

## Public Interests, Private Institutions? Public Policy Challenges to Tax-Free Universities

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**ABSTRACT.** As the increasing concentration of wealth and property in private universities draws attention and criticism, legislators across political parties and jurisdictions are questioning the scope of broad university tax exemptions. Universities have responded by asserting that state and federal constitutional provisions offer their assets perpetual protection from taxation—assets that not only include classrooms and dormitories, but also golf courses, power plants, travel agencies, and health clinics.

In response to these arguments, this Essay proposes ways in which states and localities could clarify or challenge sweeping property tax exemptions for private universities, with a special focus on Yale University's charter and Connecticut state law. The Essay argues that by either clarifying the boundaries of Yale's property tax exemption or freezing it in place, the Connecticut legislature could—and should—reclaim the state's fundamental power of taxation and gain leverage for negotiations with Yale, without running afoul of constitutional requirements. The Essay closes with a brief discussion of other universities and communities that could utilize an analogous approach.

### INTRODUCTION

In recent years, the concentration of wealth in private university endowments has drawn increasing public attention. On the federal level, mounting anxiety surrounding student loan debt has spurred a sustained, bipartisan inquiry as to whether wealthy universities are doing enough to keep college affordable. In 2008, Republican Senator Charles Grassley and the Senate Finance Committee requested data from 136 highly-endowed universities concerning their tuition charges, financial aid programs, and endowments.<sup>1</sup> In

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1. Doug Lederman, *Senators Scrutinize Well-Endowed Colleges*, INSIDE HIGHER ED (Jan. 25, 2008), <http://www.insidehighered.com/news/2008/01/25/senators> [<http://perma.cc/6TH5-KHRJ>]. The 136 universities were selected because they held endowments of \$500 million or more in 2007. The median endowment of these universities in 2007 was \$1.1 billion; Yale University's endowment in 2007 was \$22.5 billion. *All Institutions Listed by Fiscal Year 2007 Market Value of Endowment Assets with Percent Change Between 2006 and 2007 Endowment Assets*, NAT'L ASS'N C. & U. BUS. OFFICERS (2008), <http://www.nacubo.org/Images/All>

2011, Senator Grassley publicly criticized wealthy universities for “hoarding assets at taxpayer expense.”<sup>2</sup> And in 2016, the chairs of the Senate Finance Committee, the House Ways and Means Committee, and the House Ways and Means Subcommittee on Oversight followed up with further questioning. Their joint letter noted that despite “large and growing endowments, many colleges and universities ha[d] raised tuition far in excess of inflation.”<sup>3</sup>

A similar process has unfolded on the state and local level, as cash-strapped governments scrutinize universities’ broad, centuries-old tax exemptions. Last fall, for example, Princeton settled a five-year lawsuit brought by residents of the surrounding town, agreeing to pay millions of dollars in contributions to the town between 2017 and 2022.<sup>4</sup> One of the plaintiffs had previously described Princeton as “almost . . . like a hedge fund that conducts classes.”<sup>5</sup> Princeton was not alone: in 2015, fewer than half of private universities with endowments of over two billion dollars gave money to the cities in which they were located without imposing conditions upon its use.<sup>6</sup>

In Connecticut, legislators have attempted to amend or clarify Yale’s property tax exemptions for decades.<sup>7</sup> The most recent effort occurred during the

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%20Institutions%20Listed%20by%20FY%202007%20Market%20Value%20of  
%20Endowment%20Assets\_2007%20NES.pdf [http://perma.cc/U9WU-YYQS].

2. Libby A. Nelson, ‘*Hoarding Assets*’?, INSIDE HIGHER ED (Dec. 9, 2011), <http://www.insidehighered.com/news/2011/12/09/grassley-renews-focus-endowments> [http://perma.cc/F75J-4J7Q].
3. Michael Stratford, *Billion-Dollar Targets*, INSIDE HIGHER ED (Feb. 16, 2016), <http://www.insidehighered.com/news/2016/02/16/congress-returns-scrutiny-wealthy-university-endowments> [http://perma.cc/P7UX-5Z8L]. Executive branch officials have also expressed concern. For example, in 2015, U.S. Undersecretary of Education Ted Mitchell noted the “problem of education becoming a luxury good” and emphasized that elite institutions had to be “challenge[d] . . . to do more.” Mikhail Zinshteyn, *Rich, Stingy Colleges*, ATLANTIC (Aug. 5, 2016), <http://www.theatlantic.com/education/archive/2016/08/rich-stingy-colleges/494696> [http://perma.cc/3EP9-7JUA].
4. Anna Merriman, *Princeton U., Residents Reach Agreement in Tax Exemption Lawsuit*, NJ.COM (Oct. 14, 2016, 7:53 PM) [http://www.nj.com/mercer/index.ssf/2016/10/princeton\\_u\\_residents\\_reach\\_agreement\\_in\\_tax\\_exemp.html](http://www.nj.com/mercer/index.ssf/2016/10/princeton_u_residents_reach_agreement_in_tax_exemp.html) [http://perma.cc/AW78-WW26].
5. Elise Young, *Princeton’s Neighbors Say to Heck with Freebies—We Want Cash*, BLOOMBERG NEWS (May 2, 2016, 5:00 AM), <http://www.bloomberg.com/news/articles/2016-05-02/princeton-s-neighbors-say-to-heck-with-freebies-we-want-cash> [http://perma.cc/EY3T-DC9U].
6. Kate Smith et al., *Some Rich Colleges Aren’t Sharing with the Locals*, BLOOMBERG NEWS (Aug. 22, 2016, 5:00 AM), <http://www.bloomberg.com/news/articles/2016-08-22/wealthiest-private-colleges-are-slow-to-open-purses-to-hometowns> [http://perma.cc/VW7V-FMNR].
7. Over the past few decades, Democrats in the state legislature have routinely introduced bills to tax Yale’s property. In 1991, Representative Martin M. Looney introduced a bill that

2016 legislative session, when Democratic state legislators introduced Raised Senate Bill No. 414, An Act Concerning the Tax on College Property (S.B. 414).<sup>8</sup> S.B. 414 would have amended the Connecticut statute providing tax exemptions to Yale University, Trinity College, Wesleyan University, and certain other schools.<sup>9</sup> The bill enumerated types of Connecticut university properties that would be taxable, but only for institutions that held properties of over two billion dollars in total value. Thus, it affected Yale alone.<sup>10</sup>

Unlike the other recent efforts to tax mixed-use Yale properties, S.B. 414 was successfully voted out of committee on April 7, 2016, and quickly generated a firestorm of attention and criticism.<sup>11</sup> Yale's response was swift. On April 21, Yale released a document claiming that under both the Connecticut Constitution and the U.S. Constitution, S.B. 414 and a related endowment-taxation bill that died in committee were unconstitutional impairments of Yale's charter.<sup>12</sup>

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would eliminate Yale's property tax exemption, citing the University by name. H.B. 5383, 1991 Gen. Assemb., Jan. Sess. (Conn. 1991). Two years later, after Looney's election to the State Senate, he and current New Haven Mayor (then-Senator) Toni Harp, along with two state representatives, introduced a nearly identical bill that removed Yale's exemption for New Haven properties "not used for educational purposes." H.B. 6326, 1993 Gen. Assemb., Jan. Sess. (Conn. 1993). And in 2004, Representative Patricia Dillon introduced a bill that sought to clarify that Yale's tax exemption did not apply to certain enumerated types of revenue-generating properties. H.B. 454, 2004 Gen. Assemb., Feb. Sess. (Conn. 2004). Each of these bills died in committee. Other proposals concerning university property tax exemptions met the same fate. *See, e.g.*, H.B. 5621, 2015 Gen. Assemb., Jan. Sess. (Conn. 2015) (proposing tax on all land held by nonprofit hospitals and private universities, excluding open space); H.B. 5182, 1996 Gen. Assemb., Feb. Sess. (Conn. 1996) (providing for taxation of private university dormitories "since they are money-making propositions for universities"); H.B. 5478, 1993 Gen. Assemb., Jan. Sess. (Conn. 1993) (prohibiting, if passed, property acquisition by tax-exempt colleges, universities and hospitals "unless they can demonstrate a need for such acquisition in terms of increasing enrollment or bed capacity").

8. S.B. 414, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016). A 2004 bill proposed substantially the same reforms as S.B. 414 did in 2016 and contained much of the same language. H.B. 454.
9. CONN. GEN. STAT. ANN. § 12-81 (West).
10. In contrast, the 2004 predecessor to S.B. 414 cited Yale by name. *See* H.B. 454.
11. *See, e.g.*, Noah Feldman, *Tax Yale's Endowment? Good Luck with That*, BLOOMBERG VIEW (Mar. 30, 2016, 2:30 PM), <http://www.bloomberg.com/view/articles/2016-03-30/tax-yale-s-endowment-good-luck-with-that> [<http://perma.cc/UJ7D-BWXQ>]; Ira Stoll, *Maybe Yale Would Be Happier in Boston*, HARTFORD COURANT (Mar. 29, 2016, 5:00 AM), <http://www.courant.com/opinion/op-ed/hc-op-stoll-maybe-yale-should-move-0329-20160328-story.html> [<http://perma.cc/M3K3-5SG2>].
12. *FAQs on State Legislation To Tax Yale's Academic Property*, YALENEWS (Apr. 21, 2016), <http://news.yale.edu/2016/04/21/faqs-state-legislation-tax-yale-s-academic-property> [<http://perma.cc/48RL-VXBH>].

The bill's proponents argued that it merely clarified certain categories of commercial-use properties that were already taxable under the Yale charter.<sup>13</sup>

Upon closer analysis, Yale's claims lacked merit. Yale Law School students worked with professors who taught economic development, land use, state and local government, and constitutional law to draft a response.<sup>14</sup> In this public letter, eleven law professors from a number of schools argued not only that S.B. 414 was a constitutional interpretation of the Yale charter, but also that the legislature could, in fact, go substantially further in taxing university property. Yale continued to advocate against the bill on policy grounds,<sup>15</sup> and it was shelved without being raised for a floor vote in the Senate.<sup>16</sup>

Legal scholars have previously examined tax exemptions for universities,<sup>17</sup> non-profit organizations,<sup>18</sup> and Yale specifically.<sup>19</sup> However, no work has spe-

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13. See, e.g., Paul Bass, *Yale Fights Back; Lemar Rips "Scare Tactics,"* NEW HAVEN INDEP. (Apr 13, 2016, 3:15 PM), [http://www.newhavenindependent.org/index.php/archives/entry/lemar\\_blasts\\_yale\\_](http://www.newhavenindependent.org/index.php/archives/entry/lemar_blasts_yale_) [<http://perma.cc/72LW-CE4P>].
  14. Letter from Professor Muneer I. Ahmad et al. to Brendan Sharkey, Speaker of the House, Connecticut, and Martin Looney, Senate President Pro Tempore, Connecticut (Apr. 25, 2016), [http://www.newhavenindependent.org/archives/upload/2016/04/pjb/SB\\_414\\_comment\\_FINAL.pdf](http://www.newhavenindependent.org/archives/upload/2016/04/pjb/SB_414_comment_FINAL.pdf) [<http://perma.cc/8KQU-PQZT>].
  15. Bruce D. Alexander, *Wrongheaded Yale Tax Would Stifle Investments, Growth,* HARTFORD COURANT (Apr. 2, 2016), <http://www.courant.com/opinion/op-ed/hc-op-alexander-keep-yale-tax-exempt-0403-20160401-story.html> [<http://perma.cc/9JQ2-2LQQ>].
  16. Martha W. Kessler, *Yale Property Tax Bill Dies in Connecticut,* BLOOMBERG BNA (May 6, 2016), <http://www.bna.com/yale-property-tax-n57982070776> [<http://perma.cc/9LNP-AKF2>].
  17. For scholarship expressly addressing universities and property taxes, see Evelyn Brody, *All Charities Are Property-Tax Exempt, But Some Charities Are More Exempt than Others*, 44 NEW ENG. L. REV. 621 (2010) (reviewing the source of nonprofit property tax exemptions, rationales for such exemptions, and issues of consistent application and administration across the fifty states and the District of Columbia); Nina J. Crimm, *Why All Is Not Quiet on the "Home Front" for Charitable Organizations*, 29 N.M. L. REV. 1 (1999) (analyzing the interplay between federal and state regulation of nonprofits; the tendency for increasing local government deficits to lead to voluntary payment arrangements from nonprofit organizations to cities; and the relationship between the growth of nonprofit monitoring and efforts to rescind tax exemptions); Gerald Rokoff, *Alternatives to the University Property Tax Exemption*, 83 YALE L.J. 181 (1973) (analyzing alternative strategies to relieve the burden of university tax exemptions on local governments and arguing that states should address the issue through direct payments to local governments).
  18. Much scholarship on nonprofits focuses on *income* tax rather than the subject of this Essay, property tax. See, e.g., Michael Fricke, *The Case Against Income Tax Exemption for Nonprofits*, 89 ST. JOHN'S L. REV. 1129 (2015) (critiquing theories used to support the nonprofit income tax exemption and arguing that the exemption should be revoked); Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J.

cifically addressed the mixed commercial and educational properties claimed as tax-exempt by Yale—an issue that may be relevant for other states as well. Nor have scholars directly considered whether courts or legislatures are better positioned to make judgments about private university tax exemptions and public policy.

In this Essay, we argue that Connecticut legislators may tax some Yale-owned property currently treated as tax-exempt, addressing unexamined questions regarding mixed educational- and commercial-use property and exploring viable public policy arguments for such taxation. In Part I, we summarize the Connecticut Supreme Court's liberal interpretation of the Yale charter and argue that the judiciary has left doctrinal space for reforms. In Part II, we contend that the state legislature can and should clarify ambiguities in Yale's charter-granted tax exemption through legislation. Further, we argue that the legislature could pass, and colorably defend, more sweeping reforms on the ground that Yale's claim of a tax exemption in perpetuity improperly divests Connecticut of its fundamental power of taxation. We close in Part III with examples of other cities and states that might use similar strategies to reclaim their power to tax university property.

## I. YALE'S TAX EXEMPTION

Although courts have often upheld Yale's claims of tax exemption, the University's protection from property taxation is not as ironclad as Yale's attorneys and spokespeople have suggested. Yale's original tax exemption, granted in 1745, was limited to "Lands and Ratable Estate . . . not Exceeding ye Yearly Value of five Hundred Pound Sterling."<sup>20</sup> This original exemption was informed, in part, by Yale's status as a quasi-public institution.<sup>21</sup> State funding eclipsed private donations as a source of Yale's revenue, and the Yale Corporation's ten members were all ordained ministers of the established church, consolidating

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54, 66-68 (1981) (using economic analysis to argue that commercial nonprofit firms should only be exempted from taxation where contract failure is a serious problem).

19. See Peter Dobkin Hall, *Is Tax Exemption Intrinsic or Contingent?: Tax Treatment of Voluntary Associations, Nonprofit Organizations, and Religious Bodies in New Haven, Connecticut, 1750-2000*, in PROPERTY-TAX EXEMPTION FOR CHARITIES 253 (Evelyn Brody ed., 2002) (examining the historical roots of Yale's tax exemption and arguing that the conditions under which the exemption was granted have changed drastically); Alvin C. Warren, Jr. et al., *Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut*, 4 CONN. L. REV. 181, 185-93 (1971) (providing a history of property tax and tax exemptions in Connecticut and contending that Yale cannot enjoy a permanent exemption from taxation).

20. Charter of Yale College ¶ 10 (May 1745), <http://www.yale.edu/sites/default/files/files/University-Charter.pdf> [<http://perma.cc/VEM7-Z6AJ>].

21. Hall, *supra* note 19, at 256-57.

control of the institution in the hands of local public figures.<sup>22</sup> To allow local taxation of Yale in 1745 would have permitted New Haven to reappropriate public monies intended for Yale for the city's own use.

In 1834, Yale accepted an amendment to the charter, often called the "proviso," which revised the income-production cap on its property to six thousand dollars.<sup>23</sup> The amendment represented a bargain between Yale and the State of Connecticut. Connecticut won the concession that private estates owned by the President and faculty would lose their tax exemptions.<sup>24</sup> In exchange, Yale would receive a broader tax exemption with a proviso limiting acquisition of income-generating property.<sup>25</sup>

The 1834 amendment reads, in relevant part, as follows:

That the funds which have been, or may hereafter be, granted, provided by the State of Connecticut, or given by any person or persons, to the corporation of the President and Fellows of Yale College in New Haven, and by them invested and held for the use of that institution, shall, with the interest thereof, be and remain exempt from taxation. Provided, however, that the said corporation shall never hold in this State, real estate free from taxation affording an annual income of more than six thousand dollars; and provided also, that the private property of the officers of the institution, shall not be exempt from taxation . . . .<sup>26</sup>

The Connecticut Supreme Court has twice considered the scope of the proviso, ruling in favor of Yale each time while confirming the continuing viability of the proviso.<sup>27</sup> The Connecticut Supreme Court first considered the scope of this exemption in 1899. In that case, the court stated that "[t]he charter, in the broadest terms, exempts all the property of the college from taxation," includ-

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22. *Id.*

23. 1834 CONN. PUB. ACTS 510.

24. *Yale Univ. v. Town of New Haven*, 42 A. 87, 94 (Conn. 1899).

25. *Id.*

26. *Id.* at 93.

27. Connecticut's lower courts have considered the issue more frequently. *See Conn. Coll. v. City of New London*, No. 04-0569617, 2006 WL 1828256 (Conn. Super. Ct. June 13, 2006) (holding that Connecticut College's annual five-day rental of a tax-exempt arena for a private home show did not invalidate the tax exemption); *Yale Univ. v. Town and City of New Haven*, 17 Conn. Supp. 166 (Conn. C.P. 1950) (rejecting New Haven's attempt to place Yale-owned housing for married veterans and their families on property tax rolls); *Yale Univ. v. Town of West Haven*, No. 37889 (Conn. Super. Ct. Jan. 7, 1935) (blocking West Haven's attempt to add the Yale golf course to property tax rolls) (unpublished opinion).

ing “all estate and funds invested and held lawfully.”<sup>28</sup> However, the court also interpreted the proviso to prevent Yale from investing its funds extensively in “productive real estate”:

The act of 1834 plainly exempts all the property of the college from taxation; and the *proviso* qualifies this exemption only for the purpose of imposing a limited restraint on the mode of investment . . . . It is not presumed that the college will, to any considerable extent, invest its funds in unproductive property, so there is no direct limit to its holding of such land; but the college might well be tempted to put all its funds into productive real estate, and the *proviso* directly restrains this tendency by limiting its right to hold real estate producing more than \$6,000 a year, unless it pays taxes on the excess.<sup>29</sup>

The court elaborated on the distinction between productive and unproductive property when summarizing its decision: “For reasons before given, we think that students’ fees, whether apportioned to room rent or tuition, cannot be treated as income of real estate, and that *land occupied and reasonably necessary for the plant of the college* is not productive real estate, within the meaning of the proviso in the act of 1834.”<sup>30</sup> However, the breadth of protection for Yale’s tax exemption offered by the court should not be overstated. The 1899 court did *not* find that all educationally-related property was automatically unproductive; instead, it held only that land “reasonably necessary for the plant of the College” could be considered “unproductive” real estate that enjoyed a default exemption from taxation. The court expressly noted that the proviso’s “restraint” on Yale’s investment in productive real estate remained valid.

In 1975, the Supreme Court of Connecticut again confirmed the viability of the proviso, even as it deferred to a trial court’s ruling that Yale University Press could not be added to the New Haven tax rolls.<sup>31</sup> The court did not consider the question of whether the Press’s functions were primarily educational; instead, because the Press lost nearly one million dollars over a six-year period, the court held that it could not fall under the proviso allowing taxation of Yale property generating income of more than six thousand dollars per year.<sup>32</sup> The court did not consider whether the public policy reasons supporting a broad tax exemption still held true; its ruling was limited to the finding that there

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28. *Yale Univ.*, 42 A. at 94.

29. *Id.*

30. *Id.* at 94 (emphasis added).

31. *Yale Univ. v. City of New Haven*, 363 A.2d 1108 (Conn. 1975).

32. *Id.* at 1115.

was no error in the conclusions drawn by the trial court.<sup>33</sup> One concurring justice opined that Yale’s tax exemption was limited to property “devoted to educational uses,” indicating that non-educational properties should be taxable even if they were non-productive.<sup>34</sup>

The jurisprudence therefore raises, but does not resolve, the question of what defines a “reasonably necessary . . . plant” of the college. Between the 1899 decision and today, the value of the Yale Corporation’s assets has increased many times over.<sup>35</sup> Yale appeared to argue in 2016 that any Yale-owned property not used entirely for commercial purposes was properly classified as academic; Yale claimed that it already paid taxes on all of its commercial properties, and that all of its other properties fell under its tax exemption.<sup>36</sup> However, the intentions of the legislature in passing the 1834 amendment cast doubt on Yale’s interpretation. The 1834 amendment was a simple, “value-for-value” swap, in which the State granted a broader tax exemption for Yale academic property in exchange for the right to tax faculty-owned residential property. The proviso did not address the limits of “academic” as opposed to “productive” property, nor could legislators have predicted the drastic changes in size and scope to Yale’s operating model that would unfold over nearly two hundred years. Despite Yale’s protestations that the great extent of its property fell neatly on one side of the proviso agreement, neither Connecticut courts nor the state legislature have clearly defined the categories of “reasonably necessary” and “productive” property under the 1899 decision. Thus, theoretical space remains for tax measures that would be consistent with the charter and the proviso.

## II. PLAUSIBLE LEGISLATIVE REFORMS

As Connecticut lawmakers and their peers across the country critically examine the public benefits of subsidizing elite private universities, they should consider two plausible strategies for legislative reform. First, legislators might accept the continued viability of Yale’s tax exemption but clarify that when universities compete with private businesses, their activities are effectively “productive” and therefore taxable. Second, and more boldly, legislators could statutorily “freeze” university tax exemptions, preventing universities from acquiring new tax-exempt property until a compromise is reached that restores

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33. *Id.*

34. *Id.* at 1116 (Bogdanski, J., concurring).

35. See *infra* notes 51-54 and accompanying text.

36. See *FAQs on State Legislation to Tax Yale’s Academic Property*, *supra* note 12.

the state's sovereign power of taxation. Contrary to Yale's assertions in 2016, either type of measure could survive statutory and constitutional muster.

*A. Clarifying the Scope of Yale's Exemption*

Connecticut courts have left doctrinal space for the state legislature to clarify the scope of Yale's exemption, based on the legislature's interpretation of public policy—and the legislature has any number of compelling reasons to do so. As we have seen, the 1899 decision endorsed a broad tax exemption for Yale-owned property while suggesting that this exemption assumed certain limitations on growth. Specifically, land occupied and reasonably necessary for the college's plant does not count as “productive property” and is not subject to taxation. However, courts have not directly confronted the question of who decides which properties are productive or nonproductive. The stakes are high: the definition of what property is “income-producing” under the proviso determines whether Yale may continue to compete in the fields of travel services, power generation, and healthcare provision, among other services, without paying property tax.

Proponents of S.B. 414 argued that the Connecticut legislature was empowered to clarify this distinction through statute. In response, Yale's spokespeople argued in part that judicial precedents had foreclosed the legislature's ability to do so.<sup>37</sup> But the legislature has the authority, competence, and democratic legitimacy to establish the public policy of the state. Indeed, the legislature is substantially better placed than the courts to determine the public policy question of which functions are *educational* and which are *commercial*. Such categorizations are a fundamentally legislative task within the legislature's institutional competence, especially considering that nearly two hundred years have passed since the adoption of the 1834 amendment to Yale's charter. And constituents are directly affected by these categorizations: because of the state's Payment in Lieu of Taxes (PILOT) program, which subsidizes cities that lose tax revenue to non-profit organizations, all Connecticut residents pay an annual subsidy to New Haven to compensate for Yale University's property tax exemptions.<sup>38</sup> If a property's use is arguably educational or commercial and its classification affects all Connecticut residents, then the classification is a matter of public

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37. See, e.g., *id.* (“Yale's charter has been repeatedly and authoritatively construed by the courts, including at least twice by the Connecticut Supreme Court, to affirm the nontaxation of academic property.”).

38. For a description of PILOT payments in the Yale tax exemption context, see Ed Stannard, *Yale's Tax Exempt New Haven Property Worth \$2.5 Billion*, NEW HAVEN REG. (Sept. 1, 2014), <http://www.nhregister.com/general-news/20140901/yales-tax-exempt-new-haven-property-worth-25-billion> [<http://perma.cc/XL48-DSC9>].

policy: does the state want to subsidize the property's owners, or not? The state legislature is uniquely well-positioned to speak authoritatively to such questions of politics and policy.

Public policy played a starring role in the 1899 decision exempting some Yale-owned properties from New Haven property tax. The decision turned on whether Yale's freedom from taxation qualified as a "tax exemption," which would be construed narrowly by law, or whether college property was simply the kind of property that is not subject to tax.<sup>39</sup> In other words, was Yale's freedom from taxation an exception, or the rule? The court found that nontaxation was the rule, under the following public policy: "[P]roperty necessary for the operation of state and municipal governments, and buildings occupied for those essential supports of government,— public education, and public worship,—ought not to be the subject of taxation . . ." <sup>40</sup> Importantly, the court's decision refers to the role of Yale University as a provider of *public* education. Since Yale's role as a provider of *public* education has changed over time—from a relatively accessible university to the darling of global elites—it is possible that the state may find that Yale's public subsidy is no longer justified by its contribution to the public good.

This question of public policy is appropriately determined by the state legislature. In the disputes that reached the state's highest court in 1899 and 1975, the City of New Haven plainly thwarted the public policy of the state by adding Yale property to the tax rolls without going through the state legislature. Under those circumstances, courts may have reasonably worried that the city was trying to circumvent the state's established policy. But if the people of Connecticut, through the state legislature, approved new tax law or clarifications regarding Yale, the University could not argue that the change violated public policy. Instead, the law would represent an adaptation in policy to changing models of higher education and a response to the advent of "hedge fund[s] with . . . universit[ies] attached."<sup>41</sup> There are no state constitutional obstacles to taking this path: unlike other state constitutions that expressly protect tax exemptions for nonprofit organizations, the Connecticut Constitution is silent on the question of property tax exemptions.<sup>42</sup> Accordingly, in contrast to the uni-

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39. *Yale Univ. v. Town of New Haven*, 42 A. 87, 91-93 (Conn. 1899).

40. *Id.* at 92.

41. See, e.g., Astra Taylor, *Universities Are Becoming Billion-Dollar Hedge Funds with Schools Attached*, NATION (Mar. 8, 2016), <http://www.thenation.com/article/universities-are-becoming-billion-dollar-hedge-funds-with-schools-attached> [<http://perma.cc/7X6F-LG6C>].

42. Evelyn Brody, *All Charities Are Property-Tax Exempt, But Some Charities Are More Exempt Than Others*, 44 NEW ENG. L. REV. 621, 672 (2010). The Connecticut Constitution does

lateral actions by New Haven that the Connecticut Supreme Court struck down in 1899 and 1975, the Connecticut legislature would have strong arguments in defense of an S.B. 414-like clarification.

Further, a historical review of the “longstanding public policy” underlying the 1899 case illustrates that the policy warrants revision.<sup>43</sup> Between 1701 and 1800, seventy-two percent of grants and donations to Yale came from the government.<sup>44</sup> The limited scope of local government, the small property holdings of Yale, and the economic benefits from students’ in-town lodging and dining made the tax exemption a fair deal for New Haven.<sup>45</sup> In this context, Yale could properly be understood as a semi-public entity, not a private corporation under today’s standards.<sup>46</sup> Additionally, Yale won its tax exemptions at a time when it primarily educated Connecticut residents: for the first one hundred years of its existence, between seventy-four percent and ninety-four percent of all Yale University students hailed from Connecticut, including not just the children of the wealthy, but also farmers’ sons who would not inherit land of their own.<sup>47</sup> Thus, the generous public policy outlined by the 1899 court was justified, in part, by Yale’s semi-public status and its numerous contributions to Connecticut. Of course, the relationship between Yale and Connecticut residents has since evolved dramatically. In 2016, Yale enrolled eighty-six college freshmen from Connecticut—just six percent of its 1,371-student entering class.<sup>48</sup> But the paradigm shift is perhaps best illustrated by a review of Yale’s spending. In fiscal year 1900, Yale spent \$698,000 per year, or about \$18 million in today’s dollars.<sup>49</sup> The University’s annual budget was about thirty times larger than in 1835—a time of substantial expansion, but perhaps not dramatically exceeding the expectations of trustees in 1834, when the proviso was revised to a U.S. dol-

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“confirm[]” the Yale charter, but it does not endorse any specific interpretation of the tax exemption, the proviso, or any other provision. CONN. CONST. art. VIII, § 3.

43. The 1975 decision did not address issues of public policy, and there is no indication that the court was asked to address them.
44. JESSE SEARS, *PHILANTHROPY IN THE HISTORY OF AMERICAN HIGHER EDUCATION* 24 (1919); see also GEORGE WILSON PIERSON, *A YALE BOOK OF NUMBERS: HISTORICAL STATISTICS OF THE COLLEGE AND UNIVERSITY, 1701-1976*, at 518-23 (1983) (documenting Yale’s receipts from 1701-1789).
45. Hall, *supra* note 19, at 254-58.
46. *Id.* at 255 (“Colonial Connecticut was home to no private corporations as they are understood today.”).
47. *Id.* at 257.
48. *State Origins of Yale College Freshmen 2008-2016*, YALE UNIV., [http://oir.yale.edu/sites/default/files/wo26\\_fresh\\_bystate.pdf](http://oir.yale.edu/sites/default/files/wo26_fresh_bystate.pdf) [<http://perma.cc/C5YU-LU46>].
49. *Historical Summary of Yale University Spending by Category (\$ in Thousands) (a) 1830-2016*, YALE UNIV., [http://oir.yale.edu/sites/default/files/wo96\\_fin\\_spending.pdf](http://oir.yale.edu/sites/default/files/wo96_fin_spending.pdf) [<http://perma.cc/9GED-RTPM>].

lar amount. However, Yale's growth through 2015 must have exceeded the wildest imaginations of trustees and legislators in 1834. In 2015, Yale spent \$3.5 billion and owned \$4.5 billion in land, buildings, and equipment.<sup>50</sup> Adjusting for inflation, Yale's current spending exceeds its 1835 spending by a factor of 5,667.

The value of Yale's tax-exempt assets has also increased over time. In 1818, Yale's holdings consisted of "three college buildings for housing the officers and students, a lyceum, a chapel, a kitchen, and large dining-room."<sup>51</sup> In 1834, the \$6,000 annual income restriction presented little imposition on Yale, for "the college held little real estate other than the land on which it stood."<sup>52</sup> But by 1911, local reformer William S. Pardee calculated the value of Yale's tax-exempt property at \$10.4 million, or \$267 million in 2016 dollars.<sup>53</sup> As noted, the value of Yale's land, buildings, and equipment today is approximately \$4.5 billion.<sup>54</sup>

Yale's growth contrasts dramatically with recent budget pressures faced by the state. In February 2017, Connecticut's projected budget deficit totaled approximately \$1.7 billion.<sup>55</sup> Governor Malloy's budget, unveiled that month, proposed either \$1.5 billion in wage and benefit cuts or 4,200 layoffs of state employees, while separately imposing \$400 million in annual pension costs on cities.<sup>56</sup> These pressures have led municipal officials to predict sharp increases in local property taxes, nearly all of which would be shouldered by non-Yale property owners under the University's interpretation of the proviso.<sup>57</sup> By clari-

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50. FINANCIAL REPORT 2014-2015, YALE UNIVERSITY, at 9, 15, [http://your.yale.edu/sites/default/files/2014-2015\\_annual\\_financial\\_report\\_o.pdf](http://your.yale.edu/sites/default/files/2014-2015_annual_financial_report_o.pdf) [<http://perma.cc/2FVS-USHR>].

51. *Yale Univ. v. Town of New Haven*, 42 A. 87, 90-91 (Conn. 1899).

52. Hall, *supra* note 19, at 262.

53. WILLIAM S. PARDEE, *THE RELATIONS OF NEW HAVEN AND YALE UNIVERSITY: (THE RELATION OF A MOTHER AND HER CHILD)* 7 (1911). Inflation was calculated using consumer price index estimates. *Consumer Price Index (Estimate) 1800-*, FED. RES. BANK MINNEAPOLIS, <http://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-1800> [<http://perma.cc/TVB6-4VCR>].

54. FINANCIAL REPORT 2014-2015, *supra* note 50, at 15.

55. Rich Scinto, *Malloy Proposes Tax Hikes to Help Solve CT's Massive Budget Deficits*, DARIEN PATCH (Feb. 8, 2017), <http://patch.com/connecticut/darien/malloy-proposes-tax-hikes-help-solve-cts-massive-budget-deficits> [<http://perma.cc/2SUA-DXG3>].

56. Keith M. Phaneuf, *Malloy Budget Hinges on Big Labor Savings, New Revenues*, CT MIRROR (Feb. 8, 2017), <http://ctmirror.org/2017/02/08/malloy-unveils-40-6-billion-two-year-budget> [<http://perma.cc/6VW5-DJZ7>].

57. Steven Werbner et al., *Will Connecticut's State Budget Sink Towns?*, HARTFORD COURANT (Apr. 7, 2017), <http://www.courant.com/opinion/op-ed/hc-op-werbner-tolland-ct-budget-state-0409-20170406-story.html> [<http://perma.cc/3C6P-EBNH>].

fyng the scope of Yale's exemption, the state could distribute these tax increases more equitably.

The legislature could also direct additional tax revenue towards educational opportunities for Connecticut students, the overwhelming majority of whom do not attend Yale. For example, in a shift from current policy, the state might provide consistent funding for special education services in K-12 school districts.<sup>58</sup> The legislature could maintain or increase funding for after-school programs in public schools, rather than consolidating programs and cutting resources.<sup>59</sup> It might also increase funding for scholarships and financial aid in order to reduce the state's \$21,805 in average student debt per college graduate, a figure that is among the worst in the country.<sup>60</sup> Although clarifying which of Yale's properties are taxable would not resolve all of these issues, it could empower the state to make investments in furtherance of a broader public policy to expand educational opportunity.

In sum, the Connecticut legislature has the power, and no shortage of reasons, to establish a public policy interest in taxing certain Yale properties. The legislature could in fact go substantially further than it contemplated in 2016. S.B. 414 proposed to allow taxation of any Yale-owned properties generating more than six thousand dollars in annual income from the following:

1. Rentals or fees from for-profit entities
2. Entrance or use fees for sports or entertainment facilities, except where attendees were faculty, employees, or enrolled students or substantially all athletes or performers were faculty or enrolled students
3. Fees, charges, or royalties paid by the public or for-profit entities for goods designed or produced on the property

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58. Advocates argue that Connecticut is one of only four states without a clearly-established system for funding such services. Brian Zahn, *Connecticut School Finance Project Proposes Special Education Funding Model*, NEW HAVEN REG. (Dec. 14, 2016), <http://www.nhregister.com/general-news/20161214/connecticut-school-finance-project-proposes-special-education-spending-model> [<http://perma.cc/3CD8-RXXD>].

59. See Jon Greenberg & Sara Tabin, *Budget Cuts Threaten Local After-School Programs*, YALE DAILY NEWS (Mar. 10, 2017), <http://yaledailynews.com/blog/2017/03/10/budget-cuts-threaten-local-after-school-programs> [<http://perma.cc/N3Q4-W69F>].

60. Mark Saunders, *Report: Connecticut Among Worst States for Student Debt*, CT POST (Nov. 25, 2016), <http://www.ctpost.com/news/article/Report-Connecticut-among-worst-states-for-10635817.php> [<http://perma.cc/8CWC-RC58>]. Notably, undocumented students who live in Connecticut are not even eligible for need-based financial aid grants from state universities. Vanessa de la Torre, *Undocumented Students, Advocates Push for Financial Aid 'Afford To Dream' Bill*, HARTFORD COURANT (Feb. 7, 2017), <http://www.courant.com/breaking-news/hc-undocumented-financial-aid-0208-20170206-story.html> [<http://perma.cc/A8JU-AQ4J>].

4. Services rendered on property for individuals or for-profit entities<sup>61</sup>

Yale representatives indicated that the bill would have applied to the Yale Center for Genome Analysis, which provides genetic analysis services to Yale departments and outside organizations; major sports and performance facilities; and campus laboratories where sufficiently profitable products are designed or generated.<sup>62</sup>

A successor to S.B. 414 could reach more broadly in defining the contours of the state's public policy. The legislature might enumerate other specific properties that are properly deemed "productive" under the proviso. For example, the Yale-owned power plant competes with utility companies, and is neither an inherently educational building nor part of the "traditional" function of universities – unlike dining halls, student dormitories, or research buildings.<sup>63</sup> Similarly, Yale's health center and the Yale Police Department do not engage in traditional university functions and have clear private market alternatives. Yale even operates its own travel service for Yale alumni.<sup>64</sup> The legislature might determine that public policy requires the above properties to be taxed. Legislators could reach further still by providing a list of tax-exempt educational uses and clarifying that all other uses are not protected from taxation. In the alternative, they could delegate the ability to make such determinations to the City of New Haven.<sup>65</sup> Each of these efforts would fall well within the legislature's authority

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61. S.B. 414, 2016 Gen. Assemb., Feb. Sess. (Conn. 2016).

62. *FAQs on State Legislation to Tax Yale's Academic Property*, *supra* note 12.

63. *See Yale's Central Power Plant*, YALE UNIV., <http://sustainability.yale.edu/tools-resources/sustainability-tour/yales-central-power-plant> [<http://perma.cc/E4FP-FAXN>].

64. *Yale Educational Travel: About Us*, YALE UNIV., [http://ivy.yale.edu/yet/pages/display/about\\_us](http://ivy.yale.edu/yet/pages/display/about_us) [<http://perma.cc/3YUD-ABJ2>] (promising "behind-the-scenes access" and "stimulating discussions with prominent local alumni and dignitaries").

65. Clarifying Yale's tax exemption would not necessarily increase revenue for New Haven. In 2014, Yale paid almost \$8.3 million to New Haven, including "\$2.7 million for fire service and \$5.6 million in additional voluntary payments." Stannard, *supra* note 38. The University could reduce the financial impact of new tax assessments by reducing these voluntary payments. Nevertheless, a clarifying law passed under this strategy could limit the long-term expansion of non-educational-use property by Yale and reduce Yale's ability to influence the city by threatening to withhold or delay payments, a tactic Yale and other universities have used in the past to influence city actions. *See* Paul Bass, *Yale Threat Pays Off*, NEW HAVEN INDEP. (Aug. 25, 2016), [http://www.newhavenindependent.org/index.php/archives/entry/yale\\_delay\\_](http://www.newhavenindependent.org/index.php/archives/entry/yale_delay_) [<http://perma.cc/P9VF-SFWU>] (describing Yale's threats to delay payments to New Haven to speed approval of parking plan); Kohler Bruno, *Tax Haven*, YALE HERALD (Sept. 20, 2013), <http://yaleherald.com/homepage-lead-image/cover-stories/tax-haven> [<http://perma.cc/6AVK-7KC5>] (describing Princeton University's threats to withhold voluntary payments to win approval of a \$300 million arts complex).

to set public policy, and each would be supported by the compelling reasons outlined above.

*B. Challenging the Continuing Validity of Yale's Exemption*

In general, Connecticut's taxation power is unlimited, save for self-imposed limitations and constitutional limits.<sup>66</sup> However, Yale has argued that the state has permanently alienated itself from this sovereign power with regards to Yale's educational properties.<sup>67</sup> Yale thus contends that legislators can permanently divest Connecticut of its taxation powers through contract. It is true that if Yale's tax exemption were a term in a contract between private parties, it would not obviously be susceptible to the traditional defenses to breach of private contracts, such as unconscionability, frustration of purpose, mutual mistake, or impracticability.<sup>68</sup> However, Connecticut has colorable arguments that private contract law principles are inapplicable to the permanent limitation on its sovereign tax power in the Yale charter, and that a modification (rather than a mere clarification) is therefore permissible.

First, strictly applying private contract standards to Yale's charter—a public-private contract—in perpetuity would grant Yale an unlimited right to a state government subsidy for any arguably educational purpose. Accordingly, accepting the Yale's classification of the charter and proviso as a “contract” would contravene the reasonable expectations of the parties at the time of contract formation.<sup>69</sup> In the case of Yale's charter, when the Connecticut legislature passed the 1834 amendments to the charter, it expected that residents of Connecticut would subsidize Yale's investments and at least some of its property through a tax exemption, and that in exchange, Yale would give up the tax-

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66. *State v. Murphy*, 98 A. 343, 345 (Conn. 1916).

67. *FAQs on State Legislation to Tax Yale's Academic Property*, *supra* note 12 (“The legislature is bound under the Contracts Clause to respect the charter and may not unilaterally alter the language or contours of the charter's nontaxation covenant . . .”).

68. Of these four doctrines, frustration of purpose and impracticability would constitute more viable defenses to a unilateral modification of the charter. For example, Connecticut might argue that Yale's educational benefits to in-state residents have dwindled since the 1800s, thereby frustrating the purpose of Yale's tax exemption. *See supra* notes 47-48 and accompanying text. However, the State would have to establish that this change was “so severe that it [was] not fairly to be regarded as within the risks . . . assumed under the contract.” RESTATEMENT (SECOND) OF CONTRACTS § 265 cmt. a (1981). Similarly, “only in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated.” *Dills v. Town of Enfield*, 557 A.2d 517, 523 (Conn. 1989).

69. We credit Professor Daniel Markovits with the suggestion that this classification is suspect.

exempt status of faculty housing.<sup>70</sup> At the time, this arrangement likely represented a fair exchange; today, given Yale's 5,677-fold growth in spending since 1834, the calculus has almost certainly shifted.

Even beyond this remarkable growth, Yale's investments and activities have ballooned beyond the scope of the original bargain. In 1834, the forerunners of Yale's Graduate School of Arts and Sciences, the *Yale Daily News*, the Forestry School, the Yale Bowl, Payne Whitney Gymnasium, modern residential colleges, the School of Management, and many other institutions had yet to be established.<sup>71</sup> And as noted above, Yale is now in the business of security, healthcare, power, commercial scientific research, and alumni travel services.<sup>72</sup> Put simply, the 1834 legislature would have expected that Yale would run a university, not a miniature tax-exempt city. In this context, the rule for which Yale has advocated—allowing state legislators to bind future legislators and citizens in perpetuity by creating an obligation that only the grantee may discharge—appears increasingly unjustified.

Second, private contracting parties have access to time limitations and remedies for unforeseen developments. As a preliminary matter, unlike public charters, private contracts are not designed to last hundreds of years. Of course, Connecticut can create tax incentives, but any such bargains should be subject to reasonable limits of time and scope. Perpetual and irrevocable tax incentives raise questions of justice and fairness, and some level of public subsidy must exist that would stretch such agreements past the breaking point. Even if a private contract were to continue into perpetuity, parties have recourse when a deal proves too one-sided: a private party could, for example, declare bankruptcy and rely on a judge to resolve an untenable deal in an equitable manner. However, federal law does not allow states to declare bankruptcy.<sup>73</sup> Thus, the usual release valves are simply not present in the private-public contracting context.

Given these considerations, there may be room for legislation to address the imbalances of Yale's tax exemption directly. State legislators might pass a law ending Yale's contractual tax exemption altogether, but such a direct law might fail in the face of a court challenge. The Connecticut Constitution declares: "The charter of Yale College, as modified by agreement with the corporation

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70. *Yale Univ. v. Town of New Haven*, 42 A. 87, 93-94 (Conn. 1899).

71. *Traditions & History*, YALE UNIV., <http://www.yale.edu/about-yale/traditions-history> [<http://perma.cc/2SP5-J5JJ>].

72. See *supra* notes 63-64 and accompanying text; *2016 Year in Review*, YALE UNIV. OFFICE OF COOP. RES., <http://ocr.yale.edu/2016-year-review> [<http://perma.cc/G9CJ-52G7>].

73. See 11 U.S.C. § 109 (2012) (allowing a municipality to be a debtor eligible to declare bankruptcy under federal law, but excluding states).

thereof, in pursuance of an act of the general assembly, passed in May, 1792, is hereby confirmed.”<sup>74</sup> Instead, the legislature might consider freezing Yale’s contractual tax exemption by limiting it to currently-owned property.

Certainly, the Connecticut legislature may not violate *any* public-private contract as soon as it becomes unfavorable. Such a result would be disastrous, as governments and private parties regularly rely on such contracts to serve residents. But Yale’s dramatic growth in finances and scope, combined with the potentially breathtaking sweep of the tax exemption, presents an egregious case in which such action could be permissible. Moreover, the federal Contract Clause’s protection against substantial impairments of contracts sufficiently addresses such concerns.<sup>75</sup> In fact, Yale invoked the Clause heavily in its arguments against S.B. 414, arguing that the Clause barred any modification of Yale’s charter as a public-private contract.<sup>76</sup> Yet Yale’s reliance on the Contract Clause in that context was misplaced. In *Trustees of Dartmouth College v. Woodward*,<sup>77</sup> the Supreme Court did find the Contract Clause to bar New Hampshire from modifying the Dartmouth College charter to seize control of the school. But modern Contract Clause jurisprudence has shifted to acknowledge each state’s “authority to safeguard the vital interests of its people.”<sup>78</sup> Thus, the Court has emphasized, “[s]tate regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment” sufficient to implicate the Contract Clause.<sup>79</sup> In this case, Connecticut might argue, and a reviewing court could find, that a freeze on Yale’s tax exemption, limiting its application to currently-owned property, does not constitute a substantial impairment of the charter—while continuing to preclude more significant contract modifications.

Even if a court found that freezing Yale’s tax exemption *did* constitute a substantial impairment to the charter, the court could uphold a law having

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74. CONN. CONST., art. VIII, § 3.

75. See U.S. CONST., art I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . .”).

76. See *FAQs on State Legislation to Tax Yale’s Academic Property*, *supra* note 12 (“This legislation, if enacted, would unlawfully impair the nontaxation covenant in Yale’s charter, in violation of the Contracts Clause of the United States Constitution, the Constitution of the State of Connecticut, or both.”).

77. 17 U.S. (4 Wheat.) 518 (1819).

78. *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434 (1934).

79. *Energy Reserves Grp., Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 411 (1983); see also *City of El Paso v. Simmons*, 379 U.S. 497, 515 (1965) (“This Court’s decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change.”). For more on this point, see generally Letter from Professor Muneer I. Ahmad et al., *supra* note 14.

such an effect by finding that the law was necessary or reasonable to achieve a “significant and legitimate public purpose.”<sup>80</sup> A budget crisis, if severe enough, could constitute such a purpose.<sup>81</sup> So, too, could an attempt by the State to bargain with Yale to admit more low-income students and fund their tuition.<sup>82</sup> The State might even argue that simply reclaiming its sovereign power of taxation and clarifying that it cannot cede this power in perpetuity constitutes a significant and legitimate public purpose. Accepting any of these reasons would allow courts to sanction a freeze of Yale’s tax exemption, limiting its application to currently-owned property, without opening the floodgates to the abrogation of other public-private contracts. Courts could add further limitations under state contract principles, given the exceptional nature of the 1834 amendment’s lack of expiration date and its broad, ever-increasing cost to the state.<sup>83</sup> A reviewing court might even require compensation for an abridgement of the charter, awarding damages to Yale but not mandating specific (and perpetual) performance by Connecticut.

A legislative effort to reclaim Connecticut’s powers of taxation by freezing the Yale tax exemption would be unprecedented. But the result urged by Yale would leave Connecticut residents at the mercy of any private party that could strike a deal and wrest away the state’s fundamental power of taxation. Connecticut possesses strong legal and public policy arguments to the contrary.

### III. LESSONS FOR OTHER CITIES AND STATES

As discussed in the Introduction, the 2016 debate over taxing Yale was merely one manifestation of a national conversation. Indeed, cities, states, and

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80. *Energy Reserves Grp.*, 459 U.S. at 411.

81. See *Buffalo Teachers Fed’n v. Tobe*, 464 F.3d 362, 369-71 (2d Cir. 2006) (finding efforts to remedy a severe budget crisis to be a legitimate public purpose, justifying a temporary wage freeze on school district employees in violation of their union contract).

82. Congressional leaders and executive branch officials have urged Yale and other private universities to increase financial aid and lower tuition costs, bolstering this argument. See *supra* notes 1-3 and accompanying text.

83. There may be appetite for a reexamination of educational tax exemptions in Connecticut courts. In 2009, the Connecticut Supreme Court described the holding of *Yale University v. Town of New Haven*, 42 A. 87 (Conn. 1899) – that tax exemptions for educational institutions were not acts of grace, but instead central to public policy and public interest – as “contrary to our modern approach.” *Joseph’s Living Ctr., Inc. v. Town of Windham*, 966 A.2d 188, 199 n.22 (Conn. 2009). The Court went on to describe the modern scope of this doctrine as a “mystery” that need not be resolved in the case at issue. *Id.* While not hinting at how it would resolve the issue, the court clearly indicated that the current applicability of this doctrine was uncertain.

advocates seeking to clarify or limit other tax exemptions enjoyed by elite universities are likely to face legal arguments similar to those raised by Yale. For example, after settling a suit brought by local taxpayers in October of 2016, a Princeton University spokesperson emphasized that the University was “entitled to [a] property tax exemption” under “New Jersey’s Constitution and decades of public policy.”<sup>84</sup> Similarly, in response to a 2012 news investigation into Brown University’s property tax exemption, Brown argued that its charter trumped conflicting state law, with one scholar citing the federal Contract Clause as one possible bar to reform.<sup>85</sup> And although a 2008 effort to tax Harvard University’s endowment quickly fizzled,<sup>86</sup> had it moved forward, Harvard would likely have invoked a seemingly broad state constitutional provision in its favor.<sup>87</sup>

In many such cases, public policy arguments like those proposed above could provide grounds for legislatures to modify or overturn longstanding tax exemptions. For example, the Brown University charter of 1764 declares the estates of the University to be “freed and exempted from all taxes.”<sup>88</sup> In 1897, the Rhode Island Supreme Court ruled that the Brown’s tax exemption should be applied broadly, given the intent of the legislature—as expressed in Brown University’s charter—to benefit the local community and the state of Rhode Island by ensuring that the University would have a tax-exempt endowment.<sup>89</sup> Brown University is thus positioned similarly to Yale: it possesses a charter-based tax exemption that has not been substantively reviewed by the state’s highest court for more than one hundred years. But review increasingly ap-

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84. Rick Seltzer, *Deferring a Key Battle for Wealthy Universities*, INSIDE HIGHER ED (Oct. 21, 2016), <http://www.insidehighered.com/news/2016/10/21/princeton-settlement-leaves-door-open-future-tax-exemption-challenges> [<http://perma.cc/8UU4-9K7Q>].

85. Stephen Beale, *PART TWO INVESTIGATION: Legal Loophole Saves Brown Millions in Taxes*, GOLOCALPROV (Jan. 10, 2012), <http://www.golocalprov.com/news/investigation-legal-loophole-saves-brown-millions-in-taxes> [<http://perma.cc/62ML-CA8P>].

86. Doug Lederman, *Endowment Debate Seeps into the States*, INSIDE HIGHER ED (May 1, 2008), <http://www.insidehighered.com/news/2008/05/01/mass> [<http://perma.cc/G5NZ-BM8R>].

87. See MASS. CONST., ch. V, § 1, art. I (“[T]he President and Fellows of Harvard College, in their corporate capacity, and their successors in that capacity . . . shall have, hold, use, exercise and enjoy, all the powers, authorities, rights, liberties, privileges, immunities and franchises, which they now have or are entitled to have hold, use, exercise, and enjoy . . . forever.”).

88. THE CHARTER OF BROWN UNIVERSITY WITH AMENDMENTS AND NOTES 16 (1945), <http://www.brown.edu/about/administration/corporation/sites/brown.edu/about.administration.corporation/files/uploads/charter-of-brown-university.pdf> [<http://perma.cc/LT58-HDHY>].

89. *Brown Univ. v. Granger*, 86 A. 720, 721 (R.I. 1897).

pears justified, in part due to the University's simultaneous growth in assets and its decreased role in training and educating local residents.

Thus, universities like Brown and Yale should be careful not to overplay their hands in claiming freedom from taxation. And the weaknesses in Yale's legal arguments should embolden legislators and community activists in other jurisdictions to seek out analogous doctrinal space, so as to undercut similarly egregious claims advanced by other wealthy and elite universities. Where possible, state legislatures can and should use their authority on questions of public policy to clarify hoary university tax exemptions that have eclipsed the parties' original understanding. And where necessary, they should attempt to freeze tax exemptions or implement other creative reforms to reclaim their sovereign powers of taxation. By testing these arguments in the coming years, Connecticut could offer a path for these other cities, states, and advocates to follow.

## CONCLUSION

In response to S.B. 414, Yale's lawyers took the position that the University's tax exemption was far-reaching and permanently unchangeable. But given Yale's remarkable growth since its founding and the passage of the proviso, this claim seems increasingly unsustainable. As legislators and law professors argued during the debate over S.B. 414, the Connecticut legislature may properly clarify the scope of the exemption through legislation without modifying the exemption itself. In doing so, the state could reach beyond the specific enumerated categories in S.B. 414. Further, the novel circumstances presented by Yale's sheer size and exponential growth, in combination with the sweeping scope of its own interpretation of its tax exemption, suggest new avenues for legislative and judicial challenges, ranging from a mere clarification of state public policy to a freeze on the existing exemption. And given the salience of the national conversation around university tax exemptions, legislatures and advocates in other jurisdictions might consider similar challenges to exemptions enjoyed by other elite universities.

Understandably, Yale has demonstrated its intent to oppose any encroachment on the historical construction of its tax exemption. Nevertheless, legislators should rise to the challenge, and will find ample support in history and legal doctrine if they choose to do so.

*Wally Hilke and Amit Jain are members of the Yale Law School J.D. Class of 2018. We would like to thank our fellow law students Adam Bradlow and R. Henry Weaver for researching this topic alongside us in 2016. We are also indebted to Professor Mi-*

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