body. In the 1819 *Dartmouth College* case, Chief Justice John Marshall proffered his classic definition of a corporation: "[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence."[84] A charter is "a franchise," granting "a property right over and

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[78] Ernst H. Kantorowicz, The King's Two Bodies: A Study in Medieval Political Theology 310–11 (1957 (1981)) (quoting Gierke, *Gen.R.*, III, 193f).

[79] *Id.* at 310.

[80] *See* Organic Act, § 13 ("The Regents and *their successors in office*, when so incorporated, shall have power, and it shall be their duty, to enact laws for the government of the University" (emphasis supplied)); Cal. Const. art. IX, § art. IX, § 9 (1879) ("The University of California shall constitute a public trust, *and its organization and government shall be perpetually continued* in the form and character prescribed by the organic Act creating the same." (emphasis supplied)).

[81] *See* Hastings Rashdall, 1 The Universities of Europe in the Middle Ages 1 (F. M. Powicke & A. B. Edmen, eds., 1895 (1936)).

[82] M. M. Chambers, *Who Is the University?: A Legal Interpretation*, 30 J. Higher Educ. 320, 320 (1959) (emphasis preserved). In a recent article, Adam Sitze has asked a similar question: "[i]s the professor an employee who works *for* and *in* the university or an appointee who in some constitutive sense *is* the university itself?" Adam Sitze, *University in the Mirror of Justices*, 33 Yale J. L. & Human. 175, 179 (2021).

[83] Rashdall, *supra* note 81, at 5. Maitland's influence on Rashdall is apparent here; Rashdall solicited Maitland's commentary on drafts of the books. *See id.* at x–xi (crediting Maitland for assistance with medieval law).

[84] Dartmouth College v. Woodward, 4 Wheat. 518, 636 (1819 US) (Marshall, C.J.).

above the specific properties granted in the document."[85]

As Walter Rüegg wrote,

> Even the name of the universitas, which in the Middle Ages applied to corporate bodies of the most diverse sorts and was accordingly applied to the corporate organization of teachers and students, has in the course of centuries been given a more particular focus: the university, as a *universitas letterarum*, has since the eighteenth century been the intellectual institution which cultivates and transmits the entire corpus of methodically studied intellectual disciplines.[86]

"[T]he *universitas* is a person."[87] *Universitas* included, Maitland and co-author Frederick Pollock state, even "the king himself," who "is the greatest of all communities, 'the university of the realm,' "[88] and whose "twinned" corporate personality was elucidated by Ernst Kantorowicz in his famous study of the King's two bodies.[89] The medievalist Maurice Powicke maintains that the *universitas* referred specifically to "the internal structure of

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[85] HENDRIK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730–1870 19 (1983). While it is outside the scope of this article, franchises were granted to certain constitutional universities through constitutional provision. Blackstone defined a franchise as "a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject." Caleb Nelson, *Vested Rights, "Franchises," and the Separation of Powers*, 169 U. PA. L. REV. 1429, 1439 (2021) (quoting 2 BLACKSTONE'S COMMENTARIES 37). Incorporation itself is a franchise. *See id.* at 1429 ("Blackstone observed that 'it is . . . a franchise for a number of persons to be incorporated, and subsist as a body politic, with a power to maintain perpetual succession and do other corporate acts.' " (quoting 2 BLACKSTONE'S COMMENTARIES 37) (brackets omitted)).

In the section of the 1858 Minnesota Constitution dealing with the University of Minnesota, the People of Minnesota proclaimed that "[a]ll the rights, immunities, franchises, and endowments heretofore granted or conferred are hereby perpetuated unto the said university." MINN. CONST. art. VIII, § 4 (1858)); see also Gleason v. University of Minnesota, 104 Minn. 359, 360–61 (1908) (Lewis, J.) (discussing same). The 1890 Idaho Constitution provided that "[a]ll the rights, immunities, franchises, and endowments heretofore granted thereto by the territory of Idaho are hereby perpetuated unto the said university." ID. CONST. Art. IX § 10 (1890). Similarly, the 1896 Utah Constitution stated that "[t]he location and establishment by existing laws of the University of Utah, and the Agricultural College are hereby confirmed, and all the rights, immunities, franchises and endowments heretofore granted or conferred, are hereby perpetuated unto said University and Agricultural College respectively." UTAH CONST. art. 10, § 4 (1896). In the nineteenth century, it was not the case that "franchises were granted by the government," a mistaken view that American jurists have embraced dating at least to James Kent. Nelson, *supra* note 85, at 1438 (internal quotation marks omitted); *see also id.* at 1440–41 (discussing nineteenth-century American views on franchises). The sovereign People granted franchises as well. Indeed, Western Americans perpetuated franchises unto their constitutional universities.

[86] Rüegg, *supra* note 26, at xx; *see also* BLACKSTONE'S COMMENTARIES, *supra* note 31, at ch. 18 ("They were afterwards much confidered by the civil law [a], in which they were called univerfitates, as forming one whole out of many individuals ; or collegia, from being gathered together : they were adopted alfo by the canon law, for the maintenance of ecclefiaftical difcipline ; and from them our fpiritual corporations are derived.").

[87] Maitland, *supra* note 12, at xxii.

[88] FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, 1 THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 725 (1898) (quoting Bracton at 171); *see also* Maitland, *supra* note 12, at xxxvii (discussing Bracton's reference to "*universitas regni*"). Francis Lieber believed that "[a] nation itself is the great corporation, comprehending all the others, the powers of which are exerted in legislative, executive and judicial acts, which, when confined within the scope, and done according to the forms, prescribed by the constitution, are considered to be the acts of the nation, and not merely those of the official organs." ENCYCLOPAEDIA AMERICANA, *supra* note 54, at 547.

[89] KANTOROWICZ, *supra* note 78, at 3.

a community, whether this be a body politic, a city or borough, a *studium*, or other entity."[90]

Section 12 of the Act read, in relevant part:

> The said Board of Regents, when so incorporated, shall have the custody of the books, records, buildings, and all other property of the University . . . . Regents to have power. All lands, moneys, bonds, securities or other property which shall be donated, conveyed or transferred to the said Board of Regents by gift, devise, or otherwise, including such property as may hereafter be donated and conveyed by the President and Board of Trustees of the College of California, in trust, or otherwise, for the use of said University . . . shall be taken, received, held, managed, invested, reinvested, sold, transferred, and in all respects managed, and the proceeds thereof used, bestowed, invested and reinvested, by the said Board of Regents, in their corporate name and capacity.

Furthermore, the California Legislature included among the Regents' powers "[t]he general government and superintendence of the University."[91] The Act required the University to provide instruction in the various liberal arts as well as training in the mechanical arts.[92] The Act further required that the College of Agriculture be established first, followed by the College of Mechanical Arts, and then the College of Civil Engineering, highlighting the primacy of technical instruction.[93]

When the California Legislature granted the University a corporate personality in the Organic Act it engaged in an ancient practice.[94] The university is fundamentally a legal entity—a corporation[95]—and "the corporate form [is] the legal foundation for the governance of colleges and

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[90] F. M. Powicke, Ways of Medieval Life and Thought: Essays and Addresses 163 (1949 (1971)). By *studium*, Powicke meant to refer to "the academic institution in the abstract—the schools or the town which held them." Rashdall, *supra* note 81, at 5–6; *see also* Thomas J. McSweeney, Katharine Ello, & Elsbeth O'Brien, *A University in 1693: New Light on William & Mary's Claim to the Title "Oldest University in the United States*," 61 William & Mary L. Rev. Online 91, 94–96 (2020) (discussing the meanings of *studium generale*); *but see* William Clark, From the Medieval Universitas Scholarium to the German Research University: A Sociogenesis of the Germanic Academic 252 (unpublished dissertation 1986) (discussing differences between *universitas* and *studium generale*).

[91] Organic Act, § 13.

[92] *See id.* at 1.

[93] *See id.* at 2–3.

[94] *See* Duryea, *supra* note 22, at 7–30 (discussing academic corporation's medieval origins).

[95] Jonathan Levy observed that "[i]n twentieth-century American public discussion, 'the corporation' became synonymous with just one kind of corporation—the for-profit business corporation." Jonathan Levy, "From Fiscal Triangle to Passing Through," *in* Corporations and American Democracy 213 (Naomi R. Lamoreaux & William J. Novak, eds., 2016).

universities."[96] "If one regards the existence of a corporate body as the sole criterion," Rüegg writes, "then Bologna is the oldest" university.[97] This should not surprise the student of corporations history, as the corporation was a Roman invention.[98]

By 1215, the ancient universities at "Bologna, Paris, and Oxford were" already in operation, "exercis[ing] a high degree of legal autonomy, elect[ing] their own officers, control[ling] their own finances."[99] As Clyde Milner wrote of the American West, the university "is an idea that became a place."[100] The idea of the university finds its roots, like the "constitutional kingship, or parliaments, or trial by jury," in medieval Europe.[101]

A university's corporate personality is located in its governing body. "In the eyes of the law," wrote legal scholar Merritt Chambers, "this ghostly legal entity *is* the university."[102] In the United States, "governing authority . . . flows directly through the governing board."[103] As a result, "colleges and universities have performed a public function that remains essentially separate from the state in the private sector and from other agencies of government in the public."[104] In contrast, the English and European universities were "scholastic guild[s] whether of masters or students."[105] In the eighteenth century, American "academic corporations attempted to

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[96] Duryea, *supra* note 22, at 3. The university was so interwoven with law that even the conferral of degrees was a distinctively legal process: "[i]n the Middle Ages, award of degrees presumed and transformed a moral subject or juridical persona beyond the physical person. The degree inhabited a juridico-ecclesiastical charismatic sphere similar to knighthood and holy orders." Clark, *supra* note 66, at 197. The right to award degrees itself was a *legal* right. *See* Axtell, *supra* note 26, at 119 ("upstart Harvard simply *assumed* the customary and perhaps legal right to award degrees to its graduates" (emphasis in original)).

[97] Rüegg, *supra* note 68, at 6. Rüegg is quick to note, however, that "[i]f one regards the association of teachers and students of various disciplines into a single corporate body as the decisive criterion, then the oldest university would be Paris, dating from 1208." *Id.*

[98] *See* Duryea, *supra* note 22, at 3 ("Historians credit Rome during the period of the Empire from the first to fifth centuries with the creation of the corporation.").

[99] Axtell, *supra* note 26, at 4.

[100] Clyde A. Milner II, "Introduction: America Only More So," *in* The Oxford History of the American West 3 (Clyde A. Milner II, Carol A. O'Connor, & Martha A. Sandweiss, eds., 1994).

[101] Rashdall, *supra* note 81, at 3.

[102] Chambers, *supra* note 82, at 320 (emphasis preserved). *But see* Ernst H. Kantorowicz, The Fundamental Issue 16 (1950), https://oac.cdlib.org/view?docId=hb0f59n9wf;NAAN=13030&doc.view=frames&chunk.id=div00012&toc.depth=1&toc.id=div00012&brand=lo) (arguing that "the judges *are* the Court, the ministers together with the faithful *are* the Church, and the professors together with the students *are* the University."). As we will see, the California Supreme Court put Chambers's dictum to the test in an 1899 case where the central question was who the University was.

[103] Duryea, *supra* note 22, at 2.

[104] *Id.* The terms *college* and *university* are used interchangeably in the United States but this article deploys the latter because of its essential link to *universitas*. *See* Labaree, *supra* note 35, at 2 ("One of the peculiarities of the system is that Americans use the terms 'college' and 'university' interchangeably.").

[105] Rashdall, *supra* note 81, at 15. On the universities as guilds, *see* Norman F. Cantor, The Civilization of the Middle Ages 440–41 (1963 (1993)).

reassert their chartered prerogatives as 'masters of their colleges' and were defeated. Colleges in America were not to be governed by their teachers, but by the representatives of the civil society that supported and protected them."[106] Because those who owned the government of the university were the university, the American governing board became synonymous with the university.

The medieval university's jurisdiction was extensive. *Jurisdiction*, as it is used here, "meant the power of ruling in general," and, in our medieval and early-modern context, "actual powers of government were widely diffused,"[107] including among universities. In 1215, the pope granted each master at Paris "jurisdiction over his scholar,"[108] although this jurisdiction would later be "exercised by university officers (rector, chancellor)."[109] Cambridge was "endowed with an explicit jurisdiction in cases involving its members" by the letters patent of 1561.[110] In addition to its "immunities, privileges, and special jurisdiction," Cambridge was granted "seats in the House of Commons in 1604 . . . [,] a further acknowledgement of [its] exceptional status."[111] Cambridge maintained "its jurisdiction over regraters and ingrossers, the sale of victuals, and policing in the town" of Cambridge.[112] Cambridge was recognized "as a liberty, partly insulated from normal jurisdictions."[113] Even in nineteenth-century Cambridge, "[t]he university's far-reaching regulation of local tradesmen, its assumption of police power

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106 Jurgen Herbst, From Crisis to Crisis: American College Government 1636–1819 48 (1982).

107 Tierney, *supra* note 44, at 30.

108 "Rules of the University of Paris, 1215," *in* University Records and Life in the Middle Ages 29 (Lynn Thorndyke, trans., 1944 (1975)). In the Middle Ages, "scholar" meant "someone who was resident at, or who came to be associated with, a school." Kibre, *supra* note 30, at xv; *see also* Elisabeth Leedham-Green, A Concise History of the University of Cambridge 245 (1996) (defining *scholar* as "the general term for all members of the university").

109 Jacques Verger, "Teachers," *in 1* A History of the University in Europe: Universities in the Middle Ages 157 (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992).

110 Victor Morgan, 2 A History of the University of Cambridge 1546–1750 74 (2004); *see also* Paolo Nardi, "Relations with Authority," *in 1* A History of the University in Europe: Universities in the Middle Ages 83 (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992) (discussing jurisdiction over scholars).

111 Morgan, *supra* note 110, at 74–75. Blackstone found this development noteworthy enough to include it in his *Commentaries*. *See* Blackstone's Commentaries, *supra* note 31, at ch. 2. Oxford received the same recognition. *See* Herbst, *supra* note 106, at 3. The College of William & Mary had representation in the Virginia legislature in the seventeenth century. *See* Axtell, *supra* note 26, at 146; Duryea, *supra* note 22, at 88. The College held its legislative representation, as did sixteenth-century Scottish royal burghs, as part of its estate. *See* Phil Withington, The Politics of Commonwealth: Citizens and Freemen in Early Modern England 20 (2005) ("In Scotland, royal burghs possessed not only parliamentary representation but also an extra place of corporate identity in the form of the Convention, whereby burgh representatives would formulate a burghal position on various topics prior to sitting in parliament."). The scholars received a similar "right, as members of corporative associations, particularly at Paris, to have a proctor of their own to look after their interests at the papal court." Kibre, *supra* note 30, at 326. In the Middle Ages, "privilege" meant "the specific favor granted or . . . the grant of favors and exemptions made to scholars as individuals and as members of university associations by ecclesiastical and lay potentates and communes." *Id.* at xv.

112 Morgan, *supra* note 110, at 74. On Cantabrigian privileges more generally, *see* George Dyer, The Privileges of the University of Cambridge (2 Vols. 1824).

113 Morgan, *supra* note 110, at 74.

within the town, its high-handed treatment of prostitutes and the inquisitorial nature of its examination of prisoners in the university prison—so much at variance with common law—aroused the suspicion and hostility of borough officials."[114]

Meanwhile, in Oxford, "[a]fter quarrels and disputes with the burgesses, the university, victorious since the mid-fourteenth century, practically governed the town of Oxford."[115] According to Brockliss, "Oxford University was essentially an ecclesiastical liberty, a town within a town or a state within a state; its Chancellor in many respects enjoying a jurisdiction and authority analogous to the vast powers of the palatine bishops of Chester and Durham."[116] English kings repeatedly confirmed the university's status as an ecclesiastical liberty by reference to what Brockliss calls its "jurisdictional autonomy."[117] As Brockliss argues, "[s]ince Oxford's organizational structure was largely aped by Cambridge, it becomes possible to speak of the emergence, by 1350, of a specifically English university model, independent and self-contained, with its own institutional identity."[118] The Oxford Chancellor's court, "a quasi-ecclesiastical jurisdiction," was "free to proceed either according to the 'laws and customs of the university' or according to the 'law of the realm'; but in fact the canon law procedure of the ecclesiastical courts was used."[119]

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[114] ROTHBLATT, *supra* note 66, at 184. These privileges and immunities were a frequent issue between town and gown, especially with regard to "boundaries and jurisdiction." MORGAN, *supra* note 110, at 10–11; *see generally* ROWLAND PARKER, TOWN AND GOWN: THE 700 YEARS' WAR IN CAMBRIDGE (1983). On the chancellor's imprisonment power at Oxford, Cambridge, and Paris, *see* ALAN COBBAN, ENGLISH UNIVERSITY LIFE IN THE MIDDLE AGES 218 (1999). The Oxford Chancellor was even known to imprison town officials for impinging on university privileges. *See* R. L. Storey, "University and Government 1430–1500," *in* 2 THE HISTORY OF THE UNIVERSITY OF OXFORD: LATE MEDIEVAL OXFORD 723 (J. I. Catto & Ralph Evans, eds., 1992) (noting that "[i]n the previous year [1458] one of the bailiffs of Oxford had imprisoned a scholar, whereupon the chancellor had the bailiff flung into prison for his breach of the university's privilege" of having arrested scholars delivered to the university by secular authorities.).

[115] Aleksander Gieysztor, "Management and Resources," *in 1 A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN THE MIDDLE AGES* 123 (Hilde De Ridder-Symoens & Walter Rüegg, eds., 1992) (citing ALAN B. COBBAN, THE MEDIEVAL UNIVERSITIES: OXFORD AND CAMBRIDGE TO C. 1500 259 n. 12 (1988)).

[116] L.W.B. BROCKLISS, THE UNIVERSITY OF OXFORD: A HISTORY 24 (2016). The university's privileged realm was always in flux, however, and "[i]n 1559 Parliament restored the crown's 'ancient jurisdiction over the state ecclesiastical and spiritual,' including the universities, where an oath to crown supremacy was required of 'anyone taking holy orders or degrees at the Universities.' " AXTELL, *supra* note 26, at 49 (quoting G. R. ELTON, THE TUDOR CONSTITUTION: DOCUMENTS AND COMMENTARY 372–77 (1960)). While other medieval entities enjoyed privileges, universities received privileges of a different sort. In his history of the University of Paris, Stephen Ferruolo writes that, by dint of King Philip's 1200 charter, "[s]cholars had become an acknowledged group within the city, with their own rights and privileges, which were similar in kind to but distinct in form from those of other clerics." STEPHEN C. FERRUOLO, THE ORIGINS OF THE UNIVERSITY: THE SCHOOLS OF PARIS AND THEIR CLERICS, 1100 – 1215 287 (1985). At Oxford, the "members of the university were part of a separate estate." BROCKLISS, *supra* note 116, at 7.

[117] BROCKLISS, *supra* note 116, at 25; *see also* GAINES POST, THE PAPACY AND THE RISE OF THE UNIVERSITIES 155 (William J. Courtenay, ed., 1931 (2017)) ("In England, then, jurisdiction was fundamentally ecclesiastical, but in the case of Cambridge was set up and enforced by royal authority.").

[118] BROCKLISS, *supra* note 116, at 24; *see also* DURYEA, *supra* note 22, at 43 (Oxford and Cambridge transformed, during the fifteenth and sixteenth centuries, from unified corporations "dominated by regent masters . . . into autonomous, self-contained colleges, each chartered as a corporation.").

[119] PANTIN, *supra* note 8, at 60, 64.

The university's place in medieval society reflected or derived from this jurisdiction: it was one "[o]f the three acknowledged powers of medieval European society—*regnum*, *sacerdotium*, and *studium*."[120] These three powers "form[ed] a single compound entity."[121] At the same time, however, one former Oxford archivist would attribute "the survival (so far) of academic freedom . . . to the fact that the medieval university, the *studium*, was a kind of third force, not wholly to be identified either with the *regnum* or the *sacerdotium*."[122]

Of the ancient universities, Oxford and Cambridge—independent, privileged, self-contained, and possessed of jurisdiction—were "the fullest and most direct transplantation[s]" to what would become the United States.[123] James Axtell argues that "[t]he genesis of America's great modern universities lies not in the continental experience of all European universities, but in the provincial antecedents of England's Oxford and Cambridge."[124] As Pearl Kibre argues, scholarly privileges, originating in Roman law, come down to America through England: "[o]nly in England were the universities to retain some semblance of their earlier autonomy and vested rights. From England these rights, privileges, and immunities which in the Middle Ages distinguished the university associations as well as their professors and scholars were no doubt carried to America."[125] These privileges were not merely "secondary characteristics," as Susan Reynolds argues with regard

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[120] Rüegg, *supra* note 26, *at xix*; *see also* Axtell, *supra* note 26, at 38 (recalling that universities—"the collective *Studia*—quickly became key institutions in the maintenance and direction of society, along with the *Imperium* or *Regnum* (empire or kingdom) and the *Sacerdotium* (church)."); Rashdall, *supra* note 81, at 2 ("*Sacerdotium*, *Imperium*, *Studium* are brought together by a medieval writer as the three mysterious powers or 'virtues', by whose harmonious co-operation the life and health of Christendom are sustained." (footnote omitted)). Jurgen Herbst argued for "*the continuing viability of the European concept of the unity of regnum, sacerdotium, and studium in the colonies as the unity of established state, church, and college.*" Herbst, *supra* note 106, at *x*. *As Thomas McSweeney notes, "[j]ust as canon law was regarded as the universal law of the sacerdotium, the priestly power exercised by the pope, Roman law was regarded by many as the universal law of the regnum.*" Thomas J. McSweeney, Priests of the Law: Roman Law and the Making of the Common Law's First Professionals 4 (2019). The *studium* had its law as well. It also had its peace. *See* Storey, *supra* note 114, at 709 ("Here again [Oxford Chancellor] Chace was presumably exercising an authority conferred by Edward III's charter of 1355, that of the chancellor to imprison and punish anyone carrying arms in the university; indeed, the university told the king's council on this occasion that its chancellor had long been empowered to imprison breakers of its peace without being accountable to any royal judge.").

[121] Roger L. Geiger, The History of American Higher Education: Learning and Culture from the Founding to World War II xviii (2015).

[122] Pantin, *supra* note 8, at 56.

[123] Axtell, *supra* note 26, at 43. *But see* Herbst, *supra* note 106, at 3 (arguing that early American colleges "continued a form of academic government practiced consistently among Calvinist-Reformed groups in Europe from Switzerland to the Netherlands and Scotland."). One might prefer "implants" to "transplants." *See* John Roberts, Águeda M. Rodríguez Cruz, & Jurgen Herbst, "Exporting Models," *in* 2 A History of the University in Europe: Universities in Early Modern Europe 257 (Hilde de Ridder-Symoens, ed., 1996).

[124] *Id.*

[125] Kibre, *supra* note 30, at 566; *see also* Axtell, *supra* note 26, at 42. ("The genesis of America's great modern universities lies not in the continental experience of all European universities, but in the provincial antecedents of England's Oxford and Cambridge.").

to the privileges of the medieval English towns, but the university's defining possessions.[126] In the United States, the university would continue to exercise its ancient jurisdiction, including over students.[127] One historian of the university could write as late as 1982 about "the relationship between civil and academic jurisdiction."[128] That a university has a jurisdiction might be striking to moderns, but, to the medievalist, "[t]he really astonishing and unique feature about the university's jurisdiction was its mixed character, half secular, half ecclesiastical."[129]

To moderns, a university might seem like a peculiar thing to own, and an especially peculiar thing for a corporation to own. It turns out, however, that a university is exactly the kind of thing that a corporation might own.[130] It is important to emphasize that the university is the product of the Middle Ages,[131] a time when "[t]he struggle of ownership and rulership to free themselves from each other"[132] was very much ongoing, and which "knew

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[126] SUSAN REYNOLDS, AN INTRODUCTION TO THE HISTORY OF ENGLISH MEDIEVAL TOWNS x (1977).

[127] *See* SCOTT M. GELBER, COURTROOMS AND CLASSROOMS: A LEGAL HISTORY OF COLLEGE ACCESS, 1860–1960 49 (2015) ("The admission of students in a public educational institution is one thing . . . and the government and control of students after they are admitted, and have become subject to the jurisdiction of the institution is quite another thing." (quoting State ex rel. Stallard v. White 82 Ind. 278, 284 (1882 IN) (Niblack, J.)); DURYEA, *supra* note 22, at 190 (discussing same case). On Purdue's legal profile, *see* EDWARD C. ELLIOTT & M. M. CHAMBERS, CHARTERS AND BASIC LAWS OF SELECTED AMERICAN UNIVERSITIES AND Colleges 435–43 (1934 (1970)).

[128] HERBST, *supra* note 106, at ix. In 1931, Hawai'i's territorial legislature placed "a Teacher's College under the jurisdiction and management of the [Hawai'i] regents." ROBERT M. KAMINS & ROBERT E. POTTER, MALAMALAMA: A HISTORY OF THE UNIVERSITY OF HAWAI'I 38 (1998). For further discussion of "academic jurisdiction," *see* Rainer A. Müller, "Student Education, Student Life," *in* 2 A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN EARLY MODERN EUROPE 331–32 (Hilde de Ridder-Symoens, ed., 1996).

[129] PANTIN, *supra* note 8, at 55.

[130] A corporate portfolio might also include "Jurisdictions Court powers Officers Authorities fines Amerciaments perquisites fees," as was the case with the City of the Corporation of New York. HARTOG, *supra* note 85, at 18–19; *see also* Runciman, *supra* note 21, at 93 ("A corporation may have an area of interest, an area of conflict, even an area of jurisdiction."). Academic corporations own jurisdictions, as described *supra*. The jurisdiction described here play a "substantive role in law." SHAUNNAGH DORSETT & SHAUN MCVEIGH, JURISDICTION 37 (2012). This is a general feature of corporations. Political theorist David Ciepley underscores the fact that a corporation "receives a *jurisdiction* within which it can make and enforce rules beyond the law of the land, so long as not inconsistent with the law of the land." David Ciepley, *Member Corporations, Property Corporations, and Constitutional Rights*, 11 L. & ETHICS HUM. RIGHTS 31, 32 (2017) (emphasis in original).

[131] See AXTELL, *supra* note 26, at 1 ("Universities, like cathedrals and parliaments, were unique creations of Western Europe and the Middle Ages.").

[132] MAITLAND, *supra* note 11, at 30. Maitland illustrates this point through the term *landlord*. "Landlord: we make one word of it and throw a strong accent on the first syllable. The lordliness has evaporated; but it was there once. Ownership has come out brightly and intensely; the element of superiority, of government, has vanished; or rather it is in other hands." *Id.* Gierke wrote that, in the medieval German lands, Land—and its organization through "the *comradely union of the estates*"—and "Lord became the juxtaposed bearers of political Right." OTTO VON GIERKE, COMMUNITY IN HISTORICAL PERSPECTIVE 84 (Antony Black, ed., & Mary Fischer, trans. 1868 (1990)). Nineteenth-century American jurists, perhaps more so than their medieval Roman and canon law predecessors, separated rulership and ownership. *See* HARTOG, *supra* note 85, at 261; David Ciepley, "Governing People or Governing Property?: How Dartmouth College Assimilated the Corporation to Liberalism by Treating it as a Trust," at 1 (working paper 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796298 (arguing that the *Dartmouth College* case "place[d] a spotlight on the corporation's property powers while putting its governance powers in shadow"); TIERNEY, *supra* note 44, at 30 ("[A]round 1200 any competent Roman or canon lawyer could discriminate between ruling and owning . . . .").

no fundamental distinction between 'public' and 'private,' between (personal) property and (state) territory."[133] As Maitland reminds us in his book about medieval Cambridge, in which "three learned corporations," otherwise known as colleges, along with several other legal persons laid competing claims to parcels of land, "ownership and rulership are but phases of one idea."[134] In the case of New York, "[t]he opposition between property and sovereignty often said to lie at the heart of nineteenth- and twentieth-century American law had no place in the [City's] Charter of 1730 and can only limit our understanding of the corporation of the city of New York."[135] The California Regents have, since 1868, straddled both sides of the property-sovereignty divide and continue to do so. While "universities may be seen to exist in the borderland between public and private law" generally,[136] and while such "university corporation[s]"—a legal tautology—were

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[133] Wheatley, *supra* note 12, at 8.

[134] *Id.* at 2, 31.

[135] Hartog, *supra* note 85, at 19.

[136] Simon Whittaker, *Public and Private Law-Making: Subordinate Legislation, Contracts, and the Status of 'Student* Rules,' 21 Oxford J. Leg. Studies 103, 105 (2001). One recent study of the academic corporation notes that "[t]he colleges of colonial America could not be and were not neatly categorized as either public or private." Kaufman-Osborn, *supra* note 43, at 200. This was true in the early Republican period as well. One lawyer, for example, argued in 1790 in a Virginia appellate court that the College of William & Mary was "a corporation for public government, and whose proceedings must therefore be subject to the control of this Court." Herbst, *supra* note 106, at 220 (quoting Bracken v. College of William and Mary, 3 Call at 573, 590 (1790)).

There was great disagreement about how to classify nineteenth-century American universities, including universities that are considered public today. For example, nineteenth-century Michiganders disagreed about whether the University of Michigan was public or private. *See* Regents of University of Michigan v. Board of Education of the City of Detroit, 4 Mich. 213, 217, 226 (1856) (Green, J.) (Detroit's Board of Education arguing that the territorial act of 1821 incorporating the university created a private corporation); Regents v. Detroit Young Men's Society, *supra* note 13, at 163 ("The university of Michigan is a public corporation."). The issue was not settled elsewhere in the country, even in the twentieth and twenty-first centuries. "When Carl Borgmann accepted the presidency of the University of Vermont in 1952, he assumed he was taking over a public university, pure and simple." Slayton, *supra* note 37, at 282. However, "in the 1950s, as in the 1980s, there was considerable uncertainty and debate on campus about whether the school was actually public or private." *Id.* Around the same time, Governor Earl Warren could write in the *Oakland Tribune* that the University of California was "a quasi-public institution with practically all the attributes of a private corporation organized for a public purpose." Kantorowicz, *supra* note 102, at 18 (quoting Earl Warren, Oakland Tribune, Sept. 22, 1950).

The University of Delaware, one education scholar wrote in 2003, exists in "an ambiguous state-university relationship," causing "[l]egal opinions [to] differ on the question of whether the University of Delaware is a state agency or not." Gunapala Edirisooriya, *A Historical Analysis of the State-University Relationship: A Case Study of the University of Delaware, USA*, 32 Hist. Educ. 367, 380 (2003).

Modern readers will likely think that the question of whether a university is public or private turns on the source of its funding. Historians of universities urge us to resist this temptation: "The question of public control is to be kept separate from that of public support. Yet the two are intimately connected." Elmer Ellsworth Brown, The Origin of American State Universities 18 (1903). In the nineteenth century, public funding and public control were not necessarily related. For example, the Indiana Supreme Court wrote in 1887 that "[t]he university [of Indiana], although established by public law, and endowed and supported by the state, is not a public corporation, in a technical sense." State ex rel. Robinson v. Carr, 12 N.E. 318, 319 (IN 1887) (Mitchell, J.). Indeed, the Indiana high court wrote, "[t]he legal *status* of the state university being that of a technically private, or at most a *quasi* public, corporation, the university fund, of which it is the sole beneficiary, is therefore not a public fund, within the meaning of the law." *Id.* at 320 (emphasis in original). In concluding that the University of Indiana was a private corporation, the court noted that "[i]ts members are not officers of the government." *Id.* Duryea opined that this case was "typical" of the difficulty that nineteenth-century courts faced in addressing the corporate personality of universities. Duryea, *supra* note 22, at 157.

On the public-private issue regarding corporations generally, *see* Bruce A. Campbell, *Social Federalism: The Constitutional Position of Nonprofit Corporations in Nineteenth-Century America*, 8 L. & Hist. Rev. 149, 160–61, 175 (1990) (tracing a line of nineteenth-century cases in which courts found publicly-established, publicly-supported entities to be private); Fraser, at 11 (describing nineteenth-century distinction between "[p]ublic corporations [which] were those established with a view to the 'general good' " and "[p]rivate corporations [which] were created instead for the 'private emolument' of their owners." (quoting Ellis v. Marshall, 2 Tyng 168 (MA 1807)).

"unclassifiable" even in the Middle Ages,[137] the California Regents' story raises these familiar issues with special vigor.

The Regents had both *dominium* and *proprietas* in the university. Maitland emphasizes that

> [n]ot every *dominium* is *proprietas.* There is a baron with a barony; above stand count, duke, king. Each of the four has a *dominium* over the land, but only the baron's *dominium* is a *proprietas* of the land, for he has an immediate *dominium* and the other *dominia* are mediate. Then, however, we must admit that count, duke and king, each of them has a *proprietas* (that is, an immediate *dominium*), not in the land, but in his *dominium*: a property in his lordship.[138]

Moreover,

> [b]efore we have gone far back in our own history, the 'belongs' . . . of private law begins to blend with the 'belongs' of public law; ownership blends with lordship, rulership, sovereignty in the vague medieval *dominium*, and the vague medieval *communitas* seems to swallow up both the corporation and the group of co-owners.[139]

The Regents had a *proprietas* in the University itself and a *proprietas* in their *dominium*—"ownership"[140]—over the university. Just as "[t]o have a proprietary right of 'owning' feudal territory implied and entailed a corresponding juri[s]dictional right of 'ruling' that territory,"[141] the Regents' ownership of the University implied and entitled it to rulership of the same.

As Shaunnagh Dorsett and Shaun McVeigh argued, "[s]overeignty connoted authority (often political) but without a nexus to the modern concept of the state."[142] "Medieval Europe was a complex amalgam of hierarchies and territories through which authority was organized and exercised."[143] In the

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[137] JACQUES LE GOFF, INTELLECTUALS IN THE MIDDLE AGES 72 (Teresa Lavender Fagan, trans., 1957 (1994)).

[138] MAITLAND, *supra* note 11, at 31.

[139] *Id.* at 11–12.

[140] Maitland, *supra* note 8, at 94.

[141] LEE, *supra* note 49, at 91.

[142] DORSETT & MCVEIGH, *supra* note 130, at 35.

[143] *Id. See also* Orren, *supra* note 10, at 904 ("European kings surveyed realms fragmented into principalities, duchies, estates, bishoprics, and all manner of corporate associations, to whom they granted or sold off land and privileges in exchange for aid and supplies in the constant struggle against invasion."); Ciepley, *supra* note 52, at 418 ("In the wake of the recovery of Justinian's *Digest* in the 11th century, Europe was gradually reorganized as a civilization of corporations—a dense web of monasteries, bishoprics, confraternities, universities, towns, communes, and guilds that governed the associational life of an energized Europe."). This description of medieval Europe rhymes with Laura Edwards's description of the early Republican United States, in which she observed "multiple, overlapping jurisdictions within the new republic's governing order." LAURA F. EDWARDS, ONLY THE CLOTHES ON HER BACK: CLOTHING AND THE HIDDEN HISTORY OF POWER IN THE NINETEENTH-CENTURY UNITED STATES, Introduction (2022).

early modern era, Philip Stern observed a "world filled with a variety of corporate bodies politic and hyphenated, hybrid, overlapping, and composite forms of sovereignty."[144] The California Regents' *domiunium* and *proprietas* are products of these lost worlds.

Maitland wrote in 1900: "[r]eally and truly the property of a corporation—for example a city or university—belongs to no *real* person or persons."[145] What does it mean to own a university? A university is owned by whomever owns its government. The university's government is so important that one historian of the university observed of early American colleges that "[w]hat was taught was seen as a means to an end." Rather than the content of the curriculum, it was, ironically, "the circumstances under which instruction was offered [that] came as close to being the end itself as anything within the college possibly could."[146] A university belongs to those who control "the circumstances under which instruction was offered." The university has a fundamental legality.[147] Expressing and enforcing this fundamental legality, by vying "with church and public authorities for legal rights to practice their trade,"[148] is as close to the university's purpose as any. "For this intellectual nobility, nothing was more important than autonomy."[149] While the content of this legality may change, enforcing this legality, rather than education, is the university's ultimate purpose. Although this paper highlights the in-court enforcement of one university's legality, this enforcement usually takes place outside of state court and inside of the university, including in

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[144] Philip J. Stern, The Company State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India 3 (2011).

[145] Maitland, *supra* note 12, at xxi (emphasis added).

[146] Herbst, *supra* note 106, at xii. To the extent that Herbst is correct, the early American colleges shared this preoccupation with the conditions under which instruction was given with the ancient universities. The ancient privileges, which the scholars guarded jealously, *see* Clark, *supra* note 66, at 187, 199, and, at times, appropriated to themselves, *see* Parker, *supra* note 114, at 31 ("the chancellor and masters of the university of Cambridge have appropriated to themselves of their own authority more liberties than are granted in the charters which they hold of the king's predecessors") (quoting thirteenth-century Hundreds Rolls)), "were concerned almost entirely with the external conditions surrounding [the scholars] rather than with the less tangible circumstances of intellectual activity," Kibre, *supra* note 30, at xv. Internal conditions were determined within the university. For instance, "[t]he discipline and control to which the professor was subjected were largely intramural." Cantor, *supra* note 105, at 441.

[147] Following David Ciepley and William Clark, my focus in this paper is not on the University as an "institution" or "organization," but on the University as "a legal person"—the "juridical" university. *See* David A. Ciepley, *Juridical Person of State*, at 2 (working paper 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3796297; Clark, *supra* note 66, at 154 (arguing, in study of university history, "that, not the modern concepts 'institution' and 'individual,' but rather the scholastic concepts 'corporation' ('*universitas*') and 'juridical person' ('*persona repraesentata*') provide the proper conceptual nexus"). The institutional approach continues to predominate the study of state and corporation. *See*, *e.g.*, Taisu Zhang & John D. Morley, *The Modern State and the Rise of the Business Corporation*, 132 Yale L.J. 1970, 1973 (2023) ("The two great institutions of modernity are the business corporation and the state.").

[148] Joseph A. Soares, The Decline of Privilege: The Modernization of Oxford University 17 (1999).

[149] *Id.* at 18.

university courts.[150]

In addition to universities, corporations also owned cities, as Maitland noticed.[151] Hendrik Hartog famously observed that part of the portfolio owned by the Corporation of the City of New York in the eighteenth century was the city's government. "The city's charter created an institution in which property and governmental rights were blurred and mixed. The charter was a grant of property, but it was a grant of property for government."[152] Unlike in New York City's charter, in which "[t]here was nothing . . . to divide the 'public' from the 'private' rights of the corporation,"[153] however, attempts *were* made to distinguish the public from the private in the 1868 Organic Act creating the University of California.

The Organic Act endowed the Regents with the power to legislate.[154] The Act empowered them to "consider and determine whether the interests of the University and of the students, as well as those of the State, and of the great body of scientific men in the state whose purpose is to devote themselves to public instruction" might be advanced by employing short-term professors. Such workaday considerations and determinations constitute the substance of the Regents' law. Tellingly, the Regents continue to confer degrees with "all the rights and privileges thereto pertaining."[155]

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[150] In 1968, a California appellate court held that the University's suite of constitutional powers "necessarily includes the delegation of such [judicial] powers." Ishimatsu v. Regents of the University of California, 266 Cal.App.2d 854, 864 (3rd Div. Ct. App. 1968) (Brown, J.). Universities have long exercised judicial powers. In the thirteenth century, "[t]he chancellor [of Oxford], Henry III asserted, was to have authority over all cases involving scholars and pertaining to such matters as the assessing, changing, receiving, and rental of houses occupied by them; as well as the sale of foodstuffs and other commodities or moveable articles within the area of the city and in the suburbs of Oxford. And he was to have cognizance of all personal actions involving scholars who were immune, as at Paris, from summons for any civil cause outside the jurisdiction of the university. The chancellor was authorized to summon to appear before him, burgesses and other laymen, who were parties to a suit pertaining to a scholar. This provision was reaffirmed, in 1272, by Edward I, and again in 1275, when the chancellor was given a blanket authorization to have jurisdiction over all cases where either party was a scholar." KIBRE, *supra* note 30, at 273 (footnotes omitted). At Cambridge, university court proceeded, at least for a time, according to civil law. *See* GEORGE DYER, ACADEMIC UNITY: BEING THE SUBSTANCE OF A GENERAL DISSERTATION 48–54, 188–90 (1827). At Oxford, the steward presided over a common-law court. *See* Storey, *supra* note 114, at 743–45.

[151] Corporate ownership of cities is of ancient vintage. In 1229, King Henry III of England offered to the masters and scholars of the University of Paris, grappling with an early iteration of the perennial struggle between town and gown, the following relief: "[i]f it pleases you to come to our kingdom of England and make it your permanent center of students, whatever cities, boroughs or towns you choose we shall assign to you." BARZUN, *supra* note 41, at 229 (quoting King Henry III (July 16, 1229), Chart. Univ. of Paris, at 119); *see also* KIBRE, *supra* note 30, at 92–93 (discussing same); WIERUSZOWSKI, *supra* note 26, at 157 (discussing same with a slightly different translation). The *universitas* of scholars and masters were offered "whatever cities, boroughs or towns" they should choose.

[152] HARTOG, *supra* note 85, at 21.

[153] *Id.* at 18.

[154] Organic Act, § 13. The Michigan Regents were similarly charged. As Michigan's Superintendent of Public Instruction noted in 1861, "[t]he Regents as a Board legislate for the University . . . . They enact its laws." UNIVERSITY OF MICHIGAN REGENTS' PROCEEDINGS WITH APPENDIXES AND INDEX 1837–1864 975 (Issaac Newton Demmon, ed. 1915) (Quoting "Report on the Removal of the Medical Department to Detroit") (September 28, 1858)); *see also id.* at 1157 (quoting President Henry Philip Tappan) (the Regents "are also the fountain of all legislative and executive power in relation to the university….").

[155] This language is featured in the University of California degree that the author holds. Pearl Kibre wrote that " '[w]ith all the rights, privileges, and immunities thereunto pertaining,' has become a phrase strikingly familiar to countless generations of American holders of Academic degrees. The very triteness of the words have indeed obscured the extent to which they evoke the mediaeval past in which they were enunciated and had practical application." KIBRE, *supra* note 30, at xiii.

The Regents' conferral of degrees is a *legal* act and represents a familiar and ubiquitous, albeit unrecognized, legal action regularly undertaken by universities around the world. Indeed, William Clark wrote, "[i]n the Middle Ages, award of degrees presumed and transformed a moral subject or juridical persona beyond the physical person. The degree inhabited a juridico-ecclesiastical charismatic sphere similar to knighthood and holy orders. Statutes delimited the required moral subject or juridical persona."[156] More specifically, "[e]ach degree created duties and privileges. The degree marked one juridically for life."[157]

Degrees were but one expression of the university's legality. The university register, "the official legal record kept by the university's magistrate, the rector," was a legal document.[158] "When the register documented academic condition, it recorded the juridical status of the individual as scholar, bachelor, licentiate, master, or doctor within the corporation of scholars."[159] Even the doctoral examination was legal. "Related to the confession, the inquisition, and the sentencing, examination . . . has a judicial provenance."[160]

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[156] Clark, *supra* note 66, at 197.

[157] *Id.* at 198. Clark argues that "[l]ike other medievalisms, it appeared [academic degrees] would perish with the *ancien régime*," *id.* at 196, and that "degrees survived only because they largely ceased treating the candidate as juridical person, and thus became suitable to the rational authority of the bureaucratic state," *id.* at 199. Pearl Kibre argues, with regard to academic privileges, that they "were not to be swept away on the continent until the end of the old regime," and, "even after that, they were retained in their entirety in England, and, in spirit at least, in most countries of Europe. For the force of the tradition of scholarly privileges so firmly planted and cultivated in the middle ages could not be wholly obliterated by the revolutionary changes that took place in Europe." Kibre, *supra* note 30, at 330. The same might be said of academic degrees, linked intimately as they were to academic privileges.

[158] Clark, *supra* note 66, at 185.

[159] *Id.* at 185–86.

[160] *Id.* at 93. The "judicial-confessional" examination, *id.* at 94, reminds us of the interconnections between the scholar, the judge, and the priest. Ernst Kantorowicz wrote in 1950 that "it is through the fact that [the scholar's] whole being depends on his conscience that he manifests his connection with the legal profession as well as with the clergy from which, in the high Middle Ages, the academic profession descended and the scholar borrowed his gown." Kantorowicz, *supra* note 102, at 21. Indeed, the first academics were in fact priests, and "[a]lmost anything might be referred to the judgment of the masters," including "matters of ecclesiastical, theological, moral and public interest." Powicke, *supra* note 90, at 185; on the early scholar-priest, *see* W. N. Hargreaves-Mawdsley, A History of Academical Dress in Europe Until the End of the Eighteenth Century 5 (1963) (noting that, in the thirteenth century, "[t]here was only one exclusively clerical non-liturgical garment, the *cappa clausa*," and a 1222 order by the Archbishop of Canterbury introduced the *cappa* clausa, a variant of "a loose cape with a hood" that was "already in use on the Continent," to English clergy, and "[t]he result of this was that at Bologna, Paris, and Oxford and at subsequent universities the *cappa clausa* came to be regarded as the academical dress, at least for formal occasions, for Doctors of Theology and Masters of Arts, who as priests—nearly all Masters were in Orders—wore this garment before any particular form of academical dress had come to be established"). At Oxford, the scholar-priest remained in office until the middle of the nineteenth century. *See* Soares, *supra* note 148, at 20 (under 1854 reforms, "Oxford's teachers made the transition from clergymen to don"). Kantorowicz maintained that "[t]here are three professions which are entitled to wear a gown: the judge, the priest, the scholar. This garment stands for its bearer's maturity of mind, his independence of judgment, and his direct responsibility to his conscience and to his God. It signifies the inner sovereignty of those three interrelated professions." Kantorowicz, *supra* note 102, at 6. Hastings Rashdall wrote that "[t]he philosophy of clothes in its application to the medieval universities is a less superficial matter than might at first sight appear" because "[i]t throws much light upon the relation of the universities to the Church." Hastings Rashdall, 3 The Universities of Europe in the Middle Ages 393 (F. M. Powicke & A. B. Emden, eds., 1936 (1895)) (internal quotation marks omitted). Interestingly, the judge did not follow the scholar in borrowing the priest's gown, *see* W. N. Hargreaves-Mawdsley, A History of Legal Dress in Europe Until the End of the Eighteenth Century 3, 54 (1963) ("In legal costume the influence of ecclesiastical dress was . . . only slight."), but the judge nonetheless

Such medieval examinations are regularly "replicated" today.[161] One early-nineteenth-century commentator could write that "[t]he polity of our [English] Universities is, in some respects, of a nature peculiar to itself, and, indeed, possesses more of law than [properly] belongs to places of literature."[162] Universities, in short, were "[l]egal to the core."[163]

That the University's authority was vested in its Board of Regents is worth dwelling upon. The California Regents owned the government of the University, and the Regents considered the University to be "an independent institution, having a complete unity in itself."[164] The Organic Act "places all this property under the control of a little government."[165] The term *regent* has a highly particularized legal meaning, and has historically been used to describe "[a] ruler; a governor.[166] Francis West, a legal historian of medieval

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inhabits "a role that is, in large part, clerical, where he labors largely as a functionary, applying and implementing the law," Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV., 127, 189 (1998) (citation omitted).

More recently, William Clark drew a similar comparison between priests and scholars, recalling that "[l]ike priests, degree-holders had been invested by those before them, and these by those before them, and so on, in an unbroken chain." Clark, *supra* note 66, at 197. By university law, degree-holders were, at times, "enabled, at times obliged, to wear a certain costume." *Id.* at 198; *see also* Peter A. Vandermeersch, "Teachers," *in* 2 A HISTORY OF THE UNIVERSITY IN EUROPE: UNIVERSITIES IN EARLY MODERN EUROPE 246 (Hilde de Ridder-Symoens, ed., 1996) ("Moreover, the statutes of the universities defined academic garb."); HARGREAVES-MAWDSLEY, *supra* note 160, at 69 (describing 1770 university statutes requiring Oxford's doctors of divinity to "wear, in common with other doctors, their Convocation dress on all Sundays within term"). More recently still, Thomas McSweeney argued that thirteenth-century English jurists sitting on the central royal courts, through treatise writing, "transformed themselves from servants of the king to priests of the law." MCSWEENEY, *supra* note 120, at 32. McSweeney draws on a sentence from Bracton's treatise on English laws and customs, which read "law is called the art of what is fair and just, of which we are deservedly called the priests, for we worship justice and administer sacred rights." *Id.* at 1 (quoting 2 BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 24 (1220s–60s)).

Ultimately, the gowns marked the gown-bearer as a privilege-holder. These privileges, in turn, "marked [privilege-holders] off from the rest of the community in which they lived." BROCKLISS, *supra* note 116, at 7. In the late thirteenth century, Parliament enhanced the University of Oxford's privileges, applying them, in addition to the scholars themselves, to "the servants of the clerks or scholars as well as to bedels, parchment dealers, illuminators, scribes, barbers, and any others who wore the livery or robes of clerks." KIBRE, *supra* note 30, at 280. These "bedels, parchment dealers, illuminators, scribes, barbers," according to Clark, would have been "within the *universitas* [but] not necessarily within the studium generale," which was "a very abstract consortium of professional collegia." CLARK, *supra* note 90, at 252. This distinction between *universitas* and *studium generale* maps onto the distinction drawn by the California Supreme Court between the University of California and the California Regents in 1899, discussed *infra*.

This excursis on gowns and gown-bearers aims, on the one hand, following Laura Edwards, to illuminate the legal "relationship between a person and the garments in question," EDWARDS, *supra* note 143, at Introduction, and, following Clark, the legal meaning of the "material practice" of gown-bearing itself, on the other, CLARK, *supra* note 66, at 5. The gown stands for the gown-bearer's clerical status, from which privileges flow. The priests stand in a clerical position to God, the judges to Law, and the scholars to Truth.

[161] CANTOR, *supra* note 105, at 530.

[162] DYER, *supra* note 150, at 50.

[163] Orren, *supra* note 10, at 879.

[164] "The State University: Memorial by the Board of Regents" (1876), UC Berkeley Bancroft Library, CU-1, Box 3.

[165] Ciepley, *supra* note 16, at 2. Americans have long emphasized the value of little governments, through which "rational discussion" may be conducted, as demonstrated by "the New England town meeting and the Quaker meeting." MCCONNELL, *supra* note 19, at 95.

[166] "Regent," 2 BOUVIER'S LAW DICTIONARY 431 (12th ed., 1868). The word *regent* is derived from the Latin *regēns*, meaning "ruler" or "governor." *See* "Regent," *in* THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (T.F. Hoad, ed. 2003). Lord Bryce, in the second volume of his classic *American Commonwealth*, suggested that to a given state, the state university was the "highest organ of its intellectual life." JAMES BRYCE, 2 THE AMERICAN COMMONWEALTH 718 (1914). "On the whole," Bryce writes, "the Regents of late years have generally *ruled* well." *Id.* (emphasis added). The California Regents even issued "rulings" regarding the charge of laboratories, the use of seals by affiliated colleges, and the award of degrees. *See* REGENTS' MANUAL OF ENDOWMENTS, FOUNDATIONS, AGREEMENTS, LAWS, AND ORDERS GOVERNING THE UNIVERSITY 322–23 (1911). Regents' rulings are "mandarin materials" that American legal historians have left untouched. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984).

England, identified "three features of regency" at early common law, the first of which was "that the regent had power to treat the administrative system as the king would."[167] Universities also had regents. At medieval Oxford and Cambridge, "the congregation of regents became the body that carried out the routine functions of university government."[168]

In the university context, the "regent masters" held "powers of government."[169] In 1569, the Earl of Leicester addressed a letter to "Mr Vitz Channcelor as to the rest of the Regentes and rulers in the Universitye."[170] At Paris, Oxford, and Cambridge, newly minted masters were "obligated to teach for one or two years of necessary regency."[171] The regents within the university, as with the regents outside the university, *ruled*. New York seems to have established the first American regents, although the New York Regents are statutory and superintend educational activities across the state, rather than in a single university.[172] Americans adopted the term, and most of the constitutional universities established in the nineteenth century are governed by regents.[173]

During the University's first decade, "it was frequently threatened with proposals for drastic reorganization by the legislature."[174] The Regents

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[167] Francis West, The Justiciarship in England 1066–1232 15 (1966). *See also* E. P. Thompson, Whigs and Hunters: The Origin of the Black Act 77 (1975) ("Throughout th[e] summer [of 1723] the Lords of the Regency Council evidently enjoyed their godlike exercise of the prerogative of mercy, normally reserved to the King.").

[168] Cobban, *supra* note 114, at 228.

[169] Morgan, *supra* note 110, at 76; *see also* Pearl Kibre, The Nations in the Mediaeval Universities 160 (1948) (noting the masters' university "was strictly speaking a masters' association, with the control of affairs largely in the hands of the regent masters in arts").

[170] *Id.* at 77 (quoting Cambridge University Archives, Letter 9.c.2a).

[171] Axtell, *supra* note 26, at 19. The terms *master* and *doctor* were interchangeable in the medieval university. See Rashdall, *supra* note 81, at 19. ("[T]he three titles, master, doctor, professor, were in the Middle Ages absolutely synonymous."); Clark, *supra* note 66, at 187 ("In the Middle Ages, 'master' and 'doctor' had been used rather promiscuously for a time, so that a certain pragmatic synonymy existed.").

[172] *See* E. Blythe Stason & Wilfred B. Shaw, "The Organization, Powers, and Personnel of the Board of Regents," *in* 1 The University of Michigan: An Encyclopedic Survey 140 (Wilfred B. Shaw, ed., 1942) (noting that term originated in University of Paris, where it was used to denote masters of arts, and came to New World via English universities, first arriving in 1787 in the University of the State of New York); *see also An act to revise and consolidate the laws relating to the University of the State of New York*, Laws of New York 1892 ch. 378 §§ 9, 27 (amended 1905) ("The Regents may, as they deem advisable in conformity to law, make, alter, suspend or repeal any bylaws, ordinances, rules and resolutions for the accomplishment of the trusts reposed in them.").

[173] In Michigan, "[t]he term 'Regents' appeared in the Proposed Act of 1818 for the first time." Shelby Schurtz, "The First Twenty Years," *in* A University Between Two Centuries: The Proceedings of the 1937 Celebration of The University of Michigan 39 (Wilfred B. Shaw, ed., 1937). The University of Missouri's Board of Curators is the exception. The Missouri Curators might owe their name to the medieval "apostolic curators," a group of curial officers tasked with "protect[ing] the privileges which the popes had granted to the universities from being abridged or infringed on by local actions." Rüegg, at 16 (citing Miethke, "Kirche," at 314 n. 4)). *See also* Duryea, *supra* note 22, at 3 ("Under such titles as *curators*, *reformatores*, and *trattatores*, the concept of the nonacademic trustees had precedents in the northern Italian medieval *studia* at Bologna, Padua, Florence, and Pisa."); Post, *supra* note 117, at 144 (noting that the University of Paris held "the corporate right of electing a *procurator* to represent them at Rome in causes concerning them."). Oxford also had procurators, known as "proctors." *See* Pantin, *supra* note 8, at 77.

[174] Verne A. Stadtman, "Constitutional Provisions," *in* The Centennial Record of the University of California 149 (Verne A. Stadtman, ed., 1968).

proclaimed themselves to be the University of California's "guardians against external attack" in response to a law to unify California's Common Schools and its University.[175] They might have meant to invoke the Michigan Regents, who commissioned a report in 1858 to investigate the question of moving the university's medical department to Detroit. The Report concluded that the 1850 Michigan Constitution made the Regents "the constitutional guardians of the Institution."[176] Henry Philip Tappan, the University of Michigan's first president,[177] described the Michigan Regents in a speech two months earlier as "the legal guardians of the University."[178]

The California Regents defended the University against internal attack in addition to external attack. For example, "[i]n the autumn of 1873, [Professor Ezra S. Carr] instigated a movement to abolish the appointed board of Regents and to abolish all colleges of the University but that of agriculture and mechanic arts."[179] Carr and one of his colleagues "joined the protests of the Grange," a group of "discontented farmers [who] rose in anger" against California's bankers, railroad tycoons, and University.[180] Instead of subordinating the University, these attacks helped to elevate the University "to the place and dignity of a constitutional department of the body politic."[181]

Although the Regents were granted the government of the University, they did not govern all of the University's constituent components and the University remained within the Legislature's reach. The Hastings College of the Law provides an early example.

The Hastings College of the Law "was founded by S[erranus] C[linton] Hastings, under and by virtue of the act entitled 'An act to create Hastings College of the Law, in the University of the State of California,' approved March 26th, 1878."[182] Classes commenced in San Francisco in August

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[175] "Memorial by the Board of Regents," *supra* note 164.

[176] UNIVERSITY OF MICHIGAN REGENTS' PROCEEDINGS, *supra* note 154, at 778.

[177] THE RISE OF THE RESEARCH UNIVERSITY: A SOURCEBOOK 145 (Louis Menand, Paul Reitter, & Chad Wellmon, eds., 2017).

[178] HENRY PHILIP TAPPAN, THE UNIVERSITY: ITS CONSTITUTION AND ITS RELATIONS, POLITICAL AND RELIGIOUS (1858), *reprinted in* 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 543, 544 (Richard Hofstadter & Wilson Smith, eds., 1961). Drawing on the imagery of defense and guardianship, one University of California historian went so far as to compare the university to a castle. *See* THOMAS GARDEN BARNES, HASTINGS COLLEGE OF THE LAW: THE FIRST CENTURY 1–2 (1978).

[179] Richard E. Powell, "College of Chemistry," *in* THE CENTENNIAL RECORD OF THE UNIVERSITY OF CALIFORNIA 71 (Verne A. Stadtman, ed., 1968).

[180] DOUGLASS, *supra* note 34, at 48–49.

[181] Williams v. Wheeler, *supra* note 28, at 623.

[182] Foltz v. Hoge, 54 Cal. 28, 31 (1879) (per curiam).

1878.[183] That same year, Serranus Hastings, California's first Chief Justice and the first Dean of the College of the Law which, until recently, bore his name,[184] urged the California Regents to affiliate the College with the University of California.[185] Under the Organic Act of 1868, the Regents could "affiliate with the University, and make an integral part of the same, and incorporate therewith, any incorporated College of Medicine or of Law . . . and such college or colleges so affiliated shall retain the control of their own property."[186]

The College's founder saw the question as to who had the government of the College, which was an open one because the College had a Board of Directors independent of the Regents, through the medieval prism of *dominium*.[187] Hastings put forth his "Suggestions for affiliation" of the College of the Law with the University in an 1879 document addressed to the Regents.[188] In it, Hastings discussed several concerns regarding this affiliation, including what relationship the Directors of the College would have with the Regents. On this issue, he wrote the following: "It is asked have the Regents anything to do with this College? The answer to which is, they *rule* it as a department and as a College affiliating. They have the *general dominion* while the Directors have a *Special Dominion*."[189] The Directors' *dominium* is, according to Hastings, a *proprietas*; they have a *proprietas*—"an immediate *dominium*"[190]—in the College itself. The Regents, however, have a mediate *dominium* and no *proprietas* in the College; their *proprietas* was in their *dominium*.

Clara Foltz's case for admission to California's first law school[191] in the last quarter of the nineteenth century illustrates this point. Foltz found herself in

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[183] Verne A. Stadtman, "Hastings College of the Law," *in* The Centennial Record of the University of California 303 (Verne A. Stadtman, ed., 1968).

[184] The College of the Law has indicated that it will change the school name because of controversy over its founder's alleged involvement in wars with Indian tribes in the second third of the nineteenth century, *see* Thomas Fuller, *A New Name for California's Oldest Law School? It's Not Easy*, N.Y. Times (March 17, 2022), https://www.nytimes.com/2022/03/17/us/new-name-california-law-school.html, notwithstanding the statutory requirement that the College "be forever known and designated as 'Hastings' College of the Law.' " 1878 Cal. Stats. ch. CCCLI, § 1. *See also* John Briscoe, *Of Colleges and Halls and Judges Bearing Gifts: Reflections on the Great Denaming Debates*, Cal. Sup. Ct. Hist. Soc'y Rev. 2 (2023).

[185] *See* Foltz v. Hoge, *supra* note 182, at 31 (quoting Organic Act of 1868).

[186] Organic Act, § 8 (1868).

[187] *See* Foltz v. Hoge, *supra* note 182, at 32.

[188] Hastings Suggestions, UC Berkeley Bancroft Library, CU-1, Box 5.

[189] *Id.* at 2.

[190] Maitland, *supra* note 11, at 31. Similar jurisdictional debates were taking place at the University of Cambridge around the same time. Rothblatt notes that, in the mid-nineteenth century, "[d]iscipline was undermined . . . by jurisdictional disputes between the university and its constituent colleges; college loyalty frequently conflicted with university authority." Rothblatt, *supra* note 66, at 184.

[191] *See* Barbara Babcock, Woman Lawyer: The Trials of Clara Foltz 10 (2011).

the midst of "the medieval muddle"[192] of *proprietas* and "divided *dominium*."[193] Often reduced to "the happy haze of collective ownership"[194] —"a haze that was more than [the] fog" so emblematic of the San Francisco Bay[195]—*proprietas* and *dominium* continue to haunt the University. The *Foltz* case at once exemplifies California's progressive proclivities and helps us see clearly "the beginnings [that] could easily be lost in the haze of a half-legendary past."[196]

Foltz, an early proponent of public defense in criminal cases, attempted, against considerable opposition, to enroll at Hastings.[197] After Foltz attended the school for three days (more or less), the Directors refused her admission. Her supplications for reconsideration failed to reverse the decision, and she sued the Directors for admission.[198]

In February 1879, as the delegates to the Constitutional Convention in Sacramento were framing the new Constitution, Foltz litigated her case along with another woman seeking admission to the law school.[199] The Directors, through their president Joseph Hoge,[200] claimed that the College "is a private eleemosynary perpetual trust, and although not a corporation, its nature and character may be ascertained by way of analogy, from what has been declared to be the attributes of corporations created for similar purposes."[201] To make their case, they turned to the *Dartmouth College* case as well as English precedent, including a seventeenth-century English case called *Philips v. Bury*,[202] which stood for the principle that determinations by a visitor, according to the constitution and laws of a college properly formed as an eleemosynary corporation, were "final, and examinable in no other court whatsoever."[203] The Directors argued that they "have the entire

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[192] MAITLAND, *supra* note 11, at 32.

[193] LEE, *supra* note 49, at 95.

[194] *Id.* at 31.

[195] BARNES, *supra* note 178, at 43.

[196] TIERNEY, *supra* note 44, at 28.

[197] SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 25 (2020) (describing how Foltz "toured the nation lobbying for public defender legislation beginning in the 1890s"); *see also* Laurence A. Benner, *The California Public Defender: Its Origins, Evolution and Decline*, 5 CAL. LEG. HIST. 173, 174 (2010).

[198] *See* BABCOCK, *supra* note 191, at 44–46.

[199] *See id.* at 46, 48.

[200] *See* BARNES, *supra* note 178, at 53, 71.

[201] Foltz v. Hoge, *supra* note 182, at 28–29 (citations omitted). On "unincorporate bodies," *see* Frederic William Maitland, "The Unincorporate Body," *in* THE FREDERIC WILLIAM MAITLAND READER 130 (V. T. H. Delaney, ed., 1957).

[202] Philips v. Bury, King's Bench (1694) (C.J. Holt, dissenting).

[203] BLACKSTONE'S COMMENTARIES, *supra* note 31, at 470 (summarizing Chief Justice Holt's opinion). There is an ongoing "debate as to whether university decision-making should be subject to judicial review." Whittaker, *supra* note 136, at 105.

control and management of the trust," full power to "exercise[] a wise and enlightened discretion upon all matters of government and of discipline which are essential to the success and usefulness of the College," and were "not controlled by the general law which regulates the University."[204] While "[t]he act of foundation, it is true, makes the College the Law Department of the University, . . . it does not give the Regents any control of it."[205]

On the other side, the "legal theory for [Foltz's] suit was clear. Hastings was a branch of the public university, which had been made coeducational by law."[206] Shortly after the Constitutional Convention closed in early March 1879, the trial judge, Robert Morrison, ruled in favor of Foltz.[207] "Against the wishes of founder Hastings, who thought the opinion correct, the directors decided to appeal."[208]

The California Supreme Court took the appeal, hearing arguments in late December 1879.[209] Foltz argued the case herself, and she was no doubt aided in this effort by the fact that she had been, since September 1878, admitted as a lawyer to the California bar.[210] The Court's decision was swift and brief: "[f]emales are entitled, by law, to be admitted as attorneys and counsellors in all the courts of this State, upon the same terms as males . . . . It was affiliated with the University, and thus became an integral part of it, and in our opinion became subject to the same general provisions of the law, as are applicable to the University."[211] In the final analysis, "the same general policy which admitted females as students of the University, opened to them the doors of the College of the Law."[212] Foltz, who was a lawyer when she successfully sued the American West's first law school for admission, never matriculated to the law school.[213]

Although the Directors of the College of the Law had the government and property of the College, rather than the Regents, Foltz's suit demonstrated that the College was integrated into the University. The University, in

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[204] Foltz v. Hoge, *supra* note 182, at 29.

[205] *Id.*

[206] Babcock, *supra* note 191, at 47.

[207] *Id.* at 55.

[208] *Id.*

[209] Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman*," 30 Ariz. L. Rev. 673, 714 (1988).

[210] *See id.* at 31, 57.

[211] Foltz v. Hoge, *supra* note 182, at 35.

[212] *Id.*

[213] *See* Babcock, *supra* note 191, at 57 (noting that California Supreme Court decision in *Foltz* "came too late for Foltz" herself because of competing demands).

turn, was within the Legislature's reach. The new Constitution, which the People would ratify in just a few short months, would drastically change this arrangement. We will return to the College of Law's "medieval muddle" after discussing California's second Constitutional Convention.

PART II: THE CONSTITUTIONAL CONVENTION OF 1878

Californians convened a second Constitutional Convention in Sacramento in September of 1878,[214] ten years after the Organic Act was passed. This second Convention grew out of "deeply rooted discontents" that "reflected disillusionment, and often keen outrage, with how the political system was performing."[215] While the Grangers remained concerned with University affairs, drought, depression, corruption, race issues, and labor disputes drew most of the delegates' focus at the Convention.[216] Delegates introduced two main proposals regarding the University: one "that would both limit the function of the University to instruction 'of a practical character' and place it more directly under legislative control" and another "that would free the University from 'all pernicious political influences'"[217] and "remove[] the University from the changeable and sometimes capricious ideas of education and of methods of administration advocated from time to time in legislatures."[218]

The delegates thought that how the University planned to use the proceeds generated from the sale of land provided by the 1862 Morrill Act, furnishing public lands for the advancement of education in the agricultural and mechanical arts, was important.[219] The Grangers also brought complaints about the University's curriculum, by that time familiar, to the Constitutional Convention.[220] But other elements of the Convention had a different plan in mind for the University.

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[214] *See*, *e.g.*, FERRIER, *supra* note 70, at 306–15.

[215] Harry N. Scheiber, *Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution*, 17 HASTINGS CONST. L. Q. 35, 37 (1989).

[216] *See* DOUGLASS, *supra* note 34, at 57; *see also* Gordon Morris Bakken, *California's Constitutional Conventions Create Our Courts*, 1 CA. SUP. CT. HIST. SOC'Y YEARBOOK 37 (1994) ("[T]he motive force behind the calling of a convention was domestic politics and depression.").

[217] Stadtman, *supra* note 174, at 149.

[218] FERRIER, *supra* note 70, at 372–73; *see also* Stadtman, "Constitutional Provisions," supra note 174, at 149.

[219] Act of July 2, 1862, Public Law 37–108. Some believed that this initial grant from the national government, coupled with the largesse of the State of California, endowed the University with "a National and State character." PROSPECTUS FOR THE PHEBE HEARST ARCHITECTURAL PLAN OF THE UNIVERSITY OF CALIFORNIA 3 (1897).

[220] *See* Douglass, *supra* note 70, at 59–60.

In October 1878, Walter Van Dyke, a Republican lawyer and Delegate from Alameda,[221] introduced a proposal that would shield the University from "legislative enactments" that might change its organization.[222] The delegates would later adopt much of this proposed amendment. Because of its extraordinary nature, the proposed Amendment is reproduced in its entirety below:

> Whereas, the University of California is not, either in its origin or endowments, exclusively a State institution, but derived its origin from the College of California, and has received large endowments from the Congress of the United States upon certain conditions connected therewith affecting its organization, and also valuable endowments from individuals, which were designed to preserve and develop it in its present form, and to attain the full benefit and proper use of said endowments, and give such stability to said University as will tend to acquire further endowments from private sources, it is expedient that it should continue in perpetuity under its present organization and government, and incapable of change—it is declared that said University shall constitute a public trust, and that its organization and government shall be perpetually continued in their existing form, character, and condition, subject only to such legislative enactments as shall not be inconsistent therewith, and shall only pertain to its support and more complete development; and it is further declared that the Board of Regents, in its corporate capacity, and their successors in that capacity, their officers and servants, shall have, hold, use, exercise, and enjoy all the powers, authorities, rights, liberties, privileges, immunities, and franchises which they now have or are entitled to have, hold, use, exercise, and enjoy, and the same are hereby ratified and confirmed unto them and to their successors, and to their officers and servants, respectively, forever.[223]

Van Dyke's proposal is extraordinary for a number of reasons. First, it represents an attempt by a nineteenth-century legal mind to make sense of the academic corporation. Second, it represents a constitutional attempt to satiate the American insistence on external lay government of universities.[224]

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[221] Biographical Sketches of the Delegates to the Convention to frame a New Constitution for the State of California 156 (T.J. Vivian & D.G. Waldron, eds. 1878).

[222] E. B. Willis & P. K. Stockton, Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28 1878, Vol. 1 at 172 (1880).

[223] *Id.*

[224] *See* Duryea, *supra* note 22, at 3 ("one can note a pervasive trait of American higher education has been the influence of governing boards of lay trustees").

Third, it underscores the Regents' corporate personality. Fourth, it highlights the Regents' perpetual existence. Fifth, it grants the Regents an impressive estate, complete with such "authorities, rights, liberties, privileges, immunities, and franchises" that it already held, and in addition, those that it might be entitled to hold, and mandates that these entitlements be held "forever."

The University's foremost proponent at the Convention, Regent Joseph H. Winans of San Francisco,[225] argued in January 1879 that the University "will never flourish" so long as it remains the "plaything of politics."[226] He drew inspiration from the University of Michigan example.[227] Regent Winans offered a proposal, which included the public-trust language, developed by the University's supporters in the months after Van Dyke offered his October proposal.[228]

In his excellent book on the University's history, political scientist John Aubrey Douglass suggested that the University's detractors implored the other Convention delegates to reject the public-trust language because that status "could not be revoked 'no matter what naughty things it may do hereafter.' "[229] Douglass argued that most delegates were "decidedly against the university becoming a public trust."[230] But this, the delegates said explicitly, was not the main objection to the aforementioned proposed language. One delegate asked whether the University "[i]s . . . not a public trust." Another delegate responded: "I will explain in the course of the argument. That is not the main objection."[231] A third delegate observed that "no one can deny that [the University] is a great public trust, but objection is made to the provision that its organization and government shall be perpetually continued."[232] If this delegate summarized the disagreement accurately, the issue would appear to have been the irrevocable fixing of the University's organization and government. No one, it seems, wished to deny that the University was a public trust. Moreover, it is not clear that the Constitution's public-trust language affected the University's public-trust

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[225] BIOGRAPHICAL SKETCHES, *supra* note 221, at 130. *See also* Douglass, *supra* note 70, at 40–52, esp. 42.

[226] DOUGLASS, *supra* note 34, at 68 (quoting E. B. WILLIS & P. K. STOCKTON, 2 DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF STATE OF CALIFORNIA 1476 (1881)).

[227] *See id.* at 64 (Winans was "[e]nthralled with Michigan's 1849 definition of its university as a 'coordinate branch of state government' "); MICH. CONST. art. XIII § 8 (1850). University supporters drew inspiration from the University of Michigan, with one article in the San Francisco *Evening Bulletin* suggesting that "[w]hat the Michigan University is now doing for the West we hope to see the University of California do for the Pacific Coast." FERRIER, *supra* note 70, at 285 (quoting San Francisco *Evening Bulletin*, March 17, 1868).

[228] *See* DOUGLASS, *supra* note 34, at 64.

[229] *Id.* at 66 (quoting 2 DEBATES AND PROCEEDINGS, *supra* note 226, at 1110, 1113).

[230] *Id.* at 65.

[231] 2 DEBATES AND PROCEEDINGS, *supra* note 226, at 1116.

[232] *Id.* at 1117.

status. In using the present tense to reference the University's public-trust status, the third delegate quoted above indicated that the University was, at the time of the Convention, already a public trust. Lastly, the pages in the Convention record that Douglass cited to support his claim that the delegates objected to the proposal because of the public-trust language contain no mention of the term *public trust*.[233]

A last-minute proposal, drafted in part by Regent Winans, carried the day.[234] Article IX, § 9, read as follows:

> The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic Act creating the same, passed March twenty-third, eighteen hundred and sixty-eight (and the several Acts amendatory thereof), subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments, and the proper investment and security of its funds. It shall be entirely independent of all political or sectarian influence, and kept free therefrom in the appointment of its Regents, and in the administration of its affairs; *provided*, that all the moneys derived from the sale of the public lands donated to this State by Act of Congress, approved July second, eighteen hundred and sixty-two (and the several Acts amendatory thereof), shall be invested as provided by said Acts of Congress, and the interest of said moneys shall be inviolably appropriated to the endowment, support, and maintenance of at least one College of Agriculture, where the leading objects shall be (without excluding other scientific and classical studies, and including military tactics) to teach such branches of learning as are related to scientific and practical agriculture and the mechanic arts, in accordance with the requirements and conditions of said Acts of Congress; and the Legislature shall provide that if, through neglect, misappropriation, or any other contingency, any portion of the funds so set apart shall be diminished or lost, the State shall replace such portion so lost or misappropriated, so that the principal thereof shall remain forever undiminished. No person shall be debarred admission to any of the collegiate departments of the University on account of sex.[235]

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[233] *See* Douglass, *supra* note 34, at 66 (quoting 2 Debates and Proceedings, *supra* note 226, at 1110, 1113).

[234] For a detailed account, *see id.* at 62–67.

[235] Cal. Const. art. IX, § 9 (1879) (emphasis in original).

This section incorporated the 1868 Organic Act into the Constitution and continued the University's government in perpetuity, as the California Supreme Court observed in 1894.[236] A 2011 treatise on California constitutional law noted that, "[b]y virtue of Section 9, the university was invested with 'constitutional' status, acquiring significant autonomy from the legislature in its governance."[237] Douglass wrote that "the regents suddenly possessed exclusive power to operate, control, and administer the University of California."[238] Thus, the University was, as one California appellate judge put it in 1913,

> elevat[ed] . . . to the place and dignity of a constitutional department of the body politic, and from the express terms of the constitution itself, to the effect that its organization and government should be perpetually continued in the form and character prescribed by the act of its foundation, and that in those respects it should not be subject to legislative control.[239]

The University's authority no longer derived from the Legislature, but directly from the People of California.[240] The University's "organization and government," which was to "be perpetually continued" in the manner described in the 1868 Organic Act, included the 1868 incorporation certificate, which was an essential part of the University's corporate history.[241] Incorporating by reference the Organic Act and the incorporation certificate into the 1879 Constitution created a constitutional corporation, which was the foundation of California's constitutional university. While "various groups have sought to give their own favored public bodies special constitutional status," the University's proponents not only secured special constitutional status for the University, they transformed it into "the highest form of juristic person known to the law, a constitutional corporation."[242]

If the University is a fourth branch of government,[243] as Douglass

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[236] *See* Lundy, *supra* note 77, at 659

[237] Joseph R. Grodin, Calvin R. Massey, & Richard B. Cunningham, The California State Constitution 166 (2011). *See also* Douglass, *supra* note 70, at 32 ("the existence and powers of the university were elevated from a statutory to a constitutional provision.").

[238] Douglass, *supra* note 34, at 69.

[239] Williams v. Wheeler, *supra* note 28, at 623.

[240] *See* Douglass, *supra* note 70, at 32, 65 (quoting Joint Committee on Legislative Organization, Constitution Revision Commission, "Article IX, Education: Background Study" at 16–19 (Jan. 1969), UC Santa Barbara Archives).

[241] *See* Lundy, *supra* note 77, at 658–59.

[242] Auditor General v. Regents, *supra* note 14, at 450.

[243] Or, if one prefers, the Regents constitute the fifth branch of government where the electorate is the fourth. See David A. Carrillo, Stephen M. Duvernay, & Brandon V. Stracener, *California Constitutional Law: Popular Sovereignty*, 68 Hastings L.J. 731, 734 (2017) ("[T]he electorate should be viewed as a legislative branch of the state government when using its legislative powers."); Leah Haberman, *More than Moratoriums?: The Obstacles to Abolishing California's Death Penalty*, 17 Cal. Leg. Hist. 333, 335 (2022) ("Because of California's ballot initiative process, there are four branches of government that shape California's laws: the executive, the legislature, the courts, and the people."). Arrangements such as this are common in state constitutions. See Marshfield, *supra* note 45, at 6 (noting the "highly complex, ad hoc, cross-cutting, and imbalanced arrangement of powers in state government").

argued,[244] then at the core of this branch of California government are, ironically, private citizens, who are not public officers.[245] In other words, the Regents are non-public constitutional officers.[246]

The 1879 Constitution was adopted by the Convention on March 3, 1879, ratified by the People of California on May 7, 1879, and took full effect on January 1, 1880.[246]

PART III: CALIFORNIA'S CONSTITUTIONAL UNIVERSITY, 1879–1900

California's constitutional university posed immediate legal problems after its creation and, while "the scope of [the University's] independence has never been precisely delineated" by California courts, the few opinions dealing with the issue are instructive.[247] The 1886 California Supreme Court case of *People v. Kewen* sheds light on the issue by demonstrating the constitutional university's legislation-busting power.

The *Kewen* case dealt with two statutes passed by the California Legislature soon after the new Constitution went into effect. The College of Law's early years were at once successful and tumultuous.[248] The College's founder, Serranus Hastings, delivered a scathing speech at a September 1882 Regents meeting, in which he argued that either a college's founder or the founder's heir retains visitorial power, citing English precedents and statutes.[249] Hastings delivered the speech after draft legislation, enacted the following year, concerning the College was introduced in the California Legislature.

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[244] See Douglass, *supra* note 34, at 69 (noting that the University "became virtually a fourth branch of government"); *see also* Horowitz, *supra* note 22, at 25 (noting that 1879 California Constitution "seems clearly to have created a separate branch of state government in the area of higher education"). This metaphor was invoked by Moos and Rourke in 1959 but its earliest appearance seems to be in Chambers and Elliot's 1941 book on colleges and the courts. *See* Moos & Rourke, *supra* note 22, at 18, 22 ("And those states which have given the university constitutional recognition as virtually a fourth branch of government have honored higher education with a status that has lifted it high above the common run of state activities."); M. M. Chambers, The Colleges and the Courts 1936–40 35 (1941). One historian has suggested that, "[u]ntil the late nineteenth century, Oxford was literally part of the British state. Along with the monarchy, Parliament, and the Church of England, Oxford was a branch of the governing establishment." Soares, *supra* note 148, at 5. That is, until recently, Oxford was, by my count, also a "fourth branch of government." To the extent that this was the case, this branch of government was an exceptionally weak one at times. At late medieval Oxford, for instance, "the university had come to regard the unofficial position of protector as established in practice, and necessary" for the protection of its privileges. Storey, *supra* note 114, at 719.

[245] The Regents held their positions as private trust[s]" only. Organic Act, § 11. One popular nineteenth-century legal dictionary defined a trust as "[a] right of property, real or personal, held by one party for the benefit of another." "Trust," 2 Bouvier's Law Dictionary 615 (1868).

[246] *See* Cal. Const. art. XXII § 12 (1879).

[247] Grodin, Massey, & Cunningham, *supra* note 237, at 167.

[248] *See* Barnes, *supra* note 178, at 77.

[249] *See id.*

That act amended the College's 1878 charter, stating that "[t]he Regents of the University shall have the same control of the College as they possess over the academic department of the University of California."[250] According to legal historian Thomas Garden Barnes, "[t]he effect of the amending act was to make the Board of Directors superfluous, though it does not appear to have effected the Board's abolition."[251] All authority formerly vested in the Directors was vested instead in the Regents, including control of the College's property.

The second bill at issue in *Kewen* was introduced in the Legislature in February 1885, and would amend the 1883 act by vesting in the Chief Justice of California, who was the president of the Directors by both the 1878 act and the 1883 act,[252] the power to appoint future Directors, with the assent of the remaining members of that body.[253] The act reaffirmed the Regents control of the College and aimed to addressing the issue of the control of College property. The Organic Act of 1868 granted the Regents the power to "affiliate with the University, and make an integral part of the same, and incorporate therewith, any incorporated College of Medicine or of Law . . . and such college or colleges so affiliated shall retain the control of their own property."[254] The 1883 Act succeeded in integrating the College with and incorporating the College into the University but had failed to affiliate the College by relieving the Directors of their *proprietas* in and *dominium* over in the College, thereby causing the "affiliating corporate entity" to "disappear[] by virtue of the act."[255] Indeed, "by vesting the property of the College in the [Directors], the 1885 act cured the [1883 act's] defect by recreating the affiliating entity."[256] Property constitutes "the breath of a fictitious life,"[257] guaranteeing independence and defining "the public and political character of boroughs like New York City"[258] and universities like the University of California.

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[250] *Id.* at 79 (quoting Cal. Stats. 1883, ch. 20).

[251] *Id.* at 80.

[252] *See* 1878 Cal. Stats. ch. CCCLI, § 14.

[253] *See id.* at 80–81.

[254] Organic Act, § 8 (1868).

[255] BARNES, *supra* note 178, at 81.

[256] *Id.* at 82.

[257] Maitland, *supra* note 12, at xxx.

[258] HARTOG, *supra* note 85, at 23–24. On the relationship between university independence and property, *see* SOARES, *supra* note 148, at 15–31, 273 ("The power of self-governance ultimately rests on material resources, especially cash."); *see generally* MIGUEL URQUIOLA, MARKETS, MINDS, AND MONEY: WHY AMERICA LEADS THE WORLD IN UNIVERSITY RESEARCH (2020). A recent book on the history of university endowments is illuminating: BRUCE A. KIMBALL WITH SARAH M. ILER, WEALTH, COST, AND PRICE IN AMERICAN HIGHER EDUCATION: A BRIEF HISTORY (2023).

The 1885 act caused as many problems as it resolved. Most importantly, the act disturbed the delicate, unorthodox relationship between founder and Directors, producing "an impasse in the exercise of responsibility and powers that really did not affect function."[259] While not affecting function, the act galvanized the original Directors, appointed under the 1878 act, into action against the founder. In April 1885, the Directors asserted their "claim as the rightful authority over the College," rather than the new "trustees" appointed under the 1885 act, by appointing Regent Winans—"the noted lawyer, man of culture, bibliophile"—to the deanship and Perrie Kewen to the position of registrar, goading the College's founder.[260] The Directors elevated to "the deanship the most stalwart fighter for the University's independence from political influence," who was instrumental in securing the University's constitutional status, which was "the basis of [the Directors'] case against the 1883 and 1885 acts."[261] The Chief Justice of California, who as a trial judge had ruled in favor of Foltz in 1879, allied himself with the Directors, but does not appear to have participated in the case.[262] The Directors succeeded in eliciting legal action from the founder, who caused the California attorney general to bring a lawsuit to remove the Directors' registrar.

The founder prevailed over at trial, and Kewen appealed. Five directors, including former president Joseph Hoge, represented Kewen in the appeal, which was heard by the California Supreme Court in March 1886. The question was the constitutionality of the 1883 and 1885 acts. If the acts were lawful, the Directors' appointment was unlawful; if they were unlawful, the Directors' appointment was lawful. In a short opinion, the Court held that

> [t]he constitution of 1879 (article 9, § 9) declared that the university should be continued in the form and character prescribed in the acts then in force, subject to legislative control for certain specified purposes only. Such being the case, it was not competent for the legislature, by the act of March 3, 1883, or that of March 18, 1885, or by any other act, to change the form of the government of the university, or of any college thereof then existing.[263]

Thus, the court held that the constitutional prohibition on legislative interference with University governance extended even to the Hastings

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[259] Barnes, *supra* note 178, at 82.

[260] *Id.* at 83.

[261] *Id.*

[262] *See Id.* at 83.

[263] People v. Kewen, 69 Cal. 215, 216 (1886) (Myrick, J.).

[264] This may reflect Americans' deep distrust of the legislature, legislators, *and legislation itself* in late-nineteenth-century California. *See* Grodin, Massey, & Cunningham, at 21; *see also* Barnes, *supra* note 178, at 46 (listing "distrust[] of legislators and the judiciary" among the "small-farmer element in California society" whose demands brought about the Second Constitutional Convention).

College of the Law, which was not governed by the Regents.[264] The Court so held without defining the extent of the University's independence. What was clear from the opinion was that the Regents' *dominium* extended to the whole of the University, which was "a complete unity in itself,"[265] including to that part of the University in which the Regents did not have a *proprietas*.

The case evinced the irony characteristic of university history. As Barnes noted, "[t]he constitutional safeguards against political interference in the University had been construed to prevent the legislature from perfecting the affiliation of Hastings with the University, which had been intended by the original act of [the College's] creation of 1878."[266] The Legislature was unable to legislate for the College, even if that meant frustrating the design of the College's original legislative charter. Because the University was a constitutional university, the legislature was no longer able to control that which it created.

In the following decade, the University would again appear before the California Supreme Court, this time concerning the Regents' status as public officers. The case began with a "an early-day gift of inestimable value to the University" that became "the crowning possession of the University": the Lick Observatory at Mount Hamilton, located seventy miles south of the University, just east of San Jose in the Diablo Mountain Range.[267] The still-standing observatory, made possible through James Lick's munificent 1875 gift of $700,000, was the largest telescope on earth when it was completed and transferred to the Regents in 1888.[268] The Regents maintained a telegraph and telephone line running from San Jose to the Observatory, presumably along the very road constructed in 1876.[269] In November 1891, Daniel Lundy was traveling along this road when he was caught in the utility wires and instantly killed. Lundy's son sued the Regents and, in doing so, presented the California courts with an interesting case turning on the Regents' status as public officers.

The *Lundy* plaintiff accused sixteen Regents of negligently maintaining the utility poles, allowing them to rot.[270] These rotting poles, in turn, dropped the utility wires dangerously low to the ground. The Regents, the plaintiff

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[265] "Memorial by the Board of Regents," *supra* note 164.

[266] Barnes, *supra* note 178, at 84.

[267] Ferrier, *supra* note 70, at 417 (quoting Millicent W. Shinn, "The University of California," Overland Monthly (Oct. 1892)).

[268] *See id.* at 418; Annual Report of the Secretary of the Board of Regents of the University of California 13 (1876).

[269] Lundy, *supra* note 77, at 656.

[270] *Id.* at 659.

alleged, allowed these wires to remain in this dangerous position, and were therefore at fault for Lundy's death. The Regents moved the trial court to consider whether the suit could proceed because "[t]he negligence shown, if any, is the negligence of the corporation called the 'Regents of the University of California,' which, as owner of the lines in question, owed to the plaintiffs' father the duty of maintaining said lines in proper condition."[271] The trial court denied this motion. After parties presented their respective cases, the trial court ruled for the plaintiff and awarded $10,000 in damages.[272] The case was then appealed to the California Supreme Court.

The only question before the Supreme Court in *Lundy v. Delmas* was whether the lower court properly denied the Regents' motion. The court recounted the University's chartering documents—the 1868 Organic Act, the 1868 incorporation certificate, the 1879 Constitution—before turning to the pertinent suite of statutory provisions. First, there was the 1873 act, which enumerated the state's "civil executive officers." This list included the twenty-two Regents.[273] However, the Court noted, the 1868 Organic Act required that no Regent "be deemed a public officer by virtue" of their regency,[274] and this arrangement was "perpetually continued" by the 1879 Constitution.[275]

The Court first addressed the preliminary question as to whether the Regents were a corporation, answering it in the affirmative. The next question was whether the Regents were individually liable for Lundy's death. "The rule," the Court wrote, "undoubtedly is that public officers are answerable in damages to any one specially injured by their neglect or omission to perform the duties of their offices."[276] Yet the Regents "were not public officers" by the explicit language of the 1868 Organic Act.[277] The 1879 Constitution overrode the 1873 act including the Regents among the state's "civil executive officers." The verdict below had to be reversed because none of the Regents could be held liable under the rule of public-officer negligence, according to which the case proceeded. Thus, the Court recognized for the first time that the Regents were non-public constitutional officers.

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[271] *Id.* at 657.

[272] *See id.*

[273] *See id.* at 659.

[274] *Regency* was the term used to refer to the collective Regents in both California and Michigan. *See* Annual Report, *supra* note 268, at 3 (describing "changes in the Regency"); A University Between Two Centuries, *supra* note 173, at 8 (quoting University of Michigan president Alexander G. Ruthven recounting that Regent Edmund C. Shields had "steadfastly refused to hold any public office except the Regency of the University").

[275] Lundy, *supra* note 77, at 658–59 (quoting 1868 Organic Act).

[276] *Id.* at 659.

[277] *Id.*

The Regents were before the California Supreme Court again five years later in *In re Royer's Estate*.[278] Herman Royer included a provision in his will that "[a]ll the rest and residue of my property and estate I do hereby give, devise, and bequeath unto the University of the State of California."[279] Should this gift fail, it was to revert to Royer's next of kin. In the case involving a challenge to the resulting bequest to the University, the trial court concluded that

> neither the University of the State of California, nor the University of California, is now, or ever has been, a corporation under the laws of this state, and is not a person, and that each is an entity distinct from the Regents of the University of California, which latter are a corporation duly organized under the laws of this state.[280]

Because neither the University of the State of California nor the University of California was a corporation, neither could receive the bequest and the same was to revert to the next of kin.[281] The case was appealed to the California Supreme Court.

Because "[t]he questions involved are of much importance, as they concern not only the bequest in issue, but previous gifts and grants as well as the legal status of the university,"[282] the high court entered into a thorough discussion of the University's legal history, beginning with the California Constitution of 1849, which reserved certain lands for the prospective use of a contemplated university, and running up to the provisions of the 1879 Constitution.[283] After recounting this history, the Court analyzed the University's corporate status.

The Court determined that, while the University "may be unique, . . . it is nevertheless an instrumentality of the state, created by the legislature acting within its just power."[284] Further, "[t]hat the regents are by law made the governing body of the university, and are required to incorporate under the laws of the state, is by no means inconsistent with the continued existence of the university as a public corporation." Because the University was a public corporation, the Court reasoned, with reference to the U.S. Supreme Court's 1819 *Dartmouth College* decision, "[a]ll its property is property of the state. It was created by the state, and is subject to the laws of the state, as a state institution, within the limits of the new constitution, which has declared it

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[278] In re Royer's Estate, *supra* note 70, at 615.

[279] *Id.* at 615; *see also* Regents' Manual, *supra* note 166, at 211–12.

[280] In re Royer's Estate, *supra* note 70, at 615.

[281] *See id.* at 616.

[282] *Id.* at 616.

[283] *See id.* at 617–20 (citing Cal. Const. art. 9, § 4 (1849)).

[284] *Id.* at 620.

to be a public trust." The Organic Act established the University and, while vesting the government thereof in the Regents, it did not establish them as a corporation. The Organic act "nowhere provides, in terms or by implication, that when incorporated the regents should become, and thereafter be, the university."[285] Because "[t]he regents are in fact a part of the university, with specifically defined powers in their custody and control of the property and the management of university affairs,"[286] they "have no duties or powers beyond the purpose of their creation, which was to take the custody and control of the university property, and to perform certain prescribed duties in the management of the university."[287] The Regents constituted "a corporation within a corporation,"[288] and cannot be regarded "as a legal corporate entity, except as a part of, and ancillary to, the parent and principle institution,—the public corporation created by law as such, and entitled 'The University of California.' "[289] This view of the University's legal status aligned with the view espoused by the Regents in 1876, according to whom the University had "a complete unity in itself."[290] Because the University was a public corporation, it could receive money by bequest and the decision below was accordingly reversed.[291]

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[285] *Id.* at 621.

[286] In re Royer's Estate, *supra* note 70, at 621.

[287] *Id.* at 622.

[288] *Id.* The corporation within a corporation might reflect the issue of corporate government, which some scholars believe is constituted separately from the corporation itself. "[B]ecause an abstract legal entity cannot itself act," David Ciepley writes, the corporation's "charter also constitutes a government for the corporation, such as a board, with authority to manage the corporation's property and contracts as its legal agent." Ciepley, *supra* note 16, at 6. Where governing boards are corporations themselves, Ciepley's view might precipitate an infinite legal regress in which nobody, including no *body*, has the government of a given corporation because a corporation's government must vest separately from the corporation itself.

[289] *Id.* at 622.

[290] "Memorial by the Board of Regents," *supra* note 164.

[291] In re Royer's Estate, *supra* note 70, at 622–23. The concept of "corporations within corporations" was a fixture of the legal organization of the ancient universities. *See* Morgan, *supra* note 110, at 10–11. With regard to the University of Cambridge, Morgan notes, "[i]t should be added that certain readerships and professorships were also 'bodies corporate', and therefore, the university reasoned, capable of accepting the security of income to be derived from permanent endowment." *Id.* 187 n. 22. The situation was similar at Oxford, where "[t]he colleges were often a powerful force in the university because they were independent corporate entities and usually supported older students in the higher faculties." Brockliss, *supra* note 116, at 8. In thirteenth-century Paris, Gaines Post reports, "the development of the organization of the University was slow, starting with a general body which broke up into several small bodies or corporations within a corporation." Gaines Post, *Parisian Masters as a Corporation, 1200–1246*, 9 Speculum 421, 429 (1934); *see also* Le Goff, *supra* note 137, at 73 (describing "corporations or colleges inside the university" of Paris). Medieval universities encompassed corporate nations of students. *See* Kibre, *supra* note 169, at 16 ("In considering the question when the nations at Paris came into existence, a distinction is made between the voluntary associations of masters and students from the same locality, and the legal corporation which possessed a seal, a common treasury, and the right to bind its members by the oath to the rules decreed."). In the twentieth-century American multiversity, Clark Kerr noticed a similar pattern. In comparing the university to the United Nations, he writes that in the modern multiversity "[t]here are several 'nations' of students, of faculty, of alumni, of trustees, of public groups. Each has its territory, its jurisdiction, its form of government." Kerr, *supra* note 64, at 27. On corporations within corporations in English law, *see* Mary Sarah Bilder, "English Settlement and Local Governance," *in* I The Cambridge History of Law in America: Early America (1580–1815) 70 (Michael Grossberg & Christopher Tomlins, eds., 2008) ("This corporation-within-a-corporation was, theoretically, a coherent model for London-based governance, but the only settlement actually governed that way was Bermuda."). American universities also incorporate inferior corporations. *See* Regents of the University of Michigan v. Pommerening, *supra* note 31, at 396 (noting that Michigan Regents incorporated inferior corporation in 1924). However, the California Regents ruled in 1897 that "[t]he Academic Colleges of the University are not corporate bodies, and the use of seals by them has no legal force." Regents' Manual, *supra* note 166, at 322.

In affirming the University's ability to accept bequests, the *Royer* Court to show that the state was able to accept a bequest. Statutes enacted in the 1870s, which the Court appears to cite,[292] address these issues directly. For example, one statute stated that "[t]he state of California, *in its corporate capacity*, may take by grant, gift, devise, or bequest, any property for the use of the university, and hold the same, and apply the funds arising therefrom, through the regents of the university, to support the university."[293] The next section of the statute was similar but addressed the Regents instead of the state and was considerably longer:

> [t]he regents of the university, *in their corporate capacity*, may take, by grant, gift, devise, or bequest, any property for the use of the university, or of any college thereof . . . and such property shall be taken, received, held, managed, and invested, and the proceeds thereof used, bestowed, and applied by the said regents for the purposes, provisions, and conditions prescribed by the respective grant, gift, devise, or bequest.[294]

A related statute, dealing with the Regents' power, reaffirmed that the Regents could "receive, in the name of the state, or of the board of regents, as the case may be, all property donated to the university."[295] These statutes relate directly to and deepen the mystery of the *Royer* case. It remains unclear why the Court went to such lengths to deny the Regents' corporate personality, especially when such personality plainly appeared across the relevant statutes. It is also curious that the Regents' seal was the University's seal, reading only "University of California."[296] Like the rector at medieval Bologna and the chancellor at medieval Oxford,[297] the Regents were the corporate Head of the University; they had a personality separate from and contained within the University.

Curiously, the *Royer* court found it necessary to emphasize that "[t]he university, while a governmental institution, and an instrumentality of the state, is not clothed with the sovereignty of the state, and is not the sovereign."[298] Judges and scholars disclaim university sovereignty with a

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[292] *See* In re Royer's Estate, *supra* note 70, at 619 (citing Cal. Stats. 1873-74, § 1415).

[293] ELLIOTT & CHAMBERS, *supra* note 127, at 74 (quoting Cal. Stats. Title III, Article II, § 1415(6) (1874)) (emphasis added).

[294] *Id.* (quoting Cal. Stats. Title III, Article II, § 1415(7) (1874)) (emphasis added).

[295] *Id.* (quoting Cal. Stats. Title III, Article III, § 1425(5) (1874)) (emphasis added).

[296] REGENTS' MANUAL, *supra* note 166, at 294.

[297] *See* KIBRE, *supra* note 169, at 54 ("The rector as the supreme head of the *universitas* presided over the examinations and at the ceremonies at which degrees were conferred."); LE GOFF, *supra* note 137, at 74 (noting that "[t]he 'chancellor' was the head of the university" at medieval Oxford); RASHDALL, *supra* note 160, at 54 ("The chancellor loses his independent position and becomes the presiding head of the university" at thirteenth-century Oxford).

[298] In re Royer's Estate, *supra* note 70, at 624.

surprising frequency and exasperation, which might hint at the enduring force of the idea of university sovereignty. The Minnesota Supreme Court, for instance, found it necessary to proclaim in a 1928 case that the Minnesota Regents were not "the rulers of an independent province or beyond the lawmaking power of the Legislature," notwithstanding the fact that "the people of the state, speaking through their Constitution, have invested the [Minnesota] regents with a power of management of which no Legislature may deprive them."[299] A former Michigan Regent wrote in his 1969 book on the University of Michigan that "[a] university campus cannot be an extraterritorial state within a state."[300] These reflections highlight the legal challenge posed by constitutional corporate personality.

The *Royer* case neatly presents each side of the constitutional-university puzzle. While *Royer* offers a rather strained reading of the relevant documents, it demonstrates the difficulty posed by the novel issue of a constitutional university's corporate personality. The question of whether university property was state property was particularly vexing in the nineteenth century, and the *Royer* court's assertions that the Regents were not a corporation and that the University's property was state property does not resolve the underlying issue. As discussed above, the Michigan Supreme Court saw things differently in their state. In an 1893 case, that court held that "[u]nder the constitution, the state cannot control the regents. It cannot add to or take away from its property without the consent of the regents."[301] The property of the Michigan Regents was its own but only because it was a corporate entity separate from the state. The Idaho Regents, a constitutional corporation, proclaimed in 1920 that "the board of Regents denies that a claim against the University is a claim against the state of Idaho and subject to the regulations prescribed for the latter."[302] The Idaho Regents' view was ultimately upheld by the Idaho Supreme Court.[303] Only by depersonifying the Regents could the *Royer* Court assign any property that body might hold to the state. The Court does not explain how it was that the state could hold property and did not think it necessary to show that the state was a corporation.

The Regents prevailed in *Royer* because the Court was convinced that they were not a corporation, or at least not a corporation in the first instance.

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[299] State v. Chase, *supra* note 21, at 266.

[300] Cudlip, *supra* note 73, at 113.

[301] Weinberg v. Regents, *supra* note 22, at 254.

[302] Black v. Board of Education, *supra* note 17, at 202 (quoting Oct. 1, 1920, Idaho Regents Resolution).

[303] *See Id.* at 205.

The Regents won the case by losing their corporate personality. This corporate personality was, however, reaffirmed by constitutional provision just nineteen years later. The California Constitution was amended in 1918, making clear that the Regents were in fact a corporation: "the University to be administered by the *existing corporation* known as 'The regents of the University of California,' with full powers of organization and government," which would appear to indirectly reference and incorporate the Organic Act.[304] This clarification did not resolve the issue of whether the Regents was the University, a question that is beyond the scope of this article. While the Regents won by losing itself—that is, *its self*—conflict arose at constitutional universities across the West.

Americans across the Western United States established constitutional universities, first in Michigan in 1850, and then in Minnesota in 1858, then in Missouri in 1875, in Colorado in 1876, in California in 1879, in Idaho in 1890, and in Utah in 1896.[305] Each constitutional university charter was initially legislative before its corporate foundation was "elevated from a statutory to a constitutional provision."[306] That each constitutional university followed the Michigan pattern might reflect the fact that, by the 1870s, "the universities then in course of establishment in the West already looked to Michigan for guidance."[307] Historian Jurgen Herbst wrote that the U.S. Supreme Court's decision in the *Dartmouth College* case "safeguard[ed] chartered college government" by holding that, "[f]or a corporation charter to be altered, the corporation had to agree to the changes or else be convicted of wrongdoing by due process in a duly constituted court of law."[308] However, Herbst wrote, "the court did not move the colleges beyond the reach of governmental authority."[309] The U.S. Supreme Court had no power to remove colleges from government authority because that power rested with the People themselves. Thirty-one years after *Dartmouth College*, the People of Michigan severely restricted the Michigan legislature's authority over their university. The real achievement of the constitutional university was to place the university and the legislature on the same plane by creating the one by

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[304] Cal. Const. art. 9, § 9 (as amended, Nov. 5, 1918) (emphasis added); *see* Elliott & Chambers, *supra* note 127, at 64 (quoting amended California Constitution).

[305] *See* Mich. const. art. XIII § 8 (1850); Minn. Const. art. XIII § 3 (1858); Mo. const. art. XI (1875); Colo. Const. art. IX § 14 (1876); Cal. Const. art. IX, § 9 (1879); Id. Const. art. IX § 10 (1890); Utah Const. art. X (1896).

[306] Douglass, *supra* note 70, at 32.

[307] A University Between Two Centuries, *supra* note 173, at viii.

[308] Herbst, *supra* note 106, at 241–42.

[309] *Id.* at 242.

the same means and at the same moment as the other.[310]

The constitutional university emerged only in the second half of the nineteenth century and only in the Western United States, centuries after the first universities were established in Western Europe and thousands of miles west of the ancient seats of the university at Bologna, Paris, Oxford, and Cambridge (UK), and indeed hundreds of miles west of the ancient seats of the American university at Cambridge (US), Williamsburg, New Haven, and Princeton.

It is surprising that the constitutional university emerged in the middle of the nineteenth century, amidst a general distrust of corporations[311] and a movement toward general incorporation fueled by a "desire to prevent the politics of special privileges from influencing the legislative process."[312] Just as other anglophone universities, including the ancient English and Irish universities (to the extent that Irish universities may be considered anglophone), saw their authority reduced, western Americans were busy enhancing the authority of their universities. In 1850, the same year that the first constitutional university was created, a motion in Parliament proposed the establishment of a royal commission to "inquire into the state of the Universities of Oxford, Cambridge and Dublin 'with a view to assist in adaptation of those important institutions to the requirements of modern times.' "[313] This motion led to the passage of legislation pertaining to the ancient universities, the 1856 bill for Cambridge substantially mirroring that which was passed for Oxford.[314] That bill established a commission whose members "were to have the power to frame statutes" for the college,[315] dispossessing the University of one of its foundational ancient privileges. The ancient English universities were adapted to modern times while the modern western American universities were reconfigured in an ancient mold.[316]

The American West seems to have stood out even among modern universities in the English-speaking world, where universities seemed to be losing ground

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310 While the California Constitution does not itself incorporate the University, it fixes the University's incorporation by reference to and perpetuation of the Organic Act of 1868. *See* Cal. Const. art. IX, § 9 (1879). The 1850 Michigan Constitution offers a more straightforward case of constitutional incorporation: "The regents of the university and their successor in office shall continue to constitute the body corporate, known by the name and title of 'The Regents of the University of Michigan.' " Mich. Const. art. XIII, § 7 (1850).

311 *See* Friedman, *supra* note 40, at 391 (discussing contemporary distrust of corporations).

312 Hennessy & Wallis, *supra* note 46, at 83.

313 Leedham-Green, *supra* note 108, at 152 (quoting Motion, April 23, 1850).

314 *Id.* at 158.

315 *Id.*

316 Soares argues, however, that "Oxford was never more autonomous, wealthy, and influential than in the period between the Victorian Royal Commissions and the Second World War." Soares, *supra* note 148, at 270.

alongside their ancient counterparts. For example, by 1853 legislation, the University of Toronto, established in 1827, was "effectively controlled by the government."[317] The American university's quintessential embodiment is, as Willard Hurst argued regarding American law,[318] found in the west.[319]

Cases contesting the constitutional university's authority appeared regularly in state supreme courts soon after the first constitutional university was established in Michigan in 1850. For fifty years the Regents resisted the legislature's attempts to govern their universities, resulting in decades of litigation. In 1896, the Michigan high court, in denying a writ of mandamus that would have compelled Michigan's Regents to establish a homeopathic medical college under a legislative enactment, explained that "[t]he board of regents and the legislature derive their power from the same supreme authority, namely, the constitution. In so far as the powers of each are defined by that instrument, limitations are imposed, and a direct power conferred upon one necessarily

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[317] MARTIN L. FRIEDLAND, THE UNIVERSITY OF TORONTO: A HISTORY 8, 39 (2002).

[318] *See generally* J. WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES (1956).

[319] When one thinks of the quintessential American university, Harvard University likely springs to mind. However, Harvard is an ordinary legislative university, of which there exist many across the nation and world. It cannot lay claim to anything like the special constitutional status of the western constitutional universities. This was denied to Harvard long ago. The Massachusetts Constitution of 1780 includes a chapter on Harvard University and its government. *See* Mass. CONST. c. V §§ I & II (1780). The Massachusetts constitution ordained that the Harvard Corporation "shall have, hold, use, exercise and enjoy, all the powers, authorities, rights, liberties, privileges, immunities and franchises, which they now have or are entitled to have, hold, use, exercise and enjoy: and the same are hereby ratified and confirmed unto them, the said president and fellows of Harvard College, and to their successors, and to their officers and servants, respectively, forever." *Id.* at § I art. I. However, that constitution expressly reserved to the Massachusetts legislature the power to govern the university: "nothing herein shall be construed to prevent the legislature of this commonwealth from making such alterations in the government of the said university, as shall be conducive to its advantage and the interest of the republic of letters, in as full a manner as might have been done by the legislature of the late Province of the Massachusetts Bay." *Id.* at § I art. III.

Another early example of a university claiming its origin in a state constitution came from North Carolina. The North Carolina Supreme Court held in 1805 that the University of North Carolina was established by the North Carolina legislature according to a mandate included in the North Carolina Constitution of 1789, and, therefore, the legislature could not deprive the university of the property previously granted thereto by that body. *See* Trustees of the University of North Carolina v. Foy and Bishop, 5 N.C. 58, 86 (NC 1805) (Locke, J.); *see also* HERBST, *supra* note 106, at 220–21 (discussing *Foy*). The court "view[ed] this corporation as standing on higher grounds than any other aggregate corporation; it is not only protected by the common law, but sanctioned by the [North Carolina] constitution . . . . [T]he people evidently intended this University to be as perpetual as the Government itself." *Id.* at 86. Additionally, "although the Trustees [of the University of North Carolina] are a corporation established for public purposes, yet their property is as completely beyond the control of the Legislature, as the property of individuals or that of any other corporation." *Id.* at 88. However, the North Carolina Constitution is not the University of North Carolina's charter. That charter came from the legislature, rather than the Constitution. *See id.* at 58. The crucial difference between the University of North Carolina and the University of California after 1879 is that the California Constitution was the University of California's charter. On the importance of the *Foy* case in American legal history more generally, *see* Jonathan Levy, "Altruism and the Origins of Nonprofit Philanthropy," *in* PHILANTHROPY IN DEMOCRATIC SOCIETIES: HISTORY, INSTITUTIONS, VALUES 25 (Rob Reich, Chiara Cordelli, & Lucy Bernholz, eds., 2016); R. Kent Newmyer, *Justice Joseph Story's Doctrine of Public and Private Corporations and the Rise of the American Business Corporation*, 25 DEPAUL L. REV. 825, 833 n.29 (1976). Interestingly, the California Regents claimed a similar constitutional status for their legislative university in the early 1870s. *See* REPORT OF THE BOARD OF REGENTS, *supra* note 71, at 5–6 ("[T]he University, as one of the future institutions of the State, is expressly recognized by Article IX, section four, of the [1849] Constitution of California.").

excludes its existence in the other."[320] In 1911, the Michigan Supreme Court put it more strikingly: "By the Constitution of 1850, and repeated in the new Constitution of 1908, the Board of Regents is made the highest form of juristic person known to the law, a constitutional corporation of independent authority, which, within the scope of its functions, is co-ordinate with and equal to that of the Legislature."[321] One historian of the University of Michigan explained the decision's meaning: "[c]reated by the constitution, the Board of Regents of the University was as firmly founded as the legislature, the governor, or the judiciary, and was equal in its power over its designated field of state endeavor."[322]

Differences in the University of Michigan's constitution might explain the differences in judicial opinion between the Michigan Supreme Court and the California Supreme Court. The first difference is that the Michigan Regents were undoubtedly public officers. In Michigan, according to president Tappan, "[t]he Regents of the University have ever regarded themselves as State officers, and not as the representatives of special religious or political interests."[323] "As the President of the University of Michigan," Tappan proclaimed, "I claim to be an officer of the State."[324]

In addition to Michigan, litigation across states arose in the early twentieth century, as states centralized and streamlined "the sheer multiplicity of agencies in state government" through "reorganization movement[s]."[325] This was especially true during the first quarter of the twentieth century, when constitutional universities faced renewed external challenges to their independence and authority.[326] Meanwhile, in 1922, a committee of the American Association of Land-Grant Colleges and State Universities was charged with investigating "the administrative relationships of the land-grant colleges and their respective State governments with special reference to the increasingly frequent adoption of the system of centralized expenditure control, a system which is seriously encroaching upon the administrative officers of many land-grant institutions."[327]

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[320] Sterling v. Regents, *supra* note 22, at 382.

[321] Auditor General v. Regents, *supra* note 14, at 450.

[322] Peckham, *supra* note 43, at 35.

[323] Tappan, *supra* note 178, at 539.

[324] *Id.* at 541.

[325] McConnell, *supra* note 19, at 183–84. On centralization and the university, *see generally*, Moos & Rourke, *supra* note 22, at 43–69 (discussing administrative centralization); see also Elliott & Chambers, *supra* note 22, at 155–64 (discussing consolidation in states).

[326] *See* Auditor General v. Regents, *supra* note 14, at 450; Black v. Board of Education, *supra* note 17, at 205; State v. Chase, *supra* note 21, at 265.

[327] Moos & Rourke, *supra* note 22, at 44–45 (quoting Association of Land-Grant Colleges, Proceedings of the Thirty-Sixth Annual Convention, November 21–23, 1922).

In the 1928 case *State v. Chase*, the Minnesota Supreme Court affirmed a decision ordering the state auditor to issue funds requested by the University of Minnesota, holding that "the University, in respect to its corporate status and government, was put beyond the power of the Legislature by paramount law, the right to amend or repeal which exists only in the people themselves."[328] It would appear that the University of Minnesota, while "a function of the state . . . may not be subject to state control."[329] This conclusion would have been familiar to nineteenth-century jurists, who were of the opinion that "a grant of property was beyond the reach of the legislature, whereas a grant of political power could never be viewed as a 'vested right' against the state."[330] One might think of the Regents as a "mixed corporation—a corporate body with a combination of public and private powers"[331]—but it might be more helpful to think of the Regents as a classical corporation, "a juridical person steered by a legally constituted government that exercises jurisdictional authority,"[332] who was "peculiarly intangible" due to its existence "apart from the individual human beings who are its members and officers, apart from any property it might own, apart even from the place at which it resides."[333] To the extent that the Regents and the University shared a single identity, their corporateness, and the peculiar intangibility that sprang therefrom, "disembodied"[334] the University. In this disembodied individual, "the belongs of the private law" were interconnected with and inseparable from "the belongs of the public law."[335] As Anne Hyde wrote in her history of the nineteenth-century American West, "*belong* turns out to be a very capacious term."[336]

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[328] State v. Chase, *supra* note 21, at 265.

[329] Moos & Rourke, *supra* note 22, at 19.

[330] Hartog, *supra* note 85, at 17.

[331] *Id.* (internal quotation marks omitted).

[332] Ciepley, *supra* note 16, at 7. More specifically, the Regents were a classical, complex Anglo-American corporation, which features "the board as the head" of the corporation, *id.* at 9, and in which the "head and members ruled co-ordinately." Tierney, *supra* note 44, at 83. If Axtell is correct when he writes that "[t]he faculty is the indispensable mind and soul of a university," then the university's mind might be located outside of its head. James Axtell, The Making of Princeton University: From Woodrow Wilson to the Present 27 (2006).

[333] Runciman, *supra* note 21, at 93.

[334] Axtell, *supra* note 26, at 8 (quoting W. A. Pantin, "The Halls and Schools of Medieval Oxford: An Attempt at Reconstruction," *in* Oxford Studies Presented to Daniel Callus 31–32 (1964)).

[335] Maitland, *supra* note 11, at 11–12. David Ciepley notes that "[c]orporations were originally understood to be (legally limited) governments, exercising rights of government delegated to them by the public authority." Ciepley, *supra* note 16, at 3. This is generally what is meant by "classical corporation," although the exercise of university authority sometimes preceded authorization. *See* Parker, *supra* note 114, at 31 (noting Cambridge claimed more liberties than were granted by king).

[336] Anne F. Hyde, Empires, Nations, and Families: A New History of the North American West, 1800–1860 17 (2011) (emphasis in original).

CONCLUSION

The histories of the constitutional corporation and constitutional university have gone unwritten. By 1900, seven constitutional universities were in existence, and more were established in the early twentieth century, including the Oklahoma Agricultural and Mechanical College in 1907, and Michigan State University and Wayne State University, both in 1908.[337] Legal historians and university historians have generally not recognized that the university is fundamentally legal. Because the university is fundamentally legal and has a fundamental legality, it also has a legal history. General histories of the American university tend to give the university's legality short shrift, and, even when attention is paid thereto, law is presented as something that *happens to* the university somewhere *outside of* the university.[338] In sharp contrast, this article focuses on what the university does with and to law within its own walls, bringing law back into the university, and returning the university to the history of government.[339]

Just as "universities are historical institutions,"[340] universities are also legal institutions. Here, *legal institution* has a triple meaning.[341] Universities are legal institutions because they (1) are corporations and, therefore, are fundamentally legal; (2) have a fundamental legality, the enforcement of which is their raison d'être; and (3) make law in their corporate capacity in service of enforcing this raison d'être. Because universities are legal institutions, it follows that, just as "Western history is legal history,"[342]

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[337] *See* Okla. Const. (1907); Mich. Const. (1908).

[338] *See*, *e.g.*, John R. Thelin, A History of American Higher Education 43–44, 70–73 (2004); Laurence R. Veysey, The Emergence of the American University (1965). Even self-consciously legal histories of the university embrace this view. *See*, *e.g.*, Gelber, *supra* note 127.

[339] Relatedly, Ciepley seeks to return corporations "to the history of government." Ciepley, *supra* note 16, at 4. Indeed, as Philip Stern wrote, corporations "were by nature public authorities and governments in their own right, which were not always quiescently subject to the nation-state." Stern, *supra* note 144, at 214. Universities, too, "were by nature public authorities and governments in their own right."

[340] Thelin, *supra* note 338, at xiii.

[341] As I have tried to show, universities are not, in the first place, "institutions" at all. They are corporations. As William Clark wrote in 1986, the "[a]dministrative history of scholastic forms must be written, not as a history of institutions, but rather as a history of collegia and corporations, a history of a multiplicity of corporate persons, 'personae.' " Clark, *supra* note 90, at 16. Institutional history is valuable scholarship but this paper is not an institutional history. Rather, it is a history of the University of California as such.

[342] Katrina Jagodinsky, "Introduction: Into the Void, or the Musings and Confessions of a Redheaded Stepchild Lost in Western Legal History and Found in the Legal Borderlands of the North American West," *in* Beyond the Borders of the Law: Critical Legal histories of the North American West 3 (Katrina Jagodinsky & Pablo Mitchell, eds., 2018); *see also* Patricia Nelson Limerick, The Legacy of Conquest: The Unbroken Past of the American West 55 (1987) ("Western American history was an effort first to draw lines dividing the West into manageable units of property and then to persuade people to treat those lines with respect."). Earlier collection of essays on Western legal history include Law in the Western United States (Gordon Morris Bakken, ed., 2000) and Law for the Elephant, Law for the Beaver: Essays in the Legal History of the North American West (John McLaren, Hamar Foster, & Chet Orloff, eds., 1992). Sarah Barringer Gordon's contribution to the *Blackwell Companion to the American West* is a concise and valuable bibliographical essay on western legal history. *See* Sarah Barringer Gordon, "Law and the Contact of Cultures," *in* A Companion to the American West 130 (William Deverell, ed., 2004).

university history is also legal history.[343] Legal historians and university historians alike have neglected university legal history, which is the history of the university as such. As a result, thousands of legal institutions in the United States alone have been left unexplored.[344] Because university legal history, as we have seen, has less to do with courses, curricula, and students than it does with constitutions, corporations, and sovereignty, scholars have not uncovered what universities might tell us about the latter set of subjects. Perhaps more importantly, neglecting university legal history leaves obscure the legal-governmental nature of academic work. This neglect has caused academics to forget that, in undertaking their academic duties as members of university corporations, they *govern*.

The fact that scholars tend to view university history as something separate from legal history might help to explain why the university's prominent place in corporations history—from Miatland in 1898 up to Philip Stern in 2023[345]—has gone unremarked. It is no coincidence that Maitland began his 1897 lectures on the medieval corporate borough of Cambridge, delivered at Oxford, with the following sentence: "[o]n the 20th of January, 1803, Mr Justice Lawrence and a jury of merchants were sitting at the Gildhall in London to try an issue between the Mayor, Bailiffs and Burgesses of the Borough of Cambridge and the Warden, Fellows and Scholars of Merton College in the University of Oxford."[346] That the university features so prominently in the history of the corporation should, by now, come as no surprise. The constitutional university and its constitutional corporate personality bring these features into stark relief and open avenues for further study.

The proprietary government—a *proprietas* in *dominium*—vested in the Regents is something that legal historians might expect to find in seventeenth-century Pennsylvania,[347] eighteenth-century New York,[348] or nineteenth-century

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[343] This was not lost on Hastings Rashdall, whose history of the university in the Middle Ages begins with a chapter entitled "What is a University," which quickly turns into a legal history. *See* Rashdall, *supra* note 81, at 5.

[344] *See* Axtell, *supra* note 26, at xiv–xv (discussing number and variety of colleges and universities in United States).

[345] *See* Philip J. Stern: Empire, Incorporated: The Corporations That Built British Colonialism 85, 89, 118–19, 128, 147, 152–55, 162, 166–67, 257 (2023) (discussing colonial American universities and English universities).

[346] Maitland, *supra* note 11, at 1.

[347] *See* Bilder, *supra* note 291, at 75. This was a feature of the early proprietary colonies more generally. See Christopher Tomlins, Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865 166–77 (discussing early proprietary colonies).

[348] Hartog, *supra* note 85, at 20 (because "the officers of the corporation could not be certain of their ability to assert their possession of the government of the city of New York and its properties," a new charter "was drafted").

Utah[349] but this regime will strike this same group as out of place, if not downright anachronistic, in twenty-first-century California. Corporate government, or, if one prefers, "corporate rulership,"[350] is hardly an anachronism. As much as early Americans "reconceive[d] the fundamentals of government and society's relation to government,"[351] in California, "the change in the idea of political authority itself, 'from a lordship into an association,' " remains incomplete.[352] At the same time, the California Regents, and American Regents in general, appear strikingly modern in a bureaucratic, centralized, post-New Deal United States.[353]

The University of California was "the great University created by the people of the State of California," the California Regents wrote in 1897.[354] However, the California Regents, as noted above, are not unique in their constitutional status and power, although they might be unique in that they are not public officers. Since 1879, California's Regents have comprised a corporation of constitutional officers, which holds the University of California, the world's foremost public university, as its private property. This remains the case today.[355] They might be the only constitutional officers in the country who are not public officials. As such, they might also be emblematic of a genus of constitutional officers, appearing in all manner of American constitutions, who have not been studied carefully.[356]

Indeed, many of the legal arrangements of authority in the nation's States, Tribal Nations, and Territories will surprise legal historians who seem to view American legal history, and especially the history of American constitutional

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[349] *See* Sarah Barringer Gordon, The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America 210 (2002) ("Because [the Mormon Church corporate charter] granted a religious organization the right to make laws that affect society, most conspicuously among them control over marriage and the right to tax citizens through the tithe, [one antipolygamist lawyer] claimed, the territorial legislation that had created the Mormon Church corporation violated the establishment clause.").

[350] Tierney, *supra* note 44, at 82.

[351] Bernard Bailyn, The Ideological Origins of the American Revolution 230 (1967 (2017)).

[352] Tierney, *supra* note 44, at 2 (quoting J. N. Figgis, Political Thought from Gerson to Grotius, 1414–1625 (1916 (1960)); *see also* Stern, *supra* note 345, at 309 (discussing continuity of corporate government).

[353] *See* Daniel R. Ernst, "Law and the State, 1920–2000: Institutional Growth and Structural Change," *in* 3 The Cambridge History of Law in America: The Twentieth Century and After (1920–) 2–3 (Michael Grossberg & Christopher Tomlins, eds., 2008) (noting that "[c]entralized administration finally came to the United States in the twentieth century in three waves of state building," following an initial "wave [that] emerged at the state and local level in the 1890s and reached the federal government by World War I.").

[354] Memorial to Regent Timothy Guy Phelps, June 11, 1899. UC Berkeley Bancroft Library, CU-1 Box 25, Folder: Phelps.

[355] Cal. Const. art. IX, § 9 (1879) (as amended Nov. 5, 1974).

[356] The Regents of the constitutional universities are one example. Vermont's assistant judges constitute another. *See* Vt. const. ch. II, § 50. The Texas Attorney General is yet another. *See* Tx. const. art. 4, § 1 (1876). *See generally*, Orren, *supra* note 10.

law, as primarily, if not exclusively, the history of federal law. The States, Tribal Nations, and Territories, along with their subdivisions, are ripe for legal-historical research.

Historians have traditionally thought of the past as "a foreign country" where things are done differently.[357] The continued scholarly focus on federal law has inhibited our understanding of American law and its history.[358] Indeed, a legal historian could write earlier this year that "states are highly familiar but poorly understood constitutional entities."[359] By refocusing our attention on the constitutions of the States, Tribal Nations, Territories, and the subdivisions thereof, we can begin to address this neglect.[360] The development of this constellation of constitutions is where America's constitutional history may be found. American law's present appears as foreign as its past if one knows where to look.

Michael
Banerjee

[357] See L. P. Hartley, The Go-Between (1953).

[358] Christian Fritz made this point nearly two decades ago. *See* Christian G. Fritz, *Fallacies of American Constitutionalism*, 35 Rutgers L.J. 1327, 1327 (2004) (arguing that inaccurate assumptions about early American constitutional experience "impoverish our constitutional discourse by denying us the capacity to see that the history of American constitutions is dynamic, not an elaboration of a static idea from 1787").

[359] Craig Green, *Beyond States: A Constitutional History of Territory, Statehood, and Nation-Building*, 90 U. Chi. L. Rev. 813, 817 (2023).

[360] This effort is, happily, already well underway. On the States, *see*, *e.g.*, Maureen E. Brady, *Uses of Convention History in State Constitutional Law*, 2022 Wisc. L. Rev. 1169; Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. Pa. L. Rev. 853 (2022); Maureen E. Brady, *Zombie State Constitutional Provisions*, 2021 Wisc. L. Rev. 1063 (2021); Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 N.W. L. Rev. 65 (2019). Far too little work has been done on western state constitutions generally but one valuable, if somewhat antiquated, contribution is Gordon Morris Bakken, Rocky Mountain Constitution Making, 1850–1912 (1987). On the Tribes, *see* Elizabeth Anne Reese, *The Other American Law*, 73 Stan. L. Rev. 555 (2021); Linda Colley, The Gun, the Ship, and the Pen: Warfare, Constitutions and the Making of the Modern World 153 (2021) ("[r]ival attempts to use these [constitutional] devices," such as the 1827 Cherokee Constitution, "to advance separate legislative and national projects within United States territory were not permitted and often brutally repressed"). On the Territories, *see* Anthony M. Ciolli, *Territorial Constitutional Law*, 58 Idaho L. Rev. 206 (2022). On subdivisions, *see* Nestor M. Davidson, *Local Constitutions*, 99 Tex. L. Rev. 839 (2021).

MIRANDA TAFOYA*

A Shameful Legacy:

Tracing the Japanese American Experience of Police Violence and Racism from the Late 19th Century Through the Aftermath of World War II

Law enforcement agencies are allegedly meant "to protect and serve" and yet there are numerous examples of state violence and brutality against citizens, especially because of racial profiling and racist stereotypes. One often ignored blight on American history is Executive Order 9066. Law enforcement agencies played an integral part in the round up of Japanese American families and the implementation of President Franklin Delano Roosevelt's infamous wartime executive order. This paper argues that the actions of law enforcement in the lead-up to the forced removal of Japanese Americans, in the operation of the prison camps, and in the aftermath of Japanese Internment demonstrate how deeply rooted nativism coupled with wartime hysteria resulted in racialized violence against Japanese immigrants and Japanese American citizens. Law enforcement did not protect and serve Japanese Americans and this paper examines how this state violence is part of a shameful legacy that must be part of discussions about policing and race in America. Moreover, this paper shines a light on the policing of everyday life for Japanese Americans during this historical period.

This project arises out of my family history. My great-great-grandfather, a leader in the San Francisco Japanese community, fought for his civil rights all the way to the U.S. Supreme

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Court in a case against the San Francisco Sheriff in 1902. My grandmother was born after World War II, but her two older siblings, her parents, grandfather, and extended family were imprisoned at Topaz War Relocation Center in rural Utah. In this telling of my family's story, I offer a heretofore underexamined aspect of the criminalization of Japanese Americans' everyday life and the ways that government action and law enforcement controlled this community. I also subvert the dominant narrative of silence and shame about pre-war Japanese exclusion and Executive Order 9066 by turning this shame squarely onto the state to encourage accountability and aid future discussions of policing and race in America.

INTRODUCTION

"December 7, 1941, a date which will live in infamy."[1] The American President who uttered these famous words not only plunged the country into World War II, but also derailed the lives of approximately 120,000 people with a staggering executive order.[2] Wartime hysteria and pre-existing anti-Asian sentiments collided with devastating results. For nearly a century prior, many Californians viewed Asian immigrants and Asian American citizens as an economic threat.[3] White America considered Asian Americans perpetual foreigners whose loyalties were in question, a stereotype of Orientalism that remains pervasive today.[4] The bombing of Pearl Harbor was the impetus for legitimizing this pre-existing xenophobia into official government policy as the U.S. government and many of its citizens perceived anyone of Japanese descent residing in the West Coast as a "menacing fifth column" that could thwart the American war effort.[5] In the name of national security, local police and FBI forces teamed up to conduct warrantless raids of Japanese American homes, confiscating "contraband" and arresting community leaders.[6] Then—upon intense petitioning by lobbyists from

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[1] Speech by Franklin D. Roosevelt, New York (Transcript), Library of Congress. Available at https://www.loc.gov/resource/afc1986022.afc1986022_ms2201/?st=text.

[2] Roger Daniels, *The Japanese American Incarceration Revisited: 1941-2010*, 18 Asian Am. L.J. 133, 134 (2011).

[3] *See generally* Roger Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion (University of California Press, 1977). *See also* Chinese Immigration and the Chinese Exclusion Acts, U.S. Dept of State, Office of the Historian. Available at https://history.state.gov/milestones/1866-1898/chinese-immigration.

[4] *Combatting the AAPI Perpetual Foreigner Stereotype*, New American Economy Research Fund, https://research.newamericaneconomy.org/report/aapi-perpetual-foreigner-stereotype/.

[5] Quote from the Office of the Attorney General (1941). Investigation of Un-American Propaganda Activities in the United States: Hearings Before a Special Committee on Un-American Activities. H. Res. 282, 72nd Cong. (1942). Available at http://www.mansell.com/eo9066/1942/ROJA/Report_on_Japanese_Activities_1942.html.

[6] National Archives, *Japanese-American Incarceration During World War II*, Jan. 24, 2022. Available at https://www.archives.gov/education/lessons/japanese-relocation.

nativist groups, military officials, politicians, and police—on February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066.[7]

Shame is a strong value in Japanese culture. For many families—my own included—feelings of shame about Japanese incarceration and pre-war exclusion led to this history being swept under the rug for generations. Shame is about taking personal responsibility for failure. Many Japanese Americans silently carried this burden to save face and *gaman* (我慢): persevere. Through this paper highlighting the shameful legacy of state violence against Japanese Americans, and the telling of my own family's story, I hope to turn this shame squarely onto the U.S. government to encourage accountability and aid future discussions of policing and race in America. Japanese Americans faced a broad range of state violence and policing before, during, and after Executive Order 9066.

This paper demonstrates how police agencies deeply rooted in nativism and exacerbated by wartime hysteria played an integral role in racialized violence against Japanese immigrants and Japanese American citizens. Local and military police participated in the forced removal of Japanese Americans, the operations of the prison camps, and the continued surveillance and control in the aftermath of Japanese incarceration. The analysis for this paper follows in three parts.

Part I describes the historical backdrop to the extreme policing of the Japanese American community post-Pearl Harbor. Nativist responses to Japanese immigration in the late nineteenth century laid the groundwork for President Roosevelt's infamous Executive Order 9066. Included in this history is the story of my great-great-grandfather, Matsunosuke "George" Tsukamoto. In his pursuit of the American Dream, my great-great-grandfather faced intense discrimination from the San Francisco Sheriff and the Anti-Jap Laundry League. He took his case all the way to the U.S. Supreme Court in 1902. His story is an example of how competing entrepreneurs and disgruntled neighbors used law enforcement to hold Asian immigrants back, enforcing the status quo both economically and racially. His story is also an example of how government action and law enforcement officers shaped and controlled the everyday lives of Japanese Americans. Xenophobia and fearmongering about Asian immigrant communities set the stage for Executive Order 9066.

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[7] Executive Order 9066, February 19, 1942; General Records of the Unites States Government; Record Group 11; National Archives. *See* "Executive Order 9066: Resulting in Japanese-American Incarceration (1942), National Archives. Available at https://www.archives.gov/milestone-documents/executive-order-9066.

Part II analyzes the police aggression against the Japanese community in the wake of the Pearl Harbor attack, inside the prison camps, and upon returning from the prison camps. In the aftermath of Pearl Harbor, law enforcement officials raided Japanese American neighborhoods along the West Coast to seize items considered contraband.[8] Local police departments, including the Los Angeles Police Department ("LAPD"), patrolled Japanese American neighborhoods, and accompanied FBI agents to raid Japanese American homes and arrest community leaders.[9] This Part also investigates the violence in the prison camps and the ways that the Military Police, the uniformed law enforcement branch of the U.S. Army, operated with impunity. This Part will conclude with a summary of the hostile actions of law enforcement, specifically the LAPD, upon the return of the imprisoned Japanese Americans. The LAPD made it only more difficult for returning Japanese Americans to pick up the pieces of their shattered lives and try to find normalcy again.

Part III critiques the policing of Japanese Americans during World War II as an outgrowth of decades of xenophobia and nativism, ultimately asserting that the shame Japanese Americans have felt about their wartime incarceration should be foisted on the state instead. This Part inverts the dominant narrative of shame and silence by highlighting how the U.S. government failed to protect Japanese American citizens and the Japanese immigrants who had long been denied citizenship.

I. NATIVISM, ANTI-JAPANESE SENTIMENT PRE-WORLD WAR II, AND THE CASE STUDY OF MATSUNOSUKE TSUKAMOTO

Even before the attack on Pearl Harbor, people of Japanese ancestry living in America faced discrimination. In some states, Japanese immigrants could not own land, become naturalized citizens, or vote.[10] These Japanese immigrants, also known as *Issei* (meaning "first generation" in Japanese), first arrived in the United States in the 1880s.[11] In the spring of 1882, Congress passed the

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[8] *See generally* Roger Daniels, The Japanese American Cases: The Rule of Law in Time of War (University of Kansas Press, 2013).

[9] *Id.*

[10] J. Burton, M. Farrell, F. Lord & R. Lord, Excerpts from "Confinement and Ethnicity: An Overview of World War II Japanese American Relocation Sites," The National Park Service: A Brief History of Japanese American Relocation During World War II, https://www.nps.gov/articles/historyinternment.htm. For an exploration of how settlement was an important tool to maintain racial hierarchy, see generally Genevieve Carpio, Collision at the Crossroads: How Place and Mobility Make Race (University of California Press, 2019).

[11] *See generally* Yuji Ichioka, The Issei: The World of the First Generation Japanese Immigrants, 1885-1924 (Free Press, 1988). The Naturalization Act of 1790 only allowed an immigrant to become a naturalized person if he was a "free white person." Naturalization Act, 1 Stat. 103 (1790). In California, for example, lawmakers passed the 1913 Alien Land Law and voters passed the California Alien Land Law of 1920. The first act prohibited "aliens ineligible for citizenship" from owning or taking on long-term leases of agricultural property; the second prohibited aliens from owning stock in companies holding agricultural land. *Alien Land Laws in California (1913 & 1920)*, Immigration History, https://immigrationhistory.org/item/alien-land-laws-in-california-1913-1920/.

Chinese Exclusion Act, perhaps one of the most prominent and effective nativist responses to Asian immigration at that time.[12] The Chinese Exclusion Act created a demand for new immigrant labor. As a result, Japanese began to come to America, chasing the American Dream.

Japanese immigration threatened the racial and economic status quo in America and from this xenophobia, the anti-Japanese exclusion movement was born. The anti-Japanese exclusion movement was the combined endeavor of politicians, intellectuals, and community leaders to label Japanese an undesirable race.[13] These efforts ranged from introducing discriminatory legislation to discourage Japanese immigration, encouraging and enforcing boycotts of Japanese businesses, and spreading propaganda about reasons to exclude Japanese from America.[14] This movement paved the way for the wartime incarceration of Japanese Americans by laying a groundwork of suspicion about Japanese loyalty.

In Japanese culture, there is a common saying "*shikata ga nai*" (仕方がない). "It can't be helped." "Nothing can be done about it." "It is what it is." My great-great-grandfather, a first-generation Japanese immigrant, threw "*shikata ga nai*" to the wind and persistently fought for his rights. My great-great-grandfather's story illustrates the nativism and xenophobia that Japanese immigrants to California faced in their pursuit of the American Dream. Furthermore, his story is an example of how government action and law enforcement shaped and controlled the everyday lives of a marginalized group.

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Matsunosuke Tsukamoto (1857–1958) was a civil rights pioneer and a leader in the San Francisco Japanese community. In his pursuit of the American Dream, he faced many obstacles because of discriminatory policing and the anti-Japanese exclusion movement.

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[12] Chinese Exclusion Act, Pub. L. No. 47–126, 22 Stat. 58, Chap. 126 (1882).

[13] Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States*, 37 Pol. Sci. Q. 605, 608 (Dec. 1922).

[14] *Id.* at 618.

[15] The Japantown Task Force, Inc., Images of America: San Francisco's Japantown, 11 (Arcadia Publishing, 2005).

My great-great-grandfather, Matsunosuke "George" Tsukamoto was one of the first Japanese to immigrate to America, arriving in California in the 1880s.[16] Sent by Fukuzawa Yukichi, "the great educator" of the Meiji era, to open new fields for agricultural development in America, Matsunosuke and a colleague purchased twenty acres of wasteland in Valley Springs, Calaveras County, California.[17] Their venture was unsuccessful because the seller did not actually own the land.[18] While his friend returned to Japan, Matsunosuke remained in California and opened a hand laundry in Tiburon in 1892.[19]

Seeing an opportunity to expand his successful business, Matsunosuke moved to San Francisco to open a steam-powered laundry.[20] He established Sunset Laundry, the first Japanese-owned automated laundry, in 1899.[21] At the time, there were many Chinese-owned hand laundries in San Francisco, but all the steam laundries were white-owned.[22]

Matsunosuke attempted to equip his laundromat with modern machinery and sought a permit to operate a steam boiler from the Board of Supervisors.[23] The Board denied his permit at the prompting of a petition circulated by disgruntled residents who claimed his steam laundry would be "an intolerable nuisance from a sanitary standpoint," that it "[would] cause an increase in insurance rates, deteriorate the value of residents' property, and materially interfere with the development of the neighborhood."[24]

He filed a new petition with the Board of Supervisors, this time attaching a certificate signed by two competent boiler inspectors stating that the boiler was in good working order.[25] He also filed a paper from one of the inspectors that certified him as competent to operate the boiler safely.[26] At the hearing on his second application, many property owners near the laundromat protested his license application.[27] The Board once again denied his petition.[28]

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[16] *Id.*

[17] Hiroshi Ushimaru, *Japanese Immigrants in the North Bay Region: Their Movements, Achievements and Settlements 1870-1930,* Sonoma State University, 1987.

[18] *Id.*

[19] Ikuro Torimoto, Okina Kyūin and the Politics of Early Japanese Immigration to the United States 1868-1924, 122 (MacFarland & Company, Inc., Publishers, 2017).

[20] David E. Bernstein, *Two Asian Laundry Cases*, 24 J. Sup. Ct. Hist. 95, 102 (1999).

[21] *Id.*

[22] *Id.*

[23] *Id.* at 103.

[24] *Id. See also* U.S. Supreme Court Transcript of Record *Tsukamoto v. Lackmann*, 187 U.S. 635 (1902), The Making of Modern Law: U.S. Supreme Court Records and Briefs, 1832–1978.

[25] Bernstein, *supra* note 20, at 103.

[26] *Id.*

[27] *Id.*

[28] *Id.*

Matsunosuke realized the Board was discriminating against him, so he practiced civil disobedience and operated his steam boiler without the permit.[29] The San Francisco Sheriff arrested him later that month for violating the fire ordinance.[30] The court convicted Matsunosuke and sentenced him to pay a $20 fine or serve a 20-day jail term.[31] He appealed to the California Superior Court, which affirmed the conviction and held the fire ordinance constitutional.[32]

Then he filed for a writ of habeas corpus in the U.S. District Court for the Northern District of California.[33] The named defendant was John Lackmann, the Sheriff of the City and County of San Francisco.[34] Matsunosuke argued that the Board had granted non-Japanese people permits and the refusal of the Board to grant him a permit was "an unjust, arbitrary, and unreasonable discrimination against him prompted solely by prejudice" because of his Japanese ancestry.[35] He also asserted a Fourteenth Amendment argument and an argument about a violation of a treaty between the United States and Japan.[36] The City of San Francisco intervened and hired a private attorney as special counsel to work with the District Attorney.[37]

Matsunosuke lost and appealed to the U.S. Court of Appeals for the Ninth Circuit.[38] He took his case all the way to the U.S. Supreme Court in 1902.[39] Unfortunately, he lost there too in a one-sentence ruling that a writ of habeas corpus was an improper remedy.[40]

Matsunosuke did not take his case back to the California Supreme Court.[41] Instead, he continued practicing civil disobedience and was arrested over fifty times in a one-and-a-half-year period.[42] He spent three weeks in jail at one

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[29] *Id.*

[30] *Id.* Chinese laundry owners had successfully invalidated a San Francisco laundry ordinance that prohibited laundries in wooden structures. The U.S. Supreme Court ruled in 1886 that the ordinance was intended not for health and safety purposes but rather to discriminate against Chinese-owned laundries and therefore violated the Equal Protection clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886).

[31] Bernstein, *supra* note 20, at 103.

[32] *Id.*

[33] U.S. Supreme Court Transcript of Record *Tsukamoto v. Lackmann, supra* note 24.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Bernstein, *supra* note 20, at 104.

[38] *Id.*

[39] *Id.*

[40] *Tsukamoto v. Lackmann,* 187 U.S. 635 (1902).

[41] Bernstein, *supra* note 20, at 104.

[42] *Id.*

point.[43] San Francisco law enforcement and the Anti-Jap Laundry League constantly harassed him.[44] Later, he purchased an old masonry building and established a steam laundry there.[45] This evaded the fire ordinance because it was a stone building rather than a wood building.[46] He also incorporated his business under the name of a white ally to avoid further harassment.[47]

Despite hostile legislation, discriminatory enforcement of the rules and harassment by the Anti-Jap Laundry League, Matsunosuke became a great businessman and "a leader in the San Francisco Japanese-American community."[48] He persisted in fighting for his constitutional rights. Unfortunately for Matsunosuke and his family, all the suspicion, hatred, and fear of Japanese Americans suddenly escalated when the Empire of Japan attacked Honolulu, Hawai'i in 1941.

Matsunosuke's experience is especially relevant to this paper given the involvement of the local police. The San Francisco Sherriff discriminatorily enforced the law at the prompting of racist neighbors who wanted to keep Matsunosuke from having a steam boiler. This is one of the many examples from history of the shameful legacy of law enforcement discriminating against racial minorities in America, perpetuating white supremacy and the subjugation of racial minorities. It is also one of the many examples of the criminalization of routine life for members of marginalized groups.[49]

People of Asian descent have long faced bigotry in the United States. From the stereotype of the "perpetual foreigner" to the racist trope of "Asians coming to steal white jobs," many generations of Asian Americans have been subject to discrimination, scapegoating, and violence.[50] While discrimination was rampant in this historical period, retellings of Japanese-Californian acts of resistance are less likely because Japanese culture greatly values conformity and the preservation of social harmony. It is notable that there has been a more documented history of Chinese-Californian resistance to injustice, such as the civil disobedience in the case of Yick Wo.[51] This landmark U.S.

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] The Japantown Task Force, Inc., Images of America: San Francisco's Japantown, 11 (Arcadia Publishing, 2005).

[49] For more examples of the criminalization of everyday activities for Asian Americans, see Gabriel J. Chin & John Ormond, *The War Against Chinese Restaurants*, 67 Duke L.J. 681 (Jan. 2018). *See also* Joshua S. Yang, *The Anti-Chinese Cubic Air Ordinance*, 99 Am. J Pub. Health 440 (Mar. 2009).

[50] *See* Gillian Brockell, *The long, ugly history of anti-Asian racism and violence in the U.S.*, Washington Post (Mar. 18, 2021), https://www.washingtonpost.com/history/2021/03/18/history-anti-asian-violence-racism/.

Supreme Court case bears a surprising resemblance to my great-great-grandfather's story, but Matsunosuke's case was nearly two decades later and distinguished from *Yick Wo* because Matsunosuke was unable to prove that the ordinance discriminated against Japanese.[52] The *Yick Wo* ruling by the Supreme Court should have served as clear precedent. It appears, however, that prejudice against a new group of immigrants distracted judges from their duties to apply laws—and precedents—universally. Both cases are historical examples of Asian American civil disobedience that deserve recognition.

II. POLICE ACTION AGAINST THE JAPANESE AMERICAN COMMUNITY IN THE AFTERMATH OF PEARL HARBOR

After the Empire of Japan brought World War II to America in 1941, shock, anger, and fear swept the States—a fear magnified by long-standing anti-Asian bigotry. Many suspected that Japanese Americans remained loyal to their ancestral homeland. As suspicions grew about Japanese Americans, Frank Knox, FDR's Secretary of the Navy blamed the Pearl Harbor sneak attack on Japanese espionage.[53] This led to talk of sabotage and an imminent Japanese invasion.[54]

Fueled by racial prejudice against the unpopular group, more rumors spread about a plot among the Japanese people living in America to sabotage the war effort.[55] Patriotism inflamed the country and racial tensions were high. Lieutenant General John L. DeWitt, head of the Western Defense Command wrote, "The Japanese race is an enemy race."[56] And Los Angeles representative Leland Ford insisted that "all Japanese, whether citizens or not, be placed in concentration camps."[57] *The Los Angeles Examiner* published the following, "A viper is nonetheless a viper no matter where the egg is hatched."[58] This quote supports the then-popular view that an American born of Japanese parents would grow up to be Japanese, not American. Theories about rampant

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[51] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

[52] U.S. Supreme Court Transcript of Record *Tsukamoto v. Lackmann, supra* note 24.

[53] Burton et al., *supra* note 10.

[54] *Id.*

[55] *Id.*

[56] Stanford M. Lyman, *The "Yellow Peril" Mystique: Origins and Vicissitudes of a Racist Discourse*, 13 Int'l J Pol., Culture & Soc. 683, 707 (Summer 2000).

[57] *Japanese Americans,* The War, PBS.org, https://www.pbs.org/kenburns/the-war/civil-rights-japanese americans#:~:text=Los%20Angeles%20representative%20Leland%20Ford,posted%20on%20April%2030%2C%20 1942.

[58] *See* Samantha Schmidt, *Migrant children: 'Lies just big enough to stick' are all too familiar to George Takei, who was interned in America during WWII*, Washington Post (June 20, 2018), https://www.washingtonpost.com/news/morning-mix/wp/2018/06/20/lies-just-big-enough-to-stick-are-all-too-familiar-to-george-takei-who-was-interned-during-wwii-in-america/.

espionage by Japanese living in Hawai'i and along the West Coast was "one way to save face . . . to explain the disaster at Pearl Harbor."[59]

At the beginning of World War II, Matsunosuke's eldest son, Keitaro, and his family featured in a set of publicity photographs that attempted to sway public sentiment about Japanese American loyalty. Ultimately and unfortunately, public opinion was not on their side. According to a public opinion poll conducted by the American Institute of Public Opinion in March 1942, 93% of Americans surveyed agreed that the forced removal of "Japanese aliens" was "the right thing," with 6% saying they do not know, and 1% saying no.[60] In addition, 59% of Americans surveyed thought that Japanese who were born in this country should be removed as well, with 25% saying no, and 16% saying they do not know.[61] The only national political figure to publicly denounce the wartime incarceration of Japanese Americans was Norman Thomas, a socialist leader, in 1942.[62] Even former chief justice of the U.S. Supreme Court, Earl Warren—considered by some to be "one of the most vigorous advocates of civil liberties in the history of the Supreme Court"—advocated and defended this racist policy that deprived the civil rights of Japanese Americans.[63]

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[59] Fritz Snyder, *Overreaction Then* (Korematsu) *and Now (The Detainee Cases)*, 2 Crit 80, 84 (2009).

[60] Survey from the American. Institute of Public Opinion, "Public Opinion Poll on Japanese Internment," United States Holocaust Memorial Museum, https://exhibitions.ushmm.org/americans-and-the-holocaust/main/us-public-opinion-on-japanese-internment-1942.

[61] *Id.*

[62] *See generally* Norman Thomas, Democracy and Japanese Americans (1942) (criticizing the incarceration of Japanese Americans as unconstitutional and immoral).

[63] G. Edward White, *The Unacknowledged Lesson: Earl Warren and the Japanese Relocation Controversy*, 55 Va Q. Rev. 4 (Autumn 1979). Available at https://www.vqronline.org/essay/unacknowledged-lesson-earl-warren-and-japanese-relocation-controversy (Dec. 12, 2003). In 1942, Warren referred to the presence of Japanese Americans in California as "the Achilles' heel of the entire civilian defense effort." *Id.* He felt that "when we are dealing with the Caucasian race we have methods that will test [their] loyalty," but "when we deal with the Japanese we are in an entirely different field" because of "their method of living." *Id.* In Warren's posthumously published memoirs, he later repudiated his role in bringing about Executive Order 9066. *Id.*

[64] The Tsukamoto Family featured in a set of publicity photos attempting to convince the American public that Japanese Americans are loyal and not a threat to national security. Image source: USC Digital Library, "Japanese American Incarceration Images, 1941–1946," https://doi.org/10.25549/jarda-m73, https://doi.org/10.25549/jarda-m71. AP Photos. Used with permission from the Associated Press.

A. Searches and Seizures in Japanese American Neighborhoods Post-Pearl Harbor

In the aftermath of the attack on Pearl Harbor, the policing of Japanese Americans went as far as policing homes, the area considered most sacrosanct under the Fourth Amendment.[65] The FBI searched the private homes of thousands of Japanese American residents on the West Coast, seizing items considered to be contraband.[66] As a response to these rampant warrantless searches in the hysteria that followed the events of December 7, 1941, Japanese Americans burned family photos, destroyed precious wall hangings, and buried their cultural heritage in their backyards.[67] Many families destroyed or hid anything that might make them appear loyal to Japan.

No Japanese household was safe from the aggressive policing tactics that law enforcement agencies employed post-Pearl Harbor. Police came to Fred Korematsu's house in Oakland and confiscated all his family's flashlights and cameras without a search warrant.[68] Korematsu recounted the experience saying, "[the police] confiscated everything that they thought we might use for signaling."[69] My great-aunt was a seven-year-old Japanese American in West Oakland at the time. She told me that she remembers *Ojiisan* (her grandfather, Matsunosuke) burying the family's shortwave radios and camera in the backyard, hiding the contraband items so the authorities would not confiscate them.

In addition to warrantless searches, immediately after the bombing of Pearl Harbor, the FBI issued orders "to arrest enemy aliens based on pre-drafted watch lists."[70] The FBI rounded up 1,291 Japanese American community and religious leaders, arresting them without evidence and freezing their assets.[71]

In Los Angeles, for example, on the night of December 7, 1941, the FBI and local law enforcement arrested eighty-six *Issei* leaders and held them at the LA County Jail.[72] For the next two months, FBI agents, LA Sheriffs, and

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[65] U.S. Const. amend. IV. *See also Payton v. New York*, 445 U.S. 573 (1980) (holding that searches and seizures inside a home without a warrant are presumptively unreasonable).

[66] Burton et al., *supra* note 10.

[67] Annelise Finney, *How Japanese Americans in the Bay Area Are Carrying Forward the Legacy of Reparations*, KQED, Feb. 23, 2022, https://www.kqed.org/news/11906015/how-japanese-americans-in-the-bay-area-are-carrying-forward-the-legacy-of-reparations.

[68] *See generally* Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. SOC. JUST. 1 (2005).

[69] *Id.* at 6.

[70] Jonathan Van Harmelen, *Los Angeles County Jail (detention facility)*, Densho Encyclopedia, https://encyclopedia.densho.org/Los%20Angeles%20County%20Jail%20(detention%20facility).

[71] PBS.org, *WWII Internment Timeline*, https://www.pbs.org/childofcamp/history/timeline.html (excerpted from the Japanese American National Museum).

[72] Van Harmelen, *supra* note 70.

LA policemen conducted mass arrests and raids in the Japanese American community.[73] Although FBI records showed there were 300 "Japanese enemy aliens classified for arrest" in Los Angeles, by late December, there were over 400 Japanese held in the LA County Jail.[74] The police departments of other counties in Southern California, such as Ventura, Santa Barbara, and San Luis Obispo brought their arrested *Issei* to the LA County Jail.[75]

Many local jails across the West Coast and in Hawai'i were used as temporary holding centers for Japanese Americans in the aftermath of Pearl Harbor.[76] As described in the previous section, the Los Angeles County Jail served as a temporary holding area for Japanese arrested by the FBI following the Pearl Harbor attack.[77] Holding periods ranged from one day to multiple weeks in the jail.[78] The police limited visits between inmates and their families.[79] In some instances, family members were told to wait hours for a meager minutes-long visit.[80]

Overcrowding and inadequate sanitation in the jails coupled with the stress and uncertainty of being arrested led to depression and, in some cases, suicide.[81] In the LA County Jail there were at least two documented cases of suicide among the incarcerated Japanese Americans in December 1941. On December 12, 1941, an *Issei* woman strangled herself in the LA County Jail after she was arrested for possession of a Japanese war bond.[82] And Dr. Rikita Honda died by suicide on December 14, 1941, in the LA County Jail.[83] His suicide note read: "I dedicated myself to Japanese-American friendship. Now Japan and America are at war. I could not prevent it. I wish to make amends by taking my own life."[84] While the LA County Jail has the most records of specific examples of Japanese incarceration during this time, given the large number of Japanese Americans living on the West Coast and the racist

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[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] See Densho Encyclopedia, https://encyclopedia.densho.org/categories/ for a list of the detention facilities.

[77] Van Harmelen, *supra* note 70.

[78] *Id.*

[79] *Id.*

[80] Duncan Ryūken Williams, American Sutra: A Story of Faith and Freedom in the Second World War, 19 (Belknap Press of Harvard University, 2019).

[81] Van Harmelen, *supra* note 70.

[82] *Japanese Alien Prays, Then Hangs Herself*, San Francisco Chronicle, Dec. 13, 1941.

[83] Eiichiro Azuma, *Rikita Honda*, Densho Encyclopedia, https://encyclopedia.densho.org/Rikita_Honda/#cite_ref-ftnt_ref5_5-0.

[84] Yuji Ichioka, Gordon H. Chang and Eiichiro Azuma, eds., Before Internment: Essays in Prewar Japanese-American History, 264 (Stanford University Press, 2006).

hysteria in response to the attack on Pearl Harbor, it is likely that there were many other jails being used to imprison Japanese Americans without due process of law.

Although local jails were not part of the larger carceral system operated by the War Relocation Authority or the Department of Justice and the Immigration and Naturalization Service, the willingness of these local jails to participate in the incarceration of Japanese Americans shows the true colors of the police departments. Carrying out these federal orders complemented their xenophobic and nativist beliefs, so law enforcement agencies were more than willing participants in carrying out the mass removal of Japanese Americans.

The xenophobia of local law enforcement at the time can be seen in the actions of then-LAPD-Commissioner Alfred Cohn. Commissioner Cohn was a longtime anti-Japanese advocate and "an important force in persuading Los Angeles Mayor Fletcher Bowron to support the forced removal of Japanese Americans."[85] Commissioner Cohn demonstrates how a law enforcement leader can advise and influence politicians to advocate for change. In this case, Cohn presented a thirty-two-page report—among other memoranda[86]—to Mayor Bowron to convince him that Japanese incarceration was a good idea.[87]

Cohn was a public official, reporter, and screenwriter.[88] Mayor Bowron of Los Angeles appointed Cohn to the Board of Police Commissioners on February 9, 1940.[89] As LA Police Commissioner, Cohn initiated several procedural reforms.[90]

Commissioner Cohn's paternalistic ideas about Japanese Americans were on display in his report to Mayor Bowron where he stated, "The Issei are so completely rattled that many of them welcome the thought of the security internment affords them."[91] In that same report to Mayor Bowron, Cohn

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[85] Jonathan Van Harmelen, *The LAPD and Japanese Americans*, The Rafu Shimpo (July 18, 2020), https://rafu.com/2020/07/the-lapd-and-japanese-americans/.

[86] Scott Kurashige. The Shifting Grounds of Race: Black and Japanese Americans in the Making of Multiethnic Los Angeles, 118 (Princeton University Press, 2010).

[87] *See* Report to Mayor Bowron by Alfred Cohn on several phases of the investigation into Japanese matters. Reproduced from the holdings at the Franklin D. Roosevelt Library, 3. Available at https://www.archives.pref.okinawa.jp/wp-content/uploads/roosevelt.pdf.

[88] Alfred A. Cohn, Prabook, https://prabook.com/web/alfred.cohn/2566955.

[89] *Id.*

[90] *Id.*

[91] Report to Mayor Bowron, *supra* note 87.

wrote, "when conditions become so aggravated that they become unbearable, [the Nisei (second-generation Japanese)] will surely be fit subjects for fifth-column propaganda and therefore potential sources of subversive acts."[92] Cohn emphasized that all Japanese must be removed from the West Coast: "Evacuation and/or internment of the Issei, therefore, necessarily must mean the evacuation and/or internment of these younger Nisei."[93]

Mayor Bowron in turn "helped to escalate the magnitude of the 'Japanese problem' in public eyes."[94] Japanese American scholar, Scott Kurashige wrote,

> The mayor seems to have reacted quite strongly to internal reports he solicited from police commissioner Al Cohn. In memos dated January 10 and January 21, 1942, Cohn stated that there was "no doubt that in this horde of alien born Japanese, espionage activities have been in progress for several decades. Yet he argued that the Nisei posed the "greatest menace." While the Nisei "outwardly" appeared to be "thoroughgoing Americans," Cohn discerned that "it would be foolish to look for any great degree of loyalty among them."[95]

Cohn also asserted to Togo Tanaka, an American newspaper journalist, in a City Hall meeting the month after the Pearl Harbor attacks that they both "knew [that] more planes [were] wrecked at Pearl Harbor" by *Nisei* driving trucks than by Japanese bombers.[96] His past writings and actions reflected his dangerous conspiracy theories. But his authority as a law enforcement leader made his ideas particularly influential. He used his authority as a law enforcement leader to spread his racist conspiracy theories, contributing in part to Mayor Bowron's paranoia about Japanese Americans.

B. A Community Incarcerated

This section will examine the actions of the police following the enactment of Executive Order 9066. First, it will describe the forced removal of Japanese Americans. Second, it will investigate the brutality of the Military Police against Japanese Americans in the prison camps. Third, it will analyze the aggression from the LAPD in response to the return of the Japanese Americans.

On February 19, 1942, ten weeks after the Pearl Harbor attack, President Franklin Delano Roosevelt signed Executive Order 9066.[97] Executive

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[92] *Id.*

[93] *Id.* at 4.

[94] Kurashige, *supra* note 86, at 118.

[95] *Id.*

[96] *Id.* at 119.

[97] Albert H. Small Documents Gallery, *Righting A Wrong: Japanese Americans and World War II,* The National Museum of American History, Washington, D.C.

Order 9066 did not name a specific racial or ethnic group, but rather gave the military power to decide who was a threat to homeland security.[98] It authorized the Secretary of War, or any designated military commander to establish "military areas" and exclude from them, "any or all persons."[99] In the event of a Japanese invasion of the U.S. mainland, many viewed the large Japanese American population on the West Coast as a security risk.

Under Executive Order 9066, nearly 75,000 American citizens of Japanese ancestry along with 45,000 Japanese nationals living in the United States (but long denied citizenship because of their race) were taken into custody.[100] The government told Japanese Americans to pack up their lives and evacuate their homes. They could only take what they could carry and had to arrange to store, sell, or give away everything else they owned on short notice.

Like many others, Matsunosuke's second son, Joseph Tsukamoto, received information from the War Relocation Authority about where and when to report for "evacuation."

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[98] *Id.*

[99] Washington, DC and American Lives II Film Project, LLC, "Civil Rights: Japanese Americans," PBS, September 2007, http://www.pbs.org/thewar/at_home_civil_rights_japanese_american.htm.

[100] *Righting A Wrong: Japanese Americans and World War II, supra* note 97.

[101] Joseph Tsukamoto, Matusnosuke's second-born son, was a priest at the Episcopal Christ Church in San Francisco's Japanese District. Here, he receives information on the "evacuation" under Executive Order 9066, c. April 1942. Photo taken by Dorothea Lange. Image source: Library of Congress, https://www.flickr.com/photos/library_of_congress/51691485560/. According to the Library of Congress, there are no known restrictions on publication.

Families had only a matter of days to gather their possessions, told to pack only what they could carry. They were not told where they were going or how long they would be gone. Since voluntarily leaving your home and possessions to live in a prison camp was "the truest sign of loyalty,"[102] Japanese Americans sold their homes, businesses, and other valuables for small sums of money. With their identification numbers pinned to their finest clothes, tens of thousands of Japanese Americans boarded trains to leave behind the only homes they ever knew. After six months living in manure-crusted horse stalls and other detention centers—including local jails[103]—while the prison camps were being built, they journeyed inland to live in dusty, hastily constructed barracks for three years. There they would meet unfamiliar desert flora and fauna, unfamiliar food, unforgiving weather, and even more unforgiving Military Police.

My great-aunt, Kazuko Rowe—who was seven years old at the time—remembers everyone "packing like crazy." They each filled a laundry bag with all they could carry. Her family stored a few of their possessions in the basement of a sympathetic neighbor's house and at their church. They did not have enough time to sell many of their possessions, but they did sell their grocery store to a Chinese American family for next to nothing.

When it came time to "evacuate," my great-grandparents, Ima and Nobu Yasuda, dressed up their two young children, Kazuko and Hiroshi, age four, in their hats and coats because they had no idea where they would be going. They also placed paper luggage tags with their family number, 2407, on string hanging around their necks. In May of 1942, with one laundry bag apiece, the family departed on train cars with other Japanese American families. They were shipped thirty miles from their home in West Oakland to Tanforan Racetrack in San Bruno, California.

C. The Brutality of the Military Police

Not many know about the brutality that incarcerated Japanese Americans experienced at the hands of the Military Police during World War II. Military Police are the law enforcement arm of the U.S. Army. The Army website says that Military Police, "protect peoples' lives and property on Army installations by enforcing military laws and regulations."[104] They are supposed to "control traffic, prevent crime, and respond to all emergencies."[105]

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[102] Kurashige, *supra* note 86, at 123.

[103] *See The LAPD and Japanese Americans, supra* note 85.

[104] *Military Police,* U.S. Army (April 16, 2020), https://www.goarmy.com/careers-and-jobs/career-match/support-logistics/safety-order-legal/31b-military-police.html.

[105] *Id.*

The Military Police effectively brought the war within the U.S. border by terrorizing citizens whose loyalties were in question due to racism and wartime hysteria. Nativism further propelled the war effort as state entities turned their attention to the Japanese American community.

The shootings and killings of unarmed Japanese Americans represent the most egregious use of force by law enforcement against the unjustly incarcerated Japanese Americans. This Military Police brutality against unarmed Japanese Americans contributes to the shameful legacy of law enforcement's complicity in the state violence of Executive Order 9066.[106]

There are several reported protests from the prison camps that the Military Police turned violent. One of the most violent and most well-known of these protests was a protest at Manzanar prison camp. The police feared a riot and tear-gassed the crowds that had gathered at the police station to demand the release of Harry Ueno, a man who had been arrested for allegedly assaulting Fred Tayama.[107] The Military Police fired into the crowd of protestors, killing two people and wounding ten others.[108] In the fallout of the violent conflict, a six-year-old tearfully told his mother, "Mommy, let's go back to America."[109]

In another case of Military Police violence against Japanese Americans, Shoichi James Okamoto from Garden Grove, California, was shot and killed by a sentry after a verbal altercation at Tule Lake prison camp.[110] Shoichi drove a construction truck between Tule Lake and a nearby worksite.[111] The sentry at the gate demanded that Shoichi step out of the truck and show his pass.[112] Shoichi stepped out of the construction truck but refused to show the sentry his pass.[113] The sentry responded by striking Shoichi on the shoulder with the butt of his rifle.[114] A verbal altercation ensued, and the

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[106] In Lordsburg, New Mexico, Japanese Americans were delivered by trains and forced to march two miles to the camp in the middle of the night. On July 27, 1942, during one of the night marches, two Japanese Americans, Toshio Kobata and Hirota Isomura, were shot and killed by a sentry who claimed they were attempting to escape. Witnesses testified that the two elderly men were disabled and had been struggling during the night march. However, the army court martial board found the sentry not guilty. See National Japanese American Historical Society (NJAHS) Digital Archives, *Lordsburg*, https://njahs.org/confinementsites/lordsburg-internment-camp/.

[107] Brian Niiya, *Manzanar riot/uprising*, Densho Encyclopedia, https://encyclopedia.densho.org/Manzanar_riot/uprising/.

[108] *Id.*

[109] Snyder, *supra* note 59, at 90.

110 Tetsuden Kashima, *Homicide in Camp*, Densho Encyclopedia, https://encyclopedia.densho.org/Homicide%20in%20camp/. See https://digitalassets.lib.berkeley.edu/jarda/ucb/text/reduced/cubanc6714_b256r12_0050.pdf for the Report of the Investigation Committee on the Shoichi Okamoto Incident (July 3, 1944).

111 Richard Reeves, Infamy: The Shocking Story of the Japanese American Internment in World War II, 198 (Henry Holt and Company, 2015).

112 *Id.*

113 *Id.* at 199.

114 *Id.*

sentry shot Shoichi, who was unarmed.[115] Shoichi died on May 25, 1944, when he was only thirty years old.[116] The court martial acquitted the sentry of the homicide.[117] The sentry was fined one dollar for the cost of firing the bullet that killed Shoichi since it was an "unauthorized use of government property."[118]

My family was imprisoned at Topaz prison camp, where a Military Police sentry shot James Hatsuaki Wakasa on April 11, 1943.[119] My Great-Aunt Kazuko, who was a child at the time, told me that she had heard about Mr. Wakasa's murder. The narrative that she heard was that he was walking his dog too close to the barbed-wire fence. She said her parents frequently warned her and her younger brother, Hiroshi, to stay far away from the camp perimeter.

Later in the day after the sentry shot James Wakasa, the U.S. State Department and the Spanish embassy sent representatives to investigate the shooting.[120] The representatives reported that James's body was lying five feet inside the fence, and in such a way that he "had been facing the sentry tower and walking parallel to the fence; and the wind was from [his] back making it highly improbable that he could have heard [the sentry's] challenge."[121] The Spanish representative concluded that the shooting was "due to the hastiness on the part of the sentry, who, not receiving an immediate response to his challenge, 'probably fired too quickly.'[122] The court martial charged the sentry with manslaughter but later acquitted him.[123] Below is a photograph of Mr. Wakasa's funeral at Topaz.

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115 *Id.*

116 *Id.*

117 *Id.*

118 *Id.*

119 Kashima, *supra* note 110.

120 *Id.* In March 1942, the United States established an official "Exchange Process" for prisoner of war negotiations with Japan and Germany. Spain served as the Protectorate Nation for Japan and Switzerland served as the Protectorate Nation for Germany. Diplomats including consulate and embassy staff in America led this Exchange Process. Since the U.S. government likely viewed the Japanese Americans imprisoned in the concentration camps as a type of prisoner of war, it makes sense that the Spanish Embassy would come to investigate this shooting and represent Japan. *See* https://www.thc.texas.gov/preserve/projects-and-programs/military-history/texas-world-war-ii/japanese-german-and-italian.

121 Kashima, *supra* note 110.

122 *Id.*

123 *Id.*

[124]

With the end of World War II in 1945 and the closing of the incarceration camps shortly after, Japanese Americans were left to pick up the pieces of their shattered lives. Some went back to their hometowns while others scattered across the country in hope of finding a new home free from racial discrimination. They all faced financial ruin and many lost irreplaceable personal property because they were only allowed to take what they could carry. Assimilating to life after "camp" was a hardship for everyone.[125] Japanese Americans faced job scarcity and racism after World War II. Even the most highly educated of the former "evacuees"[126] had trouble finding work. As they tried to rebuild their lives, however, law enforcement hostility further stigmatized Japanese Americans and made it difficult for them to return to normalcy in the post-war period.

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[124] "Topaz, Utah. James Wakasa funeral scene. (The man shot by military sentry)", Records of the War Relocation Authority, 1941–1989, National Archives Catalog, https://catalog.archives.gov/id/538190. According to the National Archives website, "access unrestricted" and "use unrestricted."

[125] The federal government resettled families, moving many of them to the Midwest and East Coast. *See generally* Greg Robinson, After Camp: Portraits in Midcentury Japanese American Life and Politics (University of California Press, 2012). The federal government also created the Japanese Evacuation Claims Act of 1948 to compensate interned families for property losses but, in the end, little money was distributed. Japanese-American Evacuation Claims Act, Pub. L. 80-886, 62 Stat. 1231 (1948) (establishing a system for examining the claims for compensation submitted by Japanese internees; monetary compensation was capped at $2,500 per person). *See generally* Frank F. Chuman, The Bamboo People: The Law and Japanese-Americans, 235–45 (Publisher's Inc., 1976); Roger Daniels: Prisoners Without Trial: Japanese Americans in World War II, 88–97 (Rev. ed., Hill & Wang, 2004).

[126] Even though the U.S. government forcibly removed Japanese Americans from their homes and made them prisoners, many called these incarcerated Japanese Americans "evacuees."

D. Picking Up the Pieces in the Post-War Period

In *Ex parte Mitsuye Endo*, the U.S. Supreme Court ruled in favor of Mitsuye Endo who claimed that exclusion from the West Coast prevented her from continuing with her employment.[127] The Supreme Court's ruling led the War Department to issue a statement saying that people of Japanese ancestry "would be permitted the same freedom of movement throughout the United States as other loyal citizens and law-abiding aliens" effective January 2, 1945.[128] In postwar Los Angeles, where many Japanese Americans chose to reestablish themselves, "there were more Japanese . . . on government relief than there had been in the depths of the Great Depression."[129]

After being released from Topaz in October of 1945, my family chose to take the train back to San Francisco, where they lived in a flat in Chinatown with three other families. My great-grandfather, Nobu, worked as a dishwasher and my great-grandmother, Ima, cleaned apartments. Both were college educated—Ima was a graduate of the University of California, Berkeley, and Nobu graduated from a Japanese university—but those were the only jobs they could find. The hostile social climate, housing shortage, and limited job opportunities created arduous challenges for returning Japanese Americans to overcome.

My family experienced economic hardship in San Francisco and decided to move to Oakland, where my grandmother, Amy, was born in November 1946. Under pressure to assimilate and prove their American-ness, Ima and Nobu gave their youngest child an American name. Both Ima and Nobu died from cancer when my grandmother was a child. They were fifty and fifty-three years old respectively. My Great-Aunt Kazuko, Ima and Nobu's first-born, turned down a college scholarship to raise her younger siblings. She worked as a grocery store cashier to provide for her family. My grandmother and her siblings suspect their parents' premature deaths had much to do with the stress and poor living conditions that they endured in Topaz and the upheaval that followed their years of incarceration.[130]

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[127] *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944).

[128] *The Return of Japanese Americans to the West Coast in 1945*, The National WWII Museum (Mar. 26, 2021), https://www.nationalww2museum.org/war/articles/return-japanese-americans-west-coast-1945.

[129] Daniels, *supra* note 2.

[130] For an analysis of this incarceration trauma response, see Donna K. Nagata, Jackie H. J. Kim & Teresa U. Nguyen, *Processing Cultural Trauma: Intergenerational Effects of the Japanese American Incarceration*, 71 J. Soc. Issues 356 (2015). Available at https://operations.du.edu/sites/default/files/2021-07/processing%20cultural%20trauma.pdf.

The Tsukamoto family regained ownership of their laundry business in 1946.[131] The People's Laundry remained in the hands of the Tsukamoto family until 1973, when it was sold and converted into office space.[132] Today, the building is still privately owned.[133] It became San Francisco Designated Landmark number 246 in 2004.[134]

San Francisco designated the Tsukamotos' People's Laundry as Landmark 246 in 2004. Image source: photograph taken by Andrew Ruppenstein, August, 23, 2020, and he granted permission to use here.

[131] Sam Chase, James Lick Baths, Clio: Your Guide to History, Mar. 25, 2019, https://theclio.com/entry/13227. See also City of San Francisco, *Landmark Designation Report: James Lick Baths and People's Laundry*, 2004. Available at http://ec2-50-17-237-182.compute-1.amazonaws.com/docs/landmarks_and_districts/LM246.pdf.

[132] Chase, *supra* note 131.

[133] *Id.*

[134] *Id.*

Hardship was a common experience for the returning Japanese Americans. While they faced prejudice and aggression, the former incarcerees were adamant about moving forward and deliberately decided not to dwell on the past. This mentality helped the community rebuild, but the silence delayed healing the trauma from the atrocities of Executive Order 9066 and the *Korematsu* Supreme Court decision.[135] Shame began to grow.

E. The Case Study of the LAPD

Although Japanese Americans were allowed to return to the West Coast, their arrival was slow at first.[136] Before Executive Order 9066, approximately 36,000 Japanese Americans lived in Los Angeles County.[137] Fewer than 300 Japanese Americans returned to the formerly restricted territory a month after they left the prison camps.[138] Many felt apprehensive about returning to the West Coast due to fears of violence and discrimination. For example, city councils in Atwater, Livingston, and Turlock all expressed that they did not want Japanese to return.[139]

Los Angeles police officials immediately protested the return of Japanese Americans to Los Angeles after the U.S. Supreme Court's *Ex Parte Endo* decision that revoked the West Coast exclusion.[140] The Police Commission, with support from LAPD Chief Clemence Horrall, passed a resolution on December 20, 1944, announcing their opposition to the return of Japanese American families, arguing that "it would be impossible to vet for loyalty" and that police officers "would be incapable of preventing riots caused by white mobs."[141] One of the two votes against the resolution was that of LAPD Commissioner Cohn, who opposed the resolution on the grounds that its language was not tough enough to protect the public from the returning Japanese Americans.[142]

Commissioner Cohn argued that returning Japanese Americans should be mandated to carry identification cards.[143] Dillon Myer of the War Relocation Authority rejected Cohn's idea.[144] The LAPD Police Chief urged the War

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135 *Korematsu v. United States*, 323 U.S. 214 (1944).

136 *The Return of Japanese Americans to the West Coast in 1945*, The National WWII Museum (Mar. 26, 2021), https://www.nationalww2museum.org/war/articles/return-japanese-americans-west-coast-1945.

137 *Id.*

138 *Id.*

139 *See* The Mass Incarceration of Japanese Americans in WW2, Silent Sacrifice Part 2, Timeline – World History Documentaries, https://www.youtube.com/watch?v=lhGcz0URFOk.

140 *The LAPD and Japanese Americans, supra* note 85.

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

Relocation Authority to provide the LAPD with the names and addresses of all the Japanese Americans returning to Los Angeles so his forces could "better patrol" those areas.[145]

Even after Japanese Americans left the West Coast zone, the LAPD—propelled by nativism—remained active in enforcing racial exclusion.[146] The anti-Japanese *Los Angeles Examiner* reported on September 6, 1944, that LAPD officer, Sergeant Jack Sergel visited Manzanar concentration camp for judo tournaments.[147] *The Examiner* asserted that judo "instilled Japanese values" and that the judo lessons and tournaments were "a gross violation of official property."[148] To appease the newspaper, the LA Police Commission announced a board inquiry into Sergel's judo activities, but Sergel resigned from the LAPD in protest.[149]

From helping bring about Executive Order 9066 to sowing seeds of distrust about the Japanese American community once freed from the prison camps, the record shows that many LAPD leaders were relentless with their racist conspiracy theories and fearmongering.

III. INVERTING SHAME

As a result of their mistreatment both during and after incarceration, silence and shame reigned supreme within the Japanese American community after the war. Even within families, no one discussed it. My grandmother said that on the rare occasion her parents and older siblings talked about their incarceration experience, they would refer to it as "camp." For years, my grandmother thought that Topaz was like a summer camp. My family is not alone in this, as many Japanese American families refused to discuss the humiliation and hardship they endured.[150]

In the aftermath of Executive Order 9066, Japanese Americans came out of their desert prisons with a sense of shame and guilt, having been considered betrayers of their country. There were no complaints or rallies for justice because the Japanese way is to *shoganai* しょうがない (roughly translated as "it can't be helped"). *Shoganai* is an acceptance of fate because some things are outside of our control. The Japanese mentality is to accept and move on.

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[145] *Official Row Flares Up Over Freed Japs' Return*, Los Angeles Times (Jan. 13, 1945).

[146] *See The LAPD and Japanese Americans, supra* note 85.

[147] *Ban on Judo Training in Police Department Ordered by Board,* Los Angeles Examiner (Sep. 6, 1944).

[148] *The LAPD and Japanese Americans, supra* note 85.

[149] *Id.*

[150] *See generally* Violet H. Harada, *Breaking the Silence: Sharing the Japanese American Internment Experience with Adolescent Readers.* 39 J. Adolescent & Adult Literacy 630 (1996). Available at http://www.jstor.org/stable/40015654.

Shame is also a pervasive value in Japanese culture. Japanese people are generally very concerned about how their behavior appears to others. American police, on the other hand, seem to operate with zero accountability and with no shame. By highlighting the ways that law enforcement acted shamefully and in violation of their purported creed "to protect and serve," I hope to expand the conversation on police accountability and highlight how racism infiltrates law enforcement and results in state violence. By sharing my family's story, I hope to repudiate the silence and shame that has plagued generations of Japanese Americans.

In this paper, I used my family history to explain the terror and state violence that happened to the Japanese American community. This paper is about how nativism and white supremacist notions of race influence law enforcement agencies, resulting in state violence against minority groups. I am proud to be the descendant of a civil rights pioneer who was not afraid to rock the boat and stand up against discrimination. Matsunosuke Tsukamoto's story deserves to be highlighted not only because of the historical lessons we can learn about discriminatory policing and nativism, but also because it is a rejection of the notion that Asians are docile, meek, and politically passive.

The state violence I describe in this paper is an example of a community at the mercy of state actors. Executive Order 9066 was part of a continuum of a long history of discrimination and prejudice against Japanese immigrants and their American-born children. While Japanese Americans lost billions of dollars in property and net income, the most damaging aspect was the loss of their personal liberty and dignity.[151] Despite the formal apology and reparations of the late 1980s, these government actions haunt the victims of Executive Order 9066 and their descendants.[152]

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[151] The Commission on Wartime Relocation and Internment of Civilians estimates that the total property lost was $1.3 billion, and net income lost was $2.7 billion (calculated in 1983 dollars). Allison Shephard, *"Pride and Shame:" The Museum Exhibit that Helped Launch the Japanese American Redress Movement*, The Seattle Civil Rights & Labor History Project at the University of Washington (2006), https://depts.washington.edu/civilr/prideandshame.htm.

[152] *See* Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 903 (1988) (offering a formal presidential apology and granting reparations "to discourage the occurrence of similar injustices and violations of civil liberties in the future"). The Act compensated 82,210 people of Japanese descent who were incarcerated during World War II (out of roughly 120,000) with a symbolic payment of $20,000 to each. Tracy Jan, *Reparations mean more than money for a family who endured slavery and Japanese American internment*, Washington Post (Jan. 24, 2020), https://www.washingtonpost.com/graphics/2020/business/reparations-slavery-japanese-american-internment/. This came nearly four decades after their captivity. Many victims of Executive Order 9066 had already died by the time reparations came around—my great-grandparents included. While no amount of money could ever compensate for their losses, Mits Yamamoto, a Japanese American who was incarcerated at "Jerome Relocation Center" in Arkansas, told the *Washington Post* in an interview that cash compensation "[makes] the government apology feel more sincere." *Id.* He added, "You should pay for your mistakes." *Id.*

For generations, there have been overwhelming feelings of shame within Japanese American families for something that was not their fault. The state actors that terrorized Japanese Americans should be the ones that feel shame. Instead, the experiences of the Japanese American community have been cloaked in silence. Shame loves secrecy. In Japanese culture, it is common to avoid shame and to fear losing face. While one of the best ways to manage shame is to discuss it, in many Japanese American families this trauma has gone unspoken, providing an ideal breeding ground for shame. In recent years there has been an increase in scholarship about Japanese incarceration, especially as it relates to the War on Terror and the corrosive effects of state overreaction.[153] I hope that this paper will continue the work of making sure these stories are not forgotten. History has a terrible habit of repeating itself if we do not heed the warnings of those who came before us.

One of the most unsettling aspects of Japanese incarceration during World War II is how easily most Americans accepted it.[154] Many Americans, typically fueled by nativism and racist stereotypes, challenged Japanese loyalty and commitment to the war effort. Executive Order 9066 was the culmination of decades of racism and xenophobia. We must remain vigilant against racial profiling, civil rights abuses, discriminatory policing, and wartime panic. Executive Order 9066 proves the fragility of our constitutional rights. White America has a history of doing despicable things to people of color, and this could happen to any marginalized group.

While stories of the incarceration experience were not openly shared within the Japanese community or even within families, it is important to educate those who have never heard these stories. The stories of those who lived through this state violence must go on to prevent this injustice from happening again. Stories of pre-war Japanese exclusion and Executive Order 9066 are worth revisiting as the United States witnesses a spike in anti-Asian violence and confronts a racial reckoning, especially as it relates to discriminatory policing and police brutality.

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[153] *See* Eric K. Yamamoto & Rachel Oyama, *Masquerading behind a Façade of National Security*, 128 YALE L.J. F. 688 (2018); Evelyn Gong, *A Judicial Green Light for the Expansion of Executive Power: The Violation of Constitutional Rights and the Writ of Habeas Corpus in the Japanese American Internment and the Post-9/11 Detention of Muslim Americans*, 32 T. MARSHALL L. REV. 275 (2007); Harvey Gee, *Habeas Corpus, Civil Liberties, and Indefinite Detention during Wartime: From Ex Parte Endo and the Japanese American Internment to the War on Terrorism and Beyond*, 47 U. PAC. L. REV. 791 (2016).

[154] *See* Bill Ong Hing, *Lessons to Remember from Japanese Internment*, HUFFPOST (Feb. 21, 2012), https://www.huffpost.com/entry/lessons-to-remember-from_b_1285303.

CONCLUSION

While December 7, 1941, is a dark day in our country's history, February 19, 1942, is also a day that will live in infamy. It was the day that 120,000 Japanese Americans were betrayed by their country. This piece of American history is rarely discussed, yet it is important that we learn about Executive Order 9066 and the nativism and hysteria that led to it. From the racist rhetoric of police leaders that helped bring about Executive Order 9066 to the violence in the prison camps and the continued fearmongering upon the return of the "evacuees," the police actions during that time show how deeply rooted nativism and anti-Asian sentiment run through law enforcement and how that racism in turn can have devastating effects on the lives of ordinary people.

Executive Order 9066 stole the hopes and dreams of generations of Japanese Americans. The law enforcement role in bringing about and implementing Executive Order 9066 is a shameful legacy and should be part of the discussion about how to solve the problem of policing in America. This story of racial discrimination and policing is one that occurs over and over again in this country, especially as it relates to the criminalization of the routine activities of marginalized groups. Surfacing my family history and shifting the shame of Executive Order 9066 squarely on the U.S. government is especially important given the recent resurgence of anti-Asian sentiment stemming from the COVID-19 pandemic as our country continues to grapple with what safety and protection mean.

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