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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

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* 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.

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[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).