

NOTES

WHY IS UNIVERSITY HOUSING TAX-EXEMPT?

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“Taxes are what we pay for civilized society.”

—Justice Oliver Wendell Holmes, Jr., 1927¹

“[T]he power to tax involves the power to destroy.”

—Chief Justice John Marshall, 1819²

In this Note, I challenge three dominant theories behind property tax exemptions for university housing—the “Quid-Pro-Quo,” “Sovereignty,” and, what I call, “Oxbridge” theories—and propose that only undergrad housing should be tax-exempt. My proposal would recognize the unique educational value of undergrad housing, help reduce town-gown tensions, and be easy to apply.

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* Copyright © 2024 by Hacibey Catalbasoglu. J.D., 2024, New York University; B.A., 2019, Yale University; Ward 1 Alder, New Haven, Connecticut, 2018–2019. I dedicate this Note to the people of New Haven, “God’s city under the mountain: haven to exiles, heaven on earth” VINCENT SCULLY, CATHERINE LYNN, ERIC VOGT & PAUL GOLDBERGER, *YALE IN NEW HAVEN* 353 (2004).

¹ *Compania Gen. de Tabacos de Filipinas v. Collector of Internal Revenue*, 275 U.S. 87, 100 (1927) (Holmes, J., dissenting). *But see* Orin Kerr (@OrinKerr), TWITTER (Dec. 17, 2019, 2:26 AM), <https://twitter.com/OrinKerr/status/1206837951403085824> [<https://perma.cc/P5B6-JUA5>] (“It’s hard to think of a law review article that was improved by adding an opening quotation before the article began.”).

² *McCulloch v. Maryland*, 17 U.S. 316, 431 (1819).

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INTRODUCTION

Picture two charming Brooklyn brownstones side-by-side. They're identical: They offer the same amenities, look the same, cost the same, and both house university students. But one is owned by the local Davenport University³ and the other by lifelong Brooklynite Benjamin Butler.⁴ Yet, come the end of the year, the City of New York can charge property taxes only on Mr. Butler's brownstone. The students in both homes can use the city's services—for example, they can all enjoy Central Park or, if they have kids, send them to Brooklyn Tech—but Mr. Butler's tenants pay for the city's services, through property taxes in their rent,⁵ while the university's tenants don't.

In 2018, one year into my term on New Haven's city council, the Yale Political Union invited me to debate whether Yale should abolish its dorms,⁶ also known as residential colleges.⁷ I spoke in favor of abolition. Rather than cloister students in ivy-covered castles, I argued, Yale should turn its residential colleges into mixed-use real estate, with shops on the first floor and dorms on top.⁸ The retail would bring much-needed property taxes to a city with mostly tax-exempt

³ No such university exists in Brooklyn. Davenport University is a reference to Yale's Davenport College, where I spent my Bright College Years.

⁴ I chose Benjamin Butler for alliterative purposes. The real Benjamin Butler, though, founded the New York University School of Law. RONALD L. BROWN, *THE LAW SCHOOL PAPERS OF BENJAMIN F. BUTLER* 7 (1987).

⁵ KAREN LYONS, SARAH FARKAS & NICHOLAS JOHNSON, *CTR. ON BUDGET AND POL'Y PRIORITIES, THE PROPERTY TAX CIRCUIT BREAKER* 5 (2007), <https://www.cbpp.org/sites/default/files/archive/3-21-07sfp.pdf> [<https://perma.cc/AP87-UXEP>] (“Renters pay property tax implicitly as part of their monthly rent payments.”). Whether increases in property taxes are passed on to tenants or landlords depends on tenants' elasticity of demand. If demand is elastic—that is, if tenants are sensitive to prices—landlords have to bear the brunt of the tax, lest tenants find housing elsewhere. But demand for housing is mostly inelastic, so landlords can and do pass property taxes on to tenants. *See* David J. Schwegman & John Yinger, *The Shifting of the Property Tax on Urban Renters: Evidence from New York State's Homestead Tax Option* 7–10 (U.S. Census Bureau Ctr. for Econ. Stud., Working Paper No. 20-43, 2020), <https://www2.census.gov/ces/wp/2020/CES-WP-20-43.pdf> [<https://perma.cc/6MLU-CGB5>] (reviewing literature on the incidence of property taxes).

⁶ Nathalie Bussemaker, *Ditch the College System, Hacı Says*, *YALE DAILY NEWS* (Sept. 12, 2018, 12:57 AM), <https://yaledailynews.com/blog/2018/09/12/ditch-the-college-system-haci-says> [<https://perma.cc/E79W-PUPG>].

⁷ *Residential Colleges*, *YALE COLL.*, <https://yalecollege.yale.edu/residential-colleges> [<https://perma.cc/K5NR-EMS5>].

⁸ Bussemaker, *supra* note 6.

land.⁹ In defense of the resolution, I speculated that Yale didn't pay taxes on its residential colleges because each housed a classroom. And since classrooms have always been exempt from property taxes, I said, attaching one to a dorm let the university exempt the whole building. After the debate, the *Yale Daily News* corrected me: "[A]lthough Yale does receive tax exemptions for its student residences, it is not because the University holds one class in each college to exploit a nonexistent legal loophole."¹⁰ Since then, I've wondered: Why is university housing tax-exempt?

This Note tries to answer that in five parts: Part I explains why property tax exemptions matter so much to cities and their residents. Part II dusts off the history of property tax exemptions for universities. Part III questions the exemption's theoretical foundations. Part IV describes what courts look to when upholding exemptions for certain kinds of university housing. And Part V proposes that only undergrad—not graduate, staff, or faculty—housing should be tax-exempt.

I

WHY PROPERTY TAX EXEMPTIONS MATTER

The university property tax exemption: (1) costs cities tons in forgone taxes each year, (2) is a crude tool to carry out tax policy, (3) is construed in ways that abandon ordinary principles of statutory interpretation, (4) breeds town-gown friction, and yet (5) is little studied.

First, the exemption is expensive. One estimate puts the national price tag at around \$15 billion yearly in forgone tax revenue.¹¹ New York City alone loses almost \$2 billion.¹² Closer to home,¹³ in 2022, New York University (NYU) got a \$141 million property tax break,¹⁴ which comes out to around \$16,000 per NYU-owned dwelling.¹⁵ Whenever a

⁹ Thomas Breen, *60% of City Real Estate Now Tax-Exempt*, NEW HAVEN INDEP. (Mar. 12, 2020, 8:04 AM), https://www.newhavenindependent.org/article/grand_list [<https://perma.cc/NWL7-R7R3>].

¹⁰ Flora Lipsky, *FACT CHECK: Taxes*, YALE DAILY NEWS (Nov. 5, 2018, 7:33 PM), <https://yaledailynews.com/blog/2018/11/05/fact-check-taxes> [<https://perma.cc/5JS8-LBZP>].

¹¹ ELIZABETH SCHMIDT, *NONPROFIT LAW* 242 n.51 (2d ed. 2016).

¹² Charles Brecher & Thad Calabrese, *Property Tax Exemptions for Nonprofits: Three Policy Questions*, 21 CITY L. 25 (2015).

¹³ During my time at NYU, I lived in Hayden Hall. See generally Russell D. Niles, *Planning and Building Arthur T. Vanderbilt Hall*, 4 J. LEGAL EDUC. 265, 274 (1952) (describing early plans for Hayden Hall).

¹⁴ Alex Tey, *How NYU Is Saving \$141 Million This Year*, WASH. SQUARE NEWS (Nov. 23, 2022, 12:42 PM), <https://nyunews.com/under-the-arch/2022/11/23/nyu-saving-millions-property-taxes> [<https://perma.cc/K6BQ-UDLJ>].

¹⁵ Brecher & Calabrese, *supra* note 12. NYU is often criticized for using real estate to recruit and retain faculty. See, e.g., Beth Landman, *Does It Take \$5.6 Million in Real Estate*

property is exempted from taxes, there's less funding for city services or higher taxes on everyone else.¹⁶

Second, the exemption is a crude tool to carry out tax policy.¹⁷ Scholars highlight, for example, how it worsens the regressive nature of property taxes,¹⁸ how passively exempting properties—rather than sending universities an annual grant equal to the exemption—is untransparent,¹⁹

to Lure a Professor to the Village?, N.Y. MAG.: INTELLIGENCER (July 25, 2011), https://nymag.com/intelligencer/2011/07/does_it_take_56_million_in_rea.html [<https://perma.cc/DCR6-ZSUX>]; Ariel Kaminer & Alain Delaquerière, *N.Y.U. Gives Its Stars Loans for Summer Homes*, N.Y. TIMES (June 17, 2013), <https://www.nytimes.com/2013/06/18/nyregion/nyu-gives-stars-loans-for-summer-homes.html> [<https://perma.cc/6LTD-4TCG>]; Roland Li, *NYU Law School Buys \$3.6M UWS Condo For Faculty Housing*, INT'L BUS. TIMES (Mar. 13, 2012, 1:29 PM), <https://www.ibtimes.com/nyu-law-school-buys-36m-uws-condo-faculty-housing-photos-424514> [<https://perma.cc/MGP2-WA7B>]; Melissa Klein, *NYU Professor Rakes in Millions from Sweet Real Estate Deal with School*, N.Y. POST (Aug. 10, 2019, 10:47 PM), <https://nypost.com/2019/08/10/nyu-professor-rakes-in-millions-from-sweet-real-estate-deal-with-school> [<https://perma.cc/2XZ8-P99E>]; C.J. Hughes, *NYU Picks Up Another High-Grade Teacher's Residence*, CRAIN'S N.Y. BUS. (Jan. 26, 2023, 12:35 PM), <https://www.craainsnewyork.com/education/nyus-law-school-picks-another-high-grade-teachers-residence-time-townhouse-453-henry-st> [<https://perma.cc/CXC6-847A>].

¹⁶ See James P. Buchele, *Justifying Real Property Tax Exemptions in Kansas*, 27 WASHBURN L.J. 252, 274 (1988) (“[R]eduction of the tax base . . . causes the tax rate on nonexempt property to increase.”); Newman F. Baker, *Judicial Interpretation of Tax Exemption Statutes*, 7 TEX. L. REV. 385, 389 (“[T]he less property subjected to the tax, the greater the burden on the remaining property.” (quoting *City of Providence v. Hall*, 142 A. 156, 160 (R.I. 1928))).

¹⁷ Note, *Alternatives to the University Property Tax Exemption*, 83 YALE L.J. 181, 183 (1973) (“One difficulty with distributing public moneys in this manner [that is, through property tax exemptions] is that it is a crude means for ascertaining the proper size of the subsidy.”).

¹⁸ Note, *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, 64 HARV. L. REV. 288, 293 (1950) (“[T]he wealthiest organizations will receive the greatest benefit, to the extent that they own the greatest amount of property that would otherwise be subject to tax.”).

¹⁹ Richard L. Pfister, *A Reevaluation of the Justifications for Property Tax Exemption*, 4 PUB. FIN. Q. 431, 443 (1976) (“[T]axpayers and public officials do not know what they are paying for or how much they are paying, so they do not weigh this use of [forgone] tax revenues against alternative uses.”); Michael A. Pagano, *How Nonprofits Can End Up Becoming a Drain on City Budgets*, BLOOMBERG: CITYLAB (Nov. 12, 2012, 8:40 AM), <https://www.bloomberg.com/news/articles/2012-11-12/how-nonprofits-can-end-up-becoming-a-drain-on-city-budgets> [<https://perma.cc/9TRY-M8BB>] (“Wherever any one falls on the tax-exempt/taxable divide, the taxpayer-voter ought to at least know which entities are subsidized at what tax-price, so that a deliberative dialogue on ‘who benefits’ can be honestly and openly debated.”); see *Brainard v. Town of Colchester*, 31 Conn. 407, 410 (1863) (“Exemptions of this kind are contrary to public policy . . . It is to be regretted that legislatures should ever resort to this indirect mode of conferring favors. It is always much more satisfactory to have their benefactions definite and direct.”). In 1874, Harvard President Charles Eliot argued before the Massachusetts legislature that what the public loses in transparency, it gets back in efficiency: “The exemption method is comprehensive, simple and automatic; the grant method . . . gives occasion for acrimonious debates, and tempts to jobbery . . . The proximate effects of the two methods of state action are as different as well-being from pauperism, as republicanism from communism.” CHARLES

and how city residents pay for the exemption while suburban residents enjoy its benefits.²⁰

Third, courts construe property tax exemptions in ways that abandon ordinary principles of statutory interpretation. Statutes granting universities property tax exemption generally require the properties to be used “exclusively” for “educational” purposes.²¹ But despite the rule that exemptions should be read narrowly,²² courts rule that “exclusively” actually means “primarily”²³ and that “educational” actually means “anything involving students or faculty.”²⁴ As one author

W. ELIOT, THE EXEMPTION FROM TAXATION OF CHURCH PROPERTY, AND THE PROPERTY OF EDUCATIONAL, LITERARY AND CHARITABLE INSTITUTIONS 382–83 (1874). *But see* Daniel J. Hemel, *Tangled Up in Tax: The Nonprofit Sector and the Federal Tax System*, in THE NONPROFIT SECTOR 144, 147 (Patricia Bromley & Walter Powell eds., 3d ed. 2020) (noting that one man’s “political controversy” can be another’s “democratic debate”).

²⁰ Rebecca S. Rudnick, *State and Local Taxes on Nonprofit Organizations*, 22 CAP. U. L. REV. 321, 337 (1993) (“The evidence is quite clear that nonprofits in the center cities serve the suburbs to an inequitable degree.”); Alvin C. Warren, Jr., Thomas G. Krattenmaker & Lester B. Snyder, *Property Tax Exemptions for Charitable, Educational, Religious and Governmental Institutions in Connecticut*, 4 CONN. L. REV. 181, 195 n.65 (1971) (“Suburban residents are sometimes said to enjoy benefits from central cities for which they pay neither taxes nor service charges.”); *see infra* Section III.A (examining this mismatch through Yale and New Haven).

²¹ *See infra* Part IV.

²² 2 THOMAS M. COOLEY, THE LAW OF TAXATION § 672 (4th ed. 1924) (“[S]ince taxation is the rule, and exemption the exception, the intention to make an exemption ought to be expressed in clear and unambiguous terms Moreover, if an exemption is found to exist, it must not be enlarged by construction.”); *Wash. Chapter of Am. Inst. of Banking v. District of Columbia*, 203 F.2d 68, 70 (D.C. Cir. 1953) (“Exemptions from taxation are strictly construed against those claiming the exemption, even if the claimant is a charitable or educational institution, because such exemptions are . . . at war with sound basic tax philosophy which requires a fair distribution of the burden of taxation.” (footnotes omitted)). *But see* Brief and Argument on Behalf of the Appellant at 6, *Yale Univ. v. Town of New Haven*, 42 A. 87 (Conn. 1899) (“The rule requiring strict construction of statutory exemptions applies only to property used for purposes of private gain. A liberal construction harmonizing with the policy of the law is permissible and proper as to property used for literary, scientific or religious purposes.”).

²³ *See, e.g.,* *McKenzie v. Johnson*, 456 N.E.2d 73, 78 (Ill. 1983) (“This court has long held that property satisfies the exclusive-use requirement of the property tax exemption statutes if it is primarily used for the exempted purpose.”); *cf.* Philip T. Hackney, *A Response to Professor Leff’s Tax Planning ‘Olive Branch’ for Marijuana Dealers*, 99 IOWA L. REV. BULL. 25, 29 (2014) (“The Treasury Regulations regarding § 501(c)(3) also interpret exclusively to mean primarily.”).

²⁴ *See, e.g.,* *People ex rel. Clarkson Mem’l Coll. of Tech. v. Haggatt*, 77 N.Y.S.2d 182, 185 (Sup. Ct. 1948) (“We have recognized as being within the statute’s requirement of being an educational use, inter alia, dormitories, dining halls, armories, drill rooms, stables, recreation grounds, chaplains’ and farmers’ residences.”); *cf.* *Provena Covenant Med. Ctr. v. Dep’t of Revenue of State*, 894 N.E.2d 452, 481 (Ill. App. Ct. 2008) (“The term ‘charity’ has become magical gibberish to sanctify any socially beneficial use of property that a court deems worthy of subsidy.”).

put it, “the confusion in the tax exemption cases largely is the result of the relaxation of the rule of strict construction.”²⁵

Fourth, the property tax exemption for university housing breeds town-and-gown friction.²⁶ City leaders, unwilling to raise taxes,²⁷ look to universities for contributions—also known as “payments in lieu of taxes” or PILOTs—to the municipality’s coffers.²⁸ Cities call the payments “voluntary.”²⁹ Universities call them “extortion.”³⁰ As leverage, these municipalities threaten to stall approval of campus development projects³¹ or otherwise make the local universities’ lives harder.³² In response, universities threaten to stop providing residents free services, like access to university-owned concert halls and art museums.³³ Every

²⁵ Baker, *supra* note 16, at 395; see also William R. Ginsberg, *The Real Property Tax Exemption of Nonprofit Organizations: A Perspective*, 53 TEMP. L.Q. 291, 294 n.12 (1980) (“[This] tension created by the rigidity in language of most exemption statutes has led to a form of judicial schizophrenia.”); Buchele, *supra* note 16, at 256 n.21 (“In many states, the courts have espoused strict construction against exemption, but then expanded the scope of the statute to compromise the strict construction concept.”); Comment, *Judicial Restoration of the General Property Tax Base*, 44 YALE L.J. 1075, 1089 (1935) (“[T]he declaration that exemption statutes must be strictly construed is repeated as if by rote in some of the loosest constructions.”).

²⁶ Gerald A. Rosenberg, *Real Property Tax Exemptions at Risk*, TAX’N EXEMPTS, Sept.-Oct. 2008, at 1, 2, <https://www.pbwt.com/content/uploads/2015/07/EORisk.pdf> [<https://perma.cc/3MHX-D8Q9>] (“[T]own-gown’ tensions over property tax are widespread . . .”). “Town-and-gown” or “town-gown” refers to “the relationship and interaction that exists between the inhabitants of municipality (Town) and the faculty, staff, and students of a college or university (Gown).” ROGER L. KEMP, TOWN AND GOWN RELATIONS 257 (2013).

²⁷ See Rosenberg, *supra* note 26, at 1 (“There is less political resistance to pursuing a relatively weak constituency, the nonprofit sector, than to increasing the marginal rates payable by individuals and for-profit business organizations . . .”); Robert Christopherson & James J. Coffey, *Hedging Property Taxes for Exempt Organizations*, 24 TAX’N EXEMPTS 39, 41 (2012) (“As local coffers continue to dry up, a charitable institution consuming local government services without paying property taxes could become a tempting target for a revenue-starved municipality.”).

²⁸ Evelyn Brody, *All Charities Are Property Tax Exempt, but Some Charities Are More Exempt Than Others*, 44 NEW ENG. L. REV. 621, 623–24 (2010).

²⁹ Julia A. Quigley, Note, *Payments in Lieu of Trouble: Nonprofit PILOTs as Extortion or Efficient Public Finance?*, 26 N.Y.U. ENV’T L.J. 272, 281 (2018).

³⁰ Brody, *supra* note 28, at 661.

³¹ See, e.g., *Cornell Increases Payments to Ithaca for City Services*, N.Y. TIMES, Nov. 1, 1995, at B9 (“‘We would have liked to get more,’ said Mayor Benjamin Nichols. . . . But Mr. Nichols said he was pleased with the outcome of a battle that began when he withheld permits for construction at the university unless the payments in lieu of taxes increased.”).

³² See, e.g., DOUGLAS W. RAE, CITY 429–30 (2003) (“The mayor invoked something known as the Guida Amendment, under which any project that would remove property from the grand list for a tax-exempt institution would face special rigors . . . (churches and the like were exempted on the theory that they served local congregants).”).

³³ See Paul Bass, *Yale Threat Pays Off*, NEW HAVEN INDEP. (Aug. 25, 2016, 8:26 AM), https://www.newhavenindependent.org/index.php/article/yale_delay_ [<https://perma.cc/P9VF-SFWU>] (describing Yale’s threats to delay PILOTs and speed up approval of parking plan); Kohler Bruno, *Tax Haven*, 56 YALE HERALD 13, 14 (2013), <https://issuu.com/yaleherald/>

now and then, there are even whispers of universities relocating.³⁴ More often, though, these fights end up in court.³⁵ In 2016, for example, residents of Princeton, New Jersey, sued Princeton University over its tax-exempt land.³⁶ They settled for \$18.2 million.³⁷ Similar fights are increasingly happening across the country.³⁸

Finally, at least compared to the federal income tax exemption, little attention has been paid to state property tax exemptions for

docs/tyh_lvi_3 [https://perma.cc/4ZJ7-NWKX] (describing Princeton's threats to withhold PILOTs and win approval of \$300 million arts complex).

³⁴ See Ira Stoll, *Maybe Yale Would Be Happier in Boston*, HARTFORD COURANT (Dec. 12, 2018, 4:59 AM), <https://www.courant.com/opinion/op-ed/hc-op-stoll-maybe-yale-should-move-0329-20160328-story.html> [https://perma.cc/6BCJ-XLKG]; see also Candace Denise Jones, *White Flight?: George Pepperdine College's Move to Malibu, 1965–1972*, at 91 (Dec. 2003) (M.A. thesis, Pepperdine University) (Pepperdine Digital Commons) (recounting how an “unpredictable urban setting” led Pepperdine to move from Los Angeles to Malibu). *But see* Quigley, *supra* note 29, at 289 (“The thought of a university relocating completely is almost unimaginable.”); Clio Chang, *When New York's Biggest Private Landlords Are Columbia and NYU*, CURBED (Dec. 13, 2023), <https://www.curbed.com/2023/12/columbia-nyu-property-tax-cuny-bill.html> [https://perma.cc/QV9T-KANG] (“I think there's zero chance that a school called New York University moves to New Jersey.”).

³⁵ See, e.g., Rani Chor, *Stanford Files Lawsuit Against Santa Clara County, Wants 'Educational' Tax Exemption for Faculty Homes*, STAN. DAILY (Mar. 15, 2023, 9:28 PM), <https://stanforddaily.com/2023/03/15/stanford-files-lawsuit-against-santa-clara-county-wants-educational-tax-exemption-for-faculty-homes> [https://perma.cc/WLU8-HS6A] (“Stanford filed a lawsuit against Santa Clara County earlier this February seeking a partial tax exemption for faculty homes on campus . . .”); Audrey Williams June, *Suit Adds to Bitterness in Northwestern–Evanston Relationship*, CHRON. OF HIGHER EDUC. (Mar. 7, 2003), <https://www.chronicle.com/article/suit-adds-to-bitterness-in-northwestern-evanston-relationship> [https://perma.cc/U8C3-89HK] (“The university charged that Evanston was trying to punish the institution for its longstanding refusal to give the city money each year in lieu of property taxes.”); cf. Rory Linnane, *Wisconsin Lutheran High School Sues the City of Milwaukee to Get Out of a \$106,000 Property Tax on Dorm*, MILWAUKEE J. SENTINEL (June 23, 2023, 6:00 AM), <https://www.jsonline.com/story/news/education/2022/06/23/wisconsin-lutheran-high-school-sues-city-of-milwaukee-dorm-tax-exemption/7701755001> [https://perma.cc/V3C9-SPJ8] (“Unhappy with paying property taxes for a dormitory, Wisconsin Lutheran High School has filed a lawsuit against the city of Milwaukee with the hope that a judge will grant them a tax exemption after denial from city officials.”).

³⁶ *Fields v. Trs. of Princeton Univ.*, 28 N.J. Tax 574, 578 (2015).

³⁷ W. Raymond Ollwerther, *University to Pay \$18.2 Million to Settle Tax Suit by Residents*, PRINCETON ALUMNI WKLY., Nov. 2016, at 13, 13, <https://paw.princeton.edu/file/86766/download?token=SHzMZZWW> [https://perma.cc/68EC-W8WU].

³⁸ See *National Council of Nonprofits Flags NY Judicial Decision as Threat to Nonprofit Exemptions*, PHILANTHROPY N.Y. (Aug. 11, 2015), <https://philanthropynewyork.org/news/national-council-nonprofits-flags-ny-judicial-decision-threat-nonprofit-exemptions> [https://perma.cc/ZE2T-JUV9] (“[R]ecent reports from Florida, Michigan, New York, and elsewhere suggest that tax assessors in various communities have become more aggressive in challenging the longstanding property tax exemption of nonprofits.”); see also Joan M. Youngman, *Property, Taxes, and the Future of Property Taxes*, in *THE FUTURE OF STATE TAXATION* 111, 120 (David Brunori ed., 1998) (noting recent property tax exemption cases reflect “greater judicial scrutiny of the extent to which organizations seeking tax exemptions meet statutory requirements”).

universities.³⁹ This is ironic since property tax exemptions are in some ways more important to universities.⁴⁰ Few “would have much net taxable income even if they were nonexempt, but many own realty of considerable value.”⁴¹ Even less attention has been paid to property tax exemptions for university *housing*.

I focus on universities, instead of churches⁴² or other nonprofits, since universities own the most tax-exempt land.⁴³ And I mainly examine private universities since state schools are thought to be exempt from local taxes as an arm of the government.⁴⁴ Finally, an important caveat: To question the university property tax exemption is not to question the value of universities or higher education.⁴⁵ But unless we think *all* university property should be tax-exempt, which few do,⁴⁶ the line separating housing worthy of an exemption and what ought to be taxed must be drawn somewhere. This Note merely tries to help draw that line.

³⁹ See Wally Hilke & Amit Jain, *Public Interests, Private Institutions? Public Policy Challenges to Tax Free Universities*, 127 YALE L.J.F. 94, 97 n.18 (“Much scholarship on nonprofits focuses on *income* tax rather than the . . . property tax.”). The latest 682-page Restatement on nonprofits dedicates just half a page to state property tax exemptions. RESTATEMENT OF CHARITABLE NONPROFIT ORGS. § 1.01 cmt. j (AM. L. INST. 2021).

⁴⁰ See Michael Fricke, *The Case Against Income Tax Exemption for Nonprofits*, 89 ST. JOHN’S L. REV. 1129, 1173 n.208 (2015) (“An argument can be made that the state-level [property] tax exemptions are actually more valuable to the average nonprofit than the federal [income tax] exemption.”); see also 2 WILLIAM A. KAPLIN, BARBARA A. LEE, NEAL H. HUTCHENS & JACOB H. ROOKSBY, *THE LAW OF HIGHER EDUCATION* 1543 (John Wiley & Sons, Inc., 6th ed. 2019) (“Local government taxation is one of the most significant tax problems in postsecondary education law.”).

⁴¹ *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, *supra* note 18, at 288.

⁴² I use “churches” and “religious institutions” synonymously. Cf. MILAN N. BALL, CONG. RSCH. SERV., IF12520, *WHAT IS A “CHURCH” FOR FEDERAL TAX PURPOSES?* 1 (2023) (doing the same).

⁴³ Ginsberg, *supra* note 25, at 327 (“Privately held real property used for educational purposes constitutes the largest single category of exempt property.”); see, e.g., Amira McKee, *Exceeding Previous Estimates, Columbia Is the Largest Private Landowner in New York City, City Data Reveals*, COLUM. SPECTATOR (Apr. 28, 2023, 11:45 AM), <https://www.columbiaspectator.com/city-news/2023/04/20/exceeding-previous-estimates-columbia-is-the-largest-private-landowner-in-new-york-city-city-data-reveals> [https://perma.cc/2ZX9-8WCU].

⁴⁴ John D. Colombo, *Why Is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 842 n.1 (1993) (“[I]t doesn’t make much sense for the government to tax itself.”). *But see infra* notes 92–93 and accompanying text (challenging that theory).

⁴⁵ See PETE BUTTIGIEG, *SHORTEST WAY HOME* 175 (2019) (“I now believe that a mayor who is granted one wish for any feature to add to her city—a stadium, a major corporate headquarters, a state capitol—should find the answer obvious: pick a world-class research university.”); RICHARD C. LEVIN, *THE WORTH OF THE UNIVERSITY* 116 (2013) (“Universities are uniquely poised to strengthen urban America.”).

⁴⁶ See *infra* note 104 (providing examples of university properties that are taxed).

II

THE HISTORY OF PROPERTY TAX EXEMPTIONS

The history of property tax exemptions stretches from Ancient Egypt to the 2007–2008 financial crisis.⁴⁷ Carved in 196 BC, the Rosetta Stone was a decree from the Pharaoh granting religious temples a property tax exemption.⁴⁸ In Roman Britain, Emperor Constantine I, “discomfited by the weak state of secular government, allied with the Church’s well-organized hierarchy.”⁴⁹ In exchange, he made Christianity the state religion and exempted the Church’s property, including its schools, from taxes.⁵⁰ Exemptions for secular universities came later when King Henry VIII granted them to the Universities of Oxford and Cambridge.⁵¹

In the American colonies, the first colleges were “quasi-public” religious seminaries and, following England’s lead, were exempt from property taxes.⁵² So widespread was this custom that even the property of some college professors was tax-exempt.⁵³ As secular nonprofits began offering charitable and educational services, they too received tax exemptions from their states.⁵⁴

It wasn’t until the Reagan Revolution that issues around property tax exemptions for universities came to the national fore.⁵⁵ President Ronald Reagan, determined to shrink the size of the federal government,

⁴⁷ See generally ALFRED BALK, *THE FREE LIST* 20–21 (1971) (surveying ancient property tax exemptions).

⁴⁸ Richard Henry Carlson, *A Brief History of Property Tax*, 3 *FAIR & EQUITABLE* 3, 3 (Feb. 2005), https://www.iaao.org/uploads/a_brief_history_of_property_tax.pdf [<https://perma.cc/Z3P9-GT7C>]; see also *Genesis* 47:26 (“Joseph made it law over the land of Egypt unto this day, that Pharaoh should have the fifth part; except the land of the priests only, which became not Pharaoh’s.”); *Ezra* 7:24 (“Also we certify you that touching any of the priests and Levites, singers, porters, Nethinims, or ministers of this house of God, it shall not be lawful to impose toll, tribute, or custom upon them.”).

⁴⁹ BALK, *supra* note 47, at 22.

⁵⁰ Warren, Jr. et al., *supra* note 20, at 188 n.28.

⁵¹ WESTCHESTER CNTY. CHAMBER OF COM., *TAX EXEMPTIONS ON REAL ESTATE* 50–51 (1922).

⁵² Colombo, *supra* note 44, at 845.

⁵³ See *id.* at 844, n.11 (“The Massachusetts Bay Province Laws of 1706–1707, for example, provided exemption from local property and poll taxes for ‘the president, fellows and students of Harvard Colledge [sic].’” (quoting 1706–1707 Mass. Bay Province Laws, ch. 6, § 2)); *id.* (“Rhode Island also originally exempted the professors of Brown University from local property taxation.” (citing Chauncey Belknap, *The Federal Income Tax Exemption of Charitable Organizations: Its History and Underlying Policy*, in *Research Papers Sponsored by the Commission on Private Philanthropy and Public Needs* 2025, 2029 (U.S. Dep’t of the Treasury ed., 1977))).

⁵⁴ Warren, Jr. et al., *supra* note 20, at 190.

⁵⁵ Thomas A. Kelley & Christopher B. McLaughlin, *North Carolina’s Nonprofit Property Tax Exemption Conundrum*, 96 *N.C. L. REV.* 1769, 1776 (2018).

cut grants to cities.⁵⁶ In response, local governments looked to nonprofits, at first hospitals, as a source of revenue.⁵⁷ Lawmakers argued that nonprofit hospitals had grown so large and commercial that they were no different from taxable, for-profit hospitals.⁵⁸ This led to a flurry of challenges to their, and later universities', property tax exemptions.⁵⁹ For the most part, though, the exemptions got by unscathed.⁶⁰

After a *détente*, the exemption battle reemerged following the Great Recession, when local governments again looked to nonprofits to prop up municipal treasuries.⁶¹ In 2008, at the federal level, Senator Chuck Grassley sought tuition, financial aid, and endowment data from 136 wealthy universities.⁶² This effort led to the first-ever university endowment tax in President Donald Trump's 2017 Tax Cuts and Jobs Act.⁶³ At the state level, in 2016, the Connecticut General Assembly considered a bill that would have narrowed Yale's property tax exemptions.⁶⁴ It didn't pass.⁶⁵ In 2023, New York State legislators introduced a bill to repeal NYU's and Columbia's property tax

⁵⁶ JULIE M. LAWHORN, CONG. RSCH. SERV., R40638, *FEDERAL GRANTS TO STATE AND LOCAL GOVERNMENTS* 11 (2019) (“[A]t the urging of President Ronald Reagan in 1981, Congress approved the largest reduction in the number of federal grants to state and local governments in American history”); ANNIKA MARLEN HINZE & DENNIS R. JUDD, *CITY POLITICS* 374 (11th ed. 2023) (“[F]ederal aid to municipalities peaked at 10 percent of cities’ own-source revenue in 1979 and then dropped like a stone. President Reagan ended the special relationship that had been forged between the federal government and cities”); Quigley, *supra* note 29, at 277 (“In 2007, local governments received roughly half the amount of federal aid they did in 1977.”).

⁵⁷ Kelley & McLaughlin, *supra* note 55, at 1779.

⁵⁸ *Id.*

⁵⁹ *Id.* at 1779–80.

⁶⁰ *Id.* at 1779 n.53.

⁶¹ Marie-Claire Hart, *Protecting the Texas Nonprofit Property Tax Exemption: The Unintended Absence of a Nonproducing Mineral Exemption and Its Consequences*, 1 TEX. A&M J. PROP. L. 219, 221 (2013) (“The [2007–2008] fiscal crisis has driven a reexamination of nonprofit property tax exemptions at the local level.”); Stephanie Strom, *Tax Exemptions of Charities Face New Challenges*, N.Y. TIMES, May 26, 2008, at A1 (“Authorities from the local tax assessor to members of Congress are increasingly challenging the tax-exempt status of nonprofit institutions—ranging from small group homes to wealthy universities—questioning whether they deserve special treatment.”).

⁶² Doug Lederman, *Senators Scrutinize Well-Endowed Colleges*, INSIDE HIGHER ED (Jan. 25, 2008), <https://www.insidehighered.com/news/2008/01/25/senators-scrutinize-well-endowed-colleges> [<https://perma.cc/6TH5-KHRJ>].

⁶³ Andrew Kreighbaum, *Taking on the College Endowment Tax*, INSIDE HIGHER ED (May 30, 2018), <https://www.insidehighered.com/news/2018/05/31/gop-lawmaker-and-former-community-college-leader-weighs-endowment-tax> [<https://perma.cc/ENM8-7MHR>].

⁶⁴ Vidya Kauri, *Yale to Fight Conn. Proposal to Revoke Tax-Exempt Status*, LAW360 (Mar. 24, 2016, 2:48 PM), <https://www.law360.com/articles/775756/yale-to-fight-conn-proposal-to-revoke-tax-exempt-status> [<https://perma.cc/29AZ-XUVJ>].

⁶⁵ Davarian L. Baldwin, *When Universities Swallow Cities*, CHRON. OF HIGHER EDUC. (July 30, 2017), <https://www.chronicle.com/article/when-universities-swallow-cities> [<https://perma.cc/A89G-5VYE>].

exemption and funnel the new revenue to the City University of New York (CUNY).⁶⁶ The New York bill's fate is unclear.⁶⁷ What is clear is that policymakers across the country are starting to question the theories behind the exemption and ask whether the juice is really worth the squeeze. The next Part examines those theories.

III

THREE THEORIES FOR THE EXEMPTION

Courts largely rely on three theories to uphold property tax exemptions for universities: (A) the “Quid-Pro-Quo” theory, (B) the “Sovereignty” theory, and (C) what I call the “Oxbridge” theory. But as we’ll see, none explain the dormitory property tax exemption on all fours.

A. *The Quid-Pro-Quo Theory*

The oldest⁶⁸ and most widely accepted⁶⁹ justification for the property tax exemption is the quid-pro-quo theory. Property tax exemptions are justified, the theory goes, when one provides a service “that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community.”⁷⁰ The theory has its roots in British history. Where the Queen couldn’t, for example,

⁶⁶ Matthew Haag & Meredith Kolodner, *Columbia and N.Y.U. Would Lose \$327 Million in Tax Breaks Under Proposal*, N.Y. TIMES (Dec. 10, 2023, 3:01 AM), <https://www.nytimes.com/2023/12/10/nyregion/columbia-nyu-property-tax-exemptions-legislation.html> [https://perma.cc/Y9GZ-G3T7].

⁶⁷ Chang, *supra* note 34 (discussing the New York bill’s odds of passing).

⁶⁸ Colombo, *supra* note 44, at 862.

⁶⁹ *Developments in the Law—Nonprofit Corporations*, 105 HARV. L. REV. 1578, 1620 (1992).

⁷⁰ *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 687 (1970); *see Tyler v. Hennepin Cnty.* 598 U.S. 631, 637 (2023) (“[Property] taxes . . . are a mandated ‘contribution from individuals . . . for the support of the government . . . for which they receive compensation in the protection which government affords.’” (quoting *Mobile Cnty. v. Kimball*, 102 U.S. 691, 703 (1881))); *Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983) (“Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.”); REP. OF THE COMM’N ON PRIV. PHILANTHROPY AND PUB. NEEDS, *GIVING IN AMERICA* 103 (1975) (“A frequently cited justification for tax immunities that affect nonprofit organizations is that government, in fact, would itself have to supply many of the services, fill many of the functions, of such organizations if they did not exist.”); H.R. REP. NO. 1860 (1938), *as reprinted in* J. S. SEIDMAN, *SEIDMAN’S LEGISLATIVE HISTORY OF FEDERAL INCOME TAX LAWS* 17 (2003) (“The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds . . .”).

build a bridge, the person who built and paid for one was given a tax break.⁷¹ Similarly, cities subsidize the building and maintenance of dorms through property tax exemptions because if they didn't, the government would have to build and maintain them.⁷² But the quid-pro-quo theory suffers from at least four weaknesses: (1) The theory is too broad, (2) its assumption that the exemption's benefits outweigh its costs is unproven, (3) the distribution of these costs and benefits can be uneven, and (4) the theory can't explain exemptions for public universities.

First, the quid-pro-quo theory proves too much. Even if the government were forced to step in and create universities in the absence of private ones, it doesn't follow that it would build housing too.⁷³ Indeed, the first public universities diverted money from housing and expected students to commute.⁷⁴ And, given the First Amendment's Establishment Clause,⁷⁵ the quid-pro-quo theory doesn't work for dorms at religiously-affiliated schools like Notre Dame or Yeshiva.⁷⁶ That is, it can't be that without a property tax exemption, the

⁷¹ H. Woods Bowman, *Reexamining the Property Tax Exemption*, LAND LINES (Lincoln Inst. of Land Pol'y, Cambridge, Mass.), July 2003, at 5 (“[T]he first charitable exemptions were a type of quasi-government exemption, subsidizing private parties who discharged public responsibilities.”).

⁷² See *People ex rel. Clarkson Mem'l Coll. of Tech. v. Haggett*, 77 N.Y.S.2d 182, 185 (Sup. Ct. 1948) (“[S]chool and college properties may be said to receive their rights of tax exemption . . . as a quid pro quo for the assumption of a portion of the function of the state.”).

⁷³ See Robert A. Lenga, *Exemption from Taxation of Residences Owned by Charitable, Religious, and Educational Institutions in Ohio*, 14 W. RESV. L. REV. 549, 558 (1963) (“[S]tate-supported schools do not provide residences for their faculty, and thus it cannot be said that private schools which provide such residences are relieving any of the financial burden of the state.”).

⁷⁴ W. H. Cowley, *The History of Student Residential Housing* (pts. 1–2), 40 SCH. & SOC'Y 705, 711 (1934), https://dn720001.ca.archive.org/0/items/sim_usa-today_1934-12-01_40_1040/sim_usa-today_1934-12-01_40_1040.pdf [<https://perma.cc/U8WS-2MQW>] (“The German point of view, in fact, ruled, and as it grew in popularity dormitories were frowned upon, occasionally abolished, and seldom built at state universities. . . . If [students] could live at home while attending college, so much the better.”). Today, some eighty-five percent of university students commute to school. Barbara Jacoby, *What About the Other 85 Percent?*, INSIDE HIGHER ED (July 22, 2020), <https://www.insidehighered.com/views/2020/07/23/colleges-should-be-planning-more-intentionally-students-who-commute-campus-fall> [<https://perma.cc/JFS6-A523>].

⁷⁵ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion.”).

⁷⁶ See Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 403–04 n.23 (1997) (“[The quid-pro-quo] theory cannot account for a large and historically significant segment of the charitable sector, churches, and other religious organizations, without running afoul of the Establishment Clause of the First Amendment.”); *City of Louisville v. Presbyterian Orphans Home Soc'y*, 186 S.W.2d 194, 199 (Ky. 1945) (“Religious societies, unlike charitable and educational institutions, do not perform any function which relieves the taxpayers of a portion of their burden.”).

government would build and maintain religiously-affiliated university housing.⁷⁷ Nor does the theory account for profit-seeking schools—like most trade schools—that also relieve the government of a burden yet pay property taxes.⁷⁸

Second, it's unclear whether the government's "quid" is ever equal to the university's "quo." No court has measured the exemption's costs with its benefits.⁷⁹ How could it? What would count as a "cost" or a "benefit"?⁸⁰ In any case, local assessors generally don't assess properties that won't be taxed.⁸¹ When they do, their assessments can be inaccurate.⁸² Even if assessors assessed university housing *and* did so

⁷⁷ See Lenga, *supra* note 73, at 558 ("[I]t is difficult . . . to justify granting exemptions for residences occupied by theological students, for clearly the state would never provide theological schools, let alone residences for their students.").

⁷⁸ Ginsberg, *supra* note 25, at 329 ("If relief of a public fiscal burden were the sole criterion of exempt status for educational institutions, it would be irrelevant whether private educational institutions operated for profit. A private . . . school relieves the public of a burden by educating at private expense, whether it is a profit or nonprofit organization."); see Melanie Hanson, *College Enrollment & Student Demographic Statistics*, EDUC. DATA INITIATIVE (Jan. 10, 2024), <https://educationdata.org/college-enrollment-statistics> [<https://perma.cc/76VW-G9BK>] ("Among the . . . students who attend private institutions, 80.3% attend nonprofit schools while 19.6% attend for-profit institutions.").

⁷⁹ Evelyn Brody, *Legal Theories of Tax Exemption*, in PROPERTY-TAX EXEMPTION FOR CHARITIES 145, 149 (Evelyn Brody ed., 2002); see Am. Ass'n for Lost Child., Inc. v. Westmoreland Cnty. Bd. of Assessment Appeals, 977 A.2d 595, 601 (Pa. Commw. Ct. 2009) (Jubelirer, J., dissenting) ("I would suggest that requiring a reviewing body to look at the exact amounts of money that a taxpayer's efforts saved the government is an approach that few, if any, taxpayers will, or can, ever succeed at.").

⁸⁰ See 14 YALE ALUMNI WKLY. 696, 696 (1905) ("If the University buys a piece of land, pulls down old and unsightly dwellings and replaces them by new . . . structures of high cost—with an incidental lift of adjacent realty values—should her 'exemption' be rated by what she has created rather than by what she originally subtracted?").

⁸¹ Ginsberg, *supra* note 25, at 301–02 n.33 ("Such inaccuracies [in the value of exempt property] are attributed to the lack of incentive on the part of the local assessors to devote their energies to the appraisal of properties that generate no revenue."); Dick Netzer, *Property Tax Exemptions and Their Effects: A Dissenting View*, 65 PROC. ANN. CONF. ON TAX'N UNDER AUSPICES NAT'L TAX ASS'N 268, 271 (1972) ("[A]ssessors would be derelict in their duties if they wasted time trying to value precisely wholly tax-exempt properties, for their job is to apportion tax liability among taxpayers, not to engage in wholly academic exercises . . .").

⁸² See Joan M. Youngman, *The Politics of the Property-Tax Debates*, in PROPERTY-TAX EXEMPTION FOR CHARITIES, *supra* note 79, at 3, 27 (arguing that property tax assessments for nonprofits are inflated because "[s]ome jurisdictions' debt limits are based on property value, including the value of tax-exempt property"); *Alternatives to the University Property Tax Exemption*, *supra* note 17, at 192 ("Calculating the hypothetical tax bill according to property valuations will produce a figure higher than the university would have paid if it had never been exempt and it thus overstates the revenue loss attributable to the property tax exemption." (footnotes omitted)). But see LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, *LOCAL GOVERNMENT LAW* 594 (6th ed. 2022) ("One can compare [the market value of] dormitories to apartment buildings, despite their differences.").

accurately, the size of the exemption would just reflect the property's market value, not how much it "benefits" its host city.⁸³

Third, the quid-pro-quo theory is silent on the uneven distribution of the exemption's benefits and burdens. The exemption is paid for by locals, but many of its benefits are realized by those living outside the city and state.⁸⁴ At Yale, for example, New Haven subsidizes the housing of all students who live in the school's dorms through property tax exemptions.⁸⁵ But for the class of 2027, only seventeen students, or a hundredth of one percent, were from New Haven,⁸⁶ and for the class of 2026, only six percent were from Connecticut.⁸⁷ It wasn't always this way. In the 1800s, thirty percent of Yalies were from Connecticut; in the 1700s, that number was eighty to ninety percent.⁸⁸ And while most students used to remain in Connecticut after graduation, only fifteen percent did in 2023.⁸⁹ In Professor Peter Hall's words, "over the course of the 19th century, as more students came from out of town and out of state, and were steadily less willing to stay in the state, the public

⁸³ Atkinson, *supra* note 76, at 407–08 (illustrating how market value is a poor proxy for the size of an exemption).

⁸⁴ See *Alternatives to the University Property Tax Exemption*, *supra* note 17, at 184 n.13 ("Efficient allocation of public goods requires that the political unit be coterminous with the tax base and the welfare area."); BAKER ET AL., *supra* note 82, at 55 ("The governmental entity responsible for solving the problems of market failure should be the one whose boundaries are most consonant with the spatial benefits and burdens that are the source of any misallocation that would otherwise occur."). But see *Alternatives to the University Property Tax Exemption*, *supra* note 17, at 183 n.8 ("[T]he federal government indirectly supports cities that host educational institutions, since students are included in the population of that city for revenue sharing purposes. 31 U.S.C. § 1228 (Supp. II 1972)."). One could imagine a system in which property tax exemptions are enjoyed only by students from that state, like in-/out-of-state tuition at state schools. But the United States Supreme Court shot that idea down in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*. See 520 U.S. 564, 568, 588 (1997) (holding unconstitutional a Maine statute that exempted nonprofit camps only if they primarily served Maine residents).

⁸⁵ Fricke, *supra* note 40, at 1132 ("In economic terms, a tax exemption is equivalent to a government subsidy."); CONN. GEN. STAT. § 1281(8) (exempting Yale from property taxes).

⁸⁶ Eric Gershon, *New at Yale (But Not to New Haven): A Rising Number of New Haven Public School Students Are Coming to Yale for College*, YALE NEWS (Aug. 10, 2023), <https://news.yale.edu/2023/08/10/new-yale-not-new-haven> [<https://perma.cc/RS7R-XXKR>].

⁸⁷ *First Year Students by Geographic Origin*, YALE UNIV.: OFF. OF INSTITUTIONAL RSCH., <https://oir.yale.edu/data-browser/student-data/admissions/first-year-students-geographic-origin-w026> [<https://perma.cc/9X53-V7ZH>].

⁸⁸ Peter Dobkin Hall, *Is Tax Exemption Intrinsic or Contingent?*, in PROPERTY-TAX EXEMPTION FOR CHARITIES, *supra* note 79, at 253, 261.

⁸⁹ *Yale College First Destinations*, YALE UNIV.: OFF. OF CAREER STRATEGY, <https://ocs.yale.edu/outcomes> [<https://perma.cc/U3E4-6N5E>]; see also Hacıbey Catalbasoglu, *Stay in New Haven*, YALE DAILY NEWS (Jan. 24, 2019, 4:25 AM), <https://yaledailynews.com/blog/2019/01/25/catalbasoglu-stay-in-new-haven> [<https://perma.cc/EPX4-V933>] (urging Yalies to stay in New Haven post-graduation).

extending the tax subsidy was increasingly less likely to be the public benefiting from it.”⁹⁰ The exemption can also be inequitable among students. If, for example, it’s more expensive to live in one of Yale’s residential colleges than off-campus—Professor Carla Yanni suggests that it is⁹¹—the students benefitting from the property tax exemption would be those living in the more expensive, on-campus housing, that is, those who need the exemption the least.

Finally, the quid-pro-quo theory can’t explain the exemption for public universities. In defense of property tax exemptions for state schools, some argue that to charge property taxes on public universities would be “an inefficient, empty ceremony that passed money from one government pocket to the other.”⁹² But that analogy doesn’t work. The property tax exemption is mandated by the *state* government, while the party that forfeits tax revenue is the *local* government.⁹³ A better analogy would be to say, for example, that taxing the University of

⁹⁰ Hall, *supra* note 88, at 261; Hilke & Jain, *supra* note 39, at 103 (“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.”); *see also* Rudnick, *supra* note 20, at 337 n.79 (“[I]n Bridgeport, Connecticut in 1973, . . . two-thirds of the students of the universities lived outside [the city].”); Matthew Haag & Meredith Kolodner, *The Untouchables: How Columbia and N.Y.U. Benefit from Huge Tax Breaks*, N.Y. TIMES (Sept. 26, 2023, 7:54 AM), <https://www.nytimes.com/2023/09/26/nyregion/columbia-university-property-tax-nyc.html> [<https://perma.cc/XZ3D-MJMJ>] (“If New York is such an asset to [Columbia University], . . . then it makes sense to make sure that New York students are represented in a real capacity in the student body.”).

⁹¹ CARLA YANNI, *LIVING ON CAMPUS* 31 (2019) (“The cost of living in a dormitory (whether or not it has the most up-to-date amenities) is greater than the cost of living at home.”); *cf.* Liam Hibbert, *Students Find Dorm Living More Expensive Than Apartments, Despite Added Costs*, WASH. SQUARE NEWS (Feb. 27, 2023), <https://nyunews.com/news/2023/02/27/nyu-campus-housing-costs-nyc-rents> [<https://perma.cc/PW29-NK3J>] (“As the [NYU] housing application for the coming academic year opens, and students make the decision between staying on campus and venturing out into the New York City real estate market, many are opting for apartment living to save money.”). *But cf.* ELIZABETH MILLS BROWN, *NEW HAVEN* 66 (1976) (“In the latter part of the 19th century it became the fashion, at Yale as at Harvard, for well-healed students to live off campus.”); BROOKS MATHER KELLEY, *YALE* 309 (1974) (“[A]s New Haven grew, wealth increased, the student body changed, and private dormitories for the wealthier undergraduates began to appear.”).

⁹² Quigley, *supra* note 29, at 276; *see* Albert S. Abel, *Public and Public Welfare Property Tax Exemption in West Virginia*, 55 W. VA. L. REV. 171, 175 (1953) (“To tax the state’s own property or that of its subordinate divisions pretty much involves simply a wasteful transfer from one civic pocket to another.”); Bowman, *supra* note 71 (“Government-owned property traditionally has been exempt from taxation in order to avoid an empty ritual whereby the sovereign taxed itself.”). *But see* FRANK W. BLACKMAR, *THE HISTORY OF FEDERAL AND STATE AID TO HIGHER EDUCATION IN THE UNITED STATES* 28 (1890) (“[I]t is frequently said that . . . to tax [‘the State university’] would be the same as if an individual were to pass money from one hand to the other; but this is not generally true. . . . In most cases a large percentage of property came from other sources than from the pockets of the people through taxation.”).

⁹³ *See supra* Part I.

Connecticut's dorms in Stamford would be like taking money from Connecticut Governor Ned Lamont's pocket and putting it in Stamford Mayor Caroline Simmons's.

B. *The Sovereignty Theory*

The next, and to some “most compelling,”⁹⁴ justification for the nonprofit property tax exemption is the sovereignty theory.⁹⁵ States can't tax people or institutions over which they have no sovereignty, the idea goes.⁹⁶ The theory was first used to justify exemptions for churches.⁹⁷ Over the years, as secular nonprofits stepped into the fray once filled by religious institutions, the theory was grafted onto the nonprofits too.⁹⁸ But this theory also fails: (1) Universities, unlike churches, are so pervasively regulated that they can't be thought of as “sovereign,” and (2) the sovereignty theory can't explain why dorms, as opposed to other university property, should be tax-exempt.

First, while the sovereignty theory might work for churches, it doesn't for universities. Universities, unlike churches, are pervasively regulated by their states. For example, states have plenary power over school incorporation and licensure.⁹⁹ But no such power exists

⁹⁴ Fricke, *supra* note 40, at 1152.

⁹⁵ See generally Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998) (introducing the sovereignty theory).

⁹⁶ Glenn Goodwin, Note, *Would Caesar Tax God? The Constitutionality of Government Taxation of Churches*, 35 DRAKE L. REV. 383, 391 (1985–86); see Reece Barker, *A Memorial and Remonstrance Against Taxation of Churches*, 47 BYU L. REV. 1001, 1020 (2022) (“Because the state has no authority over churches’ internal governance, it has no authority over church income and property. And if the state had such authority, it would be dangerous to both religious and civil liberties.”).

⁹⁷ See Claude W. Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 411, 416 (1934) (“Church property . . . was exempted under the doctrine that it ceased to be under human control when it was devoted to God.”); Brody, *supra* note 95, at 586 (“Charities go untaxed because Caesar should not tax God (or the modern secular equivalent).”); *Walz v. Tax Comm’n of N.Y.C.*, 397 U.S. 664, 674 (1970) (“Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.”).

⁹⁸ See Brody, *supra* note 95, at 588 (“[W]hen charity became secularized in Tudor England, and privately organized philanthropy complemented public poor relief, no one bothered to make fine distinctions between the work of the state and the work of charity.”); Stimson, *supra* note 97, at 418 (“The schools, at first as a part of the churches, and later as public institutions, were not taxed. The gradual secularization of schools, completed by the middle of the nineteenth century, called for no change in taxation policy.”).

⁹⁹ KAPLIN ET AL., *supra* note 40, at 30 (“[States] have general police powers under which they charter and license private higher educational institutions and recognize their authority to grant degrees.”); see *Shelton Coll. v. Bd. of Educ.*, 226 A.2d 612, 618 (N.J. 1967) (“The privilege of granting degrees is very intimately related to the public welfare, and is unquestionably subject to regulation by the State.” (quoting EDWARD C. ELLIOT & M. M.

over churches. And churches, unlike universities, are protected by federal statutes and the Constitution. For example, the Religious Land Use and Institutionalized Persons Act protects churches from burdensome but otherwise lawful land use regulations.¹⁰⁰ And the Civil Rights Act, which bans discriminatory hiring, exempts churches.¹⁰¹ Constitutionally, laws that burden one's sincere religious practices are generally subject to heightened judicial scrutiny.¹⁰² In other words, the statutory and constitutional protections afforded to churches and their sovereignty don't extend to universities. Peter Salovey is not Pope Francis.¹⁰³

Second, even if the sovereignty theory explains why universities should be tax-exempt in general, it doesn't explain the exemption for their housing in particular. Surely not every ownership of property by a university is an act of its sovereignty that should be exempt from taxes. Indeed, it's accepted that some properties, like commercial projects wholly unrelated to education, aren't exempt.¹⁰⁴ Perhaps only activities that are central to a university's mission are an exercise of its sovereignty. But even then, housing alone is hardly such an activity.¹⁰⁵

CHAMBERS, THE COLLEGES AND THE COURTS 200 (1936))). In New York, the State Board of Regents "incorporates independent, not-for-profit colleges and universities by issuing a charter." *Program Registration Guidance Documents*, N.Y. EDUC. DEP'T, <https://www.nysed.gov/college-university-evaluation/proposals-requiring-charter-amendment-or-amendment-certificate> [<https://perma.cc/84BB-N3XP>]; see N.Y. EDUC. LAW § 224(1)(a) (McKinney 2021) ("No individual, association, partnership or corporation not holding university, college or other degree conferring powers by special charter from the legislature . . . shall confer any degree . . . , unless the right to do so shall have been granted by the regents in writing under their seal.").

¹⁰⁰ 42 U.S.C. § 2000cc(a)(1).

¹⁰¹ *Id.* § 2000e-1(a).

¹⁰² *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022).

¹⁰³ Peter Salovey is Yale's twenty-third president. Jane Darby Menton & Julia Zorthian, *Salovey Named Next Yale President*, YALE DAILY NEWS (Nov. 9, 2012, 5:25 AM), <https://yaledailynews.com/blog/2012/11/09/salovey-named-next-yale-president> [<https://perma.cc/HC4S-S7NL>]. Pope Francis is the Catholic Church's 266th pope. Rachel Donadio, *Cardinals Pick Bergoglio, Who Will Be Pope Francis*, N.Y. TIMES (Mar. 12, 2013), <https://archive.nytimes.com/www.nytimes.com/2013/03/14/world/europe/cardinals-elect-new-pope.html> [<https://perma.cc/6UQB-9ZXP>].

¹⁰⁴ See, e.g., *Yale Decries Tax Bill as Unconstitutional*, YALE NEWS (Apr. 11, 2016), <https://news.yale.edu/2016/04/11/yale-decries-tax-bill-unconstitutional> [<https://perma.cc/WY4P-WKDE>] ("Yale currently pays \$4.5 million in property taxes annually on its commercial, nonacademic properties, such as the stores on Broadway."); Chris McLaughlin, *Income Tax Exemptions vs. Property Tax Exemptions*, UNC SCH. OF GOV'T: COATES' CANONS NC LOC. GOV'T L. (July 28, 2023), <https://canons.sog.unc.edu/income-tax-exemptions-vs-property-tax-exemptions> [<https://perma.cc/3NVD-WA2X>] (noting that while Duke's dorms, classrooms, and Cameron Indoor Stadium are property tax-exempt, its luxury hotel, the Washington Duke Inn, isn't since it's used for commercial, not educational, purposes).

¹⁰⁵ See Lenga, *supra* note 73, at 553 ("Furnishing low-rent housing to the institution's personnel is clearly not in itself using property 'exclusively for charitable purposes.'");

The theory is also hard to apply among different kinds of schools: How is a for-profit university's housing, which is taxed, any less "sovereign" than a nonprofit university's, which is not?¹⁰⁶

C. *The Oxbridge Theory*

Finally, lots of courts skip the academic debates and uphold property tax exemptions for university housing under what I call the "Oxbridge" theory. Here's the idea: Dorms are like classrooms; classrooms have always been tax-exempt; therefore, dorms should also be tax-exempt. The theory has its roots in the seminal¹⁰⁷ 1899 case of *Yale University v. Town of New Haven*.¹⁰⁸ The Connecticut Supreme Court, relying mostly on the history of student housing at Oxford and Cambridge,¹⁰⁹ ruled that Yale's dorms were tax-exempt.¹¹⁰ Over a century later, courts across the country uphold university property tax exemptions based on the *Yale* case.¹¹¹ But this theory's main weakness is that the role of student housing has evolved since medieval Oxford and Cambridge. So while the *Yale* court's historical reasoning may have held water in 1899, much of it has since evaporated.

cf. *Page v. City of Fernandina Beach*, 714 So. 2d 1070, 1077 (Fla. Dist. Ct. App. 1998) ("[O]perating a marina partakes of no aspect of sovereignty and does not warrant an exemption for a marina leased to a nongovernmental operator seeking profits.").

¹⁰⁶ Fricke, *supra* note 40, at 1152.

¹⁰⁷ See *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, *supra* note 18, at 296 n.74 ("The leading case [on 'school dormitory facilities'] is *Yale Univ. v. New Haven*."); *Judicial Restoration of the General Property Tax Base*, *supra* note 25, at 1085 (attributing the American tax exemption for university housing to "the authority of the famous *Yale University* case"); *Webb Acad. v. City of Grand Rapids*, 177 N.W. 290, 296 (Mich. 1920) (describing the *Yale* case as "an exhaustive and carefully considered case, dealing thoroughly with the subject, historically and otherwise"); *Church Divinity Sch. v. Alameda Cnty.*, 314 P.2d 209, 212 (Cal. Dist. Ct. App. 1957) ("The best definition [of 'college'] is found in the case of *Yale University v. Town of New Haven*.").

¹⁰⁸ 42 A. 87 (Conn. 1899).

¹⁰⁹ Hence the "Oxbridge" in "Oxbridge theory." See *Oxbridge*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/Oxbridge> [<https://perma.cc/F6U2-NKG9>] ("[O]f, relating to, or characteristic of Oxford and Cambridge Universities.").

¹¹⁰ *Yale Univ.*, 42 A. at 87; see also BLACKMAR, *supra* note 92, at 336 ("Our modern college has sprung from the mediæval college through the 'great schools' of England."); E. Tammy Kim, *How the Yale Unions Took Over New Haven*, NEW YORKER (Oct. 23, 2023), <https://www.newyorker.com/news/dispatch/how-the-yale-unions-took-over-new-haven> [<https://perma.cc/PXK2-98RU>] ("[T]he U.S. imported many aspects of the physically and socially cloistered British university system.").

¹¹¹ See, e.g., *Conn. Coll. v. City of New London*, No. 040569617, 2006 WL 1828256 (Conn. Super. Ct. June 13, 2006) (athletic stadium); *City of Chicago v. Univ. of Chicago*, 81 N.E. 1138 (Ill. 1907) (dorms, dining hall, and club house); *President, etc., of Harvard Coll. v. Assessors of Cambridge*, 55 N.E. 844 (Mass. 1900) (student, staff, and university president housing); *Princeton Twp. v. Inst. for Advanced Study*, 157 A.2d 136 (N.J. Super. Ct. App. Div. 1960) (Institute director's residence); *Pratt Inst. v. Boyland*, 16 Misc. 2d 58 (N.Y. Sup. Ct. 1958) (housing for staff and faculty, including two residences for retired faculty).

In 1895, for the first time, New Haven taxed Yale's dorms.¹¹² The statute at issue exempted "buildings or portions of buildings exclusively occupied as colleges."¹¹³ The question for the court was whether Yale's dorms fell within this "colleges" exception. Despite the statute's silence as to housing, the court found they did.¹¹⁴ In so doing, the unanimous court "by exhaustive historical argument proved that eating and sleeping have been part of the Anglo-Saxon educational process."¹¹⁵

The word "college," the court explained, for 800 years meant a residence for students. At Oxford, since the 1200s, "instruction and discipline of the university were through the colleges," each with its own chapel, dining hall, and housing for students and faculty.¹¹⁶ Students had to live on campus, among their peers and professors, such that the line between dorm room and classroom was blurred. To "go to college" meant to learn *and* live in college.¹¹⁷

Tying learning to lodging continued into colonial America.¹¹⁸ In 1650, when the Massachusetts legislature chartered Harvard College, it also required all students, mostly just thirteen or fourteen years old,¹¹⁹ to live on campus.¹²⁰ The university's first governing board wrote: "It is

¹¹² *Yale Univ.*, 42 A. at 88.

¹¹³ *Id.*

¹¹⁴ G. E. B., 8 YALE L.J. 207, 207 (1899).

¹¹⁵ *Judicial Restoration of the General Property Tax Base*, *supra* note 25, at 1085.

¹¹⁶ *Yale Univ.*, 42 A. at 89. Before Oxford offered its students housing, they would board with townfolk. Cowley, *supra* note 74, at 705–06. In *The Miller's Tale*, of Geoffrey Chaucer's classic *The Canterbury Tales*, Nicholas, a student at Oxford, lives in a townsman's home. GEOFFREY CHAUCER, *THE CANTERBURY TALES* 83 (David Wright trans., Oxford Univ. Press 2011).

¹¹⁷ *Yale Univ.*, 42 A. at 89 ("The term 'college' was taken to mean a place of residence for the university student, who would there find himself under the guidance and instructions of superiors and tutors, bound to attend to his personal interest, moral and intellectual."); *cf.* Michael C. Dorf, *God and Man in the Yale Dormitories*, 84 VA. L. REV. 843, 854 (1998) ("The Yale College Administration believes that students learn as much or more from one another in their dormitories as they do from their professors in class."); Samuel G. Freedman, *Yeshivish at Yale*, N.Y. TIMES MAG., May 24, 1998, at 32, 34 (quoting Yale President Richard Levin, who once said: "[W]e believe the undergraduate experience is more than just the classroom").

¹¹⁸ Charles F. Frederiksen, *A Brief History of Collegiate Housing*, in *STUDENT HOUSING AND RESIDENTIAL LIFE* 168 (Roger B. Winston, Jr., Scott Anchors & Associates eds., 1993) ("The English pattern of the residence unit being the center of both informal and formal education became the organizational standard of the American College."); CHARLES C. SCHROEDER & PHYLLIS MABLE, *REALIZING THE EDUCATIONAL POTENTIAL OF RESIDENCE HALLS* 6 (Theodore J. Marchese ed., 1994) ("Distinctions between inclass and outofclass learning and activities were not apparent, and faculty members viewed themselves as responsible for the total education of the student."). Except for the College of William & Mary, all the founders of the colonial colleges graduated from English universities or American colleges founded by English settlers. Cowley, *supra* note 74, at 708.

¹¹⁹ Cowley, *supra* note 74, at 708.

¹²⁰ *Yale Univ.*, 42 A. at 89.

wel known . . . what advantage to Learning accrue's by the multitude of persons cohabitating for Scholasticall communion, whereby to actuate the minds of one another, and other waies to promote the ends of a Colledge-Society."¹²¹ So, the 1899 Connecticut Supreme Court explained, dorms were inseparable from "colleges." And since "colleges" were always tax-exempt, it followed that dorms should be too. But the history of university housing didn't end in 1899.

Between the Civil War and about 1900, with the Industrial Revolution in full swing, Americans flocked overseas to the more technically advanced German universities and brought back the German-style dormitory.¹²² German universities were different from those in England and the United States. For one, they were concentrated in cities,¹²³ not the countryside.¹²⁴ For another, they spent their money on research and professors' salaries,¹²⁵ not on frivolities like extracurriculars or student housing.¹²⁶ When the University of Berlin was founded, for example, "no provisions were made for the housing of students . . . because the leading spirits in its founding preferred to put all their emphasis upon spreading the frontiers of knowledge."¹²⁷ So in the mid-to-late 1800s, influenced by the German

¹²¹ SAMUEL ELIOT MORISON, *HARVARD COLLEGE IN THE SEVENTEENTH CENTURY, PART I* 49 (1936); see FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY* 96 (1991) ("For the dormitory held young men to a common experience. It took them from the bosom of a sheltering home and placed them under the same roof, where they might share the experiences which made men of boys.").

¹²² CARL DIEHL, *AMERICANS AND GERMAN SCHOLARSHIP* 148 (1978) ("Virtually every one of the Americans who built the modern university system in the United States, and many of those who staffed the new institutions, studied in Germany."); see JURGEN HERBST, *THE GERMAN HISTORICAL SCHOOL IN AMERICAN SCHOLARSHIP* 8–10 (1965) (describing why Postbellum American students preferred German universities to those in the United States and elsewhere in Europe); see also J. Albin Yokie, *The Social Position of Residence Halls: Status Stratification Among a Selected Portion of College Students Within Two Types of Residential Systems* 3 (Aug. 1959) (M.S. thesis, Montana State College) (on file with author) ("[W]hile most of our earliest colleges and universities were originally actively committed to the residential philosophy, after the Civil War the influence of the German educational philosophy . . . led to a significant de-emphasis of residence halls . . ."). Stanford, founded in 1891, has a German motto: "Die Luft der Freiheit weht." Nick Burns, *What You Don't Know About the Stanford Seal*, *STAN. MAG.* (Mar. 2019), <https://stanfordmag.org/contents/what-you-don-t-know-about-the-stanford-seal> [<https://perma.cc/PR6D-CK8U>] (exploring the history of Stanford's seal and motto).

¹²³ PAUL VENABLE TURNER, *CAMPUS* 163 (1984).

¹²⁴ See *id.* at 18 (describing the "American tendency for colleges to be located on the frontier rather than in the cities").

¹²⁵ Cowley, *supra* note 74, at 711.

¹²⁶ GREGORY S. BLIMLING, *STUDENT LEARNING IN COLLEGE RESIDENCE HALLS* 5 (1994) ("The Germans abandoned the practice of housing students following the Protestant Reformation (1517–1648) because the facilities (Bursen) too closely resembled the monkish cloisters of Catholic monasteries, which were antithetical to the ideals of the Reformation.").

¹²⁷ Cowley, *supra* note 74, at 707.

model, dorms were seen as a liability.¹²⁸ And with the rapid growth of state universities in the West—especially after President Lincoln signed the Morrill Act of 1862, which donated federal land to each state for public universities¹²⁹—German anti-dorm sentiment was in full swing.¹³⁰ Dorms were “frowned upon, occasionally abolished, and seldom built”¹³¹

The path of the American dorm after the German period, from about 1900 onward, is harder to chart. Back on the East Coast, some students¹³² and administrators¹³³ yearned for the English collegiate experience. Elsewhere—with the help of government subsidies from programs like the Federal Emergency Administration of Public Works and later Title IV of the Housing Act—universities built inexpensive,

¹²⁸ See TURNER, *supra* note 123 (“Johns Hopkins University, founded in 1867 in Baltimore, and other institutions that followed it, adopted the German system faithfully, . . . rejecting most aspects of the collegiate tradition. These schools were generally in cities. They purposely provided no dormitories and took no official interest in their students’ extracurricular lives.”). Henry Philip Tappan, president of the University of Michigan, a school built on the German model, expressed his philosophy as follows: “The dormitory system . . . is objectionable in itself. By withdrawing young men from the influences of domestic circles, and separating them from the community, they are often led to contract evil habits, and are prone to fall into disorderly conduct. It is a mere remnant of the monkish cloisters of the middle ages, still retained in England, indeed, but banished from the universities of Germany.” HENRY S. FRIEZE, A MEMORIAL DISCOURSE ON THE LIFE AND SERVICES OF REV. HENRY PHILIP TAPPAN 35 (1882); see also Yokie, *supra* note 122, at 2 (“The University of Michigan was one of the leaders in the ‘German Movement’ in the United States and the impetus given by this institution was important to the spread of the German Ideology . . .”).

¹²⁹ 7 U.S.C. § 301 (“There is granted to the several States, for the purposes hereinafter mentioned in this subchapter, an amount of public land, to be apportioned to each State . . .”).

¹³⁰ Cowley, *supra* note 74, at 711.

¹³¹ *Id.*; ALEX DUKE, IMPORTING OXBRIDGE 42 (1996) (“Dormitories were expensive to build and maintain, and money was often needed for other projects. Many campuses, particularly in the Midwest and South, grew to depend on Greekletter societies to provide organized housing for students.”).

¹³² The editorial board of the University of Rochester student newspaper, for example, wrote that “[i]t seems to us that the greatest need of our university is that of dormitories, since without them we can never enjoy a decent supply of that delightful article, vaguely called *college spirit*.” JESSE LEONARD ROSENBERGER, ROCHESTER 188–89 (1927).

¹³³ John Milton Cooper, Jr., *Woodrow Wilson: The Academic Man*, 58 VA. Q. REV. 38, 47–48 (1982) (“[I]n June 1907 [Princeton (and later United States) President Woodrow Wilson] announced the institution of a novel plan for undergraduate living, in which students and faculty would reside together in ‘quadrangles,’ along the lines of Oxford and Cambridge colleges, and thereby extend the university’s intellectual life beyond the classroom.”). At Columbia University, where real estate for undergrad housing was scarce, the Board of Trustees approved a plan in 1896 to construct new dorms. *Dormitories at Columbia*, N.Y. EVENING POST, Nov. 21, 1896, at 2. Columbia College Dean Van Amringe celebrated the decision: “For a great many years the absence of such a system at Columbia has been deplored. Since the acquisition of the new site, there is, perhaps, no single matter connected with the college that has received more general attention and more hearty commendation” *Id.*

barrack-like dorms “to maximize the number of beds constructed for the dollars available, [but] with little or no regard for the quality of students’ educational experiences and personal development.”¹³⁴

Today, the American dorm is a medley of housing styles: Some universities proudly boast of their rustic residential colleges;¹³⁵ others lure prospective students with luxury apartments—rock-climbing walls and lazy rivers to boot;¹³⁶ others just offer bare-bones but affordable dorms. Unlike in the colonial era, when the English residential college was dominant, or in the 1800s, when they were an afterthought, today’s landscape is diverse and ever-evolving.¹³⁷ Yet the property tax exemption remains frozen.

So, the first issue with the *Yale* court’s Oxbridge theory—that dorm rooms are just like classrooms—is that the role of the American dormitory has evolved over the years. Yes, older schools like Harvard and Yale might still advertise their collegiate residential housing as places of learning and lodging, but many dorms elsewhere today serve no purpose distinct from ordinary, taxable housing. Second, dorms are no longer necessary for one’s education. While students in the 1800s had to travel long distances and were required to live on campus to go to college, most students today commute to school.¹³⁸ And there are more and more students who earn their degrees online, never stepping foot

¹³⁴ Frederiksen, *supra* note 118, at 172.

¹³⁵ See, e.g., *Residential Colleges*, *supra* note 7 (“Yale’s residential college system . . . is the cornerstone of Yale College’s mission to bring together and educate exceptionally promising students of all backgrounds.”); see also Stella, *7 Ways Yale is like Hogwarts*, YALE BULLDOGS’ BLOGS (Feb. 20, 2021), <https://admissions.yale.edu/bulldogs-blogs/stella/2021/02/20/7-ways-yale-hogwarts> [<https://perma.cc/VYK8-CPXK>] (comparing Yale’s Residential Colleges to Hogwarts Houses).

¹³⁶ Joe Pinsker, *Why Dorms Are So Nice Now*, ATLANTIC (Aug. 29, 2019), <https://www.theatlantic.com/education/archive/2019/08/college-dorms-fancy/597070> [<https://perma.cc/X3TY-QD5V>].

¹³⁷ Even NYU, a German research institution-style university, recently debuted its “Residential College at the Paulson Center.” *The Residential College*, NYU, <https://www.nyu.edu/students/student-information-and-resources/housing-and-dining/on-campus-living/the-on-campus-experience/the-residential-college.html> [<https://perma.cc/HZV8-FDPV>] (“The Residential College provides unique & exciting opportunities for residents to engage with one another and faculty and staff at the university to create a greater sense of connection and belonging.”); RUDOLPH, *supra* note 121, at 128–29 (“[NYU’s founders] were aware of the distinction between the scholarly foundations in Germany and the more leisurely collegiate order of things in England, and they favored the German orientation.”).

¹³⁸ Jacoby, *supra* note 74 (“Commuter students . . . make up more than 85 percent of today’s college students.”); see also Alice Park & Alayna Lee, *Off Campus Housing on the Rise*, YALE DAILY NEWS (Nov. 15, 2018, 2:13 AM), <https://yaledailynews.com/blog/2018/11/15/off-campus-housing-on-the-rise> [<https://perma.cc/HGE5-5RCP>] (“This year, over 40 percent of seniors are living off campus, leaving administrators scrambling for a solution as the center of campus continues to shift away from the residential colleges.”).

on campus, let alone a dorm.¹³⁹ Finally, students back then were much younger, so dorms naturally played a greater role in their intellectual and social development than today. This is all to say, while university housing may have served some pedagogical purpose in 1899, that's not necessarily true today.

Countless other theories try to justify tax exemptions for universities.¹⁴⁰ Yet none of them seem to explain the property exemption for dorms perfectly. But as Professor Harvey Dale put it: "The not-for-profit sector of our society is complex and varied; its lineage is ancient. It would be unreasonably simplistic to expect to capture its essence or justification within the compass of any theory."¹⁴¹ So, given that property tax exemptions are here to stay,¹⁴² what kinds of university housing should be exempt? All? Just some? The next Part examines how property tax exemptions work on the ground; the Part after that proposes an answer.

IV

PROPERTY TAX EXEMPTIONS IN PRACTICE

Every state exempts universities from property taxes.¹⁴³ Some grant the exemption through their constitutions, others through

¹³⁹ Genevieve Carlton, *2024 Online Learning Statistics*, FORBES: ADVISOR (Aug. 23, 2024, 10:31 AM), <https://www.forbes.com/advisor/education/online-colleges/online-learning-stats> [<https://perma.cc/G2VG-4RQB>] ("In 2012, 12.4% of college students enrolled fully online, while 13.1% took at least one online class. By 2019, [before the COVID-19 pandemic] the share of fully and partially online learners grew to 17.2% and 19.1%, respectively."); see, e.g., *Complete Your Degree at Northwestern*, Nw., <https://sps.northwestern.edu/part-time-undergraduate> [<https://perma.cc/2P7H-9NXN>] ("Earn your bachelor's degree online or on campus."); *An Online Law School Built for Working Adults*, PURDUE GLOB., <https://www.purduegloballawschool.edu> [<https://perma.cc/2FMG-VDAF>] ("The nation's first fully online law school.").

¹⁴⁰ There are too many to discuss in this Note. See, e.g., Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976) (income measurement theory); Henry B. Hansmann, *The Rationale for Exempting Nonprofit Organizations from the Corporate Income Taxation*, 91 YALE L.J. 54 (1981) (capital formation theory); John R. Cummins, *Real Property Tax Exemptions for Religious Institutions in Ohio: Bishop Ordains a Faulty Progeny*, 47 OHIO ST. L.J. 536 (1986) (power politic theory); Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990) (altruism theory); Mark A. Hall & John D. Colombo, *The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of the Tax Exemption*, 66 WASH. L. REV. 307 (1991) (donative theory); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419 (1998) (risk compensation theory).

¹⁴¹ Harvey P. Dale, *Rationales for Tax Exemption 2* (1998) (unpublished manuscript) (on file with author).

¹⁴² *Alternatives to the University Property Tax Exemption*, *supra* note 17, at 190.

¹⁴³ For a fifty-state survey on nonprofit property tax exemptions, constitutional and statutory, see Brody, *supra* note 28, at 671–732; for a different fifty-state survey on property

statutes, and others through the universities' incorporating charters.¹⁴⁴ Regardless of the source, for a university's property to be tax-exempt, it must generally: (A) own the property and (B) use it exclusively for educational purposes.

A. Ownership

Universities generally must own—not just lease or manage—their housing to get a property tax exemption. A case from Ohio helps illustrate this rule. In *Athens County Auditor v. Wilkins*, a private developer built an apartment across the street from a college, hoping to fill it with students.¹⁴⁵ The college didn't own the building but worked with the developer to build it.¹⁴⁶ Shortly after construction, the developer applied for a property tax exemption. But the Ohio Supreme Court shot it down. “[The developer] has no education-related mission,” the court explained.¹⁴⁷ “[I]t exists to earn a profit by renting temporary housing accommodations to students attending the college. [The exemption's purpose is] to reduce the tax burden on higher education facilities; not to shelter private property owners who build and maintain student housing near college campuses.”¹⁴⁸ Ultimately, though, given universities' financial incentive to own, rather than rent, their housing,¹⁴⁹ the “‘use’ and not ‘ownership’ [prong] will determine the right to the exemption.”¹⁵⁰

B. “Educational” Use

To get an exemption, states also generally require universities to use their property exclusively for “educational” purposes.¹⁵¹ Other than

tax exemptions for specific university properties, including bookstores, faculty housing, and stadiums, see GREATER HARTFORD CHAMBER OF COM., PROPERTY TAX EXEMPTIONS FOR NON-PROFIT INSTITUTIONS 70–96 (1978).

¹⁴⁴ See *Dartmouth Coll. v. Woodward*, 17 U.S. 518, 518 (1819) (holding Dartmouth College's state-granted charter was protected under the United States Constitution's Contracts Clause).

¹⁴⁵ 834 N.E.2d 804, 806 (Ohio 2005).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 807.

¹⁴⁸ *Id.*

¹⁴⁹ Evelyn Brody, *Introduction*, in PROPERTY-TAX EXEMPTION FOR CHARITIES, *supra* note 79, at i, xv (“[T]oday the property-tax exemption provides an unambiguous incentive to own rather than rent.”).

¹⁵⁰ Robert T. Bennett, *Real Property Tax Exemptions of Non-Profit Organizations*, 16 CLEV.MAR. L. REV. 150, 152 (1967). See, e.g., *Vanderbilt Univ. v. Tenn. State Bd. of Equalization*, No. M2014-01386-COA-R3-CV, 2015 WL 1870194, at *8 (Tenn. Ct. App. Apr. 22, 2015) (“Our Supreme Court has explained that ‘[t]he real test determinative of [an entity's] tax exempt status is the use it makes of the property.’”).

¹⁵¹ To the extent the educational use of a property is not “exclusive,” the majority rule is to exempt only the portion that is. See Byron C. Keeling, *Property Taxation of Colleges and*

ordinary undergrad dorms, which are virtually always tax-exempt,¹⁵² whether a particular university dwelling is “educational” varies.¹⁵³ To tease out what factors courts consider, it helps to examine challenges to different university properties. Below are cases involving housing for: (1) school presidents, (2) staff and faculty, and (3) fraternities.

1. *Presidents’ Housing*

In *Cook County Collector v. National College of Education*, an Illinois appellate court declined to exempt a college president’s house.¹⁵⁴ The court held that while the building was used for some school-related activities, its primary use was as a residence for the president and his family. No classes were held there, and access was by invitation only. Similarly, in *Knox College v. Board of Review*,¹⁵⁵ the Illinois Supreme Court held that the Knox College president’s house was not tax-exempt. The house was eleven blocks from campus and “not so closely connected with the work of the main institution as to distinguish it from any other home.”¹⁵⁶ It was also used merely as a dwelling for the president and his family, with no pedagogical purpose, and therefore fulfilled no “educational” use.¹⁵⁷

On the other hand, in *Appeal of University of Pittsburgh*, the Pennsylvania Supreme Court, looking to the unique role of modern university presidents, upheld an exemption for the University of Pittsburgh’s president’s home.¹⁵⁸ The court explained that “[t]he head of such an institution . . . represents to the public eye the ‘image’ of the institution,” and “[t]he residence of the head of a university or college necessarily renders a real function, tangibly and intangibly, in the life of the institution.”¹⁵⁹

Universities: The Dilemma Posed by the Use of Facilities for Purposes Unrelated to Education, 16 J.C. & U.L. 623, 625–30 (1990) (examining the “exclusive” prong of the “exclusive use” element); see also *supra* notes 21–25 and accompanying text (describing judicial enlargement of “exclusive”).

¹⁵² *Exemption of Educational, Philanthropic and Religious Institutions from State Real Property Taxes*, *supra* note 18, at 296 (“[Undergrad] dormitory facilities have almost always been thought to play a sufficiently significant role in the educational process to warrant the same preferential treatment given more vital facilities of the institution such as classrooms.”).

¹⁵³ See *Nat’l All. v. United States*, 710 F.2d 868, 873 (D.C. Cir. 1983) (“We recognize the inherently general nature of the term ‘educational’ and the wide range of meanings Congress may have intended to convey.”).

¹⁵⁴ 354 N.E.2d 507, 509 (Ill. App. Ct. 1976).

¹⁵⁵ 139 N.E. 56, 58 (Ill. 1923).

¹⁵⁶ *Id.* at 57–59.

¹⁵⁷ *Id.*

¹⁵⁸ 180 A.2d 760 (Pa. 1962).

¹⁵⁹ *Id.*

2. *Faculty and Staff Housing*

In *MacMurray College v. Wright*, the Illinois Supreme Court held that MacMurray College's faculty and staff housing was not used for educational purposes and denied the exemption.¹⁶⁰ The court stressed that none of the faculty or staff had to live on campus and that "the uses of the properties were [merely] residential and private."¹⁶¹

On the flip side, in *St. Paul's School v. City of Concord*, a case involving a private high school, the New Hampshire Supreme Court held that faculty, but not staff, housing was "educational" and tax-exempt.¹⁶² The faculty had to live on campus and served as "godparents" to the students, chaperoning after-school activities like dances and movies.¹⁶³ As a result, they had to limit their personal lives during the school year.¹⁶⁴ The court found that the point of the housing was "to participate effectively in the educational scheme of the school and not merely to have a place of residence," and that "[o]ccupancy of quarters in close proximity to the students [was] necessary to enable the faculty to perform the many duties required of them outside the classroom."¹⁶⁵

But the New Hampshire high court rejected the exemption for the school's staff housing. Around half the staff lived on campus. Unlike the faculty, they weren't required to do so. But it was convenient since no public transit reached the campus, and some kitchen and dining room staff had to be there early in the morning and late into the evening. Still, the court reasoned, "the record does not establish that such an arrangement is 'reasonably necessary' to promote the school's purposes."¹⁶⁶

3. *Fraternity Housing*

In *Cornell University v. Board of Assessors*, a New York appellate court denied Cornell's attempt to exempt housing it leased to fraternities.¹⁶⁷ The school owned the houses, so the only question was whether they were being used exclusively for educational purposes.¹⁶⁸ The court held that they weren't. Instead, they were "devoted, in

¹⁶⁰ 230 N.E.2d 846, 850 (Ill. 1967).

¹⁶¹ *Id.*

¹⁶² 372 A.2d 269, 273 (N.H. 1977).

¹⁶³ *Id.* at 274.

¹⁶⁴ *Id.* at 275.

¹⁶⁵ *Id.* (emphasis added).

¹⁶⁶ *Id.* at 277.

¹⁶⁷ 24 A.D.2d 526, 526 (N.Y. App. Div. 1965).

¹⁶⁸ *Id.*

substantial part, to the social and other personal objectives of a privately organized, self-perpetuating club.”¹⁶⁹

But in a later case, the same court upheld the exemption for fraternity houses at the University of Rochester.¹⁷⁰ As at Cornell, the University of Rochester owned the houses and leased them to fraternities. But, other than its occupants, the housing offered to the fraternities was the same as that offered to everyone else. The court compared everything from their architecture to their kitchenettes to the parties held in both and concluded that the fraternity houses should, for tax-exemption purposes, be treated the same as ordinary dorms.¹⁷¹

In all, whether a dorm is “educational” depends. Courts take a holistic approach, weighing everything from its architecture to its distance from campus. But two factors seem especially important. First, the housing should serve some pedagogical purpose. If students socialize with and learn from one another in the dorm, courts will be more likely to uphold the exemption. Second, the students’ age matters. For example, the New Hampshire Supreme Court emphasized the students’ youth and the faculty’s mentorship in upholding their exemption. If the St. Paul’s students had been in law school rather than high school, the case for exempting their faculty housing might have been weaker. The next Part, looking to these factors, proposes a brightline rule for exempting only certain kinds of university housing.

V

MY PROPOSAL TO EXEMPT ONLY UNDERGRAD DORMS

Given the imperfect theories, hodgepodge of history, and discordant case law on the property tax exemption for university housing, I propose a new regime: Only undergrad—not graduate, staff, or faculty—housing should be considered “educational” and tax-exempt.¹⁷² To be sure, exempting *any* university housing still runs into some of the problems explored above. But since the exemption is “practicably irrevocable

¹⁶⁹ *Id.* at 527.

¹⁷⁰ *Univ. of Rochester v. Wagner*, 63 A.D.2d 341, 354 (N.Y. App. Div. 1978).

¹⁷¹ *Id.* (“[T]he social intercourse and recreational activities that take place in the fraternity houses are similar both in quantity and quality to that which occurs in the dormitories. . . . [W]e see no reason why under the facts of this case the fraternity houses should not be accorded similar treatment [as ordinary dormitories].”).

¹⁷² Since states can’t tax federal land, my proposal wouldn’t apply to dorms at military academies, like those at the United States Coast Guard Academy in New London, Connecticut. *See McCulloch v. Maryland*, 17 U.S. 316, 317 (1819) (holding Maryland couldn’t tax the Second Bank of the United States).

law,”¹⁷³ my proposal would merely be a compromise between town-and-gown that would: (1) recognize the unique educational value of undergrad housing, (2) help reduce town-gown tensions, and (3) be easy to apply.

First, undergrad dorms are different. Undergrads are younger and often living away from their families for the first time.¹⁷⁴ Graduate students, on the other hand, “have different developmental needs. . . . [For example, a]ctivities, leadership experiences, and other types of programs typically geared to undergraduates are secondary.”¹⁷⁵ While undergrad dorms may come with amenities like common rooms and libraries, “[i]f an institution is planning to construct graduate housing, an *apartment complex* is preferable to a traditional residence hall structure.”¹⁷⁶ But apartment-style living doesn’t provide the same benefits as dormitory-style living.¹⁷⁷ Studies show, for example, that undergrads who live in dorms do better academically and socially than their off-campus peers.¹⁷⁸ But for graduate students, staff, and faculty, living in an apartment on-campus is indistinguishable, academically and socially, from living in one off-campus.¹⁷⁹ In other words, while on-campus housing provides distinct benefits to undergrads, it doesn’t

¹⁷³ BLACKMAR, *supra* note 92, at 25 (“The principle of exemption of educational institutions from taxation has been so grounded in the nature of our Government as to represent a practicably irrevocable law.”). *But see* Bennett, *supra* note 150, at 166 (pushing for “the abolition of all non-governmental property tax exemptions”).

¹⁷⁴ Ginsberg, *supra* note 25, at 335–36 (“It may be argued that, at least on an undergraduate level, students are younger than faculty, do not usually have families present with them, and, when being educated away from their homes, need to be provided with dormitory and dining facilities.”).

¹⁷⁵ Patricia L. Mielke & John H. Schuh, *Housing for Graduate Students*, in 1995 NEW DIRECTIONS FOR STUDENT SERVICES 59, 60 (Margaret J. Barr ed., Winter).

¹⁷⁶ *Id.* at 59–65 (emphasis added); *see also* HAROLD C. RIKER, COLLEGE STUDENTS LIVE HERE 23 (1961) (“[Graduate students are] older than the undergraduate group and more mature socially. Graduates are eager to move ahead with minimum interruption in their work. They do not accept many of the customary college conduct regulations. . . . [A]t least half of them need apartments for families.”).

¹⁷⁷ YANNI, *supra* note 91, at 20.

¹⁷⁸ *See* Lisa Ward, *For Some College Students, Living on Campus Helps Their GPA*, WALL ST. J. (Oct. 17, 2020, 12:00 PM), <https://www.wsj.com/articles/for-some-college-students-living-on-campus-helps-their-gpa-11602884953> [<https://perma.cc/W9AV-C9PC>] (“[T]hose who lived in a dorm were about 13% less likely than commuting students to have a freshman GPA of less than 1.5, the threshold for academic dismissal.”); Donna Randall, *Living on Campus Builds Lifelong Skills*, HUFFINGTON POST (Feb. 12, 2013), https://www.huffpost.com/entry/living-on-campus-builds-l_b_2287734 [<https://perma.cc/8NV4-2C3L>] (“[Students] encounter new perspectives and beliefs through living with students representing different races, cultures, and lifestyles, and they develop a fuller understanding of diversity as a result.”).

¹⁷⁹ *Cf.* Presbyterian Residence Ctr. Corp. v. Wagner, 66 A.D.2d 998, 999 (N.Y. App. Div. 1978) (denying exemption for elderly housing that was “indistinguishable from a commercial apartment complex”)

do much for others but give them a property tax break.¹⁸⁰ Some schools recognize this distinction and *voluntarily* pay taxes on their graduate student housing.¹⁸¹

Second, taxing all but undergrad housing could help lower town-gown tensions. As explained above, the property tax exemption causes friction between universities and their host cities. But not in New Hampshire, where towns *can* tax university housing.¹⁸² Take the account of former Dartmouth professor and later Hampshire College President Gregory S. Prince, Jr.:

One of the things I found extraordinary at Dartmouth, which is so different from Hampshire, is that Dartmouth is taxed like any other institution, for profit or not, in the state. Because New Hampshire does not have the income tax or the sales tax, the town of Hanover is permitted to impose a property tax on all nonacademic facilities [including dorms] at the college. This tax policy has been in effect for decades, so it is an accepted part of life. People struggle over all the same issues that any academic community faces, but the conversation in town meetings is quite different when the college is paying just like anybody else. . . . I saw a relationship between the college and the community that I found very healthy.¹⁸³

Improved town-gown relations could have other positive spillover effects. Consider the affordable housing crisis.¹⁸⁴ Property taxes increase

¹⁸⁰ Jack Goodman, *Houses, Apartments, and Property Tax Incidence* 15 (Joint Ctr. for Hous. Stud. of Harv. Univ., Working Paper No. W05-2, 2005), <https://www.jchs.harvard.edu/sites/default/files/w05-2.pdf> [<https://perma.cc/87HD-JS83>] (“The rental property owner pays the tax bill but attempts to recoup the cost through the rent payments of the property’s residents.”); cf. Bill Wheaton, *Can Landlords Really Pass on Higher Property Taxes to Tenants?*, MIT CTR. FOR REAL EST. (Oct. 5, 2018), <https://cre.mit.edu/news-insights/can-landlords-really-pass-on-higher-property-taxes-to-tenants> [<https://perma.cc/MS4H-3Q8U>] (finding commercial landlords passed eighty to ninety percent of property tax increases to tenants).

¹⁸¹ See, e.g., PRINCETON UNIV.: OFF. OF CMTY. AND REG’L AFFS., PRINCETON IN PRINCETON 1 (2018), https://community.princeton.edu/sites/g/files/toruqf751/files/princeton_in_princeton_updated_92718.pdf [<https://perma.cc/S6DZ-9T8N>] (“[F]or decades, the University has left many exempt properties, including graduate student housing . . . on the municipal tax rolls.”).

¹⁸² See Flora Lipsky, *The Shadow Tax*, YALE DAILY NEWS (Sept. 19, 2017, 10:40 AM), <https://yaledailynews.com/blog/2017/09/19/the-shadow-tax> [<https://perma.cc/S3W8-VYWD>] (“Dartmouth professor William Fischel, an expert in the economics of land use regulation, singled out Dartmouth as an example of a nonprofit with a more narrowly defined range of tax-exempt property: the town can tax dormitories.”).

¹⁸³ Gregory S. Prince, Jr., *Principles for College and Community Interaction*, LAND LINES (Lincoln Inst. of Land Pol’y, Cambridge, Mass.), July 2003, at 1; see also Lipsky, *supra* note 182 (“Dartmouth and Hanover get along swimmingly. Hanover is not at all reluctant to have Dartmouth build residence halls.”).

¹⁸⁴ Conor Dougherty, *America’s Affordable Housing Crisis*, N.Y. TIMES: MORNING (Mar. 27, 2024), <https://www.nytimes.com/2024/03/27/briefing/affordable-housing-crisis.html> [<https://>

the cost of housing, pricing some people out of the market.¹⁸⁵ But these taxes don't affect residents of university-owned, tax-exempt housing. If it did, if "gown" had an interest in lowering property tax rates, they might work with "town" to lower them.¹⁸⁶ This wouldn't be unprecedented.¹⁸⁷ Universities already lobby the government any time their exemptions are threatened.¹⁸⁸

Finally, my proposal would be easier to apply than the current regime.¹⁸⁹ Instead of assessors trying to figure out whether a university

perma.cc/MZR5-65X4] ("Tens of millions of families, across red and blue states, struggle with rent and home prices. . . . But action in Washington won't make a huge difference. America's affordable housing crisis is likely to be solved in cities and states.").

¹⁸⁵ Economists call this a "deadweight loss." Alicia Tuovila, *What Is Deadweight Loss, How It's Created, and Economic Impact*, INVESTOPEDIA (June 14, 2024), <https://www.investopedia.com/terms/d/deadweightloss.asp> [<https://perma.cc/BS7W-YULT>] ("Taxes also create a deadweight loss because they prevent people from engaging in purchases they would otherwise make because the final price of the product is above the equilibrium market price.").

¹⁸⁶ *But see* ROBERT A. DAHL, WHO GOVERNS? 138 (2d ed. 2005) ("Although . . . the last three Democratic aldermen from the First Ward have been young Yale faculty members[,] most Yale people are much less interested in the politics of New Haven than in the politics of Yale, their professional associations, the nation, or the international arena."); WILLIAM L. MILLER, THE FIFTEENTH WARD AND THE GREAT SOCIETY 6 (1966) (describing "Yale people" as those who "ignore the merely local scene, who subscribe to no New Haven paper but only to *The New York Times*, [and] who testify in Washington but don't know which ward they live in in New Haven").

¹⁸⁷ As the chair of the New York State Legislature's tax committee put it nearly 100 years ago, "Religious denominations, charitable institutions, benevolent societies, hospitals, educational institutions, cemeteries, patriotic societies, libraries and fraternal orders—all of the most diverse character, and possibly at swords' points with each other unite as brothers, when any attempt is made to curtail their tax exemption." Seabury C. Mastick, *The Problem of Tax Exemption*, in 20 PROC. ANN. CONF. ON TAX'N UNDER AUSPICES NAT'L TAX ASS'N. 309, 310 (1927).

¹⁸⁸ In 2021, for example, Yale and Harvard each spent over half a million dollars lobbying the federal government. Camille G. Caldera, Cara J. Chang & Isabella B. Cho, *Harvard Spent \$560,000 on Federal Lobbying in Biden's First Year*, HARV. CRIMSON (Mar. 3, 2022), <https://www.thecrimson.com/article/2022/3/3/harvard-tops-ivy-lobbying-fifth-year> [<https://perma.cc/5HP4-9ZXZ>]. Locally, when the Connecticut General Assembly considered a bill to reexamine Yale's property tax exemptions, the university lobbied state leaders to nix it through legislative testimonies, press conferences, and campus-wide emails. Jacqueline Rabe Thomas, *Taxing Yale: An Attack or Fair Game?*, CT MIRROR (Mar. 22, 2016, 10:00 PM), <https://ctmirror.org/2016/03/22/taxing-yale-an-attack-or-fair-game> [<https://perma.cc/6CQ8-47ER>] (legislative testimonies); Paul Bass, *Yale Tax Bill Backers Respond*, NEW HAVEN INDEP. (Apr. 28, 2016, 5:01 PM), https://www.newhavenindependent.org/article/yale_response_show [<https://perma.cc/5RMV-3VZF>] (press conferences); Paul Bass, *Yale Fights Back; Lemar Rips "Scare Tactics"*, NEW HAVEN INDEP. (Apr. 13, 2016, 3:15 PM), https://www.newhavenindependent.org/article/lemar_blasts_yale_ [<https://perma.cc/Z4NC-WQ6B>] (campus-wide emails).

¹⁸⁹ *See* John A. Swain, *The Taxation of Private Interests in Public Property: Toward a Unified Theory of Property Taxation*, 2000 UTAH L. REV. 421 439–40 (describing a "good" tax system as one that's easily administrable, with the fewest transaction costs); *see also* Francine J. Lipman, *Pro Bono Matters*, 32 A.B.A. SECTION TAX'N: NEWSQUARTERLY, Winter 2013, at 9,

dwelling is sufficiently “educational,”¹⁹⁰ or judges doing the same in court, the only question under this proposal would be, “Does/did an undergrad live there?” That’s a much easier question to answer than the “feeling-based”¹⁹¹ and “schizophreni[c]”¹⁹² tests assessors and judges use today. If universities mix undergrads with non-undergrads to dodge the tax, assessors could exempt the units with undergrads but tax everyone else. This would work like the federal Unrelated Business Income Tax (UBIT), which exempts nonprofits from taxes on income related to their tax-exempt purpose but taxes everything else.¹⁹³ (Congress created UBIT after the NYU School of Law monopolized the New York macaroni market.¹⁹⁴)

There are a few potential drawbacks to this proposal. First, having universities pay property taxes could make higher education more expensive. But under the proposal, that burden would shift to graduate students, faculty, and staff who live on campus. The burden now falls

9, https://www.americanbar.org/content/dam/aba/publishing/aba_tax_times/13win/06-pbm.pdf [<https://perma.cc/9GPO-TU8L>] (quoting Albert Einstein, who once joked: “The hardest thing in the world to understand is the income tax”); Learned Hand, *Thomas Walter Swan*, 57 YALE L.J. 167, 169 (1947) (“[T]he words of . . . the Income Tax . . . merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed, purport.”).

¹⁹⁰ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH NATIONS 362 (Encyclopedia Britannica 1952) (1776) (“[B]y subjecting the people to the frequent visits and odious examination of the tax-gatherers, it may expose them to much unnecessary trouble, vexation, and oppression.”); Stephen Diamond, *Efficiency and Benevolence: Philanthropic Tax Exemptions in 19th-Century America*, in PROPERTY-TAX EXEMPTION FOR CHARITIES, *supra* note 79, at 115, 129 (“There is also the burning zeal of assessors eager to get hold of new resources for taxation.”).

¹⁹¹ Brody, *supra* note 28, at 654.

¹⁹² Ginsberg, *supra* note 25, at 305; Joan M. Youngman, *The Charity Property-Tax Exemption Special Political Issues Concerning Property Tax Exemptions for Charities*, 93 PROC. ANN. CONF. ON TAX’N & MINUTES ANN. MEETING NAT’L TAX ASS’N 164, 166 (2000) (describing judicial treatment of the exemption as “uncertain, varied, and subjective”).

¹⁹³ *Unrelated Business Income Tax*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/unrelated-business-income-tax> [<https://perma.cc/E2UA-SGUW>] (“Even though an organization is recognized as tax exempt, it still may be liable for tax on its unrelated business income. . . . [UBIT] is income from a trade or business, regularly carried on, that is not substantially related to the charitable, educational, or other purpose that is the basis of the organization’s exemption.”).

¹⁹⁴ See generally John Brooks, *The Law School and the Noodle Factory*, NEW YORKER, Dec. 26, 1977, at 48 (“Over the past generation, the New York University School of Law derived a substantial portion of its income from the sale of spaghetti, macaroni, egg noodles, and related products. . . . [Y]ou may think you’re working for a law school, but you’re really working for a noodle factory.”); see also Revenue Revision of 1950: Hearings Before the H. Comm. on Ways and Means, 81st Cong., 579–80 (1950) (statement of Rep. Dingell) (“From the purely competitive standpoint . . . the advantage of a tax-exempt organization . . . is so great that, if something is not done to level it off, the macaroni monopoly will be in the hands of the universities.”).

on residents of the taxing jurisdiction, which in many postindustrial cities like New Haven are largely made up of working-class residents. If the goal is to subsidize higher education, there are other ways to do so at the federal, instead of local, level.¹⁹⁵ Alternatively, schools might just stop offering non-undergrad housing. Maybe that makes it harder for students in, say, law school to find somewhere to live. But many law schools already don't offer students housing,¹⁹⁶ and even those that do see most students living off-campus.¹⁹⁷ Finally, one might argue taxing faculty housing will make it harder for urban universities to recruit and retain faculty. But that can't be right. Unlike private landlords, universities need not profit from their housing.¹⁹⁸ Whereas a private landlord has to charge her tenants more than her costs to turn a profit, universities can break even and still benefit from the faculty's residence.¹⁹⁹ That difference, the profits a university can forgo, could redound in lower rents for the same housing. So, yes, taxing faculty housing would make it more expensive, but it would still be more affordable than comparable market-rate housing.²⁰⁰

¹⁹⁵ See, e.g., Adam N. Michel, *14 Ways the Tax Code Subsidizes Higher Education*, CATO INST. (Mar. 2, 2023, 3:21 PM), <https://www.cato.org/blog/14-ways-tax-code-subsidizes-higher-education> [<https://perma.cc/7CR2-BEUV>].

¹⁹⁶ See, e.g., *Housing*, NE. UNIV. SCH. OF L., <https://law.northeastern.edu/student-life/housing> [<https://perma.cc/4HX4-MQV2>] (“University housing will not be available to new or returning law students for the 2022–23 academic year.”); *Housing & Living in Miami*, UNIV. MIA. SCH. OF L., <https://admissions.law.miami.edu/admitted/housing-living-in-miami> [<https://perma.cc/U2BX-32EE>] (“The law school does not provide on-campus housing.”).

¹⁹⁷ Richard K. Neumann Jr., *Violations During the Pandemic of Law School Faculties' Authority to Decide Methods of Instruction*, 70 J. LEGAL EDUC. 413, 428 (2021) (“Law students typically live off campus . . . and have always done so.”); see, e.g., *Housing at Duke Law*, DUKE L., <https://law.duke.edu/apply/housing> [<https://perma.cc/FKQ5-4QNU>] (“Most Duke law students live off campus in privately owned apartment complexes.”); *Housing & Dining*, YALE L. SCH., <https://law.yale.edu/student-life/housing> [<https://perma.cc/36E2-UM8F>] (“Most students chose to live in non University-affiliated housing.”); *Housing Information for Law Students*, BOS. UNIV. SCH. OF L., <https://www.bu.edu/law/admissions-aid/jd-admissions/jd-first-year-students/housing> [<https://perma.cc/6JS3-VVKN>] (“Most of our students choose to live in non-University-affiliated housing in neighborhoods located close to the Law Complex.”).

¹⁹⁸ While nonprofits, including universities, can turn a profit from any venture, under the “nondistribution constraint,” they're barred from distributing those profits to stakeholders or employees. JAMES J. FISHMAN, STEPHEN SCHWARZ & LLOYD HITOSHI MAYER, *NONPROFIT ORGANIZATIONS* 3 (6th ed. 2021).

¹⁹⁹ Cf. About Here, *The Non-Capitalist Solution to the Housing Crisis*, YOUTUBE (Nov. 1, 2022), https://www.youtube.com/watch?v=sKudSeqHSJk&ab_channel=AboutHere [<https://perma.cc/7MSS-UG74>] (describing how “nonmarket housing”—that is, housing that doesn't seek to make a profit—can help solve the housing crisis).

²⁰⁰ *But see* Ginsberg, *supra* note 25, at 309 (“[M]any private colleges and universities are only marginally viable today due to high rates of inflation, fluctuations in the birth rate, and the growth of competing state universities. Real property taxation of their physical plants could have a devastating effect.”); Gina Macris, *Graphic Improvements at Hope*, PROVIDENCE J., Mar. 12, 2003, at B1 (“Ruth J. Simmons, Brown president, said it would be ‘wrongheaded’

CONCLUSION

So, why is university housing tax-exempt? Why do Mr. Benjamin Butler's tenants pay property taxes while Davenport University's don't? Perhaps it's because Davenport provides Brooklynites a service that, without the university, the government would have to. Or maybe it's because the City of New York doesn't have sovereignty over Davenport. Or maybe it's because students learn and grow more in the university's brownstone than in Mr. Butler's. Whatever the reason, courts are almost invariably upholding the exemption, while cities are increasingly looking to rein it in. I propose a brightline rule that exempts all undergrad, but no other, university housing.

to tax a nonprofit institution such as Brown, which would be forced to raise tuition, already at \$29,200 a year.”).