

“Entitled to Our Land”¹: The Settler Colonial Origins of the University of California

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Many may recognize the “land grant” moniker that several dozen U.S. universities like the University of California carry, but what many do not realize is that the land “granted” to fund these universities was land that the federal government had recently expropriated from Native Nations through violent seizures and coercive treaties. While scholarship already exists on the colonial history of land grant universities, this article zeroes in on the history of the University of California. It describes how the school’s governing body—the University of California Regents—aggressively managed the state’s land grant in the recent wake of state-sponsored genocide of Native Californians to raise funds necessary for the university’s development into an elite institution. It also describes how the Regents brought records of their land grant management to California’s 1879 Constitutional Convention. There the Regents lobbied for the university to be declared an autonomous public trust, independent from legislative control. This article concludes with a case study to argue that this history has resulted in cruel irony. California Tribes’ modern ability to seek legislative redress for harms ratified by the University of California is limited by the university’s legal status as a public trust—a sovereign-like immunity that the Regents built, in part, from their participation in Native dispossession.

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*. Berkeley Law Classes of 2022 and 2021, respectively. This article was written as part of the Truth and Justice Project at University of California, Berkeley, under the supervision of Professor Tony Platt. The original research for the piece was completed during the Fall 2020 Federal Indian Law Writing Seminar taught by Professors Seth Davis and Tony Platt. We are also indebted to Professor Nazune Menka and Dr. Robert Lee for their feedback.

1. A quote by Joseph Winans, University of California Regent and delegate at the 1878 California Constitutional Convention, defending the University of California’s management of its land grant to the education committee. Debates and Proceedings of the Constitutional Convention of the State of California, Convened at the City of Sacramento, Saturday, September 28, 1878, at 1353 (1881) (“Why does he stab in the dark? Why, if he has anything to say against the Regents, does he not come out and

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INTRODUCTION

In commemoration of the 150th anniversary of the 1862 Morrill Act, nearly forty supporters gathered on University of California, Berkeley’s campus next to a bust of President Abraham Lincoln at the base of the Campanile.² Attendees included students, alumni, faculty, historians, and representatives of the campus’s Reserve Officer Training Corps (ROTC) program. A campus planner spoke about the origins of the Lincoln bust and the Campanile carillon rang with a special concert. “Blueberry juice, cranberry juice, and white lemonade were poured in a patriotic toast” to the act which gave the University of California its start.³

This celebration presents a hallowed and oft-repeated version of the university’s origin story as that of a partnership between a benevolent federal

point out where they have done wrong? I dislike this method of dealing with questions by innuendo. I dislike insinuations. Now, sir, I have explained this matter as fully as I could, and as fully as we who are Regents here are informed about. We are entitled to our land, and we will get it if Congress chooses to be equitable and just.”)

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2. Steve Finacom, *150th Anniversary for Civil War-Era Law That Helped Bring UC into Being*, BERKELEY NEWS, June 29, 2012, <https://news.berkeley.edu/2012/06/29/150th-anniversary-of-the-morrill-act/>.

3. *Id.*

government and the little state school-that-could.⁴ But the reality is that the Morrill Act was only the latest act of settler colonialism by the United States federal government, and the University of California was cashing in on stolen land mere years after state-sponsored genocide had been committed against Native Californians, the land’s original possessors. Dr. Cutcha Risling Baldy defines settler colonialism as “a continuous set of structures designed to claim land and to do whatever is necessary to erase Indigenous claims to land, territory, and even history.”⁵ The Morrill Act and its mythologized history at the University of California are a part of this set of structures Dr. Risling Baldy describes.⁶

As exposed in a landmark report by Tristan Ahtone and Robert Lee in *High Country News* in March 2020, the Morrill Act transferred to California 150,000 acres that had been expropriated coercively and violently from Native Californians by the United States federal government.⁷ The University of California Regents then sold this land to white speculators and settlers and turned the profits into an endowment for their new school. Ahtone and Lee, and other activists and scholars, thus urge that the Morrill Act be called a “land grab” rather than a “land grant.”⁸

The land that the University of California received through the Morrill Act in 1868 had only recently been violently invaded and claimed by the United States government. To take the land, the federal government and the state of California, through white settlers and militias, committed genocide against Native Californians between 1846 and 1873.⁹ The full scope of this atrocity and

4. See, e.g., *Morrill Act Event Spotlights History of Higher Education*, LINK, May 1, 2012, <https://link.ucop.edu/2012/05/01/morrill-act-event-spotlights-higher-educations-land-grant-history/>; Nicole Freeling, *Conference Celebrates UC’s Land-Grant History*, University of California, April 30, 2012, <https://www.universityofcalifornia.edu/news/conference-celebrates-ucs-land-grant-history> (authors’ note: the university apparently removed this article from its website in late 2021, but the content was retrieved from an internet archive and is on file with the authors.).

5. CUTCHA RISLING BALDY, *WE ARE DANCING FOR YOU: NATIVE FEMINISMS & THE REVITALIZATION OF WOMEN’S COMING-OF-AGE CEREMONIES* 11 (2018) (citing Patrick Wolfe).

6. See generally Sharon Stein, *A Colonial History of the Higher Education Present: Rethinking Land-Grant Institutions Through Processes of Accumulation and Relations of Conquest*, *Critical Studies in Education* (2017) (reconnecting public higher education to its history of conquest and imperialism).

7. 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>.

8. See, e.g., *id.*; JOSEPH A. MYERS CENTER FOR RESEARCH ON NATIVE AMERICAN ISSUES & NATIVE AMERICAN STUDENT DEVELOPMENT, *THE UNIVERSITY OF CALIFORNIA LAND GRAB: A LEGACY OF PROFIT FROM INDIGENOUS LAND* (2021), <https://cejce.berkeley.edu/centers/native-american-student-development/uc-land-grab>.

9. DAMON B. AKINS & WILLIAM J. BAUER, JR., *WE ARE THE LAND: A HISTORY OF NATIVE CALIFORNIA* 137 (2021) (estimating that from 1846 to 1873 vigilantes, militias, the state of California, and the United States initiated hundreds of campaigns that killed between 9,492 and 16,094 California Indians); see also Lee & Ahtone, *supra* note 7 (“Bounties for Indigenous heads and scalps, paid by [California] and reimbursed by the federal government, encouraged the carving up of traditional territories without any compensation.”).

the Indigenous people who resisted and survived it¹⁰ is beyond the confines of this article. But the destruction and “brutality of the missions, rancho system, and Gold Rush” is real, consistently erased, and very much known to California Indians today.¹¹ Early in this period of genocide, California Tribes negotiated and signed eighteen treaties with United States agents, securing 7.5 million acres of their land in the face of invasion.¹² The United States Senate, however, refused to ratify the treaties and sealed the documents.¹³ That land became so-called “public land” and “[t]he University of California located all of its grant among these stolen lands.”¹⁴

Profits from selling the land greatly aided the early development of the University of California. The university aggressively managed its land grant, raising more than \$700,000 (\$19.2 million in today’s value) from selling its 150,000 acres over the course of thirty years.¹⁵ As Ahtone and Lee summarize, “[i]n the late 19th century, income from the fund—traceable to the lands of the Miwok, Yokuts, Gabrieleño, Maidu, Pomo and many more—covered as much as a third of the University of California’s annual operating expenses.”¹⁶

But profits weren’t the only thing the university reaped from the grant. The Regents also used the fact that they had managed the land grant to prove that they were responsible to govern the university as a constitutional public trust.¹⁷ At the 1879 California Constitutional Convention, the Regents faced charges that they had mismanaged the grant by violating federal grant guidelines; many Californians desired that under the new constitution the legislature be more involved in the running the university.¹⁸ But the Regents, at least twice, responded by producing land grant records to insist that they could be trusted to run the university without legislative interference.¹⁹ At one point, Regent and constitutional delegate Joseph Winans responded to an inquiry about some of the Regents’ land grab tactics with a revealing sentiment, “Now, sir, I have explained

10. See AKINS AND BAUER, *supra* note 9, Chapter 5; *see also* BALDY, *supra* note 5, at 66 (“Many tribes throughout California resisted the continued encroachment on their lands and repeated violence against their people.”).

11. BALDY, *supra* note 5, at 52; *see also* AKINS AND BAUER, *supra* note 9, at 2 (“Despite the long and rich history of Indigenous People in California, historians, anthropologists, and everyday people disconnected California Indian History from California history.”).

12. AKINS AND BAUER, *supra* note 11, at 146.

13. *Id.*

14. Lee & Ahtone, *supra* note 7.

15. *Id.* The precise amount earned was \$730,860. Robert Lee, Tristan Ahtone, et al., *All Universities*, HIGH COUNTRY NEWS, <https://www.landgrabu.org/universities> (last accessed December 15, 2020). Today’s value was calculated by the author using an inflation calculator. Technically, by 1916 a small fraction, only 1,402 acres, of the grant remained. Lee & Ahtone, *supra* note 7.

16. Lee & Ahtone, *supra* note 7.

17. *Infra* section II.B.

18. John Aubrey Douglass, *How and Why the University of California Got Its Autonomy*, Research & Occasional Paper Series, Center for Studies in Higher Education (2015) at 4, 6 (hereinafter Douglass, *Autonomy*).

19. *Id.*

this matter as fully as I could and as fully as we who are Regents here are informed about. We are entitled to our land and we will get it if Congress chooses to be equitable and just.”²⁰ After months of debate and a statewide vote, the Regents’ arguments of entitlement prevailed and gained constitutionally protected status as trustees of the university.²¹

As public trustees, the Board of Regents has full power over university affairs.²² While the California legislature still controls the university through appropriations and generally applicable laws, the Regents have nearly exclusive authority over internal school affairs.²³ This sprawling power today covers nine campuses, five medical centers, three national laboratories, 227,700 employees, 280,380 students,²⁴ a \$21 billion endowment,²⁵ and, importantly for this article, thousands of acres across the state.²⁶ These acres are different from the land sold to speculators and settlers under the Morrill Act originally, but are a potential source of redress and reparations for California Tribes seeking land for ancestral and cultural repatriation purposes.²⁷ Because the university is a constitutional public trust, the Regents have plenary authority over internal university matters, including its property.²⁸ California Tribes and advocacy groups like the California Truth & Healing Council²⁹ thus face a legal barrier if they were to attempt to enact state legislation forcing the Regents to give up an inch of their land.

This article proceeds as follows. Part I provides a description of the Morrill Act’s primary provisions and its contested legacy. Part II turns to how the University of California Regents managed their land grant and then used records of their management to lobby for status as a public trust at the 1879 California

20. Winans, *supra* note 1.

21. *Id.*

22. CAL. CONST. art. IX, § 9(a).

23. Neal H. Hutchens, Preserving the Independence of Public Higher Education: An Examination of State Constitutional Autonomy Provisions for Public Colleges and Universities, 35 J. COLLEGE & UNIV. L. 271, 274-75 (2009).

24. *The UC System*, University of California, <https://www.universityofcalifornia.edu/uc-system>; see also, Evan Comen & Michael B. Sauter, *The Largest Employer in Every State*, 24/7 WALL ST., last updated January 12, 2020, <https://247wallst.com/special-report/2017/03/17/largest-employer-in-every-state/> (finding that the University of California was the largest employer in the state of California).

25. Annual Endowment Report: Fiscal Year Ended June 30, 2019, University of California, at 3 (2019) (listing the total endowment assets as of June 30, 2019 as \$21,096,783,000).

26. UNIVERSITY OF CALIFORNIA REAL PROPERTY REPORT (2020), <https://www.ucop.edu/real-estate-services/resources/real-property-data/university-of-california-real-property-portfolio-4-2020.pdf>.

27. Rosalie Fanshel, *The Land in Land-grant: Unearthing Indigenous Dispossession in the Founding of the University of California 19* (2021), <https://escholarship.org/uc/item/7kx7k25f> (noting that while “repatriation is not an easy process, and risks duplicating colonial property regimes,” the University of California has yet to “fulfill obligations under the federal and California Native American Graves Protection and Repatriation Acts”).

28. See *infra* Section II.B.

29. California Truth & Healing Council, <https://tribalaffairs.ca.gov/cthc/> (last visited June 23, 2022).

constitutional convention. Part III is a case study that traces the history of just one parcel of the university's land grant back to the Nome Lackee Reservation in Northern California. This case study was chosen to illustrate just a fraction of the university's active participation in Native dispossession across the state. The authors hope that it can demonstrate the practical mechanics of dispossession and the legal barrier to redress today.³⁰

I.

BACKGROUND: THE 1862 MORRILL ACT FACILITATED THE SALE OF DISPOSSESSED NATIVE LAND TO FUND NEW COLLEGES AND UNIVERSITIES IN THE UNITED STATES.

In 1862, President Abraham Lincoln signed “An Act Donating Public Lands to the several States and territories which may provide Colleges for the Benefit of Agriculture and Mechanic Arts.”³¹ The law became known as the “Morrill Act” after its sponsor, Vermont Senator Justin Morrill.³² The act consisted of three basic provisions.

The first provision made federal public land available to states to sell to private parties.³³ Each state was granted 30,000 acres per congressional member.³⁴ Under the Morrill Act, states were free to establish a system for selection and disposal of their acres.³⁵ Twenty western states, including California, selected land from within their state borders.³⁶ Together, the western states received nearly three million acres.³⁷ To other states, where there was less public land available such as in the East and South, the federal government instead issued scrip—certificates entitling the holder to acquire possession of

30. An interactive map of all Morrill Act parcels sold by the University of California can be found at the following link. Robert Lee, Tristan Ahtone, et al., All Universities, HIGH COUNTRY NEWS, <https://www.landgrabu.org/universities> (last visited June 23, 2022) (navigate to “California”).

31. Act of July 2, 1862 (Morrill Act), ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. § 301 *et seq.*). In 1859, when Congress passed a first version of the Morrill Act, President James Buchanan vetoed it, declaring it unconstitutional. Gordon C. Lee, *The Morrill Act and Education*, 12 BRITISH J. OF EDUC. STUDIES 19, 25-26 (1963) (Buchanan wrote: “Congress does not possess the power to appropriate money in the treasury . . . for the purpose of educating the people of the respective states”). Had Southern Democrats suspicious of federal power taken part in the 37th Congress, the Morrill Act would have faced stronger opposition. John Y. Simon, *The Politics of the Morrill Act*, 37 AGRIC. HIST. 103, 108 (1963); Margaret Nash, *Entangled Pasts: Land-Grant Colleges and American Indian Dispossession*, 59 HIST. OF EDUC. Q. 437, 449 (2019).

32. *Morrill Land Grant College Act*, U.S. States Senate, https://www.senate.gov/artandhistory/history/common/civil_war/MorrillLandGrantCollegeAct_FeaturedDoc.htm. For more on Senator Morrill, see COY F. CROSS, JUSTICE SMITH MORRILL: FATHER OF THE LAND-GRANT COLLEGES (Michigan State University Press, 1999).

33. Morrill Act § 2.

34. *Id.*

35. *See id.*

36. Robert Lee, “Morrill Act of 1862 Indigenous Land Parcels Database,” *High Country News*, March 2020, <https://github.com/HCN-Digital-Projects/landgrabu-data>.

37. *Id.*

160 acres of public land.³⁸ Initial purchasers resold the scrip to purchasers who could then redeem it at a local branch of the federal General Land Office.³⁹ In total, Morrill scripholders acquired roughly 7,830,000 acres of public land, dispersed throughout the country.⁴⁰

The second provision of the Morrill Act required states to use the proceeds from land sales to support and maintain at least one university “where the leading object will be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agricultural and mechanic arts.”⁴¹ Instruction was to be conducted so as “to promote the liberal and practical education of the industrial classes . . .”⁴² Some states created separate institutions dedicated solely to agricultural and mechanical instruction.⁴³ Others, like California, used the money to fund state universities that taught agricultural and mechanical arts in addition to other disciplines.⁴⁴

Finally, the third provision of the act directed how the land proceeds were to be handled. The principal was to remain perpetual and “undiminished” and had to be invested in “safe stocks.”⁴⁵ States could not use the funds to purchase or maintain buildings, or for other capital projects.⁴⁶ Only the interest could be used to cover operating expenses of a university.⁴⁷

The Morrill Act is often celebrated as a shining example of federal investment in higher education.⁴⁸ It was enacted, however, in 1862 as part of a

38. Morrill Act § 2; *Id.*

39. The General Land Office (GLO) was the federal agency in charge of administering the federal government’s public lands. The GLO was the precursor to the Bureau of Land Management (BLM). *A Land Management History*, U.S. Department of the Interior Bureau of Land Management, <https://www.blm.gov/about/history>.

40. Robert A. Sauder & Rose M. Sauder, *The Morrill Act’s Influence on Public Land Disposal after 1870*, 61 *AGRIC. HIST.* 34, 35 (1987). There were 27 scrip states and they received 7,826,400 acres. Robert Lee, “Morrill Act of 1862 Indigenous Land Parcels Database,” *HIGH COUNTRY NEWS*, March 2020.

41. Morrill Act § 4.

42. *Id.*

43. See J. B. EDMOND, *THE MAGNIFICENT CHARTER: THE ORIGIN AND ROLE OF THE MORRILL LAND-GRANT COLLEGES AND UNIVERSITIES* 23 tbl. 2-1 (Exposition Press, 1978); see e.g., Sam Peshek, *The Morrill Act, Explained*, *TEXAS A&M TODAY*, July 1, 2019, <https://today.tamu.edu/2018/07/01/the-morrill-act-explained/>. Some land-grant institutions started as agricultural colleges and later became state universities. See, e.g., *History*, Michigan State University, <https://msu.edu/about/history>.

44. See e.g., *Land Grant History*, University of Minnesota, <http://landgrant150.umn.edu/background.html>; Cal’s Land-Grant Roots, Light the Way: The Campaign for Berkeley, <https://light.berkeley.edu/o/cals-land-grant-roots/>.

45. Morrill Act § 4.

46. *Id.* § 5(2) (“No portion of said fund, nor the interest thereon, shall be applied, directly or indirectly, under any pretence [sic] whatever, to the purchase, erection, preservation, or repair of any building or buildings.”). States could use up to ten percent of initial funds raised to purchase sites or experimental farms.

47. Morrill Act § 4.

48. See NATIONAL EDUCATION ASSOCIATION OF THE UNITED STATES, *ONE HUNDRED AND SIXTY YEARS OF FEDERAL AID TO EDUCATION* 6 (1946) (“The Morrill Land Grant Act of 1862 marks

broad federal policy to settle the West.⁴⁹ For example, in 1862, President Lincoln had signed the Homestead Act, which provided land to settlers willing to “improve” it,⁵⁰ and the Pacific Railway Act, which subsidized the transcontinental railroad through land grants.⁵¹ In total, the Morrill Act oversaw the transfer of nearly eleven million acres of federal land to private ownership.⁵² Previous scholarship has challenged the degree to which the act benefitted individual settlers, documenting how land speculators and corporate interests cashed in.⁵³

Until recently, the story of how the federal government initially obtained the Morrill Act lands was erased from the historical record. As early as 1852, the act’s proponents erased Indigenous possession of and rights to their land. Writing in 1852, Jonathan Turner—credited as the architect of the land grant policy that Morrill introduced—argued there was sufficient momentum at the time to pass “an appropriation of public lands adequate to create and endow . . . a general system of population Industrial Education.”⁵⁴ He stated, “There is wisdom enough in the State, and in the Union, to plan and conduct it—there students enough to patronize it—there is *useless land* and wealth enough to endow it.”⁵⁵ This was logic of settler colonialism at work—settlement of stolen Native land was justified by putting “vacant” land to “use.”⁵⁶ This early rhetoric of erasure had a lasting impact, as many institutions today fail to mention the Indigenous possessors of the land that comprised their Morrill Act land grants.⁵⁷

a definite change in federal educational policy. Grants in aid to general education with no federal control over how the money would be spent by the state began to change to grants in aid of named areas of education, with the law stating conditions for use of the money by the states.”).

49. See Nash, *supra* note 31, at 449 (“The Morrill Act was part and parcel of the federal government’s quest to settle the continent with (mostly) white people.”); see, generally, Paul W. Gates, *California’s Agricultural College Lands*, 30 PAC. HIST. REV. 103 (1961) (analyzing the University of California’s disposal of its land grant strictly as a matter of public land policy).

50. Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862).

51. Pacific Railway Act, ch. 92, 12 Stat. 489 (1862).

52. Lee & Ahtone, *supra* note 7.

53. Sauder & Sauder, *supra* note 40, at 35 (“The Morrill Act . . . facilitated land speculation and absentee ownership.”); see generally, Paul W. Gates, *The Homestead Act in an Incongruous Land System*, 41 AM. HIST. REV. 664 (1936) (detailing how the Morrill Act benefitted primarily large land dealers and speculators).

54. See Donald R. Brown, *Jonathan Baldwin Turner and the Land-Grant Idea*, 55 J. ILL. STATE HIST. SOC’Y 370, 377-78 (1962).

55. *Id.* (emphasis added).

56. See Nash, *supra* note 31, at 446 (arguing that the existence of land-grant institutions “depended entirely on the forced removal of Indigenous peoples, the expropriation of Native land, and the erasure of that history”) (emphasis added) (relying on the theory of “genesis amnesia” developed by sociologists Pierre Bourdieu and Jean-Claude Passeron which “draw[s] attention to the processes by which societies cover up or erase the origins of policies or institutions in order to obfuscate the social constructions that underlie them”).

57. Many land-grant institutions celebrated the 150th anniversary of the Morrill Act’s passage in 2012. The authors could not find an example of a land-grant institution acknowledging the Morrill Act’s direct link to Indigenous dispossession at these commemorations. See, e.g., Senator Justin S. Morrill, *The Land-Grant College Act and Cornell: Opening the Doors of Education to “Any Person,”* Online Exhibit, Cornell University, 2012, <https://rnc.library.cornell.edu/morrill/introduction.html>; Bill

But in March 2020, Robert Lee and Tristan Ahtone published a report in *High Country News* with the aggregated data and created visualizations of the scope of the land grab.⁵⁸ They tracked down land records of nearly 10.8 million acres acquired under the authority of the Morrill Act. Their report also identified the nearly 250 Tribal Nations that originally possessed the lands.⁵⁹ By comparing the data, the two researchers implicated land-grant universities in 162 “violence-backed land cessions”⁶⁰ perpetrated by the United States federal government and for which the government rarely paid a dime. Lee and Ahtone also calculated the total principal raised from the sale of land and scrip, revealing a massive transfer of wealth from Indigenous communities to land-grant universities.⁶¹ These universities must finally reckon with their role in this history.

Loftus, *Morrill Act’s 150th Year—1862 Dream Still Helps Idaho Families & Ag Industry Thrive*, AGKNOWLEDGE, 2012, <https://www.cals.uidaho.edu/edcomm/AgKnowledge/AgKnow276.pdf>; *UT Celebrates Morrill Act, 150 Years of Land-Grant Universities*, UNIV. TENN. KNOXVILLE NEWS, November 7, 2012, <https://news.utk.edu/2012/11/07/ut-celebrates-morrill-act/>; Jimmy Ryals, *Land-Grant Legacy*, NC STATE UNIV. NEWS, July 2, 2012, <https://news.ncsu.edu/2012/07/land-grant-legacy/>. More recently, however, some land-grant institutions have begun to acknowledge this history. *See e.g.*, Land Acknowledgement, American Indian and Indigenous Studies, College of Arts & Letters, Michigan State University, <http://aisp.msu.edu/about/land/>; Wokini Initiative, South Dakota State University, <https://www.sdstate.edu/wokini>.

58. Lee & Ahtone, *supra* note 7. *See also* Robert Lee & Tristan Ahtone, Land-Grab Universities and the Morrill Act, Presentation at University of California: The UC Land-Grab: A Legacy of Profit from Indigenous Land Part 1 (September 25, 2020) (recordings available at <https://www.youtube.com/playlist?list=PLTTT4bzLbP4nbhwKw8aB2K1roOiYLhjkW>) (discussing the difficulties of collecting records from parcels dispersed around the Western half of the country and the importance of translating their research into a visually effective format). For an earlier documentation of the difficulties in uncovering records of land obtained using Morrill scrip, see Kaisha Esty, *A Land-Grant College in Native American History*, in *SCARLET AND BLACK: SLAVERY AND DISPOSSESSION IN RUTGERS HISTORY* (Rutgers University Press, Marisa J. Fuentes & Deborah Gray White, Eds., 2016).

59. The nearly 250 tribal nations are the signers of the treaties or those named in various takings.

60. Lee & Ahtone, *supra* note 7; *see also* Robert Lee, *Land-Grab Universities: User Guide*, HIGH COUNTRY NEWS, <https://github.com/HCN-Digital-Projects/landgrabu-data/blob/master/User%20Guide%20March%202020.pdf>. Lee & Ahtone used maps created by Charles Royce as the primary source for these cessions. Royce compiled sixty-seven maps of land cessions made by Tribal Nations to the United States until 1894. EIGHTEENTH ANNUAL REPORT OF THE BUREAU OF AMERICAN ETHNOLOGY TO THE SECRETARY OF THE SMITHSONIAN INSTITUTION 1896-97 (Government Printing Office, Washington, D.C., 1899) (maps compiled by Charles Royce). The maps identified each treaty or other legal mechanism that authorized the cession. *Id.* Cession is a legal term for the assignment of property to another. Lee & Ahtone, *supra* note 7. The phrase “violence-backed” acknowledges the violence and genocide Tribal nations experienced in and around the time legal mechanisms were deployed by the federal government to seize land. For a brief historical overview of the eighteen unratified treaties negotiated by three U.S. commissioners with Tribes in present-day California which left the question of Tribal title unresolved, see Larisa K. Miller, *The Secret Treaties with California’s Indians*, PROLOGUE (2013), <https://www.archives.gov/files/publications/prologue/2013/fall-winter/treaties.pdf>.

61. Lee, Ahtone, et al., *supra* note 15 (“Altogether, the grants, when adjusted for inflation, were worth about half a billion dollars.”).

II.

THE MORRILL ACT IN CALIFORNIA: THE UNIVERSITY OF CALIFORNIA REGENTS
OVERSAW CALIFORNIA'S LAND GRANT, PARTICIPATING IN DISPOSSESSION
THROUGHOUT THE STATE TO RAISE MONEY NECESSARY FOR THEIR NEW
SCHOOL'S DEVELOPMENT.

The California legislature accepted its 150,000-acre grant in 1864.⁶² Over the course of the next thirty years, the University of California raised a principal amount of \$730,860 from land sales, or roughly \$19.2 million in today's dollars.⁶³ During this period, the interest earned from the invested proceeds covered close to a third of the university's operating costs.⁶⁴ The grant also acted as seed money, helping the university to attract other investments and donations.⁶⁵ As Lee and Ahtone point out, the ultimate return on land that was never paid for is simply incalculable.⁶⁶ Further, the university was not a passive recipient of land grant funds. Rather, for three decades, its governing Board of Regents actively surveyed and sold land dispossessed from Native Californians.

A. *The Regents gain control of and aggressively manage California's
land grant.*

In 1868, the California state legislature created the University of California to receive the state's Morrill Act land grant.⁶⁷ The founding act placed the university in the "charge and control" of the Board of Regents.⁶⁸ It gave the Regents full power to locate and sell the 150,000 Morrill Act acres "for such price and on such terms only as they shall prescribe."⁶⁹ The act also gave the Regents custody of university property.⁷⁰ All land, money, and other university property was to be managed and sold, and its profits invested and reinvested by the Regents.⁷¹

The state legislature's decision to empower the Regents to oversee the land grant is noteworthy in comparison to the land grant administration of other states.

62. VERNE A. STADTMAN, *THE UNIVERSITY OF CALIFORNIA, 1868-1968*, at 27 (1970).

63. Lee, Ahtone, et al., *supra* note 15.

64. Lee & Ahtone, Presentation at University of California, *supra* note 58.

65. *Id.*

66. Lee, Ahtone, et al., *supra* note 15; *see also* Fanshel, Land in Land-grant, *supra* note 27, at 9 ("Native Americans received paltry financial reward for the lands that became 'public.' Via treaties, congressional acts, executive acts, and other agreements, the federal government only paid \$397,250 to tribes for the parcels of land subsequently sold through the Morrill Act. Due to the California Land Act of 1851 (which served to dissolve pre-statehood land claims) and failure of the federal government to ratify treaties with California Indians, Indigenous people did not receive a cent for the land sold to fund UC's endowment.") (citing Lee).

67. Organic Act of 1868, ch. 244, 1867-68 Cal. Stat. 244, 248 (Organic Act) § 1 ("A State University is hereby created, . . . in order to devote the largest purposes of education the benefaction made to the State of California under and by the provisions of [the Morrill Act].")

68. *Id.* § 1.

69. *Id.* § 20.

70. *Id.* § 12.

71. *Id.*

In most other states, governors appointed state commissions to sell Morrill Act land.⁷² Often, these commissions sold their land or scrip quickly and at a low price.⁷³ California, however, declined to create a state agency to administer its grant. Instead, the management landed in the hands of the Regents, who had largely unchecked power to dispose of the lands as they saw fit.⁷⁴

Two examples demonstrate how the Regents aggressively managed the grant and thus took an active part in the settler colonial project. First, in 1871, the Regents successfully lobbied Congress for an exemption from the Morrill Act’s requirements in order to increase the value of their land grant.⁷⁵ Other states putting scrip on the market between 1865-71 were only yielding forty-two cents per acre.⁷⁶ The Regents, however, endeavored to earn five dollars per acre.⁷⁷ The special Congressional amendment permitted three changes.⁷⁸ First, the Regents were permitted to select parcels as small as forty acres. The Morrill Act had originally allowed for the selection of 160-acre parcels at minimum. The change allowed the Regents to sell land to buyers looking for smaller parcels—by 1874, 341 separate applications were submitted to the Regents for tracts of forty and eighty acres each.⁷⁹ Second, the amendment allowed the Regents to select lands reserved for railroad companies. These reserved public lands, also called “double minimum” lands, typically required purchasers to pay double.⁸⁰ The

72. Nash, *supra* note 31, at 451; *see, e.g.*, Esty, *supra* note 58, at 156 (describing how Governor Joel Parker of New Jersey created a commission to dispose of scrip in order to endow Rutgers University). The other exceptions to this general trend appear to be Rhode Island, New York, and Illinois. These three states conveyed their awarded scrip directly to colleges, including Brown University, Cornell University, and Illinois Industrial University, respectively. Gates, *supra* note 49, at 105. For more on Ezra Cornell’s manipulation of the scrip system resulting in a contribution of over \$5 million to Cornell University’s endowment, see Jon Parmenter, *Flipping Scrip, Flipping the Script: The Morrill Act of 1862, Cornell University, and the Legacy of Nineteenth Century Indigenous Dispossession*, Cornell University and Indigenous Dispossession Project, October 1, 2020, <https://blogs.cornell.edu/cornelluniversityindigenousoffpossession/2020/10/01/flipped-scrip-flipping-the-script-the-morrill-act-of-1862-cornell-university-and-the-legacy-of-nineteenth-century-indigenousoffpossession/>.

73. *See* STADTMAN, *supra* note 62, at 45 (“In most states receiving agricultural college land grants, the appropriate state officers selected the number of acres allotted by the Morrill Act and disposed of them at the best price they thought they could get.”); Gates, *supra* note 49, at 106 (“[S]tates receiving scrip offered it on the market during the years 1865 to 1871 . . . yielded as little as forty-two cents an acre.”).

74. *See* Organic Act § 20.

75. Statements of the Regents of the University of California to the Joint Committee of the Legislature at 27, in *Biennial Report of the Regents of the University of California for the Years 1873-73* (on file with the University of Minnesota)

76. Gates, *supra* note 49, at 106.

77. *See* Statements of the Regents of the University of California to the Joint Committee of the Legislature, *supra* note 75, at 26 (“On the eighth of October, 1868, the Board appointed H. A. Higley Land Agent of the University, with authority to sell the College lands at \$5 per acre.”).

78. Act of March 3, 1871, ch. 126, 16 Stat. 581 (1871).

79. Statements of the Regents of the University of California to the Joint Committee of the Legislature, *supra* note 75, at 27.

80. “Double minimum land” is a by-product of land grant made by the federal government to railroad companies. *See* William S. Greever, *A Comparison of Railroad Land-Grant Policies*, 25 *AGRIC.*

amendment allowed the Regents to reimburse the federal government only \$1.25 per double minimum acre instead of five dollars, and thus charge purchasers \$6.25 instead of double (which would have been ten dollars per acre). Finally, the amendment allowed the Regents to make selections “from any lands within [California’s] limits, subject to preemption, settlement, entry, sale, or location”⁸¹ This meant the Regents could locate and sell un-surveyed land, which the Morrill Act had prohibited. Un-surveyed land is land that has not been described in surveys in land office files.⁸² These concessions from the federal government not only increased the value of California’s land grant but also increased the scope of the university’s ratification of Native dispossession.⁸³

Second, the Regents authorized a hired land agent to sell selected lands at five dollars per acre, of which twenty percent could be paid up front and the remaining eighty percent in installments at ten percent interest.⁸⁴ In fiscal year 1889, the Regents earned \$20,217.61 from selling land.⁸⁵ At this point, the Regents had sold over 106,000 of their allotted 150,000 acres.⁸⁶ That same year, nearly 17,000 of those acres had yet to be fully paid off, and the Regents earned an additional \$8,187.90 in interest.⁸⁷ The Regents acted as debt collectors, reminding purchasers that if deposits were unpaid or if, after five years, payments remained delinquent, their contracts would be void and the land agent would re-advertise the land immediately.⁸⁸ The Regents were not a passive recipient of funds from transactions between white settlers or speculators and the federal government. Instead, the Regents were in the real estate business, surveying lands across California and engaging in long-term financial relationships with purchasers at great profit.

HIST. 83, 83-84 (1951). Statutes granting the land to railroads were similar in structure to the Morrill Act. They made public land available for railroads to sell. The proceeds were used for construction of a railroad. The government granted land in alternating sections some miles out from where the track would be laid. The government retained the remaining alternate sections but sold those lands at double the price. This allowed the government, in theory, to recoup the cost of the grant. These lands were called “double minimum” lands. *Id.*

81. Act of March 3, 1871, ch. 126, 16 Stat. 581 (1871).

82. Survey Definition, *Black’s Law Dictionary*, available at Westlaw.

83. See Gates, *supra* note 49, at 114.

84. Statements of the Regents of the University of California to the Joint Committee of the Legislature, *supra* note 75, at 26.

85. Annual Report of the Secretary of the Board of Regents for the Year Ending June 30, 1889, 66 (1889) (on file with the University of Minnesota and available at <https://babel.hathitrust.org/cgi/pt?id=umn.31951002210588h&view=1up&seq=5> at 704).

86. *Id.* at 65.

87. *Id.* at 66.

88. *Id.*

B. Constitutional Status: The Regents used their records of managing the land grant to help lobby for status as a public trust at the 1878-79 California constitutional convention, acquiring enormous autonomy for the institution.

“Without UC’s status as a public trust, California’s higher education system, and the university itself, would simply not exist in its present form.”⁸⁹

The 1879 constitutional convention in Sacramento presented an opportunity for the Regents to free themselves from “legislative control and popular clamor”⁹⁰ they felt had been tying them down. The Regents sent one of their own, Joseph Winans, as a delegate.⁹¹ Winans served as a Regent from 1873-87.⁹² His primary occupation was as a lawyer in Sacramento and San Francisco.⁹³ Winans, conveniently, was appointed chair of the convention’s committee on education.⁹⁴

The State Grange and Mechanics’ Deliberative Assembly (the Grangers) also showed up to the convention in full force.⁹⁵ They were a “national, populist political movement” that advocated for farmers’ interests.⁹⁶ The group was upset with how the Regents’ had managed the land grant, arguing that the board had mismanaged the money and not spent the proceeds as they were meant to be spent—on practical mechanical and agricultural education.⁹⁷ The Grangers had already made multiple unsuccessful legislative attempts to abolish the Regents as the governing body of the university, or at least to convert their seats into elected, not appointed, positions.⁹⁸ They saw the constitutional convention as a chance to permanently wrest the university from the Regents, whom they viewed as east coast elites, and to hold the institution accountable to the people.⁹⁹ The Regents, in other words, faced an uphill battle in Sacramento.

89. John Aubrey Douglass, *How and Why the University of California Got Its Autonomy*, Research & Occasional Paper Series, Center for Studies in Higher Education (2015) at 3 (hereinafter Douglass, *Autonomy*).

90. *Id.* at 1 (“However well we may build up the University of California, its foundations are unstable, because it is dependent on legislative control and popular clamor.”) (quoting UC President Gilman in 1876).

91. *Id.* at 8.

92. *Regents of the University of California: Biographies*, UNIVERSITY OF CALIFORNIA HISTORY: DIGITAL ARCHIVES, https://www.lib.berkeley.edu/uchistory/general_history/overview/regents/biographies_w.html (last visited Aug. 3, 2022).

93. *Id.*

94. Douglass, *Autonomy*, supra note 89, at 8.

95. *Id.* at 7 (“Following elections, 152 delegates arrived in Sacramento in September 1878. The delegates included 51 Workingmen’s Party members, 78 nonpartisans who were mostly farmers and lawyers, 11 Republicans, 10 Democrats, and 2 independents.”).

96. *Id.* at 4, 6.

97. *Id.*

98. *Id.*

99. *Id.*

The education committee's largest debate was about who should manage the university, and the different political factions submitted multiple competing proposals and revisions.¹⁰⁰ Grangers and delegates from the Workingmen's party submitted draft language to place the university under legislative control and to freeze the land grant proceeds until the changes were implemented.¹⁰¹ Joseph Winans, on the other hand, proposed that the university become a "public trust," to be managed by the Regents alone. Winans admired how the University of Michigan had achieved such a legal status and "urged a similar level of autonomy for the University of California, primarily to protect it from the corruption of California's legislature, although he did not advocate the election of Regents, as practiced in Michigan"¹⁰²

The convention debate records are massive, but the authors identified at least two instances of when the Regents invoked their management of the Morrill Act land grant as evidence that they should control the university. The first instance was when the committee asked University President John LeConte "to submit a statement . . . relative to the institution's finances and plans for its agricultural program" in response to the Grangers' charge of Morrill Act mismanagement.¹⁰³ LeConte provided the details of the university's financial situation, including "cash receipts, disbursements, and investments between 1868 and 1878"¹⁰⁴ The first and most prominent item on LeConte's report was the land grant proceeds from over the past ten years.¹⁰⁵

The Granger delegates, however, were not convinced by LeConte's report. They questioned if the Regents could be the trusted stewards they claimed, calling into question if the Regents' tactics managing the Morrill Act grant and seeking Congressional exemptions had been legal or responsible.¹⁰⁶ Thus came the second instance of the Morrill Act being used to bolster their claims for independent university management. Winans defended his fellow Regents: "Their business was conducted upon a strictly business plan, and as a financial scheme, involving the highest degree of merit and success."¹⁰⁷ Getting further questions on improper land acquisition outside the bounds of the original Morrill Act grant, Winans responded, "We are entitled to our land, and we will get it if Congress chooses to be equitable and just."¹⁰⁸ These two moments during the

100. *Id.* at 11.

101. *Id.* at 8; John Aubrey Douglass, *Creating a Fourth Branch of State Government: The University of California and the Constitutional Convention of 1879*, 32 HIST. EDUC. Q. 31, 55 (1992) (hereinafter Douglass, *Fourth Branch*).

102. Douglass, *Autonomy*, *supra* note 89, at 9.

103. Douglass, *Fourth Branch*, *supra* note 101 at 56.

104. *Id.*

105. John LeConte, Report of the Board of Regents, State University, to the Constitutional Convention at 3-7 (1878), available at <https://babel.hathitrust.org/cgi/pt?id=uc1.10070335088&view=1up&seq=2&skin=2021> . .

106. *Id.*

107. Debates and Proceedings, *supra* note 1, at 1353.

108. *Id.*

debates demonstrate the centrality of the land grant to the University of California Regents' claims to legitimacy and how the Regents conceived of the stolen land they were selling.¹⁰⁹

The Regents' arguments worked. The education committee proposed the final language:

"The University of California shall constitute a public trust and its organization and government shall be perpetually continued in their existing form and character, subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments, and of the Legislature of this State, and of the Congress of the United States, donating lands and money for its support."¹¹⁰

California voters provided the final step in the spring of 1879, approving the state constitution which permanently established the university as a public trust under Article IX, section 9.¹¹¹

The concept of "public trusts" borrows from private trust doctrine.¹¹² The basic setup of a trust or fiduciary relationship is that one person (or board, in this case) is entrusted with property or power for the benefit of another. The fiduciary exercises discretion over the beneficiary's assets, and the beneficiary relies on the fiduciary to act in the beneficiary's best interest. Common fiduciary relationships include those between trustee and trust beneficiary and corporate director and shareholder. Here, the Regents act as fiduciaries, or trustees, of the university.

While some scholars have promoted transposing the private trust model into the public sphere, others have critiqued it. On the one hand, the public trust model in higher education provides autonomy from state legislative oversight and thus more academic freedom.¹¹³ Law professor Seth Davis, however, has analyzed how the public trust in other contexts historically has lent itself to oppression when it was used to justify slavery, plantation governance, and colonial rule over Indigenous peoples.¹¹⁴ Fiduciary law in private and public

109. As historian Verne Stadtman explained, the Regents success at the convention was not guaranteed: "Throughout these first ten years, [the university] was frequently threatened with proposals for drastic reorganization by the legislature. In October, 1878, a delegate to the second constitutional convention proposed an article that would both limit the function of the University to instruction 'of a practical character' and place it more directly under legislative control. Friends of the University (the chairman of the convention's educational committee was Regent Joseph Winans) countered with a provision that would free the University from 'all pernicious political influences.' After long, heated debate, it first appeared that those seeking to insure maximum legislative control of the University would win. But the proponents of a 'strong' University prevailed . . ." STADTMAN, *supra* note 62, at 149.

110. Douglass, *Autonomy*, *supra* note 89, at 10 (citing *Debates and Proceedings of the Constitutional Convention of the States of California, 1878-79* (Sacramento: State Office, 1880)).

111. CAL. CONST. art. IX, § 9.

112. Jennifer Anglim Kreder, *The "Public Trust,"* 18 UNIV. PA. J. CONST. L. 1425, 1441-42 (2016).

113. Hutchens, *supra* note 23, at 272.

114. Seth Davis, *Pluralism and the Public Trust*, in FIDUCIARY GOVERNMENT 281 (E. Criddle, E. Fox-Decent, A. Gold, S. Kim & P. Miller eds., 2018).

spheres, Davis argues, shifts power and control to the fiduciary and away from the beneficiary. The model can thus result in power imbalance and unaccountability.

Today the University of California is considered one of the “Big Three” public universities who have the strongest record of autonomy from legislative interference thanks to their status as constitutional public trusts.¹¹⁵ The public trust language in the California constitution remains largely unchanged since the 1879 version and the Regents remain the university’s trustees.¹¹⁶

In cases where they are asked to balance the constitutional power of the Regents against that of the state legislature, courts often defer to the Board’s autonomy.¹¹⁷ California’s legislature theoretically can affect the university through appropriations, its police power (such as by enacting public health measures), and statutes of statewide concern.¹¹⁸ But judicial decisions have exempted the university from construction regulations and wage laws when they determine that a law intrudes too much on the Regents’ internal management of the university.¹¹⁹ As one decision put it, the Regents are “intended to operate as

115. Hutchens, *supra* note 23, at 282. The other two are Michigan and Minnesota.

116. Karen Petroski, *Lessons for Academic Freedom Law: The California Approach to University Autonomy and Accountability*, 32 J. COLLEGE & UNIV. L. 149, 178 (2005) (describing how, in 1918, Article IX, section 9 was slightly amended).

117. *See, e.g.*, *People v. Kewen*, 69 Cal. 215 (1886) (striking down statutes changing the governing structure of Hastings College of Law because the legislative act creating the college had affiliated it with the University of California and, as such, the Regents had exclusive authority); *Williams v. Wheeler*, 23 Cal. App. 619 (1913) (upholding the Regents’ power to regulate admissions, including vaccination requirements); *Hamilton v. Regents of the Univ. of Cal.*, 219 Cal. 663, 664 (1934) (approving of Regents’ authority to suspend students for failing to abide by military instruction requirement); *Wall v. Board of Regents*, 38 Cal. App. 2d 698, 699-700 (1940) (deferring to the Regents’ decision to continue employing Bertrand Russell); *Goldberg v. Regents of the Univ. of Cal.*, 248 Cal. App. 2d 867, 874 (1st Dist. 1967) (approving of the Regents’ right to enforce order on campus “by all appropriate means,” including suspension or dismissal of students).

118. Hutchens, *supra* note 23, at 288 (citing Karen Petroski 2005); *see also* *Wallace v. Regents of the Univ. of Cal.*, 75 Cal. App. 274, 278 (1925) (“The power vested under the Constitution in the Regents is not so broad as to destroy or limit the general power of the Legislature to enact laws for the general welfare of the public.”); Joseph Beckham, *Reasonable Independence for Public Higher Education: Legal Implications of Constitutionally Autonomous Status*, 7 J. L. & EDUC. 177, 181 (1978) (“California courts have recognized the constitutional autonomy of the university regents and sustained that autonomous status in numerous decisions despite the constitutional reservation of limited powers in the state legislature.”). Scholars have challenged the validity of this dichotomy between matters of statewide concern and university affairs. *See* Harold W. Horowitz, *The Autonomy of the University of California under the State Constitution*, 25 UCLA L. REV. 23, 41 (1977) (“That a legislative regulation deals with a matter of statewide concern would not be a compelling argument for validity of application to the University, for the Regents are delegated powers of government with respect to one category of matters of statewide concern—University affairs.”); Caitlin Scully, *Autonomy and Accountability: The University of California and the State Constitution*, 38 HASTINGS L.J. 927, 955 (1987) (“[A]lthough attempts to regulate University labor practices do impinge upon internal University affairs, these affairs are, nonetheless, matters of statewide concern.”).

119. Hutchens, *supra* note 23, at 288 (citing Karen Petroski 2005). California courts strike down laws that conflict with the university’s ability to have complete authority over its affairs or recognize that the university is immune from state and local regulations. Petroski, *supra* note 116, at 180. For example, in *Scharf v. Regents of the University of California*, the court held that UC-specific open files

independently of the state as possible.”¹²⁰ The Regents have thus been referred to as “a branch of the state itself,”¹²¹ the “fourth branch of government,”¹²² and a “branch of the state government equal and coordinate with the legislative, the judiciary and the executive”¹²³ with something akin to “sovereign university power.”¹²⁴

Scholars have critiqued the University of California’s independence from meaningful legislative oversight. Karen Petroski analyzes how the protected category of “internal university affairs”—that is, where the legislature is unable to regulate—has proved to be a nebulous and broad category that “clearly includes more than just academic affairs”¹²⁵ Courts’ inability to cabin the category of internal university affairs has resulted in “a doctrine equating university autonomy with plenary Regental power, virtual immunity from scrutiny, and dramatically decreased accountability”¹²⁶ Similarly, Caitlin Scully examines how the Regents’ questionable labor practices have gone unchecked because of the public trust immunity.¹²⁷ Despite the legislature’s theoretical retention of the ability to enact laws for the general welfare, Scully concludes that courts often appear an inadequate check on the Regents’ power, “solicitously guarding the independence granted the university in the state constitution.”¹²⁸

An example of this autonomy is a case in which a court has also upheld the Regents’ authority to manage its property without the interference of local government regulation.¹²⁹ In *Oakland Raiders v. City of Berkeley*, a court sided with the Regents in a 1976 property dispute, relying on the university’s status as a public trust.¹³⁰ The court wrote, “The Regents of the University of California are vested by the Constitution with the legal title and management of property of the University of California and have the *unrestricted* power to take and hold real and personal property for the benefit of the university. Thus, the University of California is not subject to local regulations with regard to its use or management of the property held by the Regents in public trust.”¹³¹

law was invalid because it conflicted with the Regent’s plenary authority over university affairs. 286 Cal. Rptr. 227 (Cal. Ct. App. 1991). Similarly, in *San Francisco Labor Council v. University of California*, a law requiring Regents to fix minimum wages for staff was overturned as “an unconstitutional invasion of the University’s autonomy under article IX, section 9.” Scully, *supra* note 118, at 938.

120. Regents of the Univ. of Cal. V. Superior Court, 17 Cal. 3d 533, 537 (1976).

121. Pennington v. Bonelli, 15 Cal. App. 2d 316, 321 (3d Dist. 1936).

122. Horowitz, *supra* note 118, at 27.

123. 30 Ops. Cal. Att’y Gen. 162, 166 (1957).

124. Horowitz, *supra* note 118, at 27.

125. Petroski, *supra* note 116, at 181.

126. Petroski, *supra* note 116, at 208.

127. See, e.g., Scully, *supra* note 118.

128. *Id.* at 927.

129. *Id.* at 932.

130. 65 Cal. App. 3d 623, 626 (1976).

131. *Id.* (emphasis added).

Any legislative mandate containing a reparatory scheme for the university's Morrill Act legacy—such as a mandate to repatriate some of the University's currently owned land to Tribes—would thus likely run afoul of this legal framework as an infringement by the state legislature on the exclusive power of the Regents over the university's internal affairs. The irony is that this immense legal latitude, gained at the 1879 state constitutional convention, was justified based on the Regents' records of participation in Native dispossession.

III.

A CASE STUDY OF MORRILL ACT LAND: THE NOME LACKEE RESERVATION

This article now turns to a brief case study to demonstrate practically how the Regents participated in Native dispossession and how their constitutional immunity from any potential legislative mandate to give land back to California Tribes today is a standing injustice. This Part traces the history of just a singular Morrill Act sale, a mere fraction of the dispossession that the University of California is responsible for. Of course, the Regents located and sold plots throughout the entire state, implicating the ancestral lands of over a hundred different California Tribes.¹³² Each of these histories is unique, but the story of this sale at least illustrates the mechanics of how dispossession proceeded in California and how the Regents are one settler colonial structure, in Dr. Risling Baldy's words, that has worked to erase Indigenous claims to land over time.¹³³

In 1879, the same year the constitutional convention ended, the Regents sold 1,537 acres of land located in present-day Tehama County, California to a William B. Parker and Francis Houghton.¹³⁴ The Regents charged \$5.00 an acre earning a total of \$7,680, the equivalent of \$201,995 in today's dollars.¹³⁵ The proceeds from this sale were deposited into university accounts. The Regents used the interest earned from this principal amount, as they did with all Morrill Act profits, to cover a portion of the new university's operations. But how did this land end up in the Regents' hands to sell and profit from?

Just nine years before Parker and Houghton purchased the land from the Regents, these acres made up part of the Nome Lackee Reservation and were occupied by Nomlakis and seven other Tribes.¹³⁶ The reservation spanned

132. Lee, Ahtone, et al., *supra* note 15.

133. BALDY, *supra* note 5, at 11.

134. *Infra* figure 2; Fred B. Rogers, *Early Military Posts of Mendocino County, California*, 27 CAL. HIST. Q. 215, 215 (1948).

135. *Infra* figure 2.

136. See AKINS AND BAUER, *supra* note 9, at 147.

25,000 acres.¹³⁷ At various points, federal documents and newspapers reported the population on the reservation varied between 300 and 3,000 people.¹³⁸

The Nome Lackee Reservation was a military reservation, not like many other reservations in the United States. The federal government’s typical approach to diplomacy with Tribes involved treaty-making.¹³⁹ Article II of the U.S. Constitution empowered the President to negotiate treaties, which became binding agreements upon ratification by the Senate.¹⁴⁰ At its most basic, a treaty sets out the terms of an exchange negotiated in good faith by two sovereigns. In typical treaties negotiated between Tribes and the federal government, Tribes reserved lands for their continued use and enjoyment in exchange for ceding other lands.¹⁴¹ Tribes also reserved rights for themselves, such as hunting or fishing rights, on ceded lands.¹⁴² Article VI of the U.S. Constitution declares ratified treaties to be the “supreme law of the land.”¹⁴³ In modern federal Indian law, treaty rights are one of Tribes’ most powerful tools in safeguarding their inherent sovereignty and rights.¹⁴⁴

But the Nome Lackee Reservation did not come from this treaty-making process. Instead, the military reservation was part of the “brutal and unrelenting history of genocide in California.”¹⁴⁵ In 1850, the California legislature passed the Act for Government and Protection of Indians, which legalized the slavery of California Indian people.¹⁴⁶ The same year Governor Peter Burnett promised to wage a “war of extermination” of California Tribes.¹⁴⁷ Historian Benjamin Madley estimates that between 1849-73 between 9,400 to 16,000 Californian Indians were killed by white settlers and militias.¹⁴⁸ Despite the onslaught of

137. Josie Smith and the Tehama County Genealogical & Historical Society, *Tehama County 1-2* (2016); *see also* J.Y. McDuffie, Superintendent Indian Affairs for California, Reports on condition and management of Indians and reservations in California, 3 (Sept. 4, 1859) (“[Nome Lackee] has generally been considered the most prominent reservation . . . It is said to contain 25,000 acres . . .”).

138. National Park Service, *Nome Lackee Indian Reservation: Tehama County*, A History of American Indians in California, https://www.nps.gov/parkhistory/online_books/5views/5views1h55.htm.

139. CHARLES J. KAPPLER, *INDIAN AFFAIRS: LAWS AND TREATIES* (Washington: Government Printing Office, 1904, hosted by the Oklahoma State University Library Electronic Publishing Center) (providing an online database of more than four hundred treaties that Tribal Nations made with the United States federal government from 1778 to the mid-1800s).

140. U.S. CONST. art. II.

141. *See, e.g.,* *Worcester v. Georgia*, 31 U.S. 515 (1832) (reasoning that the Treaty of Hopewell was a Tribal reservation of rights and not a United States granting of rights).

142. *United States v. Winans*, 198 U.S. 371 (1905).

143. U.S. CONST. art. VI.

144. *See* *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (holding that the land the Creek Nation reserved via treaty was Indian country for purposes of federal criminal legislation).

145. BALDY, *supra* note 5, at 52.

146. State of California Native American Heritage Commission, Short Overview of California Indian History, available at: <http://nahc.ca.gov/resources/california-indian-history/>.

147. Peter Burnett, State of the State Address (Jan. 6, 1851), available at: https://governors.library.ca.gov/addresses/s_01-Burnett2.html.

148. *See generally*, BENJAMIN MADLEY, *AN AMERICAN GENOCIDE: THE UNITED STATES AND THE CALIFORNIA INDIAN CATASTROPHE, 1846-1873* (2016).

violence, many Tribal representatives resisted the unfair treaties the U.S. was offering under these conditions.¹⁴⁹ But eventually, “under extreme duress and threats from the gold miners, the settlers and the persuasive United State Army,” California Tribes negotiated eighteen treaties with the U.S. government that exchanged land cessions for a protected 7.5 million acres, services, and goods.¹⁵⁰

When it came time for the Senate to ratify the treaties, however, state leaders objected.¹⁵¹ Local newspapers and politicians argued for forced removal of California Tribes.¹⁵² California’s legislature declared the land too valuable to reserve for Tribes.¹⁵³ The U.S. Senate obliged, and never ratified the treaties. Instead, U.S. legislators sealed them.¹⁵⁴ The “secret” treaties were not publicized until 1905 after activists lobbied the federal government to release the documents.¹⁵⁵ The lack of Senate ratification left California Tribes in a precarious position. Tribes were left without legal rights, protections, or government support.¹⁵⁶ The practical result was “complete dispossession.”¹⁵⁷

One of the unratified treaties negotiated by these agents concerned the lands later purchased by Parker and Houghton. Under the terms of the treaty, negotiated on September 9, 1851, eight California Tribes agreed to cede lands in present-day Tehama, Butte, and Glenn counties and parts of Yuba, Sutter, and Colusa counties.¹⁵⁸ In exchange, the federal government agreed to reserve a tract on the Sacramento River in present-day Colusa County for the use and enjoyment of the Tribes.¹⁵⁹ Figure 1 illustrates the boundaries of the ceded lands

149. BALDY, *supra* note 5, at 65.

150. *Id.*

151. As Benjamin Madley describes it, “Greed and racism animated California legislators’ intense hostility to the treaties.” MADLEY, *supra* note 148, at 167.

152. Harry Kelsey, *The California Indian Treaty Myth*, 55 SOUTHERN CAL. Q. 225, 230 (1973).

153. William Wood, *The Trajectory of Indian Country in California: Rancherias, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias*, 44 TULSA L. REV. 317, 339 (2008).

154. “On July 18, 1852, US senators, meeting in a secret session, unanimously repudiated all eighteen treaties. The Senate then placed the eighteen treaties and associated documents under an ‘injunction of secrecy.’” MADLEY, *supra* note 148, at 168.

155. Miller, *supra* note 60.

156. MADLEY, *supra* note 148, at 168 (“The eighteen treaties comprised evidence related to a deceitful crime of vast proportions and documented a massive betrayal. California Indians had surrendered vast tracts of land for reservations, varied forms of remuneration, and protection. By failing to ratify the treaties, the Senate took back the reservation lands promised to California Indians and canceled federal treaty negotiators’ promises to provide animals, clothing, cloth, blankets, tools, food, education, and physical protection.”).

157. State of California Native American Heritage Commission, *supra* note 146.

158. 1851-1852 Eighteen Unratified Treaties between California Indians and the United States, US Government Treaties and Reports 16-18, available at https://digitalcommons.csumb.edu/hornbeck_usa_2_b/5?utm_source=digitalcommons.csumb.edu%2Fhornbeck_usa_2_b%2F5&utm_medium=PDF&utm_campaign=PDFCoverPages.

159. Indian Land Cessions in the United States, Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 1896-97, available at: <https://archive.org/details/annualreportofbu218smit/page/786/mode/2up?view=theater>.

and the reservation in light blue highlight. When the Senate neglected to ratify and sealed the treaty, legal ownership was left undetermined.



Figure 1: Map of Northern California. The large light blue outlines the boundaries agreed to by eight California Tribes and the federal government in an unratified treaty on September 9, 1851. The small light blue enclosure towards the south represents the boundaries of the reserved land for the eight Tribes. The red enclosure within the larger light blue enclosure represents the boundaries of the Nome Lackee Reservation unilaterally created by Superintendent of Indian Affairs Thomas J. Henley in 1854. The larger red area to the west represents the Round Valley Reservation. A portion of this area remains a reservation occupied by the federally recognized Round Valley Indian Tribes today. Source: <https://www.arcgis.com/apps/webappviewer/index.html?id=eb6ca76e008543a89349ff2517db47e6>.

The next year, Congress passed the Indian Appropriation Act of March 3, 1852.¹⁶⁰ The Act authorized the President to “make five military reservations from the public domain in the state of California . . . for Indian purposes.”¹⁶¹ In 1854, Superintendent of Indian Affairs Thomas J. Henley unilaterally established the Nome Lackee Reservation, represented in red in Figure 1.¹⁶² This reservation was about 75 miles north of the land the federal government promised the eight Tribes just three years earlier. By 1861, the Secretary of Interior reported there were five such military reservations in Northern

160. U.S. Congress, Indian Appropriation Act, 31st Congress, 1st Sess., 1852, Vol. 8, Doc. 59:8.

161. National Park Service, *supra* note 138.

162. Donald Lindsay Hislop, *The Nome Lackee Indian Reservation, 1854-1870*, at 15 (1978); Indian Land Cessions in the United States, Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution 1896-97, available at: <https://archive.org/details/annualreportofbu218smit/page/786/mode/2up?view=theater>; see also AKINS AND BAUER, *supra* note 9, at 147.

California: Nome Lackee, Round Valley, Smith River Valley, Mendocino, and Klamath Reservations.¹⁶³

Genocidal violence extended to the Nome Lackee Reservation. As Dr. Risling Baldy summarizes, “Reservations were not safe for Native people.”¹⁶⁴ Reports from Indian Agents documented egregious and violent acts committed by white settlers, including killings, rape, sabotage of crops and livestock, illegal settlement, kidnapping, and enslavement.¹⁶⁵ White settlers’ presence was often met with the tacit and, occasionally, explicit approval of federal agents. In 1859, the federal government opened an investigation into the management of the Nome Lackee reservation. Investigators found that Vincent E. Geiger, the agent in charge of overseeing Nome Lackee, was “selling equipment that belonged to the reservation and . . . involved with illegal transfers of the Reservation land to private parties.”¹⁶⁶ Geiger urged that the reservation “should be thrown open to the occupancy of our citizens.”¹⁶⁷

Some federal officials pleaded for more funds to ensure there was sufficient food and resources on the reservation and sufficient protection from white settlers.¹⁶⁸ Had appropriations been obligated by a ratified treaty, perhaps Congress would have acted. But by 1861, the Secretary of Interior recommended the federal government dissolve the Nome Lackee Reservation and sell the land.¹⁶⁹ He recommended removing any remaining people on the reservation to the Smith River or Round Valley Reservations.¹⁷⁰

Two years later, United States Army Captain Augustus Starr and twenty-three Army officers captured 461 people on the Nome Lackee Reservation.¹⁷¹

163. Report of the Secretary of the Interior (Nov. 29, 1862), at 452 (<https://memory.loc.gov/cgi-bin/ampage?collId=llss&fileName=1100/1157/lls1157.db&recNum=451>).

164. BALDY, *supra* note 5, at 66.

165. Report of the Secretary of the Interior, *supra* note 163.

166. CALIFORNIA OFFICE OF HISTORIC PRESERVATION, FIVE VIEWS: AN ETHNIC HISTORIC SITE SURVEY FOR CALIFORNIA 49 (1988); *see also* National Park Service, *supra* note 138; BALDY, *supra* note 5, at 66-67 (“After establishing reservations throughout California, the federal government appointed government agents, also called ‘Indian agents,’ to seemingly keep the peace and administer treaty agreements, thought they were usually ill equipped to handle their new posts. They never lasted long in their positions, and each one brought his own biases against native people.”).

167. Vincent E. Geiger, *Nome Lackees Indian Reserve Report* (Aug. 31 1859), <https://images.library.wisc.edu/History/EFacs/CommRep/AnnRep59/reference/history.annrep59.i0015.pdf>.

168. Report of the Secretary of the Interior (Nov. 29, 1862), at 456 (<https://memory.loc.gov/cgi-bin/ampage?collId=llss&fileName=1100/1157/lls1157.db&recNum=455>); *see also* Geiger, *supra* note 167.

169. The request was spurred by Agent Geiger’s request in an 1859 report: “An Indian war, under the auspices of the State government is now being waged against the Indians east of the Sacramento river. Some prisoners have been taken and sent to Mendocino, this place not being considered sufficiently distant to prevent their return, unless a large force be kept to guard and watch them. In view, then, of all the circumstances, it is respectfully suggested that the Indians here, and those of the entire Sacramento valley, be removed west of the Coast range of mountains, and the lands included in this reservation be thrown open to the occupancy of our citizens.” Geiger, *supra* note 167.

170. Report of the Secretary of the Interior (Nov. 29, 1862).

171. Hislop, *supra* note 162, at 63; *see also* AKINS AND BAUER, *supra* note 9, at 149.

Beginning near present-day Chico, CA, Captain Starr forced them to march to the Round Valley Reservation near present-day Covelo, CA.¹⁷² It is likely that anyone remaining at the Nome Lackee Reservation was included in this violent displacement.¹⁷³ The journey covered 100 miles and lasted fourteen days.¹⁷⁴ Only 277 survived the journey; nearly 200 people were left to die or died en route.¹⁷⁵

In 1864, the California legislature petitioned Congress to return the now vacant Nome Lackee Reservation to the public domain and allow settler claims on it.¹⁷⁶ In 1870, the Department of the Interior declared the land public domain. Shortly after, speculators and settlers attempted to acquire the land. One speculator, William S. Chapman, approached the US Register in Marysville to “reserve” the acres until he could “make entries on them.” Individual settlers with preemption claims or homesteaders occupied several sections.¹⁷⁷

Despite this competition, between 1874 and 1880, the University of California Regents were able to secure patents to 5,167 acres in and around Tehama County as part of the Morrill Act land grant acreage.¹⁷⁸ As previously described, the Morrill Act prohibited states from selecting un-surveyed federal public land for sale.¹⁷⁹ The Regents, however, in anticipation of competition from speculators and settlers, had lobbied and won an exception from Congress to select un-surveyed land to sell.¹⁸⁰ This special privilege is what allowed the Regents to act fast and select acres within the former Nome Lackee Reservation before it was officially surveyed. In 1879 the Regents sold 1,537 of these acres to Parker and Houghton. The transaction between the Regents and Parker and Houghton represented the culminating phase of dispossession.

172. Hislop, *supra* note 162, at 63.

173. *Id.*

174. J. Dizard, Nome Cult Trail, CSU Chico Department of Anthropology, <https://www.arcgis.com/apps/MapJournal/index.html?appid=2fedcaf06e3049c196a236e1ac341b41>.

175. *Id.*; see also WILLIAM J. BAUER, CALIFORNIA THROUGH NATIVE EYES: RECLAIMING HISTORY vii (2016).

176. Gates, *supra* note 49; see also B.B. Redding, Secretary of State, Nome-Lackee reservation, resolutions of legislature of California (1863) (“Whereas the general government of the United States has entirely abandoned ‘Nome Lackee Indian reservation,’ . . . and whereas the Indians who were on the same have mostly died, and the remainder have scattered through the country . . . the land . . . should be as speedily as possible, thrown open to pre-emption . . . [by] settlers.”) (Adopted February 15, 1864).

177. Gates, *supra* note 49.

178. U.S. Department of the Interior, Bureau of Land Management General Land Office Records, https://gloreCORDS.blm.gov/results/default.aspx?searchCriteria=type=patent|st=CA|cty=103|dt1_m=1|dt1_yr=1868|dt2_m=12|dt2_yr=1880|aut=262201|sp=true|sw=true|sadv=false#resultsTabIndex=0&page=9&sortField=11&sortDir=0.

179. See *supra* Section II.A.

180. *Id.*

Date of patent.	Number of patents.	Number of location.	Name of patentee.	Minimum land.	Double Minimum land.
July 1....	112	418,511.....	G. W. Murdock		240.00
July 1....	113	422.....	Thomas J. Kirkpatrick		480.00
July 1....	114	433.....	Cynthia E. Sanborn		40.00
July 1....	115	437.....	M. A. Reager		80.00
July 1....	116	488.....	C. B. Ashurst		48.00
July 1....	117	500.....	Thomas M. McClanahan.....		80.00
July 1....	118	501, 709, 503, 507, 508.....	Wm. B. Parker & Francis Houghton.....		1,536.67
July 1....	119	529.....	F. R. Lofton, assignee of Eli Hacker.....		80.00
July 1....	120	582.....	E. R. Lowe, assignee of G. W. Hiatt.....		35.89
July 1....	121	590, 591.....	Richard M. Sparks.....		80.00
July 1....	122	924.....	James L. Wiebur.....		80.00
July 1....	123	1014.....	C. P. Berry.....		80.00
July 1....	124	1035.....	James H. Street.....		80.00
July 1....	125	1141.....	Jno. Fennell, assignee of J. Fennell.....		80.00
July 1....	126	1474.....	G. G. Briggs.....		160.00
July 1....	127	212.....	Edward H. Hallett.....		7.40

Figure 2: Section of “Statement of Patents Issued” compiled by the Board of Regents of the University of California’s Land Agent J. Ham. Harris in 1880. The highlighted section marks the acreage of the patent sold to William B. Parker and Francis Houghton. These 1,537 acres were occupied by California Indians at the Nome Lackee Reservation just eighteen years earlier.

Today, the Round Valley Indian Tribe is a federally recognized tribe who has “endured settler colonialism.”¹⁸¹ It is a confederation of smaller tribes in light of the history of forced relocations, including those from the Nome Lackee Reservation.¹⁸² While the Yuki people recognize the present-day Round Valley Reservation lands as part of their ancestral home, many from different tribes were forcibly relocated to the reservation.¹⁸³ The Tribe writes:

“From years of intermarriage, a common lifestyle, and a shared land base, a unified community has emerged. In 1936, the descendants of Yuki, Wailacki, Concow, Little Lake Pomo, Nomlacki, and Pit River peoples formed a new tribe on the reservation through the adoption of a Constitution and created the Covelo Indian Community, later to be called the Round Valley Indian Tribes. Our heritage is a rich combination of different cultures with a common reservation experience and history.”¹⁸⁴

If the Round Valley Indian Tribes are interested in increasing their land base, the University of California is well suited to provide such reparations today, given the amount of real property it holds.

181. BAUER, *supra* note 175, at 6.

182. Round Valley Indian Tribes, *About Us*, <https://www.rvit.org/about/about-us>.

183. *Id.*

184. *Id.*

CONCLUSION

The modern University of California has its roots in violently expropriated Native land from across the state. The school’s endowment and its enduring legal autonomy, including over its vast landholdings, are tied to its settler colonial land grant. And it is this power, in the form of a largely unaccountable constitutional public trust, that serves as a roadblock to legislative reparations for past harm to California Tribes today.

The story of the Regents’ immunity from suit for matters involving university affairs and authority as public trustees has been often documented. However, it has not been explicit that the land grant that the Regents used to prove their competency at the constitutional convention operated by selling recently stolen Native land across the state. In this context, the power of the Regents over university affairs is more than a mere institutional quirk, but a legacy of colonial power.

The impact of this colonial legacy is most stark when considering whether Tribes in California, such as the Round Valley Indian Tribes, could seek recourse from the California legislature in the form of land back from the Regents. 150,000 acres of land across California, once possessed by Indigenous peoples and ceded in the face of violence, genocide, and eighteen unratified treaties, contributed \$19.2 million to the endowment of the University of California. Dispossessed Tribes may encounter myriad barriers in seeking land back from the University for this harm. One of the foremost roadblocks will be the Regents’ exclusive authority over university affairs, including university property, which the legislature has no power to regulate. Without a legislative option, it would take either an (unlikely) constitutional amendment limiting the university’s legal status as a public trust or the university would need to give land back to Tribes of its own volition. For the latter to happen, it will no doubt take a political movement to make the university give up a sense of entitlement to its land.