A BRIEF ON BEHALF OF THE CORPORATE UNIVERSITY

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INTRODUCTION

"Universities are meant to be guardians of democracy and bulwarks against authoritarianism."[1] So reads the first sentence of the announcement for a symposium whose purpose is to "critically examine why universities have failed to protect democracy and how we might democratize our institutions and reorient toward their core mission: to pursue truth and knowledge for the common good."[2] Here, the university is imagined as a site where inquiry is unfettered, pluralism finds a home, and dissenting voices are tolerated and even encouraged.

To identify the American academy as democracy's intended champion is to flatter our self-conception and, for that reason, we are quick to offer our assent. However, this representation is highly problematic for several reasons. My principal concern here is the antidemocratic organization of the university's power to govern its internal affairs. That constitution, I argue, is essentially autocratic insofar as the final power of rule is vested by law in governing boards whose members are neither selected by nor accountable to those they rule. Moreover, although not formally mandated by the university's constitution of rule, in practice, those appointed to these boards continue to be drawn chiefly from dominant elites outside the university, including patrons, plutocrats, and pals of those in positions of power.[3]

If indeed the American academy is an antidemocratic order within, and if its rulers are drawn from the ranks of the privileged without, it is not clear why we should be taken aback when it "fails" to "protect democracy." Nor is it clear why we should think that the task before us today is to "reorient" the academy toward a "common good" that, apparently, it realized yesterday but no longer does today. Arguably, therefore, this symposium's description bears traces of nostalgia for a past that never was, and if that is so, perhaps we should ask whether this yearning compromises our capacity to think the academy anew.

To imagine a future university whose institutional structure might better shelter the fragile enterprises of teaching and learning, I offer the juridical entity that is a corporation. This move will appear counterintuitive to many readers. We have come to think of the corporation as a creature whose home is the economy and whose purpose is to maximize profit. If that is what a corporation is, we then conclude, it must never be identified with the academy or confused with the scholar's work. To conflate the latter with the former is to encourage what we reject each time we invoke the epithet "corporatization," and to do that

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1 *Fall 2025 Law Review Symposium: The University and Democracy*, B.U. SCH. L. (Nov. 14, 2025), https://www.bu.edu/law/ engagements/ fall-2025-law-review-symposium [https://perma.cc/5LUC-2VQK].

2 *Id.*

3 *See* Charlie Eaton & Albina Gibadullina, *Elite Embeddedness: The Rise of Financiers on University Boards as Parallel Social Organizations*, 23 SOCIO-ECON. REV. 1057, 1058-59, 1073-74 (2025) (finding wealthy external elites increasingly dominate university boards to cultivate exclusive social ties and financial advantages).

is to forsake the university's "core mission: to pursue truth and knowledge for the common good."[4]

To counter what this epithet affirms, I aim to show how the corporate legal form, rightly understood, furnishes a model that is helpful in criticizing the autocratic academy. This requires that we loosen capitalism's stranglehold on our conception of the corporation and, more particularly, its neoliberal variant. To do that, I first recover the once familiar representation of this juridical entity as a "body politic" that may be organized as an autocracy or, alternatively, as a self-governing republic; and, second, I show why the property held by corporations is not private but, instead, essentially social. Together, these two amendments to received understandings serve as a preface to imagining what I only hint at in this Essay's latter part: the American academy's reconstitution as a democratic socialist enterprise.[5] The university so construed, I suggest in Part III, offers a response to what I consider the most urgent issue confronting U.S. higher education today: How is the university's autonomy to be secured against those who would render it a compliant servant of purposes not its own?

I. THE AUTOCRATIC ACADEMY

The autocratic academy has deep roots in American history. All nine colonial colleges were legally constituted as chartered corporations. In their early decades, the first and second of these colleges, Harvard and William & Mary, were sites of episodic but sometimes vitriolic controversy about how the power of rule was to be organized within each.[6]

At William & Mary, for example, this struggle assumed the form of a protracted battle between the president and faculty, on the one hand, and the board of visitors, on the other. The terms of this conflict stemmed from its 1693 charter, which provided for organization of the college's president and professors in the form of a "body politic and incorporate," and to this juridical entity the charter assigned many of the powers conventionally granted to corporations, including the authority to govern its everyday business.[7] The college's unincorporated visitors, however, were also assigned certain powers, including that of appointing its instructors and enacting "rules, laws, statutes,

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[4] *Id.*

[5] I offer a more developed account of this academy, which I name "Commonwealth University," in the epilogue to *The Autocratic Academy*. *See* TIMOTHY V. KAUFMAN-OSBORN, THE AUTOCRATIC ACADEMY: REENVISIONING RULE WITHIN AMERICA'S UNIVERSITIES 258-72 (2023).

[6] For a more detailed account of the history and controversies that beset Harvard as well as William & Mary in their early years, see *id.* at 63-104.

[7] CHARTER OF THE COLL. OF WILLIAM & MARY OF 1693 art. V, *reprinted in Royal Charter*, WM. & MARY LIBRS.: SPECIAL COLLECTIONS RSCH. CTR., https://scrc-kb.libraries.wm.edu/royal-charter [https://perma.cc/J54N-PPAF] (last visited May 21, 2026).

order and injunctions, for the good and wholesome governance of the said college."[8]

The 1693 charter, however, did not indicate how disputes between these two bodies were to be resolved (for example, whether the visitors were empowered not merely to appoint but also to dismiss professors).[9] How this question would eventually be answered was anticipated when, in 1763, the visitors announced that henceforth they would exercise "the control, superintendency and final determination of all orders made about the affairs of the college."[10] Making good on this decree, over the course of the next few decades, a board whose members were drawn from local notables succeeded in stripping from the college's self-governing corporation of professors the powers granted to the latter by its founding charter.[11]

The possibility of conflict based in competing authorizations to exercise the power of rule within these early colleges was effectively foreclosed when Yale secured its corporate charter in 1745.[12] By mandating the creation of a single board to which all powers of governance and prerogatives of ownership were assigned, Yale's charter departed from that of William & Mary as well as that of Harvard, which provided for a corporation of resident fellows but also a board of overseers created to ensure that the college remained loyal to the provincial government of Massachusetts.[13] Instead, from the outset, Yale was ruled by a monocratic corporation whose membership was restricted to the ten ministers holding seats on its board, none of whom were professors. In the eyes of the law, this corporation *was* the college; and to this body the charter granted sole authority to "make ordain and Establish all such wholsome [sic] & Reasonable Laws Rules & Ordinances . . . as they shall think fit and proper for ye Instruction and Education of ye Students and Ordering Governing Ruling & Managing ye Sd College."[14]

The architecture of rule established at Yale is what Richard Hofstadter and Walter Metzger once labeled "the great anomaly of American higher

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8 *Id.* art. IX.

9 *Id.* art. IV (authorizing visitors to appoint professors and fill vacancies after "deprivation" while leaving removal authority unclear).

10 A Statute for the Better Government of the College, Ordained in a Meeting of the Visitors and Governors (Sep. 14, 1763) (on file with Lambeth Palace Libr., Fulham Papers, vol. 14).

11 *See* KAUFMAN-OSBORN, *supra* note 5, at 71-74.

12 CHARTER OF YALE COLL. OF 1745, *reprinted in* YALE UNIV., THE YALE CORPORATION, CHARTER AND LEGISLATION 8 (1976), https://www.yale.edu/sites/default/files/files/University-Charter.pdf [https://perma.cc/L78J-TYKK].

13 *See id.* art. 8; CHARTER OF THE COLL. OF WILLIAM & MARY OF 1693 art. IV; HARVARD CHARTER OF 1650, *reprinted in Harvard Charter of 1650*, HARV. LIBR. (Sep. 9, 2025, at 16:27 ET), https://guides.library.harvard.edu/c.php?g=880222&p=6323072 [https://perma.cc/ST9L-7ZTX]

14 CHARTER OF YALE COLL. OF 1745 art. 8.

education."[15] That anomaly consists of the law's exclusive location of the university's powers of governance within boards that are conventionally dubbed "external" insofar as their members are not employees of the universities they rule and "lay" insofar as expertise in matters academic is neither required nor even expected as a condition of appointment.[16]

What renders this legal form autocratic is the structural disenfranchisement of those who are subject to these boards' rule from any legally guaranteed title to enjoy these powers of governance. These are the subjects who in time will come to be designated as employees and who, upon signing employment contracts, effectively agree to do as they are told by those to whom they report. Their lack of any political authority to make the rules by which they are governed, or to hold accountable those who do, is thereby supplemented by an asymmetrical economic relationship that authorizes some to hire and others to become employed, some to fire and others to be terminated.

Granted, certain categories of employees (for example, tenure-track faculty) may sometimes be permitted to engage in institutional decision-making, but that opportunity is delegated by governing boards and, as Texas and other states have recently reminded us, may always be revised or even revoked.[17] So, too, informal norms and formal policies sometimes check the exercise by boards of the full measure of power afforded to them by law. That power never disappears, however, and that is a lesson we relearn each time a crisis, real or manufactured, is declared and boards respond by wielding their ultimate right to rule.

This, for example, is what the American Association of University Professors ("AAUP") taught us when, according to a 2021 report titled "COVID-19 and Academic Governance," it discovered egregious violations of "shared governance" at multiple universities, including the termination of tenured as well as nontenured appointments, the suspension of faculty handbooks, the elimination of entire academic programs, the abolition of established bodies of governance, the invocation of force-majeure clauses to nullify collective bargaining agreements, and more.[18] Peering into the future, the AAUP's report

[15] RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 416 (1955). On the victory of external lay boards over those who fought on behalf of the academy's constitution as a self-governing corporation, see generally JURGEN HERBST, FROM CRISIS TO CRISIS: AMERICAN COLLEGE GOVERNMENT, 1638-1819 (1982) (tracing institutional and governmental development of early American colleges before 1820); and EDWIN D. DURYEA, THE ACADEMIC CORPORATION: A HISTORY OF COLLEGE AND UNIVERSITY GOVERNING BOARDS (Don Williams ed., 2000) (surveying historical development of college and university governing boards from medieval times through the 1950s).

[16] *See* HOFSTADTER & METZGER, *supra* note 15, at 416.

[17] Emma Whitford, *Texas University Boards Abolish Faculty Senates, Create Toothless Councils*, INSIDE HIGHER ED (Aug. 22, 2025), https://www.insidehighered.com/news/faculty-issues/ shared-governance/ 2025/ 08/ 22/ tex- boards- abolish- faculty- senates- create [https:// perma.cc/8Z5P-L6QB].

[18] AM. ASS'N OF UNIV. PROFESSORS, SPECIAL REPORT: COVID-19 AND ACADEMIC GOVERNANCE 34-40 (2021), https://www.aaup.org/sites/default/files/Special-Report_COVID

expressed its authors' fear that rule by "unilateral" fiat may soon become a "permanent" element of institutional governance.[19]

That future is our present as, today, we watch governors pack public university governing boards with cronies who then exercise their legal authority to ride roughshod over those who, as depoliticized subjects in the guise of hired hands, can do no more than complain.[20] We may want to believe that the boards of private universities are more likely to resist encroachment on the institutional autonomy that is the academy's freedom; but, as Columbia University's capitulation to the extortionist demands of the Trump Administration illustrates, that supposition is naïve at best.[21]

In public and private alike, what we are now witnessing is not a violation of the American academy's accustomed constitution of rule but, instead, its clarification. When the bifurcation between public and private universities first emerged in the nineteenth century, it did not fundamentally modify the academy's autocratic constitution. True, public universities are more fully subject to legislative intervention, including the appropriation or denial of funds, than are their private counterparts.[22] True, some public universities are not corporations but, instead, quasi-corporations insofar as they are not incorporated as independent juridical entities but nonetheless enjoy many of the powers assigned to their full-fledged counterparts.[23] And, true, their respective methods of appointment differ: Governing boards of private colleges are generally self-replicating whereas trustees at public universities are typically appointed by governors, legislatures, or both.[24] The denominator common to both, however, remains intact: All vest the powers of institutional governance in external lay boards that rule over those who have no cognizable basis for challenging their exclusion from any exercise of those powers.

-19-and-Academic-Governance.pdf [https://perma.cc/6E38-ZVG6] ("COVID-19 served as an accelerant, turning the gradual erosion of shared governance on some campuses into a landslide.").

[19] *Id.* at 37-38.

[20] C.A. Bridges & Tarah Jean, *Diaz, Nuñez, Johnson: How Many DeSantis Allies Lead Florida Universities and Colleges?*, TALLAHASSEE DEMOCRAT (June 4, 2025, at 14:26 ET), https://www.tallahassee.com/story/news/education/2025/06/04/desantis-allies-staff-fill-top-spots-florida-higher-education/84006308007 [https://perma.cc/49YA-JZL3].

[21] Moira Donegan, Opinion, *Columbia's Capitulation to Trump Begins a Dark New Era for US Higher Education*, GUARDIAN (July 26, 2025, at 07:35 ET), https://www.theguardian.com/commentisfree/2025/jul/26/columbia-trump-fine-universities-palestine [https://perma.cc/7KMT-5CBP].

[22] Brian Pusser, Sheila Slaughter & Scott L. Thomas, *Playing the Board Game: An Empirical Analysis of University Trustee and Corporate Board Interlocks*, 77 J. HIGHER EDUC. 747, 770 (2006).

[23] *See, e.g.*, Veronica Gray, *A Government Branch of Its Own: Reining in the Power of the Regents of the University of California*, 51 U.C. L. CONST. Q. 503, 503 (2024) (describing constitutionally unusual status of Regents of the University of California).

[24] *See* Pusser et al., *supra* note 22, at 765.

What does change over time is not the autocratic organization of the academy but, instead, the occupations of those who hold office on its governing boards. Within America's earliest colleges, the appointment of ministers and magistrates from specific denominations secured sectarian conformity (for example, by Congregationalists at Yale, Baptists at Rhode Island, and the Church of England's clerics at King's College).[25] By the turn of the twentieth century, however, more than half of the appointees to academic boards had backgrounds in business, as one would anticipate in a rapidly industrializing order.[26] Today, we witness a rapid increase in the appointment of captains of finance, which signals yet another shift in America's political economy as manufacturing cedes to derivatives, debt, and capital gains as primary sources of capital accumulation.[27] Each of these changes in board composition reflects a transformation in America's principal mode of production; and, at each stage, the power of rule vested in external lay boards has gravitated toward those who reap the greatest rewards from that reorganization.[28]

If this analysis is correct, then it is misguided to lament the American university's contemporary capture by powers antithetical to its work, whether they be wealthy donors, for-profit corporations, and/or the state and federal governments that now conspire to reduce the academy to a pawn. That "capture" is built into the American academy's legal constitution as an autocratic corporation ruled by outsiders beholden to other outsiders. And, if that is so, then no amount of tinkering within these confines is likely to succeed in countering those who would render the university an accomplice to authoritarianism, and still less is the academy likely to become a paladin of democratization.

II. THE CORPORATION AS CRITIQUE

Often, especially among those on the political left, the term "corporation" serves as a pejorative that condemns what it names, i.e., the predatory behemoths that now dominate the U.S. economy, whether those be Amazon, NVIDIA, Alphabet, JP Morgan Chase, Tesla, or others of this ilk. This, though, cannot be the whole of the matter since diverse associations, including churches, universities, charities, and municipalities, also assume the form of incorporated juridical entities. To forget this is to overlook the semantic compression that gained momentum throughout the twentieth century and that now explains how the corporation came to be identified with its specifically capitalist incarnation. It is this assimilation that we presuppose each time we condemn the academy's "corporatization" as we forget that the incorporated for-profit enterprise is but one species of the larger genus to which it belongs.

[25] CLYDE W. BARROW, UNIVERSITIES AND THE CAPITALIST STATE: CORPORATE LIBERALISM AND THE RECONSTRUCTION OF AMERICAN HIGHER EDUCATION, 1894-1928, at 39 (1990).

[26] *Id.* at 38 tbl. 2.5.

[27] CHARLIE EATON, BANKERS IN THE IVORY TOWER: THE TROUBLING RISE OF FINANCIERS IN US HIGHER EDUCATION 42-44 (2022).

[28] *See* Eaton & Gibadullina, *supra* note 3, at 1084.

We can challenge this reductionism by asking what is essential to the corporate legal form regardless of its specific type. To answer that question, in Section A of this Part, I argue that all corporations, including but not limited to those we consider economic, are at bottom political entities defined by how they distribute and structure their powers of rule; and in Section B, I show that the very existence of corporations turns not on property's privatization but instead on its socialization. Stitched together, these amendments to more familiar accounts provide a possible foundation for the university's democratization as well as its anticapitalist reformation.

A. *The Corporation as a Body Politic*

That we so often equate the corporation with what, historically, is its most recent manifestation testifies not just to the enormous power of its capitalist variant but also to the considerable clout of that corporation's champions within the American academy. Think, for example, of those Chicago School economists who contend that a corporation is merely a "nexus" of contracts and, more specifically, a site where self-interested suppliers of key factors of production, including capital, labor, materials, and services, enter into voluntary agreements aimed at securing the advantage of each.[29] On this account, the corporation is a gussied-up partnership that belongs essentially within the economic sphere, is constituted entirely by means of private deals, and is oriented exclusively to profit's maximization.

The Chicago School errs insofar as it denies that the corporation, including the variant its students commend, is an essentially political entity. To see why this is so, recall the charter of William & Mary. Issued by the Crown, that document performatively summoned into being a "body politic and incorporate";[30] and today, it remains common to find this designation or its functional equivalent employed within corporate charters, articles of incorporation, enabling statutes, and state constitutions.[31]

To Chicago School economists, this denomination poses a problem because it runs counter to the neoliberal representation of corporations as authority-free zones built by contract alone and located squarely within the private sphere of freedom that classical liberalism neatly distinguishes from the coercive realm of state power.[32] If pressed, these free marketeers may concede that corporations are indeed political insofar as the rights, powers, and immunities they enjoy in their capacity as juridical entities cannot exist absent antecedent availability of certain legal instruments—for example, general incorporation statutes—that

[29] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310-11 (1976).

[30] CHARTER OF THE COLL. OF WILLIAM & MARY art. IX.

[31] *See, e.g.*, 1 MCQUILLIN MUN. CORP. § 2:8 (3d ed.), Westlaw (database updated June 2025) (defining municipal corporations as bodies politic and corporate created by public law).

[32] *See* Jensen & Meckling, *supra* note 29, at 310-11 ("It is important to recognize that most organizations are simply legal fictions." (emphasis omitted)).

voluntary exchange among self-interested agents cannot engender. Should this be acknowledged, however, the Windy City's economists will characterize these mechanisms as mere conveniences that private agents could have fashioned on their own but chose not to do so because it is more cost-effective to employ those already made available by the state.[33]

This concession, however, does not exhaust what it means to call a corporation a "body politic." The state's authorization of a corporation calls into being a juridical creature that holds the authority, within limits specified by law, to govern its own affairs. "[A]longside the corporation's well-known power to own, contract, and appear in court in its own name," writes David Ciepley, "every corporation receives from the public authority the power to legislate, and also to adjudge and enforce its legislation, backed by the public courts," and it is for this reason, Ciepley concludes, that every corporation, no matter what its type, is constituted as a "chartered government."[34]

The Model Business Corporation Act (2025) prepared by the American Bar Association and its nonprofit counterpart (2022) are therefore rightly read as manuals that indicate not only the process whereby a proposed corporation can secure state authorization but also how to organize the powers that accompany that stamp of approval.[35] Both acts explain, for example, how to draft the constitution of a corporation's government (its articles of incorporation),[36] what legislative powers this government may exercise over those subject to its jurisdiction (to adopt bylaws that regulate its internal affairs),[37] who holds these powers (its board of directors),[38] and how these officers are to be selected (by its ongoing members or via appointment by external parties).[39]

Although their ends differ, for my purposes, our familiar division between for-profit and nonprofit corporations is a distinction that makes no difference. No matter what its type, to become a corporation is to become a juridical entity authorized by the state and endowed with the capacity to act in its own name (hence suits filed on its behalf designate the corporation rather than "natural" persons as complainant); to enjoy certain powers (including but not limited to

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33 *See, e.g.*, FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 5-6 (1991).

34 David Ciepley, *The Corporation as a Chartered Government*, 51 HOFSTRA L. REV. 815, 816, 818 (2023).

35 *See generally* MODEL BUS. CORP. ACT (A.B.A. 2025) (providing default rules for business-corporation formation and governance); MODEL NONPROFIT CORP. ACT (A.B.A. 2022) (providing default rules for nonprofit formation and governance).

36 MODEL BUS. CORP. ACT §§ 2.01-.05 (A.B.A. 2025); MODEL NONPROFIT CORP. ACT §§ 201-05 (A.B.A. 2022).

37 MODEL BUS. CORP. ACT §§ 2.06-.08 (A.B.A. 2025); MODEL NONPROFIT CORP. ACT § 206 (A.B.A. 2022).

38 MODEL BUS. CORP. ACT §§ 8.01-.32 (A.B.A. 2025); MODEL NONPROFIT CORP. ACT §§ 801-33 (A.B.A. 2022).

39 MODEL BUS. CORP. ACT §§ 8.40-.44 (A.B.A. 2025); MODEL NONPROFIT CORP. ACT §§ 840-44 (A.B.A. 2022).

the power to hold and dispose of property); and to vest in a government the authority to determine what actions a corporation shall or shall not undertake (because this immaterial entity has no will of its own).[40]

What is inessential to the corporate form is organization of its powers of rule in specifically autocratic form. Elsewhere, I have discussed in greater detail what state statutes often call "member" or "membership" corporations.[41] Unlike its antidemocratic antithesis, this type of corporation is self-governing insofar as the power of rule remains embedded within its members. That power is exercised by these incorporated members not over others but over themselves, whether directly in assembly or indirectly via the officers they select and hold accountable in their capacity as representatives to whom certain powers have been delegated. So constituted, William Blackstone, the eighteenth century English jurist, labeled these corporations "little republic[s]."[42] Here, the power of rule is enjoyed not by a monocratic head severed from the body politic over which it unilaterally rules but, instead, by this body's members in their corporate capacity; and those members conduct their political affairs not by imposition on those permanently relegated to the status of subjects but, instead, by means of deliberation that eventuates in decisions binding on all.[43]

If we knew our history better, we would recall that William & Mary in its earliest years offered America's closest approximation to a member corporation.[44] And we would recall that this experiment concluded when its board of visitors arrogated to itself the college's corporate powers, including those its charter vested in its professors and president.[45] This amnesia, however, should not erase our appreciation of the self-governing member corporation because, as Ciepley also shows, it is this juridical entity that furnishes the conceptual underpinnings of the United States Constitution: This corporate form, whose origins are traceable to Roman law, "helped generate the doctrine of popular sovereignty, the notion that rulers receive their authority from the people (the corporate members), whom they should serve and to whom they are accountable."[46] This corporate type, therefore, is not constitutional democracy's enemy but its principal source of inspiration.[47] What should offend us,

[40] MODEL BUS. CORP. ACT § 3.02 (A.B.A. 2025); MODEL NONPROFIT CORP. ACT § 302 (A.B.A. 2022).

[41] *See* KAUFMAN-OSBORN, *supra* note 5, at 47-60.

[42] 1 WILLIAM BLACKSTONE, COMMENTARIES *566-67.

[43] *See* KAUFMAN-OSBORN, *supra* note 5, at 51-52.

[44] *Id.* at 70-72.

[45] *Id.*; *see supra* notes 9-11 and accompanying text (tracing William & Mary's external governing board of visitor's assertion of final authority over college affairs).

[46] David Ciepley, *Democracy and the Corporation: The Long View*, 26 ANN. REV. POL. SCI. 489, 497-98 (2023) [hereinafter Ciepley, *Democracy*]; *see also* David Ciepley, *Is the U.S. Government a Corporation? The Corporate Origins of Modern Constitutionalism*, 111 AM. POL. SCI. REV. 418, 418 (2017) (arguing corporate forms shaped development of Anglo-American liberal-democratic state).

[47] *See* Ciepley, *Democracy*, *supra* note 46, at 491.

accordingly, is not the American university's constitution as a corporation but, rather, its formation as a specifically autocratic juridical entity whose powers of ultimate rule are located in the hands of outsiders whose authority neither stems from nor is accountable to the governed.[48]

If, today, we do not find the university's unification of power and privilege problematic, that is because what Hofstadter and Metzger labeled the "great anomaly of American higher education" now appears as an obdurate given that we may grumble about but cannot fundamentally alter.[49] So long as this constitution remains unchallenged, we should relinquish our romantic expectation that American universities should now stand as "guardians of democracy and bulwarks against authoritarianism."[50]

B. *The Corporation's Socialized Property*

Objections to the contemporary university's "corporatization," among other complaints, serve as shorthand for objections to its assumption of the trappings of for-profit corporations, including but not limited to several forms of privatization. For example, however inchoately, this term gestures toward "academic capitalism" whereby the academy's work is valued only insofar as it can be refashioned into a commodity that, when sold in the marketplace, generates sizeable revenue streams.[51] So, too, this epithet points toward the defunding of higher education as state governments, especially since the Great Recession of 2008, have reduced their appropriations for public universities, which forces them to raise tuition that is financed by debt assumed by individual students who are beggared for decades.[52] In both cases, what should be collective goods are displaced by those corrupted by the logic of the marketplace.

Neoliberalism's representation of the corporation as an economic rather than a political entity, I argued earlier, turns on the false universalization of a historically specific kind of corporation.[53] The same is true of the conviction that the corporation is an entity grounded in private property and fixated on profit.[54] This misrepresentation is reinforced each time we accept without question the contention that corporate shareholders are this entity's "owners."[55] When that claim is joined to the doctrine of "shareholder primacy," it follows that the

[48] *See* KAUFMAN-OSBORN, *supra* note 5, at 83-84.

[49] *See id.* at 22 (quoting HOFSTADTER & METZGER, *supra* note 15, at 416).

[50] B.U. SCH. L., *supra* note 1.

[51] KAUFMAN-OSBORN, *supra* note 5, at 265.

[52] *See* Fructoso Basaldua, *Connecting Disinvestment in Public Higher Education, Rising Tuition, and Student Debt*, AM. SOCIO. ASS'N (2023), https://www.asanet.org/footnotes-article/connecting-disinvestment-in-public-higher-education-rising-tuition-and-student-debt [https://perma.cc/8DN6-C79Z].

[53] KAUFMAN-OSBORN, *supra* note 5, at 30-31.

[54] *Id.* at 37.

[55] *Id.*

corporation's overriding imperative is to accumulate earnings that will be distributed to its owners in the form of dividends.[56]

This conclusion, like the economistic representation of the corporation, is mistaken.[57] On this account, the corporation is conceptualized as a form of private property; and, if that is so, then its shareholders qua "owners" must be entitled to the rights legally ascribed to all other proprietors within a capitalist economy.[58] Among others, these include the exclusive right to determine how property will be used, to exclude others from access to what one owns, and to alienate one's possessions by selling, renting, or bequeathing them to another. If this is what ownership is, however, shareholders cannot be said to own the corporation. Unlike the possessions you and I own as individuals, corporate assets are legally possessed by a juridical artifact that neither of us will ever be.[59] Because this entity has legal title to these assets, the corporation cannot itself be an object of the property rights afforded to "natural" persons.[60] The creature of law that is this abstract but very real fiction holds these goods in its own name; or, put differently, these goods are incorporated within an entity that is not reducible to any identifiable persons, whether considered individually or collectively.[61]

We know this to be true when we concede that it is the incorporated city rather than its specific occupants at any given moment in time that "owns" a municipality's parks, streets, and sewers. The same is true, however, of a publicly traded "private" corporation in relation to those who purchase shares on the New York Stock Exchange. Shares are financial instruments that are accompanied by certain limited rights but cannot be equated with the property held by a corporation.[62] Although shareholders may sell their stock in a secondary market, they cannot withdraw, borrow, or lend corporate assets, for these goods are "locked in," to borrow a term employed by Margaret Blair and others, and hence are not their alienable property.[63] No matter how many shares

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[56] *Id.* at 38.

[57] *Id.* at 37. The remainder of this section condenses an argument more fully elaborated in *The Autocratic Academy*. *See generally* KAUFMAN-OSBORN, *supra* note 5.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 38.

[62] *Id.*

[63] *Id.*; *see* Margaret M. Blair, *Corporate 'Ownership': A Misleading Word Muddies the Corporate Governance Debate*, BROOKINGS REV., Winter 1995, at 16, 17 (arguing shareholders in large public corporations possess few rights associated with ownership of the corporation); Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 392 & n.12 (2003) (arguing corporate form's lock-in of capital is inconsistent with ordinary incidents of ownership); David Ciepley, *Privatizing Sovereignty, Socializing Property: What Economics Doesn't Teach You About the Corporation*, LAW & POL. ECON. PROJECT (Feb. 18, 2020), https://lpeproject.org/blog/privatizing-sovereignty-socializing-property-what-economics-

of Tesla stock I hold, I cannot walk into one of its showrooms and, without paying, drive off in the latest model, nor, for that matter, can its chief executive officer. Were I or Elon Musk able to do so, we would have to conclude that Tesla is not a corporation but a partnership whose contributors may at any time withdraw whatever capital they have contributed to this enterprise.

Nor can shareholders assert ownership rights over the profits generated by Tesla each quarter, and that is so even after this corporation's contractual obligations to others have been satisfied.[64] How that residual is apportioned is not determined by its shareholders, as I could if I were to sell my home and then do whatever I please with the proceeds.[65] Rather, decisions about the distribution of residual income are made by Tesla's board of directors who, if they choose, may allocate the company's profits to other purposes (for example, by moving production elsewhere, currying favor with politicians, or investing in Tesla's training programs for service technicians). Payment for these purposes reduces the revenue that would otherwise be available for disbursement in the form of dividends and, in doing that, mocks the shareholders' conviction that they own a corporation and hence are entitled to its full yield.[66] True, these disgruntled shareholders may seek to elect new board members with different priorities, but these governance rights should not be confused with affirming a legal title to private property.[67]

Nor should we consider the members of that board owners of the corporation's holdings, and that is so even though this body exercises control over their disposition. Whatever authority this board enjoys stems not from its members' election by shareholders but from the charter or other legal vehicle that first afforded the board specific governance prerogatives.[68] When that board acts, it does so in the name of a juridical entity that may endure through time even though individual board members, like those who hold shares, will come and go.[69] Enjoyment of the power to determine disposition of this incorporated property no more makes this board its owner than are its shareholders.[70]

To overlook these facts is to forget that one of the principal purposes of creating a corporation is to vest assets in a legal entity that shields shareholders from claims that may be directed against unincorporated individuals.[71] Should a corporation lose a civil suit, the doctrine of limited liability provides that its

doesnt-teach-you-about-the-corporation [https://perma.cc/P36S-XB9V] (arguing law-and-economics concepts like "lock-in" and "equity shielding" rest on false premise that shareholders own corporation).

64 KAUFMAN-OSBORN, *supra* note 5, at 38.

65 *Id.*

66 *Id.*

67 *Id.* at 34-35.

68 *Id.* at 41.

69 *Id.* at 41-42.

70 *Id.* at 42.

71 *Id.* at 38.

investors will not be required to pay damages that exceed the amount they invested. So, too, should a corporation file for bankruptcy, its individual investors will be protected from personal accountability for that firm's debts.[72] That is so, once again, because it is the corporation that possesses its incorporated capital whereas corporate assets cannot be owned by persons without destroying its very existence as a corporation.[73]

In short, and at odds with capitalism's champions, corporations of all types are created to *foreclose* particular rights claims that individual property owners are entitled to make about their private possessions, as well as particular claims that can be made against those individuals in the same capacity.[74] Put differently, the very possibility of a corporation presupposes the socialization of assets that were once privately held but, upon incorporation, no longer are.[75] Marx, therefore, was right to contend that the corporation is one of capitalism's most perfect articulations but also a legal formation that anticipates a truly socialized economy.[76]

Within the socialized university, its incorporated assets must remain unavailable for appropriation as so much privatized property and hence insertion within capitalism's circuits of accumulation.[77] Should someone represent as "knowledge" something that has been taken from that university and rendered a rivalrous good via its privatization, we should explain that this thing no longer qualifies as a common good that is correctly considered knowledge. Should I, for example, appropriate a product of labor whose creation is enabled by the academy and then reconstitute that fruit as a textbook sold to profit Pearson, I will thereby transform this thing into the very different sort of entity that is a vendible commodity. So, too, should I employ the oxymoronic phrase "academic capitalism," you should be quick to tell me that I do not know what I am talking about. This category appears coherent only because it masks the violation necessary to expropriate the epistemic goods that "academic capitalism" converts into so many ownable and hence alienable objects. To become so much private property, these goods must be wrested from the social relations of intellectual production out of which they emerge (for example, the conduct of peer review); and only after they are so disembedded can their "owners" invoke the state's property laws to shield them from what will now be condemned as theft.[78]

[72] *Id.*

[73] *Id.*

[74] *Id.* at 38-39.

[75] *Id.* at 39.

[76] *See* 3 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 516 (Friedrick Engels ed., Ernest Untermann trans., Charles H. Kerr & Co. 1909) (1894) ("[Stock companies are] the abolition of capital as private property within the boundaries of capitalist production itself.").

[77] KAUFMAN-OSBORN, *supra* note 5, at 266.

[78] *Id.* at 265.

The academy constituted as a socialist corporation denies to anyone the right to extract this or that from its common pool of resources and then claim exclusive rights over its enjoyment and employment. Ownership of that which this corporation's members produce remains vested within the juridical entity to which they jointly belong. Because this corporation is organized as a republic, the power of its members or their designated representatives to dispose of their common wealth must not be conflated with the bundle of rights conventionally ascribed to private property owners.[79] Rather, that power remains grounded within a body politic whose members govern themselves and so are not subject to unilateral rule by external elites. Unlike neoliberal economists, these citizens of the academy are able to explain why its epistemic productions become commodities only at the cost of losing their identity of knowledge.[80]

These misconceptions rectified, we can now appreciate the radical edge inherent within an appeal to the corporate form. If, as I suggested in the preceding Section, the "little republic" that is the member corporation invites us to question the American academy's autocratic constitution, this Section suggests that this same legal form invites a critique of the privatized university because its goods are not and cannot be held as so much exclusively owned property. To put these claims together is to envision a university whose corporate constitution provides a foundation for challenging the academy's "corporatization."

III. THE ACADEMY'S AUTONOMY

Affirmation of the university's corporate form offers a possible response to what I take to be the most significant threat confronting U.S. colleges and universities today: erosion—if not evisceration—of their autonomy and hence a loss of their capacity for self-governance. We misunderstand that disintegration if we frame it merely as a matter of encroachment by alien interlopers. The American university's rule by external lay boards internalizes and institutionalizes its susceptibility to usurpation by heteronomous powers. The achievement of autonomy therefore demands abolition of this colonial relic, followed by the university's reconstitution as a locus of self-rule.

Contrary to conventional belief, the corporate legal form is not itself an enemy of the academy's autonomy. Indeed, the earliest European guilds of scholars and/or students sought incorporation, whether via papal bulls or state charters, because they were persuaded that this juridical recognition would secure for them powers of self-governance they otherwise lacked.[81] It was "through the device of incorporation," Walter Metzger explains, that these fraternities obtained "the right to elect their own officers and representatives, to sue and be

[79] *Id.* at 267.

[80] *Id.* at 267.

[81] *See* Walter J. Metzger, *Academic Tenure in America: A Historical Essay*, *in* FACULTY TENURE: A REPORT BY THE COMMISSION ON ACADEMIC TENURE IN HIGHER EDUCATION 93, 94-96 (William R. Keast & John W. Macy eds., 1st ed. 1973).

sued as a single juristic person, and—above all—to enact the rules and regulations to which they and those who dealt with them had to conform."[82] Incorporation, in sum, was the means by which these universities secured the juridical fortifications that sustained their capacity to repel outsiders and hence their ability to manage their internal affairs as they deemed best, whether by determining whom to admit as students or to retain as faculty, arranging their academic program, or disposing of its assets.[83]

The corporation is a unique way of combining human and nonhuman assets, thereby generating modalities of power that would not exist in the absence of this legal form. Many of these powers can be exercised by individual persons—for example, to buy and sell property, to sue and be sued, or to enter into contracts. The power to rule its own affairs, however, is a specifically political power, and it is this power that we invoke when we affirm the academy's right to resist any and all who would compromise its independence.

CONCLUSION

Today, the American academy's autonomy is under assault by authoritarians claiming the mantle of democracy. The university, insists Christopher Rufo, should be ruled "according to the principles and priorities of voters, who elect legislators to govern state institutions in the interest of the common good."[84] The superficial plausibility of this contention suggests that this symposium's title, "The University and Democracy," should be re-issued as a question: How is the university's autonomy to be secured within a political order that formally vests sovereign power within the people and so renders credible the claim that the American academy may rightfully be brought to heel in its name? Alternatively, how is the academy's independence to be defended when it is endangered by what Kim Scheppele calls "autocratic legalism,"[85] by which she means a regime in which democratically elected rulers aim to dismantle by legal means the institutions of civil society, including the university, that might otherwise counter consolidation of an authoritarian regime?

To address this question, I have argued on behalf of the university's democratization but also affirmation of its status as a corporation.[86] In common parlance, when we claim that the university is becoming "corporatized," we lament its departure from democratic modes of governance. Better in my view

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[82] *Id.* at 96.

[83] *Id.* at 95-96.

[84] *The Great University Reform Debate*, CHRISTOPHER F. RUFO (May 21, 2023), https://christopherrufo.com/p/the-great-university-reform-debate.

[85] Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545, 548 (2018).

[86] For an indication of what this affirmation might look like, see Michael Banerjee, *What Harvard's Lawsuit Should Have Said*, 16 CALIF. L. REV. ONLINE 51, 51-53 (2025); and see also Michael Banerjee, *Using Citizens United*, 106 B.U. L. REV. 1239, 1244 (2026) ("At the end of the day, the university's freedom depends on corporate rights that the university shares with many others.").

to challenge the neoliberal representation presupposed by this charge and, that done, argue on behalf of the university's reconstitution as a different kind of corporation. On my account, that involves, first, declaration of the university's status as an essentially political entity whose rule is now but need not be constituted in autocratic form; and, second, declaration of that corporation's status as a juridical entity whose assets, owned by no one, are subject to collective disposition by those who are members of a democratically governed university.

However appealing this vision may be, it is important to recall that the academy's assumption of this form may temper but will never finally overcome the antagonism between democracy and the university. So long as the academy is a chartered creature of a state that draws its authority from a popular sovereign, the tension between the two is not a problem that can be definitively solved but, rather, a dilemma that must be ceaselessly negotiated. If what we call a university is to remain worthy of this name, its members must question established pieties, challenge received orthodoxies, and contest commonsense convictions. Public opinion within a democracy, therefore, will always be discomfited by the university's work and so forever tempted to bring it to heel. What we see in President Trump's second term is a cynical exploitation of this danger in the service of authoritarianism. To fight back, we may seek to convince those who consider the university an enemy of the people that it is in the long-term interest of a democracy to respect the academy's independence. Its fate, however, will ultimately turn on the university's capacity to affirm and deploy the corporate powers that give it strength.