

**URBAN DEVELOPMENT THROUGH PLANNED RETAIL: YALE'S COMMERCIAL
REAL ESTATE PROGRAM**

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INTRODUCTION

In the past fifteen years, urban universities have become increasingly active as commercial real estate developers. Universities have begun to acquire, renovate, or develop from the ground floor significant tracts of commercial property near their campuses. Often these investments are accompanied by management policies inspired by shopping center developers, with tenants carefully chosen, the details of operation such as opening hours specified by contract, and public goods provided either by the university or through university-controlled organizations. While the activities of some universities, notably the University of Pennsylvania, have been extensively documented, no published study exists of Yale's extensive program to improve New Haven through investment in and careful management of commercial real estate. Beginning in the early 1990s, Yale has become a major player in New Haven commercial real estate, emerging as the city's largest commercial landlord, with approximately ninety retail tenants. In this paper, I will both describe Yale's commercial real estate program and assess the success of this program, both from the internal perspective of whether Yale has met its goals and the external perspective of its effects on New Haven residents.

I begin by providing an overview of university development practices. In the 1950s and 1960s, urban universities participated extensively in federal, state, and local urban renewal programs in order to improve the quality of surrounding neighborhoods and protect the long-term health of their institutions. But as public enthusiasm for urban renewal waned, many universities found that their aggressive clearance had made them the target of significant community resentment. After these events, universities got out of the urban development game for several decades. In the past fifteen or twenty years, however, a number of urban universities have instituted new programs intended to enhance areas surrounding the university and their

cities more generally. These programs have coalesced around a certain model, with active management of commercial real estate playing a very large role in these modern efforts.

Next, I discuss three behavioral models of university investment in commercial real estate. The first of these sees universities as simply private developers, taking advantage of certain institutional competencies to maximize the returns on their commercial investments. The second model sees universities as investors with a broader focus. Because universities have enormous, concentrated, and essentially fixed investments in often-deteriorating urban communities, it may be rational for them to make secondary real estate investments that are direct money losers if those investments sufficiently increase the returns on their existing investments by enhancing the university appeal for potential students and faculty. Finally, I introduce the possibility that universities should be seen as political institutions with their policies shaped by typical political dynamics. As a result, we should expect the most powerful and organized groups within the university community to tilt policy toward their own best interests at the expense of other, less-organized stakeholders.

In Part 3, I discuss Yale's practices in detail. This begins with a brief history of the establishment of Yale's program and the acquisition of its properties, which fall into three main areas. I then turn to Yale's current institutional structure for managing its program. Finally, I catalogue a number of notable practices and a few specific incidents that will help us to understand what Yale is trying to do and whether it has been successful.

I then attempt to explain the data of Part 3 with the theories introduced in Part 2. The goal of Part 4 is positivistic: to understand Yale's purposes and goals based on its observed behavior rather than relying on official statements of the University's objectives. This Part begins with an extended discussion of the economic forces that shape shopping mall developer practices. Yale

for the most part behaves exactly as a private developer would, which lends support to this model of Yale's activities. However, this model is unable to explain some prominent features of Yale's program. While the second model, Yale as a secondary investor, accounts for some of these deficiencies, it too falls short. Instead, Yale's behavior is best explained using the political institution model, as we see evidence that Yale's policies favor those members of the Yale community who can most easily organize to shape policy toward their needs. Yale's program is also the victim of several serious agency problems. Thus while Yale's program is generally successful at meeting its goals of improving the quality of life for its affiliates, its policies depart from what would be optimal in several consistent ways. These dysfunctional features of Yale's program are so far relatively minor, but probably cannot be corrected, suggesting that as Yale's real estate investments expand they will become less and less efficient.

Finally, in Part 5 I attempt to assess Yale's program from an external perspective: have the University's activities improved New Haven as a whole? Adopting a utilitarian approach, I argue that Yale's program is likely to depart from what is socially optimal in a systematic way because the different interests of the Yale community and New Haven residents impose unequal transaction costs on certain groups of New Haveners. The basic dynamic is reminiscent of exclusionary zoning, which may be the best model for conceiving of the possible harms created by Yale's program. Because Yale and other urban universities are becoming increasingly active in urban development—that is, they are acting to meet the needs of affiliates in new ways that are not traditionally seen as part of the university's mission—they risk repeating many of the mistakes of 1950s urban renewal, only in the name of today's accepted theories of urban development. The harms created by Yale's program are so far minor given its relatively small scope, but if the University's ambitions should continue to increase, it runs the risk of imposing

significant costs on non-affiliates and creating community backlash. Finally, I conclude this Part with an alternative critique, questioning whether importing the development strategies of shopping centers to urban development is a good idea. Such practices may deprive the city of many of the virtues urbanists prize, notably its vitality and micro diversity.

1. AN OVERVIEW OF UNIVERSITY URBAN DEVELOPMENT

Histories of universities' urban development present a common story.¹ In these accounts, the rapid rise in college attendance following World War II led many universities to expand aggressively to meet this greater demand. At the same time, suburbanization and the decline of urban areas prompted many urban universities to become active participants in urban renewal efforts, particularly the federal urban renewal program, in order to improve the quality of their surrounding neighborhoods and to maintain the appeal of the university area. As with the federal urban renewal program generally, the heavy-handed, top-down, and somewhat elitist nature of universities' activities led to severe community backlash in the late 1960s and early 1970s. For the next few decades, urban universities' expansion and development plans were stymied by newly powerful community groups. By the 1980s and 1990s, however, universities had learned the error of their ways and adopted more-collaborative approaches to meeting their institutional goals that involved local communities in university planning and decisionmaking. With these new institutional structures, as well as the insights of Jane Jacobs and her followers, universities have developed new programs to meet their needs for expansion and to improve their communities that avoid the mistakes of the 1950s and 1960s. This latter goal of spurring urban

¹ See, e.g., JUDITH RODIN, *THE UNIVERSITY & URBAN REVIVAL: OUT OF THE IVORY TOWER AND INTO THE STREETS* 23-44 (2007); Sabina Deitrick & Tracy Soska, *The University of Pittsburgh and the Oakland Neighborhood: From Conflict to Cooperation, or How the 800-Pound Gorilla Learned To Sit with—and not on—Its Neighbors*, in *THE UNIVERSITY AS URBAN DEVELOPER: CASE STUDIES AND ANALYSIS* 25 (David C. Perry & Wim Wiewel eds., 2005); Henry S. Webber, *The University of Chicago and Its Neighbors: A Case Study in Community Development*, in *THE UNIVERSITY AS URBAN DEVELOPER*, *supra* note 1, at 65.

revival has become a major priority at many urban universities, which have adopted a particular model of university urban development that focuses on improving public safety and schools and investing in housing and commercial real estate.

In this Part, I will present this general history in more depth, beginning with universities' activities in the 1950s and 1960s, particularly their involvement in urban renewal programs.² I then turn to the humbling of the once-mighty universities in the 1970s, when the power of community groups increased and many universities' expansion and development plans failed. Finally, I will provide an overview of current university practices, looking in particular at three major innovators: the University of Chicago, Columbia University, and the University of Pennsylvania.

1.1 Postwar Expansion and Urban Renewal

Following World War II, many universities embarked on aggressive programs to expand and to improve their neighborhoods. Many universities had been slowly expanding for decades before the mid-Twentieth Century.³ But the 1950s saw two demographic trends that prompted greater activity. First, the end of the war and the G.I. Bill led to a rapid increase in college enrollment.⁴ Many colleges and universities chose to expand their facilities in order to take advantage of this greater demand for college education.

Second, the postwar era saw enormous growth in the suburbs, accompanied by urban deterioration.⁵ This suburban growth led to absolute declines in population in many central cities

² Of course, universities cared about the quality of their communities long before the mid Twentieth Century. I begin with this period both because it marked more-involved efforts in this area and because it provides useful lessons for current practices.

³ Yale University was somewhat of an outlier, as its major period of expansion occurred in the 1930s, with most of its major land acquisitions occurring long before this.

⁴ U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970 at tbl. Bc523-536 (rev. ed. 2006). As these statistics show, enrollment growth was relatively consistent from 1900 until the mid-1950s, at which point the rate of growth increased significantly and permanently.

⁵ See, e.g., JON C. TEAFORD, THE TWENTIETH-CENTURY AMERICAN CITY 97-118 (1986).

between 1950 and 1970.⁶ These cities also saw significant demographic changes, as white residents departing for the suburbs were replaced by blacks migrating from the South in search of better-paying manufacturing jobs in the Northeast and Midwest.⁷ These trends meant that the neighborhoods surrounding many urban universities very quickly changed from middle- or upper-class white neighborhoods to integrated neighborhoods with lower per capita incomes. The University of Chicago's Hyde Park-Kenwood neighborhood is a notable example: between 1950 and 1956, its black population grew from 4,300 to 30,000, while the white population declined from 67,000 to 47,000.⁸ Chicago administrators worried that these changes would make it more difficult to recruit students and faculty, threatening the long-term success of the University.⁹ Thus at the University of Chicago and elsewhere, university administrators searched for ways to improve their surrounding neighborhoods.

These twin goals of expansion to meet greater demand and investment to improve university surroundings made universities natural participants in cities' and the federal government's urban renewal programs. At first, universities' partnerships with cities were initiated by the universities themselves. For example, in 1958, the University of Chicago developed an urban renewal plan for 885 acres, which included clearing 101.2 acres, and secured from the city the use of its eminent domain power.¹⁰ Similar efforts were underway at the University of Pennsylvania in the mid-1950s.¹¹ The 1950s excitement for urban renewal made cities more than willing to cooperate with universities by granting them eminent domain power and tailoring public urban renewal plans to meet universities' needs.

⁶ *Id.* at 110, tbl. 1.

⁷ *Id.* at 115.

⁸ Webber, *supra* note 1, at 68-69.

⁹ *Id.* at 69.

¹⁰ *Id.* at 70.

¹¹ RODIN, *supra* note 1, at 30-31.

This partnership between universities and municipalities received an enormous boost in 1959 with that year's amendments to federal urban renewal legislation. Under the federal renewal program, the federal government made grants to municipalities for specified urban renewal projects.¹² These grants were made in the form of matching funds, with one-third of the cost of the urban renewal project supplied by the municipality in which the project was located and the remaining two-thirds of the cost supplied by the federal government.¹³ In 1959, however, due to the lobbying of several cities and urban universities, including New Haven and the University of Chicago, federal legislation was amended to permit municipalities to include the private expenditures of colleges or universities made within an urban renewal project's boundaries as part of the municipality's one-third contribution.¹⁴ This provision was even retroactive: it applied to expenditures made five years before the designation of an urban renewal area.¹⁵

These amendments to federal law increased university involvement in urban renewal in two ways. First, it gave cities greater incentives to locate urban renewal projects in the vicinity of universities, since only then could the universities' private expenditures increase the amount of federal funding available for a project.¹⁶ Second, it made cities more willing to assist universities' expenditure of funds by exercising eminent domain on the universities' behalf, rezoning land, etc. Unsurprisingly, following the 1959 amendments to federal urban renewal

¹² The literature on the federal urban renewal program is vast and discussing the program in detail is unnecessary to the purposes of this paper. For a helpful overview of the structure of the legislation and its early evolution, see Ashley A. Foard & Hilbert Fefferman, *Federal Urban Renewal Legislation*, 25 LAW & CONTEMP. PROBS. 635 (1960).

¹³ ALLAN R. TALBOT, *THE MAYOR'S GAME: RICHARD LEE OF NEW HAVEN AND THE POLITICS OF CHANGE* 153 (1970).

¹⁴ Pub. L. No. 86-372, 73 Stat. 677 (1959); see TALBOT, *supra* note 13, at 156; Foard & Fefferman, *supra* note 12, at 680-81.

¹⁵ Foard & Fefferman, *supra* note 12, at 681.

¹⁶ As Talbot notes, universities lobbied for this provision precisely so that cities would plan urban renewal projects in the area of universities, allowing the university to leverage its own expenditures with federal funds to enhance the scope of these private projects. TALBOT, *supra* note 13, at 156.

legislation, the University of Chicago and the University of Pennsylvania expanded their existing programs to include new areas,¹⁷ while new universities, including Columbia University and St. Louis University, got in on the action.¹⁸ These projects mostly consisted of clearing “blighted” buildings in the area and replacing them with new university buildings. But not all land acquired and cleared for urban renewal was used for new university facilities. In keeping with their ambitions to improve the quality of surrounding neighborhoods, many of the more-ambitious universities, notably Chicago, Columbia, and Penn, also erected apartment buildings, townhouses, and commercial space, which was then either sold to private owners or managed by the university as an investment.¹⁹

It is worth noting that Yale was less involved in urban renewal than many of its peers, particularly relative to New Haven’s ambitious efforts. With the notable exception of the Oak Street project, which was planned and carried out long before the 1959 amendments to federal legislation made catering to universities a priority, none of New Haven’s urban renewal projects were placed in areas that would particularly benefit Yale.²⁰ Moreover, New Haven never exercised eminent domain on behalf of Yale, unlike the governments of many other cities with major urban universities. These facts are likely due to New Haven politics, as Mayor Dick Lee suffered some backlash for appearing too favorable to Yale in a pre-urban renewal episode involving the sale of city schools.²¹ To avoid similar political opposition, Mayor Lee changed his

¹⁷ See RODIN, *supra* note 1, at 33-36 (discussing the University of Pennsylvania); Webber, *supra* note 1, at 68-71 (discussing the University of Chicago).

¹⁸ See Sarah Cummings et al., *University Involvement in Downtown Revitalization*, in THE UNIVERSITY AS URBAN DEVELOPER, *supra* note 1, at 147, 166-67; Peter Marcuse & Cuz Potter, *Columbia University’s Heights: An Ivory Tower and Its Communities*, in THE UNIVERSITY AS URBAN DEVELOPER, *supra* note 1, at 45, 48-49.

¹⁹ See Marcuse & Potter, *supra* note 18, at 48-49; Webber, *supra* note 1, at 70-73.

²⁰ Yale’s expenditures on Ezra Stiles and Morse Colleges were included as part of the city’s costs for the Dixwell renewal project, but unlike projects in other cities, it is doubtful that the Dixwell project was planned to benefit Yale. See DOUGLAS W. RAE, CITY: URBANISM AND ITS END 322 (2003); TALBOT, *supra* note 13, at 156-57. Rather, the fact that the University’s expenditures could benefit the city’s project was just good fortune.

²¹ TALBOT, *supra* note 13, at 74-78.

initial plans to sell a large parcel cleared as part of the Oak Street project to Yale, instead holding an auction in which Yale was (unexpectedly) outbid.²² As a result of these political forces, Yale was a smaller player in New Haven's urban renewal program than were Chicago, Penn, and Columbia. Instead, Yale's interest in expansion and neighborhood improvement would need to be met through voluntary transfers of land.

1.2 Backlash

Universities' use of urban renewal to improve their surroundings quickly died for the same reasons 1960s-style urban renewal died, but with the additional result that resentment over universities' activities in the 1960s was long-lasting, leading to significant community opposition to almost any efforts by universities to expand their facilities or invest in surrounding areas. Discussing the failures of the federal urban renewal program is far outside the scope of this paper, but scholars generally recognize that urban renewal projects were often poorly planned, undemocratic, did not respond to market demand, imposed disproportionate costs on poorer displaced residents, and were based on fundamentally unsound visions of what cities should look like.²³ Many of these same complaints apply to universities' efforts to improve their communities through clearance: they were an example of a top-down, hyper-planned effort at transformation that imposed enormous costs on nearby, mostly poor, residents in order to benefit wealthier universities and their affiliates.

It should hardly be surprising, then, that universities' growing involvement in urban renewal was controversial and spurred political opposition in many cities. Columbia University is a well-known example. In 1968, its plans for expansion through clearance came to an abrupt

²² *Id.* at 78-80.

²³ *See, e.g.,* RAE, *supra* note 20, at 330-60.

halt following protests by community members and students.²⁴ Chicago's and Penn's aggressive renewal programs came to a similar end, as neighborhood groups became increasingly powerful in municipal politics.

Political and community resistance to urban universities' expansion and investment plans lasted long past their interest in using 1960s-style urban renewal. Many universities found their efforts to build new facilities stymied for decades. The University of Pittsburgh, for example, developed a series of plans for expansion into the surrounding neighborhood during the 1960s and 1970s, only to meet implacable opposition that forced modification or abandonment of many of the University's more ambitious ideas.²⁵ Yale experienced similar setbacks in the early 1970s, as its plans to build two new residential colleges on land it already owned, a proposal that likely would have been swiftly approved by the Lee administration just a decade earlier, was killed by political opposition over diminished tax revenue.²⁶ In response to these setbacks, universities scaled back the scope of their expansion plans, focusing more on upgrading facilities on land already owned and used by the university than on acquiring non-university land. And from the collapse of urban renewal in the 1960s until the mid-1990s, no university, with the exception of the University of Chicago and Columbia, seems to have taken any significant steps to improve the quality of its surrounding neighborhoods. Such ambitions were a casualty of universities' previous mistakes.

1.3 Universities' Responses

As universities recognized that the political power they had enjoyed in the 1950s and 1960s had vanished and was unlikely to return, they responded primarily by developing new

²⁴ Marcuse & Potter, *supra* note 18, at 49.

²⁵ Deitrick & Soska, *supra* note 1, at 28-32.

²⁶ See RAE, *supra* note 20, at 427-31. The land in question was occupied by commercial space and thus was subject to property taxes.

institutional approaches. Case studies, such as those collected in *The University as Urban Developer*,²⁷ tell of how various universities developed collaborative approaches that included community groups in university plans for expansion and development.²⁸ Judith Rodin, former President of the University of Pennsylvania, tells a similar story, as Penn administrators in the 1980s and 1990s (before Rodin's time as President) established various fora for planning and discussion with the University's neighbors to ensure that their concerns about the University's programs were considered.²⁹

While sources such as these are unfortunately vague on the details, they allow us draw some useful insights into what lessons university administrators have and have not learned from universities' previous efforts to redevelop and renew their communities. Specifically, administrators at schools such as Penn, Chicago, and no doubt Yale,³⁰ view the failure of these programs as due to two factors. First, many of these plans were based on simply erroneous theories about what made urban areas successful. Clearing existing land and replacing it with modern buildings in the park, based on the visions of Le Corbusier, harmed rather than helped the areas targeted for improvement.³¹ Second, universities' plans for urban improvement were the result of flawed processes. These plans were developed largely in secrecy by high-level administrators and academics, ceremoniously announced to the community, and then acted

²⁷ *Supra* note 1. The studies in this collection were written primarily by university administrators and planning professors and directed toward an audience of the same.

²⁸ See, e.g., Deitrick & Soska, *supra* note 1, at 33-42; Elizabeth Strom, *The Political Strategies Behind University-Based Development: Two Philadelphia Cases*, in *THE UNIVERSITY AS URBAN DEVELOPER*, *supra* note 1, at 116.

²⁹ RODIN, *supra* note 1.

³⁰ Apparently a case study on Yale was prepared for *The University as Urban Developer*, but it was withdrawn due to "confidentiality concerns." Wim Wiewel & David C. Perry, *Ivory Towers No More: Academic Bricks and Sticks*, in *THE UNIVERSITY AS URBAN DEVELOPER*, *supra* note 1, at 300, 305. On Yale's general secrecy regarding its program, see *infra* notes **Error! Bookmark not defined.**, 128-132 and accompanying text, and 188.

³¹ See, e.g., RODIN, *supra* note 1, at 38. The influence of Jane Jacobs on Rodin's plans for Penn in the 1990s is made abundantly clear to the reader, beginning with the epigraph.

upon.³² The lack of community involvement in university planning spawned political opposition and may even have diminished the quality of university plans.

Fortunately for universities' self-image, the literature suggests that today's administrators see these deficiencies as cured by modern practices. Not only have universities learned the lessons of Jane Jacobs and the New Urbanists,³³ they have also learned the value of working with their communities.³⁴ But the universities' needs, particularly the importance of improving surrounding areas to ensure the long-term success of the university, are if anything even more pressing today.³⁵ Thus with better processes and better theory, universities are finally equipped to realize some of the ambitions that animated their participation in urban renewal during the 1950s and 1960s.

These self-histories of university development written by current administrators and planners are perhaps most surprising for one theme they entirely lack. On their view, the policies that benefit the university will also benefit the community. Thus universities' present activities consist solely of Pareto superior moves. I will return to this issue later in this paper,³⁶ but for now it is enough to note the curious fact that no doubt much like their predecessors in the 1950s and 1960s, today's university administrators regard reversing urban deterioration as essentially a problem to be solved by wise technocrats. There is no hint that urban universities and the residents of the central cities surrounding them may have fundamentally different interests, that this makes the university a poor institution for achieving broad social change, and that this deficiency may in part explain the failure of universities mid-century urban renewal programs.

³² See, e.g., Deitrick & Soska, *supra* note 1, at 28-32.

³³ See, e.g., RODIN, *supra* note 1, at 20-21 (discussing the influence of New Urbanists on Penn's plans).

³⁴ See *id.* at 21-22.

³⁵ See *id.* at 3-11.

³⁶ See *infra* Subsection 5.1.3.

1.4 Modern Practices

Today, many universities are engaged in programs to revive their communities as ambitious as those of the post-war era. Describing universities' present activities in detail would be far beyond the scope of this paper, but in order to better understand Yale's program, it is helpful to have a general sense of what Yale's peers are doing, particularly since university practices are quite similar. This similarity is surely not an accident—these universities have clearly learned from their peers—and this process of imitation has created a standard model of development. This model consists of four components: improving public safety, increasing the quality of housing, investing in commercial real estate, and assisting local schools. I will provide some detail regarding the efforts of two other universities that contributed significantly to developing this model, the University of Chicago and Columbia University, before briefly discussing the University of Pennsylvania's program, perhaps the best, or at least best-publicized, example of modern university practices.³⁷

1.4.1 The University of Chicago

The University of Chicago was one of the few universities to maintain a significant program for improving its surrounding neighborhood, Hyde Park-Kenwood, following the collapse of urban renewal.³⁸ It was also a key innovator, developing several programs that have been widely copied. The most important of these was the establishment of a university police force. This force began in 1968 when, following a crime wave in Hyde Park, the University reached an agreement with the City that enabled the existing campus security force to become a

³⁷ Yale's program, while different from Penn in many details, is a serious rival to Penn's program in terms of scope, and given the relative size of New Haven and Philadelphia has arguably had a greater effect on its city. I will mention important differences between Yale's and Penn's programs, particularly in the area of commercial real estate, this paper's focus, throughout the remainder of this paper.

³⁸ It is clear, however, that even though Chicago continued in its efforts to enhance the quality of Hyde Park-Kenwood, these efforts were greatly reduced from those it made during the 1950s and 1960s. Webber, *supra* note 1, at 74.

fully licensed police department within the Hyde Park-Kenwood neighborhood.³⁹ University police forces have since become the norm at urban universities.

The University also maintained a more-active role in real estate than its peers. In the early 1980s, it acquired and renovated a deteriorating shopping center in Hyde Park that had been built during urban renewal, in part to ensure that university affiliates would have access to stores that would appeal to them.⁴⁰ The success of this program led the University to acquire additional commercial property near its campus for similar purposes.⁴¹ Throughout this period, Chicago maintained a program aimed at “problem buildings,” purchasing residential housing that was in serious violation of housing codes and renovating it for student or staff housing.⁴² As a result, by the late 1990s, the University owned nearly 2,000 units dedicated to graduate student, faculty, and staff housing.⁴³ The University also played a minor role in several residential development projects aimed at providing housing to non-university affiliates.⁴⁴ Although modest compared with the present day programs of Yale or Penn, these efforts clearly served as a model for other universities’ real estate investments.⁴⁵

1.4.2 Columbia University

Columbia University was also a major innovator, particularly in the area of real estate. The University had acquired significant land in the 1960s, intending to clear much of it and build new university facilities. But this plan was disrupted by student protests and community opposition, leaving the University with significant holdings of existing commercial and

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at 75.

⁴³ *Id.*

⁴⁴ *Id.* at 73.

⁴⁵ Today, the University of Chicago has expanded its efforts to include the sort of full-scale development projects seen at Penn or Yale, though its program does not appear to rival these in scope. *Id.* at 77.

residential space.⁴⁶ For more than a decade, the University managed these properties more or less like a normal landlord, with its goal being to achieve investment-grade returns.⁴⁷

In 1982, Columbia developed a new plan, both for managing its current holdings and for future expansion, which had four important features. First, the plan recommended a “deck of playing cards” approach in which the University quickly purchased any potentially useful properties that became available and then considered how these properties could be used to best meet the University’s needs.⁴⁸ Second, the plan proposed managing existing properties with an eye toward the University’s broader interests.⁴⁹ This meant, in part, accepting lower rents from tenants whose businesses would provide goods and services desired by university affiliates, thereby contributing to an atmosphere that would help the university draw top faculty and students. Finally, the plan recommended various streetscape improvements on major streets surrounding campus and providing assistance to local property owners to expand or renovate their properties.⁵⁰ This plan was gradually implemented in the 1980s and 1990s.⁵¹ In order to meet the University’s second goal, tenants for commercial properties were carefully selected based in part on surveys of University affiliates.⁵² While I have found no evidence that other universities were consciously influenced by Columbia’s program in the 1980s, these four aspects of Columbia’s 1982 plan have much in common with some of the key features of real-estate development efforts at other urban universities, notably Penn and Yale, more than a decade later.

⁴⁶ See Marcuse & Potter, *supra* note 18, at 49.

⁴⁷ *Id.* at 50.

⁴⁸ *Id.* Previously, the University had used the opposite practice: developing plans and then seeking to purchase buildings to implement them.

⁴⁹ *Id.* at 50-51.

⁵⁰ *Id.* at 51.

⁵¹ *Id.*

⁵² *Id.*

1.4.3 The University of Pennsylvania

The University of Pennsylvania has not only incorporated many of the innovations of other universities, such as Chicago's university police force and Columbia's management of commercial real estate to suit the university's broader interests, but it has also developed a few of its own. Further, Penn's program is useful to study both historically and in comparison with Yale's for three reasons. First, Penn's program contains all the elements of the modern university development model. To my knowledge, there is no common practice among universities aimed at improving their surroundings that is not found in Penn's program. Second, Penn's investments in West Philadelphia and Philadelphia as a whole are unsurpassed, with the possible exception of Yale.⁵³ Finally, Penn has been quite public regarding its program of urban development, providing many details regarding its activities and the thinking behind them.⁵⁴ This means that getting a general sense of Penn's program is much easier than for many other universities, including Yale.

Penn's program to improve West Philadelphia began in 1996 following the well-publicized murder of a Penn biochemist and several other major criminal incidents involving university affiliates.⁵⁵ In response, Judith Rodin, who had recently become the University's new president, began developing plans for improving West Philadelphia and the safety and appeal of Penn. These plans focused on five areas: public safety, residential housing, commercial activity,

⁵³ This is necessarily a rough qualitative rather than a quantitative assessment, since no university publishes much in the way of figures regarding their spending on these programs. *See also* Katie DeWitt, *Many Universities Face Town-Gown Issues*, THE YALE DAILY NEWS (Mar. 29, 2005), <http://www.yaledailynews.com/news/2005/mar/29/many-universities-face-town-gown-issues/> (quoting Yale Professor Douglas Rae as saying that Penn is the only school "decidedly more ambitious" than Yale in community outreach).

⁵⁴ Of course, much of this information comes from Penn administrators, notably its former President, Judith Rodin, who made improving the Penn campus and West Philadelphia a priority of her tenure. There are obvious perils in relying too much on these accounts. As such, my discussion of Penn's program should not be taken as a completely accurate description of what Penn is actually doing it, why it is doing it, or what effects it had on West Philadelphia, but rather as a rough account of the priorities of Penn administrators and their public justification of these steps.

⁵⁵ RODIN, *supra* note 1, at x.

economic development, and public schools.⁵⁶ Penn decided early on to implement these initiatives itself, rather than to allow community groups to manage them with Penn's input and money.⁵⁷ To ensure these measures remained a priority, Rodin appointed a new executive vice president to manage day-to-day activities,⁵⁸ and a number of institutional changes were made, such as relocating offices within Penn's bureaucratic structure, to ensure that responsibility for the program would be concentrated under this vice president.⁵⁹

It is unnecessary to go into great detail regarding Penn's program, particularly in areas other than commercial real estate, but I will provide a brief overview to give a sense of the program. To improve public safety, Penn increased the number of campus and city police patrols, invested in lighting, worked to eliminate graffiti and other "broken windows," established several neighborhood associations including a special services district funded mostly by the university, and expanded its shuttle service.⁶⁰ Penn's housing program focused on purchasing, rehabilitating, and selling vacant housing; expanding its existing mortgage-guarantee program for university affiliates; and acquiring and renovating rental housing for both affiliates and non-affiliates of the University.⁶¹ Penn's investments in local public schools were perhaps its most-ambitious set of measures, but these are too complex to summarize here.⁶²

Like Columbia before it and, as I discuss later in this paper, Yale, a major component of Penn's plans to improve West Philadelphia was investment in and management of commercial

⁵⁶ *Id.* at 22.

⁵⁷ *Id.* at 46.

⁵⁸ *Id.* at 48.

⁵⁹ *See, e.g., id.* at 51.

⁶⁰ *Id.* at 59-80.

⁶¹ *Id.* at 81-106. Rodin reports that the University was willing to tolerate below investment grade returns on many of these projects and outright lost money rehabilitating vacant housing. *Id.* at 88, 95. Interestingly, the organization Penn created to develop residential housing has occasionally exercised eminent domain powers. *Id.* at 97.

⁶² *See id.* at 139-66.

real estate.⁶³ Penn evaluated potential real-estate investments with an eye toward two considerations: what types of retail would attract the most buying power and what retail would best reinforce “campus-neighborhood linkage.”⁶⁴ These considerations led Penn to commit substantial resources, redeveloping two areas into new commercial centers with major retail anchors, with a hope of gradually reducing its participation as private investment in the area grew.⁶⁵ The first of these projects, Sansom Common, a \$95 million mixed-use development built on a former parking lot and anchored by a new Barnes & Noble operating as Penn’s bookstore, opened in 1999.⁶⁶ Penn’s second major project, 40th Street, was a \$40 million mixed-use development with a large grocery store, a movie theater, and a public library as its anchors. This project encountered numerous delays, with some stores opening in 2000 and final completion in 2004.⁶⁷ Penn, apparently advised by the New Urbanist Andres Duany, carefully selected tenants for these developments in order to generate an appealing mix of businesses, much as shopping center developers do.⁶⁸ In this process, Penn made extensive use of focus groups and surveys both of university affiliates and non-affiliates.⁶⁹ In all of these measures, Penn was again willing to accept returns below those provided by ordinary endowment investments.⁷⁰

Penn’s program, both in commercial real estate and other areas, demonstrates the full range of present university urban development activities. As mentioned, these programs typically focus on four main areas: public safety, housing, commercial real estate, and education. In

⁶³ Much like Columbia, Penn’s real-estate development efforts were greatly aided by the fact that it had acquired but never developed significant tracts of land during urban renewal. *See* Strom, *supra* note 28, at 120.

⁶⁴ RODIN, *supra* note 1, at 108-09. This latter term is not well defined, but in context suggests building retail that would appeal to students, faculty, and the community at large.

⁶⁵ *Id.* at 109. Rodin does not explain precisely what this means. I interpret this statement as indicating not that Penn had intended to sell off its real estate but rather instead planned to invest a lot of money now in new projects in order to spur private investment, but would not invest much in the future.

⁶⁶ *Id.* at 114-19.

⁶⁷ *Id.* at 119-29.

⁶⁸ *Id.* at 127-28.

⁶⁹ *Id.* at 110.

⁷⁰ *Id.* at 111.

commercial real estate, some universities undertake entirely new developments, while others primarily rehabilitate existing real estate. These projects are frequently managed much like modern shopping centers, with careful tenant selection and an emphasis on attracting appealing anchor tenants. Finally, projects are often developed with an eye toward creating favorable externalities that will be captured both by the University itself and the surrounding neighborhood. This sort of approach is what I have in mind when I mention the general model of current university development. While universities differ greatly in the details, these basic features are found in development programs at Columbia, Chicago, Penn, Brown, Ohio State, and Case Western, to name just a few. Keeping this general model in mind will be useful when I discuss Yale's own commercial real-estate program in detail.

2. THREE THEORIES OF UNIVERSITY BEHAVIOR

Before introducing Yale's program of urban revitalization through commercial real estate investment, I want to consider the question of why universities would invest in commercial real estate at all. In this paper, I will consider three models of university behavior, which I will call the university as private developer, the university as secondary investor, and the university as political institution. These theories are not only useful to explain *why* universities would invest in commercial real estate in the first place; they also produce different predictions regarding *what sort* of investments universities will make. It is important to note at the outset that in practice, distinguishing which model best explains a particular university's behavior may be difficult, since in many cases the three models will recommend the same action. Further, as I will shortly argue, the three models should be seen along a continuum of behavior, meaning that a university is not "bound" to any one model. In some circumstances, its activities may be best explained

using one model, while in other areas, different institutional dynamics result in another model being more persuasive.

2.1 The University as Private Developer

Universities have several traits that may make them successful as private developers. First, many universities have access to considerable amounts of capital.⁷¹ This would allow them to invest in projects that many private real estate developers could not. Because private developers often must obtain significant financing for their projects, they may be unable to invest in ventures that will generate significant returns but only far down the road.⁷² Universities do not face these constraints because they can invest their own capital. Universities also have a good knowledge of the local community, and, if they are to be successful at attracting students, must know something about the interests of demographic groups that many retailers target. Further, because universities usually operate within one community for a long time, they are likely to have strong preexisting ties both to community organizations and government. This may render the zoning and permit approval processes easier than they would be for private developers, who may lack these prior ties to government officials.⁷³ And because the university, government, and community groups are repeat players, they may have incentives to get along and be able to engage in greater logrolling and deal-making than ordinary private developers. Finally, universities, particularly elite universities, produce many powerful and highly skilled graduates

⁷¹ At the end of fiscal year 2009, Yale valued its endowment at \$16.3 billion. YALE UNIVERSITY INVESTMENTS OFFICE, THE YALE ENDOWMENT 2009 at i (2009), *available at* http://www.yale.edu/investments/Yale_Endowment_09.pdf. Given universities' long time horizons, much of their endowments are in illiquid investments, but clearly they have significant resources for investing in real estate if they should choose to do so.

⁷² For a brief overview of real estate financing, see ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 20-24 (3d ed. 2005).

⁷³ Of course, this is not necessarily so. Long-standing hostility to or resentment against a university from its prior actions may make it more difficult for the university to obtain permit approvals and the like.

who feel a special bond with their alma mater. Universities thus may be able to benefit from the favors and human capital of its graduates at below-market rates.

Descriptively, the university as private developer model predicts that universities will act in the same way as an ordinary private developer would. This model would explain a university's behavior when that university engages in practices that are common among successful private developers and make economic sense for such investors. The model would be falsified if we find a university behaving unlike a private developer by taking certain actions a private developer would deem economically irrational. Thus using this model to explain university behavior first requires that we have a sense of what sort of decisions an ordinary private developer with land holdings similar to a university's would make. I will consider how a private developer who held the properties Yale holds might manage these properties later in this paper in order to assess the explanatory power of this model in the Yale case.⁷⁴ As an initial statement, however, it suffices to note that the manner in which one property is used may affect nearby properties. Thus private developers with significant and condensed holdings will consider how renting space to a particular tenant may enhance or impair the value of their nearby properties. Private developers will seek to maximize the value of their properties as a whole rather than maximizing income on a property-by-property basis. If a university acquires concentrated properties, this model of behavior would expect them to be sensitive to the same dynamic.

2.2 The University as Secondary Investor

The university as private developer model assumed that universities were rational investors in a narrow sense. That is, universities maximize the economic returns on their real estate investments in the same way as a private developer would. The university as secondary investor model begins with this same assumption—universities are rational investors—but with

⁷⁴ See *infra* Section 4.1.

an added element: unlike an ordinary private developer, whose primary activity is real estate, universities are primarily engaged in education. Thus unlike the private developer, who needs only to consider how his or her properties may affect each other, the rational university might also consider how its investments in secondary areas may affect the success of its primary activity. This means that certain secondary investments that are locally unsound—that is, they produce lower gains than opportunity costs—may be globally prudent if they sufficiently improve the return to the university’s primary activity.

To flesh this out, consider the plight of the urban university. Universities such as Yale have made substantial investments in their cities, often for centuries. These primary investments are fundamentally illiquid. Few private parties have a use for, say, a residential college or a university library, so the market value of these investments is likely much lower than their value to the university. This means that universities simply cannot cash out their investments and build a new campus elsewhere without significant economic loss. It is hardly surprising, then, that established universities (at least in the current day) never move: the size of their prior investments makes this impossible absent extraordinary circumstances.⁷⁵ In addition, universities tend to be physically concentrated in a campus. Because of this, they will inevitably capture many of the good and bad externalities created by surrounding land uses.⁷⁶

The success or failure of universities’ illiquid investments is largely the result of their ability to attract high-quality students and faculty. Appealing to the former ensures that the university can charge higher tuition, since it means that demand to attend is high,⁷⁷ while hauling

⁷⁵ This, when combined with first-mover advantages and the enormous cost of creating new elite universities, means that the placement of elite universities may well be “semi-strong” path dependent. See Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 HARV. L. REV. 641, 648-50 (1996).

⁷⁶ Many universities use gates, architecture, and campus security to keep out certain negative externalities, but there are limits to what these techniques can accomplish.

⁷⁷ As discussed below, however, universities are in the business of providing what Henry Hansmann calls an “associational good.” HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 185-86 (1996). As a result, they

in the latter (theoretically) increases the quality of the university's product and thus ensures (again theoretically) continued high demand for it among potential students.⁷⁸ Thus the rationality of a particular investment is best analyzed through its impact on the university's total bottom line—its success as an institution—rather than the narrow sense of whether the investment's direct proceeds cover its costs.

An example makes this clear. A university calculates that increasing the budget of its campus police force by \$10,000 a year will reduce vandalism and damage to campus buildings by \$5,000 a year. In the local sense, this is a bad investment. But globally, if the investment increases demand to work for and attend the institution by \$200,000 a year, it is likely a sound one.⁷⁹ This same dynamic can apply to real estate investment decisions. Building a new shopping center or renting to a particular tenant may be a local money-loser but a global money-winner if the costs of the investment exceed its direct returns but are less than its indirect returns of increased tuition and alumni giving from the happy feeling the new shopping center or store creates in potential students, faculty, and alumni.

A final consideration should be noted here. As mentioned above, universities are repeat players with their communities. This means that the rational university will also consider how a

primarily use any gains in market power from increased demand for attendance to attract more-appealing students rather than to raise tuition. *Id.* at 190-91.

⁷⁸ Marcuse and Potter argue that appealing to the interests of students is what makes universities unique, since attracting quality faculty is no different from the need of every large institution, public or private, to attract quality employees and thus improve the quality of its products. Only universities must convince their clients, as well as their employees, to live near their institutional home for several years, making them unlike most other institutions. Marcuse & Potter, *supra* note 18, at 45. While the university's need to attract quality faculty is clearly similar to the need of any institution to attract a quality workforce, it seems to me that the extraordinarily high human capital needed for becoming a university professor means that the supply of possible employees is much more limited, which makes it more essential for universities to appeal to the needs of faculty than is the case in most industries. Moreover, few companies have illiquid investments in particular communities on par with those of even a small university, meaning that most companies are much more mobile and thus the break-even point between investing to improve the surrounding community and relocating is much, much lower than it is for a university. Finally, Hansmann notes that universities have associative characteristics for faculty, not just students. HANSMANN, *supra* note 77, at 192. Ordinary employees do not ordinarily obtain such associational goods.

⁷⁹ Of course, I am not considering opportunity costs here. Other investments may increase demand by a larger amount.

particular investment now may influence the community and government's willingness to let the university have its way in future interactions. Thus a money-losing investment today may be efficient if it creates so much community goodwill that it makes possible a future project that will generate significant returns for the university and would have otherwise been killed by community or government opposition. This dynamic is probably less important in the context of commercial real estate practices than in other areas where universities make investments to improve their surrounding communities, such as residential housing for non-affiliates and schools, but it is useful to keep it in mind.

These dynamics thus produce the following positive model: universities maximize their self-interest measured broadly. Since universities' investments in their primary activities are highly illiquid, even large losses in secondary investments such as real estate may be globally efficient. This is particularly true because universities' physical concentration in a campus causes them to be greatly affected by the externalities generated by nearby properties. This model therefore predicts that universities will make many seemingly irrational investments that in fact serve their long-term best interests.

Perhaps unsurprisingly, this theory of university behavior is dominant in the literature on university urban development. As mentioned above, one of the essential features of Columbia University's innovative 1982 campus plan, arguably the prototype of the present-day model of university development seen at Penn and Yale, was to transition from a private-developer model of managing the university's commercial property to something like the secondary-investor model, with the University making fine-grained land use decisions such as tenant selection with an eye toward how these decisions would affect the success of the University as a whole.⁸⁰ Case

⁸⁰ See Marcuse & Potter, *supra* note 18, at 50-51.

studies of universities' urban development programs uniformly stress the importance of these considerations as the impetus for university actions.⁸¹

But before simply accepting this dominant approach, we should think about what it actually means. In what way does it make sense to even say that a university has “interests” it tries to further? Is Yale *itself* really better off as an elite, secular, research institution than it was as a Congregationalist seminary? Than it would be if it had become a mid-ranked regional school? Than it would be if it became a community college catering to New Haven residents? This seems doubtful. Rather, when people talk about the “best interests” of a university, they are talking about the best interest of those people who comprise the university. In this respect, universities are no different from most other institutions. When people say that a corporation acted in its best interests by doing X, they do not mean that the corporation itself has interests, rather they mean that the corporation acted to further the interests of the people who have some claim on it, which usually means its owners.

This means that to assign any real content to the phrase “best interests of the university” we have to decide whose interests universities serve. In other words, we need a theory about the nature of university “ownership.”⁸² Henry Hansmann has persuasively argued that colleges and universities, particularly elite ones, should be seen primarily as providing an associational good.⁸³ By this, he means that the “customers” of the university, its students, choose where to attend college not solely based on the quality of school facilities or the education one receives there but based in part on the other students of the institution and its alumni. By attending a

⁸¹ See, e.g., RODIN, *supra* note 1, at 54-55; David Dixon & Peter J. Roche, *Campus Partners and The Ohio State University: A Case Study in Enlightened Self-Interest*, in THE UNIVERSITY AS URBAN DEVELOPER, *supra* note 1, at 268, 281; Marcuse & Potter, *supra* note 18, at 45-47.

⁸² Since universities are generally non-profits, they lack owners as this term is traditionally defined, since no one has a claim to residual profits. This does not mean that universities lack individuals who serve as the analogue of owners in a public corporation.

⁸³ HANSMANN, *supra* note 77, at 185-86.

college, one is purchasing an association that lasts for a lifetime, and so one has a strong interest in selecting the best association possible. In this respect, colleges and universities are much like social clubs.

This creates a problem, however. Associational enterprises such as clubs or colleges will naturally stratify.⁸⁴ This gives elite colleges a certain market power: individuals would, all else being equal, rather attend a more-elite institution. If the college were controlled by profit-maximizing individuals, then, these owners would be able to charge quasi-monopoly prices and to expand the university.⁸⁵ Some desirable students would therefore be unable to attend the institution while less-appealing students who could afford the high tuition would be admitted. Both of these developments would reduce the value of the association to the school's alumni, who cannot change their association with a particular college once they have graduated. To avoid being exploited in this way, elite colleges are overwhelmingly organized as nonprofits controlled by current and former students so that no one is in a position to exploit the value of the college's associational assets and reduce the value of the association to the alumni.⁸⁶ But students are not the only members of the university community who derive associational benefits from membership. Faculty and to a lesser extent administrators no doubt prefer, all else being equal, to work at more-prestigious institutions in order to associate with interesting and successful peers.⁸⁷ Because these three groups, students (including former students), faculty, and administrators all have an associational interest in the university, these three groups typically control university decisions. I will call these groups the university's "affiliates." Other groups that are part of the

⁸⁴ *Id.* at 186-87.

⁸⁵ *Id.* at 189-90.

⁸⁶ *Id.* at 190-91. Hansmann further notes that universities are overwhelmingly organized as nonprofits because they are funded in large part by donations, and donative organizations are more successful as nonprofits because the lack of owners with a right to residual earnings means that their gifts are less likely to be subverted. *Id.* at 230-33.

⁸⁷ *Id.* at 192.

university or deal with it on a regular basis,⁸⁸ such as its staff, generally have no greater say in university governance than do the employees of a corporation, because the staff of a university, like the employees of a corporation, lack the strong associational ties with the university and thus there is no reason for these individuals to have significant power within it.

When clarified in this way, the secondary investor model becomes more robust. When we say the university makes secondary investments in order to advance the university's best interests, we mean nothing more than that the university works to advance the best interests of its affiliates. The "best interests" of the university simply are the aggregated best interests of its affiliates. Investments in secondary areas, such as commercial real estate, may advance the best interests of the university's affiliates by making the university a more-appealing place, thus allowing it to increase the value of the associational good it offers. This further means that the university can attract more talented students, faculty, and administrators for the same cost, thereby enhancing its ability to provide high-value educational services. Thus the fullest statement of the secondary investor model is that the university will take actions that best serve the interests of its affiliates measured in aggregate.

2.3 The University as Political Institution

This statement of the university's objective—advancing the best interests of its affiliates—leads to the third model of university behavior: the university as a political institution. By and large, the university's affiliates will be relatively homogenous. They will have similar

⁸⁸ Hansmann uses the term "patrons" to describe all those who transact with an enterprise, whether as purchasers of its products or sellers of supplies, labor, or other factors of production. *Id.* at 12. On Hansmann's view, the general principle of ownership is that enterprises assign ownership to those groups of patrons who it would be very costly to contract with, thereby reducing the total costs of the enterprise by making these patrons "owners." *Id.* at 20-22. In ordinary public corporations, it would be very expensive to obtain all of the firm's capital through contract, so these firms are typically owned by their investors. *Id.* at 53. In the university context, it would be very expensive to contract with students, alumni, faculty, and administrators given the associational goods supplied by the university, so this form of enterprise is controlled by these classes of patrons. My use of the term "affiliates" is therefore not equivalent to Hansmann's "patrons" but rather denotes a certain class of patrons who occupy a position similar to that of the owners of a for-profit firm.

backgrounds and tastes and are pursuing similar careers. Moreover, at most urban universities, the university's affiliates tend to cluster within certain university neighborhoods, and thus are similarly affected by university investments in physical space.⁸⁹ Individuals with this much in common will have many interests in common.

But it would be absurd to think that the interests of university affiliates will never conflict. Sometimes, what is best for current students will be harmful to the alumni or faculty, or less good for them than alternatives that are less good for students. And when this is the case, aggregating the best interests of the university's affiliates no longer becomes a simple task. This is particularly so because different subsets of a university's affiliates will likely have very different governance costs.⁹⁰ The faculty, for example, may be able to organize more cheaply and tailor university policy to their needs than the alumni, who are often physically distant from the university and its day to day struggles. The same public-choice problems that afflict governmental institutions should also be found within universities.⁹¹ I will have more to say about these issues later in the paper, but for now it is enough to note that while the university may in theory attempt to maximize the aggregate best interests of its affiliates, differences in political power among the university's affiliates may result in it pursuing policies that advance the interests of some within the university to the detriment of the best interests of the affiliates as a whole. The university as political institution model predicts that universities will pursue those policies that best serve the interests of its most influential affiliates, not necessarily those of its affiliates in aggregate.⁹²

⁸⁹ In New Haven, Yale affiliates are heavily clustered in East Rock, the Nine Squares, the eastern part of Dwight, and West Rock.

⁹⁰ See HANSMANN, *supra* note 77, at 39-44 (discussing the costs of governance).

⁹¹ See *id.* at 287-89 (recommending that firms be viewed in part as political institutions).

⁹² It is tempting to view this model as merely stating that universities behaving under the second model will simply fail to meet their goal of maximizing aggregate affiliate best interests because of internal political dynamics. This is a mistake, however. This is a truly different model because it postulates that universities are not actually trying to

2.4 Agency Slack

There are two other theories of university behavior that merit brief mention. The first of these, agency slack, is a qualification of the above models rather than a complete model on its own. The university, of course, like any other institution, cannot act on its own but must act through agents, who necessarily must have some discretion in carrying out their duties. In this context, the agents are those who manage the university's commercial real estate investments. As in the corporate context, the interests of agents may diverge from the interests of the university's affiliates.⁹³ Thus the agents managing the university's real estate may make decisions that are beneficial to them personally but not in the best interests either of the university's affiliates in aggregate, if we assume the second model, or of its most powerful affiliate groups, if we assume the third. A small-scale example of this would be an employee in a university's commercial real estate office deciding to lease property to a particular tenant because he is personal friends with that tenant despite believing that tenant would be less beneficial to the quality of the surrounding area than other candidates. We can also imagine more-consequential instances of this. For example, the senior administrators of a university's commercial real estate division may recognize that the affiliates whose best interests they are supposed to advance will become upset if the university's property is rented to a tenant they dislike but will never attribute the opening of attractive tenants to the university's actions. As a result, these administrators may be risk averse, since they are much more likely to be punished if a risky tenant falls short of expectations than if it exceeds expectations or is never allowed to rent property in the first place.

maximize affiliates best interests in aggregate. Rather, they have a completely different objective function: maximizing the best interests of the more-powerful affiliate groups. They do not fail to achieve the goal assumed by the second model; they are not even attempting to achieve it.

⁹³ See generally Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (discussing the principle-agent problem of the corporation).

Before moving ahead, I should further clarify how I will use the term agency slack. This clarification is needed because certain outcomes could be described either using the political institution model or as examples of agency slack. For example, if a university's faculty uses governance institutions such as the faculty senate to tilt the university's policies toward their interests at the expense of the aggregate best interests of the university's affiliates as a whole, is this an agency problem or a governance problem? The answer to this depends on our institutional theory of the university. If we think that the university's only goal should be to advance the best interests of its current, past, and future students, with all other ends subordinated to this, then we would describe this as an agency problem, because one group of the university's agents, its faculty, has used the students' inability to monitor the university's policies to distort these policies to the faculty's ends. If, however, we think that universities serve a broader constituency, including faculty, then we would describe the faculty's action using the political institution model.

In many cases, this distinction will not matter, at least as far as this paper is concerned. Whether we regard the previous example as a problem of politics or agency, the upshot is the same: in both cases, the university has departed from optimal policy, defined as serving the best interests of its affiliates in aggregate. Distinguishing between political failure and agency problems is important in two contexts, however. First, it would be important if our goal were to correct suboptimal policies. In such cases, we would need to know how these suboptimal policies came about, so correctly characterizing the source of these inefficiencies would be important. Second, and more important, these issues make a difference when it comes to deciding whether the university's policy is optimal in the first place. Recall that I have described the university's best interests as whatever is in the best interests of its affiliates in aggregate, with affiliates

consisting of all those who derive associational value from the university: its students, faculty, and administrators. Other theoretical accounts of the university may deny that the best interests of some of these groups should be considered at all, except as a means to serving the best interests of some other more fundamental group.⁹⁴ Or they may admit that the interests of all three groups should be valued as ends alone but put different weight on the interests of each group.⁹⁵ These different definitions of whose interests the university should serve mean that there are some outcomes I would define as optimal—that is, maximizing the aggregate best interests of the university’s affiliates—that others would describe as the result of agency problems. This is because I include the best interests of faculty and administrators in my calculation of aggregate utility, while others may not.

What this means is that different theoretical accounts of the university change whether an outcome is seen as optimal, the result of defective internal governance, or a simple agency problem. Because I have defined the university’s best interest as being whatever is in the best interests of its affiliates and have defined affiliates to include students, faculty, and alumni, the range of outcomes I would see as plausibly optimal is relatively large. Further, because my definition posits that the university can and should balance the best interests of these three very different groups, the scope for political decisionmaking within my theory of the university is quite broad. One who rejected my assumption that it is legitimate for the university to advance the best interests of faculty and administrators as an ends in themselves would see the range of optimal policies as quite small. And because the only patron group whose interests the university could legitimately serve, its students and alumni, are much more homogeneous than three

⁹⁴ Such an account would probably focus on the best interests of students and alumni, seeing anything that serves the best interests of faculty and administrators as only justifiable if it ultimately advances the interests of students and alumni.

⁹⁵ For example, one could accept that students, faculty, and administrators’ best interests should all count, but think that the students’ best interests should be twice as important in the university’s calculation of utility as the faculty’s.

disparate affiliate groups, they would see fewer circumstances where suboptimal outcomes are due to political forces, instead attributing most suboptimal policies to agency slack.

I have already said more on this than is warranted, since given the limited goals of my paper, this theoretical issue has few substantive ramifications and only terminological ones. But to clarify my terms, throughout this paper, I will use the political institution model to describe cases where disparate power among the university's affiliates leads it to adopt formal policies or goals that further the best interests of the more-powerful affiliates more than alternative policies that would result in greater aggregate benefits but fewer benefits to the more-powerful affiliate groups. When I refer to agency problems, I mean cases in which the inability of the university's affiliates to perfectly monitor university administrators' exercise of discretion in implementing these policies results in suboptimal outcomes—those where the aggregate gains are lower than they would be if different decisions had been made. This distinction, then, is primarily one of whether the suboptimal outcome is the result of a deliberate policy arrived at through deficient political structures or the result of difficult-to-monitor administrative discretion.⁹⁶

2.5 Moral Obligation

A final theory of university behavior deserving mention is the “moral obligation” model. It is not uncommon to find within the literature on university urban development the claim that universities are morally obligated, either because of their expertise, superior resources, or history, to act in a way that benefits their surrounding communities.⁹⁷ While this sounds very nice, it adds nothing to the above theories. I see no reason to claim that universities as entities

⁹⁶ Agency costs should not be seen as an independent model because they are simply pathologies that can afflict any of the first three models. Even if agency costs are very high, the university's objective remains to maximize the economic returns on its investments, the best interests of its affiliates as a whole, or the interests of its most-powerful affiliates. Agency costs simply limit reaching these ends rather than changing the end sought, and so they do not provide a fourth model because they do not specify a new way of conceiving of the university's aim.

⁹⁷ See, e.g., RODIN, *supra* note 1, at 18-20.

can have moral obligations. But clearly their affiliates can. When so clarified in this way, however, the moral obligation model merely reduces to the university as secondary investor model—the university works to maximize the best interests of its affiliates as a whole, including their moral interests—or to the political institution model—the university works to maximize the best interests of the most politically powerful affiliates, including their moral interests. Moral obligations certainly can be part of the interests of affiliates that universities aim to further. But discussing this in terms of the university’s moral obligation produces no meaningful additional insights, so I will not talk in this way.

3. YALE UNIVERSITY’S COMMERCIAL REAL ESTATE PROGRAM

In this Part, I will discuss the details of Yale University’s program to improve the New Haven area by investing in commercial real estate. I begin by giving an overview of the history of Yale’s efforts. I then discuss the institutional structure of Yale’s program. Next, I turn to the details of Yale’s current activities, looking at those aspects of the program I consider noteworthy. Finally, I conclude with a brief look at other major initiatives by the University to rejuvenate New Haven in order to put Yale’s commercial real estate investments in context.

3.1 The History of Yale’s Program

Narrating the history of Yale’s program is slightly difficult because it is unclear when Yale began thinking of its real estate investments as a means to improve New Haven. As with Columbia and Penn, much of the property currently rented to commercial tenants by the University was acquired long before any “program.”⁹⁸ Acquisitions along Broadway, Audubon/Whitney, and Wall Street were already well underway by the 1950s, with most pieces

⁹⁸ All information about property ownership, dates of acquisition, and current assessed value are based on the New Haven Tax Assessor’s online database. ASSESSORS ONLINE DATABASE FOR NEW HAVEN, CT, <http://data.visionappraisal.com/NewHavenCT/DEFAULT.asp> (last visited Mar. 4, 2011).

of the University's current portfolio purchased by the late 1970s.⁹⁹ Some of this property was acquired in connection with specific University plans. For example, as mentioned above, the University once hoped to build two new residential colleges at the corner of Grove and Whitney.¹⁰⁰ This presumably explains why it purchased some property in the area around that time. The majority of the property acquired by the University before the 1990s, however, does not appear to have been purchased as part of any definite plan. I would speculate that most of it was purchased according to a philosophy akin to Columbia's "deck of playing cards" approach, in which any potential useful available properties were acquired, with a plan for them to be developed later.¹⁰¹ Throughout this period, all of Yale's properties were managed by its investment office simply as a part of its endowment.¹⁰²

The emergence of a distinct program began around the time of Richard Levin's appointment as president of the University in 1993. Soon after his arrival, he established the Office of New Haven and State Affairs (ONHSA) to manage all community outreach activities on behalf of the University.¹⁰³ These outreach activities included programs designed to improve the New Haven area, such as the Yale Homebuyer Program, which provides mortgage assistance to Yale employees who purchase homes in certain areas of the city.¹⁰⁴ In 1996, the University recognized that commercial real estate could assist in its aspirations of improving New Haven, so it transferred much of its real estate portfolio from the investments office to the control of

⁹⁹ I describe the current portfolio in a general way *infra* Subsection 3.3.1. For a map of Yale's properties in the downtown New Haven area, see Figure 1. For a complete list of current properties owned by Yale and managed as part of its commercial real estate program, see the Appendix. Because the information reported in the Appendix is derived from the New Haven Assessor's Office, it uses the addresses in that database. For reasons I do not understand, the addresses in the database do not always match the present street addresses of these properties.

¹⁰⁰ See *supra* note 26 and accompanying text.

¹⁰¹ See *supra* note 48 and accompanying text.

¹⁰² Gretchen Hoff, Shopping, Safety, and Students: Yale University's Brand of Urban Renewal 44-45 (2004) (unpublished manuscript).

¹⁰³ DeWitt, *supra* note 53; David McKay Wilson, *Yale and New Haven Find Common Ground*, N.Y. TIMES (Dec. 16, 2007), http://www.nytimes.com/2007/12/16/nyregion/nyregionspecial2/16yalect.html?_r=1&oref=slogin.

¹⁰⁴ Wilson, *supra* note 103.

ONHSA.¹⁰⁵ Very shortly after this, the University created University Properties (UP), a branch of ONHSA tasked with managing the University's commercial and residential real estate.¹⁰⁶ Finally in 1998, Bruce Alexander, a former executive of the Rouse Company who had worked on Fenueil Hall in Boston, the South Street Seaport in New York City, and the Harborplace Mall in Baltimore, was hired to run ONHSA, which necessarily included the management of Yale's property through ONHSA's subsidiary, University Properties.¹⁰⁷ While the hiring of Alexander to head this office indicates that Yale already considered the management of its commercial real estate to be a major priority, his background no doubt increased the importance of this program among Yale's efforts to improve New Haven.

President Levin's tenure has seen three significant changes to Yale's commercial property. First, Yale has invested a significant sum, by one measure \$6.2 million, in improving the Broadway area.¹⁰⁸ This began soon after President Levin's arrival, when the University contributed \$2 million and the federal government \$4 million to improve the street layout, upgrade sidewalks, and enhance storefronts.¹⁰⁹ Soon after, the University began a more-ambitious program to remake Broadway. The project began in 1997, when the University replaced the Yale Co-Op, its longtime bookstore, with a Barnes & Noble.¹¹⁰ This change was

¹⁰⁵ Hoff attributes this innovation to Levin and University Secretary Linda Lorimer, who personally managed these properties for some period. Hoff, *supra* note 102, at 57.

¹⁰⁶ DeWitt, *supra* note 53.

¹⁰⁷ Wilson, *supra* note 103.

¹⁰⁸ Eli Bildner, *Officials Not Concerned by Vacancies, University Properties Expects To Fill Several Storefronts in Coming Months*, YALE DAILY NEWS (Nov. 7, 2006), <http://www.yaledailynews.com/news/2006/nov/07/officials-not-concerned-by-vacancies/>. The University will apparently add to this figure by spending nearly \$5 million to renovate one of its Broadway properties in order to attract Apple as a tenant. Thomas MacMillan, *Broadway Getting \$4.8M Apple Makeover*, NEW HAVEN INDEPENDENT (Apr. 27, 2011), http://www.newhavenindependent.org/index.php/archives/entry/yale_ready_for_apple_with_4.8_m/

¹⁰⁹ Eleanor Charles, *In the Region/Connecticut; Yale Works to Break Down the Town-Gown Barrier*, N.Y. TIMES (Sept. 25, 1994), <http://www.nytimes.com/1994/09/25/realestate/in-the-region-connecticut-yale-works-to-break-down-the-town-gown-barrier.html?scp=1&sq=yale+town+gown+barrier&st=nyt>; Hoff, *supra* note 102, at 51.

¹¹⁰ Mark Alden Branch, *Barnes and Noble and Mom and Pop*, YALE ALUMNI MAGAZINE, Feb. 1999, at 34, 39; Erin Donar, *Over 5 Years, a New Yale Face for Broadway*, YALE DAILY NEWS (May 26, 2002), <http://www.yaledailynews.com/news/2002/may/26/over-5-years-a-new-yale-face-for-broadway/>. Note that Penn

motivated by two considerations: the desire to bring in a national tenant that could serve as an “anchor” for the renovated Broadway area and the Co-Op’s refusal to participate in the University’s efforts to extend the operating hours of Broadway businesses until nine pm.¹¹¹ Next, the University moved several tenants, demolished their former buildings, and built a completely new retail space with room for four tenants in the center of Broadway.¹¹² The University then wooed a number of prominent national chains to serve as additional anchor tenants for the area, including J.Crew, Urban Outfitters, Origins, and Au Bon Pain, all of which had opened by 2001. As part of this process of making Broadway friendlier to shopping, many service businesses such as barber shops were moved to less-prominent locations, particularly second floors,¹¹³ while the leases of some businesses Yale disliked were not renewed.¹¹⁴ The physical changes in Broadway as well as new requirements imposed on University tenants were particularly disruptive to many established tenants, leading many of them to close after decades of operation in the Broadway area.¹¹⁵ By 2002-03, this process was more or less complete; while there have obviously been changes in the tenant mix since this period, ambitious reworking of Broadway had ended.

replaced its bookstore with a Barnes & Noble at nearly the same time. *See supra* note 66 and accompanying text. It is unclear whether this was merely a coincidence, the result of some corporate strategy by Barnes & Noble to open new college bookstores, or whether one university was influenced by the other. Yale has specifically disclaimed being influenced by Penn or any other university’s urban development program, *see infra* Subsection 3.3.11.

¹¹¹ Branch, *supra* note 110, at 39; Hoff, *supra* note 102, at 51. On the University’s nine pm policy, *see infra* Subsection 3.3.5.

¹¹² Karen Abrecht, *Yesterday’s Broadway Lives on in Family Businesses*, YALE DAILY NEWS, Oct. 1, 1998, at 1; Hoff, *supra* note 102, at 51-52. This structure is currently the home to J.Crew, Urban Outfitters, Laila Rowe, and Thom Browne.

¹¹³ Branch, *supra* note 110, at 39.

¹¹⁴ One prominent example of this was Krauszer’s. *See* Henry Wong, *Gourmet? My Snapple Still Tastes the Same*, YALE DAILY NEWS (Mar. 26, 2001), <http://www.yaledailynews.com/news/2001/mar/26/gourmet-my-snapple-still-tastes-the-same/>. I discuss these episodes in greater detail *infra* Subsections 3.3.3 and 3.3.6.

¹¹⁵ Two prominent examples were Quality Wine, *see* DeWitt, *supra* note 53, and Barrie Ltd., *see* Tom Sullivan, *Barrie Ltd. Booters Plans To Close Shop*, YALE DAILY NEWS (Sept. 11, 2003), <http://www.yaledailynews.com/news/2003/sep/11/barrie-ltd-booters-plans-to-close-shop/>. *See also* Hoff, *supra* note 102, at 65. I discuss this issue further *infra* Subsection 3.3.3.

The second major event in the history of Yale's program was the acquisition of fifteen properties on Chapel and College Streets in the late 1990s.¹¹⁶ This episode began in the 1980s, when New Haven real estate developer Joel Schiavone gradually assembled a significant block of properties on Chapel Street between High and Temple, on College Street between Chapel and Crown, and on Crown Street between College and High.¹¹⁷ By all accounts, the management of these properties as a unit substantially enhanced their value.¹¹⁸ However, Schiavone lost control of these properties in 1992, when his partner, First Constitution Bank, failed and was taken over by the FDIC.¹¹⁹ Schiavone's wife continued to manage these properties for several years while the couple attempted to regain control of them, but they never managed to do so. In the late 1990s, New Haven Mayor John DeStefano, apparently worried that the properties would be auctioned off separately and thereby lose the benefits of common ownership, convinced Yale to purchase these properties as a block.¹²⁰ Yale completed this deal in early 1999, paying \$5 million to purchase all but one of the properties in foreclosure.¹²¹

Finally, Yale's most-recent activity has been on Audubon Street and Whitney Avenue.

The University has long owned a stretch of properties (with a few holes) on the west side of

¹¹⁶ News sources are inconsistent regarding both the number of properties Yale purchased and the price it paid for these properties. Compare Brenda Marks, *Business Booster: Yale University Invests in Small Businesses Downtown*, NEW HAVEN REGISTER (Aug. 24, 2003),

<http://www.nhregister.com/articles/2003/08/24/import/10056681.txt?viewmode=fullstory> (16 buildings for \$9.5 million), with Hoff, *supra* note 102, at 55 (14 for \$5 million). This confusion is due to two factors. First, the Tax Assessor's database splits these properties up in a way that does not necessarily conform to how the average observer would describe them. See *supra* note 99. This makes it possible to describe the sale of this block of buildings in several ways, depending on how one defines each building. Second, some of the properties purchased in this sale were vacant space or parking lots. By my count, the University purchased twelve buildings and three vacant properties in this sale. These two points do not, however, account for the different figures given for price. I have used the figure quoted in Hoff because this figure is found in numerous sources, while Marks's figure is unique.

¹¹⁷ Schiavone also owned two properties on Chapel west of York street, both of which the University later acquired.

¹¹⁸ See, e.g., Chris Capot, *Schiavone Striving To Regain Real Estate*, NEW HAVEN REGISTER, Oct. 9, 1995, at A1.

¹¹⁹ *Id.*; see also Arielle Levin Becker, *Schiavone, From the Banjo to the Stump*, YALE DAILY NEWS (Oct. 15, 2001), <http://www.yaledailynews.com/news/2001/oct/15/schiavone-from-the-banjo-to-the-stump/>.

¹²⁰ James M. Klatell, *Yale Leads New Haven's Renaissance*, CBSNEWS.COM (June 10, 2006), http://www.cbsnews.com/stories/2006/06/10/national/main1699378_page2.shtml?tag=contentMain;contentBody.

¹²¹ Hoff, *supra* note 102, at 55. For reasons unknown to me, Yale chose not to purchase the former Palace Theater building, thus leaving a rather large hole in its control of properties along College Street.

Whitney between Grove and Trumbull, beginning approximately half way up the street. In 1997, it expanded these holdings by purchasing a large office building at the corner of Whitney and Grove, conveniently called the Whitney Grove building.¹²² It expanded again in 2002, acquiring a rather substantial block of property on the east side of Whitney and north side of Audubon.¹²³ In this purchase, which as far as I can tell went completely unnoted at the time by both the student and professional press, the University purchased the 55 Whitney Avenue building and all the ground-floor retail space on the north side of Audubon between Whitney and Orange, apparently for the sum of \$10.2 million.

After this purchase, Yale has been relatively quiet. The University has purchased a number of properties within the downtown area, many of which are retail properties with existing tenants.¹²⁴ But these properties should probably not be considered part of Yale's commercial real estate program.¹²⁵ The University has also presumably purchased properties through front corporations, a tactic it has used in the past, but such acquisitions are both impossible to discover and not particularly relevant to the topic of this paper, which is interested in Yale's public program of commercial real estate. Yale has added to its portfolio of properties since 2002 by building new campus facilities with ground floor retail space, such as the Howe

¹²² Branch, *supra* note 110, at 37.

¹²³ David Shieh, *Audubon Finally Fills Up*, YALE DAILY NEWS (Nov. 10, 2005), <http://www.yaledailynews.com/news/2005/nov/10/audubon-finally-fills-up/>.

¹²⁴ For example, in the last five years, Yale has purchased several properties on York Street (e.g., 142 and 146), while in 2005 it acquired several properties on the western portion of Crown Street (e.g., 331 Crown and some neighboring properties).

¹²⁵ There are three reasons for this. First, the University does not itself seem to regard these properties as part of its commercial real estate program. For example, vacancies in these spaces are not listed on the University Properties website and the University does not appear to apply the same policies, such as tenant selection, to these properties as to those on, say, Chapel Street. Second, these properties are generally ill suited to the upscale retail Yale wishes to attract, as they are generally run-down and shabby. Finally, these properties are concentrated on blocks where the University already has existing holdings devoted to educational or administrative functions. I suspect that the University intends to demolish or seriously renovate these structures and then devote this space either to school uses or to retail, at which point the properties would be brought within the fold of the University's program. Currently, these properties are likely being held as is until existing leases expire or the University can obtain the needed funding and approval for whatever plans it has. This, however, is just speculation.

Street Garage. But these additions are of minor importance because the University has yet to find tenants for them. Finally, since the arrival of Bruce Alexander in the late 1990s, Yale's strategy for managing its properties has been more or less consistent, though obviously with some evolution in response to market forces. With this background in mind, I will now discuss the institutional structure of Yale's program.

3.2 Current Institutional Structure

Yale's program is managed by three main entities. The first is the Office of New Haven and State Affairs. This small office is run by Bruce Alexander, Vice President for New Haven and State Affairs and Campus Development.¹²⁶ None of the administrators in this office except for Alexander appear to have any duties related to the management of Yale's real estate.¹²⁷ Instead, ONHSA focuses primarily on interacting with state and local government and community organizations and managing Yale programs in other areas, such as its efforts to improve New Haven's public schools.

University Properties, housed within ONHSA and run under the direction of Alexander, is the entity primarily responsible for Yale's commercial real estate program. This office is, frankly, a bit of a black box. In 2004, it was managed by David Newton with a staff of approximately ten, many of whom were recent graduates from Yale's School of Management.¹²⁸ Newton has since retired,¹²⁹ and the office is currently run by Abigail Rider, who previously

¹²⁶ The addition of this last element to Bruce Alexander's title is recent: its first appearance in a newspaper article is in 2008. See Sam Pilku, *Mayor Unveils \$1.6M Plan for Economic Development*, YALE DAILY NEWS (Feb. 1, 2008), <http://www.yaledailynews.com/news/2008/feb/01/mayor-unveils-16m-plan-for-economic-development/>.

¹²⁷ Michael Morand, former Associate Vice President for New Haven and State Affairs in ONHSA frequently commented on Yale's commercial real estate to the press. However, he recently joined the University's Office of Public Affairs and Communications and thus is no longer affiliated with ONHSA. Danny Serna, *Morand Joins Office of Public Affairs and Communications*, YALE DAILY NEWS (Nov. 15, 2010), <http://www.yaledailynews.com/news/2010/nov/15/morand-joins-office-of-public-affairs-and/>.

¹²⁸ Hoff, *supra* note 102, at 58.

¹²⁹ Reading between the lines, it is likely that Newton's departure was related to the University's dispute with the owners of the restaurants Bespoke and Roomba regarding the boundaries of the former. See Lea Yu, *Univ.*

worked for Brown University, where she was the director of its real estate office.¹³⁰ According to Yale's employee directory, the office currently has a staff of eight.¹³¹ This office handles nearly all aspects of Yale's commercial real estate program, including selecting tenants, negotiating leases, and coordinating advertising campaigns. The evidence strongly suggests, however, that UP has very little discretion and is very tightly managed by Alexander, who makes essentially all important decisions.¹³²

The day-to-day management of Yale's commercial properties, by which I mean maintenance requests and the like, is managed by an outside entity, Elm Campus Partners. While Elm Campus's involvement in commercial real estate is limited, it is much more active in the management of Yale's residential properties, as it is responsible for advertising and leasing all of these units.¹³³ Elm Campus Partners was started by two Yale School of Management graduates, Andy Lewandowski and Troy Resch, the latter a former associate director at University Properties.¹³⁴ It commenced operations on January 1, 2006, and was immediately given the contract to manage the University's properties.¹³⁵ It manages no properties other than the University's. As this timeline suggests, Elm Campus Partners was spun off from within

Properties Head Begins Amid Conflict, YALE DAILY NEWS (Oct. 19, 2007), <http://www.yaledailynews.com/news/2007/oct/19/univ-properties-head-begins-amid-conflict/>. I discuss this curious episode in greater detail *infra* Subsection 3.3.8.

¹³⁰ *Id.*

¹³¹ *Directory of Organizations*, YALE UNIVERSITY, <http://www.yale.edu/directory/FinalUpdates/DirectoryOrgs.pdf> (last visited Mar. 4, 2011).

¹³² Its former director, David Newton, was once quoted in *Business New Haven* as saying that he had "a lot of responsibility but very limited authority." Yu, *supra* note 129. Many of Yale's tenants reportedly agreed with his assessment. After Newton's departure following the Bespoke episode, UP has become even more inscrutable. When Gretchen Hoff wrote a paper on Yale's commercial real estate program in 2004, she was able to interview three UP employees, including Newton. All of my attempts to contact UP managers, including Rider, in researching this paper were passed on to Bruce Alexander, who responded personally to all my inquiries. While he was certainly very helpful in writing this paper, it is an unusual (to say the least) to find an institution in which only the highest person on its organizational chart will speak with a law student writing a paper. For an additional anecdote regarding my interactions with University Properties that suggests its lack of discretion, see *infra* note 188.

¹³³ On Yale's residential properties, see *infra* Section 3.4.

¹³⁴ See Hoff, *supra* note 102, at 50. Attempts to interview them were unsuccessful.

¹³⁵ David Shieh, *Univ. Hires New Firm To Manage Properties*, YALE DAILY NEWS (Jan. 10, 2006), <http://www.yaledailynews.com/news/2006/jan/10/univ-hires-new-firm-to-manage-properties/>.

University Properties to replace its existing management firms.¹³⁶ It has maintained very close ties with University Properties.¹³⁷

Throughout the history of its real estate program, Yale has always contracted out day-to-day management of its properties to a private firm.¹³⁸ Presumably, Yale began this practice when its property was managed by its investment office, which was likely ill-equipped to handle the maintenance needs of tenants. When these properties were moved to the newly created ONHSA and UP, they too probably lacked the capacity to handle these operations initially. It is somewhat puzzling, however, that Yale has continued to contract these services out, particularly since the University clearly has significant internal capacity for building maintenance and the like. Moreover, it is difficult to argue that UP would have been unable to take on these responsibilities in house in 2005, since at least one founder of Elm Campus Partners was a UP employee at the time. If UP believed he had the ability to manage daily operations in a private firm, it is hard to see why he would not have the ability to do so in-house.

I believe that the University's continual practice of contracting the daily management of its properties to an outside firm can be explained by three factors. First, there are probably reputational benefits from this arrangement. Tenants who are unhappy with the response to their maintenance requests do not become angry with Yale if these services are provided by a private

¹³⁶ Telephone Interview with Bruce D. Alexander, Vice President for New Haven and State Affairs and Campus Development, Yale University (Feb. 18, 2011). Prior to this, Yale's residential properties were managed by Owens, Renz and Lee Company, Shieh, *supra* note 135, and its commercial properties by ProManagement Services, Hoff, *supra* note 102, at 58.

¹³⁷ Elm Campus Partners leases its office space from the University.

¹³⁸ Telephone Interview with Bruce D. Alexander, *supra* note 136. Interestingly, one of Yale's first managers was Schiavone Management Co., owned by Craig and Joel Schiavone. For unknown reasons, this relationship deteriorated, the Schiavones were fired, and several lawsuits were filed. *See, e.g., Randall Beach, Schiavone Says Yale Plays Rough*, NEW HAVEN REGISTER (Feb. 16, 2001), <http://www.newhavenregister.com/articles/2001/02/16/import/1421542.txt>; Tom Sullivan, *Yale Fires Schiavone Management Co.*, YALE DAILY NEWS (Mar. 20, 2001), <http://www.yaledailynews.com/news/2001/mar/20/yale-fires-schiavone-management-co/>.

firm.¹³⁹ Thus Yale avoids having animosity directed at it from frustrated tenants. Second, Yale employees are heavily unionized and receive generous salaries and benefits. Hiring an outside firm with very close ties to UP to provide these services allows Yale to achieve many of the benefits of internal management, while also paying sub-union wages and benefits.¹⁴⁰ Finally, and perhaps most important, contracting these services out to a private firm allows UP to maintain greater discipline, since if the management company is not performing adequately it is much simpler to not renew their contract than to fire an entire in-house division. This threat may induce better performance than if these services were provided from within UP.

3.3 Notable Practices

In this Section, I will discuss several noteworthy practices of Yale's program to improve New Haven through investments in commercial real estate. For the most part this Section is merely descriptive. Explaining why the University had adopted these policies will be the primary task of Part 4. I will, however, mention Yale's own explanation for some of these policies.¹⁴¹ And I will also attempt to account for a few minor practices that are not closely integrated with Yale's overall plans but instead are the result of idiosyncratic forces.

3.3.1 A Sketch of Yale's Holdings

While very little of New Haven's total commercial real estate is owned by Yale, it is the city's largest commercial landlord and within downtown New Haven its holdings are significant. These holdings are heavily concentrated in three areas, forming particular blocks or stretches of blocks in which Yale is the majority and sometimes the dominant landowner. A complete list of

¹³⁹ Remember that Elm Campus Partners is not only responsible for managing the daily needs of the University's commercial tenants, but also the tenants of its roughly 500 residential units.

¹⁴⁰ This assumes that unionized Yale employees are entitled to above market compensation, which seems likely. The minimum hourly wage for a Yale "maintenance technician" is \$16.73 an hour, with a maximum of \$23.67. *Appendix I-A—Salary Structure*, YALE UNIVERSITY, <http://www.yale.edu/hronline/labrelat/Salarystructure.htm> (last visited Mar. 9, 2011). Maintenance technicians are rated on the Labor Grade B scale. *C&T Salary Structure Grid*, YALE UNIVERSITY, <http://www.yale.edu/hronline/compclas/ctgrid.htm> (last visited Mar. 9, 2011).

¹⁴¹ Often, alternative explanations of these same practices will be discussed in Part 4.

all Yale properties rented out to commercial tenants within downtown New Haven is provided in the Appendix. Figure 1 provides a map of Yale's current commercial property. The areas in blue are campus facilities, including administrative buildings. The yellow areas denote the University's commercial real estate.¹⁴²

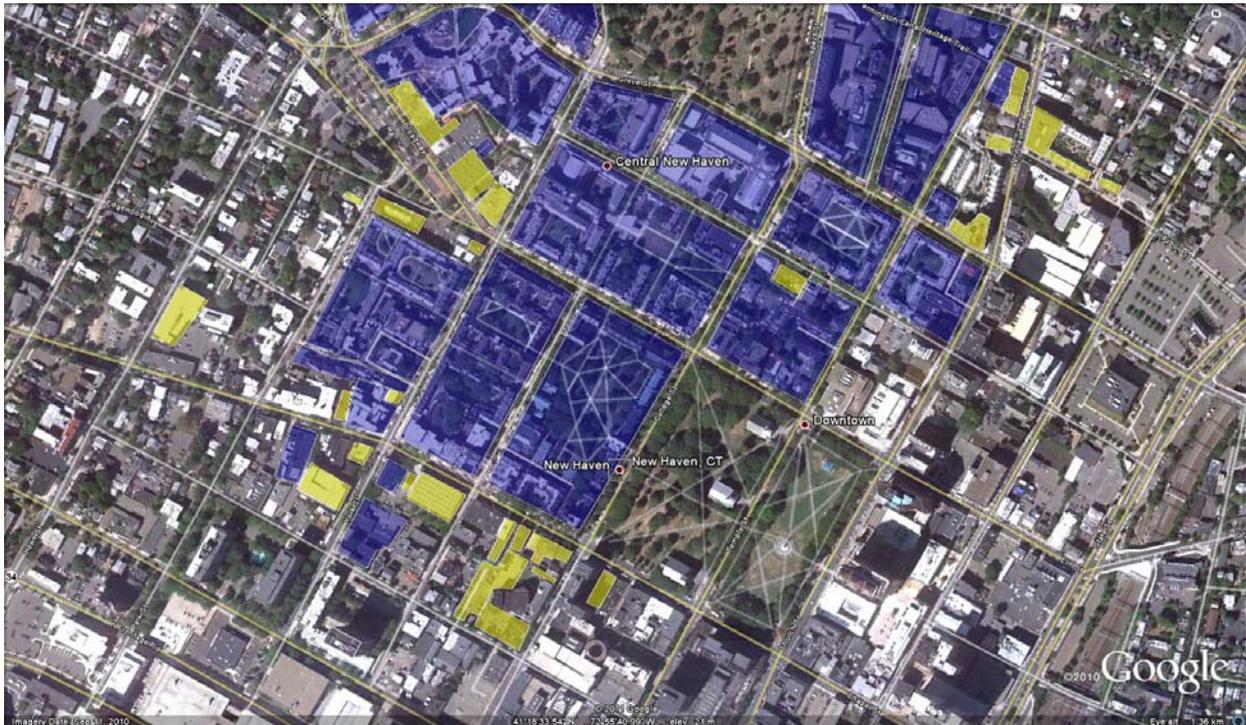


Figure 1: Yale's Downtown Property

Yale's foremost concentration of commercial real estate is in the Broadway district.¹⁴³ I define this district as consisting of Elm Street between Park and York, York Street both north and south of Elm, and both the northeast and southwest side of Broadway. Beginning with the latter, Yale owns the entirety of the northeast side of the street except for a small building that currently houses A-One Pizza on Broadway and a larger building with several tenants further up the street that houses Campus Customs, Blue Jay Cleaners, American Apparel, and the Educated

¹⁴² I have colored yellow any building with retail space. Thus buildings such as the Yale British Art Gallery, which has retail space on the ground floor but space used by the University on the upper floors, is colored yellow. I have also colored yellow commercial properties that currently lack tenants.

¹⁴³ Clearly, the University owns more property and has more tenants along Chapel Street. But Yale owns more than two-thirds of all the retail property in Broadway, a much higher percentage than in the Chapel district.

Burgher.¹⁴⁴ On York, Yale owns all the buildings between J. Press to the south, which is independently owned, and Yorkside Pizza, which is also independent. Yale does not own Toad's Place or the space occupied by Labyrinth Books. Finally, on Elm, Yale owns all properties on the south side of the street between Park and York except for Tyco. Yale owns none of the buildings on the north side of Elm. Yale began acquiring property in the Broadway area before the 1950s and had purchased essentially all of its current holdings by the mid 1970s.¹⁴⁵

Yale's second-most significant block of property is along Chapel and College streets and consists primarily of the former Schiavone properties that it purchased in 1999.¹⁴⁶ The University owns two properties on Chapel west of York, one on the north side mid block and one on the southwest corner of Chapel and York. The University then owns a long strip on the south side of Chapel running from York to College. There is no commercial real estate on the north side of the street. Within this strip, the University does not own two prominent buildings: the building that houses the Starbucks on the corner of Chapel and High, and a larger building adjacent to this that houses Enson's, News Haven, Savitt Jewelers, Allegra Printing, Merwin's Art Shop, and Ten Thousand Villages. The rest of this strip is entirely the University's, including the recessed and lower-level properties at 1044 Chapel and the lower-level properties at 1020 Chapel.¹⁴⁷ Yale also owns two buildings west of College, 986 and 976 Chapel Street, both of which are currently vacant. Yale owns the building at 260 College Street and the three buildings on College Street

¹⁴⁴ As mentioned previously, all information about property ownership, dates of acquisition, etc., comes from the New Haven Tax Assessor's online database. *See supra* note 98. Some of these tenants are housed in the renovated York Square Cinema building, which closed in 2005. *See* Randall Beach, *Leaking Roof, Thousands in Back Rent Play Role in Theater's End*, NEW HAVEN REGISTER, July 4, 2005, at A1.

¹⁴⁵ Hoff, *supra* note 102, at 49.

¹⁴⁶ *See supra* notes 118-121 and accompanying text. The only Yale tenants in this area that are not in space acquired from the Schiavone sale is the Willoughby's Coffee location on the ground floor of the School of Architecture building on York and Chapel and several tenants on the ground floor of the Yale British Art Gallery on Chapel.

¹⁴⁷ I have departed here from the practice in the Appendix by listing the properties according to their current street addresses. These properties are listed in the New Haven Tax Assessor's database as 1042 and 1022 Chapel, respectively, and that is how I refer to them in the Appendix.

closest to Crown. The former previously housed Celtica, but is now vacant because that tenant has moved into another Yale property, the space formerly occupied by the Copper Kitchen on Chapel. The latter houses three restaurants: Pacifico, Samurai, and Oaxaca Kitchen. Finally, Yale owns a number of parking lots and vacant spaces in the interior of this block.

Yale owns several properties along Whitney between Grove and Trumbull and on Audubon. On Whitney, Yale owns the entire west side of the street except for two small buildings in the center that house a Dunkin' Donuts and a Subway and a stretch of ground-floor retail space near Whitney Avenue that houses Knit, FedEx/Kinkos, and a realtor's office.¹⁴⁸ Yale owns none of the east side of the street except for a rather large building at 55 Whitney, which houses several tenants. Yale owns none of the buildings on the south side of Audubon, but all the ground-floor retail space on the north side between Whitney and Orange.¹⁴⁹ Most of the properties on Audubon are vacant or house service businesses such as Salon Ivanova.

Yale also owns scattered properties. The most important of these for my purposes is a small strip along Wall Street between College and Temple that houses Naples Wall Street Pizza, Blue State Coffee, and Phil's Hair Styles. Finally, Yale owns a number of properties that are unique and best considered on their own rather than analyzed as part of Yale's general program of improving New Haven through commercial real estate. Thus the University owns vacant retail space at the bottom of two parking garages, one on Howe Street, a recently constructed building that has never had any tenants, and one on York between Crown and Chapel. Yale also has a handful of properties surrounding the medical school, again mostly on the ground floor of buildings used for other purposes. Finally, the University owns a considerable amount of

¹⁴⁸ This stretch of retail space is located below a large condominium complex.

¹⁴⁹ These buildings are condominiums with ground-floor retail space. The above-ground condominiums are owned by their residents—only the ground floor commercial space is owned by Yale.

commercial property at its Science Park site. But these properties should be seen as part of Yale's ambitions for Science Park rather than for improving downtown.

3.3.2 Yale's Three Neighborhoods

As the preceding discussion makes clear, Yale's properties in downtown New Haven break down into three areas: Broadway, Chapel Street (which includes the College Street properties), and Audubon/Whitney. Yale has a definite "vision" for each of these areas. Broadway is intended to be the most student-focused of the three, with retail and food establishments that appeal to students and faculty.¹⁵⁰ However, the University is careful to ensure that the area does not become too dependent on students, in part because Yale students are absent or much diminished in number for five months of the year, meaning that businesses generally must draw in some non-student customers to be successful.¹⁵¹ The University thus has tried to manage the area so as to appeal to Yale students, the students of other New Haven colleges and universities,¹⁵² and to suburban shoppers.¹⁵³

Yale's plan for Chapel aims at an older crowd.¹⁵⁴ The main draw in this area, as Yale sees it, is the Shubert Theater and a selection of upscale restaurants.¹⁵⁵ Because of these attractions, the area appeals to middle-aged shoppers. For this reason, the University has

¹⁵⁰ Telephone Interview with Bruce D. Alexander, Vice President for New Haven and State Affairs and Campus Development, Yale University (Feb. 16, 2011).

¹⁵¹ *Id.*

¹⁵² See David Shieh, *Broadway Tries To Attract Non-Yalies*, YALE DAILY NEWS (Feb. 10, 2006), <http://www.yaledailynews.com/news/2006/feb/10/broadway-tries-to-attract-non-yalies/>.

¹⁵³ See, e.g., Aaron Bray, *Shop Vacancies Reflect Careful Growth*, YALE DAILY NEWS (Oct. 9, 2007), <http://www.yaledailynews.com/news/2007/oct/09/shop-vacancies-reflect-careful-growth/>; Rachel Dempsey, *Elm City Attracts Regional Shoppers*, YALE DAILY NEWS (Feb. 8, 2007), <http://www.yaledailynews.com/news/2007/feb/28/elm-city-attracts-regional-shoppers/>.

¹⁵⁴ Telephone Interview with Bruce D. Alexander, *supra* note 150.

¹⁵⁵ Union League Café at 1044 Chapel is perhaps the most well known restaurant in a Yale property, while Ibiza, Bespoke, and Zinc are three prominent restaurants in non-Yale properties.

primarily focused on nicer restaurants, more-expensive clothing stores, primarily for older women, and gift shops, establishments it believes this demographic is most interested in.¹⁵⁶

Finally, Yale's plan for Audubon/Whitney has recently gone through some revision. At first, the University's strategy aimed to capitalize on the area's "arts" theme.¹⁵⁷ Thus it had a wide variety of tenants, including a southern restaurant, a bike store, a toy shop, yarn and furniture stores, and several boutiques.¹⁵⁸ This plan, however, was a bit of a failure, and nearly all these stores have closed.¹⁵⁹ The primary culprit, it seems, is that the area does not draw enough foot traffic because the area's office workers are only present during weekday hours.¹⁶⁰ Thus the University's current plan for Audubon sees it becoming "a hub of 'beauty, health, and wellness.'"¹⁶¹ To this end, it hopes to attract more service-oriented businesses that can draw their own traffic.¹⁶² Recent openings of this sort include a salon and a spa.¹⁶³

3.3.3 Tenant Selection Practices

Perhaps the most well-known feature of Yale's real estate program is its careful selection of tenants. This began with the University's redevelopment of Broadway in the mid to late 1990s, when attracting "anchor tenants" such as Barnes & Noble, J.Crew, and Urban Outfitters became a priority.¹⁶⁴ Yale's choosiness, however, is not limited to major retailers, but instead

¹⁵⁶ Telephone Interview with Bruce D. Alexander, *supra* note 150.

¹⁵⁷ Shieh, *supra* note 123.

¹⁵⁸ *See id.*

¹⁵⁹ *See* Paul Bass, *3 Stores Closing on Audubon*, NEW HAVEN INDEPENDENT (May 6, 2008), http://www.newhavenindependent.org/index.php/archives/entry/3_stores_closing_on_audubon/.

¹⁶⁰ Telephone Interview with Bruce D. Alexander, *supra* note 150.

¹⁶¹ Jennifer Nadelmann, *A Makeover for Audubon Street*, YALE DAILY NEWS (Sept. 13, 2010), <http://www.yaledailynews.com/news/2010/sep/13/a-makeover-for-audubon-street/> (quoting Abigail Rider, University Associate Vice President and University Properties Director).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See* James Collins, *Broadway District Sees Substantial Upgrade in Last Four Years*, YALE DAILY NEWS (May 17, 2001), <http://www.yaledailynews.com/news/2001/may/17/broadway-district-sees-substantial-upgrade-in/>; Tom Sullivan, *J.Crew Will Fill Last Broadway Storefront*, YALE DAILY NEWS (Sept. 5, 2001), <http://www.yaledailynews.com/news/2001/sep/05/jcrew-will-fill-last-broadway-storefront/>. On the importance of anchor tenants to successful retail developments, see *infra* Section 4.1.

applies to filling all of its properties. The University does not rent out properties to the highest bidder, but instead chooses tenants that fit its vision for the area, even if that means accepting lower rent.¹⁶⁵

This tenant selection process involves three components. First, the University attempts to discover market demand by conducting surveys and focus groups of university affiliates, primarily students.¹⁶⁶ Although this practice was perhaps more common when Yale was first selecting tenants for the newly renovated Broadway area, it continues today.¹⁶⁷ Through this process and its own sense of an area's needs, UP comes up with ideas for new tenants it believes will be successful.¹⁶⁸

Second, the University carefully scrutinizes tenant applicants to ensure that they fit its plans for the area. This process apparently produces many casualties, as Yale claims that numerous applicants are passed over for every opening.¹⁶⁹ The criteria the University uses to make these decisions are uncertain, mostly consisting of vague statements about "fitting existing tenant mixes."¹⁷⁰ But Yale's considerations are clearly broader than this. Among the tenants rejected by Yale was American Apparel, which opened a location in one of the few non-Yale properties on Broadway after the University refused to rent it space for unknown reasons.¹⁷¹ Not

¹⁶⁵ See Bray, *supra* note 153 (quoting UP's director of marketing as saying "we wouldn't go with a bank just because it was the highest bidder").

¹⁶⁶ See Collins, *supra* note 164.

¹⁶⁷ Telephone Interview with Bruce D. Alexander, *supra* note 150.

¹⁶⁸ This process is often strangely specific. For example, UP determined that Broadway required a Mexican restaurant, which led years later to the opening of Bulldog Burrito. See Mark Wiznia, *No Rush To Fill Empty Storefronts*, YALE DAILY NEWS (Sept. 6, 2002), <http://www.yaledailynews.com/news/2002/sep/06/no-rush-to-fill-empty-storefronts/>.

¹⁶⁹ Kendra Locke, *Stores To Join Chapel Lineup*, YALE DAILY NEWS (Sept. 9, 2004), <http://www.yaledailynews.com/news/2004/sep/09/stores-to-join-chapel-lineup/>.

¹⁷⁰ Telephone Interview with Bruce D. Alexander, *supra* note 150.

¹⁷¹ Egidio DiBenedetto, *American Apparel Struggles with Debt, Falling Stock*, YALE DAILY NEWS (Sept. 7, 2010), <http://www.yaledailynews.com/news/2010/sep/07/american-apparel-struggles-with-debt-falling-stock/>. Yale could have rejected American Apparel for three obvious reasons: concern over its financial health (the company expanded aggressively and perhaps unwisely), concern over its image (it has been criticized for racy advertisements), or because it would compete with some of Yale's existing tenants, notably Urban Outfitters and J.Crew.

surprisingly, this selectivity bothers some tenants, particularly those that appeal to lower-income demographics, while tenants aiming at a more-upscale market tend to favor this selectivity.¹⁷²

Third, the University does not merely select from a pool of tenant applicants—it actively recruits tenants to come to New Haven. This process involves sending UP recruiters, primarily student interns, to nearby urban areas such as New York and Boston, to scout possible tenants and convince them to open locations in New Haven.¹⁷³ Many of Yale’s current tenants were found in this way, including Gourmet Heaven (from New York),¹⁷⁴ Blue State Coffee (from Providence),¹⁷⁵ and Thom Browne (from Boston).¹⁷⁶ Alexander believes that recruitment is the most-important element of Yale’s program because it allows the University to affect the supply of tenant applicants rather than merely respond to it.¹⁷⁷ In his estimation, supply is three-fourths of the story; Yale’s demand is much less important.¹⁷⁸

While Yale’s tenant selection policies may allow it obtain its preferred mix of tenants going forward, when it began managing the Broadway area more actively, it faced a problem: many of the existing tenants did not fit its new vision for the area. The University responded in three basic ways. First, it simply closed down some tenants by refusing to renew their leases. The most well-known example of this is Krauszer’s, a convenience store once located on York Street

¹⁷² See Alison Griswold & Everett Rosenfeld, *Univ. Properties Remain Vacant*, YALE DAILY NEWS (Feb. 5, 2010), <http://www.yaledailynews.com/news/2010/feb/05/univ-properties-remain-vacant/> (“‘I like that they’re being selective,’ [the owner of Seychelles’] said. ‘I’m not elitist, but the district needs to maintain a certain level.’”)

¹⁷³ The best description of this process can be found in Eli Muller, *Behind Broadway, One Feisty Student*, YALE DAILY NEWS (Mar. 20, 2001), <http://www.yaledailynews.com/news/2001/mar/20/behind-broadway-one-feisty-student/>, an interview with Andrea Pizziconi, a student intern and later employee of UP who “discovered” Gourmet Heaven in Manhattan. Her trip to New York was specifically for the purpose of bringing a New York deli to New Haven.

¹⁷⁴ *Id.*

¹⁷⁵ Press Release, University Properties, Yale University Properties Welcomes Blue State Coffee to Downtown New Haven (Feb. 11, 2009), <http://www.yale.edu/up/documents/BlueStatePressRelease.pdf>.

¹⁷⁶ Marc Winzia, *New Women’s Shoe Store To Occupy Spot on Broadway*, YALE DAILY NEWS (Sept. 26, 2002), <http://www.yaledailynews.com/news/2002/sep/26/new-womens-shoe-store-to-occupy-spot-on-broadway/>.

¹⁷⁷ Telephone Interview with Bruce D. Alexander, *supra* note 150.

¹⁷⁸ *Id.* Alexander also stated that the supply of quality local merchants has shrunk significantly in recent years, making it more important to attract regional or national retailers, which must be done through recruitment rather than an application process.

just south of Elm. Apparently concerned over its dirty appearance and high prices, the University announced in late 2000 that the store's lease would not be renewed.¹⁷⁹ Second, Yale moved many tenants from prominent locations to less-prominent ones in order to free up the most-desirable space for anchor stores and attractive retail.¹⁸⁰ For example, several ground-floor barber shops on Broadway were relocated to second-floor spaces, a move Alexander believes was crucial to improving retail in the area.¹⁸¹ Many of these retailers and service providers survived in their new locations, but others did not. Finally, Yale implemented various contractual requirements, notably a nine pm closing time for the Broadway district, and increased rent, making it economically infeasible for many existing businesses to continue to operate.¹⁸²

There is one final wrinkle of this tenant selection process worth mentioning now. Because Yale has basically no stated criteria for accepting tenants, it can refuse to rent to any tenant it pleases. This provides Yale with a relatively easy way of granting certain businesses monopoly rights, at least within its properties. One possible example of this is Gourmet Heaven, which is the only grocery or convenience store in Yale's Broadway properties. Because of the simple lack of available retail space in the Broadway district, a monopoly within Yale's properties there goes a long way toward ensuring a local monopoly, since few non-Yale properties are both available and suitable for a competitor. This not only ensures the economic success of Gourmet Heaven, but it also gives the University some ability to extract certain in-

¹⁷⁹ Donar, *supra* note 110. As I discuss below, *see infra* Subsection 3.3.6, there are much more-plausible reasons why Krauszer's lease was not renewed, primarily to facilitate a monopoly for Gourmet Heaven, a store the University much preferred. Note that Krauszer's was not the first convenience-store casualty of Yale's renovation of Broadway. In 1998, the University refused to renew the lease of Store 24, apparently in an effort to "upscale Broadway." Craig Gilbert, *City Beautiful*, NEW HAVEN ADVOCATE, May 21, 1998, at 7.

¹⁸⁰ *See, e.g.*, Paul Bass, *Blue Mother*, NEW HAVEN ADVOCATE, Sept. 30, 1999, at 5.

¹⁸¹ *Id.*; Telephone Interview with Bruce D. Alexander, *supra* note 150. The recent move of Celtica from College Street to a more-prominent and vacant storefront (the home of the former Copper Kitchen) on Chapel Street, may be a recent example of this practice, though in this case to improve the retail mix of Chapel by bringing in a desirable tenant rather than moving an undesirable one away.

¹⁸² *See* Matt Bender, *How Many Customers Can One University Serve?*, THE YALE HERALD, Oct. 17, 2003, at 1, 6; Sullivan, *supra* note 115.

kind payment for these de facto monopoly rights.¹⁸³ American Apparel may be another example of this practice, as Yale's refusal to lease it space may have been in part to protect Urban Outfitters, an American Apparel competitor already renting from Yale.¹⁸⁴ While this may seem unusual, as I discuss below, this is an ordinary part of modern shopping center development.¹⁸⁵

To get a sense for how much these policies shape the tenant mix of Yale properties, consider a few facts about Yale's tenants. None of Yale's properties contains a bar. This is easy to miss because within Yale's block of properties on College and Chapel are three bars: Anchor, Richter's, and the Owl Shop. But all of these tenants are in non-Yale properties. A similar pattern is found with cheaper restaurants. Broadway contains several of these, such as A-One Pizza, the Educated Burgher, and Yorkside, but these are all on non-Yale property.¹⁸⁶ The story is similar on Chapel, where the only greasy spoon in Yale's holdings, the Copper Kitchen, was forced to close after Yale refused to renew its lease.¹⁸⁷ In fact, the only arguably dingy restaurant in all of Yale's property holdings is Naples, which has been operating for some time and perhaps has been spared because it is not located in a retail-focused area. The story is similar with convenience stores. In Broadway and Audubon/Whitney, Gourmet Heaven locations are the only such establishments in Yale properties. In the Chapel Street district, Yale has only one store of this variety, J & B Deli and Grocery, and this store is separated from the remainder of Yale's Chapel Street properties by several non-Yale buildings. All other convenience stores within these

¹⁸³ For further evidence Gourmet Heaven has been granted a de facto monopoly, as well as the benefits Yale may have received in return, see *infra* Subsection 3.3.6.

¹⁸⁴ See *supra* note 171. If true, however, this effort failed, as American Apparel was able to secure space in a non-Yale property.

¹⁸⁵ See *infra* Subsection 4.1.4. Hoff quotes the owner of Bulldog Burrito as saying that while Yale's tenant selection process is an inconvenience, it is a net positive because it has protected him from competition. Hoff, *supra* note 102, at 64.

¹⁸⁶ Ivy Noodle and Bulldog Burrito are both Yale tenants, but I believe these are more sophisticated (and certainly cleaner) even if not substantially more expensive.

¹⁸⁷ Emily Suran, *Copper Kitchen Closes*, YALE DAILY NEWS (Oct. 28, 2010), <http://www.yaledailynews.com/news/2010/oct/28/copper-kitchen-closes/>.

three districts, such as the News Haven on Chapel Street and the Breakaway Deli on Whitney, are tenants of landlords other than Yale.

3.3.4 Basic Lease Structure

Yale's leases are in many ways ordinary retail leases.¹⁸⁸ Rent terms are the same as those in a standard shopping-center lease.¹⁸⁹ This means they contain two types of rent: a base rent and a percentage rent. The percentage rent, or "overage," is zero for sales below a certain threshold, called a "break point."¹⁹⁰ Above this break point, the tenant pays both the base rent and the overage. As discussed below, the break point in shopping center leases is generally set at base rent divided by percentage rent. This means that if the tenant's sales are below the break point, it pays a higher rent as a percentage of its sales than it would if its sales exceeded the break point. Since Alexander maintained that Yale's leases are completely standard retail leases in terms of rent, presumably the break point is set in the same way.¹⁹¹ I also assume that Yale, like all shopping center developers, sets the overall rate of compensation based on tenant characteristics, charging better tenants less in rent.¹⁹²

¹⁸⁸ I asked University Properties and Bruce Alexander several times if it would be possible to see a sample Yale lease. Alexander told me this would not be a problem, however, I could only see a blank lease to protect the confidentiality of their tenants. I was soon contacted by Abigail Rider, who informed me that I could only see this blank lease if I first signed a confidentiality agreement promising not to discuss any of the lease's terms in any context. Clearly, such an offer would not have been helpful for writing this paper. When I asked her whether these terms were negotiable, she replied that she could not waive them herself and would need to ask Alexander. I have still not heard back regarding the blank lease and my attempts to follow up have gone unreturned. I am not sure what is more amusing about this episode: that UP was unwilling to show me a standard, blank lease, or that the Director of UP apparently lacked authority to do so on her own. Regardless, my discussion of Yale's leases is not informed by the actual content of these leases but instead relies entirely on second-hand statements.

¹⁸⁹ Telephone Interview with Bruce D. Alexander, *supra* note 136. I discuss the structure of shopping center leases *infra* Subsection 4.1.3.

¹⁹⁰ See, e.g., John D. Benjamin, Glenn W. Boyle & C.F. Sirmans, *Retail Leasing: The Determinants of Shopping Center Rents*, 18 AM. REAL EST. & URB. ECON. ASS'N J. 302 (1990); *infra* Subsection 4.1.3.

¹⁹¹ Telephone Interview with Bruce D. Alexander, *supra* note 136. Given how common this structure is in the industry, it is extremely implausible that someone with Bruce Alexander's background would not be aware of it.

¹⁹² See *infra* Section 4.1 for further discussion of these points.

Yale's leases are unusual in three respects. First, nearly all of Yale leases are for five-year terms without a tenant option to renew.¹⁹³ The University sometimes, but rarely, allows for longer lease terms for restaurants, which often have high up-front costs and thus may want greater security.¹⁹⁴ Second, Yale's leases typically contain "business purpose" clauses specifying what sort of business the tenant will operate in order to prevent an end-run around Yale's tenant selection.¹⁹⁵ Finally, Yale tenants cannot sublease or assign their leases without Yale's consent.¹⁹⁶ This limitation also follows from Yale's tenant selection practices.

3.3.5 Extended Hours Requirements

While the structure of Yale's leases is relatively standard, save for a few terms designed to protect its right to select tenants, many of the specific terms of its leases are unusual. Most prominent, when Yale redeveloped Broadway, it inserted a provision into all its leases requiring tenants to remain open until nine pm six nights a week and six pm on Sunday.¹⁹⁷ This requirement, intended to increase foot traffic at night, improve safety, and enhance retail sales, unsurprisingly proved controversial and drove many long-time tenants to move out of Yale properties or close.¹⁹⁸ While Alexander recognizes that some of these concerns were legitimate, he believes that most of the tenants who complained about this policy were merely seeking an

¹⁹³ Telephone Interview with Bruce D. Alexander, *supra* note 136; Hoff, *supra* note 102, at 68.

¹⁹⁴ Telephone Interview with Bruce D. Alexander, *supra* note 136. Yale also apparently granted longer leases to tenants when it was renovating the Broadway district, as Origins signed a 10-year lease in 1998. Edward J. Crowder, *Cosmetics Store To Open on Broadway*, NEW HAVEN REGISTER, June 5, 1998, at A16.

¹⁹⁵ Hoff, *supra* note 102, at 68. Such clauses give Yale the ability to cancel the lease if the tenant proves to have lied during the tenant selection process regarding the nature of its business.

¹⁹⁶ Telephone Interview with Bruce D. Alexander, *supra* note 136; Hoff, *supra* note 102 at 69.

¹⁹⁷ Cara Baruzzi, *Yale University Drives Downtown Retail Renewal*, NEW HAVEN REGISTER (Oct. 30, 2005), <http://www.nhregister.com/articles/2005/10/30/import/15479564.txt?viewmode=fullstory>.

¹⁹⁸ See, e.g., Bray, *supra* note 153; Tom Sullivan, *After Lease Problems, Shoe Store Will Close*, YALE DAILY NEWS (Sept. 17, 2003), <http://www.yaledailynews.com/news/2003/sep/17/after-lease-problems-shoe-store-will-close/>.

excuse to get out of their lease, which Yale permitted them to do.¹⁹⁹ This policy continues to apply in the Broadway area.

Unlike Broadway, however, which the University sought to transform through its policies, Chapel Street has long been a successful retail and restaurant corridor. Most of the tenants in this area were inherited by Yale. Nonetheless, Yale has been inserting similar clauses, with a closing time of eight rather than nine pm, as these tenants' leases come up for renewal.²⁰⁰ These clauses specify that when a certain number of Yale's tenants in the area have leases with an eight pm provision, Yale can require all such tenants to remain open to this later time. Yale has reached this threshold but has so far not instituted a mandatory eight pm closing time and, according to Alexander, does not believe it is necessary to do so at this time given that Chapel Street is already successful and the imposition of this requirement would likely harm many of its smaller businesses, such as boutiques, which are unlikely to benefit from extended hours.²⁰¹ Yale has, however, enforced clauses in its Chapel Street leases requiring these tenants to remain open on certain holidays.²⁰² For now, however, these tenants remain free to set their own hours.

3.3.6 Other Contractual Micromanaging

Setting mandatory business hours is not the only detail of tenants' business operations Yale manages by contract. Many of the leases of its restaurant tenants contain terms requiring Yale to approve the restaurant's menu.²⁰³ Although this may seem unusual, it is perhaps best seen as another contractual term designed to protect Yale's tenant selection process by preventing tenants from changing their menu and thereby the character of the restaurant.

¹⁹⁹ Telephone Interview with Bruce D. Alexander, *supra* note 150.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Marks, *supra* note 116.

Other forms of contractual regulation are more unique. Three are particularly curious, all of which relate to Gourmet Heaven. First, Gourmet Heaven's lease prevents it from selling tobacco products.²⁰⁴ Krauszer's lease, which Yale declined to renew immediately before Gourmet Heaven opened, contained no such provision.²⁰⁵ As a result, the only business that currently sells tobacco product in the immediate Broadway area is a gas station at the intersection of Goffe and Whalley, far removed from the ordinary Broadway shopping traffic. Eliminating tobacco products from Broadway can be seen either as an effort to change the clientele, as shoppers interested in purchasing cigarettes would have no reason to go to Gourmet Heaven thereby making it appeal to a different demographic than Krauszer's,²⁰⁶ or as a sort of public welfare regulation designed to improve the cleanliness of Broadway and perhaps the health of Yale students.

Second, Gourmet Heaven's lease contains an obscure clause imposing a maximum price on certain goods. Specifically, it is required at some interval to assess the price of a basket of goods at competitors' stores in the area and ensure that certain hygiene products are sold at an "affordable" price.²⁰⁷ This is perhaps the strongest evidence that Gourmet Heaven has been granted a de facto monopoly, since it is unclear why Yale would want this provision if it thought the market would be operating normally on Broadway. Yale's inclusion of this term suggests that it believed no competitor would open nearby Gourmet Heaven and prevent it from charging monopoly prices. And if it believed this, this is likely because it intended to permit no such competitor to open. These monopoly rights may have been part of the price Yale paid both to woo Gourmet Heaven to New Haven and to induce it to agree to other contractual terms, such as

²⁰⁴ Tom Sullivan, *On Yale's New Retail Strip, Grocery Heaven Is Gourmet*, YALE DAILY NEWS (Mar. 27, 2001), <http://www.yaledailynews.com/news/2001/mar/27/on-yales-new-retail-strip-grocery-heaven-is/>.

²⁰⁵ *Id.*

²⁰⁶ Smoking is obviously correlated with lower social class.

²⁰⁷ Bender, *supra* note 182, at 6; Hoff, *supra* note 102, at 67.

the ban on tobacco products, that no doubt hurt its sales. The fact that Krauszer's lease was not renewed immediately before Gourmet Heaven opened further suggests a monopoly.²⁰⁸ But Yale does not want Gourmet Heaven's monopoly to harm students too much, requiring it to introduce additional contractual terms to prevent monopolistic pricing of essential hygiene products.

Finally, Gourmet Heaven's lease requires it to display flowers and fruit outside of its store unless the weather is too cold.²⁰⁹ This clause is best seen as an effort to ensure that Gourmet Heaven contributes to the provision of public goods, such as a pleasant streetscape, which no doubt improves the atmosphere of the neighborhood. This clause presumably costs Gourmet Heaven money, since if this were the most efficient use of Gourmet Heaven's display space the clause would not be needed. I suggest that Gourmet Heaven's de facto monopoly provides implicit compensation for this cost.²¹⁰

An important question to consider is whether Gourmet Heaven is unique in having a lease with these sorts of contractual provisions. Given Yale's general secrecy, there is no real way to know the answer to this.²¹¹ On the one hand, the nature of Gourmet Heaven's business may expand the scope of externalities it could potentially create. Thus it could be either particularly harmful to the area, if it becomes a seedy store like the Krauszer's it replaced, or it could be the beautiful Manhattan deli Yale administrators desired. More likely, however, these sorts of clauses are not unique. We merely know about them in the case of Gourmet Heaven because the

²⁰⁸ The non-renewal of Krauszer's lease was also justified on the grounds that it charged too much for its products, while Gourmet Heaven would be a cheaper alternative. *See, e.g.,* Sullivan, *supra* note 204. Even if this were so, it is quite unclear why not renewing Krauszer's lease would do more to solve this problem than simply permitting Gourmet Heaven to open in addition. Regardless, this hope soon proved to be misplaced, as students realized that Gourmet Heaven was, if anything, more expensive than the store it replaced. *See id.*; Wong, *supra* note 114.

²⁰⁹ Baruzzi, *supra* note 197. It should be noted as well that Gourmet Heaven's lease requires it to stay open until two am, but the store has voluntarily chosen to remain open twenty-four hours, so this provision has no effect. Hoff, *supra* note 102, at 68.

²¹⁰ Of course, Yale could have obtained these same concessions from Gourmet Heaven by charging a lower rent. It likely chose to compensate Gourmet Heaven by granting it a monopoly instead because preventing the opening of additional convenience stores within Broadway is desirable as a means to ensuring the highest sales volume for the district. *See infra* Subsection 4.1.5.

²¹¹ *See, e.g., supra* note 188.

controversy with Krauszer's and Yale's excitement over its opening prompted a lot of *Yale Daily News* articles, which led to looser lips than usual and the disclosure of contract terms that probably have many parallels.

3.3.7 The Problem of Vacancies

Long-term vacancies are a well-publicized result of Yale's program, producing a steady stream of fluff pieces in student newspapers regarding new store openings and closings and more-critical articles questioning the causes of Yale's apparent inability to fill its properties, often sourced with puzzled quotes from other Yale tenants.²¹² While a certain number of vacancies in retail property is inevitable and the weak state of the New Haven retail economy has produced many vacancies in non-Yale properties, Yale's properties appear to be particularly prone to long-term vacancies, especially in comparison with similar non-Yale properties.



Figure 2: 986 Chapel Street

²¹² See, e.g., Bray, *supra* note 153; Griswold & Rosenfeld, *supra* note 172; Locke, *supra* note 169; Wiznia, *supra* note 168; Yu, *supra* note 129.

Perhaps the clearest example of this is Yale's property at 986 Chapel Street. The property, acquired in the Schiavone sale in 1999 and once the home to Schiavone's New Haven Restaurant, has remained vacant for more than ten years.²¹³ In early 2010, this property was the cause of an unusual exchange, when a New Haven resident used the City's SeeClickFix website to point out the property's long-term vacancy and asked Bruce Alexander personally to find a tenant for this prominent location on the New Haven Green.²¹⁴ Alexander eventually responded on the SeeClickFix website, acknowledging that the University had not done as well with this property as it deserved and making "a New Year's resolution to do better in 2010."²¹⁵ Alexander also observed that "[p]utting a low-quality tenant in my experience is often worse than a vacant storefront because it drags down the whole block and makes attracting the better tenants all that more difficult."²¹⁶ Over the years, the university had shown the space to "literally scores of excellent tenants" but had never managed to close a deal because tenants were worried about low projected sales in the location.²¹⁷ The history of this property and Alexander's response to this event show that UP is so committed to its tenant selection policies that it would rather have a vacant store than a store that does not meet its standards. This preference is not without some direct costs to the University. The property has a current assessed value of nearly \$700,000, and thus has a yearly property tax bill of approximately \$30,000. This is to say nothing for the opportunity costs of foregone rent. This sort of long-term vacancy, while perhaps an extreme case, is far from unique. Many Yale properties, including several in Broadway such as the former

²¹³ Melissa Bailey, *Yale Explains "Hideous Storefront,"* NEW HAVEN INDEPENDENT (Feb. 4, 2010), http://www.newhavenindependent.org/index.php/archives/entry/yale_vp_vows_to_address/.

²¹⁴ #14074 Bruce Alexander & Yale, *Please do Something!* SEECCLICKFIX, <http://www.seeclickfix.com/issues/14074> (last visited Mar. 5, 2011). The poster, Edward Anderson, observed that the neighboring property, 976 Chapel, is also Yale owned and had been vacant for several years.

²¹⁵ *Id.* The property remains vacant. Mental-state resolutions are more easily achieved than outcome resolutions.

²¹⁶ *Id.*

²¹⁷ *Id.*

home of Krauszer's on York and the Davenport College Annex on Elm, have been vacant for at least five years and possibly ten.²¹⁸

UP has responded to the long-term vacancies that result from its tenant selection practices in two basic ways. The first is to concentrate vacancies in less-desirable and less-visible locations. This is done both by ensuring that new tenants move in to the most-prominent vacant property the University owns and by moving existing tenants into these more-visible vacancies.²¹⁹ A recent example of this is Celtica, which moved from an isolated Yale property at 260 College to the recently vacated former location of the Copper Kitchen on Chapel near College. The result of this policy is that Yale's vacant properties are most often found at the outskirts of each area it owns.²²⁰ Second, Yale frequently employs a strategy that one observer has called the creation of "Potemkin stores." Yale places prominent advertisements for its other tenants in the windows of vacant stores, often designed to look to the casual observer like an actual store is in the location. This practice has two benefits. First, as mentioned, it may deceive the unwary into thinking the property is not vacant, thereby avoiding some of the negative externalities of vacancy. Second, it provides a form of implicit compensation to tenants whose business may be harmed by a neighboring vacancy in the form of free advertising.

3.3.8 Conflicts with Tenants and Yale's "Iron Fist"

A final puzzling and controversial element of Yale's behavior in the management of its real estate program is its frequent confrontations with tenants, which have led some to view it as having an "iron fist." The story here is much like with vacancies: a certain amount of

²¹⁸ Yale has finally found a tenant for the former Krauszer's location. Jack Wills, a UK clothing chain known for its preppy aesthetic, will soon open in the location. Sharon Yin, *Jack Wills To Bring Brit Prep*, YALE DAILY NEWS (Mar. 1, 2011), <http://www.yaledailynews.com/news/2011/mar/01/jack-wills-to-bring-brit-prep/>. Student reaction appears to be mixed, in large part because the store's target demographic is very similar to that of Gant and J.Crew.

²¹⁹ Obviously, tenant demand also contributes to this dynamic, as new tenants no doubt prefer to move into the most-promising property available while existing tenants may be willing to upgrade.

²²⁰ For example, in Broadway, the southern-most and northern-most Yale-owned properties on York are vacant, while in the Chapel area, both of Yale's properties on the east side of College are vacant.

confrontation between tenants and a landlord is inevitable. But as with vacancies, one particularly extreme incident suggests that Yale may be somewhat less flexible than a typical landlord, or at the very least is not obviously more interested in maintaining positive relations with seemingly desirable tenants when doing so imposes costs on Yale.

The incident in question is the conflict between Yale and the owners of the restaurants Roomba and Bespoke.²²¹ Before this conflict, Roomba was a quite popular restaurant in one of Yale's properties at 1044 Chapel Street, which had opened in 1999.²²² In 2003, its owners, the Franco-Camachos, leased a non-Yale property at 266 College and began renovating it to create a second restaurant with living space on the upper floors.²²³ Soon after this, a dispute emerged between the Franco-Camachos and Yale regarding ownership of a small walkway behind the 266 College property on which the Franco-Camachos had placed a storage shed. While this dispute was ongoing, Roomba's lease expired in 2005, and it continued to operate, paying month-to-month rent.²²⁴ Yale and the Franco-Camachos attempted to negotiate a new two-year lease, but according to the Franco-Camachos, Yale's terms were unreasonable, including a requirement that they agree not to open another downtown restaurant.²²⁵ If this is true, it is unclear whether Yale's motive for this term was to prevent the Franco-Camachos from acting to diminish the success of Roomba or whether this was merely a negotiating tactic to secure a concession regarding ownership of the disputed walkway. In 2006, the Franco-Camachos opened their new restaurant, Bespoke, at the 266 College property. Around this same time, then-UP Director David Newton and a Yale lawyer met with the Franco-Camachos and entered into an agreement

²²¹ Reconstructing this event is quite difficult because there is no impartial narrator but merely a series of newspaper articles written after the fact recounting the events from the perspectives of the parties.

²²² Cara Baruzzi, *Downtown Restaurant To Close over Lease Dispute*, NEW HAVEN INDEPENDENT (June 2, 2007), <http://www.nhregister.com/articles/2007/06/02/import/18417616.txt?viewmode=fullstory>. It is unclear whether Roomba became a tenant before or after Yale acquired this property.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

according to which Bespoke would have access to the alley and be able to use the shed in question for at least two years.²²⁶ This agreement, however, was not to Bruce Alexander and other Yale officials' liking, so they immediately tried to repudiate it, arguing that Newton lacked authority to make such an agreement.²²⁷ This led to a lawsuit between the Franco-Camachos and Yale, during the course of which, Yale evicted Roomba, explicitly because the Franco-Camachos were unwilling to concede ownership of the walkway and continued to assert the validity of the agreement in court.²²⁸ This lawsuit is still ongoing, with the Franco-Camachos having won at both the trial and appellate court levels, but Yale apparently pursuing an appeal to the Connecticut Supreme Court.²²⁹ Meanwhile, the Franco-Camachos have sold Bespoke and left New Haven.²³⁰

While there are obvious perils in taking these newspaper reports as an accurate history of events, it does demonstrate two curious details about Yale's behavior. The first is that, as suggested above,²³¹ University Properties apparently has very limited discretion and authority. Second, Yale is very protective of what it sees as its rights and is not above playing hardball to get what it wants, even if this includes losing very successful tenants.²³² As a result, scattered quotes in newspaper articles suggest that the University and Alexander have a reputation for having an "iron fist" and "intimidating" tenants.²³³ Similar aggressive behavior can be seen in Yale's handling of the Broadway redevelopment and the institution of new policies that

²²⁶ Victor Zapana, *After Local Judge Rules in Favor of Bespoke, Yale Plans To Appeal*, YALE DAILY NEWS (Feb. 20, 2008), <http://www.yaledailynews.com/news/2008/feb/20/after-local-judge-rules-in-favor-of-bespoke-yale/>.

²²⁷ Yu, *supra* note 129. Newton "retired" in September of 2006. *Id.*

²²⁸ Andrew Mangino, *Roomba To Close After Dispute with Univ.*, YALE DAILY NEWS (June 5, 2007), <http://www.yaledailynews.com/news/2007/jun/05/roomba-to-close-after-dispute-with-univ/>.

²²⁹ Ed Stannard, *Restauranteurs Score Second Win vs. Yale*, NEW HAVEN REGISTER (Jan. 5, 2010), http://www.nhregister.com/articles/2010/01/05/news/new_haven/a3-nebespoke.txt?viewmode=fullstory.

²³⁰ *Id.*

²³¹ *See supra* note 132 and accompanying text.

²³² The Roomba space has not been filled since the restaurant's departure and remains vacant today.

²³³ Yu, *supra* note 129. This specific quote comes from Joel Schiavone, who has a long history of conflict with Yale, *see supra* note 138, and thus is hardly a reliable source on his own.

accompanied it. Yale's behavior at that time left several decades-long tenants quite upset.²³⁴ Disputes with tenants in the Audubon area have also been reported.²³⁵ While too much should not be made of these incidents, as some disputes between landlords and tenants are bound to occur, they are useful to keep in mind as a corrective against any temptation to view Yale as a benevolent actor.

3.3.9 Merchant Associations and Public Goods

Certain services are provided to Yale's tenants by business improvement districts, merchants associations, and UP itself. On Chapel Street, Yale's properties fall within the Town Green Special Services District, a business improvement district that provides various services within the downtown area and is funded by property tax contributions.²³⁶ Because Yale is such a significant landowner within the boundaries of the district, it has extraordinarily close ties with its operations.²³⁷ On Broadway, no business improvement district exists, but there is a Broadway Merchants Association, which provides many of the same services as a business improvement district, such as maintenance to common areas and streets. Yale tenants are contractually obligated to pay dues to the Association.²³⁸ Further, UP directly provides about half of the Association's annual funding, and the Association is staffed and operated by UP.²³⁹

²³⁴ Dewitt, *supra* note 53.

²³⁵ Traci Tillman, *Audubon District Cite [sic] Conflict with University Properties*, YALE DAILY NEWS (Oct. 20, 2010), <http://www.yaledailynews.com/news/2010/oct/20/audubon-district-cite-conflict-with-university/>.

²³⁶ For more on the Town Green Special Services District, see Hoff, *supra* note 102, at 72-74, though some of this information is no longer correct (for example, the District's offices are no longer located in a Yale-owned property but instead are at 900 Chapel Street).

²³⁷ See, e.g., Cara Baruzzi, *Downtown Plan Aims To Diversify Retail Mix*, NEW HAVEN REGISTER (Apr. 28, 2007), <http://www.nhregister.com/articles/2007/04/28/import/18274280.txt> (discussing how the District and UP collaborate on attracting tenants to New Haven and particularly Yale-owned properties).

²³⁸ Telephone Interview with Bruce D. Alexander, *supra* note 150.

²³⁹ *Id.*

3.3.10 Profitability

Information on the budgetary details of Yale's commercial real estate program is not publicly available, and my inquiries in this area met with vague answers. At the very least, the transfer of the University's property from its investments office to ONHSA and UP suggests that these properties, like those at Penn and other universities,²⁴⁰ do not generate investment-grade returns.²⁴¹ In interviews, Bruce Alexander stated without hesitation that UP would readily forego higher profits if he believed a particular tenant would produce sufficient externalities to justify this decision.²⁴² But this statement was ambiguous because he made it in the context of a claim that the favorable externalities from a good tenant are captured by neighboring tenants and increase their sales. It was thus unclear whether he would forego higher rent for externalities that are not captured by neighboring stores, but the general tone of his remarks suggested that he would.²⁴³ However, he then stated that in his mind the University had never had to do so because all the externalities he seeks to generate through tenant selection to benefit the University and the City of New Haven are also captured by nearby tenants.²⁴⁴

Gretchen Hoff reports that then-Director of UP David Newton stated in an interview that UP's budget is kept separate from the University's as a whole, and the office is entirely self-sufficient.²⁴⁵ He further stated that UP generally provides some revenue to the University.²⁴⁶ This may still be true. We should, however, keep in mind the obvious point that while UP may be kept separate for matters of accounting, it is clearly "too big to fail." If its revenues ever fell

²⁴⁰ See *supra* note 70 and accompanying text.

²⁴¹ See *supra* notes 105-106 and accompanying text.

²⁴² Telephone Interview with Bruce D. Alexander, *supra* note 150.

²⁴³ As I discuss later, it is quite clear that the University has in fact done this, see *infra* Section 4.3, so closely parsing his statement is unnecessary.

²⁴⁴ This is clearly false, or at least misleading, since the benefits of the externalities captured by other Yale tenants cannot be equal to the costs of some decisions. See *infra* Section 4.2.

²⁴⁵ Hoff, *supra* note 102, at 89.

²⁴⁶ *Id.*

short of costs, Yale would surely cover the difference. Thus while it may for the most part act as an independent entity, the decisions of UP are no doubt influenced by this implicit financial backstop provided by the University.

3.3.11 Influence of Other Universities' Programs

Despite the rather large number of newspaper articles written on Yale's commercial real estate program and University Properties, I have not found a single article asserting that the University's program has been influenced by the programs of any other universities. Several articles suggest that Yale's activities have influenced other universities, such as Penn and particularly Case Western.²⁴⁷ In an interview, Bruce Alexander stated that Yale's program had not been informed by programs at any other universities but instead its policies were the result of his own private-sector experience.²⁴⁸ While at first glance, this may seem implausible, particularly given many of the similarities between Yale's efforts and those of Columbia and Penn, it may be true, as Yale's program is nearly identical to the methods employed by modern shopping center developers.²⁴⁹ While universities' programs are quite similar, this may be more a matter of universities independently imitating private developers than each other.

3.4 Other Major Initiatives To Improve New Haven

Before assessing whether Yale's program has met its goals, I should note that Yale's investment in commercial real estate is but one element of a much broader effort to improve the New Haven area. Like Penn, Yale also has programs designed to improve New Haven's schools, boost the local economy, enhance public safety, and to increase the quality of New Haven's housing. In interviews, Bruce Alexander stated that in his mind, Yale's commercial real estate

²⁴⁷ See, e.g., DeWitt *supra* note 53.

²⁴⁸ Telephone Interview with Bruce D. Alexander, *supra* note 150.

²⁴⁹ See *infra* Section 4.1.

program was perhaps the most-important element of Yale's broader effort.²⁵⁰ He also believes it is the most-visible program and has had the greatest impact on the City's image.²⁵¹

While this paper will not discuss these programs, it is important to remember that their existence may influence commercial real estate. Yale's rental housing is particularly significant here. Yale owns more than 500 residential units. A significant portion of these units are in the same areas as Yale's commercial real estate. Further, many of Yale's commercial properties are actually mixed-use developments, with ground-floor retail and apartments on the upper floors. This coexistence of commercial and residential property certainly influences Yale's decisions regarding its commercial real estate, since the effects of particular tenants are not only felt by neighboring retail tenants but also by residential ones. Throughout this paper, I have ignored this complexity because it would be simply too difficult to integrate these considerations in a systematic way. It should be kept in mind, however, that the inclusion of residential housing as a factor influencing Yale's decisions may sometimes be important.

4 AN INTERNAL ASSESSMENT OF YALE'S PROGRAM

Yale University believes that its efforts to improve New Haven through investing in commercial real estate have been quite successful, and many members of the New Haven community apparently agree.²⁵² University officials credit the program with improving New Haven in three ways. First, they believe it has greatly improved safety, particularly in the Broadway district.²⁵³ Second, it has improved the image of New Haven, both among those within the greater New Haven area and among potential students.²⁵⁴ The University conducts regular

²⁵⁰ Telephone Interview with Bruce D. Alexander, *supra* note 150.

²⁵¹ *Id.* He cited the Yale Homebuyers Program as an example of a program that is very important, but largely invisible but to a few beneficiaries.

²⁵² *See, e.g.*, Wilson, *supra* note 103 (quoting Yale administrators and the leaders of two community organizations).

²⁵³ Telephone Interview with Bruce D. Alexander, *supra* note 150.

²⁵⁴ *Id.*

surveys among these groups and has found that over the past decade, suburban residents are more favorable disposed toward the city while the importance of New Haven as a factor influencing prospective students' decision to attend Yale has diminished.²⁵⁵ Because, as noted above, the University sees its commercial real estate program as the most visible of its efforts to improve New Haven, it attributes these gains largely to its investments in this area.²⁵⁶ Finally, Yale administrators think that their successful development and management of commercial real estate, particularly in the Broadway district, has served as a model for private developers and spurred additional private investment.²⁵⁷

While these assessments of Yale's program are nice, they are also unsatisfying. Obviously, it is impossible to create empirically ironclad evaluations of how Yale's program has affected New Haven. But it is certainly possible to go about making this judgment in a more-rigorous way. I will attempt this in two steps. In this Part, I will try to determine whether Yale's program has been successful in its own terms, that is, whether it has met its own goals and aspirations. Then in the final Part of this paper, I will consider whether Yale's plans and the degree to which it has fulfilled these plans are good for New Haven more broadly.

The first step in assessing Yale's program from this internal perspective is to come up with a theory of Yale's actions. While it is not difficult to find statements from University officials regarding what Yale is trying to accomplish, I regard these as minimally useful. Instead, my approach will be to use the models introduced in Part 2 to explain the University's development practices. Which of these models best accounts for Yale's behavior as described in

²⁵⁵ *Id.* To my knowledge, these surveys are internal and are not publicly available.

²⁵⁶ *Id.*

²⁵⁷ *Id.* It is unclear which projects and developers the University believes it has influenced.

Part 3? While there is necessarily a high degree of judgment in this task,²⁵⁸ I will argue that the political institution model best accounts for Yale's behavior, but there is also strong evidence of high agency costs within Yale's program.²⁵⁹ Because both of these explanations posit that Yale's behavior systematically departs from its best interests, which is defined as the aggregated best interests of its affiliates, I will then consider how far political forces and agency problems distort the University's policy away from what is optimal from an internal perspective.

4.1 Yale as Private Developer

According to the university as private developer model, universities invest in commercial real estate because they have many of the traits needed to be a successful real estate developer.²⁶⁰ They have access to large amounts of capital, know the demands of desirable demographics, have long-standing ties with government and community groups, and may be able to benefit from the expertise of their graduates at sub-market rates. While this model is ultimately unable to account for some Yale's activities, it is important to consider it in depth because most of the decisions Yale has made in the management of its commercial real estate program are identical to the decisions that would be made by an experienced and successful private developer with Yale's property holdings. Showing this requires an extended detour into the economics of shopping malls, enterprises that have much in common with Yale's concentrated retail holdings.

²⁵⁸ This is so because there is no simple means to aggregate the interests of Yale's affiliates in order to arrive at the policy that produces the greatest benefits for these affiliates. As such, one can never prove that a particular policy does not in fact serve the best interests of Yale's affiliates as a whole and thus must be the result of dysfunctional governance—the political institution model—or opportunism by managers—agency slack.

²⁵⁹ Recall that the traditional definition of agency costs is the sum of three costs: expenditures by principals to monitor their agents, expenditures needed to bond agents to principals, and the loss from suboptimal decisions when agents' actions diverge from their principals' best interests. *See* Jensen & Meckling, *supra* note 93, at 308. Throughout the rest of this paper, when I refer to high agency costs, I usually have the latter of these three in mind.

²⁶⁰ *See supra* Section 2.1.

4.1.1 Shopping Externalities

Shopping centers exist and succeed for the same reasons that stores tend to cluster together, often in dense locations such as a central business district: shopping externalities. While other considerations may be relevant to the success of malls and the location of retail more generally,²⁶¹ economists have increasingly focused on these demand externalities as the dominant factor explaining the success of shopping malls.²⁶² Unfortunately, much of this literature is disappointing. Much like “ketchup economists,”²⁶³ scholars working in this field have generally discussed these externalities in a very simplistic way,²⁶⁴ apparently concerned more with producing models capable of empirical testing than creating models that are conceptually satisfying and persuasive. Thus there are few rewards to summarizing this literature. Instead, I will present my own account, drawing on these studies when necessary.

Shopping externalities come in two basic types. The first of these, I will call “spillover effects” or “spillovers,” the stores that generate them “spillover generators,” and the stores that benefit from these effects “spillover beneficiaries.” Spillover externalities are created when a shopper travels to store *X* only to shop at store *X*, but then sees store *Y* and decides to shop there as well. The second kind of shopping externality I will call “aggregation effects” and the stores that generate them “aggregators.” An aggregation effect exists when a shopper would not travel to a particular location to shop if only store *X* or only store *Y* were at that location, but would travel to that same location if both store *X* and *Y* were located there.²⁶⁵ Aggregation effects are the result of two forces: comparison shopping and complementary goods. Shoppers may be more

²⁶¹ For a brief literature review of economic analysis of shopping centers, see Mark J. Eppli & John D. Benjamin, *The Evolution of Shopping Center Research: A Review and Analysis*, 9 J. REAL EST. RES. 5 (2001).

²⁶² See, e.g., B. Peter Pashigan & Eric D. Gould, *Internalizing Externalities: The Pricing of Space in Shopping Malls*, 41 J. LAW & ECON. 115 (1998).

²⁶³ Lawrence H. Summers, *On Economics and Finance*, 40 J. FIN. 633 (1985).

²⁶⁴ See *infra* note 268.

²⁶⁵ Put differently, the number of shoppers who would travel to stores *X* and *Y* if they are near each other is greater than the sum of those who would travel to the two stores individually if they were not.

willing to visit a shopping center if it contains competing stores because they can more easily compare merchandise.²⁶⁶ Similarly, they may be more willing to visit a center if merchants complement each other, allowing the shopper to purchase multiple goods he or she needs in one trip.²⁶⁷ The conceptual difference between these two types of externalities is causal. The spillover benefiter can be thought of as a sort of free rider. The shopper visits the shopping center entirely because of the existence of the spillover generator, with the benefit accidentally accruing to the spillover benefiter. By contrast, when an aggregation effect exists, the stores that generate the effect also benefit from it, because the benefiting stores also motivated the shopper's decision to visit the center.²⁶⁸

A spillover effect is a true externality. In the example above, store *X* creates an external benefit that is enjoyed by neighboring stores: more shoppers. This is a sort of public good, as *X* cannot exclude neighboring stores from this benefit. Without the right institutional structure, *X* will be undercompensated for creating this good, leading to insufficient production.²⁶⁹ Thus we have a relatively straightforward example of an unpriced benefit.

The dynamics of aggregation effects are different, however. Stores *X* and *Y* both benefit from being located in the same shopping center and thus capture the benefits of their proximity. The market failure here is of a different sort. Aggregation effects are likely a diminishing marginal good. While the opening of store *X* next to store *Y* may generate a large aggregation effect—that is, more shoppers travel to the stores when they are located together than the sum of those who would travel to each store if they were separate—the addition of a third store, store *Z*,

²⁶⁶ Eppli & Benjamin, *supra* note 261, at 14-15; Douglas S. West, Balder Von Hohenbalken & Kenneth Kroner, *Tests of Intraurban Central Place Theories*, 95 *ECON. J.* 101, 101 (1985).

²⁶⁷ Eppli & Benjamin, *supra* note 261, at 9-11; West, Von Hohenbalken & Kroner, *supra* note 266, at 102-04.

²⁶⁸ My primary objection to the existing literature is a failure to notice the basic conceptual difference between aggregation effects and spillovers and instead to treat all shopping externalities as spillovers.

²⁶⁹ See HARVEY S. ROSEN, *PUBLIC FINANCE* 65-72 (2d ed. 1988).

likely produces a smaller aggregation effect than did the opening of the second. At some point, then, the marginal benefit of an additional store (the additional aggregation effects it generates) exceeds the marginal cost of that store to existing stores (the reduction in profits from greater competition). But the additional store only bears the average costs, not the marginal costs, of locating in the shopping center. Thus if entry into the shopping center is unrestricted, competing and complementary stores may be overprovided in the shopping center.²⁷⁰

Retail tenants vary in the degree to which they create these externalities. Some generate neither, some only one, and some both. A fast food restaurant is an example of a tenant that likely generates neither externality: shoppers travel to the restaurant, purchase their food, then leave. Rarely will they shop at other stores after they have eaten and rarely will the presence of a fast food restaurant plus store *X* generate a shopping trip that would not have been generated by store *X* or the fast food restaurant alone. Department stores are often large spillover generators, since many shoppers will travel to a center merely to visit a department store, but then shop elsewhere.²⁷¹ Smaller clothing retailers are likely to be aggregators, as shoppers will travel further to a location with multiple competing and complementary stores of this type than they would to a center with only one such store. And both of these store types may, or may not, generate externalities of the other type in addition, depending on the circumstances.

Retail tenants also vary in how much they benefit from these externalities. For example, while fast food restaurants generate few externalities of either type, they are likely to benefit greatly from spillovers, as customers who shop at a large department store may choose to stop off at an adjacent restaurant for a treat. Other retailers, for example car dealerships, are so

²⁷⁰ George Tolley has argued that this same dynamic will result in excessively large and congested cities, since new residents only bear average congestion costs, not marginal congestion costs. George S. Tolley, *The Welfare Economics of City Bigness*, 1 J. URB. ECON. 324 (1974).

²⁷¹ Of course, department stores may also generate aggregation effects, particularly with each other.

specialized that they are unlikely to benefit at all from spillovers.²⁷² Few people visit store *X*, see a car dealership nearby, and decide to buy a new car on the spot. When it comes to aggregation effects, it is logically the case that a tenant can only benefit from an aggregation effect to the extent it generates it.²⁷³ Thus while a tenant can be a free rider or a public goods provider in the area of spillovers, no such distinction exists in the context of aggregation effects.

Finally, it is important to note that whether a spillover or aggregation effect is generated depends on the specific combination of the stores in the shopping center; it is not an immutable trait of any store to generate such effects.²⁷⁴ In order to generate and capture these benefits, stores must appeal to the same basic demographic. Thus while *X* and *Y* may generate an aggregation effect when paired together, *X* and *Z* may not if their products will not appeal to the same shoppers. The same is true of spillovers. While store *Y* may benefit from *X*'s spillovers, a store that targets a very different demographic may not benefit at all. This dynamic means that externalities are likely to be much greater if neighboring stores appeal to the same customers.

4.1.2 The Efficient Shopping Center

With these considerations in mind, we can construct a model of the efficient shopping center. I define the efficient shopping center as one that generates the highest total profits for the stores that make it up. The center will be efficient when spillover and aggregation effects are

²⁷² However, because car dealers sell a good that customers will comparison shop for, they are an excellent example of aggregation effects. Hence they tend to cluster. They also provide an intuitive example of the diminishing marginal benefits of aggregation. While car dealers clearly like clustering to an extent, we can easily imagine that at some point, they would oppose the opening of an additional dealership, recognizing that it provides no further aggregation benefits—i.e., attracts no additional customers—while reducing the existing dealers' sales.

²⁷³ If store *X* benefited from being near store *Y* more than store *Y* benefited from being near store *X*, then the placement of store *X* cannot be an equal causal factor in attracting shoppers to the location. Rather, there must be two externalities here: an aggregation effect benefiting both stores and a spillover created by store *Y* that benefits *X*. As this point shows, I am implicitly defining “benefit” not as higher sales but rather as a higher opportunity for sales. Stores *X* and *Y* can contribute equally to the causal motivation of shoppers to travel to the center without necessarily enjoying the same sales as a result (if, say, *X* is particularly poor at product placement and thus does not capture as many sales as it should from the volume of customers in the door).

²⁷⁴ See, e.g., Jan K. Brueckner, *Inter-Store Externalities and Space Allocation in Shopping Centers*, 7 J. REAL EST. FIN. & ECON. 5, 10 (1993).

correctly priced, that is, priced so that they are provided until the marginal benefits equal the marginal costs. Achieving an efficient shopping center thus requires three institutional arrangements. First, there must be some way for spillover benefiteres to compensate spillover generators in order to ensure that spillovers are not underproduced. Second, controls on aggregators must be imposed so that the number of aggregators is set at an efficient level, where marginal benefits equals marginal costs, rather than at a level where average benefits equals average costs, which is what an unrestricted market is likely to provide. Third, because space in the shopping center is limited, stores that create or benefit from spillovers will compete for space with stores that generate and benefit from aggregation effects. If the center's tenants generate large spillovers, a store that benefits from spillovers but creates no aggregation effects may outbid a store that would generate a large aggregation effect and provide greater aggregate marginal benefits to the center. Thus those stores in the center that would benefit from the marginal aggregation effect generated by an additional tenant of a certain type must find some way to subsidize the rent of the beneficial tenant, or deter the addition of free-riding spillover benefiteres, so that the optimum level of aggregation effects is created.

4.1.3 Shopping Center Contracts

While it is possible that the efficient shopping center could be created through ad hoc bargaining between stores, an alternative exists with much lower transaction costs: concentrating ownership of the shopping center in the hands of one developer. This allows the developer to serve as a common agent, with his or her principals, the retail tenants of the center, coordinating their behavior through the developer by means of contracts.²⁷⁵ Because spillovers and aggregation effects generated by the stores within the center will remain mostly within the

²⁷⁵ See Thomas J. Miceli & C.F. Sirmans, *Contracting with Spatial Externalities and Agency Problems: The Case of Retail Leases*, 25 REGIONAL SCI. & URB. ECON. 355, 355-56 (1995).

confines of the center, the developer has an incentive to maximize sales for the center as a whole.²⁷⁶ The developer can also easily price these externalities. For spillovers, developer can simply charge spillover generators lower rent, recouping this loss from higher rent charged to spillover benefiter. Thus the spillover effects are correctly priced through price discrimination in rent. The developer can also ensure an efficient number of aggregators by refusing to rent to an additional tenant of a certain type when the marginal costs of an additional tenant of that type exceed the marginal benefits in terms of greater aggregation effects. And the developer can simply refuse to rent to spillover benefiter, thereby preventing them from crowding out more-efficient aggregation-effect stores. Finally, through careful tenant selection, the developer can ensure that the tenant mix best captures spillovers and generates the largest possible aggregation effects.

Efficiency is aided to a lesser degree by the structure of retail leases. Tenants in shopping centers pay two types of rent: a base rent and an overage.²⁷⁷ The overage is a percentage rent that the tenant pays in addition to the base rent when the tenant's sales exceed a threshold, called a break point.²⁷⁸ Total rent is thus the sum of the base rent and the overage. This break point is typically set at the base rent divided by the overage percentage.²⁷⁹ As a result, the tenant pays a higher rent as a percentage of total sales if the tenant fails to meet the break point level of sales than if the tenant exceeds the break point.²⁸⁰ While strictly speaking, the landlord would have the

²⁷⁶ I assume that the costs to the developer of each store are proportional to the square footage of space devoted to that store. Thus the developer maximizes his or her profits by maximizing sales per square foot. If, however, some store types are more expensive for the developer to service than others, the calculation would be more complex.

²⁷⁷ See, e.g., Benjamin, Boyle & Sirmans, *supra* note 190, at 302-03.

²⁷⁸ Actual data on the average terms of retail leases are disappointingly rare. As a rough guide, however, Benjamin, Boyle, and Sirmans's study of shopping center leases in Greensboro, North Carolina, found average percentage rent rates of approximately five percent, with no contract having a rate higher than 10 percent. *Id.* at 306-07.

²⁷⁹ Miceli & Sirmans, *supra* note 275, at 366-67.

²⁸⁰ Setting the break point in this manner creates an incentive for the store to assure sales of at least the break point level, since otherwise it pays high rent as a percentage of sales. *Id.* at 368. This is important because stores also generate externalities, particularly spillover externalities, based in part on their effort. If a retail tenant puts greater

same incentive to maximize total sales of the center from a fixed rent contract as from a percentage rent, this arrangement allows landlords and tenants to share risk from low sales²⁸¹ and also ensures that the landlord exerts an efficient level of effort on the provision of common services, such as safety and cleanliness.²⁸²

4.1.4 The Predictions of This Model of Shopping Centers

These economic forces allow us to explain many features of shopping centers and the behavior of developers. First, shopping centers tend to have a few large anchor tenants, such as department stores and movie theaters. These tenants occupy a very large percentage of the shopping center's total area, have relatively low sales volume per square foot, and pay extremely low rents.²⁸³ These tenants create enormous spillover and aggregation effects. As a result, one study estimated that anchor stores receive a per-square-foot rent subsidy of approximately seventy-two percent versus a non-anchor store with a similar sales volume.²⁸⁴

Shopping centers then have a selection of aggregation merchants that also benefit from the spillovers generated by the anchor tenants. Some of these tenants, particularly women's clothing stores, may also create some spillovers, and studies show they pay lower rent than many

effort into promotions, store design, etc., this may draw more customers, which has spillover effects on neighboring stores. Thus it is in the best interest of the stores as a whole to create incentives for each store not to slack off in retailing, since this maximizes the total sales of the center.

²⁸¹ *Id.* at 368-70.

²⁸² Benjamin, Boyle & Sirmans, *supra* note 190, at 304. They also note that percentage rents serve as a hedge against inflation for the landlord, since rents will automatically rise with inflation. *Id.*

²⁸³ THE URBAN LAND INSTITUTE, DOLLARS & CENTS OF REGIONAL SHOPPING CENTERS 2004 at 40 (2004). In 2004, department stores in large malls paid a median rent of \$2.84 and had a median sales volume of \$153.15 per square foot of retail space. Rent thus constitutes less than two percent of their revenue.

²⁸⁴ Pashigan & Gould, *supra* note 262, at 125. This study was based on data from the Urban Land Institute (ULI) from the mid 1990s, but that data is nearly identical to the most recent ULI figures. See THE URBAN LAND INSTITUTE, *supra* note 260. The authors of this study note that the apparent size of the externalities generated by department stores suggests that the decline of the central business district as a retail destination may have as much to do with unpriced externalities as with the rise of the automobile and suburbanization. Pashigan & Gould, *supra* note 262, at 140-41. Once an institution emerged that could correctly price these externalities, namely the suburban mall, central business districts with fractured ownership could not possibly compete, since they had no way to subsidize department stores for the externalities they created. And once the department stores left, the externalities left with them, leading to a decline in the sales of non-anchor tenants as well.

other tenants.²⁸⁵ Other tenants, such as jewelry stores, are unlikely to generate any spillovers, since shoppers who travel to the mall to purchase jewelry are more specialized and unlikely to do as much shopping for other merchandise.²⁸⁶ They thus pay very high rent.²⁸⁷ While data exist on average number of these stores in malls, I have found no empirical studies on whether developers limit the number of these stores below what would be observed in an unrestrained market. We should expect, however, that rational developers would do so, limiting the number of aggregator stores to the level where the marginal benefits of an additional store equals the marginal costs.

Shopping centers contain a few stores that benefit from spillovers but do not generate aggregation effects. Empirical data generally show that in planned malls, stores that sell inexpensive merchandise—and thus are not prone to comparison shopping—and are not obviously complementary with retailers of other types, such as furniture stores, card shops, and music retailers, are usually limited to merely one or two stores within a shopping center.²⁸⁸ Further, one study found that in unplanned shopping centers, stores of this variety were more common than in planned shopping centers.²⁸⁹ This is not surprising. Stores that benefit from spillovers but do not generate aggregation effects are likely to be oversupplied within an unregulated shopping center for the same reason as aggregation generators are: new entrants to the center only bear the average cost, not the marginal cost. Thus to maximize total revenues, developers will wish to limit the number of these stores so that marginal cost equals marginal

²⁸⁵ Pashigan & Gould, *supra* note 262, at 135.

²⁸⁶ They are, however, likely to comparison shop, and hence jewelry stores benefit from aggregation effects.

²⁸⁷ According to the ULI, women's clothing stores in large malls pay a median rent of \$22 per square foot, while jewelry stores pay a median of \$68.05. THE URBAN LAND INSTITUTE, *supra* note 283, at 40. Thus the median jewelry store pays approximately twenty-four times as much rent per square foot as the median department store. This indicates how strong the internalization of spillover effects is. Women's clothing stores and jewelry stores also have higher sales per square foot than department stores, but this greater sales volume does not offset the higher rent they pay, as each type of store spends approximately eight percent of its revenues on rent, compared with below two percent for department stores. *Id.*

²⁸⁸ *Id.*

²⁸⁹ West, Von Hohenbalken & Kroner, *supra* note 266, at 112-14.

benefits, which because they do not generate aggregation effects, will likely occur with one or perhaps two stores.²⁹⁰ Keeping the number of these free-riding stores low allows for more space to be dedicated to aggregation-effect generating stores, which increases the center's total sales.

Finally, stores that do not benefit from spillover effects will not be found in shopping centers at all. This is because they will be outbid by stores that do benefit from spillovers. Thus high aggregation effect generators such as car dealerships and appliance stores, which efficiently cluster together, have no reason to be located in malls because they do not benefit from anchor tenants and thus will be outbid by the tenants that do.

4.1.5 Yale's Behavior Closely Mirrors That of Shopping Center Developers

Yale's tenant selection practices closely conform to what is found in modern shopping centers. Like a shopping center, Yale's holdings are very concentrated in a few particular areas. Thus like a mall developer, many of the shopping externalities generated by their tenants will be captured by their other tenants, making pricing of these externalities through price discrimination in rent possible. This explains why Yale made attracting anchor tenants such as Barnes & Noble, Urban Outfitters, and J.Crew a priority in its redevelopment of Broadway.²⁹¹

Yale then supplements these anchor tenants with a selection of aggregation-generating merchants tailored to the anchors in each district. In Broadway, where the anchors appeal to suburban residents and younger shoppers, Yale has chosen a variety of retailers, primarily apparel merchants, who can not only capture the spillovers generated by the anchors but also create some aggregation effects among each other. Tenants such as Barrie Ltd. that were not well-suited to capturing these spillovers or generating aggregation effects with Yale's new

²⁹⁰ Two stores may be the efficient number because malls are large, and some spillovers may not be captured with only one store because of placement issues.

²⁹¹ See *supra* note 164 and accompanying text.

tenants because they appealed to different demographics²⁹² were systematically driven out of the area by higher rents and new leasing requirements.²⁹³ Similarly, in the Chapel Street area, where the main anchors are not retail establishments in Yale-owned properties but instead cultural attractions, such as theaters, that draw an older crowd, Yale has maintained and enhanced a tenant mix suited to capturing these externalities and maximizing total sales.

These dynamics also explain apparent monopolies such as Gourmet Heaven. Since stores of this nature are neither complementary with others nor benefit from comparison shopping, they create no aggregation effects. Thus the efficient number of retailers of this variety in a district is one.²⁹⁴ Hence Yale ensured that Krauszer's closed before bringing in Gourmet Heaven, since two retailers of this sort would be a waste of space better allocated to stores of a different type.²⁹⁵

Finally, Yale's desire to maximize total revenues explains its explicit policy of not renting retail space to the highest bidder.²⁹⁶ The highest bidder for retail space will be tenants that have the highest sales volume, which often are fast food merchants.²⁹⁷ But tenants with the highest sales volume may generate low or no spillovers. Thus it often makes economic sense to rent to a tenant that pays lower rent if that tenant creates sufficient externalities to increase the sales of other tenants and thus increase the rent those tenants pay.²⁹⁸ If all these tenant selection decisions are made correctly, Yale would increase total sales volume in its retail districts and thus increase rent. By all accounts, this is in fact what has occurred.²⁹⁹

²⁹² Barrie's appealed to an older demographic than typically shops at J.Crew or Urban Outfitters.

²⁹³ See *supra* note 182 and accompanying text.

²⁹⁴ As throughout this Section, "efficient" is defined as maximizing revenue from retail, not in a broader, socially optimal sense.

²⁹⁵ See *supra* note 183 and accompanying text.

²⁹⁶ See *supra* note 165 and accompanying text.

²⁹⁷ See Griswold & Rosenfeld, *supra* note 172 (quoting Abigail Rider as saying that fast food restaurants would fill New Haven's shopping districts without UP's selectivity because they can pay higher rents due to high turnover).

²⁹⁸ See *supra* notes 242-244 and accompanying text.

²⁹⁹ Telephone Interview with Bruce D. Alexander, *supra* note 150. Of course, there is no way to verify Alexander's assertion that average rents on Broadway have increased due to Yale's hands-on management.

4.1.6 Yale's Extended-Hours Policy

Yale's decision to require its Broadway stores to extend their hours until nine pm involves similar concerns. While it may at first appear that imposing such a requirement would reduce the rent Yale could charge for its properties, if Yale makes correct decisions on tenant selection, total sales could in fact increase more than costs, allowing Yale to charge higher rent. As with Yale's policies in other areas, this seems to have occurred.³⁰⁰

Begin by considering whether a store is a winner or a loser from the institution of a mandatory nine pm closing time. A store wins from the policy if it does sufficient extra business to cover the extra costs of longer hours. A store is a loser if it does not. Some stores will be self-sustaining under such a policy. That is to say, they will generate enough extra business from staying open until nine pm that they will cover the costs of doing so regardless of how late their neighbors are open. Such self-sustaining businesses presumably will already remain open until nine pm, since it is cost effective for them to do so, so the institution of this policy has no causal effect on their actions. Restaurants are a good example of businesses of this type. While they can certainly be winners or losers from the institution of the nine pm requirement, as other stores staying open later could help or hurt their business, they will stay open past this time even before the policy is implemented.

But all other stores are only conditional winners from the policy. Since, by hypothesis, they are not self-sustaining, they can only be winners if the collective activity of the entire neighborhood staying open later generates sufficient externalities that the extended hours become profitable. Thus the same factors needed to maximize the size of externalities, primarily a complementary selection of tenants, will be implicated here. With the right tenant mix, the

³⁰⁰ *Id.*

landlord can act as a common agent of the tenants, overcoming the high transaction costs of negotiation by forcing them to set hours that are efficient only if shared by all stores.

However, there is an added wrinkle here: tenants that create and benefit from externalities at one time of day may not do so at another, since different demographic groups are likely to shop at different times. Thus while a tenant may contribute to an aggregation effect during the day, that same tenant may not generate aggregation effects at night if its customers are unlikely to frequent the store during its extended hours. Thus when Yale implemented this requirement, it had strong incentives to drive out retail tenants that appealed to customers unlikely to shop at night in favor of tenants that would draw night shoppers, since the former class of tenant contributed no externalities to other stores and thus made them less profitable, while the latter tenant did and thus could make its neighbors winners from the policy. This provides a further reason why the University was keen to drive out tenants that appealed to older demographics, such as Barrie Ltd. and Quality Wine,³⁰¹ since even if these stores created shopping externalities such as aggregation effects during the day, their older customers were unlikely to shop much at night meaning that the persistence of such stores hurt the proceeds of its neighbors once the nine pm requirement was implemented, and thus dragged down Yale's rents.³⁰² Because of Yale's success at driving out these tenants, it has apparently managed to increase rents in the Broadway area as a result of its nine pm mandatory closing time.³⁰³

4.2 The Deficiencies of This Account

As the preceding discussion makes clear, many features of Yale's program that at first appear to be bold ideas for improving New Haven may well just be sound business decisions for

³⁰¹ See *supra* note 115 and accompanying text.

³⁰² It is hardly surprising, then, that J.Press, a non-Yale tenant, to this day is not open in the evening. Even if the nine pm requirement pays for itself for Yale's Broadway tenants, J.Press is unlikely to benefit sufficiently from these externalities to cover its costs. See Bender, *supra* note 182, at 6.

³⁰³ Telephone Interview with Bruce D. Alexander, *supra* note 150.

a landlord with concentrated retail holdings. Tenant selection and the extended hours requirement are only two examples. Yale's investment in public goods, whether more directly through the Broadway Merchants Association, or indirectly, such as through Gourmet Heaven's flower displays, are the sort of policies commonly found in shopping centers, where developers are presumably only motivated by profits. Even measures such as banning Gourmet Heaven from selling tobacco or the relatively short terms of Yale's leases can be entirely explained in terms of maximizing the sales of Yale's tenants and therefore rent, as the former helps ensure a cleaner street while the latter allows Yale to evict tenants whose externality generation falls short of expectations. Most of what Yale does in the management of its program, then, is identical to what a private developer who held its properties would do.

The model of the private developer, however, ultimately breaks down because several of Yale's decisions and actions are simply irrational if we see it as just an ordinary developer maximizing profits. The best example is the decision to have a real estate program at all. While UP and Yale's commercial real estate is apparently self-supporting, there is strong reason to doubt that it generates investment-grade returns.³⁰⁴ The rational real estate developer would no doubt stop being a real estate developer entirely if he or she could see greater returns from investing his or her time and money elsewhere. Since Yale presumably could sell its real estate and invest the proceeds in investments that would generate much higher returns, its commercial real estate cannot be explained simply as an investment: the University must have some extraneous reason that prompts it to purchase and manage commercial real estate in the first place, such as a desire to generate non-shopping externalities that are captured by its non-commercial real estate.

³⁰⁴ See *supra* Subsection 3.3.10.

Another deficiency with this model is the placement of Yale's investments. The three areas of New Haven in which Yale owns property are all in close vicinity to the Yale campus. It is difficult to believe that Broadway, Chapel, and Audubon are really the three streets in New Haven with the greatest opportunities for high returns. No doubt the University has chosen to invest in these areas precisely because any positive externalities generated by activity in these districts are likely to be captured by the school's non-commercial property. Indeed, when Yale's program was in its infancy and before the arrival of Alexander, it invested nearly \$10 million in the Ninth Square redevelopment project.³⁰⁵ But no similar investment has been made by the University in an area as far removed from Yale's existing holdings since Alexander's arrival, suggesting perhaps a deliberate policy to concentrate on those parts of New Haven where improvements from real estate investment would redound to the campus's benefit.³⁰⁶

Another puzzle is Yale's long-term vacancies. A building like 986 Chapel Street is quite difficult to explain from the standpoint of a private developer.³⁰⁷ At first, Alexander's justification for this building's continued vacancy—that the negative externalities generated by a bad tenant can harm the area worse than a vacant building—may seem like a plausible consideration for a private developer.³⁰⁸ But it is quite difficult to believe that repeatedly turning away even less-desirable tenants makes economic sense. Yale's property tax bill on the property amounts to approximately \$30,000 annually. While the precise percentage rent Yale's tenants in

³⁰⁵ Katie DeWitt, *Ninth Sq. Struggles To Fill Retail Spaces*, YALE DAILY NEWS (Apr. 21, 2005), <http://www.yaledailynews.com/news/2005/apr/21/ninth-sq-struggles-to-fill-retail-spaces/>.

³⁰⁶ The lack of repetition suggests that Yale now regards its investment in the Ninth Square as a mistake.

³⁰⁷ See *supra* Subsection 3.3.7.

³⁰⁸ This judgment, however, does not have any empirical support. To my knowledge, no economist has attempted to estimate the magnitude of externalities for neighboring commercial tenants of vacant retail properties or low-class tenants. Intuitively, however, I expect that the negative externalities generated by vacant property are very large, probably as large as or larger than anything but the worst commercial use. See *infra* note 311. Most scholars have assumed that the negative effects of vacant properties are very large, but most of these studies look at abandoned, not vacant, property, which presumably is much worse. See David T. Kraut, *Hanging out the No Vacancy Sign: Eliminating the Blight of Vacant Buildings from Urban Areas*, 74 N.Y.U. L. REV. 1139, 1143-51 (1999) (reporting sociologists and economists' findings on the problems created by vacant buildings).

the area pay is unknown, the only empirical study of retail leases I am aware of found average percentages of five percent, with maximum percentages approaching ten percent.³⁰⁹ Assuming that Yale's properties on Chapel pay a similar percentage, a lease that merely covered Yale's annual tax bill on 986 Chapel would need to lower the annual sales of Yale's other tenants by \$300,000 a year before passing on such a contract would be justified. This is a difficult figure to accept, particularly because the only Yale property on the same block as 986 Chapel is also vacant. Moreover, this ignores both the fact that Yale would almost certainly be able to lease the property for more than costs and that its existing use as a vacant building certainly imposes some externalities already.³¹⁰ It is only plausible that Yale could capture negative externalities of this magnitude from an undesirable tenant if there is some additional mechanism, such as New Haven's attractiveness to Yale's faculty and students, by which these costs are internalized.³¹¹

In an interview, Alexander explained long-term vacancies as less a function of avoiding negative externalities and more the result of UP's desire to avoid filling a vacant property, a limited commodity, with an undesirable tenant, thereby preventing it from renting that space to an externality-producing tenant should it come along.³¹² But this explanation does not fare much better. Yale has owned the property for more than a decade without a tenant. Given Yale's five-year leases, two tenants could have run the complete terms of their leases in the time this space has been vacant. In light of this track record, UP's belief that it must keep the property open in order to rent it to a favorable tenant, which is always just around the corner, is unrealistic. It is

³⁰⁹ See *supra* note 278.

³¹⁰ It is hard to imagine what sort of store a block away from Yale's nearest occupied properties could reduce the sales of those tenants by \$300,000 a year more than they are already reduced from having two vacant properties (that, incidentally, neighbor a bar) in those same locations.

³¹¹ Joel Schiavone, who originally assembled these properties, claims to have made leases at or below costs in order to avoid having vacant storefronts during the early days of his Chapel Street development activities. See Branch, *supra* note 110, at 37. This suggests that he viewed vacant stores as creating very large negative externalities for neighboring tenants. This quote comes before the outbreak of Schiavone's dispute with Yale, see *supra* note 138, so there is no obvious reason to doubt the truth of this statement.

³¹² Telephone Interview with Bruce D. Alexander, *supra* note 136.

difficult to imagine a private developer maintaining similar optimism in the face of ten years of vacancy. Yale's apparent unwillingness to rethink this policy suggests that some consideration besides economic returns to neighboring properties motivates its decisions.

It may be that UP and its staff simply lack the time or interest to find a tenant for this property. Indeed, Alexander suggested as much in his comments during the SeeClickFix episode.³¹³ But surely any private developer in this position would sell land he or she could not profitably use due to limited resources. Yale's behavior shows clear signs of a "Deck of Playing Cards" approach. While it acquires property all the time, it never seems to sell it for any reason.³¹⁴ Thus it is quite clear that while Yale may mostly behave as a private developer would, many of its decisions, notably the acquisition, tenant selection, and disposal, of Yale's property would clearly be irrational for any private developer, since the negative externalities captured by neighboring Yale tenants could not possibly be so large as to make these policies efficient.

4.3 Yale as Secondary Investor

These puzzles largely disappear if we instead see Yale as a secondary investor. As discussed above,³¹⁵ this theory of university behavior sees it as an actor with enormous, illiquid investments in an industry other than real estate. As such, it is economically sound for the University to make certain investments that, while locally perhaps money losers, are global money winners because they create externalities captured by the universities' primary operations. On this model, Yale invests in commercial real estate because it believes it will generate investment-grade returns, only not directly through rent, but indirectly through a university that

³¹³ See *supra* notes 214-217 and accompanying text.

³¹⁴ Puzzling, long-term vacancies are hardly unique to Yale's commercial real estate program. For example, Yale has owned the building at 33 Dixwell Avenue since 1983. This property is currently a vacant apartment building in such a bad state that the casual observer may falsely believe it to be outright abandoned. The property across the street, listed as 27 Dixwell Avenue in the New Haven tax database, was purchased on the same day as 33 Dixwell. But it has been extensively renovated, rechristened 104 Lake Place, and rented to Yale affiliates through Elm Campus Partners. I have no idea why 33 Dixwell has not received similar treatment.

³¹⁵ See *supra* Section 2.2.

is more attractive to potential students and faculty. This effect will be strongest if Yale invests in areas close to campus, where its existing holdings can capture favorable externalities. The externalities Yale seeks to generate through its commercial real estate, then, are not the shopping externalities mentioned above, but rather favorable characteristics such as an attractive, appealing, and safe area surrounding the campus. And Yale never sells property because doing so serves its long-term interests. Yale is in it for the long haul, and it is hard to predict when today's vacant land or useless commercial property will suddenly become valuable for university expansion or commercial and residential development.

This model still struggles, however, to explain long-term vacancies. While it is plausible that the negative externalities that would be generated by a bad retail tenant at 986 Chapel would be felt by Yale students and faculty and thereby reduce the appeal of the University as an institution, it is unlikely that the externalities generated by any plausible land use could be so harmful. As noted, Yale pays nearly \$30,000 a year in taxes on the property, and vacant buildings generate more than a few negative effects on their own.³¹⁶ It is hard to believe that the costs of a convenience store or cell-phone retailer on the well-being of Yale's affiliates would really be this negative. Yale may be operating here under an implicit assumption that the negative externalities of a bad retail tenant or a vacant store are only felt in a small radius, while the positive benefits of a particularly desirable use, say a popular restaurant, can be felt throughout a much greater area. This theory seems plausible, and would seem to be supported by Yale's practice of moving and placing tenants to ensure that vacancies are only found on the outskirts of its commercial districts. I will return to this issue shortly.

Using this model also helps explain why the University's properties target the demographics they do. Broadway's college-age appeal, Chapel Street's theater-goers, and

³¹⁶ See *supra* note 308.

Audubon's service shops for professionals all resemble demographics well represented at Yale. It should be clear from the discussion of externalities in the shopping-center context that the ability of one tenant to capture the externalities generated by another is the result of the two tenants' complementarity. It should not be surprising, then, that Yale has chosen to develop its properties toward demographic groups that make up Yale, since this enables Yale affiliates to enjoy personally the externalities generated by the University's real estate. As a result, retail establishments appealing to certain demographic groups, such as less-educated, native New Haveners, are a market Yale has no interest in tapping, since Yale affiliates can only feel the negative externalities of these establishments, never the positive ones.³¹⁷

These considerations explain why so much of Yale's behavior can be accounted for with the private developer model. Because Yale has deliberately tailored its commercial real estate to complement the demographics of Yale, the same externalities that benefit these commercial tenants will also benefit Yale affiliates and thereby Yale, while externalities harmful to these tenants are harmful to Yale. Thus even though Yale's behavior is not actually aimed at maximizing the rent from its retail properties, the same methods are useful for Yale's broader goals. It can act as if it is a private developer because doing so achieves the ends of Yale's program, even though Yale itself is motivated by concerns unlike those of the private developer.

4.4 Yale as Political Institution

Before simply accepting the secondary investor model, we should consider more carefully our final model: the political institution model. The predictions of this account are quite similar to the secondary investor model. It forecasts that Yale will adopt real estate policies to maximize the best interest of its affiliates. But unlike the secondary investor model, which

³¹⁷ In an interview, Bruce Alexander used dollar stores as the go-to example of a tenant that, while not per se objectionable, does not fit Yale's vision. He used tattoo parlors as his example of per se bad tenants. Telephone Interview with Bruce D. Alexander, *supra* note 136.

expects the university to adopt those policies that achieve the best interests of the university's affiliates in aggregate, the political institution model predicts that the university will maximize the best interests of those affiliates who are most able to organize within the university to advance their interests. Those affiliates who are less able to promote their causes, that is who operate at a political disadvantage, are likely to see their interests harmed because of this differential political power within the university. I believe this is a better model of the University's behavior because it includes all of the above points as well as explaining several nagging questions about Yale's behavior.

At first, one could be tempted to dismiss the political institution model out of hand. Since it predicts that Yale will adopt those policies that favor its most powerful groups of affiliates at the expense of less powerful groups, it would seem to be falsified unless we can locate some harm from the program to the least powerful of Yale's affiliates. And no such harms seem to exist. There is no real evidence that Yale's investments in commercial real estate or the decisions it has made in managing these properties have affirmatively harmed the interests of any group of affiliates: students, alumni, faculty, or administrators.

But this is a strained understanding of the political institution model. A better approach is to think of opportunity costs: has Yale adopted policies that, while beneficial to all groups, deliver greater benefits to more-powerful affiliate groups than alternative policies that would be more beneficial to the affiliates in aggregate. And here the evidence is much stronger. Before discussing this, however, we should think about what affiliate groups are more and less powerful. I will assume, with only a brief argument, that faculty and administrators can more easily advance their interests within Yale's political system than can students and alumni. This seems self-evident: Faculty and administrators often have close professional ties with each other

that may exceed the ties of students, who are more diffuse and dissimilar. Faculty and administrators have decades-long relationships with the University, whereas students are only students for a few years. Once students graduate and become alumni, they have even greater obstacles to organizing and furthering their interests, notably distance and problems of rational ignorance about what is happening at Yale. These dynamics suggest that under a political institution model, we should expect Yale's policies to most benefit its faculty and administrators, while benefiting its students and alumni less than alternative policy decisions would.

An example of this is Yale's focus on certain demographic groups. As noted, Yale has deliberately chosen to focus its retail districts on demographic groups similar to University affiliates so that these affiliates can benefit from the externalities generated by these retailers.³¹⁸ But this is under-determinative. There are many possible visions for a neighborhood that would generate externalities captured by the University. A satisfying account must go further and explain why the University has chosen to appeal to the markets it has: suburban shoppers in Broadway and older demographics on Chapel.³¹⁹ Many college campuses are surrounded by commercial districts with heavily student-centered establishments, such as cheap restaurants, college bars, bookstores, and coffee shops. These neighborhoods are often vibrant and safe because they attract a steady stream of students nearly twenty-four hours a day. But Yale's management of Broadway and Chapel suggests a conscious desire to avoid creating such areas, as relatively few Yale tenants fall into this category. Instead, Yale favors retail tenants, particularly upscale clothing retailers that appeal to suburban shoppers. It is not obvious that Yale's vision for Broadway would be less successful at generating public goods captured by the

³¹⁸ See *supra* Section 4.3.

³¹⁹ The former is more important than the latter because Yale inherited many of its Chapel Street tenants and thus has mostly maintained the neighborhood's character, whereas Broadway's aesthetic was consciously changed.

Yale community, particularly students, than a more-typical college neighborhood would.³²⁰ But it is easy to see that certain Yale affiliates, notably older administrators and faculty, probably benefit much more from the area's current focus than they would from a hypothetically student-centered one. This may be the result of differential political power within the University, as Yale's faculty and administrators can shape its policies to favor their own interests against hypothetical policies that may be more beneficial to students.³²¹

More fundamentally, we may ask why Yale has a real estate program at all. Yale could easily sell its properties and use the proceeds for other purposes. Or it could maintain its properties and manage them as a pure investment, maximizing revenue just like a private developer and spending the revenue generated on other activities. The real opportunity-cost question of Yale's program is not whether the way it currently manages this program is the result of differences in political power within the University but rather whether having a program at all, as opposed to spending the money otherwise, is a result of these forces. It is here that the strongest case can be made for seeing Yale's commercial real estate as the result of political forces and not the University's best interest. Faculty and administrators, who will live within the New Haven area for decades and often make significant real estate investments themselves in the city, certainly benefit if the University's investments can improve New Haven. Indeed, given their personal stakes in New Haven, they may well favor quite high expenditures toward this end. But students, whose time in New Haven is quite limited and often sheltered within the

³²⁰ Broadway's lack of student bars or late night restaurants and heavy reliance on retail means that it has few visitors after nine pm. The few establishments that fall into the former category, such as Toad's or Yorkside, are nearly all in non-Yale properties. A different vision for the area thus may well generate more "eyes on the street" well into the night, producing significant public safety benefits.

³²¹ There is strong support for this argument in the pages of the *Yale Daily News*. Over the years, it has published dozens and dozens of articles in which students complain that the University cares too much about attracting rich, suburban shoppers, rather than appealing to students' needs and interests. Students' desires for more-affordable food options are particularly prominent. See, e.g., Bender, *supra* note 182, at 6; Daniel Weisfield, *On Broadway, Past Must Be Lesson*, YALE DAILY NEWS (Nov. 19, 2003), <http://www.yaledailynews.com/news/2003/nov/19/on-broadway-past-must-be-lesson/>.

colleges, and alumni, whose time in New Haven is at an end, have much less to gain. Students and alumni may benefit indirectly from improvements in the quality of life of faculty and administrators achieved through investing in New Haven, but this effect is likely quite small. Students and alumni may well be better served by allocating this money toward something else, such as improved class offerings, more faculty members, or better athletic facilities.³²²

In the end these are empirical questions. There is no easy way to measure the aggregated best interests of a university's affiliates and to empirically determine whether the university's policies are perfectly tailored toward achieving those interests. The disparate gains to faculty and administrators from Yale's policies could be efficient. They could benefit all affiliates more than any other use of these resources, particularly if they create indirect gains to students and alumni from efficient in-kind compensation to the University's most-important employees. This is something we simply do not know and cannot easily discover. This uncertainty itself suggests that the political institution model may well be right. Given that it is essentially impossible for Yale to assess the long-term costs and benefits from investing in real estate and managing it as it does, the secondary investor model would suggest that Yale would be unwilling to undertake these investments, instead preferring alternative policies that have more-foreseeable and readily calculated benefits for the University's affiliates. Instead, Yale has chosen to allocate significant resources toward a program that clearly benefits its most powerful affiliate groups but has less-certain gains for the least powerful. On the political institution model, this outcome is no puzzle at all.

³²² Real estate investments thus may be similar to universities' accumulation of large endowments. Henry Hansmann has questioned whether such large endowments are a rational policy and suggested (among other explanations for this practice) that they may do more to advance the best interests of administrators and faculty than current and future students. Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J LEGAL STUD. 3, 35-37 (1990).

4.5 Agency Slack

Finally, assessing Yale's program requires us to think about agency costs. The nature of Yale's activities suggests that these are likely to be high. The problem, in short, is that the administrators running Yale's real estate program inevitably have a lot of discretion. They must make countless decisions about what tenants to select, how much rent to charge, what contractual terms to insist on, etc. In this, they are no different from an ordinary real estate developer. But the real estate developer has one enormous advantage over his or her peers at Yale. The developer's objective is quite simple: maximizing revenue. And it is subject to easy empirical assessment, as the developer can measure the results of his decisions, say of selecting a particular tenant, on total rent to inform future actions. If the developer should prove to be unable to do so well, he will not be a developer for long. But Yale administrators' objectives are much more complicated because their investments in real estate are merely a means to advancing the University's primary activity. This makes it effectively impossible to empirically assess the ultimate effects of specific decisions, to compensate for noise,³²³ and to improve the University's policy based on these insights.

The result of this is that the Yale affiliates whose best interests the managers of Yale's real estate are supposed to be serving cannot monitor these agents based on outcomes, but only based on their decisions. This is a major disability for effective monitoring. A shareholder at a public corporation, say, need not assess every decision the managers of that corporation make; he can rely on outcomes, the firm's profits as compared with its rivals, to at least indirectly judge whether his managers are serving his interests and to discipline them if not. Yale affiliates,

³²³ If New Haven's quality improves and the University's appeal is enhanced as a result, is this due to Yale's program or exogenous factors? Note that the last decade has seen significant gains in the quality of life in cities generally and a corresponding increase in demand for urban living. Thus Yale's program has been operating in a period of considerable noise, making it unwise to attribute all improvements in New Haven to Yale's activities.

however, can only police the managers of Yale's real estate to ensure similar faithfulness to their wishes by monitoring actual decisions, because there is no objective means to measure success.

This gives rise to four serious agency problems. First, it likely makes the managers of Yale's program too risk averse. Yale affiliates are busy people. They cannot closely follow everything University Properties does. Many of University Properties' decisions they are incapable of observing at all, such as decisions not to rent to a particular tenant. And among the affirmative decisions UP makes, Yale's affiliates are much more likely to notice and respond to decisions that seem to produce undesirable results than to decisions that produce positive ones. Thus UP will likely favor renting to tenants that will be uncontroversial than to take a chance on renting to a tenant that will either be quite popular or much disliked. Yale's decision not to rent to American Apparel may be an example of this.³²⁴ And 986 Chapel's vacancy may be due to similar factors. Its vacancy is simply part of the status quo and thus does not create much controversy among Yale affiliates. But if UP were to take a chance on a tenant, and that tenant should prove unpopular, many Yale affiliates may notice and complain about the decision, even if the tenant created greater positive effects than a vacant building.³²⁵

Second, it will be easier for some in the Yale community to monitor the decisions of UP than others. The same groups that are likely to win in political battles over University policy are also likely to be the best monitors. As long-time New Haven residents, Yale faculty and administrators are simply in a much better position to observe what decisions UP is making and to criticize UP if it should make decisions harmful to their interests. The managers of a university's real estate program would not be ignorant of this, and thus they may have incentives to err on the side of favoring the interests of the university's most-powerful affiliate groups. The

³²⁴ See *supra* note 171 and accompanying text.

³²⁵ Further, many Yale affiliates are likely unaware that 986 Chapel is a Yale-owned property, but would become aware of this fact if it were rented to a novel, undesirable tenant.

agency problems of university management of commercial real estate thus are likely to exacerbate the inequalities of benefits produced through political processes.

Third, because Yale affiliates cannot objectively assess the results of Yale's commercial real estate investments, the managers of Yale's program have incentives to maximize something other than the affiliates' best interests. Specifically, Yale's managers will act to maximize affiliates' *perception* that Yale's program serves their interests, since it is this perception that ultimately shapes the continued existence of Yale's program. Perception is not reality, however, particularly in cases such as this one, where Yale's affiliates are relatively ignorant about commercial real estate and Yale's actions. As a result, program administrators may be pursuing a very different objective than serving the best interests of Yale's affiliates, instead trying to make Yale affiliates believe that University Properties is doing a lot to improve New Haven.³²⁶ In short, Yale's real estate managers are likely maximizing "excitement" about Yale's efforts. Yale's recently announced plans to spend nearly \$5 million renovating one of its properties on Broadway to make room for an Apple store may be an example of this.³²⁷

Finally, the managers of Yale's program are likely to make more substantively bad decisions, defined as decisions that advance no one's interest more than the alternatives. Yale's management of Audubon is a good example of this.³²⁸ Since expanding its holdings in 2002, UP consistently tried to fill the district with arts-themed retailers. These businesses failed at an alarming rate for eight years before the University adopted a different approach. It is now

³²⁶ Cf. David Romer, *Do Firms Maximize? Evidence from Professional Football*, 114 J. POL. ECON. 340 (2006) (noting that football coaches' decisions on fourth down significantly diverge from decisions that would maximize the chances of winning, suggesting either that coaches are imperfect maximizers or that they are attempting to maximize something other than winning, such as fans' impression of their team's chance of winning throughout the course of the game).

³²⁷ MacMillan, *supra* note 108. Perhaps this investment will produce such large increases in business for neighboring tenants or generate sufficient non-business externalities captured by University affiliates as to be justified. But \$5 million is a lot of money to spend, particularly to fill a property that already had a tenant.

³²⁸ See *supra* notes 157-163 and accompanying text.

focusing on service providers such as hair salons because of the area's low foot traffic.³²⁹ Yale can persist in these poor policies much longer than a private developer could because it does not face any competition. And Yale's affiliates are unable to discipline UP for ineffective policies because they are only aware of the affirmative decisions it makes, not the negative ones. Thus they have no means of comparing UP's performance with how effective it could have been and pushing for more-beneficial policies.

It could be argued that the above points regarding commercial real estate apply to Yale's decisions more broadly. Hiring faculty and setting curriculum are not obviously more amenable to objective assessment of results and low-cost monitoring than are decisions on commercial real estate. This objection, however, ignores that Yale administrators have acquired tremendous experience in these areas that are central to the University's mission. The path of University decisionmakers' careers, both in different positions and between different universities, provides a market-like mechanism, where objectively correct results can be measured over time and systematically rewarded, and negative results punished. But commercial real estate is far outside the areas of expertise Yale administrators are ordinarily selected for. Given the novelty of university activity in this area, it would be somewhat surprising if systematically correct methods of managing university property have emerged.

4.6 Assessing Yale's Program Internally

Ultimately, it is simply impossible to develop a quantitative assessment of Yale's program because of the complexity of the mechanisms involved. There is no way to look to objective measures of Yale's successes and attribute gains or losses to concrete decisions about commercial real estate. Thus we can only render a qualitative judgment about the merits of Yale's program, and given the nature of this task, reasonable people are bound to disagree.

³²⁹ Give the area's significant continued vacancies, the early returns on this new strategy are not promising.

I think I have shown that Yale's efforts have a strong theoretical foundation. Given that the University has made enormous investments in New Haven for its primary mission of education, even large money-losing secondary investments in city real estate may be efficient if they can produce positive externalities, such as safety or an appealing and attractive downtown, that are felt by the University's affiliates. Further, it makes good sense that the University's decisions will look a lot like the decisions that would be made by a private retail developer, because the techniques these developers use to create favorable shopping externalities are very likely to also generate the sort of externalities that University wishes to create.

The problem from Yale and its affiliates' perspective, however, is not one of theory but one of practice. First, universities are highly political institutions with multiple constituencies. These different groups are likely to have unequal political power. And this means that university policies are likely to benefit those groups that can more easily advance their interests through the university's political system. Second, management of commercial real estate by university administrators is likely to create very severe agency problems. Both of these dynamics mean that universities' investments in commercial real estate could easily be inefficient, because other uses of the same funds would do more to advance the best interests of the university's affiliates in aggregate. While political and agency problems beset the university generally, they are more likely to be pronounced in areas such as commercial real estate that are far outside the university's traditional competence. And because programs of this sort are novel, institutional mechanisms have not been developed within the university to control these bad effects.³³⁰

³³⁰ These problems provide a useful corrective against the temptation to see the first model of university behavior as irrational. Since commercial real estate clearly affects a university's affiliates in at least some ways, it may seem like a mistake for a university to simply manage its property in order to achieve the highest possible returns rather than to consider the secondary effects of its investments. But given that political and agency dynamics may prevent universities from maximizing the aggregate welfare of their affiliates, it may in fact be more rational not even to try.

What does this mean for Yale's programs and those of other universities? I propose that, at least from the internal perspective of the university, these programs should be thought of as having an efficient size. The benefits of commercial real estate investment to a university's affiliates are likely to decrease as these programs expand. On most campuses, there is likely some low-hanging fruit: particular properties near the university that are poorly used where targeted investments could produce large gains for university affiliates. Once this low-hanging fruit is picked, however, and universities make investments further and further from the campus, the total gains from additional investment are likely to be lower. At the same time, the costs of these programs—suboptimal outcomes due to political or agency problems—likely become more pronounced as the scope of investments increases. This is because the gains captured by university affiliates from far-out investments are likely to be highly concentrated, leading to political dysfunction, while larger programs inevitably require more delegation of decisionmaking, creating higher agency costs. The efficient size for a university's program is that at which the marginal benefits of expansion equal the marginal costs of expansion.

I see Yale's program, then, as raising many of the same issues as government investment in and management of real estate. While a theoretical case can be made for at least some such investments, the efficiency costs of turning to a non-market mechanism can be high because of public choice and agency issues. As these investments expand, the costs of these dysfunctions become higher and the theoretical justification for further investments lower. At some point, further investment ceases to be efficient and becomes simply a waste of resources.

My own take on Yale's program is that it has likely exceeded this point. The University's recent investments in Audubon seem to have been a mistake. Both the placement of these investments and their subsequent management do not seem to have produced gains to the

University's affiliates, at least in aggregate, that justify the costs of these investments. Also troubling is that the University continues to be so active in Broadway and Chapel. Ten or fifteen years ago, when these investments were first made, these areas, particularly Broadway, looked like ones with some of the low-hanging fruit postulated above. But New Haven has changed in the meantime and become a much more-attractive downtown. A strong case could be made, then, that Yale should consider selling these properties or at least playing a less-active role in management. But large investments and extensive tenant recruitment, most recently with the Apple store on Broadway, has continued. Worst of all, there are some signs that the University may be seeking to expand its retail holdings into areas ever-further from the University.³³¹ These points suggest that Yale's program is increasingly being captured by more-powerful affiliate groups and beset by higher and higher agency costs.³³² Given these signs of greater political and agency dysfunction, I think that Yale's program has exceeded the point where this is the best use of Yale's resources. Thus while some of Yale's initial investments likely created sufficient positive externalities for the Yale community as a whole so as to be justified, more-recent investments do not appear to have created similar gains and further investments are undesirable.

5 EVALUATING YALE'S PROGRAM FROM AN EXTERNAL PERSPECTIVE

In this Part, I consider whether Yale's program is good for New Haven as a whole. Obviously, internal assessments of Yale's program, discussed in Part 4, are relevant to this. Yale is very important to New Haven's economy, so it may be that even if the program has negative effects on those not affiliated with Yale, it may be a net positive for New Haven if it is sufficiently beneficial to Yale affiliates. Alternatively, the benefits to Yale affiliates may be insufficient to make up for its harms to non-affiliates. Finally, it may be that the program benefits

³³¹ See *supra* note 125 and accompanying text.

³³² Self-aggrandizement, the tendency of agents to wish to expand their empires, is a well-known agency cost that I have not much discussed but clearly may be applicable.

both affiliates and non-affiliates and is therefore universally positive.³³³ But Yale, as an international university, may have effects that far exceed the boundaries of the greater New Haven area. An external assessment thus could attempt to determine whether Yale's program is beneficial more broadly. I will not attempt to do this for two reasons. First, I have no idea how to assess these global effects. Second, I am inclined to doubt they exist. I view elite universities as substitutes for each other. If the deterioration of New Haven should cause Yale to lose its place as an elite international university, I doubt this would diminish the state of the world in any appreciable sense, since the students and faculty lost by Yale would merely go to some other university, which would then simply replace Yale and produce the same output.

As should be implicit from above, I will adopt a utilitarian perspective on the question of whether Yale's program is good for New Haven. The socially desirable decision is, roughly speaking, that which would be made if all costs and benefits of the decision for everyone were taken into account and correctly weighed. Thus my definition of a good policy is one that increases aggregate welfare, while a bad policy decreases aggregate welfare.

From this utilitarian, New Haven-centric perspective, two distinct criticisms can be made of Yale's program. I will dub these the "conservative" and the "radical" critique. The conservative critique argues that Yale is simply a bad institutional form for radically transforming cities. Yale affiliates differ from New Haven residents in a systematic way. This means that some demographic groups within New Haven are either directly represented in Yale, by being Yale affiliates, or they are "virtually represented,"³³⁴ because those with similar interests are part of Yale. Other New Haven demographic groups, however, primarily lower-

³³³ Since taken as a whole, I believe that Yale's program benefits its affiliates, even if it does not benefit them as much as alternative uses of those resources would, I will not consider the possibility that Yale's program harms everyone.

³³⁴ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787* at 173-81 (2d ed. 1998).

income and minority individuals, are neither part of Yale in large numbers nor do they have interests in common with large numbers of Yale affiliates. This results in a simple problem of unequal transaction costs. Some demographic groups within New Haven can easily influence Yale's policies and thus internalize these policies' effects on them, while other groups, those disproportionately excluded from Yale, have great difficulty internalizing the costs Yale's policies may impose on them. As a result, Yale's policies are likely to create negative externalities for some groups of New Haven residents. These externalities can stem either from general policies and priorities or from specific management decisions. Regardless, the existence of these inequalities in transaction costs makes Yale poorly suited to transforming New Haven because it will not consider the total costs imposed by its decisions but only the costs and benefits that fall on some New Haven residents. Serious harms of this sort have so far been avoided, but only because Yale's program remains relatively small. If Yale or other universities should continue to expand their ambitions from simply improving the immediate vicinity of their campuses to drastically remaking their cities, they run the risk of repeating the mistakes of universities' urban renewal programs of the 1950s and 1960s, the errors of which were due in large part to these disparities in transaction costs.

The radical critique argues that universities should in fact work to transform their cities, but their strategies so far have been unduly influenced by the lessons of shopping centers. While the careful management of shopping centers does succeed in generating externalities conducive to shopping, it fails to create other important externalities only found in vibrant and diverse urban areas. On this view, university urban investment is a promising trend because universities are one of the few institutions remaining in many cities capable of generating these externalities.

But doing so will require universities to disregard many of the techniques of the shopping mall developer and instead invent new ones, something they have not yet tried to do.

5.1 Inequalities in Transaction Costs

It should be obvious that the Yale community is not representative of New Haven. No representation, of course, can be perfect, or else it would not be representation at all.³³⁵ But in countless ways, New Haven residents differ meaningfully from Yale affiliates, primarily in terms of wealth, social class, and race. This plays out in two ways. First, some groups of New Haven residents are much more likely to be Yale affiliates. Second, among those New Haveners who are not Yale affiliates, some New Haveners are very similar to Yale affiliates and thus share many interests with them, while other New Haveners have less in common with Yale affiliates and thus lack proxies who will, by pursuing their own interests within Yale, accidentally advance non-affiliates' interests.

Differences in how well certain groups are represented at Yale lead to inequalities in transaction costs. Some New Haven residents are Yale affiliates. If Yale adopts policies that impose costs on these residents, they can cheaply make these costs known to the University and influence its decisionmaking. New Haven residents who are not Yale affiliates but share interests with them can free ride on Yale affiliates' efforts and similarly have their interests virtually represented. But New Haveners who are not Yale affiliates and do not have interests in common with affiliates have no such luck. If a Yale policy imposes costs on them, it is much more difficult for these individuals to organize, communicate their concerns, and change University decisions because they have no formal position within the University's structure.

³³⁵ To use Borges's example, only a map as big as the world can perfectly represent the world. JORGE LOUIS BORGES, *On Exactitude in Science*, in *THE ALEPH AND OTHER STORIES* 181 (Andrew Hurley trans., 2000)

From a utilitarian perspective, this presents an obvious problem. What we have here are unequal transaction costs. Some groups within New Haven can negotiate with Yale and shape its decisions more easily than others. Unequal transaction costs are a problem because they lead to externalities.³³⁶ If some groups have low transaction costs while others high ones, the costs and benefits for the groups with low costs will be considered more fully than the costs and benefits for those with high transaction costs. The policies adopted through aggregation of preferences, then, will be inefficient, because not all costs and benefits are included within the calculation.³³⁷ And inefficient policies are undesirable.

5.1.1 The Costs of Yale's Program for Non-Affiliates

With this theoretical foundation, I can now discuss the potential problems of Yale's investment in commercial real estate from the perspective of New Haven as a whole. The above institutional dynamic—that the transaction costs of negotiating with Yale are unequally distributed—is hardly unique to real estate. It applies to everything the University does. But investments in real estate make this issue more salient because it is quite clear how land-use can create externalities, whereas Yale's educational curriculum, say, is unlikely to impose costs on a similar scale. While there are many costs Yale's management of its commercial real estate could impose on non affiliates, two are particularly noteworthy and can be demonstrated with concrete examples.

³³⁶ Indeed, the basic point of Coase is that the concept of an externality is derivative of the idea of transaction costs. If the world had no transaction costs, it would have no externalities either, since the effects of every action would be internalized through bargaining. See Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1970).

³³⁷ It is the inequality of unequal transaction costs that creates the problem, not the existence of transaction costs as such. If transaction costs were distributed proportionally, then over the long run they would balance out. Collective decisionmaking would not be *procedurally* made based on calculating total costs and benefits, but the *substantive* result would mirror that which would obtain if there were no transaction costs. When transaction costs are disproportionately allocated, however, collective decisionmaking will be both *procedurally* and *substantively* inefficient.

The first of these is harm to consumers. Businesses that do not fit Yale's vision for a particular area of New Haven are put at a disadvantage versus those that do. In areas where Yale controls much of the desirable property, such as Broadway or Chapel, this means that such businesses must compete over the handful of non-Yale properties, be relegated to the less-appealing properties within the area (these two are often the same), or be excluded from the area entirely. This not only harms the businesses in question, but it may harm consumers. They may be unable to purchase some goods at all, such as tobacco products, which are not sold anywhere on Broadway. Or they may face monopoly prices, since Yale retailers are protected against new entrants. Yale must be aware of these effects, and no may have determined that the benefits to Yale affiliates of its tenant selection policies exceed the costs created by restrictions on market entry. But because Yale considers only the costs and benefits for its affiliates, non-affiliates, particularly those not in a position to capture the externalities generated from Yale's tenant selection policies, may be hurt by the monopolistic effects of its tenant selection.³³⁸

These concerns are not entirely new. In the late 1960s and 1970s, there was a brief period of legal tumult, both in courts and among academics, regarding the antitrust and anticompetitive implications of shopping malls' tenant selection policies.³³⁹ While various policies of shopping centers were criticized, the main area of focus was mall developers' practice of granting anchor tenants such as department stores contractual veto rights over the developer's selection of other tenants.³⁴⁰ The Federal Trade Commission (FTC) and private plaintiffs attempted to have these

³³⁸ Consider, for example, the construction workers employed at Yale's renovation of Morse and Ezra Stiles Colleges. They benefit little if at all from Yale's tenant selection policies, but clearly are hurt by restrictions on competition for the goods they purchase in the area, such as lunch.

³³⁹ For a retrospective overview of the events of this period, see Milton Handler & Daniel E. Lazaroff, *Restraint of Trade and the Restatement (Second) of Contracts*, 57 N.Y.U. L. REV. 669, 678-702 (1982).

³⁴⁰ There is little to be gained by discussing this literature in depth, since it is overwhelmingly concerned with practices that are not part of Yale's program, such as tenants' ability to control the allocation of space to other tenants and radius clauses that prevent a tenant from opening another store within some vicinity of the shopping center. See *id.* at 695 n.146 for a catalog of the literature.

and other provisions of shopping center leases declared per se violations of federal antitrust law, but federal courts refused to bite, uniformly applying a rule of reason approach and upholding as reasonable nearly all incidental restraints of trade from these tenant selection practices.³⁴¹ The main justification for this was that even if these practices restricted competition within a shopping mall, malls themselves would compete with each other.³⁴²

Clearly, Yale's practices in tenant selection do not violate antitrust laws, since, unlike the practices targeted by the FTC in the 1970s, they involve no contracts or conspiracies to restrain trade but are merely the result of Yale's internal decisionmaking process. This does not mean, however, that Yale's tenant selection policies do not restrict competition and thereby hurt some consumers. This is particularly so because unlike shopping malls, which are generally found in suburban areas where land can be cheaply acquired and new malls opened, Yale's holdings are all found within the downtown core of New Haven. The supply of land available for retail space downtown is simply fixed and cannot be expanded. Those who wish to compete with Yale regarding how downtown New Haven should look have a limited ability to do so.

A second kind of harm is a more-straightforward externality. Here, I again will use the long-term vacancy of 986 Chapel as an example. It may be that Yale tolerates very costly long-term vacancies such as this one because its affiliates do not bear the full costs of the externalities these vacancies create. Given the nature of its existing tenants and the demographic characteristics of its affiliates, Yale may be better off not filling these properties than filling them with a "bad" tenant.³⁴³ Furthermore, Yale tends to manage the location of tenants in such a way

³⁴¹ See *id.* at 695-703

³⁴² See *Walgreen Co. v. Sara Creek Prop. Mgmt. Co.*, 966 F.2d 273, 274 (7th Cir. 1992) (opinion of Posner, J.).

³⁴³ See *supra* Subsection 4.3. I believe that the more-persuasive explanation for this property's vacancy is agency costs, but such an account assumes that the property's vacancy primarily imposes costs of the opportunity variety, since if it imposed more-measurable costs, affiliates would likely do something about it.

that its vacant properties are disproportionately located at the fringes of its real estate holdings.³⁴⁴ Together, these features of Yale's behavior likely impose significant costs on non-affiliates. Since Yale's vacant properties often border many non-Yale properties, any negative externalities created by a long-term vacancy are borne by non-Yale tenants.³⁴⁵ Moreover, a tenant Yale sees as "bad"—that is, not creating positive shopping externalities for its tenants or public goods for its affiliates because it appeals to demographic groups not found among its affiliates—may well be a "good" tenant for neighboring non-Yale tenants, since it may generate externalities that can be enjoyed by these neighbors and their customers. It seems quite safe to say that decade-long vacancies in properties facing the New Haven Green are socially undesirable and would not occur in a world without transaction costs. Yale, then, only tolerates this vacancy because most of the externalities it generates are felt by non-affiliates, and these costs do not enter Yale's calculus; but for these unequal transaction costs, we might expect a different result.

We should not exaggerate the magnitude of these problems. So far, any harm to consumers from Yale's policies is likely small. It is clear that at least in some cases, notably Gourmet Heaven on Broadway, Yale's practices have led to artificially inflated prices,³⁴⁶ while in others, such as American Apparel,³⁴⁷ Yale has possibly refused to rent to certain tenants in order to protect the position of its anchor tenants. But Yale hardly owns all of downtown New Haven. Much retail space remains, including areas that appeal primarily to lower-income shoppers.³⁴⁸ And while Yale's tolerance of long-term vacancies may harm neighboring tenants and their customers, the damage is confined to only a few properties. But if Yale's program were

³⁴⁴ See *supra* Subsection 3.3.7.

³⁴⁵ See *supra* note 308.

³⁴⁶ See *supra* notes 207-208 and accompanying text.

³⁴⁷ See *supra* note 171 and accompanying text.

³⁴⁸ This largest of these is on Chapel Street between Church and State Streets.

to continue to expand, we might well expect the magnitude of the harms to non-affiliates to expand as well.

5.1.2 The Parallel of Exclusionary Zoning

This way of looking at Yale's program of commercial real estate, and that of universities generally, reveals how novel this activity is. It may be tempting at first to think of Yale's efforts as simple gentrification.³⁴⁹ This analogy seriously misunderstands Yale's motivation, however. Gentrification is normally seen as a market phenomenon. For exogenous reasons, such as improvements in the safety of a neighborhood or restraints on supply in other neighborhoods, demand for commercial or residential real estate within a particular area increases. Increases in demand without increases in supply inevitably result in higher prices, which often prices a neighborhood's existing residents out of the market.

This is not what is happening in Yale's case. While Yale is clearly trying to increase the appeal of neighborhoods around campus to wealthier demographics, it is doing so in order to achieve a further goal: increasing the safety, quality, etc., of these neighborhoods in order to benefit Yale affiliates. Yale's program is actually a sort of reverse gentrification. Rather than creating exogenous factors that increase land values, Yale is using the market itself to generate the exogenous factors that usually drive gentrification. This, of course, may result in further gentrification, leading to feedback effects that increases land values even further. But seeing Yale as deliberately trying to increase land value through a process akin to gentrification is to fundamentally misunderstand what its goals are. It is using investments in real estate to create the sort of increases in quality that ordinarily drive gentrification, in order to benefit its affiliates and thereby enhance the success of its existing, illiquid investments in its primary activity. When university investments in real estate are viewed in this way, I think it is clear that cities have

³⁴⁹ This comparison is made by more than a few newspaper articles on the topic. *See, e.g.*, Bray, *supra* note 153.

never seen any institution that behaved like this before. This is a novel practice not only for universities, but within cities as well.

A better parallel may be exclusionary zoning. The more-common approach to exclusionary zoning sees it as a substantive wrong: residential segregation by income creates residential segregation by race or other characteristics, which is itself undesirable.³⁵⁰ But other scholars view exclusionary zoning through an institutional lens.³⁵¹ From this perspective, the chief problem with the exclusionary suburb is not that the exclusion itself is harmful. Rather, excluding certain income groups makes the suburb demographically dissimilar to the region as a whole, and that means that the suburb will set policy with an eye only to how its policies will affect certain groups. In short, exclusionary suburbs are an institutional form that creates unequal transaction costs, and that will lead to inefficient policies, since significant externalities are likely to follow from inequalities in transaction costs.³⁵²

My account of the potential problems with Yale's investments in New Haven closely mirrors this analysis of exclusionary zoning. Yale is in some ways like an exclusionary suburb, less because its land-use decisions exclude certain classes of individuals than because its institutional structure means that it will systematically disregard the costs of its policies on non-affiliates, just as the exclusionary suburb's political structure ensures it will disregard the costs of its policies on non-residents. Moreover, in both the exclusionary suburb and the university

³⁵⁰ See, e.g., John M. Payne, *Lawyers, Judges, and the Public Interest*, 96 MICH. L. REV. 1685, 1708-09 (1998) (reviewing CHARLES HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996)).

³⁵¹ See, e.g., J. Peter Byrne, *Are Suburbs Unconstitutional?*, 85 GEO. L.J. 2265, 2278-79 (1997) (reviewing CHARLES HAAR, *SUBURBS UNDER SIEGE: RACE, SPACE, AND AUDACIOUS JUDGES* (1996) and DAVID L. KIRP, JOHN P. DWYER & LARRY A. ROSENTHAL, *OUR TOWN: RACE, HOUSING, AND THE SOUL OF SUBURBIA* (1995)).

³⁵² See *id.* at 2283-84.

context, the excluded group is disproportionately likely to be poorer and less political powerful in other venues.³⁵³

One benefit from thinking about university actions in these terms is remedies. A frequent pattern with exclusionary zoning is that exclusionary communities “win” at the local level with land-use decisions, but “lose” at a higher level, as state legislatures adopt measures to hinder local governments’ ability to create policies that are too exclusionary.³⁵⁴ This should not be surprising. Since higher levels of government are more representative of society as a whole than highly homogeneous local communities, they may doubt the decisionmaking process of these communities, prompting them to adopt measures that deter actions that may be influenced by the costs and benefits of only a narrow group. In essence, as exclusionary zoning has become more prevalent, state legislatures and courts have created new counter institutions to internalize the externalities exclusionary communities may create through policies arrived at from unequal transaction costs.

Here is where the university differs. As discussed above, university investment in urban real estate is a new phenomenon, and the purposes for which universities make these investments are unlike the purposes of any other real estate developer. This is simply a new type of actor on the urban scene, with motivations completely different from all other participants. Because of the novelty of this form, no other institutions have yet emerged to counter the potentially destructive effects of the university’s unequal transaction costs. It may be that as universities become more ambitious with their real estate programs, and possibly create greater externalities for non-affiliates, other institutions will arise to counter this imbalance. But this has not yet occurred.

³⁵³ From a distributive justice framework, the fact that these costs fall so heavily on poorer individuals is a further problem.

³⁵⁴ For an overview of state and regional controls of exclusionary zoning, see ELLICKSON & BEEN, *supra* note 72, at 783-85; and STUART MECK, REBECCA RETZLAFF & JAMES SCHWAB, REGIONAL APPROACHES TO AFFORDABLE HOUSING (2003).

5.1.3 The Parallel of Urban Renewal

Viewing the problems of Yale's present program through this institutional lens sheds a great deal of light on universities' involvement in urban renewal during the 1950s and 1960s. While university administrators and planners tend to see the failures of that period as due to poor methods and poor internal procedures,³⁵⁵ from the institutional perspective, these failures look inevitable. Universities are simply not institutions that are well equipped to remaking cities, particularly cities inhabited by large numbers of residents who have different interests from the university and its affiliates. The University of Chicago's urban renewal efforts in Hyde Park, for example, failed in large part because the University's structure necessarily creates unequal transaction costs, and that will lead to significant externalities imposed on non-affiliates. The backlash against university development following urban renewal was nothing more than the emergence of counter institutions to internalize on universities the costs their policies imposed on non-affiliates. While universities may have taken steps to ensure greater community involvement in their land-use planning decisions since the days of urban renewal, such measures only reduce the disparity in transaction costs. These inequalities can never be entirely eliminated since they are inherent in the structure of a university, and that makes universities fundamentally unsound actors for remaking cities.

Yale and other universities have so far avoided repeating the mistakes of the past largely because their ambitions have not yet reached the scale of their predecessors' during urban renewal. This may not last, however. While Yale has not yet adopted aggressive policies that impose large costs on outsiders, its efforts to remake New Haven are ongoing and if anything expanding. If this trend continues, we might well expect a repeat of the mid century, as the

³⁵⁵ See *supra* notes 33-35 and accompanying text.

university's basic form makes it inevitable that it will adopt inefficient policies leading to backlash.

5.4 Nostalgia

There is another, very different critique that could be made of these modern university development practices, including those of Yale. Taken to their logical conclusion, the application of modern shopping center development practices to cities would result in a pattern of land use with many small, highly specialized, but internally homogeneous neighborhoods. Each neighborhood would target a particular demographic to the exclusion of establishments that appeal to others. Such an approach would best capture the shopping externalities generated by retail and ensure higher revenues, perhaps allowing urban retail to compete favorably with the suburbs. There would still be a great deal of diversity between neighborhoods, but very little within them. This stands in contrast with a more-traditional model of urban places, in which urban land uses are diverse at both a neighborhood and at a micro level. Neighborhoods have recognizable differences, but within each part of town there is a little something for everyone as opposed to a fine-grained homogeneity targeting a particular demographic.³⁵⁶

The prospect of cities that look like a series of extensively planned shopping centers, each appealing to a slightly different crowd, no doubt fills many fans of urban places with a certain gloom. For them, one of the chief virtues of cities is their vibrancy and variety on the block level. Such a pattern is in large part the result of fractured ownership and the high costs of land assembly, which ensure that externalities within cities often remain externalities. But the failure of urban landowners to capture and price all the positive and negative business externalities created by their properties may well create its own unique set of externalities: a

³⁵⁶ Clearly, diversity among neighborhoods is only possible to the extent that there is some absence of diversity within individual neighborhoods.

certain urban way of life. Suburban developers intent on capturing every possible shopping externality inevitably must forego these, for this latter set of externalities is enjoyed as broadly as possible, and thus the transaction costs of bargaining to achieve them are prohibitively high.

This critique points in one of two directions. On the one hand, those who fear this micro-homogenization of cities may be tempted to view the university as a savior. Universities may be the only major urban actors with the resources, expertise, and incentives to simply ignore these business realities and create the urban vitality externalities that make cities enjoyable. On this view, Yale acts far too much like a profit-driven developer. The externalities targeted by shopping center developers are not the only type that can be created from a successful shopping district. Yale has been unduly influenced by the lessons of these shopping centers and instead should focus on how its decisions do or can affect and improve the City of New Haven and the University community as a whole in a much broader way. While this may sound at first appealing, it is unlikely to play out as hoped. For this view asks universities to play a much more-active and novel, even altruistic, role, subsidizing all sorts of land uses that are seen as attractive. This strategy, combined with their institutional structure, would most likely result in universities pursuing the interests of a narrow few—their affiliates—even more aggressively, imposing significant costs on non-affiliates. After all, it may be that this sophisticated argument for cities is nothing more than the aesthetic tastes of a certain class of educated urbanites.

The other way this critique may go is toward a kind of sad nostalgia. For on this view, the vibrancy externalities generated by many urban places in their heyday were merely a historical anomaly caused by certain features of the urban economy. So long as no institution existed that could capture shopping externalities and the like, cities maintained their exciting variety. But the emergence of suburban retail forever changed this. For in the shopping mall, an institution was

created that could capture the huge shopping externalities generated by central-city department stores, externalities that had done much to sustain the health of central business districts.³⁵⁷ Once the shopping mall was established, the days of the central business district were limited, since suburban mall developers could finally subsidize these spillover generators for the external benefits they created. Offered lower rent, they departed for the suburbs. Once there, the smaller retailers who had long enjoyed success as free riders could either struggle on without them or follow them to the suburban fringe. A world where no institutional form exists to capture these externalities is unlikely to return anytime soon. Thus cities today face two bad choices: either continue to exist in the shadow of suburban retail or copy the development strategies of the suburb and tolerate the unpleasant homogeneity and loss of diversity that it inevitably brings.

The university, on this view, is one of the few institutions capable of possibly breaking central cities out of this trade off. Universities are enormous generators of public goods, through for example university police forces, and create many positive externalities of their own as major employers and cultural centers. The university's appropriate role in the modern city, then, is not to copy suburban developers but simply to generate these public goods and externalities, letting the rest of the city be. Instead of attempting to micromanage urban development, universities should be content to focus on their core competencies, education and research, perhaps with a few public goods such as safety thrown in, and leave to private forces decisions about how to use and manage the city's commercial real estate. This role too sees universities as somewhat altruistic, providing public benefits on which non-affiliates can free ride, but this approach may well be more sustainable, as it may benefit university affiliates just as much as active management. For while it requires universities to forego whatever externalities may be generated by homogenous shopping districts, turning their resources toward their primary activities may

³⁵⁷ Pashigan & Gould, *supra* note 262, at 140-41.

not only be more efficient from the university's perspective, it may well produce greater benefits for the city, as it provides a sort of externality the suburbs can never hope to match.

CONCLUSION

Yale's program of commercial real estate investment, like those at other urban universities, is a new type of actor in urban areas. It relies on the same techniques successful shopping center developers use to make business decisions. But unlike ordinary shopping center developers, who use these considerations to maximize the value of the center by increasing sales, Yale uses these insights primarily to generate certain positive externalities, such as safety, that are enjoyed by its affiliates both as students and employees of Yale and as residents of New Haven. While the theory behind this effort is sound and the University has clearly succeeded in generating many of these positive effects, the complicated structure of the University makes this a difficult goal to achieve without substantial inefficiencies. Yale's policies have been distorted to suit the interests of its more-powerful affiliate groups, and the agency costs of its program are very high. While the program as a whole has undoubtedly benefited Yale's affiliates, recent expansions of its investments have been disappointing and future growth in the program is likely to be increasingly detrimental to affiliates' aggregate interests in comparison with alternative uses of the same resources.

The assessment is similar if Yale's efforts are viewed from the perspective of New Haven as a whole. The missteps of the bad-old-days of urban renewal were not merely the result of poor theories of urban places but also were caused by the institutional limitations of the university. The more aggressive universities become in trying to remake central cities, the greater the risk that their decisions will significantly depart from what is socially optimal by imposing large costs on non-affiliates of the university. Yale does not appear to have reached the point where its

decisions impose such costs on non-affiliates, but given the small size of New Haven and the current magnitude of Yale's efforts, it is perhaps closer to this line than any other university.

Finally, there is some room for questioning whether universities' use of the techniques of shopping center developers is good for cities. It may well be that the features of cities many people prize were largely the result of institutional forms that mispriced public goods such as shopping spillovers. But this failure to capture one set of externalities may have allowed them to create other positive externalities, such as vibrancy and diversity. While this view is not without a certain appeal, these accidental benefits may be gone for good, a casualty of suburbanization and changes in institutions. It may be too easy to reject this view as nostalgia, however, as if taken seriously, it may have something very different to say about how urban universities should behave. For on this view, the great virtue of universities is that they remain perhaps the greatest public-good generator remaining in urban places, something for which the suburbs have no counterpart. Sound investments in the university's primary activities, and those few secondary activities it can manage without sacrificing large efficiency gains, may do much more to benefit both cities and universities' affiliates over the long-term than these recent experiments with areas outside of universities' core competencies, such as real estate.

APPENDIX: A LIST OF YALE'S DOWNTOWN COMMERCIAL PROPERTIES

Broadway District

264 York Street

Acquired 1973,³⁵⁸ will soon be occupied by Jack Wills³⁵⁹

³⁵⁸ All dates of acquisition come from the New Haven Tax Assessor's Online Database. ASSESSORS ONLINE DATABASE FOR NEW HAVEN, CT, <http://data.visionappraisal.com/NewHavenCT/DEFAULT.asp> (last visited Mar. 11, 2011).

³⁵⁹ Sharon Yin, *Jack Wills To Bring Brit Prep*, YALE DAILY NEWS (Mar. 1, 2011), <http://www.yaledailynews.com/news/2011/mar/01/jack-wills-to-bring-brit-prep/>.

266 York Street

Acquired 1973, currently occupied by Gant

282 York Street

Acquired 1992, currently occupied by Blue State and Ashley's Ice Cream, with a vacant space

296 Elm Street

Date of acquisition unknown, currently occupied by Trailblazer

310 Elm Street

Attached to one of the Yale colleges, currently vacant

316 Elm Street

Acquired 1930, currently occupied by Ivy Noodle and Bulldog Burrito

1 Broadway

Acquired 1994,³⁶⁰ currently occupied by Au Bon Pain, Origins, and Denali

15 Broadway

Date of acquisition unknown, currently occupied by Gourmet Heaven

23 Broadway

Acquired 1992,³⁶¹ currently occupied by Cutler's and Encore

29 Broadway

Acquired 2000,³⁶² currently occupied by J.Crew, Thom Browne, Laila Rowe, and Urban Outfitters

65 Broadway

Date of acquisition unknown, currently occupied by Thali Too and future home of Apple store³⁶³

77 Broadway

Date of acquisition unknown, currently occupied by Barnes & Noble

Notable non-Yale Properties

21 Broadway, owned by Mortgage Investors I LLC, current tenant A-One Pizza

51 and 57 Broadway, owned by Yale Mall Partnership, currently occupied by American Apparel, Blue Jay's Cleaners, Educated Burgher, and Campus Customs

260 York street, owned by J. Press, current tenant J. Press

³⁶⁰ This date may be the result of renovation, which changed the layout of the property.

³⁶¹ This date may be the result of renovation, which changed the layout of the property.

³⁶² This date certainly the result of renovation. Actual date of acquisition unknown.

³⁶³ Thomas MacMillan, *Broadway Getting \$4.8M Apple Makeover*, NEW HAVEN INDEPENDENT (Apr. 27, 2011), http://www.newhavenindependent.org/index.php/archives/entry/yale_readies_for_apple_with_4.8_m/.

290 York Street, owned by A&G Realtor Ass'n, current tenants Labyrinth Books and Yorkside

294 York Street, owned by EWP Realty LLC, current tenant Frog's Place

Chapel District

1145 Chapel

Acquired 1999,³⁶⁴ currently occupied by J&B Deli and a vacant space

1126 Chapel

Acquired 1999, currently occupied by Claire Jones and the Book Trader³⁶⁵

184 York

Attached to the School of Architecture,³⁶⁶ currently occupied by Willoughby's Coffee

1074 Chapel

Attached to the Yale British Art Gallery, currently occupied by Scoози, Derek Simpson
Goldsmith, Hello Boutique, Atticus, and Froyo World

1042 Chapel

Acquired 1999, currently occupied by Wave Gallery, Tracy B, and other tenants

1032 Chapel

Acquired 1999, currently occupied by Union League Café and other tenants

1022 Chapel

Acquired 1999, currently occupied by Seychelles, Raggs, and other tenants

1016 Chapel

Acquired 1999, currently occupied by Idiom and Basta

1002 Chapel

Acquired 1999, currently occupied by Celtica and Claire's Corner Copia

986 Chapel

Acquired 1999, currently vacant

976 Chapel

Acquired 1999, currently vacant

³⁶⁴ The Schiavone buildings are listed in the Tax Assessor's database as being purchased in 1999 by the "Chapel Company." In 2004, these properties were all transferred to Yale's name. I assume that the Chapel Company was merely a corporate entity controlled by the University.

³⁶⁵ Elm Campus Partners' offices are on the upper floors of this building.

³⁶⁶ This is the only retail property Yale owns in the Chapel Street area that it did not acquire in the Schiavone sale.

260 College
Acquired 1999, currently vacant³⁶⁷

234 College
Acquired 1999, a parking lot

220 College
Acquired 1999, currently occupied by Pacifico, Samurai, and Oaxaca Kitchen

255 Crown
Acquired 1999, vacant land (possibly used as a parking lot)

265 Crown
Acquired 1999, vacant land (possibly used as a parking lot)

Notable non-Yale Properties

1066 Chapel, owned by Chapel Investment LLC, currently occupied by Starbucks

1048 Chapel, owned by Chapel Investment LLC, currently occupied by Enson's, News Haven, Savitt Jewelers, Allegra Printing, Merwin's Art Shop, and Ten Thousand Villages

265 College, owned by Taft Intermediate LLC, currently occupied by Archetype, Karma, and Downtown at the Taft on College Street and by Richter's on Chapel

268 College, owned by 268 College LLC, currently occupied by Anchor and the Owl Shop

266 College, owned by Ravada Enterprises LLC, currently occupied by Bespoke

238 College, owned by 238 College Street LLC, currently occupied by several tenants, including College Street Cycles and Greg's Tailor Shop

Audubon/Whitney

2 Whitney Avenue
Acquired 1997, office space only, no retail

40 Whitney Avenue
Acquired 1972, used as a parking lot

44 Whitney Avenue
Acquired 1972, currently occupied by Gourmet Heaven and Moe's

58 Whitney Avenue
Acquired 1986, currently occupied by Katahdin Furniture

³⁶⁷ Until very recently, this building housed Celtica, which has since moved to 1002 Chapel.

68 Whitney Avenue

Acquired 1986, currently occupied by Clark's Dairy

72 Whitney Ave

Acquired 1986, currently occupied by Kennedy & Perkins and a vacant space³⁶⁸

55 Whitney Avenue

Acquired 2002, houses several tenants as well as vacant space

95 Audubon Avenue

Acquired 2002, houses several tenants as well as vacant space

Notable non-Yale Properties

48 Whitney Avenue, owned by Toto LLC, currently occupied by Subway

52 Whitney Avenue, owned by TFAC LLC, currently occupied by Dunkin' Donuts

67 Whitney Avenue, owned by Guo's Whitney Realty LLC, currently occupied by Hong Kong Grocery

102 Audubon, owned by FDRL2 LLC, currently occupied by Koffee?

Other Downtown Properties

90 Wall Street

Acquired 1968, currently occupied by Naples Wall Street Pizza

86 Wall Street

Acquired 1972, currently occupied by Blue State

84 Wall Street

Acquired 1968, currently occupied by Blue State³⁶⁹ and Phil's Hair Styles

150 York Street

Acquired 1996, vacant retail space on the ground floor of the Chapel-York Garage

67-81 Howe

Date of acquisition unknown, vacant retail space on the ground floor of Howe Street Garage

³⁶⁸ This vacant space used to house Clark's Dairy, which has since moved next door.

³⁶⁹ Blue State spans both 86 and part of 84 Wall Street.