

April 25, 2016

The Honorable Brendan Sharkey
Speaker of the House
Legislative Office Building, Room 4100
Hartford, CT 06106-1591

The Honorable Martin Looney
Senate President Pro Tempore
Legislative Office Building, Room 3300
Hartford, CT 06106-1591

Dear Speaker Sharkey and President Looney,

The Connecticut General Assembly is considering legislation to clarify and elaborate on the scope of the proviso permitting real estate taxation of college and university property used for commercial purposes, *see* Raised Senate Bill No. 414 (“S.B. 414”), An Act Concerning the Tax on College Property, which was recently approved by the Finance, Revenue and Bonding Committee. Connecticut is not alone in examining historic tax exemptions for university property. *See, e.g.*, Michael Stratford, *Congress Returns to Scrutiny of Wealthy University Endowments*, INSIDE HIGHER ED (Feb. 16, 2016). We understand, however, that spokespersons for Yale University contend this proposed legislation would violate the Connecticut and federal constitutions, because the state lacks authority to tax university property on which commercial activities occur. *See* “FAQs on state legislation to tax Yale’s academic property” (April 21, 2016) (“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.”). As lawyers and professors who practice and teach community and economic development, land use, state and local government, and constitutional law, we have examined Yale’s constitutional concerns and conclude that they are significantly overstated. The legislature is fully empowered to clarify, by legislation, that university property on which certain commercial activities occur is not exempt from real estate taxation. In fact, we believe the legislature has the authority to go substantially further than the proposed legislation in providing for the taxation of university property.

Yale University’s charter, originally granted in 1745, has limited the extent of Yale’s tax exemption from its inception. The earliest charter excluded any real property generating a “Yearly Vallue of five Hundred Pound Sterling.”¹ In 1834, Yale accepted an amendment that restated the cap in U.S. dollars. 1834 Conn. Pub. Acts 25. That limit persists to this day and is codified in statute. Conn. Gen. Stat. § 12-81(8) (granting tax exemption to certain colleges “provided none of said corporations shall hold in this state real estate free from taxation affording an annual income of more than six thousand dollars”). The charter itself is also confirmed in the state constitution. Conn. Const., Art. VII, § 3. The current legislative proposal preserves this proviso, in full conformity with the state and federal constitutions, while clarifying

¹ Charter of Yale College ¶ 10 (May 1745), available at <http://www.yale.edu/sites/default/files/files/University-Charter.pdf>.

and elaborating on its terms. *See generally* Alvin C. Warren, Jr. et al., *Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut*, 4 CONN. L. REV. 181, 256-265 (1971).

Yale's primary contention – that the language of pending legislation is unconstitutional – is without merit. Yale's charter exempts its holdings from taxation with the proviso that "[Yale] shall never hold in this State, real estate free from taxation affording an annual income of more than six thousand dollars" The Connecticut Supreme Court construed this proviso in 1899 to mean that "[i]f the college finds in any year that its revenues from land exceed \$6,000, it must choose between its unlimited exemption from taxation and its unlimited right to hold real estate . . . [I]f it chooses the latter, it must pay taxes on the land." *Yale Univ. v. New Haven*, 71 Conn. 316, 337 (1899). The Court concluded that Yale's educational properties, such as dormitories and dining halls, were exempt under the principle that "students' fees . . . cannot be treated as income of real estate, and . . . land occupied and reasonably necessary for the plant of the College is not productive real estate within the meaning of the proviso." *Id.* at 327, 337. Nevertheless, the Court reiterated, the charter "does not authorize the College to hold any property exempt from taxation for any private use, *and does not authorize any commercial dealings with its exemptions.*" *Id.* at 338 (emphasis added). Subsequent lower court decisions applied this functional analysis to conclude that university sports facilities, including the Yale golf course and Connecticut College arena, may be treated as educational properties like classrooms and dormitories, and do not lose their educational character or function even when occasionally rented out for other purposes. *Yale Univ. v. West Haven*, No. 37889 (New Haven Cty. Super. Ct., 1935); *Conn. Coll. v. New London*, No. 040569617, 2006 WL 1828256 (Conn. Super. Ct. June 13, 2006).

A more recent opinion of the Connecticut Supreme Court restated the functional analysis first articulated in 1899 – university property used for education and training is exempt, property used for income-generating commercial purposes is not. *Yale Univ. v. New Haven*, 169 Conn. 454, 466-67 (1975); *see also id.* at 472 (Bogdanski, J. concurring). In that case, the Court held that the property on which the Yale University Press is located was exempt from taxation, not due to its function (as educational rather than commercial) but because the press did not "afford an annual income of more than six thousand dollars." *Id.* at 468. The Court did not reach the issue of whether a profitable press owned by the University would be exempt from taxation.

The state constitutional analysis is plain. Only land that is "reasonably necessary for the plant of the College" is exempt from property tax, even if it generates revenue in the form of tuition or room and board charges. On the other hand, university property on which "commercial dealings" occur is not exempt. Thus Yale may elect to engage in commercial activities on its properties, but if on any property these activities "afford an annual income of more than six thousand dollars," then Yale forfeits its tax exemption for that real estate. The legislation now under consideration properly seeks to clarify and elaborate on the activities that would render university property subject to real estate tax, updating ancient terms for a twenty-first century economy.²

² In *New Orleans v. Houston*, the U.S. Supreme Court held that "an ordinary act of legislation" cannot abrogate constitutionalized contract obligations. 119 U.S. 265, 275 (1886). However, the Connecticut Constitution simply

Yale has also objected that the Contract Clause of the U.S. Constitution divests the legislature of all power to clarify what constitutes “educational” and “commercial” activities. This objection is unfounded. In fact, even if the state went beyond clarifying Yale’s charter to modifying it outright, it could do so in service of a legitimate public purpose.

In *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), the Supreme Court held that the Contract Clause prohibited New Hampshire from modifying Dartmouth’s charter to shift control of the university from private to public hands. But this doctrine has changed significantly over the last century. “The hostility to state legislative power and incredible devotion to the development and protection of property interests symbolized by the Marshall Court no longer runs as a dominant theme in our national jurisprudence . . . The [Supreme] Court has not once in [the twentieth] century affirmatively protected a university from taxation because of a grant of tax immunity in its charter.” Warren et al., *Property Tax Exemptions in Connecticut*, *supra*, at 222.

In modern jurisprudence, the Contract Clause does not pose an absolute bar to contract modifications; rather, its scope is limited by each state’s authority to “safeguard the vital interests of its people.” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434 n.18 (1934). Contemporary doctrine looks first to whether a state law operates as a “substantial impairment of a contractual relationship.” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). Not every law that limits a contract “substantially” impairs it. “State regulation that restricts a party to gains it reasonably expected from the contract does not necessarily constitute a substantial impairment.” *Energy Reserves Grp., Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1983). Yale’s growth over the centuries could not have been foreseen, as evidenced by the fact that the university’s property holdings have grown from a mere ninety acres at its inception to over one thousand today. Nor was the complexity of the modern economy and the diversity of university holdings, investments, and activities knowable to the drafters of the charter. Any tax levied pursuant to the legislative amendments now under consideration would merely restrict Yale “to those gains reasonably to be expected from the contract,” removing an “unforeseen advantage.” *El Paso v. Simmons*, 379 U.S. 497, 515 (1965). *See also Sanitation & Recycling Indus., Inc. v. New York*, 107 F.3d 985, 993 (2d Cir. 1997) (“Impairment is greatest where the challenged government legislation was wholly unexpected.”). Indeed, we believe the legislature could go further in taxing university property without “impair[ing]” the charter, and further still before impairing it “substantial[ly]” enough to trigger federal constitutional scrutiny.

Moreover, even where a legislative action *does* result in a “substantial impairment,” it does not violate the U.S. Constitution where, for instance, a tax serves a “significant and legitimate public purpose” and works an adjustment of contractual rights that is necessary or reasonable given that purpose. *Energy Reserves Grp.*, 459 U.S. at 411-12. And this makes sense.

acknowledges the existence of a contractual relationship between the state and Yale without granting any extra-contractual privileges. *See* Conn. Const., Art. VII, § 3 (“[t]he charter of Yale College, as modified by agreement with the corporation thereof . . . is hereby confirmed.”). The relevant constitutional clause in *New Orleans* also stated that “all laws contrary to the provisions of this article are hereby declared null and void.” *Id.* at 269. No such intent to prevent future lawmaking appears in the Connecticut Constitution.

There are occasions where the public interest or social welfare demand revision of past agreements. The charter is not a perpetual contract, standing above and apart from all democratic processes and policymaking. There might well be many grounds on which a state would seek dramatic change in its tax policy – change far greater than the mere clarification under consideration in the state legislature now, and change that *would* constitute a “substantial impairment” of contracts. In Buffalo, for example, a severe budget crisis was found to be a legitimate public purpose for imposing a wage freeze for school district employees. *Buffalo Teachers Fed'n v. Tobe*, 464 F.3d 362, 369-371 (2d Cir. 2006). In Yale’s case, a tax could help rectify the educational inequities produced by a private university’s concentration of massive wealth, or condition the continued enjoyment of tax privileges on fundamental, structural changes to a university’s admissions, research, employment, or expenditure policies.

In sum, we conclude that the state legislature may by statute clarify and elaborate on the scope of the “commercial dealings” limitation on Connecticut’s general exemption for real estate taxation on university property. The bill now pending before the legislature is not unconstitutional, and we expect its application would be upheld by the courts if challenged. As we stated at the outset, we conclude that the legislature is constitutionally empowered to elaborate on the scope of Yale’s tax exemption under its charter, and to go even further.

Respectfully,*

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