THEORIES OF UNIVERSITY ENDOWMENT TAXATION

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ABSTRACT

University endowment taxation is now one of the most significant issues in U.S. federal tax policy, and it only promises to grow in prominence over the next four years. Yet while growing criticism of university wealth has precipitated a wave of proposed tax legislation, policymakers and scholars have largely avoided engaging with the deeper political questions that lurk behind this new trend in federal tax policy. Instead, discussions about I.R.C. § 4968—the Code's current "endowment tax"—are either dominated by antagonistic rhetoric or concerns about administrative feasibility, revenue generation, and the potential for tax-avoidance. And although President Donald Trump and Vice President JD Vance seem eager to make the endowment tax a central part of their executive agenda, no one has meaningfully or systematically assessed the normative issues at the heart of § 4968 and proposals for its reform.

This Article provides the first conceptual framework for addressing the fundamental political questions implicated in the endowment tax debate. Calls for and against taxing university endowments directly challenge the political status of private American universities. They reflect a growing desire to redefine these institutions' obligations to the public and their relationship with the state. And unfortunately, the prevailing discourse on the Code's current endowment tax has obscured these broader ideological stakes. This Article aims to correct for this oversight by identifying the core political concepts that structure and influence the network of federal tax laws responsible for recognizing and governing private universities and their financial practices. Drawing on scholarship on political theory and corporate governance, this Article constructs a framework for evaluating and comparing the most recently introduced proposals for reforming the federal endowment tax, and in turn assesses how different approaches to endowment taxation reflect and reinforce competing visions of the university's role in American society. By reframing discussions about

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endowment taxation in terms of first principles, this Article suggests new ways of thinking about some of the most recent and popular endowment tax reforms.

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INTRODUCTION

For anyone in higher education, the bill was alarming. But for a handful of the nation's top colleges and universities, it was potentially catastrophic. Then-Senator JD Vance had just introduced a new piece of tax legislation that placed elite institutions squarely in his crosshairs.[1] On December 14, 2023, Vance took to the Senate floor to denounce schools such as Harvard

1. College Endowment Accountability Act, S. 3514, 118th Cong. (2023).

and Yale as "massive hedge funds pretending to be universities," arguing that their institutional wealth was fueling "political insanity."[2] To remedy the situation, Vance proposed levying a 35 percent tax on these institutions' net investment income. The logic, he insisted, was straightforward: "if the universities have caused the problem, they ought to pay for it."[3]

In the past, members of Congress would have dismissed Vance's floor speech as the grandstanding of an ambitious political newcomer. But in the political climate of 2023, Vance's critique struck a nerve.[4] The senator's rhetoric went far beyond standard conservative complaints about academia.[5] For decades, Republicans had accused universities of financial profligacy and failing to prepare students for the workforce.[6] Yet the party's supply-side orthodoxy generally meant that when it came to fiscal policy, Republicans heavily favored tax cuts over new taxes.[7] Vance's endowment

2. 169 CONG. REC. S5975 (daily ed. Dec. 14, 2023) (statement of Sen. JD Vance) (stating that "Harvard, Penn, Yale, [and] many of our Ivy League institutions . . . are little more than hedge funds with universities attached to them as pretend," and that endowments rendered institutions "completely independent of any political, financial or other pressure," allowing them to operate without regard for the "public will," their donors, alumni, or even their students); *see also id.* (stating that universities had "now metastasized into one of the most corrupt and one of the most politically active and politically hostile organizations in the United States of America").

3. *Id*.

4. *See* Matthew Rice, *Vance Proposes New Tax on America's Largest College Endowments, Saying Funds Are Used 'To Push DEI and Woke Insanity*,*'* N.Y. SUN (Dec. 14, 2023), https://www.nysun.com/article/vance-proposes-new-tax-on-americas-largest-college-endowments-saying-funds-are-used-to-push-dei-and-woke-insanity [https://perma.cc/FDP2-UNS9] (reporting that Senator Vance's proposed 35 percent excise tax on wealthy university endowments drew attention amid broader Republican efforts to curb elite academia); Craig Kennedy, Opinion, *J.D. Vance Had a Point: Let's Rein in All Large Endowed Institutions*, CHRON. PHILANTHROPY (Sept. 14, 2023), https://www.philanthropy.com/article/j-d-vance-had-a-point-lets-rein-in-all-large-endowed-institutions [https://perma.cc/9VAY-NYH2] (arguing that Vance's proposal to tax large endowments "addressed a legitimate concern" and merited serious consideration).

5. *See, e.g.*, Larry P. Arnn, *Why the GOP Is Flunking Higher Education*, CLAREMONT REV. BOOKS (Fall 2006), https://claremontreviewofbooks.com/why-the-gop-is-flunking-higher-education/ [https://perma.cc/L3F4-JJRQ] (arguing that Republican critiques of academia—focused on ideological bias, bureaucratic expansion, and weak civic education—risk undermining universities' truth-seeking role by politicizing federal oversight); Jason Blakely, *A History of the Conservative War on Universities*, THE ATLANTIC (Dec. 7, 2017), https://www.theatlantic.com/education/archive/2017/12/a-history-of-the-conservative-war-on-universities/547703/ [https://perma.cc/K247-63WX].

6. *See, e.g.*, U.S. DEP'T OF EDUC., A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION (2006) [hereinafter SPELLINGS COMMISSION REPORT] (representing the culmination of longstanding Republican critiques of higher education by concluding that universities had become "unduly expensive," lacked "accountability mechanisms," and were graduating students who "enter the workforce without the skills employers say they need").

7. *See, e.g.*, Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 401–404, 115 Stat. 38, 53–63 (expanding higher-education tax relief—such as the tuition deduction, education IRAs, and student loan interest deductions—and exemplifying the party's supply-side emphasis on tax cuts rather than new federal taxes as a solution to problems in higher education); *see also* SPELLINGS COMMISSION REPORT, *supra* note 6, at 11–12 (criticizing "duplicative" federal funding programs and expressing skepticism as to "whether the national investment in higher education is paying off and how taxpayer dollars could be used more effectively").

tax broke with that tradition. To justify this departure, Vance reframed the "university problem" in regime-level terms, portraying elite universities as engines of wealth accumulation and ideological control, rather than institutions of higher learning. The country's best colleges and universities, he argued, had become the institutional proxies of a cosmopolitan elite working against the interests of ordinary Americans.[8]

Vance further suggested that federal tax law itself was complicit in this state of affairs.[9] Universities were obviously wealthy because of their endowments. Yet they paid "almost nothing" in federal taxes by virtue of their tax-exempt status—treatment unavailable to ordinary individuals and families.[10] The arrangement was not merely "unfair."[11] In Vance's telling, it effectively required working taxpayers to subsidize endowment growth and, in turn, the political radicalism and elite privilege such wealth purportedly enabled.[12] The policy implications of such a narrative seemed self-evident. Such a radical case of institutional corruption and systemic unfairness demanded a radical restructuring of federal tax law. Against that backdrop, it was possible Senator Vance's proposal to raise the tax on net investment income for a small class of "elite" universities—from 1.4 percent to 35 percent—was really a step toward long-overdue accountability, rather than an extreme form of political posturing.

Democrats acted swiftly to block Vance's College Endowment Accountability Act.[13] However, despite their quick action, the sentiment behind the senator's floor speech had already resonated far beyond conservative circles. Two years earlier, a similar version of Vance's endowment tax appeared in early drafts of the Build Back Better Act.[14]

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8. 169 CONG. REC. S5975 (daily ed. Dec. 14, 2023) (statement of Sen. JD Vance).

9. *Id*. (statement of Sen. JD Vance) (arguing that the Internal Revenue Code's treatment of university endowments has allowed "elite colleges" to "metastasize[] into one of the most corrupt and one of the most politically active and politically hostile organizations in the United States of America").

10. *Id.* ("Right now, they pay a tax that is less than 2 percent on their net income—far lower than any of the working-class members of my own family and far lower than most Americans pay in taxes.").

11. *Id.* (statement of Sen. JD Vance) (explaining that "we allow . . . universities to enjoy lower tax rates than most of our citizens—people who are struggling to put food on the table and buy Christmas presents this season? Yet they enjoy a far higher tax rate than these university endowments. It is insane, it is unfair . . . .").

12. *Id.* (statement of Sen. JD Vance) (arguing that university endowments "have made these universities completely independent of any political, financial, or other pressure," and that endowments "have grown incredibly large on the backs of subsidies from the taxpayers"); *see also infra* notes 84–93 and accompanying text.

13. *Id.* (statement of Sen. Ron Wyden).

14. H.R. 5376, 117th Cong. § 137702 (2021) (creating a phaseout of the § 4968 endowment tax for institutions that provide sufficient grant aid to first-time, full-time undergraduates and adding reporting, inflation-adjustment, and 500-student-threshold clarifications); Adam Harris, A *Tax on Endowments Became Law. But Congressmen and Colleges Are Still Fighting It.*, CHRON. HIGHER EDUC.

States home to prestigious universities had also taken up the cause, and their proposed local endowment taxes sometimes even attracted the support of university students themselves.[15] Donald Trump had also jumped on the bandwagon to make taxing university endowments a centerpiece of his 2024 presidential campaign.[16]

And in the years since, popular interest in taxing university endowments has only seemed to grow. Frustration with private universities is becoming increasingly widespread, and many see the growth of their endowments as evidence of institutional mismanagement and moral decline.[17] Yet beyond a general sense of disaffection with higher education, exactly what is motivating this recurring interest in endowment taxation has been difficult to pin down. Calls for reform have induced scholars, policy advocates, and members of Congress to introduce an avalanche of proposals for repealing and amending § 4968—the current Code provision that taxes universities' net investment income.[18] But despite its prolixity, the endowment tax debate has not precipitated much in the way of consensus. Instead, discussions about whether and how to tax university endowments have become mired in economic prediction, niche conceptual disputes, and evocative but often equivocal rhetoric.[19] And although President Trump and the Republican-led Congress have made the current endowment tax a central part of their

(Mar. 8, 2018), https://www.chronicle.com/article/a-tax-on-endowments-became-law-but-congressmen-and-colleges-are-still-fighting-it/ [https://perma.cc/X3GJ-6ULD] (noting that today's endowment-tax proposals closely track Rep. Dave Camp's 2014 Tax Reform Act blueprint, which would have imposed a 1% excise tax on the investment income of private-college endowments with at least $100,000 in assets per full-time student).

15. *See, e.g.*, H.R. 2824, 193d Gen. Ct., Reg. Sess. (Mass. 2023); S. 859, 2023 Gen. Assemb., Jan. Sess. (R.I. 2023); H.R. 5868, 2023 Gen. Assemb., Jan. Sess. (Conn. 2023); *see also* Drew Stephens, *Students Rally, Admin Expresses Concern Over Endowment Tax Bill*, AMHERST STUDENT (Dec. 13, 2023), https://amherststudent.com/article/students-rally-for-endowment-tax-bill/ [https://perma.cc/B5GS-LC9P].

16. *Agenda47: The American Academy*, DONALD J. TRUMP (Nov. 1, 2023), https://www.donaldjtrump.com/agenda47/agenda47-the-american-academy [https://perma.cc/3EVC-XXJ4].

17. Mae C. Quinn, *Wealth Accumulation at Elite Colleges, Endowment Taxation, and the Unlikely Story of How Donald Trump Got One Thing Right*, 54 WAKE FOREST L. REV. 451, 453–54, 462–68 (2019).

18. *See, e.g.*, James J. Fishman, *How Big Is Too Small: Should Certain Higher Educational Endowments' Net Investment Income Be Subject to Tax*, 28 CORNELL J.L. & PUB. POL'Y 159 (2018); Jennifer Bird-Pollan, *Taxing the Ivory Tower: Evaluating the Excise Tax on University Endowments*, 48 PEPP. L. REV. 1055, 1055–56 (2021); Melanie McCoskey & Doron Narotzki, *Education Has Been "Dumbed Down" in Tax Reform*, 22 FLA. TAX REV. 677 (2019); Edward A. Zelinsky, *Section 4968 and Taxing All Charitable Endowments: A Critique and a Proposal*, 38 VA. TAX REV. 141 (2018).

19. For scholarship discussing these issues as a phenomenon in tax policy and tax-exemption debates, see, for example, LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 57 (2002) (describing this phenomenon as a general problem in tax policy discourse). *See also* Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505, 549–53 (2010) (noting that scholarship that addresses distributive justice issues in tax-exempt law is "[t]oo [s]hallow").

agenda, no one has meaningfully or systematically assessed the normative issues underlying a university endowment tax and proposals for § 4968's reform.[20]

That the endowment tax debate has failed to move beyond this state is concerning, if not entirely unexpected.[21] Tax policy battles are frequently won and lost in electoral politics or hashed out by experts behind closed doors in Congressional tax-writing committees. But these realities should not distract from what is truly at stake in this particular tax debate. Those who passionately advocate for taxing endowments "more" or "less" do so because they believe that the country's political and economic system is fundamentally broken. Moreover, they view federal tax law and university endowments as both contributors to this problem and potential instruments for its reform.

Unfortunately, the current tax policy discourse has overshadowed these deeper ideological issues. This Article addresses this oversight by presenting the first conceptual framework for analyzing the fundamental political issues underlying the university endowment tax debate. By identifying the core political principles that shape § 4968, § 501(c)(3), and the broader law governing tax-exempt organizations, it introduces a typology of political ideals for analyzing key design elements of proposed endowment tax legislation. This Article then uses its typology to conduct a systematic evaluation of how different proposals for reforming § 4968 reflect and reinforce competing visions of the university's role in American society.

This Article is organized into three parts. Part I explores the history of university financing and its treatment under U.S. tax law to provide further insight into the origins of the university endowment tax debate and account for its current state. Part II integrates insights from tax, corporate law scholarship, and political theory to develop a conceptual framework for analyzing the political dynamics of university endowment tax reforms. Part III applies this framework to categorize and evaluate the core political ideologies that each proposal seeks to advance.

The primary goal of this Article is to cut through the noise—to make the normative stakes visible while offering a space for thoughtful, comparative assessment of endowment tax proposals. Debates about § 4968 and proposals for its reform should not be dismissed as mere political posturing

20. *See infra* Part II.

21. This Article uses the terms "endowment tax" and "university endowment tax" interchangeably. References to the "endowment tax debate" should not be confused with another well-established philosophical debate about whether *individuals* should be taxed based on their ability to earn income or accumulate wealth. *See, e.g.*, Lawrence Zelenak, Essay, *Taxing Endowment*, 55 DUKE L.J. 1145 (2006) (offering a "reasonably comprehensive critical guide" to the endowment-tax debate).

or reduced to a technical exercise in fine-tuning the Internal Revenue Code. Before choosing sides or identifying the most viable legislative solution, advocates and commentators must clearly define and articulate the political objectives behind their policy proposals.

Of course, mapping the connections between the technical aspects of tax legislation and abstract ideals in seemingly undifferentiated political landscapes is undoubtedly a challenging task. Achieving such clarity requires a degree of simplification, idealization, and abstraction. Yet, at a time when public confidence in higher education is plummeting[22] and policymakers appear more than willing to wield tax law as a weapon,[23] the normative implications of endowment tax reform must be seriously considered. Thus, this Article aims not only to illuminate the deeper meanings behind various § 4968 proposals, but also to guide this specific tax policy debate toward a more constructive and informed conclusion.

I. BACKGROUND: THE UNIVERSITY ENDOWMENT TAX DEBATE

The debate over taxing university endowments sits at the crossroads of two distinct but often conflated issues: how universities accumulate and deploy their wealth and their privileged tax status as exempt organizations under federal law. On the one hand, university endowments are seen as engines of private financial power, raising questions about whether tax law should regulate how universities spend, save, and invest. On the other, the

22. Michael T. Nietzel, *Gallup: Public Perception of a College Education Hits a 15-Year Low*, FORBES (Sept. 13, 2025), https://www.forbes.com/sites/michaeltnietzel/2025/09/13/gallup-public-perception-of-a-college-education-hits-a-15-year-low/ [https://perma.cc/LZ5D-9M3X] (noting that Americans' views of the importance of college education have declined to the lowest level in fifteen years, with only about one-third of adults rating college as "very important," reflecting historically diminished confidence in higher education).

23. *See, e.g.*, Howard Gleckman, *Trump IRS Would Use Investigators to Target Perceived Political Foes*, FORBES (Oct. 17, 2025), https://www.forbes.com/sites/howardgleckman/2025/10/17/trump-irs-would-use-investigators-to-target-perceived-political-foes/ [https://perma.cc/Q8W7-UBAM] (describing plans to direct IRS Criminal Investigation resources toward left-leaning nonprofits, install political loyalists inside the agency, and revoke tax-exempt status for groups engaged in activities the Administration labeled "extremism"); Jonathan Yerushalmy, *Trump's Tariffs Replace Diplomacy as Other U.S. Tools of Statecraft Are Discarded*, THE GUARDIAN (Aug. 19, 2025), https://www.theguardian.com/us-news/2025/aug/20/trump-tariffs-replace-diplomacy-us-statecraft-discarded [https://perma.cc/T6YZ-CGGD] (reporting that Trump used tariffs as political weapons against Canada, India, and Brazil to "compel loyalty to the president," including tariff threats tied to positions on Russia, Palestine, and domestic prosecutions); Lauren Libby, *Public Service Loan Forgiveness Is the Canary in the Coal Mine*, SLATE (Apr. 10, 2025), https://slate.com/life/2025/04/pslf-loan-forgiveness-program-trump-executive-order.html [https://perma.cc/VUJ3-CS4T] (explaining that Trump's PSLF executive order weaponized federal benefits administration by restricting forgiveness for employees of nonprofits the Administration associated with "radical agendas," thereby targeting ideological opponents through tax-adjacent statutory categories).

fact that some of the wealthiest institutions in the country are formally exempt from federal income taxation strikes many as fundamentally unfair, cutting against core principles of equity in the tax system.[24] These concerns are not identical, and they do not inevitably imply the need for federal tax reform. Yet in political and public debate they have become entangled, with the federal endowment tax repeatedly presented as a one-size-fits-all solution to both. This Part unpacks the legal and policy background of the university endowment tax, tracing how these strands have crystallized into the current controversy and why consensus around reform has proven so difficult—laying the foundation for why a typology is necessary to make sense of the debate.

The starting point for understanding the endowment tax is the federal tax status of universities themselves. Nearly all colleges and universities, public or private, are treated as tax-exempt under federal law.[25] Public institutions generally derive their exempt status from their affiliation with state government,[26] while private universities rely on the explicit grant of § 501(c)(3).[27] To qualify under that provision, a university must be organized and operated for one or more statutory purposes—one of the most prominent of which is "educational."[28] It must also comply with a series of familiar restrictions: a prohibition on "private inurement,"[29] a ban on

24. STEPHANIE HUNTER MCMAHON, MCMAHON'S PRINCIPLES OF TAX POLICY 109–20 (2d ed. 2018) (discussing various models of tax fairness, including horizontal and vertical equity, and the conceptual difficulties involved in determining when taxpayers are similarly situated).

25. *See, e.g.*, *Tax-Exempt Status of Universities and Colleges*, ASS'N AM. UNIVS. (Oct. 2, 2022), https://www.aau.edu/key-issues/tax-exempt-status-universities-and-colleges [https://perma.cc/WZ4Z-T9NK] (noting that "[t]he vast majority of private and public universities and colleges are tax-exempt entities as defined by Internal Revenue Code (IRC) Section 501(c)(3) because of their educational purposes").

26. I.R.C. § 4968 only applies to private universities and colleges. Many public universities qualify as governmental entities not subject to federal income tax under principles of intergovernmental immunity. *See* I.R.S. Gen. Couns. Mem. 14,407 (Jan. 28, 1935); I.R.C. § 115. However, some public universities obtain tax-exempt status under I.R.C. § 501(c)(3) as quasi-governmental entities that are separately organized, educational, non-regulatory, and not integral to the state. Additionally, many public school endowments are raised and managed by supporting organizations that qualify for I.R.C. § 501(c)(3) status. *See, e.g.*, FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS ¶¶ 20.01–20.07 (2024); *see also* Mark J. Cowan, *Taxing and Regulating College and University Endowment Income: The Literature's Perspective*, 34 J. COLL. & U.L. 507, 511–13 (2008).

27. While § 501(c)(3) defines the types of organizations eligible for the exemption, I.R.C. § 501(a) actually grants the exemption. *Compare* I.R.C. § 501(c)(3), *with* I.R.C. § 501(a).

28. I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(a)(1) (as amended in 2017).

29. I.R.C. § 501(c)(3) (requiring that "no part of the net earnings of which inures to the benefit of any private shareholder or individual"). For further discussion, see HILL & MANCINO, *supra* note 26, at ¶¶ 4.01–4.05 (discussing intricacies of private inurement and general prohibitions against private benefits for § 501(c)(3) organizations).

substantial lobbying or political campaign activity,[30] and an obligation that its resources serve "public" rather than private benefit.[31]

What this means is that while federal tax law is one of the primary mechanisms for regulating nonprofit institutions such as universities,[32] it does so through a statute that looks far more like corporate or associational law than like a substantive regulatory regime.[33] The Food, Drug, and Cosmetic Act, for example, prescribes in minute detail what pharmaceutical companies may sell, how products must be tested, and what information must be disclosed—dictating outcomes as well as process.[34] By contrast, § 501(c)(3) excels at establishing organizational form and governance constraints, but it falters at dictating substantive results. The statute is focused on ensuring that resources are not siphoned away for private gain and that an organization is at least nominally dedicated to an exempt purpose. Beyond that, it leaves tremendous discretion to managers.

For example, § 501(c)(3) organizations are often casually described as "charities," but exempt purposes have been interpreted broadly.[35] The category of "educational" activity has been defined to include nearly any systematic instruction or training, ranging from universities and K–12 schools to public debate forums and even some advocacy groups.[36] The IRS and courts have declined to require that an educational institution be democratically run, admit financially disadvantaged students, or provide a particular type of instruction.[37] As long as an organization is organized and

30. I.R.C. § 501(c)(3) (describing exempt organizations further, requiring that "no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office").

31. John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267, 271 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006) (describing how the concept of public benefit is only really described in reference to a prohibition against private inurement).

32. *See generally* Mark L. Ascher, *Federalization of the Law of Charity*, 67 VAND. L. REV. 1581 (2014) (explaining how federal law—particularly through federal tax-exempt status and associated tax incentives—has supplanted state nonprofit law as the primary mechanism for regulating charitable organizations, effectively determining their formation, operation, and survival).

33. *See* Evelyn Brody & John Tyler, *Respecting Foundation and Charity Autonomy: How Public is Private Philanthropy?*, 85 CHI.-KENT L. REV. 571, 574 (2010)

34. Federal Food, Drug, and Cosmetic Act of 1938, Pub. L. No. 75-717, 52 Stat. 1040 (codified at scattered sections of 21 U.S.C. § 301 et seq.).

35. I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(d)(2)-(5)(defining "charitable," "educational," and other exempt purposes in capacious terms—extending to activities that advance religion, science, education, public safety, social welfare, the arts, and community improvement—and emphasizing that an organization may qualify under § 501(c)(3) so long as it serves a "public" rather than a "private" interest).

36. *Id.*; *see also* John D. Colombo, *Why Is Harvard Tax-Exempt (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 845–55 (1993).

37. Cowan, *supra* note 26, at 514–15.

operated for "educational purposes," avoids private inurement, and steers clear of excessive lobbying or partisan activity, it can qualify.[38] The upshot is that universities need not admit low-income students, offer generous financial aid, or pursue egalitarian missions to receive tax-exempt status. They may charge high tuition, serve elite communities, or focus on highly specialized research. How they choose to educate, what they teach, which communities they serve, and whether they prioritize access or exclusivity are all matters left to the discretion of private individuals.[39]

Reforms and restrictions that one might assume would apply directly to university endowments often turn out not to reach them. A good example is the 21 percent tax on "unrelated business income" (UBIT) that applies to nearly all tax-exempt organizations.[40] At first glance, one might think that the investment income generated by endowments—dividends, interest, rents, royalties, and capital gains—would fall within this category, since managing a multi-billion-dollar portfolio looks indistinguishable from the activity of hedge funds. But under current law, most of this investment income remains exempt so long as it is tied to assets owned by the university and are ultimately used to support its operations.[41] In other words, simply having an endowment, even an enormous one, does not violate § 501(c)(3). And because universities are classified as "public charities" rather than "private foundations," they also avoid the more stringent financial management restrictions that apply to foundations, such as mandatory payout rules or excise taxes on investment practices.[42] Federal tax law does not prevent university endowments from reaching a certain size, dictate how their assets should be invested, or narrowly constrain how their income is

38. *Id.* at 514–18.

39. *Id.* at 549-50; *see also* Brody & Tyler, *supra* note 33 at 579–81 (2010) (describing how this principle applies to all charitable organizations, not just universities).

40. The UBIT under I.R.C. § 511 generally applies to organizations exempt under I.R.C. § 501(c) (including 501(c)(3) charities and other nonprofit organizations) and certain state colleges and universities claiming tax-exempt status under I.R.C. § 115(1) or I.R.C. § 501(c)(3). However, governmental entities exempt under the doctrine of intergovernmental tax immunity are generally not subject to UBIT, unless they have separately established tax-exempt affiliates under § 501(c). Certain entities under I.R.C. § 501(c)—such as religious organizations, instrumentalities of government, and specific employee benefit trusts—may have exemptions or limitations regarding UBIT.

41. *See* I.R.C. § 512(b) (exempting passive income such as dividends, interest, annuities, royalties, rents from real property (with certain exceptions), capital gains and losses, income from certain research activities, and income from controlled organizations (subject to specific limitations under I.R.C. § 512(b)(13))).

42. Universities qualify for public charity status under I.R.C. § 509(a)(1) because they are the type of organization described in I.R.C. § 170(b)(1)(A)(i)–(v) (describing contributions to "an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on").

spent.[43] Instead, universities enjoy broad discretion to use their endowment funds for a wide range of purposes, from administrative salaries to esoteric research to ambitious construction projects.[44]

Taken in a long view, the association of universities with endowments and tax-exemption seems almost ingrained in the fabric of American law. Harvard's endowment dates back to the seventeenth century, and Harvard itself is the nation's oldest tax-exempt corporation.[45] But this appearance of stability is deceptive. Universities did not always enjoy a uniform or federally-granted exemption; their tax status was historically secured through special state charters or private bills and at times actively contested.[46] In the nineteenth century, as universities lost chartered privileges, they turned more heavily to endowments as a financial foundation around the same time when states began experimenting with taxing or restricting charitable property.[47] Legislatures in New York, Massachusetts, and elsewhere questioned whether perpetual endowments were consistent with democratic values, while critics from James Madison to President Ulysses Grant warned that concentrated exempt wealth could undermine republican government.[48] These disputes underscored that the association of higher education, endowment wealth, and tax-exemption has

43. Unlike public charities, private foundations are subject to several requirements, including the minimum distribution requirement (I.R.C. § 4942), a self-dealing prohibition (I.R.C. § 4941), and excess business holdings limitations (I.R.C. § 4943). Additionally, private foundations must avoid jeopardizing investments (I.R.C. § 4944) and are prohibited from taxable expenditures (I.R.C. § 4945), such as lobbying or non-charitable grants. Private foundations must also pay an excise tax on net investment income (I.R.C. § 4940), currently set at 1.39%, following a reduction from 2% in 2019.

44. *See* Colombo, *supra* note 36, at 845–47 (discussing the interpretation of "educational"); *see also* Treas. Reg. § 1.501(c)(3)-1(d)(3) (defining "educational" broadly); Goldsboro Christian Schs., Inc. v. United States, 436 F. Supp. 1314 (E.D.N.C. 1977) (recognizing broad discretion in educational expenditures). Universities must also remain compliant with the general requirement that earnings must not inure to the benefit of private individuals. The commerciality doctrine and private benefit doctrine may impose some outer limits on endowment management, but these doctrines have been inconsistently applied and rarely used to challenge the accumulation or structure of university endowments.

45. As a chartered corporation, Harvard was effectively tax-exempt. However, the colonial charter also exempted its employees and faculty from taxation. *See* Jason Kaufman, Origins of the Asymmetric Society: Political Autonomy, Legal Innovation, and Freedom of Incorporation in the Early United States 10 (2006) (unpublished manuscript), https://scholarship.law.columbia.edu/law_culture/46/ [https://perma.cc/9NEA-AZ43] (describing how Harvard's 1636 corporate charter granted the College and its staff some exemption from "taxes and rates" as well as "all personall ciuill offices militarie exercises or seruices watchings and wardings").

46. Jonathan Levy, *From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation*, *in* CORPORATIONS AND AMERICAN DEMOCRACY 213, 217 (Naomi R. Lamoreaux & William J. Novak eds., 2017).

47. *See* Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3, 29–31 (1990) (describing this history, while noting that "it does not necessarily follow that an important motivation was to insulate the universities from a dependence on public resources that might make them hostage to the whims of legislatures").

48. William H. Byrnes, IV, *The Private Foundation's Topsy Turvy Road in the American Political Process*, 4 HOUS. BUS. & TAX L.J. 496, 510–24, 536 n.225 (2004).

always been less a matter of custom than a contested bargain between private privilege and public power.

And this was only at the state level. Federal taxation—and in turn federal exemption—did not arrive until 1894, when Congress first codified an entity-level corporate income tax and simultaneously carved out an exemption for universities.[49] At that time, however, the role of endowments in higher education was still relatively modest.[50] It was only in the late nineteenth and early twentieth centuries that endowment funds began to emerge as a cornerstone of the university's financial strategy. Large-scale philanthropy became possible only in the wake of the country's rapid industrial expansion after the Civil War, when fortunes amassed by magnates like Carnegie, Rockefeller, and Stanford found their way into private higher education.[51] Between 1870 and 1900, the aggregate value of endowments in the sector grew nearly tenfold, by an estimated $195 million, and the pace of growth continued into the new century.[52] By 1926, John D. Rockefeller's General Education Board calculated that university endowments had quadrupled since 1900, marking the arrival of endowment wealth as a defining feature of the modern American university.[53]

American universities gladly accepted the new donations, and by the early twentieth century, their endowments had grown impressively. By 1920, the country's largest endowments were held by eight private universities: Harvard ($44.57M), Columbia ($39.60M), Stanford ($33.26M), Chicago ($28.36M), Yale ($24.05M), Cornell ($16.00M), Princeton ($10.31M), and Johns Hopkins ($9.14M).[54] Harvard's lead reflected not only its elite status but also the increasing importance of endowments. Rather than relying on large donations alone, Harvard established its financial supremacy by adopting a novel strategy of building

49. STAFF OF J. COMM. ON TAX'N, 109TH CONG., JCX-29-05, HISTORICAL DEVELOPMENT AND PRESENT LAW OF THE FEDERAL TAX EXEMPTION FOR CHARITIES AND OTHER TAX-EXEMPT ORGANIZATIONS 8 (Comm. Print 2005) (noting that "[t]ax exemption for educational organizations was provided in the Tariff Act of 1894, and has been replicated in each subsequent income tax act"); *see also* STEVEN A. BANK, FROM SWORD TO SHIELD: THE TRANSFORMATION OF THE CORPORATE INCOME TAX, 1861 TO PRESENT 25 (2010).

50. Bruce A. Kimball & Benjamin A. Johnson, *The Inception of the Meaning and Significance of Endowment in American Higher Education, 1890–1930*, 114 TCHRS. COLL. REC., Oct. 2012, art no. 100302, at 4.

51. *Id.* at 4–5.

52. Bruce A. Kimball, *A "Thoroughly Satisfactory and Permanent Remedy": The Twentieth Century Invention of the American University Endowment*, HISTPHIL (Nov. 6, 2017), https://histphil.org/2017/11/06/a-thoroughly-satisfactory-and-permanent-remedy-the-twentieth-century-invention-of-the-american-university-endowment/ [https://perma.cc/B6RJ-VZVZ].

53. GEN. EDUC. BD., ANNUAL REPORT OF THE GENERAL EDUCATION BOARD, 1924–25, at 4 (1926).

54. 2 U.S. BUREAU OF EDUC., BIENNIAL SURVEY OF EDUCATION, 1920–22, at 384–425 (1925), https://archive.org/details/ERIC_ED540711 [https://perma.cc/F5L4-LTGY].

permanent investment funds to generate income. Under President Charles W. Eliot, Harvard set the trend of leveraging endowment growth to compete for academic achievement, influence, and status, while also providing a "satisfactory and permanent remedy" for future financial or political challenges.[55]

During this period, universities still managed their investments cautiously, prioritizing stability over risk. Their funds were not terribly diverse, composed of gifts like land or government securities that provided income from rents and interest. Early speculative investments rarely yielded the security universities sought, prompting them to adopt investing practices that were relatively conservative at the time.[56] As a result, endowments largely stuck to fixed-income securities and real estate throughout the 19th and early 20th centuries.[57] While some endowments dabbled in equities during the 1920s stock market boom, the Great Depression swiftly dampened this enthusiasm.[58] By the 1930s, trustees at Yale and other institutions solidified their conservative strategies, favoring bonds over stocks and spending income cautiously while preserving principal.[59] This restrained approach persisted well into the postwar era until calls for more aggressive investment strategies challenged the long-held orthodoxy.[60]

A significant step on this path occurred in the late 1960s, after a task force report sponsored by the Ford Foundation concluded that most college and university endowments were too conservative in their investment policies.[61] The report led to several reforms related to accounting and state charitable trust law, which were primarily responsible for regulating how universities managed their finances. As a result, university trustees tasked with managing endowments were permitted to delegate many of their responsibilities to professional investment firms.[62] Schools were also allowed to treat capital appreciation from investments as part of their

55. Kimball & Johnson, *supra* note 50, at 9–13; *see also* Bruce A. Kimball, *The Rising Cost of Higher Education: Charles Eliot's "Free Money" Strategy and the Beginning of Howard Bowen's "Revenue Theory of Cost,"* 1869−1979, 85 J. HIGHER EDUC. 886, 903 (2014).

56. CTR. FOR SOC. PHILANTHROPY, TELLUS INST., EDUCATIONAL ENDOWMENTS AND THE FINANCIAL CRISIS: SOCIAL COSTS AND SYSTEMIC RISKS IN THE SHADOW BANKING SYSTEM 17–18 (2011).

57. *See* Fishman, *supra* note 18, at 165.

58. *Id.*

59. *Id.* at 166.

60. *Id.*

61. The legal impetus for the shift in investment and spending policies stemmed from Ford Foundation-sponsored reports. *See* ADVISORY COMM. ON ENDOWMENT MGMT., MANAGING EDUCATIONAL ENDOWMENTS: REPORT TO THE FORD FOUNDATION (1969); WILLIAM L. CARY & CRAIG B. BRIGHT, THE LAW AND LORE OF ENDOWMENT FUNDS: REPORT TO THE FORD FOUNDATION (1969).

62. Peter Conti-Brown, Note, *Scarcity Amidst Wealth: The Law, Finance, and Culture of Elite University Endowments in Financial Crisis*, 63 STAN. L. REV. 699, 717–19 (2011).

endowments' annual income.[63] Together, these changes enabled a far more aggressive investment approach. Endowments could now allocate heavily to common stocks and riskier assets, facilitating much larger returns within a diversified, long-term portfolio.[64]

Emboldened by these new changes, universities began experimenting with new portfolio management and spending policies. By the 1990s, after decades of experimentation, universities had adopted spending and investment strategies that became standard in higher education.[65] Universities with particularly large endowments embraced the "endowment model" of investing, a strategy that emphasized diversified, long-term investments in alternative assets such as private equity, hedge funds, and real assets.[66] Regardless of size, universities typically spent between 4 and 5 percent of their endowment each year.[67] Moreover, endowments generally contributed only a limited portion of a university's annual operating budget.[68] The policies that shaped these practices precipitated significant endowment growth, particularly among the wealthiest universities.[69] One recent analysis reported that between 1980 and 2016, the wealthiest 1 percent of university endowments grew tenfold, from an average of $2

63. *Id.*

64. Harry Markowitz's 1952 paper *Portfolio Selection* laid the foundation for Modern Portfolio Theory (MPT), which was later adopted by university endowments such as Harvard and Yale. *See* Fishman, *supra* note 18, at 166–168; *see also* Christopher J. Ryan, Jr., *Trusting U.: Examining University Endowment Management*, 42 J. COLL. & U.L. 159, 170–73 (2016) (describing how the Ford Foundation's Barker Report prompted reforms in endowment accounting and trust law that allowed universities to treat capital appreciation as spendable income and to delegate investment authority to professional managers, enabling a shift toward more aggressive, equity-heavy investment strategies).

65. *See* Fishman, *supra* note 18, at 169.

66. *Id.* at 169–171; *see also* Stephen G. Dimmock, Neng Wang & Jinqiang Yang, *The Endowment Model and Modern Portfolio Theory* 1 n.3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25559, 2022), https://www.nber.org/system/files/working_papers/w25559/w25559.pdf [https://perma.cc/2KRY-6BZG] (noting that the "endowment model" of investing is widely credited to David Swensen of the Yale University endowment, whose approach—emphasizing high allocations to illiquid alternative assets to capture illiquidity premia and exploit market inefficiencies—became the template for institutional portfolio strategy).

67. *See* NAT'L ASS'N OF COLLEGE & UNIV. BUS. OFFICERS & COMMONFUND INST., 2023 NACUBO-COMMONFUND STUDY OF ENDOWMENTS 47 (2024) [hereinafter NCSE FY23] (reporting effective annual spend rates for FY22 and FY23 for participating colleges and universities).

68. *Id.* at 47–48 (reporting the average of institutional operating budgets funded by endowment as 10.9% for participating colleges and universities).

69. University trustees establish spending rules (spending policies) to determine the portion of endowment returns allocated to current operations, often using a moving-average formula to mitigate market volatility. These are distinct from actual spend rates. *See* Hansmann, *supra* note 47, at 8–10; *see also* AM. COUNCIL ON EDUC., UNDERSTANDING COLLEGE AND UNIVERSITY ENDOWMENTS 6 (2024) , https://www.acenet.edu/Documents/Understanding-College-and-University-Endowments.pdf [https://perma.cc/T4PA-2X4C]. For the most recent data on university spending policies, see NCSE FY23, *supra* note 67, at 48–50.

billion to $20 billion.[70] Another study estimated that between 1990 and 2021, the sixty wealthiest university endowments grew by an average of 423 percent.[71] According to the National Association of College and University Business Officers 2023 endowment survey, the 688 colleges and universities it examined held a combined $839.1 billion in endowment assets.[72] Private nonprofit institutions—roughly 415 schools—accounted for two-thirds of this total, or about $554 billion.[73] To put the figure in perspective, this small subset of private institutions alone controlled roughly one-third of all foundation wealth in the United States.[74] Their collective endowments also exceed the assets of CalPERS, the nation's largest public pension fund.[75] In financial terms, these private universities operated investment pools on a scale comparable to the country's largest institutional investors.[76] But during this same period, endowment wealth was also unevenly distributed: the top twenty institutions, representing only about

70. Charlie Eaton, *Elite Private Universities Got Much Wealthier While Most Schools Fell Behind. My Research Found Out Why*, WASH. POST (Nov. 4, 2021), https://www.washingtonpost.com/politics/2021/11/04/elite-private-universities-got-much-wealthier-while-most-schools-fell-behind-my-research-found-out-why/ [https://perma.cc/63AL-5YXJ].

71. Joshua Kim, Opinion, *Endowments from 1990 to 2050*, INSIDE HIGHER ED (Mar. 1, 2022), https://www.insidehighered.com/blogs/learning-innovation/endowments-1990-2050 [https://perma.cc/U4JJ-L8X4] (noting that the study examined only 60 schools and did not account for institutions with significant endowment growth after 1990).

72. NCSE FY23, *supra* note 67, at 4.

73. *Id*.

74. NAT'L PHILANTHROPIC TR., 2024 DONOR-ADVISED FUND REPORT 12 (2024) (estimating private U.S. foundations' total assets at about $1.48 trillion).

75. CalPERS identifies itself as "the nation's largest public pension fund," and reported total assets of $506.6 billion in FY 2023–24. CALPERS, FACTS AT A GLANCE: FY 2023–24, CALPERS ORGANIZATION 1 (2024); CALPERS, FACTS AT A GLANCE: FY 2023–24, INVESTMENTS 1 (2024) (showing total fund market value of $506.6 billion).

76. The fact that universities manage investment pools on a scale comparable to major institutional investors does not imply that they are among the most economically "valuable" institutions in the United States. Many for-profit firms finance their operations primarily through issuing debt and equity rather than maintaining large investment reserves. *See* Hansmann, *supra* note 47, at 3–4 (explaining that business corporations generally rely on capital markets rather than accumulated investment pools). Moreover, the ability to raise enormous sums through bond markets, equity offerings, or market capitalization often gives for-profit corporations far greater economic power than institutions that rely on endowments. *See Nonfinancial Corporate Business; Debt Securities and Loans; Liability, Level (BCNSDODNS*), FED. RSRV. BANK OF ST. LOUIS (Sept. 12, 2025), https://fred.stlouisfed.org/series/BCNSDODNS [https://perma.cc/UC6E-C98V] (showing total nonfinancial-corporate debt and loan liabilities for FY 2023 totaled approximately $13–14 trillion in 2023); Kif Leswing, *Apple Becomes First U.S. Company to Reach $3 Trillion Market Cap*, CNBC (Jan. 3, 2022), https://www.cnbc.com/2022/01/03/apple-becomes-first-us-company-to-reach-3-trillion-market-cap.html [https://perma.cc/6R69-9JAH] (illustrating that corporate market capitalization can vastly exceed university endowment assets); *see also* Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54, 72–73 (1981) (noting that nonprofits lack access to equity capital and face significant borrowing constraints, making retained earnings and endowment accumulation unusually important as substitutes for the capital-market financing available to for-profit firms).

0.03 percent of those surveyed in FY2023, controlled 54.5 percent of the total endowment assets.[77]

Amidst all this growth, most private universities remained exempt from federal income taxation, leading some policymakers and commentators to question whether their treatment under § 501(c)(3) was still appropriate. What, exactly, was the purpose of the wealth that these universities were generating? Publicly, universities insisted that endowments were vital because they allowed institutions to pursue goals such as intergenerational equity.[78] Endowments provided a buffer against economic volatility, helped optimize donations, and secured institutional longevity.[79] They also enabled universities to remain relatively independent, shielding them from political pressures and the influence of large donors.[80] Yet as the "endowment model" gained popularity, some academics and observers began to view these justifications with skepticism.[81] Was the rhetoric about "equity" and donor restrictions sincere, or was something else driving the accumulation of wealth behind the scenes?

By the mid-2000s, Congress started to get involved. During a Senate hearing in September 2007,[82] several lawmakers appeared alarmed to learn that universities were routinely using so-called "blocker" corporations so that their endowments' hedge fund investments would not trigger tax liability under UBIT.[83] All tax-exempt charitable organizations are required to pay a corporate tax on their debt-financed income, yet universities had

77. Natalie Schwartz, *How the Value of the 20 Largest College Endowments Changed Last Year*, HIGHER ED DIVE (Feb. 15, 2024), https://www.highereddive.com/news/how-the-value-of-the-20-largest-college-endowments-changed-last-year/707578/ [https://perma.cc/F9A7-LPAB] (calculating the percentage as the sum of the top 20 endowment market values divided by the total reported endowment value of all institutions in NSCE report).

78. *See* Hansmann, *supra* note 47, at 14–19; *see also* AM. COUNCIL ON EDUC., *supra* note 69, at 1–2.

79. *See* Hansmann, *supra* note 47, at 20-27.

80. *Id.* at 29; *see also* SANDY BAUM, URB. INST., ENDOWMENTS AND FEDERAL TAX POLICY 2, 5 (2019), https://www.urban.org/sites/default/files/publication/100535/endowments_and_federal_tax_policy.pdf [https://perma.cc/K4ER-NPVQ].

81. *See, e.g.*, Hansmann, *supra* note 47; *see also* Conti-Brown, *supra* note 62, at 729–41; Sarah E. Waldeck, Essay, *The Coming Showdown Over University Endowments: Enlisting the Donors*, 77 FORDHAM L. REV. 1795, 1805–12 (2009).

82. *Offshore Tax Issues: Reinsurance and Hedge Funds: Hearing Before the S. Comm. on Fin.*, 110th Cong. (2007).

83. *Id.* at 12–16, 22–23, 31–35. One major exception to the UBIT passive income exclusion is debt-financed property, which includes income-generating assets acquired with outstanding acquisition indebtedness. *See* I.R.C. § 512(b)(4). This rule primarily applies to real estate transactions but also subjects margin-financed securities to UBIT. *See, e.g.*, Bartels Tr. v. United States, 209 F.3d 147 (2d Cir. 2000) (holding that a university's supporting organization owed UBIT on margin-financed investments). If a tax-exempt entity is a partner in a leveraged partnership, its share of debt-financed income is taxable. *See* I.R.C. § 512(c)(1). To avoid UBIT on leveraged hedge fund investments, universities often use foreign blocker corporations, which receive the fund's debt-financed income but owe no U.S. tax. The blocker then distributes dividends to the university, which are exempt from UBIT.

found a creative solution to this apparent problem. By establishing offshore feeder corporations, it looked as though universities had managed to reap the rewards of their alternative investments without the burden of contributing additional revenue to the public fisc.[84] One of the testifying witnesses urged universities to increase endowment spending to reduce tuition, eventually suggesting that Congress could impose taxes on educational institutions that increased tuition by more than an appropriate rate.[85] No legislation resulted from the hearing, but the perception that universities were shirking their social and fiscal responsibilities—and that an endowment tax could resolve this problem—stuck firmly in Congress's mind.[86]

Over the next several years, congressional interest in universities waxed and waned, but the prospect of an endowment tax remained as long as the affordability of higher education was a pressing issue.[87] Further heightening public scrutiny of university endowments was the behavior of seemingly well-endowed schools during the 2008 financial crisis. Amid falling enrollment, a sharp market downturn, and declining revenues, schools addressed the fiscal crunch by cutting costs rather than drawing on their endowments.[88] Budgets were slashed across colleges and departments, leading to salary freezes and layoffs. Meanwhile tuition prices continued to rise.[89] The "Paradise Papers" scandal further undermined public trust when it was revealed that a decade after the Senate inquiry, universities were continuing to use blocker corporations to avoid UBIT.[90]

Shortly after this publicity nightmare, Congress passed § 4968 (2018), the first federal income tax on university endowments. The provision

84. *See, e.g.*, Andy Guess, *Senate Scrutiny for Endowments*, INSIDE HIGHER ED (Sept. 26, 2007), https://www.insidehighered.com/news/2007/09/27/senate-scrutiny-endowments [https://perma.cc/VH5R-4DC5].

85. *See Offshore Tax Issues*, *supra* note 82, at 14–15 (statement of Jane G. Gravelle, Senior Specialist in Economic Policy, Congressional Research Service).

86. *See* Fishman, *supra* note 18, at 172–173 (describing how Senator Chuck Grassley "began to ask why colleges with the largest endowments had the highest tuition, which was increasing at a greater rate than inflation, and spent so little").

87. *Id.* at 172–74.

88. *See* Conti-Brown, *supra* note 62, at 701–03, 744–47.

89. Bridget Terry Long, *The Financial Crisis and College Enrollment: How Have Students and Their Families Responded?*, *in* HOW THE FINANCIAL CRISIS AND GREAT RECESSION AFFECTED HIGHER EDUCATION 209, 212–13 (Jeffrey R. Brown & Caroline M. Hoxby eds., 2015) (noting that between "2007/8 to 2011/12, list tuition and fees at private, nonprofit, four-year institutions grew 13 percent, above the norm but about half of the growth rate at public colleges and universities").

90. *See, e.g.*, Hayley Glatter, *Twelve Massachusetts Schools Named in Paradise Papers*, BOS. MAG. (Nov. 20, 2017), https://www.bostonmagazine.com/education/2017/11/20/massachusetts-schools-paradise-papers/ [https://perma.cc/234A-QSEH]**;** Sasha Chavkin, Emilia Díaz-Struck & Cecile S. Gallego, *More Than 100 Universities and Colleges Included in Offshore Leaks Database*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Nov. 17, 2017), https://www.icij.org/investigations/paradise-papers/universities-colleges-offshore-leaks-database/ [https://perma.cc/4PHJ-YN8N]**.**

imposed a 1.4% tax on the net investment income of private colleges and universities with at least 500 tuition-paying students and endowment assets exceeding $500,000 per student.[91] It was projected to generate approximately $1.8 billion in revenue over a decade, although it was unclear exactly how many institutions were expected to pay the tax.[92] Yet, when signing the provision into law as part of the Tax Cuts and Jobs Act (TCJA), President Donald Trump did not mention the endowment tax, instead lauding the legislation for "cutting taxes, . . . taking care of our military, and . . . taking care of people.[93] Perhaps unsurprisingly, § 4968 did little to quiet longstanding concerns about elite institutions' wealth and independence, and in the years since its enactment, proposals for its revision were repeatedly debated.

Universities denounced the provision as an unprecedented intrusion into their charitable status, while critics across the political spectrum complained it did too little to address the real problems of higher education. For some members of Congress, the answer was simply to tax more. In 2024, Representative David Joyce called for raising the rate from 1.4% to 10%, and even layering a 20% penalty on institutions that raised tuition faster than inflation.[94] Representative Drew Ferguson looked elsewhere, warning of foreign influence and "outside agitators," and proposed that the tax be recalibrated to penalize schools that enrolled too many international students.[95] Meanwhile, Senator JD Vance tried a different tack altogether: just months after his first proposal failed, he returned with the Encampments

91. I.R.C. § 4968(a)–(b) (2018).

92. *Compare* McCoskey & Narotzki, *supra* note 18, at 685 n.27 (estimating that the final version of § 4968 would subject "approximately more than 50 institutions to the tax"), *with* Phillip Levine, *The University Endowment Tax: Who Will Pay It and Why Was It Implemented?*, ECONOFACT (Jan. 25, 2018), https://econofact.org/the-university-endowment-tax-who-will-pay-it-and-why-was-it-implemented [https://perma.cc/RMH7-QUAN] (estimating that 23 institutions would likely be subject to the tax). The Joint Committee on Taxation initially declined to estimate how many institutions § 4968 would reach. *See* JOINT COMM. ON TAX'N, JCX-67-17, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT" 8 (2017).

93. President Donald Trump, Remarks at Signing of H.R. 1, Tax Cuts and Jobs Bill Act, and H.R. 1370 (Dec. 22, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-signing-h-r-1-tax-cuts-jobs-bill-act-h-r-1370/ [https://perma.cc/7XMQ-A83P].

94. Press Release, Dave Joyce, U.S. Rep., Joyce Introduces Bill to Hold Elite Universities Accountable for Ballooning Student Debt (Aug. 13, 2024), https://joyce.house.gov/posts/joyce-introduces-bill-to-hold-elite-universities-accountable-for-ballooning-student-debt-2 [https://perma.cc/EPY9-JHJ6].

95. U.S. HOUSE COMM. ON WAYS & MEANS, H.R. 8913, THE *PROTECTING AMERICAN STUDENTS ACT* (2024) [hereinafter PAS ONE-PAGER], https://waysandmeans.house.gov/wp-content/uploads/2024/07/H.R.-8913-Protecting-American-Students-Act-One-Pager.pdf [https://perma.cc/5FKM-NK7F] (describing proposed amendments to the § 4968 endowment tax formula, including limiting the student-count denominator to students eligible for federal financial aid under 20 U.S.C. § 1091(a)(5), and estimating that the bill would newly subject roughly 10–12 institutions to the tax).

or Endowments Act, threatening universities with a confiscatory 50% tax if they refused to shut down student protests.[96]

These efforts revealed how muddled the politics of endowment taxation had become. For some, it was a way to punish elite institutions for soaring tuition and student debt. For others, it was a vehicle for regulating campus culture or policing the composition of student bodies. And for still others, it was simply a way to humble universities whose enormous wealth made them convenient political targets. Yet even as proposals multiplied, the rationale for taxing net investment income—rather than wealth, or tuition revenue, or revoking § 501(c)(3) status altogether—remained elusive. The universities themselves, far from conceding ground, dug in, describing the tax as a "beatdown of the blue-state, college-educated elite" and lobbying for repeal.[97]

Even those willing to look past the partisan theater and engage with the technical details of § 4968 often came away unsatisfied. Within the tax policy community, endowment taxation became a niche but persistent subject of analysis. Reports from the Urban Institute, the Tax Policy Center, and others consistently concluded that the tax was unlikely to achieve its stated goals: it would not reduce tuition, expand access, or materially increase endowment spending.[98] Analysts pointed out that small fluctuations in enrollment or market performance could dramatically change a university's tax liability, while similarly situated schools could fall just

96. Press Release, JD Vance, U.S. Sen., Senator Vance Introduces Legislation to Crack Down on University Encampments (May 9, 2024), https://www.legistorm.com/stormfeed/view_rss/2376500/member/3556/title/senator-vance-introduces-legislation-to-crack-down-on-university-encampments.html [https://perma.cc/G4MZ-WGJ9].

97. Evan Mandery, *What Trump Gets Right About Harvard*, POLITICO (Sept. 27, 2022), https://www.politico.com/news/magazine/2022/09/27/trump-elite-colleges-taxes-00058697 [https://perma.cc/JMP3-FZNB]; *see also* Letter from 48 University Presidents to Congress Regarding Endowment Tax (Mar. 7, 2018), https://www.insidehighered.com/sites/default/files/media/3-7-18%20Universities%20letter%20re%20endowment%20tax.pdf [https://perma.cc/TL6X-HPWQ]; Brandon J. Dixon, *Faust Calls Republican Tax Plan 'Blow at the Strength of American Higher Education*,*'* HARV. CRIMSON (Nov. 6, 2017), https://www.thecrimson.com/article/2017/11/6/faust-criticizes-republican-tax-plan/ [https://perma.cc/SZU7-LQ5C]; *see, e.g.*, Noah Feldman, Opinion, *University Tax Flunks the First Amendment Test*, BLOOMBERG (Jan. 11, 2018), https://www.bloomberg.com/view/articles/2018-01-11/university-tax-flunks-the-first-amendment-test [https://perma.cc/ZJF3-A9EE].

98. *See generally* McCoskey & Narotzki, *supra* note 18; *see also* Melissa Korn & Richard Rubin, *Endowment Tax on Wealthiest Universities Netted a Fraction of Predictions in 2021*, WALL ST. J. (Oct. 4, 2022), https://www.wsj.com/articles/endowment-tax-on-wealthiest-universities-netted-a-fraction-of-predictions-in-2021-11664886683 [https://perma.cc/72ER-SN3X] (reporting that § 4968 applied to thirty-three schools and generated $68 million in revenue); *What Is the Tax Treatment of College and University Endowments?*, TAX POL'Y CTR. (Jan. 2024), https://taxpolicycenter.org/briefing-book/what-tax-treatment-college-and-university-endowments [https://perma.cc/R2PT-23HB] [hereinafter TAX POL'Y CTR.] (noting that in 2022 "the tax raised $244 million from 58 institutions"); Phillip Levine, *How Trump Could Devastate Our Top Colleges' Finances*, CHRON. HIGHER EDUC. (Jan. 13, 2025), https://www.chronicle.com/article/how-trump-could-devastate-our-top-colleges-finances [https://perma.cc/M49B-B25N] (noting that "56 colleges paid this tax, raising $380 million in revenue").

inside or outside the law's reach.[99] Some recommended that federal funds be targeted more directly to under-resourced institutions and low-income students.[100]

Despite recognizing the law as poorly designed, few advocated outright repeal. Indeed, many legal academics came to embrace some version of an endowment tax as preferable to alternatives such as mandatory distribution rules or new reporting requirements.[101] Their analyses were sophisticated, grounded in economic modeling and statutory detail, but often sidestepped the deeper normative questions at the heart of the debate. They became mired in niche conceptual disputes, such as whether the exemption of endowment income was a "subsidy," or simply a normal component of the baseline structure of the tax code.[102] Were universities properly compared to corporations, with similar "abilities to pay" and comparable use of government benefits?[103] Was the real issue distributive justice, egalitarian fairness, or something else entirely? By framing the debate in terms of efficiency, subsidies, or vague notions of "fairness," policy experts often obscured the political ideals that were really driving the controversy.[104]

Whether despite or in spite of these trends, by the early 2020s, it was clear that the endowment tax had become a political symbol more than a coherent policy. Congress could not agree on what problem it was meant to solve, universities could not persuade lawmakers to repeal it, and the tax policy community could not agree on what should replace it. In the meantime, the tax's fiscal impact was modest: the IRS reported only $692 million collected between 2021 and 2023, a rounding error for both the

99. BAUM, *supra* note 80, at 9; *see also* Fishman, *supra* note 18, at 189–94.

100. BAUM, *supra* note 80, at 10.

101. *See, e.g.*, Waldeck, *supra* note 81, at 1813–18; Zelinsky**,** *supra* note 18 (arguing that Congress clearly intends to extend the private foundation regime to universities and other public charities).

102. *See, e.g.*, Daniel Halperin, *Tax Policy and Endowments—Is Excessive Accumulation Subsidized? (Part II)*, 67 EXEMPT ORG. TAX REV. 125 (2011) (framing the normative policy issue as whether "the income tax exemption for investment income of charities is a departure from normal tax principles and hence a subsidy").

103. Zelinsky**,** *supra* note 18, at 144 (arguing generally that the endowment tax debate hinges on whether universities are comparable to corporations or other organizations subject to a net investment income tax—whether they have similar "abilit[ies] to pay" and use the same level of government benefits).

104. *See* MURPHY & NAGEL, *supra* note 19, at 103–12 (discussing spending versus saving fairness debate as an example of the issues involved in conceptual solutionist framings of inherently moral debates); Victor Thuronyi**,** *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155, 1163–70 (discussing the concept of income as applied to tax expenditures, and difficulty of framing the baseline debate).

schools and the federal budget.[105] But politically, the frustration kept building. It was in this atmosphere—of dissatisfaction on all sides, with no consensus on what universities owed the public and whether tax law should intervene—that Congress finally returned to overhaul § 4968 through the One Big Beautiful Bill Act of 2025.[106] As a result, beginning in 2026, the net investment income tax would apply to a broader set of universities and would operate under a tiered rate structure keyed to endowment assets per student, with rates ranging from 1.4 percent to 8 percent depending on the size of an institution's "student-adjusted endowment."[107]

Taken together, this brief history of university endowments and federal taxation provides some discursive insight into why an endowment tax remains such a contentious issue in federal tax policy. For more than a century, Congress, universities, and policy experts have wrestled with the same questions—whether endowments are too big, whether tax exemption is too generous, whether taxation can make universities better serve the public—without producing a stable or satisfying answer. Each new round of reform has promised clarity but instead has left behind frustration and confusion. Even today, arguments over § 4968 are framed in the language of fairness, efficiency, or loophole-closing, while the deeper commitments driving those arguments go unspoken. The result is a debate that feels at once highly technical and yet profoundly political, obscure in its details but heated in its stakes. It is precisely this tension—the recognition that every technical choice carries hidden normative weight—that demands a clearer way of making sense of what the university endowment tax is really about.

II. THE POLITICS OF POLICY DESIGN

It is tempting to dismiss the university endowment tax debate, to write it off as the product of partisanship, ignorance, or disciplinary insularity. Yet this paper contends that this discourse should be taken seriously. When critics ask whether it is "fair" that Harvard is tax-exempt, whether wealthy universities serve enough students, whether they are indoctrinating their students, or whether exempting endowment income is economically efficient, they are all making fundamentally political claims. The problem is that these assertions are usually posed in ad hoc or rhetorical terms,

105. Korn & Rubin, *supra* note 98 (reporting that § 4968 applied to 33 schools and generated $68 million in revenue); TAX POL'Y CTR., *supra* note 98 (noting that in 2022 "the tax raised $244 million from 58 institutions."); Levine, *supra* note 98 (noting that "56 colleges paid this tax, raising $380 million in revenue").

106. Pub. L. No. 119-21, § 70415, 139 Stat. 72, 221–23 (amending I.R.C. § 4968).

107. I.R.C. § 4968 (2026). See *infra* Part III for further discussion of exact changes made to § 4968 pursuant to the One Big Beautiful Bill Act.

without a shared language for discussing them in the context of federal taxation. And the conventional language of tax policy—its technical categories, economic framings, and institutional design choices—tends to obscure rather than illuminate the normative values at stake. Debates about whether and how to tax university endowments usually collapse into a narrow focus on the tax rate, niche conceptual disputes about the structure of the tax system, or on the fairness of paying a tax that someone else escapes.

This Part attempts to cut through the noise and make sense of the chaos by introducing a framework for understanding what everyone is *really* talking about in the endowment tax debate. Drawing on familiar currents in Anglo-American political philosophy, it offers a way to translate the structural features of tax law—thresholds, bases, rates, and technical definitions—into the political values they embody.[108] Applied to the university endowment tax, this framework shows how tax policy design choices encode competing visions of the university's role in democratic society and of the state's authority to shape that role. It helps explain why tax law has become the unlikely battleground for disputes about higher education and provides a common vocabulary for understanding the arguments most often heard in this debate. More importantly, it offers a means for systematically evaluating, comparing, and prioritizing competing university endowment tax reforms and their component elements.

A. Political First Principles

Tax law is never only about revenue. Choices about who is taxed, what counts as taxable, and how heavily to impose liability inevitably embody judgments about how institutions should be organized and what obligations they owe to the public. The problem is that these judgments are rarely made explicit. They surface indirectly, in arguments about fairness, efficiency, economic prediction, or institutional legitimacy, without a shared vocabulary for connecting technical design to normative principle. Political theory offers a way to make these commitments visible.[109] By distilling

108. The typological framework introduced in this paper is modeled, in the first instance, on a conceptual approach introduced by Roberta Romano in her 1984 essay, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923 (1984). However, because this Article incorporates insights from more recent scholarship on distributive justice and egalitarianism, some of its conceptual parameters diverge from Romano's original framework. As a result, while the "typology of democratic ideals" presented here remains closely aligned with Romano's metapolitical approach, it has been updated and adapted to better address the tax policy issues central to the current debate on university endowment taxation.

109. *See* Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395 (1997) (summarizing prominent political and

recurring patterns of thought into a simple set of first principles that are commonly found in democratic political philosophy, this Part provides the conceptual tools for interpreting the values embedded in endowment tax design.

1. Two Axes of Political Organization

At a high level of generality, democratic political ideals can be understood as emerging from two fundamental concepts: what Roberta Romano succinctly describes as "organization" and "community."[110] The concept of *organization* refers to the structures, processes, and relationships that enable individuals to cooperate within social settings. *Community*, by contrast, pertains to the political subject of society—shaping how one defines individuals, families, charities, or corporations and whether they are recognized as real, knowable, and politically relevant entities. To simplify the classification of political ideals, this Article defers to Romano's classification scheme and presents organization and community as having two distinct modes, though it recognizes that in reality, policy values are rarely so neatly divided. This framework nonetheless provides a useful map for understanding complex fiscal and institutionally-oriented statutes like the federal endowment tax. By crossing the modes of organization with those of community, one can identify the core orientations that have long structured debates about law, taxation, and the role of institutions like universities.[111]

a. Organization: Hierarchical vs. Decentralized

The first axis in this Article's framework concerns organization—the ways in which authority and decision-making are structured. At one end is

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economic theories of charitable tax-exemption); *see also* Fleischer, *supra* note 19 (noting that tax scholarship tends to focus on utilitarian theories of tax policy); Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601 (2011) (incorporating concepts from the "equality of what" debate into analysis of § 501(c)(3) as a tax subsidy); Philip T. Hackney, *What We Talk About When We Talk About Tax Exemption*, 33 VA. TAX REV. 115 (2013) (using normative justifications for corporate income taxation to analyze why federal tax law might exempt certain associations from the income tax); Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998) (proposing that tax-exempt status is a form of sovereign recognition similar to federal exemption of state instrumentalities).

110. Romano, *supra* note 108, at 926 (drawing these two principles from Oliver Williamson's *Markets and Hierarchies* (1975)). *But see* MIRJAN R. DAMAŠKA, *Organization of Authority: The Hierarchical and the Coordinate Ideals*, *in* THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS 16 (1986) (incorporating Williamson's dimensions to create a slightly more complex framework of political ideals behind the legal process).

111. Romano, *supra* note 108, at 927.

the *hierarchical* model, in which power is concentrated, roles are specialized, and control flows from the top down.[112] At the other is the *decentralized* model, where authority is dispersed and coordination occurs through markets, networks, or peer-to-peer arrangements.[113] Federal tax law reflects both modes. For example, the Code provisions governing charitable organizations (those classified under § 501(c)(3)) divide these organizations into two types: private foundations and public charities. Through a series of intermediate sanctions and excise taxes, the Internal Revenue Code effectively creates a hierarchical, class-based structure within the charitable sector.[114] While public charities are afforded substantial institutional autonomy, private foundations are subject to strict payout requirements and intensive regulatory oversight, rendering them functionally "second-class" institutions.[115] The Code's assignment of tax liability likewise tracks internal governance structures: corporations—where decisionmaking authority is centralized in managers and boards rather than dispersed among owners—are taxed at the entity level,[116] whereas partnerships, in which ownership and control remain largely unified, are taxed on a pass-through basis, allowing income and losses to flow directly to individual partners.[117]

Political ideologies often favor a particular mode of organization based on its *functional* attributes—namely, how effectively that mode allocates

112. *Id.*; Herbert A. Simon, *Organizations and Markets*, 5 J. ECON. PERSP. 25, 27–38 (1991) (describing hierarchical organizations as boundedly rational, authority-based, information- and coordination-intensive systems for structuring behavior and decision-making, and arguing that private internal hierarchies, and not markets, constitute the primary structure of the modern organizational economy).

113. Michael Y. Lee, *Enacting Decentralized Authority: The Practices and Limits of Moving Beyond Hierarchy*, 69 ADMIN. SCI. Q. 791, 794 (2024) (noting that in decentralized organizations, authority is exercised by a wider and broader group of organizational members than it is in rank-based structures).

114. *See e.g.*, Boris I. Bittker, *Should Foundations Be Third-Class Charities?*, *in* THE FUTURE OF FOUNDATIONS 132 (Fritz F. Heimann ed. 1973).

115. I.R.C. § 4942 (establishing the mandatory distribution requirement for private foundations, which mandates that they distribute at least 5% of their net investment assets annually for charitable purposes); Simon, Dale & Chisolm, *supra* note 31, at 272 (describing the private foundation rules as signifying the "second-class" status of foundations in the tax law of charity).

116. I.R.C. § 11 (imposing income tax at the corporate entity level). *See generally* Reuven S. Avi-Yonah, *Corporations, Society, and the State: A Defense of the Corporate Tax*, 90 VA. L. REV. 1193 (2004) (canvassing and defending the view that entity-level corporate taxation is justified as a regulatory tool aimed at corporate management, particularly where ownership is dispersed and managerial decisionmaking is decoupled from shareholders, and arguing that taxing corporations directly can limit managerial power and agency costs that corporate law alone cannot adequately control).

117. *See, e.g.*, Luna v. Comm'r, 42 T.C. 1067 (1964) (outlining factors for determining the existence of a partnership, including the mutual agreement to share profits and joint control over the business). However, a partnership can elect to be treated as a corporation under the Check-the-Box Rules. Treas. Reg. § 301.7701-3(c)(1) (2024).

scarce resources and achieves a desired distributional outcome.[118] These considerations frequently shape tax policy debates, where commentators rely on microeconomic theory to assess the distributional effects of various reforms. For example, some scholars justify § 501(c)(3)'s prohibition against private inurement as a "nondistribution constraint" that prevents individuals with a financial stake in an organization from diverting profits away from its intended beneficiaries.[119] Similarly, the long-standing debate over whether it is more efficient to tax corporations or their shareholders reflects competing hierarchical and decentralized perspectives on federal income tax administration.[120]

In the functional sense, hierarchical arrangements are often valued for their efficiency—reducing transaction costs and allocating risk among an organization's members—while also being cast as Pareto-superior moves.[121] Yet organizational modes also carry *relational* significance, because they structure social phenomena such as class and status.[122] Cases such as *United States v. Windsor* illustrate how tax policy conflicts frequently turn on differing normative views about the value of social equality and hierarchy, and on how such principles are expressed in the law's recognition of particular groups.[123]

b. Community: Organic vs. Individualist

The second axis of this Article's framework is community—the way tax law conceptualizes the subjects of political life. One pole is *individualist*, treating persons as the fundamental units of analysis, and in turn viewing associations—families, universities, corporations—as mere aggregates of

118. *See* Eva M. Witesman, *Centralization and Decentralization: Compatible Governance Concepts and Practices*, *in* OXFORD RESEARCH ENCYCLOPEDIA OF POLITICS (Oct. 27, 2020) (discussing distributional benefits of hierarchical and decentralized organizational forms).

119. Hansmann, *supra* note 76, at 56.

120. *See, e.g.*, Richard M. Bird, *Why Tax Corporations?*, Bull. for Int'l Tax'n, May 2002, at 194; Daniel N. Shaviro, Decoding the U.S. Corporate Tax 4, 11 (2009); Richard Goode, The Corporation Income Tax 26 (1951); J. Gregory Ballentine, Equity, Efficiency, and the U.S. Corporation Income Tax 7 (1980).

121. R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

122. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2321–24 (1997) (discussing status groups and social hierarchy); *see also* Dan Wielsch, *Relational Justice*, 76 LAW & CONTEMP. PROBS. 191 (2013).

123. United States v. Windsor, 570 U.S. 744, 770 (2013) (explaining that "[t]he avowed purpose and practical effect of the law here in question [denial of federal estate tax exemption to spouse] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States").

individuals with no independent standing.[124] Under the individualist perspective, the primary purpose of collective settings is to facilitate individual experiences. As a result, individualists regard families, universities, nonprofit corporations, and even the broader concept of "society" as mere collections of individuals, with no intrinsic value beyond their members.[125] In contrast, *organicism*—the other mode of community—regards associational forms as entities with their own purposes and identities, distinct from and prior to the interests of their members.[126] Rather than treating associations as instruments for individual ends, organicists view them as ends in themselves, possessing inherent worth.[127] Accordingly, organic political ideals conceptualize private universities as having characteristics, preferences, and purposes distinct from—and prior to—those of their students, donors, faculty, and managers.

One of the most critical distinctions between organic and individualist ideologies lies in how they conceptualize preferences—specifically, which preferences count as politically relevant and how they are knowable.[128] In the individualist framework, personal preferences take precedence.[129] This view assumes that individuals, while not infallible, are best positioned to judge their own interests, making their assessments inherently more reliable than those of external actors who purport to speak on their behalf. Accordingly, individualist political ideals focus on designing structures and decision rules that aggregate individual choices rather than imposing collective judgments.[130] By contrast, organicism treats broader social groups—or even the state itself—as the primary units of concern,

124. *See* T. William Greene, *Three Ideologies of Individualism: Toward Assimilating a Theory of Individualisms and Their Consequences*, 34 CRITICAL SOCIO. 117 (2008) (describing individualism outside of typical American autonomy and rights context).

125. *Id.*

126. *See* Richard Bellamy & Dario Castiglione, *Three Models of Democracy, Political Community and Representation in the EU*, 20 J. EUR. PUB. POL'Y 206, 210 (2013) (instead using the term "solidarism" to conceive of citizens as part of the polity, "whose standing, interests and judgements are both separate and independent from them: they are 'incorporated' into the body politic, which can then act in their collective name").

127. *Id.*

128. Jack Crittenden, *The Social Nature of Autonomy*, 55 REV. POL. 35, 35–38, 42–43 (1993) (discussing the phenomenon in relation to individuals).

129. *See, e.g.*, Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); *see also* KENNETH JOSEPH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951)

130. *See, e.g.*, MICHAEL SAWARD, THE TERMS OF DEMOCRACY 51 (1998) (describing the ideal form of democratic governance as a system that facilitates aggregation of individual preferences and ensures "correspondence between acts of governance and the equally weighted felt interests of citizens with respect to those acts").

prioritizing collective preferences over the sum of individual ones.[131] Under this view, the collective good is determined by the group's interests, which need not correspond to those of its individual members. [132] Organicists assume that such preferences are objectively knowable and independent of fluctuating personal desires. Because collective and individual interests are presumed naturally to align, organic theories see little need for coalition-building or negotiation. Conflict is treated as illusory, and deliberation as unnecessary, since the interests of the group are understood to exist apart from and above those of its constituent members. [133]

The structure and substance of federal tax law embrace both visions of community, individualist and organic. On the one hand, a sole proprietorship is treated as a disregarded entity, with its income attributed directly to the individual owner.[134] On the other, corporations are taxed as separate entities, with obligations and rights that attach to the organization itself.[135] Similarly, § 501(c)(3) presumes that charities and universities exist to serve a "public" rather than private interest, reflecting an organic vision of community in which the institution has obligations that extend beyond the preferences of its students, donors, or managers.[136]

B. Typology of Ideals

Combining these two conceptual dimensions—organization and community—creates a framework for translating tax design choices into political ideals. The result of their cross is four categorical political ideals. Hierarchical organization paired with organic community produces *corporatism*; hierarchical organization with individualism produces *market*

131. Roland Paris, *The Right to Dominate: How Old Ideas About Sovereignty Pose New Challenges for World Order*, 74 INT'L ORG. 453, 459–61 (2020); *see also* Slawomir Fundowicz, *Public Law Corporations in the Theory and Practice of German Law*, 7 REV. COMP. L. 89, 104–09 (2002) (describing organicism's influence in German corporate law and politics during the late 19th and early 20th centuries).

132. Paris, *supra* note 134, at 460.

133. Romano, *supra* note 108, at 930–31.

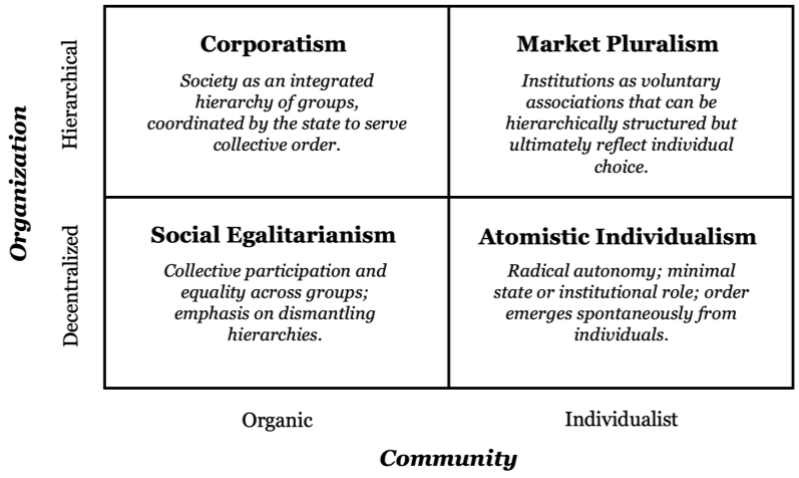
134. Treas. Reg. § 301.7701-2(c)(ii).

135. Corporate taxation is primarily governed by Subchapter C of the Internal Revenue Code, particularly I.R.C. § 301 through I.R.C. § 385, which address various aspects of corporate income, distributions, and deductions. Notably, corporations are unable to deduct distributions to shareholders. This rule is outlined in I.R.C. § 162 (regarding ordinary and necessary business expenses) and is further clarified by Treas. Reg. § 1.301-1(a) (providing for general rule regarding treatment of distributions to shareholders).

136. Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (requiring that a § 501(c)(3) organization "serve[] a public rather than a private interest"); *see* HILL & MANCINO, *supra* note 26, at ¶ 4.02 (defining a "charitable class" as a group of individuals who are not limited or restricted, ensuring that the organization operates for a charitable purpose and benefits a sufficiently broad and indefinite group of people).

pluralism; decentralized organization joined with organic community produces *social egalitarianism*; and decentralization coupled with individualism produces *atomistic individualism*.[137] These four categories, while stylized, capture recurring patterns in both political theory and tax policy. Their core concepts are already implicit in federal tax law's treatment of corporations, charities, and individuals, and they supply a neutral vocabulary for analyzing reforms without collapsing into partisan labels. Framed this way, the typology becomes a tool for interpreting the values embedded in § 4968 and its reform proposals, and for clarifying the competing visions of the university's place in American society embedded within them.

FIGURE 1. TYPOLOGY OF POLITICAL IDEALS



1. Corporatism

The corporatist political ideal envisions society as an integrated hierarchy of groups—churches, unions, professional guilds, universities—each performing a state-recognized role in maintaining order.[138] Corporatism advocates for the organization of society as an interconnected

137. Romano's framework refers to four ideals—corporatism, pluralism, participationism, and atomistic individualism. *Id.* However, this Article's framing of the second and third ideals does not align with Romano's framing. It rejects participationism's deconstructive approach to institutions and does not distinguish between welfarist and minimal state theories of pluralism, instead viewing them as fundamentally similar ideologies. Accordingly, it assigns different labels to these categories.

138. Philippe C. Schmitter, *Still the Century of Corporatism?*, *in* TRENDS TOWARD CORPORATIST INTERMEDIATION 7, 15–16 (Philippe C. Schmitter & Gerhard Lehmbruch eds., 1979).

hierarchy of associational forms—such as businesses, labor unions, and professional organizations—in which each group plays a unique, state-sanctioned role in maintaining social order and economic stability.[139] Fusing together public and private spheres,[140] politics and the economy, corporatist societies involve extensive central planning[141] and place significant authority in government agencies, industry associations, and individual associations.[142] Corporatism also advocates for a collective approach to economic transactions and policymaking, in which groups and institutions engage in collective bargaining on the basis of their common interests.[143] It regards these associations as organic entities whose obligations transcend their individual members. However, the ideology holds that each individual should occupy a distinct functional niche within the broader political economy.[144] Hierarchy is valued for stability, cohesion, and the reduction of conflict through structured interdependence.[145]

Historically, corporatism has been associated with modern Catholic political theory and social movements, especially the Church's early twentieth-century goal of creating an organic state that could facilitate the "Christian restoration of society in a Catholic sense."[146] These ideals were most clearly articulated in papal encyclicals such as *Rerum Novarum* (1891) and *Quadragesimo Anno* (1931), which envisioned a corporatist social order structured through interlocking associations operating under the Church's moral authority.[147] Developed in response to the perceived failures of

139. *Id.* at 15.

140. *See* ALAN CAWSON, CORPORATISM AND POLITICAL THEORY 38–39 (1986) (claiming that corporatism's "distinctive" feature is "the fusion of representation and intervention in the relationship between groups and the state," so that "interest representation and policy implementation" are inextricably combined).

141. *Id.* at 84–123 (explaining macro-, meso-, and microcorporatism).

142. *Id.* at 26–37 (describing corporatism as the institutional tendency of recognizing vital producer groups and bringing them into a privileged, stable relationship of "collaboration" in particular policy areas).

143. *Id.*

144. *See* Schmitter, *supra* note 138, at 15 (describing corporatism's commitment to the use of state power to foster a spirit of cooperation among state-sanctioned, functionally organized groups that would make possible the creation of "an organically interdependent whole"); *see also* CAWSON, *supra* note 140, at 36–37 (describing the primary characteristic of private corporatist groups as their monopolistic capacity for self-regulation, delivering on negotiated agreements, and both controlling and disciplining their members).

145. Ellis W. Hawley, *The Discovery and Study of a "Corporate Liberalism,"* 52 BUS. HIST. REV. 309, 312–15 (1978).

146. John Pollard, *Corporatism and Political Catholicism: The Impact of Catholic Corporatism in Inter-War Europe*, *in* CORPORATISM AND FASCISM: THE CORPORATIST WAVE IN EUROPE 42, 43-55 (Antonio Costa Pinto ed., 2017) (internal quotations omitted). *See generally* Paul S. Adams, *Corporatism and Comparative Politics: Is There a New Century of Corporatism?*, *in* NEW DIRECTIONS IN COMPARATIVE POLITICS 17, 28 (Howard J. Wiarda ed., 3d ed. 2002).

147. *See* Pope Leo XIII, Encyclical Letter, *Rerum Novarum* (On the Condition of Labor) (1891); Pope Pius XI, Encyclical Letter, *Quadragesimo Anno* (On Reconstruction of the Social Order) (1931).

unrestrained Western capitalism and Eastern socialism, Catholic corporatism presented a "third way" of political organization, one that could reduce alienation and social conflict by grounding economic and political life in common moral values and communal governance.[148]

Yet despite their appeal, corporatism's most promising features are also the source of the ideology's greatest risks. Because corporatism idealizes respect for authority, selflessness, and an essentialized conception of community, it can be invoked to justify authoritarian control under the guise of harmony and tradition.[149] In the twentieth century, corporatism was appropriated by authoritarian regimes in Europe, most notably in Italy, where the "Fascist corporate state" sought to organize economic and social life through compulsory syndicates while suppressing dissent.[150] These examples illustrate how corporatism's emphasis on unity and hierarchy can slide from moralized pluralism into coercive authoritarianism and exclusionary control.

2. Social Egalitarianism

The next category of ideals—social egalitarianism—emphasizes equality in both political participation and social standing.[151] It rejects entrenched hierarchies and insists that justice requires institutions to correct inequalities produced by luck, such as disparities of wealth, education, physical or mental disabilities, or status. Decision-making is participatory, inclusive, and decentralized, and institutions are held accountable to broad publics rather than narrow elites.[152] Social egalitarian ideals place particular

148. Pollard, *supra* note 146 at 42, 44–45, 47–49.

149. *See* Randall K. Morck & Bernard Yeung, *Corporatism and the Ghost of the Third Way*, 5 CAPITALISM & SOC'Y, issue no. 3, 2010, art. no. 2, at 5–6.

150. Laura Cerasi, *Rethinking Italian Corporatism*, *in* CORPORATISM AND FASCISM, *supra* note 150, at 103, 103–18.

151. The term *social egalitarianism* is ad hoc, though it generally aligns with relational egalitarian theories, such as those endorsed by Elizabeth Anderson and Samuel Scheffler, which prioritize equalizing political and economic relations in capitalist societies over the more "distributive" approach of luck egalitarianism. This category does not encompass all strains of egalitarianism, especially those in the more "liberal" vein. *See, e.g.*, Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999); Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFFS. 5, 33–34, 38–39 (2003) (differentiating his, Rawls's, and Anderson's versions of egalitarianism from luck egalitarianism); *see also* Thomas W. Pogge, *Relational Conception of Justice: Responsibilities for Health Outcomes*, *in* PUBLIC HEALTH, ETHICS, AND EQUITY 135 (Sudhir Anand, Fabienne Peter & Amartya Sen eds., 2004) (discussing the expressive aspects of relational justice).

152. Samuel Scheffler, *The Practice of Equality*, *in* SOCIAL EQUALITY: ON WHAT IT MEANS TO BE EQUAL 21, 25 (Carina Fourie, Fabian Schuppert & Ivo Wallimann-Helmer eds., 2015) (quoting Anderson's argument that societies should be structured so that individuals have the "dispositions" necessary to treat each other's "strong interests as playing [an equally] significant role . . . in constraining [their] decisions and influencing what [they] do.") Under this ideal, political and economic transactions

weight on dismantling structures of domination and ensuring that all members of society stand in relations of equality, not dependency or subordination.[153] However, social egalitarianism's emphasis on participation is not driven by an interest in individual autonomy. Instead, social egalitarians view direct participation as the most effective way to achieve a cohesive and harmonious society.[154]

This orientation has deep roots in modern democratic theory and social movements. Philosophers such as Elizabeth Anderson and Samuel Scheffler argue that economic inequality is *always* intolerable if it means *anyone* is excluded from political participation, or fosters "oppressive" social relations.[155] Egalitarianism also found practical expression in the leveling demands of nineteenth- and twentieth-century labor movements, in the push for universal suffrage, and in the civil rights and feminist struggles of the mid-twentieth century, which sought to eliminate forms of subordination rooted in race and gender.[156] The theory is especially compelling among progressive critics of higher education.[157] But social egalitarianism has also drawn criticism. Detractors argue that by emphasizing equal standing above all else, it can erode a sense of personal morality, social responsibility, or

occur through the process of "collective self-determination" via "open discussion among equals, in accordance with rules acceptable to all." Anderson, *supra* note 151 at 313.

153. *See* Anderson, *supra* note 151, at 313 (noting that "to stand as an equal before others in discussion means that one is entitled to participate, that others recognize an obligation to listen respectfully and respond to one's arguments, that no one need bow and scrape before others or represent themselves as inferior to others as a condition of having their claim heard"). *See generally* RICHARD S. KATZ, *Participationist Democracy*, *in* DEMOCRACY AND ELECTIONS 67 (1997); Jyl J. Josephson, *Higher Education and Democratic Public Life*, 42 NEW POL. SCI. 155, 156, 161 (2020); Luke Sinwell, What Universities Owe Democracy*, by Ronald J. Daniels, with Grant Shreve and Phillip Spector*, *Educ. as Change*, 26 EDUC. AS CHANGE, July 2022, art. no. 11705, at 2 (book review); Martin Paul Eve, *Introduction: The Abolition of the University*, 7 OPEN LIBR. HUMANS., issue no. 1, May 2021, art no. 10.

154. Anderson, *supra* note 151, at 313, 321–23 (describing a system of joint production).

155. *See id.* at 313–315; Scheffler, *supra* note 152, at 23–24.

156. *See* Nan D. Hunter, *In Search of Equality for Women: From Suffrage to Civil Rights*, 59 DUQ. L. REV. 125 (2021) (discussing varied visions of equality and perils of relying on egalitarian ideals in various social movements). *But see* Kate Andrias, *Constitutional Clash: Labor, Capital, and Democracy*, 118 NW. U. L. REV. 985 (2024) (arguing that the labor movement's original egalitarian ideals were subverted by a technocratic legalist regime).

157. Kristi Carey, *On Cleaning: Student Activism in the Corporate and Imperial University*, 2 OPEN LIBR. HUMANS., issue no. 2, Nov. 2016, art. no. e4; *see also* GAYE TUCHMAN, WANNABE U: INSIDE THE CORPORATE UNIVERSITY 21 (2009) (noting that along with other forms in which the university emphasizes business, the managerial attitudes of administrators and governing boards have introduced "different kinds of relationships with the professoriate. Increasingly, they try to govern them rather than govern with them"); Aziz Choudry & Salim Vally, *Lessons in Struggle, Studies in Resistance*, *in* THE UNIVERSITY AND SOCIAL JUSTICE: STRUGGLES ACROSS THE GLOBE 1, 9 (Aziz Choudry & Salim Vally eds., 2020) (arguing the corporatization of universities "divides the university community into a small group of highly paid managers and 'the rest of the staff' (academics and administrative)").

the sustaining bonds of family and community.[158] At its strongest, social egalitarianism can broaden participation and dismantle entrenched privilege; but at its limits, it risks imposing conformity, flattening diversity of institutional mission, and demanding uniformity in ways that can stifle social diversity and personal responsibility.

3. Market Pluralism

The third category in the typology is market pluralism. Market pluralism is grounded in individualism but recognizes the importance of voluntary associations as mediating institutions between the individual and the state.[159] As an ideology, it acknowledges the inherently social nature of individuals, advocating for rules and structures that hold individuals accountable for their choices within these shared contexts.[160] Crucially, it values voluntary and spontaneous interactions between individuals and groups over state-mandated arrangements.[161] Like corporatism, market pluralism endorses hierarchical features such as bureaucratic or technical expertise, but only if they are contained to voluntary private associations.[162] Thus, market pluralism emphasizes contractual freedom, private ordering (e.g., associational law), and incremental reform, while resisting efforts to impose centralized or homogenizing rules.[163] And while it accepts that government is the source of positive law—statutes, judicial decisions, and

158. Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271, 305–06 (2007) (describing Anderson's vision of equality as stipulative, because it requires that "relations of equality must endure, at every moment, from now on").

159. The term market pluralism is also ad hoc and is used to describe both luck egalitarian and libertarian political ideologies. Key liberal figures include Ronald Dworkin, Daniel Markovits, and G.A. Cohen, while Richard A. Epstein represents the libertarian perspective. This category is likely the broadest and most frequently referenced in legal scholarship.

160. *See generally* Ronald Dworkin, *What Is Equality? Part 1: Equality of Welfare*, 10 PHIL. & PUB. AFFS. 185 (1981); *see also* Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFFS. 283, 285 (1981); Amartya Sen, *Equality of What?*, in 1 THE TANNER LECTURES ON HUMAN VALUES 195 (Sterling M. McMurrin ed., 1980).

161. *See* Richard A. Epstein, *Decentralized Responses to Good Fortune and Bad Luck*, 9 THEORETICAL INQUIRIES L. 309, 311 (2007) (arguing that government policies should be reserved "for keeping individuals apart . . . so as to allow those who so choose to come together on voluntary terms for whatever . . . purposes they see fit"). *But see generally* Markovits, *supra* note 158, at 305–06 (describing voluntarism as being associated with luck and morally non-arbitrary uses of state power). *See also* Schmitter, *supra* note 138, at 15–16.

162. Romano, *supra* note 108, at 939–41.

163. *See generally* R. JEFFREY LUSTIG, CORPORATE LIBERALISM: THE ORIGINS OF MODERN AMERICAN POLITICAL THEORY, 1890–1920 (1982); H.G. SCHENK, THE MIND OF THE EUROPEAN ROMANTICS: AN ESSAY IN CULTURAL HISTORY (1979).

administrative rules—it resists the idea that the private sphere should be subordinated to the state.[164]

Instead, market pluralists see the private sphere as at least equally important in shaping politics and the economy.[165] In this vision, groups such as churches, civic organizations, and universities are valued for the diversity of purposes they embody and for the space they create for individuals to pursue their own conceptions of the good.[166] Consequently, market pluralism sees the role of law and government as "enabling" of the private sphere.[167] Social stability is achieved not by hierarchy or enforced equality, but by the coexistence of many competing institutions and sources of authority.

The strength of pluralism lies in its tolerance for diversity and its resistance to absolutism.[168] It also has deep roots in liberal political thought. Alexis de Tocqueville famously celebrated America's voluntary associations as the cornerstone of democratic life,[169] and modern pluralist theorists such as Robert Dahl argued that democracy thrives when political power is dispersed among multiple, competing groups.[170] In the twentieth century, pluralism has most famously shaped debates about free speech and expression, where competing interests were seen as balancing one another in a larger democratic order.[171] Critics, however, have long noted that pluralism's deference to existing distributions of power and focus on capturing "natural" human behavior risks entrenching inequalities: groups with greater resources or louder voices may dominate the field, while marginalized communities remain excluded under the guise of "voluntary"

164. *See, e.g.*, Richard A. Epstein, *Compounding Errors: Why Heightened Regulation and Taxation Are Bad Antidotes for Recessions and Income Inequality*, 17 THEORETICAL INQUIRIES L. 711, 723–25 (2016).

165. *See* Cowan, *supra* note 37, at 551; *see also* Atkinson, *supra* note 109, at 402–08.

166. *See* Fleischer, *supra* note 19, at 505, 529–36 (describing pluralist justifications for exemption under § 501(c)(3)).

167. Romano, *supra* note 108, at 941.

168. *See generally* ROBERT A. DAHL, DILEMMAS OF PLURALIST DEMOCRACY: AUTONOMY VS. CONTROL (1982); Neil W. Williams, *Absolutism, Relativism and Anarchy: Alain Locke and William James on Value Pluralism*, 53 TRANSACTIONS CHARLES S. PEIRCE SOC'Y 400 (2017) (discussing value pluralism as a political theory and check against absolutism).

169. Dana Villa, *Tocqueville and Civil Society*, *in* THE CAMBRIDGE COMPANION TO TOCQUEVILLE 216, 222–24 (Cheryl B. Welch ed., 2006).

170. *See, e.g.*, ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES: CONFLICT AND CONSENT (1967); ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971).

171. *See* MICHAEL J. GLENNON, FREE SPEECH AND TURBULENT FREEDOM: THE DANGEROUS ALLURE OF CENSORSHIP IN THE DIGITAL ERA 29–37 (2024); *see also* THOMAS HEALY, THE GREAT DISSENT: HOW OLIVER WENDELL HOLMES CHANGED HIS MIND—AND CHANGED THE HISTORY OF FREE SPEECH IN AMERICA (2013).

competition.[172] Thus, the theory tends to have little appeal for those who desire reform.

4. Atomistic Individualism

The final category—atomistic individualism—represents the most radical expression of individualist and decentralized ideals. Atomistic individualism denies that groups, institutions, or even the state itself have intrinsic value, insisting that only individuals are politically real. From this perspective, collective goods and associations are treated with suspicion, and social order should emerge spontaneously from the uncoordinated actions of free persons.[173] In its more extreme forms, atomistic individualism rejects even the minimal state, denying that government should play a role in protecting or facilitating markets at all.[174] Any attempt to privilege or penalize institutions—whether universities, unions, or corporations—is viewed as coercive interference in personal liberty. Instead, atomistic individualists embrace social, political, and economic arrangements that arise solely from convention or "spontaneous" interactions among individuals.[175]

Although rarely developed as a systematic doctrine in mainstream American political philosophy, atomistic individualism bears a close family resemblance to libertarian thought and to certain strands of classical liberalism.[176] For example, scholars such as Robert Nozick implicitly

172. *See, e.g.*, J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 375–79 (discussing progressive feminist critiques of First Amendment pluralism); *see also* Markovits, *supra* note 158, at 307 (criticizing responsibility-tracking liberal theory for assuming that distributive principles should "turn on a naturalized conception of moral responsibility").

173. *See* Tibor Machan, *Liberalism and Atomistic Individualism*, 34 J. VALUE INQUIRY 227 (2000) [hereinafter Machan, *Liberalism*] (describing atomistic individualism's theory of personality); *see also* Tibor R. Machan, *Atomistic Individualism: Anatomy of a Smear*, FOUND. FOR ECON. EDUC. (Oct. 1, 2003), https://fee.org/articles/atomistic-individualism-anatomy-of-a-smear [https://perma.cc/S9AM-3LKB] [hereinafter Machan, *Atomistic Individualism*].

174. Machan, *Liberalism, supra* note 173 (describing atomistic individualism's theory of personality); *see also* Machan, *Atomistic Individualism*, *supra* note 173 (claiming that "[n]o community, whether the family, tribe, ethnic group, club, religious order, nation, or humanity at large, has priority over the adult individual's personal responsibility to decide what to do in his life").

175. CHANDRAN KUKATHAS, *Individualism and Social Theory*, *in* HAYEK AND MODERN LIBERALISM (1989). It should be noted that not all social contract theorists are atomistic individualists (e.g., Hobbes, Rawls, Kant).

176. Agonistic theories of democracy, which treat conflict as constitutive of political life, are the closest fully elaborated democratic analogues to atomistic individualism. Although they reject liberal rationalism and do not fully embrace the extreme individualism associated with atomistic ideals, their agonistic model rests on the premise that political identities are never unified, that social totalities are always incomplete, and that antagonism is constitutive of the political itself. *See generally* ERNESTO

embrace atomistic individualist ideals when arguing that redistributive taxation is undesirable because it treats people as means rather than ends, and that the just state is a "minimal state" constrained to protecting rights rather than promoting social goods.[177] Atomistic individualism has also been reflected in political culture, especially in American frontier mythology and strands of populist resistance to centralized authority and redistribution.[178] It surfaces in calls to abolish the IRS or radically curtail the federal government's role, and in libertarian skepticism toward all forms of collective identity.[179] The strength of this view lies in its radical commitment to individual freedom and anti-elitist populist rhetoric.[180] However, such radical commitments are often criticized as pre-modern and impractical, incapable of sustaining the stability required for complex societies.[181] Moreover, atomistic individualism's emphasis on individual autonomy and perpetual conflict can be destabilizing—at times verging on

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LACLAU & CHANTAL MOUFFE, HEGEMONY AND SOCIALIST STRATEGY: TOWARDS A RADICAL DEMOCRATIC POLITICS (1985); CHANTAL MOUFFE, ON THE POLITICAL: THINKING IN ACTION 2–3, 10–15 (2005) (rejecting consensus-based democratic theory and arguing that "the political" is defined by ineradicable antagonism, the permanent instability of collective identities, and the need for institutions that transform antagonism into agonism rather than eliminate conflict). These commitments parallel this Article's account of atomistic individualism, which likewise denies the possibility of a harmonious or "sutured" social whole and instead treats political order as emerging from the contingent interactions of discrete subjects whose identities are formed through conflict rather than consensus.

177. George C. Christie, *The Moral Legitimacy of the Minimal State*, 19 ARIZ. L. REV. 31 (1977) (comparing Nozick's theory of minimal state autonomy, which recognizes political authority as legitimate, with Robert Paul Wolff's anarchy).

178. *See* Samuel Bazzi, Martin Fiszbein & Maximiliano Garcia, *The Moral Values of "Rugged Individualism"* 1–4, 10–11 (Nat'l Bureau of Econ. Rsch., Working Paper No. 32433, 2025) (identifying "rugged individualism" as a distinctive, persistent, and historically-rooted American political-cultural ideology, which combines strong individual autonomy and self-reliance with localist, in-group–oriented moral particularism that diverges sharply from the universalistic individualism characteristic of Western Europe; and showing that this ideological configuration is especially prevalent in American demographics exhibiting resistance to federal authority, higher opposition to redistribution, and localized social ties); Lisa L. Miller, *Racialized Anti-Statism and the Failure of the American State*, 6 J. RACE, ETHNICITY & POL. 120 (2021) (discussing how racial politics became aligned with delegitimizing state authority).

179. *See generally* JOSEPH J. THORNDIKE, THEIR FAIR SHARE: TAXING THE RICH IN THE AGE OF FDR (2013); Megan Brenan, *U.S. Confidence in Institutions Mostly Flat, but Police Up*, GALLUP (July 15, 2024), https://news.gallup.com/poll/647303/confidence-institutions-mostly-flat-police.aspx [https://perma.cc/W3E2-48EJ]

180. *See* Alexander Rifaat, *Vance's Tax Views Swing Toward Economic Populism*, TAX NOTES (July 16, 2024), https://www.taxnotes.com/featured-news/vances-tax-views-swing-toward-economic-populism/2024/07/16/7kh2x [https://perma.cc/4DJT-KY3N]; *see also* Press Release, U.S. House Comm. on Ways & Means, President Trump's Cease and Desist to IRS Protects Middle-Class Families and Small Businesses from IRS Audits and Weaponization (Jan. 23, 2025), https://waysandmeans.house.gov/2025/01/23/president-trumps-cease-and-desist-to-irs-protects-middle-class-families-and-small-businesses-from-irs-audits-and-weaponization/ [https://perma.cc/N3EL-JZDF].

181. *See* Machan, *Liberalism*, *supra* note 173, at 228–30.

a justification for exclusion or even violence.[182] By rejecting the importance of cooperative structures, the theory risks undermining the stability and shared institutions necessary for modern social and economic life.

Together, these four orientations—corporatism, social egalitarianism, market pluralism, and atomistic individualism—offer a vocabulary for interpreting how the structural and often substantively technical features of tax statutes embody deeper political ideals. They are not exhaustive, nor do they map perfectly onto partisan divides, but they capture enduring tensions in political thought about social hierarchy, economic inequality, personal autonomy, and the role of institutions in everyday life. With these categories in hand, we can turn to the university endowment tax itself. Part III applies this typology to the design of § 4968 and its proposed reforms, showing how seemingly technical or minor changes to the statute reflect competing visions of the university's role in American society.

III. THE IDEAL UNIVERSITY ENDOWMENT TAX

The typology outlined in Part II shows how design choices in tax law encode political ideals. This Part applies that framework to the endowment tax itself. Its analysis begins with § 4968 (2018) as originally enacted in the Tax Cuts and Jobs Act of 2017, the statute serving as the baseline against which subsequent endowment tax reforms can be measured. It then assesses both the current version of § 4968 (2026), as well as salient components of several major endowment tax proposals, including JD Vance's College Endowment Accountability Act,[183] and his Endowments or Encampments Act,[184] Senator Tom Cotton's WEST Act, [185] Representative David Joyce's HEAT Act, [186] Representative Drew Ferguson's Protecting American Students Act, [187] and the One Big Beautiful Bill Act (OBBBA). [188]

182. *Cf.* Murat İnce, *A Critique of Agonistic Politics*, 10 INT'L J. ŽIŽEK STUD. 1, 5–8 (2016) (arguing that agonistic theories of democracy draw a precarious and unstable distinction between productive antagonism and violence; noting that a politics grounded in perpetual antagonism can blur into justificatory frameworks for exclusion and delegitimization of opponents; and emphasizing that agonism's celebration of conflict, coupled with its rejection of rational consensus, generates internal contradictions that can open the door to violent or anti-democratic outcomes).

183. College Endowment Accountability (CEA) Act, S. 3514, 118th Cong. (2023).

184. Encampments or Endowments Act, S. 4295, 118th Cong. (proposed I.R.C. § 4969).

185. Woke Endowment Security Tax (WEST) Act, S. 3465, 118th Cong. § 2 (2023) (proposed I.R.C. § 4969). Cotton later reintroduced the bill in 2025 as S.936, 119th Cong. § 2 (2025) (proposed I.R.C.§ 4969).

186. Higher Education Accountability Tax (HEAT) Act, H.R. 9331, 118th Cong. (2023); *see also* Higher Education Endowment Tax Reform Act, H.R. 5152, 117th Cong. (2024) (providing for the same tax as the HEAT Act of 2023).

187. Protecting American Students Act, H.R. 8913, 118th Cong. (2024).

188. One Big Beautiful Bill Act, Pub. L. 119-21 § 70415, 139 Stat. 72, 76 (2025).

Incorporating these proposals, even though they were not enacted into law, is valuable not only as an exercise in understanding the political nuances of tax policy design, but also as a way of illuminating the architecture of the current version of the endowment tax. Although the OBBBA's legislative history contains little direct discussion of the policy motivations underlying the amendments to § 4968,[189] the statute's structure and drafting suggest that its architects were influenced by these prior proposals, each of which is supported by a more developed legislative record. Examining these earlier proposals therefore helps illuminate the deliberate design choices that ultimately shaped the revised university endowment tax.[190]

Rather than treating endowment tax reform as a purely technical exercise in designing statutes, this Part examines how the statute's core features—who is taxed, what is taxed, how heavily, and under what conditions—reflect competing visions of the university's role in American society. By analyzing the evolution of § 4968 and its proposed reforms through the lenses of corporatism, social egalitarianism, market pluralism, and atomistic individualism, this Part shows that debates over endowment taxation and legislative design are not so much about revenue generation or abstract tax principles as they are about rival normative claims concerning higher education and its place in American life. It does so by tracing, for each enactment and proposal, the statute's central design choices—the tax's unit (who is taxed), object (what is measured), and rate structure (how and under what conditions the burden is imposed)—to reveal the political commitments embedded in those choices. The analysis then demonstrates how these design elements can either clarify or obscure, and amplify or frustrate, the normative values the tax purports to advance.

A. Taxable Unit: Who Counts as Taxable

Every tax must begin by defining the *taxable unit*—the person or entity that the law treats as the taxpayer.[191] The choice of unit matters because it

189. The Congressional Record associated with the OBBBA contains virtually no deliberation regarding § 4968 and only limited commentary addressing the revisions enacted for taxable years beginning after 2025. Floor statements and committee materials largely restate the statutory changes without offering a sustained justification for expanding the scope or restructuring the rate of the endowment tax. *See, e.g.*, H.R. REP. NO. 119-###, pt. 2, at 1728 (2025) (Budget Committee) (providing single paragraph policy change while largely summarizing the mechanics of the revised excise tax); SENATE FINANCE COMMITTEE, SECTION-BY-SECTION SUMMARY 26–27 (describing the amendment to § 4968 without extended normative analysis).

190. I.R.C. § 4968 (2026) (as amended by One Big Beautiful Bill Act, Pub. L. No. 119-21, § 70415, 139 Stat. 72, 222–23 (2025)).

191. JOHN F. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 28–29 (1985).

determines not only who pays, but also how obligations are distributed across society. In some parts of the U.S. federal tax system, the statutory unit is the individual. Most natural persons have to pay income taxes (or at least report their income) every year, even when income arises through employment, business activity, or investment.[192] In fact, individual income taxes are consistently the most important tax revenue source in the United States.[193] In other statutory contexts, however, the tax unit is collective. The Internal Revenue Code treats a corporation as a separate taxable entity, even though it is legally composed of shareholders and managers.[194] Still other taxes look to households: the estate tax is levied on the estate as a legal unit at death,[195] while the gift tax is imposed on the donor rather than the recipient.[196] Each of these choices reflects normative judgments about how we conceptualize the relevant actors—whether as individuals, groups, or institutions—and about which relationships matter for allocating the responsibility of paying taxes.

The text of the Internal Revenue Code implements these judgments by specifying a cluster of economic and non-economic attributes to define the relevant unit for each type of tax. Those attributes are offered as proxies for desert or capacity—that is, reasons why a given entity should (or should not) be taxed. In the university endowment context, the most visible proxy is endowment, the resource's scope and content.[197] Section 4968 and its progeny rely on an ad hoc, statute-specific conception of "endowment" to define the universe of potential taxpayers, while employing endowment "size" as the threshold criterion for determining which institutions within that universe are subject to taxation and which are not. These design choices help explain why policy debates so often fixate on questions of

192. *See generally* I.R.C. §§ 1, 2, 61–63; *see also* AJAY K. MEHROTRA, MAKING THE MODERN AMERICAN FISCAL STATE: LAW, POLITICS, AND THE RISE OF PROGRESSIVE TAXATION, 1877–1929, at 191–289 (2013) (discussing the transition in American tax law from an asset-based to an owner-based unit of taxation).

193. *See* Cristina Enache, *Sources of U.S. Tax Revenue by Tax Type, 2025*, TAX FOUND. (May 29, 2025) https://taxfoundation.org/data/all/federal/us-tax-revenue-by-tax-type/ [https://perma.cc/FE59-W2PY] (showing that individual income taxes accounted for the largest share (39.95 percent) of U.S. tax revenue in 2023, whereas corporate taxes accounted for only 8.3 percent of revenues).

194. *See generally* BANK, *supra* note 49 (canvassing the development of corporate taxation from an aggregation model to an entity model).

195. *See* Anne L. Alstott, Commentary, *Family Values, Inheritance Law, and Inheritance Taxation,* 63 TAX L. REV. 123 (2009) (discussing whether the U.S. estate tax embraces a conception of family defined in liberal terms, in conventional terms, or in functional terms).

196. William C. Warren, *Correlation of Gift and Estate Taxes*, 55 HARV. L. REV. 1 (1941).

197. *See generally* Frances R. Hill, *University Endowments: a (Surprisingly) Elusive Concept*, 44 NEW ENG. L. REV. 581 (2010) (discussing how the legal and financial definitions of what endowment is differ, how these definitions and methods of endowment measurement are often institutionally dependent, making it difficult to translate endowment into something that can be captured by a federal tax).

measurement—how to define "endowment," what assets to include or exclude, and how large is "too large"—as though the central challenge of endowment taxation were merely one of objective valuation, [198] redistribution,[199] or conformity with generalized tax policy norms.[200]

But such perspectives are unnecessarily limiting. Choices about what counts as "endowment," which assets are really used to support students, as well as issues involving related entities, and who exactly qualifies as an "applicable educational institution" (AEI) all smuggle in value judgments about the ideal American university. Who belongs within its boundaries? What activities are treated as central to its mission? How should it relate to donors, affiliates, competitors, students, and the state? And why should tax law be involved in structuring these relationships? How § 4968 defines AEI and the rules for endowment valuation reveal—and often entrench—political positions about institutional form, social hierarchy, and public obligation. Paying close attention to these seemingly technical attributes shows that the "unit" of an endowment tax is not merely a neutral descriptor. It is really a choice about *governance*, about which universities count and on what terms they may participate in civil society.

1. Baseline: § 4968 (2018)

The original endowment tax, enacted as part of the Tax Cuts and Jobs Act of 2017, defined its taxable unit as an "applicable educational institution." To fall inside this category, a university needed to be an "eligible educational institution" under § 25A(f)(2) of the Internal Revenue Code,[201] with least 500 tuition-paying students, more than half of whom were located in the United States, and endowment assets of at least $500,000 per student.[202] Assets directly used for educational purposes—such as classrooms, laboratories, or libraries—were excluded from the

198. *See, e.g.*, Waldeck, *supra* note 81, at 1799; Halperin, *supra* note 102, at 5–6; Fishman, *supra* note 18, at 194.

199. Bird-Pollan, *supra* note 18, at 1068–74; Quinn, *supra* note 17, at 454.

200. Zelinsky, *supra* note 18, at 142–43.

201. I.R.C. § 4968(b)(1) (2018) (enacted by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13701, 131 Stat. 2054, 2164 (2017)). The term "eligible educational institution" under § 25A(f)(2) means an institution, (A) which is described in Section 481 of the Higher Education Act of 1965 (20 U.S.C. § 1088), as in effect on the date of the enactment of Section 481, and (B) which is eligible to participate in a program under title IV of such Act. An eligible educational institution is a school offering higher education beyond high school. It's any college, university, trade school or other post-secondary educational institution eligible to participate in a student aid program run by the U.S. Department of Education. This includes most accredited post-secondary institutions, whether public, nonprofit and privately-owned for-profit. *See* I.R.C § 25A(f)(2).

202. I.R.C. § 4968(b)(1) (2018) (enacted by Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 13701, 131 Stat. 2054, 2164 (2017)).

calculation.[203] Public schools were also excluded from the definition of AEI.[204] The practical effect of this construction was to single out a very small set of institutions, roughly forty of the largest and wealthiest private universities in the country.[205]

From a political-theoretical perspective, the statute's design reflects a hybrid form of *market pluralism* and *corporatism*. Rather than taxing universities based on the absolute size of their endowments, § 4968's original asset-to-student ratio implicitly acknowledges that some institutions were more expensive to operate than others.[206] The ratio captures not just wealth in the abstract, but the functional power of an endowment—its capacity to finance institutional activity. In this sense, § 4968's choice of unit echoes pluralism's respect for voluntary associations and their internal economic choices,[207] treating endowment accumulation as legitimate so long as it supported the institution's self-defined exempt purpose, itself construed only by the capacious terms of § 501(c)(3).[208]

Yet § 4968's original asset-to-student ratio also introduces a distinctly corporatist dimension into the statute's conception of the taxable unit. By relating the number of enrolled, tuition-paying students to the aggregate fair market value of endowment assets, the provision functions either as a rough proxy for educational spending or, more normatively, as a signal that spending on students should receive preferred tax treatment.[209] By measuring endowment wealth in relation to the size and composition of a school's student body—rather than by reference to alternative benchmarks, such as actual operating costs or an institution's own assessment of financial need—§ 4968's original definition of an applicable educational institution plainly favors certain institutional forms and patterns of endowment capacity over others.[210] The additional requirement that an institution enroll at least 500 tuition-paying students further reinforces what is, in effect, a

203. I.R.C. § 4968(b)(1)(d); Treas. Reg. § 53.4968–1(b)(5) (defining "used directly" by a facts-and-circumstances test; deeming property with 95% or more exempt use "exclusively" exempt-use and otherwise requiring reasonable allocation).

204. I.R.C. § 4968(b)(1)(c) (cross-referencing I.R.C. § 511(a)(2)(B) to exclude "any college or university which is an agency or instrumentality of any government or any political subdivision thereof, or which is owned or operated by a government or political subdivision").

205. JOINT COMM. ON TAX'N, *supra* note 92.

206. Waldeck, *supra* note 81, at 1800.

207. H.R. REP. NO. 115-409, at 422 (2017)(explaining that "[w]here the endowment of a private college or university has grown so large that it is not commensurate with the scope of the institution's activities in educating students, the Committee believes it is appropriate to impose a modest excise tax on the investment income derived from the endowment").

208. *See supra* notes 35–39 and accompanying text (discussing how the Code broadly construes charitable, educational, and other exempt purposes).

209. Waldeck, *supra* note 81, at 1800 (discussing the student to asset ratio as a more administrable metric than relying on institutional costs).

210. *Id.* at 1801–12.

tax-based hierarchy among private colleges and universities. By exempting a small class of institutions—such as Berea College—that maintain substantial endowments while serving low-income populations tuition-free, the original version differentiates among universities on the basis of institutional structure and mission, in addition to wealth.[211] The result is a subtle form of corporatism: one that uses federal tax law to disadvantage certain kinds of economic power, as well as subordinate particular institutional forms and behaviors—large, tuition-charging universities serving predominantly middle- and upper-income students—beneath others.[212] This structure closely aligns with corporatism's vision of society as an ordered hierarchy of groups, coordinated through more overt forms of state planning, and assigned differentiated roles and obligations to the public.

Seen this way, the 2018 version of § 4968 carves the private higher education sector into two classes, with the vast majority of institutions retaining full exempt status,[213] while a small group of elite schools are treated as a special public concern. This institutional hierarchy reflects a clear normative charge: if a university amasses very significant endowment wealth, it is expected—at least implicitly—to translate this economic capacity into broader public service, either by enrolling more students, enrolling more under-resourced students, or otherwise converting capital into access rather than prestige.[214] Unfortunately, however, the statute's cliffed, ratio-based unit test is a blunt and administratively brittle way to enforce that ideal. Because coverage turns on an annual snapshot of (i) an institution's assets counted (and excluded) for "direct," use (ii) the number of "tuition-paying" students, and (iii) the share of students located in the United States, and sets the assets per student ratio at a fixed dollar threshold, minor, often cosmetic changes could toggle a university's liability on and off without advancing the statute's underlying public objective.[215]

For example, institutions could reclassify assets as "used directly" for exempt purposes to reduce the taxable unit's denominator and avoid being

211. Fishman, *supra* note 18, at 192, note 3 (explaining that "tuition-paying" was added to the legislation in the February 2018 Bipartisan Budget Act, Pub. L. No. 115-123, 132 Stat. 64 (2018) to exempt Berea College from the excise tax.).

212. H.R. Rep. No. 115-409, at 422 (2017)(Explaining that the tax is aimed at the "many private colleges and universities" with "endowment balances [that] have increased dramatically" in recent years, while "college tuition has risen at rates in excess of the rate of inflation.")

213. I.e., subject to UBIT. *See supra* notes 40–44 and accompanying text.

214. *Supra* notes 207, 212.

215. *Id.* at 188.

classified as an AEI.[216] They could also increase scholarships or formalize tuition waivers to drop below the 500 "tuition-paying" students threshold.[217] Other routes included altering the timing or composition of enrollment (e.g., online versus in-person) to shift the per-student denominator or reorganizing international programs so that no more than half of students are located in the United States.[218] Even market volatility alone—changing asset values quarter-to-quarter—could push a school just above or just below the $500,000-per-student screen from year to year.[219] The result was a regime that symbolically ranked universities according to certain public values, while remaining highly sensitive to institutional accounting, classification, and timing choices. In practice, it allowed institutions that were adept at metric management, not necessarily those that meaningfully expanded access or redirected resources to students, to escape tax liability. Thus, § 4968's original taxable unit expressed a corporatist preference for a particular institutional form, but did so through fragile, easily gamed proxies that risked arbitrariness and invited strategic behavior—undercutting the very public-facing commitments the statute purported to enforce.

2. Major Proposals and Revisions

Subsequent proposals to revise § 4968 reveal how contested the definition of its taxable unit—applicable educational institution—has become. Each bill redraws the boundaries differently according to specific political preferences concerning how the U.S. private higher education system should be structured. Yet each continues to suffer from flaws in

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216. Treas. Reg. § 53.4968–1(b)(5)] (identifying as direct-use assets administrative assets, portions of buildings used for exempt work, classroom and research equipment and art on public display, a reasonable operating cash balance (roughly three months of program-service expenses, or more if justified), nominal-rent property furthering exempt purposes, and certain intellectual property; and excluding assets held for investment and property used to manage endowment funds; a framework that—given its nonexhaustive examples and "reasonable" safe harbors—leaves universities substantial discretion to classify assets, especially in light of their broad latitude to define educational and charitable purposes); *see also* Fishman, *supra* note 18, at 187.

217. Treas. Reg. § 53.4968–1(b)(3)(iii) (explaining that "[w]hether a student is tuition-paying is determined after taking into account any scholarships and grants provided directly by the educational institution or by the Federal government or any state or local government, and after application of any work study programs operated directly by the institution," but that such assistance provided by NGOs are considered payments by the students.).

218. Treas. Reg. § 53.4968–1(b)(4) (explaining that "[w]hether a student resided in the United States in any given year can be determined using any reasonable method, as long as that method is consistently applied.").

219. Fishman, *supra* note 18, at 175, 190 (noting how following the financial crisis, the returns for the largest endowments "were volatile, and there was substantial variation in the rate of return from year to year," and that large endowment returns tend to be more volatile than smaller ones).

translating these ideals into attributes that can be administered through the Code.

a. Narrowing to the Very Top

Several recent proposals have redefined "applicable educational institution" primarily by reference to endowment assets, departing from the statute's original definition, which used a per-student asset threshold of $500,000 combined with enrollment requirements to construct its taxable unit. For example, Vance's 2023 College Endowment Accountability Act proposes a top-up tax that would apply to "certain institutions"—those AEI's that have $10 billion in endowment assets, excluding those used directly for exempt purposes.[220] This move shifts the focus from relative measures of wealth per student to an absolute dollar figure, effectively targeting only a handful of the very largest institutions. [221] On a functional account, Vance's amendment could have reflected the view that universities with immense endowments were inefficiently hoarding resources, and that taxation would incentivize greater present spending.[222] On a normative account, it may have been designed to advance the judgment that institutions with wealth above a certain threshold deserved less favorable treatment than less well-endowed private schools. Both rationales resonate with current political sentiment toward private elite universities, [223] and both align with

220. College Endowment Accountability Act, S. 3514, 118th Cong. § 1(a) (2023).

221. According to *U.S. News & World Report*, there are fourteen universities with endowment assets of at least $10 billion: Harvard University ($50.7 billion), Yale University ($40.7 billion), Stanford University ($36.5 billion), Princeton University ($33.4 billion), Massachusetts Institute of Technology ($23.5 billion), University of Pennsylvania ($21.0 billion), Texas A&M University ($17.2 billion), University of Michigan–Ann Arbor ($17.1 billion), University of Notre Dame ($17.0 billion), Columbia University ($13.6 billion), Duke University ($11.6 billion), Washington University in St. Louis ($11.5 billion), Emory University ($11.4 billion), Northwestern University ($10.6 billion), and Johns Hopkins University ($10.5 billion). *See* Sarah Wood, *20 Colleges with the Biggest Endowments*, U.S. NEWS & WORLD REP. (Mar. 12, 2025), https://www.usnews.com/education/best-colleges/the-short-list-college/articles/universities-with-the-biggest-endowments [https://perma.cc/22B4-US4D]. This figure provides only a rough approximation of the institutions that would have fallen within the scope of Senator Vance's College Endowment Accountability Act, which sought to impose a tax on universities with endowment assets exceeding $10 billion but still allows them to exclude assets used directly for exempt purposes.

222. *But see* Waldeck, *supra* note 81, at 1805–12 (taking issue with an absolute value of endowment, in favor of an endowment-expense ratio, and seeing endowment-student ratio as a second-best option); *see also* Halperin, *supra* note 102.

223. *See* Fishman, *supra* note 18, at 185–86 (describing the perception among Republican critics that wealth has corrupted core values of higher education, such as respecting freedom of speech, teaching, and producing productive research); *see also* Ross Douthat, Opinion, *What Students Read Before They Protest*, N.Y. TIMES (Apr. 27, 2024), https://www.nytimes.com/2024/04/27/opinion/columbia-university-protests.html [https://perma.cc/5ZHV-VX7J] (writing that reading lists' 20th-century selections only cover the "progressive preoccupations and only those preoccupations: anticolonialism,

a *corporatist* perspective, which embraces centralized control of economic resources by the state and the construction of functional and normative hierarchies among institutions.

Today, this anti-wealth, pro-spending perspective finds many supporters in the tax policy space. However, there are other aspects of Vance's definition of AEI that may undermine support for its corporatist construction. Vance's bill excludes institutions that are "religious in nature," [224] a carve-out also found in Senator Tom Cotton's WOKE/"WEST" Act.[225] The House version of the endowment tax under the OBBBA went further, excluding from the definition of AEI "qualified religious institutions," which the bill defined as schools affiliated with a church or denomination, with a mission predicated on religious tenets and endorsed by its governing board.[226] Together, these selective approaches construct multiple tax-induced hierarchies: between religious and nonreligious institutions, and between institutionalized faith traditions and more pluralistic or nontraditional religious communities.[227] They also invite direct state entanglement in questions of theology, requiring the IRS to determine whether a university's mission is sufficiently religious. These features raise serious First Amendment concerns, especially under the church autonomy doctrine, which bars the state from second-guessing matters of belief and internal governance.[228] In trying to privilege religion,

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sex and gender, antiracism, climate."); Niall Ferguson & Jacob Howland, *What the Freshman Class Needs to Read*, THE ATLANTIC (Aug. 24, 2024), https://www.theatlantic.com/ideas/archive/2024/08/what-freshman-class-ought-be-studying/679530/ [https://perma.cc/EFV5-NE3X]; MATT GROSSMANN & DAVID A. HOPKINS, POLARIZED BY DEGREES: HOW THE DIPLOMA DIVIDE AND THE CULTURE WAR TRANSFORMED AMERICAN POLITICS (2024) (arguing that elite university curricula have played a major role in making minority or fringe viewpoints dominate public conversation).

224. S. 3514, 118th Cong. § 1(a) (2023) (defining AEI as an "applicable educational institution . . . which is not religious in nature . . . .").

225. Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. § 2 (2023) (replacing AEI with "specified applicable educational institution," which was defined as "any applicable educational institution, 19 other than an institution which is religious in nature . . . ."); H.R. 1, 119th Cong. § 112021 (as reported by H. Comm. on Ways & Means, May 20, 2025).

226. H.R. 1, 119th Cong. § 112021 (as reported by H. Comm. on Ways & Means, May 20, 2025). Specifically the requirements were that an institution "(A) established after July 4, 1776," "(B) that was established by or in association with and has continuously maintained an affiliation with an organization described in section 170(b)(1)(A)(i)," and "(C) which maintains a published institutional mission that is approved by the governing body of such institution and that includes, refers to, or is predicated upon religious tenets, beliefs, or teachings"). Part A appears designed to make sure that religiously affiliated Ivy League Schools were excluded. Dartmouth, the last of the religious Ivies, was founded in 1769.

227. *See, e.g.*, Lauren Libby, *Nice Endowment You Got There: Trump's "Big, Beautiful Bill" Is Coming for Elite Colleges' Money. The Consequences Would Be Unpredictable*, SLATE (May 22, 2025), https://slate.com/news-and-politics/2025/05/trump-big-beautiful-bill-pass-tax-endowment-republican.html [https://perma.cc/3BMT-2JKF].

228. In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, the Supreme Court developed its most robust theory of church autonomy doctrine, describing it as a constitutional immunity

the definitional constraints employed by Vance, Cotton, and the House amendment risk undermining religious liberty itself by empowering the state to define and police religious identity.

Examining these definitional choices also illuminates a broader tension built into tax policies that embrace corporatist ideals. On the one hand, policymakers may seek to make tax treatment as specialized and targeted as possible—ensuring that the "right" institutions are captured while others are spared, in the name of fairness or efficiency. Such a desire helps explain why so much of the scholarly literature on university endowments is devoted to questions of scale and university financing—when an endowment becomes "too big" and how tax rules might be crafted to single out those institutions for special treatment.[229] On the other hand, this impulse toward precise line-drawing risks turning tax law into a system of social control, blurring the line between personal choices and preferences and those the state seeks to impose or discourage.[230] That danger is most acute when tax statutes start to make narrow distinctions based on characteristics related to religion and educational choice, topics that many regard as deeply personal and outside the proper reach of government authority.

b. Broadening to More Institutions

Not all reform proposals embraced this narrow, top-targeted approach; others instead advanced a more expansive conception of institutional responsibility by broadening the definition of "applicable educational institution" to include a wider range of endowment-holding universities. Representative Joyce's Higher Education Accountability Tax (HEAT) Act did just this by proposing to lower § 4968's asset-per-student threshold from $500,000 to $250,000.[231] Whereas § 4968's original definition of AEI was narrowly tailored to capture only a few dozen of the wealthiest private universities, Joyce's change would have substantially expanded the circle

(dubbed the "ministerial exception" in the federal circuits when the immunity arises in the context of employment disputes) from government oversight that "interferes with the internal governance of the church." 565 U.S. 171, 188 (2012). The doctrine has been described by Carl H. Esbeck as standing for the proposition that "every church gets to choose its own polity." Carl H. Esbeck, *Church Autonomy, Textualism, and Originalism: SCOTUS's Use of History to Give Definition to Church Autonomy Doctrine*, 108 MARQ. L. REV. 705, 707 (2025).

229. *See* Waldeck, *supra* note 81, at 1799–1803; Fishman, *supra* note 18, at 189–90 (describing the overinclusive, underinclusive problem).

230. *See* Halperin, *supra* note 102, at 2 (stating that "a legislative directive mandating a particular level of distributions that would be sensible in all circumstances is difficult").

231. Higher Education Accountability Tax Act, H.R. 9331, §2(c), 118th Cong. (2023).

of institutions subject to the endowment tax, reaching mid-sized schools with more modest—but still significant—endowments.[232]

The logic of this definitional amendment aligns more closely with social egalitarian, rather than explicitly corporatist ideals. It assumes that allowing wealth to accumulate disproportionately in a few universities entrenches inequality in the higher-education sector, and that an excise tax redistributes public burdens more fairly.[233] The design reflects a view that universities with substantial resources have heightened obligations to make education more affordable and accessible—an echo of *social egalitarianism's* emphasis on deconstructing hierarchies and dismantling privilege.[234]

Yet broadening the scope of § 4968's taxable unit in this way carries notable risks. Endowments are not merely piles of unspent assets or rainy day funds—they also operate as clear signals of an institution's strength and stability, much like a corporation's market capitalization or credit rating signals its long-term viability to investors and counterparties.[235] Large endowments often reflect a university's long-standing reputation, its success in attracting talented students and faculty, and its ability to command donor support and even borrow.[236] By contrast, schools with

232. Press Release, Rep. Dave Joyce, Joyce Introduces Bill to Hold Elite Universities Accountable for Ballooning Student Debt, (Sept. 19, 2022), https://joyce.house.gov/posts/joyce-introduces-bill-to-hold-elite-universities-accountable-for-ballooning-student-debt [https://perma.cc/P7S9-3TXB] (estimating that the expanded definition of "applicable educational institution" would subject approximately sixty-five colleges and universities to the endowment excise tax, which in 2022 included schools such as Claremont McKenna College and the University of Richmond).

233. *Id.* (arguing that "America's elite universities . . . need to be held accountable for their role in our nation's ballooning student debt," and that universities with "larger" endowments are particularly problematic because they "are not more likely to reduce the list price of tuition, nor do they increase the fraction of students receiving institutional aid").

234. *Id.*

235. *See* Hill, *supra* note 197, at 585 (describing university endowments as "as working capital even though the principle will not be currently distributed" and how endowments have "multiple uses in long-term budgeting and in securing university borrowing, including bond indentures and other debt covenants").

236. *Id.*; *see, e.g.*, Michael T. Nietzel, *2023 Was a Year of Record-Breaking Mega Gifts for Higher Education*, FORBES (Jan. 3, 2024), https://www.forbes.com/sites/michaeltnietzel/2024/01/03/2023-was-a-year-of-record-breaking-mega-gifts-for-higher-education/ [https://perma.cc/3XT8-S2X3]; *2025 Best National University Rankings*, U.S. NEWS & WORLD REPORT (Sept. 22, 2025), https://www.usnews.com/best-colleges/rankings/national-universities [https://perma.cc/7EZL-3KQ9] (ranking Princeton University, Massachusetts Institute of Technology, Harvard University, Stanford University, and Yale University as the top five); *Graduate Employability: Top Universities in the United States Ranked by Employers 2026*, TIMES HIGHER EDUC. (Oct. 30, 2025), https://www.timeshighereducation.com/student/best-universities/graduate-employability-top-universities-united-states-ranked-employers [https://perma.cc/AP2B-UQLM] (ranking Massachusetts Institute of Technology, Stanford University, California Institute of Technology, Stanford University, University of California, Berkeley, and Harvard University as the top five U.S. universities for graduate employability); Peter Levine, *The Democratic Mission of Higher Education: A Review Essay*, 139 POL. SCI. Q. 95, 102 (2024) ("Students relentlessly compete for slots in institutions that vigorously compete with each other. Graduating from selective institutions is seen as a way of moving up the economic ladder—or at least, not moving down.").

small or nonexistent endowments often struggle with poorer student outcomes and weak reputations.[237] A policy that targets the former while sparing the latter may, in effect, punish institutions for succeeding in the higher education space, while ignoring those that have mismanaged their finances. It risks expanding state intervention in a way that creates moral hazard, discouraging prudent saving and long-term planning, while privileging short-term spending. Moreover, by narrowing the range of acceptable financial strategies, Joyce's HEAT Act pressures universities to adopt the same institutional model: larger or increasingly similar student populations, higher present spending, and less regard for the symbolic or strategic value of endowment accumulation. In doing so, it imposes a single set of values on an incredibly diverse sector—values defined and enforced by the state.

In the context of higher education, where diversity of mission and autonomy of institutional choice are central, social egalitarian policies threaten to undermine the very pluralism that sustains the sector. Educational research consistently shows that students do not learn best under a one-size-fits-all model.[238] Some benefit from small, seminar-style classes with close faculty interaction, while others thrive in large research universities where they can access laboratories, graduate students, and expansive course offerings.[239] This is why the higher education landscape includes liberal arts colleges with intimate cohorts, flagship state universities with large lecture courses, and institutions that deliberately mix

237. Alex Muresianu, *Should We Tax University Endowments?*, TAX FOUND. (Oct. 19, 2022), https://taxfoundation.org/blog/university-endowment-tax/ [https://perma.cc/Z5CZ-VB5W].

238. *See, e.g.*, Sarah Cohodes & Astrid Pineda, *Different Paths to College Success: The Impact of Massachusetts' Charter Schools on College Trajectories* (Nat'l Bureau of Econ. Rsch., Working Paper No. 32732, 2024), https://www.nber.org/papers/w32732 [https://perma.cc/EYD8-YU52] (emphasizing the necessity of diverse educational models to serve different student populations); Michael D. Smith, *Masters of None: The Flawed Logic of One-Size-Fits-All Education*, MIT PRESS READER (Mar. 3, 2023), https://thereader.mitpress.mit.edu/masters-of-none-the-flawed-logic-of-one-size-fits-all-education/ [https://perma.cc/52QP-4GHV] (highlighting Benjamin Bloom's research on how individualized mastery-learning students vastly outperform peers taught under conventional, uniform instruction).

239. *See Large or Small College?*, NAT'L ASS'N FOR COLL. ADMISSION COUNSELING (2025), https://www.nacacnet.org/large-or-small-college/ [https://perma.cc/MG67-TWF3] (explaining that small colleges emphasize close faculty contact and participation, while large universities appeal to students seeking independence, anonymity, and diverse course offerings); *see also* Peter Schmidt, *University Honors Colleges Pitch the "Liberal-Arts College Experience*,*"* CHRON. HIGHER EDUC. (Feb. 28, 2010), https://www.chronicle.com/article/university-honors-colleges-pitch-the-liberal-arts-college-experience/ [https://perma.cc/GBJ9-G4SG] (noting that honors colleges at major universities offer "small class sizes" and "faculty interaction" like a small college, coupled with "research opportunities" typical of large institutions).

the two.[240] Forcing all schools to adopt the same approach to class size or enrollment undercuts this pedagogical diversity.

Similarly, requiring universities to spend more of their endowment each year assumes that present spending is always better than saving—but that is not always true.[241] Research-intensive universities often need to preserve funds to support long-term projects or to smooth volatile federal grant cycles.[242] The fragility of this balance was illustrated dramatically when President Trump revoked certain streams of federal research funding, forcing universities with large scientific enterprises to scramble for cash and, in some cases, take on debt simply to maintain projects midstream.[243] Humanities-focused institutions, which lack the external revenue streams that STEM research attracts, may prudently save to maintain stable operations.[244] Other schools may hold back resources to fund future growth, or to prepare for demographic downturns in enrollment.[245] In these cases, lower current spending is a *deliberate* strategy to balance today's needs with tomorrow's obligations. And, for schools facing financial shortfalls due to federal funding cuts, unrestricted endowment assets can be pledged as

240. Schmidt, *supra* note 239 (reporting that honors colleges were designed to offer the "best of both worlds"—the intimacy of liberal-arts education within the scale and resources of large research universities).

241. *See, e.g.*, *Your Endowment Questions Answered*, NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS (Feb. 12, 2025), https://www.nacubo.org/Topics/Endowment-Management/Your-Endowment-Questions-Answered [https://perma.cc/KGA6-VZPV] ("For most institutions, significantly increasing spending from an endowment would be financially irresponsible and a move away from meeting long-term goals to provide stability over time."); *see also* Hill, *supra* note 197 (describing capital model of endowments).

242. *See, e.g.*, Ben Unglesbee, *Johns Hopkins University Self-Funds Some Research in Wake of Federal Cuts*, HIGHER ED DIVE (Apr. 29, 2025), https://www.highereddive.com/news/johns-hopkins-self-funds-endowment-research-grants-federal-cuts-trump-administration/746678/ [https://perma.cc/L4U2-ZQEM]; Kathryn Palmer, *Can Scientific Research Survive Without Federal Funding?*, INSIDE HIGHER ED (May 12, 2025), https://www.insidehighered.com/news/business/revenue-strategies/2025/05/12/can-scientific-research-survive-without-federal-funding [https://perma.cc/CK96-2S77]; Anne Krapfl, *University Funds Spur Progress for Defunded Research Teams*, IOWA STATE UNIV.: INSIDE IOWA STATE (Sept. 24, 2025), https://www.inside.iastate.edu/article/2025/09/24/university-funds-spur-progress-defunded-research-teams [https://perma.cc/HW6R-BH75].

243. Amanda Albright & Elizabeth Rembert, *Harvard, MIT Lead Elite Colleges' $4 Billion Debt Spree After Trump Threats*, BLOOMBERG (May 28, 2025), https://www.bloomberg.com/news/articles/2025-05-28/elite-colleges-go-on-4-billion-debt-spree-after-trump-threats [https://perma.cc/X2LJ-KTC4]; Cate Latimer, *Brown Takes Out $300 Million Loan Amid Federal Funding Uncertainty, Budget Deficit*, BROWN DAILY HERALD (Apr. 16, 2025), https://www.browndailyherald.com/article/2025/04/brown-takes-out-300-million-loan-amid-federal-funding-uncertainty-budget-deficit [https://perma.cc/3HFR-KRSA].

244. *See Research and Development Expenditures at Colleges and Universities*, AM. ACAD. OF ARTS & SCIS. (2024), https://www.amacad.org/humanities-indicators/funding-and-research/research-and-development-expenditures-colleges-and [https://perma.cc/JRZ7-WFCX] (Indicator IV-35d: Sources of Funding for Academic Research and Development in the Humanities and Other Selected Fields, Fiscal Year 2023).

245. *See* Hansmann, *supra* note 47, at 14–19 (discussing university strategies to achieve intergenerational equity, but ultimately questioning whether such equity is a normatively desirable goal).

collateral to secure loans from outside lenders.[246] Thus, treating all endowment accumulation as wasteful disregards these strategic choices and risks homogenizing institutional behavior in ways that weaken, rather than strengthen, the sector.

Framing the HEAT Act's redefinition of § 4968's taxable unit in social egalitarian terms reveals both the attraction and the risks of its design choices. The strengths of Joyce's conception of "applicable educational institution" lie in its capacity to dismantle entrenched privilege, ensuring that wealthier institutions bear greater obligations to the public. But when used as a model for endowment tax policy, its ideological bent risks flattening meaningful distinctions among institutions and enforcing uniformity. The lesson is that while social egalitarian ideals offer a powerful rationale for redistributing burdens, they also carry the danger of turning tax law into a tool for conformity—sacrificing institutional diversity and independent educational goals for the sake of equality alone.

c. Redefining "Student"

Another subtler, but no less significant strategy for amending § 4968's taxable unit involves altering how the denominator in the AEI's asset-per-student ratio is defined. The original version of § 4968 described an "applicable educational institution" using three criteria: at least 500 tuition-paying students, with more than half of those students located in the United States, and assets of at least $500,000 per student (excluding those directly used for educational purposes).[247] Representative Ferguson's Protecting American Students (PAS) Act proposed to revise this definition by tying the term "student" to the eligibility requirements of the Higher Education Act—specifically in § 484(a)(5) (20 U.S.C. § 1091(a)(5))—which limits eligibility for federal student aid to U.S. citizens, permanent residents, and certain other noncitizens.[248] At first glance, this change seems minor, even logical: why not borrow an existing definition from another education statute, especially one already used for allocating financial aid?

246. Hill, *supra* note 197, at 593–94 (explaining that although the Internal Revenue Code imposes a "prohibitory" tax on use of endowment funds to directly support tax-exempt bond issues, rating agencies nevertheless assess a university's creditworthiness by reference to all available assets, not merely those formally pledged to a particular debt issue, and noting that universities also borrow through non–tax-exempt credit arrangements in which endowment assets may be pledged as collateral).

247. I.R.C. § 4968(b)(1) (2018).

248. Protecting American Students Act, H.R. 8913, 118th Cong. § 2 (2024) ("CERTAIN STUDENTS NOT TAKEN INTO ACCOUNT FOR PURPOSES OF CALCULATION TO DETERMINE IF CERTAIN PRIVATE COLLEGES AND UNIVERSITIES ARE SUBJECT TO EXCISE TAX ON NET INVESTMENT INCOME.").

However, there was more to this amendment than aligning the endowment tax with other areas of education policy. The Higher Education Act's definition of "student" was crafted for a narrow purpose—determining which students qualify for federal loans and grants—not for measuring institutional wealth or tax liability.[249] By importing the HEA's definition of student into § 4968, Ferguson's PAS Act redefines "applicable educational institution" in citizenship-based terms. Foreign nationals would no longer count toward the unit's asset-per-student calculation.[250] By shrinking the denominator, Ferguson's amendment would push globally oriented universities—those enrolling large numbers of international students—over § 4968's taxable threshold, thereby expanding the endowment tax's reach.[251]

On its face, this reconceived taxable unit might appear social egalitarian in kind, because it ties institutional responsibility to serving American students, distributing resources in a way that seems more accountable to domestic publics. But in substance the bill's thrust is *corporatist* (as well as populist), privileging national belonging as the relevant marker of community. It encodes the view that universities enrolling "too many" foreign students are failing their public obligations, and that tax law should be used to discipline them into conformity with state-serving institutions.

The drawbacks of framing § 4968's taxable unit in corporatist-populist terms are considerable. Redefining "student" along citizenship lines imposes a hierarchy between domestic and international students, treating the education of the latter as less socially valuable. It also forces the IRS into politically fraught territory: requiring universities to report both their total enrollment and the number of "eligible" students under the new definition, effectively turning tax returns into a tool for political monitoring.[252] More troubling still, Ferguson and his cosponsors justified these changes in explicitly xenophobic terms, citing "malign foreign influence" as a rationale for excluding noncitizens from the denominator of § 4968's taxable unit.[253] This framing ignores the fact that the international character of student and faculty bodies has been a defining feature of American higher education since the mid–twentieth century, when the

249. *See, e.g.*, 1 H.R. REP. 99-383 (1985) (describing how the act "also requires that in order to be eligible to receive financial assistance a student must be a U.S. citizen or permanent resident, a requirement currently embodied only in regulations").

250. PAS ONE-PAGER, *supra* note 95.

251. *Id*.

252. H.R. 8913, 118th Cong. § 3(a) (2024) (amending I.R.C. § 6033(o)(1)).

253. PAS ONE-PAGER, *supra* note 95 ("Data and public reporting make clear that malign foreign influence, including some students present in the United States on temporary student visas, have directly contributed to the rise in antisemitic behavior on college campuses.").

United States deliberately positioned its universities as global centers of learning in the post-World War II era.[254] By tying tax eligibility to citizenship-based criteria, the PAS Act represents not just a technical amendment, but an effort to fundamentally transform the nature of the higher education sector—remaking universities as primarily national rather than international institutions.[255]

The desire to construct perfectly rational, efficient social and economic hierarchies, to make sure that universities operate more productively and fairly, and to bring tax law into conformity with the policy goals of higher education statutes is compelling. But, as the PAS Act's taxable unit illustrates, such seemingly rational policy changes can quickly collapse into exclusion, subordinating the autonomous, pluralistic, and global features of American higher education to state-enforced homogeneity. Social egalitarian ideals might support redistributing resources to "the public's" students, but when filtered through corporatist and populist logics, they help blur the boundary between fiscal policy and immigration politics. The lesson is that tax law, when designed around corporatist hierarchies of belonging, can quickly become a tool of social control, enforcing contested visions of identity in domains—like education and community membership—that many consider beyond the legitimate reach of the state.

d. Conditioning Status on Student Conduct

The most recent effort to redefine the "applicable educational institution" appears in the Encampments or Endowments (EOE) Act, which was introduced by then-Senator JD Vance in May 2024.[256] While other proposals preserved § 4968's original asset to student ratio,[257] the EOE Act reformulated the endowment tax's unit to focus narrowly on a very specific issue related to university governance. The proposal first amended the

254. *See, e.g.*, Hugo A. García & María de Lourdes Villarreal, *The "Redirecting" of International Students: American Higher Education Policy Hindrances and Implications*, 4 J. INT'L STUDENTS 126, 128 (2014); *see also* HILARY PERRATON, INTERNATIONAL STUDENTS, 1860–2010: POLICY AND PRACTICE ROUND THE WORLD 77–79, 106–09, 120–24 (2020) (noting how policy regarding competition was not always consistent in countries like the US, and there was some resistance to foreign students, especially after the 1990s).

255. For an in-depth study of the relationship between nationalist ideologies and the modern university, see JOHN AUBREY DOUGLASS, NEO-NATIONALISM AND UNIVERSITIES: POPULISTS, AUTOCRATS, AND THE FUTURE OF HIGHER EDUCATION 1–6, 9–11, 15–20 (2021) (arguing that modern universities are not autonomous institutions but have historically functioned as instruments of nation-building—educating state elites, shaping national identity, and serving as vehicles for ideological formation—and that they have been repeatedly co-opted by governments and populist movements, including authoritarian regimes, to consolidate political power).

256. Encampments or Endowments Act, S. 4295, 118th Cong. (2023) (proposed I.R.C. § 4969).

257. I.R.C. § 4968(b)(1) (2018).

Higher Education Act so that any university that failed to clear a "permanent encampment" (lasting more than seven days and interfering with core functions like instruction, research, or graduation ceremonies) from its campus would become ineligible for Title IV federal student aid.[258] Vance's bill then added a new section—§ 4969—to the Internal Revenue Code, which would impose a 50 percent excise tax on the endowment assets of any "disqualified educational institution."[259] The legislation defined this new taxable unit as any institution that was disqualified from Title IV funding as a result of campus disorder.[260] The addition of this second—and far more substantial—endowment tax would render a university's approach to managing student protest, rather than its financial profile, the primary determinant of liability under the federal excise tax regime.

An examination of the new taxable unit featured in Vance's second bill once again reveals a strongly *corporatist* orientation. It uses the redistributive power of tax law to create a stark hierarchy among colleges and universities, rewarding those that are willing to enforce state-sanctioned norms of order, while singling out those that tolerate dissent for fiscal punishment. Vance himself claimed the Act would "force colleges to follow the law [and] protect their students" from the threat of campus protests.[261] By conditioning § 4969's taxable unit on the expressive behaviors of a university's students, the EOE Act transforms an "endowment tax" into an instrument for regulating institutional ideologies. The risks associated with this policy strategy are considerable. The statutory changes blur the line between tax administration and the policing of speech and assembly, raising clear First Amendment concerns.[262] They place the IRS and Department of

258. Encampments or Endowments Act, S. 4295, 118th Cong. (2023) (proposed I.R.C. § 4969) (see proposed § 2 INELIGIBILITY DUE TO CAMPUS DISORDER. Part (a), the *Act*, stipulating that if a university allows a permanent encampment to remain on campus for at least seven days and the encampment's occupants "(1) have attempted to interfere with a core function of the institution . . . or (2) have obstructed the ingress or egress of students" it will be disqualified for funding).

259. *Id.* § 3 (proposed § 4969(a) and (b)(1) imposing new excise on "each disqualified educational institution", meaning those categorized as eligible educational institutions under I.R.C. § 25A(f)(2) that are also ineligible to receive funds under the Higher Education Act of 1965).

260. *Id*.

261. Jackson Walker, *Colleges with Protest Encampments Could Lose Federal Funds Under GOP Bill*, KMTR (May 9, 2024), https://nbc16.com/news/nation-world/colleges-with-protest-encampments-could-lose-federal-funds-under-gop-bill-sen-jd-vance-r-ohio-israel-palestine-gaza-protests-antisemitism-higher-education [https://perma.cc/XQ9K-FQZU] (quoting language from press release issued by Senator Vance's office in conjunction with the bill).

262. *See, e.g.*, Healy v. James, 408 U.S. 169 (1972) (holding the First Amendment precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large," but also holding that universities could prohibit students' associational activities that would "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain

Education in the business of monitoring expressive activity, effectively chilling protest by threatening universities with catastrophic fiscal consequences if they fail to suppress demonstrations.[263] In this way, the proposal illustrates how corporatist desire for social cohesion and the elimination of conflict can easily mutate into a form of authoritarian control and the suppression of dissent.

When directed at institutions of higher education in particular, such heavy-handed tax policy carries especially troubling implications. Student protests have repeatedly played critical roles in resisting authoritarianism—from the anti-apartheid movement in South Africa to the democracy uprisings of Eastern Europe, to the pro-democracy demonstrations in Hong Kong.[264] American universities themselves have long been sanctuaries for scholars fleeing repression, particularly in the post-World War II era, when émigré academics from fascist and communist regimes found refuge on U.S. campuses.[265] To weaken universities' capacity to tolerate dissent and protect vulnerable voices is to erode one of their most important functions: serving as a counterweight to authoritarian power at home and abroad.

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an education."); Papish v. Bd. of Curators, 410 U.S. 667 (1973) (holding that *Healy* made "clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency"). For discussion of First Amendment protections regarding protests in secondary schools, see, for example, Tinker v. Des Moines Ind. Cmty. Sch. Dist., 393 U.S. 503 (1969). *But see* Defoe v. Spiva, 625 F.3d 324, 339 (6th Cir. 2010) (holding that "racially hostile or contemptuous speech" can be restricted even if it is not disruptive).

263. *See, e.g.*, Regan v. Taxation with Representation, 461 U.S. 540, 461 (1983) (permitting § 501(c)(3)'s prohibition against lobbying but stating that such restrictions are only permissible when they are not targeted at the "content" of an organization's speech, thereby suggesting that viewpoint-based prohibitions in § 501(c)(3) are impermissible under the First Amendment); *see also* Speiser v. Randall, 357 U.S. 513, 519 (1958) (holding that "the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is frankly aimed at the suppression of dangerous ideas," although denying loyalty oath requirement for tax-exemption on due process grounds (internal quotations omitted)).

264. *See, e.g.*, Ian Macqueen, *Students, Apartheid and the Ecumenical Movement in South Africa, 1960–1975*, 39 J. S. AFR. STUD. 447 (2013) (discussing the role of South African Christian student organizations in raising Black Consciousness and resisting apartheid); *BSA Report on Academic Protests and Repression in Belarus*, EUR. STUDENTS' UNION (Feb. 26, 2021), https://esu-online.org/publications/bsa-report-on-academic-protests-and-repression-in-belarus/ [https://perma.cc/54F2-HBXS] (documenting state repression of academic freedom and student protest movements in Belarusian universities); Laignee Barron, *"I Absolutely Will Not Back Down." Meet the Young People at the Heart of Hong Kong's Rebellion*, TIME (Jan. 22, 2020), https://time.com/5765560/hong-kong-portraits/ [https://perma.cc/WH2S-3K6B] (profiling university students and other young activists who played leading roles in Hong Kong's 2019 pro-democracy movement, describing how campuses became hubs of political resistance).

265. *But see* Hannah Stamler, *WWII's Refugee Academics and the Myth of a Welcoming American Academy*, THE NATION (Feb. 26, 2020), https://www.thenation.com/article/culture/laurel-leff-well-worth-saving-book-review/ [https://perma.cc/J57K-RKTA] (examining the experiences of European refugee scholars in the United States during World War II and challenging the myth of an unconditionally open and welcoming American academy).

Examining the political valence of Vance's proposal reveals the difficulty inherent in using an endowment tax to tackle social conflict in private institutions. On one hand, tax's precision is attractive: it promises to target only those universities deemed disorderly, while sparing compliant ones. On the other, it starkly demonstrates how the core strength of corporatist tax policy interventions—their ability to organize private institutions so they align more closely with public values—can become liabilities. Instances in which particularly burdensome taxes are used to target education and speech reveal how corporatism's emphasis on central planning and collective harmony can morph into coercion, subordinating other values such as pluralism and autonomy to state-imposed conformity. And because universities and student protests have historically been vital sites of resistance to authoritarianism, weakening them in the name of order risks eroding one of the country's important counterweights to illiberal government power.[266] Thus while corporatist tax interventions, like many of the endowment taxes surveyed in this Article, can stabilize society by enforcing order, in contexts like higher education they risk destroying the very pluralism, autonomy, and dissent that make the sector valuable.

3. Current Law: § 4968 (2026)

A review of these proposals is useful not only as a theoretical exercise. It also allows us to better understand the political logic of the most recent revisions made to § 4968's taxable unit. The One Big Beautiful Bill Act (OBBBA) carried over some familiar features from earlier proposals, while also layering in new requirements into the statute's definition of "applicable educational institution."[267] Today's version of § 4968 retains the minimum $500,000 per-student asset threshold as part of its definition of AEI, as well as the requirement that at least half of students be located in the United States.[268] Both of these factors reflect themes already seen in the earlier proposals. The per-student wealth test reflects a mix of pluralism's respect

266. *See, e.g.*, Michael Ignatieff, *The Geopolitics of Academic Freedom: Universities, Democracy & the Authoritarian Challenge*, 153 DAEDALUS 194, 196 (2024) (noting that academic freedom in higher education has become "central to the self-definition of liberal democracy" and that "Private universities are one of the countermajoritarian institutions" that protect individuals against authoritarian regimes, and that academic freedom has come under "attack within democracies themselves by authoritarian populists who claim that democracy is simply majority rule.")

267. I.R.C. § 4968 (c) (2026) (definition of AEI: "Applicable educational institution.—For purposes of this subchapter, the term 'applicable educational institution' means an eligible educational institution (as defined in section 25A(f)(2) . . . .")).

268. I.R.C. § 4968(c)(2)–(4) (defining the same AEI requirements, although now the $500,000 student to asset ratio is calculated based on a "student adjusted endowment" test defined in part (d)).

for voluntary associations and their internal economic choices,[269] as well as a quasi-corporatist desire to make universities more efficient or occupy a prescribed social niche.[270]

The most notable amendment to § 4968's taxable unit has been the addition of a 3,000 tuition-paying student minimum.[271] The change has the effect of excluding small but wealthy institutions—elite liberal arts colleges with enormous per-student endowments, for example—from the reach of the tax. The amendment itself seems to reflect a persistent desire to target bigness and elitism. Now, only large institutions with the largest endowments will be subject to the endowment tax under § 4968. The chosen parameters for its taxable unit mean that only five institutions—Princeton, Yale, MIT, Harvard, and Stanford— which are often perceived as the nation's most elite schools,[272] will face the tax's highest bracket.[273] And while the tax's revenue-raising power is dubious,[274] its punitive nature has powerful populist appeal. It channels a familiar impulse to distrust entrenched authority—whether corporate, governmental, or academic—and taps into the broader American suspicion of concentrated wealth and power.[275]

Yet when this anti-bigness ideology is wielded by the state against private institutions rather than against itself, it takes on a more troubling dimension. Instead of curbing state authority, it becomes a tool for the state

269. *See supra* Section II.A.2.a.

270. *See supra* Sections II.A.2.b, III.A.1. (describing § 4968's taxable unit as a mix between pluralism and corporatism).

271. I.R.C. § 4968(c)(1).

272. *See, e.g.*, Jeffrey Selingo, *The "Best" Colleges Aren't the Best Forever*, THE ATLANTIC (Oct. 2025), https://www.theatlantic.com/ideas/archive/2025/10/ivy-league-schools-prestige/684454/ [https://perma.cc/GZM6-HKPA] (describing the unstable nature of what makes an institution a top school, but noting that the social prestige associated with certain schools means that "[n]o one expects Princeton, MIT, and Harvard to suddenly tumble out of the elite ranks").

273. Richard L. Schmalbeck, *Taxing Endowments* 10 (Duke L. Sch. Pub. L. & Legal Theory Series, Paper No. 2025-54, 2025), https://ssrn.com/abstract=5620710 [https://perma.cc/RZ9F-W2SH] (also noting that the correlation between university rank and the taxable unit resembles a bill of attainder). See *infra* Section III.C for further discussion of rate structure.

274. JOINT COMM. ON TAX'N, 199TH CONG., JCX-35-25, ESTIMATED REVENUE EFFECTS RELATIVE TO THE PRESENT LAW BASELINE OF THE TAX PROVISIONS IN "TITLE VII- FINANCE," FISCAL YEARS 2025–2034, at 4 (Comm. Print 2025) (projecting the provision to raise only about $760 million over ten years).

275. *See generally* Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J. ECON. PERSP. 94 (2019) (explaining that while hostility toward concentrated economic and political power—what Brandeis famously called "the curse of bigness"—has been a recurring feature of American political thought, it has not been consistently incorporated into the structure of American law); *see also* Daniel A. Crane, *Antitrust as an Instrument of Democracy*, 72 DUKE L.J. ONLINE 21, 35–38 (2022) (observing that although the anti-bigness impulse remains deeply rooted in American democratic ideology, modern antitrust and related doctrines have not systematically enshrined it as a legal or policy principle).

to weaken rival centers of social, political, and economic capital.[276] Although several commentators have criticized the latest version of § 4968 for drawing "unjustified distinctions between colleges and universities," the statute's definitional choices do not seem to be accidental.[277] There is a reason why the OBBBA zeroed in on universities like Harvard—with their immense endowments, global prestige, and deep political influence—while leaving smaller but still wealthy institutions like Williams untouched. As Greg Lukianoff recently observed in *The Atlantic*, "the idea is to destroy the left's institutional power centers—media, pro bono law practices, and higher education—to assert dominance and control."[278]

Examining these changes thus reveals how seemingly technocratic or rational amendments to an endowment tax's unit can operate powerful instruments of governance, using the bureaucratic language of taxation to erode the autonomy of private institutions perceived as competitors to state authority. However, § 4968's amended definition of AEI is still rife with cliff effects. Beginning in 2026, a university's liability will now turn on a year-end snapshot of a school's student-adjusted endowment, a hard 3,000 "tuition-paying" student floor, a U.S.-location share, and expansive related-organization attribution. The same small, often cosmetic adjustments described in Section III.A.I—relabeling assets as "used directly," shifting

276. When legal reforms against bigness—targeting size, wealth, or elitism—are turned against private institutions rather than the state, history shows they can become tools of consolidation of power. Instead of limiting government, such measures have been wielded by regimes to weaken or eliminate rival centers of influence in society. For example, in Russia, the prosecution and breakup of Yukos following Mikhail Khodorkovsky's arrest—publicly framed as restoring the "equality of even the richest before the law"—functioned to neutralize a major independent economic actor and reassert Kremlin primacy. *See* David M. Woodruff, *Khodorkovsky's Gamble: From Business to Politics* (Program on New Approaches to Russ. Sec., Policy Memo No. 308, 2003), https://eprints.lse.ac.uk/3689/1/Khodorkovsky%E2%80%99s_gamble-from_business_to_politics_(LSERO).pdf [https://perma.cc/PWY6-VU83]; *see also* Rashed Chowdhury, *Implications of the Yukos Scandal for Russian Domestic Politics*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Sept. 16, 2003), https://carnegieendowment.org/events/2003/09/implications-of-the-yukos-scandal-for-russian-domestic-politics [https://perma.cc/AE5V-2YGG]. In China, the Party's "anti-monopoly" campaign against big tech has been explicitly linked to "solidify[ing] political control" and "resolutely guard[ing] against risks of capital manipulating public opinion"; without rule-of-law safeguards, such tools are more likely to further consolidate an abusive government than curb state power. *See* Yaqiu Wang, *China's Big Tech Crackdown Is Not a Model for the U.S.*, HUM. RTS. WATCH (Mar. 16, 2021), https://www.hrw.org/news/2021/03/16/chinas-big-tech-crackdown-not-model-us [https://perma.cc/M3YX-2KKR]. In Saudi Arabia, Crown Prince Muhammed bin Salman's 2017 "anti-corruption" purge—detaining senior princes and tycoons—eliminated rival centers of power and centralized coercive levers of the state in the Crown Prince's hands. *See* Adel Abdel Ghafar, *Muhammed bin Salman and the Push to Establish a New Saudi Political Order*, BROOKINGS (Nov. 9, 2017), https://www.brookings.edu/articles/muhammed-bin-salman-and-the-push-to-establish-a-new-saudi-political-order/ [https://perma.cc/KS9K-NGAA].

277. *See* Schmalbeck, *supra* note 273, at 1.

278. *Id.* at 8 n.20 (explaining that there are now five institutions—Amherst, Pomona, Swarthmore, Grinnell, and Williams—are within about $100,000 of having an endowment larger than $2 million per student, but that since they all have fewer than 3000 students, they will not be subject to the current version of the § 4968 tax).

or timing valuations of illiquid holdings, pushing or pulling resources across unrelated affiliates, or trimming the mix of tuition-paying headcount—can toggle the tax on or off and produce outsized swings in liability.[279] And even if universities succeed in reducing or avoiding tax bills with this type of gaming, it raises another normative question. What, if anything, is gained when universities devote energy to denominator management, asset reclassification, or affiliate choreography rather than to expanding access or advancing their educational mission? In this light, relying on a university endowment tax deployed to pursue a corporatist agenda presents a double bind. When it "works," it pressures universities to conform to a state-preferred institutional form; when it doesn't, it channels effort into avoidance that is at best arbitrary and at worst harmful to universities and the broader public.

B. The Taxable Object: What Is Taxed

Once a tax statute defines who must pay a tax, it must also decide which economic resource—or object—will be taxed .[280] The choice of object, how it is defined and distinguished from others, and how it is valued, are the key issues that tax writers face when dealing with this aspect of statutory design.[281] A brief survey of some of the most popular kinds of taxes highlights the range of possibilities. An income tax uses a particular conception of net income as its object, which roughly tracks the economic value of a taxpayer's consumption plus the change in their net worth (savings) over a specific period.[282] A property tax looks to the market value of land or real estate.[283] A sales tax applies to consumption alone, taxing goods and services at the point of purchase.[284] A wealth tax, by contrast, targets the value of accumulated assets in the aggregate, regardless of

279. *See supra* notes 214–19 and accompanying text; *see also infra* Section III.C.3 (discussing the dramatic shifts in tax liability caused by inclusion and exclusion from the taxable unit, as well as § 4968's new progressive rate structure).

280. WITTE, *supra* note 191, at 28.

281. *See* ROBIN L. EINHORN, AMERICAN TAXATION, AMERICAN SLAVERY 25–109 (2006) (discussing a variety of different types of taxable object that formed the basis of colonial American taxation).

282. Robert M. Haig. "The Concept of Income- Economic and Legal Aspects;" The Federal Income Tax. (1921) at. 1–28; Henry Simons. Personal Income Taxation: the Definition of Income as a Problem of Fiscal Policy (1938) at 49; *see also* EDWIN R.A. SELIGMAN, THE INCOME TAX: A STUDY OF THE HISTORY, THEORY AND PRACTICE OF INCOME TAXATION AT HOME AND ABROAD 15–19 (2d ed. 1914) (discussing income as a proxy for a "faculty" tax, which is itself a proxy for "ability to pay").

283. Seligman, *supra* note 282, at 1015 (discussing a property tax for the same).

284. Ajay K. Mehrotra, *The Missing U.S. VAT: Economic Inequality, American Fiscal Exceptionalism, and the Historical U.S. Resistance to National Consumption Taxes*, 117 NW. U. L. REV. 151 (2022) (discussing how American tax policy's rejection of a VAT and other consumption taxes is based in a narrow view of tax regressivity).

whether they generate current income.[285] Still more ambitious—and not to be confused with a university endowment tax—is the idea of an endowment or faculty tax, which looks not at what people actually earn or accumulate, but at their underlying productive capacity.[286] A *university* endowment tax, however, only taxes a discrete part of a university's institutional wealth—its investment returns, its underlying assets, or some hybrid thereof.

How a statute defines its taxable object reflects practical concerns regarding administrability and measurement, as well as normative judgments about which kinds of resources should be contributed to the public fisc.[287] Yet because modern tax law translates obligation into economic value—a market abstraction that reduces complex institutions to quantifiable units[288]—and since constitutional constraints limit how Congress may define the object of taxation,[289] the normative policy link between the statute's unit and object is often attenuated. The more comprehensive and abstract the taxable object—how Congress defines endowment, for example—the harder it is to translate the object into clear and constitutional language.

The practical realities of translating between ideals and statutory text make it difficult to discern the political intuition a tax is meant to vindicate. Moreover, the evaluative content of a tax's object choice is frequently obscured by technocratic habit. Appeals to economic rationality, generic debates over equality and fairness, and experts' tendency to fixate on redistribution while ignoring what a tax communicates about institutional purpose—each of these common policy interventions often leave the normative ideology embedded in the tax's object underdeveloped or invisible.[290] This Section therefore traces how successive definitions of § 4968's (and its companion provisions') taxable object have both expressed and concealed the political ambitions behind university endowment tax reform—and why those ambitions tend to falter particularly

285. *See* Samuel Sturgis, *The Wealth Tax—Egalitarian Dream or Utilitarian Nightmare?*, 83 LA. L. REV. 561 (2023); *see also* Ronald M. Dworkin*, Is Wealth a Value?,* 9 J. LEGAL STUD. 191, 191–226 (1980).

286. *See generally* Zelenak, *supra* note 21.

287. MURPHY & NAGEL, *supra* note 19, at 97–98 (discussing how debates about taxable object or "base" tend to focus on administrative costs of taxation and reflexive arguments about economic efficiency).

288. *Id.* at 116–17 (noting the pragmatic limitations of administering a wealth v. income tax, and the limitations of the realization requirement).

289. *See infra* note 313 (discussing the direct tax clause and realization).

290. *See, e.g.*, McCoskey & Narotzki, *supra* note 18, at 700–01(criticizing § 4968 because it "will likely decrease the dollar amount of scholarships that are available to students from middle-class families, significantly harming, rather than helping, middle-class families").

when taxation is used to restructure universities in the image of a normative ideal, rather than simply raise revenue.

1. Baseline: § 4968 (2018)

The earliest version of § 4968 defined its taxable object in terms of *income*—specifically, a university's *net investment income*.[291] Borrowed directly from the private-foundation excise tax in § 4940,[292] net investment income encompassed various types of passive income—dividends, interest, rents, royalties, and realized capital gains—reduced by the expenses an institution incurred in producing that same income.[293] At the same time, Congress excluded from this taxable object a few specific categories of passive income, such as student loan interest, rents from student and faculty housing, and royalties related to IP generated by university research.[294] In effect, the statute distinguished between passive income generated by assets primarily held to expand a university's endowment and income derived from resources more directly tied to the institution's instructional mission.

However, Congress's choice of taxable object ultimately obscured its publicly expressed political objective. Section 4968's taxable unit targeted universities by reference to endowment wealth—specifically, the ratio of assets to students—implying that for certain institutions, endowment *size* or accumulated capital was the condition that needed to be disciplined.[295] Yet the statute's taxable object operated on a different and more limited dimension of financial activity: the investment income generated by a subsection of that wealth. Net investment income captures the *flow* of economic resources, not *stock* or institutional capacity. It is a measure of returns realized over a discrete time, rather than the total value of assets held.[296] And although investment income is produced by endowment assets, they provide limited insight into the character of those assets or the universities that own them. As a general matter, colleges and universities with larger endowments have tended to earn higher returns, but endowment returns still vary across different types of institutions and over time.[297]

291. I.R.C. § 4968(c) (2018).
292. *Id.*; Treas. Reg. § 53.4968-2(a).
293. Treas. Reg. § 53.4968-2(b) to (d).
294. Treas. Reg. § 53.4968-2(b)(2).
295. *Supra* Section III.A.1.
296. Fishman, *supra* note 18, at 186–87.
297. *See* CONG. RSCH. SERV., R44293, COLLEGE AND UNIVERSITY ENDOWMENTS: OVERVIEW AND TAX POLICY OPTIONS, at Summary, 6 (2018); *see also* Fishman, *supra* note 18, at 170; Josh Lerner, Antoinette Schoar & Jialan Wang, *Secrets of the Academy: The Drivers of University Endowment Success*, 22 J. ECON. PERSP. 207, 211–14 (2008) (pre-financial crisis study finding that variation in

Moreover, universities vary in how they choose to use those returns. Some may choose to reinvest their investment income, allowing the endowment to grow, or they may spend them immediately on scholarships, salaries, construction, or other projects.[298] Taxing the income, rather than the wealth itself, therefore regulates a related but distinct financial phenomenon: not the possession of accumulated resources, but the periodic gains they yield. The TCJA's endowment tax treated the production of realized financial gain from invested assets, rather than the total stock of endowment wealth or even just a university's reinvested income, as the locus of tax liability—somewhat confusingly signaling that what Congress meant to discipline was not possession of wealth per se, but the ongoing production of income deemed in excess of some standard of educational use.

Exactly why taxwriters defined § 4968's taxable object in this way is unclear, although the choice likely reflected both institutional habit and constitutional caution. Congress borrowed the definition of "net investment income" wholesale from § 4940, the excise tax on private foundations, thereby favoring continuity and administrative ease over innovation.[299] It also sidestepped the constitutional ambiguities associated with taxing wealth directly. Under the longstanding "realization" principle—and the lingering uncertainty surrounding the Constitution's apportionment requirement—an unapportioned federal tax on the mere *ownership* of property could invite legal challenge.[300] By restricting § 4968's object to net investment income (e.g., realized investment returns), Congress avoided that risk. Yet the resulting statutory scheme created a conceptual mismatch between ends and means. Section 4968 framed endowment *wealth* as the

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endowment returns is primarily explained by institutional characteristics—especially endowment size and student-body selectivity—as well as by the use of alternative investments; showing that larger and more selective universities consistently outperform peers; and concluding that top-performing endowments benefit not only from distinctive asset allocations but from superior asset-selection ability).

298. CONG. RSCH. SERV., R44293, *supra* note 297, at 2.

299. *See* Waldeck, *supra* note 81, at 1813–16; Hill, *supra* note 197, at 598–600 (describing the tendency of policymakers to assume that universities with large endowments should be analogized to private foundations); Zelinsky, *supra* note 18, at 143–44 (also that "Section 4968 is best defended in political terms as an incremental step towards the kind of comprehensive tax on all charitable endowments suggested by conventional tax policy criteria"). *But see* Fishman, *supra* note 18, at 179–80 (criticizing Zelinsky's assumption that the Code's treatment of exempt organizations must follow broadly generalizable principles).

300. *See* Eisner v. Macomber, 252 U.S. 189 (1920) (holding that "income" taxable under the Sixteenth Amendment generally requires a realized gain separate from capital); Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895) (holding that unapportioned taxes on income from property are "direct" taxes subject to Article I apportionment); Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796) (upholding a carriage tax as not "direct" within the meaning of Article I); Moore v. United States, 602 U.S. 572 (2024) (upholding a tax on undistributed foreign corporate earnings and treating realization as a "legislative choice"). Although *Moore* weakens the traditional realization requirement, concurring and dissenting opinions diverged sharply over whether taxing unrealized gains would constitute an unapportioned "direct tax," leaving the constitutional status of a traditional federal wealth tax unresolved.

political problem, but it addressed it by taxing *income*, a proxy only loosely connected to the underlying economic accumulation that had apparently provoked Congress's concern in the first place.

In isolation, § 4968's original taxable object can be understood as superficially *pluralist*, moving directionally toward a *corporatist* ideal.[301] It still gives schools significant discretion when it comes to spending non-investment income—they can choose to use their income to fund scholarships, salaries, or research, without worrying about incurring additional tax liability. In this respect, the object exemplifies pluralism's tolerance for self-governing associations and their internal economic choices. Yet § 4968's original taxable object also embraces corporatist values. By singling out investment income rather than surplus revenue, the provision implicitly disfavors saving and long-term capital accumulation in favor of present expenditure, while drawing a normative line between income generated through financial activity (portfolio returns, market holdings) and income derived from educational or charitable activity (faculty innovations, housing, or campus services). The result is that the statute preserves a university's financial independence in one form (the spending of non-investment income), while narrowly disciplining their fiscal conduct through the state's classification of what counts as "investment" versus "charitable" income.

Whether this initial version of § 4968 had the ability to induce universities to reduce their savings and increase their current spending is doubtful. Beginning in 2018, institutions that qualified as AEIs could easily reduce their tax exposure by adjusting their portfolios—holding fewer income-producing assets, delaying asset sales, or shifting toward non-taxable financial instruments—without increasing current spending on activities related to their exempt purpose.[302] Meanwhile, even if a university chose to spend its endowment income on activities that furthered its charitable purpose (i.e., fund more scholarships), those expenditures would

301. Some might characterize § 4968's original design as a modest pluralist market correction—a neutral intervention against a particular kind of economic activity (net investment income) that any institution could, in principle, undertake, and thus an intervention agnostic as to identity. The distinction between measurement and state-imposed ordering is, of course, contestable. *See, e.g.*, Romano, *supra* note 108, at 943–45. But two features tilt the TCJA version toward corporatist ordering rather than pluralist calibration because § 4968's unit singles out a narrow stratum of private universities for special treatment and because its unit privileges certain sources of income over others.

302. *See* Schmalbeck, *supra* note 273, at 1213; Fishman, *supra* note 18, at 187–88 (also discussing how universities can avoid falling into § 4968's definition of taxable unit by adding students to reduce the student to asset ratio or reducing the number of tuition-paying students to get below the 500 tuition-paying student threshold. It is possible that the latter adjustment could be made without necessarily increasing the socioeconomic diversity of the student population).

not reduce its tax base.[303] Without additional offsets, the endowment tax would still apply to a school's entire net investment income, regardless of how those funds were used that taxable year. For a discrete subset of institutions, the statute rendered the tax consequences of one type of economic activity—holding income-producing assets not closely tied to an institution's exempt purpose—less favorable than others. If anything, the provision risked entrenching the very behaviors it purported to correct, reinforcing universities' incentives to preserve endowment principal and to manage their resources defensively against future fiscal or political uncertainty, rather than deploying them to meet the needs of current students.

2. Major Proposals—A Wealth Tax Two Ways

To remedy the perceived mismatch between ends and means, subsequent endowment tax reform proposals abandoned taxing endowment *income* in favor of taxing endowment *wealth*. Whereas the initial version of § 4968 taxed a selection of passive income streams, Senator Cotton's Woke Endowment Security Tax (WEST) Act [304] and Senator Vance's Encampments or Endowments (EOE) Act[305] proposed taxing the "aggregate fair market value" (AFMV) of a university's assets under a new provision: § 4969. [306] The imposition of this additional tax would reach what § 4968 left untouched—the scale of a school's resources. Yet Vance and Cotton's competing definitions of what and whom to tax reveal varied political ideals, illustrating how the move from taxing income to taxing wealth transforms not only statutory mechanics but the statute's political orientation.

Senator Cotton's proposed endowment tax treats endowment wealth as a legitimate but bounded form of private accumulation. By taxing the aggregate fair market value of an institution's assets, [307] the provision adopts a taxable object that is dramatically broader than § 4968's net investment

303. *See* Treas. Reg. § 53.4968-2(c)(1)(iii) ("No amount is allowable as a deduction under this section to the extent it is paid or incurred for purposes other than those described in paragraph (c)(1)(i) . . . . Thus, for example, the charitable deductions prescribed under sections 170 and 642(c) . . . are not allowable."); *id.* § 53.4968-2(c)(1)(i) (limiting deductions to "ordinary and necessary expenses . . . for the production or collection of gross investment income or for the management, conservation, or maintenance of property held for the production of such income"). Read together, these provisions make clear that expenditures for an institution's exempt (educational) purposes are not deductible in computing net investment income under § 4968. Congress has never amended § 4968 to add a "spending offset."

304. Woke Endowment Security Tax Act, S. 3465, 118th Cong (2023).

305. Endowments or Encampments Act, S. 4295, 118th Cong. (2024).

306. S. 3465 (proposed I.R.C. § 4969(a)); S. 4295 (2024) (proposed I.R.C. § 4969(a)).

307. S. 3465 (proposed I.R.C. § 4969(a)).

income base. For example, in fiscal year 2024, Harvard University reported $331,443,983 in investment income, $133,862,450 in royalties, and $28,509,253 in rental income—figures that reflect gross passive revenue rather than net investment income as defined in § 4968.[308] By contrast, Harvard reported $74,371,580,000 in total assets.[309] Thus, even without accounting for expenses or statutory exclusions from net investment income, Harvard's taxable base under § 4969 would be roughly 150 times larger than its taxable base under § 4968.[310]

At first, the principles behind Cotton's new taxable object appear to reflect a distinctly social-egalitarian intuition. By abandoning realized income in favor of aggregate wealth, the WEST Act treats extreme concentrations of institutional capital as a problem in themselves, independent of how that wealth is generated or deployed. The proposal's normative appeal lies not in incentivizing particular spending behaviors or correcting market failures, but in narrowing the distance between the most affluent universities and the rest of the sector. In this sense, the tax adopts a leveling-down logic. It seeks to contain elite wealth as a matter of distributive justice, even when doing so produces no direct material benefit for less-resourced institutions or students.[311]

Yet, even if one accepts the social-egalitarian intuition that extreme endowment wealth should be trimmed, the WEST Act implements that intuition in a structurally incoherent way. Eligibility for the tax turns on a narrow threshold: only "specified applicable educational institutions"—schools whose portfolios of non-exempt-use assets exceed $12.2 billion in aggregate fair market value—are subject to liability.[312] Yet once an institution crosses that threshold, the taxable object expands dramatically, sweeping in the aggregate fair market value of *all* institutional assets,

308. President & Fellows of Harvard College, IRS Form 990, Part VIII (Statement of Revenue) (FY 2024) (reporting gross investment income, royalties, and rental income).

309. PRESIDENT & FELLOWS OF HARV. COLL., IRS FORM 990 (FY 2024), PART X (Balance Sheet) (reporting total assets). These figures are only meant to serve as illustrative proxies.

310. Using Harvard Management Company's reported FY24 endowment value of $53.2 billion as a proxy for the WEST Act base, that base would be approximately 108 times larger than the roughly $494 million in gross passive revenue reported for the same period. *See* HARVARD MGMT. CO., ANNUAL REPORT FOR FISCAL YEAR 2024, at 12 (2024) (comparing Harvard's reported investment income, royalties, and rental income).

311. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 75–83 (1971) (introducing the "difference principle," or *maximin* rule, which holds that social and economic inequalities are permissible only if they maximize the position of the least advantaged). Most social egalitarian theorists reject this leveling-down characterization as an oversimplification of their moral and political claims. *See, e.g.*, Larry S. Temkin, *Equality, Priority, and the Levelling-Down Objection*, in THE IDEAL OF EQUALITY 126 (Matthew Clayton & Andrew Williams eds., 2000). However, the WEST Act does seem to embrace this non-instrumental vision of egalitarianism, where equality is the goal, and human flourishing is not.

312. S. 3465 (proposed I.R.C. § 4969(b)(1)).

including those used directly in carrying out exempt functions and including the first $12.2 billion in value.[313]

This unit–object mismatch sits uneasily with the egalitarian logic invoked to justify the new tax. If the normative concern is excessive accumulation beyond a defensible baseline, one would expect liability to attach only to the excess or to track consistently the category of assets deemed morally suspect. Instead, the WEST Act uses a narrow conception of wealth to determine *who* is taxable and a much broader conception to determine *what* is taxed. This asymmetry illuminates the proposal's deeper ideological orientation. While the statute's emphasis on wealth feels egalitarian, it ultimately adopts a corporatist mechanism—i.e., a state-imposed hierarchy that treats extreme institutional size as a marker of special public obligation and subjects only a narrow upper tier of secular universities to comprehensive fiscal discipline. In doing so, the WEST Act's policy logic reflects a belief that federal tax law can directly regulate the conduct of elite institutions without asserting authority over higher education as a whole. Thus, rather than resolve egalitarian concerns through consistent, systemic redistribution, the WEST Act relies on a narrowly constructed categorical hierarchy to achieve its aims.

Cotton's proposal reveals the limits of pursuing egalitarian ends through fiscal means alone. Reliance on federal tax law—especially the IRS—as an instrument of democratic decentralization generates a structural paradox in which the state becomes the arbiter of which private concentrations of power are legitimate. This problem is not new; critics of Marxist and state-socialist projects have long observed the irony of using centralized authority to abolish hierarchy.[314] The same paradox haunts modern egalitarian taxation. Without a clear theory of how revenue will advance collective welfare, or how private actors will participate in shaping that use, such measures risk devolving into retributive corporatism—punishing wealth and enforcing conformity without cultivating solidarity or articulating a positive social good. Styled in the language of fairness and autonomy, the WEST Act promises to humble privilege, but its structure replicates the very hierarchy it condemns. It positions the state above all universities (public and private) empowering it to define educational virtue through taxation. What begins as a gesture of egalitarian restraint thus ends as a new assertion of control, substituting fiscal discipline for genuine accountability and leaving universities less autonomous, not more publicly responsive.

313. *Id.*

314. *See generally* Martin Shaw, *The Theory of the State and Politics: A Central Paradox of Marxism*, 3 ECON. & SOC'Y 429 (1974) (examining the paradox within Marxist theory arising from the tension between social emancipation and the continued role of the state and political institutions).

Whereas Cotton's WEST Act operates within an—albeit flawed—social-egalitarian logic, Vance's wealth-based taxable object advances an explicitly corporatist vision. The former Senator's EOE Act proposes levying a 50-percent excise tax on the AFMV of the assets of any "disqualified educational institution."[315] Like Cotton's bill, the Act sweeps a university's assets, as opposed to just its net investment income, into the tax base. But unlike Cotton's proposal—where the tax on endowment wealth corresponds to a concern with extreme institutional size—Vance's exceptionally broad tax base functions in a categorically punitive manner. Regardless of whether a university's assets totaled $74 billion or only a few million dollars, the Act would impose a tax liability capable of eliminating half of the institution's asset base in a single stroke—before accounting for the separate and compounding consequence of disqualification from Title IV federal student aid.[316]

In ideological terms, Vance's proposal more explicitly transforms an endowment tax from a measure of institutional capacity into an instrument of political control. It fuses fiscal and moral governance, subordinating university autonomy to the state's judgment about "order" and "disorder." This is corporatism in its most authoritarian form—hierarchical, moralizing, and coercive. The Act collapses the line between tax administration and the policing of expression, signaling that universities that tolerate dissent risk annihilation, while those that enforce conformity are rewarded with fiscal survival. The policy's conservative appeal—its promise to punish left-wing universities—also masks a broader danger. It performs exactly the parade of horribles often invoked against wealth taxes or taxation writ large by essentially empowering the state to tax disfavored institutions or ways of life out of existence.[317] Under the guise of restoring order, Vance's proposal

315. S. 4295 (2024) (proposed I.R.C. § 4969(a) imposing a tax on "the aggregate fair market value of the assets of the institution at the end of the preceding taxable year."). Neither Cotton, *see supra* note 225, nor Vance's bill define exactly what "assets" mean for purposes of their proposals' taxable units, and neither cross reference either § 4968(2018)(d) (excluding assets "which are used directly in carrying out the institution's exempt purpose") or Treas. Reg. § 53.4968–1(b)(5) (defining direct use assets) to clarify this definition.

316. S. 4295 (2024) (proposed I.R.C. § 4969(b) defining a disqualified educational institution as "which is ineligible to receive funds under the Higher Education Act of 1965 (including funds for Federal student assistance under title IV of such Act) or participate in programs under title IV of such Act pursuant to section 124 of such Act"); *see also id.* (proposed I.R.C. § 124 amending 20 U.S.C. 1011 et seq). Once a university loses eligibility to receive funds under title IV of the Higher Education Act or participate in programs under title IV due to "campus disorder" as described in amended § 124 of the Higher Education Act, they simultaneously are classified as a "disqualified educational institution" for the purposes of the 50% AFMV tax imposed under § 4969.

317. *See, e.g.*, Brad Polumbo, *AOC's Latest Viral Post Flunks Econ 101*, FOUND. FOR ECON. EDUC. (Nov. 29, 2020), https://fee.org/articles/aoc-s-latest-viral-post-flunks-econ-101/ [https://perma.cc/Z6HC-999J] (arguing progressive proposals seek to "regulate and tax [billionaires] out of existence,"

converts taxation into a form of cultural discipline, using the language of fiscal responsibility to justify the suppression of disagreement or difference.

3. Current Law: § 4968 (2026)

In contrast to the more dramatic wealth-based objects advanced by the EOE and WEST Acts, Congress's latest revision to § 4968 leaves the statute's taxable object formally intact while quietly expanding its content. On its face, the new provision preserves § 4968's basic, "pluralist" posture of taxing net investment income rather than the stock of endowment wealth. But it does so only after redefining what must be counted as gross investment income.[318] Beginning in 2026, an "applicable educational institution" (and any "related organization") must treat "any interest income from a student loan made by the [institution] (or any related organization)" as gross investment income for § 4968 purposes, and must likewise treat royalties from federally funded intellectual property—revenues that had historically been excluded as "related" to the educational mission under the regulations—as gross investment income.[319] Congress offered almost no accompanying analysis for the changes. Still, the two inclusions track familiar policy impulses. The first channels a diffuse critique that large endowments are complicit in rising tuition and student indebtedness. The second reflects a "pay-for-benefit" intuition that it is inequitable for universities to convert taxpayer-financed research into private revenue streams without bearing a corresponding federal tax charge.[320]

Although both inclusions read as minor technical tweaks, each carries significant political weight. Consider the royalty override. It repositions § 4968's taxable object and tightens the nexus between federal spending and federal taxation. By policing the boundary between "public" appropriations and "private" enrichment, the amendment shifts § 4968 away from a measure of investment yield that aligns with pluralist ideals and toward a corporatist logic—one that treats universities less as autonomous civil

thereby punishing successful entrepreneurs and deterring innovation); Parker Sheppard & Richard Stern, *Democrats' Proposed Wealth Tax Spells Doom for Entrepreneurs and Economic Growth*, HERITAGE FOUND. (Aug. 21, 2023), https://www.heritage.org/taxes/commentary/democrats-proposed-wealth-tax-spells-doom-entrepreneurs-and-economic-growth [https://perma.cc/8YAD-CMMA] (contending a wealth tax "should alarm anyone who wants to start a business" and would "doom" entrepreneurship and broad-based growth).

318. *See infra* note 319.

319. I.R.C. § 4968(f)(2) (describing "Override of certain regulatory exceptions" of net investment income); *see* Treas. Reg. § 53.4968–2(b)(2)(iii) (2020) (excepting student loan interest and passive income from federally funded research from net investment income).

320. *See* MURPHY & NAGEL, *supra* note 19, at 16–20 (discussing the general use of this quid-pro-quo or benefits principle in tax policy and examining its conceptual failings).

associations and more as quasi-public nodes to be steered through fiscal interventions.[321] The change entrenches a view of the university as a regulable arm of the state's fiscal apparatus. They are only eligible for a subsidy (federal funding) on the condition that downstream revenue be folded back into a federal excise base—rather than as an independent association whose activities are presumptively part of its civic mission.[322] Practically, the rule conditions tax exposure on whether and how successfully a university's research enterprise generates passive returns from federally underwritten knowledge assets.[323] Tying tax liability to the success of research translation, however, also muddles the endowment tax's policy objective. A university's passive income is now taxable even when it arises from publicly valuable, grant-supported projects and even when the resulting royalties are devoted to core academic missions rather than reinvested as corpus. It is not obvious why a welfare-oriented version of corporatism would prefer that outcome.

Consider a research-intensive university that spins out a related therapeutics company from an NIH-funded lab and negotiates a $50-million royalty stream. Under pre-amendment regulations, much of that royalty income—"royalty income that is derived from patents, copyrights, and other intellectual property and intangible property to the extent those assets resulted from the work of student(s) or faculty member(s) in their capacities as such with the applicable educational institution"—was previously excluded from net investment income and thus fell outside the § 4968 excise base.[324] By contrast, the 2026 override sweeps royalties attributable to federally funded IP into gross investment income,[325] potentially lifting the institution into a higher bracket[326] and imposing a significant tax on what is, in substance, the return on public-purpose research. Rather than ensuring better alignment between university saving and spending targets and federal

321. *See* Brody & Tyler, *supra* note 39, at 598–613(debunking the "myth" that because § 501(c)(3) organizations are tax exempt their funds are essentially public funds).

322. *See, e.g.*, Quinn, *supra* note 17, at 486 (presenting a populist image of universities and arguing that the institutions must "actually earn their tax-exempt status by privileging public good over prestige and stockpiled income").

323. *See* Libby, *supra* note 227; Kendi E. Ozmon, Franziska Hertel & Gil J. Ghatan, *Significant Changes for Tax-Exempt Organizations Included in House Ways & Means Committee Tax Package*, ROPES & GRAY (May 13, 2025), https://www.ropesgray.com/en/insights/alerts/2025/05/significant-changes-for-tax-exempt-organizations-included-in-house [https://perma.cc/58EF-HUKP].

324. Treas. Reg. § 53.4968–2(b)(2)(iii) (2020).

325. *Id.* § 4968(f)(2)(B)(ii) (defining the term "Federally-subsidized royalty income" as "any otherwise-regulatory-exempt royalty income if any Federal funds were used in the research, development, or creation of the patent, copyright, or other intellectual or intangible property from which such royalty income is derived.")

326. *See* Schmalbeck, *supra* note 273, at 5–9; *see also infra* Section III.C (discussing § 4968's new progressive brackets).

higher education policy, this change is more likely to distort technology-transfer incentives.[327] To avoid liability under the endowment tax, universities may structure their research activities to delay or offshore commercialization or favor proprietary, industry-funded research over projects tied to federal grants[328]—all outcomes in tension with the Bayh–Dole Act's innovation goals.[329]

In short, the new tax does not advance a benign vision of corporatism. The OBBBA's selective inclusion of federally funded royalties is an especially punitive and populist reform. It deploys federal tax machinery to discipline and stigmatize a discrete class of disfavored institutions by taxing the very outputs that Bayh–Dole was designed to propel into public use.[330] Framed as recouping public investment, the provision transforms a nominally neutral excise on investment yield into a targeted fiscal intervention, conditioning liability on a university's success in translating government-funded discoveries and treating mission-consonant royalty streams as suspect "private" gain. The practical effect is not to advance any coherent efficiency or welfare-enhancing objective—much less to promote broad dissemination and reinvestment. Rather, the aim of the tax is to extract rents from well-endowed research universities precisely because their prosperity is publicly disfavored, and to pressure them to conform their research, licensing, and funding choices to shifting political expectations.

The second inclusion—counting interest on loans "made by" the institution (or a related organization) as gross investment income—superficially draws on the fair-share rhetoric that animates social-egalitarian critiques of elite endowments.[331] It symbolically locates responsibility for

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327. The Bayh–Dole Act, 35 U.S.C. §§ 200–12, permits universities to elect title to federally funded inventions to promote "practical application" through their licensing to private sector partners, subject to certain conditions (e.g., march-in, U.S.-manufacturing preferences, inventor sharing, nonprofit reinvestment). The Act's overarching technology-transfer goal is to accelerate the commercialization and broad, affordable public availability of federally funded discoveries through private licensing, while preserving public safeguards to ensure those discoveries are actually used, made in the United States where appropriate, and reinvested in the research and educational mission. *See, e.g.*, Rebecca S. Eisenberg & Robert Cook-Deegan, *Universities: The Fallen Angels of Bayh-Dole?*, 147 DAEDALUS 76, 77–79 (2018) (although noting that the overall impact of the Bayh-Dole tech transfer regime is subject to significant debate).

328. A university could expand sponsored-research and fee-for-service work funded by industry (with cost-reimbursement, milestones, or fixed access fees) and emphasize IP developed solely with non-federal funds, thereby shifting downstream consideration away from federally funded "royalties" on subject inventions. This may reduce excise exposure but raises UBIT/mission-fit and academic-freedom/public-access concerns and can narrow dissemination pathways.

329. *See supra* note 327.

330. *Id*.

331. I.R.C. § 4968(f)(2)(B) (defining net investment income to include "any interest income from a student loan made by the applicable educational institution (or any related organization) as gross

the student-debt crisis in institutional balance sheets and, more pointedly, in the most affluent institutions that operate institutional-loan programs.[332] Whether elite institutions should, as a normative matter, bear the burden of "fixing" the cost of tuition, and whether access to elite higher education should be a universally accessible good, raises similar leveling-down questions to those described in the prior section.[333] Yet, even if we treat this vision of social egalitarianism as acceptable, the inclusion of loan interest is ill-targeted as an economic intervention. High tuition sticker prices and student borrowing needs are systemic features of contemporary higher education. They are not confined to endowment-rich campuses,[334] and they reflect federal policy design and broader market dynamics (the structure of Title IV credit, cost-of-attendance rules, and student demand for high-amenity programs) as much as any single school's pricing discretion.[335]

investment income."); *see* Fishman, *supra* note 18, at 172–78 (discussing how the cost of higher education and student debt was a primary motivation behind congressional criticism of university endowments).

332. *See, e.g.*, Ben Luthi, *What Is an Institutional Loan, and Should You Consider One?*, BANKRATE (Feb. 10, 2025), https://www.bankrate.com/loans/student-loans/institutional-loans/ [https://perma.cc/3AR9-XX5V] (explaining that institutional loans are school-based student loans funded and administered by colleges themselves, often used to fill gaps after federal aid is exhausted and with terms that vary by institution); Mark Kantrowitz, *Whatever Happened to Federal Perkins Loans?*, SAVING FOR COLLEGE (Nov. 18, 2020), https://www.savingforcollege.com/article/whatever-happened-to-federal-perkins-loans [https://perma.cc/A2EV-RE48] (noting that institutional loan programs at many colleges trace their origins to campus-based revolving funds created under the now-discontinued Federal Perkins Loan program, which mixed federal and institutional capital and left many schools still holding Perkins-style portfolios).

333. *See supra* note 311 and accompanying text.

334. *See* JENNIFER MA, MATEA PENDER & XIAOWEN HU, COLL. BD., TRENDS IN COLLEGE PRICING AND STUDENT AID 2025, at 12 figs.CP-2 & CP-3, 19 fig.CP-10 (2025) (showing that published tuition and fees, before adjusting for inflation, continue to rise across public two-year, public four-year, and private nonprofit four-year institutions nationwide); *see also* Sandy Baum, *Endowments Won't Solve College Affordability Problems*, URB. INST. (Sept. 10, 2019), https://www.urban.org/urban-wire/endowments-wont-solve-college-affordability-problems [https://perma.cc/8PCK-FMP8] (documenting that endowment assets are highly concentrated—only a small share of institutions can spend even $10,000 per student per year from their endowments, while roughly half can spend less than $1,300—and concluding that endowment income is generally too small to offset tuition for most undergraduates); ASS'N OF AM. UNIVS., MYTHS ABOUT COLLEGE AND UNIVERSITY ENDOWMENTS 2 (2009), https://www.aau.edu/sites/default/files/AAU%20Files/Key%20Issues/Taxation%20%26%20Finance/MythsandFacts.pdf [https://perma.cc/3B7Y-D2J9] (explaining that "universities and colleges with large endowments actually increase tuition at a slower rate than schools that lack such resources" and attributing rising tuition instead to sector-wide forces, including reduced state appropriations, rising benefit and compliance costs, and student and family demand for expanded services).

335. *See*, *e.g.*, *What Does Cost of Attendance (COA) Mean?*, FED. STUDENT AID, https://studentaid.gov/help-center/answers/article/what-does-cost-of-attendance-mean [https://perma.cc/B23C-ZW7B] (explaining that federal aid eligibility and borrowing limits are tied to each institution's federally defined cost of attendance, which includes tuition, housing, books, and living expenses); David O. Lucca, Taylor Nadauld & Karen Shen, *Credit Supply and the Rise in College Tuition: Evidence from the Expansion in Federal Student Aid Programs* 3, 15 (Fed. Res. Bank of N.Y., Staff Rep. No. 733, 2017), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf [https://

Moreover, institutional loans remain a narrow slice of student borrowing in the aggregate.[336] Even as federal aid has declined, many elite colleges have in fact shifted away from institutional loans toward grant-heavy aid models.[337] Moreover, institutional lending is more common in certain professional programs[338] or among institutions serving students with limited federal eligibility, including undocumented and international students.[339] Such loan programs are typically designed to fill gaps left by federal aid and to serve students whose access to Title IV programs is limited or nonexistent.

Thus, even as this story sounds egalitarian, the incidence and behavioral margins point elsewhere. The new rule therefore risks taxing the very programs—albeit imperfect ones—that help credit-constrained students. For example, a university that runs a need-based, low-interest loan pool funded from endowment earnings will now see each dollar of interest it books pulled into the § 4968 base, notwithstanding that the interest margin may simply cover defaults and servicing rather than enrich the school's

perma.cc/9AF8-EN9W] (finding that increases in federal student loan limits raise tuition across institutions, with roughly sixty percent of increases in subsidized loan caps passed through to higher sticker prices).

336. *See* MA ET AL., *supra* note 334, at 32 tbl.SA-1, 37 fig.SA-5 (2025) (reporting that in 2024–25 students and parents borrowed about $13.9 billion in nonfederal education loans—only roughly 5% of total student aid and about 14% of all education loans—after inflation-adjusted nonfederal loan volume fell from a 2007–08 peak of $33.8 billion; also showing that, for undergraduates, loans from all sources declined from 37% to 27% of total aid between 2014–15 and 2024–25, so that institutional loans, which are only one component of the nonfederal category, represent an even smaller share of overall student aid).

337. *Id.* (showing that between 2014–15 and 2024–25, institutional grant aid rose 24% in real terms to an estimated $85.1 billion and came to constitute 49% of all grant aid, while total federal aid fell 27% and the federal share of all student aid declined from 67% to 56%; also showing that nonfederal education loans, though slightly higher than a decade ago at $13.9 billion in 2024–25, remain far below their 2007–08 peak of $33.8 billion).

338. *See, e.g.*, *Institutional Loan Programs*, UC BERKELEY: STUDENT BILLING, https://studentbilling.berkeley.edu/loan-services-and-repayment/institutional-loan-programs [https://perma.cc/6MG5-EL8C] (describing a Berkeley Law institutional loan that provides funding to graduating law students while they study for the bar, with repayment beginning after bar passage when they are expected to be employed, as well as a "Teacher Education Repayable Scholarship" structured as a loan to give flexibility to teaching graduates working in high-need districts); *University Loans*, BROWN UNIV.: STUDENT FIN. SERVS., https://sfs.brown.edu/loans/university-loans [https://perma.cc/4UPP-3J5G] (describing Brown's need-based institutional loans for medical students—subsidized in school and during up to three years of medical residency—and forgivable Urban Education Policy and Urban Education Teacher Loans for graduate students who complete three consecutive years of qualifying service in high-need Providence schools or education organizations).

339. *See, e.g.*, *Loans*, WESLEYAN UNIV.: FIN. AID OFF., https://www.wesleyan.edu/finaid/current-students/loans.html [https://perma.cc/7TKN-AA9U] (stating that "Wesleyan Loans originate from a limited fund managed by Wesleyan and are available only to eligible DACA, undocumented and international students").

endowment.[340] Predictably, some institutions will respond by shrinking or externalizing these loan programs—substituting third-party lenders (often at higher rates and with less favorable payment terms) or tightening access instead of lowering the sticker price of tuition or providing more scholarships or grants.[341] This outcome is hard to reconcile with the aim of reducing student debt burdens and making higher education more accessible, especially to the middle class.[342] In this sense, the inclusion of student loan interest could act as a credit-access penalty for the very students whom policymakers say they aim to help.

Ultimately, then, the loan interest-inclusion is less a social egalitarian amendment than it is a sanction aimed at a narrow class of institutions, draped in "fair-share" rhetoric.[343] It does little to address the structural drivers of borrowing and instead makes it more difficult for certain universities to fix financing gaps. The result will likely be to constrain rather than expand access to higher education and do little to relieve student debt burdens. If the impulse is egalitarian, it is an extremely reckless kind. It reduces resources at the top by penalizing forms of university finance that support access, without plausibly improving conditions for the median borrower. As a tool of policy, it sits uneasily with § 4968's social egalitarian veneer and is a poor proxy for genuine affordability reform.

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340. *See, e.g.*, *University Loans*, BROWN UNIV.: STUDENT FIN. SERVS., https://sfs.brown.edu/loans/university-loans [https://perma.cc/4UPP-3J5G] (describing Brown's institutional loan fund as capitalized by "generous donations" and carrying fixed interest rates of roughly 5–7%, with repayments returning to the fund); *Fund Type Definitions*, UNIV. OF OR.: BUS. AFFS., https://ba.uoregon.edu/finance-and-accounting/chart-of-accounts/fund-type-definitions [https://perma.cc/68E2-BTNX] (defining "institutional loan funds" as donor-restricted gifts used for student loans); Jon Marcus, *A New Way to Help Some College Students: Zero-Percent, No-Fee Loans*, HECHINGER REP. (June 10, 2025), https://hechingerreport.org/a-new-way-to-help-some-college-students-zero-percent-no-fee-loans [https://perma.cc/L8CD-YHRU] (describing philanthropy-backed "pay-it-forward" institutional loans that charge no interest and recycle repayments to future borrowers rather than to institutional coffers). All of these indicate that any interest margin on institutional loans is meant to sustain the revolving loan fund and cover servicing and default risk rather than enrich the university's endowment.

341. *See Student Debt and College Loans, Explained*, AMERIPRISE FIN., https://www.ameriprise.com/financial-goals-priorities/education-planning/student-loans-debt [https://perma.cc/AV2Z-VKSS] (comparing federal, private, and institutional loans and noting that institutional loans may offer "more competitive interest rates and deferment provisions than both federal and private loans," whereas private loans typically carry higher interest rates, require cosigners, and lack income-driven repayment or forgiveness options); *see also* ELLIE BRUECKER, INST. FOR COLL. ACCESS & SUCCESS, PRIVATE STUDENT LOANS: FACTS AND TRENDS 1 (2023), https://ticas.org/wp-content/uploads/2023/12/Private-Student-Loans-Facts-and-Trends.pdf [https://perma.cc/JY2T-TWTY] (describing private student loans as "one of the riskiest ways to finance a college education," with higher interest rates and no deferment, income-driven repayment, or forgiveness options, compared to federal loans).

342. *See* McCoskey & Narotzki, *supra* note 18, at 679–80 (noting how much of the rhetoric around § 4968 has been to reduce the cost of tuition and make higher education more accessible to the middle class).

343. *See generally* THORNDIKE, *supra* note 179 (discussing how throughout the history of the federal income tax, the concept of fair share taxation often encapsulates populist vision of tax policy in which the income tax is used to target wealthy taxpayers).

C. Rate Content and Structure: How Heavily to Tax

A third essential element of any tax is its rate. The rate determines how heavily the chosen object is taxed—turning the base into a liability—and its design often carries normative weight as much as fiscal significance.[344] Some taxes apply a flat rate, imposing the same percentage across all taxpayers regardless of size or wealth. The corporate tax and payroll taxes that fund Social Security largely work this way.[345] Others, such as the federal income tax, adopt a progressive rate structure, with percentages increasing as the base grows.[346] Certain excise taxes, by contrast, function almost like penalties, with rates set high enough to discourage behavior rather than simply raise revenue—cigarette taxes being the familiar example.[347]

Rates—their size and structure—are often the most salient face of tax policy, and the endowment tax is no exception. Yet debates over rate design too often collapse into slogans that treat rates as straightforward expressions of political morality. Progressive schedules are praised as "fair" because they allow for redistribution.[348] Flat schedules are defended as "fair" because they are proportionate and therefore do not differentiate among taxpayers.[349] Neither claim is universally true. The fairness of a rate structure depends on which characteristics it uses to distinguish taxpayers and on how those characteristics relate to the tax's defined unit and object. The political valence of a rate—whether flat, progressive, or penalty-like—thus turns on its fit with those other elements. The pages that follow map this interaction and show how rate design can either sharpen or obscure the normative aims of an endowment tax.

1. Baseline: § 4968 (2018)

The original version of § 4968 had a flat rate structure instead of a progressive one, imposing a 1.4 percent "excise" on the net investment income of an applicable educational institution for the taxable year.[350] It

344. *See* MURPHY & NAGEL, *supra* note 19, at 130–32.

345. *See* I.R.C. § 11(b) (2024) (setting the corporate income tax rate at 21%); *id.* § 3101(a) (imposing a 6.2% Social Security tax on employees' wages up to the contribution and benefit base).

346. *See id.* § 1(j)(2) (prescribing graduated individual income tax rates ranging from 10% to 37%, depending on taxable income and filing status).

347. Id. § 5701(b) (imposing a federal excise tax on cigarettes at a rate of $50.33 per 1,000, or approximately $1.01 per pack of 20).

348. MURPHY & NAGEL, *supra* note 19, at 130–4 (noting how these inquiries often focus narrowly on tax burdens rather than a more holistic vision of distribution or ability).

349. *Id.* at 17.

350. I.R.C. § 4968(a) (2018) (calculating the tax as "equal to 1.4 percent of the net investment income of such institution for the taxable year").

modestly skimmed from a university's investment yield once an institution was classified as "applicable," the amount being proportionate to the size of a university's net investment income.[351] However, even though the rate itself avoided progressive gradations or behavioral penalties, the narrow scope of § 4968's taxable object and unit created a de facto hierarchy among universities. The result was that only large, wealthy universities that received certain kinds of passive income were taxed.[352] Everyone else was not.

Universities subject to § 4968 likely took steps to minimize or avoid the tax. Yet revenue data are sparse,[353] and Form 990 disclosures shed little light on institutions' specific planning choices,[354] making it hard to identify any systematic behavioral response.[355] Industry-level indicators are likewise equivocal.[356] What can be said with confidence is that § 4968's rate was modest (1.4%),[357] and its base narrow (net investment income) relative to

351. *Id.*

352. *See supra* Sections III.A.1, III.B.1.

353. The IRS has reported the following revenues for § 4968 over the past several calendar years: 2021 ($68 million from 33 institutions), 2022 ($243 million from 58 institutions), 2023 ($380 million from 56 institutions), and 2024 ($168,823,327 from 48 institutions). Data for calendar year 2020 was not disclosed to prevent disclosure of identifying taxpayer information. Data for prior calendar years (2019 and 2018) was not reported. *SOI Tax Stats – Charities and Other Tax-Exempt Organizations Statistics*, IRS (Sept. 25, 2025), https://www.irs.gov/statistics/soi-tax-stats-charities-and-other-tax-exempt-organ izations-statistics [https://perma.cc/PUC6-3D23] (download year of report under heading "Excise Taxes Reported by Charities, Private Foundations, and Split-Interest Trusts on Form 4720").

354. Form 990 filings do shed a fair amount of light on how university endowments are managed, valued, and spent. Any institution reporting endowment funds must complete Schedule D, Part V, which provides a five-year roll-forward of endowment balances, contributions, "investment earnings, gains and losses," grants and scholarships paid from endowment, other expenditures for facilities and programs, and administrative expenses, along with a rough breakdown between permanent, term, and board-designated funds; the balance sheet and related parts of Schedule D and Schedule R, in turn, reveal the aggregate size and valuation of the investment portfolio and the web of related investment entities. *See, e.g.*, *IRS Form 990 for FY2022 Filed by Trustees of Harvard University*, PROPUBLICA (June 2023), https://projects.propublica.org/nonprofits/organizations/530199180/202431309349304763/full [https://perma.cc/7DWK-HHS4].

355. Form 990 leaves significant informational gaps for anyone trying to determine whether a university responded to § 4968 by altering the composition of its endowment, rather than its overall size. The return aggregates all "investment earnings, gains and losses" into a single line, does not disaggregate returns by asset class or by character (interest, dividends, realized versus unrealized gains), and reports only very high-level investment categories on the balance sheet; it does not require disclosure of asset-allocation targets, turnover, use of derivatives or "blocker" entities, or the share of assets that generate current taxable net investment income as opposed to deferred appreciation. Nor does Form 990 reproduce the § 4968 computation itself (which is reported, if at all, on Form 4720, which has no public disclosure mandate) or any internal policy changes adopted in anticipation of the tax.

356. For example, NACUBO reported that for FY 2023, 53.8% of institutions with endowments valued over $5 billion reported that they increased the percentage of their operating budget funded by endowment. Still, about 93% of institutions with endowments valued over $5 billion changed their spending policies from the prior year. That same year, fifty-six private institutions were subject to the endowment tax. *See* NCSE FY23, *supra* note 67, at 47.

357. *See, e.g.*, Halperin, *supra* note 102, at 7 (noting that a 10% tax on net investment income would be modest and "avoid undue disruption" for a university's financial management practices).

the corporate tax.[358] As a result, the provision operated at the margins, marking a legal boundary and expressing a regulatory preference without materially reorganizing the sector. And because nearly all private universities (AEIs or otherwise) remained § 501(c)(3) public charities and were already subject to UBIT,[359] federal tax law continued to treat them relatively uniformly even after § 4968 first came into effect in 2018. As designed, then, that version of the endowment tax largely deferred to a market-pluralist ideal: beyond facilitating the voluntary formation of institutions, the Code remained mostly neutral as to how they are structured and operate.

2. Major Proposals—Penalties and Progressive Rates

Because tax rates are among the most politically sensitive design choices, recent endowment tax proposals have leaned heavily on their rates as a political signaling device. The point is unmistakable in Senator Vance's Endowment or Encampments (EOE) Act. As discussed in Part III.B.2, the bill provides for levying an additional endowment tax (§ 4969) equal to 50% of the entire aggregate fair market value of a covered university's assets, regardless of its size.[360] The surcharge is plainly punitive and potentially debilitating for any institution that falls within its scope. And because liability turns on the presence of campus encampments, the measure functions to suppress internal dissent—an aim consonant with corporatism's organic ideal. Here, the rate choice reinforces the logic of the bill's unit and object, enabling the endowment tax to shape the university into a single, harmonized corporate body.

Alternatively, Representative Joyce's Higher Education Accountability Tax (HEAT) Act deploys a flat rate paired with a penalty tier that reinforces a social egalitarian, as opposed to corporatist, ideal. It replaces the baseline 1.4 percent levy with a single, much higher 10 percent rate on net investment income, and then layers on an escalated rate.[361] Institutions whose net price grows faster than the CPI over the prior three years are designated "net-price-increase institutions" and face a 20%, rather than 10%, rate for that year.[362] That structure—a 10% flat rate, rising to 20% upon a behavior-

358. *Id.* (noting that an asset-based tax could potentially create a greater burden for universities than a net investment income tax).

359. *See supra* notes 40–44 and accompanying text.

360. Endowments or Encampments Act, S. 4295, 118th Cong. (2024) (proposed I.R.C. § 4969).

361. Higher Education Accountability Tax Act, H.R. 9331, §2(a), 118th Cong. (2023).

362. *Id.* at § 2(b)(1)–(3) (defining "net price" under section 132(a)(3) of the 20 U.S.C. 1015a(a)(3) "except that such price shall be determined by taking into account all first-time, full-time undergraduate

contingent trigger—converts a modest, proportional tax into a more muscular distributive impost that assigns heavier fiscal responsibility to endowment-rich schools, using the rate structure as a norm-enforcing mechanism for tuition restraint. In this way, the tax's rate design mitigates some of the arbitrariness in the tax's chosen object (net investment income) by pushing the measure toward the social-egalitarian commitments embedded in its unit definition (the expanded assets-per-student screen with related-entity aggregation).

Yet, in proposals other than Vance and Joyce's, rate design obscures rather than clarifies a university endowment tax's underlying political theory. Senator Cotton's WEST Act is illustrative of this phenomenon. Like Vance's bill, it adds an endowment tax on top of § 4968, but the effect of its rate is to create a hybrid penalty/progressive regime. Cotton's version of § 4969 imposes a one-time 6 percent levy on the aggregate fair market value of an AEI's assets. The higher nominal rate and the unit (defined as AFMV of a university's assets) signal a social egalitarian, or populist strike at "big endowments." Yet the tax would apply only once, and its structure would create significant cliff effects. For example, a university with $12.19 billion in non–exempt-use assets would fall just below the $12.2-billion threshold and owe nothing, while a peer with $12.21 billion—only $20 million more—would immediately be liable for a one-time tax of roughly $732.6 million. This structure would powerfully incentivize universities to engage in strategic accounting to avoid classification for a single tax year. An institution could, for instance, transfer or reclassify assets through related organizations that, under § 4968(d),[363] were not "controlled" by the university or were not "intended or available" for its benefit, temporarily reducing its countable AFMV below the threshold. Because the levy would apply only once and only to a narrow band of institutions, its practical effect would likely be modest or transient. The result is a largely symbolic use of the rate that muddles the proposal's ideological valence, making its ultimate political commitments difficult to discern.

3. Current Law: § 4968 (2026)

As a result of Congress's amendments under the OBBBA, § 4968 now adopts an explicitly progressive rate structure. For taxable years beginning after December 31, 2025, § 4968 follows a progressive schedule keyed to

students at the institution (in addition to such students who receive student aid")). Net price under the Higher Education Act refers to the average yearly price charged for first-time, full-time undergraduates after subtracting need-based and merit-based grant aid from the institution's cost of attendance.

363. Woke Endowment Security Tax Act, S. 3465, 118th Cong. (2023) (proposed I.R.C. § 4969(c)(1) stating that the rules of "section 4968(d)" shall apply to the provision's definition of assets).

the value of an institution's "student-adjusted endowment" (SAE).[364] Applicable educational institutions with an SAE of $500,000–$750,000 per student will be taxed at 1.4 percent.[365] For those with an SAE of $750,000–$2,000,000, the rate is 4 percent,[366] while AEIs with an SAE above $2,000,000 face an 8 percent tax.[367]

Although progressive in form, § 4968's new rate structure is not progressive in a familiar sense. Progressive taxation—most paradigmatically in the individual income tax—is ordinarily justified as a mechanism for reallocating resources toward those with greater need or for distributing fiscal burdens according to relative economic capacity.[368] The idea is that such a structure will narrow disparities in welfare, access, opportunity, or democratic responsibility.[369] But, whatever the limitations of those justifications in the individual context may be, their translation to § 4968's institutional rate schedule is especially strained. Section 4968's rates do not operate on individuals, households, or even students as beneficiaries. Instead, they apply exclusively to private universities (AEIs) as institutional actors,[370] while measuring progressivity by reference to the concentration of assets relative to the average number of "full-time" students attending the institution.[371] In doing so, § 4968 treats students as the sole relevant members of the institution for purposes of economic judgment and ignores other constituencies—faculty, staff, researchers, patients, and communities—who are deeply implicated in a university's resource commitments. At the same time, the rate structure is indifferent to how those assets are used: whether they generate returns or are used as collateral to finance need-based aid, subsidize research, or simply provide long-term stability is irrelevant to liability.[372] And because the schedule applies only to private colleges and universities, it excludes similarly endowed public institutions and other tax-exempt entities, reinforcing the sense that the statute is not redistributive in the ordinary sense, but selectively hierarchical.[373]

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364. I.R.C. § 4968(b) & (d) (2026) (defining student adjusted endowment as "(1) the aggregate fair market value of the assets of such institution (determined as of the end of the preceding taxable year), other than those assets which are used directly in carrying out the institution's exempt purpose, divided by (2) the number of students of such institution").

365. I.R.C. § 4968(b)(1) (2026).

366. I.R.C. § 4968(b)(2) (2026).

367. I.R.C. § 4968(b)(3) (2026).

368. MURPHY & NAGEL, *supra* note 19, at 29–30.

369. *Id*.

370. I.R.C. § 4968(c) (2026).

371. I.R.C. § 4968(e) (2026).

372. *See supra* notes 235–46 and accompanying text.

373. Although the charitable exempt-status of universities is frequently cited as a justification for § 4968 and other endowment taxes, the legislation makes no reference to § 501(c)(3).

What the rate structure does accomplish is the differentiation of institutions according to size and capital intensity. By escalating rates as student-adjusted endowment levels rise, § 4968 expresses a normative judgment that larger, wealthier universities warrant heightened fiscal discipline. That judgment is corporatist in character. It constructs a state-defined hierarchy of institutions, identifying a narrow upper tier as uniquely obligated to bear tax burdens because of their scale, influence, and social capital, and not because of the welfare of the individuals they serve. In classic corporatist fashion, the rate structure appears particularly attuned to disciplining private institutions whose economic and cultural power places them in tension with the state's efforts to harmonize private authority with public objectives. It is therefore unsurprising that only five universities—Princeton, Yale, MIT, Harvard, and Stanford—are likely to fall within the top (8 percent) bracket.[374] These institutions are not only among the wealthiest in the country; they are also among the most prestigious and globally influential, occupying a position of exceptional autonomy and symbolic power within American higher education.[375]

Yet regardless of whether one endorses the goal of using tax law to subordinate private institutions to heightened state oversight, § 4968's rate structure may ultimately frustrate that objective. The statute's sharp jumps—from 1.4 percent to 4 percent and from 4 percent to 8 percent—convert relatively small differences in measured capital intensity into categorical exposure to dramatically higher liability. Unlike the marginal rate structure of the individual income tax, where higher rates apply only to income earned above a specified threshold, § 4968's higher rates apply to the entirety of a university's net investment income once a bracket is crossed.[376] A modest shift in student-adjusted endowment can therefore produce a sudden and disproportionate increase in tax liability, untethered from any corresponding change in institutional behavior, wealth accumulation, or educational access.

Consider a stylized example. Suppose a university with stable endowment assets and unchanged investment income falls within the 1.4 percent bracket in one year based on its student-adjusted endowment. If, the following year, an unexpectedly small matriculating class increases its student-adjusted endowment just enough to place it in the 4 percent bracket, the institution's tax rate nearly triples—even though its endowment size, investment returns, tuition policy, and spending on students remain unchanged. The statute thus treats fluctuations in enrollment or timing,

374. Schmalbeck, *supra* note 273, at 10.
375. Selingo, *supra* note 272.
376. *Compare* I.R.C. § 1, *with* I.R.C. § 4968(b).

rather than durable indicators of institutional capacity or public obligation, as triggers for sweeping fiscal consequences.

Given these dynamics, it is almost certain that universities will respond strategically to avoid bracket escalation.[377] Universities cannot easily shed endowment wealth or meaningfully alter their long-term asset base in response to an annual excise. Instead, they will focus on the margins the statute renders salient, such as manipulating student counts, reclassifying assets, or—most plausibly—reducing reported net investment income through portfolio adjustments, timing strategies, or substitution toward non-income-producing returns.[378] In this way, § 4968's progressive rate schedule amplifies pressure on the tax's object rather than advancing its ostensible political objective. The statute treats wealth concentration as the problem yet incentivizes responses that reshape their portfolios and accounting practices rather than disburse wealth, expand access, or redistribute resources to students. Far from resolving § 4968's ideological tension, the new rate structure deepens it.

CONCLUSION

The university endowment tax has become one of the most symbolically charged provisions in the Internal Revenue Code. On its face, § 4968 is a narrow excise on net investment income. In practice, it has become a vessel for grievances about the cost of tuition and student protests, resentment toward elite institutions, and competing stories about what universities owe their local communities and broader public. The result is a proliferation of tax proposals that are technically intricate but normatively opaque, bills that speak in the language of rates, bases, and thresholds while smuggling in deep disagreements about hierarchy, equality, pluralism, and the proper reach of the state over private life.

This Article has argued that these disagreements cannot be resolved—and may not even be intelligible—if we either treat endowment taxation as a purely technocratic exercise or rely on political gesturing and conceptual solutionism to address the normative concerns at the heart of each policy proposal. By reconstructing the political ideals—the ideals about governance—that already structure tax law's treatment of universities and their finances, it offers a vocabulary for making those commitments explicit. The descriptive typology it develops—corporatism, social egalitarianism, market pluralism, and atomistic individualism—does not purport to exhaust political theory. It does, however, capture the recurring patterns that surface

377. Schmalbeck, *supra* note 273, at 12–13.
378. *Supra* Section III.B.3.

when Congress uses excise taxation to tackle issues regarding private university governance and wealth accumulation. Applied to § 4968 and its reform proposals, that framework reveals how choices about taxable unit, taxable object, and rate structure encode contested visions of the university's role in American society.

The analysis yields three immediate payoffs. First, it supplies a coherent normative foundation for describing what endowment taxes are doing. It allows us to interrogate much of the received wisdom about tax policy—for example, that progressive rate structures and wealth taxes are always the fairest tools for raising revenue or disciplining behavior, or that taxes should invariably be structured to advance the regulatory agendas of other legal regimes (such as those related to student aid or federally funded research)—and forces us to pay attention to the details of policy design. A "progressive" schedule keyed to institutional capital turns out not to be egalitarian at all when its object is the political and economic hierarchy of institutions rather than the welfare of the persons they employ and serve.[379] Likewise, seemingly modest definitional choices—such as importing the Higher Education Act's definition of "student" into a 1.4% excise—can render an otherwise pluralist-seeming levy corporatist in structure.[380] And proposals that go further, by coupling access to Title IV funding and programs with compliance with an endowment tax risk destroying universities as well as opportunities for students who seek to attend them, not because these changes "align" the goals of tax and education policy but because they give the state a more powerful tool to punish and control universities under the guise of coordination.[381]

Second, this paper's normative framework exposes alignment and misalignment across the core components of endowment tax design. It shows, for example, how a corporatist choice of taxable unit can be undermined by a more pluralist base—an object defined in terms of net investment income[382]—or how a penalty-like rate layered on a thin conception of wealth invites avoidance without advancing any public-regarding objective.[383] Those internal tensions matter for administration. They identify where gaming, classification arbitrage, and cliff effects will predictably arise.[384] Third, the framework establishes a set of draftable and reviewable criteria for assessing a single excise tax aimed at a diffuse array of private institutions. It allows legislators, agencies, and courts to ask not

379. *See supra* Section III.C.3.
380. *See supra* Section III.A.2.c.
381. *See supra* Section III.B.2.
382. *See supra* Section III.B.3.
383. *See supra* Section III.C.2.
384. *See supra* Sections III.A.1, III.A.3, III.B.1, III.B.3, III.C.1–3.

only whether a provision "works" or is politically salient, but whether its means are in fact suited to the ends it claims to advance.

The most important contribution of this intervention, however, is that the typology clarifies the risks of using an endowment tax to pursue goals that tax law is poorly equipped to serve. Even if university endowment excises operate only at the margins economically, their design choices set precedents about whether and how the federal tax system should enable, regulate, or control private institutions. In a moment when tax laws are being asked to do unprecedented structural work,[385] clarity about ends and means matters. Corporatist excise designs promise order and institutional responsibility, but in the private university context they can slide quickly into using federal tax law to police campus governance, suppress dissent, or privilege certain missions and student bodies over others. Social egalitarian endowment taxes rightly attend to access and affordability, yet when translated into blunt thresholds and steep progressive rates, they risk flattening institutional diversity and instrumentalizing universities as generic redistribution devices. Market pluralist policies preserve institutional autonomy and mission-differentiation, but their default to stability and the repeal of new tax laws can entrench the status quo and offer little guidance as to when donor or market preferences can permissibly broaden social commitments. And while no current proposal self-consciously embraces atomistic individualism, its anti-institutional impulse lurks in efforts to punish "bigness" or prestige as such, and is often indifferent to whether dismantling institutional capacity actually benefits students or the public.

None of this analysis dictates that there must—or must not—be a university endowment tax. It does, however, narrow the space of normatively coherent options. A defensible endowment tax must do more

385. *See, e.g.*, Michael Sainato, *US Supreme Court Justices Express Skepticism Over Legality of Trump Tariffs*, GUARDIAN (Nov. 5, 2025), https://www.theguardian.com/us-news/2025/nov/04/trump-tariffs-supreme-court-oral-arguments [https://perma.cc/8W3B-Q8AZ] (reporting that, in defending "Liberation Day" tariffs imposed under the International Emergency Economic Powers Act, the Solicitor General argued the levies were "regulatory tariffs" exercising the power to regulate foreign commerce rather than taxes exercising Congress's taxing power, and that multiple Justices pressed the administration on that characterization); William D. Ford Federal Direct Loan (Direct Loan) Program, 90 Fed. Reg. 40154, 40156–57 (Aug. 18, 2025) (to be codified at 34 C.F.R. pt. 685) (explaining that the Department's new PSLF employer-eligibility rule is "based . . . in part, on the so-called 'illegality doctrine' utilized when determining whether organizations qualify for tax-exempt status under Internal Revenue Code § 501(c)(3)" and expressly modeling PSLF exclusions on IRS denials and revocations of exemption for organizations with a "substantial illegal purpose"); *see also* Amanda Friedman, *Trump Threatens to Remove Harvard's Tax-Exempt Status*, POLITICO (Apr. 15, 2025), https://www.politico.com/news/2025/04/15/harvard-trump-tax-exempt-00290534 [https://perma.cc/YL6T-5SR8] (describing President Trump's Truth Social post that "perhaps Harvard should lose its Tax Exempt Status" and his broader campaign to use revocation of § 501(c)(3) status as a sanction for perceived failures in diversity, equity, and inclusion and campus speech); *cf.* Brian Faler, *Supreme Court Rejects Bid to Preempt Wealth Tax*, POLITICO (June 20, 2024), https://www.politico.com/news/2024/06/20/supreme-court-wealth-tax-00160593 [https://perma.cc/2ZCC-NJQS] (describing *Moore v. United States* as a "closely watched" test case for whether the Constitution's realization requirement would bar a federal wealth tax and noting that business and anti-tax advocates had hoped a ruling for the taxpayers would preempt such proposals).

than express frustration with elite universities or selective instances of wealth inequality and cultural conflict. It must candidly specify what role universities, as well as the state, should play in our democratic polity, explain how taxing private endowment income or wealth advances that role, and accept the tradeoffs—for innovation, institutional autonomy, free expression, and, most importantly, education—that follow. That will require, at a minimum, aligning § 4968's unit, object, and rate with an ideologically coherent and transparent vision of the higher education sector. It requires determining whether we want universities to function as quasi-public fiduciaries, egalitarian engines of mobility, pluralistic centers of experimentation, or something else. It will also require acknowledging the limits of fiscal instruments—recognizing, for example, when tuition subsidies, direct appropriations, accreditation rules, or student-aid reform are better suited than an excise on investment returns to advance access and affordability, and when the benefits provided by the current system of higher education (world-class research, intellectual freedom, and social mobility) are sufficiently valuable that aggressive fiscal intervention risks doing more harm than good.

The core claim of this Article is therefore modest but urgent. Endowment taxation is not just an argument about revenue or fixing "loopholes" in § 4968, § 501(c)(3), or the federal tax system writ large. It is an argument about the political status of universities themselves, and the role that federal tax law—one of the clearest expressions of state authority—should play in shaping that status. If Congress is going to use the tax code to reshape the relationship between universities, individuals, and the public, it should do so with its eyes open—owning the political ideals it is enacting rather than hiding them behind the neutral veneer of technical design or the emotional but often equivocal rhetoric of fairness and desert. Making those ideals explicit will not produce consensus. But it can produce something more valuable in a polarized, high-stakes policy domain: a debate in which the participants understand what they are really fighting about, and a law whose structure can be judged and revised against the vision of higher education it is meant to serve.