THE EVOLUTION OF THE LEGAL RELATIONSHIP BETWEEN PENN STATE AND THE
COMMONWEALTH OF PENNSYLVANIA

A Dissertation in
Higher Education
by
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Abstract

Public higher education faces a crisis in the twenty-first century. While a college education has never been more vital to individual and societal success, state governments have increasingly withdrawn their support for public colleges and universities. National trends suggest that reductions in state funding for public higher education will not subside anytime soon. Public institutions of higher education have compensated for weakening state support by increasing tuition and implementing market-responsive strategies aimed at reducing costs, diversifying revenue streams, and increasing operational efficiencies. The growing privatization of American public higher education has myriad implications for college access, affordability, and quality, and also raises questions about the future relationships between public universities and state governments.

As the pressures to privatize continue to mount, public colleges and universities have been exploring policy options to provide them with the autonomy necessary to nimbly respond to market forces and pursue new sources of revenue. An understanding of the historical evolution of institution-state relationships provides the context for evaluating potential policy options. The purpose of this dissertation is to advance our understanding of the origins and subsequent development of the legal relationship between one state, the Commonwealth of Pennsylvania, and one public institution of higher education, the Pennsylvania State University.

Through a historical legal analysis, this study traces the evolution of the legal relationship between Penn State and Pennsylvania. This study reveals that the ambiguous legal relationship between Penn State and Pennsylvania developed in a haphazard manner. This ambiguity emerged from the contested land-grant origins of the University and has been reinforced by
several legal authorities throughout the years. In addition, the failure to establish a statewide strategy for the development of public higher education in Pennsylvania engendered the haphazard evolution of Penn State’s legal relationship with the Commonwealth. As a result, the University exhibits traits of both public and private universities. However, this study argues that the haphazard development of the legal relationship between Penn State and Pennsylvania has provided the University with the governance structure and flexibility to thrive in the current economic and policy context of American public higher education.
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Chapter 1

Introduction

Problem Statement

Public higher education faces a crisis in the early twenty-first century. While a college education has never been more vital to individual and societal success, state governments have increasingly withdrawn their support for public colleges and universities. This reduction in state funding resulted from a number of factors, including the failure of traditional arguments to convince policymakers to support higher education, i.e., public good, economic development, and social equity; the increasingly stiff competition colleges and universities increasingly face for public dollars from other services like K-12 education, social services, corrections, and healthcare; and the challenges posed to state budgets by prolonged periods of structural deficits.

Accompanying this decline in support are calls from state legislators for stronger political

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oversight over the operations of public institutions. The erosion of support expands beyond state governments as members of the media, students, parents, and the general public claim that college has become too expensive and that our institutions fail to adequately prepare students for the demands of the twenty-first century global economy.

National trends seem to indicate that reductions in state support for higher education will not subside anytime soon. Although state appropriations for higher education have increased each year over the last few years, the increases follow a record 50-year decline of 7.6% in 2012. Further, over the last 40 years, the proportion of state funding dedicated to higher education has decreased dramatically. In 1976, higher education funding represented $10.58 per $1,000 of state personal income, but currently only $5.40 per $1,000 of personal income goes to colleges and universities. The rate of this drastic decline suggests that within a few decades, the national average per $1,000 in personal income that states invest in higher education will reduce to $0.

At the same time, due to increased student demand, institutions must support more and more students each year. In response to this pattern of cuts in state appropriations and increased demand, public institutions have become more reliant on tuition, private support, and market-responsive initiatives. In fact, the saturation of market-driven strategies among public colleges

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7 Ehrenberg, What’s Happening, xiii
8 CSEP, Grapevine, Historical Data, https://education.illinoisstate.edu/grapevine/historical/.
and universities leads many observers to conclude that we are heading towards the de facto privatization of public higher education, which Lyall and Sell define as “a significant decline in the public investment in higher education institutions and educational opportunities, and the shrinkage of states as stakeholders in their own higher education assets.”

As state funding for public higher education ebbs, institutions feel increasingly compelled to replace public funds with private dollars. Some commentators characterize the confluence of these political, financial, and administrative pressures to privatize public colleges and universities as a “perfect storm.”

Even as public investment in higher education continues to wane, states retain extensive legal control over colleges and universities. States have the sole authority to create, organize, support, and abolish public colleges and universities. State oversight can also limit the ability of institutions of higher education to respond to the “perfect storm.” Existing laws and governance structures often hinder the efforts of public institutions to implement flexible and market-responsive privatization strategies. For example, state oversight can restrict the freedom of public colleges and universities to increase tuition, issue revenue bonds, and make executive hiring decisions. These limitations stand in contrast to the philosophical foundations of privatization that stress institutional freedom from burdensome public regulation.

It seems reasonable to conclude that as pressures to privatize intensify and states continue to disinvest from public higher education, colleges and universities will find that the status quo

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no longer allows them to effectively and creatively respond to their challenges. Under these
difficult conditions, public institutions will likely challenge their legal relationships with state
governments and explore alternative governance arrangements that enhance institutional
autonomy. In fact, some public universities and commentators have already started to question
the prudence of allowing state governments to have significant influence over the Board of
Trustees, especially given the paltry size of state appropriations.15 Therefore, as public
institutions tire of the onerous restraints of state governments and the undue influence of
politicians on their operations, they may want to reassess the state’s role in university
governance. Indeed, these tensions may permanently alter the long-established, mutually-
supportive relationship between state governments and public higher education.

The resolute, yet discrepant, pressures on state governments and public institutions to
privatize public higher education invite the question: how should states and public institutions
respond to this “perfect storm?” While some commentators denounce privatization as a threat to
the quality of public higher education, others suggest that public institutions should embrace
these new economic realities and become more responsive to market forces.16 In order to flourish
under changing conditions, public universities must assess a suite of policy options ranging from

15 Kevin Kiley, “Redefining the Relationship,” Inside Higher Ed, July 25, 2012,
http://www.insidehighered.com/news/2012/07/25/vermont-group-proposes-making-more-flagship-universitys-
http://www.nytimes.com/2012/09/16/magazine/teresa-sullivan-uva-
ouster.html?pagewanted=1&r=1&ref=directory, Ben Wieder, “How Governors Govern Higher Ed,” Stateline,
8589414770.
16 Jennifer Washburn, University, Inc.: The Corporate Corruption of Higher Education (New York: Basic Books,
2005); Christopher Newfield, Unmaking the Public University: The Forty-Year Assault on the Middle Class
Massy, Remaking the American University: Market-Smart and Mission-Centered (New Brunswick: Rutgers
University Press, 2005).
maintaining the status quo to becoming private institutions. To determine the feasibility of changing their affiliations with states, public colleges and universities need to comprehensively examine the nature of their legal relations.

The legal relationships that exist among public institutions and states vary throughout the country, and they often differ within states based on institutional type. Due to the diversity of affiliations and the myriad implications that they trigger, a thorough understanding of the specific relationship between a college or university and a state will provide constituents with an understanding of the implications of the arrangement. After thoroughly assessing the parameters of an existing legal relationship between a state and a specific institution or institutional type, policymakers can identify hot-button legal issues and select strategies to manage their implications. The purpose of this dissertation is to analyze the development of the legal relationship between one state, the Commonwealth of Pennsylvania, and one institution, the Pennsylvania State University, to advance understanding of the considerations that have and continue to shape and influence its direction.

Purpose of the Study

This dissertation traces the development of Penn State’s legal relationship with the Commonwealth of Pennsylvania. This study identifies the themes, developments, and issues that characterize this evolving relationship, and explores potential implications for the future of that relationship. This study is guided by an historical legal analysis of court cases, statutes, other legal materials, and institutional histories.

17 Throughout this dissertation, Pennsylvania is referred to as the Commonwealth, Pennsylvania, or the state.
18 Throughout this dissertation, Penn State is referred to as Penn State, the Farmers’ High school, the Agricultural College of Pennsylvania, Pennsylvania State College, and Penn State. This dissertation also capitalizes the first letter of College and University to specifically refer to Penn State.
Research Questions

This study specifically addresses two research questions:

1. How has the legal relationship between the Commonwealth of Pennsylvania and the Pennsylvania State University evolved over time?

2. What are the legal and policy implications of those relational changes?

Context

For a number of reasons, the relationship between the Commonwealth of Pennsylvania and Penn State merits an historical legal analysis. The precise nature of the legal relationship between the Commonwealth and University is somewhat nebulous. Throughout the years, Penn State has been referred to as “an agency of the state,” a state actor, a “semi-state” institution, “state-related,” “state-aided,” “an instrumentality of the state,” “similar to a state authority,” a “state institution,” and “not a state institution.” The Penn State website states that “the Pennsylvania State University is a multi-campus, land-grant, public research University,” but Penn State has also argued in court that the University “is a non-state agency.” These seemingly contradictory statuses suggest that the relationship has different

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20 Benner v. Oswald, 592 F.2d 174 (4th Cir. 1979).
22 24 P.S. § 5009.
24 24 P.S. § 2510-503.
meanings in different contexts and that perceptions of the relationship may have changed over time. Further, the seemingly inconsistent portrayals of the relationship indicate that contradictions and tension have influenced the development of the association. An analysis of the various developments and interest that have shaped the legal interpretation of the relationship between Penn State and the Commonwealth will likely lead to a more thorough understanding of the association between the two entities.

While the perfect storm is brewing across the country, the developments are especially evident in Pennsylvania. Nationally, the 2008 recession reduced state revenues and slowed state and local support for higher education. However, while state governments throughout the country have cut appropriations to colleges and universities, the drop-off in state funding for higher education in Pennsylvania has far outpaced much of the rest of the nation. Between 2007 and 2012, state fiscal support for higher education in Pennsylvania decreased by a staggering 15.2%.\(^{30}\) Over the same 5-year period, national figures reflect only a 3.8% dip in total state support for higher education.\(^{31}\) Nationally, average state funding for public higher education has increased during the last five years, but funding has not bounced back to pre-financial-crisis levels, and the gains in Pennsylvania lag behind the national average. During the last five years, state fiscal support has increased nationally by 20.4%, while Pennsylvania has only witnessed a growth of 3.3%. The recent, precipitous decline in higher education funding in Pennsylvania suggests that governmental leaders may be inclined to loosen the historical ties between Penn

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\(^{30}\) Grapevine, *Annual Compilation*, Table 2.

\(^{31}\) Grapevine, *Annual Compilation*, Table 2.
State and the Commonwealth, and that loosening may have implications for the legal relationship between the two entities.

To further complicate the situation, as state support for higher education recedes, demand for a college degree continues to rise unabated, and public institutions face seemingly diametric pressures to accept more and more students each year with less and less public support. Public colleges and universities in Pennsylvania have felt the tension of these diametric pressures to a greater extent than their counterparts in other states. In Pennsylvania, despite an increase of 13.7% in full-time equivalent enrollment (FTE) at Commonwealth colleges and universities between 2005 and 2010, educational appropriations per FTE dropped by 14.3%. That reduction occurred even with the inclusion of federal stimulus funds which accounted for 4.9% of educational appropriations in 2010.32 Across the country, educational appropriations per FTE student have declined by 15% from pre-recession levels. In Pennsylvania, although college enrollment has increased by 2.2% since 2008, educational appropriations per FTE have plummeted by 37% which marks the fourth largest post-recession decrease of any state.33 Reduced state appropriations and increased enrollments continue to constrain the resources of American public institutions of higher education. Due to the enhanced effects of this trend in Pennsylvania, the relationship between the Commonwealth and Penn State is ripe for further analysis.

Public institutions of higher education that heavily rely on state funding find themselves in an increasingly challenging and uncertain position. With an increasing tide of students and

decreasing state appropriations, public colleges and universities, in effect, are being asked to do more with less. To persevere, these institutions may need to explore alternative models of governance and support that reduce their reliance on the state and provide for more financial and operational flexibility. Since governmental support for higher education in Pennsylvania has decreased rapidly in recent years, an analysis of the legal and policy options of public colleges and universities in the state is timely for those interested in public higher education policy and legal issues in higher education.

The contraction in state appropriations have notable implications for Penn State. Although applications to Penn State have been on the rise, state support of the university has not kept pace.\textsuperscript{34} Penn State primarily uses state appropriations to lessen the burden of in-state tuition, which at a hefty price tag of $17,514 is the third highest in the country among 4-year public universities in 2017, and roughly $9,500 above the national average.\textsuperscript{35} Continued tuition hikes threaten the ability of Penn State to prove an affordable education to residents of the Commonwealth.

Recently, the state government in Pennsylvania has been more reluctant to support public higher education. Between 2011 and 2015, then-Governor Tom Corbett proposed significant reductions to the appropriations for public colleges and universities in Pennsylvania. In 2011, Corbett proposed a 52.4% reduction in state funds for general support of Penn State, and for the

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following year, he proposed an additional 30% cut.\textsuperscript{36} If the governor had been able to push his budget proposals through the General Assembly between 2011 and 2013, Penn State would have lost roughly $170 million or 53% of its state appropriation funds. Further, Corbett’s statements at the time implied that public institutions of higher education could expect additional cuts, and that he favored a new, less financially dependent relationship between the Commonwealth and its public colleges and universities. Citing the spiraling costs of college tuition despite annual appropriations from the state, the Governor claimed in 2012 that it was “time to re-think state spending on higher education.”\textsuperscript{37} In addition, Corbett appointed an Advisory Commission on Postsecondary Education to evaluate the state’s higher education efforts and make recommendations related to, among other topics, the governance and financial structure of the Commonwealth’s postsecondary education system.\textsuperscript{38}

In 2014, Democratic candidate Tom Wolf defeated incumbent Tom Corbett in the Pennsylvania gubernatorial election. For 2015-16, Governor Wolf proposed increases to the budget for higher education with the goal of fully restoring the cuts to colleges and universities within two years.\textsuperscript{39} The Republican-controlled General Assembly rejected the first-year governor’s proposal, and Governor Wolf and the legislature found themselves ensnared in a


budget stalemate that government leaders did not resolve until the spring of 2016. Ultimately, Penn State only saw a modest 5% increase to its general appropriation. The increasing frequency of budget impasses suggests that state appropriations are no longer a predictable, stable source of funding for Penn State.

The recent unwillingness of state government leaders to substantially increase appropriations signals a new political attitude towards public higher education in Pennsylvania – one in which state appropriations will factor less prominently in Penn State’s as well as other state-related institutions’ futures. Corbett’s support for reductions in state appropriations to Penn State and his exploration of alternative financial and legal models of public higher education demonstrate that government leaders are increasingly scrutinizing funding for higher education.

While Democratic Governor Tom Wolf aspires to return to pre-recession funding levels, he will not likely realize his agenda with the current Republican majority in the General Assembly. Further, Democrats have only held the party majority four times in the last twelve years. Since party control of the state government has been fairly consistent, for the foreseeable future, the downward trend of funding for public higher education in Pennsylvania is likely to continue.

Penn State must appreciate the implications of funding trends and establish a responsive plan that best serves the interests of the institutions and residents of the Commonwealth. The objective of


this study is to examine the evolution of the legal relationship between Penn State and Pennsylvania and identify implications for its future.

This dissertation’s consideration of Penn State’s governance issues is also timely in light of the fallout from the Sandusky child sex abuse scandal of 2011. In November 2011, the Commonwealth filed criminal charges against former Penn State assistant football coach Jerry Sandusky, alleging that he sexually abused 8 boys over a 15-year period. The state’s investigation of Sandusky revealed evidence that he committed some of his crimes on University property, and that key administrators, including former President Graham Spanier and football coach Joe Paterno, had been aware of allegations of child sex abuse against Sandusky dating back at least to 2002 and had failed to report them to the proper authorities. In connection with the investigation, two Penn State administrators, Gary Schulz, Senior Vice President for Finance and Business, and Tim Curley, Athletic Director, were arrested for making materially false statements under oath to a Grand Jury and failing to report a violation of law. The arrests made international headlines, and the university came under heavy criticism for seemingly protecting an alleged child abuser by not only neglecting to report the accusations to authorities, but by also granting Sandusky professor emeritus status and allowing him to have full access to the University’s sports facilities for 13 years after Penn State first had knowledge of his suspected child abuse.

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In the ensuing frenzy after the scandal broke out, Penn State’s board of trustees fired Spanier and Paterno. The events surrounding the scandal implicated issues of governance and institutional autonomy. A 2012 report suggests that Corbett played a central role in managing the fallout from the scandal, including the firing of Spanier and Paterno, which potentially points to an intrusion upon Penn State’s institutional autonomy by Pennsylvania’s then-governor.

The governor of Pennsylvania is an ex-officio member of Penn State’s Board of Trustees. Although the Governor had generally not even attended the board of trustees meetings at Penn State, Corbett became heavily involved in the board’s business after the 2011 arrests. Some trustees found Corbett’s sudden interest in the University’s affairs disconcerting. Board members suggested that Corbett’s intrusion on institutional autonomy was a reaction to former President Spanier’s criticism of the governor’s cuts to funding and for Spanier’s perceived support of the Democratic candidate in the 2010 race for governor. The function of the board of trustees is to select the president, develop strategy that promotes the institution’s mission and goals, and manage the university’s assets. If the governor used his position on the board to settle a political grudge, Corbett may have violated his fiduciary duty to the university.

48 Penn State Board of Trustees, “Meeting Dates, Agendas, and Minutes,” accessed September 17, 2012, http://www.psu.edu/trustees/meetings.html. The attendance records of the board of trustees meetings show that prior to the outbreak of the Child Sex Abuse Scandal at Penn State, Corbett did not attend any of the meetings during his tenure, which is not uncommon for Pennsylvania Governors. Corbett has attended 3 meetings since November 2011.
49 Van Natta, Jr., “Fight on State.”
Corbett’s actions may have also strengthened the University’s resolve to protect itself from the political whims of state legislators by revisiting its relationship with the Commonwealth and exploring options for more institutional autonomy. Therefore, due to the unfolding implications of the Sandusky scandal, this study is a timely analysis of the role of state governments in public university governance.

This dissertation also contributes to efforts to understand the legal and policy landscape of American public higher education in an environment in which public colleges and universities are facing less cooperative and supportive state governments. Since the politics of today are more contentious than they were for the majority of the twentieth century, St. John and Parsons claim that current developments present “a complex situation for administrators who argue for increases in public funding as well as for researchers attempting to understand the new policy context.”

Over the last 30 years, governors, higher education boards, and university presidents have recommended several options for addressing the changing political and financial conditions facing public colleges and universities. These options have ranged from outright privatization, as in the case of St. Mary’s College in Maryland, to higher education vouchers in Colorado, to partial privatization at Cornell University and the University of Virginia. Thus, the proper balance between governmental oversight and institutional autonomy remains a prominent and unsettled issue in American public higher education.

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51 Penn State Board of Trustees, “The Corporate Bylaws,” accessed September 18, 2012, http://www.psu.edu/trustees/pdf/bylaws.pdf. The bylaws state that trustees members have a fiduciary relationship with the University, which requires that “they shall act in good faith, with due regard to the interests of the University.” The governor likely did not act in good faith if he persuaded members to take punitive action against Spanier in order to settle a political and personal score.


suggests a greater sense of urgency on the part of higher education leaders to reexamine the relationship between state governments and public higher education. By tracing the evolution of an university-state relationship and exploring its implications, this dissertation aids higher education administrators, state lawmakers, and policymakers who are working on strategies to address the new political and financial realities confronting public institutions of higher education.

The approach of this study differs in scope from the work of policy analysts and legal studies of governance and institutional autonomy in public higher education. My dissertation analyzes the relationship between one state and its flagship public university. Policy analysts tend to focus their research on state-level issues related to higher education governance and legal studies of institutional-state governance generally concentrate on the issue of constitutional autonomy. Constitutional autonomy refers to “the use of a constitutional provision to establish and provide legal protection for the internal control of public colleges and universities.” Constitutional autonomy is instrumental to understanding the extent of the legal relationship between states and public institutions with constitutional status. Penn State is a statutory creation, and statutory institutions generally do not tend to have as much autonomy as


constitutional institutions. By focusing primarily on the relationship between one public institution of higher education and one state, this study seeks to develop a more comprehensive understanding of the statutory relationship by analyzing its historical evolution and implications.

This study’s consideration of a university’s legal relationship with the state government is an important addition to discussions about government support of higher education and its impact on our country’s global economic status. In the United States, universities “are currently perceived—and expected—to be founts of innovation for a growing economy.”\(^57\) The university’s contribution to economic growth manifests through workforce development and the production and transfer of innovative research, which are essential elements of the knowledge economy, i.e., an economy that is “directly based on the production, distribution, and use of knowledge and information.”\(^58\) The leading economies of the world today are marked by greater dependence upon intellectual competencies rather than physical inputs or natural resources. The keys to growth in the knowledge economy are strategic investments in education, training and research and development.\(^59\) Further, the knowledge economy requires a highly-skilled workforce that can readily adapt to changes in technology.\(^60\) In order to produce this type of workforce, government policies must nurture investments in human capital that engender access to knowledge and skills.\(^61\) Thus, at the center of the knowledge economy lies education and in particular, institutions of higher education, which largely have the responsibility of training


\(^{60}\) OECD, “The Knowledge-Based Economy,” 16.

future workers and serve as knowledge producers for business and industry through basic and applied research.

As one of the select institutions classified by the Carnegie Foundation as a research university with the highest research activity, Penn State plays an important role in the knowledge economy.⁶² Penn State is a land-grant college and a flagship public research university. Since the passage of the Morrill Land Grant College Act of 1862 (Morrill Land Grant Act), land grant institutions have tailored their mission to promote economic development and train students for careers in industry, business, and agriculture.⁶³ Today, public universities educate 85% of our undergraduate and 70% of our graduate students who attend research universities.⁶⁴ As producers of knowledge and the chief educators of undergraduate and graduate students, public universities are critical to the economic success of our country. An analysis of the legal relationship between public universities and state governments has implications for our national economy.

America’s under-investment in higher education arguably threatens our international economic standing. The growth of our economy has recently stagnated, and we face competition from the booming economies of international challengers like China and India. Since 1980, America’s share of the world economy has dropped from 25% to 19%; meanwhile, during the same period, the shares of the thriving economies of India and China have risen from 2.5% to 5.7% and from 2% to 2%, respectively. Success in the global economy over the next century

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⁶⁴ APLU, “Forging a Foundation,” 7.
hinges on a country’s ability to produce a highly-skilled and educated workforce. Recently, American children have made sluggish gains in areas that experts typically link to economic growth including education, health, and economic status. While state governments in the United States continue to withdraw investment from higher education, education-centered strategies have spurred the rapid economic growth in China and India.65 Without significant, ongoing investment in education, the United States may fall behind in the production of workers with the requisite skills to compete in a global, technologically advanced economy.

An analysis of the legal relationship between a university and a state triggers questions about the roles of institutions of higher education and state governments in supporting national economic growth. By contextualizing the implications of changes to the legal relationship between Penn State and Pennsylvania within Penn State’s mission as a land-grant research university, this dissertation offers insight into debates about the shared responsibility of states and universities in promoting economic growth and facilitating the land-grant mission. Through an historical legal analysis of Penn State’s relationship with the state, including its land grant history, this furthers our understanding of the lived land-grant mission in a political environment that favors limited public support to higher education.66

This study addresses critical issues that face Penn State and institutions of higher education across the country. The configuration of public higher education will change significantly in the upcoming years.67 In order to respond to the sweeping, uncertain political, legal, and financial conditions, Penn State will need to ensure that the University’s legal

66 Ehrenberg, What’s Happening, 225.
67 Lyall and Sell, The True Genius, 47.
relationship with the state allows the institution to effectively confront the current and future challenges. A review of the evolution and implication of the University’s legal affiliation with the state supports efforts to nimbly navigate this precarious environment by identifying the enduring legal issues confronting the institution.

This dissertation finds that interpretations of Penn State’s legal relationship with the state have tended to privilege different aspects of that relationship and that certain tensions and features of the relationship have endured throughout the history of Penn State. A review of the legal materials related to Penn State’s relationship with the Commonwealth reveals that enduring themes carry through along two general views of the relationship between Penn State and the Commonwealth. Legal authorities have tended to adopt an expansive view which focuses on the institution’s land-grant history and tends to assess the qualitative and historical connections between Penn State and the Commonwealth to determine that there exists a close nexus between the two entities, while a restrictive view is less likely to privilege the land-grant history and emphasizes the corporate origins of Penn State and the rights and privileges conferred to the board by the charter. The two views demonstrate tensions in the benefits and burdens of Penn State’s legal association with the Commonwealth.

The development of these two views reveals implications for Penn State’s legal status with the Commonwealth. The shift toward a restrictive view of the legal relationship between Penn State and the Commonwealth reflects a broader societal shift that increasingly emphasizes the economic roles and discounts the civic foundations of higher education. This shift manifest in the legal relationship between Penn State and Pennsylvania and has significant implications for the institution and higher education as a whole.
Chapter 2

Review of the Literature

Introduction

This study analyzes the evolution of the legal relationship between Penn State and the Commonwealth of Pennsylvania. This chapter reviews pertinent literature and provides the foundation for the legal analysis of this study. The first section of this chapter discusses the concept of governance and its role in the relationship between state governments and institutions of higher education. The second section of this chapter traces the early development of American higher education and the connection between colleges and state governments leading up to the founding of the Farmers’ High School in 1855. The purpose of this historical overview is to provide an understanding of the unique organizational and governance features of American higher education, to explain the evolving dynamics of the institution-state relationship, and to review key developments in early higher education law. This section contextualizes the study of one state and one institution within the broader evolution of the role of state governments in American public higher education. The overview also outlines the legal environment in higher education nearing the starting point of my analysis, the founding of Penn State, and serves as the foundation for my study of the legal relationship between Penn State and the Commonwealth of Pennsylvania.

Governance in Higher Education

The study of a legal relationship between an institution of higher education and a state largely involves issues related to control and governance. Kaplin and Lee claim that studies of higher education law must devote special attention to governance, and the concept is critical to
this study as it examines the balance of authority in the university-state relationship.¹

Governance in higher education does not have a single, widely accepted definition, but it generally incorporates factors related to the exercise of authority within institutions and systems of higher education as well as those related to the methods by which institutions interact with the broader environment.² Birnbaum defines governance expansively as “the structures and processes through which institutional participants interact with and influence each other and communicate with the larger environment.” Kaplin and Lee’s definition of governance also refers to structures and processes, but includes an emphasis on how those relate to the decision-making process of an institution:

Governance encompasses (1) the organizational structures of individual institutions and (in the public sector) of statewide systems of higher education; (2) the delineation and allocation of decision-making authority within these organizational structures; (3) the processes by which decisions are made; and (4) the processes by which, and forums within which, decisions may be challenged.³

This definition emphasizes the structural and procedural elements of governance related to the authority and decision-making within both individual institutions and state systems of higher education. The concept of governance is central to the analysis of the rules, structures, and processes, both internal and external to a university or college, that resolve issues related to authority in the institutional-state relationship. Governance provides the framework for analyzing

and understanding both the legal and administrative context through which Penn State and the Commonwealth of Pennsylvania interact with each other and the larger environment.\textsuperscript{4}

The American system of higher education contains two types of governance: internal governance, systems within the institution, and external governance, systems outside the college or university. Although influenced by a number of factors, including size and public-private status, internal governance at American colleges and universities share common structures and hierarchical patterns. In general, a governing board, e.g., a board of trustees, sits atop the hierarchy of authority and has responsibility for the internal governance of a college or university. The governing board generally delegates day-to-day management of the institution to a president or chancellor. Beneath this chief executive officer, various academic and executive officers manage the academic and administrative operations of the university. The provost or vice president of academic affairs serves as the head academic officer, followed by the deans, program directors, and department heads of individual units. The list of executive officers generally includes personnel, such as the general counsel and chief financial officer, who oversee the university’s core business functions. In addition, faculty and student bodies, consisting of members from across the campus, represent the interests of their constituents in university governance. The participation of faculty members also extends to their roles in managing their respective programs, divisions, and schools within the larger university structure.\textsuperscript{5}

External governance in higher education can be split into two types: public external governance and private external governance. Public external governance consists of the

governmental structures and processes at the federal, state, and local levels that play a role in the governance of higher education, while private external governance describes the systems and procedures by which private entities engage in the governance of colleges and universities. Although a government of limited powers, the federal government exerts considerable authority over higher education through the use of enumerated and implied powers. For example, the federal government uses its spending power to provide aid to the majority of American colleges and universities, and through the exercise of its implied powers, the federal government regulates institutions by placing conditions on the receipt and use of that aid. The federal government also regulates a number of other areas that impact governance at institutions of higher education, such as intellectual property, racial discrimination, students with disabilities, and disputes concerning workplace conditions. The U.S. Department of Education is the most recognizable federal structure involved in the external governance of higher education. However, many agencies and departments at the federal level influence higher education governance, including the Department of Labor, which manages disputes related to working conditions, and the Department of Homeland Security, which tracks international students during their stay in the country.\footnote{Kaplin and Lee, \textit{The Law of Higher Education}, 18.}

Despite the federal government’s role in university governance, an institution’s relationship with the state is arguably more vital than any other external relationship in American higher education. From a college or university’s inception, a state’s legal system holds a prominent place in institutional governance. Legal theory traditionally recognizes the state as the principal external participant in the governance of higher education. State constitutions generally
contain provisions that explicitly grant them extensive authority over education. Accordingly, the states have absolute authority over the establishment, coordination, support, and termination of public institutions of higher education and retain “general police powers under which they charter and license private higher educational institutions and recognize their authority to grant degrees.”

Many types of state laws, including state administrative regulations, sunshine laws, and ethics codes, also apply to public higher education. Further, state courts administer the common law areas of contracts and torts that serve as “the foundation of the legal relationship between institutions and their faculty members, students, administrators, and staffs.”

Within public higher education, states dictate the creation and termination of institutions. State laws apply mandates and regulate relationships, and state courts host and resolve disputes between members of a University’s community. Any discussions of altering the institutional-state relationship require an assessment of an institution’s governance structures and processes. Since this dissertation analyzes the evolution and implications of the legal relationship between Penn State and the Commonwealth of Pennsylvania, governance issues that clarify the boundary of authority between the University and state play a significant role in the study.

**Historical Foundations of Governance in Higher Education**

To lay the foundation for this study’s analysis of issues related to governance, this section chronicles the developments that shaped the balance of authority in the institutional-state relationship in American higher education. A number of governance issues that first emerged during the colonial era have persisted throughout the history of higher education, including

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determining the proper balance between internal and external control and the appropriate role of the college president. This section reviews the historical background of the salient features of American higher education governance that are considered in further detail in the legal analysis of the relationship between Penn State and the Commonwealth of Pennsylvania.

Colonial colleges emerged from the European model of the university which continues to serve as the dominant organizational structure in higher education around the world.\(^9\) Soon after landing in America, the colonists expressed a desire to establish an institution of higher education. A 1643 marketing pamphlet from Harvard states that after the first settlers built houses, erected a church, and organized a local government, “one of the next things we longed for, and looked after was to advance learning and perpetuate it to posterity, dreading to leave an illiterate ministry to the churches when our present ministers shall lie in the dust.”\(^10\) In the development of an entirely new social order with novel governmental and educational structures, the colonists who settled the American colonies borrowed from European institutions and tailored them to the sociocultural contexts of their respective colonies.\(^11\)

In order to fill positions of power within these new social structures, the colonial colleges needed to not only train ministers, but also prepare the future political and economic leaders of colonial society. Accordingly, the early directions of the institutions catered to this need. For example, in 1764, an early historian of the College of New Jersey claimed that the rapid growth of the colonies created the need for learned clergy and competent men of letters in the legislature.

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to provide direction to the populace. Influenced by Reformation universities and colleges, which were legally more secular than ecclesiastical, the colonial colleges established tight connections with their colonial governments.\textsuperscript{12} These “schools of the European Reformation” expanded the scope of their missions beyond strictly religious concerns to serve a broader function. Herbst, summarizing how early American colleges assumed a dual civic and religious mission, stated, “for public employment in church and state – this phrase defined the traditional purpose of university education as it was transmitted to the New World from the medieval and Reformation centers of European learning.”\textsuperscript{13} The development of the colonial college as a complement to civic and religious authority echoed the medieval European conception of authority as embodied by three institutions: “the State, based on Law; the Church, founded on Revelation; and the University upheld by Reason.”\textsuperscript{14} The idea of tripartite authority continued into the New World, and early colleges, along with churches and governmental entities, emerged as the three distinguished public institutions of colonial societies.\textsuperscript{15}

Before the American Revolution, the colonists founded nine colleges: Harvard (founded in 1636); the College of William and Mary (1693); the Collegiate School at New Haven (1701, later renamed Yale College); the College of New Jersey (1746, later renamed Princeton College); King’s College (1754, later renamed Columbia University); the College of Rhode Island (1764, later renamed Brown University), Queen’s College (1766, later renamed Rutgers College), and

\begin{itemize}
  \item \textsuperscript{13} Herbst, \textit{From Crisis to Crisis}, 1-2.
  \item \textsuperscript{15} Herbst, \textit{From Crisis to Crisis}, 4.
\end{itemize}
Dartmouth College (1769). Despite their disparate religious affiliations and patterns of development, the nine colonial colleges largely shared the dual mission of educating and preparing leaders of the church and civil government, and they also shared key governance characteristics that still exist today.\textsuperscript{16}

The colonial colleges resembled European institutions that predated them by five hundred years.\textsuperscript{17} In particular, two European models shaped governance in American higher education. The English college model encouraged the development of charters and corporate bodies while Calvinist and Scottish universities introduced the practice of external governance.\textsuperscript{18} These factors combined to produce a distinctive and often ambiguous organizational configuration in colonial American higher education.\textsuperscript{19} The corporate form originated in Roman law. In 1243, Pope Innocent first articulated the concept of an artificial legal entity, i.e., a corporation, with power derived from an external authority. The church created the legal device as a means of consolidating control over its subsidiaries and as a defensive measure against the rising power of lay authorities during the thirteenth century. By bestowing each collegiate church, religious fraternity, and university with a corporate personality, the church hoped to prevent local constituents from appropriating these institutions for their own benefit. The legal concept of an artificial entity created and protected by an external body provided the foundation for the corporate form in higher education.\textsuperscript{20}

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\textsuperscript{17} Cohen & Kisker, \textit{The Shaping}, 19.
\textsuperscript{19} Herbst, \textit{From Crisis to Crisis}, 4, notes that colonists often entrusted their institutions in the hands of ecclesiastical and civil authorities, which left the question of their status unanswered; Hutchens, “A Comparative Legal,” 15.
\textsuperscript{20} Duryea, “Evolution of University,” 4.
\end{flushleft}
The immediate legal precursors to corporate bodies in higher education formed during the fifteenth and sixteenth centuries in England. British kings and parliament used the concept of corporations to delineate authority to carry out specific activities to a variety of entities, including universities, municipalities, and charities. Corporations received charters that provided the institutions with limited authority and allowed the corporations to promulgate rules and regulations related to succession and internal governance. In accordance with the concept of limited corporate authority, the charters reserved the right for government officials to oversee and regulate corporations. Despite reserving the right of supervision, the charters also offered significant legal protections to corporations. As artificial entities under the law, the corporations enjoyed some of the same rights afforded to individual citizens. The charters and statutes of English universities adopted these early understandings of corporations by generally including provisions for the organization of corporate bodies with legislative authority for internal governance and the power to select a head of the college as well as stipulations that mandated the right of visitation by external supervisors.\textsuperscript{21} This dual mode of governance – an external board of visitors and internal college corporation of master and teachers – personified the English college model of governance.

The first two colonial colleges, Harvard College and the College of William and Mary, followed the pattern of the English college model. For example, the language of Harvard’s 1650 charter closely resembled the text of the royal charters for the colleges at Oxford and Cambridge.\textsuperscript{22} Similarly, Harvard’s original statutes lifted language directly from the statutes of


the University of Cambridge. In addition, Harvard and William and Mary had dual governing bodies: internal corporations and external boards of overseers or visitors. However, the dual governing bodies at these institutions did not share power equally, and the American practice of privileging external governance over internal governance first took hold at these institutions. At William and Mary, the charter provided the Board of Visitors, an external group of eighteen Virginian gentlemen, with legislative authority and the right of self-perpetuation. The Virginia Visitors also retained the right to appoint members to the college’s internal corporation of college masters and “in effect had far greater authority over the faculty than had been the tradition at European universities.” The curtailment of the corporation’s authority may be partially attributed to the general distrust of clergymen-professors on the part of colonists or to the perceived inadequacies of schoolmasters. Regardless of the reasons, due to the transfer of power from the corporation to the Board of Visitors, “the Virginia college, in contrast to those at Oxford and Cambridge, was far less autonomous and more subject to local outside control.”

The development of the governance structure at Harvard paralleled the experience at William and Mary. In 1636, the General Court, the legislative body of the Massachusetts Bay Colony, founded Harvard when it voted to financially support the erection of a college. At the beginning, the General Court established control over Harvard’s operations. An external Board of Overseers, formed as a committee of the General Court, initially governed the institutions as a quasi-corporation with designated legislative and administrative powers. However, the General Court’s authority superseded that of the Overseers, and the colonial government did not shy from

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26 Herbst, *From Crisis to Crisis*, 34.
interfering in Harvard’s affairs. For example, in 1639, after discovering that the college’s first president, Nathaniel Eaton, was abusing students, the court fired him and then hired his replacement. Although the president delivered the whole curriculum to students and granted bachelor’s degrees to nine students at the first commencement in 1642, he did not retain any formally recognized authority. This changed in 1650 when the General Court granted Harvard College’s petition for a charter of incorporation. The members of the corporation included the president, fellows, and treasurer. The charter provided the entity with the customary rights of a corporation: the right of corporate possession and management of the college’s property, the right to establish and fill administrative posts, the attendant legal rights as an artificial person, the right to perpetual succession, and the enjoyment of exemptions from taxes, customs, and duties.

However, the charter did not, in reality, grant the powers of self-government to the corporation. The charter subjected the corporation’s right to self-perpetuation to the advice and approval of the Overseers. Further, the charter required the corporation to convene a meeting with the Overseers to obtain their consent to enact bylaws and settle major disputes. Rather than furnish the corporation with the rights of institutions under the English college model, “the charter in effect placed the corporation under the supervising authority of the Overseers in all matters that went beyond routine questions.”27 Similar to William and Mary, Harvard had two governance boards. One of the boards comprised of an external lay group and the other consisted of an internal body of administrators and faculty, and the external board had absolute control over the college’s affairs.

27 Herbst, *From Crisis to Crisis*, 11.
During the 1720s at Harvard and the 1750s at William and Mary, the corporations unsuccessfully attempted to wrestle control from external boards. The fights at Harvard throughout the 1720s pitted liberal Congregationalists against conservative Puritans, which in combination with the increasing heterodoxy of the colony, actually worked to reduce ministerial influence in political and collegiate affairs. The academics attempted to fill the leadership void, but failed, and instead, Boston’s rising mercantile class, in conjunction with local politicians, assumed stewardship of the Board of Overseers. The unsuccessful attempts by faculty at these institutions to gain an upper hand in college governance may be viewed as an effort to stray away from the Reformation model of governance towards the academic corporate model of English universities. In both situations, the clerical interests of the colleges sought to return to the medieval precedent of universities as corporations of masters and scholars. However, at both colleges, the result was the same as secular authority trumped clerical leadership. The battles at these early schools established the precedent that “colleges in America were not to be governed by their teachers, but by the representatives that supported and protected them.”

Even more broadly, the governing principles of these early institutions established the principle that “external governors, favoring landed wealth and secular interests, set the policies for higher education in the colonies.”

Although Harvard and William and Mary established early precedents for governance in American higher education, Yale College “became the governance prototype of the nation.” Unlike Harvard and William and Mary, Yale arranged for a single external governing board, and

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28 Herbst, From Crisis to Crisis, 48.
29 Herbst, From Crisis to Crisis, 48.
this feature became the customary governance structure of colleges in the United States. Yale was founded in 1701 by a group of Congregationalist ministers who successfully petitioned the General Court of the Connecticut colony for the establishment of a college to train men “for public employment both in church and civil state.”31 These ministers founded the institution partially because they felt that Harvard had become too secular of an institution, and this sensibility guided the college during its early years. In fact, while Harvard’s curriculum increasingly reflected the influence of the rising mercantile class and heterodoxy in the Massachusetts Bay colony, Yale remained a dogmatically devout institution until the mid-eighteenth century.32 Yale’s desire to be an orthodox institution seems to have also influenced its choice of governance structure. Ex-president of Harvard, Increase Mather, advised the college to adopt a governance model in which local churches and ministers would govern and financially support the institution.33 The 1701 charter adopted by the Connecticut General Court entrusted organization of the college to ten Congregationalist ministers.34

Yale’s deliberations over governance raised larger, sensitive legal issues that affected all of the colonies and represented one of the first major challenges in American higher education law. While the General Court considered how to incorporate the college, a legal question arose as to whether the college should appeal directly to the colony or all the way to England for a charter. This question raised the broader issue of whether English statutes and acts of Parliament applied to the colonies. Local legal opinions varied on this matter. Gershom Bulkey, a lawyer

33 Dexter, Documentary History of Yale, 6-7.
from Wethersfield, discouraged the General Court from incorporating the college, claiming that the authority of the King and Parliament superseded the Colony’s and that the college should submit its application accordingly. Bulkey also urged restraint and pointed to statutes related to punitive acts against teaching by dissenters. As Congregationalists, perhaps the ministers’ failure to seek permission from the England would receive added scrutiny. However, other lawyers claimed that only British laws that explicitly referred to the colonies applied to them. Further, these lawyers found solace in the fact that the incorporation of Harvard by the General Court of the Massachusetts Bay Colony had yet to be contested by England.  

Lawyers found a case on point from 1608, which marked a distinction between “the realm of England” and “the dominions of the King,” and held that the acts of Parliament and English statutes predating settlement only applied to the king’s dominions if the legislation had explicitly referred to the settlement or if they had been ratified locally. However, the issue of the applicability of English laws to the colonies presented a predicament to the General Court. Although colonists favored the extension of English legal protections, such as the right of habeas corpus, the desire the restrictive wholesale application of English laws to the colonies. Unfortunately, by asserting that Connecticut had the right to incorporate the college, the colony threatened to reject the more protective measures in English law.

Due to the broader legal implications of incorporating the college, the General Court purposely adopted an ambiguous charter that did not include provisions for the participation of magistrates in college governance; incorporation of the school by royal, parliamentary or state

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35 Herbst, *From Crisis to Crisis*, 39-40. In actuality, questions surrounded Harvard’s legal status in 1701 and Harvard faced challenges crafting a charter satisfactory to the crown.

36 Herbst, *From Crisis to Crisis*. 
governmental authorities; articulation of the rights of the college; or provisions for visitation. Yale’s 1701 charter named the ten Congregationalist ministers “as trustees, partners or undertakers for the said school.”37 The charter provided the trustees with the power to organize the school, legislate rules for its governance, manage the college’s property and financial resources, appoint a master, and grant degrees. In addition, the General Court appropriated an annual payment of £120 to the trustees. Yale’s 1701 charter was a landmark in the history of Reformed academic institutions because “for the first time a Reformed collegiate establishment declared its intention to operate without the direct participation of secular officials in its government, while it nonetheless expected to receive financial support from the General Court.”38 The 1745 charter incorporated the trustees as “the President and Fellows of Yale College in New Haven.”39 Similar to the situation in 1701, all of the trustees in 1745 were ministers from Connecticut churches.40 This corporate body retained control over the college’s affairs. Although the General Court still had the right of visitation, the charter limited this right to actions by the corporation that violated the laws of the colony.41

The colonial era produced the standard governance pattern in American higher education. Founded in 1746, Princeton followed the precedent of Yale and established a single external governing board. Almost all of the colonial colleges that followed also adopted the Yale corporation model. The mixture of external governance and internal clerical authority created intense friction at the early colleges. Despite attempts by clerical leadership to gain control over

38 Herbst, *From Crisis to Crisis*, 42.
40 Herbst, *From Crisis to Crisis*, 47.
41 Yale University, *The Yale Corporation*, 11.
the colleges, secular constituents emerged as the more powerful force. Even at Harvard and William and Mary, which featured dual governing boards and unique constitutions, the faculty and ministers failed in bids to increase their power. Faculty members did not enjoy substantial power at colonial colleges, and in general, the president was the only faculty member on the governing board.\textsuperscript{42} More broadly, the balance of power in the colonies shifted from the ministers to the more secular elements of society. For example, in Massachusetts, as rising heterodoxy weakened the role of ministers in the colony’s and Harvard’s affairs, Boston’s aristocratic class of merchants and traders emerged to fill their void.\textsuperscript{43}

This review serves as a foundation for later discussions of the evolution of the legal relationship between Penn State and the Commonwealth of Pennsylvania. Despite the variety of early patterns of colonial college governance, Yale’s model of a single board emerged as the dominant governance structure for American higher education. Although Yale established the standard form of governance at colonial colleges with a single external board, unresolved legal issues still remained regarding the public-private nature of colleges. Another enduring aspect of early higher education governance was the emergence of the strong college president.

\textit{The Emergence of the Strong College President}

The central role of the president in higher education governance represents another feature that colonial institutions borrowed from the English college model. The chancellors of English universities only nominally presided over governance. These figureheads exercised limited power and only held office for short periods of time. On the other hand, the presidents of

\textsuperscript{42} Cohen and Kisker, \textit{The Shaping American Higher Education}, 44.  
\textsuperscript{43} Herbst, \textit{From Crisis to Crisis}, 54-55.
English colleges possessed significant authority and could serve indefinitely. The colonial college president enjoyed similar privileges. For example, at Harvard, the president served as the sole academic on the Board of Overseers.

The American practice of external governance encouraged the ascendancy of the president in higher education administration. Since external governing boards only met periodically, the president played a central role in administering day-to-day operations and acting as liaison between the board and the faculty. In addition, the meager conditions of the colonies also aided the rise of strong college presidents. In the early days of American higher education, the colleges lacked the human and financial capital to support a large professoriate. The colonies needed the colleges to provide learned men to fill these positions. For all intents and purposes, the terms “president” and “faculty” are interchangeable when discussing colonial college because the president, and the few tutors that he selected, taught the entire curriculum at these institutions. The notion of college teaching as a profession did not develop until later, and even then, early colleges did not subscribe to the European model of the faculty as an independent, corporate body with substantial institutional control. Therefore, although ultimate authority rested with lay governing boards, the strong college president represented another enduring legacy of the early American colleges that further analyses of governance must take into consideration.\footnote{Geiger, “The Ten Generations,” 39; Duryea, “Evolution of University Organization,” 7; Herbst, \textit{From Crisis to Crisis}, 17-62, discussing evolution of the role of president in early colonial colleges.}
The Emergence of the Public-Private Distinction and the Dartmouth Case of 1819

The current public-private distinction in American higher education did not easily apply to the colonial colleges. The early colonial colleges were provincial institutions that adopted the customs of the colony’s majority denomination, but tolerated students, faculty, and patrons of other sects of Christianity. To varying degrees, these institutions enjoyed the financial support and official recognition of their colonial legislatures, and for all intents and purposes, the majority of colonial colleges existed as quasi-public institutions. However, like today’s institutions, colonial colleges patched together operating budgets from multiple sources, including churches, private donors, and government entities. The diverse nature of the colonial colleges’ funds complicated precise designations of public-private status.

Rudolph referred to the colonial colleges as state-church colleges. Although they had originally been established by churches, the colonial colleges developed a “relationship of mutual obligation and responsibility with the state.”45 The colonies supported the state-church colleges in a variety of ways, including land grants, public lotteries, and fund drives. The early days at these institutions illustrate the peculiar financial model of colonial colleges. The General Court contributed a sum of £400 towards the initial construction of Harvard as well as land and revenues from the Charlestown Ferry. In addition, the institution received money and a large library of four hundred books from its namesake, Reverend John Harvard. Yale College received its name from Elihu Yale who left an endowment worth £500 to the institution. The Connecticut General Court also provided sporadic funding and exempted students from taxes and military

service. In addition to exempting students from taxes and military service, the Virginia legislature appropriated revenues from taxes on exports, peddlers, and tobacco to the College of William and Mary. The state legislatures’ financial support of colonial colleges created an uneasy tension between the two entities over institutional control.  

Between 1770 and 1820, the landscape of higher education changed dramatically. After the Revolutionary War, the appearance of new institutions and institutional forms challenged the traditional relationship between the states and their colleges. In the immediate years prior to the war, Anglican interests and colonial colleges thwarted efforts to establish rival institutions. To the established colleges, the proposed institutions stood as unwelcomed competition for scarce resources, and their non-Anglican affiliations discomfited Anglican proponents. In fact, Anglicans persuaded royal officials to prevent the formation of colleges in New Hampshire, Georgia, and North Carolina.

By 1820, the monopoly of provincial colleges on higher education in their respective colonies had succumbed to an explosion of rivaling institutions as the number of colleges increased from nine to over forty institutions. Influenced by revolutionary fervor and the Enlightenment, Americans gravitated towards republican education which reflected the belief “that public institutions were in the best position to imbue young men with republican principles and prepare them for their roles as leaders of the new nation.” As a result, newly formed states without colleges established state institutions and systems of higher education in New York, Maryland, Georgia, South Carolina, North Carolina, and Vermont during the 1780s and 90s.

46 Herbst, From Crisis to Crisis, 1-47.
47 Herbst, From Crisis to Crisis, 206.
Meanwhile, Presbyterian clergymen founded private colleges during the 1780s out on the frontier lands. The people on the frontier also fashioned their own typology of institutions of higher education because of their impatience with stalled legislative negotiations, skepticism of detached politicians in urban state capitals, and concern that they would be collateral damage in political and ideological conflicts.⁴⁸ In other states, Christian denominations, including Catholics, Methodists, and Congregationalists, founded private academies and colleges.

The emergence of new institutions and institutional types led to tensions between public and private colleges and heightened competition for governmental support. For example, in Vermont during the early nineteenth century, the University of Vermont, a public institution supported by the legislature, rebuffed repeated attempts by private Middlebury College to secure state support and merge the institutions. Therefore, the period following the War for Independence witnessed a parallel development of public and private colleges and with the appearance of new institutions and institutional types, new questions emerged about the legal status of college corporations and the legal distinctions between public and private colleges. Due to the proliferation of such diverse types of institutions, “it became increasingly difficult to define the rights and responsibilities of these schools in relation to the public, and it remained unclear whether public and private institutions enjoyed the same legal standing and whether they were accountable to the people.”⁴⁹

The changing nature of American higher education and its attendant uncertainty required clarification of the boundaries between public and private higher education and the relationship

⁴⁸ Herbst, From Crisis to Crisis, 146.
⁴⁹ Herbst, From Crisis to Crisis, 144.
between colleges and state governments. As a result, legal conflicts between the states and colleges over issues related to charters and the reach of state power occurred in state assemblies rather than courts of law. This all changed with the Dartmouth case of 1819, which first addressed the distinction between public and private institutions of higher education and “laid the legal basis for the two-pronged system of American higher education.”

The Dartmouth case stemmed from a local disagreement between President John Wheelock, son of founder Eleazar Wheelock, and Dartmouth’s Board of Trustees. Contrary to Harvard and Yale, Dartmouth successfully secured a royal charter in 1769, incorporating twelve people as trustees of the college and providing them with customary corporate and administrative authority. The charter also permitted Eleazar Wheelock to name his successor, and he appointed his son, John Wheelock. John proved to lack the mind, temperament, and political skills to be a successful college president and became embroiled in a conflict with local Congregational church leaders that eventually alienated him from Dartmouth’s faculty and trustees. The rift between Wheelock and the board led to John’s dismissal, and he sought relief from the New Hampshire legislature. Jeffersonian Republicans depicted Wheelock’s dismissal as Federalist resistance to efforts to democratize the aristocratic literary institutions. Their sympathizers in the legislature viewed the conflict as an opportunity to gain more control over the institution and passed a series of laws in 1816 that amended the charter, enlarged the board of trustees, allowed the state to appoint new trustees, and reorganized the institution as Dartmouth University. The original trustees resisted the changes, and, for a short period of time, Dartmouth

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College and Dartmouth University operated in competition with each other. When the issue of which institution controlled Dartmouth’s seal and records arose in 1816, the original trustees sued the new university’s secretary-treasurer, William H. Woodward.52

The case represented a clash between two competing visions of higher education. On one side, people felt that the public had the right to control institutions founded on their behalf. Thomas Jefferson echoed this view in a letter to the governor of New Hampshire, writing that, the idea that institutions established for the use of the nation cannot be touched or modified even to make them answer their end, because of rights gratuitously supposed in those employed to manage them in trust for the public, may, perhaps, be a salutary provision against the abuses of a monarch, but it most absurd against the nation itself.53

In contrast, supporters of the original trustees feared that subjecting governance to the caprice of popular sentiment and political partisanship would cause institutional instability. The trustees relied on the legal argument that the school’s charter was a contract and any amendment of the contract without mutual assent amounted to an unconstitutional violation of the Contract Clause of the United States Constitution.54

The United States Supreme Court considered the constitutionality of the acts that the New Hampshire legislature passed without the assent of the original board of trustees. The main issue of the case “was whether the college was a public corporation whose founding charter was liable to amendment by the legislature, or an inviolate private corporation with a charter immune

52 Herbst, From Crisis to Crisis, 219-244.
New Hampshire’s high court ruled that Dartmouth was a public corporation and that the legislature had the authority to amend the charter. The court reasoned that the institution must remain in public control because absent legislative oversight, the board of trustees retained the power to govern in a nefarious manner and betray the public’s trust. The trustees disagreed and appealed the decision to the Supreme Court.56

On February 2, 1819, the Court ruled 5-1 in favor of the board of trustees. In the majority opinion, Chief Justice Marshall first determined that the charter of Dartmouth College constituted a valid contract. Dartmouth College submitted an application to the crown for a charter to incorporate an educational institution. The application declared that contributors made funds available to the institution upon the application’s approval. The crown approved the charter, and, based upon that approval, the donations transferred to Dartmouth. Therefore, the charter satisfied the basic elements of a legitimate contract.57

The court then considered the issue of whether the U.S. Constitution protected the contract. The issue turned on whether Dartmouth was a civil or private institution.58 If the Court concluded that the college was a private institution, then the Contract Clause prohibited the legislature from interfering with the contract. The court construed the Contract Clause as restraining the legislature in the “future from violating the right to property.” However, if the charter involved a sole grant of political power, public property, or benefits to the state of New Hampshire, then the Contract Clause did not apply and the legislature had the authority to pass the challenged acts. If the court found Dartmouth to be a private institution, funded by private

56 Dartmouth, 4 U.S. 518.
57 Dartmouth, 4 U.S. at 627.
58 Dartmouth, 4 U.S. at 629-630.
funds, and empowered to dispense the property for reasons unrelated to the government, then the legislative acts likely violated the charter and impaired contractual obligations in violation of the Contract Clause. To make this distinction, the court examined the circumstances surrounding the founding of the institution, the source of donations, and the purpose of Dartmouth College. The Court stated that Dr. Eleazar Wheelock founded the institution and private individuals contributed funds to the institution “for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally.” Due to the private nature of its origins, support, and the non-governmental purposes of the college, the court determined that Dartmouth College was a private institution.

Furthermore, the court dismissed the argument that the simple act of incorporation automatically subjected an institution to legislative control by stating that in order to be under governmental oversight, corporations must be created as instruments of the government. In this case, the court found that the Constitution protected the charter as a valid, inviolable contract and the legislative acts impaired the obligations of the contract by substituting the will of the state “for the will of the donors, in every essential operation of the college.” Since the charter was a valid, constitutionally protected contract that empowered the trustees to execute the will of the donors, and the actions of the state legislature interfered with those rights, the acts violated the Constitution and the Court ruled in favor of the trustees.

59 U.S. Const. art. I, § 10, cl. 1.
60 Dartmouth, 4 U.S. at 633.
61 Dartmouth, 4 U.S. at 633.
62 Dartmouth, 4 U.S. at 638.
63 Dartmouth, 4 U.S. at 652.
64 Dartmouth, 4 U.S. at 654.
The Dartmouth case marked the first time that the United States Supreme Court heard a higher education law case. Herbst refers to the decision as “the magna carta of the American system of higher education in which private and public institutions develop side by side, and the private colleges are protected against state violation of their charter without their consent.”65 Glenny and Daglish claim that the case was “the watershed for the delineation of the legal relationship between American colleges and the state.”66 Justice Marshall’s opinion protected private colleges and their charters from unjust interference by political partisans.67 The case also represented an official declaration of the legal distinction between public and private colleges. Marshall identified a host of criteria, including the circumstances surrounding the institution’s founding, the source of originating funds, the donor’s intent, and the stated purposes of the institution, to help guide that determination. Although historians debate the significance of the distinction prior to the Civil War, developments suggest that the case “laid the legal foundations on which our present public and private institutions and systems of higher education have been built.”68

In the years following the case, the number of private institutions increased dramatically.69 The provincial colleges on the east coast transformed into wholly private schools, and the period between the 1820s and 1850s witnessed the ascendancy of the private denominational college as the distinctive institution in American higher education.70 Further,

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68 Whitehead and Herbst, How to Think, 349.
69 Herbst, From Crisis to Crisis, 242.
state subsidies to private institutions during the antebellum period dropped off precipitously as did efforts by state legislatures to inject themselves into the operations of existing private colleges.\textsuperscript{71} Therefore, the legal recognition of institutional autonomy by the Supreme Court in the Dartmouth case may have encouraged the founding of private colleges and dissuaded governmental support of institutions that they could not control. By delineating the characteristics of private colleges, the Court also helped distinguish the features of public institutions. Moving forward, states would need to explicitly establish colleges as public institutions in order to assert control over them.\textsuperscript{72}

In the decades prior to the founding of the Farmers’ High School of Pennsylvania in 1855, the number and diversity of types of institutions of higher education flourished. A 1932 survey of the number of colleges established in the United States prior to the Civil War found that five hundred and sixteen colleges had been founded in sixteen of the thirty-four antebellum states, including thirty-one alone in the Commonwealth of Pennsylvania.\textsuperscript{73} The Dartmouth case aided in the expansion of the private sector in higher education by inoculating these institutions from excessive governmental interference.\textsuperscript{74} Despite the sharp uptick in the number of institutions, most of the colleges failed, and founders liberally applied the name “college” to a range of institutions of varying quality, including seminaries, technical institutes, academies, professional schools, and formalized apprenticeships. Immigration, westward migration, denominationalism, and pro-expansion sentiment drove the increase in colleges. Public

\textsuperscript{72} Hutchens, “A Comparative Legal Analysis,” 18.
\textsuperscript{73} Donald G. Tewksbury, \textit{The Founding of American Colleges and Universities Before the Civil War} (New York: Teachers College, Columbia University, 1932), 16-31. Of these 209 to 232 institutions, 182 had survived until the time of publication.
\textsuperscript{74} Brubacher and Rudy, \textit{Higher Education in Transition}, 59.
institutions also developed during this time. Between 1790 and 1869, seventeen state universities were founded. Financial issues plagued both private and public institutions during this era, and state legislatures lacked the appetite and resources to financially support these fledgling colleges.

A number of key enduring patterns of governance emerged during the colonial era. First, colonial colleges introduced the standard governance model in American higher education: a single, lay, external governing board. Second, the organizational structure of colonial colleges laid the foundation for the emergence of the college president as a powerful intermediary between the external and internal constituents of institutions of higher education. Third, upon inception, American colleges and universities relied on multiple revenue streams, both public and private, to satisfy their operating budgets. These developments provide the historical context for the legal and governance issues facing colleges and universities today, and for this study, in particular, the issues confronting Penn State and the Commonwealth of Pennsylvania.

Institutional Autonomy

Institutional autonomy is another important concept related to legal studies of higher education governance. In public higher education, a fundamental tension exists between two long-standing traditions: public institutions’ responsibility to the public as overseen by the state, and their inherent right to direct their own affairs, otherwise known as institutional autonomy. Hutchens noted that institutional autonomy must counterbalance the state governmental oversight of public higher education. Even as far back as the Dartmouth case, colleges worried about the pernicious effect of external political intrusion. In his closing argument, Daniel

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Webster, lead attorney for Dartmouth, summed up the threat of undue political influence, “It will be a dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions.”77 More recently, the appropriate balance between these competing claims to control has continued to perplex observers of higher education since the mid-twentieth century.78

The following section discusses the relevance of autonomy to legal studies of governance in higher education. Autonomy issues are central to the analysis of the legal relationship between Penn State and the Commonwealth of Pennsylvania and the implications of changes to that relationship. Due to the key role that autonomy plays in the institution-state relationship, this section review studies of institutional autonomy.

Institutional autonomy is a multidimensional concept that carries different connotations within the legal field and the literature of higher education. Researchers in higher education tend to focus on the academic and administrative aspects of institutional autonomy. In higher education literature, institutional autonomy refers to the authority of a college or university to control its own academic and administrative matters.79 Berdahl, Altbach, and Gumport defined institutional autonomy at its most basic level as “the power to govern without outside controls.”80 Institutional autonomy is a critical component of university governance; one which Moos and Rourke identified as a necessary condition underlying the university’s efforts to perform its core functions of teaching and research.81

77 Dartmouth, 4 U.S. at 599.
Volkwein named three types of institutional autonomy: academic autonomy, financial autonomy, and appointive autonomy. Academic autonomy allows colleges and universities to direct activities related to their academic mission, including programming, admissions standards, and degree requirements. Financial autonomy relates to an institution’s authority to control its own financial matters, namely the administration of revenues and expenditures. Appointive powers refer to governance over personnel matters like promotion, tenure, and hiring.\(^2\) Further, since numerous external participants, e.g., federal, state, and local governments, participate in the governance of higher education, the university has to negotiate several sources of outside control, and each source affects the various types of autonomy to a different degree. This study focuses on the aspects of institutional autonomy related to the chief external participant in the governance of Penn State, the Commonwealth of Pennsylvania.

Berdahl, et al. used a process-oriented distinction to classify two types of autonomy: substantive and procedural autonomy. Substantive autonomy represents “the power of the university or college in its corporate form to determine its own goals and programs (the what of academe),” while procedural autonomy refers to “the power of the university or college in its corporate form to determine the means by which its goals and programs will be pursued (the how of academe).”\(^3\)

The academic component of institutional autonomy should not obscure the concept with another cherished tradition in higher education, academic freedom. Along with tenure, institutional autonomy and academic freedom constitute “a central part of the rich legal history


\(^3\) Berdahl, Altbach, and Gumport, \textit{American Higher Education}, 6.
of American higher education,” and closer inspection reveals important distinctions between the three doctrines.  

The concept of academic freedom derives from the fields of law and education. Educators view academic freedom as a necessary condition to effectively carry out their research and teaching duties, while the field of law uses the term to broadly define the legal rights associated with the work of faculty. Berdahl, et al. viewed academic freedom as the individual right of a scholar to freely engage in scholarly activity without the fear of retribution from the government or an employer “for having offended some political, methodological, religious, or social orthodoxy.” Courts interpret faculty’s legal “rights by reconciling basic constitutional law or contract law principles with prevailing views of academic freedom’s intellectual and social role in American life.” Steeped partially in educational and legal customs, these bases frame academic freedom as an individual right. On the other hand, institutional autonomy refers strictly to the collective rights of colleges and universities.

In American higher education, the historical origins of tenure, the most recent of the three traditions, lie in the American Association of University Professors’ (AAUP) 1915 “Declaration of Principles.” In addition to protecting intellectual freedom, the purpose of tenure is to offer a “sufficient degree of economic security to make the profession attractive to men and women of ability.” Tenure systems provide employment and economic security by allowing faculty to secure permanent status and protecting them from arbitrary dismissal. Legally, tenure at public institutions is generally a product of statute, while contracts govern tenure at private colleges and universities.

84 Berdahl, Altbach, and Gumport, American Higher Education, 5.
87 AAUP 1940, 3
Tenure and academic freedom both concern the individual academic rights of faculty, but tenure serves as a mechanism to achieve academic freedom. On the other hand, institutional autonomy relates to the broader ability of an institution to control and direct its own operations. However, at their core, all three doctrines seek to protect the academic enterprise from whimsical incursions by external constituents.

**Constitutional and Statutory Autonomy**

Researchers in higher education law have focused on the implications of the legal sources of institutional autonomy on the operations of public colleges and universities. The constitutions of some states include provisions that decree the establishment of systems and institutions of higher education and vest authority for them in governing boards. Higher education law scholars use the term constitutional autonomy to describe the extent of internal control provided by these constitutional provisions to public colleges and universities. In the vast majority of other states, public colleges and universities derive their existence from state statutes. Glenny and Daglish referred to these schools as “statutory institutions.” The legal distinctions between these sources carry special significance for analyses of institutional governance.

Most states have used statutory provisions to establish public colleges and universities in order to retain broad supervisory powers for state governments. State legislatures generally treat

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88 Higher ed policy, 580
90 Glenny and Daglish, Public Universities, 6.
93 Glenny and Daglish, Public Universities, 42.
statutory institutions like other legislative-enacted state agencies that have been created for an express purpose. Although universities differ from other state agencies with respect to objectives, composition of workforce, and governmental appointment powers, state legislatures still exercise extensive authority over statutory institutions, and some states “have passed statutes relating to new programs and departments, student admissions, expulsion and discipline, degrees and diplomas, scholarships and loans, dormitories, bookstores, student union buildings, counseling centers, infirmaries, athletics, publications and printing, and the use of institutional lands.”94

Glenny and Daglish found that the autonomy of statutory institutions lies in the following sources: (1) their implied powers as a state agency, (2) the considerable legal influence of academic traditions, (3) carved out exemptions in special legislation, (4) the rights associated with their status as public corporations, and (4) statutes explicitly declaring their autonomy.95

The existence of one or many of these conditions may reserve a variable amount of autonomy for public universities, but in comparison to schools with constitutional autonomy, statutory institutions usually have less institutional control “because they are subject to legislative enactment and executive orders and procedures.”96

Glenny and Daglish cited the decision by many states in the nineteenth century to vest institutional authority in governing boards through constitutional provisions as “one of the most significant legal developments in the United States relating to university autonomy.”97

The Dartmouth case facilitated the proliferation of constitutional status provisions by subjugating

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94 Glenny and Daglish, *Public Universities*, 43.
95 Glenny and Daglish, *Public Universities*, 44-49.
96 Glenny and Daglish, *Public Universities*, 49.
New Hampshire’s legislature to constitutional authority. The original purpose of the legal device was to protect the administration of colleges and universities from capricious interference by state politicians. The colleges and universities with constitutional status operate in cooperation with the executive, legislative, and judicial branches as a “fourth branch” of the state government. For the majority of public institutions with constitutional status, their state legislatures granted the status during constitutional conventions where states debated host of issues related to education. However, the grant of constitutional status does not automatically guarantee an institution complete autonomy from the state, and numerous scholars have analyzed the degree of authority, or constitutional autonomy, enjoyed by public institutions with constitutional status.

Glenny and Daglish’s definition of constitutional status is similar to other scholars’ definitions of constitutional autonomy. According to Glenny and Daglish, constitutional status is the inclusion of provisions in state constitutions that provide for “exclusive governance of the university by the institution's governing body.” Hutchens referred to the legal concept of constitutional autonomy as “the use of a constitutional provision to establish and provide legal protection for the internal control of a public college or university.” Hutchens’ limited his definition of constitutional autonomy to provisions that explicitly afford and protect the internal control of public institutions. Similarly, Beckham distinguished the concept of constitutional

100 Hutchens, “Preserving the Independence;” Deborah K. McKnight, University of Minnesota Constitutional Autonomy: A Legal Analysis (St. Paul: Research Department of the Minnesota House of Representatives, 1996); Beckham, “Reasonable Independence;” Glenny and Daglish, Public Universities.
101 Glenny & Daglish, Public Universities, 14.
status, which simply indicates the existence of a constitutional provision related to the establishment of public higher education, from the broader idea of constitutional autonomy, which assesses the degree of internal control an institution has in comparison with the state government. Beckham asserted that the wording of provisions that grant constitutional status and relevant case law define the limits of constitutional autonomy. McKnight viewed constitutional autonomy as a status that transforms a public university into a distinctive department within the state government that “is subject to judicial review and to the legislature’s police power and appropriations power,” yet still retains substantial internal control over a number of the university’s operations. McKnight stated that the purpose of constitutional autonomy is to protect the university from the undue political influence of the state legislature, to ensure that university decision-making is vested in tenured civilian boards with a dedication to education, and to nurture the campus’s commitment to academic freedom.

McKnight’s definition acknowledged the prevailing tension in the concept of constitutional autonomy. Although the state has a legitimate interest in public university governance as a gatekeeper of public interest and education, and as a significant benefactor of public institutions, universities need a certain degree of autonomy to protect their academic missions. McKnight also offered insight into the limits of constitutional autonomy that emerged from this tension by stating that public institutions with constitutional autonomy remain “subject to judicial review and to the legislature’s police power and appropriations power.” Hutchens added that various state laws restrict constitutional autonomy, and overall, myriad factors

103 Hutchens, “Preserving the Independence,” 179.
104 McKnight, University of Minnesota, 3.
105 McKnight, University of Minnesota, 3.
106 McKnight, University of Minnesota, 3.
including public sentiment, academic norms, and political constraints influence the degree of
total control that public institutions exercise within constitutional status states. Although the
precise definition of constitutional autonomy changes over time, all of the definitions refer to the
adoption of constitutional provisions as a means to defend the institutional autonomy of public
colleges and universities from excessive political meddling.107

Early studies by Elliot and Chambers recognized nine states with constitutional autonomy
provisions.108 In 1959, Moos and Rourke claimed that the effort to ground higher education in
organic law “reached its greatest achievement in American society with the establishment in six
states of institutions of higher education that have been granted constitutional status as virtually a
fourth branch of the government.”109

During the 1970s, studies by Beckham and Glenny and Daglish analyzed the issue of
constitutional autonomy. Glenny and Daglish found seven or eight states that recognized the
constitutional autonomy of their public institutions (California, Colorado, Georgia, Idaho,
Michigan, Minnesota, and Oklahoma).110 In addition, the authors concluded that due to adverse
court decisions, attorney generals’ opinions, and/or tradition, six states with constitutional
provisions that seemingly granted constitutional autonomy did not recognize the status for their
public institutions (Alabama, Arizona, Louisiana, Missouri, Nevada, and Utah). Scholars have
identified between seven and thirteen states that explicitly recognize constitutional autonomy for

108 Edward C. Elliot and Merritt M. Chambers, The Colleges and the Courts (New York: Carnegie Foundation for
the Advancement of Teaching, 1936), 134-144, Merritt M. Chambers, The Colleges and the Courts since 1950 (New
109 Moos and Francis E. Rourke, The Campus and the State, 22.
110 The authors claim that Montana had appeared to confer a degree of constitutional autonomy to public institutions
in a 1973 constitution, but the issue had not been tested in the courts by the time of publication. Glenny & Daglish,
Public Universities, 15.
public colleges and universities. Beckham identified twenty states with constitutional provisions that afford public institutions and systems a measure of constitutional recognition. Beckham split the states into three types: (1) states with constitutional provisions that form public systems and institutions yet subject them to general legislative authority (Alaska, Colorado, New Mexico, Arizona, Mississippi), (2) states with constitutional provisions that establish institutions and grant autonomy but reserve legislative authority in specified areas (California, Idaho, Nevada, and South Dakota), and (3) states which provide unfettered autonomy to the institutions and systems in their constitutions. The author claimed that nine states had a demonstrable record of case law that recognized constitutional autonomy (California, Georgia, Idaho, Louisiana, Michigan, Minnesota, Montana, Nevada, and Oklahoma).

More recently, Hutchens and McKnight conducted analyses of the status of constitutional autonomy in higher education. McKnight listed twenty states with constitutions that feature provisions explicitly recognizing the autonomy of public institutions or systems. McKnight divided the states into four categories: (1) states with significant case law on the degree of autonomy (California and Michigan), (2) states with at least one decision recognizing university autonomy, (3) states that outright deny or hardly discuss autonomy, and (4) those without any case law on the subject.

Hutchens also assessed the status of constitutional autonomy. The author identified twenty-two states that potentially have constitutional provisions granting constitutional

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111 Hutchens, “Preserving the Independence,” 275.
112 Alabama, Georgia, Louisiana, Michigan, Minnesota, Missouri, Montana, North Dakota, Oklahoma, Utah.
113 Alabama, Florida, Georgia, Hawaii, Idaho, Louisiana, Montana, Nebraska, Nevada, North Dakota, and Oklahoma.
114 Alaska, Colorado, Mississippi, Missouri, New Mexico, South Dakota, and Utah.
autonomy and through an analysis of legal materials and prior studies, organized the states into categories by level of judicial recognition and degree of constitutional autonomy. Hutchens found that courts have long recognized constitutional autonomy in California, Michigan, and Minnesota. In addition, judges have granted extensive internal authority to institutions in those states. In eleven other states, Hutchens claimed that courts have affirmatively recognized constitutional autonomy, but that the recognition and/or constitutional may be limited. Courts in Arizona, Colorado, Missouri, and Utah have rejected the presence of constitutional autonomy and in six other states, judicial recognition remains ambiguous and/or unlikely.

Further Analysis of Institutional Autonomy

Hutchens’ study extended beyond traditional legal analyses of constitutional autonomy by using the concepts of substantive and procedural autonomy from higher education literature to further explore the status. Berdahl, et al. defined substantive autonomy as “the power of the university or college in its corporate form to determine its own goals and programs (the what of academe)”\textsuperscript{115} and procedural autonomy as “the power of the university or college in its corporate form to determine the means by which its goals and programs will be pursued (the how of academe).” Rather than simply assessing the constitutional strength of autonomy provisions, Hutchens considered the operable effect on the ability of institutions to exercise control over a number of key areas, including employees and students, curriculum and academic content, and funds.

Fisher analyzed the institutional autonomy of public institutions of higher education in four states over a period of eighty years. Fisher’s study employed a methodology that

\textsuperscript{115} Altbach, Gumport, and Berdahl, \textit{American Higher Education}, 6.
quantitatively and qualitatively analyzed each state’s higher education legal acts. Fisher reviewed the founding documents that established the governance structure of public higher education in each state and also identified all of the provisions of major acts that affect institutional autonomy. Fisher contextualized the primary sources in the study by consulting “institutional histories, reports of state boards of higher education and other state agencies, reports of the U.S. Office of Education and its successors, studies of state systems of higher education done by outside consultants, reports of legislative committees, and newspapers.”¹¹⁶ The study used the founding documents to establish the governance structure of each state and then coded all of the higher education acts between 1900 and 1979 by subject areas.¹¹⁷

This dissertation differs in purpose and scope from previous analysis of institutional autonomy. The study’s comprehensive examination of the legal relationship between Penn State and Pennsylvania expands beyond an analysis of state legislative action and considers the implications of judicial and executive action. Fisher’s study narrowly focused on the role of state legislatures in the regulation of colleges and universities and relied on statutory legislation to guide the analysis of the study. In contrast, this study analyzes multiple legal sources that relate to the relationship between one university and one state.

In a recent study that examined the role of courts in resolving the balance of power between states and institutions of higher education, Conyers noted that higher education scholars have long used legal analysis to further our understanding of developments in higher

education.\textsuperscript{118} Through a legal analysis of court cases between 1900 and 1930, Conyers identified patterns of power struggles between state governments and colleges and universities. For each case that explores issues of power between states and colleges, Conyers provided a narrative that included the parties, questions of law, court’s decision, and significance of the case. Conyers’ accounts resembled the case briefs that students prepare for law school classes. From this collection of briefs, Conyers identified themes that advance our understanding of how the relationships between public institutions and states developed over time.

Similar to the study from Conyers, this dissertation also explores issues surrounding the balance of power between states and public colleges and universities, and this study also consults relevant case law to broaden our understanding of the power dynamics in the relationship between states and public institutions of higher education. In contrast to Conyers, this study focuses on the evolution of one specific relationship over its entire existence rather than the role of one legal entity, courts, in resolving issues in the institution-state relationship. The methodological assumptions of this study also differ from those of Conyers. Conyers examined the role of courts in settling conflict and questions of power between states and colleges and universities. This study embraces dialectical thinking and the premise that relationships are collections of contradictions. Following this perspective, the contradictions that embody the relationships between states and universities do not necessarily find resolutions. This dissertation uses the concept of benefits and burdens to offer insight into the legal relationship between Penn State and Pennsylvania and looks for the contradictions in burden and benefits to deepen our

understanding of the legal status of Penn State. By consulting a range of primary and secondary sources of law and examining a single institution-state relationship over time, this study builds on previous historical legal and autonomy studies by scholars of higher education law.

Conclusion

Penn State’s relationship with the state exists within the context of decreasing state appropriations, increased privatization of public higher education, and broader discussions of restructuring the relationship between public universities and the states. This study supports those discussions by researching the historical foundations of the legal relationship between the Pennsylvania State University and the Commonwealth. An analysis of the legal relationship between Penn State and Pennsylvania over time offers insight into the developments and themes that have shaped our current understanding of that relationship and suggests implications for that relationship’s future. This study builds on previous scholarship on the legal relationships between states and public institutions of higher education. The study differs in focus from Hutchens and other scholars who have analyzed autonomy and provided national overviews of the status of state constitutional provisions. Legal studies of autonomy have tended to categorize states by levels of institutional autonomy and provide updates on judicial interpretations of the constitutional provisions. This study also concerns autonomy, but examines the concept in relation to the specific legal relationship between Penn State and the Commonwealth.

This dissertation analyzes the entirety of the legal association between the University and the Commonwealth in order to identify themes and patterns that suggest new implications for the relationship and higher education in the Commonwealth. The legal research method guides this dissertation’s analysis of the institution-state relationship over time. As Conyers notes, “using
legal cases to improve our understanding of higher education has been embraced by a number of scholars.”

The works by these scholars tended to be written to provide practitioners with the most current case law on issues relevant to their day-to-day activities. The analysis of this study expands beyond cases to include other primary and secondary legal sources. A historical account of the legal relationship between Penn State and Pennsylvania sets the stage for an exploration of the implications of the relationship. This study’s consideration of the issues and themes that mark the relationship between the University and the Commonwealth informs the analysis of possible changes to the relationship.

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Chapter 3

Methods

Introduction

The primary purpose of this dissertation is to develop a fuller understanding of the legal relationship between the Pennsylvania State University and the Commonwealth of Pennsylvania. Within a broader, shifting policy context marked by declining state appropriations and the increasing privatization of public colleges and universities, this study contributes to conversations about the future role of states in public higher education. Politicians often look to public colleges and universities first when state budgets tighten because reducing support to higher education is politically more palatable than cutting funding to K-12 education, prisons, and health care. Public institutions have responded to cuts by pursuing alternative streams of revenue and increasing tuition, and “there exists an implicit understanding between state officials and institutional leaders that cuts to the expected amount of state funding will be offset at the institutional level by increases in tuition.”¹

Yet spiraling tuition has caused concern among state officials and state governments have grown increasingly reluctant to honor the implicit understanding. For example, political leaders in some states, including Massachusetts, New York, and Colorado, have criticized the rising costs of college and sought to cap tuition at public institutions.² Amidst the unwillingness of politicians to sustain traditional levels of support for public higher education, and their mounting

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¹ Morphew and Eckel, Privatizing the Public University, 112.
² Morphew and Eckel, Privatizing the Public University, 110.
critiques of public universities’ efforts to replace that support through tuition, university and state leaders have begun to question the state’s role in public higher education.³

In fact, efforts are already underway in some states to alter the nature of the legal relationships between state governments and public colleges and universities. Multiple states, including Virginia, Wisconsin, Ohio, and Texas, have introduced initiatives that modify the role of state governments in the affairs of public institutions. Initiatives that adjust the relationships between states and public institutions of higher education may have implications for the public purposes of higher education, and close attention must be paid to the potential effect that the initiatives have on college access and affordability, and the overall health of states’ economies and technology sectors.⁴

By closely studying the dynamics of the institutional-state relationship between the Commonwealth of Pennsylvania and the state’s flagship University, the Pennsylvania State University, this dissertation contributes to our understanding of the implications of decisions by universities and state governments to reevaluate their affiliations. My study tracks the historical evolution of the legal relationship between Penn State and Pennsylvania in order to offer insight into how the relationship and interpretations of the relationship have changed over time. The legal analysis focuses on aspects of the relationship that concern governance and autonomy. This study relies on contradictions related to the benefits and burdens of Penn State’s legal status to enhance understanding of the historical development of the legal relationship between Penn State

and Pennsylvania. After tracing the historical evolution of the relationship, this dissertation considers implications for Penn State and the Commonwealth of Pennsylvania.

The following questions guide this dissertation:

1. How has the legal relationship between the Commonwealth of Pennsylvania and the Pennsylvania State University evolved over time?
2. What might be the legal and policy implications of those relational changes?

The legal analysis of this study provides an historical legal overview of the development of the governance structure and relationships between the Commonwealth and the institutions of higher education in the state. Founding legal documents and other sources, such as institutional histories and state reports, inform the legal analysis. The purpose of the initial analysis is to provide background information on the landscape of public higher education in Pennsylvania, and it serves as the starting point of this study’s consideration of the legal relationship between Penn State and the Commonwealth of Pennsylvania.

The legal analysis also extends to the relationship between Penn State and Pennsylvania to explicate the historical development of that relationship. This study analyzes legal authorities that have examined the relationship between Penn State and the Commonwealth of Pennsylvania and relies on the legal research method to identify the main themes and issues that mark this relationship. This study also considers implications of the legal relationship between Penn State and the Commonwealth. The analysis offers a detailed chronicle of the evolution of the institutional-state relationship, provides practical guidance for policymakers in Pennsylvania, and addresses significant legal issues for all researchers interested in public higher education governance.
Legal Analysis

Introduction

This dissertation employs the traditional legal research method (“legal research method”) to guide this study’s account of the evolution of the legal relationship between the Commonwealth and Penn State. The legal research method “can be described as a form of historical-legal research that is neither qualitative nor quantitative.” The purpose of legal research is to interpret and explicate the law. The legal research method requires scholars to look “to the past, present, and future for a variety of purposes.” By placing legal issues in context, education law researchers identify the current status of law related to a research topic and also identify points in question for future consideration. Due to the historical nature of legal research, the legal research method is uniquely suited to inform the development of a holistic account of the evolution and implications of the legal relationship between Penn State and Pennsylvania.

Traditional Legal Research Method

The legal analysis of this dissertation focuses on the legal environment of Penn State which includes external law, e.g., law created by federal, state, and local governments, and internal law, the specific rules and regulations of institutions. Together – external law and internal law – form the legal environment of institutions of higher education. External law supersedes internal law and is the primary focus of my dissertation’s legal analysis. As state

governments generally have authority for higher education, the legal analysis of this dissertation predominantly concerns the legal authorities of the Commonwealth of Pennsylvania.

Primary and secondary sources of law provide the data for traditional legal research. The primary sources of law are enacted law and case law. Enacted law refers to constitutions, statutes, and administrative regulations, and case law is judge-made law. In the American legal system, “analysis of a problem is controlled by enacted law that regulates the subject matter of that problem, and by the decisions of earlier cases that involved issues and facts similar to those in that problem.”10 Legal researchers usually first consult the enacted law that relates to their problem, then analyze cases that have interpreted that enacted law and determine whether those cases contain any relevant common law.

The legal system of the United States derives from the English system of common law, and in common law countries, the case opinions of judges serve as the rules of law.11 The various local, state, and federal legal jurisdictions establish the scope of authority that enables judges to resolve cases between opposing parties. Once resolved, the decisions become law and guide future litigation. The American judiciary is a hierarchical system of courts, and the decisions of higher courts are binding on lower courts. The decisions of judges serve two purposes. First, each decision adjudicates the controversy before the issuing court, and second, “if that decision is published, it becomes available for use by judges in later litigation.” The doctrine of precedent states that “judges should resolve litigation according to the resolution of similar cases in the past,” and as a result, common-law is referred to as “judge-made law.”12

11 Shapo, Walter, and Fajans, Writing and Analysis, 2.
12 Shapo, Walter, and Fajans, Writing and Analysis, 3.
Although enacted law, e.g., constitutional provisions and statutes, supersede case law, since the United States is a common-law country, judicial opinions can attain the status of law through the system of precedent. In the system of precedent, prior judicial opinions serve as a guide for resolution of future litigation. The fundamental basis of common law systems is the doctrine of precedent or *stare decisis*, which states “judges should resolve litigation according to the resolution of similar cases in the past.”  

Accordingly, legal researchers must consult the prior decisions of judges to determine the current status and interpretation of enacted law.

Case law and enacted law are organized along vertical hierarchies. Constitutions are the foundational source of law in a jurisdiction; they outline the framework of the jurisdiction’s government and define the rights and responsibilities of its citizens. The United States Constitution is the supreme law of the land and describes the relationship between the legislative, executive, and judicial branches of the American government. The legislative branch creates law in the form of statutes, the executive branch enforces law through regulations, and the judicial branch interprets the law in court opinions. Constitutions, statutes, regulations, and cases represent the four types of primary sources of law in the United States.

Courts must adhere to constitutions and statutes as they occupy the highest level of legal authority in a jurisdiction. A statute, which is the result of the legislative process, is defined as “a command of a particular legislature (federal, state, municipal) that must be obeyed, under threat of governmental sanction, by those who behavior it regulates.”  

In the hierarchy of statutory law, the United States Constitution, federal statutes, international treaties, and federal

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administrative regulations sit above state constitutions, state statutes, state administrative regulations, and municipal enactments.” The legislature may only pass legislation within the purview of the powers conferred by the constitution of its jurisdiction. Therefore, a court must follow the directive of a statute unless the court finds the statute to be unconstitutional. In that case, the court will rule that the statute is invalid.

The hierarchy of case law parrots the vertical structure of the American court system. Case law emanates from the federal, state, and local court systems, and each of the courts in these systems has its own jurisdiction or authority to decide cases. The assignment of jurisdiction is influenced by many factors, including location and subject matter. Some courts have jurisdiction for cases within their geographic vicinity, and others may have subject matter jurisdiction, which “is the authority of a court to resolve disputes in only a particular area of the law, such as criminal law.”

The courts of the local, state, and federal systems are also organized along a hierarchy. The hierarchy of courts in state systems usually consists of three levels: courts of original jurisdiction, trial courts, and appellate courts. At the bottom of the hierarchy sits courts of original jurisdiction which are the courts where litigation originates. The courts of original jurisdiction often do not follow normal court rules and procedures; their jurisdiction is typically restricted to certain cases and their decisions have no precedential value.

The courts at the next level are trial courts. Trial courts are where litigation as we know it generally begins. In trial courts, plaintiffs and defendants litigate cases of all types before a

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judge, and the litigants must adhere to customary trial procedures. Litigants may appeal the decisions of trial courts to the appellate courts at the next level. The majority of states have two types of appellate courts: intermediate and supreme. The supreme court is the highest court in the state system and by and large provides the venue for appeals from the intermediate court of appeals. The supreme court is often referred to as the court of last resort because “there is no further appeal of the decisions of the state court of last resort as to matters of state law.”

The federal system has a similar hierarchy of courts as the state system. In the federal system, federal district courts are the trial courts, circuit courts are the appellate courts, and the United States Supreme Court is the both the highest federal court and the court with ultimate authority for the entire country’s court system. Federal courts have jurisdiction for cases involving federal law, for lawsuits between citizens of different states, and for cases naming the United States as a party.

The vertical hierarchy of the court system is critical to the doctrine of precedent. American law requires courts to adhere to precedents that carry binding authority. A court’s own previous decisions in precedential cases or the prior decisions of higher courts qualify as binding authority. When deciding cases in which binding authority exists, courts must follow the binding authority or outright reject it. Courts may also consider non-binding authority, e.g., the decisions of lower courts or courts in other states. This type of authority, referred to as persuasive authority, may influence the decision of a court, but does not bind it.

In the state system of courts, “a state court must follow precedents from the higher courts in the state in matters of state law.” The exact relationship between the intermediate appellate

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courts and the trial courts will vary from state to state, but as a general rule, appellate court precedents bind trial courts. In the federal system, United States Supreme Court decisions on matters of constitutional and federal law are binding on all courts in the country.\textsuperscript{18} A circuit court’s decisions qualify as binding authority for itself, but not for other circuit courts. The district courts must follow their own decisions, the decisions of their home circuits, and the decisions of the U.S. Supreme Court.

The doctrine of stare decisis implies that American courts do not have the flexibility to deviate from prior decisions; however, for myriad reasons, courts and judges may reject its earlier rulings. For example, a court may elect not to follow a prior opinion that it finds to be outdated or a court may overrule an earlier ruling that “has produced undesirable results.”\textsuperscript{19} The doctrine of stare decisis is limited to cases in which the facts, causes of actions, and issues substantially resemble those of a previous case with binding authority. Even in applicable cases, judges and courts are only obligated to adhere to the holding of the decision. The holding “is the court’s decision on the issue or issues litigated.”\textsuperscript{20} These limitations, and others, moderate the compulsory effect of stare decisis.

Judicial opinions also include non-binding statements called “dicta” that may be instructive to judges, lawyers, and legal researchers. Dicta are defined as statements “of opinion or belief considered authoritative because of the dignity of the person making it.”\textsuperscript{21} Dicta often clarify the limits of a decision and may carry the weight of persuasive authority.

\textsuperscript{18} Shapo, Walter, and Fajans, \textit{Writing and Analysis}, 9.
\textsuperscript{19} Shapo, Walter, and Fajans, \textit{Writing and Analysis}, 10.
\textsuperscript{20} Shapo, Walter, and Fajans, \textit{Writing and Analysis}, 11.
\textsuperscript{21} \textit{Black’s Law Dictionary}, 7\textsuperscript{th} ed. (1999), s.v. “dicta.”
In legal research, enacted law, e.g., statutes and constitutions, are another primary source of law. Statutes supersede case law, and cases often interpret the meaning and application of statutes.\textsuperscript{22} Legal researchers should first look to statutes when analyzing a legal issue. According to the traditional theory of statutory interpretation, “statutes are commands of the legislature that must be followed by the courts.”\textsuperscript{23} In the interpretation of statutes, one “must follow the legislative command by applying the statute’s language or referring to legislative intent or purpose as discerned through legislative history or canons of construction.”\textsuperscript{24} Canons of construction are a collection of judicially-created tenets which convey the collective wisdom of our legal system. An example of a canon of construction is the maxim that, “statutes should be read to avoid constitutional questions.”\textsuperscript{25} Critics malign canons of construction for their lack of consistency and coherence. Despite this criticism, judges continue to have discretion over the use of canons of construction to determine the meaning of statutes. Nevertheless, the traditional approach to statutory interpretation favors a plain reading of the text of the statute and a review of the legislative history over the use of canons of construction.

Data

The previous section provides a brief overview of the traditional legal research method. The section discusses salient features of American law, introduces the different types of primary sources of law, and delineates the hierarchy of authority in the court and statutory systems. This section reviews the data and databases used to collect legal materials for the study, and the next section introduces the analytical framework of this dissertation.

\textsuperscript{22} Shapo, Walter, & Fajans, Writing & Analysis, 2.
\textsuperscript{24} Mikva and Lane, An Introduction to Statutory, 4-5.
\textsuperscript{25} Mikva and Lane, An Introduction to Statutory, 24.
In general, “states have the greatest reservoir of legal authority over postsecondary education.” This dissertation analyzes the boundary of that authority with respect to the Commonwealth of Pennsylvania and the Pennsylvania State University. Federal and local governments exercise limited control over public higher education; however, disputes tend to arise over the distribution of authority between local, state, and federal governments. This study consults federal and local materials, but will relies primarily on state legal sources.

The legal analysis of this dissertation relies on four types of primary sources of law: constitutions, statutes, regulations, and cases. This study reviews all state and federal cases that name the Pennsylvania State University as a party, and uses the search tools from Westlaw and other legal databases, such as HeinOnline, to identify cases that discuss the legal relationship between Penn State and Pennsylvania as a matter of law or as a material fact. The legal analysis of this study also includes cases in which judges refer to the institution-state relationship in dicta.

This study also analyzes cases between the Commonwealth and other public institutions of higher education. Penn State is among a group of public institutions in Pennsylvania that is classified as state-related universities. Pennsylvania’s General Assembly legally defines Penn State, the University of Pittsburgh (Pitt), Temple University (Temple), and Lincoln University (Lincoln) as state-related institutions. The cases that involve the other state-related universities are instructive in clarifying the legal relationship between Penn State and Pennsylvania. Cases from local and federal court systems may also provide other systems’ interpretations of the relationship between Penn State and Pennsylvania.

This study also examines state statutes that have bearing on the relationship between Penn State and Pennsylvania; for example, statutes that directly reference the Pennsylvania State University as well as statutes that apply to state-related universities. This study employs the legal research method to interpret statutes and assess their significance to the relationship between Penn State and Pennsylvania. In addition to the text of statutes, the study also analyzes their legislative histories to clarify their meaning. A legislative history tracks the formation of legislation through its various stages of development in legislative hearings and often reveals the statutory intent of legislative bodies. Relevant statutory material includes the Pennsylvania Constitution, Penn State’s charter, legislative histories, and various regulations that apply to Penn State.

In legal research, “secondary sources are writings about the law rather than the law itself.” Secondary sources generally either summarize the law in a certain area or offer arguments on various legal issues. Legal researchers primarily produce the latter types of materials in law review articles and books. Legal summaries may be found in legal dictionaries and encyclopedias, restatements of the law, books, and periodicals. Secondary legal sources are not authoritative sources, but can help guide researchers to relevant primary source materials. For this study, the secondary sources that summarize the law help guide the search for primary resources on the relationship between Penn State and the Commonwealth, and they also offer insight into the current status of autonomy in public higher education in Pennsylvania.

review articles also inform this dissertation by offering novel ways of approaching the institutional-state relationship in public higher education.

Three electronic databases, Lexis-Nexis (Lexis), Westlaw, and HeinOnline, provide the data for the legal analysis in this dissertation. Lexis-Nexis and Westlaw are the foremost online research systems for contemporary legal research, and the HeinOnline database supplements contemporary legal materials with older Pennsylvania cases and statutes. The databases provide the most up-to-date and extensive collection of primary legal sources, and they also include comprehensive secondary materials. Westlaw and Lexis offer a number of helpful tools to assist in the search for legal materials. Westlaw has a key number digest system for cases that allows legal researchers to access all cases related to specific topics. The key number digest system consists of over four hundred numbered and keyed subjects organized under broad major headings. For example, specific legal issues in higher education fall under the topic of colleges and universities. Westlaw positions all of the keynotes along with summaries of their respective points of law at the beginning of each opinion. Westlaw and Lexis also provide citators for all of the legal materials in their databases. Citators collect the entire judicial history of courts opinions, statutes, and other legal materials, and enable a researcher to confirm the status of a statute or ruling and find related cases. The key number digest system and citators assist the search for cases and statutes relevant to the legal relationship between Penn State and the Commonwealth.

Lexis and Westlaw also provide access to the constitution and statutes of Pennsylvania. In addition, the databases include legislative history for legislative enactments, administrative law materials, law reviews, legal journals, and other publications. Legislative histories record the legislative process and help clarify the meaning and context of a statute for judges, attorneys, and legal researchers. This study accesses local legal materials through county websites.  

A search of all Penn State-related federal and Pennsylvania statutes, cases, regulations, and secondary sources guides the historical legal analysis of this study. Since states have extensive control over higher education, the search primarily focuses on decisions from the courts of the Unified Judicial System of Pennsylvania. Dating back to the 1680s, Pennsylvania has one of the country’s oldest court systems. In 1968, the Pennsylvania Constitution organized the state courts into the Unified Judicial System of Pennsylvania. The Pennsylvania Supreme Court sits atop the system as the state’s appellate court of last resort. The court system has two intermediate appellate courts, the Pennsylvania Superior Court, which hears most appeals from the trial court, and the Commonwealth Court, which has limited jurisdiction for any appellate cases involving the Commonwealth or one of its agencies. The Court of Common Pleas is Pennsylvania’s general trial court, and the first level of the state’s judiciary consists of a variety of minor courts, including magistrate courts and the Traffic Court of Philadelphia.

In addition to court decisions, this dissertation reviews all statutes, regulations, and secondary sources that mention Penn State. Over the last one hundred and sixty years, the Pennsylvania State University has had four difference names: Farmers’ High School,  

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32 Liu et. al., Pennsylvania Legal Research, 1-10, 228-240.
Agricultural College of Pennsylvania, The Pennsylvania State College, and The Pennsylvania State University. Each search accounts for the appropriate name of the institution at the time.

Analytical Framework

Primary and secondary sources of law provide the majority of the data for the legal analysis of this dissertation. To provide context for an examination of Penn State’s legal status, the legal analysis offers a historical overview of early legal developments related to higher education in Pennsylvania and the founding of Penn State. Following the historical overview, this study traces the evolution of the legal relationship between Penn State and the Commonwealth through an analysis of relevant attorney general opinions, statutes, and court cases. An examination of the benefits and burdens of Penn State’s legal status over time informs this study’s account of the evolution of the institution-state relationship.

This study analyzes the historical development of the legal relationship between Penn State and the Commonwealth of Pennsylvania. To advance understanding of that relationship, this study primarily relies on the legal research method to analyze primary and secondary sources of law relevant to Penn State, the Commonwealth, and the state-related status. Researchers have long looked to legal cases to explain and inform our understanding of developments in higher education. Conyers notes that Chambers and Elliott likely published the first compendium of cases on higher education law in 1936. Elliott states that the analysis of state and federal laws and cases provides scholars with an understanding of the relationship between institutions of higher education and the external sources of authority, “which are bound to produce

modifications and limitations”\textsuperscript{34} on the autonomy of colleges and universities. Elliott adds that judicial decisions offer insight into the boundaries of autonomy for colleges and universities and are critical to the development of higher education policy in the United States.\textsuperscript{35} The scope of this dissertation expands beyond previous studies by considering secondary sources of law for insight into the legal relationship between the Commonwealth and the University.

Dialectical thinking informs this study’s consideration of the broader institutional-state relationship. The existence of simultaneous, contradictory interpretations of the legal status of Penn State guides the analysis of the historical development and context of the association between the University and the Commonwealth. This study adopts a dialectical view that the legal relationship between Penn State and Pennsylvania is defined by the relationship’s historical context and development. To understand an aspect of social life, dialectical thinkers assert that we must identify, “both the process by which it has become that and the broader interactive context in which it is found.”\textsuperscript{36} This study embraces this general worldview by accepting the mutual existence of two contradictory perceptions of the legal relationship between Penn State and the Commonwealth. To comprehensively capture the processual evolution, the analysis of this dissertation begins with the founding of Penn State.

According to the dialectical view, society is in a state of constant flux, i.e., society is continuously ensnared in a process of transformation that is driven by opposing forces. The transformative tension between opposing forces, referred to as contradiction, is “present whenever two tendencies or forces are interdependent (the dialectical principle of unity) yet

\textsuperscript{34} Elliott and Chambers, \textit{The Colleges and the Courts}, vi.
\textsuperscript{35} Elliott and Chambers, \textit{The Colleges and the Courts}, vi.
mutually negate one another (the principle of negation).”37 Dialectical thinkers analyze and make meaning from the interaction between the unified oppositions of social arrangements. This dissertation utilizes the contradictions between benefits and burdens to examine the nuances of the evolution of the legal institution-state relationship. The analysis identifies relevant themes across legal authorities and interprets their significance to the overall legal relationship between Penn State and Pennsylvania. By recognizing the mutual, complementary, and fluctuating existence of the burdens and benefits, this study reveals the complexities of the legal relationship between the University and the Commonwealth.

The legal concepts of benefits and burdens originate in Anglo-American property law and refer to the land use agreements in the law of servitudes. Servitudes create rights and obligations that bind to the ownership or occupation of land and continue with successive owners. The Anglo-American law of servitudes dates back to the sixteenth century and the dissolution of monasteries under Henry VIII. In 1540, the mass transfer of Catholic property to private landowners occasioned the need to pass legislation that preserved the existing rights and responsibilities associated with the land.38 The density challenges presented by the Industrial Revolution exacerbated the need to use legal devices for land planning and spurred the development of modern American servitude law.39

The law of servitudes is notoriously complex with one scholar describing it as “an unspeakable quagmire” and claiming that any person who attempts to comprehend, “this

formidable wilderness never emerges unscarred.” Nevertheless, the concepts of benefits and burdens inherent in the law of servitudes helps explain the development of the legal relationship between the Commonwealth of Pennsylvania and the Pennsylvania State University.

In American law, servitudes include easements, covenants, and profits. Easements generally provide a person with a right to use another person’s land for a limited purpose. A common type of easement that explains the benefits and burdens associated with the law of servitudes is the utility easement. Public utility easements are a type of public easement, or “an easement for the benefit of an entire community,” that allows utility companies to use a portion of a landowner’s property to erect, lay, and maintain lines for power, cable, phone, etc. A utility easement creates burdens and benefits for utility companies and landowners. The easement burdens the portion of land that hosts the utility lines by limiting the landowner’s rights to full enjoyment and use of the land, i.e., the easement prevents landowners from interfering with aboveground and underground lines. However, easements also provide landowners with the benefit of utilities, including the benefit of services and any increase in value afford to the property by virtue of having access to utilities. Utility companies, the beneficiaries of the easement, have the benefit of access to the property of the landowner for a limited purpose, but also assume the burdens of the construction and maintenance of lines. This dissertation looks to the benefits and burdens of Penn State’s legal status over time to help illustrate the evolution of the University’s legal relationship with the state.

Webster’s Dictionary defines a benefit as “something that produces good or helpful results or effects or that promotes well-being,” and Oxford’s English Dictionary identifies a benefit as “an advantage or profit gained from something.” This dissertation applies the dictionary definitions of “benefits” to analyze and discuss the role and implications of legal developments in the legal relationship between Penn State and the Commonwealth for producing, promoting, or serving as an advantage for institutional autonomy. The study also uses the concept of ‘burdens’ from property to law to examine how the same developments restrict institutional autonomy and/or state control. The analysis of benefits and burdens has significance for Penn State and broader implications for higher education.

This study consults typologies from higher education literatures to help guide thinking about autonomy. The Carnegie Foundation classifies judicial decisions related to higher education under three headings: academic, personnel, and administrative. Academic decisions relate to purely educational matters such as admissions, curriculum, and accreditation. Personnel decisions cover areas like the hiring, promotion, and tenure of faculty and union negotiations, and administrative decisions refer to strategic decisions concerning budgets, planning, and buildings. Volkwein identifies budgetary or financial decisions as a distinct category. This dissertation combines the classification systems of Volkwein and the Carnegies Foundation to categorize legal acts based on their impact on financial, appointive (personnel), academic, or administrative autonomy. The classification of legal acts by subject matter and autonomy type

44 Carnegie Foundation, The Control of the Campus, 1-25.
45 Volkwein, “Campus Autonomy,” 510-520.
provides for a thematic analysis of changes in emphasis and degree of autonomy in the legal relationship between the Commonwealth and the University. By combining the legal research method with an analysis of the subject matter and autonomy types of legal acts, this study advances a more comprehensive understanding of nuances of the legal relationship between Penn State and the Commonwealth.

The study also considers the implications of the relationship between Penn State and Pennsylvania. Lyall and Sell suggest that due to the downward trend in state support for public higher education, “university presidents and state governors must begin to seriously consider and plan for alternatives by engaging in dialogue with faculty, students, and alumni and with state governments, legislatures, business communities, and other sectors.”

Although the movement to change the traditional bond between the states and public colleges and universities is still in its infancy, the evolution “toward some new forms of state-sponsored public higher education relationships is already under way.” The results from the legal analysis offers potential new directions for the relationship between Penn State and Pennsylvania.

Conclusion

This dissertation defines the evolution of the legal relationship Penn State and Pennsylvania through an analysis of primary and secondary sources of law. The legal analysis guides the identification of themes in the interpretations of the legal relationship between Penn State and the Commonwealth of Pennsylvania. The methodology of the study facilitates a deeper

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understanding of the development and implications of the relationship between Penn State and Pennsylvania.
Chapter 4

Development of Legal Relationships between States and Higher Education

This chapter reviews legal developments in American higher education leading up to the founding of Penn State. The review focuses on developments related to the point of origin for most colleges and state governments, the college charter. Both public and private institutions of higher education derive their existence from and operate under a corporate structure. The chapter begins by reviewing the authority of the state in relation to college corporations and discusses the evolution of the corporate form. Next, the chapter identifies the implications of nineteenth century charter cases for the legal development of higher education in the U.S. and Pennsylvania. The chapter reveals the early contradictions of burdens and benefits that marked the early legal relationships between the Commonwealth and institutions of higher education and which carry over to the founding of Penn State.

College Corporations

State law provides the primary source of legal authority over higher education. The United States Constitution defines the scope and limits of the federal government’s legal authority and supersedes all other federal and state law. Education is not addressed in the U.S. Constitution, and the powers of the federal government are typically limited to those expressed in the document. However, broad powers enumerated in other sections of the U.S. Constitution grant the federal government with superseding authority over the states for many matters related

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2 Dartmouth v. Woodward, 17 U.S. 518 (1819); Sage v. Dillard 54 Ky. 340 (1854); Pennsylvania College Cases 80 U.S. 190 (1871); Allen v. McKeen 1 Summer U.S. 276 (1833).
to education.\textsuperscript{3} In the U.S. system of federalism, states are viewed to derive general legislative authority from the delegated powers of the Tenth Amendment of the U.S. Constitution. Therefore, state law provides the context for the legal analysis of higher education governance.

The fundamental bases for legal relationships between states and their institutions of higher education can be found in state constitutions and statutes, and the charters of individual colleges and universities.\textsuperscript{4} States have extensive legal relationships with institutions of higher education. State constitutions generally include provisions granting states definitive authority over education, and states typically have the authority to create and terminate institutions of higher education. Several powers reserved to the states, including general police, fiscal, and administrative power, provide them with regulatory authority for higher education. Public colleges and universities are created, controlled, and supported by the state.\textsuperscript{5} Public institutions are generally created by state statutes or state constitutions. Constitutional status often confers public institutions a greater degree of autonomy than other public colleges and universities.\textsuperscript{6} Private institutions are not the creation nor under the control of the state government. In general, institutions founded by private individuals and/or funded by private sponsors are considered private colleges and universities.\textsuperscript{7}

The charter establishes the legal existence of a college corporation and serves as the point of origin in the relationship between a state and an institution of higher education. The legal concept of a corporation originated in Roman law, but really came into view in England during

\begin{itemize}
  \item \textsuperscript{3} Kaplin & Lee, \textit{The Law of Higher Education}, 612-613.
  \item \textsuperscript{5} Lister W. Bartlett, \textit{State Control of Private Incorporated Institutions} (New York: Columbia University, 1926), 7.
  \item \textsuperscript{6} Hutchens, “Preserving the Independence.”
  \item \textsuperscript{7} 15A Am. Jur. Colleges and Universities § 2; Board of Trustees of Vincennes University v. State of Indiana, 55 U.S. 268 (1852).
\end{itemize}
the Middle Ages. Corporate charters enabled English monarchs to systematically bestow authority for myriad activities to the cities and towns that surrounded their castles. The charters provided protection and support from the crown and conferred certain duties, rights, and privileges to the aggregate residents of the municipalities. The idea evolved throughout the Middle Ages to describe organized groups of people collectively existing as separate legal entities with independent rights and duties. This important development paved the way for the corporate law concept of limited liability, e.g., not holding members of a municipality jointly and individually responsible for the personal debts of other members. The emergence of the distinct legal personality of a corporation coincided with the development of the concept of “successors” having vested corporate rights and duties. During the fourteenth century, the use of the common seal as the sole means to conduct business on behalf of the corporation further solidified its distinct legal personality.\(^8\)

In 1765, Sir William Blackstone enumerated the foundational principles that underlie the law of corporations. The fundamental elements of corporate law concern three types of relations: governmental, internal, and societal. First, corporations derive their existence, purposes, and scope of authority and activity from the state. A charter granted by the state lists the purposes, rights, and obligations of the corporation. Second, the corporation consists of an aggregate of individual persons who enjoy perpetual succession, i.e., the corporation has the ability to replace members and provide for the corporation’s continued existence. Through a constitution, corporations define the eligibility of members and the voting rules and procedures that determine corporate action. Third, corporations exist as distinct, legal entities, or “artificial persons,” in

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\(^8\) Davis, *Corporations*, 217-220.
their relations with society, a designation that allows them to possess some of the characteristics of a natural person, including a name, the right to sue or be sued, and the right to own property.9

The corporation as a legal entity was already familiar to Americans prior to the establishment of the first colonial colleges. England employed the corporate formation to effectively address the legal challenges posed by colonization. Colonization was legally more complex than other relationships with foreign lands. In contrast to the mere establishment of trade relations with other countries, the founding of American colonies required the imposition of English laws and customs in foreign lands and the conversion of residents of those lands into English subjects. Further complicating the process, the colonization efforts were spearheaded by private citizens rather than the English government. The government of England utilized corporate charters to promote and bring order to the public-private process of colonization by proscribing authority and granting privileges for political and economic activities to private entities.10 The societal challenges posed by colonization required colonial corporations to exercise a broad set of powers. The sixteenth and seventeenth century charters reflected the commercial and political objectives of the colonies and provided the corporations with the authority to conduct a wide range of activities, including the fortification of settlements, mining of land for minerals, creation of currency, and establishment of laws.11 The charter organized and regulated the fundamental activities of colonial life, and therefore, colonies recognized the charter as a legitimate legal instrument to establish colonial colleges.

10 Davis, *Corporations*, 158.
The colonies chartered nine colleges prior to the American Revolution. With the establishment of a newly independent country in 1776, and the creation of the United States Constitution in 1789, uncertainly surrounded the entire legal framework of the American experiment. The Dartmouth case of 1819 clarified some of the ambiguity related to colonial charters and offered general insight into the legal nature and functions of charters for institution of higher education. In the Dartmouth case, the legislature of New Hampshire attempted to exert control over the board of trustees of Dartmouth in violation of the original charter issued under seal of King George III. The New Hampshire legislature altered the charter by changing the composition and trustee selection process of the board. The decision of the United State Supreme Court found the actions of the legislature of New Hampshire to be unconstitutional in violation of Article I, Section 10 of the Constitution of the United States.\(^\text{12}\) Thus, the U.S. Supreme Court recognized the original charter as a contract, which “is an agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”\(^\text{13}\)

Article I, Section 10 of the U.S. Constitution, referred to as the Contract Clause, prohibits states from passing laws and “impairing the obligation of contracts.”\(^\text{14}\) Therefore, the actions of the legislature of New Hampshire unconstitutionally violated the contract between Dartmouth and the English monarchy. The recognition of the charter as a contract offered college corporations a degree of constitutional protection from the capriciousness of state legislatures and established “that an act of legislature altering the terms of the contract embodied in the charter must have, as a general rule, the assent of the corporation if the act is to be constitutional,

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\(^{12}\) *Dartmouth*, 17 U.S. at 518.

\(^{13}\) *Black’s Law*, 7th ed. (1999), s.v. “contract.”

\(^{14}\) U.S. Const. art. I, § 10, cl. 1.
where the right to amend the charter is not reserved in the original contract.”^15 Later cases demonstrated that legislative acts cannot unconstitutionally impair the obligations of the college charter even with assent of the college corporation.^

The nineteenth century college charter cases established the legal definition and effect of the charter and also offered insight into the burdens and benefits that exist at the point of origin in the legal relationship between states and institutions of higher education. The charter is a “contract between the state, the founder, and the objects of the charity,” and delineates burdens and benefits to both the state and institutions of higher education.^

Both the state and the members of a corporation have the burden of abiding by the stipulations of the charter. Either party can seek relief from the courts if the other party violates the terms of the contract. For example, trustees of an institution have the burden of properly handling any assets placed in their trust in support of the college or the founder’s will. However, the charter offers the college corporation a measure of protection from external interference in the carrying out of the founder’s will. The courts can only intervene in instances in which the corporation fails to abide by the stipulations of the charter. Therefore, the burden of the college to carry out the will of the founder is countered by the benefit of protection from legislative interference.

The nineteenth century college charter cases also established that the terms of the charter dictate whether a college corporation is public or private. This legal finding conferred a significant benefit to college corporations and provided them with a substantial measure of autonomy. Until the Dartmouth case, for all intents and purposes, colonial colleges existed as


^16 Sage, 54 Ky. 340; Pennsylvania College, 80 U.S. 190; Allen, 1 Summer U.S. 276.

quasi-public institutions.\textsuperscript{18} Legislatures had assumed the right to control colleges irrespective of
the terms of the charter. The Dartmouth case clarified the rights of college corporations and
provided them protection from undue legislative interference. Although the distinction between
public and private colleges and the full legal effect of charters remained unclear immediately
following 1819, the Dartmouth case confirmed the status of the charter as a contract that
qualified for constitutional protections.

The Dartmouth case revealed one of the early contradictions of the legal development of
American higher education. After 1819, uncertainty still surrounded the legal status of college
corporations, and colleges in the early nineteenth century still existed “as semipublic,
semiprivate institutions.”\textsuperscript{19} The uncertainty arose from the significant role that governmental
entities played in the organization and support of these institutions. For example, early colleges,
such as Yale, Harvard, Columbia, and Dartmouth, received land and cash grants from state
governments for roughly fifty years following the American Revolution. During that time, the
institutions benefitted from the substantial amount of funds states received in recuperation for
wartime expenses and as bonuses for bank charters.\textsuperscript{20} The high level of state support suggested
that the colleges were agencies of colonial governments.

In addition, state government leaders often had positions on the governance boards of
colonial colleges or provided oversight to them as was the case with the New York Regents and
Columbia.\textsuperscript{21} In determining the public or private status of a college, the nineteenth century

\textsuperscript{18} Clapp, “The College Charter,” 84; Geiger, The American College, 19.
\textsuperscript{19} Roger L. Geiger, ed., The American College in the Nineteenth Century (Nashville: Vanderbilt University Press,
2000), location 3962 (Kindle edition).
\textsuperscript{20} John S. Whitehead, The Separation of College and State: Columbia, Dartmouth, Harvard, and Yale, 1776-1876
\textsuperscript{21} Whitehead, The Separation, 90.
college charter cases privileged the contractual terms of charters over the mere presence of public funding and state participation in governance. However, before and after the Dartmouth case of 1819, the distinction between public and private colleges continued to be murky as the explicitly public state universities founded prior to the mid-nineteenth century did not enjoy substantial financial support from their state legislatures nor did the public necessarily assume responsibility for these public institutions.  

The Dartmouth case’s recognition of the charter as a contract had significant implications for institutional autonomy and the development of legal relationships between state governments and institutions of higher education. The college charter cases established limitations on the authority of state legislatures to revoke, annul, or amend the charters of college corporations. However, well into the nineteenth century, uncertainty surrounded the legal effect of charters, and stakeholders continued to view colleges as quasi-public institutions. Further, state governments controlled colleges through other means. States possessed two resources that early colleges needed to sustain their operations: land and money. Prior to and following the Dartmouth case of 1819, state legislatures utilized the power of the purse to exert control over colleges. Additionally, states followed Justice Story’s advice, and began to protect their interests in the original charters issued for colleges and universities. The next section explores the establishment of legal relationships between the Commonwealth and Pennsylvania’s early colleges. The section discusses how the Commonwealth influenced the organization and governance of the state’s early colleges and clarified the balance of authority in the institutional-state relationship on the eve of the founding of Penn State.

Early Legal Relationships between Commonwealth and Pennsylvania Colleges and Universities

The previous section discussed the emergence of college corporations in colonial America and the impact of the college charter cases had on the legal relationships between state governments and institutions of higher education. The distinctions between public and private colleges remained blurry following the Dartmouth case of 1819 as state legislatures continued to assume a degree of responsibility for colleges and universities.\textsuperscript{23} State legislatures provided financial support to institutions, and government leaders often participated in college governance. The involvement of the state in the support and management of colleges obscured the distinction between public and private higher education.\textsuperscript{24} This section reviews the legal themes that emerged from the establishment of Pennsylvania’s early colleges.

This section reviews themes in the evolution of legal relationships between Pennsylvania colleges and the Commonwealth prior to the founding of Penn State in 1855. The section specifically focuses on developments related to the charters of three colleges: Dickinson College, the College of Philadelphia, and Allegheny College. A review of the charter and early history of Dickinson College illustrates the influence of Pennsylvania’s legislature on the organization and governance of the early colleges of the Commonwealth. The 1779 revocation of the charter of the College of Philadelphia revealed that the General Assembly assumed considerable authority over the colleges of the Commonwealth and that charters did not necessarily protect against legislative intrusions of institutional autonomy. Throughout the nineteenth century, the General

\textsuperscript{23} Whitehead, \textit{The Separation}, 142.
\textsuperscript{24} Geiger, \textit{The American College}, Location 3962 (Kindle edition).
Assembly expanded and preserved the interests of the Commonwealth in college charters. However, Allegheny College had already formed a governing board, hired faculty, and enrolled students before the legislature had approved the institution’s charter. This incongruity reflected the General Assembly’s apathy toward colleges of the Commonwealth and further obscured the legal effect of charters. This section establishes the power of the purse as the principal source of legislative authority over Pennsylvania colleges and identifies an institution’s willingness and capacity to compromise in return for state recognition and funding as an enduring theme in the legal relationship between the Commonwealth and institutions of higher education in Pennsylvania.

Prior to the nineteenth century, colleges and college degrees were relatively scarce, and the cause of higher education did not attract strong support among government leaders. At the close of the eighteenth century, only eighteen colleges existed with a total enrollment of less than 1,200 students. Less than one in every two hundred white males held a degree while nearly one in every three adults held a college degree in 2015. Additionally, religious groups had founded and operated nearly all existing institutions of higher education and stood united in their opposition to the involvement of the government in college affairs. However, colonial governments established the precedent of providing land to support education. Land was plentiful and served as the principal currency of wealth in the young, burgeoning nation, and the government distributed property to support individuals, states, and private entities. For example, in 1619, the Virginia Company allotted land for the founding of a university in the Virginia

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colony. Following the American Revolution, Congress continued the practice of granting land for educational purposes.\textsuperscript{27} The Northwest Ordinance of 1787 affirmed the critical role of education in supporting the religious, moral, and educational needs of the nation by dedicating a portion of land sales by townships to fund public elementary education.\textsuperscript{28}

Throughout the late eighteenth and early nineteenth centuries, Pennsylvania established an early pattern of limited support for the nascent colleges of the state. During the 1780s, Dickinson College and Franklin College each received grants of ten thousand acres of land from the legislature. The General Assembly allocated forty acres of land to the Western University upon its incorporation in 1819. Although the legislature distributed land and funds to a number of colleges and universities throughout the nineteenth century, the support generally amounted to meager, one-time appropriations that failed to mitigate the financial difficulties faced by the fledgling colleges. As a result, institutions often appealed to the legislature for additional funds.

\textit{Dickinson College}

The case of Dickinson College offered insight into the financial difficulties and legal considerations confronting early nineteenth century colleges in Pennsylvania. Following an 1837 legislative visit to Dickinson College in Carlisle, PA, Pennsylvania State Senator John James Pearson issued a report in support of a proposed bill to provide the institution with additional funding. The report chronicled Dickinson College’s record of financial hardships. Due to a lack of funds, the college closed twice during the early nineteenth century, and at the time of the report, the college carried a debt of $20,500. The college did not have the means to repay the


\textsuperscript{28} Confederation Congress, \textit{An Ordinance for the Government of the Territory of the United States North West of the River Ohio} (New York: s.n., 1781), https://www.loc.gov/item/90898154/.
debt which resulted from the replacement of two buildings lost to fire and the purchase of a philosophical apparatus.\textsuperscript{29} Demonstrating the frequency with which early nineteenth century colleges sought funding from states, Pearson’s report indicated that just three years prior, Dickinson had appealed to the legislature for assistance paying off a debt of $2,500.\textsuperscript{30}

To justify additional funding for Dickinson College, Pearson noted the important role that the college played in the development of the political, economic, and religious institutions of the Commonwealth. Dickinson alumni were well-represented among the influential professional and religious ranks of the state. The school also had a sizeable student population of one hundred and twenty eight students and provided elementary education to the community of Carlisle. Pearson asserted that Dickinson College was poised to be a “strong auxiliary to the common school system” as the institution educated the “industrious sons of respectable farmers, mechanics, and artisans”\textsuperscript{31}

The report also emphasized that the school did not indoctrinate students with the beliefs of any single denomination and promoted religious toleration.\textsuperscript{32} The General Assembly’s preference for nonsectarian colleges influenced the Dickinson College’s decision not to affiliate with an organized church. While galvanizing support for the college, Benjamin Rush, the founder of Dickinson College, initially wanted the college to be exclusively affiliated with the Presbyterian Church, but the legislature thwarted his efforts.\textsuperscript{33} Rush planned for Dickinson College to serve as a Presbyterian counterbalance to the other existing college in Pennsylvania,


\textsuperscript{33} Herbst, \textit{From Crisis to Crisis}, 194.
the University of the State of Pennsylvania (University of Pennsylvania). Contrary to most colonial colleges, the University of Pennsylvania was a decidedly secular institution. The trustees of the institution comprised of members from the business, legal, and political classes of Philadelphia, and these lay interests influenced the governance and curriculum of the university.\textsuperscript{34} Despite his denominational intentions for Dickinson College, Rush opted to establish the college as a nonsectarian school in order to curry favor with members of the General Assembly from other Christian faiths. Rush felt this decision would broaden the appeal of the institution, facilitate approval of the charter, and secure financial support from the legislature.\textsuperscript{35}

The decision by Rush influenced the structure of the charter and highlighted the pressures associated with the burdens and benefits of the legal relationships between the Commonwealth and its early colleges. Approved by the legislature in 1783, the charter of Dickinson College prohibited faculty and the head of the college from serving on the board and did not permit ministers to serve as ex officio trustees. Further, the charter provided for nine more lay trustees than clergymen and allowed clergymen of any Christian faith to replace ministers on the board. The legislative pressure to be nonsectarian also affected the hiring decisions of Dickinson College. To stave off any claims of religious bias, Rush planned to select faculty representing the panoply of Christian denominations, including the Lutheran, Calvinist, and Episcopalian faiths.\textsuperscript{36}

The text of the charter also opened the college to legislative interference. The General Assembly deemed the charter and constitution of Dickinson College to be “inviolable” against “any other

\textsuperscript{34}Herbst, \textit{From Crisis to Crisis}, 88-90, 194-196.
\textsuperscript{36}Herbst, \textit{From Crisis to Crisis}, 195.
manner than by an act of legislature.”37 Therefore, the charter did not ensure the perpetuation of a Presbyterian majority on the board nor safeguard Presbyterian interests from later legislative amendments to the charter.

Pearson’s report demonstrated that in exchange for legal recognition and state funding, colleges were obligated to advance the educational policies of the Commonwealth, including the education of lower income students. In fact, many of the colleges and academies founded in Pennsylvania between 1790 and 1834, the year that the Commonwealth passed a bill to adopt free schooling, agreed to provide tuition-free education to poor children in return for grants of land and/or money.38 Moreover, the contribution of Pennsylvania’s colleges to the preparation of teachers for the state’s “lower grades of school” was one of the motivating factors for legislators to authorize, establish, and support Pennsylvania’s early colleges.39 Before and following the 1834 adoption of free schools, the legislature granted charters to colleges, academies, and seminaries with the expectation that these institutions would provide elementary schools with teachers.40

The case of Dickinson College illustrated the benefits and burdens of the legal relationship between the state and its early institutions of higher education. The events surrounding the founding of Dickinson College suggested that the benefits of legal recognition and financial support came with a set of expectations that influenced the governance, curriculum,

and faculty composition of Pennsylvania’s colleges. The charter reflected a governance structure that aligned with the preferences of the legislature rather than those of its Presbyterian founders and benefactors. As evidenced by the arguments offered by Pearson, in exchange for funding, Pennsylvania expected the curriculum and graduates of many early colleges to support the strategic educational objectives of the state. In return for initial grants of land and/or money, the legislature required several colleges to provide free education to poor children of the state. The legislature also conferred legal recognition to numerous colleges, academies, and seminaries with the explicit understanding that the institutions would support the educational aims of the Commonwealth.

The developments between the General Assembly and the early colleges of Pennsylvania revealed the simultaneous benefits and burdens that marked the legal relationship between the Commonwealth and the state’s early institutions of higher education. From the establishment of the charter, the point of origin in the legal relationship between colleges and the Commonwealth, the state established a pattern of burdens and benefits that influenced the governance, board composition, curriculum, and in at least one case, religious background of faculty, of these early institutions. The state assumed the burden of conferring legal existence, providing initial funding, and in the case of institutions like Dickinson, ongoing support, to the early colleges of Pennsylvania, but in return, also enjoyed a measure of control and influence over their governance, curriculum, and operations, and incorporated many of them into the Commonwealth’s broader plans for public elementary education.
The early colleges undertook significant burdens in exchange for the right to exist and for financial support from the legislature. Early on, the state legislature reserved the power to create colleges and universities. In 1776, Pennsylvania passed the state’s first constitution following the Declaration of Independence. The 1776 state constitution vested ultimate legislative power in the legislature of Pennsylvania, including the authority to grant charters, and asserted that “all useful learning shall be duly encouraged and promoted in one or more universities.” While the state constitution established that the legislature had the benefit of the power of creation, the founding document also conferred the burden of encouraging and promoting the development of at least one institution of higher education. The decision by the Commonwealth to include a clause in Dickinson College’s charter that restricted amendment to an act by the legislature may have been prompted by the state’s previous controversial attempt to change a charter without the consent of the institution.

Following the establishment of Pennsylvania as an independent state, the Commonwealth passed an act in 1779 to revoke the property rights of the board and faculty of the College of Philadelphia. The College of Philadelphia’s charters of 1753 and 1755 specifically identified the trustees by name and provided them and their successors in perpetuity with the rights to buy and sell land, accept donations, hire and fire faculty, determine the curriculum, and select students for admission. The charters also mandated that the trustees must pledge loyalty to the English crown. The British occupation of Philadelphia between 1777 and 1778 exacerbated

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41 Pa. Const. of 1776.
42 Act of November 27, 1779 (P.L. 258).
increasing tensions between the Loyalist leadership of the College of Philadelphia and Patriots in the General Assembly. In 1779, the General Assembly, in response to a legislative report that claimed the loyalty oaths violated the constitution of the Commonwealth, revoked the College of Philadelphia’s previous charters, appointed new trustees, and renamed the school as the University of the State of Pennsylvania.\textsuperscript{44} Courts never weighed in on the legality or constitutionality of the act, but in 1785, the General Assembly acknowledged that the dissolution of the trustees and faculty and deprivation of their property rights violated the constitution, established a dangerous precedent, and represented a repugnance to justice.\textsuperscript{45}

\textit{Allegheny College}

Dickinson College was the first college to be incorporated following the establishment of an independent Pennsylvania, and the legislature asserted its authority in the charter of the college. With the establishment of the 1817 charter for Allegheny College, the balance of benefits and burdens in the legal relationship between Pennsylvania and the state’s early colleges shifted even more toward the Commonwealth. In the charter of Allegheny College, the General Assembly retained the right to remove and replace the president and trustees if they abused the privileges afforded them.\textsuperscript{46} The decision of the United States Supreme Court in the Dartmouth case of 1819 opened the door for states to assert further control over private corporations. In fact, Justice Story’s concurrence in the case affirmed the legislative actions taken by the Commonwealth in the charters of Dickinson College and Allegheny College. Story noted that legislative acts taken without the assent of a corporation, which deprive or limit the corporation

\textsuperscript{44} Act of November 27, 1779 (P.L. 258).
\textsuperscript{45} Act of September 22, 1785 (P.L. 395).
\textsuperscript{46} Pennsylvania General Assembly. \textit{Laws of the Commonwealth}, 473.
or the corporate officers of any rights or powers vested in the charter, would violate the charter. However, “if the legislature mean to claim such an authority, it must be reserved in the grant.”47 Therefore, states began to protect their interests in the terms of the original charters granted to colleges and universities at the point of origin.

Although the legislature of Pennsylvania established protective measures of control in the charter for Allegheny College, the actual actions of the board of trustees revealed the simultaneous, contradictory effects of the burdens and benefits that marked the tension between institutional autonomy and state control.

The American War for Independence transformed the political structure of the country by replacing colonial governments with state institutions and creating a federal government with authority that superseded the states. At the same time, the spirit of popular sovereignty that emerged from the American Revolution undermined the concept of absolute governmental authority in favor of individual and collective freedom and enterprise.48 Further, the post-Revolution push west of the Alleghenies encouraged and necessitated creative forms of self-governance and influenced the organization of frontier colleges. As a result, at the start of the nineteenth century, states also seemed more willing to grant charters and less inclined to assume responsibility for their continued support, maintenance, and regulation. In states where one college dominated the landscape of higher education, government leaders assumed the state right of control, while in states with multiple institutions, officials did not care to participate in the governance and oversight of colleges.49

47 Dartmouth, 17 U.S. at 712.
48 Martin Trow, “In Praise of Weakness: Chartering, the University of the United States, and Dartmouth College,” Research and Occasional Papers Series, (Berkeley: Center for Higher Education Studies, 2003), 4-7.
49 Geiger, The American College, location 3990 (Kindle edition).
In 1815, a group of men in the small frontier village of Meadville decided to start the Allegheny College and declared themselves as the institution’s board of trustees. The board chose a curriculum, established admissions procedures, and submitted the charter to the state government. In the two years that lapsed between the founding and legislative approval for the charter, Allegheny College hired a president, selected faculty, and opened its doors for classes.

During its early years, the school faced constant financial difficulties. Although the college appointed government officials as ex-officio members of the board, government officials seemed uninterested in financially supporting Allegheny College as funding requests to the legislature were both frequent and fruitless.\(^{50}\)

The case of Allegheny College demonstrated the burdens and benefits of early colleges in the new state of Pennsylvania. The burden of establishing independent means of funding accompanied the relative freedom to start colleges in the Commonwealth. Upon appointment, the president of Allegheny College traveled throughout New England and New York soliciting subscriptions in support of the college. Allegheny College also sought support from Lutherans by proposing an endowed professorship in German and approached Masons with a potential professorship in architecture. In fact, the college engaged in a continual quest for financial stability until aligning with the Methodist church in 1838. The experience of Allegheny College revealed a contradiction between the proactive measures taken by the state to provide for strong governmental control in the charter and the apathetic interest of government officials to regulate and finance colleges.\(^{51}\)

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\(^{50}\) Trow, “In Praise of Weakness,” 4-7.

\(^{51}\) Trow, “In Praise of Weakness,” 4-7.
While the Dartmouth case held that the Contract Clause of the U.S. Constitution offered protections to the corporate charters of established colleges, and therefore likely would have invalidated the 1779 action taken by the Pennsylvania legislature against the College of Philadelphia, the holding did not preclude the state from staking their interests in the language of the original charter. Throughout the nineteenth century, the Pennsylvania legislature increasingly secured and protected the General Assembly’s right to amend and annul charters. For example, the 1826 charter of Lafayette College expanded the authority of the legislature “to revoke, alter or annul the charter” 52 and provided “that it shall be lawful for the Governor of this Commonwealth from time to time, as often as he shall deem necessary, to appoint visitors to inspect the books, concerns and transactions of the said corporation, who shall make detailed reports to him of the state of the institution, and such other matters connected therewith as shall be thought fit, which reports shall be by the Governor laid before the legislature as often as they may require.”53

Summary

Immediately prior to the founding of Penn State, the legal relationships between the Commonwealth and the early college of Pennsylvania were still in the nascent stages. The state only had a handful of institutions of higher education and all but three came into existence during the nineteenth century. The legal framework of the state, and the country as a whole, had just started to come into view following the American Revolutionary War with the establishment of Pennsylvania’s first state constitution in 1776 and the creation of the U.S. Constitution in 1787.

52 Act of March 9, 1826 (P.L. 76).
53 Act of March 9, 1826 (P.L. 76).
The establishment of an independent country and independent states necessitated an evaluation of the legal effect of the colonial charter.

The nineteenth-century college charter cases established the college charter as a contract and clarified the benefits and burdens that existed at the point of origin in the institution-state relationship. The Contracts Clause of the U.S. Constitution protected the impairment of the obligations of the charter. This important legal finding prevented states from ex post facto modification or revocation of charters and obligated states to respect the rights and powers of colleges stipulated in the contract. The college corporation also assumed the burden of living up to the will of the founder, as stated in the charter, and failure to do so invited state interference through the legislature and/or judiciary. Courts also acknowledged “that the nature of the corporation as defined in the charter is not altered by the subsequent acceptance of support from the state.”54 This finding proved to be significant as colleges repeatedly appealed to legislatures for support, and the states felt a degree of responsibility for the welfare of many of these institutions.

The legal developments surrounding the charter cases had implications for legal relationships between colleges and the Commonwealth of Pennsylvania. In response to the charter cases, state legislatures began to protect their interests in charters, and the Commonwealth also affirmatively stated its rights in provisions of the 1838 and 1873 state constitutions. Both constitutions stated 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

54 Clapp, The College Charter, 87.
manner, however, that no injustice shall be done to the incorporators.”

Further, as evidenced by the case of Dickinson College, the legislature heavily influenced the curriculum and operations of colleges. These developments revealed a tension in the burden and benefits as institutions were required to balance autonomy against politics, the desire to exist, and the need for financial resources.

The burdens and benefits analysis revealed a number of benefits and burdens in the legal relationships between the Commonwealth and early colleges. The case of Dickinson College demonstrated that the process of establishing colleges could be political and required colleges to compromise institutional autonomy. The experience of the College of Philadelphia suggested that the threat of legislative interference remained despite the presence of a charter. The development of the Allegheny College highlighted the contradiction between legislative attentiveness to the charter and the General Assembly’s apathy toward the support and oversight of Pennsylvania’s colleges. In sum, the themes depicted an ambiguous legal relationship between institutions of higher education and the Commonwealth: a relationship that was largely marked by legislative indifference, but potentially ripe for conflict due to the political and negotiated process of establishing colleges. The political and negotiated themes that emerged from the legal relationships that the Commonwealth established with early colleges also carry over to the mid-nineteenth century and the founding of the Farmers’ High School.

During the 1830s, the Pennsylvania legislature ended the policy of indiscriminately granting land and/or support to institutions of higher education upon incorporation. This decision likely stemmed, in part, from the Dartmouth case of 1819. Before the decision in the Dartmouth

case, few people likely drew a distinction between public and private colleges, and in fact, the public-private dichotomy would not be relevant until after the Civil War. The early American colleges were enmeshed in a web of church, colonial government, and private associations that made this distinction virtually impossible. Although the relevance of the public-private distinction remained to be seen, states realized after Dartmouth that they had limited control over the governance of private colleges and became increasingly less likely to provide private institutions with substantial financial support. In Pennsylvania, the overproliferation of colleges throughout the early decades of the nineteenth century prompted the state to be more selective about providing support to higher education. One exception to this rule was the Farmers’ High School or the Pennsylvania State University.

58 Martin, “Pennsylvania’s Land Grant,” 87.
Chapter 5

Founding of Penn State

This chapter reviews the events surrounding the founding of Penn State and the establishment of the University as the land-grant institution of Pennsylvania. The chapter also discusses Penn State’s 1855 charter and the association that the document established between the University and the state. A clearer understanding of the benefits and burdens of Penn State’s legal relationship with the Commonwealth emerges from an analysis of the debates that engulfed the founding of Penn State and the legislation that provided the institution with the proceeds from the Morrill Land Grant Act. The appeals from other institutions and legislative resistance hampered the sale of the scrip, and Pennsylvania did not fully realize the proceeds from the Morrill Land Grant Act until February 19, 1867. The debates surrounding the land-grant and the contested process that conferred the benefits to Penn State reveal enduring burdens, benefits, and contradictions that continue to persist throughout the legal analysis of Penn State’s relationship with Pennsylvania.

Penn State was founded in 1855, and the charter reflects the University’s land-grant origins as “an institution for the education of youth in the various branches of science, learning, and practical agriculture.” Land-grant institutions are colleges and universities that either state legislatures or the U.S. Congress have appointed as beneficiaries of the Morrill Acts of 1862, 1890, and 1994, and Penn State is the sole land-grant institution in Pennsylvania.¹ President

Abraham Lincoln signed the first Morrill Land Grant College Act (Morrill Land Grant Act) into law on July 2, 1862. The passage of the Morrill Land Grant Act stands as a watershed moment in the history of American higher education as the legislation permanently established the role of the federal government in supporting higher education.

Higher education leaders and historians have tended to romanticize land-grant colleges by shrouding the motivations for the Morrill Land Grant Act in the populist ideals of Jacksonian Democracy, and proclaim that land-grant colleges introduced a new type of education to a segment of the population previously ignored by the aristocratic literary institutions. Recent historical accounts emphasize the economic impulses behind the land grant movement and recognize the Land Grant Act as “the culmination of a growing state interest to develop the nation’s scientific capabilities, especially in the areas of agricultural and industrial science, and to enhance the profitability of agriculture and industry.” The development of Penn State supports this revised account of the land grant movement. Even prior to the passage of the Land Grant Act, the desire to improve the profitability of agriculture spurred the founding of Penn State. The Pennsylvania State Agricultural Society (Pennsylvania Agricultural Society), founded in 1851, led the effort to establish an agricultural college in the Commonwealth. In fact, the campaign to establish a state-supported institution of higher education distinguished the Pennsylvania Agricultural Society from other state agricultural societies.

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The charter for the Pennsylvania Agricultural Society stated that the purpose of the group was “to improve the condition of agriculture, horticulture, and the household arts.”\textsuperscript{5} As part of that mission, the Pennsylvania Agricultural Society, which included representatives from every congressional district in the state, appointed a committee to investigate “the expediency of establishing a ‘State Agricultural School.’”\textsuperscript{6} The Pennsylvania Agricultural Society’s first annual report states that the curriculum of the agricultural college should be oriented towards teaching “that which is valuable for a farmer to know,”\textsuperscript{7} including the “art of farming”\textsuperscript{8} which included daily manual labor on the school’s farm.

The 1855 charter for Penn State reflected the Pennsylvania Agricultural Society’s aims for the institution and established a prominent role for its members in the governance of the University. The 1855 charter designated the school as “an institution for the education of youth in the various branches of science, learning, and practical agriculture, as they are connected with each other.”\textsuperscript{9} The board of trustees consisted of thirteen members; the governor, secretary of the commonwealth, president of the Pennsylvania Agricultural Society, and principal (president) of the College as ex-officio members, and nine members of the Pennsylvania Agricultural Society from across the Commonwealth. Further, the election procedures to replace board members upon the expiration of their dates of service strengthened the Pennsylvania Agricultural Society’s influence over the institution. A vote by members of the executive committee of the Pennsylvania Agricultural Society and members of the county agricultural societies determined

\textsuperscript{5} Act of March 29, 1851 (P.L. 289, No. 204).
\textsuperscript{9} Act of February 22, 1855 (P.L. 46, No. 50).
the selection of new trustees. The charter also provided the board of trustees with the authority to select a president and professors with the expertise to deliver an education appropriate for a farmer.\textsuperscript{10}

The benefits and burdens associated with the establishment of Penn State offer insight into the legal relationship between the University and the Commonwealth and explicate the tensions between institutional autonomy and state control. The interests and expertise that birthed the idea for Penn State benefitted the legal establishment of the University. Scholars have recently noted that the land-grant college emerged from an aggressive movement to enhance science education in United States and apply scientific knowledge to advance the agricultural and economic interests of the nation. The agricultural societies played a crucial role in the movement and in the promotion of agricultural science education. The members of agricultural societies were not mere farmers, but practitioners of agricultural science. The membership of the societies included educated leaders from government and business who conducted experiments, published research, and organized local and statewide agricultural fairs.\textsuperscript{11}

The Pennsylvania Agricultural Society moved swiftly to establish the Farmers’ High School. Two years after forming, the group had already produced a report that identified the name, place, building, curriculum, faculty, and anticipated resources for the agricultural school. At a society meeting, representatives from thirty-six counties unanimously approved the report and enlisted members to secure a charter.\textsuperscript{12} The Pennsylvania Agricultural Society found a

\textsuperscript{10} Act of February 22, 1855 (P.L. 46, No. 50).
\textsuperscript{11} Geiger and Sorber, \textit{The Land Grant Colleges}, 3-11.
supporter in Pennsylvania Governor William Bigler who urged legislative approval. The society even included an annual appropriation from its own funds into the charter.\(^{13}\)

The first president of Farmers’ High School, Evan Pugh, also proved to be an enormous benefit to the legal establishment of Penn State. Dr. Pugh earned a Ph.D. in chemistry at the University of Göttingen in Germany and was elected as a fellow of the Royal Philosophical Society of Great Britain. During his travels, Pugh familiarized himself with the organization and curriculum of European research universities. As a respected researcher and European-educated scholar, Pugh had the knowledge and legitimacy to articulate the vision of agricultural and industrial education to supporters, legislators, and skeptics. Pugh compiled an ambitious plan for a school of agricultural and industrial science and presented it to the General Assembly. The report offered an expansive vision of an industrial school based on Pugh’s belief that “the industrial operations of life embrace the entire range of human thought.”\(^{14}\) To realize that vision, Pugh claimed that a properly-resourced college would require twenty-nine faculty members, a variety of research laboratories and materials, six degree programs, and an endowment of $600,000.\(^{15}\) Pugh’s expertise and ability to effectively articulate the vision and resource needs of the Farmers’ High School facilitated efforts to secure the benefits of the Morrill Act.

Penn State’s 1855 charter is the point of origin for the establishment of the legal relationship between Penn State and the Commonwealth of Pennsylvania. The charter denoted a

\(^{13}\) Act of February 22, 1855 (P.L. 46, No. 50).


\(^{15}\) Evan Pugh. *A Statement by Dr. E. Pugh of the Agricultural College of Pennsylvania, at a Special Meeting of the Judiciary Committee at Harrisburg, Convened March 3d, 1864, in Reference to the Proposition to Deprive This College if Its Endowment*, 1864, Penn State Archives, 2.
number of benefits and burdens at the start of the institutional-state association. First, by 1855, the state had taken steps to largely clarify the uncertainty surrounding the legislature’s right to modify and repeal charters. Prior to the passage of the charter, the Pennsylvania legislature secured the right to alter, revoke, or annul a charter “whenever in their opinion it may be injurious to the citizens of the commonwealth.”\textsuperscript{16} Nineteenth-century legal interpretations suggest that this constitutional clause conferred a significant benefit to the Commonwealth in its relationship with Penn State. Concerns about college corporations did not appear to have been motivating factors for the construction of this constitutional clause. Pennsylvania’s constitutional convention of 1837 began the same month as an enormous financial panic that exacerbated already simmering resentment towards banks. The serendipity had a massive impact on the constitutional debates and the discussion of corporations. During the debates, a commenter noted that the existing bank charters enlarged the powers of banks to such a great extent that in the future, “the people will be nothing, the bank everything.”\textsuperscript{17} Similarly incensed comments from members of the constitutional convention reflected the dominance that the banking crisis and corporations had over the proceedings. The predominance of the banking crisis led to a number of proposals seeking to limit the authority of corporations.\textsuperscript{18}

Although concerns about banks prompted the construction of the clause that provided the legislature with the authority to modify and revoke charters, the clause was also applied to the charters of educational institutions by Commonwealth courts. For example, in 1888, the Wagner

Institute of Science in Philadelphia (Wagner Institute) brought suit against the City of Philadelphia seeking equitable relief from paying property taxes. The terms of the charter provided tax exemption to the original property of the Wagner Institute. Wagner Institute subsequently acquired property annexed to the original site, and the city of Philadelphia attempted to tax the annexed property. The Wagner Institute brought suit in protest of the taxation. Wagner Institute claimed that taxation of the property in question violated the terms of the charter, and thus, violated the Contracts Clause of the United State Constitution. Wagner Institute also argued that the taxation of the annexed property contravened the clause of the Pennsylvania Constitution of 1838 that limited legislative revocation of charters to situations in which the privileges granted have become injurious to Pennsylvania residents.¹⁹

The opinion of the Supreme Court of Pennsylvania first dispensed with the argument that the charter was a contract eligible for protection under the Contracts Clause of the U.S. Constitution per the Dartmouth College Case of 1819. The court reasoned that that the clause granting the legislature the right to revoke or alter charters changed the legal definition and interpretation of corporate charters. With that clause, charters became quasi-contracts since they were “revocable at will of the grantor.”²⁰ The court likened the charter to a license, and as such, the charter did not qualify for constitutional protection under the Contracts Clause. This decision seemed to limit the effect of the Dartmouth case of 1819 by stating that the clause in Pennsylvania’s constitution that provided the legislature with the authority to revoke or alter

²⁰ Wagner Free Institute, 132 Pa. 612.
charters, although limited to situations of ‘injurious’ harm, still had the effect of converting the charter to a quasi-contract that was ineligible for constitutional protection.

Wagner Institute also claimed that the legislature should not be the final and absolute judge of whether the charter has become injurious to Pennsylvania residents. The court disagreed, asserting that the constitutional clause reserved that judgment to the legislature. The court added that the subject of taxation, and the attendant revenue generated in support of the state, clearly qualified as “a subject of inherent public interest” that would fall under the legislature’s constitutional discretion. 21 In 1952, the court more acutely identified the conditions that must be met in order to authorize the reserved power of the legislature to amend the charter of a corporation: “(1) there must be involved a matter of public concern, and (2) the just rights of the shareholders must be protected.” 22 The court retained the right to determine whether the conditions had been met. Therefore, at the onset of Penn State’s relationship with the state, the legislature retained a considerable amount of power over the charters of colleges. The General Assembly had the power to create colleges and universities and also held the right to revoke, annul, or amend college charters under limited circumstances.

The 1855 charter also established the burden of institutional accountability to the General Assembly. Under the terms of the 1855 charter, Penn State had the duty to annually report on the operations of the institution and account for “all of its receipts and disbursements.” 23 The institution had to submit the report to the Pennsylvania Agricultural Society and the state legislature. The circumstances surrounding the founding of Penn State also provided benefits to

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21 Wagner Free Institute, 132 Pa. at 615.
23 Act of February 22, 1855 (P.L. 46, No. 50).
the University at the point of origin. Penn State received the benefit of indirect funding from the state through the 1855 charter. The charter enabled the Pennsylvania Agricultural Society, which derived its budget through matching appropriations from the state, to provide funding to Penn State. The Pennsylvania Agricultural Society birthed the idea for Penn State and proved to be a staunch ally before the General Assembly. The institution also had the burden of accountability to the state, the Pennsylvania Agricultural Society, and the responsibility of satisfying the purposes of the charter.

The Morrill Land Grant Act facilitated a closer relationship between Penn State and the Commonwealth of Pennsylvania. The Morrill Land Grant Act provided the states with 30,000 acres of federal land scrip for each senator and representative. States had the responsibility of selling the scrip and applying the proceeds towards a fund in support of a college offering instruction in agriculture and the mechanical arts (engineering). The 1855 charter’s unambiguous language as to the agricultural purposes of Penn State proved to be advantageous in the school’s battle for the land grant designation in Pennsylvania. The state’s legislation accepting the land scrip from the Morrill Act stated that proceeds from sales of the scrip would be directed toward the “endowment, support, and maintenance” of Penn State.25

The legislative record reflects numerous attempts by colleges and universities across the Commonwealth, including the University of Lewisburg (Bucknell), Allegheny College, Pennsylvania College (Gettysburg), Western University (Pittsburgh) and the Polytechnic of the

25 Act of April 1, 1863 (P.L. 231, No. 227).
State of Pennsylvania, to obtain a share of the proceeds from the land scrip. However, due in large part to the efforts of Evan Pugh, the first President of Penn State, and the sponsorship of the Pennsylvania Agricultural Society, the institution successfully defeated those bids and furthered its association with the state. President Pugh presented compelling arguments in defense of Penn State’s sole ability to provide students with an industrial education as envisioned by the Morrill Land Grant. In reports and statements before the General Assembly, Pugh displayed a more thorough understanding of agricultural and industrial education and offered a more compelling argument for Penn State’s receipt of the land scrip.

In addition, the Pennsylvania Agricultural Society, which included representatives from across the Commonwealth, galvanized support in favor of the institution’s bid for the scrip by writing letters to the General Assembly and lobbying legislative leaders. In fact, the Pennsylvania Agricultural Society began working on the campaign to secure the land grant a full year before the state accepted the lands, and prior to that, the agricultural societies strategically worked with friends in the legislature to pass an 1861 bill allocating $50,000 in construction funds to the institution.

The debates surrounding the land grants also offer insight into the legislature’s impression of the legal relationship between the Commonwealth and Penn State. In 1863, while arguing for the permanent assignment of the benefits from the land grant to Penn State, Pennsylvania Senator Henry Johnson referred to Penn State as a “state institution, having been erected in part out of the funds paid to the treasury of the Commonwealth, and in part by

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27 Act of April 18, 1861 (P.L. 392, No. 367).
contributions of citizens of this state.”

Not all representatives in the Commonwealth supported Penn State and the broader objectives of the land-grant movement. While debating a bill to provide the Farmers’ Higher School with additional funding, one state representative questioned why the state should fund a school for this particular class as opposed to creating “law high schools for the sons of lawyers, or a school for miners and machinists,” especially given that the agricultural class made “more money than any other class of men.” While Penn State had support from a majority of the General Assembly, the institution also had detractors in the legislature. Many legislators viewed the College as an institution of the state and recognized the special relationship that resulted from the land grant legislation. However, due to competitive politics and confusion over the value of agricultural science, others remained incredulous of Penn State. The conflict between the perception of Penn State as a state institution with a special relationship with the state and the view that the institution resembled other colleges and universities of the Commonwealth would prove to be an enduring theme in the legal relationship between Penn State and Pennsylvania.

As a result of legislative skepticism and competition from other colleges for the proceeds from the Morrill Land Grant Act, the legislature delayed the sale of the land scrip which resulted in Pennsylvania not realizing as much revenue from the scrip as other states. The legislative skepticism also reflected the discrepancy between the fervor and expertise of the Pennsylvania Agricultural Society and Evan Pugh on one side, and the lack of vision among many legislators

30 Moran and Williams, “Saving the Land Grant,” 125-126.
on the other. In 1857, one legislator suggested that a pamphlet on farming techniques would be a better use of money than supporting a college for agricultural and industrial education.\textsuperscript{31} Comments like these led Pugh to sarcastically reflect back on his work to convince the legislature to provide Penn State with the proceeds of the land-grant, “I spent four weeks after the opening of this session in our state legislature, trying to get a bill through donating us the land for agr. colleges. We have such a virtuous legislature that it made a very very troublesome disagreeable job.”\textsuperscript{32} The frustration in Pugh’s words and the legislative battle to secure the scrip revealed another enduring tension between the University and the Commonwealth over responsibility and accountability for realizing the land-grant vision. This tension continued to mark the legal relationship between Penn State and the Commonwealth in later attorney general opinions and court cases.

Penn State supporters appealed to the potential economic benefits that would accrue from elevating the study of agriculture and industrial science to the level of classical education, insisting that “an institution so fraught with good to our Commonwealth for all coming time.”\textsuperscript{33} Ultimately, the proponents of Penn State prevailed and the legislature made an appropriation of $25,000 to Penn State, but added contingencies that exerted state control over the admission of students and compelled the University to provide a free service to the Commonwealth. In order to receive the funding, Penn State had to admit students from the counties of the Commonwealth in proportion to the taxpaying population of each county and establish an office that provided free soil testing to Pennsylvania residents.\textsuperscript{34} Penn State also incurred the burden of heightened

\begin{footnotesize}
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\item[31] Pennsylvania General Assembly, \textit{The Legislative Record of 1857}, 295-296.
\item[32] Evan Pugh to S.W. Johnson, 14 April 1863, Evan Pugh Papers, Penn State Archives, Penn State Library.
\item[33] Pennsylvania General Assembly, \textit{The Legislative Record of 1857}, 65.
\item[34] Act of May 20, 1857 (P.L. 617, No. 657).
\end{itemize}
\end{footnotesize}
accountability requirements. In the 1863 legislation accepting the land grant, the General Assembly, just as it had done with the 1855 charter, required the institution to present an annual report on its operations and usage of land-grant funds.\textsuperscript{35}

The land-grant designation permanently marked Penn State as a unique institution of higher education in Pennsylvania. The institution accepted the burden of offering a curriculum grounded in agriculture and the mechanical arts, and in exchange, received the benefits of the land grant. In total, the state earned $439,186.80 on the sale of the scrip.\textsuperscript{36} The University used roughly $50,000 of that fund to purchase model and experimental farms. The acceptance of the land grant required institutions to establish experimental farms for agricultural research which imposed another legally-mandated burden on Penn State. The legislative record demonstrates that Penn State clearly enjoyed some favorable support from legislators and proponents from the Pennsylvania Agricultural Society. Between the American Revolution and the mid-nineteenth century, Pennsylvania was the most prominent agricultural state in the union, and the agricultural interests carried considerable influence in the state legislature.\textsuperscript{37}

However, the record also indicates that Penn State incurred a number of burdens. The belabored and contested process to award the proceeds from the land-grant scrip signaled a lasting pattern of legislative interest in the operations of Penn State. As exhibited by the numerous attempts by colleges in Pennsylvania to secure the proceeds from the scrip, the Morrill Land Grant Act provided a substantial amount of funding to the land-grant colleges. Also, as reflected in the legislative debates, the issue of whether an agricultural and industrial college

\textsuperscript{35} Act of April 1, 1863 (P.L. 213, No. 227).
\textsuperscript{36} Moran and Williams, “Saving the Land Grant,” 125-130.
should exist remained an unsettled issue even after the founding of Penn State. The coupling of significant pockets of legislative uncertainty and skepticism with the legislature’s benefice in providing Penn State with the land grant meant that the operations and activities of Penn State would remain under scrutiny and the legal status of the University would continue to be contested.
Chapter 6

Legal Authority on the Relationship between Penn State and the Commonwealth

During the nineteenth century, the majority of the cases and statutes involving Penn State related to board governance and the land grant, but the major issue at stake in Penn State’s first court case following the 1855 charter concerned the measurement of lumber. In 1862, a contract dispute arose between the Farmers’ High School and a local mill owner over whether the appropriate method of measurement for yellow pine flooring was surface area or thickness. Relying on a logging statute that established board thickness as the proper method absent a contrary intention in the contract, the Pennsylvania Supreme Court ruled against the University.¹ That Penn State’s first case concerned construction came as no surprise as building issues loomed large during the early days of the University. After receiving a generous gift of two hundred acres of land and $10,000 to establish the institution in State College, the Farmers’ High School successfully lobbied the leadership of the Pennsylvania Agricultural Society to locate the college in town. Unfortunately, the site in State College did not offer many advantages other than acreage. In the mid-nineteenth century, the area was relatively inaccessible with no railroad nor city within close proximity, and the institution lacked access to water. Edwin Sparks, president of Penn State from 1908 to 1920, facetiously saluted State College for its central location in the state and for being “equally inaccessible from all parts of it.”²

The inaccessibility of the location hindered progress on the construction of the building and toward the end of the 1850s, the original contractors informed the Board that completion of the College’s first edifice would cost nearly double the estimated figure. To make up the difference, Penn State leadership appealed to the Pennsylvania Agricultural Society for donations, but the financial panic of 1857 and crop failures across the Commonwealth thwarted these efforts. When the school opened in 1859, students arrived to an unfinished building, and well into the 1860s, raising funds to complete the institution’s first building remained a top priority for Evan Pugh. Therefore, the financial conditions of Penn State and the institution’s previous unpleasant dealings with building contractors likely influenced the University’s vigilance to ensure that contractors did not overcharge for building materials.

A search does not reveal any other state cases involving Penn State until the twentieth century; however, throughout the nineteenth century the state passed a number of statutes that touched upon the legal relationship between Penn State and the Commonwealth. The charter of the institution was first amended in 1862 when the Court of Quarter Sessions of Centre County approved a request to change the name of the institution from the Farmers’ High School to the Agricultural College of Pennsylvania. Since 1855, the charter of Penn State has undergone nine amendments, and the Court of Common Pleas of Centre County approved the majority of these changes. In response to the sharp increase in the number of colleges applying for recognition during the nineteenth century, the legislature extended the authority to approve and amend charters for literary, charitable, religious, scientific, and agricultural organizations to the Courts of Common Pleas.³

³ Act of October 13, 1840 (P.L. 1); Act of February 20, 1854 (P.L. 90).
The charter amendment in 1862 implicates the burdens and benefits of the College’s connection with the agricultural interests of the Commonwealth. The founders of Penn State intentionally decided upon the name, “The Farmers’ High School,” so as not to offend local farmers by assigning a name that conjured up the image of an aristocratic literary college. Further, the desire to more closely align the institution with the state’s agricultural interests and the objectives of the impending land-grant act prompted the name change to the Agricultural College of Pennsylvania. The circumstances surrounding the 1862 amendment demonstrated the obligation that the institution felt to curry favor with the state’s agricultural industry and how that obligation significantly impacted institutional governance. On the other hand, the name change to the Agricultural College of Pennsylvania may have also indicated the institution’s desire to appeal beyond the agricultural classes as well as the superseding importance to secure the proceeds of the Morrill Land Grant Act. Evan Pugh imagined a curriculum for the College that expanded beyond agricultural science to include industrial sciences. While the name, “The Agricultural College of Pennsylvania,” may have been a nod to farmers in the Commonwealth, it also enabled the College to lay claim to the bountiful proceeds of the Morrill Land Grant Act and accelerate the development of an expansive curriculum of applied sciences.

The early charter amendments of Penn State and the decision by the institution to appeal to Pennsylvania farmers echoed the theme of compromise found in the case of Dickinson College. Similar to Dickinson, the desire for state legislative approval shaped the language of Penn State’s charter and influenced decisions regarding the governance, curriculum, and faculty of the institution. In the 1860s, these compromises of institutional autonomy conferred the

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4 Dunaway, History of the Pennsylvania, 42.
significant benefits of state support and the land-grant proceeds. However, it remained to be seen if that would be the case in the future, and the viability and usefulness of compromise would continue to be a theme and consideration in the legal relationship between Penn State and the Commonwealth.

Attorney General Opinions

In 1891, the Pennsylvania Attorney General provided the state’s earliest legal interpretation of the relationship between Penn State and the Commonwealth of Pennsylvania. The opinions of attorney generals constitute persuasive authority and guide judicial interpretation of the law. The Pennsylvania Constitution establishes an elected attorney general who serves as “the chief law officer of the Commonwealth.”\(^5\) Among other duties, the attorney general provides legal advice on governmental matters at the request of the governor and other state government leaders.\(^6\) In certain instances, the opinion of the Pennsylvania Attorney General is binding on the governor and government agencies, but in most cases, the opinions are advisory. However, the opinions of attorney generals carry significant weight with courts, especially when limited case law exists on the legal issues at hand.\(^7\)

In the early twentieth century, few state courts had ruled on the legal issues that implicated the relationship between Penn State and the Commonwealth, but the attorney general weighed in on these matters in response to requests from government officials. Issues concerning the land grant, state employee retirement, and taxation prompted the first analyses of the legal relationship between Penn State and Pennsylvania. Two perspectives on Penn State’s status with

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\(^6\) 71 P.S. § 732-204.  
\(^7\) Liu et. al., *Pennsylvania Legal Research*, 195.
the state emerged from these opinions. One perspective considered the University to be a “semi-state” institution and the other viewed Penn State as a state institution. The burdens and benefits implied by the two perspectives reveal persistent themes in the legal relationship between Penn State and the Commonwealth.

**Issues**

The attorney general received specific questions about Penn State from 1891 up until the end of the 1970s. Requests for opinions focused on two issues in particular: whether the employees of Penn State qualified as state employees and whether Penn State constituted a state agency for purposes of taxation and compliance. From the early twentieth century through the 1970s, the employee status issue, in particular, confused a range of University stakeholders. A former Penn State president and the state secretaries of agriculture, labor and industry, and education all wrote to the attorney general requesting clarification on the state status of Penn State’s employees. The several requests from a variety of officials likely resulted from the broader confusion surrounding Penn State’s status with the Commonwealth. The record of opinions from the attorney general only seems to have contributed to that uncertainty. For example, the attorney general has claimed that Penn State employees are state employees and that the University is “an instrumentality of the state,” but has also exempted Penn State employees from state compliance requirements and suggested that the institution was not a department of the state.⁸ The decades-long confusion regarding Penn State’s state status continued the theme of ambiguity that emerged at the time of the University’s founding, and the

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implications of Penn State’s status would remain a focal point in the evolution of the legal relationship between the University and the Commonwealth.

The requests also revealed tax law as an enduring theme in the evolution of the legal relationship between Penn State and the Commonwealth. Penn State’s status under tax laws prompted several requests for attorney general opinions that addressed the institution-state relationship. Tax issues also provoked discussions of the institution-state relationship in judicial opinions. A substantial portion of the court cases that have touched upon Penn State’s status emerged from attempts by local school districts and municipalities to impose taxes on colleges and universities in Pennsylvania. The attorney general opinions here that involved issues of taxation reflect two different perspectives on Penn State’s association with the state: one that views the institution as a state agency, and one that perceives the College as a “semi-state” institution. These two perspectives also appear in court opinions that have examined Penn State’s status with the state. The analysis of the opinions from the attorney general revealed the implications of these two perspectives.

*Penn State as a “Semi-State” Institution (Restrictive View)*

In 1915, the attorney general responded to a request for an opinion on the issue of whether the treasurer of Penn State qualified as a state official or state employee.\(^9\) Here, Penn State sent two bills to the state controller to compensate the treasurer of Penn State for the costs associated with bond premiums. Pennsylvania set aside funding in the appropriation to the Board of Public Grounds and Buildings to compensate state employees and officials for costs related to bonds procured in furtherance of their duties. To avoid using University funds to pay for costs

incurred by the treasurer of Penn State, the University requested that the Board of Public Grounds and Buildings reimburse the treasurer for fees related to bond premiums. The fundamental issue in this opinion was whether or not the treasurer at Penn State was a state employee, and the answer to that question required a discussion of the legal status of Penn State.

The attorney general asserted that Penn State was a “semi-state institution…whose property is not held in the name of the Commonwealth although partly supported by the State, which has some control over its affairs.” The attorney general acknowledged that Penn State received a number of appropriations from the federal government and the Commonwealth of Pennsylvania, but pointed to the intermediate role of the state treasurer in the transfer of land-grant appropriations from the federal government to the institution as an intervening step that precluded Penn State’s treasurer from assuming state employee status. The attorney general’s recognition of the intervening role of the state treasurer may have served to sever or soften the legal relationship between the Commonwealth and the University. By symbolically minimizing the role of the state in the implementation of the Morrill Land Grant Act, this interpretation may have promoted the viewpoint that Penn State was not a state agency.

The most critical part of the opinion related to the criteria for determining whether a college was a state institution, and the opinion suggested that an institution must be wholly supported and controlled by the Commonwealth to receive that designation. The opinion marked the first legal declaration by a government official as to the limit of the benefits that accrued from Penn State’s land-grant status and indicated that the institution would not be able to avail itself of certain privileges of state agencies, e.g., the repayment for the costs associated with

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bond premiums.\textsuperscript{11} The request from Penn State also reflected the financial challenges that faced the institution during the early twentieth century. Between 1908 and 1915, the enrollment of the College more than doubled from 909 to 2,017 students, and the institution lacked the resources to accommodate the ever-expanding student services that accompanied the jump in enrollment. The most pressing need was the construction of an infirmary as the closest hospital was located over ten miles away in Bellefonte, and the College suffered a scarlet fever outbreak in 1912-13. To facilitate prudent financial stewardship, Penn State consolidated fiscal activities in the treasurer’s office in the years before 1915.\textsuperscript{12} The College likely sent the bond bills to the Board of Public Grounds and Buildings as part of a larger strategy of managing costs and enhancing the efficiency of the College’s financial operations. Nevertheless, the attorney general did not find a state agency relationship to exist between Penn State and the Commonwealth.

In May 1919, the Pennsylvania Office of the Attorney General again took up the issue of Penn State’s status with the Commonwealth in response to a question about whether faculty members at Penn State were eligible to join the State School Employees’ Retirement Association.\textsuperscript{13} In 1917, the state passed legislation establishing a retirement association for employees of public schools.\textsuperscript{14} The opinion turned on the issue of whether Penn State constituted a public school according to the definition in the act which defined a public school as “any…school,…within the State of Pennsylvania, conducted under the order and superintendence of the Department of Public Instruction of the Commonwealth of Pennsylvania and of a duly elected or appointed Board of Public Education, Board of School Directors or

\textsuperscript{12} Michael Bezilla, \textit{Penn State: An Illustrated History} (University Park: Penn State Press, 1985), 93-94.
\textsuperscript{13} 7 Pa Att’y Gen. Op. 186 (May 21, 1919).
\textsuperscript{14} Act of May 18, 1917 (P.L. 1043).
Board of Trustees, of the Commonwealth, or of any school district or normal school district
thereof.”15 The opinion claimed that Penn State was not a public school under the act as the
Pennsylvania Department of Public Instruction did not supervise and direct the operations of the
institution.16 This opinion advanced the view that Penn State was not a state agency by focusing
on the state’s lack of control over the governance of the institution.

The next attorney general opinion that addressed the status of Penn State seemed to
contradict the legal reasoning of the 1915 and 1919 opinions that found Penn State not to be a
state institution. In 1922, the attorney general received a request from Penn State President John
M. Thomas for clarification on the eligibility of employees of Penn State to retire as state public
school employees.17 The attorney general opinion affirmed the 1919 opinion that Penn State was
not a public school, but recognized the employees of Penn State as state employees who could
avail themselves of state employee benefits.18 The state employee retirement statute defined state
employees as,

(a) all officers and employees of the executive and legislative branches of the State

Government, including officers and employees of the Department of Public

Instruction who at the time of retirement are not contributors to the State Teachers’

Retirement Fund and entitled to retirement in accordance therewith;

(b) all officers and persons employed by the Supreme and Superior Courts; and

18 May 24, 1923 (P.L. 436).
(c) all salaried employees of hospitals, asylums, penitentiaries, reformatories, and other institutions operated by the Commonwealth.\(^{19}\)

The attorney general did not offer any further explanation for the finding beyond a reference to the statute, and the declaration that the employees of Penn State “are eligible for retirement in the same manner as other State employees.”\(^{20}\) By declaring that Penn State employees were eligible for state employee benefits, the 1922 opinion seemed to contradict the opinion from 1919 as the statutes in both instances required institutions to be controlled by the state in order for their employees to qualify for benefits.

The attorney general addressed the issue of the legal status of Penn State again in 1929.\(^{21}\) In 1911, to protect the interests of the state, the General Assembly passed a law that converted into a lien any portion of state appropriations used for real estate improvements by any “benevolent, charitable, philanthropic, educational or eleemosynary” institutions “not wholly supported by this Commonwealth, and not under the exclusive control and management of this Commonwealth.”\(^{22}\) The law also subjected these institutions to reporting requirements when applying state appropriations to real estate improvement projects. The attorney general here reaffirmed Penn State’s “semi-state” status, which was first referenced in the attorney general opinion of 1915, and found Penn State to be “an incorporated educational institution” that the state government did not wholly control nor manage.\(^{23}\)

\(^{19}\) May 24, 1923 (P.L. 436).
\(^{22}\) Act of Jun. 9, 1911 (P.L. 736, No. 304).
\(^{23}\) Pa. Att’y General Opinion 20, 21 (February 7, 1929).
The series of attorney general opinions from 1915, 1919, 1922, and 1929 portrayed Penn State as a “semi-state” institution and defined benefits and burdens associated with that status. The 1915 and 1919 opinions limited the benefits available to Penn State and the University’s employees. The University could not have certain expenses covered by the state, and Penn State employees could not participate in a state retirement program for public school employees. The opinions seemed to establish a limit to the state’s financial responsibility for the University by restricting the eligibility of the University to receive benefits exclusively reserved for state institutions. However, the 1919 opinion also established that Penn State was not under the control of the Pennsylvania Department of Public Instruction which was a precursor to the state’s education department. Here, the finding of semi-state status afforded a measure of institutional autonomy from the direction and management of the state department responsible for education, and the determination appeared to place the governance of the University beyond the reach of the state’s education department.

The opinions also suggested that certain governance characteristics were central to determinations of the legal status of Penn State. The 1929 opinion affirmed the importance of control to the legal status of the University. The 1929 opinion noted that government officials represented less than one-third of the total number of members on the board of trustees and seemed to adopt the binary view of control from the 1915 and 1919 opinions to conclude that Penn State qualified as a semi-state institution. Subsequent authorities clarified the role of control in Penn State’s relationship with Pennsylvania. Later attorney general opinions and court decisions refined the distinctions between partial and complete state control over an institution of higher education.
The 1922 attorney general opinion appeared to further muddy the boundaries between Penn State and the Commonwealth. The designation of Penn State employees as state employees did not seem to align with the argument in the previous opinions that Penn State was not a state institution. The only interpretation of the state employee retirement statute that would reasonably apply to Penn State employees would be under the provision that defined state employees as employees of “other institutions operated by the Commonwealth.” If considered employees of the executive, legislative, or judicial branches, as indicated in (a) and (b), then Penn State would undoubtedly be considered a department of the government. However, “operation” by the Commonwealth seemed to be the distinguishing feature of the institutions included in (c), and the attorney general had previously argued that Penn State did not operate under the direction and control of the state education department nor was it wholly managed by the state. There does appear to be much of a distinction between operation and whole management. Therefore, no strong legal justification existed to explain why Penn State employees qualified as state employees. The General Assembly eventually added language to the State Employees’ Retirement Code that specifically identifies employees of Penn State as employees. However, the lack of legal justification for the original state employee designation continued the theme of ambiguity in the legal relationship between Penn State and the Commonwealth of Pennsylvania. The state employee designation implicated that a special yet limited and ill-defined relationship existed between the University and the Commonwealth.

24 Act of May 24, 1923 (P.L. 436).
Overall, the 1915, 1919, 1922, and 1929 opinions of the attorney general portrayed Penn State as an institution that had enjoyed benefits from the state and federal governments as a land-grant institution, but the opinions did not appear to include the history of those benefits into analyses of the institutional-state relationship nor did they reference any ongoing financial responsibility on the part of the Commonwealth to realize the land-grant vision. The opinions also clearly established that the state did not have exclusive control over the institution. Lastly, the 1929 opinion noted a distinguishing feature of Penn State’s special relationship with the Commonwealth, i.e., the state status of University employees, but did not offer a detailed justification to help clarify the nature of that special association. The restrictive view privileged Penn State’s status as an independent corporation and downplayed the land-grant foundations of the University. While the restrictive view acknowledged a unique feature of the relationship that implied a tight connection between Penn State and Pennsylvania, the lack of a strong legal justification for the state employee designation suggested that the finding may be an aberration.

**Penn State as a State Institution (Expansive View)**

The attorney general opinions also presented a more expansive view of the legal relationship between Penn State and the Commonwealth. This view tended to acknowledge the land-grant foundations of the University and the mutual obligations that the state’s acceptance of the land grant created between Penn State and Pennsylvania. This simultaneous development of the expansive and restrictive views had implications for the nebulous legal status of the University and the evolution of the legal relationship between Penn State and Pennsylvania.
An attorney general opinion from 1921 defined Penn State as a state institution and articulated the expansive view of Penn State’s relationship with the state.\textsuperscript{26} This opinion concerned the payment of a 1921 gas tax. Pennsylvania’s Constitution of 1874 vested authority for taxation in the legislature, and in 1921, the state imposed a tax on gasoline sold within the Commonwealth.\textsuperscript{27} In response to the enactment of the tax, the Pennsylvania Auditor General sent numerous letters to the attorney general inquiring whether Penn State was exempt as a state institution from state gasoline taxes. To avoid redundant state taxation of its own departments, the state had already established the precedent that state-owned or -controlled entities were immune from taxation. Therefore, without clear statutory intent expressing the contrary, state courts generally found public property not to be taxable.\textsuperscript{28}

The 1921 attorney general opinion turned on the issue of whether or not Penn State qualified as a state institution. Here, the attorney general concluded that Penn State was a state institution. The opinion cited a number of developments in the history of the institution to support that designation. First, the attorney general viewed the change of the institution’s name from the Agricultural College of Pennsylvania to the Pennsylvania State College as evidence of its status as a state institution. The opinion also focused on the composition of the institution’s board of trustees, and in particular, on the 1905 amendment to Penn State’s charter that increased the number of trustees to thirty-two and empowered the governor to appoint six members to the board. The amendment brought the total number of government officials on the board up to nine

\textsuperscript{27} Pa. Const. of 1874, art. III, § 14; Act of May 20, 1921 (P.L. 1021).
\textsuperscript{28} 37 Cyc. 872, Directors of the Poor vs. School Directors, 42 Pa. 21 (Pa. 1862); County of Erie vs. City of Erie, 113 Pa. 360 (Pa. 1886); Carlisle School District vs. Carlisle Borough, 11 Dist. Rep. 294 (C.P. Cumberland September 3, 1901); Pittsburgh vs. School District 204 Pa. 635 (Pa. 1903).
members. The 1905 amendment expanded alumni participation on the board as well and extended membership to the manufacturing and mining industries. Overall, the changes in 1905 seemed to have been motivated by a push to make the board more reflective of the interests served by Penn State.\(^29\) The opinion also pointed to legislative actions that supported governmental control over the institution, including the 1857 act that required the institution to admit students in proportion to the taxable population in each county of the Commonwealth.\(^30\)

As further corroboration of the connection between the institution and the Commonwealth, the attorney general referenced the Morrill Land Grant Act. By accepting the terms of the Morrill Land Grant Act, the attorney general found that the state had formed “a covenant with the United States, to establish and maintain a college of the character described in the Act and, to the extent therein indicated, subject to the control of the Legislature.”\(^31\) The attorney general referred to another state legislative act from 1866 that mandated the state to pay for the expenses incurred selling the land-grant scrip and also permitted Penn State to borrow on mortgage to pay off the existing debt on the institution’s first building. The General Assembly eventually settled the debt on the first building through an appropriation to Penn State.\(^32\) The 1866 act demonstrated that the Commonwealth had assumed financial responsibility for facilitating Penn State’s land-grant mission.

Further, the attorney general claimed that two legislative acts related to the state’s experimental farms evinced significant entanglement between the two entities.\(^33\) In 1867, in

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32 Act of April 11, 1866 (P.L. 100); Act of June 12, 1878 (P.L. 178).
33 Act of February 19, 1867; Act of May 13, 1887 (P.L. 115).
accordance with provisions of the Morrill Land Grant Act, the board of trustees accepted the burden of establishing experimental farms in the eastern and western parts of the state. After the efforts had failed, the state passed another law in 1887 that authorized the sale of the farms, and instructed the state to assume responsibility for investing the proceeds and directing the income to the board of trustees. The attorney general relied on these two legislative examples, not only as evidence of state control and involvement, but to also support the contention that the majority of Penn State’s property had been secured with federal and state funding.  

Additionally, the opinion from the attorney general noted the accountability measures imposed on Penn State by the Commonwealth. Penn State had the burden of compiling reports to account for the expenditures of resources, and the state government paid for the printing and distribution of the reports. The attorney general found that the entirety of the entanglements between Penn State and the Commonwealth established that the trustees of Penn State held the property of the institution as “trustees for the people of the Commonwealth.” The Morrill Land Grant Act limited the authority of the board to dispose of University property by prescribing its uses. These uses were public in nature as land-grant institutions supported the agricultural and industrial interests of the nation.

In this instance, the attorney general found the strength, history, and number of connections between Penn State and the Commonwealth to be so substantial that they overshadowed the board’s existence as an independent corporate body. The frequency that the institution received aid, the sources of the aid, the proportion of the college’s assets that were

funded by public money, the purely public nature of its operations, the control that the state government exhibited over governance of the institution, and the assumed covenant that the Commonwealth had established with the federal government by accepting the land grant all supported the attorney general’s opinion that Penn State was a state institution, and therefore, exempt from the gasoline tax.

The 1921 opinion stood in contrast to the previous opinions offered by the Pennsylvania Attorney General. The previous opinions treated the issue of control as a binary by establishing exclusive state control as a requirement for classification as a state agency. In contrast, the attorney general in 1921 took a more expansive view of control and determined Penn State’s public status by looking at the totality of the evidence, which in the opinion of the attorney general, pointed to an institution so inextricably linked to the Commonwealth that it qualified as a state institution.

The 1921 opinion also considered the historical development of the relationship between the University and the state in its analysis of Penn State’s assets. The attorney general treated the early investments in the College by the Commonwealth and federal government as a trust for public purposes. These earmarked investments limited the full enjoyment of the trustees, and as a result, further cemented a bond between the institution and the Commonwealth. The state also encroached upon the academic autonomy of the institution by prescribing admissions requirements through the county admissions quotas. The 1921 attorney general opinion seemed to blur the boundaries established in the previous opinions. By invoking Penn State’s special status with Pennsylvania, the opinion shifted the tax burden for fuel from the College to the state government. In contrast to the restrictive view, the expansive view embraced a more historical
and liberal perspective on the aspects of governance, such as financial support and board composition, that guided determinations of the legal relationship between Penn State and the Commonwealth. Therefore, the simultaneous existence of these two contrary perspectives on the institution-state relationship reinforced its ambiguity and would influence later legal interpretations of Penn State’s legal status.

The adversity that Penn State faced around the time of these opinions also reflected the general ambiguity surrounding Penn State’s special status. Around 1920, Penn State confronted a number of financial challenges. As a result of weak state support, Penn State could not offer faculty members competitive salaries. In an attempt to clarify the needs of the institution to legislators, Penn State invited the Pennsylvania Chamber of Commerce to tour the campus and compile a report on the conditions of the College.\(^{36}\)

The 1920 report from the Pennsylvania Chamber of Commerce noted the contradiction between the land-grant vision and the reality of Penn State’s circumstances. The report claimed that years of sparse appropriations had left the institution with inadequate facilities. Due to the insufficient condition of these facilities, the University turned thousands of qualified students away. The report warned that “continuation of these conditions will rob the College of the public character derived from its foundation under the Morrill Act and arbitrarily restrict its invaluable service to the Commonwealth in the improvement of agriculture and the mechanic arts.”\(^{37}\) The report attested to the needs of the institution and endorsed the view of Penn State as a public

\(^{36}\) Bezilla, *Penn State: An Illustrated History*, 103-104.

\(^{37}\) Bezilla, *Penn State: An Illustrated History*, 104.
institution of the state. The report also invoked the land-grant foundations of the University as evidence that Penn State performed a public function in support of the Commonwealth.

Legal developments and the report from the Pennsylvania Chamber of Commerce revealed the contradiction between the stated land-grant covenant and the amount of support provided by the state to the University. The report also demonstrated that the public perceived Penn State to be a public institution. Penn State persistently faced challenges navigating the gulf between the institution’s conception of the land-grant colleges and the view held by leaders in state government. The attorney general opinions and the chamber of commerce report referenced the enormous burden that Penn State assumed as a land-grant institution. The designation conferred the expectation that the University would help improve economic conditions in the state through advancements in the agricultural and industrial science. However, the 1915 and 1919 opinions seemed to place time constraints on the responsibility of the state to support the University’s efforts. In contrast, the chamber of commerce claimed that the appropriations did not adequately enable Penn State to realize the ambitious land-grant vision and called on the state to assume continued responsibility in that endeavor. These temporal considerations distinguished the legal perspective in the 1921 opinion, which recognized a tight nexus between the two entities and treated the land-grant foundations as an ongoing entanglement, from the perspective formulated in the previous opinions that included scant reference to the land-grant foundations and viewed the early investments as completed events. This discrepancy among the attorney general opinions pinpointed responsibility and accountability for the realization of the land-grant vision as a persistent theme in the legal relationship between Penn State and Pennsylvania.
In the 1921 opinion, the attorney general acknowledged the shared responsibility for land-grant education as a factor in determining Penn State’s relationship with the Commonwealth. The attorney general found that the state’s acceptance of the land scrip from the Morrill Land Grant Act established a “covenant” between the Commonwealth and the federal government. The 1921 attorney general opinion listed subsequent legislative actions that suggested that the state understood and willingly welcomed the responsibility associated with the covenant. According to the attorney general, the land-grant responsibility carried so much weight that it superseded some of the corporate rights and privileges provided by Penn State’s original 1855 charter. For example, the 1855 charter stated that the board of trustees was the corporate body of Penn State and had the right to manage the disposition of real estate in furtherance of the college’s purposes.

However, the 1921 attorney general found that by accepting federal and state lands, the trustees held “their property as trustees for the people of the Commonwealth.” The trustees owed duties that expanded beyond the corporation to the citizens of Pennsylvania, and this broader set of responsibilities seemed to limit the customary rights and privileges of trustees and corporate directors. The attorney general in 1921 cited the entanglements between Penn State and the Commonwealth to distinguish the College from “similar institutions which merely receive state aid from time to time.” Therefore, the expansive view recognized the enhanced scrutiny of Penn State’s management of resources as evidence that the University operated as a

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state institution and generally perceived the land-grant mission of Penn State to be a public mission that served the interests of the Commonwealth.

The benefit conferred in the attorney general’s finding in the 1921 opinion, i.e., the non-applicability of the gasoline tax to Penn State, also suggested a simultaneous burden on the autonomy of the institution as the attorney general viewed the board of trustees as public trustees. This simultaneous burden and benefit perpetuated the legal ambiguity of Penn State’s status. The finding suggested that the state had a measure of authority over the institutional autonomy of Penn State, but did not provide details on the boundary of that influence.

The broad view of a shared responsibility between Penn State and the Commonwealth to carry out the land-grant vision appeared to have influenced the attorney general’s treatment of state control in 1921. The attorney general did not identify majority control of the board by government representatives as a requirement for state control. Rather, the addition of government officials satisfied the attorney general to a sufficient degree to claim that Penn State “was largely controlled by the state.”\footnote{6 Pa. Att’y Gen. Op. 70 (December 21, 1921), 74.} The College’s contributions to the economic agendas of the state and country through the land-grant mission supported the contention that Penn State was more of a public institution. Penn State and the Commonwealth shared a responsibility to the people to establish and maintain a college that advanced the profitability of the agricultural and industrial interests of the state. According to the expansive view in the 1921 opinion, the combination of the institution’s public purposes, the limitations on the full exercise of corporate governance, and extensive governmental representation on the board revealed the public nature of Penn State.
As part of the 1921 attorney general’s argument that Penn State and the Commonwealth shared responsibility for implementing the land-grant vision, the court cited a case involving an institution with a markedly distinct legal status from Penn State. The 1921 attorney general opinion cited a Michigan case to support the contention that similar to municipalities, Penn State constituted a government agency which precluded the application of tax laws to the property of the University. However, that cited case involved the University of Michigan which had a substantially different legal status in the state of Michigan than Penn State appeared to have in Pennsylvania.

The Pennsylvania legislature created Penn State through a statute, while the state of Michigan’s constitution established the University of Michigan. Several states have created public institutions through constitutional provisions and endowed those colleges and universities with constitutional autonomy. Constitutional autonomy is “the use of a constitutional provision to establish and provide legal protection for the internal control of a public college or university.” State constitutions provide these colleges and universities with a degree of protection from excessive legislative, executive, and judicial interference by establishing the institutions as distinct departments of the government. For example, institutions with constitutional status can only be terminated by constitutional amendment and their inclusion in the constitution places them on the same level as other branches of the government. Institutions with constitutional status must still abide by the constitution and are not completely beyond the reach of legislative and executive authority. The legislative and executive branches may attach

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conditions to appropriations, and the legislature may create regulatory obligations through general police powers that influence the governance of institutions with constitutional status.43

Michigan granted constitutional autonomy to the University of Michigan prior to the founding of Penn State, and Michigan’s state courts have long recognized precedents that afford significant constitutional autonomy to the University of Michigan. In the Michigan case cited by the 1921 opinion, the court ruled that property of the constitutionally-created public corporation of the Regents of the University of Michigan, which the corporation held in trust to support a public purpose, was exempt from taxation. In discussing the constitutional status of the Regents of the University of Michigan, the court asserted that the public corporation through constitutional sanction “has become a part of the fundamental law, and in some respects, is not subject to legislative control or interference” and likened the regents to a department of the state.44

The relationship between Penn State and Pennsylvania appeared to differ considerably from the association between the University of Michigan and Michigan as articulated in Auditor General v. Regents of the University. First, as a statutory institution, Penn State did not have constitutional status. In Michigan, the constitution is the source of authority for both the legislature and the university. The constitutional status of the University of Michigan provides the institution with more protection from legislative interference than Penn State has in Pennsylvania. Penn State was created by and is subject to the authority of the General Assembly. The University of Michigan had also been established and funded with public money, and at the

43 McKnight, University of Minnesota, 1-2.
44 Auditor General vs. Regents of the University, 83 Mich. 467 (1909).
time of the case in 1890, a property tax had been specifically created to support the institution. The public tax represented a continuing public interest and investment in the university. In contrast, while Penn State had received significant support from the state through ad hoc appropriations, the institution had been founded with a mixture of private funds, and the state had not created a dedicated tax to support the University. Therefore, in 1921, the constitutional status and sources of public support for the University of Michigan offered much more compelling evidence of a state institution.

In citing Auditor General, the attorney general seemed to equate the legal status of Penn State with an institution which enjoyed a significantly closer relationship with its home state. This comparison reflected the same expansive view of the legal relationship between the University and the state that the attorney general relied on to find that Penn State was a state agency. The attorney general suggested setting aside the distinctions between the legal devices that created these institutions in lieu of a perspective that privileged the qualitative and historical characteristics of the connections between the University and the Commonwealth.

Themes

The attorney general opinions highlighted a number of persistent themes in the legal relationship between Penn State and the Commonwealth. In the opinions, attorney generals focused on the sources and levels of support required for an institution to qualify as a state agency. The 1921 opinion viewed the collective investments of the federal and state governments as substantial evidence of the public nature of the University and Penn State’s status as a state agency. However, in other opinions, the attorney general treated the early federal and state investments as completed events, and as a result, established temporal limitations on Penn
State’s special status with the Commonwealth. For example, the references to the appropriations that Penn State received from the federal and state governments in the 1915 and 1919 attorney general opinions suggested that these events conferred a special status to Penn State, but the opinions did not emphasize any ongoing responsibility on the part of the state to facilitate the land-grant vision. The omission suggested that the state had satisfied the responsibility, or at the very least, the continued shared responsibility was not relevant to Penn State’s legal status. By contrast, the 1921 attorney general opinion referred to the state’s responsibility to the institution as concordant with a non-expiring “covenant” between the Commonwealth and the United States. The discrepancy in these points of view perpetuated the ambiguity of the legal status of Penn State and established that the issues of support and responsibility for the land-grant vision would figure prominently in courts’ analyses of the legal relationship between the University and the Commonwealth.

Control also proved to be a significant factor in evaluations of the legal status of Penn State. The restrictive view required either complete and exclusive control or a majority government representation on the board of trustees to define a college as a state institution. The expansive view evaluated the totality of entanglements between the University and the state and did not limit the assessment to board composition and representation. For example, the attorney general in 1921 observed that the land-grant foundations of the University created obligations that limited the autonomy of the institution and held Penn State accountable to the public. The land grant limited the property rights of the board of trustees. Additionally, the perceived public nature of the institution invited the legislature to prescribe admissions requirements. The expansive view recognized the special status of the University as creating obligations that
resembled those of a state institution. This perspective also considered factors that a strict analysis of the charter and board majority did not observe. This discrepancy between the two views indicated that control would remain a major theme in court cases that touched upon the legal relationship between Penn State and Pennsylvania.

The opinions also highlighted the unresolved ambiguity of Penn State’s legal status. The 1922 attorney general opinion introduced ambiguity by declaring that Penn State was not a public school, but that the employees of the College were state employees. In order to come to that conclusion, the attorney general applied a provision that suggested Penn State was an institution “operated” by the Commonwealth. However, previous opinions found Penn State was not controlled by the state. The 1915 opinion found the absence of sufficient state control over the assets and operations of Penn State demonstrated that the University was not a state institution. The opinion in 1922 suggested that Penn State was operated by the state, and the dictionary definition of operate is to “control the functioning of (a machine, process, or system),” so that would have seemed to suggest that Penn State was under the control of the state and likely a state institution. The seemingly contradictory findings in these opinions further obscured the contours of the legal relationship between Penn State and the Commonwealth. Both the restrictive and expansive views agreed that Penn State had a special relationship with the Commonwealth, but differed on the extent and longevity of that association.

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45 Act of May 24, 1923 (P.L. 436).
Summary

Analysis of the attorney general opinions revealed persistent themes in the legal relationship between Penn State and the Commonwealth. The issues of support, control, and ambiguity appeared in the attorney general opinions and continued to be critical to analyses of Penn State’s status. Two views of Penn State’s relationship with the Commonwealth emerged from the attorney general opinions: one that treated the institution as semipublic (restrictive) and one that considered Penn State to be a state institution (expansive). The land-grant history and early federal and state appropriations provided the basis for the expansive view of the 1921 attorney general opinion. Later attorney general opinions would continue to espouse both views. In 1929, the attorney general reverted to the finding that Penn State was not a state institution in an opinion concerning the legal requirements imposed on the use of state money by non-state institutions. However, decades later in 1972, an attorney general opinion demonstrated how the expansive view of 1921 may have influenced later legal interpretations of the relationship between Penn State and Pennsylvania. The opinion also indicated that the precise nature of the status of Penn State would remain contested and uncertain.

In 1972, the Secretary of the Pennsylvania Department of Labor & Industry wrote a letter to the attorney general asking whether Penn State employees qualified as state employees under Pennsylvania’s unemployment laws.47 The pertinent section that defined state employees provided,

Section 1001 (43 P. S. § 891) provides: "Notwithstanding any other provisions of this act, the Commonwealth of Pennsylvania and all its departments, bureaus, boards, agencies,

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commissions and authorities shall be deemed to be an employer and services performed in the employ of the Commonwealth and all its departments, bureaus, boards, agencies, commissions and authorities shall be deemed to constitute State employment subject to this act with the exceptions hereinafter set forth in Section 1002. Except as herein provided, all other provisions of this act shall continue to be applicable in connection herewith.\textsuperscript{48}

The attorney general here found that Penn State employees were state employees under the definition in the act and cited to previous opinions from the attorney general that found Penn State was “an instrumentality of the state” similar to “authorities” under state unemployment laws. The 1972 attorney general opinion added that the close connection between Penn State and the Commonwealth distinguished the University from the “state-aided” institutions of Pitt and Temple. The first authority that the attorney general cited in support of this finding was the 1921 attorney general opinion that introduced the expansive view of the relationship between Penn State and the Commonwealth. The attorney general also listed opinions throughout the years that illustrated the special status of the University, including opinions that found Penn State to be immune from inheritance tax, exempt from capital stock tax, and an instrumentality for matters related to social security.\textsuperscript{49}

Further legislation by the General Assembly convinced the attorney general in 1972 that the legislature recognized the special relationship between Penn State and Pennsylvania. The legislation included an act stating that Penn State employees were state employees, an act that

did not require Penn State to return unspent state appropriations, an act that provided for roads on the Penn State campus to be constructed by the state highway department, and an act that exempted Penn State from liens on appropriations to state-aided universities. Based on the record of attorney general opinions and state statutes, the attorney general in 1972 found “that the Legislature intended that employees of the Pennsylvania State University be considered “state employees” for purposes of the state unemployment law.

With the issuance of the 1921 and 1922 attorney general opinions, one Penn State historian proclaimed that “the status of the College as a state institution was more clearly defined than at any previous time in history” and that the attorney general had “fixed the status of the College authoritatively as a State institution.” In reality, the status of the legal relationship between Penn State and Pennsylvania still seemed murky, and the opinions of the attorney general did not necessarily add all that much clarity. Various opinions from the attorney general contradicted each other throughout the years. The 1929 and 1972 attorney general opinions reflected the tension and ambiguity that enveloped Penn State’s status with the state. The 1929 attorney general opinion took a legalistic approach to assessing the status of Penn State and focused on the charter and the College’s founding as “an educational institution.” The attorney general in 1929 looked at the proportion of government officials on the board in determining whether the Commonwealth controlled and managed the institution and found Penn State to be among an ordinary class of “semi-state” institutions.

50 Act of June 27, 1923 (P.L. 858), § 1(6); Act of May 2, 1949 (P.L. 870); Act of May 11, 1949 (P.L. 1126); Act of June 1, 1945 (P.L. 1242).
52 Dunaway, History of the Penn State, 231.
In contrast, the 1972 attorney general opinion assumed the more expansive view of the relationship and inferred legislative intent from a comprehensive view of the ties between Penn State and the Commonwealth. Contrary to the 1921 attorney general opinion, the opinion in 1972 did not explicitly reference the land-grant history of Penn State nor the existence of a “covenant” between the federal government and Pennsylvania. This omission suggested that Penn State’s land-grant history, the embodiment of the unique characteristics that marked Penn State’s special status upon founding, had been internalized into the legal rationale that influenced subsequent attorney general opinions and legislative action. The decision by the attorney general in 1972 to cite the atypical opinion from 1921 as an authority also implied that a parallel view of the legal status of Penn State accompanied the development of the expansive view which treated the University as one of many semi-state institutions.

As a result of the unique circumstances of the founding of the University, Penn State had accrued a number of benefits. The Morrill Land Grant Act, the support of the Pennsylvania Agricultural Society, and the expertise of Evan Pugh helped establish and cement Penn State’s status as the land-grant college of the Commonwealth. The institution received federal and state appropriations and support from the agricultural societies of the Commonwealth. However, a number of burdens countered the perception that Penn State had a special relationship with the Commonwealth. With the special status came competition from other colleges for the land-grant, legislative criticism of the institution’s spending habits, a delayed and contested sale of the land scrip, a lethargic commitment from the state to sustain investment in the land-grant mission, and the burden of actualizing a college-level education in the agricultural and industrial sciences.
The opinions of the attorney general reflected this tension between the benefits and burdens of Penn State’s status and revealed that the contours of the legal relationship between Penn State and the Commonwealth remained unclear. One of the unsettled issues that emerged from the attorney general opinions was the issue of control. The issue of control implicated questions of the degree to which the state actually exerted control over Penn State, and of the extent to which the state would have to exhibit control over Penn State in order for it to be classified as a state institution. Another unresolved issue concerned support and the level of support necessary to implicate state agency status. In assessing Penn State’s status with the Commonwealth, later legal authorities looked not only to the total value of state support, but also to the proportion of the University’s budget represented by state funds. The ambiguity of Penn State’s status also continued to be an underlying issue in analyses of the institution-state relationship. Later court cases expounded upon the issues and themes of the attorney general opinions and suggested that one of the two perspectives had emerged as the dominant conception of the legal relationship between Penn State’s and the Commonwealth.

1939 Tax Case

In 1939, the Court of Common Pleas of Centre County was the first court to consider the legal relationship between Penn State and the Commonwealth.\textsuperscript{54} The case (1939 tax case) stemmed from a dispute between Penn State and local municipalities over the taxability of land used by the College for agricultural experimentation and instruction. Between 1935 and 1937, local municipalities assessed and taxed the farm that Penn State used for agricultural research and instruction. Penn State failed to pay the taxes, and in response, the municipalities put the

\textsuperscript{54} Pennsylvania State College v. County of Centre, No. 2 (C.P. Centre Eq. Nov. Term 1937, filed August 24, 1939).
property up for public sale. Penn State then filed an action in equity to prevent the sale of the land and challenge the right of local municipalities to assess and tax the property of the College.

This 1939 tax case and later Penn State tax cases concerned the ability of local communities to tax the real estate of the University. The Pennsylvania Constitution of 1874 conferred taxation authority to the General Assembly by establishing “all taxes…shall be levied and collected under general laws.”\textsuperscript{55} The power of taxation is exclusively the right and duty of the legislature, but the power may be delegated to localities.\textsuperscript{56} Under the state constitution, all taxes must be uniformly applied to all classes of subjects. The purpose of uniformity clauses in state constitutions is to ensure the equitable distribution of the burdens of taxation among the citizens of the state.\textsuperscript{57}

The Pennsylvania Constitution of 1874 also provided the General Assembly with the authority to exempt certain types of property from taxation:

1. Public property used for public purposes
2. Actual places of religious worship
3. Places of burial not used or held for private or corporate profit
4. Institutions of purely public charity\textsuperscript{58}

Subsequent amendments and constitutions expanded and further specified the types of property and institutions eligible for tax exemptions.\textsuperscript{59} The Pennsylvania Constitution provides for tax-exemptions, but the legislature must activate them through legislation. With the passage

\textsuperscript{55} Pa. Const. of 1874, art. IX § 1.
\textsuperscript{57} 71 Am. Jur. 2d State and Local Taxation § 102.
\textsuperscript{58} Pa. Const. of 1874, Art. IX, § 1.
\textsuperscript{59} For example, see, 1923 Pa. Laws 1117; Pa. Const. of 1968.
of the 1933 General County Assessment Act (GCCA), the legislature delegated taxing authority for real estate to local governments and also exercised the power to exempt certain types of real property from taxation by local authorities.\textsuperscript{60} Section 201 of the GCCA subjected all real estate to taxation by the local, school, and county authorities of the Commonwealth.\textsuperscript{61} The passage of the GCCA led to the establishment of two circumstances in which real property is protected from local taxation.\textsuperscript{62} The type of exception hinges on action by the legislature; the General Assembly can actively stipulate that property is exempt from local taxation or the General Assembly can decline to delegate authority to local counties to tax certain property. In the former, section 204 of the GCCA exempts certain types of property from taxation, including the property of purely public charities. The taxing authority of local governments is not even an issue with exempt property as the General Assembly has affirmatively determined that the type of property is not taxable.\textsuperscript{63}

For the latter situation, the property is considered immune from taxation, i.e., the taxing entity lacks the authority to tax the property. The Commonwealth and its agencies cannot be taxed by local authorities, and therefore, the Commonwealth’s property is immune from taxation without an express grant of legislative authority.\textsuperscript{64} Tax immunity has limited application to all property of the Commonwealth and its instrumentalities unless expressly provided for by

\textsuperscript{60} Act of May 22, 1933 (P.L. 853, No. 155).
\textsuperscript{61} Act of May 22, 1933 (P.L. 853, No. 155), § 201.
\textsuperscript{63} Delaware County Solid Waste Authority v. Berks County Bd. of Appeals, 534 Pa. 81 (Pa. 1993), 86.
The relationship between the constitutional exemption and the legislative enactment of that exemption is a key consideration in tax-exemption cases and has significant implications for the legal relationship between Penn State and the Commonwealth.

The central issue of the 1939 case was whether Penn State was a state agency for tax purposes. However, Penn State offered two arguments as to why the local tax should not apply to the University:

1. Penn State was an agency of the state and the property was immune, and
2. The property was exempt since the University was an institution for purely public charity and the property was being used for a public purpose

State Agency Exemption/Immunity

The Commonwealth of Pennsylvania has had a long-standing rule that local taxing authorities cannot tax state-owned property without explicit statutory permission from the legislature. The Pennsylvania Constitution of 1874 granted the General Assembly the authority to exempt “public property used for public purposes” from taxation. The legislature exercised that authority by passing legislation that exempted public property being used for public purposes from local taxes. The court has also found that immunity also extends to the property of state agencies. The litigants and the court in the 1939 tax case seemed to confound the terms “immunity” and “exemption” by using them interchangeably; however, the court has found the
distinction between the two meaningless in cases involving government-owned property, since the property is not taxable under either exception.69

The Court of Common Pleas reviewed the history of the institution’s relationship with the state and held that the Pennsylvania State College was “an agency of the Commonwealth for the purpose of carrying on educational functions and experimentation, with particular emphasis upon education and experiment of an agricultural character.”70 The court found that Penn State was “an institution of such a public nature that its property and activities are not subject to local taxation.”71 In arriving at that decision, the court discussed the historical background of the institution and observed three attributes that indicated that Penn State was a public institution: its land-grant status, sources of support, and governance structure.

The court discussed the unique status of Penn State as the land-grant institution of the Commonwealth, and how the College was founded and maintained to advance state governmental interests in agricultural education. The court looked at the statutory foundations of Penn State as evidence that Penn State carried out a public purpose. The court noted that the legislature conferred a charter to Penn State to perform functions that supported the agricultural aims of the Commonwealth and the United States. The case also devoted attention to how the specific property in question facilitated the institution’s responsibility to carry out the agricultural experimentation aims of the Morrill Land Grant Act. The court found that the land-grant status, and its attendant responsibilities to the agricultural interests of the state, bestowed Penn State with the standing of a state agency of the Commonwealth. The opinion also treated

70 Pennsylvania State College v. County of Centre, No. 2 (C.P. Centre Eq. Nov. Term 1937, filed August 24, 1939).
the public’s history of funding and the participation of government officials on the board as indicators of Penn State’s status as a public agency. The court cited the substantial state and federal support and the significant participation of government representatives on Penn State’s board of trustees to support the contention that the institution was public. Shortly before the decision, the College had added another state government official, the secretary of mines, to the board of trustees. The reasoning the court exhibited to determine that Penn State was a state agency aligned with the rationale of the expansive view of the legal relationship between Penn State and the Commonwealth.

*Charitable Exemption*

The court in the 1939 tax case primarily based its decision on state agency reasons, but also considered the University’s eligibility as an institution of purely public charity. The court found that the nature of the property at issue and the institution’s expenditures established Penn State’s eligibility for the exemption. The court noted the manner in which the designated purposes of the property limited the corporate rights and privileges of the institution’s board of trustees. The 1855 charter provided the fundamental right of disposition of property to the board of trustees.72 The court claimed that the property that Penn State purchased with public funds for agricultural education and experimentation could not be devoted to other purposes and thus, the funds limited Penn State’s corporate right to full enjoyment of the property. Further, the minimal fees that the University charged students, and Penn State’s application of any revenue earned to the improvement and efficiency of the University’s educational programs, facilities, and grounds,

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72 Act of February 22, 1855 (46 P.L. 50, no. 46).
affirmed its status as a charity. Therefore, the 1939 court found that Penn State qualified for both statutory and constitutional exemptions.

*Summary*

The 1939 tax case had significant implications for the legal relationship between Penn State and Pennsylvania. First, the case previewed the tax law issues that prompted future judicial examinations of the institution-state relationship. Second, the opinion included both the restrictive and expansive views of Penn State’s legal status with the Commonwealth. The court’s determination that the University was a state agency reflected the expansive view, and the restrictive view informed the finding that Penn State qualified as an institution of purely public charity. The state agency determination resonated the expansive view’s emphasis on the land-grant foundations of the University. The court considered the land-grant mission of the University to be a public endeavor in support of the economic interests of the Commonwealth and the United States. To satisfy this public land-grant mission of the University, Penn State endured constraints on institutional autonomy that evidenced state control. For example, the property in question in the 1939 tax case was limited to the agricultural purposes that spawned the Morrill Land Grant Act and the founding of Penn State. Additionally, these land-grant interests shaped the composition of the board of trustees. The board included a significant number of government officials, including the secretaries of agriculture and mining. The court viewed the representatives from the agricultural and mining industries as public officials because of their role in the land-grant mission of the University. Therefore, the totality of the entanglements attendant to the University’s land-grant mission established Penn State as a state agency.
The finding that Penn State was a purely public charity was more reflective of the restrictive view of the legal relationship between Penn State and the Commonwealth. Consistent with the restrictive point of view, the court’s finding only partially recognized the land-grant foundations of the University. The agricultural purposes of the property in question in the 1939 tax case justified the purely public charity exemption. The implication of this finding was that property not used for agricultural instruction and experimentation would not likely qualify for the exemption. The state agency determination exempted all of an institution’s property from taxation.

This distinction highlighted the temporal restrictions of the restrictive view of Penn State’s status. For example, over the years, the curriculum of the University expanded beyond the agricultural and industrial sciences, but the court’s decision suggested that the exemption would only apply to the original agricultural and industrial purposes stated in Penn State’s charter. This restrictive view of the exemption stood in contrast to the evolving mission of land-grant universities and the changing landscape of American higher education.

During the early twentieth century, Penn State ushered in a second generation of land grant universities by expanding its academic offerings and research portfolio. Between 1917 and 1927, Penn State President Ralph Hetzel broadened the liberal arts curriculum of the University and nearly doubled the number of faculty. Hetzel’s efforts were met with resistance and skepticism from the legislature. The General Assembly believed that the University should primarily concentrate on agriculture, and members often suggested eliminating liberal arts from the curriculum. However, Hetzel remained steadfast in the belief that a liberal education was a necessary complement to a practical education and reminded detractors that the Morrill Land
Grant Act provided for both classical and scientific studies. Perhaps the compartmentalized approach of the purely public charity exemption, with its focus on the specific uses of individual parcels of property, appealed to lawmakers and legal authorities who held the restrictive view of the legal relationship between Penn State and the Commonwealth. The court in the 1939 tax case grounded its decision in both the restrictive and expansive views of Penn State’s legal relationship with the Commonwealth. The establishment of the state-related status and the decisions in later cases would testify to the emergence of one of these two views as the prevailing perception of Penn State’s legal status in Pennsylvania.

Origins of State-Related Status

The Pennsylvania courts did not thoroughly examine the issue of Penn State’s relationship with the Commonwealth for over forty years after the 1939 case. In the interim, the state designated Penn State, Pitt, Temple, and Lincoln as state-related institutions and members of the Commonwealth System of Higher Education (Commonwealth System). During the mid-1960s, the state created the Commonwealth System by statute to address an imminent surge in enrollments at the colleges and universities of Pennsylvania. The establishment of the Commonwealth System and the state-related designation entrenched the restrictive view of the legal relationship between Penn State and the Commonwealth of Pennsylvania. By equating Penn State’s legal status with Temple, Pitt, and Lincoln, the General Assembly severed the

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distinctive feature of the University, i.e., its land-grant foundations, from Penn State’s legal standing in Pennsylvania. The formation of state-related universities was part of a broader state initiative to establish a system of public higher education that integrated the community colleges, state colleges, and state-related universities of the Commonwealth. The state intended for each of the three types of institutions to complement each other’s strengths and envisioned that the state-related universities would work together to reduce the duplication of academic programs, ease the transfer of students among the institutions, and standardize their academic and business operations. However, the Commonwealth System did not materialize as expected, and the state-related universities did not work together nor evolve under the guidance of a state plan. The incongruity between the original plans for the Commonwealth System and the actual development of Pennsylvania’s public institutions of higher education may offer guidance for future efforts by the state and policymakers to organize a comprehensive system of higher education.

During the early to mid-1960s, two circumstances prompted the General Assembly to establish the Commonwealth System. First, state government officials and policymakers warned that Pennsylvania’s colleges and universities were unprepared for an imminent surge in enrollments. In 1959, an advisory panel of the Joint State Government Commission issued a report claiming that “a crisis in higher education of major proportions is facing the Commonwealth.” The report warned that Pennsylvania lacked the facilities, faculty, and funding to accommodate the estimated 114% increase in college enrollments that the state stood

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to witness by 1970. The advisory panel suggested a number of recommendations to prepare the Commonwealth’s institutions of higher education for the impending influx of students. The report recommended that the state bring together the state-aided institutions of Pitt and Temple to work together with Penn State to strategically address the graduate and professional education needs of Pennsylvania, reduce internal competition, and eliminate the duplication of academic programs. The advisory panel also recommended drastically increasing state financial support for public higher education and introduced the idea of connecting that support to set tuition fee schedules. A 1961 Pennsylvania Council on Education report to the Governor of Pennsylvania also cited the looming issues confronting the state’s colleges and universities and declared the “lack of proper administration” as the greatest weakness of public higher education in the Commonwealth.\(^77\) The Council on Education recommended enhanced support for the colleges and universities of the state as Pennsylvania’s public institutions were “underdeveloped.”\(^78\)

The state lobbying efforts of Temple and Pitt to secure additional funding and the same legal status of Penn State also influenced the development of the Commonwealth System. The first legislative reference to “state-related” occurred in 1965 when the General Assembly passed a law that designated Temple as a “state-related” institution.\(^79\) In the years leading up to the legislation, leaders from Temple and Pitt appealed to state government officials for additional funding and a closer institution-state relationship. In 1960, Temple President Millard Gladfelter met with state government officials in Harrisburg to discuss strategies for tightening the university’s relationship with the Commonwealth and expanding state support for the


\(^{79}\) Act of November 30, 1965 (P.L. 843, no. 355).
institution. As part of a plan to increase support for state-related institutions, provide for better coordination of higher education, and expand access for citizens of the Commonwealth, the legislature passed the Temple University Commonwealth Act (Temple Act) into law on November 30, 1965. In the Temple Act, the Commonwealth acknowledged Temple as “an integral part of a system of higher education in Pennsylvania” and asserted that continuing the state’s relationship with Temple served the interests of the public. The stated purpose of the act was “to extend Commonwealth opportunities for higher education by establishing Temple University as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth system of higher education.” Although the Temple Act did not eliminate the corporation established by Temple’s original charter, and the legislation assured that the property and buildings of Temple remained under the direction and management of the trustees, its stipulations had an impact on university governance and provided insight into the burdens and benefits of the state-related status.

The Temple Act increased the number of trustees from twenty-five to thirty-six and added the Governor of Pennsylvania, Mayor of the City of Philadelphia, and the Superintendent of the Pennsylvania Department of Public Instruction as ex-officio members. The state government had the authority to appoint twelve of the thirty-six trustees: the governor, president pro tempore of the senate, and speaker of the house each had discretion to appoint four members. The Temple Act also stipulated that the university must observe the tuition fee schedule set by the legislature for both Pennsylvania and non-Pennsylvania residents in the institution’s annual

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81 Act of November 30, 1965 (P.L. 843, no. 355), 844.
82 Act of November 30, 1965 (P.L. 843, no. 355), 844.
state appropriation. However, if the appropriation proved to be insufficient to allow Temple to observe the set schedule, the university could adjust the fee “to provide required income equal to the amount not provided by the appropriation act.” The legislature provided Temple with the authority to spend appropriation money on capital development and improvement projects, but only under certain circumstances, and any construction of new buildings or purchases of new property would have to be agreed to by the Commonwealth. The Temple Act also required the university to provide a report on all expenditures to the General Assembly and subjected the institution to auditing by the Auditor General of Pennsylvania.

The state-related designation conferred a significant benefit to Temple. In 1964, Temple’s trustees submitted a proposal to the State Council of Higher Education requesting the “state-related” designation. Temple anticipated a significant increase in enrollments and submitted the proposal with the hope that by 1970, the state would share half of the burden of the institution’s costs. Temple also proposed a one-third increase to the institution’s appropriation so that the university could reduce its tuition from $920 to $540 (Penn State, $525). In the immediate aftermath of the Temple Act, the university received an appropriation of $11 million that enabled the institution to reduce in-state tuition to $450 in 1967. By 1968, the state appropriation to Temple had leaped to over $33 million. Further, it was clear that Temple considered the new arrangement as equivalent to Penn State’s relationship with the Commonwealth.

85 Hilty, Temple University, 104.
The developments that engendered the state-related status and the haphazard manner in which the state applied it to Penn State indicated a shift in the legal relationship between Penn State and the Commonwealth. The new Commonwealth System included Penn State, Temple, Pitt, and Lincoln. Through legislation, the General Assembly modified the charters of Pitt, Temple, and Lincoln to reflect the addition of the words, “of the Commonwealth System of Higher Education” to the name of the institutions and to confer them with the status of “state related.”\footnote{Temple, Act of November 30, 1965 (P.L. 843, no. 355); Pitt, Act of Jul. 28, 1966, Special Session 3 (P.L. 87, no. 3); Lincoln, Act of Jul. 7, 1972 (P.L. 743, no. 176).} The modifications to their charters also established the institutions as instrumentalities of the state which supported the educational needs of the Commonwealth. The General Assembly, however, never legislatively changed the name and mission of Penn State by executing changes to the institution’s charter. The first time that the state statutorily defined Penn State as a state-related institution was in a 1972 amendment to the Pennsylvania Fair Educational Opportunities Act that included a provision stating that “‘state-related’ institutions means the University of Pittsburgh, Temple University and the Pennsylvania State University.”\footnote{Act of July 16, 1961 (P.L. 776, no. 341), § 9; amended 1972, Dec. 29, P.L. 1682, No. 360, § 3.} The act distinguished the universities from the list of “state-aided” and “state-owned” institutions, but the legislation did not provide further explanation as to the meaning of “state-related” as applied to Penn State.

Prior to the Temple Act, and the subsequent 1972 amendment to the Fair Education Opportunities Act, the status of Penn State did not have a specific label. However, some courts and attorney generals had recognized the institution as having a special status and often referenced this unique status and the institution’s land-grant history to distinguish Penn State
from Pitt and Temple, e.g., the 1972 opinion from the attorney general. The Commonwealth created the state-related universities designation as part of the Commonwealth’s broader plan to address the anticipated influx of college students. The enacting legislation for Pitt, Temple, and Lincoln specified that state-related universities were intended to serve the educational aims of the Commonwealth as instrumentalities of the state. The General Assembly seemed to remove the land-grant foundations from Pennsylvania’s relationship with Penn State by lumping the University together with Temple, Pitt, and Lincoln, and broadly defining the group as supporting the educational aims of the state. By focusing on the tuition benefits of the new state-related status, which Pitt and Temple equated to that of Penn State, Pitt, Temple, and the Commonwealth may have redefined and limited the relationship between Penn State and Pennsylvania. For example, in the midst of lobbying for the Temple Act, Temple leadership invoked the restrictive view of Penn State’s legal relationship with the Commonwealth by announcing Temple’s desire to have “the same relationship to the state as the Pennsylvania State University, which is controlled by its own board of trustees but subject to state obligations and control.” This portrayal omitted the land-grant considerations that had shaped Penn State’s legal relationship with the Commonwealth, and the state seemed to affirm that description by passing the Temple, Lincoln, and Pitt Acts.

Following the signing of the Temple Act, the state appropriation bills for Penn State reflected the shifting perception in the legal relationship between the Commonwealth and the University. Prior to the Temple Act, Penn State did not receive funding specifically allocated for

in-state tuition. For example, the General Assembly’s 1955 appropriation bill for Penn State implied that the funding related to the state’s promise to the federal government to support land-grant colleges. The title of the bill explicitly mentioned the state’s 1863 acceptance of the land grant and Pennsylvania’s agreement “to carry the same into effect.”\(^90\) The itemized allocations provided funding for general maintenance and research related to coal, petroleum, and mining, and the bill did not include any references to tuition assistance for students. However, in the bill for the first appropriation following the Temple Act, Penn State received an itemized allocation specifically for tuition support. The change seemed to signal a shift in the legislature’s perception of the state’s financial responsibility towards Penn State and the land-grant mission.

The General Assembly created the state-related designation and the Commonwealth System as part of a broader plan to organize a cohesive system of public higher education. The plans for the Commonwealth System further defined the state-related status of Penn State. To help facilitate the Commonwealth System, the General Assembly established the State Board of Education in 1963 to plan and coordinate postsecondary education in the Commonwealth.\(^91\) The State Board of Education is a statutory office of the executive-level Pennsylvania Department of Education and has the power and duty to establish policies, regulations, and standards related to elementary and postsecondary education. The State Board of Education consists of two councils; the Council of Basic Education, which focuses on K-12 education, and the Council of Higher Education (Council), which concentrates on the state’s higher education efforts. The Council has the authority and duty to create a master plan for higher education in the Commonwealth. In

\(^{90}\) Act of May 31, 1956 (P.L. 78, no. 102-A).
\(^{91}\) An Act of June 17, 1963 (P.L. 143, No. 94).
addition, the Council also sets standards for the authorization of degree-granting institutions and the approval of higher education capital projects funded by the Commonwealth.\textsuperscript{92}

\textit{1967 Master Plan}

Pursuant to Act 94, the State Board of Education prepared a master plan for higher education in 1967. The purpose of the master plan was “to formulate public policies for higher education in Pennsylvania to insure adequate resources and orderly growth in the future.”\textsuperscript{93} The plan presented proposals to coordinate and guide the responses of Pennsylvania’s colleges and universities to the projected growth in demand for higher education. To provide the citizens of the Commonwealth with broad access to a variety of postsecondary education opportunities, the plan encouraged the development of the Commonwealth System which consisted of three segments: community colleges, state colleges, and Commonwealth universities.

The Commonwealth University segment included Penn State, Temple, and Pitt. The master plan noted that recent legislation had established Temple and Pitt as equivalent to Penn State and envisioned that the three universities would collectively provide low cost university-level education to the citizens of Pennsylvania. A governance council consisting of representatives from Temple, Pitt, Penn State, and the State Board of Education was proposed to coordinate activities among the three universities, ease the transfer of credits and students, and identify and address gaps and duplications in programs and services.\textsuperscript{94} To facilitate coordination among the universities, the plan encouraged the development of uniform admissions

\textsuperscript{94} Pennsylvania State Board of Education, \textit{A Master Plan}, 34-35.
requirements, transfer policies, financial systems, and academic calendars. The 1967 master plan recommended that the state-related universities focus primarily on graduate education and research and allow the state colleges to provide the bulk of undergraduate education to the citizens of the Commonwealth. The State Board of Education also urged the General Assembly to include Temple, Pitt, and Penn State among the list of institutions eligible for preferred appropriations.\textsuperscript{95} To that point, the three universities held non-preferred status. In Pennsylvania, the general state appropriation bill does not provide funding to non-preferred institutions. Non-preferred appropriations require separate bills and must receive two-thirds support from both houses of the Pennsylvania General Assembly. The master plan viewed the preferred designation as key to the development of the Commonwealth System. To adequately serve the higher education needs of the Commonwealth and prevent overextension, Temple, Pitt, and Penn State needed the assurance of stable, guaranteed funding.\textsuperscript{96}

The General Assembly did not provide the State Board of Education with the powers necessary to manage the three segments of the Commonwealth System, and Pennsylvania never realized the Commonwealth System outlined in the 1967 master plan. The state only granted the State Board of Education with the authority to plan and coordinate which meant that master plans served as guides instead of mandates. In addition, the state-related universities did not convene the University Coordinating Council, and the State Board of Education did not possess the power to compel the state-related universities to coordinate and standardize their academic and financial programs, operations, and processes. The General Assembly also did not take the

\textsuperscript{95} Pennsylvania State Board of Education, \textit{A Master Plan}, 3.
\textsuperscript{96} Pennsylvania State Board of Education, \textit{A Master Plan}, 29.
legislative actions necessary to designate Temple, Pitt, and Penn State as preferred institutions.

As a result, the annual appropriations for state-related universities must still receive approval from two-thirds of the members of the house and senate of the Pennsylvania General Assembly. The two-thirds requirement compels state-related universities to devote significant attention to securing bipartisan support and also creates a considerable amount of budgetary uncertainty as the appropriations for state-related institutions are often held “hostage” by political bickering between Democratic and Republican legislators.97

1966 Consultant Report

In developing the 1967 master plan, the Commonwealth solicited the input of a panel of consultants. In 1966, the Academy for Educational Development, Inc. submitted a report (consultant report) to the State Board of Education with opinions and recommendations to guide the preparation of the master plan.98 In contrast to the 1967 master plan, the consultant report noted the special relationship between Penn State and the Commonwealth as distinct from the “state-aided” schools of Pitt and Temple and dedicated an entire section of the report to Penn State. The consultant panel identified the University as “the keystone of public higher education in the state,” and asserted that Penn State offered a broader array of graduate and professional programs, conducted more research, and provided more continuing education opportunities than any other college and university in the Commonwealth that received substantial state support.99

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99 Academy for Educational Development, Elements of a Master Plan, 44.
The consultant report urged the Commonwealth to “build upon its tremendous investment” in Penn State and “vigorously assist the University to improve its programs, facilities, and faculties until they are of the highest quality.”

In contrast to the 1966 consultant report, the 1967 master plan did not reference the special relationship between Penn State and the Commonwealth nor highlight the distinctive features and achievements of the University. Instead, the master plan identified broad objectives for the group of state-related universities. The consultant report placed greater emphasis on the history between Penn State and Pennsylvania and singled out the University as the cornerstone of public higher education in the Commonwealth. The State Board of Education did not follow the consultant report’s recommendation to position Penn State as the keystone of public higher education in Pennsylvania. This decision suggested that state government officials and policymakers in Pennsylvania did not include the land-grant foundations of the University in their perceptions of the legal relationship between Penn State and the Commonwealth. The contrast between the reports also indicated that the restrictive and expansive views of the legal relationship between Penn State and Pennsylvania continued to influence the perceptions and policies of state government officials and policymakers.

**Summary**

The creation of the state-related status and the Commonwealth System suggested a more restrictive view of the institutional-state relationship. The state-related status equated the legal standings of Penn State, Temple, Pitt, and Lincoln, and did not reference the land-grant vision. The designation also centered on the roles of state-related universities in supporting the broad

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100 Academy for Educational Development, _Elements of a Master Plan_, 45.
educational aims of the state and failed to acknowledge Penn State’s singular duty to carry out the land-grant mission.

The master planning process that followed the creation of state-related universities also implied the further erosion of the expansive view of Penn State’s legal relationship with the Commonwealth of Pennsylvania. In the final draft of the 1967 master plan, the State Board of Education excluded the consultant report’s recommendation to make Penn State the cornerstone of public higher education. This decision appeared to reject or at least call into question the existence of a special relationship between Penn State and the Commonwealth.

At the same time, the process of establishing the state-related universities hinted at the continuing existence of a special relationship between the University and the state. In contrast to the other state-related universities, the charter of Penn State was never amended to reflect the University’s acceptance of its role as a state-related university nor did the General Assembly change Penn State’s name to formally include the University in the Commonwealth System. These intricacies potentially symbolized distinctions between the perceptions of Penn State versus the other state-related universities. Therefore, the creation of the state-related status paradoxically clarified and obscured the legal relationship between Penn State and the Commonwealth. While the state-related designation offered a more restrictive definition of Penn State’s legal status, the distinct process that established Penn State as a state-related university indicated the continued existence of a special relationship.

Pennsylvania’s failure to follow through on the broader plan to establish the Commonwealth System further muddied the legal relationship between Penn State and the Commonwealth. The General Assembly created state-related universities to support a
Commonwealth System that never materialized. Pennsylvania neglected to implement the master plan, and as a result, the state-related designation ultimately represented an unfulfilled promise of cooperation and coordination in furtherance of the higher education needs of the Commonwealth. State government officials and policymakers may want to revisit the original purposes and plans underlying the Commonwealth System to inform how best to invest declining resources to facilitate a more strategic, coherent, and affordable system of public higher education in the Pennsylvania.

**Tax-Exemption Cases**

The court cases that clarify the legal relationship between the Pennsylvania State University and the Commonwealth of Pennsylvania concern the identity of the institution under three different types of laws: tax, open records, and constitutional. The relevant issue at hand in the first two contexts is whether state-related institutions qualify as state agencies under open records and tax laws. In both contexts, courts must determine whether state-related institutions qualify as state agents, but the judgment must be made in accordance with the respective statutes that govern tax and open records laws. The constitutional law cases deal with the issue of whether state-related institutions must abide by the fundamental rights and interests protected by the Bill of Rights and other relevant amendments to the U.S. Constitution. The opinions in the cases for all three types of laws illustrated the shifting tensions and burdens and benefits in the evolving legal relationship between Penn State and the Commonwealth. The cases also have implications for defining for the future relationship between Penn State and Pennsylvania.

The tax-exempt cases involve challenges by local governments to the tax-exempt statuses of colleges and universities. To challenge the tax-exempt status of an institution, local leaders
must first reverse the exemption, then assess the property of the college and remit a tax bill. To maintain the exemption, an institution appeals the finding to the local tax board and the courts. In these cases, courts interpret state constitutional provisions and statutes to determine whether an institution and its property qualify for a recognized tax-exemption or immunity.101

Colleges and universities in Pennsylvania that have attempted to exempt property from local taxation have tended to rely on the public charity exemption provided for in the state constitution. In cases in which institutions of higher education claim tax immunity, the courts have made determinations of whether or not a college or university is an agency or instrumentality of the Commonwealth. Often institutions present both arguments when defending a challenge to tax-exempt status.

Important distinctions can be found between the two amnesties. Courts focus on the actual uses of the property at issue in cases involving the public charity exemption, while tax immunity status presumptively exempts all of an institution’s property.102 An institution would likely have more protection for tax-exempt property because the designation results from an affirmative determination by the legislature the specific property is exempt. In contrast, tax immunity is the product of legislative inaction, and institutions must rely on favorable judicial interpretations.103

In the 1939 tax case, the court found that the Penn State property at issue had both a tax exemption and a tax immunity. The tax exemption applied because the farms supported

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102 Act of November 6, 1923 (P.L. 1117), added the requirement that public property be used for public purposes. Also added as exemption in GCCA.
103 Oravetz, “Penn State Derry,” 935.
agricultural instruction and experimentation and did not operate for profit. The court also found the institution to be tax immune due to substantial financial support from the state and federal governments and the significant participation of government officials on the board of trustees. Over fifty years later, the court again weighed in on these exact tax issues as well as the legal relationship between the Commonwealth and Penn State. The decisions in these later cases demonstrated how the University’s legal association with the Commonwealth had evolved.

1992 State Agency Case

In 1992, the Supreme Court of Pennsylvania heard an appeal from a Commonwealth court decision. The Commonwealth court held that the 1939 tax case that found Penn State was an agency of the Commonwealth acted as res judicata and barred subsequent action on that issue.\(^{104}\) Similar to the 1939 tax case, Penn State initiated an action in equity to enjoin Centre County from assessing and taxing property of the University. The dispute stemmed from the county’s decision to remove the tax exemption status of portions of Penn State property that were being used by the Penn State Book Store and the Mid-State Bank and Trust Company.

The Supreme Court of Pennsylvania claimed that the doctrine of issue preclusion did not apply in cases where “there is a lack of total identity between matters involved in the two proceedings because the events in suit took place at different times.” In this instance, the court found a total lack of identity had occurred “given the significant changes in the last 50 years.” The court proceeded to identify a number of developments that had occurred over the last fifty years in the legal relationship between Penn State and the Commonwealth of Pennsylvania. First, the court pointed to changes in financial matters between the two entities. In 1939, students at

Penn State did not pay tuition, and state and federal money provided the majority of support to the institution. Second, the court considered the governance structure of Penn State and claimed that trustee membership did not reflect a board that was “public-much less governmental-in nature.” Therefore, the state did not have exclusive authority to dispose of University property, and overall, the factors suggested that the institution resembled a non-profit educational corporation and not a state agency.\(^{105}\)

The court also contrasted the property in question in this case from the property in 1939. In the 1939 tax case, Penn State sought to enjoin the county from assessing and taxing property that the University used for agricultural education and experimentation. The court claimed that those uses aligned with the public purposes of Morrill Land Grant Act. Here, the University did not have complete possession of the property as Penn State leased it to third parties, and those third parties used the property for commercial purposes. Due to changing conditions and the differences between the facts of the two cases, the court found that the cases lacked identity, and the doctrine of preclusion issue did not apply. Therefore, whether Penn State was a state agency remained a genuine issue and the court remanded the case back to the Court of Common Pleas. No further history exists on the case, but shortly afterwards, Penn State entered into an agreement with local townships to pay $600,000 a year in lieu of property taxes.\(^{106}\)

**1999 State Agency Case**

Taxation issues resurfaced in 1999 with a case involving Penn State’s Milton S. Hershey Medical Center (Hershey Medical Center).\(^{107}\) The Supreme Court of Pennsylvania received the

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case on appeal from a Commonwealth Court of Pennsylvania decision affirming that the property of Penn State was immune from taxation as an instrumentality of the Commonwealth.\textsuperscript{108}

The crux of the issue in the case before the Supreme Court of Pennsylvania was whether or not Penn State qualified for tax immunity as an agency of the Commonwealth, and the court held that the University was not a Commonwealth agency. The court’s opinion acknowledged the challenging task of determining the status of Penn State with the Commonwealth:

The difficulty in determining the status of PSU arises from the fact that it is not merely funded by the Commonwealth, but in certain very limited respects it has governmental characteristics, while in other regards it is plainly non-governmental.\textsuperscript{109}

The court reviewed its reasoning from the 1992 tax case, namely that in the course of over fifty years since the Court of Common Pleas decision in 1939, the relationship between Penn State and the Commonwealth had undergone substantial changes. State appropriations figured less prominently as a proportion of Penn State’s budget, the institution did not rely solely on federal and state support, and the board composition had changed to reflect more diversity. Therefore, the board was less “governmental in nature,” and as a result, the state government did not control the disposition of property. The University also no longer provided education free-of-charge to students who resided in the Commonwealth.\textsuperscript{110}

The court contrasted Penn State’s status as a non-profit corporation from the statuses of the universities in the Pennsylvania State System of Higher Education (PASSHE). PASSHE institutions were created by statute as public corporations and instrumentalities of the

\textsuperscript{109} Penn State, 557 Pa. at 95.
\textsuperscript{110} Penn State, 557 Pa. at 96-97.
Commonwealth. The court also conceded that the University exhibited some characteristics of governmental entities. For example, employees of Penn State are defined as state employees in the State Employees’ Retirement Code. Ultimately, the court found that the critical factor in determining if the property of the University was immune from taxes was “whether the institution’s real property is so thoroughly under the control of the Commonwealth that effectively, the institution’s property functions as Commonwealth property.” The issue of control turned on the composition of Penn State’s board of trustees. Since the majority of the trustees were not government officials, the state government did not have control over the purchase and sale of real property, and therefore, the Commonwealth lacked sufficient control over Penn State to qualify the institution for tax immunity. The court reversed the decision of the Commonwealth court and remanded the case back to the Court of Common Pleas to decide if Hershey Medical Center qualified for an exemption from taxes as a purely public charity under the General County Assessment Law.

Background on Charitable Exemption

The charitable tax exemption protects property of institutions of purely public charity from taxation. The granting of tax exemptions has been a long-standing practice in the Commonwealth of Pennsylvania, and the Pennsylvania Constitution of 1874 established a tax exemption for “institutions of purely public charity.” The Pennsylvania Constitution authorizes, but does not require, the General Assembly to exempt “institutions of purely public

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111 71 Pa.C.S. § 5102
112 *Penn State*, 557 Pa. at 96.
113 72 P.S. § 5020-204 (a)(3)
The real property exemption extends only to “that portion of real property of such institution which is actually and regularly used for the purposes of the institution.” Prior to the Pennsylvania Constitution of 1874, the General Assembly exempted the property of charities through special legislative grants; however, the legislature abused this practice by awarding exemptions to favored institutions with little regard for “whether the property was charitable, religious, or even devoted solely to purposes of corporate or private gain.” For example, in the 1878 case of Donohugh's Appeal, the Supreme Court of Pennsylvania noted that among the 130 institutions granted tax exemptions between 1850 and 1873, “some of these were, at best, only private charities, and some of them, notably in the fifth class—cemeteries—were not charities at all, but mere trading corporations for private and individual profit.”

The Pennsylvania Constitution of 1874 sought to remedy legislative favoritism by subjecting tax exemptions to general laws and specifying the types of property eligible for exemption. However, the architects of the state constitution did not define “institutions of purely public charity,” so the courts have been left with the unenviable task of constructing a meaning of the term. In later decisions, courts added criteria to clarify the meaning of “institutions of purely public charity,” but the ad hoc development of criteria failed to produce a consistent and coherent definition. To facilitate an intelligible definition of the term, in 1985,

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119 Donoguh's Appeal, 86 Pa. at 311.
the Supreme Court of Pennsylvania assembled the various criteria used by courts to define “institutions of purely public charity” into a multi-prong test (HUP test).\textsuperscript{121} Unfortunately, the HUP test did not offer much clarity and incited a conflict with the General Assembly over which branch of the state government has the authority to define “institutions of purely public charity.”

\textit{HUP Test}

In \textit{Hospital Utilization Project v. Commonwealth of Pennsylvania}, 507 Pa. 1 (1985), the Pennsylvania Supreme Court compiled the criteria that state courts had used over the years to determine purely public charities into a five prong test. To qualify as an institution of purely public charity, an organization must:

(a) Advance a charitable purpose;
(b) Donate or render gratuitously a substantial portion of its services;
(c) Benefit a substantial and indefinite class of persons who are legitimate subjects of charity;
(d) Relieve the government of some of its burden; and
(e) Operate entirely free from the private profit motive.\textsuperscript{122}

In general, courts strictly construe laws related to tax exemptions, and the HUP case established a high bar for organizations to qualify as purely public charities. As a result, the HUP decision spawned a tremendous amount of litigation between municipalities and charities, including institutions of higher education.\textsuperscript{123} In the immediate years after the HUP case,

\begin{footnotesize}
\textsuperscript{122} \textit{Hospital Utilization Project v. Com.}, 507 Pa. 1, 22 (Pa. 1985).
\end{footnotesize}
organizations rarely qualified as public charities in decisions by the Commonwealth Court of Pennsylvania.\footnote{Ballard Spahr LLP, “Back to the Future for Real Estate Tax Exemptions and PILOTs/SILOTs? Charities Must Meet HUP Test and Act 55, Pennsylvania High Court Rules,” \textit{LexisNexis Legal Newsroom}, Elder and Estate Law, June 6, 2012.}

\textit{Early Applications of the HUP Test}

The following cases illustrate how strictly Commonwealth courts applied the \textit{HUP} test. The cases also reveal distinctions in applications of the test between lower courts and the Pennsylvania Supreme Court. In \textit{St. Margaret Seneca Place v. Board of Assessment, County of Allegheny}, the Commonwealth court found that a 156-bed nursing home failed all five prongs of the \textit{HUP} test.\footnote{\textit{St. Margaret Seneca Place v. Bd. of Prop. Assessment, County of Allegheny}, 149 Pa.Cmwlth 615, 613 A.2d 674 (Pa.Cmwlth. 1992).} The Commonwealth court stated that the nursing home did not advance a charitable purpose since residents paid for care, and the payment for services also evidenced that the nursing home did not render gratuitously a substantial portion of services. Further, the nursing home only provided care to paying customers so the residents did not constitute an indefinite class of persons.

The court also found that the home did not relieve the government’s burden to provide care to residents who otherwise could not afford it, Government funding accounted for a substantial proportion of the nursing home’s revenues (around 60%). Lastly, the nursing home’s financial statements indicated an expected profit which contradicted the argument that the nursing home operated free from the profit motive.\footnote{\textit{St. Margaret Seneca}, 149 Pa.Cmwlth at 621-630.
The Supreme Court of Pennsylvania reversed the decision of the Commonwealth court and held that the nursing home was a purely public charity entitled to tax exemption. The court found the fact that all residents had at least partial insurance coverage neither surprising, as most citizens were eligible to receive Medicare and Medicaid benefits, nor dispositive that the nursing home did not advance a charitable purpose. Here, the nursing home made up differences in costs between Medicaid payments and the total costs of care, and therefore, advanced a charitable purpose. About half of the nursing home’s residents paid for their care through Medicaid which did not cover the full costs of services. The court viewed the provision of services to residents receiving Medicaid as evidence that the nursing home satisfied the other four criteria since the home assumed responsibility for about one-third of the costs for these residents and also accepted patients with limited Medicaid coverage. By providing services to residents with Medicaid, the nursing home bore a responsibility of the government. The nursing home’s assumption of indebtedness on behalf of the patients with partial coverage negated a private profit motive. Therefore, the nursing home satisfied all five prongs of the HUP test and constituted a purely public charity.

In another early application of the HUP test, the Court of Common Pleas of Washington County ruled that Washington and Jefferson College (W&J) was not a purely public charity. In 1993, the city of Washington, Pennsylvania, challenged the county board’s determination that 87 W&J properties were exempt from taxation as the property of a “purely public charity” under section 204(a)(3) of the GCCA and appealed the board’s ruling to the trial court.

128 St. Margaret Seneca Place, 536 Pa. at 489.
129 Act of May 22, 1933 (P.L. 853, no. 155).
In 1994, the trial court issued an order that the college was not a purely public charity, and thus, the property of W&J was not eligible for tax-exemption.\textsuperscript{130} The central issue of the case was whether or not W&J qualified as an institution of purely public charity under the state constitution. Although the tax exemption fell under a provision of the GCCA, the Pennsylvania Constitution provides the legislature with the right to exempt “institutions of purely public charity” from taxation.\textsuperscript{131} According to the separation of powers doctrine, Pennsylvania courts have sole authority to construe the meaning of the constitution. As the Supreme Court noted in 1849, “it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce.”\textsuperscript{132} Therefore, since the original exemption is found in the state constitution, the court must first make a determination of whether an institution qualifies as a purely public charity in cases that challenge an institution’s tax-exempt status.\textsuperscript{133} The court had developed a test for “institutions of purely public charity” under the state constitution so accordingly, the trial court applied the HUP test to W&J.

Under the first prong, the trial court found that W&J did not advance a charitable purpose as the mere provision of education alone was not a charitable function. The court distinguished W&J from other charitable organizations, such as hospitals and nursing homes, by claiming that those entities provided care to residents who could no longer bear the costs whereas W&J received three-quarters of its revenue through tuition and fees, did not allow students who could not afford or secure funding to attend classes, and did not offer scholarships based strictly on

\begin{itemize}
\item\textsuperscript{130} In Re Appeal of the City of Washington, No. 93-7033 (C.P. Washington County 1994).
\item\textsuperscript{131} Pa. Const. Art. VIII § 2(a)(v).
\item\textsuperscript{132} Greenough v. Greenough, 11 Pa. 489, 494 (Pa. 1849).
\item\textsuperscript{133} Hospital Utilization Project, 507 Pa. 1.
need. Due to W&J’s heavy reliance on tuition and private support, the trial court believed that the college had evolved from a charity into “an enterprise of big business.”

The trial court also noted that the constitution and statutory code of Pennsylvania did not require the government to provide a college education to the citizens of the Commonwealth. Therefore, W&J did not relieve the government of any burden. However, the trial court did find that W&J satisfied the last prong by operating free from a private profit motive. Any surpluses that W&J incurred went back into maintenance and operations, and W&J did not distribute dividends or profits to investors.

On appeal, the Commonwealth court reversed the trial court’s decision, and the Supreme Court of Pennsylvania later affirmed the Commonwealth court’s reversal. The Supreme Court of Pennsylvania stated that “an institution advances a charitable purpose if it benefits the public from an educational, religious, moral, physical or social standpoint,” and found W&J served a charitable purpose by providing an education to young people in Pennsylvania. The court also found that W&J gratuitously rendered a substantial portion of its services as it provided students with an education at roughly half the cost of full tuition. The court based the determination on the amount of aid that the college offered to students as well as the significant portion of endowment funds used to finance W&J’s educational programs.

The court determined that W&J satisfied the third prong’s requirement to benefit a substantial and indefinite class of citizens who are legitimate subjects of charity. The court

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135 In Re Appeal of the City of Washington, No. 93-7033 (C.P. Washington County 1994).
137 City of Washington, 550 Pa. at 181.
broadened the definition of legitimate subjects of charity to include “youths seeking education,” and asserted that 82% of aid goes to students in need. Additionally, W&J admitted students who met admissions standards. Based on W&J’s substantial provision of aid to education-seeking youths who met the institution’s standards of admission, the court found that W&J satisfied the third prong. The court observed that 40% of the state’s college students attended private colleges in the Commonwealth, and therefore, these institutions relieved the state of the burden of educating a significant number of students who would otherwise strain the resources of Pennsylvania’s public institutions of higher education. The court agreed with the finding of the trial court that found that W&J did not operate for private profit. 139

Local government officials who want to press colleges and universities to pay for their fair share of services have two options:

1. Challenge the tax-exempt status of the institution or

2. Negotiate voluntary payments.

The first option necessitates litigation and the second option requires the willingness and cooperation of the college or university. Under the doctrine of sovereign immunity, local governments cannot tax the property of the Commonwealth unless explicitly provided permission by statute. 140 Therefore, local taxing authorities must reserve their tax-exempt challenges for non-public colleges and universities.

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138 City of Washington, 550 Pa. at 183.
139 City of Washington, 550 Pa. 175.
140 Com. v. Dauphin County, 335 Pa. 177, 180-185, 6 A.2d 870, 872 (Pa. 1939).
The HUP test has failed to clarify the process of determining “institutions of purely public charity,” and the criteria have been deemed “overbroad, ambiguous, and unclear.”¹⁴¹ Both government officials and nonprofit advocates have been disappointed by the test and claim that it has led to inconsistent court rulings and applications.¹⁴² While the W&J case moved through the courts, the General Assembly began working on legislation to clear up the confusion caused by the HUP test and definitively identify colleges and universities as “institutions of purely public charity.”¹⁴³

Act 55

The General Assembly passed the Institutions of Purely Public Charity Act in 1997 (Act 55).¹⁴⁴ Section 2 of Act 55 included findings from the legislature and a statement of legislative intent. In recognition of the court’s conflicting applications of the HUP test, the General Assembly noted an “increasing concern that the eligibility standards for charitable tax exemptions are being applied inconsistently, which may violate the uniformity provision of the Constitution of Pennsylvania.”¹⁴⁵ The General Assembly also found that a lack of legislative guidance defining “institutions of purely public charity” had encouraged litigation between charities and local governments. The purpose of Act 55 was to codify the HUP test and provide detailed specifications for each of the test’s five prongs. For example, to satisfy the charitable purpose prong, Act 55 states that institutions must be organized and operated principally to

¹⁴⁴ Act of November 26, 1997 (P.L. 508, no. 55).
¹⁴⁵ Act of November 26, 1997 (P.L. 508, no. 55), 509.
alleviate poverty, advance education or religion, prevent or treat disease or injury, further governmental services, or accomplish an important public objective.\footnote{146}{Act of November 26, 1997 (P.L. 508, no. 55), § 5(b), 512.}

The legislative debates over the bill offer insight into the pressing concerns with the charitable exemption and also reflect the broader societal tendency to focus on the economic roles of institutions of higher education. When the Pennsylvania Senate introduced the bill that eventually became Act 55, senators’ comments centered on the financial implications of the bill, and legislators barely mentioned the civic role of charitable institutions. The few references to the civic role of charities were indistinctly scattered among the broader argument that centered on the cost savings charitable organizations provided to state and local governments by assuming the responsibility for government services.

After an initial vote on the bill, Senator Michael Dawida from Allegheny County motioned the senate to reconsider and expressed his concern that the bill would interfere with existing agreements negotiated between nonprofits and local taxing authorities for payments in lieu of taxes (PILOTs). According to Senator Dawida, as a result of the bill, Allegheny county and the city of Pittsburgh stood to lose a total $11 million. Senator Dawida also suggested that other communities with colleges and universities did not support the bill,

In a place like State College, for example, the municipal people have said that they would really like us not to pass this kind of legislation.\footnote{147}{Pennsylvania General Assembly, \textit{Commonwealth of Pennsylvania Legislative Journal 1995} (Harrisburg: Government Printing, 1995), 811.}
In opposition to the bill, Senator Anthony Andrezeski from Erie County echoed the sentiment that colleges more closely resembled private for-profit corporations and that their tax-exempt status shifted the tax burden of these organizations to local citizens and governments.\footnote{Josh Freedman, “Are Universities Charities? Why the ‘Nonprofit Sector’ Needs to go,” \textit{Forbes}, December 10, 2013, https://www.forbes.com/sites/joshfreedman/2013/12/10/the-nonprofit-sector-should-not-exist/#e2e74c575013.} Mr. President, several years ago we started working on a pure public charities bill, and it was my impression that we were going to work on public charities and what we have is more of a purely public corporation bill….I think what we are now doing for our municipalities that are strapped at every end on trying to figure out how to make a city budget or how to make a county budget is we are now giving them an unfunded mandate.\footnote{General Assembly, \textit{Commonwealth of Pennsylvania}, 811.}

The economic benefits of public charities also permeated the arguments of those in support of the bill. In response to the senator from Allegheny, Senator Clarence Bell of Chester County argued,

I was not going to say anything, but when I heard the gentleman from Allegheny…crying about poor people up in State College, it struck home. I come from a borough, we have a hospital. We do not want to tax it because it brings jobs into our borough…I have colleges in my district…And if there is anything we need in my district…what we need are jobs.\footnote{General Assembly, \textit{Commonwealth of Pennsylvania}, 812.}

The President Pro Tempore, Senator Bob Jubelirer of Blair County, defended the bill and criticized local governments targeting the tax-exempt status of charities,
Right now, Mr. President, questions of tax-exempt property are currently marked by confusion, inconsistency, and costly legal fights. As local jurisdictions are caught up in budget problems or face tax base pressures, and certainly many of them do, some resort to putting the squeeze on hospitals, on colleges and universities, and other nonprofits to win the payment lottery…."Pay us or we sue” is not the sort of policy conducive to community cooperation.  

The debates over Act 55 demonstrated that the economic role of charities heavily influenced legislative perceptions of the legal status of these organizations. The debates also reflected the contentious nature of the debates and the range of opinions on the tax-exempt status of charities, and namely, colleges and hospitals. The senators who supported and opposed the bill all represented counties in Pennsylvania that have sizable nonprofit hospitals and institutions of higher education, and each of the counties is home to a campus of Penn State. 

For example, the University of Pittsburgh, Penn State Greater Allegheny, and Penn State New Kensington are located in Allegheny County along with the University of Pittsburgh Medical Center (UPMC) and Allegheny General Hospital. Blair County features Penn State Altoona and UPMC Altoona which is a major regional hospital for residents of Central Pennsylvania. Mercyhurst University, Penn State Erie, and Gannon University are located in Erie County along with Hamot Medical Center. Chester County is home to Immaculate University, Lincoln University, Penn State Great Valley, and the University of Valley Forge. The Chester County Hospital, a hospital of the University of Pennsylvania, is also located in Chester County. The disparity and intensity of the legislative opinions on the Act 55 bill offer insight into the

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high stakes of the debate over the tax-exempt status of colleges and universities and illustrate why Pennsylvania has become “the epicenter of attempts to alter nonprofit tax policy.”

**2000 Charitable Exemption Case**

In 2000, the Court of Common Pleas in Dauphin County took up the issue of whether Hershey Medical Center and Penn State qualified for tax exemption purposes as purely public charities. The facts of this case predated the passage of Act 55 so the court applied the *HUP* test to establish if either Penn State or Hershey Medical Center were purely public charities for purposes of tax exemption. The test recognizes an organization as a purely public charity if the entity advances a charitable purpose, donates or renders gratuitously a substantial portion of its services, benefits a substantial and indefinite class of persons who are legitimate subjects of charity, relieves the government of some of its burden, and operates entirely free from private profit motive.

An institution needs to satisfy all five prongs for tax exemption purposes. The court found that Penn State furthered a charitable purpose through the education of youth. In determining whether an institution gratuitously renders a substantial portion of its services, the court looked at the totality of the circumstances to determine if the entity made “a bonafide effort to service primarily those who cannot afford the usual fee.” The court found that Penn State satisfied this prong by charging tuition and fees at a far lower price than the cost of providing the

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154 *Hospital Utilization Project*, 507 Pa. 1.


156 *City of Washington*, 666 A.2d 352.

157 *Hospital Utilization Project*, 507 Pa. at 19.
educational services. The relatively open nature of Penn State’s educational services demonstrated that Penn State met the requirements of the third prong. For the fourth prong, the court emphasized the University’s role in assuming the state’s burden to support the agricultural interests of the state which the court asserted “is widely recognized as the Commonwealth’s leading industry.”158

Ultimately, the court found that the University failed to satisfy the fifth prong which requires the entity to operate free from the profit motive (free from profit motive). In consideration of this prong, the court devoted a substantial amount of attention to the salary package of Penn State’s highest paid employee who the court referred to as John Doe. In all likelihood, John Doe was the coach of the men’s football team at Penn State. The court did not disclose the salary of John Doe, but focused on the compensation that Doe received in addition to his salary. The court determined John Doe earned at least $260,000 in 1995 for product endorsements and media appearances through the University which exceeded the president’s salary of $250,000.159

The court found that the high wages and compensated activities of Penn State’s highest paid employees more closely resembled a profit-making organization than a charitable institution. The University’s contract with Nike for commercial endorsements also evidenced a profit motive. The contract showed that Penn State received compensation as high as $300,000 per year to display Nike logos on uniforms as well as clothing and athletic wear for all twenty-nine of the University’s varsity sports teams. Overall, the court determined that the University

159 Penn State, 45 Pa.D.&C.4th 51.
operated for a profit motive due to the commercial licensing and trademarking of the Penn State name, logo, and research technology as well as the University’s high salaries and endorsements.\(^{160}\)

**Summary**

This section reviewed cases related to the real estate tax-exemptions for Penn State and the Commonwealth’s other colleges and universities. These cases provided insight into the legal relationship between Penn State and Pennsylvania. The record of tax-exemption cases that discussed the legal status of Penn State established that tax law issues will likely continue to drive analyses of the institution-state association. The review also illustrated the shift in views on the University’s legal relationship with the Commonwealth of Pennsylvania. In 1939, the court in the first case that ruled on Penn State’s tax-exemption found that the University qualified for both the state agency and charitable tax exemptions. To justify the finding that Penn State was a state agency, the court emphasized connections between the state and University that emanated from Penn State’s land-grant foundations. Due to the land-grant history of the University, the 1939 court asserted that Penn State “was founded by the Commonwealth of Pennsylvania and is endowed and maintained by the public, that is, by appropriations from the Pennsylvania Legislature and the Congress of the United States.”\(^{161}\)

Despite Penn State’s corporate existence as a board of trustees independent of the state, the court considered the University’s land-grant mission as satisfying a broader public purpose and as creating University obligations to the citizens of the Commonwealth. The court also

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treated the state’s decision to allot the land grant to the University as evidence of Penn State’s founding as an agency of the Commonwealth. According to the court, by accepting the land grant and awarding it to Penn State, the Commonwealth had for all intents and purposes established a college that met the requirements of the Morrill Land Grant Act which required states to establish and maintain a college focused on the agricultural and industrial sciences.\textsuperscript{162} The responsibility that derived from the Morrill Land Grant Act established entanglements between Penn State and the Commonwealth.

The 1939 court’s finding that Penn State was a Commonwealth Agency reflected the expansive view of the legal relationship between Penn State and Pennsylvania. The expansive view accentuated the ways in which the land-grant history of the University bound Penn State and the Commonwealth. For example, legal authorities that adopted the expansive view tended to highlight the limitations that the land grant placed on the institutional autonomy of the University. Penn State was expected to fulfill the public purpose of providing an education in the agricultural and industrial sciences and that expectation restricted institutional autonomy toward satisfying those ends.

However, over fifty years later, the next cases that examined Penn State’s tax-exemption delineated a more restrictive view of the legal relationship between Penn State and the Commonwealth. This view eschewed the land-grant foundations of the University and focused on the language in Penn State’s corporate charter. The 1992 and 1999 state agency cases determined that Penn State was not a state agency for purposes of taxation. In contrast to the

\textsuperscript{162} Cty. of Centre, Bd of Assessment, 565 A.2d at 192-193 (citing Pennsylvania State College v. County of Centre, No. 2, Slip op. at 8-9 (C.P. Centre Eq. Nov. Term 1937, filed August 24, 1939).
expansive view, the 1999 court did not interpret the presence of government officials on Penn State’s Board of Trustees as evidence of state control. Instead, the court analyzed the terms of the charter to determine whether the total number of government officials represented a controlling majority. The decisions in these two cases announced the ascendance of a restrictive view of the relationship between Penn State and the Commonwealth and confirmed that the University must now rely on the charitable exemption to relieve University property from the burden of taxation.

The ascendance of the restrictive view had significant implications for Penn State’s tax-exemption status and the legal relationship between Penn State and the Commonwealth. The charitable tax exemption does not provide the presumption of immunity afforded by the state agency exemption. Therefore, in determining eligibility for charitable tax exemptions, courts identify whether a college or university is an institution of purely public charity and whether the property at issue advances the purposes of the institution. If a local taxing authority challenges the tax-exemption status of Penn State, the University is subject to an unpredictable journey through the courts. In addition, the battle that has ensued between Pennsylvania’s legislative and judiciary branches over the HUP test, and the right to define “institutions of purely public charity,” has further affirmed the precariousness of Penn State’s charitable tax exemption and legal status. For example, the opinion of the court in the 2000 charitable tax exemption case suggested that Penn State’s charitable tax exemption status is vulnerable to future challenges. The next chapter analyzes the implications that the restrictive view and more recent

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163 Penn State, 557 Pa. at 96.
developments in tax-exemption cases have for the legal relationship between Penn State and the Commonwealth of Pennsylvania.

Open Records Cases

Pennsylvania courts have also addressed the legal relationship between state-related universities and the Commonwealth in cases concerning open records laws. The open records cases have involved requests to inspect the records of state-related institutions. In 1957, the Commonwealth of Pennsylvania passed an act requiring state governmental authorities and agencies to make their records available for inspection by the public, and the act stood as Pennsylvania’s open records law until the 2008 signing of the Right-to-Know Law. The 2008 act overhauled the previous statute by expanding access to records of the General Assembly and creating an administrative unit, the Office of Open Records, to handle disputes over records requests. The law also reduced the response times to requests and increased penalties for non-compliance. Over the years, disputes over open records requests have prompted litigation that has touched on the legal status of the Commonwealth’s state-related institutions.

In 1972, the Supreme Court of Pennsylvania heard an appeal in *Mooney v. Temple* concerning the issue of whether the Temple was a state agency under the Inspection and Copying Records Act (hereinafter, Right-to-Know Law). The original action arose after Temple refused to comply with a request from a group of Temple students and faculty (appellants) for a host of university records, including information on Temple’s finances and budget and the minutes from meetings of the board of trustees.

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166 *Mooney*, 448 Pa. at 424.
The Right-to-Know Law compelled the Commonwealth to make available all public records of state agencies and defined a state agency as,

Any department, board or commission of the executive branch of the Commonwealth, any political subdivision of the Commonwealth, the Pennsylvania Turnpike Commission, or any State or municipal authority or similar organization created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function.167

The appellants argued that the support that Temple received as a result of the 1965 act, which designated the university as a state-related institution, transformed Temple into an entity akin to a “state or municipal authority.”168 The court disagreed and held that financial support from the legislature did not change Temple's status as a nonprofit corporation chartered for educational purposes and did not convert the institution into a state agency under the Right-to-Know Law.169

The appellants relied on a number of provisions in the Temple Act to support their argument that Temple resembled a “state agency.” The Temple Act changed the name of the institution and amended the charter with the stated purpose of extending “opportunities for higher education by establishing Temple University as an instrumentality to the Commonwealth to serve as a State-related institution.”170 According to the appellants, the strong language in these acts clearly revealed that legislators intended for the university to be viewed as a state agency. However, the court found that other provisions of the Temple Act, which preserved

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167 Mooney, 448 Pa. at 427.
168 Mooney, 448 Pa. at 428-429.
169 Mooney, 448 Pa. at 434.
170 Mooney, 448 Pa. at 430.
Temple’s status as a corporation with the same purposes and rights and privileges from the original charter, reflected the legislature’s intent not to alter Temple’s status as nonprofit educational corporation.

In determining Temple’s status as a state agency, the court also considered issues related to the balance of state control and institutional autonomy. Specifically, the court analyzed the degree of state control over the property, finances, and governance of Temple. The court noted that the board of trustees retained the same rights and privileges under the Temple Act, and although the Temple Act had added state government officials to the board, the majority of the members of the board remained non-public trustees. Therefore, the state did not exercise control over the board. In addition, the court found that the Temple Act reflected the General Assembly’s intent not to include Temple as a state agency. The Temple Act included a provision requiring the institution and the General Assembly to agree on the use of state appropriations for capital building projects. The court reasoned that had the legislature desired to exert total control over the board, the provision requiring the establishment of an agreement between the institution and the legislature would have been unnecessary.171

The Temple Act increased state support by compelling the state to provide adequate funds to adhere to legislatively-determined tuition fee schedules, by availing the institution of opportunities to participate in Commonwealth capital development programs, and by authorizing the board to issue tax-free bonds. In return for the increased support, the Temple Act obligated the university to submit a report to the Commonwealth on the expenditures of state appropriation

171 Mooney, 448 Pa. at 432.
funds. The court found that the additional support, and the series of obligations attached to that support, did not interfere with nor transform Temple’s status as a nonprofit educational corporation. This case established that three factors are critical to the determination of state agency under the Right-to-Know Law: the charter and founding of the institution, the governance of the institution, and the financial control of the institution.

In 1990, the Commonwealth Court of Pennsylvania dealt directly with the issue of whether Penn State was a state agency under the Right-to-Know Law. The court applied the Supreme Court of Pennsylvania’s reasoning in *Mooney* and found Penn State not to be a state agency. Like Temple, Penn State was a nonprofit corporation chartered for educational purposes, and at the time of the case, Commonwealth officials represented only ten of Penn State’s thirty-two trustees. Further, the substantial amount of support that Penn State received from the Commonwealth resembled the aid provided to Temple, and the articles of incorporation provided the board of trustees at Penn State with the same corporate rights and privileges as the board at Temple.

**Summary**

The open records cases supported the continued emergence of the restrictive view of the legal relationship between Penn State and Pennsylvania. The courts in the open records cases found that Temple and Penn State were not state agencies under the Right-to-Know Law, and the cases established key characteristics of the restrictive view as precedent. In accordance with the restrictive view, the courts in these cases privileged the corporate charters of the institutions and

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172 *Mooney*, 448 Pa. at 432.
173 *Mooney*, 448 Pa. at 433.
regarded the lack of majority state control over board governance as a decisive factor in
determining state agency status. These decisions advanced and legitimized a restrictive view of
Penn State’s legal relationship with the Commonwealth; one which eschewed Penn State’s land-
grant foundations and equated the University’s status with that of the other state-related
universities.

The open records cases also underscored the implications of Penn State’s unique
relationship with the Commonwealth. Although the courts found that Temple and Penn State
were not state agencies, and therefore, not subject to the requirements of the Right-to-Know
Law, a subsequent open records case revealed that Penn State’s participation in the State
Employees’ Retirement System (SERS) had left the University more vulnerable to open records
challenges.176 In *Penn State v. State Employees’ Retirement Board (SERS)*, Penn State appealed
the decision by SERS to disclose information on the salaries and benefits of University
employees in response to a Right-to-Know Act request from a journalist. The Supreme Court of
Pennsylvania upheld the board’s action. The court established that SERS was a Commonwealth
agency as the board oversees the benefit plan for “state employees” as defined by statute.177 As
voluntary participants in SERS, Penn State employees willingly assume the right, duties, and
privileges associated with the state agency status of SERS. Consequently, the court found that
the salary and benefits information of Penn State employees who participated in SERS
constituted “public records” of a “Commonwealth agency,” and the University was compelled to
release the information.178

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178 *State Employees’ Retirement Bd.*, 594 Pa. at 249-264.
In SERS, the end run that secured information on the salaries and benefits of Penn State employees confirmed the lingering precariousness of Penn State’s relationship with the Commonwealth. The University’s participation in SERS was one of the characteristics that distinguished Penn State from the other state-related universities, and the attorney general opinions revealed that there was no clear legal justification for the SERS eligibility of the institution’s employees. Therefore, although the restrictive view emerged as the prevailing conception of Penn State’s legal status, the haphazard development of Penn State’s relationship with the Commonwealth could still elicit inconsistent implications. The next chapter further explores the implications of this haphazard development for the future of public higher education in Pennsylvania.

Constitutional Law Cases

The distinction between public and private institutions of higher education is critical to assessing the regulatory reach of the U.S. Constitution. The Bill of Rights “define the relationship between a citizen and the federal government.”179 The 14th Amendment ratified the protection of individual rights and freedoms from federal, state, and local government encroachment:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

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property, without due process of law; nor deny to any person within its jurisdiction the
equal protection of the laws.\textsuperscript{180}

In general, only public institutions of higher education must abide by the constitutional
protections of individual rights and liberties, such as, the right of free speech, due process, the
right to assemble, and the guarantee of equal protection under the law. Constitutional law treats
public colleges and universities and their officers as agents of the government, and therefore,
subject to constitutional constraints. In contrast, contracts form the basis of relationships between
private institutions of higher education and their numerous constituencies. The private
contractual nature of the relationships between private colleges and universities and their
constituencies provides private institutions with the freedom to engage in behavior that violates
the constitutional protections of individual rights and liberties so long as the behavior does not
violate the terms of the contract.

However, through the doctrine of state action, courts will recognize the actions of private
colleges and universities as state action and subject the institutions to constitutional constraints.
The state action doctrine applies in limited circumstances, i.e., when a private entity conducts the
function of a state, operates under the color of law, or has an interconnected relationship with the
state. Courts have found that determinations of state action require one to “sift facts and weigh
circumstances.”\textsuperscript{181} The four cases here consider whether the actions of state–related institutions
qualify as state action. The court opinions advance our understanding of the state-related status
and the relationships between these institutions and the Commonwealth of Pennsylvanıa.

\textsuperscript{180} U.S. Const. amend XIV.
\textsuperscript{181} Alexander and Alexander, \textit{Higher Education Law}, 140; Robert M. Hendrickson, \textit{The Colleges, Their
Constituencies, and the Courts}, 4.
The United States Court of Appeals for the Third Circuit (Third Circuit) heard two civil rights cases that faculty members at Temple and Pitt brought against their respective institutions under 42 U.S.C. § 1983 (section 1983). Section 1983 is a federal law that allows a person to bring a federal lawsuit for violations of constitutionally protected rights, liberties, and immunities. In these cases, the pivotal issue that touched on the legal relationship between state-related institutions and the Commonwealth was whether or not Temple and the Pitt qualified as state actors. The Third Circuit conducted a symbiotic analysis in these two cases to find that the actions taken by Temple and the Pitt were “actions taken under color of state law and are subject to scrutiny under section 1983.”\(^{182}\)

On remand, the United States District Court for the Western District of Pennsylvania summarized the arguments between Pitt, which claimed that the institution was not a state actor, and Dr. Braden, who claimed that the institution had a symbiotic relationship with the Commonwealth.\(^{183}\) In support of that argument, Dr. Braden pointed to the University of Pittsburgh’s reliance on the state for funding, the state’s provision of one-third of the institution’s buildings, the university’s designation as “an instrumentality of the Commonwealth” in the University of Pittsburgh Commonwealth Act (Pitt Act), the control that the state exerted over tuition through appropriations, and the stated purpose of the Pitt Act which was “to extend Commonwealth opportunities for higher education.”\(^{184}\) Pitt claimed that it was chartered as a private institution with absolute control over governance, and that the state intentionally worded

\(^{182}\) Krynicky v. Univ. of Pittsburgh, 742 F.2d 94, 103 (3d Cir. 1984).
\(^{184}\) Act of Jul. 28, 1966, Special Session 3 (P.L. 87, no. 3).
the Pitt Act to preserve Pitt’s sole management of the institution; therefore, Pitt was a private entity in dealings with Dr. Braden.\textsuperscript{185}

The district court found that a symbiotic relationship existed between Pitt and the Commonwealth of Pennsylvania. The district court based this ruling on an analysis of the legislation that established Pitt as a member of the Commonwealth System. The Pitt Act subjected Pitt to coordination by an agency of the state, renamed the institution, designated Pitt as state-related, created institutional reporting requirements, and allocated substantial funds and buildings to the institution based on the understanding that Pitt would accommodate the higher education needs of the Commonwealth. The court also looked to the composition of the board of trustees at Pitt and found that the one-third of the membership of state officials on the board provided the Commonwealth “with a full vote in Pitt’s management affairs.”\textsuperscript{186} The Third Circuit affirmed the judgment of the district court and claimed that the Pitt Act was a “most telling factor” of “the overall relationship between the University and the Commonwealth.”\textsuperscript{187}

The court also focused on the circumstances that prompted the Pitt Act. Prior to the legislation, Pitt leadership approached Pennsylvania’s State Board of Education to request assistance in confronting the financial difficulties of the institution. The court viewed the provisions of the Pitt Act as conditions to an agreement with the Commonwealth to increase state funding to Pitt and alleviate the institution’s financial burdens. As mentioned earlier, in return for funding, Pitt renamed the university and revamped the mission toward supporting Pennsylvania’s educational needs.\textsuperscript{188} The court found that the legislative history, and other factors surrounding

\textsuperscript{185} Braden, 392 F.Supp. at 124.
\textsuperscript{186} Braden, 392 F.Supp. at 125.
\textsuperscript{187} Braden v. University of Pittsburgh, 552 F.2d 948, 958-959 (3rd Cir. 1977).
\textsuperscript{188} Braden, 552 F.2d at 959.
the Pitt Act indicated “that the relationship between the University and the Commonwealth was intended to be a close one.”\textsuperscript{189} The court also found that the usage of the words “state-related institution” and “instrumentality” in reference to Pitt’s relationship with the state “blurred, if not obliterated” the boundary between the university and the Commonwealth.\textsuperscript{190} Further, the court found that the state’s commitment to provide capital funding and the attendant accountability measures evidenced an entanglement between the two entities, and that sufficient factual evidence existed that there was a symbiotic relationship between Pitt and Pennsylvania.\textsuperscript{191} The decision in \textit{Krynicky} affirmed the symbiotic relationship test from \textit{Braden} and applied it to hold that a symbiotic relationship existed between both Pitt and Temple and the Commonwealth of Pennsylvania.\textsuperscript{192}

In 1979, the Third Circuit court affirmed a district court decision that found “Penn State’s actions are state actions.”\textsuperscript{193} The district court based the determination on the significant number of government officials on the board of trustees, the substantial annual appropriations from the state, the proportion of total University revenues that these appropriations represented, the amount of capital development funding that Penn State received from the General State Authority, and the prior attorney general opinions that found Penn State to be a public institution.\textsuperscript{194}

\textsuperscript{189} \textit{Braden}, 552 F.2d at 959.
\textsuperscript{190} \textit{Braden}, 552 F.2d at 959.
\textsuperscript{191} \textit{Braden}, 552 F.2d at 965.
\textsuperscript{192} \textit{Krynicky}, 742 F.2d at 103.
\textsuperscript{193} \textit{Benner}, 592 F.2d (quoting Benner v. Oswald, 444 F.Supp. 545, 558 (M.D. Pa. 1978)).
\textsuperscript{194} \textit{Benner}, 444 F.Supp. at 557-558.
Summary

The decisions in the constitutional law cases adhered to the expansive view of the legal relationship between state-related universities and Pennsylvania. The courts considered the totality of the entanglements between the Commonwealth and the state-related universities and focused on legislative actions that blurred the boundaries between the two entities. These cases suggested that future courts would find Penn State to be a state actor. However, starting in the 1970s, the Supreme Court and other courts began limiting the application of state action, and a more recent case indicated that the haphazard development of Penn State’s legal relationship with the Commonwealth may have implications for future judicial determinations of Penn State’s status as a state actor.195

In 1980, a student who was expelled from Duquesne University (Duquesne) commenced a suit against the institution for violating his constitutional rights during the dismissal process. Duquesne moved for a summary judgment on the basis that the institution was private and not subject to constitutional restrictions. The court conducted the symbiotic relationship test to determine whether Duquesne was a state actor. The analysis of the court compared the legal status, governance structure, and finances of Duquesne with Pitt and Temple.196

The court found that Duquesne did not have a similar relationship with the state as Pitt and Temple. The General Assembly amended the charters of Pitt and Temple to establish the institutions as state-related universities and instrumentalities of the state. Duquesne was founded as a private nonprofit corporation by a Catholic religious society. Further, the members of

196 Smith, 612 F.Supp. 72
Duquesne’s corporation elected the corporate board of directors, and none of the board members were state government officials. In contrast, the Commonwealth selected one-third of the trustees at Temple and Pitt. Lastly, state funding for Duquesne paled in comparison to the substantial appropriations that Pitt and Temple received from the Commonwealth. Based on the “tenuous” interrelationship between Duquesne and the Commonwealth, the court held that the institution was not a state actor.\(^{197}\)

Due to the haphazard development of Penn State’s legal relationship with the state, a future symbiotic relationship analysis by the court may find that Penn State is not a state actor. Similar to Duquesne, Penn State was founded as a private nonprofit corporation, and unlike Pitt and Temple, the General Assembly never amended the charter of Penn State to define the University “as an instrumentality of the Commonwealth to serve as a State-related institution in the Commonwealth System of higher education.”\(^{198}\) Further, if state support for public higher education continues to decline in Pennsylvania, courts may decide that state contributions to Penn State are no longer compelling evidence that “Penn State is substantially dependent on Commonwealth subsidies.”\(^{199}\) Thus, the constitutional law cases demonstrated that the peculiarities of Penn State’s status may have implications for the future of the legal relationship between the University and the Commonwealth. These cases also highlighted the continuing ambiguity surrounding Penn State’s status with the state.

\(^{197}\) *Duquesne*, 612 F.Supp. at 77-78.


\(^{199}\) *Benner*, 444 F.Supp. at 557.
Conclusion

Over the years, numerous legal authorities have examined the legal relationship between Penn State and the Commonwealth. The attorney general opinions revealed the establishment of two interpretations of Penn State’s relationship with the state. The expansive interpretation viewed a close nexus between the University and the Commonwealth that had origins in the land-grant movement. This view tended to treat the state’s acceptance of the land scrip from the Morrill Land Grant Act as evidence of the Commonwealth’s consent to assume responsibility for supporting Penn State and actualizing the land-grant vision. The expansive interpretation took a more holistic perspective of the connection between Penn State and Pennsylvania in assessments of institutional autonomy and the University’s legal status. Legal authorities that embraced the expansive view recognized Penn State as a state agency and provided the University with tax benefits associated with that status.

The attorney general opinions also revealed a restrictive view of the legal relationship between Penn State and the Commonwealth. This view tended to observe a looser connection between the University and the state and emphasized aspects of the relationship that supported the institutional autonomy of Penn State. Legal authorities that embraced the restrictive view noted Penn State’s status as a nonprofit educational corporation with an independent corporate board of trustees that enjoyed the customary right and privileges of corporations. The restrictive view did not take a holistic view of the University’s entanglements with the state. For example, in contrast to the expansive view, the mere presence of government officials on the board did not evince state control for authorities following the restrictive view. The restrictive view interpreted state agency as an all-or-nothing proposition, and Penn State could only be granted state agency
status if the Commonwealth exerted complete and exclusive control over the University. As a result, legal authorities that abided by the restrictive view did not recognize Penn State as an agency of the Commonwealth.

As the legal relationship between Penn State and the Commonwealth evolved throughout the twentieth century, the restrictive view emerged as the prevailing perception of the institution-state relationship. In 1939, the first case that analyzed the association between Penn State and Pennsylvania found the University to be a state agency. However, subsequent cases and legal developments rejected the justifications for the state agency relationship. During the 1960s, the creation of the state-related status solidified the prevalence of the restrictive view by grouping Penn State among universities that had traditionally been characterized as private “state-aided” institutions. The enacting legislation defined state-related universities according to their roles in supporting the educational needs of the Commonwealth. The statute also set forth that the state appropriations provided to state-related universities were intended to reduce tuition for the citizens of the Commonwealth. By equating Penn State with previously private institutions, and limiting the application of state appropriations to tuition, the Commonwealth effectively removed land-grant considerations from the legal relationship between the University and Pennsylvania.

The majority of the state court cases that considered the legal relationship between Penn State and the Commonwealth have concerned tax exemptions. These cases further cemented the restrictive view and demonstrated that tax issues will likely continue to influence the evolution of the legal association between the University and the Commonwealth. The 1992 and 1999 state agency cases examined the same legal issues as the 1939 tax case and noted that changing
conditions over fifty years precluded the University from designation as a state agency. In contrast to 1939, the 1992 and 1999 courts asserted that state and federal funding no longer represented a majority of Penn State’s budget, the University was not tuition-free, and the composition of the board reflected a broader number of constituents. Therefore, the state did not provide total financial support to the institution nor wholly manage and control the University, and Penn State did not qualify as a state agency.

The 1992 and 1999 cases effectively eliminated Penn State’s claim to the state agency tax exemption and closed the door on the expansive view of the legal relationship between the University and the Commonwealth. The University must now rely on the charitable tax exemption and the HUP test to exempt property from taxation. By focusing on the specific uses of property, the HUP test does not provide blanket tax immunity to the property of an institution and advances the restrictive view of the institution-state relationship. Further, the Commonwealth court’s analysis of Penn State under the HUP test implies that the University’s increasing reliance on private revenue generation and financial administration may threaten to violate the free from profit prong, and thus, jeopardize the institution’s eligibility for the charitable tax exemption.

The open records cases reflected the expansive view of the legal relationship between state-related universities and the Commonwealth, but also highlighted the unique characteristics of Penn State’s legal status. The appellants in Mooney claimed that the university was a state institution under the text of the Temple Act. The appellants pointed to the name change, its designation as “state-related” and “an instrumentality of the state,” and the university’s support for the educational agenda of the legislature as evidence of Temple’s status as a state institution.
These arguments established that Temple was a state actor, and they also revealed distinctions between Penn State and the other state-related universities. Penn State did not change its name to reflect membership in the Commonwealth System, and the General Assembly never passed legislation that changed the charter and mission of the University to reflect its role in supporting the educational objectives of the Pennsylvania General Assembly.

In fact, Penn State had discussed relinquishing more control to the state around the time of the Pitt and Temple Acts, but decided against it. Then-Penn State President Eric Walker determined that adding more state government officials to the board would further compromise governance. President Walker’s admission suggested that Penn State may not have even wanted the state-related status conferred by the Pitt and Temple Acts.200 The open records cases raise more questions about the current and future status of Penn State’s legal relationship with the Commonwealth.

From inception, Penn State has had a special, but ill-defined legal relationship with the Commonwealth, and the association between the University and Pennsylvania has evolved without a clear design. The antecedents for the haphazard evolution can likely be found in the battle for Pennsylvania’s land-grant. Along with the University’s failure to demonstrate early returns on public investment in agricultural science, competition from other institutions, legislative skepticism, and political obstinacy delayed Penn State’s designation as the land-grant institution of Pennsylvania. These developments also reflected the Commonwealth’s broader hesitancy to commit to Penn State as the keystone of public higher education in Pennsylvania.

Therefore, Penn State’s legal status was ambiguous from the time that the University was founded.

As a result of the ambiguity surrounding Penn State’s founding, legal authorities have struggled with defining the contours of the legal relationship between Penn State and the Commonwealth. The legal analysis of this study reveals the simultaneous development of two views on the legal relationship between the Commonwealth of Pennsylvania and Penn State. An expansive view rooted in the land-grant history of the University that implied a tight relationship with the state, and a restrictive view that perceived a loose affiliation with the Commonwealth and was grounded in Penn State’s corporate origins. Later case law and the establishment of the state-related status elevated the restrictive view as the dominant conception of the institution-state relationship. The emergence of the restrictive view had legal implications for Penn State’s eligibility to claim certain benefits as a state agency, but also allowed the University to initially defeat an open records challenge. However, the peculiarities of Penn State’s legal status eventually caused the release of the information requested in the open records challenge and underscored the lingering ambiguity of Penn State’s legal relationship with the Commonwealth.

The cases in this study suggest that tax issues will continue to shape the legal relationship between Penn State and Pennsylvania. The next chapter discusses the implications of Penn State’s legal status within the context of broader social and economic developments in the Commonwealth of Pennsylvania. This study argues that the haphazard evolution of Penn State’s legal status in Pennsylvania may have positioned the University well to thrive in the current policy landscape of higher education and lead efforts to realize the unfulfilled potential of the Commonwealth System.
Chapter 7
Implications, Future Research, and Conclusion

Implications

This study has implications for Penn State and the future of public higher education in Pennsylvania. The legal analysis of this study identifies tax law as the main area of law that has influenced the development of the legal relationship between Penn State and the Commonwealth. In particular, the tax exemption for the real property of Pennsylvania’s colleges and universities has elicited substantial judicial discussion of Penn State’s legal status. Throughout Pennsylvania, local school districts and municipalities face mounting budgetary pressures from declining tax revenues and state support. These taxing authorities have increasingly looked to Pennsylvania’s colleges and universities as potential sources of new revenue. As the budgetary constraints on local communities intensify, the Commonwealth’s institutions of higher education should expect a growth in the number of challenges to their charitable tax exemptions by local school districts and municipalities. Potential tax exemption challenges present an acute threat to Penn State as the University has campuses located in rust belt cities throughout the Commonwealth. Penn State administrators should proactively explore strategies to preempt challenges to the University’s charitable tax exemptions that also address the needs of local communities and maintain productive town-gown relationships.

This study also has implications for the future of public higher education in Pennsylvania and the role of Penn State in addressing the higher education needs of the citizens of the Commonwealth. The legal relationship between Penn State and Pennsylvania has evolved in a haphazard manner, but while the evolution has occurred without a clear design, the perception of
the relationship has moved decidedly toward a specific perspective. The legal analysis of this study identifies a restrictive view as the dominant perspective on the legal relationship between Penn State and the Commonwealth of Pennsylvania. This view downplays the characteristics that bind Penn State and the Commonwealth and accentuates those that differentiate the two entities. The emergence of the restrictive view, along with the state’s disinvestment in public higher education, suggest a weakening of Pennsylvania’s commitment to the public colleges and universities of the Commonwealth. However, the haphazard development of Penn State’s legal relationship with the Commonwealth may offer advantages that will enable the University to secure additional funding and become the keystone of public higher education in Pennsylvania.

*Tax-Exempt Implications*

The evolution of the legal relationship between Penn State and Pennsylvania reflects the broader shift in the longstanding public role of higher education. As state financial support for public higher education has declined, colleges and universities have diversified revenue streams and placed greater emphasis on private sources of funding, including tuition, research grants and contracts, intellectual property, philanthropy, research parks, and university-industry partnerships. The movement from away from public to private financing has fundamentally changed perceptions of higher education. To justify decreases in state funding, policymakers have adopted the view that higher education is a private good, and as the primary beneficiaries of a college degree, individuals should bear the costs of higher education. Public colleges and universities have also have become entrepreneurial in pursuit of revenue generation and increasingly position themselves as key engines of economic development. As a result, higher education scholars have noted that the traditional public role of higher education has weakened
over time. This confluence of factors – decreasing state funding, the growing perception that higher education is a private good, and public higher education’s shift in orientation toward economic development and privatization – promotes a self-perpetuating spiral toward the privatization of public higher education. The slide toward privatization and the diminishing public role of higher education also calls into question the charity status of colleges and universities.

The conditions that have contributed to the erosion of state support for public higher education have also set the stage for challenges to the charitable tax exemption of public colleges and universities. The Great Recession severely weakened local and state budgets. During the economic downturn, state and local property tax revenues decreased at the same time that demand escalated for government services. The effects of the housing bubble reduced property tax revenues that local governments rely for their budgets. The steep job losses during the recession reduced consumption and significantly diminished the income and sales taxes that serve as the primary sources of tax revenues for states. The decreases in state tax revenues further stressed local budgets as states cut back support to cities and municipalities.

Declining tax revenues continue to be a pressing issue for municipalities and states. Although the country’s economy has slowly improved since the recession, state tax revenues have yet to fully recover. States and localities are critical contributors to society and our national economy. These entities principally provide the services that we expect from our government,

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2 Gordon, “State and Local Budgets.”
and support the educational, infrastructure, and social service needs critical to our economic and social well-being.\textsuperscript{4} Further, state and local governments employ a large portion of the population. In 2012, they supplied jobs to one out of seven American workers and accounted for 12\% of Gross Domestic Product (GDP).\textsuperscript{5} Reductions in state revenues and spending lead to the elimination of local and state government jobs, the cancellation of government contracts, reduced benefits, and cuts to funding for education, healthcare, and nonprofits and businesses that offer social services. State spending contraction also negatively impacts the private sector.\textsuperscript{6}

The state tax situation in Pennsylvania mirrors developments across the country. The state faces a $2.2 billion shortfall in 2017, and nearly three months into the fiscal year, the legislature has still not approved a state budget. This has marked the second consecutive year that a budget stalemate has engulfed the Commonwealth, and the instability has caused S\&P global to downgrade the credit of the state.\textsuperscript{7} The budget stalemate has also deprived payments to counties and local school districts that heavily rely on state aid.\textsuperscript{8}

The recent budget issues in Harrisburg are just part of a broader trend of declining state aid to local governments. Across the country, state aid to local governments has still not returned to pre-recession levels, and local governments in the Commonwealth have experienced a sharp

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\item[5] Gordon, “State and Local Budgets.”
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decline in aid.\textsuperscript{9} In Pennsylvania, intergovernmental revenues from states to local governments and schools decreased by 13\% between 2010 and 2014.\textsuperscript{10} Amid the backdrop of declining state funding and tightening budgets, local governments in Pennsylvania have been searching for new sources of income, and exploring modifications to the tax-exempt status of colleges and universities.\textsuperscript{11}

The charitable tax exemption has been around since the days of the Bible, and every state in the country exempts the property of nonprofits from the burden of property taxes.\textsuperscript{12} In 1924, the United States Supreme Court articulated the basis for granting the tax exemption of charities by stating, “the exemption is made in recognition of the benefit which the public derives from (their) corporate activities.”\textsuperscript{13} Nonprofits provide their local communities with a host of benefits. Nonprofits often serve as a major source of employment and attractions, and they also offer vital services to residents.\textsuperscript{14} Nonprofits are also a key and growing sector of the American economy. The U.S. has nearly 1.6 million nonprofits, and the tax-exempt organizations represent 9.2\% of national wages and salaries and 5.3\% of GDP.\textsuperscript{15} Between 2003 and 2013, the revenues and assets

\textsuperscript{13} Trinidad v. Sagrada Orden de Predicadores, 263 U.S. 578, 595 (1924).


The charitable tax exemption also burdens the tax revenues of localities. Every year, the property tax exemption for nonprofits costs local governments about 4 to 8% of property tax revenues.\footnote{18}{Kenyon and Langley, “Nonprofit PILOTs (Payments In Lieu of Taxes).”}


The situation has been particularly tense in the rust belt cities of Pennsylvania.\footnote{20}{Katie Blackley, “How Much of Pittsburgh Property is Untaxed? (And How Does the City Get Its Money?),” WESA, April 17, 2017, http://wesa.fm/post/how-much-pittsburgh-property-untaxed-and-how-does-city-get-its-money#stream/0.} Due to population migration, the rust belt cities of the Commonwealth tend to have a larger proportion of tax-exempt properties. Following World War II, residents of these cities began to migrate to the suburbs. The largest established nonprofits, colleges and hospitals, remained in the cities and

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18 Kenyon and Langley, “Nonprofit PILOTs (Payments In Lieu of Taxes).”
expanded as the population moved out to surrounding areas. As a result, larger proportions of land in these cities is tax-exempt, and every year, local governments forfeit a significant amount of property tax revenues. For example, tax-exempt real estate represents roughly one-third of the total value of assessed real estate in Scranton, Pennsylvania, and in 2014, the city projected a return of $11.5 million in tax revenues if nonprofit property was not tax exempt.\textsuperscript{21}

\textit{Tax-Exempt Status}

In 1997, the passage of Act 55 reignited a separation of powers issue between the legislature and judiciary over which branch had the authority to define “institutions of purely public charity.” In the \textit{HUP} case, the Supreme Court of Pennsylvania established that the state constitution limits the exemption authority of the General Assembly to “institutions of purely public charity,” and prior to applying any statutory definitions of purely public charities, an institution must first “qualify under the Constitution as a ‘purely public charity.’”\textsuperscript{22} The Supreme Court of Pennsylvania has also found that “the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court.”\textsuperscript{23}

Act 55, although contemplated by the legislature as a clarification of the judicially-created \textit{HUP} test, “greatly expanded those standards well beyond what any appellate court had ever decided.”\textsuperscript{24} Nevertheless, between its signing and 2012, Act 55 guided the determination of property tax exemptions.\textsuperscript{25} However, it was only a matter of time before the legislature’s efforts

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\textsuperscript{21} Kaplan, “Pennsylvania Cities.”
\textsuperscript{22} \textit{Hospital Utilization Project}, 507 Pa. at 13.
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clashed with judicial jurisdiction and court precedent, and a 2012 decision by the Pennsylvania Supreme Court rang the bell for the next round of the “knockdown, drag-out separation-of-powers fight” between the courts and the General Assembly.26

In 2012, the court reasserted the judiciary’s authority to interpret which charitable organizations qualify as “institutions of purely public charity” under the state constitution.27 In Bobov, the Pike County Board of Assessment denied the application from a non-profit religious organization for a “purely public charity” tax-exemption. The entity ran a summer camp for members of the Orthodox Jewish faith. The court focused solely on the issue of whether the legislature or the judiciary had the authority to define “institutions of purely public charity,” and found that “the legislature may codify what is intended to be exempted, but cannot lessen the constitutional minimums by broadening the definition of ‘purely public charity’.”28 The court in Bobov firmly established that an institution must first satisfy the judicially-created HUP test for a “purely public charity” before it is eligible for consideration under Act 55, and that “if you do not qualify under the HUP test, you never get to the statute.”29

The Bobov case has significant implications for Penn State and all colleges and universities of the Commonwealth. The Supreme Court of Pennsylvania asserted that the HUP test will continue to govern determinations of whether an institution qualifies as a “purely public charity.” Due to the variance in applications of the HUP test, the Bobov case will likely

28 Bobov, 44 A.3d at 5.
29 Bobov, 44 A.3d at 9.
embolden distressed local school districts and municipalities to initiate challenges of institutions’
tax-exempt statuses.\(^{30}\)

Would Penn State “pass” the HUP test?

Given the continued budgetary pressures on local taxing authorities and the court’s
decision in the *Bobov* case, Penn State could face a challenge to the University’s tax-exempt
status. In the 2000 *Penn State v. Derry Township School District* tax case, the Dauphin County
Court of Common Pleas found that Penn State did not satisfy the fifth prong of the *HUP* test
which requires that institutions operate free from the profit motive (free from profit prong).
Assuming that Penn State would satisfy the first four prongs of the *HUP* test in future litigation,
the free from profit prong merits further attention by University administrators and state
policymakers.

Courts have indicated that the determination of whether an institution is an “institution of
purely public charity” implicates questions of law and fact and that precedent has limited value
as the concept of charity continues to evolve over time, place, and purpose.\(^{31}\) The court in the
2000 Penn State tax case pointed to the “extremely high salaries of the University’s top-paid
individuals” as evidence that Penn State more closely resembled a profit-making organization
than a charity.\(^{32}\) Courts have “implied that payment of excessive salaries and fringe benefits to
corporate officers might evidence a private profit motive.”\(^{33}\) The case cited to support this
implication concerned the compensation provided to two doctors at a hospital. In *West Allegheny*

\(^{30}\) Richard T. Frazier and Stanley J. Kull, ““Purely Public Charities’ in Pennsylvania: Back to the Future – Again,”


\(^{33}\) *St. Margaret Seneca Place*, 536 Pa. at 488, citing *West Allegheny Hosp. v. Bd. of Prop. Assessment*, 500 Pa. 236
Hosp. v. Bd. of Prop. Assessment, the court found that the compensation provided to the two doctors who founded the hospital did not establish a profit motive as the work of the doctors was essential to the facility’s operations and the doctors were compensated at the same level or less than they would have been for comparable work at comparable institutions.34

In the 2000 Derry case, the court’s analysis under the free from profit prong included an examination of the highest salaries at Penn State. The court specifically focused on the compensation of Penn State’s football and basketball coaches. The court noted that the football coach earned more than the president of the University, and that the men’s basketball coach was the third highest paid employee. The court appeared to take issue with the fact that the salary of an employee who did not support the core academic mission of the University was substantially higher than the president of the University. If the roughly $260,000 that the football coach of Penn State earned through endorsements and media appearances was noteworthy in 1995, then the current football coach’s salary would probably be relevant to a current analysis under the free from profit prong. Penn State football coach James Franklin just signed a six-year $34.7 million contract that has made him the fourth highest paid coach in college football, and his compensation is nearly six times greater than Penn State President Eric Barron’s salary.35

However, applying the rationale in West Allegheny, a court may view the salary of Penn State Coach Franklin as essential to the operations of the athletics department, and therefore, the University, and that his salary is in line with the salaries of coaches from comparable Division I football programs.

34 West Allegheny Hospital, 500 Pa. at 455.
The court may also look to the profitability of the Penn State football program as evidence of a profit motive. While the Penn State football team earned a surplus of $40 million in 2016, that money is reinvested into the athletics department of Penn State, and the department as a whole turned a surplus of $3 million.\textsuperscript{36} The court has found that “surplus revenue is not synonymous with profit,” and looks at how institutions use surplus revenue to determine whether profit motivates an institution.\textsuperscript{37} If the mission of the athletics department aligns with the charitable purposes of Penn State, then the reinvestment of surplus revenue into the athletic department would likely not violate the free from profit prong.

The fact that these visible, revenue- and endorsement-generating employees, i.e., the football and men’s basketball coaches, earned more than “someone in the educational department” seemed to be relevant to the court’s determination that the salaries at the University were excessive. The statement from the court distinguished Penn State athletics from the educational mission and seemed to suggest that the mission of the athletics department differed from that of the University. Perhaps a future court will explore this distinction and analyze whether the mission of the athletic department evinces a charitable purpose.

The federal government’s treatment of intercollegiate athletics may be instructive on the issue of whether college athletics satisfies a charitable purpose. Under 501(c)(3) guidelines, the federal government and Internal Revenue Service (IRS) have long recognized the vital contributions of intercollegiate athletics to the educational experience at colleges and


universities. The tax exemption of intercollegiate athletics has been unsuccessfully challenged by the IRS a handful of times, but not for nearly twenty years, and Congress has shown no interest in legislatively reversing the status. Further, the commensurate-in-scope doctrine allows 501(c)(3) colleges and universities to operate commercial businesses as long as the profits support the charitable aims of their institutions. For example, due to the success of the University’s NCAA Division I football program, the athletics department at Penn State is one of only seven self-sustaining Division I athletics departments in the country. Regardless, the decision in Derry suggests that the revenue-generating and commercial enterprises of the University may be relevant under the free from profit prong. Penn State administrators should keep any eye on case law in this area as the evolution of Penn State’s legal relationship with the Commonwealth indicates that state courts may be willing to reevaluate Penn State’s eligibility for the charitable tax exemption.

Under the free from profit prong, the court may also consider the compensation of Penn State President Eric Barron in an analysis of whether Penn State executives earn excessive compensation. Penn State President Eric Barron earns roughly $1 million per year. In one of the few cases that has applied the HUP test since Bobov, the Commonwealth court analyzed executive compensation under the free from profit prong to determine whether the compensation evidenced a profit motive. In that case, the court found that a nonprofit assisted living home violated the fifth prong by tying a substantial portion of executive compensation to the

38 26 U.S.C. § 501(c)(3), provides federal tax-exemptions to religious, charitable, scientific, literary, and educational organizations.
marketplace performance of the facility. President Barron has earned bonuses to his base salary, but the University connected the bonuses to his retention and transition, and not to the marketplace performance of Penn State. The University has also publicly stated that Barron’s salary reasonably aligns with his peer colleagues. 41 Penn State administrators should also stay informed on this legal issue as the justifications for any further bonuses that President Barron receives may be relevant to future HUP test analyses.

The Derry court also drew a distinction between the processes for determining the compensation for the president of Penn State and those for the rest of the University’s executives. The court asserted that the president had sole discretion to determine compensation for the rest of the University’s executive and administrative positions and implied that conferring this authority solely to the president evinced a profit motive. For a number of reasons, a current court looking at this issue may arrive at a different conclusion.

The authority of the president of Penn State to manage issues related to the compensation of employees stems from the board of trustees. Pennsylvania’s nonprofit laws provide the board of trustees with the authority to adopt bylaws related to the management of the University, and Penn State adopted a bylaw that provided the president, subject to the authority of the board of trustees, with “general supervision of and general management and executive powers over all the property, operations, business, affairs and employees of the University.” 42 The board further delineated the authority of the president in a standing order which states,

As set forth in the Bylaws, the authority for day-to-day management and control of the

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University, and the establishment of policies and procedures for the educational program and other operations of the University, is delegated to the President of the University, and by him or her either by delegation to or consultation with the faculty and the student body in accordance with a general directive of the Board of Trustees.\footnote{Penn State Board of Trustees, “Standing Orders of the Board of Trustees,” accessed September 1, 2017, http://trustees.psu.edu/pdf/Standing%20Orders%20July%202017.pdf.}

Therefore, delegation of authority to the president for day-to-day operations appears to be a legitimate exercise of the powers of the board of trustees. Further, as a member of the board of trustees, the president of Penn State has a fiduciary duty imposed by both state statute and the bylaws of the University. A fiduciary of Penn State owes the University a number of duties and obligations, including the duty to “act in good faith, with due regard to the interests of the University, and shall comply with the fiduciary principles of conduct in addition to any other state or federal requirements.”\footnote{Penn State Board of Trustees, “Amended and Restated Bylaws.”} The negotiation of executive salaries likely falls within the day-to-day management duties delegated to the president by the board of trustees. In addition, as a member of the board of trustees, the president of Penn State’s fiduciary duty to the institution would seem to protect against favoritism and excessive executive compensation. Absent a violation of that duty, the court may not find the discretion of the president to set salaries alone germane to the analysis under the free from profit prong.

Penn State may very well survive a tax-exempt challenge under the \textit{HUP} test. However, for a number of reasons, the charitable tax exemption of Penn State is susceptible to a challenge. First, the University cannot reliably predict the outcome of a \textit{HUP} analysis by the court. The decisions of courts that have applied the \textit{HUP} test have been inconsistent and contradictory. As a
result, the Bobov decision has caused alarm among tax-exempt organizations.\textsuperscript{45} Second, one court has already suggested that Penn State would fail the HUP test. Third, public higher education’s continued shift toward privatization may threaten Penn State’s claim as serving a charitable purpose. In fact, as public colleges and universities continue to privatize, it has been suggested that for-profit institutions of higher education, which are not eligible for exemptions, may push this issue. For-profit colleges and universities claim that the exemptions are unfair as they perceive no distinction between themselves and their privatized public competitors.\textsuperscript{46}

Lastly, the findings of this study suggest the emergence of a restrictive view of Penn State’s legal relationship with the state. If that trend continues, this view is inclined to privilege aspects of that relationship that distinguish the University from the Commonwealth and may influence determinations of whether Penn State serves a charitable purpose. For those reasons, Penn State administrators should stay current on legal issues related to charitable tax exemptions in Pennsylvania and may want to consider alternative policy options that preempt exemption challenges.

\textit{PILOTs}

To preserve the charitable tax exemption, Penn State may want to consider establishing agreements for payments and/or services in lieu of taxes. In addition to challenging the tax-exempt status of nonprofits, localities are increasingly requesting payments in lieu of taxes (PILOTs) or services in lieu of taxes\textsuperscript{47} which “are voluntary payments made by tax-exempt

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\textsuperscript{47} Hereinafter, the term “pilots” is used to cover both PILOTs and SILOTs.
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nonprofits as a substitute for property taxes.\textsuperscript{48} The rationale behind PILOT programs is that as significant consumers of public services, e.g., fire and police, nonprofits should share in the burden of paying for them. Otherwise, municipalities solely bear the costs of public services to institutions which generally extend benefits to individuals beyond the boundaries of the localities.\textsuperscript{49} As of 2012, localities in Pennsylvania had established PILOTs with more nonprofits than any other state, and the localities of the Commonwealth continue to view nonprofits as a source of funding to help balance their budgets.\textsuperscript{50} A recent study demonstrated that local government officials disproportionately favor requesting the establishment of PILOT agreements with colleges and universities as opposed to non-profit hospitals and churches.\textsuperscript{51} If the ebbing of state aid and cycling of legislative stalemates continue, colleges and universities in the Commonwealth can expect more charitable tax exemption challenges as Pennsylvania further solidifies its status as “the epicenter of attempts to alter nonprofit tax policy.”\textsuperscript{52}

The ambiguity that emerged from the cases that applied the \textit{HUP} test during the early 1990s encouraged the development of PILOTs. Local government leaders in some cities in Pennsylvania felt emboldened by the string of decisions following the \textit{HUP} decision in 1985 and requested PILOTs from nonprofits. Many nonprofits, fearing costly litigation and unfavorable judicial applications of the \textit{HUP} test, capitulated to the demands of local taxing authorities. For example, in 1994, Philadelphia Mayor Ed Rendell issued an executive order stating that

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49 Kenyon and Langley, “Nonprofit PILOTs (Payments In Lieu of Taxes).”
50 Larry Kaplan, “Pennsylvania Cities.”
52 Thompson, “From the Fault Line on Nonprofit Property-Tax Exemptions.”
Philadelphia had adopted the policy “that nonprofit, non-governmental institutions in the City should contribute their fair share for the municipal services and benefits they receive.” The executive order noted that nonprofit institutions owned one-quarter of the city’s total assessment property and that the tax-exempt status deprived the city and school district of over $100 million in property tax revenues. Citing the string of Pennsylvania Supreme Court decisions that had applied the HUP test by that time, the executive order speculated that several of the city’s nonprofits would fail to satisfy all of the test’s criteria for “institutions of purely public charity.” The mayor’s order obligated nonprofits with unclear legal statuses to voluntarily contribute payments and services, i.e., PILOTS, to the city of Philadelphia.

Rendell’s executive order established an advisory board to form individual Voluntary Contribution agreements between the city and each nonprofit with an unclear legal status. The agreements were to be treated as settlements against any future challenges to an organization’s tax-exempt status. Mayor Rendell’s executive order also stipulated the terms of the contributions and encouraged timely compliance with the order by offering a lower rate of payment to institutions that negotiated settlements by the end of 1994. The terms of each Voluntary Contribution agreement included:

1. Monetary payment by the nonprofit to the city of 40% of the amount that the institution would owe if not tax-exempt.
2. Permission for nonprofit to substitute services for 1/3 of the monetary payment.

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3. Promise by the city not to challenge institution’s nonprofit status during the length of the agreement.

4. Warning that non-compliance would result in recommendation to law department of city to initiate a challenge of the nonprofit’s tax-exempt status.

Following the issuance of the order, the city reached out to roughly 580 institutions that owned about 2,200 properties in Philadelphia. The advisory board mandated that the institutions apply for tax-exemption by the end of 1994. Those institutions that the advisory board determined to satisfy the HUP test were granted “home free status” and did not have to submit voluntary contributions. From the three hundred-plus nonprofits that submitted applications, the city identified 46 institutions as having an unclear legal status under the HUP test for “institutions of purely public charity.”

By the summer of 1996, the city had established Voluntary Contributions with 42 nonprofits. Hospitals and educational institutions represented over 80% of those institutions which led to claims that the city concocted the program specifically to target hospitals, colleges, and universities.54 The University of Pennsylvania established a five-year agreement to contribute annual payments of $1.93 million to the city of Philadelphia.55 However, overall, the program did not last long nor appear to be that lucrative for the city. The Voluntary Contribution agreements yielded under $9.4 million which was less than half the amount that the city had

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estimated. In 1997, Act 55 broadened the definition of “institutions of purely public charity” and undermined the city of Philadelphia’s leverage to demand services and payments from nonprofits. As a result of Act 55, the vast majority of participants pulled out of the Voluntary Contributions program. By 2011, the program netted less than $500,000 from the remaining six participants: Salus University, American College of Physicians, Albert Einstein Health Care Network, Philadelphia County Dental Society, Commission in Graduates of Foreign Nursing School International, and Cathedral Village.

Legal commentators have referred to the Bobov case as a “game-changer,” and claim that the decision cleared the way for local governments to challenge the tax-exempt status of colleges and universities. Legal experts also anticipate that local taxing authorities will use the threat of a tax-exemption challenge to encourage institutions to enter into PILOT programs. Due to Penn State’s vast size and distribution across the Commonwealth, the University is uniquely susceptible to PILOT requests from multiple taxing authorities.

Penn State has twenty-four campus locations throughout the Commonwealth of Pennsylvania. Many of the campuses are located in cash-strapped cities that have either formed

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PILOTs with local charities or identified the establishment of PILOTs as a priority to help generate revenue. The Commonwealth has designated some of these municipalities as distressed cities. In 1987, the Commonwealth passed the Municipal Financial Recovery Act (Act 47) to assist financially distressed cities. Act 47 provides loan and grant opportunities to help distressed cities curb expenses and increase revenues. Act 47 grants additional taxing authority to distressed cities and also enables them to apply for Commonwealth grants and no-interest loans. Further, Act 47 cities work with Pennsylvania’s Department of Community and Economic Development to produce financial recovery plans that guide recovery efforts. Currently, nineteen cities in Pennsylvania are enrolled in the Act 47 Financial Distressed Program. The Act 47 plans for four of the cities that are home to Penn State campuses, Altoona, Harrisburg, Reading, and Scranton, include recommendations to generate additional revenue through PILOT agreements. Therefore, these cities have the blessing and encouragement of the state to approach entities like Penn State about PILOTs.

Penn State already has PILOT agreements in place with communities in Pennsylvania. For the University’s flagship University Park campus, Penn State contributes PILOTs to local taxing authorities. The agreement involves a mixture of services and payments. Penn State offers use of facilities to county officials and also contributes payments to local school districts and

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municipalities.\textsuperscript{65} Recently, Penn State Erie entered into a ten-year PILOT agreement for the campus’s Knowledge Park which is a 106-acre business and technology park.

Penn State increasingly pursues initiatives that are likely to draw the attention of local taxing authorities. In 2015, the University launched an initiative, Invent Penn State, which provides funding for collaborations between Penn State and private industry on projects that will lead to the development of products and services. If Penn State continues to position itself as an engine of economic development, the University will likely form additional partnerships with private industry.\textsuperscript{66} For example, Penn State Altoona is currently working with industry partners on the development of a rail transportation research center. These types of commercial partnerships have formed the basis for tax-exempt challenges by local taxing authorities. For example, in New Jersey, local taxpayers partially based a challenge to Princeton University’s (Princeton) nonprofit property tax exemption on Princeton’s usage of buildings for commercial purposes and the royalties that the institution earned from a patent for a lucrative cancer drug. After a New Jersey court held that local taxpayers had standing to challenge Princeton’s nonprofit property tax exemption, the university quickly settled the case for $18 million.\textsuperscript{67} A local attorney noted that the Princeton settlement “really should be looked at as a model for other communities with large non-profits.”\textsuperscript{68}

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\textsuperscript{67} Fields v. Trustees of Princeton University, 28 N.J. Tax 574 (Tax 2015).

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The budgetary pressures on rust-belt cities, the *Bobov* decision, and the University’s slide toward privatization suggest that Penn State can expect additional requests for PILOTs from local taxing authorities. Since commercial activities, in particular, seem to draw the interest of local government officials and taxpayers, the University may want to consider concentrating their commercial activities at a few campuses and working with local government officials in those locations on reasonable, long-term PILOT agreements. If the University distributes commercial activities and industrial partnerships across all twenty-four campuses, the influx of PILOT requests from local taxing authorities may be overly costly and burdensome. In addition, with each PILOT agreement, more and more municipalities may be emboldened to approach the University regardless of how the buildings at each respective municipality’s campus are being used.

*Implications for the Future of Public Higher Education in Pennsylvania*

Public higher education in Pennsylvania is at a critical juncture. Over the years, state funding for public higher education has decreased, tuition at public colleges and universities has risen, and the number of high school students in Pennsylvania has gone down. Competition has intensified among Pennsylvania’s public institutions for the state’s diminishing population of high school students. These developments have adversely affected the Commonwealth’s fourteen state universities. While the vast majority of Pennsylvania college students stay in the Commonwealth, they are increasingly choosing not to go to PASSHE institutions. The decline in Pennsylvania students has had an enormous effect on PASSHE institutions. Roughly 90% of students enrolled at PASSHE colleges and universities are from Pennsylvania, and the operating
budgets of PASSHE institutions rely heavily on tuition revenue. As a result of this confluence of factors, PASSHE universities individually and collectively face a “bleak” financial future, and the entire system is “on the brink of collapse.”

The challenges of PASSHE have been magnified by the state’s failure to empower a statewide governance board to coordinate the Commonwealth’s public colleges and universities. The crisis facing PASSHE presents Pennsylvania with an opportunity to step back and examine the entire system of public higher education in the state to determine how best to organize and prepare public colleges and universities to meet the postsecondary needs of citizens of the Commonwealth. Amid decreasing resources and the de facto privatization of public higher education, Pennsylvania will need to pursue financially-responsible policy options that are bold, creative, and strategic in order to adequately provide low-cost higher education opportunities to residents of Pennsylvania.

The legal analysis of this study identifies the Commonwealth System as an incomplete attempt to create a comprehensive and unified system of public higher education in Pennsylvania. Pennsylvania should learn from its mistake, renew the state’s commitment to a cohesive system of public higher education, and reestablish an updated Commonwealth System. This study argues that as a result of the haphazard development of Penn State’s legal relationship


with the Commonwealth, Penn State is well-positioned to thrive in the current economic and policy environment of public higher education and lead a renewed Commonwealth System.

During the 1960s, Pennsylvania created the Commonwealth System and the state-related status as part of the state’s efforts to prepare public institutions of higher education for a surge in enrollments.71 To guide the development of the Commonwealth System, the General Assembly statutorily mandated that the State Board of Education create a master plan for higher education in Pennsylvania.72 The purpose of the original 1967 master plan was to establish an institutional framework for public higher education that would adequately meet the state’s growing demand for diverse, low-cost higher education opportunities and promote the social, economic, and cultural well-being of the Commonwealth. To that end, the original 1967 master plan outlined a tripartite system of public higher education, i.e., community colleges, state colleges, and Commonwealth universities, with each part featuring different constituents, scopes, sources of funding, and governance structures. The plan proposed that the community college segment would primarily serve local commuter students and provide lower division undergraduate courses, the state colleges (PASSHE) would handle the bulk of pre-master’s level instruction, and the Commonwealth university segment (Penn State, Temple, Pitt) would focus on graduate, professional, and upper-division undergraduate education. The state intended for the Commonwealth System to prevail as a comprehensive and complementary structure of public higher education and serve the postsecondary education needs of the Commonwealth.73

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71 State Board of Education, A Master Plan, 1-5.
73 State Board of Education, A Master Plan, 1-45.
The Commonwealth System did not develop according to the 1967 master plan. The General Assembly did not provide the State Board of Education with the necessary authority to regulate all three segments of the Commonwealth System. Without the guidance of a statewide strategy and coordinating body, the public colleges and universities of the state developed along disparate and sometimes contradictory patterns, and the Commonwealth System fell well short of the one originally envisioned. For example, the Commonwealth universities of Temple, Pitt, and Penn State declined to form a coordinating council to strategically collaborate on program offerings and standardize their academic and financial operations. Additionally, Pennsylvania only has half of the twenty-eight community colleges contemplated by the State Board of Education, and large swaths of the Commonwealth lack access to community college campuses. The Commonwealth System now only appears to exist as a statutory creation and not an actual, operative system.

The organizational structure and underlying philosophy of student financial aid also developed at the same time as the Commonwealth System. The state established a student financial aid agency, the Pennsylvania Higher Education Assistance Agency (PHEAA), which provides funding to both public and private institutions. The Commonwealth created PHEAA in response to the projected increases in enrollment and viewed private colleges as key contributors to efforts to meet the mounting demand for higher education. This policy decision stood in stark contrast to other states which chose to directly support and expand public systems of higher education; however, at the time that the General Assembly created PHEAA, the public colleges and universities of the Commonwealth did not have enough capacity to handle growing

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demand. Through PHEAA state grants, private colleges and universities receive a substantial amount of support. For example, in 2015-16, private colleges and universities received nearly 40% or $172 million of the total state funding for higher education need-based grants.

The Commonwealth System was created to address a different set of challenges than the ones currently facing public higher education in Pennsylvania. In the early 1960s, the public colleges and universities of the Commonwealth did not have the capacity to handle the impending surge of students that began later in the decade. The state government designed the Commonwealth System to manage the growth in enrollments and infused public institutions with state support to help in that endeavor. Today, the institutions that comprise the Commonwealth System confront a different set of difficulties, including declining state aid, unpredictable patterns of state funding, unfavorable demographic changes, heightened competition, and excess capacity. State support for higher education in Pennsylvania has been on a decades-long downward trend, and more recently, funding has decreased dramatically since the Great Recession. Between 2008 and 2017, Pennsylvania reduced state funding per full-time equivalent (FTE) student by 34.2% which represents the fourth highest percentage among all states. In 2016, state funding per FTE student was $3,378 less than the national average. Pennsylvania ranked second lowest in state support for higher education per capita ($139) and per $1,000 of

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personal income ($2.79) in 2015. The state does not seem prepared to restore public higher education funding to pre-recession levels.

In response to declining state aid, Pennsylvania colleges and universities have shifted costs to students and their families by hiking tuition. Over the last five years, in-state tuition has increased at the Commonwealth’s public two-year colleges by 31%, at public four-year public institutions by 15%, and at the University Park campus of Pennsylvania’s flagship university, Penn State, by 12%. Pennsylvania has the seventh highest tuition among community colleges, the third highest at public four-year institutions, and the highest among flagship universities. In addition to increasing tuition, institutional responses to decreasing state aid have included cost-cutting measures that have implications for the educational quality, including the elimination of faculty positions, programs, courses, and academic support services. The dual effect of reductions to state funding and increased tuition threatens the access, affordability, and quality of public higher education in Pennsylvania.

Today’s public institutions of higher education in Pennsylvania also confront different demographic trends than in the 1960s. Between 2011 and 2021, the state projects a 7% decrease in high school enrollments. Since 2010, the number of postsecondary bound high school graduates in Pennsylvania has decreased nearly 13%. Further, the proportion of high school graduates attending college has also declined. Over time, the percentage of postsecondary bound high school graduates has been steadily increasing, but after reaching a high of 76.5% in 2011,

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the percentage has continued to drop. In 2016, only 68.6% of high school graduates pursued postsecondary education and less than 65% headed to two- and four-year colleges and universities.  

Nevertheless, postsecondary education is as crucial as ever to the future of the Commonwealth. By 2020, 63% of jobs in Pennsylvania will require postsecondary education, and between 2010 and 2020, at least some college education will be needed for over 1.3 million of the job openings in the state. To remain competitive in the knowledge economy, Pennsylvania needs a highly educated and skilled workforce, and Pennsylvania’s public institutions of higher education play a pivotal role in enhancing educational attainment rates. Colleges and universities are also key to the creation and dissemination of knowledge and are increasingly viewed as engines of economic development, particularly in rust-belt regions. The continued expansion of higher education is imperative to the economy of Pennsylvania.

Public higher education in the Commonwealth is at a crossroads. Higher education is vital to the success of the state and its citizens. States with highly educated workers have stronger rates of economic growth and higher incomes. Colleges and universities educate the skilled workers needed to compete in the global economy, and the institution are considered

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82 Stull et. al., “College Affordability,” 1.
pivotal participants in regional economic development initiatives; however, Pennsylvania has been steadily disinvesting in public higher education. In addition, the structure of public higher education in Pennsylvania was developed at a different time to address different conditions, and the Commonwealth System never fully coalesced into a comprehensive and unified system of public higher education. These developments, along with declining high school enrollments, have intensified fiscal pressures on PASSHE institutions and threatened their existence. The struggles of PASSHE bring the issues plaguing the public colleges and universities of the Commonwealth to the fore and provide the state with an opportunity to comprehensively assess the entire system of public higher education in Pennsylvania.

The state should reexamine the landscape of public higher education in Pennsylvania and retool the Commonwealth System to best serve the social, economic, and cultural needs of the state and ensure maximum return on taxpayer dollars. This study’s account of the legal relationship between Penn State and Pennsylvania informs policy discussions on how best to organize and support public higher education in Pennsylvania and suggests that Penn State’s status may represent the prototypical legal relationship between public universities and states. In an environment of declining resources and a seemingly inevitable spiral toward privatization, Penn State’s legal status may offer an effective solution to address the challenges facing public higher education in Pennsylvania and may also represent the blueprint for legal relationships between states and public universities across the nation.

*The PASSHE Crisis*

Demographic changes and diminishing state aid have notably affected the institutions in the Pennsylvania State System of Higher Education (PASSHE). Like other public institutions in
the state, PASSHE universities have seen state support steadily erode over time. Between 2010 and 2015, the state appropriation for PASSHE decreased by 18% from $503.4 million to $412.8 million.\textsuperscript{84} Further, the dip in enrollments at Pennsylvania’s high schools have acutely affected PASSHE institutions. Pennsylvania students account for roughly 90% of enrollments at PASSHE schools, and the entire system has experienced a 12.3% decrease in enrollments since 2010. The twin effect of declining enrollments and weakening state support has dire financial implications for PASSHE as PASSHE institutions rely heavily on tuition revenue. Tuition and fees represent nearly 62% of the operating revenues of PASSHE universities, and combined, state appropriations and tuition and fees account for nearly two-thirds of the total revenues of the institutions.\textsuperscript{85} In contrast, Penn State derives less than one-third of the University’s operating revenues from tuition and fees, and the state appropriation represents only 5% of revenues.\textsuperscript{86}

PASSHE has been increasing tuition to replace the lost dollars from declining aid and waning enrollments. The most common full-time, in-state tuition rate in the state system has risen by 35% since the start of the Great Recession in 2008. Over that same time period, the tuition and fee revenues per pupil have grown by 38.4% from $5,660 to $7,832. As PASSHE has been increasing tuition to replace state dollars, the state system has become more reliant on tuition revenue and thus, increasingly vulnerable to fluctuations in enrollment.\textsuperscript{87} Unfortunately, the tuition hikes have further exacerbated enrollment challenges by alienating the price-sensitive


\textsuperscript{87} Allegheny Institute for Public Policy, “Pennsylvania’s Higher Education System Woes,” Policy Brief 14, no. 53 (November 6, 2014).
students who attend PASSHE universities. Roughly half of the students at PASSHE institutions come from families with $48,000 or less in annual household income, and enrollments at PASSHE institutions have already suffered as a result of escalating tuition prices. Additional tuition increases threaten to price a PASSHE education beyond the reach of students from working families and will intensify the pressures on the budgets of state system universities. As tuition and fees pay for nearly three-quarters of the state system’s educational costs, enrollment contractions severely impact the budgets of PASSHE institutions and jeopardize their financial viability.

The reductions in enrollment at PASSHE universities have also driven up costs. Between 2011 and 2016, spending per FTE student increased substantially at the PASSHE schools that experienced the largest decreases in enrollment, and costs at six of the institutions rose by at least 20%. Further, although tuition and fees at PASSHE universities are considerably lower than state-related institutions, their faculty costs per FTE student are roughly equivalent. For upper-division courses, however, the faculty costs per FTE at PASSHE institutions ($5,055) are much higher than state-related universities ($4,167). The escalating costs may partially be attributed to smaller class sizes. Over 40% of upper-division courses at PASSHE universities have less than ten students, and there are fewer than five students in 30% of upper-division classes. On average, upper-division courses at state-related universities have eight more students than at PASSHE

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Therefore, declining enrollments create cascading costs for PASSHE universities that severely endanger their financial health.

PASSHE leadership has conceded that the state system is ill-equipped to confront its myriad challenges and needs to dramatically overhaul operations in order to survive. Former Chancellor of PASSHE, Frank T. Brogan, noted in his January 2017 State of the System Address,

We know this: the current approach as to how we do things—how we’re organized, how we’re funded, how we operate—all of it is unsustainable; that is an undeniable fact. That’s not just philosophical; it’s mathematical; and it’s only going to get worse if we don’t do something about it.\footnote{Frank T. Brogan, “State of the System Address” (speech, Board of Governors Meeting, Harrisburg, PA, January 26, 2017).}

In recognition of the immediate need to address the system’s challenges, former Chancellor Brogan hired the National Center for Higher Education Management Systems (NCHEMS) to thoroughly review PASSHE and develop recommendations for the future. In July 2017, NCHEMS released a report with findings and recommendations for action. NCHEMS identified a number of challenges that jeopardize the long-standing mission of the state system to provide a low-cost, high-quality college education to citizens of the Commonwealth.\footnote{NCHEMS, \textit{Pennsylvania State System}, 28.} The report claimed that the governance structure of PASSHE has primarily been responsible for the challenges facing the state system. NCHEMS concluded that the state system’s ineffective and politicized governance structure, the lack of a statewide coordinating body for all the of the

\footnote{Allegheny Institute for Public Policy, “Shortcomings in the State University System Report,” Policy Brief 17, no. 39 (September 27, 2017).}
institutions of public higher education in the Commonwealth, and destructive competition among the public colleges and universities of the state have all contributed to PASSHE’s financial crisis.\textsuperscript{92}

The NCHEMS study team diagnosed governance issues at the state and system levels. The report found that the failure of Pennsylvania to establish an overall statewide policy for public higher education as well as an entity responsible for coordinating such policy prevented the state from strategically mobilizing resources to best meet the postsecondary education needs of the citizens of Pennsylvania. NCHEMS also identified obstacles to effective governance of the entire state system. The report asserted that standardization, overregulation by the state, restrictive collective bargaining agreements, and redundancies constrain the ability of PASSHE to nimbly and effectively respond to the challenges facing public higher education in Pennsylvania. The study team also found that the politicized governance board hindered strategic and timely decision making.\textsuperscript{93}

Many of the solutions offered by NCHEMS target improvements to the governance structure of PASSHE. The report urged the state to overhaul and depoliticize the PASSHE Board of Governors by replacing politicians and political appointments with lay citizens who represent the various interests of the state. NCHEMS also suggested that the Commonwealth ease, and in some cases, remove the rules and regulations related to PASSHE’s status as a state agency. The report identified the state agency rules and regulations as inhibitors to the efficient management and operation of PASSHE and recommended that the state establish a regulatory

\textsuperscript{92} NCHEMS, \textit{Pennsylvania State System}, 1-44.

environment for the State System that “resembles that which applies to state-related institutions.”\textsuperscript{94} In addition, NCHEMS proposed expanding the institutional autonomy of PASSHE universities to allow the institutions to set their respective tuition rates, and the study team urged the state to adopt a system-wide financial model that incentivized collaboration.\textsuperscript{95}

The NCHEMS recommendations will not mitigate the overwhelming challenges facing PASSHE. Changes to the governance structure of the state system will not reverse the demographic shifts in Pennsylvania, and as enrollments at PASSHE universities continue to decline, mounting instructional costs will threaten the financial health of the institutions. Additionally, the solutions presented by NCHEMS may inadvertently exacerbate the financial problems of PASSHE universities. If state funding patterns persist, PASSHE can expect additional reductions to its state appropriation, and in the face of diminishing aid, the state system will likely resort to tuition increases since they are one of the only ways for public colleges and universities to raise revenues.\textsuperscript{96} Further tuition increases by PASSHE universities will likely only hasten the state system’s downward spiral to insolvency as their target population of students will not be able to afford nor be willing to pay the high costs of attendance.

The recommendations offered by NCHEMS do not go far enough to address the underlying problems of the state system. The severe challenges confronting the fourteen state-owned universities of PASSHE require bold, innovative solutions. Policymakers have criticized the NCHEMS report for lacking specificity and for opposing the strategies that would best address the pressing problems of PASSHE, i.e., closing and merging institutions and assuming a

\textsuperscript{94} NCHEMS, \textit{Pennsylvania State System}, 36.
\textsuperscript{95} NCHEMS, \textit{Pennsylvania State System}, 33-44.
harder stance on collective bargaining. To resolve the fundamental issues of PASSHE, these are the types of forward-thinking measures that the state needs to seriously consider. Pennsylvania should take this opportunity to review the entire landscape of higher education in Pennsylvania and establish a statewide strategy that guides the prudent investment of public money and ensures the availability of affordable higher educational opportunities to the citizens of the Commonwealth.

*A Renewed Commonwealth System of Higher Education*

For fifty years, commentators have noted that the expansion the various sectors of public higher education in Pennsylvania, i.e., community colleges, state-related universities, and state colleges, has occurred without a coordinated and cohesive plan. In the 1980s, state higher education leaders expressed the need to develop a statewide strategy in the face of waning enrollments and resources. The 2005 master plan from the Commonwealth concluded that the decentralized structure of public higher education in Pennsylvania had frustrated attempts to coordinate the efforts of colleges and universities in the state. The effects associated with this failure include redundancy in programs, destructive competition, and a lack of statewide strategic financing initiatives. The crisis facing PASSHE requires dramatic, state- and system-wide solutions. Pennsylvania’s policymakers and government officials should capitalize on this opportunity to answer the call from the last five decades and develop a statewide strategy that guarantees low-cost higher education opportunities for citizens of the Commonwealth. To that

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end, this study urges the state to revive the Commonwealth System to coordinate the public colleges and universities of Pennsylvania. Further, this dissertation asserts that as a result of the haphazard development of the legal relationship between Penn State and the Commonwealth, the University is well-suited to guide the efforts of the revived system as the keystone of public higher education in Pennsylvania.

For a number of reasons, Pennsylvania should consider relinquishing control and transferring ownership of the PASSHE to Penn State. Persistent cuts to Pennsylvania’s appropriation for PASSHE evince a weakening state commitment to the state system. As suggested by NCHEMS, alternative policy options, such as overhauling the Board of Governors or increasing institutional autonomy, require substantive state action and attention, and the Commonwealth does not seem interested in strengthening engagement with the state system. By transferring control over PASSHE to Penn State, the state could drastically reduce state involvement in the governance, oversight, and regulation of the state-owned universities. Further, the solutions that will effectively address the fundamental issues of PASSHE, e.g., closings and mergers, will not be politically popular in the districts of the Commonwealth that are home to PASSHE institutions. If Penn State assumed responsibility for PASSHE, state politicians would be able to distance themselves from the difficult decisions needed to solve the serious problems plaguing the state-system.

In addition, the PASSHE schools lack the tools and resources to overcome their financial challenges. Continuing decreases in enrollments at Pennsylvania high schools will magnify the difficulties that have already presented PASSHE with “a bleak fiscal future.”

\[^{101}\text{NCHEMS, Pennsylvania State System, 1.}\]
universities of Pennsylvania have excess capacity. Even if every college-bound resident attended an in-state institution, roughly 13% of the seats would remain unfilled. Further, Pennsylvania students are increasingly choosing not to go to PASSHE schools. The governance changes promoted by NCHEMS will not reverse these demographic and enrollment trends. Additionally, PASSHE’s primary tool to raise revenue in the face of decreasing enrollments will only further exacerbate their problems. If PASSHE universities raise tuition, the institutions will lose more students, increase instructional costs, and continue their downward spiral to financial insolvency. The twin effect of diminishing state aid and demographic shifts have left PASSHE institutions in a precarious position from which they cannot help themselves.

Furthermore, Penn State has successfully managed the same demographic and budgetary pressures that have weakened PASSHE universities. While enrollment at PASSHE universities has decreased by 12.3% since 2010, the number of students at Penn State has increased by roughly 3.5%, and the University now educates about 100,000 total students. The financial structure of Penn State is also well-equipped to thrive in the present policy environment. The current political and economic context requires public institutions to diversify their revenues. Public colleges and universities rely on a variety of strategies to diversify revenues, including auxiliary enterprises, research initiatives, university-industry partnerships, financial reforms, private giving, and real estate investments. The operating budget of Penn State demonstrates that the University has capitalized on revenue-diversification opportunities. In 2017-18, auxiliary enterprises and Penn State Health account for roughly half of the University’s total operating

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102 “What Pushed Pennsylvania’s Public Universities,” BillyPenn.
104 Priest and St. John, Privatization and Public Universities, 88-92.
Penn State has also been successful in raising funds from private donors. In 2016-17, Penn State raised over $300 million, and at $3.6 billion, the University had the twenty-fourth largest endowment in 2016. Endowments are a stable, permanent source of income that enable institutions to maintain and support operating budgets in times of fluctuating enrollments and state funding. The financial structure of Penn State and the University’s diversity of revenues imply that the institution will continue to effectively manage the impacts of market forces and declining state aid.

Penn State is also up to the task of assuming control over the various institutions of PASSHE. The University already operates campus locations throughout the Commonwealth. Penn State has twenty-four campuses located across Pennsylvania, and nearly one-third of the students at Penn State are enrolled at the nineteen Commonwealth Campuses of the University. Therefore, Penn State has substantial experience operating a large multi-campus university.

Lastly, as a result of the haphazard development of Penn State’s legal relationship with the Commonwealth, Penn State already has the legal status that the NCHEMS report recommended conferring to PASSHE institutions to allow for more efficient, innovative, and strategic decision-making. The governance board of Penn State is not controlled by the state, government officials do not constitute a majority of board members, and due to the land-grant

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history of the University, Penn State’s Board of Trustees includes lay representation from the major industries of the Commonwealth. The governance structure of Penn State aligns with the major recommended governance changes in the NCHEMS report. Penn State has the governance model, physical infrastructure, financial model, curricular breadth, and legal status to thrive in the market-oriented environment of higher education. Given PASSHE’s inability to overcome the state system’s fundamental challenges, and Penn State’s unique qualifications to succeed in the current policy environment, this study recommends transferring ownership and control over PASSHE to Penn State.

The transfer of responsibility for PASSHE to Penn State will empower University to take the bold steps necessary to reorganize the state system, increase efficiencies, reduce redundancies, and guarantee low-cost higher education opportunities for Pennsylvania residents. This proposal calls for Pennsylvania to provide Penn State with the authority to renew the Commonwealth System, and the roughly $450 million state appropriation to PASSHE would serve as the catalyst for Penn State to lead this endeavor.109

As a first step in the process, Penn State would evaluate the fourteen PASSHE universities to identify a few institutions that are deserving of the state-related status. Recently, some of the PASSHE institutions, including West Chester University, Millersville University, and Shippensburg University, have publicly declared their interest in departing PASSHE to join the ranks of state-related universities.110 This study proposes extending the state-related status to a select few PASSHE institutions that demonstrate a strong likelihood of success of operating

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109 PASSHE, “Fact Center.”
independently. In 2014, the General Assembly considered a senate bill to extend the state-related status to qualified PASSHE institutions. Senate Bill 1275 articulated a list of criteria that a PASSHE institution would need to meet in order to transition into a state-related university. The criteria included an enrollment threshold of 7,000 students and required the qualifying institution to be financially stable. The criteria also mandated that an institution possess the resources necessary to pay for employee benefits and compensate the state for the value of the property of the university.\textsuperscript{111} This study recommends the implementation of criteria similar to Senate Bill 1275 to allow qualified PASSHE institutions to operate as state-related universities. The former-PASSHE appropriation would provide funding for the new state-related institutions.

After deducting funding for the few PASSHE institutions that convert into state-related universities, Penn State would take control of the balance of PASSHE’s $450 million appropriation. In the second step of the process, Penn State would conduct a statewide review of all of its campuses and the remaining PASSHE universities. The purpose of the review would be to identify opportunities for mergers, alliances, and closings to reduce costs, improve efficiencies, and promote higher education opportunities for Pennsylvania residents. Lyall and Sell noted that the forces that have fundamentally restructured other major industries, e.g., manufacturing and health care, will also alter the organization and operations of colleges and universities. The forms of restructuring will include downsizing, mergers, outsourcing, acquisitions, and/or alliances.\textsuperscript{112} The demographic shifts and excess capacity at the colleges and universities of Pennsylvania demand a reduction of physical infrastructure and more efficient use

\textsuperscript{112} Lyall and Sell, \textit{The True Genius}, 54-58.
of taxpayer dollars. The evaluation conducted by Penn State would direct efforts to restructure PASSHE institutions and the Commonwealth campuses of Penn State.

For guidance in the restructuring of campuses and universities, Penn State could look to the University System of Georgia (USG) which has consolidated fourteen institutions into seven over the last six years. In determining which institutions to consolidate, USG relies on six guiding principles: increasing opportunities to raise education attainment levels, improving accessibility and strengthening regional identity, avoiding duplications and redundancies in academic programs, securing cost and administrative efficiencies, and promoting economic development.\(^{113}\) Penn State has campuses near most PASSHE universities as thirteen of the PASSHE institutions are located within fifty miles of a Penn State campus. Penn State could look for opportunities to merge and/or close campuses and PASSHE universities within close proximity of each other, the University could articulate similar criteria to USG to guide these efforts.

Penn State could also leverage the University’s 2+2 plan to serve as the framework for mergers, consolidations, and closings. The 2+2 plan allows Penn State students to attend Commonwealth campuses for the first two years of college and finish their degrees at University Park or one of the University’s five campus colleges that are authorized to confer baccalaureate degrees.\(^{114}\) Penn State could scale the 2+2 plan to handle the influx of roughly 100,000 students from PASSHE universities. Perhaps Penn State could transform into a three-tiered system of campuses. The top tier would be Penn State’s flagship campus, University Park. The University

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Park campus would be reserved exclusively for professional, graduate, and upper division undergraduate education for honors, professional, and high-demand programs. The middle tier would be the campus colleges where students could complete their degrees in non-professional and lower-demand programs, and the lower tier would be campuses that solely provide the lower division courses of Penn State’s programs. This framework would allow the University to structure campus mergers, consolidations, and closures to accommodate the influx of PASSHE students.

The system would also enable Penn State to move toward the mixed public-private models of Cornell University and the University of Virginia which subsidize some units of their institutions with public dollars and require others to be financially independent. This study proposes using the bulk of PASSHE’s appropriation to subsidize student tuition at the middle and lower tier campuses. These locations would charge a significantly lower rate of tuition and cater to Pennsylvania students in need. Students at University Park campus would not receive subsidized tuition with the justification that the campus caters to elite programs and students. The tuition revenue from students at University Park may enable Penn State to match the lower tuition rates of PASSHE institutions for students at the lower and middle tier campuses.

Ultimately, Penn State may need to close some campuses or PASSHE institutions, and this would likely impact students in less populated areas. To ensure that students in areas without a physical location have access to higher education opportunities, the University could invest a portion of the state appropriation in the online World Campus and expand the operations of the unit. With additional funding, perhaps the World Campus could allow students in underserved

areas to take their initial college courses for free until they declare a major at which point they would matriculate as paying students. This option could also be offered to other target populations in the Commonwealth, such as adult and veteran students.

The proposal in this study is just one option that the state could pursue to optimize taxpayer investment in public higher education and right size the public colleges and universities of the Commonwealth. Several obstacles would stand in the way of implementing the proposal in this study. Unlike in Georgia, faculty at PASSHE universities are unionized, and the current union contract does not expire until 2018.\textsuperscript{116} However, the latest contract also underscores the need for the Commonwealth to take decisive action to fix public higher education in Pennsylvania. Following a strike in 2016, PASSHE and the faculty union settled on the terms of the contract which increased faculty compensation by $52 million.\textsuperscript{117} NCHEMS claimed that the additional compensation was “not matched by a realistic expectation of revenue growth” and has contributed to the financial challenges facing PASSHE.\textsuperscript{118} Although the proposal of this study has thorny implications, decisive action is needed to combat the severe challenges of PASSHE.

Political considerations would also impede the implementation of the proposal in this study. The transfer of ownership of PASSHE to Penn State would require legislative action, and state politicians would not want to be connected to the politically unpopular decision to close campuses in certain districts of the state. There are myriad other financial, political, and practical implications that would likely prevent the realization of the proposal in this study. Nevertheless,

\textsuperscript{117} Allegheny Institute, “Shortcomings,” 1-5.
\textsuperscript{118} NCHEMS, \textit{Pennsylvania State System}, 22.
PASSHE, and the entire system of public higher education in Pennsylvania, are at a crossroads. The state cannot continue to kick the can down the road and must take action to establish a comprehensive system of public higher education that promotes access, affordability, and quality for residents of the Commonwealth. The unique legal status of Penn State offers a hybrid public-private university structure to manage a renewed Commonwealth system, and government officials and policymakers in Harrisburg should consider leveraging the model to improve public higher education in Pennsylvania.

Future Research

This study points to a few areas of future research. First, further studies of the evolution of the legal relationships between public universities and state governments in other states would provide useful comparisons and situate the findings of this study within broader discussions about the future of American public higher education. A multistate taxonomy that categorizes institution-state relationships may provide policymakers, lawmakers, and higher education scholars with a better understanding of how historical and current events and interests shaped public higher education systems across the nation. Comparative analyses of the evolution of institution-state relationships in other states would also offer guidance on the success of potential policy options to change the relationships in a variety of contexts.

Another possible area of research concerns the implications of mergers, consolidations, and closings of public institutions of higher education. For example, the University System of Georgia has claimed savings of $24.4 million as a result of administrative mergers, but the
details of those savings are unclear, and Georgia has yet to close any campuses or institutions.\footnote{Rick Seltzer, “Mergers haven’t been Part of Pennsylvania Public Higher Ed’s Past. Might the Future be Different?,” Inside Higher Ed, March 27, 2017, https://www.insidehighered.com/news/2017/03/27/mergers-havent-been-part-pennsylvania-public-higher-eds-past-might-future-be.} This study suggests more research is needed on the educational, financial, and political implications of the various methods of restructuring public institutions of higher education.

This study also invites additional research on the implications of the decline of rust belt cities on public colleges and universities. The financial struggles of rust belt cities in Pennsylvania are partially responsible for the increase in challenges by local taxing authorities to the tax exemptions of colleges and universities. The transition to the knowledge economy and broader demographic shifts in the state will continue to pressure the budgets of rust belt communities. There are likely other ways in which these developments will have implications for colleges and universities, especially as institutions increasingly position themselves as engines of economic development in rust belt regions. Further research is needed on the impacts of university-industry partnerships and other entrepreneurial and “private” activities of public colleges and universities on the legal relationships between public institutions, states, and local communities.

**Conclusion**

At first glance, the legal relationship between Penn State and the Commonwealth of Pennsylvania appears difficult to define, and further inspection reveals that impression to be justified and well-earned. The haphazard development of the legal association between the University and the Commonwealth has cultivated the ambiguity that surrounds Penn State’s legal status with the state. From the time that the University was founded, Penn State has had a
special, but vague legal relationship with the Commonwealth, and that association has evolved without a clear design. The struggle for the land grant helped foster the vagueness of Penn State’s legal status. Competition from other institutions for the benefits of the land grant, legislative skepticism, and the University’s early struggles hindered Penn State’s designation as the land-grant college of Pennsylvania. These developments also reflected the broader hesitancy of the Commonwealth to commit to Penn State as the keystone of public higher education in Pennsylvania.

As a result of the ambiguity surrounding Penn State’s founding, legal authorities have struggled with defining the contours of the legal relationship between Penn State and the Commonwealth. The legal analysis of this study reveals the simultaneous development of two views on the legal relationship between the Commonwealth of Pennsylvania and Penn State: an expansive view rooted in the land-grant history of the University that implies a tight relationship with the state, and a restrictive view that perceives a loose affiliation with the Commonwealth and is grounded in Penn State’s corporate origins. Later case law and the establishment of the state-related status promoted the restrictive view as the dominant conception of the institution-state relationship.

This study chronicles the implications of the emergence of the restrictive view and the state-related designation. Due to the early and special, but undefined legal relationship between Penn State and the Commonwealth, Penn State enjoyed a number of privileges that were not afforded to other colleges in the state, including participation in the state employee retirement system, exemption from capital stock tax, and immunity from inheritance tax. On the other hand, the lack of a clear definition and design for Penn State’s relationship with Pennsylvania opened
the door for the state-aided institutions of Pitt and Temple to claim the same status as Penn State. This development allowed Pitt and Temple to increase their state appropriations, and had Penn State been designated as the flagship public university of the Commonwealth, perhaps the funding increases provided to Pitt and Temple would have been reserved for Penn State as the flagship public university. This focus of this study on the process of the legal relationship between Penn State and the Commonwealth reveals the constant tension between Penn State’s unique status as the land-grant college of the state and its existence as a nonprofit corporation. Over the years, the emergence of the restrictive view seemed to strip away the land-grant foundations from Penn State’s relationship with the state, and as a result, Penn State was less likely to be considered a state agency.

The emergence of the restrictive view recently allowed the University to prevent disclosures under open records laws; however, the lingering remnants of the expansive view eventually compelled the University to release information under those same laws through Penn State’s participation in the state employee retirement system. Ironically, there does not seem to be a strong legal justification for why Penn State employees were ever allowed to join the state employee system. This idiosyncrasy illustrates how the haphazard development of Penn State’s legal relationship with Pennsylvania continues to have implications for the University.

Additionally, diminishing state aid and demographic shifts suggest that Penn State has the governance structure and flexibility to thrive in the current economic and policy context of American public higher education. Amid waning state interest in supporting and managing public higher education, this study recognizes the relationship between Penn State and Pennsylvania as advantageous in navigating the challenges facing public colleges and
universities. With PASSHE facing crippling financial challenges, this study urges the Commonwealth to capitalize on the strengths of Penn State and tap the University to lead a renewed Commonwealth System.
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