

THE STATE AND HIGHER EDUCATION

BY SAUL SACK*

The Power to Create

HISTORICALLY the corporation, a concept whose principles had existed in Roman law in the "collegium" and "universitas," and were given continued life by ecclesiastical and municipal bodies, arose about the end of the fourteenth and the beginning of the fifteenth century.¹ The need for powers or characteristics not possessed by individuals or by mere associations, among which are immortality, or the provision for the continuity of an object beyond the life of its members, and the ability to hold property without the hazardous and endless necessity of perpetual conveyance for the purpose of transmitting it from hand to hand,² led to the creation of this artificial instrument. Since "the right to act as a corporation depends upon positive legal authority granted by the sovereign,"³ the state becomes the source from which this right is derived.

Prior to the Revolution the sovereign power rested in the hands of the Proprietors of the province. It was to them, consequently, or their appointed representatives, that the founders of the Academy and Charitable School applied for their first charter of incorporation in 1753, and from whom they obtained their second charter in 1755, elevating the Academy to a college with the right to confer degrees.⁴ With the transfer of sovereignty to the Commonwealth of Pennsylvania, and the adoption of the first state constitution in 1776, all legislative powers including those of in-

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¹ Ernest Freund, *The Legal Nature of Corporations* (Ph.D. Thesis, Columbia University, 1897), 7.

² 4 Wheat 636, "Dartmouth College vs. Woodward."

³ Ernest Freund, *The Police Power, Public Policy and Constitutional Rights* (New York: Callaghan & Co., 1897), par. 358.

⁴ Harrisburg, Commission Book A, July 13, 1753, II, 150; Commission Book A, May 14, 1755, II, 193.

corporation were vested in the Assembly.⁵ At the same time the constitution recognized the responsibility of the state for promoting education, including higher learning, by declaring that "all useful learning shall be duly encouraged and promoted in one or more universities."⁶ This concept of state responsibility for higher education, with a slight change of terminology ("The arts and sciences shall be promoted in one or more seminaries of learning.") was reiterated in the constitutions of 1790 and 1838;⁷ and though not specifically stated in the constitution of 1873 had become established as an integral part of state policy by virtue of legislative enactment and practice.

As early as 1791, the General Assembly, finding itself burdened by numerous requests for acts of incorporation, delegated a portion of this power to the Supreme Court of the Commonwealth. The act specified the necessary steps to be taken for the incorporation of persons associated "for any literary, charitable, or for any religious purpose." A statement or charter was to be formulated by the persons desiring incorporation and transmitted to the Attorney General of the Commonwealth for his opinion as to the lawfulness of the objects, articles, and conditions of the document. If he found it consistent with the laws of the Commonwealth and of the United States he was to so certify to the Supreme Court of the state. The Court, in turn, was to attest to its legality and transmit the charter to the Governor, who was required to order "the master of the rolls" to record the instrument.⁸ An early example of the exercise of this new Supreme Court function was the chartering, in 1792, of "The Trustees of the Young Ladies' Academy of Philadelphia," more commonly known as Poor's Academy.⁹ Thus, there were now two agencies of the state empowered to endow educational institutions with corporate existence.

The multiplicity of persons and associations seeking charters by 1840 led to the legislature's investing another branch of the judiciary, the Courts of Common Pleas of the various counties, with the right to grant instruments of incorporation to literary,

⁵ *Constitution of the Commonwealth of Pennsylvania, 1776*, Sec. 2.

⁶ *Ibid.*, Sec. 44.

⁷ *Constitution, 1790*, Art. VII, Sec. 2; *Constitution, 1838*, Art. VII, Sec. 2.

⁸ *Statutes at Large of Pennsylvania, 1682-1809* (Harrisburg, Pa., 1898-1915), Act of April 6, 1791, XIV, 50.

⁹ Harrisburg, Law Book, No. 4, February 2, 1792, 281.

charitable, or religious associations, fire engine or hose companies, or beneficial societies or associations. In addition to this power of creation, the Courts of Common Pleas were endowed by the Assembly with the ability to amend charters issued by the Supreme Court under the act of 1791. However, the right of the Supreme Court to issue articles of incorporation or to amend them was preserved.¹⁰

From this time on, the Courts of Common Pleas were given an increasingly large share of the responsibility for granting charters. In 1854 their area of coverage was extended to include "Scientific, Agricultural and other Associations."¹¹ The following year they were authorized to alter charters in cases not hitherto considered their province.¹² By 1867 the power of the lower courts was expanded to permit them to grant "charters in all cases in which the same is authorized to be granted under existing laws, by the supreme court of this commonwealth." Further, the legislature validated "all charters heretofore granted by the Courts of Common Pleas" in cases wherein the Supreme Court alone had the power to grant such charters, and extended the right to the Courts of Common Pleas to issue charters to other associations.¹³

With the adoption of the constitution of 1873, effective January 1, 1874, the path was laid for eliminating the duplication of powers distributed among numerous arms of the government, and for investing the right of chartering educational institutions in one agency of the state. The constitution prohibits the General Assembly from "creating corporations, or amending, renewing or extending the charters thereof."¹⁴ Accordingly, the legislature passed the general corporation act of 1874 which provided that all nonprofit corporations, or corporations of the first class, shall be chartered by the Courts of Common Pleas of the county in which they are to operate.¹⁵ Thus, for the first time since 1790, educational institutions were to derive corporate existence from only one source of governmental power, the county Courts of Common Pleas.

¹⁰ Act of October 13, 1840, *P. L.* (1841) 1.

¹¹ Act of February 20, 1854, *P. L.* 90.

¹² Act of May 7, 1855, *P. L.* 477.

¹³ Act of March 26, 1867, *P. L.* 44.

¹⁴ *Constitution of Pa., 1873*, Art. III, Sec. 6.

¹⁵ Act of April 29, 1874, *P. L.* 73.

The Power to Control

Since the state has the power to create, the question arises: does it also have the power to control or to destroy its creation? Definite limitations are placed upon the state by the federal constitution. Two of these, among others, are significantly pertinent to the consideration of this question. First, the state cannot "deprive any person of life, liberty, or property, without due process of law." Second, the state is prohibited from passing any "law impairing the obligation of contracts."¹⁶ The United States Supreme Court decision of 1819, in the Dartmouth College case, established the principle that the charter of an educational institution is a contract between the state and the incorporators. Chief Justice Marshall gave the essence of the Court's decision in the introduction to the case:

The charter granted by the British crown to the trustees of Dartmouth College in the year, 1769, is a contract within the meaning of the clause of the constitution of the United States (Art. 1, Sec. 10) which declares, that no state shall make any law impairing the obligation of contracts. The charter was not dissolved by the Revolution.

An act of the state legislature of New Hampshire, altering the charter, without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter, and is unconstitutional and void.

Under its charter, Dartmouth College was a private and not a public corporation; that a corporation established for purposes of general charity, or for education generally, does not, *per se*, make it a public corporation, liable to the control of the legislature.¹⁷

As a result of the Dartmouth College decision three principles were established governing the continued supervision by the state over incorporated institutions: first, the charter granted by a state to an incorporated institution is a contract, and the vested rights in the charter cannot be altered without the consent of the trustees; second, the state may establish institutions of its own and exercise unlimited power over their life and transactions; third, the state may incorporate a provision in the charter of an institution re-

¹⁶ *Federal Constitution*, 14th Amendment, Sec. 11; Art. I, Sec. 10.

¹⁷ 4 *Wheat* 518, "Dartmouth College *vs.* Woodward."

serving the right to alter or repeal it. But even this latter provision is subject to the limitation that the amendment or repeal does not substantially impair the object of the grant, or any rights vested under it.¹⁸

The first major attempt of the state of Pennsylvania to control an institution of higher education by the alteration of its charter was the act of 1779, which deprived the trustees and faculty of the College, Academy and Charitable School of Philadelphia of their property rights under the proprietary charters of 1753 and 1755, appointed a new set of trustees, and changed the name of the institution to The University of the State of Pennsylvania.¹⁹ Without the authority of court decision it is impossible to determine positively if the act was legal or constitutional. However, the General Assembly did itself declare in 1789 that its legislation of 1779 was unlawful, and restored the college property and charter privileges to the original faculty and trustees.²⁰

Possibly as a consequence of the controversy generated by the legislature's amending the charter of the College of Philadelphia without the corporation's consent, the first post-revolutionary college to be incorporated by the new Commonwealth, Dickinson College, contained a clause in its charter which prohibited the altering of the constitution of the institution as embodied in the articles of the incorporation in any manner other "than by an act of legislature of this State."²¹ A similar provision was included in the charter of Jefferson College in 1802.²² By 1817 the principle of state hegemony over the products of its legal creation was made more specific. The charter of Allegheny College, for example, contained the following clause: "in case of abuse of the privileges hereby given, or of the charter, or of the corporation, the Legislature reserves the right of removing said president and trustees, on due proof of such abuse of their power, and appoint others in their place."²³

¹⁸ Lester W. Bartlett, *State Control of Private Incorporated Institutions of Higher Education* (New York: Teachers College, Columbia University, 1926), 29 f.

¹⁹ John Bioren, *Laws of Pennsylvania, 1700-1810* (Philadelphia, 1810), Act of November 27, 1779, I, 474.

²⁰ *Ibid.*, Act of March 6, 1789, III, 302.

²¹ *Ibid.*, Act of September 9, 1783, II, 71.

²² *Ibid.*, Act of January 15, 1802, VI, 209.

²³ Act of March 24, 1817, P. L. 236.

Following the United States Supreme Court decision of 1819 in the Dartmouth College case, the legislature unequivocally asserted its right to amend or abrogate instruments of corporate existence. Such a declaration of power, by way of illustration, is contained in the charter of Lafayette College, granted in 1826. There the legislature reserved the right "to revoke, alter or annul the Charter hereby granted at any time they may think proper."²⁴ Subsequently, following the principles emerging from the Dartmouth College case, this sovereign power was asserted and made a part of the fundamental law of the Commonwealth in the constitutions of 1838 and 1873. Both constitutions provided that "The legislature shall have the power to alter, revoke, or annul any charter or incorporation hereafter conferred by or under any special or general law whenever in their opinion it may be injurious to the citizens of the commonwealth, in such manner, however, that no injustice shall be done to the incorporators."²⁵

Thus far we have been concerned with the power of the state to exercise control over the charters of higher educational institutions which possess the privileges of incorporation. Possibly of even greater significance is the authority of the sovereign to establish conditions upon which to predicate the acceptance or rejection of persons or associations seeking corporate existence. The need for the exercise of such power had clearly risen by the fourth decade of the nineteenth century with the formation of more colleges, or schools claiming to be colleges, than could be adequately supported either by the available sources of funds, or the supply of students seeking their ministrations.

The "evil" attending this multiplicity of institutions was early noted by the Superintendent of Common Schools of Pennsylvania. In 1837 Thomas Burrowes reported to the legislature that "The chief defect of our collegiate system . . . is the too great number of the institutions. . . . Thus the talents which should command success, are forced to stoop to ask patronage, and the means that could with ease sustain three or four flourishing institutions, are rendered unproductive by sub-division."²⁶ Periodically thereafter, the reports of the superintendents reiterated this theme, though

²⁴ Act of March 9, 1826, *P. L.* 76.

²⁵ *Constitution, 1838*, Art. I, Sec. 26; *Constitution, 1873*, Art. XVI, Sec. 10.

²⁶ *Report of the Superintendent of Common Schools of Pennsylvania, 1837* (Harrisburg, 1837), 28. Hereafter to be cited as *Rept. Supt.*

suggesting little by way of solution other than to offer financial aid to a few deemed worthy of state support, and to allow the remainder to languish and die eventually of neglect. Again, in 1862, Burrowes decried the pyramiding number of higher institutions, stating "that the number of colleges exceeds our wants by at least two-thirds."²⁷ Still, he had nothing new to add to his proposal of 1837.

It was not until 1865 that a radical solution to the problem of "multiplicity of our higher institutions," was offered by the Superintendent of Common Schools, Charles R. Coburn.²⁸

It is suggested [he said] for the consideration of the Legislature, whether it would not promote the cause of general education in our State to have all our educational interests brought under the scope of legislative authority, and all of our chartered institutions placed, to a certain extent, within the control of the School Department. These institutions are already doing a noble work in the cause of education, but they are crippled in their labors, or many of them, for the want of apparatus, furniture, libraries and cabinets, and also for lack of sufficient patronage. It is believed that if they were made subject to some State authority, and liable to official visitations by some State officer, and the recipients of State beneficence, to some extent, and upon certain prescribed conditions, it would greatly increase their efficiency and usefulness.²⁹

The following year State Superintendent Wickersham deplored the "loose manner of granting college charters," and urged its discontinuance. "Some of these," he stated, "never organized under their charters, a number of them . . . eventually failed, and several now in operation, although colleges by legislative enactment, are scarcely more than good academies." This situation, he continued, "degrades the name, and is most unjust to those institutions which are truly colleges. Indeed, the Legislature ought to do something to right the wrong that has already been done."³⁰ Wickersham proposed the enactment "of a general law regulating these institutions in certain particulars, but leaving their authorities entirely

²⁷ *Ibid.*, 1862, 28.

²⁸ *Ibid.*, 1865, 19.

²⁹ *Ibid.*, 19-20.

³⁰ *Ibid.*, 1866, xvi.

free to accept its provisions or not, at their option." He offered the following as the leading provisions to be included in such a law :

First. A provision fixing the requirements of every institution claiming to be a college, and asking the benefits conferred by the law. This legislation would give their just rank to the colleges that deserve the name, and would exclude from it those institutions that bear the name unworthily.

Second. A provision requiring all colleges, accepting the act, to make annual reports to some properly constituted State authority, and to be open to the visitation of competent officers appointed by that authority.

Third. A provision providing for a certain number of free scholarships for pupils coming up properly prepared and properly recommended from the common schools, through the academies, seminaries, and high schools of the State.

Fourth. A provision giving a liberal annual appropriation from the Treasury of the State, to all the colleges accepting the act.³¹

Indeed, he drew up a bill embodying these provisions, and called a conference attended by the Governor, members of the legislature and representatives from the University of Pennsylvania, University at Lewisburg, Allegheny College, Dickinson College, Franklin and Marshall College, Haverford College, Lafayette College, Lebanon Valley College, Washington and Jefferson College, Westminster College, Western University, and Lincoln University, where the bill was modified and agreement was reached to urge its passage by the legislature.³²

His labors, and the labors of those united with him, proved unavailing. Wickersham wrote acrid editorials in which he decried the pyramiding of unqualified institutions posing as colleges. He said: "Almost any private school with three teachers and fifty students, whatever else it may have, under our vicious system of local legislation, can obtain a college or even a university charter. It is high time some vigorous effort was made to check the evil."³³ Although he, and the superintendents who followed him, continued

³¹ *Ibid.*, xxi-xxii.

³² *Ibid.*, 1868, xxiv ff.

³³ James Wickersham, "No More Colleges," *Pennsylvania School Journal* (June, 1872), XX, 389. Hereafter to be cited as *P. S. J.*

to press for appropriate legislation³⁴ to alleviate a situation made even worse by the corporation act of 1874, which appropriated to the county Courts of Common Pleas the sole power of chartering corporations of the first class,³⁵ little or no relief was offered by the legislature.

Despite the fact that social problems seem to become intensified beyond their rates of solution, they eventually succumb to some kind of compromise or resolution. This was the pattern followed by the movement to check the uninhibited granting of college charters before legislative action was obtained. In 1895 the General Assembly passed an act "to provide for the incorporation of institutions of learning with power to confer degrees in art, pure and applied science, philosophy, literature, medicine, law and theology . . . and providing a method by which institutions already incorporated may obtain the power to confer degrees."³⁶ The act provided that five or more persons, three of whom at least are citizens of the Commonwealth, seeking to obtain a charter of incorporation as a college, university, or theological seminary with power to confer degrees, should prepare a certificate of intended incorporation setting forth the name of the corporation; the purpose for which it was formed; the place or places where its business was to be transacted; the term for which it was to exist; the names and addresses of the subscribers; the number of its directors, trustees, or managers; the assets in the possession of the subscribers which were to be devoted to the purpose of establishing and conducting the college or university; the minimum number of persons whom it was intended to employ as members of the faculty; and a brief statement of the requirements for admission and of the study to be pursued in the institution. This certificate had to be presented to a judge of the Court of Common Pleas of the county in which the institution was to be situated. Should he find its purposes and provisions lawful, and not injurious to the community, he was to so certify and transmit the document to the Superintendent of Public Instruction.³⁷

The act further stipulated that "No charter for such incorporation, with power to confer degrees . . . shall be granted until the

³⁴ *Rept. Supt.*, 1873, xxvii-xxix; 1881, iii.

³⁵ *Ibid.*, 1893, iii-v.

³⁶ Act of June 26, 1895, P. L. 327.

³⁷ *Ibid.*

merits of the application, from an educational standpoint, shall be passed upon by a board to be styled the 'College and University Council'"; nor shall an institution "be chartered with the power to confer degrees, unless it has assets amounting to five hundred thousand dollars invested in buildings, apparatus and endowments for the exclusive purpose of promoting instruction, and unless the faculty consists of at least six regular professors who devote all their time to the instruction of its college or university classes, nor shall any baccalaureate degree in art, science, philosophy or literature be conferred upon any student who has not completed a college or university course covering four years. The standard of admission to these four year courses or to advanced classes in these courses shall be subject to the approval of the said council." If the course of instruction, the standard of admission, and the composition of the faculty should appear to be sufficient to the College and University Council, and if it should appear that the educational needs of the community in which it was to be located as well as the interests of the Commonwealth at large are likely to be served by the incorporation of the institution, then the Council was to indicate its approval and recommend to the Court of Common Pleas that the charter be granted. Should the Council decide against the incorporation of the proposed institution, then the act prohibited the court from granting a charter.²⁸

Having obtained a charter under the provisions of this act, the institution was subject to visitation and inspection by representatives of the Council; and if it should fail to maintain the required standard the court should, upon the recommendation of the Council, revoke the power to confer degrees. The same procedure was to be followed by colleges, universities, and theological seminaries incorporated prior to the passage of the act which desired amendments to their charters empowering them to confer degrees. These were required to submit evidence certifying to the possession of invested funds amounting to \$100,000. The act did not impair the authority of colleges and universities already possessed of the power to confer degrees, provided they were able to certify within three months of the passage of this act that they held assets "for the purpose of promoting education in the higher branches of human learning" in the amount of \$100,000 and \$500,000 respectively.²⁹

²⁸ *Ibid.*

²⁹ *Ibid.*

This legislation, according to the Superintendent of Public Instruction, heralded the beginning of a new era for higher education in Pennsylvania.

The act creating a College and University Council and imposing a property qualification as a condition of chartering new institutions with power to confer degrees, will check the indefinite multiplication of colleges with nothing to build upon except faith in the future, and will thus pave the way for improving the scope and quality of higher instruction by strengthening the colleges that now exist. A great service will be rendered to the young people of the Commonwealth when it shall be no longer possible to inflate them with the notion that they are getting the discipline of a college course whilst in reality they are receiving an inferior training of whose defects a decade's competition in after life will convince them—possibly after it is too late to rectify the mistakes of their early education.⁴⁰

This prediction was not without foundation. The final break with the tradition of reticence speeded the enactment of legislation and the adoption of standards designed to raise the level of institutions of higher education in accordance with principles formulated by recognized accrediting agencies. Bureaus of medical education and licensure, and of professional education were created, bringing Pennsylvania in line with the other states which, by authority of law, vested in the school department the power of passing upon the preliminary education of students of medicine, dentistry, and pharmacy.⁴¹ The State Council of Education⁴² resolved to institute a system of visitation and inspection and to recommend to the courts that they revoke the power to confer degrees of those institutions which "shall fail to keep up the required standard."⁴³ That continuing vigilance was necessary is evidenced by the findings of those charged with visitation and inspection: "it is quite obvious that many colleges are granting degrees on rather low standards of achievement. A few institutions seem indifferent to-

⁴⁰ *Rept. Supt.*, 1895, iv.

⁴¹ *Ibid.*, 1911, 4.

⁴² By Act of May 20, 1921, *P. L.* 1014, the name of the College and University Council was changed to State Council of Education.

⁴³ *Rept. Supt.*, 1926, 91.

ward requiring a high quality of work while others appear too generous in their evaluation of credits for advanced standing.”⁴⁴

New legislation was enacted to protect the unsuspecting from the claims of institutions which styled themselves “colleges,” but which failed to meet the requirements of law. In 1937 the General Assembly passed an act declaring it “unlawful for any person, co-partnership, association or corporation to apply to itself, either as a part of its name or in any other manner, the designation of ‘college’ in such a way as to give the impression that it is an educational institution conforming to the standards and qualifications prescribed by the State Council of Education, unless it in fact meets such standards and qualifications.”⁴⁵ This resulted in the initiation of proceedings by the state Department of Justice to restrain the owners and operators of business schools such as the Central Business College and Lincoln Business College of Philadelphia from continuing the illegal use of the word “college” in the names of their institutions. At the same time it caused the State Council of Education to disapprove applications for charters of such proposed institutions as the “New Kensington Commercial College.”⁴⁶

Even prior to what may be called the era of the “New Life” in higher education in Pennsylvania, ushered in by the act of 1895, sporadic and somewhat indirect attempts at control were made by the legislature. These were particularly aimed at correcting abuses in the awarding of degrees, and at protecting the citizens of the Commonwealth from the hazardous ministrations of unqualified practitioners of medicine. Concerned with the practice by colleges in the remote regions of the state of establishing medical schools outside their counties (Jefferson College in Washington County, and Pennsylvania College in Adams County may be cited as examples),⁴⁷ and no doubt influenced by the objections of previously established institutions in Philadelphia, where these new schools were generally erected, the legislature in 1840 declared it unlawful “for any College incorporated by the laws of this State, to establish any faculty for the purpose of conferring degrees, either in medi-

⁴⁴ *Ibid.*, 1928, 147.

⁴⁵ Act of May 7, 1937, *P. L.* 585.

⁴⁶ *Rept. Supt.*, 1944, 8.

⁴⁷ Jefferson College, Minutes of the Trustees, June 29, 1824, I, 108; Pennsylvania College, Minutes of the Trustees, September 18, 1839, I, 70-72.

cine or the arts, in any city or county of the commonwealth, other than that in which said college is or may be located.”⁴⁸

Of more serious consequence was the growing practice of a few chartered colleges and medical schools of conferring degrees merely upon the payment of a stipulated fee, and of the emergence of persons who styled themselves physicians without the benefit of formal training. To remedy the former evil, the General Assembly in 1871 made it unlawful for any college or university incorporated under the laws of the state with the power to confer degrees to award them to any person upon the payment or promise of payment of some consideration. Penalties were to be imposed of fines not exceeding \$500, or six months imprisonment, or both, for violations of these provisions.⁴⁹ Similarly legislation was enacted attempting to define in general terms “the standard qualifications of a practitioner of medicine, surgery or obstetrics,” as consisting of “a good moral character, a thorough elementary education, a comprehensive knowledge of human anatomy, human physiology, pathology, chemistry, *materia medica*, obstetrics and practice of medicine and surgery and public hygiene.” The act made it unlawful for a person to announce himself “as a practitioner of medicine, surgery or obstetrics,” who “has not received in a regular manner a diploma from a chartered medical school duly authorized to confer upon its alumni the degree of doctor of medicine.” Fines of not less than \$200 or more than \$400 were to be imposed on persons found guilty of violating this act.⁵⁰ Though not directly aimed at controlling the curriculum of existing schools of medicine, the law had the indirect effect of preventing the establishment of institutions whose standards did not conform with the provisions of the act. The Electropathic Institute, for example, was denied a charter with the power to confer degrees on the ground that it did not require its graduates to fulfill the requirements of the act of March 24, 1877.⁵¹

Legislation, however, did not automatically put a stop to the illegal selling of degrees. Nor was this practice peculiar to Pennsylvania alone. The United States Commissioner of Education

⁴⁸ Act of March 2, 1840, *P. L.* 68.

⁴⁹ Act of May 19, 1871, *P. L.* 271.

⁵⁰ Act of March 24, 1877, *P. L.* 42.

⁵¹ *Re* Electropathic Institute, 9 *Weekly Notes Cas.* 31; 14 *Philadelphia Reports* 128.

repeatedly warned of its widespread existence, characterizing those colleges and universities that committed such abuses as "frauds," and attributing the condition "to the facility with which charters can be obtained from most State Legislatures."⁵² With the establishment in Pennsylvania in 1895 of a legally constituted agency of government with the power of inspection and investigation, systematic efforts were initiated to eliminate those institutions guilty of the practice. In its very first report, the College and University Council noted that it was aware of the fraudulent conferring of degrees, and of the legislation of 1871 that made it illegal.⁵³ Four years later, the Council, while recognizing its limited powers, and the negative nature of its efforts, declared that: "One of its chief functions is to prevent the establishment and to hinder the operation of so-called degree mills. If the Council served no other purpose, its existence would be justified so long as it assists in exposing degrees fraudulently bestowed and in drawing public attention to institutions which bestow diplomas not upon the basis of merit but for pecuniary considerations."⁵⁴

In 1908 its work was beginning to bear fruit, in that it could report that "the degrees of Pennsylvania colleges are receiving corresponding recognition at home and abroad."⁵⁵ By 1928 domestic "mills" had, by and large, been eliminated, although the threat still persisted in the form of foreign corporations chartered outside the state but operating within the boundaries of the Commonwealth. The Universal Chiropractic College of Pittsburgh, and the Franklin Research University of Philadelphia were examples of these. They, too, were declared illegal;⁵⁶ but their elimination did not obviate the necessity for eternal vigilance. At late as 1944 the Department of Justice moved to indict the Pennsylvania College of Chiropractic, and was spared the burden of prosecution only because the school ceased to operate.⁵⁷

Still another form of control was exercised by the state over institutions of higher education in Pennsylvania. Since this aspect

⁵² *Report of the Commissioner of Education*, 1877 (Washington, D. C.: Government Printing Office), cvii-cviii; 1880, cix-cxiv.

⁵³ College and University Council of Pennsylvania, *Biennial Report on Higher Education*, 1896 (Harrisburg, 1897), 34.

⁵⁴ *Ibid.*, 1900, 7.

⁵⁵ *Ibid.*, 1908, 538.

⁵⁶ *Rept. Supt.*, 1926-1928, 147.

⁵⁷ *Ibid.*, 1946, 9.

of sovereign power is inseparably linked with the financial assistance afforded those over whom the power was wielded, we shall consider its nature and effects simultaneously with our examination of the history of state aid to higher education.

The Power to Aid

The principle of financial assistance to private, incorporated institutions of higher learning was established as a legitimate and proper, though infrequently exercised, function of state power even prior to the formation of an independent Commonwealth. During the provincial period two concomitant principles emerged that were eventually adopted as basic criteria determining the relationship between the state and the colleges and universities that were recipients of its beneficence. First, aid was given in the form of scholarship grants; second, aid was given without restriction or specific direction as to its use.

Seeking solution to the ubiquitous problem facing educational institutions, the trustees of the Academy and Charitable School of Philadelphia enlisted the support of a political subdivision of provincial authority, the Common Council of Philadelphia. The Council recognized its responsibility to participate in the educational process and voted to support the project so "that the Youth of Pensilvania may have an Opportunity of receiving a good Education at home, and be under no necessity of going abroad for it." Consequently, it was agreed to contribute £200 towards completing the building purchased by the trustees; to give £50 per annum for five years "towards supporting a Charity School for the Teaching of poor children Reading, Writing and Arithmetick"; and to appropriate £50 per annum for the next five years provided Council be allowed to nominate and send "one Scholar Yearly from the Charity School, to be instructed gratis in the Academy."⁵⁸

Similarly, the precedent was set for establishing the principle of the unfettered use of appropriated funds. Simultaneously with their approval of the charter for the Academy and Charitable School of Philadelphia, the Proprietors of the colony unconditionally ordered a draft on their "Receiver General for the Pay-

⁵⁸ *Minutes of the Common Council of Philadelphia, 1704-1776*, July 31, 1750 (Philadelphia, 1847), 526-530.

ment of Five Hundred Pounds to the Trustees of the Academy."⁵⁹ When straitened circumstances compelled the trustees of the College and Academy of Philadelphia to send William Smith abroad to solicit financial assistance, he returned in 1759 with "a Deed of Gift from the Honourable Thomas Penn assigning over to them in their Corporate Capacity for the use of the Institution his fourth part of the Manor of Perkasia in Bucks County containing Two thousand five hundred Acres which the Trustees considered as a noble Benefaction from that worthy Gentleman and was received with a due Sense of Gratitude."⁶⁰

With the disavowal of foreign domination and the adoption of the constitution of 1776 providing for the encouragement of all useful learning "in one or more universities,"⁶¹ the state inaugurated a policy of initially aiding many of the colleges to whom it granted charters. Thus, in the creation of the University of the State of Pennsylvania in 1779, the institution was endowed, by charter decree, with the income from a fund to be derived from confiscated estates not to exceed £1,500 annually.⁶² Franklin College, incorporated in 1787, was given 10,000 acres of the unappropriated lands of the state, together with six per centum allowance for roads.⁶³ In 1806 the act creating Washington College vested all the property of Washington Academy in the hands of the college trustees,⁶⁴ included among which was \$5,000 granted to the Academy when it was chartered in 1787, provided poor children received free tuition,⁶⁵ and \$3,000 appropriated ten years later with a similar provision entitling ten poor children to an education gratis at the Academy.⁶⁶ Allegheny College was chartered in 1817 and was given \$2,000 by the legislature as an initial endowment.⁶⁷ The Western University of Pennsylvania was endowed by the legislature, in its act of incorporation, with forty acres of land belonging to the Commonwealth in the town of Allegheny, and all the estate, real, personal, and mixed of the Pittsburgh

⁵⁹ College, Academy and Charitable School of Philadelphia, Minutes of the Trustees, April 10, 1753, I, 31.

⁶⁰ *Ibid.*, October 9, 1759, I, 108.

⁶¹ *Constitution of Pa.*, 1776, Sec. 44.

⁶² Bioren, *Laws of Pa.*, Act of November 27, 1779, I, 474.

⁶³ *Ibid.*, Act of March 10, 1787, II, 398.

⁶⁴ Act of March 28, 1806, *P. L.* 53.

⁶⁵ Bioren, Act of September 24, 1787, II, 423.

⁶⁶ *Statutes at Large of Pa.*, Act of March 20, 1797, XV, 501.

⁶⁷ Act of March 24, 1817, *P. L.* 236.

Academy.⁶⁸ Madison College, chartered in 1827, was awarded the property of Uniontown Academy.⁶⁹

Subsequent state aid, however, was dependent upon the ability of the trustees of the various colleges to enlist the support of the legislature in their behalf. Some of these exerted greater influence and were more successful than others. Nor was aid apportioned in accordance with demonstrated need or worth. Appropriations were made individually and haphazardly without preconceived plan or design except for the undefined and inchoate one of offering some kind of assistance to higher education. The University of the State of Pennsylvania, despite its designation as the state university, received no new appropriation from the legislature in the eighteenth century, aside from a confirmation of its right to enjoy the income and ground rents from the confiscated estates awarded the institution in the incorporating act of 1779, and estimated at £25,000 or \$66,666.66.⁷⁰ Nor did the University of Pennsylvania fare much better in the first four decades of the nineteenth century. In 1807, \$3,000 was granted the University for the purpose of "establishing a botanic garden";⁷¹ and in 1832, its real estate was exempted from taxation for fifteen years.⁷²

Dickinson College, of the fourteen colleges and two universities chartered by the legislature up to 1837, received the largest share of the state's bounty and attention. In 1786 the legislature granted the College £500 and 10,000 acres of unappropriated lands of the state.⁷³ Three years later the General Assembly authorized a lottery for the benefit of Dickinson College and the City of Philadelphia from which the former was to realize \$2,000 and the latter, \$8,000.⁷⁴ This was followed by a series of acts for the relief of the College, as follows: a grant of £1,500 in 1791;⁷⁵ \$5,000 in

⁶⁸ Act of February 18, 1819, *P. L.* 152.

⁶⁹ Act of March 3, 1827, *P. L.* (1826-1827) 79.

⁷⁰ Bioren, *Laws of Pa.*, Act of September 22, 1785, II, 352; W. R. Johnson, "Chronological View of the Enactments on the Subject of Education," *Hazard's Register of Pennsylvania* (January 5, 1833), XI, 2; James Wickesham, *A History of Education in Pennsylvania* (Lancaster, Pa., 1886), 377.

⁷¹ Act of March 19, 1807, *P. L.* (1806-07) 87.

⁷² Act of May 5, 1832, *P. L.* (1831-32) 517.

⁷³ Bioren, *Laws of Pa.*, Act of April 7, 1786, II, 377; Dickinson College, Minutes of the Trustees, May 9, 1786, I, 161.

⁷⁴ *Statutes at Large of Pa.*, Act of March 27, 1789, XIII, 276; Asa E. Martin, "Lotteries in Pennsylvania Prior to 1833," *Pennsylvania Magazine of History and Biography*, XLVIII (1914), 77.

⁷⁵ *Statutes at Large of Pa.*, Act of September 20, 1791, XIV, 123; Dickinson College, Minutes of the Trustees, November 2, 1791, I, 196.

1795, on condition that up to ten students be admitted gratis for a period not exceeding two years, to be taught reading, writing, and arithmetic;⁷⁶ a loan of \$6,000 (1803), requiring as security a mortgage on the 10,000 acres of land the state had originally given the College;⁷⁷ a further loan of \$4,000, three years later, "to be applied to the purchase of suitable books and philosophical apparatus," accompanied by the cancellation of the mortgage on the 10,000 acres of land and the execution of a new one on but 5,000 acres;⁷⁸ suspension of interest payments in 1813⁷⁹ and again in 1814⁸⁰ for five and four years respectively on the preceding loans; conversion of the loans (1819) into outright gifts through the cancellation of the mortgage held by the state on the lands of the College, and the cancellation of all debts owed to the Commonwealth by the College;⁸¹ the state's purchase (1821) for \$6,000 its gift to the College of the 10,000 acres of land, and in addition the awarding of the institution \$2,000 annually for five years;⁸² and, upon the expiration of this subsidy, the granting of a new appropriation of \$3,000 annually for seven years.⁸³

By comparison with Dickinson College, the other extant institutions of higher education in the state were neglected. Franklin College was given a lot and building in 1788;⁸⁴ and 455 acres of land in 1819.⁸⁵ Allegheny College was awarded \$1,000 annually for five years in 1821;⁸⁶ \$1,000 annually for four years in 1827;⁸⁷ and \$2,000 for four years in 1834, on condition that the College, without charge for tuition, prepare twelve students to become school teachers.⁸⁸ The legislature appropriated \$1,000 annually for five years to Jefferson College in 1821;⁸⁹ \$1,000 annually for four years in 1826;⁹⁰ and \$2,000 annually for four years in 1832, provided that six students in indigent circumstances be educated

⁷⁶ Bioren, *Laws of Pa.*, Act of April 11, 1795, III, 219.

⁷⁷ *Ibid.*, Act of March 24, 1803, IV, 35.

⁷⁸ Act of February 24, 1806, *P. L.* 377.

⁷⁹ Act of March 29, 1813, *P. L.* 234.

⁸⁰ Act of March 28, 1814, *P. L.* 246.

⁸¹ Act of March 23, 1819, *P. L.* 152.

⁸² Act of February 20, 1821, *P. L.* 47.

⁸³ Act of February 13, 1826, *P. L.* 27.

⁸⁴ *Statutes at Large of Pa.*, Act of February 27, 1788, XIII, 11.

⁸⁵ Act of March 16, 1819, *P. L.* 124.

⁸⁶ Act of February 15, 1821, *P. L.* 38.

⁸⁷ Act of April 14, 1827, *P. L.* 321.

⁸⁸ Act of April 5, 1834, *P. L.* 192.

⁸⁹ Act of February 15, 1821, *P. L.* 38.

⁹⁰ Act of March 11, 1826, *P. L.* 109.

gratis for four years, and following the education of these six, that twenty-four students be prepared as school teachers.⁹¹ Relief was afforded Washington College in 1821 in the amount of \$1,000 annually for five years;⁹² \$1,000 annually for four years in 1826;⁹³ \$500 annually for five years in 1831, on condition that the College prepare twenty students annually as teachers;⁹⁴ and in 1834, \$2,500 and \$1,000 annually thereafter for three years.⁹⁵ Pittsburgh Academy, the forerunner of the Western University of Pennsylvania, received 5,000 acres of land in 1787;⁹⁶ and \$5,000 in 1798 provided the Academy educate poor children, not to exceed ten at any one time, without charge for tuition.⁹⁷ As the Western University of Pennsylvania, relief was offered by the legislature (1826) in the amount of \$2,400 annually for five years⁹⁸ in consideration of the University's relinquishing its claim to forty acres of land given to it by the Commonwealth in the act of incorporation of 1819.⁹⁹ Madison College was afforded assistance by the legislature in 1828 with a grant of \$5,000.¹⁰⁰ Lafayette College was given \$4,000 (1834), and for four years thereafter \$2,000 a year. The only limitation placed upon the grant was to prohibit its use for the payment of professors' salaries.¹⁰¹ In 1834 the legislature appropriated \$3,000 a year for six years to Pennsylvania College and stipulated that fifteen young men be prepared as school teachers.¹⁰² Marshall College in 1837 was granted \$6,000 and \$3,000 annually for two years, provided that twenty young men be instructed gratis and prepared to become teachers of the English language.¹⁰³

The recognition of elementary education as a mandated function of state power, requiring general, rather than specific, application, which was given substance in 1834 by the passage of legislation "to

⁹¹ Act of February 20, 1832, *P. L.* 81.

⁹² Act of February 15, 1821, *P. L.* 38.

⁹³ Act of March 11, 1826, *P. L.* 109.

⁹⁴ Act of April 14, 1831, *P. L.* 453.

⁹⁵ Act of March 12, 1834, *P. L.* 107.

⁹⁶ *Statutes at Large of Pa.*, Act of September 10, 1787, XII, 489.

⁹⁷ *Ibid.*, Act of March 16, 1798, XVI, 63.

⁹⁸ Act of March 9, 1826, *P. L.* 74.

⁹⁹ Act of February 18, 1819, *P. L.* 61.

¹⁰⁰ Act of February 27, 1828, *P. L.* 121.

¹⁰¹ Act of March 11, 1834, *P. L.* 107.

¹⁰² Act of February 6, 1834, *P. L.* 34.

¹⁰³ Act of March 29, 1837, *P. L.* 96.

establish a General System of Education by Common Schools,"¹⁰⁴ led to a corresponding change in state policy with respect to higher education. Commonwealth assistance to collegiate institutions up to 1837, appropriated on an individual basis, amounted to a sum approximating \$250,000.¹⁰⁵ Yet, as Burrowes stated: "No one will contend that the good effected, has been at all in proportion to the expenditure."¹⁰⁶ With a view towards correcting the spasmodic and arbitrary practice of the past, and with the emergence of a new concept, namely, the building of a great system of public education embracing the whole field from the common school to the university,¹⁰⁷ the legislature passed a resolution in 1836 affecting higher education generally, rather than specifically. It was resolved:

That on or before the first day of November annually, it shall be the duty of the president, faculty and trustees of each university or college, and the preceptor, trustees or managers of each academy or school, other than common schools, having received aid from this commonwealth, to report the number of students in each class, and the total number of graduates, if any, course of studies pursued, financial resources and expenses, the future prospects of their several institutions, accompanied with such remarks as may illustrate their general condition, to the Superintendent of Common Schools, so much of which, it shall be his duty to lay before the legislature in his annual report, as he may deem proper.¹⁰⁸

This was followed two years later by legislation defining the bases for future state appropriations to the colleges, academies, and female seminaries of the state. The very title of the act, "A Supplement to an act to consolidate and amend the several acts relative to a General System of Education by Common Schools," is indicative of the policy beginning to take root. Aid, for the next ten

¹⁰⁴ Act of April 1, 1834, P. L. 170.

¹⁰⁵ *Rept. Supt.*, 1837, 28; William H. Dillingham, *Speech of, in favor of the bill to Establish a School of Arts in the City of Philadelphia, and to Endow the Colleges and Academies of Pennsylvania, March 12, 1838* (Harrisburg, 1838), 12-13.

¹⁰⁶ *Rept. Supt.*, 1837, 28.

¹⁰⁷ Wickersham, *op. cit.*, 384 f.

¹⁰⁸ Resolution of April 1, 1836, P. L. 842.

years, was to be extended to those institutions meeting the following requirements:

To each University and College now incorporated, or which may be incorporated by the Legislature and maintaining at least four professors and instructing constantly at least one hundred students, one thousand dollars. To each Academy and Female Seminary now incorporated, or which may be incorporated by the Legislature, and maintaining one or more teachers capable of giving instruction in the Greek and Roman classics, mathematics and English or English and German literature, and in which at least fifteen pupils shall constantly be taught in either or all of the branches aforesaid, three hundred dollars. To each of said Academies and Female Seminaries, where at least twenty-five pupils are taught, as aforesaid, four hundred dollars; and to each of said Academies and Female Seminaries, having at least two teachers, and in which forty or more pupils are constantly taught, as aforesaid, five hundred dollars.¹⁰⁹

At the same time, the colleges were exempted from taxation.¹¹⁰ For six succeeding years a maximum of nine colleges were recipients of the state's bounty.¹¹¹ However, the business depression of 1842, effecting "surprising changes in the pecuniary affairs of thousands of our most respectable citizens, a transition from affluence to poverty," was reflected in decreasing enrollments and a consequent languishing of many of the colleges encompassed by the act of 1838.¹¹² The state, too, suffering from the effects of a depressed economy, reduced its appropriation to higher education by one-half in 1843, and terminated future assistance to such institutions four years before the act of 1838 had scheduled its end.¹¹³

For more than twenty years thereafter the colleges and universities of Pennsylvania were forced to depend upon their own resources without the expectation of support from the Commonwealth. Nor was the policy of 1838 envisioning a comprehensive state system of education embracing all grades of educational institutions from the common school to the university ever re-

¹⁰⁹ Act of April 12, 1838, *P. L.* 333.

¹¹⁰ Act of April 16, 1838, *P. L.* 525.

¹¹¹ *Rept. Supt.*, 1839, 13; 1840, 22-23; 1841, 12; 1842, 9; 1843, 8; 1844, 4-5.

¹¹² *Ibid.*, 1843, 9.

¹¹³ Act of September 29, 1843, *P. L.* 6.

vived, despite frequent exhortations from state superintendents and other educators.¹¹⁴ After the passage of the normal school act of 1857,¹¹⁵ the legislature renewed the discarded custom of aiding education beyond the common school level, although the normal schools were considered no more than secondary schools at best. Thus, the general appropriations act of 1861 directed the payment of \$5,000 in support of each of the two recognized state normal schools, at Millersville and Edinboro.¹¹⁶

Aside from continuing aid to the state normal schools, the Commonwealth reverted to its original policy of supporting individual and selected institutions of higher education. At first assistance was confined to those schools offering technical and professional, particularly medical, education. During this period the Agricultural College of Pennsylvania (now Pennsylvania State University) was designated as the recipient of the benefits accruing to the state from the federal land grant or Morrill Act of 1862.¹¹⁷ The Polytechnic College of the State of Pennsylvania was awarded \$5,000 in 1867 for the purpose of establishing five state scholarships in the institution.¹¹⁸ To the University of Pennsylvania in 1872, \$100,000 was appropriated for the erection of a general hospital on condition that the University raise an additional \$250,000 for that purpose.¹¹⁹ The following year the University and Jefferson Medical College were each to receive \$100,000 for the building of hospitals, provided that the former match the award with \$100,000 and maintain two hundred free beds forever, and the latter also match the appropriation by a like sum and maintain one hundred free beds forever.¹²⁰

Throughout the remainder of the nineteenth century the state continued to aid institutions offering medical and technical education. Among these may be cited the Pennsylvania Museum and School of Industrial Art,¹²¹ the Medico-Chirurgical College of Philadelphia,¹²² the Hahnemann Medical College,¹²³ the Phila-

¹¹⁴ Cf. *Rept. Supt.*, 1844, 4-5; 1845, 10; 1862, 25-32; 1863, xxv-xxviii; 1865, 19-20; 1866, xxi-xxii; 1868, xxxiii ff.; *P. S. J.*, XVI (June, 1868), 349-350.

¹¹⁵ Act of May 20, 1857, *P. L.* 581.

¹¹⁶ Act of April 18, 1861, *P. L.* 399.

¹¹⁷ Act of April 1, 1863, *P. L.* 213.

¹¹⁸ Act of April 11, 1867, *P. L.* 18.

¹¹⁹ Act of April 3, 1872, *P. L.* 13.

¹²⁰ Act of April 9, 1873, *P. L.* 15.

¹²¹ Act of June 12, 1878, *P. L.* 172.

¹²² Act of May 6, 1889, *P. L.* 99.

¹²³ Act of May 29, 1889, *P. L.* 390.

delphia School of Design for Women (Moore Institute);¹²⁴ the Philadelphia Polyclinic and College for Graduates in Medicine;¹²⁵ the University of Pennsylvania, for the purpose of building a veterinary hospital in connection with its school of veterinary medicine;¹²⁶ and the Western University of Pennsylvania (University of Pittsburgh) in 1895 to establish in connection with its school of engineering a department to be known as the "Western Pennsylvania School of Mines and Mining Engineering."¹²⁷

In 1895 the Commonwealth broadened the scope of its assistance to selected colleges and universities by including appropriations for general educational purposes, in addition to the technical and medical. This expanded policy was initiated with the University of Pennsylvania. A sum of \$200,000 was appropriated to the University for the two fiscal years beginning June 1, 1895, to promote development "of the advanced work of the University, including the special preparation of teachers . . . or the equipment of suitable buildings for graduate instruction and original investigation."¹²⁸ By 1897 the legislature began to eliminate the binding or limiting conditions attending its former appropriations, and awarded Lehigh University \$150,000 for maintenance and general expenses.¹²⁹ This nonrestrictive policy was definitely established in 1903 with the inclusion of a clause whose wording has persisted virtually unchanged to the present day. In that year, the General Assembly voted an appropriation to the University of Pennsylvania for two years for general maintenance, construction of buildings, and purchase of apparatus "as the trustees may deem best for the interests of the University."¹³⁰

A second form of aid to higher education, perhaps indirect in nature, was adopted by the legislature in 1919. Four-year state scholarships were instituted, to be awarded to the graduates of both sexes of the secondary schools of the state on a competitive basis. Each county was to receive one scholarship. In the event that any county embraced more than one state senatorial district, then one scholarship was to be awarded for each entire senatorial

¹²⁴ *Ibid.*

¹²⁵ Act of May 29, 1889, *P. L.* 393.

¹²⁶ Act of May 29, 1889, *P. L.* 392.

¹²⁷ Act of July 5, 1895, *P. L.* 619.

¹²⁸ Act of July 5, 1895, *P. L.* 621.

¹²⁹ Act of July 26, 1897, *P. L.* 425.

¹³⁰ Act of May 15, 1903, *P. L.* 376.

district.¹³¹ The success of this system of scholarships has been attested to by the Superintendent of Public Instruction, who stated: "There has been a noticeable increase in the number of graduates taking the examinations each succeeding year. In 1919 the first year the law became operative, there were 204 applicants; in 1926, applications numbered 1,454. The number of high schools having candidates has more than doubled."¹³²

The history of state aid to higher education has traversed a cycle, initiated in the eighteenth century by the provincial Proprietors in rendering assistance without the binds of restrictive provisions, and by the Common Council of Philadelphia in establishing scholarship funds in the Academy and Charitable School of Philadelphia, and returning to a substantially similar position in the twentieth century. However, aside from differences resulting from the impact of changing social and economic conditions, the General Assembly, unlike its colonial predecessors, is circumscribed by a constitutional provision with respect to the number of higher educational institutions to whom it may offer its bounty. The constitution of 1873 prohibits appropriations "to any denominational or sectarian institution, corporation or association."¹³³ When the legislature violated this constitutional restriction, as in the case of Duquesne University, the state Supreme Court rectified the error.¹³⁴

Currently, occasional warnings are issued to privately incorporated colleges and universities cautioning them to shun state aid on the assumption that rigid control invariably accompanies such assistance.¹³⁵ Whatever may be the experience in other states, this has not been and is not true in Pennsylvania. Intensive research has failed to uncover a single instance where the state has made curriculum changes or the adoption of specified administrative policies preconditions for the awarding of funds. The state's role has been confined to correcting abuses, and to establishing and maintaining standards largely formulated by and concurred in by the colleges and universities concerned. Higher education in Pennsylvania has been singularly free from state control or domination.

¹³¹ Act of July 18, 1919, *P. L.* 1044.

¹³² *Rept. Supt.*, 1924-26, 40.

¹³³ *Constitution of Pa.*, 1873, Art. III, Sec. 18.

¹³⁴ *Collins v. Kephart et al.*, 271, Pa. 430 (1921).

¹³⁵ *New York Times*, January 14, 1954, 11.