

WEALTH ACCUMULATION AT ELITE COLLEGES,
ENDOWMENT TAXATION, AND THE UNLIKELY
STORY OF HOW DONALD TRUMP GOT ONE THING
RIGHT

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President Donald Trump has declared war on immigrants, diversity, and those who dare to dissent. Rooted in resentments about who people are, where they were born, and what they believe, these executive-led assaults are dangerous developments in the modern era. However, in the course of Trump's many retrograde tirades, he has somehow managed to get one thing right—too many elite private colleges in the United States, considered nonprofit entities, have amassed way too much wealth.

This Article recounts this unlikely story, including how the Trump Administration's 2017 endowment tax could work to advance diversity. The new endowment tax penalizes private colleges for stockpiling assets. In response, potentially impacted universities have argued they are victims of an unfair conservative conspiracy intended to target liberal ideology. But the data demonstrates that this is not true. And concerns about rich colleges hoarding their resources have come from both the right and the left.

Moreover, Trump's endowment tax could be seen as an opportunity and invitation to increase egalitarianism and equity in this country. If rich colleges simply utilize more of their massive savings to further social justice, impact poverty, and enhance public good—particularly in their own at-risk communities—they will not only avoid federal taxation but also begin to address critiques about their elitism and greed. In doing so such universities would not only thwart Trump and his tax but stand with vulnerable groups who are the true

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victims of the Trump Administration's ever-expanding conservative attacks.

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I. INTRODUCTION

When it comes to progressive causes, the current presidential administration is troubling on most fronts. From stepping up immigration enforcement,¹ to dialing back antidiscrimination protections,² to encouraging retaliation against demonstrators who dare to dissent,³ Donald Trump and his appointees have taken our country in a direction reminiscent of a bygone era. But as unlikely as it may seem, as a liberal academic and longtime civil rights advocate, I agree with the Trump Administration about one thing: many elite

1. Nicole Einbinder, *How Trump's Family Separation Policy Has Affected Parents*, PBS (Aug. 2, 2018), <https://www.pbs.org/wgbh/frontline/article/how-trumps-family-separation-policy-has-affected-parents/> (shedding light on the long-term traumatic effects of Trump's immigration policies, which include removing young children from the arms of undocumented parents at the Mexican border and keeping them separated from their parents for months).

2. Sherrilyn Ifill, *President Trump's First Year Was an Affront to Civil Rights*, TIME (Jan. 17, 2018), <http://time.com/5106648/donald-trump-civil-rights-race/> (lamenting by the Executive Director of the NAACP Legal Defense Fund that civil rights policy changes under the Trump Administration hurt Black Americans).

3. Robert Patrick, *St. Louis Man Sues Trump, Police for his Arrest at 2016 Rally*, ST. LOUIS POST-DISPATCH (Mar. 9, 2018), https://www.stltoday.com/news/local/crime-and-courts/st-louis-man-sues-trump-police-for-his-arrest-at/article_64786062-ff87-53f2-b4a4-b6d31e4fb05c.html (reporting on litigation, some handled by this author, on behalf of Rodney Brown, a man who was forcibly arrested at a Donald Trump rally for allegedly laughing at Trump).

private colleges, considered nonprofit, tax-exempt entities, have amassed way too much wealth.⁴

For decades such institutions have been allowed to accumulate overflowing asset portfolios while continuing to call for millions in tax-free donations.⁵ Yet, even while sitting on multibillion-dollar endowment accounts and perpetuating extreme privilege, they have benefitted from tax-exempt status not just on the federal level but locally too.⁶ This situation has resulted in the editorial board of one news outlet arguing that such schools should be seen and treated as NINOs—“Nonprofits in Name Only.”⁷

Trump’s Tax Cuts and Jobs Act (the “Act”),⁸ which went into effect in 2019, seeks to curtail such practices by imposing a 1.4% excise tax on the annual endowment income of the richest colleges in the country. The federal government would receive this cut from the coffers of schools with more than five hundred students who maintain more than \$500,000 per student in endowment holdings.⁹

Not surprisingly, potentially impacted universities protested the adoption of this legislation. In trying to maintain their riches, private college leaders painted Trump’s endowment tax penalty as a threat to the diversity of ideas, an attack on left-leaning institutions, and contrary to the intent of donors who gave their money to advance social good.¹⁰ And now, in addition to seeking to skirt the penalties

4. See, e.g., Mae C. Quinn, Opinion, *Doing Better and Being Better?*, ST. LOUIS POST-DISPATCH (May 19, 2018), https://www.stltoday.com/opinion/doing-better-and-being-better/article_d11877ad-0710-5a90-a4de-38004f37e9a6.html; Richard Rubin & Andrea Fuller, *Which Colleges Will Have to Pay Taxes on Their Endowment? Your Guess Might Not Be Right*, WALL ST. J. (Jan. 19, 2018), <https://www.wsj.com/articles/which-colleges-will-have-to-pay-taxes-on-their-endowment-your-guess-might-not-be-right-1516271400> (explaining that the Act signed by Donald Trump will tax private schools with at least five hundred students and at \$500,000 per student).

5. Albert R. Hunt, Opinion, *Tax Overhaul to Make 2018 a Painful Year for Colleges*, BLOOMBERG (Jan. 9, 2018), <https://www.bloomberg.com/opinion/articles/2018-01-09/tax-overhaul-to-make-2018-a-painful-year-for-colleges> (estimating the Act could reduce charitable giving by up to five percent and significantly impact universities that raise money from contributions).

6. See Quinn, *supra* note 4.

7. Editorial, *Colleges Owe a Lot to City*, BOSTON HERALD (Aug. 4, 2018, 12:00 AM), <https://www.bostonherald.com/2018/08/04/editorial-colleges-owe-a-lot-to-city/> (last updated Nov. 17, 2018, 12:00 AM) [hereinafter *Colleges Owe a Lot to City Editorial*].

8. See Tax Cuts and Jobs Act, Pub. L. No. 115-97 § 4968 (2017).

9. Rubin & Fuller, *supra* note 4.

10. See, e.g., George F. Will, Opinion, *The Republicans Take Aim at Academic Excellence*, WASH. POST (Nov. 8, 2017), https://www.washingtonpost.com/opinions/the-republicans-take-aim-at-academic-excellence/2017/11/08/eb8e9056-c4af-11e7-84bc-5e285c7f4512_story.html?utm_term=.4ce9c5821cf0 (“Great universities are great because philanthropic generations have borne the cost of sustaining private institutions that seed the nation with excellence. Donors have done this in the expectation that earnings accruing from their investments will be devoted solely to educational purposes, in perpetuity. This expectation will

through creative accounting, new tax code interpretations, and declaring confusion, these same schools have joined together to repeal the tax law¹¹—in part advancing the same arguments that did not work before.

But given the many progressive voices speaking out against elite private college endowment practices, the range of schools potentially impacted by the new tax, and the content-blind application of the law, the Act is not an attack solely on liberal academic institutions and left-leaning ideology. Similarly, assertions about donor restrictions on funds and an existing focus on public interest efforts ring hollow given prestigious colleges' ongoing risky investments,¹² insufficient student support,¹³ and relative disregard for at-risk communities.¹⁴ Indeed, penalizing extreme financial privilege is less of an affront to the progressive program than the ongoing unchecked greed of rich colleges—particularly when such self-serving hoarding has occurred in some of the most crime-ridden and impoverished cities in the country.

This is not to say the federal excise tax is the best method for ending the extreme self-interest of elite academic institutions or more equitably distributing wealth. It is a blunt instrument to be sure. But Trump's new endowment excise tax should serve as a strong message to rich private colleges, that they must abandon their self-interested financial practices and relative disregard for at-risk communities—if not for altruistic reasons, then at least to avoid further critique. And if they do not want to pay endowment funds into federal coffers, which Trump will use for general expenses

disappear, and the generosity that it has sustained will diminish . . ."); John K. Wilson, *Why the Endowment Tax is Unconstitutional*, INSIDE HIGHER ED (Jan. 16, 2018), <https://www.insidehighered.com/views/2018/01/16/tax-college-endowment-unconstitutionally-targets-institutions-opinion>.

11. Adam Harris, *A Tax on Endowments Became Law. But Congressmen and Colleges Are Still Trying Still Fighting It*, CHRON. OF HIGHER EDUC. (Mar. 8, 2018), <https://www.chronicle.com/article/A-Tax-on-Endowments-Became/242774>; Press Release, Princeton U., Eisgruber and Other Higher Education Leaders Urge Repeal or Amendment of the Endowment Tax (Mar. 7, 2018), <https://www.princeton.edu/news/2018/03/07/eisgruber-and-other-higher-education-leaders-urge-repeal-or-amendment-endowment-tax> [hereinafter *Princeton U. Endowment Tax Press Release*].

12. Thomas Gilbert & Christopher Hrdlicka, *Why Are University Endowments Large and Risky?*, 28 REV. FIN. STUD. 2643, 2644 (2015) (“[E]ndowments are heavily invested in risky assets, averaging about 75% of their assets in securities such as equities, hedge funds, real estate, private equity, and other alternative assets . . .”).

13. Astra Taylor, *Universities Are Becoming Billion-Dollar Hedge Funds With Schools Attached*, NATION (Mar. 8, 2016), <https://www.thenation.com/article/universities-are-becoming-billion-dollar-hedge-funds-with-schools-attached/>.

14. Quinn, *supra* note 4.

disconnected from their own students and communities,¹⁵ they must make amends for past practice and alter the status quo.

Beginning to privilege public good over wealth accumulation can happen in any number of ways consistent with the individual missions of each school. For instance, universities can move towards the practice—already proposed by some legislators—of making sure that at least twenty-five percent of annual endowment income is directed towards scholarships and tuition waivers for students in need, including those from working-class families.¹⁶ Universities can further institute support beyond undergraduate years for those seeking advanced degrees, such as law students, who agree to go into public interest work and helping professions.

Looking for input from others—beyond the predominately white male elite who dominate the boards of trustees at the nation’s most prestigious colleges—would be another step towards rethinking college self-interest and stockpiling of wealth.¹⁷ Using participatory budgeting practices that take account of the actual expressed needs of students, families, and communities in need would go a long way towards breaking the cycle of inward focus and perpetuation of privilege. And seeking guidance from private nonprofit colleges—like Berea College—that have successfully prioritized public service over prestige and the myopic focus on financial portfolios¹⁸ could further inform reforms.

In addition to these methods for privileging equity and need over wealth accumulation, universities can satisfy their agreement to advance public good by embracing and fulfilling their commitments

15. Will, *supra* note 10 (noting the money raised from the endowment tax would make up “less than 0.005% of projected federal spending of \$53 trillion”).

16. See, e.g., Rick Seltzer, *Lawmaker with the Idea Higher Ed Leaders Hate*, INSIDE HIGHER ED (May 12, 2016), <https://www.insidehighered.com/news/2016/05/12/congressman-discusses-plan-force-colleges-spend-large-endowments> (describing an attempt in New York).

17. See, e.g., ASSOCIATION OF GOVERNING BOARDS OF UNIVERSITIES AND COLLEGES, THE AGB 2018 TRUSTEE INDEX 14 (2018), https://agb.org/wp-content/uploads/2019/01/report_2018_index.pdf (conducting a survey based upon a “random sampling” of nearly 1,300 trustees where sixty percent of respondents were male and eighty-seven percent were white); Paul Fain, *Diversity Remains Fleeting on Colleges’ Governing Boards, Surveys Find*, CHRON. OF HIGHER EDUC. (Nov. 29, 2010), <https://www.chronicle.com/article/Diversity-Remains-Fleeting-on/125566> (“[c]ollege trustees remain overwhelmingly white, male, and over 50”). To be clear, this problem also exists in public universities and even community colleges. See, e.g., Monica Levitan, *Survey: Growing Disparity in Backgrounds of Community College Trustees and Students*, DIVERSE (Oct. 24, 2018), <https://diverseeducation.com/article/130265/>.

18. Adam Harris, *The Little College Where Tuition Is Free and Every Student Is Given a Job*, ATLANTIC (Oct. 11, 2018), <https://www.theatlantic.com/education/archive/2018/10/how-berea-college-makes-tuition-free-with-its-endowment/572644/> (describing Berea College’s unique student work-study program).

to local Payment in Lieu of Taxation (“PILOT”) programs.¹⁹ PILOT programs, which involve universities voluntarily paying into local budgets to support education, housing, mental health, and criminal justice services,²⁰ could help reduce the accumulated wealth of private colleges. At the same time, PILOT payments would advance both an equity-focused education agenda and intentions of private donors who want to support academic communities working in the public interest. In the end, perhaps ironically, by embracing such agreements in reaction to the new excise tax, elite private universities would be standing with vulnerable populations who really are under attack by the Trump Administration because of who they are, where they were born, what they believe, or how they express their ideas.²¹

II. HISTORY OF PRIVATE COLLEGES AS NONPROFITS COMMITTED TO PUBLIC GOOD

Colleges and universities in the United States have long enjoyed tax-exempt status because of their purported goal of advancing the public good.²² The idea of “public good” as it relates to higher education has shifted over time—moving away from the interests of a select few to promoting greater access and democratization.²³ In this way, some argue there is “[s]ome degree of consensus” today that institutions of higher learning, beyond simply holding classes, should

19. Zack Huffman, *Unctuous Pilot: Are Colleges in Boston Paying Their Fair Share?*, DIGBOSTON (Oct. 31, 2018), <https://diggoston.com/unctuous-pilot-are-colleges-in-boston-paying-their-fair-share/> (explaining that colleges and universities enter into PILOT programs to contribute to government services from which they benefit).

20. *Id.*

21. See, e.g., David Leonhardt & Ian Prasad Philbrick, *Donald Trump’s Racism: The Definitive List*, N.Y. TIMES (Jan. 15, 2018), <https://www.nytimes.com/interactive/2018/01/15/opinion/leonhardt-trump-racist.html>; Annie Linskey, *President Trump’s Caustic Racial Comments Dovetail with Harsh Policies*, BOS. GLOBE (July 9, 2018), <https://www.bostonglobe.com/news/politics/2018/07/08/president-trump-racially-charged-words-dovetail-with-harsh-policies/eg7N0MrPG1JAgzjiwLG80/story.html>.

22. See Michael Fricke, *The Case Against Tax Exemption for Non-Profits*, 89 ST. JOHN’S L. REV. 1129, 1140–42 (2015) (describing how the “public good theory” motivates tax-exempt status for institutions of higher education who step in to provide a “public good” that might otherwise need to be delivered by government); see also Osamudia James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 58 (2011) (“[F]rom the establishment of the first colonies, through the twentieth century, American historical, cultural, and political understandings have framed higher education as a public good.”).

23. See Rachel F. Moran, *City on a Hill: The Democratic Promise of Higher Education*, 7 U.C. IRVINE L. REV. 73, 73–84 (2017) (describing how higher education has supposedly moved from being an enterprise reserved for the wealthy elite to one that has helped promote “general economic prosperity,” social mobility, and democratization); Omari Scott Simmons, *Class Dismissed: Rethinking Socio-Economic Status and Higher Education Attainment*, 46 ARIZ. ST. L.J. 231, 240 (2014).

promote some version of “greater social cohesion, robust democratic participation, economic growth, reduced poverty rates, broad diffusion of information and technology, and the development of common values.”²⁴ Many of the original mottos of the most prestigious colleges in this country embrace these ideals,²⁵ as do their more modern mission statements.²⁶ And even if everyone does not agree on the exact definition of “public good” in the context of higher education,²⁷ none would argue that it should center on college wealth accumulation. Rather, it is this commitment to prioritizing public good over profit concerns that has allowed private universities in the United States to be classified as not-for-profit entities and enjoy the benefits of operating without having to pay taxes.²⁸

As many other scholars have recounted, education-based tax exemption as a practice dates back to colonial times.²⁹ Schools established during this period, including Brown, Dartmouth, Harvard, William and Mary, and Yale, were largely connected to religious entities or chartered by the states where they operated.³⁰ As a result, early colleges and universities generally enjoyed the same treatment as churches, charities, and government when it came to local property and other taxes.³¹ Such state and local exemptions were largely carried forward over time, sometimes shaped or impacted by federal tax exemption standards.³²

On the federal level, starting in 1894, “companies or associations organized and conducted solely for charitable, religious or educational purposes” were also exempted from taxation under U. S. law.³³ The

24. Simmons, *supra* note 23.

25. See, e.g., NE. U., <https://www.northeastern.edu/> (last visited Mar. 30, 2019) (sharing the college’s motto of “Lux, Veritas, Virtus,” meaning “light, truth, and virtue”); *University Archives and Records Center*, U. PENN., <https://archives.upenn.edu/exhibits/penn-history/seals-arms-usage> (last visited Mar. 30, 2019) (explaining that the university seal includes the motto “Leges sine Moribus vanae,” translated generally to mean “[l]aws [or learning] without character are in vain”).

26. See, e.g., *Meet Princeton*, PRINCETON U., <https://www.princeton.edu/meet-princeton/service-humanity> (last visited Mar. 30, 2019) (“Princeton University has a longstanding commitment to serve, reflected in Princeton’s informal motto – Princeton in the nation’s service and the service of humanity – and exemplified by the extraordinary contributions that Princetonians make to society.”).

27. See Simmons, *supra* note 23, (“[P]ublic good’ is admittedly an ambiguous term without simple definition.”).

28. See Fricke, *supra* note 22, at 1140–41; see also 26 U.S.C. § 501(c)(3) (2012).

29. See generally John D. Colombo, *Why is Harvard Tax-Exempt? (And Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 844–45 (1993); James, *supra* note 22, at 58.

30. Colombo, *supra* note 29, at 844–45.

31. *Id.*

32. *Id.* at 855–56.

33. *Id.* at 845 (quoting Revenue Act of 1894, ch. 349, § 32, 28 Stat. 556 (1894)).

federal tax exemption for higher education institutions continued into the modern era, folded into section 501(c)(3) of the Internal Revenue Code.³⁴ Historically section 501 has been construed broadly both in terms of what counts as education and how far exempt institutions can go before becoming commercial enterprises rather than entities operating in the public good.³⁵

Moreover, private universities operating as nonprofit entities have not been required to spend any particular amount from their endowment savings.³⁶ In this way, they have stood in stark contrast to other private foundations,³⁷ which are monitored annually to ensure they utilize investment income in a manner that advances their charitable purposes.³⁸ Failure on the part of other private foundations to deploy investment returns results in a thirty percent excise tax by the Internal Revenue Service (“IRS”) for improperly stockpiling money intended for the public good.³⁹

III. EARLY EFFORTS TO UNDERSTAND WEALTH ACCUMULATION AT ELITE UNIVERSITIES

Against this backdrop, about a decade ago many began to criticize private for-profit colleges for fraudulent representations and finance-related improprieties that harmed poor youth, returning veterans, students of color, and other vulnerable groups.⁴⁰ Such problematic

34. *Id.* at 845–47.

35. *Id.* at 847–51; *see also* James, *supra* note 22, at 60 (noting that the nation’s founders believed university education could “prepare students to be good citizens, capable of thoughtful and responsible participation in a strong representative democracy”). Some modern commentators say that under federal law today, the concern is less about whether these entities meaningfully operate in the public good and more about whether they can check a box indicating they are not overtly paying out profits to private individuals. *See, e.g.*, Robert Shireman, *These Colleges Say They’re Nonprofit — But are They?*, CENTURY FOUND. (Aug. 23, 2018), <https://tcf.org/content/commentary/colleges-say-theyre-nonprofit/?agreed=1>.

36. *See* Naomi Jagoda, *College Endowments Under Scrutiny*, HILL (Apr. 2, 2016, 11:09 AM), <https://thehill.com/policy/finance/274951-college-endowments-under-scrutiny>.

37. *Id.*

38. *See Taxes on Failure to Distribute Income – Private Foundations*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/private-foundations/taxes-on-failure-to-distribute-income-private-foundations> (last updated July 28, 2018).

39. *Id.*

40. *See, e.g.*, Julia Mezaros, *For-Profit Colleges: Maintaining a Permanent Underclass*, HUFFINGTON POST (Nov. 9, 2014, 5:30 PM), https://www.huffingtonpost.com/julia-mezaros/for-profit-colleges-maint_b_5788466.html (reporting that in 2009 the Obama Administration began to crack down on for-profit college practices which, together with “private prisons, charter schools, [and] voucher programs,” worked “to create an underclass that is profitable to corporations.”); *see also* Robert Shireman, *The Covert For-Profit*, CENTURY FOUND., (Sept. 22, 2015), <https://tcf.org/content/report/covert-for-profit/>; James, *supra* note 22, at 46, 74–75.

practices included everything from aggressively growing tuition income through exploitation of federal tax and student loans loopholes,⁴¹ to misleading the public generally about their outcomes,⁴² to failing to deliver on specific promises to the students they supposedly served.⁴³

As such these schools were contrasted with the ideal college model, which was supposed to be operating with a view towards assisting the public and improving society. And wide-spread criticism ultimately led to the closure of for-profit university locations and spurred a range of investigations and lawsuits against several for-profit colleges. Corinthian College,⁴⁴ University of Phoenix,⁴⁵ and Trump University⁴⁶—the latter an institution established and run by

41. David Whitman & Arne Duncan, *Betsy DeVos and Her Cone of Silence on For-Profit Colleges*, BROOKINGS INST. (Oct. 17, 2018), <https://www.brookings.edu/research/betsy-devos-for-profit-colleges-education-america/>.

42. Barry Yeoman, *The High Price of For-Profit Colleges*, AM. ASS'N U. PROFESSORS (May-June 2011), <https://www.aaup.org/article/high-price-profit-colleges#.XEYmCoXB3m0> (“The media and policy makers are taking notice of the low graduation rates, high debt loads, and deceptive recruiting practices at many for-profit colleges.”).

43. See Alia Wong, *The Downfall of For-Profit Colleges*, ATLANTIC (Feb. 23, 2015), <https://www.theatlantic.com/education/archive/2015/02/the-downfall-of-for-profit-colleges/385810/> (noting that as of 2010, as few as twenty-two percent of students who enrolled in such educational institutions actually graduated); *id.*; see also Astra Taylor & Hannah Appel, *Subprime Students: How For-Profit Universities Make a Killing by Exploiting College Dreams*, MOTHER JONES (Sept. 23, 2014, 10:19 PM), <https://www.motherjones.com/politics/2014/09/for-profit-university-subprime-student-poor-minority/>.

44. See, e.g., Paul Fain, *Corinthian’s Long Wind-Down*, INSIDE HIGHER ED (Nov. 9, 2017), <https://www.insidehighered.com/news/2017/11/09/zenith-education-will-close-all-three-its-campus> (reporting on the closure of twenty-one Corinthian College campus locations and a California judgment against the entity for \$1.1 billion).

45. Press Release, U.S. Dep’t of Justice, *University of Phoenix Settles False Claims Act Lawsuit for \$67.5 Million* (Dec. 15, 2009), <https://www.justice.gov/opa/pr/university-phoenix-settles-false-claims-act-lawsuit-675-million>; Alexandra Samuels, *Feds Investigating University of Phoenix for Potential Unfair Business Practices*, USA TODAY (July 30, 2015, 12:59 PM), <https://www.usatoday.com/story/college/2015/07/30/feds-investigating-univ-of-phoenix-for-possible-unfair-business-practices/37405087/> (cataloging concerns about “for-profit universities that recruit low-income students that qualify for large amounts of financial aid, leave them with debt that aggregates well after graduation and then makes repayment difficult”).

46. See Caroline Howard, *Donald Trump University Lawsuit Is Lesson for All For-Profit Colleges*, FORBES (Aug. 27, 2013, 4:08 PM), <https://www.forbes.com/sites/carolinehoward/2013/08/27/donald-trump-universitys-big-lesson-for-all-for-profit-schools/#2c8869c32472> (reporting that Trump faced a \$40 million lawsuit filed the New York Attorney General for allegedly “operating a phony university”).

Donald Trump,⁴⁷ the now President of the United States—all faced such sanctions and litigation.

Yet, during this same time the financial practices of elite, private universities enjoyed little critical scrutiny or consequential evaluation.⁴⁸ For instance, Republican Senator Chuck Grassley and Democratic Representative Peter Welch convened a bipartisan congressional roundtable in 2008 entitled, “Maximizing the Use of Endowment Funds and Making Higher Education More Affordable.”⁴⁹ The gathering was intended to “explore the relationship between endowment value and college cost, the legal and accounting definitions of what an endowment is, and the impact of legislation requiring a mandatory payout from endowment funds.”⁵⁰ A range of experts were invited to help understand the issues and develop specific solutions.⁵¹ But the group’s goals, and any further efforts to change the financial practices of the nation’s most prestigious higher education entities, were set to the side during the Obama Administration following the 2008 Wall Street crash.⁵²

47. John Cassidy, *The Enduring Scandal of Trump University*, NEW YORKER (Nov. 20, 2016), <https://www.newyorker.com/news/john-cassidy/the-enduring-scandal-of-trump-university>.

48. One early examination of wealth accumulation on the part of nonprofit universities came from law professor Johnny Rex Buckles, a frequent speaker for the Federalist Society, who warned “efforts to subject university endowments to a mandatory payout rule should be viewed with a critical eye.” Johnny Rex Buckles, *Should the Private Foundation Excise Tax on Failure to Distribute Income Generally Apply to “Private Foundation Substitutes?” Evaluating the Taxation of Various Models of Charitable Entities*, 44 NEW ENG. L. REV. 493, 539 (2010).

49. See Press Release, Congressman Peter Welch, Grassley, Welch Announce College Endowment Roundtable (Aug. 28, 2008), <https://welch.house.gov/media-center/press-releases/grassley-welch-announce-college-endowment-roundtable> (providing a schedule for the three-and-a-half-hour event).

50. *Id.*; see also MOLLY SHERLOCK ET AL., CONG. RES. SERV., COLLEGE AND UNIVERSITY ENDOWMENTS: OVERVIEW AND TAX POLICY OPTIONS 1 (2018) (recounting Grassley and Welch’s 2008 initiative); Press Release, Congressman Peter Welch, Welch Opening Statement from College Endowment Roundtable with Senator Grassley (Sept. 8, 2008), <https://welch.house.gov/media-center/press-releases/welch-opening-statement-college-endowment-roundtable-sen-grassley>.

51. Roundtable participants included Amhurst President Anthony Marx as well as trusts and estates expert Iris Goodwin from the University of Tennessee College of Law. See, e.g., IRIS GOODWIN, CONGRESSIONAL ROUNDTABLE ON COLLEGE ENDOWMENTS – RESTRICTED GIFTS TESTIMONY (Sept. 18, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1268999.

52. Libby Nelson, *‘Hoarding Assets?’*, INSIDE HIGHER ED (Dec. 9, 2011), <https://www.insidehighered.com/news/2011/12/09/grassley-renews-focus-endowments> (reporting how Senator Grassley built support during 2007 and 2008 for legislation to require further college endowment payouts but, because of changes in administration priorities following the stock market crash, the effort stalled).

Thereafter, in 2010, the left-leaning Tellus Institute at the Center for Social Philanthropy⁵³ also issued an in-depth investigative report entitled *Educational Endowments and the Financial Crisis: Social Costs and the Systemic Risks in the Shadow Banking System*.⁵⁴ The report, authored by Joshua Humphreys and a team of researchers, raised grave concerns about modern investment methods of wealthy private colleges, indicating that “students, faculty, staff, alumni, and local communities are bearing the brunt” of the economic losses universities suffered as a result of the recent economic crisis.⁵⁵ Indeed, some schools lost up to thirty percent of their endowments during the 2008 markets crash,⁵⁶ negatively impacting the groups colleges were intended to serve.

The report went on to warn that such institutions had not only caused their own problems but likely contributed to the entire nation’s economic instability by “chasing speculative returns” and “high-risk investing” in the “weakly regulated ‘shadow banking system,’” under the advice of high-paid financial advisors.⁵⁷ Using six elite colleges on the East Coast as detailed case studies,⁵⁸ the report went on to warn about the new “Wall Street culture” at universities “focused on profitable investment returns as if they were central to colleges’ institutional missions,” rather than education and advancing the public’s interest.⁵⁹ Thus, Humphreys and his colleagues urged more “transparency, accountability and investor responsibility” on the part of such colleges to ensure focus on sustainable philanthropic goals, advancement of educational mission, and responsible use of donated funds to further public good.⁶⁰ But their detailed economic analyses and calls for action—little known by the public at large at the time—also went largely unheeded until a few years later.

53. *About The Institute*, TELLUS INST., <https://www.tellus.org/about> (last visited Mar. 30, 2019) (explaining that the Tellus Institute’s mission is “advancing a just and sustainable planetary civilization”).

54. JOSHUA HUMPHREYS ET AL., TELLUS INST., *EDUCATIONAL ENDOWMENTS AND THE FINANCIAL CRISIS: SOCIAL COSTS AND SYSTEMIC RISKS IN THE SHADOW BANKING SYSTEM* (2010), <http://www.croataninstitute.org/documents/Educational-Endowments-and-the-Financial-Crisis-2010.pdf>.

55. *Id.* at 5. New York University-educated historian, professor, and higher education expert Joshua Humphrey’s served as lead author of the report, which was further supported by the research findings of a range of policy and other experts. *See Author Page for Joshua Humphreys*, TELLUS INST., <https://www.tellus.org/tellus/author/joshua-humphreys>.

56. HUMPHREYS ET AL., *supra* note 54, at 3.

57. *Id.* at 3–4; *see also id.* at 22 (noting, for instance, that by “using derivatives to place bets” with university endowment money, universities were involved in creating “unexpected spillover risks within those markets”).

58. Boston College, Boston University, Brandeis University, Dartmouth College, Harvard University, and Massachusetts Institute of Technology were the schools examined. *Id.* at 3.

59. *Id.* at 5.

60. *Id.* at 6.

IV. BIPARTISAN CALLS TO PREVENT PRIVATE COLLEGES FROM STOCKPILING WEALTH

Starting in 2014, a range of individuals and organizations, perhaps otherwise unlikely to agree, again took up the cause of investigating and challenging wealth accumulation efforts of elite universities. Although not always working together, or even aware of activities on the other side, critics from across the political divide started to urge greater accountability on the part of these supposed nonprofit institutions—but now much more publicly. For instance, in 2014 Dave Camp, a Republican Congressman from Michigan, introduced the Tax Reform Act which, among other things, sought to impose a one percent tax on the investment earnings of private university endowments that held more than \$100,000 per enrolled student.⁶¹ While the effort gained a fair amount of attention, in part given the public light it shed on the endowment wealth of elite private colleges,⁶² it failed at that time to pick up legislative steam or undergo meaningful scrutiny by tax policy experts.⁶³

Next, well-known progressive public intellectual, Malcolm Gladwell, used NPR, Twitter, and his podcast to blast elite private universities for maintaining “obscene” levels of wealth while continuing to raise tuition in a manner that excluded needy students.⁶⁴ Interestingly, Gladwell’s critiques relied largely upon the findings of the Nexus Group, which had issued a report in 2015 also calling for disgorgement of surplus funds from elite university coffers in an effort to try and level the playing field for financially struggling and at-risk students.⁶⁵ The Nexus report surfaced disparities in

61. See also Christine Cahill & Amna Hashmi, *Tax Reform Plan Could Cost Harvard Millions, Though Passage Unlikely*, CRIMSON (Apr. 3, 2014), <https://www.thecrimson.com/article/2014/4/3/tax-reform-cost-endowment/> (reporting Representative Camp’s efforts to tap rich private university endowment).

62. See Janet Lorin, *Rich School Endowments Aren’t Taxed. Washington Is Out to Change That*, BLOOMBERG BUSINESSWEEK (Nov. 9, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-11-09/rich-school-endowments-aren-t-taxed-washington-is-out-to-change-that>.

63. Harris, *supra* note 11 (describing the 2014 Camp Tax Reform Act proposal and providing link to NACUBO evaluation of its provisions); see *NACUBO Assessment of the Camp Tax Reform Act of 2014*, AM. COUNCIL EDUC., <https://www.acenet.edu/news-room/Documents/ACE-NACUBO-Camp-General-Provisions.pdf>.

64. See, e.g., Malcolm Gladwell, *In Elite Schools’ Vast Endowments, Malcolm Gladwell Sees “Obscene” Inequity*, NPR (Aug. 22, 2015, 7:29 AM), <https://www.npr.org/2015/08/22/433735934/in-elite-schools-vast-war-chests-malcolm-gladwell-sees-obscene-inequity>.

65. See *id.*; see also JORGE KLOR DE ALVA & MARK SCHNEIDER, RICH SCHOOLS, POOR STUDENTS: TAPPING LARGE UNIVERSITY ENDOWMENTS TO IMPROVE STUDENT OUTCOMES 4 (2015), <http://nexusresearch.org/wp-content/uploads/2015/11/Rich-Schools-Poor-Students-Revised-November-2015.pdf>; Stephen Burd, *Even at Private Colleges, Low-Income Students Tend to Go to the Poorest Schools*, NEW AM. (May 18, 2017), <https://www.newamerica.org/education-policy/edcentral>

hidden taxpayer subsidies enjoyed at places like Princeton, Yale, and Harvard (between \$48,000 to \$105,000 per student a year) in contrast to state-run schools and community colleges (between \$2,400 and \$24,400 a year).⁶⁶ What Gladwell may not have known was that the report was actually authored by University of Phoenix founding President, Jorge Klor de Alva—who himself presents a complicated picture as both a for-profit college capitalist and long-time advocate for equity and racial justice.⁶⁷

Gladwell further lifted up critiques offered by tax law scholar Victor Fleischer, former Democratic Chief Tax Counsel for the U.S. Senate Finance Committee.⁶⁸ Fleisher placed an opinion piece in the *New York Times* in August 2015 outing prestigious private colleges for both maintaining “endowments heaving with cash” and spending vast sums to manage and aggressively grow those portfolios.⁶⁹ Based on his analysis of the situation, Fleisher urged schools with over \$100 million in their endowments to spend down their savings by at least eight percent to better support the “tangible benefits” donors expected—such as educational programs, scholarships, and services such as “libraries, museums, hospitals and laboratories” for the greater good of the public.⁷⁰

In 2015, other progressive tax scholars turned their attention to the wealth accumulation practices of the country’s elite private colleges. In particular, Professors Norman Silber and John Wei wrote an important paper that surfaced the widespread use of offshore

/private-colleges/ (noting that the nation’s Ivy League colleges and rich universities “resemble wealthy country clubs, with nearly two-thirds of the students coming from families that are in the upper middle class or richer.”).

66. Klor de Alva & Schneider, *supra* note 65, at 7–8.

67. Jorge Klor de Alva, the former President of University of Phoenix whose organization had been the target of criticism by the Obama Administration, apparently left Phoenix to join Nexus. *Id.* at i; see also Christopher Shea, *Visionary or Operator? Jorge Klor de Alva and His Unusual Intellectual Journey*, CHRON. HIGHER EDUC. (Jul. 3, 1998), <https://www.chronicle.com/article/Visionary-or-Operator-Jorge/99191> (describing how de Alva, an anthropologist and attorney, gave up a chair at University of California at Berkeley to become President of University of Phoenix, a largely online college). For additional background, see Jorge Klor de Alva & Cornell West, *Black-Brown Relations: Are Alliances Possible?*, 24 SOC. JUST. 65, 79–81 (1997) (exploring marginalization of Black and Brown persons in the United States and calling for more radical rethinking to reform the hegemonic social order).

68. Press Release, UCI Law, Leading Tax Scholar and Teacher Victor Fleischer Joins UCI Law Faculty (Mar. 12, 2018), <https://www.law.uci.edu/news/in-the-news/2018/Fleischer-faculty.html>.

69. Victor Fleischer, Opinion, *Stop Universities from Hoarding Money*, N.Y. TIMES (Aug. 19, 2015), https://www.nytimes.com/2015/08/19/opinion/stop-universities-from-hoarding-money.html?_r=0 (“Income inequality has left elite endowments heaving with cash.”).

70. *Id.*

“blocker corporations” by nonprofits seeking to avoid tax payments.⁷¹ The essay, surprisingly to some, suggested that many of the nation’s most prestigious universities were likely taking advantage of these offshore tax havens to hide unrelated business income that would have otherwise been subject to domestic taxation (sometimes referred to as UBIT funds).⁷² And investigative journalists, including John Schoen at CNBC, dug into the issue further to begin to better educate the general public about the questionable “alternative investment” schemes being used by elite colleges to try to aggressively grow and squirrel away their wealth.⁷³

Additional conservative politicians soon joined the fray. For instance, in October 2015, House Republicans held a public hearing that “sharply questioned how universities with billions of dollars in their endowments spend that money, with particular criticism directed at executive pay and administrative costs on campuses,” while student tuition continued to rise.⁷⁴ In the end, the hearing generated suggestions for a range of legislative initiatives to correct the situation—including the possibility of a federal excise tax as a means of pressuring rich, prestigious private colleges to start spending their massive savings on needy students and families.⁷⁵

Finally, in February 2016, Senator Orrin Hatch, as Chairman of the Senate Finance Committee, and Representative Kevin Brady, as Chairman of the House Ways and Means Committee, along with Representative Peter Roskam, Chairman of the House Ways and Means Oversight Committee, wrote to the fifty-six private colleges that maintained endowments of over \$1 billion, seeking a range of information about their donations, assets, and investment practices.⁷⁶

71. See Norman Silber & John C. Wei, *The Use of Offshore Blocker Corporations by U.S. Nonprofits: Should the Blockers be Blocked?*, 6 NONPROFIT POL’Y F. 353, 353–54 (2015).

72. *Id.* at 358–59 (suggesting that many nonprofit universities were likely using offshore blocker corporations to avoid taxation on vast sums relating to income generated beyond their primary educational purpose and commitment to the public good). Professor Silber has also lamented that in the United States “the poor too often do pay more” than the rich for everything from loan interest rates to toilet paper. See Norman Silber, *Discovering that the Poor Do Pay More: Race Riots, Poverty, and the Rise of Consumer Law*, 44 FORDHAM URB. L.J. 1319, 1327–28 (2017).

73. See John W. Schoen, *Why Does a College Degree Cost So Much?* CNBC (Jun. 16, 2015, 10:22 AM), <https://www.cnbc.com/2015/06/16/why-college-costs-are-so-high-and-rising.html> (“Schools with the biggest endowments are able to attract the best investment advisers and tap alternative investments that may be riskier but generate higher returns [while also] captur[ing] the bulk of charitable gifts flowing to higher education.”).

74. Michael Stratford, *Endowments Under Fire Again*, INSIDE HIGHER ED (Oct. 8, 2015), <https://www.insidehighered.com/news/2015/10/08/house-republicans-question-university-endowment-spending-executive-compensation>.

75. *Id.*

76. Michael Stratford, *Billion Dollar Targets*, INSIDE HIGHER ED (Feb. 16, 2016), <https://www.insidehighered.com/news/2016/02/16/congress-returns->

To frame the inquiry, the letter noted that a recent study by the National Association of College and University Business Officers (“NACUBO”) demonstrated those schools had an average return on their endowment investments of 15.5% during 2014. Yet, they maintained an average payout rate of only 4.4% and still “raised tuition far in excess of inflation.”⁷⁷

The Republican demand for information caused a great deal of consternation among the fifty-six targeted colleges. On the one hand, the schools worked hard to submit the requested data by the April 1, 2016, deadline, responding publicly with assertions that they were “pleased” to do so, “thankful” to be able to join with Congress in its efforts, and surely “sympathetic” to the concerns raised by Senator Hatch and his Republican colleagues.⁷⁸ But on the other hand, more privately, they began to lobby to be left alone.⁷⁹ Congressional Democrats, perhaps swayed by the pleas of the rich and influential institutions, declined to join with Republican colleagues as they had in 2008. Rather, they largely rejected calls to further monitor the

scrutiny-wealthy-university-endowments (“Amid double-digit investment returns and growing public anxiety about student debt and the price of college, members of Congress are reviving their scrutiny of the nation’s richest colleges, an issue that largely was put on hold after the financial crisis in 2008.”).

77. See, e.g., Letter from Orrin G. Hatch, Kevin Brady, & Peter J. Roskam, Members of Congress, to Steven Knapp, President, George Washington University (Feb. 8, 2016), <https://assets.documentcloud.org/documents/2711522/Congressional-Letter-to-Colleges-Re-Endowments.pdf>. The February 8, 2016 letter also cites to the 2014 NACUBO-Commonfund Study of Endowments for its claims regarding the investment returns for the nation’s fifty-six richest colleges. For whatever reason, that report, while available online, costs \$250 for members to access but \$750 for non-member access. See *2014 NACUBO-Commonfund Study of Endowments*, <https://www.nacubo.org/Import/ProductDetails/2015/2/2014-NACUBO-Commonfund-Study-of-Endowments> (last visited Mar. 30, 2019).

78. See, e.g., Letter from Carolyn Martin, President of Amherst College, responding to Orrin G. Hatch, Kevin Brady, & Peter J. Roskam, Members of Congress (Apr. 1, 2016); Letter from Christina H. Paxson, President, Brown University, to Senator Orrin G. Hatch, Representative Kevin Brady, & Representative Peter J. Roskam, Members of Congress (Apr. 1, 2016) (on file at <https://www.brown.edu/web/documents/nosearch/Brown-Response-Congress-April-1-2016.pdf>) [hereinafter *Brown University’s Apr. 1, 2016 Response*]; Letter from Kenneth P. Ruscio, President of Washington and Lee University, responding to Orrin G. Hatch, Kevin Brady, & Peter J. Roskam, Members of Congress (Mar. 31, 2016), <https://www.wlu.edu/treasurers-office/about-the-treasurers-office/messages-from-the-treasurer/congressional-endowment-inquiry>.

79. See, e.g., Matt Rocheleau, *Federal Lawmakers Query Colleges on Endowments*, BOS. GLOBE (Feb. 11, 2016), <https://www.bostonglobe.com/metro/2016/02/11/lawmakers-ask-wealthy-colleges-for-details-their-billion-dollar-endowments/OsD8TXJ4eyUi4UBcIYiC6O/story.html> (quoting Richard Doherty, President of the Association of Independent Colleges and Universities in Massachusetts, as stating, “There’s not a need for a legislative fix . . . We’ve got a pretty good formula working, a lot of it driving by private dollars, and I think it would be unwise to tinker with that.”).

nation's leading academic institutions or force them to spend assets in their endowment coffers.⁸⁰

Perhaps surprisingly, given Donald Trump's own massive wealth and troubles with his namesake university that ultimately agreed to a \$25 million settlement with former students,⁸¹ Trump added critiques of wealthy colleges into his 2016 presidential campaign platform.⁸² For instance, at a campaign rally in Pennsylvania in September 2016, seemingly in response to Hillary Clinton's calls for free in-state tuition for working class families, he took aim at the multibillion-dollar endowments maintained by more prestigious universities.⁸³ He told the crowd, perhaps drawing from the 2014 proposals of Congressman Camp and the data gathered by Senator Orrin Hatch and his colleagues, that colleges with large endowments "use the money to pay their administrators, to put donors names on their buildings, or just store the money, keep it and invest it. In fact, many universities spend more on private equity fund managers than on tuition programs."⁸⁴

Trump continued: "But they should be using the money on students, for tuition, for student life, and for student housing. That's what it's supposed to be for."⁸⁵ He further promised:

I'm going to work with Congress on reforms to make sure that if universities want access to all of these special federal tax breaks and tax dollars, paid for by you, that they are going to

80. See Stratford, *supra* note 76 (noting congressional Democrats' claims that focus on university endowments was really a "side issue from more pressing concerns on student loan debt"); see also Stratford, *supra* note 73 (describing Democrats on the hill as "uninterested in joining the fray to criticize college and university endowments and executive pay" and unwilling to pass legislation to address such issues).

81. See Howard, *supra* note 46 and accompanying text; Tom Winter & Dartunorro Clark, *Federal Court Approves \$25 Million Trump University Settlement*, NBC (Feb. 6, 2018, 3:49 PM), <https://www.nbcnews.com/politics/white-house/federal-court-approves-25-million-trump-university-settlement-n845181>; see also Scott Jaschik, *Trump Targets Colleges with Large Endowments*, INSIDE HIGHER ED (Sept. 23, 2016) <https://www.insidehighered.com/news/2016/09/23/trump-questions-spending-decisions-colleges-large-endowments> (noting a group of Hilary Clinton supporters responded that such campaign claims were "ironic coming from the man behind the student-swindling Trump University and Trump Institute. He has no credibility to speak about affordable and high-quality education.").

82. Jaschik, *supra* note 81.

83. Naomi Jagoda, *Trump Criticizes Colleges' Tax-Exempt Endowments*, HILL (Sept. 23, 2016, 11:35 AM), <https://thehill.com/policy/finance/297460-trump-criticizes-colleges-tax-exempt-endowments>.

84. Jose DelReal & John Wagner, *Trump Tests New Message on College Affordability, A Key Issue for Clinton*, WASH. POST (Sept. 22, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/22/trump-tests-new-message-on-college-affordability-a-key-issue-for-clinton/?utm_term=.950a086f2db8.

85. *Id.*

make good-faith efforts to reduce the cost of college and student debt and to spend their endowments on their students, rather than other things that don't matter.⁸⁶

Meanwhile, congressional Republicans considered further legislative remedies, including a bill by Representative Tom Reed of New York called the Reducing Excessive Debt and Unfair Costs of Education ("REDUCE") Act.⁸⁷ Under the REDUCE Act, colleges with endowments of more than one billion dollars would be required to spend at least twenty-five percent of their endowment earnings annually on student financial aid.⁸⁸ For schools that did not comply, Reed suggested a penalty of a tax of thirty percent of those undistributed endowment earnings, which would be increased for each subsequent period of non-compliance.⁸⁹ Thus they would be treated like private nonprofit foundations. Reed acknowledged his bill was not a "silver bullet" but "a step to take along with other measures" to tap the wealth of schools that had been stockpiling tax-free money, put it to use, and assist otherwise qualified students who do not qualify for Pell grants but cannot afford tuition at the nation's best colleges.⁹⁰

With such concrete proposals making the rounds, potentially impacted universities and congressional Democrats more affirmatively tried to derail legislative efforts. For instance, Cornell University, which sits in Representative Reed's district, told media outlets:

He doesn't seem to understand the Endowment is not one amorphous thing. It is largely a set of gifts that has been given to the University for specific purposes. Some of the things are financial aid. But some of them are for things like supporting faculty positions and supporting programs.⁹¹

Other elite colleges joined with Cornell to declare endowment funds could only be used for earmarked purposes, like addressing student

86. See Jagoda, *supra* note 83.

87. Press Release, Office of Congressman Tom Reed, Congressman Tom Reed Introduces Bill to Tackle Student Loan Debt for Working-Class Students (May 22, 2018), <https://reed.house.gov/news/documentsingle.aspx?DocumentID=1442>.

88. Rick Seltzer, *Lawmaker with the Idea Higher Education Leaders Hate*, INSIDE HIGHER EDUC. (May 12, 2016), <https://www.insidehighered.com/news/2016/05/12/congressman-discusses-plan-force-colleges-spend-large-endowments>.

89. *Id.*

90. *Id.*

91. *Id.*

and community need.⁹² Most offered these messages in a somewhat subtler manner,⁹³ however, in order to avoid further negative press.

V. THE PARADISE PAPERS, FURTHER PUBLIC PROTEST, AND THE 2016 TRUMP UPSET

Once Donald Trump emerged as the largely unexpected winner of the 2016 presidential election,⁹⁴ the nation's richest colleges became even more stalwart and strategic in their efforts to protect their wealth and use it as they wished. Many retained the services of costly Washington D.C. lobbying firms for behind-the-scenes assistance or deployed influential alums and advocacy organizations to advance their cause with Congress.⁹⁵ All came together to try to stop the college endowment tax.⁹⁶

Beyond reiterating claims that their endowments were filled with specially-designated funds that could be used for the limited and specific desires of their donors, the country's richest schools directly and indirectly painted themselves as unwitting victims of an unwarranted right-wing attack on liberal ideology and progressive nonprofits.⁹⁷ The schools also suggested they were simply

92. Anne Kim, *The Push for College-Endowment Reform*, ATLANTIC (Oct. 4, 2017), <https://www.theatlantic.com/education/archive/2017/10/the-bipartisan-push-for-college-endowment-reform/541140/>.

93. See Janet Lorin, *Universities Seek to Defend Endowments from Republican Tax Plan*, BLOOMBERG NEWS (Apr. 18, 2017, 5:00 AM), <https://www.bloomberg.com/news/articles/2017-04-18/universities-seek-to-defend-endowments-from-republican-tax-plan>; see also Ethan Wolff-Mann, *Colleges Trash GOP Tax Bill, Say It Would Hurt Financial Aid*, YAHOO! (Dec. 5, 2017), <https://finance.yahoo.com/news/colleges-trash-gop-tax-bill-say-itd-hurt-financial-aid-153717310.html> (describing private colleges as “hesitant to speak out” about the excise tax bill “for fear of putting a target on their back in the form of a tweet from the president himself” and as a result offered their criticisms of the proposed legislation in “muted terms”).

94. See, e.g., David A. Graham, *Donald Trump's Stunning Upset*, ATLANTIC (Nov. 9, 2016), <https://www.theatlantic.com/politics/archive/2016/11/donald-trump-elected-president/507062/>.

95. See Lorin, *supra* note 93; Wolff-Mann, *supra* note 93 (“Instead of venting in the public square, universities are hard at work focusing efforts via government relations officials, leveraging alumni who might have influence – especially in Congress.”).

96. See Andy Segedin, *Federal Tax Bill Targets Deductions, Endowments, Lobbying*, NONPROFIT TIMES (Nov. 2, 2017), <http://www.thenonproffitimes.com/news-articles/federal-tax-bill-targets-deductions-endowments-lobbying>; see also Wolff-Mann, *supra* note 93 (reporting that the potentially impacted universities “[a]cross the board” opposed the tax based upon similar rationale but would not speak publicly on the issue).

97. See Abigail Hess, *GOP College Endowment Tax Won't Just Hurt the Ivy League*, CNBC (Nov. 30, 2017, 12:11 PM), <https://www.cnbc.com/2017/11/30/gop-college-endowment-tax-wont-just-hurt-the-ivy-league.html> (reporting on the American Enterprise Institute's claims of “growing resentment of universities perceived as liberal and elitist.”); Wolff-Mann, *supra* note 93 (noting it was

misunderstood benefactors who were already meeting the needs of financially disadvantaged students and communities—operating as charities engaged in activities “essential to the country’s well-being.”⁹⁸ But there were—and are—several problems with these claims.

The first problem, of course, is that many liberals outside of politics—and even within the very institutions of higher education under scrutiny—were among those calling for change. For example, *The Nation*, a well-known progressive weekly news source, described Harvard as continuing to operate “at the troubling intersection between higher education and high finance.”⁹⁹ Left-leaning university faculty like Georgetown Law Professor Brian Galle, a tax law scholar, agreed that it was time for Congress to at least “gently pressure universities to consider their policies with more of an eye to the general social good.”¹⁰⁰ Thus, many actually known for embracing progressive ideology—and not just appropriating it when convenient—did not appear particularly threatened by the possibility of the Trump Administration tapping bulging private college endowments. Instead, as reported by *The Atlantic* magazine in October 2017, outside the hallowed halls of Congress and elite college Chancellors’ suites, many believed rich colleges had become myopic in their efforts to amass money while doing little to help at-risk

“widely suspected that the legislation was put forth by certain members of Congress as punishments for perceived political bias in higher education.”).

98. See, e.g., Abby Jackson, *Princeton Explains Why it Charges Tuition Despite its Multibillion-Dollar Endowment*, BUS. INSIDER (Apr. 4, 2016, 4:45 AM), <https://www.businessinsider.com.au/harvard-and-princeton-respond-to-endowment-criticism-2016-4> (reporting that Princeton’s President Christopher Eisgruber declared “the purpose supported by the largest number of accounts” within its endowment are financial aid packages to students and that “[o]ther accounts support faculty positions, research and teaching programs, library resources, and many other purposes”); see also Hess, *supra* note 97 (reporting on claims that “[T]axing endowment earnings would make these efforts more difficult, and would probably raise tuition for students from families that would struggle to pay it”); W. Raymond Ollwerther, *University “Very Disappointed” that Tax Legislation Retains Endowment Tax*, PRINCETON ALUMNI WKLY. (Dec. 21, 2017), <https://paw.princeton.edu/article/university-very-disappointed-tax-legislation-retains-endowment-tax> (lamenting that the tax undermined the role of universities as “charities” engaged in educational and philanthropic activities essential to the “country’s well-being.”).

99. See, e.g., Astra Taylor, *Universities Are Becoming Billion-Dollar Hedge Funds with Schools Attached*, NATION (Mar. 8, 2016), <https://www.thenation.com/article/universities-are-becoming-billion-dollar-hedge-funds-with-schools-attached/>.

100. See, e.g., Rocheleau, *supra* note 79.

students or communities.¹⁰¹ This included both conservatives and progressives.¹⁰²

What is more, both historically conservative and liberal colleges stood to be impacted by a private university endowment excise tax. Neither Senator Hatch's February 2016 request for information, nor any legislative proposal, singled out the most liberal colleges for reform.¹⁰³ Legislative proposals targeted rich private schools across the board—causing concern even among some conservatives.¹⁰⁴ In fact, Representative Reed's 2016 REDUCE Act proposal ultimately gave way to a 2017 House bill introduced during the Trump Administration.¹⁰⁵ It sought to impose a 1.4% tax on the net investment income of all universities that maintained more than \$100,000 in their endowment per enrolled student—regardless of ideology or commitments.¹⁰⁶ That draft was further amended in the House to raise the per-student ceiling to \$250,000, while the Senate advanced a similar bill that raised the cap to permit private universities to hold a half a million dollars in their endowments for each student without federal excise tax penalty.¹⁰⁷

In the end, the list of potentially covered schools ran the gamut from what might be considered some of the most left-leaning institutions in the country, like Smith College, to the most conservative, like the University of Chicago.¹⁰⁸ And Chicago was not an outlier. Indeed, under the final version of the Senate bill, many of the nation's most traditional institutions would face endowment

101. See Anne Kim, *The Push for College Endowment Reform*, ATLANTIC (Oct. 4, 2017), <https://www.theatlantic.com/education/archive/2017/10/the-bipartisan-push-for-college-endowment-reform/541140/> (explaining that while Professor Fleischer's 2015 op-ed in the *New York Times* "presaged a wave of criticism that has since become a storm" that included complaints by liberals and conservatives alike).

102. *Id.*

103. See *supra* notes 76, 87–90 and accompanying text.

104. See Kim, *supra* note 101; see also Hess, *supra* note 97 ("50 percent of the colleges with the 20 largest endowments are located in states that went for Trump in the 2016 election.").

105. See Andy Segedin, *Cash-Strapped States Eyeing Endowments*, NONPROFIT TIMES (May 26, 2016), <http://www.thenonproffitimes.com/news-articles/cash-strapped-states-eyeing-endowments/>; see generally *The REDUCE Act Compared with Current Law and Congressional Proposals*, ASS'N OF AM. U. (Dec. 5, 2017), <https://www.aau.edu/key-issues/reduce-act-compared-current-law-and-congressional-proposals> (describing how the various REDUCE Act drafts compare to each other).

106. See Ben Myers & Brock Read, *If Republicans Get Their Way, These Colleges Would See Their Endowments Taxed*, CHRON. HIGHER EDUC. (Nov. 2, 2017), <https://www.chronicle.com/article/If-Republicans-Get-Their-Way/241659> (providing concise legislative history of endowment excise tax proposals) (last updated Dec. 5, 2017).

107. *Id.*

108. *Id.*; see also Wolff-Mann, *supra* note 93 (reporting that the bill had changed at least five times during its legislative history).

excise taxation.¹⁰⁹ When schools like Rice, Washington and Lee, and the University of Richmond all stood to be impacted, it is surely hard to frame such tax proposals as a Trump attack against left-leaning institutions.¹¹⁰

A second major problem for the defensive claims of elite colleges emerged by way of a damning raft of evidence that flooded international airwaves in November 2017. Millions of pages of leaked materials from an overseas investment firm demonstrated that the schools were hardly unwitting victims, vanguards of generosity, or careful stewards of allegedly earmarked donations.¹¹¹ The document dump, which came to be known as the Paradise Papers,¹¹² outed many elite universities for putting their cash into shadow markets in places like the Cayman Islands and British Virgin Islands to avoid United States taxation.¹¹³

As *The New York Times* reported domestically, the Paradise Papers proved once and for all that Silber and Wei's earlier suspicions

109. See Myers & Read, *supra* note 106 (explaining the final version of the proposed legislation also restricted itself to schools with over five hundred students enrolled).

110. See *id.* (providing a list of schools likely to be covered by the Senate bill, which included Rice University, Washington and Lee University, and University of Richmond).

111. The leaked documents were initially provided to the International Consortium of Investigative Journalists, which then shared them with reporters internationally. See Will Fitzgibbon & Dean Starkman, *The "Paradise Papers" and the Long Twilight Struggle Against Offshore Secrecy*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Dec. 27, 2017), <https://www.icij.org/investigations/paradise-papers/paradise-papers-long-twilight-struggle-offshore-secrecy/>; see also Michael Forsythe, *Scouring the Paradise Papers, with the Help of Almost 400 New Friends*, N.Y. TIMES (Nov. 6, 2017), <https://www.nytimes.com/2017/11/06/insider/paradise-papers-appleby-leak-icij.html> (describing how the Guardian, BBC, and the New York Times worked together to interpret and report on the Paradise Papers).

112. Michael Forsythe, *Paradise Papers Shine Light on Where the Elite Keep Their Money*, N.Y. TIMES (Nov. 5, 2017), <https://www.nytimes.com/2017/11/05/world/paradise-papers.html>. An earlier leak and document dump in 2016, referred to as the Panama Papers, revealed similar shadow overseas investments of the ultra-wealthy. Hamish Boland-Rudder, *Victims of Offshore: A Video Introduction to the Panama Papers*, INT'L CONSORTIUM INVESTIGATIVE JOURNALISTS (Jan. 31, 2017), <https://www.icij.org/investigations/panama-papers/video>.

113. See Stephanie Saul, *Endowments Boom as Colleges Bury Earnings Overseas*, N.Y. TIMES (Nov. 8, 2017), https://www.nytimes.com/2017/11/08/world/universities-offshore-investments.html?_r=0&module=inline. As Saul notes, some public universities were also outed by the Paradise Papers for being involved in blocker corporation practices. *Id.* But because Trump's 2017 Tax Code and Jobs Act does not impact state schools, and because individually they do not maintain the wealth of the nation's individual elite private colleges, they are beyond the scope of this Article. See generally SHERLOCK ET AL., *supra* note 50, at i (providing in a Congressional Research Service report summary that "Endowment assets are concentrated, with 12% of institutions holding 75% of all endowment assets in 2017.").

about university activities were true: countless rich colleges had been hiding their assets by way of offshore blocker corporations.¹¹⁴ Columbia, Dartmouth, and Johns Hopkins University, for instance, all had become partners in a Bermuda-based group called H&F Investors Blocker, which successfully invested vast sums overseas and then paid no domestic taxes on the sizeable returns.¹¹⁵

More than this, some of the overseas investments were placed with controversial entities whose interests conflicted not only with public interest goals generally but also with the specifically articulated altruistic and “green” commitments of many nonprofit universities.¹¹⁶ By way of example, the Paradise Papers showed that Columbia and Duke Universities owned millions of shares in iron mining efforts in Brazil that had been vigorously protested by environmental activists.¹¹⁷ Others, such as Northeastern University, quietly placed their money with hydrocarbon, oil, and gas ventures, while supposedly fighting climate change globally.¹¹⁸ In these ways, *The New York Times* also provided specific and concrete examples of what the Tellus Institution’s report warned about in 2010.¹¹⁹ And the nation’s richest colleges were quickly placed in an exceptionally shrewd and self-seeking—if not sneaky and deceptive—light.

These somewhat shocking revelations prompted further public calls for accountability—again, not just from conservatives, but from liberals connected to the academy—faculty and students alike. Professor Silber, whose theories were now proven true, lamented the lack of transparency on the part of supposed nonprofit institutions of higher learning.¹²⁰ He went on to note there should be “a higher duty owed by publicly supported institutions to make their investments evident. If not to the public generally, certainly make it absolutely clear to stakeholders of the institution.”¹²¹

114. Saul, *supra* note 113 (reporting on the many elite colleges using offshore blocker corporations to avoid taxation).

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*; see also Ed Pilkington, *Top US Universities Use Offshore Funds to Grow Their Huge Endowments*, GUARDIAN (Nov. 8, 2017, 1:00 PM), <https://www.theguardian.com/news/2017/nov/08/us-universities-offshore-funds-endowments-fossil-fuels-paradise-papers> (“Most contentiously, some of the offshore funds are invested in carbon-polluting industries, despite leading US universities playing a key role in the fight against climate change.”).

119. See *supra* notes 54–60 and accompanying text.

120. Jingyi Cui, *Yale Reportedly Named in the Paradise Papers*, YALE NEWS (Nov. 13, 2017, 1:06 AM), <https://yaledailynews.com/blog/2017/11/13/yale-reportedly-named-in-paradise-papers/>.

121. *Id.*; see generally Laura E. Deeks, *Discourse and Duty: University Endowments, Fiduciary Law, and the Cultural Politics of Fossil Fuel Divestment*, 47 LEWIS & CLARK ENVTL L. 335 (2017) (calling for fiduciary duty requirements to apply to university endowment administration, even before the publication of the Paradise Paper).

The Paradise Papers fed further critical academic analyses. For instance, sociology professor Charlie Eaton wrote a *New York Times* piece that criticized the “trio of tax breaks” at play in elite academic institutions—tax benefits to wealthy donors, municipal tax breaks to the universities, and now overseas investing without taxation on vast returns.¹²² Based upon his research, he opined these benefits were costing federal taxpayers nearly \$20 billion a year¹²³—an amount that could be used to double Pell grant amounts nationwide for needy students.¹²⁴ And again, rather than seeing endowment reform as a challenge to autonomy or freedom to express liberal academic ideas, Professor Eaton urged fundamental rethinking around the way the country’s elite colleges—supposed nonprofit entities—were allowed to do business.¹²⁵

Students publicly shared their outrage, too, through campus newspaper articles, stepped-up protest activities,¹²⁶ and by joining efforts with nonprofit groups, like the Responsible Endowment Coalition, to press for fiscal integrity and financial reforms at supposed nonprofit universities.¹²⁷ Many expressed disgust with their prestigious colleges for carrying on what seemed like immoral investment practices that ran contrary to the very mottos of their schools.¹²⁸ Others objected that secret overseas investments and

122. Saul, *supra* note 113.

123. Charlie Eaton, *Opinion: How Elite Colleges Hide their Cash*, N.Y. TIMES (Nov. 10, 2017), <https://www.nytimes.com/2017/11/10/opinion/ivy-league-offshore-tax-stanford.html>.

124. *Id.*

125. *See id.*; *see also* Saul, *supra* note 113.

126. *See, e.g.*, Andrew Lehran & Emily Siegel, *Leaked Documents Show Fossil Fuel Holdings of Green Nonprofits*, NBC NEWS ONLINE (May 17, 2018, 4:30 AM), <https://www.nbcnews.com/business/energy/leaked-documents-show-fossil-fuel-holdings-green-nonprofits-n874336> (reporting on students protests at Harvard, Columbia, and New York University relating to the schools’ investments in coal, oil, and gas holdings); Editorial, *Paradise Papers Should Be Catalyst for Change*, HUNTINGTON NEWS (Nov. 16, 2017), <https://www.huntnewsnu.com/2017/11/editorial-paradise-papers-should-be-a-catalyst-for-change/> (demanding Northeastern University make amends for its actions disclosed in the Paradise Papers, including divestment from carbon fuel activities); Caroline Simon, *The Paradise Papers Found that Penn Dodges Taxes By Sending Money Abroad – Here’s What that Means*, DAILY PENNSYLVANIAN (Nov. 18, 2017, 11:29 PM), <https://www.thedp.com/article/2017/11/paradise-paper-penn-offshore-investment-philadelphia-finances> (calling out University of Pennsylvania’s use of blocker corporations).

127. Taylor, *supra* note 99 (quoting the executive director of the Responsible Endowment Coalition, Marcie Smith, as saying the Paradise Papers presented as “rage-inducing picture” of universities); *see also* RESPONSIBLE ENDOWMENT COALITION WEBSITE, BOARD OF DIRECTORS WEBPAGE, <http://www.endowmentethics.org/board> (last visited Mar. 30, 2019).

128. Pilkington, *supra* note 118 (reporting that a Northeastern University student affiliated with DivestNU lamented: “The university’s motto is ‘light, truth and virtue.’ . . . Now we learn that the leadership team has been operating in darkness, violating their own green principles by investing in oil and gas, and

stockpiling returns felt especially unjust in face of reduced services to students following the economic downturn and a lack of financial aid for all in need.¹²⁹ Such testimony powerfully contradicted elite university assertions that their endowments were already all tied up with supporting struggling students and underserved communities—and an excise tax would cause private colleges to become unaffordable.¹³⁰

Finally, the Paradise Papers and its related fallout demonstrated the somewhat misleading nature of another one of the elite colleges' claims—that their endowment funds were restricted through special instructions by donors that prevented them from being used for anything other than educational support and specific projects. It was confirmed these same universities had long been paying high-priced investment firms with endowment money to set up and run blocker corporations, oversee international financial portfolios, and undertake other activities far removed from course offerings and

going offshore to pay less taxes.”); Spencer Swanson, *Penn's Inclusion in the Paradise Papers is Shameful*, DAILY PENNSYLVANIAN (Nov. 22, 2017, 2:42 AM), <https://www.thedp.com/article/2017/11/spencer-swanson-penns-inclusion-in-the-paradise-papers-is-shameful> (“Penn’s motto is the Latin phrase, ‘Leges sine moribus vanae,’ which translates to ‘Laws without morals are useless.’ After the recent revelations of the Paradise Papers, it is obvious that Penn hasn’t been entirely practicing what it preaches.”).

129. See, e.g., Swanson, *supra* note 128 (calling on University of Pennsylvania to “find ways to increase its distributions from its monumental endowment rather than focusing solely on increasing its size” to better support things such as “the Asian American Studies Program and Counseling and Psychological Services and a general increase in financial aid.”); see also Taylor, *supra* note 99 (Explaining that throughout the Responsible Endowment Coalition’s protests, universities were “raking in a record \$40 billion in 2015, Wall Street stacked boards of directors approving self-dealing investments, all while tuition continues to rise, student debt continues to mount, and value of a college degree declines . . .”).

130. See, e.g., Letter from Mark S. Wrighton, Chancellor, Wash. U. St. Louis., to Senator Orrin G. Hatch, Representative Kevin Brady, & Representative Peter J. Roskam, Members of Congress (Mar. 31, 2016) (on file at https://www.stltoday.com/washington-university-response/pdf_b32a20d7-a96b-5623-8ab7-54dd0c6547ce.html) [hereinafter *Washington University's March 31, 2016 Response*] (“[O]ur highest priorities are investments in scholarships, professorships, academic programs, research and patient care.”); Letter from Mark S. Wrighton, Chancellor, Wash. U. St. Louis, to Senator Roy D. Blunt (Nov. 17, 2017) (on file at <https://source.wustl.edu/wp-content/uploads/2017/11/The-Honorable-Roy-D.-Blunt.pdf>) (arguing an excise tax would hurt students and families because it would decrease the amount of endowment money available for financial aid); see also Hess, *supra* note 97 (reporting that the American Enterprise Institute claimed elite universities were already using their endowments to support needy students such that an endowment tax would negatively impact such awards); Andrew Kreighbaum, *Final GOP Deal Would Tax Large Endowments*, INSIDE HIGHER ED (Dec. 18, 2017), <https://www.insidehighered.com/news/2017/12/18/large-endowments-would-be-taxed-under-final-gop-tax-plan> (quoting an advocate from the American Council on Education as arguing the tax was a “step in the wrong direction” would “make higher education more expensive and less accessible . . .”).

services to the community.¹³¹ And they were now hiring expensive Washington D.C. lobbyists and public relations professionals to try to fight the endowment tax's passage¹³²—further evidence that university endowment funds were not solely restricted to academic endeavors or solving pressing problems facing the general public.

These developments, especially when coupled with the April 2016 written responses to Senator Hatch and his team, provided substantial proof that endowment gift restrictions were mostly overblown canards. In fact, setting aside their niceties, lengthy preambles outlining their rich histories, and distracting attachments,¹³³ the disclosures of the targeted universities show that most elite universities have a great deal of discretion over a great deal of money in their financial portfolios.¹³⁴ For example, even if the written 2016 disclosures are taken at face value,¹³⁵ Harvard University admitted that only eighty-four percent of its \$37.6 billion endowment consisted of funds that had to be “carefully managed to meet the terms of the gift.”¹³⁶ That left sixteen percent—over \$6

131. See *supra* note 54 and accompanying text.

132. See Benjamin Gonzalez, *Trinity Awaits Endowment Tax Regulations*, TRINITONIAN (Nov. 29, 2018), <https://www.trinitonian.com/trinity-awaits-endowment-tax-regulations/> (disclosing that Trinity University hired a former congressman to lobby on its behalf to try to prevent the passage of an endowment tax); see also Lisa Lambert, *Universities to U.S. Senate, Endowment Tax Idea is “Fundamentally Flawed,”* REUTERS (Nov. 14, 2017, 4:41 PM), <https://www.reuters.com/article/us-usa-tax-colleges/universities-to-u-s-senate-endowment-tax-idea-fundamentally-flawed-idUSKBN1DE2Y4> (reporting that “more than three-dozen higher education lobbying groups” had been hired by the nation’s richest private colleges, and these lobbying groups were being led by the American Council on Education, in an effort to prevent an endowment tax from becoming law).

133. While some schools, like Brown University, provided relatively straightforward responses of less than twenty pages that directly answered questions posed, others, such as Washington and Lee University, submitted 50+ page packets that failed to provide certain specific expenditure amounts and surprisingly suggested that not a single endowment dollar was unrestricted. Compare Letter from Kenneth Ruscio, President, Wash. & Lee. U., to Senator Orrin G. Hatch, Representative Kevin Brady, Representative Peter J. Roskam, Members of Congress (Mar. 31, 2016) (on file at <https://www.wlu.edu/treasurers-office/about-the-treasurers-office/messages-from-the-treasurer/congressional-endowment-inquiry>) with *Brown University’s Apr. 1, 2016 Response*, *supra* note 78.

134. See, e.g., Jackson, *supra* note 98.

135. Given that I do not have an accounting background, I have not attempted to in any way audit the claims set forth in the reports. However, as suggested *supra* note 111, some disclosures, like that of Washington and Lee claiming none of its endowment wealth is unrestricted, may raise questions worthy of further examination and explanation. Others’ disclosures, like Princeton’s, seem to have disappeared from online public view. See Jackson, *supra* note 98 (providing a now dead link to Princeton’s response to Congress).

136. Jackson, *supra* note 98; see Letter from Drew Gilpin Faust, President, Harv. U., to Senator Orrin G. Hatch, Representative Kevin Brady, and Representative Peter J. Roskam, Members of Congress (Mar. 31, 2016) at 3, (on

billion—in unrestricted funds.¹³⁷ Apparently, only sixty-two percent of the \$6.9 billion endowment held by Washington University at St. Louis was restricted based upon donor directives.¹³⁸ And even Brown University, with its much smaller student population and endowment size as compared to Harvard and Washington University, had over \$1.5 billion in its portfolio that could be deployed without concern for gift restrictions.¹³⁹

Beyond this, most of the colleges admitted that a large percentage of the alleged restrictions on endowment holdings were not attributable to donors at all. Amherst and Wellesley Colleges explained in their filings that some restrictions are temporary and open to change.¹⁴⁰ They merely reflect the preferences of existing university trustees or boards of directors.¹⁴¹ Similarly, one of the largest donors to Washington University in St. Louis, Andrew Taylor, with family businesses such as Enterprise rental cars and Keefe prison commissary goods, apparently serves as a “life trustee” and helps to decide how the school manages and deploys its otherwise unrestricted assets.¹⁴²

file at https://www.harvard.edu/sites/default/files/content/20160401_harvard_congressional_report.pdf) [hereinafter *Harvard University’s March 31, 2016 Response*].

137. See *Harvard University’s March 31, 2016 Response*, *supra* note 136, at 3.

138. See *Washington University’s March 31, 2016 Response*, *supra* note 130, at 3 (“[N]early two-thirds of the University’s endowment is restricted by donors to specific purpose, regardless of need in any one particular area.”).

139. See *Brown University’s April 1 Response*, *supra* note 133, at 4; see also Myers & Read, *supra* note 106 (attributing an enrollment of 8,894 full-time students at Brown in 2017).

140. See, e.g., Letter from H. Kim Bottomly, President, Wellesley College, to Senator Orrin G. Hatch, Representative Kevin Brady, and Representative Peter J. Roskam, Members of Congress (Mar. 31, 2016) at 2 (on file at https://www.wellesley.edu/sites/default/files/assets/departments/controller/files/wellesley_college_congressional_response_033116_2.pdf) [hereinafter *Wellesley’s March 31, 2016 Response*] (disclosing that over \$500 million in the university’s \$1.5 billion endowment portfolio was merely restricted based solely on the temporary directives of its board of trustees); Letter from Carolyn Martin, President, Amherst College, to Senator Orrin G. Hatch, Representative Kevin Brady, and Representative Peter J. Roskam, Members of Congress (Apr. 1, 2016), at 5–6 (on file at https://www.amherst.edu/system/files/media/AmherstCongressionalLetter_4%25201_16_FINAL.pdf) [hereinafter *Amherst University’s April 1, 2016 Response*] (reporting that over \$650 million of the university’s \$2.1 billion endowment was only temporarily restricted based upon the preferences of the board of trustees and thus is generally “deemed unrestricted by the College”).

141. See *Wellesley’s March 31, 2016 Response*, *supra* note 140; see also *Amherst University’s April 1, 2016 Response*, *supra* note 140.

142. See, e.g., Chalaun Lomax, *Students Demand WU Cuts with Prisons, Andrew Taylor*, STUDENT LIFE (Feb. 18, 2016), <http://www.studlife.com/news/2016/02/18/students-demand-wu-cut-ties-with-prisons-andrew-taylor/> (covering protests of students who urged greater transparency and accountability on the part of Washington University, which continued ties with the Taylor family, despite its relatively hushed financial holdings in Keefe Group, historically one

VI. THE COLLEGE ENDOWMENT TAX AND RESPONSES BY RICH SCHOOLS

For all these reasons, it is not surprising that Congress ultimately passed a private university endowment tax over the proffered objections of the country's elite colleges. On December 22, 2017, before leaving for a holiday vacation at his Mar-A-Lago Resort,¹⁴³ President Trump signed the Senate version of the bill into law as part of the sweeping Tax Cuts and Jobs Act.¹⁴⁴ Since then the potentially impacted schools have been trying to obtain temporary relief from the tax—as well as seek its permanent removal from the books.¹⁴⁵ Quite remarkably they are doing both by advancing many of the very same arguments that proved unpersuasive before—and while maintaining some of the very same practices that drew public and lawmaker ire in the first place.¹⁴⁶

As noted, the private college endowment tax that was ultimately signed into law impacts private colleges with over five hundred students and that maintain more than \$500,000 per student in their endowments.¹⁴⁷ Under the new law, only those schools holding such sizeable savings need to pay 1.4% of their annual endowment investment income into federal coffers.¹⁴⁸ As compared to Senator Hatch's original hit list of about fifty-six schools¹⁴⁹—and earlier versions of the bill that might have taxed over a hundred schools¹⁵⁰—most commentators have speculated that the law currently extends

of the nation's largest prison commissary and contract entities); *Taylor Family Establishes \$10 Million Scholarship Challenges*, SOURCE (Nov. 14, 2017), <https://source.wustl.edu/2017/11/taylor-family-establishes-10-million-scholarship-challenge/>.

143. Dan Merica, *Trump Signs Tax Bill Before Leaving for Mar-a-Lago*, CNN (Dec. 22, 2017), <https://www.cnn.com/2017/12/22/politics/trump-sign-tax-bill-mar-a-lago/index.html>.

144. Naomi Jagoda, *Trump Signs Tax Bill into Law*, HILL (Dec. 22, 2017, 11:03 AM), <https://thehill.com/homenews/administration/366148-trump-signs-tax-bill-into-law> (referring to “the sweeping Republican tax bill” as Trump's first “legislative accomplishment” since he took office).

145. See *infra* pp. 473–75.

146. See *infra* pp. 475–76.

147. See Tax Cuts and Jobs Act, Pub. L. No. 115–97, § 4968, 131 Stat. 2167, 2167 (2017). For a fascinating behind-the-scenes account of 2017 Tax Cuts and Jobs Act discussions at the Treasury Department, see Thomas D. Greenaway, *Interview with Dana Trier*, 37 ABA TAX TIMES 6, 8 (2018) (sharing insights of Trump's former Deputy Assistant Secretary for Tax Policy, Dana Trier, a Republican who disagreed with Trump's “higher-ups in the Treasury Department”); see also Dana Trier, *Entity Taxation in the 2017 Legislation: Process and Policy*, 2019 FRANK AND ROSE FOGEL LECTURE (Mar. 21, 2019), https://www2.law.temple.edu/events/fogel2019/?utm_medium=Social&utm_source=Facebook&utm_campaign=Fogel%202019 (offering detailed analyses and critique of the rushed drafting and enactment of the 2017 Tax Act, which in part built upon Representative Camp's untested proposals from 2014).

148. *Id.*

149. See Stratford, *supra* note 76.

150. See Myers & Read, *supra* note 106.

to only between twenty-five to thirty-five schools nation-wide.¹⁵¹ This is based upon the schools' public financial statements and endowment disclosures.¹⁵²

But even this smaller group of elite schools is looking for ways to avoid or limit their liability.¹⁵³ Previously, rich universities wore their massive endowments on their sleeves as badges of honor and recruitment tools.¹⁵⁴ Now, however, some are saying they are not quite sure how much endowment money they have or how to count it for purposes of the new tax.¹⁵⁵ The University of Chicago, for instance, suggests that depending upon how it defines "full-time students" and characterizes different parts of the university—including its "South Side Campus"—it may be exempt from paying the tax despite its \$7.82 billion endowment.¹⁵⁶ Trinity University says it is still not sure if it will owe taxes because it believes funds held in trust should be excluded from endowment computations.¹⁵⁷

Another group of schools, including Emory University, argued the whole situation was so confusing and overwhelming that the United States Treasury Department should impose a one-year

151. *Id.* (speculating that twenty-seven schools would face a 1.4% penalty under the endowment tax); see also Andrew Kreighbaum, *Final GOP Deal Would Tax Large Endowments*, HILL (Dec. 18, 2017), <https://www.insidehighered.com/news/2017/12/18/large-endowments-would-be-taxed-under-final-gop-tax-plan> (providing a list of thirty-two potentially impacted universities).

152. See Myers & Read, *supra* note 106.

153. See Janet Lorin, *Facing First Tax on Endowments, Colleges May Be Set to Dodge It*, BLOOMBERG NEWS (May 17, 2018, 12:21 PM), <https://www.bloomberg.com/news/articles/2018-05-17/schools-may-try-to-dodge-endowment-tax-cleveland-fed-study-says>.

154. See Holly Hacker, *\$1.15B Raised by SMU is Largest Total for a Private Texas University*, DALL. NEWS (Feb. 25, 2016), <https://www.dallasnews.com/news/education/2016/02/25/1.15b-raised-by-smu-is-largest-total-for-a-private-texas-university> (noting increased endowments can assist a school in recruiting new faculty).

155. See Serena Cho & Lorenzo Arvantis, *University Prepares for Endowment Tax*, YALE NEWS (Nov. 8, 2018, 2:48 AM), <https://yaledailynews.com/blog/2018/11/08/university-prepares-for-endowment-tax-2/> (according to Yale's Vice President of Finance, Steve Murphy, the school is unable to say for sure how much endowment tax it owes without further guidance from the federal government); see also Rick Seltzer, *Eluding the Endowment Tax*, INSIDE HIGHER ED (Jan. 2, 2018), <https://www.insidehighered.com/news/2018/01/02/wealthy-colleges-face-uncertainty-they-look-for-ways-to-avoid-new-endowment-tax>.

156. See Dawn Rhodes, *University of Chicago and Northwestern May Avoid New Endowment Tax – For Now*, CHICAGO TRIB. (Dec. 24, 2017, 6:00 AM), <https://www.chicagotribune.com/news/local/breaking/ct-met-endowment-tax-private-universities-20171220-story.html>.

157. Gonzalez, *supra* note 132; see also Myers & Read, *supra* note 106 (estimating Washington University's endowment holdings at \$530,595 per student before the tax became law); Rick Seltzer, *Estimating the Endowment Tax's Future*, INSIDE HIGHER ED (Jan. 4, 2018), <https://www.insidehighered.com/news/2018/01/04/dozens-more-colleges-will-pay-endowment-taxes-if-growth-rates-continue> (reporting that Washington University falls just slightly below the endowment cap threshold since the tax law went into effect).

implementation delay.¹⁵⁸ Following an April 2018 meeting with Treasury staff, the President of Emory, Claire Sterk, wrote a letter explaining why more time was needed to deal with the “unbudgeted multimillion-dollar tax liability.”¹⁵⁹ Sterk argued an extra twelve months would “enable our organization to more accurately estimate our new tax burden, budget for this dramatic tax increase, submit timely estimated tax payments, and communicate and implement new policies and processes to our employees.”¹⁶⁰

Others successfully lobbied for rules from the IRS to help limit the reach of the tax law as written. As a result of this administrative guidance, released in June 2018, schools potentially impacted by the new tax have been provided with a “stepped up basis” that will allow them to exclude endowment earnings from before December 2017 when they calculate taxes owed to the federal government for the first time.¹⁶¹ And going forward, at least for the short term, it appears some schools may be turning to building projects, capital improvements, or non-endowment-based instruments in an effort to avoid taxation.¹⁶²

While various maneuvers have taken place, impacted schools and those that may be impacted in the future have also banded together to urge the endowment tax’s repeal. In March of 2018, a consortium of nearly fifty private colleges wrote to congressional leadership urging reconsideration.¹⁶³ At the same time, a group of legislators

158. See *Colleges Get Reprieve in Push to Value Endowment Assets*, BLOOMBERG (June 8, 2018, 5:02 PM), <https://www.pionline.com/article/20180608/ONLINE/180609878/colleges-get-tax-reprieve-in-push-to-value-endowment-assets>.

159. See *id.*; see also Letter from Claire E. Sterk, President, Emory U. to The Honorable Steve Mnuchin, U.S. Treasury Sec’y (May 24, 2018) (on file at <http://src.bna.com/zdR>) [hereinafter *Letter from Claire E. Sterk*].

160. See Letter from Claire E. Sterk, *supra* note 159; see also Eli Burns & Andrew Zucker, *Bacow Met with U.S Treasury Representative to Discuss Endowment Tax Guidances*, CRIMSON (Nov. 14, 2018), <https://www.thecrimson.com/article/2018/11/14/bacow-endowment-tax/>.

161. See *Colleges Get Reprieve in Push to Value Endowment Assets*, *supra* note 158; see also I.R.S., NOTICE 2018-55, GUIDANCE ON THE CALCULATION OF NET INVESTMENT INCOME FOR PURPOSES OF THE SECTION 4968 EXCISE TAX APPLICABLE TO CERTAIN PRIVATE COLLEGES AND UNIVERSITIES (2018).

162. See Seltzer, *supra* note 155. Washington University in St. Louis just completed a multi-year giving campaign that brought in over \$3.3 billion in new gifts and commitments. Apparently only \$1.6 billion of those funds will be placed into the endowment while a great deal of the monies are being used for new physical facilities. See Susan Kinnelbert McGinn, *Record \$3.378 Billion in Gifts, Commitments Raised in Washington University’s Leading Together Campaign*, SOURCE (Aug. 31, 2018), <https://source.wustl.edu/2018/08/record-3-378-billion-in-gifts-commitments-raised-in-washington-universitys-leading-together-campaign/>.

163. Amherst College et al., Letter of Coll. Consortium to Cong. Leadership (Mar. 7, 2018) (on file at https://ofr.harvard.edu/files/ofr/files/march_2018_endowment_tax_letter_to_leadership_from_schools.pdf) [hereinafter *Letter of Coll. Consortium to Cong. Leadership*].

from across the aisle, all alumni of elite schools facing the endowment tax, introduced a bill to accomplish the goals of their alma maters—The Don't Tax Higher Education Act.¹⁶⁴

But it does not seem likely that this bill will move forward anytime soon. This is in part because, despite the intellectual firing power at our nation's elite colleges, they are not doing a particularly good job of providing new—or even slightly more convincing—arguments to advance their cause. Based on their March 2018 letter to Congress, elite universities seem to have abdicated their relatively dubious prior claims about their endowment hands being tied by gift restrictions.¹⁶⁵ But they persist in asserting the endowment tax poses a dangerous threat to financial and other assistance to students, families, and communities in need.¹⁶⁶

Specifically, the schools asserted that because of the tax: “We will each have less to give in aid, less for research and less to support public engagement in the lives of our communities.”¹⁶⁷ And yet, at the same time, they now complain the tax actually does not go far enough—because it merely benefits the general federal fund and not university constituents—including the at-risk students or groups they claim to be concerned about.¹⁶⁸

VII. HOW TO TRUMP TRUMP: SHIFT PRIORITIES AND PRIVILEGE PUBLIC GOOD

To be sure, the Trump endowment tax is an imperfect response to the problem of massive wealth accumulation on the part of elite colleges that purport to be running nonprofit educational enterprises with charitable goals.¹⁶⁹ Impacted schools are correct that the excise

164. Harris, *supra* note 11.

165. See *Letter of Coll. Consortium to Cong. Leadership*, *supra* note 163. Universities seem to have replaced this argument with a “slippery slope” claim—suggesting that leaving the college endowment tax on the books sets a troubling precedent because other nonprofit, charitable, and philanthropic enterprises might soon find their savings subject to taxation. See *id.* Since this legal staple is hardly ever a persuasive assertion and such concerns are beyond the scope of this essay, I will not further analyze these supposed altruistic assertions on behalf of unknown and unnamed nonprofits that may find themselves under future attack.

166. *Letter of Coll. Consortium to Cong. Leadership*, *supra* note 163; see, e.g., Gonzalez, *supra* note 131 (reporting that Trinity University, despite having over \$1 billion dollars on hand for less than 2,500 students, says paying the endowment tax from its endowment revenue will take away from student scholarships); Harris, *supra* note 11 (providing comments of the bill's sponsor, Representative John Delaney, suggesting the endowment tax posed a threat to the ability of elite schools to provide financial aid to needy students).

167. *Letter of Coll. Consortium to Cong. Leadership*, *supra* note 163.

168. *Id.* (“[T]his tax will not address the cost of college or student indebtedness, as some have tried to suggest.”).

169. See, e.g., BENJAMIN HARRIS & ADAM LOONEY, URBAN INST. & BROOKINGS INST., THE TAX CUTS AND JOBS ACT WAS A MISSED OPPORTUNITY TO ESTABLISH A SUSTAINABLE TAX CODE 17 (2018), <https://www.brookings.edu/research/the-tax->

tax will be placed in the federal government's general revenue fund.¹⁷⁰ Therefore it will not directly address the problem of needy students and communities by redirecting university wealth.¹⁷¹ And there were likely smarter and more meaningful ways to capture and deploy accumulated college wealth.¹⁷²

A. *General Takeaways*

The university endowment tax should serve as an incentive for wealthy colleges to spend down their massive savings and take other actions to address student and other needs.¹⁷³ One would hope school administrators, complaining that they do not want university dollars to be dumped into general revenue funds, would behave as rational actors and take action to avoid what amounts to a penalty for undue privilege.¹⁷⁴ Instead, most elite private colleges seem to have largely ignored that message—pressing on with their prior self-interested financial practices without due regard for the interests of those they are intended to serve.¹⁷⁵ Thus, as the conservative *National Review* has correctly pointed out, it is disingenuous to keep sounding alarms about the federal endowment tax being the problem.¹⁷⁶

cuts-and-jobs-act-was-a-missed-opportunity-to-establish-a-sustainable-tax-code/. Many have argued there are other problems with Trump's Tax Cut and Jobs Act. Such issues are beyond the scope of this Article.

170. *Letter of Coll. Consortium to Cong. Leadership, supra* note 163.

171. See Aaron Klein & Richard V. Reeves, *New College Endowment Tax Won't Help Low-Income Students, Here's How It Could*, BROOKINGS INST. (Feb. 22, 2018), <https://www.brookings.edu/blog/social-mobility-memos/2018/02/22/new-college-endowment-tax-wont-help-low-income-students-heres-how-it-could/> (“They have simply gone for the money . . . [t]o the GOP, college endowments are an ATM, with the money taken out given straight to corporations and the rich.”).

172. See *id.* For instance, Representative Tom Reed's REDUCE Act, a version of which he has reintroduced this year, likely would have provided a more effective remedy for directly addressing unmet financial needs of students. It also would place tax revenue collected from violating schools into Pell Grant funding; see *Reducing Excessive Debt and Unfair Costs of Education Act of 2018 (REDUCE) Summary*, AM. COUNCIL EDUC., www.acenet.edu/news-room/Pages/Summary-of-2018-REDUCE-Act.aspx (last visited Mar. 30, 2019).

173. See Lorin, *supra* note 153 (noting that some “argue the tax gives schools an incentive to spend endowment funds on research and teaching,” rather than continuing with current financial practices); cf. Klein & Reeves, *supra* note 171 (arguing schools may not see the incentives as strong enough without some further affirmative rewards for compliance).

174. See generally Leo Martinez, *Tax Policy, Rational Actors, and Other Myths*, 40 LOYOLA U. CHI. L.J. 297 (2009) (detailing the limits of rational behavior with respect to tax choices).

175. See Klein & Reeves, *supra* note 171 (“There is more dream hoarding than dream sharing going on in most of our top colleges, whether they like to admit it or not.”).

176. Andrew L. Shea, *Private Universities Protest the Endowment Tax*, NAT'L REV. (Mar. 20, 2018, 6:30 AM), <https://www.nationalreview.com/2018/03/private-universities-protest-endowment-tax/> (referring to the March 7 letter as “rhetorically powerful[]” but “misleading” in its “alarmist tone”).

For instance, as noted above, in August 2018 Washington University in St. Louis completed yet another “major multiyear fundraising initiative” that had “an initial goal of \$2.2 billion in funding toward university priorities.”¹⁷⁷ Those “priorities,” set forth in the school’s “Plan for Excellence,” covered four key areas: “preparing the leaders of tomorrow; advancing human health; inspiring innovation and entrepreneurship; and enhancing the quality of life for all.”¹⁷⁸ In the end, the fundraising campaign far surpassed the target amount, pulling in “a record-breaking \$3.378 billion in gifts and commitments.”¹⁷⁹

However, while the campaign initially declared a scholarship support need of \$1 billion to assist with student financial aid, somehow it appears only \$591 million of the billions raised wound up specifically designated for scholarships to enhance affordability and student accessibility.¹⁸⁰ The rest of the funds were dedicated to such things as construction of additional “state-of-the-art facilities,” “153 new endowed deanships, professorships, and other positions,” and “\$297 million for the Annual Fund to provide deans and the chancellor with flexible funds to address urgent needs.”¹⁸¹

Thus, it hardly seems that elite private schools are currently strapped for cash or that the possibility of a federal endowment tax—which seeks to tap just 1.4% of earnings endowment investments—is what is keeping them from meeting the needs of financially struggling students or the greater community.¹⁸² Rather, it would appear parsimony and a desire to perpetuate privilege for a few is what drives decision-making at too many of these schools.¹⁸³

And, of course, many elite schools continue to maintain a culture that places a high premium on wealth accumulation and increased income over other considerations. In fact, 2018 fiscal returns demonstrate that the nation’s private Ivy League colleges—including Princeton University and the University of Pennsylvania—enjoyed endowment investment returns of between nine and thirteen

177. McGinn, *supra* note 162.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. See Shea, *supra* note 176 (calling such assertions a “scare tactic” and a “duplicitous . . . suggestion that this tax would compel administrators to cut financial aid, professor salaries and research funding from their budgets . . .”).

183. See Koran Addo, *Wash U Boosts Low-Income Enrollment, But Not Enough for Its Critics*, ST. LOUIS POST-DISPATCH (Aug. 16, 2016), https://www.stltoday.com/news/local/education/wash-u-boosts-low-income-enrollment-but-not-enough-for/article_59c136b2-7cdf-5d5b-915b-998b9d9f79a3.html (reporting that only seven percent of Washington University students were Pell Grant recipients but that its administration hoped to admit and support more poor students in the future).

percent.¹⁸⁴ Thus their endowments increased significantly in size after the endowment tax was passed. Yet it is hard to see how those in need are enjoying the bulk of the benefits from these hefty returns. Instead, contrary to lamentations of Princeton University, the endowment tax does not really “threaten[] these institutions’ ability to put their values into practice.”¹⁸⁵

For instance, before the endowment tax went into effect, Princeton University began the laudable effort of admitting more students from disadvantaged backgrounds. And at this point, approximately twenty percent of its incoming freshman class receive Pell Grants—up from just seven percent ten years ago,¹⁸⁶ which is surely an improvement. However, it is also important to note that Princeton’s endowment investment income rose from eight percent to fourteen percent this year, resulting in its endowment fund growing from \$23.8 billion at the time of the passage of the endowment tax to \$25.9 billion in 2018.¹⁸⁷

But despite this over \$2 billion return on investment, Princeton only increased its overall financial aid budget from \$161.2 million in 2017 to \$174.2 million in 2018.¹⁸⁸ While to regular people this sounds like a lot of money, quick analysis of these figures shows that the additional \$13 million dollars in financial aid reflects an increase of just 7.7% from the year before—less than the percentage by which it was increased in 2017 (8.7%).

On top of all of this, Princeton raised its tuition and fees this year by 4.9%—the largest increase in attendance costs at the school in twelve years—and noted it would be hiring twenty-five more people to help with further fundraising efforts.¹⁸⁹ Similarly, the University of Pennsylvania raised both its tuition and student fees this year, driving the cost of undergraduate attendance up over \$70,000 a

184. Geraldine Fabrikant, *Yale’s Endowment Grew 12.3% Beating Harvard’s But Not Some Others*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/business/yale-endowment.html>; Charles McGrath, *Ivy Endowment Investment Return Average 11.8% in 2018*, PENSIONS & INV. (Oct. 11, 2018, 10:17 AM), <https://www.pionline.com/article/20181011/INTERACTIVE/181019973/ivy-endowments-return-average-118-in-2018>.

185. *Princeton U. Endowment Tax Press Release*, *supra* note 11.

186. Press Release, Princeton U., Princeton Endowment Earns 14.2 Percent Return, Supporting Teaching, Research, and Financial Aid (Oct. 8, 2018), <https://www.princeton.edu/news/2018/10/08/princeton-endowment-earns-142-percent-return> [hereinafter *Princeton Endowment Earnings*].

187. *See id.*; *see also* Ollwerther, *supra* note 98 (placing the Princeton endowment at \$23.8 billion on June 30, 2017).

188. *See Princeton Endowment Earnings*, *supra* note 186; *see also* Press Release, Princeton U., Princeton’s Annual Financial Aid Budget Grows 8.7 Percent to \$161.2 Million (Apr. 10, 2017), <https://www.princeton.edu/news/2017/04/10/princetons-annual-financial-aid-budget-grows-87-percent-1612-million>.

189. *See* Allie Wenner, *Fee Package to Rise 4.9% for 2018-19*, PRINCETON ALUMNI WKLY. (May 16, 2018), <https://paw.princeton.edu/article/fee-package-rise-49-2018%E2%80%9319>.

year.¹⁹⁰ While it says it remains committed to meeting costs for first-generation, low income (“FGLI”) students in the days ahead, many believe the stated sticker price alone will scare away modest-means students from applying in the future.¹⁹¹ And students who are not FGLI students will likely have a hard time meeting the increased cost of tuition.¹⁹²

In fact, it seems that most elite private universities have done relatively little to fundamentally address many of the underlying critiques that drove implementation of the endowment tax in the first place.¹⁹³ This has occurred not just through their continued wealth accumulation practices in the face of rising tuition costs. Too many elite schools remain unduly focused on prestige and how to increase their reputations by way of endowed professorships and teaching chairs when some on campus, community members who carry much educational water for students, are made to fight for basic benefits such as health insurance and salary sufficient to pay rent each month.¹⁹⁴ The same holds true for many janitors and food service workers at the nation’s elite schools,¹⁹⁵ with Harvard apparently serving as an outlier in its expressed commitment to ensure a living wage for all on campus.¹⁹⁶

This problem can also be seen in the ways such institutions still disregard the very communities where they are located. Here too, in trying to fight the endowment tax—and again in their March 7 letter trying to have it repealed—the nation’s private colleges declared they needed their money not just to serve individual students but take on a wide range of problems in our world, including actually working on

190. Yoni Gutenmacher, *Experts and Students Raise Concerns Over Long-Term Consequences of Penn’s Tuition Increases*, DAILY PENNSYLVANIAN (Mar. 12, 2018, 3:34 AM), <https://www.thedp.com/article/2018/03/tuition-increase-board-trustees-cost-attendance-upenn-penn-philadelphia>.

191. *See id.*

192. *See id.*

193. *See* Shea, *supra* note 176 (describing elite colleges as “tone-deaf to the concerns many Americans have regarding troubling trends in higher education today”).

194. Steve Dubb, *Unions Gain Among Adjunct Faculty and Graduate Instructors on Campuses*, NONPROFIT Q. (June 12, 2008), <https://nonprofitquarterly.org/2018/06/12/unions-gain-among-adjunct-faculty-and-graduate-instructors-on-campuses/> (reporting that at Washington University at St. Louis, adjuncts had to unionize to win a twenty-six percent pay increase this year from a previously “low base” and those at Northeastern did not receive health benefits until organizing).

195. Katie Johnston, *MIT Pay Raise Shows Janitors’ Union Clout*, BOS. GLOBE (July 1, 2016), <https://www.bostonglobe.com/business/2016/07/01/mit-janitors-get-hour/dEbHes7ALk9Tft7FgxDOVN/story.html>.

196. Eduardo Porter, *Harvard is Vaulting Workers Into the Middle Class with High Pay. Can Anyone Else Follow its Lead?*, N.Y. TIMES (Sept. 8, 2018), <https://www.nytimes.com/2018/09/08/business/economy/harvard-living-wage.html>.

“enhancing the quality of life for all.¹⁹⁷ But many of the country’s most highly endowed institutions of higher learning are situated in regions that have some of the highest crime, poverty, and segregation rates in the country.¹⁹⁸ These social issues would seem to be the kind of “urgent needs” university leadership might want to try to help address.¹⁹⁹

Some endowment tax-impacted schools seem to have turned their attention to better assessing regional needs and figuring out how their educational offerings and services may empower local communities.²⁰⁰ Yet relative to their wealth and financial ability, far too many wealthy private universities still fail to do enough to address life-threatening problems in their own backyard.²⁰¹ If they did they might help more local at-risk youth to find their way into such institutions as students—rather than having such youth experience the schools as off-limits castles in their otherwise struggling communities.

This may be why, rather than succeeding in convincing Congress to overturn the existing endowment tax, some elite colleges find themselves facing calls for further taxes, financial penalties, and even citizen lawsuits on the local level.²⁰² In Massachusetts, for instance, Democratic gubernatorial candidate Jay Gonzalez is calling for a state-level endowment tax to tap the jurisdiction’s wealthiest colleges—including Harvard, Massachusetts Institute of Technology,

197. See *Letter of Coll. Consortium to Cong. Leadership*, *supra* note 163; see also *supra* note 166 and accompanying text.

198. See, e.g., Elizabeth K. Julian et al., *Why Houston Remains Segregated*, HOUS. CHRON. (Feb. 16, 2017), <https://www.houstonchronicle.com/local/gray-matters/article/Why-Houston-remains-segregated-10935311.php> (explaining how Houston, home to wealthy Rice University, is considered an extremely racially segregated city despite its growing diversity); *Poorest Big US City Endorses Predictable Work Schedules*, ASSOCIATED PRESS (Dec. 6, 2018), <https://www.apnews.com/aaa318b173d34866805645df9c487467> (noting Philadelphia, home to the University of Pennsylvania, is the poorest large city in the country); *The 30 Cities with the Highest Murder Rates in the US*, BISMARCK TRIB. (Nov. 13, 2017), https://bismarcktribune.com/news/national/the-cities-with-the-highest-murder-rates-in-the-us/collection_5a789407-4d43-5403-ad56-7c47880bda8e.html#2 (listing Chicago, Philadelphia, St. Louis, and Richmond—cities with some of the wealthiest colleges—as being among those with the highest murder rates in the country).

199. Killenberg McGinn, *supra* note 162 (detailing language used to refer to the nearly \$300 million set aside as part of an Annual Fund for the discretionary use of the chancellor and deans at Washington University).

200. See Arie Passwaters, *Leebron Commends Rice’s Sense of Community, Explains V2C2 Goals*, RICE NEWS ONLINE (Apr. 9, 2018), <http://news.rice.edu/2018/04/09/leebron-commends-rices-sense-of-community-explains-v2c2-goals/> (outlining Rice’s mission for the second century, second decade, which includes “engag[ing] . . . and empower[ing] the city of Houston’s future”).

201. See, e.g., Quinn, *supra* note 4 (highlighting Washington University’s failure to do more to support the City of St Louis, particularly in the face of the City’s reduced credit rating).

202. *Id.*

and Boston College²⁰³—which continue to amass tremendous wealth even in the face of the federal endowment tax. The City of Boston is similarly criticizing the many wealthy colleges within its confines for failing to live up to past promises to voluntarily contribute to local coffers with Payments in Lieu of Taxation, given their vast untaxed property holdings.²⁰⁴ That is, since these universities utilize local government services and support but are not required to pay property tax on their vast real property holdings in the city, all voluntarily contribute a significant amount of money each year to the city treasury.²⁰⁵ But none, it seems, have been satisfying their agreements.²⁰⁶ All of this has resulted in the *Boston Herald* questioning whether such institutions should retain their tax-exempt status at all—critically referring to the colleges as NINOs: “Nonprofit in Name Only.”²⁰⁷

B. Some Specific Suggestions to Address the Status Quo

The solution here seems relatively simple—resist the Trump endowment tax and address the critiques of rich private colleges that are coming from all corners, conservative and progressive alike. Elite private universities need to start worrying more about their public reputation and actually earn their tax-exempt status by privileging public good over prestige and stockpiled income. As the Brookings Institute recently noted, Trump’s “small tax on endowments” will not solve problems of wealth disparity on its own, but it should “serve as a wake-up call to higher education leaders: time to return to their core values of providing opportunity and enrichment for students.”²⁰⁸

And wealthy private colleges can do this in a wide range of ways without endangering the corpora of existing endowment accounts, the likelihood of future donations, or the longevity of their institutions. There is no single right way for higher education entities to increase

203. See, e.g., Steve LeBlanc, *Jay Gonzalez: Massachusetts Should Tax College Endowments*, WASH. TIMES (Sept. 19, 2018) www.washingtontimes.com/news/2018/sep/19/democratic-candidate-state-should-tax-college-endo/.

204. See Caroline Connelly, *Boston Officials: Universities Aren’t Paying Enough to City*, NECN (May 8, 2018, 6:05 PM), <https://www.necn.com/news/new-england/Boston-Officials-Universities-Arent-Paying-Enough-to-City-482109981.html>; Huffman, *supra* note 19 (noting that this year Boston’s private universities paid less than half of what they had promised to pay under PILOT agreements with the City).

205. Connelly, *supra* note 204.

206. *Id.*

207. See *Colleges Owe a Lot to City Editorial*, *supra* note 7 (describing how the elite universities in Boston benefit from tax breaks without providing sufficient benefit in return through PILOTs or otherwise).

208. Klein & Reeves, *supra* note 171.

opportunity, work to level the playing field, or intentionally produce social good.²⁰⁹ But here are some thoughts:

(1) Show good faith by at least meeting the goals suggested by Representative Reed’s REDUCE Act, which calls on all private colleges with at least five hundred students and endowment assets of at least \$500,000 per student to spend an amount equal to twenty-five percent of its annual endowment investment income on undergraduate tuition for students who come from poor, low-income, and middle-income families—a large percentage of whom will be students of color, immigrant youth, and otherwise under-representative communities.²¹⁰

(2) Extend robust financial aid awards beyond the undergraduate years for those going into helping professions such as social work, public interest law, K-12 teaching, and community medicine, as New York University recently did with its medical school, to ensure at-risk communities, immigrant populations, and communities of color are truly well served by elite university educational outcomes.²¹¹

(3) Look to educational public good leaders like Berea College, which seems to have figured out how to not only survive—but to financially thrive while maintaining its integrity, deep commitment to racial justice, and promise of free tuition for all students (most of whom are Appalachian residents with tremendous financial need).²¹² And if other rich, private

209. *Id.* (offering additional higher education policy proposals for consideration that might help prevent “reproduction of inequality across generations”).

210. See AM. COUNCIL EDUC., REDUCING EXCESSIVE DEBT AND UNFAIR COSTS OF EDUCATION ACT OF 2018 (REDUCE) SUMMARY 1–3 (2018), <https://www.acenet.edu/news-room/Documents/REDUCE-Act-2018-Summary.pdf>; see also Press Release, Congressman Tom Reed Introduces Bill to Tackle Student Loan Debt for Working-Class Families (May 22, 2018), <https://reed.house.gov/news/documentsingle.aspx?DocumentID=1442> (“In most cases, the richer the school, the smaller the percentage of working class students being served by the college.”).

211. See Karen Sloan, *NYU Drops Med School Tuition. Will Law Schools Follow Suit?*, LAW.COM (Aug. 20, 2018, 3:10 PM), <https://www.law.com/2018/08/20/nyu-drops-med-school-tuition-will-law-schools-follow-suit/?slreturn=20181109184009>.

212. Adam Harris, *The Little College Where Tuition Is Free and Every Student Is Given a Job*, ATLANTIC (Oct. 11, 2018), <https://www.theatlantic.com/education/archive/2018/10/how-berea-college-makes-tuition-free-with-its-endowment/572644/>; Klein & Reeves, *supra* note 172 (describing Berea College’s unique commitments and sizeable endowment); see also Annie Nova, *How One Kentucky College Dodged a Tax on Endowments*, CNBC (Feb. 24, 2018, 9:01 AM), <https://www.cnbc.com/2018/02/23/how-one-kentucky-college-dodged-a-tax-on-endowments.html> (explaining that Berea, established in 1855 as the South’s first interracial college, was exempted from Trump’s endowment tax because of it does not charge tuition to any of its 1,600 students).

universities are providing similar far-reaching, full-tuition scholarships for students in need or vulnerable groups, they should rethink the ways in which they advertise and explain their “sticker prices.” Higher education should not promote an exclusionary economy, but instead elite schools should offer sliding-scale rates based entirely on ability to pay. This might help encourage a broader application pool of first-generation and other underrepresented students.

(4) Engage in participatory budgeting processes that include voices of students, staff, and local community members, not just wealthy white male trustees disconnected from problems of the poor or people of color, to help drive research priorities and educational offerings at wealthy colleges. After all, how can schools claim to be taking on the nation’s leading problems without directly asking their neighbors what problems they are facing daily and how they might best help?²¹³

(5) Create more research centers and experiential learning offerings that both teach students real-world skills and really serve communities. Beyond free medical services, vulnerable populations—often a stone’s throw from the richest colleges in the country—can benefit from enhanced support, including English as Second Language services, trauma-informed social work assistance, and free legal representation. These, and other services can be embedded in university programs and course offerings in ways that will aid at-risk youth and families.²¹⁴

(6) Assist local governments that can benefit from PILOT Programs to offset the many millions of dollars in property tax breaks being provided to universities and their well-paid leaders who may be living in tax-exempt, university-owned

213. See *Participatory Budgeting*, MEGAN ELLYIA GREEN, <http://meganellyiaagree.com/participatory-budgeting/> (last visited Mar. 30, 2019); *Research and Evaluation of Participatory Budgeting in the U.S. and Canada*, PUBLIC AGENDA (Feb. 20, 2015), <https://www.publicagenda.org/pages/research-and-evaluation-of-participatory-budgeting-in-the-us-and-canada>.

214. Quinn, *supra* note 4; see Mae C. Quinn, *Missouri *@!?!@! – Too Slow*, 62 ST. LOUIS U.L.J. 847, 850-53 (2018) (describing how poverty, over-criminalization, and police brutality negatively impact youth of color in St. Louis resulting in their reduced ability to survive and thrive in the city); see also CHRISTOPHER WIMER & DAN BLOOM, MDRC, BOOSTING THE LIFE CHANCES OF YOUNG MEN OF COLOR: EVIDENCE OF PROMISING PROGRAMS iii (2014) (“[Y]oung men of color still face many obstacles to success in American society and suffer disproportionately from economic and social disadvantage.”); Michael Wald & Tia Martinez, *Connected by 25: Improving the Life Chances of the Country’s Most Vulnerable 14-24 Year Olds* 3 (Hewlett Found., Working Paper 2003) (noting that teen moms, former foster children, and court-involved juveniles are among those who need enhanced resources to make a “successful transition into young adulthood”).

mansions.²¹⁵ Such monies, if they are actually paid as promised, can be used to improve public safety, public schools, mental health support and other services to better facilitate leveling the playing field locally.²¹⁶

VIII. CONCLUSION

Following at least some of these steps will help elite private colleges begin to meaningfully deploy their stockpiled assets and potentially avoid the Trump endowment tax in the days ahead. It will also assist in moving them from being seen as public pariahs and NINOs to serving an important role in society as real sources of enlightenment and public good. But more than this, it will also ensure such institutions stop pretending they are victims of a right-wing conspiracy²¹⁷—and instead provide actual assistance to those who actually are victims of President Donald Trump and his Administration, as it continues to attack vulnerable populations based upon who they are, where they were born, or what they believe.²¹⁸

215. *Id.*; see also *Payment in Lieu of Tax (PILOT) Program*, CITY OF BOS., <https://www.boston.gov/departments/assessing/payment-lieu-tax-pilot-program> (last updated Dec. 7, 2018).

216. Mark Schneider & Jorge Klor de Alva, *Why Should Rich Universities Get Huge Property Tax Exemptions?*, WASH. POST (July 8, 2016) https://www.washingtonpost.com/news/grade-point/wp/2016/07/08/why-should-rich-universities-get-huge-property-tax-exemptions/?utm_term=.09e9c2b8220c (describing the massive number of real properties held by schools like Washington University, New York University, and others that still do not offset lost local property tax revenue with PILOT donations); see also Karin Fischer, *As Cities Seek Payments in Lieu of Taxes, Colleges are Urged to Work Out Deals*, CHRON. HIGHER EDUC. (Nov. 29, 2010), <https://www.chronicle.com/article/As-Cities-Seek-Payments-in/125558>.

217. Klein & Reeves, *supra* note 171 (highlighting the Ivy League and other elite colleges for their lack-luster reactions to the Trump endowment tax); Shea, *supra* note 177 (referring to wealthy university reactions to the endowment tax as “self-congratulatory” and “tone-deaf”).

218. Einbinder, *supra* note 1 (attack on immigrants); Ifill, *supra* note 2 (attack on civil rights of communities of color); Patrick, *supra* note 3 (attack on dissension and protest).