A HIGHER POWER IN HIGHER EDUCATION: AN EXPLORATION OF ENDOWMENT TAXES, THE ESTABLISHMENT CLAUSE, AND COLLEGE AFFORDABILITY

Abstract: Institutions of higher education in the United States have enjoyed a broad tax exemption for hundreds of years. In 2017, however, Congress imposed an excise tax on certain colleges' and universities' endowment revenue as part of the Tax Cuts and Jobs Act (Act). The endowment excise tax is not scheduled to sunset in 2025 alongside other provisions of the Act, but members of Congress have begun to revisit the issue of whether and how to tax the nation's educational institutions. This Note examines two endowment tax proposals' attempts to exempt religious colleges and universities from heightened endowment excise taxes. It argues that although taxing college and university endowments is a possible legislative tool for making higher education more affordable for more Americans, exempting religious schools from such taxes both runs counter to this goal and violates the Establishment Clause of the U.S. Constitution. If Congress chooses to expand college and university taxation, it should do so in a way that effectively addresses the college affordability crisis and treats religious and secular institutions alike.

INTRODUCTION

Chavonne, a young adult living in the Washington, D.C. area, keeps changing her cellphone number.[1] Between shifts driving cars for Uber and working temporary office jobs, Chavonne will periodically answer a phone call from an unknown number—only to realize that a debt collector is on the other end of the line.[2] She continues to change her number, but they always manage to track her down again.[3] These calls are an ever-present reminder that she is in

[1] Elissa Nadworny & Clare Lombardo, *"I'm Drowning": Those Hit Hardest by Student Loan Debt Never Finished College*, NAT'L PUB. RADIO (July 18, 2019), https://www.npr.org/2019/07/18/739451168/i-m-drowning-those-hit-hardest-by-student-loan-debt-never-finished-college [https://perma.cc/9CX4-4J46].

[2] *Id.* Debt collectors are persons or companies that seek payments for debts owed to third-parties or who have purchased past-due debt from creditors. *What Is a Debt Collector and Why Are They Contacting Me?*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/ask-cfpb/what-is-a-debt-collector-and-why-are-they-contacting-me-en-330/ [https://perma.cc/3ZWD-BDJU] (Aug. 2, 2023).

[3] Nadworny & Lombardo, *supra* note 1. You can request that a debt collector refrain from contacting you, but they are still entitled to sue you or report your unpaid debt to a credit reporting agency. CONSUMER FIN. PROT. BUREAU, *supra* note 2.

default on her student loans.[4] To make matters worse, Chavonne is in significant debt even though she never obtained her college degree.[5] After teachers and friends pushed her to attend college, she took out loans and began at the University of Mississippi.[6] She struggled through three semesters, but she eventually decided that she was unable to continue her college education.[7] Now, the debt she accrued during her brief time in school has made it nearly impossible for her to return to finish her degree.[8] "If I made sure that my credit score was my No. 1 priority and that I got these student loans taken care of," Chavonne observes, "I would not have a roof over my head."[9]

---

[4] Nadworny & Lombardo, *supra* note 1.

[5] *See id.* (noting that Chavonne is frequently contacted by debt collectors even though she never finished her college degree). From mid-2014 to mid-2016, nearly four million undergraduate students who had borrowed federal student loans left school before graduating. *Id.* Students who drop out of college are three times more likely to default on their loan repayments than students who complete their degrees. *Id.* This is not necessarily surprising, because students who drop out typically do not see the wage increases and access to a broader array of job opportunities that college degrees afford. *See id.* (noting that students who drop out of school before graduating do not generally see the same wage increases that college graduates see). This might make it more difficult for them to make loan repayments. *See id.* (acknowledging that earning a wage sufficient to repay student loans is more challenging when one does not have a college degree). In 2024, "the average federal student loan debt [was] $37,853 per borrower," and "the total average student loan debt (including private loan debt) [was likely] as high as $40,681." Melanie Hanson, *Average Student Loan Debt*, EDUC. DATA INITIATIVE, https://educationdata.org/average-student-loan-debt [https://perma.cc/JB66-CHNX] (Aug. 16, 2024). Also in 2024, 42% of student borrowers were still making payments on unpaid loans twenty years after beginning school. *Id.*

[6] Nadworny & Lombardo, *supra* note 1. Chavonne borrowed $20,000 to pay for three semesters of college. *Id.* For the 2023–2024 school year, the cost of attendance at the University of Mississippi for an undergraduate student living on campus was $46,520 for nonresidents and $28,952 for in-state residents. *Cost of Attendance 2023-2024*, THE UNIV. OF MISS., OFF. OF FIN. AID, https://finaid.olemiss.edu/cost-of-attendance-2023-2024/#2 [https://perma.cc/982P-22X5]. In 2024, the average cost of attending college in the United States was $38,270 per year per student. Melanie Hanson, *Average Cost of College & Tuition*, EDUC. DATA INITIATIVE, https://educationdata.org/average-cost-of-college [https://perma.cc/A4YT-45V4] (Nov. 18, 2023). Throughout the twenty-first century, the cost of attending college has increased by more than 200%. *Id.* Significantly, these cost of attendance estimates do not include the income one forgoes when one chooses to attend school instead of working full time. *See id.* (observing that a bachelor's degree can cost more than $500,000 when one considers interest accrued on loans and lost income).

[7] *See* Nadworny & Lombardo, *supra* note 1 (remarking that Chavonne had "had enough" after three semesters).

[8] *See id.* (noting that Chavonne cannot access federal aid that would allow her to return to school).

[9] *Id.* Having a poor credit score can have significant ripple effects. Daniel Kurt, *The Side Effects of Bad Credit*, INVESTOPEDIA, https://www.investopedia.com/the-side-effects-of-bad-credit-4769783 [https://perma.cc/NB5L-92XA] (Aug. 29, 2023). Poor credit can make it difficult to take out loans, get a cellphone, rent an apartment, or even be hired for certain jobs. *Id.* Troublingly, the factors that determine one's credit score—which include "payment history, amounts owed, length of credit history, new credit[,] and credit mix"—can be affected by generational wealth, which Black and Hispanic borrowers have historically been excluded from. Natalie Campisi, *From Inherent Racial Bias to Incorrect Data—The Problems with Current Credit Scoring Models*, FORBES: ADVISOR, https://www.forbes.com/advisor/credit-cards/from-inherent-racial-bias-to-incorrect-data-the-problems-with-current-

Chavonne's story is not unique.[10] Ashlee had to drop out of college during her third year; she had been working full time to support her family while also attending classes, but trying to do both eventually became unsustainable.[11] Ashlee is now in default on her student loans.[12] "I'm drowning in debt for a piece of paper I never received . . . . Nobody should be in this position," she says.[13]

Many agree that college affordability is a pressing problem.[14] President Joe Biden made addressing the student loan debt crisis a central part of his platform during the 2020 presidential election.[15] In 2022, the Secretary of Education took steps to honor this campaign promise and invoked his authority under the Higher Education Relief Opportunities for Students Act of 2003 to cancel approximately $430 billion in student debt.[16] The U.S. Supreme Court

---

credit-scoring-models/ [https://perma.cc/XH6V-U8ZB] (Feb. 26, 2021). Thus, critics have pointed out that credit scores are both inaccurate indicators of creditworthiness and can perpetuate racial inequities. *Id.*

[10] *See generally* Nadworny & Lombardo, *supra* note 1 (describing the stories of multiple young adults who dropped out of their college programs and are now struggling to pay back their student loans).

[11] *Id.* Studies suggest that 43% of students attending school full time and 81% of students attending school part-time work while in school. Walter G. Ecton, Celeste K. Carruthers & The Conversation, *College Students Who Have Jobs Are Much Less Likely to Graduate Than Their Privileged Peers, Shocking Study Finds*, FORTUNE (Jan. 11, 2023), https://fortune.com/2023/01/11/college-students-with-jobs-20-percent-less-likely-to-graduate-than-privileged-peers-study-side-hustle/ [https://perma.cc/26EW-BFP9]. Importantly, students who both attend college and work a job are approximately 20% less likely to graduate than their peers who do not work. *Id.* Students who work while attending school are typically just as academically successful as students who do not, but they sign up for one less credit per semester on average. *Id.*

[12] Nadworny & Lombardo, *supra* note 1. Ashlee originally borrowed $12,000 and decided to drop out during her junior year of college. *Id.* She lives in Kentucky with a parent, and, although she would like to move out soon, her unpaid student loan debt has damaged her credit and made it hard to rent a place of her own. *Id.*

[13] *Id.*

[14] *See* DAVID SCHLEIFER, WILL FRIEDMAN & ERIN MCNALLY, PUB. AGENDA, AMERICA'S HIDDEN COMMON GROUND ON HIGHER EDUCATION: WHAT'S WRONG AND HOW TO FIX IT 1 (July 2022), https://publicagenda.org/wp-content/uploads/Public-Agenda-HCG-Higher-Ed-Report-FINAL.pdf [https://perma.cc/L76Q-5WMS] (observing that Americans from different political parties are concerned about the high price of college and student debt). *See generally* Phillip Levine, Kristin F. Butcher & Coura Fall, *A Problem of Fit: Tackling Affordability and Pricing in Higher Education*, BROOKINGS INST. (May 16, 2022), https://www.brookings.edu/articles/a-problem-of-fit-tackling-affordability-and-pricing-in-higher-education/ [https://perma.cc/86H2-77EZ] (discussing the challenges low-income students face when applying to college). Several different barriers exacerbate the issue of college affordability in addition to its sticker price. Levine et al., *supra*. For one thing, the financial aid system is incredibly complicated, and many potential applicants do not realize that they likely will not need to pay the full cost of attendance. *Id.* Additionally, even though most families receive financial aid, they are still often asked to pay sums that are unreasonably high given their income. *Id.*

[15] Press Release, Joe Biden, President, President Biden Announces Student Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ [https://perma.cc/V7EY-CHMY].

[16] Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

later held, however, that the debt cancellation plan exceeded the Secretary's statutory mandate.[17]

As the executive branch has struggled to find a solution to the college affordability crisis, members of Congress have increased their scrutiny of other aspects of these institutions.[18] Americans' confidence in the nation's colleges and universities has plummeted to a historic low,[19] and House Republicans have commenced a wide-ranging investigation into ten colleges and universities across the country.[20] In December of 2023, college presidents were asked to testify before Congress about student conduct on their campuses, and two of those presidents have since resigned due to public backlash.[21] Although criti-

[17] *Id.*; Amy Howe, *Supreme Court Strikes Down Biden Student-Loan Forgiveness Program*, SCOTUSBLOG (June 30, 2023), https://www.scotusblog.com/2023/06/supreme-court-strikes-down-biden-student-loan-forgiveness-program/ [https://perma.cc/E78B-78WM]. In early December 2023, the Biden Administration approved $4.8 billion in student debt forgiveness for 80,300 borrowers. Press Release, Joe Biden, President, Statement from President Joe Biden on Another Nearly $5 Billion in Debt Relief for Over 80,000 Student Loan Borrowers (Dec. 6, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/12/06/statement-from-president-joe-biden-on-another-nearly-5-billion-in-debt-relief-for-over-80000-student-loan-borrowers/ [https://perma.cc/LF2D-2ZU4]. In a press release, the Administration noted that it would continue to pursue different paths toward achieving comprehensive student debt relief in the wake of the U.S. Supreme Court's decision in *Biden v. Nebraska*. *Id.* In *Biden*, the Court held that while the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) gave the Secretary of Education the power to "waive or modify" certain provisions of statutes and regulations that dealt with several financial assistance programs, cancelling $430 billion in student debt exceeded this grant of authority. 143 S. Ct. at 2368.

[18] *See, e.g.*, Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (imposing a 6% excise tax on certain private college and university endowments); College Endowment Accountability Act of 2023, S. 3514, 118th Cong. (2023) (increasing the existing 1.4% excise tax to 35% for certain private college and university endowments); Safeguarding American Education from Foreign Control Act, S. 2856, 118th Cong. (2023) (requiring schools to make additional disclosures about donations and contracts from persons outside of the United States); Defending Education Transparency and Ending Rogue Regimes Engaging in Nefarious Transactions Act, S. 3362, 118th Cong. (2023) (mandating that schools and their faculty members disclose additional information about financial ties to foreign entities); Debt-Free College Act of 2023, S. 1848, 118th Cong. (2023) (addressing certain college students' unmet financial needs); Student Loan Interest Elimination Act, S. 2557, 118th Cong. (2023) (modifying and refinancing federal student loans).

[19] *See* Megan Brenan, *Americans' Confidence in Higher Education Down Sharply*, GALLUP (July 11, 2023), https://news.gallup.com/poll/508352/americans-confidence-higher-education-down-sharply.aspx [https://perma.cc/Y5AD-72EQ] (finding that 22% of Americans have "very little" confidence in higher education institutions).

[20] *See* Katherine Knott, *House Republicans Threaten Colleges' Federal Funding with New Investigations*, INSIDE HIGHER ED (June 4, 2024), https://www.insidehighered.com/news/government/politics-elections/2024/06/04/house-republicans-open-antisemitism-probes-10 [https://perma.cc/6MJ5-QECG] (reporting that House Republicans sent letters to "Barnard College[;] Columbia University[;] Cornell University[;] Harvard University[;] Massachusetts Institute of Technology[;] Northwestern University[;] Rutgers University[;] the University of California, Berkeley[;] the University of Pennsylvania[;] and the University of California, Los Angeles" to inform these institutions that they are the subjects of a congressional investigation intended to "crack down on campus antisemitism").

[21] *See* Stephanie Saul & Anemona Hartocollis, *College Presidents Under Fire After Dodging Questions About Antisemitism*, N.Y. TIMES (Dec. 6, 2023), https://www.nytimes.com/2023/12/06/us/harvard-mit-penn-presidents-antisemitism.html [https://perma.cc/LV5S-4GH4] (reporting on the pub-

cism of higher education is not new, scrutiny of American academia generally and the college affordability crisis specifically could precipitate radical changes to the financial relationships between schools, students, and government institutions.[22]

In an effort to confront these challenges, federal lawmakers have introduced a variety of bills that seek to regulate how colleges and universities are funded.[23] Some proposals attempt to address college affordability by refinancing existing federal loans or helping cover certain students' unmet financial needs.[24] Others endeavor to investigate college endowments' investments in foreign assets or donations from foreign entities.[25] Several bills also aim to

---

lic backlash faced by the presidents of Harvard University, the Massachusetts Institute of Technology, and the University of Pennsylvania after they testified at a congressional hearing about antisemitism on campus); Emily Bloch, *6 Things to Know About Harvard President Claudine Gay's Resignation, Weeks After Penn's Liz Magill Stepped Down*, PHILA. INQUIRER (Jan. 2, 2024), https://www.inquirer.com/news/nation-world/claudine-gay-resignation-harvard-president-liz-magill-penn-philadelphia-20240102.html [https://perma.cc/9K4J-CCH9] (same).

[22] *See* Annie Karni, *House Republicans to Broaden Higher Education Inquiry Beyond Antisemitism*, N.Y. TIMES (Jan. 5, 2024), https://www.nytimes.com/2024/01/05/us/politics/house-republicans-antisemitism-colleges-harvard.html?searchResultPosition=7 [https://perma.cc/B9Z8-4RLU] (noting that conservatives have been critical of elite higher education institutions for decades); Katherine Knott, *House Committee Advances GOP Plan to Overhaul Higher Ed*, INSIDE HIGHER ED (Feb. 1, 2024), https://www.insidehighered.com/news/government/student-aid-policy/2024/02/01/house-committee-advances-gop-plan-overhaul-higher-ed [https://perma.cc/AE3H-3SKU]. President Richard Nixon was recorded telling Henry Kissinger:

> The Ivy League Presidents? Why, I won't let those sons-of-bitches ever in this White House again. Never, never. None of them. They're finished. The Ivy League schools are finished . . . . Henry, I would not have had them in. Don't do that again . . . . They came out against us when it was tough . . . . Don't ever go to an Ivy League school again, ever. Never, never, never.

Lauren Collins, *Team of Brainiacs*, NEW YORKER (Dec. 7, 2008), https://www.newyorker.com/magazine/2008/12/15/team-of-brainiacs [https://perma.cc/Y2E7-T8PU].

[23] *See, e.g.*, Woke Endowment Security Tax Act of 2023, S. 3465 (imposing an additional excise tax on certain private college and university endowments); College Endowment Accountability Act of 2023, S. 3514 (increasing the existing excise tax on certain private college and university endowments); Safeguarding American Education from Foreign Control Act, S. 2865 (requiring schools to make additional disclosures about gifts and contracts from foreign persons); Defending Education Transparency and Ending Rogue Regimes Engaging in Nefarious Transactions Act, S. 3362 (mandating that schools and their faculty members disclose additional information about financial ties to foreign entities); Debt-Free College Act of 2023, S. 1848 (addressing certain college students' unmet financial needs); Student Loan Interest Elimination Act, S. 2557 (modifying and refinancing federal student loans).

[24] *See, e.g.*, Debt-Free College Act of 2023, S. 1848 (providing financial support for higher education students' unmet financial needs); Student Loan Interest Elimination Act, S. 2557 (modifying and refinancing federal student loans).

[25] *See, e.g.*, Protecting Endowments from Our Adversaries Act, H.R. 4380, 118th Cong. (2023) (imposing excise taxes on certain wealthy endowments' investments in foreign entities deemed to pose a national security risk); Safeguarding American Education from Foreign Control Act, S. 2865 (requiring American colleges and universities to report gifts from entities located in foreign countries that are considered foreign adversaries); Defending Education Transparency and Ending Rogue Regimes Engaging

impose heightened excise taxes on certain college and university endowments.[26] Although the federal government already collects limited taxes on college and university revenue, these educational institutions have enjoyed a general tax exemption for hundreds of years.[27] Notably, at least two of the endowment tax proposals introduced in Congress expressly exempt religious educational institutions that otherwise qualify for the tax.[28]

This Note argues that as Congress considers imposing additional taxes on traditionally tax-exempt colleges and universities, it is critical that it does so in

---

in Nefarious Transactions Act, S. 3362 (strengthening existing disclosure obligations and penalties on American colleges and universities with respect to gifts received from foreign entities).

[26] *See* Woke Endowment Security Tax Act of 2023, S. 3465 (applying an additional 6% excise tax to the endowment revenue of certain non-religious educational institutions); College Endowment Accountability Act of 2023, S. 3514 (increasing the existing endowment excise tax to 35% for certain eligible non-religious educational institutions). The taxes proposed by these bills would purportedly serve a variety of purposes. *See* Press Release, Tom Cotton, Senator, Cotton Introduces Woke Endowment Security Tax Act to Tax College Endowments (Dec. 12. 2023), https://www.cotton.senate.gov/news/press-releases/cotton-introduces-woke-endowment-security-tax-act-to-tax-college-endowments [https://perma.cc/XVP6-K4MA] (announcing that the revenue from Senator Tom Cotton's proposed endowment tax would be used to provide military aid to Israel and Ukraine and augment security at the United States' southern boarder); Press Release, J.D. Vance, Senator, Senate Democrats Block Vance Legislation to Tax Large University Endowments (Dec. 14. 2023), https://www.vance.senate.gov/press-releases/senate-democrats-block-vance-legislation-to-tax-large-university-endowments [https://perma.cc/5W5A-PZYT] (failing to announce a specific purpose for the revenue from Senator J.D. Vance's proposed excise tax but calling for a solution to the college affordability crisis). Senator Cotton's Woke Endowment Security Tax would tax universities for their alleged failure to adequately condemn and address antisemitism perpetrated on their campuses. Press Release, Cotton, *supra*. The revenue generated by Cotton's proposed tax would be used to support Ukraine's defense against Russia, Israel's incursions into the Gaza Strip, and the United States' militarization of its southern border. *Id.* In a press release, Senator Vance emphasized that college and university endowments have grown too large. Press Release, Vance, *supra*. He asserted that these institutions' wealth has enabled "political insanity" and burdened young Americans with an extraordinary amount of student loan debt. *Id.* He argued that Democrats are misguided for thinking that "plumbers in Ohio" should pay for student loan debt relief when universities have caused the problem and should be responsible for fixing it. *Id.*

[27] *See Tax Exemption for Universities and Colleges: Internal Revenue Code Section 501(c)(3) and Section 115*, ASS'N OF AM. UNIVS. (Mar. 2014), https://www.aau.edu/sites/default/files/AAU%20Files/Key%20Issues/Taxation%20%26%20Finance/Tax-Exempt-Status-of-Universities-FINAL.pdf [https://perma.cc/6TAL-2ZCT] (explaining that the majority of private colleges and universities are exempt from federal income tax under § 501(c)(3) of the Internal Revenue Code because they primarily serve educational purposes); John D. Colombo, *Why Is Harvard Tax-Exempt and Other Mysteries of Tax Exemption for Private Educational Institutions*, 35 ARIZ. L. REV. 841, 844 (1993) (remarking that private educational institutions in the United States have generally enjoyed tax exemption since the colonial era). The existing federal taxes I refer to here are the Unrelated Business Income Tax (UBIT) and the Tax Cuts and Jobs Act's (Act) 1.4% endowment excise tax. *See infra* notes 83–87, 88–95, accompanying text.

[28] *See* Woke Endowment Security Tax Act of 2023, S. 3465 (defining a "specified applicable educational institution" as one meeting certain criteria "other than an institution which is religious in nature"); College Endowment Accountability Act of 2023, S. 3514 (noting that the proposed excise tax would only apply to educational institutions "which [are] not religious in nature").

a constitutional and ideologically neutral manner.[29] Further, any new taxes on higher education institutions should be structured in a way that directly addresses the college affordability crisis.[30] One way Congress might act counter to these goals is by exempting religious colleges and universities from any tax it might choose to enact.[31] Part I of this Note provides background on American higher education and its religious roots, university endowments and the laws governing them, and the Establishment Clause.[32] Part II discusses some of the key questions that emerge when considering the endowment tax proposals before Congress in light of the Supreme Court's interpretation of the Establishment Clause.[33] Part III argues that these endowment tax proposals both violate the U.S. Constitution and fail to adequately address the pressing issue of college affordability.[34]

I. FROM PROTESTANT SEMINARIES TO SECULAR UNIVERSITIES: THE HISTORY AND THE LAWS THAT SHAPED AMERICAN HIGHER EDUCATION

To understand the legal implications of current endowment excise tax proposals and possible solutions to the college affordability crisis, one must first understand the origins of American colleges, universities, and their endowments.[35] This Part of the Note provides a brief overview of the history and the laws that have shaped American higher education into what it is today.[36] Section A of this Part discusses the history of colleges and universities in the United

---

[29] *See infra* notes 183–223 and accompanying text (suggesting that endowment taxes might have a role to play in tackling the college affordability crisis, so long as they are ideologically neutral and coupled with other, complementary policy initiatives); John K. Wilson, *Why the Endowment Tax Is Unconstitutional*, INSIDE HIGHER ED (Jan. 15, 2018), https://www.insidehighered.com/views/2018/01/16/tax-college-endowment-unconstitutionally-targets-institutions-opinion [https://perma.cc/P6A4-4N2S] (arguing that the 2017 endowment tax imposed on colleges and universities is unconstitutional); Samantha Handler, *Endowment Tax Eyed After Supreme Court Affirmative Action Ruling*, BLOOMBERG TAX (June 29, 2022), https://news.bloombergtax.com/daily-tax-report/endowment-tax-eyed-after-supreme-court-affirmative-action-ruling [https://perma.cc/3D6J-FGD2] (noting that certain federal lawmakers support endowment tax proposals that allow universities to offset their tax liability if they spend more money supporting low-income students).

[30] *See infra* notes 211–213 and accompanying text (describing Senator Brendan Boyle's endowment tax proposal, which would make colleges' and universities' tax liability subject to offset by financial aid awards for low-income students).

[31] *See* Wilson, *supra* note 29 (arguing that ideologically motivated taxes on colleges and universities are unwise).

[32] *See infra* notes 35–128 and accompanying text.

[33] *See infra* notes 129–182 and accompanying text.

[34] *See infra* notes 183–223 and accompanying text.

[35] *See* FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY, at xxvi (Univ. of Ga. Press 2d ed. 1990) (1962) (suggesting that understanding the history of higher education in the United States might provide an answer to the question: "[h]ow and why and with what consequences have the American colleges and universities developed as they have?").

[36] *See infra* notes 36–128 and accompanying text.

States, beginning in the colonial period and through the present day.[37] Section B describes the emergence of the large endowments that many institutions of higher education use to support their educational missions, as well as the history of educational tax exemptions.[38] Section C summarizes recent forays into taxing large college and university endowments.[39] Finally, Section D provides background on the Establishment Clause and the Supreme Court's current approach to interpreting the constitutional provision.[40]

A. A Brief History of American Colleges and Universities

Higher education in the United States is older than the country itself.[41] Puritan ministers founded America's first college, Harvard, in 1636.[42] The College of William & Mary and Yale College followed shortly thereafter in 1693 and 1701, respectively.[43] By 1788, the young country boasted eighteen colleges and universities—seventeen of which had some connection to the Christian faith.[44] In

---

[37] *See infra* notes 41–65 and accompanying text.

[38] *See infra* notes 66–87 and accompanying text.

[39] *See infra* notes 88–106 and accompanying text.

[40] *See infra* notes 107–128 and accompanying text.

[41] *See* LORRAINE SMITH PANGLE & THOMAS L. PANGLE, THE LEARNING OF LIBERTY: THE EDUCATIONAL IDEAS OF THE AMERICAN FOUNDERS 146 (Univ. Press of Kan. 2021) (1993) (noting that Harvard College, the first institution of higher education in the United States, was founded in 1636 by Puritan ministers); Nat'l Const. Ctr., Staff, *The Day the Constitution Was Ratified*, https://constitutioncenter.org/blog/the-day-the-constitution-was-ratified [https://perma.cc/6UAB-P538] (June 21, 2024) (observing that the U.S. Constitution was ratified and became the governmental framework of the United States on June 21, 1788).

[42] PANGLE & PANGLE, *supra* note 41, at 146. The Great and General Court of the Massachusetts Bay Colony approved Harvard's charter on September 8, 1636. *The History of Harvard*, HARV. UNIV., https://www.harvard.edu/about/history/timeline/#1600s [https://perma.cc/5R9B-VT8S]. The school was named after John Harvard, a Puritan minister who donated his personal library and half his estate to the new school after his death. *Id.*; *Harvard University*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Harvard-University [https://perma.cc/WLY6-5CXL] (Aug. 15, 2024).

[43] PANGLE & PANGLE, *supra* note 41, at 146. The Connecticut legislature granted the "Collegiate School," which would later be renamed Yale College, its charter in 1701. *Traditions & History*, YALE UNIV., https://www.yale.edu/about-yale/traditions-history [https://perma.cc/P34L-YUAW]. It was Harvard alumnus and Puritan minister Cotton Mather who suggested the school be called "Yale College" in honor of Welsh merchant and donor Elihu Yale. *See* KENNETH SILVERMAN, THE LIFE AND TIMES OF COTTON MATHER 23, 45 (1984) (describing Mather's ordination as a Puritan minister); *About Mather*, HARV. UNIV., https://mather.harvard.edu/about-mather [https://perma.cc/9EM4-BQ27] (describing how Cotton and his father Increase were important figures in the founding of Yale and noting that Cotton suggested the name of the college). Today, Cotton Mather is perhaps most famous for his writings and sermons about witchcraft during the Salem Witch Trials. SILVERMAN, *supra*, at 87. England's King William III and Queen Mary II signed a royal charter establishing the College of William & Mary, a school named in their honor, in 1693. *See History & Traditions*, WM. & MARY, https://www.wm.edu/about/history/ [https://perma.cc/UCB3-MGLJ] (noting that King William III and Queen Mary II of England signed the charter that created "The College of William and Mary in Virginia").

[44] PANGLE & PANGLE, *supra* note 41, at 146. The one institution founded during this period that was not religious in nature was the University of Georgia, and the colleges that would later become

fact, many of these institutions were founded with the express purpose of educating future ministers and members of the clergy.[45] Nevertheless, colonial schools' curricula often embedded theological instruction within a more secular, liberal arts course of study.[46] Over time, schools deemphasized undergraduate study of

---

the universities of Princeton and Columbia were, in effect, interdenominational. *Id.* Early colonial documents show how intertwined religious faith and education were in seventeenth-century America. *See* Winthrop S. Hudson, *The Morison Myth Concerning the Founding of Harvard College*, 8 CHURCH HIST. 148, 152 (1939) (quoting from the colonial-era pamphlet "New England's First Fruits" to describe Harvard's founders' intention of creating an educated clergy); NEW ENGLANDS FIRST FRUITS 23, 24–25 (London, R.O. & G.D. 1643) (justifying Harvard's establishment and describing its early curriculum); THE YALE CORPORATION: CHARTER AND LEGISLATION 4 (1976), https://www.yale.edu/sites/default/files/files/University-Charter.pdf [https://perma.cc/UV22-TD4C] (stating that the purpose behind Yale's founding was the promotion of Protestantism).

[45] Hudson, *supra* note 44, at 152; Alison L. Cowan, *Yale Ending Its Affiliation with a Church*, N.Y. TIMES (Apr. 12, 2005), https://www.nytimes.com/2005/04/12/nyregion/yale-ending-its-affiliation-with-a-church.html [https://perma.cc/3D7E-LT78]. For example, a British pamphlet published in 1643 noted that Harvard was founded because colonists feared that they would "leave an illiterate Ministery to the Churches, when our present Ministers shall lie in the Dust." NEW ENGLANDS FIRST FRUITS, *supra* note 44, at 23. Harvard College was essentially a theological seminary created by Massachusetts Bay colonists who wanted to ensure that the nascent settlement would continue to have an educated clergy well into the future. Hudson, *supra* note 44, at 152. This was especially important given the fact that at the time, Puritan ministers were responsible for serving as both spiritual and governmental leaders for the colony. *Id.* Similarly, Yale's 1701 charter declared,

> WHEREAS several well disposed, and Publick spirited Persons of their sincere Regard to & Zeal for upholding & Propagating of the Christian Protestant Religion by a succession of Learned & Orthodox men have expressed by Petition their earnest desires that fully Liberty and Priveledge be granted . . . for the founding . . . a Collegiate School . . . wherein Youth may . . . thorough the blessing of Almighty God . . . be fitted for Publick employment both in Church & Civil State. To the intent therefore that all due incouragement by Given to such Pious Resolutions and that so necessary & Religious an undertakeing may be sett forward supported & well managed.

THE YALE CORPORATION: CHARTER AND LEGISLATION, *supra* note 44. In addition to teaching religious doctrine, early Protestant colleges often sought to instruct their students on how to write and speak persuasively. DOUGLAS JACOBSEN & RHONDA HUSTEDT JACOBSEN, NO LONGER INVISIBLE: RELIGION IN UNIVERSITY EDUCATION 17 (2012). Because many colonial Protestants believed that faith needed to be voluntary to be genuine, the use of persuasion was seen as the proper way to grow and sustain religious communities and an important skill for future clergymen to cultivate. *Id.*

[46] PANGLE & PANGLE, *supra* note 41, at 146. The first Harvard students studied logic, ethics and politics, geometry, Aramaic, and botany alongside Christian theology. Joe W. Kraus, *The Development of a Curriculum in the Early American Colleges*, 1 HIST. EDUC. Q. 64, 65 (1961). Influenced by strict English colleges and the uncompromising Puritan faith, Harvard in the seventeenth century had "not the free spirit of adult scholarly inquiry but the atmosphere of a boarding school for small boys." RUDOLPH, *supra* note 35, at 26–27. Its reputation for discipline and Godliness meant that "some of the finest rakes in England were sent overseas to the reformatory on the banks of the Charles." *Id.* at 27. Much of students' time was spent translating Old and New Testament passages from Hebrew and English into Greek and memorizing text from theological manuals, such as *Medulla Theologiae* by William Ames and *The Abridgement of Christian Divinitie* by Johann Wolleb. Kraus, *supra*, at 65. Harvard's first true "scientist," John Winthrop, became a professor in 1738; although he allegedly annoyed some of the school's religious leaders by arguing that earthquakes were scientific—rather than God-created—phenomena, he was instrumental in modernizing Harvard's curriculum. RUDOLPH, *supra* note 35, at 28. By the nineteenth century, American colleges and universities were increasingly

theology and dedicated more time and resources to the study of the sciences.[47] The secularization of American undergraduate education accelerated as a result of the Enlightenment and the American Revolution; the nation began to see higher education as a tool for preparing young men to become citizens of the new republic, rather than religious leaders.[48]

---

following the German university model and allowing students to live off campus, choose their own courses, and nurture their personal academic curiosity. John A. Beach, *The Management and Governance of Academic Institutions*, 12 J. COLL. & U.L. 301, 307–08 (1985).

[47] *See* JACOBSEN & JACOBSEN, *supra* note 45, at 17 (observing that, beginning in the nineteenth century, training for prospective ministers increasingly occurred at seminaries and divinity schools rather than at undergraduate institutions); RUDOLPH, *supra* note 35, at 29 (highlighting that during the mid-to-late eighteenth century, college students spent more time studying subjects such as surveying, navigation, and natural philosophy). This trend led several institutions to establish graduate divinity schools. *See* JACOBSEN & JACOBSEN, *supra* note 45, at 17 (describing the establishment of divinity schools); *History of Princeton Theological Seminary*, PRINCETON THEOLOGICAL SEMINARY, https://www.ptsem.edu/about/history [https://perma.cc/7TFV-Z4MV] (remarking that Princeton Theological Seminary was founded in 1812 and that Princeton University was supportive of the endeavor due to the fact that a career in theology required more specialized training than what it could offer).

[48] RUDOLPH, *supra* note 35, at 40. Several of the Framers, including George Washington, believed that a newly independent United States should establish a secular, national university; such an institution, Washington hoped, could achieve the wealth and success that had eluded America's educational institutions throughout the seventeenth and eighteenth centuries. PANGLE & PANGLE, *supra* note 41, at 147. Washington feared that if the nation's young people chose to go to Europe for their educations, students' patriotism and respect for the United States at home and abroad would be undermined. *Id.* at 150. At various points throughout his presidency, Washington urged Congress to take up the project. *Id.* at 149, 150. He even offered to donate to the university once it was established. *Id.* at 149. Although congressional opponents did not necessarily have ideological or constitutional issues with the idea, they nevertheless declined to accept Washington's invitation on the grounds that it was too expensive. *Id.* at 150. Washington was ultimately successful in initiating plans to establish a national military academy. *Id.* at 152. The United States Military Academy, more commonly known as West Point, was eventually founded in 1802. *A Brief History of West Point*, U.S. MIL. ACAD. WEST POINT,https://www.westpoint.edu/about/history-of-west-point/brief-history-of-west-point [https://perma.cc/DLE5-H7DA]. Benjamin Rush, a Philadelphian physician and Declaration of Independence signatory, was the first to publicly advocate for a national university. *See* PANGLE & PANGLE, *supra* note 41, at 147–48 (observing that Rush was the first to advocate for a national university); Indep. Hall Ass'n, *Signers of the Declaration of Independence*, USHISTORY.ORG, https://www.ushistory.org/declaration/signers/rush.html [https://perma.cc/DCS9-BUYY] (noting that Rush was an eminent physician in Philadelphia and that he signed the Declaration of Independence as Philadelphia's delegate at the Continental Congress in 1776). In the inaugural publication of the *American Museum* in January 1787, a magazine to which Thomas Jefferson, Benjamin Franklin, George Washington, and others subscribed, Rush published an essay describing what such a federal university could look like. PANGLE & PANGLE, *supra* note 41, at 148. He elaborated upon this vision in a later essay in the *Federal Gazette* in 1788. *Id.* Rush suggested that such a school should teach "everything connected with government"—courses would cover agriculture, commerce, and manufacturing, in addition to political science and history. *Id.* Instead of discussing esoteric subjects like "the ruins of Palmyra and the antiquities of Herculaneum," students at Rush's school would "acquir[e] those branches of knowledge which increase the conveniences of life, lessen human misery, improve our country, promote population, exalt the human understanding, and establish domestic, social, and political happiness." *Id.* Rush left religion out of these early curricular plans by implication; although he professed that "[w]ithout religion . . . learning does real mischief to the morals and principles of mankind," he also believed that interdenominational institutions ultimately impeded true religiosity. *Id.* Because a

The period between the Revolution and the Civil War saw a proliferation of American colleges, but many of them failed due to insufficient funds, students, or faculty.[49] Religious denominations continued to be an instrumental driving force behind the expansion of American higher education.[50] Despite continued religious influence and conservative college presidents, undergraduate students of this period were nevertheless effective at modernizing and broadening their academic experiences—in large part through literary societies, debating clubs, and the Greek fraternity movement.[51]

As the Civil War drew to a close, higher education in America underwent a number of seismic shifts, including the emergence of land-grant and women's colleges.[52] Black activists, the Freedmen's Bureau, and Northern philanthropists

---

national university could not be affiliated with a single religious sect, Rush opted for a secular approach. *Id.* at 148–49.

[49] RUDOLPH, *supra* note 35, at 47. American colleges of this period were especially small and poor when compared to their European counterparts. PANGLE & PANGLE, *supra* note 41, at 147. Historians believe that nearly seven hundred colleges were founded and failed prior to the Civil War. RUDOLPH, *supra* note 35, at 47. Fires destroyed buildings on the campuses of Princeton University, Dickinson College, Ohio University in Athens, Bowdoin College, the University of Vermont, the University of Georgia, Williams College, and other institutions. *Id.* at 44, 45, 46. Nevertheless, a number of nineteenth-century American colleges managed to survive. *Id.* at 47. The nation had 9 colleges prior to the American Revolution and 250 going into the Civil War. *Id.* Today, 182 of those institutions survive. *Id.* This exponential growth in American higher education led one to remark in 1851 that "[o]ur country is to be a land of colleges." *Id.*

[50] RUDOLPH, *supra* note 35, at 54. One motive for these denominations in founding colleges was a trend of foreign missionary activity. *Id.* at 72. At Williams College in 1806, five students took shelter from a thunderstorm under a haystack and decided to dedicate their lives to saving non-Christians by converting them to Christianity. *Id.* These students would go on to help found the American Board of Commissioners for Foreign Missions, the organization in charge of the Congregational Church's missionary activity. *Id.* Of the various Christian denominations, Presbyterians, German Reformed, Dutch Reformed, and Unitarians were particularly active in the college movement. *Id.* at 54–55. Methodists, Baptists, Disciples, United Brethren, and Universalists, initially reluctant due to their skepticism of learned clergymen, eventually joined the college-founding fray. *Id.* at 55. Roman Catholics would go on to found more schools in a later era when immigration from Ireland and other predominantly Catholic countries increased. *Id.* at 55.

[51] *Id.* at 137, 144. Bates College's Brooks Quimby Debate Council was founded during this period; it "participated in the first intercollegiate debate in 1896 and the first international collegiate debate in 1908." *Brooks Quimby Debate Council*, BATES COLL., https://www.bates.edu/debate/ [https://perma.cc/F7HD-EF97]. The group is still active today. *Id.*

[52] RUDOLPH, *supra* note 35, at 244. The Morill Act of 1862 provided federal funding to state governments and allowed them to establish institutions of higher education that would have a more practical orientation and cater to a broader subset of the population; the institutions founded under the Morill Act of 1862 would come to be known as "land-grant colleges." *Id.* By 1955, over 20% of American college students were enrolled at land-grant colleges. *Id.* Before the Civil War and for many years following, American college students were overwhelmingly white, male, and affluent. *See* AMITY L. NOLTEMEYER, JULIE MUJIC & CAVEN S. MCLOUGHLIN, DISPROPORTIONALITY IN EDUCATION AND SPECIAL EDUCATION 5, 11 (Amity L. Noltemeyer & Caven S. McLoughlin eds., 2012) (observing that higher education opportunities were predominantly available to men during the early nineteenth century, Black Americans were largely excluded from higher education until Oberlin College changed its official admissions policy in 1833, and wealthy students were more likely to be able to participate in educational opportunities). During the colonial era, around 1% of white men aged eighteen to twenty-one pursued a college educa-

helped found schools for Black Americans throughout the Reconstruction era.[53] The trend of secularization also accelerated during this period.[54] This was due in part to a desire to cultivate a nonsectarian, national culture after the Civil War, but some also sought to curb the influence of non-Protestant immigrants.[55]

---

tion, although many dropped out before graduating. *History of College Education*, PROCON.ORG, https://college-education.procon.org/history-of-college-education/ [https://perma.cc/ZN27-ZX74] (June 22, 2023).

[53] David Tyack & Robert Lowe, *The Constitutional Moment: Reconstruction and Black Education in the South*, 94 AM. J. ED. 236, 241 (1986). The Union Army also played a significant role in this effort. *Id.* Although the Union Army, charitable organizations, Black Americans, and the Freedmen's Bureau had similar goals, conflicts periodically emerged between coalition members. *Id.* at 242. For example, certain members of white philanthropic groups had a tendency to doubt the abilities of Black teachers and saw education as a means of "civilizing" Black Americans by inculcating them with Christian and capitalist values. *Id.* Although historians often focus on the Reconstruction as a particularly important moment in the history of Black education, it should also be noted that Black Americans found ways to pursue education even while oppressed by slavery. STUART BUCK, ACTING WHITE: THE IRONIC LEGACY OF DESEGREGATION 43 (2010). *See generally* Tyack & Lowe, *supra* (describing Black Americans' efforts to work with congressional Republicans and Southern allies to secure the right of education regardless of race). During slavery, many states passed and enforced laws making it a crime for an enslaved person to read, and the punishments for violating these laws were often severe. BUCK, *supra*, at 43. In addition to punishments imposed by law, enslaved people might also be punished by enslavers. *Id.* Nevertheless, both free and some enslaved Black Americans found ways to pursue education during the Antebellum period. *Id.* In 1824, Dartmouth College began admitting Black students, and in 1826, Edward A. Jones of Amherst and John Russwurm of Bowdoin became some of the country's first Black college graduates. Tom Cowan & Jack Maguire, *History's Milestones of African-American Higher Education*, 7 J. BLACKS HIGHER EDUC. 86, 86 (1995). In 1867, Congress chartered Howard University; Morehouse College was established later that same year. *Id.* Even after Congress passed the Reconstruction Amendments and education became more accessible to Black Americans, education and nearly every other facet of American life was still segregated. *See generally Segregation in the United States*, HISTORY.COM, https://www.history.com/topics/black-history/segregation-united-states [https://perma.cc/ML8H-8NYT] (Jan. 12, 2023) (describing the passage of "Black Codes," enforcement of Jim Crow laws, racist zoning laws, and "redlining"). Southern legislatures passed laws called "Black Codes" that restricted Black people's employment opportunities, living arrangements, and freedom of movement. *Id.* Later, Jim Crow laws imposed rigid racial segregation in schools, parks, restaurants, cemeteries, and other public places. *Id.* The constitutionality of segregation was affirmed by the Supreme Court in *Plessy v. Ferguson* in 1896. 163 U.S. 537, 550–51 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Brown v. Board*: Timeline of School Segregation in the U.S.*, LEARNING FOR JUST. MAG. (Spring 2004), https://www.learningforjustice.org/magazine/spring-2004/brown-v-board-timeline-of-school-integration-in-the-us [https://perma.cc/YX9A-FTKL]. While Howard University, Fisk University, and other historically Black colleges and universities provided opportunities for Black people to pursue higher education, many predominantly white institutions were segregated or did not admit Black people. *Segregation in the United States*, *supra*. Eventually, in 1950, in *Sweatt v. Painter*, the Supreme Court ruled that the Fourteenth Amendment prohibited University of Texas Law School from rejecting a Black applicant solely on account of his race. 339 U.S. 629, 635–36 (1950); Brown v. Board*: Timeline of School Segregation in the U.S.*, *supra*. In 1954, in *Brown v. Board of Education*, the Court declared that the "separate but equal" doctrine justifying segregation was unconstitutional and overturned *Plessy*. *Brown*, 347 U.S. at 494–95; Brown v. Board*: Timeline of School Segregation in the U.S.*, *supra*.

[54] J.A. Appleyard, *The Secularization of the Modern American University*, 10 CONVERSATIONS JESUIT HIGHER EDUC. 31, 31 (1996).

[55] *Id.* at 32.

Higher education was still only accessible to a small subset of the American population, but school demographics were shifting.[56]

The end of the nineteenth and early twentieth centuries saw the professionalization of college faculty and administrators, the growth of alumni associations, and the rise of higher education endowments.[57] The 1944 G.I. Bill and the Civil Rights Act of 1964 were instrumental in making higher education more accessible for a broader swath of Americans.[58] More colleges and universities also became expressly secular during this period, although Catholic colleges and universities increasingly entered the mainstream after World War II.[59] As an example, for centuries, Harvard's motto was Latin for "For the glory of Christ" and later, "For Christ in the Church"; but in 1880, in part due to a poem written by Professor Oliver Wendell Holmes, the motto was changed to "Veritas," or "Truth."[60] Other schools later followed suit.[61]

---

[56] *See* RUDOLPH, *supra* note 35, at 328 (describing the beginning of higher education for women in America). *See generally* Cowan & Maguire, *supra* note 53, at 86–90 (describing key milestones of Black Americans in higher education).

[57] RUDOLPH, *supra* note 35, at 416, 428–29, 430–31, 434–35. Colleges and universities became sophisticated corporations during this period. *Id.* at 438–39. By the advent of World War I, higher education institutions had legions of employees, chief executive officers and their assistants, stockholder-like alumni, boards of directors, capital reserves in the form of endowments, and government agencies dedicated to their regulation. *Id.* Another important development was the standardization of admissions criteria. *Id.* at 438.

[58] *See* Keith W. Olson, *The G.I. Bill and Higher Education: Success and Surprise*, 25 J. AM. Q. 596, 596 (1973) (describing the G.I. Bill's extraordinary impact on the accessibility of higher education in America); Roger Davis, Jr. & Giselle Aviles, *Increasing Access and Opportunity: An Exploration of African American Higher Education Experiences in the South*, LIBR. OF CONG., https://www.loc.gov/ghe/cascade/index.html?appid=ce6c8e9130104911b6afd2103237086e [https://perma.cc/L5NC-CHAC] (noting that the anti-discriminatory provisions in the Civil Rights Act of 1964 provided the basis for the Higher Education Act). President Franklin D. Roosevelt asked Congress to pass veterans benefits legislation in 1943. Olson, *supra*, at 597. Roosevelt signed the G.I. Bill into law in 1944, and in December 1945, Congress liberalized the law's education benefits to make even more veterans eligible for them. *Id.* at 598, 600. The initiative was extraordinarily successful—under the G.I. Bill, $5.5 billion was spent to allow over two million veterans to attend college, and contemporary studies suggested that the college class of 1949 was the "best" class of college graduates that the United States had ever seen. *Id.* at 596. The Civil Rights Act of 1964 prohibited discrimination based on race, color, sex, religion, and national origin and set the groundwork for the Higher Education Act of 1965, enacted by President Lyndon B. Johnson. Title VI, Civil Rights Act of 1864, 42 U.S.C. § 2000d; Davis & Aviles, *supra*. The Higher Education Act, and specifically Title IV, provided financial assistance for existing students and made a college education more accessible to those who previously would have not had the means to pursue it. Title IV, Higher Education Act of 1965, 20 U.S.C. § 1070; Davis & Aviles, *supra*. Institutions of higher education received federal funding to provide financial aid to students in the form of scholarships, subsidies, and other economic arrangements. 20 U.S.C. § 1070; Davis & Aviles, *supra*.

[59] *See* Mathew Garrett, *The Identity of American Catholic Higher Education: A Historical Overview*, 10 CATH. EDUC.: J. INQUIRY PRAC. 229, 596 (1973) (observing that forty-one four-year Catholic colleges emerged during the period from 1945 to 1967).

[60] Corydon Ireland, *Seal of Approval: The Long, Swirling History of the Harvard "Arms,"* HARV. L. TODAY (May 28, 2015), https://hls.harvard.edu/today/seal-approval-long-swirling-history-harvard-arms/ [https://perma.cc/MRG8-DAK3].

Although significant barriers to higher education still exist, college enrollment has steadily increased in recent decades; as of 2021, 37.9% of Americans aged twenty-five and older hold a Bachelor's degree.[62] But this progress has come at a cost: in 2024, federal student loan debt in the United States reached $1.62 trillion spread among 42.8 million borrowers.[63] Meanwhile, colleges and universities have become richer than ever and, when the 2021 fiscal year drew to a close, the combined endowments of higher education institutions were valued at approximately $927 billion.[64] Having discussed the history of higher education in the United States in broad strokes, we turn next to the emergence of educational endowments and the income tax exemption.[65]

B. Endowments and the Educational Tax Exemption

Although most institutions of higher education have always had some version of an endowment, these pools of investments became increasingly important to their financial well-being at the turn of the twentieth century.[66] One reason for this shift was the economic growth and industrialization that occurred in the United States after the Civil War.[67] Americans who had become extraordi-

---

[61] *See, e.g.*, Cowan, *supra* note 45 (remarking that Yale ended its chapel's affiliation with the United Church of Christ in 2005).

[62] Katherine Schaeffer, *10 Facts About Today's College Graduates*, PEW RSCH. CTR. (Apr. 12, 2022), https://www.pewresearch.org/short-reads/2022/04/12/10-facts-about-todays-college-graduates/ [https://perma.cc/BXQ8-AMBS].

[63] Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE https://educationdata.org/student-loan-debt-statistics [https://perma.cc/3RT9-2VWW] (July 15, 2024). In 2023, the student loan debt balance declined for the first time. *Id.*

[64] *Endowments*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=73 [https://perma.cc/79Q9-AA39].

[65] *See infra* notes 66–87 and accompanying text.

[66] Bruce A. Kimball & Benjamin A. Johnson, *The Inception of the Meaning and Significance of Endowment in American Higher Education, 1890–1930*, 114 TCHR. COLL. REC. 1, 2 (Oct. 2012). An endowment is "[a] gift of money or property to an institution (such as a university) for a specific purpose, esp[ecially] one whose principal is kept intact indefinitely and only the interest income from that principal is used." *Endowment*, BLACK'S LAW DICTIONARY (12th ed. 2024). In 1638, two years after the school's founding, John Harvard bequeathed his library and half of his estate and thereby began Harvard's endowment. Ellen M. Burstein & Camille G. Caldera, *Who Does Harvard's Endowment Serve*, HARV. CRIMSON (May 27, 2020), https://www.thecrimson.com/article/2020/5/27/commencement-2020-endowment/ [https://perma.cc/G3RG-TAJJ].

[67] Kimball & Johnson, *supra* note 66, at 4–5; *Gilded Age*, ENCYC. BRITANNICA, https://www.britannica.com/event/Gilded-Age [https://perma.cc/39CV-U846] (July 21, 2024). Mark Twain famously dubbed the late nineteenth century "The Gilded Age" in his 1873 novel by the same title. *Gilded Age*, *supra*. Before this period, there was insufficient surplus wealth to allow for charitable giving. Kimball & Johnson, *supra* note 66, at 4. Such extraordinary industrial growth was made possible by millions of immigrants who came to America during this period, as well as the development of a transnational system of railroads, "petroleum refining, steel manufacturing, and electrical power." *Rise of Industrial America, 1987–1900: Overview*, LIBR. OF CONG., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/rise-of-industrial-america-1876-1900/overview/ [https://perma.cc/V5U8-AMC9].

narily wealthy during the Gilded Age, like Andrew Carnegie and John D. Rockefeller, set up foundations to support education, research, and other charitable causes.[68] Educational institutions then realized the competitive advantage endowments provided and developed policies geared toward increasing their permanent invested funds.[69]

The law governing nonprofit organizations and their endowments comes from several doctrinal sources, including trust and property law, federal tax law, and state nonprofit incorporation statues.[70] Most relevant for purposes of this

---

[68] Kimball & Johnson, *supra* note 66, at 5. Andrew Carnegie was born in Scotland to a family of weavers but immigrated to the United States when his family fell on hard times due to the Industrial Revolution. Gregory R. Witkowski, *Captains of Philanthropy?: The Legacy of Pittsburgh's Most Famous Donors*, *in* A GIFT OF BELIEF: PHILANTHROPY AND THE FORGING OF PITTSBURGH 81, 83 (Kathleen W. Buechel ed., 2021). He became a titan of the steel industry and accumulated unprecedented profits, in large part by minimizing labor costs. *Id.* This practice precipitated the Homestead Strike in 1892, during which Carnegie's workers clashed with state troops and the Pinkerton militia over their wages. *Id.* Carnegie's wealth was controversial even among contemporaries, and he wrote his now-famous essay *The Gospel of Wealth* in order to justify the vast sums he had accumulated and to encourage his peers to donate their wealth to charitable causes. *See id.* at 81 (noting that Carnegie wrote *The Gospel of Wealth* to justify his own wealth accumulation and to facilitate the distribution of wealth to worthy causes). In 1901, Carnegie left the steel industry; he went on to found the Carnegie Institution of Washington, the Carnegie Foundation for the Advancement of Teaching, and the Carnegie Corporation of New York. Kimball & Johnson, *supra* note 66, at 5. Carnegie also donated $10 million to fund the Carnegie Teachers Pension Fund after learning that many professors made less money than the secretaries at Carnegie Steel, accomplished scholars chose to enter industry rather than academia due to inadequate compensation, and those who did choose to teach were often forced to do so well into their old age. Witkowski, *supra*, at 92–93. This fund was particularly influential on the development of American higher education. *Id.* at 93. For example, if educational institutions wanted the chance to participate, they could not be explicitly sectarian; this incentivized and further accelerated the secularization of many previously religious institutions. *See id.* (noting that certain higher education institutions changed their relationships with religious ideology in order to meet the Carnegie Teachers Pension Fund's standards and receive funding). The fund's board of trustees, comprised largely of education experts, was also given significant discretion to deploy funds how, when, and where they saw fit, which allowed them to implement significant educational reforms. *Id.* The fund's board issued a survey to 627 higher education institutions—of those, 421 sent responses and 52 were found eligible for the pension program. *Id.* As author Gregory Witkowski notes, "[s]ome colleges changed their relationship with denominations to meet these standards, limiting denominational quotas on their boards of trustees." *Id.* John D. Rockefeller also created the Rockefeller Institute of Medical Research, the Rockefeller Foundation, the Laura Spelman Rockefeller Memorial, and the General Education Board during this period. *Id.*

[69] Kimball & Johnson, *supra* note 66, at 9. Harvard was at the forefront of this shift. *Id.* Harvard's president Charles W. Eliot was the first school president to recognize the importance of growing permanent invested funds and pursuing this goal with intentional policies. *Id.* Other universities were initially reluctant to adopt a similar tack; the presidents of peer institutions during Eliot's tenure instead chose to focus on academics or theological matters unless the finances of the institution were particularly vulnerable. *Id.* at 9–10. Schools meaningfully began to take notice of Harvard's approach when it commenced its Harvard Endowment Fund campaign. *Id.* at 12. Harvard alumni initiated this unprecedented five-year giving campaign in 1916, with a two-year hiatus during World War I. *Id.* By February of 1925, seventy-five other higher education institutions were following Harvard's lead and beginning or preparing for giving campaigns of their own. *Id.* at 12–13.

[70] James R. Hines, Jr., Jill R. Horwitz & Austin Nichols, *The Attack on Nonprofit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179, 1184 (2010); Susan N. Gary, *Charities, Endow-*

Note is the tax exemption traditionally enjoyed by most educational institutions and today enshrined in Section 501(c)(3) of the Internal Revenue Code (Code).[71]

The origins of the tax exemption for private educational institutions can be traced back to early seventeenth-century England.[72] The English Statute of Charitable Uses, adopted in 1601, acknowledged the charitable purposes of schools.[73] American colonists adhered to this principle when devising their own local tax frameworks, and some even included school tax exemptions in early state constitutions.[74] The original educational tax exemption seems to have been derived from the tax treatment of religious institutions.[75] There was little need for a federal tax exemption for schools or other nonprofit organizations until the national income tax was instituted, so the first law describing colleges' and universities' federal tax-exempt status was not enacted until the late nineteenth century.[76] Be-

ments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act, 41 GA. L. REV. 1277, 1279 (2007). One particularly important state statute affecting the management of charities' financial resources is the Uniform Prudent Management of Institutional Funds Act (UPMIFA), enacted in 2006. Gary, *supra*, at 1279 n.4. Its predecessor, the Uniform Management of Institutional Funds Act (UMIFA), was drafted in 1972. *Id.* Both the UPMIFA and the UMIFA draw on trust and corporate law; they regulate how and by whom decisions regarding the investment of charitable endowment funds can be made, when restrictions on endowed funds can be modified or eliminated, and when endowment funds can be spent. *Id.* at 1279–80. At the time of writing, forty-nine U.S. states have adopted the UPMIFA; neither Pennsylvania nor Puerto Rico has adopted the law yet. *Prudent Management of Institutional Funds Act*, UNIF. L. COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=043b9067-bc2c-46b7-8436-07c9054064a3 [https://perma.cc/UZ6F-VNBU].

[71] I.R.C. § 501(c)(3); *see* Colombo, *supra* note 27, at 844 (noting that private higher education institutions in America have enjoyed a broad tax exemption since the colonial era).

[72] Colombo, *supra* note 27, at 844. The origin of tax exemption for public universities is quite simple: as Colombo puts it in his article, "it doesn't make much sense for the government to tax itself." *Id.* at 842 n.1. This Note focuses on the tax treatment, historical and present-day, of private colleges and universities, as it is those institutions' endowments that are contemplated by the tax proposals under discussion. *See* Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (imposing an excise tax on certain private college and university endowments); College Endowment Accountability Act of 2023, S. 3514, 118th Cong. (2023) (same).

[73] Colombo, *supra* note 27, at 844 ("The preamble to the English Statute of Charitable Uses enacted in 1601 also recognized the charitable nature of 'schools of learning, free schools and scholars in universities.'").

[74] Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 301 (1976). Nearly all colleges are free from taxation at the state and local level to this day. Howard Gleckman, *Question the Tax-Exemption of Universities Over Their Mideast Views Is Dangerous*, TAX POL'Y CTR.: URB. INST. & BROOKINGS INST. (Oct. 25, 2023), https://www.taxpolicycenter.org/taxvox/questioning-tax-exemption-universities-over-their-mideast-views-dangerous [https://perma.cc/QKF7-AGFA]. Notably, this also includes real estate taxes on college and university property—which is often substantial. *Id.*

[75] Colombo, *supra* note 27, at 844–45. It is likely that for as long as there have been taxes, religious institutions have been exempt from taxes. *Id.* at 845 n.12. For example, religious temples were tax exempt in Ancient Egypt during the rule of Ramses III in 1200 B.C. *Id.*

[76] *Id.* at 845. In 1894, Congress passed a 2% tax on income above $4,000 as part of the Wilson Tariff Act. *16th Amendment to the U.S. Constitution: Federal Income Tax (1913)*, NAT'L ARCHIVES & RECS. ADMIN., https://www.archives.gov/milestone-documents/16th-amendment [https://perma.cc/

ginning with the first federal income tax law in 1894 and in every subsequent iteration, income tax provisions have included sweeping exemptions for schools and other nonprofit organizations.[77]

Today, private educational institutions rely on the tax-exemption provision in Section 501(c)(3) of the Code.[78] If schools meet the criteria described in the Code, then subject to a few exceptions, they are largely exempt from federal income tax.[79] For example, colleges and universities must adopt organizational documents that state their exempt, charitable purpose.[80] Although the earliest state and federal tax laws have long recognized education as a valid tax-exempt purpose, the word "education" is not clearly defined in the Code.[81] Nevertheless, the Internal Revenue Service (IRS) has generally been quite flexible when determining which organizations qualify as having an educational purpose.[82]

ZPS3-9TVG] (Sept. 13, 2022); *Historical Highlights of the IRS*, INTERNAL REVENUE SERV., https://www.irs.gov/newsroom/historical-highlights-of-the-irs [https://perma.cc/CLL4-FMKP] (Oct. 23, 2023). Although the Supreme Court had previously endorsed the constitutionality of a federal income tax to finance the Civil War in 1881, it struck down the Wilson Tariff Act's tax provision in *Pollock v. Farmers' Loan & Trust Co.* in 1895. 158 U.S. 601, 637 (1895); *16th Amendment to the U.S. Constitution: Federal Income Tax (1913)*, *supra*. The Democratic Party, under William Jennings Bryan's leadership, made a federal income tax a critical part of its platform in the years following. *16th Amendment to the U.S. Constitution: Federal Income Tax (1913)*, *supra*. Bryan is perhaps most famous for his speech before the Democratic National Convention in Chicago in July 1896. *See Bryan's "Cross of Gold" Speech: Mesmerizing the Masses*, HIST. MATTERS: THE U.S. SURV. COURSE ON THE WEB, https://historymatters.gmu.edu/d/5354/ [https://perma.cc/6S8T-5UKD] (calling Bryan's speech "[t]he most famous speech in American political history"). In the speech, Bryan decried the Court's decision in *Pollock*, but he spent most of it criticizing proponents of the gold standard. *See generally id.* (arguing that the income tax is not truly unconstitutional and calling the gold standard "the great paramount issue"). Famously, Bryan declared, "[h]aving behind us the commercial interests and the laboring interests and all the toiling masses, we shall answer their demands for a gold standard by saying to them, you shall not press down upon the brow of labor this crown of thorns. You shall not crucify mankind upon a cross of gold." *Id.* The income tax was eventually constitutionalized when the Sixteenth Amendment was ratified in 1913. U.S. CONST. amend. XVI; *16th Amendment to the U.S. Constitution: Federal Income Tax (1913)*, *supra*.

[77] Colombo, *supra* note 27, at 845.

[78] *See* I.R.C. § 501(c)(3) (establishing that certain educational institutions can be exempt from the federal corporate income tax); Colombo, *supra* note 27, at 845–46 (noting that charitable organizations must meet the requirements established in § 501(c)(3) of the Code in order to be granted the federal tax exemption).

[79] Colombo, *supra* note 27, at 845.

[80] *Id.* at 845–46.

[81] *See id.* at 846 (remarking that the Code and the Internal Revenue Service (IRS) have never attempted to define "education").

[82] *Id.* Colombo notes that "[t]he educational exemption also has been applied to organizations that provided continuing legal education and other professional skills training, university bookstores, a jazz festival, various counseling services, research organizations, and a number of organizations whose stated purpose was to disseminate information to the public." *Id.* at 847. Nevertheless, Colombo remarks, "[e]ven the IRS . . . has its limits: a dog obedience school was held not exempt since it neither trains individuals nor educates the public." *Id.*

One significant exception to schools' tax-exempt status is the Unrelated Business Income Tax (UBIT).[83] The Code imposes the UBIT on certain income regularly generated by an exempt organization through activities that are not substantially related to its tax-exempt purpose.[84] Generally speaking, the UBIT does not apply to dividends and interest that colleges and universities receive from their endowments.[85] Despite its slippery language, the UBIT is rarely applied to exempt organizations' income in practice, and it generates little revenue for the federal government.[86] Nevertheless, the creation of the UBIT in 1950 was

[83] I.R.C. § 512. The UBIT was created in 1950 after several exempt organizations acquired for-profit businesses by way of feeder corporations. Bittker & Rahdert, *supra* note 74, at 318. A "feeder organization" is an entity "whose primary purpose is to operate a trade or business, with all the profits paid to one or more tax-exempt entities." *Feeder Organizations*, CCH ANSWERCONNECT, https://answerconnect.cch.com/contents-document/mtg018438e99e7b581000b38c00237de5959c02c/feeder-organizations [https://perma.cc/L7SM-8FHE]. Before the UBIT, exempt entities would use feeder corporations to acquire for-profit businesses to then claim tax exemption for the acquired business' profits. Bittker & Rahdert, *supra* note 74, at 318. One of the most famous instances of this phenomenon was when New York University Law School (NYU Law) acquired a sizeable macaroni company. *Id.* at 318–19. Some lawmakers feared that this acquisition could result in NYU Law acquiring a monopoly in the pasta industry; if NYU Law could sell its pasta products for a lower price than competitors due to its tax-exempt status, then its taxable competitors might go out of business. *Id.* at 319. The macaroni company at issue was called Mueller Pasta Co. Dani Grant, *NYU Owned a Noodle Factory*, MEDIUM (Feb. 6, 2013), https://nyulocal.com/nyu-owned-a-noodle-factory-e677f6fa9222 [https://perma.cc/3UPN-CWVE]. The company was donated to NYU Law by some wealthy alumni. *Id.* Initially, it was a very profitable partnership. *Id.* NYU Law used Mueller's profits to improve and develop the school's campus. *Id.* Vanderbilt Hall, which was one of the benefitting campus buildings, is now nicknamed "Noodle Hall" in homage to the source of the funds that supported its renovation. *Id.* In her article about this forgotten episode of NYU and nonprofit-law history, Dani Grant described the origin of the UBIT this way: "Representative Dingell, in a 1950 congressional meeting called it a macaroni monopoly and accused NYU of trying to reap all the income without paying the government a penne." *Id.*

[84] I.R.C. § 512(a)(1); Grant, *supra* note 83; Bittker & Rahdert, *supra* note 74, at 321. Unsurprisingly, there are a host of qualifications and caveats applicable to this exception. Bittker & Rahdert, *supra* note 74, at 321. Notably, the consequence for generating income subject to the UBIT typically is limited to taxation; organizations will not generally lose their tax-exempt status for paying the tax. *Id.* Nevertheless, an organization may jeopardize its tax-exempt status if it generates excessive unrelated business income. *What Activities Can Jeopardize a Nonprofit Organization's Tax-exempt Status?*, CANDID LEARNING, https://learning.candid.org/resources/knowledge-base/tax-exempt-revocation/ [https://perma.cc/G6A7-VFQU]. Other activities that may lead the IRS to revoke an organization's tax-exempt status include providing improper private inurement to insiders, excessive lobbying, political campaign activities, failing to comply with its annual reporting obligation, and failing to operate in accordance with its exempt purpose. *Id.*

[85] Bittker & Rahdert, *supra* note 74, at 316–17. The rationale for not applying the UBIT to passive endowment revenue is that collecting investment income is not a college or university's "purpose"; rather, endowments are accumulated and invested to support these institutions' exempt, educational purposes. *Id.* at 317. "Passive" income that is subject to the UBIT includes "income from certain leases of debt-financed acquisitions." *Id.* at 322. The reason for this application of the UBIT was the fear that an exempt organization could be "'trading on its exemption' by borrowing to acquire [debt-financed] property and using tax-free income to pay off the debt." *Id.*

[86] *See* Hines et al., *supra* note 70, at 1186 n.26 (observing that the UBIT generates little revenue for the federal government in practice). In 2004, the UBIT generated approximately $368 million. *Id.*

a notable departure from the federal government's centuries-old practice of not taxing educational institutions and other exempt organizations.[87]

C. The Tax Cuts and Jobs Act and New Federal Endowment Tax Proposals

Another departure came decades later in 2017 with the passage of the Tax Cuts and Jobs Act (Act).[88] The Act, which created a new Section 4968 of the Code, imposed a 1.4% excise tax on the endowment returns of certain university endowments.[89] For the tax to apply, the college or university (1) must be private, (2) must have at least five hundred students who paid tuition during the prior taxable year (and more than 50% of those students must be located in the United States), and (3) must have assets not used directly in carrying out the institution's exempt purpose with a fair market value equal to at least $500,000 per full-time student.[90]

---

[87] *See* Bittker & Rahdert, *supra* note 74, at 318 (calling the imposition of the UBIT a "dramatic change" in U.S. tax policy).

[88] *See* I.R.C. § 4968 (establishing a 1.4% tax on net investment revenue of certain higher education endowments); James J. Fishman, *How Big Is Too Big: Should Certain Higher Educational Endowments' Net Investment Income Be Subject to Tax?*, 28 CORNELL J.L. & PUB. POL'Y 159, 160 (2018) (describing the creation of I.R.C. § 4968).

[89] I.R.C. § 4968; Fishman, *supra* note 88, at 160. An excise tax is a general term used to refer to a tax imposed on specific goods or activities. *Excise Tax*, BLACK'S, *supra* note 66. Some excise taxes, such as those on cigarettes and alcohol, are imposed on goods or activities that lawmakers think have negative consequences. *Excise Tax: What It Is and How It Works, With Examples*, INVESTOPEDIA (Oct. 20, 2023), https://www.investopedia.com/terms/e/excisetax.asp [https://perma.cc/RV3T-LDDS].

[90] I.R.C. § 4968; Fishman, *supra* note 88, at 160. Around thirty to thirty-five colleges and universities meet these criteria and are subject to the tax. Fishman, *supra* note 88, at 160. While the IRS does not publish a list of the colleges and universities currently paying the excise tax, officials from Harvard University, Stanford University, the University of Pennsylvania, and Cornell University have spoken out against it. Isabella B. Cho & Eric Yan, *Harvard Says the Endowment Tax Is a Blow to Higher Education. Is It?*, HARV. CRIMSON (Sept. 23, 2022), https://www.thecrimson.com/article/2022/9/23/endowment-tax-feature/ [https://perma.cc/TQJ5-CFA8] (quoting former Harvard University presidents speaking out against the endowment excise tax); Michael Katz, *Stanford University Owes $43 Million Endowment Tax Bill*, CHIEF INV. OFFICER (Feb. 19, 2020), https://www.ai-cio.com/news/stanford-university-owes-43-million-endowment-tax-bill/ [https://perma.cc/9MHF-MAPD] (quoting a Stanford University spokesperson critiquing the tax); Lee Fang, *Ivy League Universities Push for Special Tax Cut*, THE INTERCEPT (July 25, 2022), https://theintercept.com/2022/07/25/harvard-university-endowment-tax-cut/ [https://perma.cc/MG45-TWSX] (noting that officials from Stanford University, the University of Pennsylvania, and Cornell University have asked federal lawmakers to repeal the endowment excise tax). CNBC also published a list of affected schools compiled by the American Council on Education. Annie Nova, *Colleges Are Fighting a New Endowment Tax. This Kentucky College Got a Pass*, CNBC, https://www.cnbc.com/2018/02/23/how-one-kentucky-college-dodged-a-tax-on-endowments.html [https://perma.cc/K47K-UR3C] (July 1, 2019). The list includes the aforementioned schools, as well as a number of smaller institutions such as Smith College, Williams College, The Julliard School, Pomona College, and Grinnell College. *Id.* Significantly for purposes of this Note, the list also includes the University of Notre Dame. *See id.* (reporting that the University of Notre Dame, a religious institution of higher education, is subject to the current federal endowment excise tax). Officials from the Catholic university, which is located in Indiana, have also spoken out against the endowment excise tax. Gwen O'Brien, *Endowment Makes Notre Dame Education Affordable*, OFF.

The Act was prompted by intensifying scrutiny of large college and university endowments.[91] These criticisms first came to the fore in 2007 and 2008, when Senators Max Baucus (D-MT) and Chuck Grassley (R-IA) of the Senate Finance Committee began a formal inquiry into elite university endowments.[92] The 2008 financial crisis, however, temporarily quieted the political will to investigate educational endowments, as financial analysts predicted schools would lose an average of twenty-three percent of their endowment values.[93] Once the market recovered and endowments began to grow again, congressional scrutiny returned.[94] Although a number of other endowment tax proposals did not achieve support, the Act and Section 4968 of the Code were eventually enacted into law.[95]

EXEC. VICE PRESIDENT (Sept. 13, 2019), https://evp.nd.edu/news/taxing-notre-dames-endowment-pool-would-be-un-american-says-chief-investment-officer/ [https://perma.cc/F2L2-2K7W]. Because Notre Dame is a Catholic educational institution, it likely would be exempt from the proposed endowment excise taxes discussed in this Note. *See* Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (imposing an additional excise tax on the endowments of certain secular private educational institutions); College Endowment Accountability Act of 2023, S. 3514, 118th Cong. (2023) (increasing the current endowment excise tax and imposing it on certain secular private educational institutions).

[91] *See* Fishman, *supra* note 88, at 171–72 (highlighting congressional hearings in 2007 that probed colleges' efforts to avoid the UBIT, tuition increases that outpaced inflation, and years of significant endowment investment returns).

[92] Peter Conti-Brown, *Scarcity Amidst Wealth: The Law, Finance, and Culture of Elite University Endowments in Financial Crisis*, 63 STAN. L. REV. 699, 700–01 (2011). Senators Max Baucus and Chuck Grassley requested that the universities provide detailed reports about the restrictions on endowed funds, financial aid programs, demographic statistics, and how much of their sticker prices student families were typically required to pay. *Id.* at 701. Perhaps even more ominously, the senators openly questioned the legitimacy of colleges' and universities' tax-exempt status under § 501(c)(3) of the Code. *Id.* Endowment criticism in Congress during this period was notably bipartisan; the House eventually passed the Higher Education Opportunity Act in 2008, which included a list of colleges with the highest tuitions. Fishman, *supra* note 88, at 173. As a result of these criticisms, several wealthy colleges updated their financial aid programs. *Id.* at 172–73. For example, the Ivy League, Swarthmore College, and Pomona College started replacing loan packages for low-income applicants with grants that did not need to be repaid. *Id.* Other schools changed financial aid eligibility criteria and increased funds for scholarships. *Id.*

[93] Conti-Brown, *supra* note 92, at 701–02. These predictions ultimately proved accurate; a voluntary survey of over four hundred colleges and universities found that these schools lost an average of 23% of endowment value during the latter of half of 2008. *See* Howard Wolinsky, *The Crash Reaches the Universities: The Global Financial Crisis Threatens Private and Public University Funding in the USA and Europe*, 10 EMBO REPS. 209, 209 (2009) (reporting that Harvard's endowment fell by 22%).

[94] *See* Fishman, *supra* note 88, at 176 (discussing how congressional criticism of college and university endowments returned in 2014). In 2015, Representative David Camp introduced a tax plan that included a 1% excise tax on investment income for universities with endowment assets totaling $100,000 per student. *Id.* Representative Tom Reed also proposed that certain wealthy endowments be required to dedicate 25% of their endowments' returns to tuition support and others distribute endowment funds to other less-wealthy institutions. *Id.*

[95] *Id.* at 160–61, 177.

In addition to the unprecedentedness of the tax itself, another notable aspect of the Act's passage was certain lawmakers' efforts to carve out exceptions for two small, religious colleges.[96] Passage of the Act was delayed after Senator Mitch McConnell (R-KY) sought to exempt Berea College, a Christian college in Kentucky that charges no tuition and enrolls primarily low-income students, from the excise tax.[97] Senator Pat Toomey (R-PA) also sponsored language that would have made the tax inapplicable to Hillsdale College, another small, Christian college in Michigan.[98] Although both proposals did not make it into the Act, the Act was later amended in early 2018 in order to exempt Berea College.[99] Certain news commentators and congressional members argued that these carve-outs were politically motivated efforts to ensure the novel tax was primarily borne by wealthy, secular, and liberal-leaning educational institutions.[100]

---

[96] *See* Bob Bryan, *Democrats Defeated Piece of the GOP Tax Bill That Appeared to Only Benefit a Single Conservative College*, BUS. INSIDER (Dec. 2, 2017), https://www.businessinsider.com/hillsdale-college-devos-gop-senate-tax-bill-trump-2017-12 [https://perma.cc/AR5E-RV6F] (describing how a last-minute version of the endowment excise tax proposed by Republicans appeared to only benefit Hillsdale College); Michael Stratford, *College That Charges No Tuition Loses Out in Tax Bill*, POLITICO (Dec. 19, 2017), https://www.politico.com/story/2017/12/19/college-that-charges-no-tuition-hurt-by-tax-bill-306313 [https://perma.cc/569P-JJ7D] (reporting that a version of the excise tax that would have benefited Berea College failed to pass the Senate due to a procedural error); Wilson, *supra* note 29 (arguing that the political motives animating the endowment excise tax were revealed when congressional Republicans tried and failed to craft a bespoke exception for the conservative Hillsdale College).

[97] Stratford, *supra* note 96.

[98] Bryan, *supra* note 96.

[99] Press Release, Andy Barr, Congressman, Berea College Receives Permanent Tax Relief (Feb. 9. 2018), https://barr.house.gov/2018/2/berea-college-receives-permanent-tax-relief [https://perma.cc/D8ZT-UM94]; *see* Bryan, *supra* note 96 (remarking that four Republicans joined Senate Democrats to remove a provision from the Act that would have exempted Hillsdale College from the proposed excise tax); Wilson, *supra* note 29 (reporting that Republican attempts to include special provisions exempting Berea College and Hillsdale College from the endowment excise tax were unsuccessful). Berea College was founded in 1855 by Reverend John G. Fee. *The Berea Story*, BEREA COLL., https://www.berea.edu/about/early-history [https://perma.cc/6HUN-QGXA]. The school began as a one-room schoolhouse. *Id.* Fee was an abolitionist, and he established an anti-slavery church on what would later become the Berea campus. *Id.* Berea's first professors came from Oberlin College, which was another anti-slavery college located in Ohio. *Id.* Fee believed that his school "would be to Kentucky what Oberlin is to Ohio, anti-slavery, anti-caste, anti-rum, anti-sin." *Id.* Later, Fee wrote, "[W]e . . . eventually look to a college—giving an education to all colors, classes, cheap and thorough." *Id.* Fee was later driven from the area by supporters of slavery, and he spent the Civil War raising money for his new school. *Id.* For decades, Berea College enrolled equal numbers of Black and white students. *Id.* But in 1904, Kentucky passed the Day Law, which prohibited desegregated educational institutions. *Id.* Fee collected funds to establish the Lincoln Institute near Louisville, which was dedicated to educating Black students. *Id.* When integrated educational institutions were once again allowed in Kentucky in 1950, Berea College was the first college to admit Black students. *Id.*

[100] *See* Wilson, *supra* note 29 (suggesting that Senator Mitch McConnell's failed attempt to exempt the conservative Hillsdale College from the excise tax revealed the tax's true purpose of punishing politically liberal higher education institutions); Erica L. Green, *How a Tuition-Free College Turned into a Casualty of the Tax Wars*, N.Y. TIMES (Dec. 20, 2017), https://www.nytimes.com/2017/12/20/us/politics/berea-college-bernie-sanders-mcconnell-tax-cut.html [https://perma.cc/EY8J-QXHV]

The endowment excise tax is not one of the provisions scheduled to sunset in 2025, but the looming deadline has prompted lawmakers to author new endowment tax proposals.[101] Senator Tom Cotton (R-AR) introduced a bill on December 12, 2023 that would impose a new six percent excise tax on university endowments.[102] Notably, unlike the Act, the bill would only tax secular institutions that otherwise meet the eligibility criteria.[103] Just days later on December 14, 2023, Senator J.D. Vance (R-OH) introduced a similar bill that would raise the existing endowment excise tax to thirty-five percent.[104] This bill, too, expressly exempts religious colleges and universities.[105] The Establishment Clause of the Constitution places limits on the government's ability to treat religious and secular entities differently, so Section D discusses the Supreme Court's past and current understandings of this provision.[106]

D. The Establishment Clause

The Establishment Clause is embedded within the First Amendment of the Constitution and, as its name suggests, prohibits Congress from establishing a

---

(reporting that Senator Bernie Sanders challenged the initial attempt to exempt Berea College from the proposed excise tax on the grounds that it was clearly only intended to benefit an institution from Senator McConnell's home state); Michael Stratford, *Democrats Defeat GOP Bid To Shield Conservative College From Endowment Tax*, POLITICO, https://www.politico.com/story/2017/12/01/senate-tax-bill-hillsdale-college-endowment-275980 [https://perma.cc/3B7N-UWM8] (Dec. 2, 2017) (stating that congressional Democrats believed Republicans sought to exempt Hillsdale College from the endowment excise tax because the college's president, Larry Arnn, was an influential member of certain conservative intellectual groups).

[101] Handler, *supra* note 29. In the wake of the Supreme Court's affirmative action ruling in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, in addition to endowment taxes, another area for potential higher education regulation is legacy admissions. *Id.* After the Court released its decision in *Students for Fair Admissions, Inc.*, a bipartisan coalition of congressional members criticized the consideration of applicants' familial ties to colleges and universities during the admissions process—although, Democrats and Republicans may have had different reasons for doing so. *Id.* One reporter suggests that while Democrats might see ending legacy admissions preference as a way to increase the diversity of schools' student bodies, Republicans might be pursuing the policy as a way to push a more populist agenda. *Id.*

[102] Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023); Press Release, Cotton, *supra* note 26.

[103] *See* Woke Endowment Security Tax Act of 2023, S. 3465 (specifying that the increased excise tax would not apply to religious institutions that are otherwise eligible). The pertinent language of Senator Cotton's bill is as follows: "any applicable educational institution, other than an institution which is religious in nature . . . ." *Id.* On January 18, 2024, Representative Ken Calvert introduced a bill in the House of Representatives that is identical to Senator Cotton's bill. *Compare* Woke Endowment Security Tax Act of 2024, H.R. 7033, 118th Cong. (2024) (proposing a 6% tax on the endowment revenues of certain private colleges and universities that is identical to the bill proposed by Senator Cotton), *with* Woke Endowment Security Tax Act of 2023, S. 3465 (proposing a 6% tax on the endowment revenues of certain private colleges and universities).

[104] College Endowment Accountability Act of 2023, S. 3514.

[105] *See id.* (applying the proposed excise tax only to certain educational institutions "which [are] not religious in nature").

[106] *See infra* notes 107–128 and accompanying text.

national religion.[107] Though its text is brief and simple, courts and academics have struggled to find the line between permissible legislation and unconstitutional religious establishment for decades.[108] In 1947, in *Everson v. Board of Education of Ewing Township*, the Supreme Court probed the meaning of the Establishment Clause for the first time in the modern era.[109] The Court held that it was constitutional for New Jersey to spend tax revenue to pay for buses for parochial school students as part of a general student transportation program.[110] Nevertheless, following *Everson*, myriad Establishment Clause questions continued to crop up.[111] The Court developed several tests to navigate through the

---

[107] U.S. CONST. amend. I; *see also* Andrew G. Loucks, Note, *Reinforcing a Crumbling Wall: Prohibiting Delegations to Religious Foster Care Agencies*, 63 B.C. L. REV. 2265, 2273 (2022) ("At its root, the Establishment Clause prohibits the government from establishing a state religion."). The clause reads: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I. It is directly followed by the Free Exercise Clause, which prohibits Congress from unduly burdening the free exercise of religion. *See id.* (requiring that "Congress shall make no law . . . prohibiting the free exercise [of religion]"). These clauses work together to "guarantee religious freedom, deeming 'religious beliefs and religious expression . . . too precious to be either proscribed or prescribed by the State.'" *Relationship Between the Establishment and Free Exercise Clause*, CONST. ANNOTATED, https://constitution.congress.gov/browse/essay/amdt1-5/ALDE_00000039/ [https://perma.cc/6UJM-ARNP].

[108] *See* Amanda Harmon Cooley, *Framers' Fidelity and Thicket Theory in Educational Establishment Clause Jurisprudence*, 58 SAN DIEGO L. REV. 1, 3–5 (2021) (highlighting the complexity of the Court's Establishment Clause jurisprudence and the ongoing debates between scholars and practitioners about its value and meaning).

[109] *Id.* at 14; Allison Hugi, *A Borderline Case: The Establishment Clause Implications of Religious Questioning by Government Officials*, 85 U. CHI. L. REV. 193, 197 (2018).

[110] Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 17 (1947). The Court's decision was decided five to four. *Id.* at 28. Writing for the majority, Justice Black declared that whatever else the Establishment Clause of the First Amendment means, the federal government cannot set up a church or enact laws that help one religion, all regions, or prefer certain religions over others. *Id.* at 15–16. The Establishment Clause also prohibits the government from forcing or influencing someone to join or separate himself from a church unwillingly. *Id.* The government cannot punish someone for their religious belief or disbelief, or for their attendance or failure to attend church. *Id.* Justice Black also declared in *Everson v. Board of Education of Ewing Township* that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." *Id. Everson* is also notable because the Court officially incorporated the Establishment Clause against the states by way of the Fourteenth Amendment. *Id.* at 14–15. The incorporation doctrine is a constitutional principle by which provisions of the Bill of Rights are applied against the states through the Due Process Clause of the Fourteenth Amendment. *Incorporation Doctrine*, CORNELL L. SCH.: WEX LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine [https://perma.cc/XNY9-2TWE]. All provisions of the First Amendment have been incorporated against the states. *Id.*

[111] *See, e.g.*, Larson v. Valente, 456 U.S. 228, 230 (1982) (asking whether a state statute requiring certain religious organizations to register and make periodic reports to the state violated the Establishment Clause); Lemon v. Kurtzman, 403 U.S. 602, 606 (1971) (considering whether state laws that provided funding for private, religious elementary and secondary schools violated the Establishment Clause); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that the recitation of a prayer in a public school violated the Establishment Clause). In 2022, the Court considered whether the Establishment Clause justified a school district's decision to prohibit a high school football coach from publicly praying on the field after games. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2415, 2416 (2022).

jurisprudential thicket, but no one test was determinative.[112] In 1971, in *Lemon v. Kurzman*, the Court fleshed out the principle of religious neutrality that was central to *Everson*'s reasoning.[113] Until recently, the so-called *Lemon* test was the Court's Establishment Clause lodestar—although it was frequently and severely criticized.[114]

In *Lemon*, the Court considered whether statutes that provide state funding for secular instruction at private, religious schools violate the Establishment Clause.[115] Writing for the majority, Chief Justice Burger elaborated upon the Court's reasoning in *Everson* and announced a new test for Establishment Clause cases.[116] The test had two prongs: first, courts had to ask whether the law at issue had a legitimate secular purpose, and second, they had to determine whether the law had the primary effect of promoting or suppressing religion or generating excessive entanglement with religion.[117] Both of these prongs were objective and depended on how a reasonable person would perceive the law at issue—rather than the subjective intentions of the government.[118] In 1989, in *Texas Monthly, Inc. v. Bullock*, the Court referenced *Lemon* when deciding whether a Texas sales tax exemption for religious publications and not secular publications violated the Establishment Clause.[119] Because the Court found that the law

---

[112] Hugi, *supra* note 110, at 197–98.

[113] *Lemon*, 403 U.S. at 656–57; *see* Cooley, *supra* note 105, at 25–26 (describing how *Lemon* preserved *Everson*'s principle of "Madisonian neutrality" toward religious groups and non-believers).

[114] Hugi, *supra* note 110, at 198 & n.20. In 2000, in *Santa Fe Independent School District v. Doe*, Chief Justice Rehnquist in dissent complained of "the Sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*." 530 U.S. 290, 319 (2000) (Rehnquist, C.J., dissenting) (quoting Comm. for Pub. Ed. & Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting)). In his concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*, Justice Scalia lamented that "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District." Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[115] 403 U.S. at 606–07.

[116] *See id.* at 611–13 (describing the Court's decision in *Everson* and noting that each of the prongs of the *Lemon* test can all be gleaned from the Court's Establishment Clause precedents).

[117] *Id.* at 612–13. While the Court in *Lemon* separated the second prong into two distinct inquiries (one considering the law in question's "primary effect" and the other considering whether the law created "excessive entanglement"), the Court later combined the second and third prongs in *Agostini v. Felton*. Agostini v. Felton, 521 U.S. 203, 233 (1997); *Lemon*, 403 U.S. at 612–14; Hugi, *supra* note 110, at 202. The Court reasoned that because the questions were related and often involved similar pieces of evidence, it would simplify the analysis to consider them simultaneously. *Agostini*, 521 U.S. at 233; Hugi, *supra* note 110, at 202.

[118] McCreary Cnty. v. ACLU, 545 U.S. 844, 862 (2005) (citing *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308); Hugi, *supra* note 110, at 201.

[119] Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5, 9 (1989).

lacked a discernible secular purpose and that its primary effect was that of promoting general religious belief, it declared the law unconstitutional.[120]

In 2022, in *Kennedy v. Bremerton School District*, the Court took a decisive step away from fifty years of precedent and stated that the *Lemon* test had been abandoned.[121] In *Kennedy*, a football coach at a public high school in Washington argued that his First Amendment free speech and free exercise rights were violated when the school prohibited him from praying on the field after games.[122] The school argued that permitting the coach to pray would violate the Establishment Clause.[123] The Court found that the school's argument was based

---

[120] *Id.* at 17. In reaching its decision, the Court emphasized that broadly applicable laws that have a legitimate secular purpose, but happen to benefit religious groups, are not necessarily impermissible. *Id.* at 14–15. The issue, however, arises when the government subsidizes exclusively religious organizations in a way that is not mandated by the Free Exercise Clause and burdens nonreligious groups. *Id.* at 15. Writing in dissent, Justice Scalia emphasizes that tax exemptions for all kinds for religious organizations have been widely implemented and generally accepted throughout the country's two hundred-year history. *Id.* at 35–36 (Scalia, J., dissenting). These tax exemptions were generally seen as legitimate, even when there were not similar tax exemptions available for other, secular nonprofit institutions. *See id.* at 30 (observing that fifteen states recognized exemptions from sales and use taxes for religious publications and not secular ones at the time of the decision).

[121] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (announcing that the Court had "abandoned" the *Lemon* test long ago). The Court argued that a historical approach to the Establishment Clause was actually more aligned with its existing Establishment Clause precedents. *See id.* at 2428 (observing that the Supreme Court had stressed in prior decisions that an analysis focused on the original meaning of the Establishment Clause was the general rule, not a deviation).

[122] *Id.* at 2415, 2419. In *Kennedy*, the Court noted that a plaintiff states a claim under the Free Exercise Clause when a state actor has impeded his sincere religious observance in furtherance of a policy that is neither "neutral" nor "generally applicable." *Id.* at 2421–22. If the plaintiff makes such a showing, the Court will hold that the First Amendment rights of the plaintiff have been violated "unless the government can satisfy 'strict scrutiny'" and show that its conduct was warranted by "a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* at 2422. In this portion of the *Kennedy* opinion, the Court cited the landmark case *Employment Division v. Smith*. *Id.*; *see* Emp. Div. v. Smith, 494 U.S. 872, 888 (1990) (holding that the government does not need to provide a compelling interest to justify a generally applicable law that burdens a religious practice). In 2021, in *Fulton v. City of Philadelphia*, three concurring members of the Court argued that *Smith* should be overruled. *See* Fulton v. City of Philadelphia, 141 S. Ct. 1868, 1888 (2021) (Alito, J., dissenting) (arguing that "[w]e should reconsider *Smith* without further delay").

[123] *Kennedy*, 142 S. Ct. at 2416–17. The majority found that the school district's conduct impermissibly infringed upon Coach Kennedy's ability to freely exercise his religious faith and that the school district's interest went further than the Establishment Clause requires. *Id.* at 2416. In her dissent, Justice Sotomayor argued that Coach Kennedy's prayers were not wholly "private and quiet" as the majority claimed. *Id.* at 2434 (Sotomayor, J., dissenting). To prove this, Justice Sotomayor included several photos of Coach Kennedy engaged in prayer in the opinion. *Id.* at 2436, 2438, 2439. The photos show Coach Kennedy surrounded by crowds of students and spectators on the playing field and in the locker room. *Id.* After winning his case and remarking that all he wanted "was to be back on the field with my guys," Coach Kennedy left his coaching position. Eduardo Medina, *Coach Who Won Supreme Court Case Over Prayers on the Field Resigns*, N.Y. TIMES (Sept. 6, 2023), https://www.nytimes.com/2023/09/06/us/washington-coach-prayer-supreme-court-resigns.html [https://perma.cc/5A8H-2GFE]. After his first and only game back with the team, Coach Kennedy prayed at the fifty-yard line—but none of the players joined him. *Id.*

on a faulty understanding of the Establishment Clause, and it held that the school violated the coach's First Amendment rights by prohibiting his public praying.[124]

In reaching this decision, the Court did not announce a new bright-line test for Establishment Clause cases.[125] Rather, it instructed lower courts to reference the Framers' understanding of the clause and eighteenth-century practices when trying to distinguish between impermissible and permissible conduct.[126] Writing for the majority, Justice Gorsuch noted that a historically sensitive application of the Establishment Clause prohibits the government from coercing religious observance—but he did not describe in detail what impermissible coercion might look like.[127] Thus, much remains to be seen about the shape the Court's post-*Kennedy* Establishment Clause jurisprudence will take; at the same time, new questions about the relationship between religion and government are emerging.[128]

II. THE *KENNEDY* "TEST" AND CURRENT FEDERAL ENDOWMENT TAX PROPOSALS

This Part of the Note discusses four key questions that surface when considering Senator Vance's and Senator Cotton's endowment tax bills in light of the *Kennedy* Court's understanding of the Establishment Clause.[129] Section A

---

[124] *Kennedy*, 142 S. Ct. at 2415–16.

[125] *See generally id.* (failing to announce a new Establishment Clause test).

[126] *Id.* at 2428.

[127] *See id.* at 2429 (citing Lee v. Weisman, 505 U.S. 577, 589 (1992)) (emphasizing that the government cannot coerce religious conduct). Indeed, Justice Gorsuch acknowledged that members of the Court have disagreed on what amounts to impermissible coercion under the Establishment Clause. *Id.* at 2429. In a footnote, Justice Gorsuch gestured to what the Court might imagine Founding-era understandings of the Establishment Clause to have been when he cited an article written by Professor Michael W. McConnell. *Kennedy*, 142 S. Ct. at 2429 n.5; Daniel L. Chen, Kennedy v. Bremerton School District: *The Final Demise of* Lemon *and the Future of the Establishment Clause*, HARV. J.L. & PUB. POL'Y PER CURIAM, Summer 2022, at 1, 12. Professor McConnell's article, entitled *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, describes the ways in which American colonial governments had "established" churches in an attempt to explain what practices the Framers sought to prohibit with the Establishment Clause. *See* Michael W. McConnell, *Establishment and Disestablishment at the Founding*, *Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2110 (noting that his article attempts to describe the debates over the establishment of religion during colonial America in order to better understand how similar issues should be resolved today). In the portion of his article cited by the Court, McConnell describes how in Elizabethan England and colonial America, people were fined for failing to regularly attend church, and churches received significant financial support from government authorities. *Id.* at 2144, 2147.

[128] *See* Chen, *supra* note 127, at 12 (noting that we will need to wait for courts to apply the Court's new historical approach to the Establishment Clause to new factual situations and scholarly analysis before ambiguities can be resolved); *see, e.g.*, Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (exempting otherwise eligible religious colleges and universities from a proposed excise tax); College Endowment Accountability Act of 2023, S. 3514, 118th Cong. (2023) (same).

[129] *See infra* notes 134–182 and accompanying text.

discusses how historical practices and understandings of the Establishment Clause might affect the constitutionality of the endowment tax proposals.[130] Section B considers the related question of whether the endowment taxes could be seen as "coercing" religious belief and practice, which the *Kennedy* Court noted would be impermissible.[131] Section C briefly examines the tax proposals' religious exception in light of the history of higher education discussed in Part I.[132] Finally, Section D looks to the Supreme Court's Free Exercise Clause cases for guidance on how these endowment excise tax proposals will be evaluated under the Establishment Clause.[133]

A. Historical Practices and Understandings of the Establishment Clause

One of the most fundamental questions post-*Kennedy* is what shape the Court's historical approach to the Establishment Clause will take.[134] Although the Court did not announce a new *Lemon*-like test for future cases, it did leave a few clues about what factors a future test might consider.[135]

---

[130] *See infra* notes 134–141 and accompanying text.

[131] *See infra* notes 142–154 and accompanying text.

[132] *See infra* notes 155–162 and accompanying text.

[133] *See infra* notes 163–182 and accompanying text.

[134] *See* 142 S. Ct. 2407, 2427, 2428 (2022) (observing that the Court had abandoned the *Lemon* test and directing lower courts and future litigants to consider what historical practices and understandings of the Establishment Clause were present at the time of the Framers); Chen, *supra* note 127, at 12 (acknowledging the ambiguity of Establishment Clause jurisprudence in the wake of *Kennedy*). Justice Gorsuch has called himself an originalist, meaning he believes that judges should reference historical sources from the Founding era when interpreting constitutional text whose meaning is not immediately apparent. Ken Levy, *The Problems with Originalism*, N.Y. TIMES (Mar. 22, 2017), https://www.nytimes.com/2017/03/22/opinion/the-problems-with-originalism.html [https://perma.cc/47BQ-RQB7]. A key moment in the development of modern originalism as a theory of constitutional interpretation was in 1985 when former Attorney General Edwin Meese made a speech before the American Bar Association and argued that the Framers intended for the judiciary to interpret the Constitution according to the original intentions of its authors. *See* Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, GEO. L. FAC. PUBL'N & OTHER WORKS 1, 7–8 (2011) (including Attorney General Meese's 1985 speech at an American Bar Association event, particularly his comments about the Framers' intent, in a brief history of the development of contemporary originalist theory). Justice Gorsuch has also claimed that textualism is his preeminent interpretative methodology. Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 266 (2020) (calling Justice Gorsuch a "self-proclaimed textualist"). Textualists believe that a judge should confine their interpretations of the Constitution to its plain text. Levy, *supra*. This mode of judicial interpretation can sometimes lead to so-called "strange bedfellows" decisions by the Supreme Court. Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 FORDHAM L. REV. 577, 580 (2013); *see* Grove, *supra*, at 266 (observing that many were surprised when the ideologically conservative Justice Gorsuch and Chief Justice Roberts ruled in favor of transgender plaintiffs in *Bostock v. Clayton County*). In *Bostock v. Clayton County*, the Supreme Court held that by prohibiting "discriminat[ion] . . . because of such individual's . . . sex," Title VII of the Civil Rights Act of 1964 prohibited an employer from discriminating against a transgender employee. Title VII, 42 U.S.C. § 2000e–2(a)(1); 140 S. Ct. 1731, 1737 (2020); Grove, *supra*, at 266.

[135] *See Kennedy*, 142 S. Ct. at 2428, 2429 (failing to articulate a clear test for Establishment Clause cases going forward but directing lower courts and future litigants to look to "historical prac-

For example, after citing a smattering of Establishment Clause cases dealing with prayers at town board meetings and in public schools, World War I memorials, and tax exemptions for churches, the Court in *Kennedy* suggested that religious government conduct that was generally accepted at the time of the Founding would be permissible under the Establishment Clause.[136] As discussed in Section B of Part I, all American colleges and universities have long enjoyed tax exemption at the state level.[137] Though federal tax exemption did not become necessary until the federal income tax was imposed in the late nineteenth century, secular and religious educational institutions alike have enjoyed this benefit since the Founding.[138] Imposing an excise tax only on secular school endowments seems to cut against the traditional exemption for all colleges and universities.[139]

---

tices and understandings" of the Establishment Clause and noting that government coercion that forced people to engage in religious exercise was clearly impermissible under the Establishment Clause).

[136] *Id.* at 2428. When announcing its turn (or return) to a historical understanding of the Establishment Clause, the Court cited *Town of Greece v. Galloway*, *American Legion v. American Humanist Ass'n*, *Torcaso v. Watkins*, *McGowan v. Maryland*, and *Walz v. Tax Commissioner of the City of New York*. *Id*. In 2014, in *Town of Greece v. Galloway*, the Court held that a town's practice of beginning town board meetings with a Christian prayer did not violate the Establishment Clause. 572 U.S. 565, 569–70 (2014). In reaching this decision, Justice Kennedy, writing for the majority, emphasized that "historical practices and understandings" play a vital role in Establishment Clause interpretation. *Id.* at 576. Justice Kennedy noted that the First Congress appointed chaplains just a few days after the Bill of Rights was approved by Congress, suggesting that the Framers saw legislative prayer as acceptable. *Id.* In 2019, in *American Legion v. American Humanist Ass'n*, the Court held that a World War I monument on public land, which included a cross, did not violate the Establishment Clause. 139 S. Ct. 2067, 2074 (2019). In 1961, in *Torcaso v. Watkins*, the Court held that Article 37 of the state of Maryland's Constitution, which required those holding state public office to declare that they believe in God, was unconstitutional. 367 U.S. 488, 495, 496 (1961). In reaching this decision, the Court highlighted that the first Lord of Baltimore was unable to settle in the colony of Virginia because he refused to take a religious oath and that he subsequently endeavored to found a colony in Maryland "securely beyond the reach of oaths." *Id.* at 490–91. The Court pointed to the Religious Test Clause in Article VI of the Constitution as further evidence that the Framers would have objected to requirements like the one at issue in the case. *Id.* at 491. In 1961, in *McGowan v. Maryland*, the Court decided that Maryland criminal statutes that prohibited commercial activities on Sundays did not violate the Establishment Clause. 366 U.S. 420, 452 (1961). Writing for the majority, Chief Justice Warren observed that similar laws remained on the books during the colonial and Founding periods, and thus the Framers must not have believed they were in conflict with a secular state and freedom of religion. *Id.* at 437–38. In 1970, in *Walz v. Tax Commission of the City of New York*, the Court found that it did not violate the Establishment Clause to grant property tax exemptions to religious organizations. 397 U.S. 664, 680 (1970). It was significant to the Court that such exemptions had been in place for "more than a century" without interruption. *Id.*

[137] *See supra* notes 66–87 (describing the history of the educational tax exemption).

[138] *See supra* Part I.B (noting that all colleges and universities were exempted from federal income taxes beginning in the nineteenth century and there was no need for a federal exemption prior to that time because there was no federal income tax for much of the country's history).

[139] *See* Colombo, *supra* note 27, at 845–46 (explaining that as long as charitable organizations, including educational institutions, meet certain basic requirements such as having proper organiza-

Nevertheless, the analysis is somewhat complicated by fact that most institutions of higher education in America were religious at the time of the First Amendment's ratification.[140] The argument in favor of the proposed endowment taxes would point to the fact that the Framers were only familiar with a tax exemption for religious colleges, as secular colleges were largely nonexistent in 1791.[141]

B. Impermissible Coercion

One of the factors the *Kennedy* Court suggested will be relevant to this historical Establishment Clause analysis is whether the government conduct at issue is coercive.[142] The Court stated that although it did not find impermissible government coercion on *Kennedy*'s facts, the government cannot force citizens to participate in formal religious practice.[143] The Framers, the Court acknowledged, adopted the Establishment Clause in order to prohibit coercive conduct of exactly this type.[144] But what amounts to coercion?[145] On the one hand, the Supreme Court has frequently acknowledged the coercive power of taxes and government subsidies, in the First Amendment context and elsewhere.[146] In 1819, in *McCulloch v. Maryland*, Chief Justice Marshall famously decried the destructive power of taxes in the Court's opinion upholding the constitutionality of a national

---

tional documents and prohibiting private inurement and political lobbying, they are granted tax-exempt status).

[140] *See* RUDOLPH, *supra* note 35, at 6, 7, 8 (describing the religious purposes behind the establishment of Harvard, William & Mary, Yale, and Princeton); *supra* Part I.A (highlighting how religious practice and belief remained an important part of higher education in America until the mid-twentieth century).

[141] *See* Derek W. Black, *America's Founders Recognized the Need for Public Education. Democracy Requires Maintaining That Commitment*, TIME (Sept. 22, 2022), https://time.com/5891261/early-american-education-history/ [https://perma.cc/MW7H-EGYW] (remarking that during the time of the Framers, education was preeminently "a private and religious affair").

[142] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2429 (2022) (explaining that the Court has consistently held that the government violates the Establishment Clause when it coerces people into religious practice).

[143] *Id.*

[144] *Id.*

[145] *See id.* (noting that coercion to practice religion is impermissible but failing to define coercion and acknowledging that members of the Court have periodically disagreed with one another about what crosses the line into impermissible coercion).

[146] *See, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819) (declaring that "[a]n unlimited power to tax involves, necessarily, a power to destroy"); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580–81 (2012) (noting that federal financial incentives offered to states to adopt certain policy changes cannot be unduly coercive, and finding that the inducement at issue in *Sebelius* was "a gun to the head"); Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 5, 9 (1989) (holding that by taxing secular publications and not religious publications, the government was using its "coercive authority" to support religious belief).

bank.[147] In finding the tax exemption for religious publications unconstitutional in *Texas Monthly, Inc. v. Bullock*, the Court highlighted the salience of the government's coercive taxing power.[148]

On the other hand, the proposed endowment excise taxes would only apply to a relatively small number of particularly wealthy colleges and universities.[149] Senator Cotton's bill would tax secular institutions with at least $12.2 billion in assets that are not directly used to carry out the school's exempt purpose.[150] Further, Senator Cotton's bill leaves the existing 1.4% excise tax in place and imposes an additional excise tax of 6% on eligible institutions.[151] Although this tax is another notable departure from the federal government's traditional tax treatment of colleges and universities, one could argue that it is not large enough to be considered coercive.[152] Senator Vance's bill would increase the existing 1.4% excise tax to 35% with respect to certain institutions with endowments over $10 billion—a dramatic increase when compared to Senator Cotton's proposal.[153]

---

[147] 17 U.S. at 327, 436. Although the Court upheld Congress's power to establish a national bank in *McCulloch*, President Jackson shut down the federal bank on September 10, 1833, when he took all federal funds out of the bank and redistributed them to state banks. *1833: Andrew Jackson Shuts Down the Second Bank of the U.S.*, HISTORY (Nov. 6, 2019), https://www.history.com/this-day-in-history/andrew-jackson-shuts-down-second-bank-of-the-u-s [https://perma.cc/QB22-FMD6]. Jackson subsequently announced that the bank would not accept new deposits after October 1. *Id.* Jackson prevailed in permanently closing the bank when its charter expired in 1836. *Id.* This episode became known as the "Bank War," and was one of the most controversial episodes of Jackson's presidency at the time. *See id.* (noting that the Bank War was a critical issue during President Jackson's reelection campaign).

[148] *See* 489 U.S. at 9 (reasoning that the tax at issue had the effect of coercing religious belief and practice).

[149] *See* Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (taxing secular private educational institutions with at least $12.2 billion in assets that are not directly used to carry out the school's exempt purpose); College Endowment Accountability Act of 2023, S. 3514, 118th Cong. (2023) (taxing secular private educational institutions with at least $10 billion in assets under management). Senator Cotton's bill also includes a provision that would make the tax applicable to "secular institutions with endowments of at least $9 billion that also operate a state contract college." Press Release, Cotton, *supra* note 26. As of the 2022 fiscal year, the institutions covered by Senator Cotton's bill include "Harvard, Yale, Stanford, Princeton, Massachusetts Institute of Technology, University of Pennsylvania, Northwestern, Columbia, Washington University, and Cornell." *Id.* As of the 2022 fiscal year, the institutions covered by Senator Vance's bill include "Harvard, Yale, Stanford, Princeton, Massachusetts Institute of Technology, University of Pennsylvania, Northwestern, Columbia, Washington University in St. Louis, Duke, and Vanderbilt." Press Release, Vance, *supra* note 26.

[150] Woke Endowment Security Tax Act of 2023, S. 3465.

[151] *See id.* (proposing to add a § 4969 to the Code establishing a new 6% endowment excise tax but leaving the existing 1.4% endowment excise tax in § 4968 in place).

[152] *See id.* (establishing a new 6% endowment excise tax on a relatively small number of very wealthy universities). Senator Cotton's proposed tax would generate an estimated $15.47 billion in revenue. Press Release, Cotton*, supra* note 26.

[153] *See* Woke Endowment Security Tax Act of 2023, S. 3465 (imposing an additional 6% tax on eligible university endowments); College Endowment Accountability Act of 2023, S. 3514 (increasing the existing endowment excise tax to 35% of certain eligible university endowments' net investment revenue annually).

Factors such as the wealth of the colleges and universities subjected to the tax and the size of the tax imposed will likely play an important role in the Court's analysis if they consider the constitutionality of a secular endowment tax in the future.[154]

C. The Religious Exception

When considering the language of Senator Vance's and Senator Cotton's bills, the question of what qualifies as an educational institution that is "religious in nature" necessarily arises.[155] Neither the Code nor the tax bills under discussion define the word "religious" or its variants.[156] In order to address this ambiguity, court decisions, Department of Treasury regulations, and IRS guidance have tried to flesh out the meaning of "religious" in Section 501(c)(3) and other contexts.[157] Recognizing that defining "religion" is a constitutionally fraught endeavor, these sources tend to emphasize that the analysis is fact and context-dependent.[158]

---

[154] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581–82 (2012) (considering factors such as the amount of the conditioned Medicaid funding and the relative size of states' budgets when determining whether the conditions on the funding were coercive and thereby constitutionally impermissible).

[155] *See* Woke Endowment Security Tax Act of 2023, S. 3465 (taxing secular private educational institutions with at least $12.2 billion in assets that are not directly used to carry out the school's exempt purpose); College Endowment Accountability Act of 2023, S. 3514 (taxing secular private educational institutions with at least $10 billion in assets under management).

[156] *See* I.R.C. § 7701 (failing to define "religion," "religious," or "church"); Woke Endowment Security Tax Act of 2023, S. 3465 (failing to define or describe when an institution is "religious in nature"); College Endowment Accountability Act of 2023, S. 3514 (failing to describe when an institution "is not religious in nature").

[157] *See, e.g.*, I.R.C. § 501(c)(3) (establishing that "[c]orporations, and any community chest, fund, or foundation, organized and operated exclusively for religious . . . purposes" are covered by the tax exemption in § 501(a) of the Code); United States v. Seeger, 380 U.S. 163, 164–65, 165–66 (1964) (holding that certain conscientious objectors possessed "religious training and belief" under the Universal Military Training and Service Act even though they did not believe in God); Treas. Reg. § 1.501(c)(3)-1 (2017) (providing that an organization will be found to be exempt under § 501(a) of the Code if it "engages primarily in activities which accomplish one or more of such exempt purposes specified in Section 501(c)(3) [of the Code]," but failing to describe what kinds of purposes qualify as religious purposes); INTERNAL REVENUE SERV., EXEMPT ORGANIZATIONS TECHNICAL GUIDE 3-3: EXEMPT PURPOSES—CHARITABLE IRC SECTION 501(C)(3), at 23 [hereinafter EXEMPT ORGANIZATIONS TECHNICAL GUIDE 3-3], https://www.irs.gov/pub/irs-pdf/p5781.pdf [https://perma.cc/K83H-ETHD] (Feb. 1. 2024) (observing that "First Amendment considerations prevent Congress and [the IRS] from establishing a concise or objective definition of the term religion," and emphasizing that when "considering the 'facts and circumstances' of an organization claiming that its activities further a religious purpose or that its activities advance religion, [the IRS] must keep an open mind").

[158] *See, e.g.*, EXEMPT ORGANIZATIONS TECHNICAL GUIDE 3-3, *supra* note 157 (acknowledging that attempting to define religion can lead to First Amendment issues and suggesting that the IRS approach such questions with an "open mind" and cognizant of the relevant "facts and circumstances").

As described in Section A of Part I, several colleges and universities that today consider themselves to be secular have decidedly religious origins.[159] Adopting an endowment excise tax like those proposed by Senator Vance and Senator Cotton would require the nation's courts to more frequently engage in the tricky business of determining how much and what kinds of religious conduct qualify a college for the exemption.[160] Is it sufficient for a school to mention God in its mission statement or require all students to take a theology class in order to graduate?[161] Enacting these or similar endowment tax bills could lead to a patchwork of inconsistent results, as lower courts try to draw lines between religious and non-religious institutions in the higher education context for the first time.[162]

D. The Free Exercise Clause

The Supreme Court has decided several Free Exercise Clause cases in recent years, and these cases could provide guidance on how the Court would rule on a constitutional challenge to the endowment excise taxes under discussion.[163] The Supreme Court has sometimes remarked that the Establishment Clause and the Free Exercise Clause work together to maintain government neutrality toward religion.[164] At other times, the Court has acknowledged that certain facts

---

[159] *See supra* Part I.B (describing the religious origins of many of the country's colleges and universities).

[160] *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 20 (1989) (citing Bob Jones Univ. v. United States, 461 U.S. 574, 604 n.30) (1982)) (reasoning that a Texas law was impermissible in part because it would require the government to assess the relative merit of various religious claims). In *Texas Monthly, Inc.*, the Court noted that the tax exemption at issue would lead to significant state entanglement with religion; courts and legislatures would be required to evaluate whether a given message in a publication was teaching a religious faith. *Id.* at 20–21. Although consideration of government entanglement with religion was a component of the *Lemon* test and the Court has now rejected the *Lemon* test, concerns about the practical workability of government entities deciding what is and is not truly "religious" are still worth bearing in mind. *Cf.* Patterson v. McLean Credit, 491 U.S. 164, 172, 173 (1989) (finding that the Court needs a "special justification" in order to overrule a decision and noting that the practical unworkability of a decision could be sufficient).

[161] *See Tex. Monthly, Inc.*, 489 U.S. at 20 (citing *Bob Jones Univ.*, 461 U.S. at 604 n.30) (suggesting that evaluating the merit of different kinds of religious claims is inherently difficult).

[162] *See id.* (noting that having courts or legislatures evaluate religious claims would create inconsistent results and would embroil the government in controversies over religious doctrine).

[163] *See, e.g.*, Carson v. Makin, 142 S. Ct. 1986, 2002 (2022) (holding that the nonsectarian requirement in Maine's tuition assistance statute violated the free exercise of religion); Shurtleff v. City of Boston, 141 S. Ct. 1583, 1593 (2022) (finding that the City of Boston violated the Free Exercise Clause of the First Amendment when it prohibited an organization from flying a religious flag outside of City Hall, even though various secular organizations were allowed to fly flags that represented their own beliefs).

[164] *See, e.g.*, Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963) (reasoning that the Establishment Clause and the Free Exercise Clause both further government neutrality toward religion by preventing the "fusion of governmental and religious functions" and recognizing "the right of every person to freely choose his own course with reference [to religion], free of any compulsion from the state"); Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 18 (1947) (declaring that the First

can bring the clauses into tension.[165] The Court has also pointed out there is "play in the joints" between what the Free Exercise Clause requires and what the Establishment Clause allows.[166] These observations suggest that to understand the import of either the Free Exercise or Establishment Clause, one should also consider the other.[167]

One recent Free Exercise Clause case that could be helpful in evaluating the constitutionality of the proposed endowment excise taxes is *Carson v. Makin*.[168] In 2021, in *Carson*, a group of parents of secondary school students sued the Commissioner of Maine Department of Education.[169] Pursuant to its education statute, Maine provided tuition assistance to parents who lived in districts that did not operate a public secondary school or send students to a school in another district.[170] Parents in these districts could choose a private secondary school they wanted their child to attend, and their school district would help defray the cost of attendance.[171] Maine only allowed parents to use this tuition assistance at "nonsectarian" schools, however, and the parent litigants in *Carson*

Amendment requires the government "to be a neutral in its relations with groups of religious believers and non-believers," and the government is not required to be the "adversary" of religion).

[165] *See, e.g.*, Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973) (emphasizing that the Court has frequently acknowledged that "tension inevitably exists between the Free Exercise and the Establishment Clauses"); Tilton v. Richardson, 403 U.S. 672, 677 (1971) (observing that the Court has previously highlighted the "internal tension in the First Amendment" between the Religious Clauses).

[166] *See* Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 U.S. 2012, 2019 (2017) (remarking that there is "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels" (quoting Locke v. Davey, 540 U.S. 712, 718 (2004))).

[167] *See, e.g.*, Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427 (2022) (evaluating the merits of the school district's Establishment Clause analysis when determining whether Kennedy's free exercise rights had been violated). For example, the *Kennedy* opinion emphasized that contrary to Bremerton School District's contention, the case did not present a genuine conflict between the two constitutional mandates—thereby suggesting that one can understand the Establishment Clause with reference to the Free Exercise Clause. *See id.* at 2432 (finding that there was only a "mere shadow" of conflict between the Establishment Clause and Free Exercise Clause in *Kennedy* because the lower courts and the school district were relying on a misinterpretation of the Establishment Clause).

[168] *See* 142 S. Ct. at 1996–98 (considering the constitutional implications of Maine's tuition assistance requirement under the Free Exercise Clause and the Establishment Clause).

[169] *Id.* at 1995. The reason Maine enacted its tuition assistance program in the first place was because the state is so rural that over half of its school districts do not have public high schools. Nina Totenberg, All Things Considered, *Supreme Court Rules Maine's Tuition Assistance Program Must Cover Religious Schools*, NAT'L PUB. RADIO, https://www.npr.org/2022/06/21/1105348236/supreme-court-rules-maines-tuition-assistance-program-must-cover-religious-schoo [https://perma.cc/VS6N-5CX2] (June 21, 2022). Vermont and Maine have the largest proportion of their populations residing in rural regions, with approximately 61% each. *America's Founders Recognized the Need for Public Education. Democracy Requires Maintaining That Commitment*, U.S. CENSUS BUREAU, https://mtgis-portal.geo.census.gov/arcgis/apps/storymaps/collections/189aa1dbd64c4c81b3b4a2b71124f6c6?item=1 [https://perma.cc/5GDT-49P3]. California is the state with the lowest proportion of its population residing in rural regions at just under 5%. *Id.*

[170] *Carson*, 142 S. Ct. at 1993.

[171] *Id.*

argued that this violated the Free Exercise Clause.[172] The state of Maine argued that allowing parents to use these benefits at religious schools would violate the Establishment Clause.[173]

The Supreme Court held that the secularity requirement violated the Free Exercise Clause.[174] The Court reasoned that its Free Exercise Clause precedents stood for the proposition that religious observers cannot be excluded from broadly available public benefits due to their faith.[175] Withholding benefits in such a circumstance is a type of indirect coercion on the free exercise of religion.[176] The Court noted that although a state is under no obligation to provide public financial support to private schools, once it provides such support to some schools, it cannot exclude other private schools on account of their religious affiliation.[177] The Court also rejected the State of Maine's argument that allowing parents to put their tuition benefits toward religious school tuition violated the Establishment Clause.[178] Allowing private citizens to use their public benefits at religious organizations does not constitute state establishment of a religion.[179] Although a state may desire to promote the separation of church and state more strenuously than the Establishment Clause requires, the Free Exercise Clause prohibits this.[180]

---

[172] *Id.* at 1994, 1995. The petitioners in *Carson* were two families who did not live in districts with their own public schools. *Id.* at 1994. The Carson family lived in Glenburn, Maine, and their daughter went to high school at Bangor Christian Schools. *Id.* Because Bangor Christian Schools was a "sectarian" school under the Maine statute at issue, the Carson family was unable to put their tuition assistance payments toward the cost of their daughter's tuition. *Id*. The Nelson family resided in Palmero, Maine; their daughter attended a secular high school, and their son attended Temple Academy. *Id.* at 1994–95. The latter was affiliated with the Centerpoint Community Church, and thus their son's tuition could not be offset through the tuition assistance program. *Id.* The Nelson family noted that they also wanted their daughter to attend Temple Academy, but because they would then have to pay for both children's tuition out of pocket, they could not afford to do so under the Maine statute. *Id.* at 1995.

[173] *Id.* at 1994. The nonsectarian requirement was added to Maine's education statute in 1981 after the former Maine attorney general opined that providing public funds to private, religious schools violated the First Amendment. *Id*. Before 1981, some parents in Maine used their tuition benefits to send their children to religious schools. *Id.* Decades later, in 2002, the Court issued its decision in *Zelman v. Simmons-Harris* and held that it did not violate the Establishment Clause for states to allow families to use generally available school vouchers to offset the cost of sending their children to religious schools. *Id.*; 536 U.S. 639, 643–44 (2002). Although the Maine state legislature considered removing the nonsectarian requirement from its education statute after *Zelman*, it ultimately declined to do so. *Carson*, 142 S. Ct. at 1994.

[174] *Carson*, 142 S. Ct. at 2002.

[175] *Id.* at 1996–97. Chief Justice Roberts, writing for the majority, reasoned that "[t]he Free Exercise Clause of the First Amendment protects against 'indirect coercion or penalties on the free exercise of religion, not just outright prohibitions.'" *Id.* at 1996 (quoting Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988)).

[176] *Id.* at 1996 (quoting *Lyng*, 485 U.S. at 450).

[177] *Id.* at 1997.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 1998 (quoting Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2260 (2020)).

One can draw an analogy between the tuition assistance at issue in *Carson* and the college and university tax exemption.[181] The tax exemption has historically been granted to colleges and universities regardless of their religious affiliation, and Senator Cotton's and Senator Vance's excise tax bills seek to disqualify certain institutions from fully enjoying such an exemption due to their lack of a religious affiliation.[182]

III. The Future of College Affordability

Higher education is becoming increasingly unaffordable, and congressional representatives on both sides of the aisle have suggested that taxing college and university endowments could be a part of the solution.[183] This Part argues that the endowment tax bills discussed in this Note are both unconstitutional under the Establishment Clause and undesirable on policy grounds.[184] Section A of this Part analyzes these endowment tax proposals under the Establishment Clause approach announced in *Kennedy v. Bremerton School District* and concludes that historical practices and understandings prohibit an exclusively secular endowment tax.[185] Section B highlights several potential unintended consequences of imposing more significant taxes on college and university endowments.[186] Section C suggests ways of structuring future endowment excise taxes in order to both comply with the Constitution and make higher education more affordable for more Americans.[187] Section D describes other policy initiatives that lawmakers could consider implementing—either in addition to or instead of endowment taxes—when seeking to address the college affordability crisis.[188]

---

[181] *Compare id.* at 1993–94 (describing Maine's tuition payment program that prohibited families from using their public benefits to pay for their children's tuition at private, religious schools), *with* Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (taxing secular private educational institutions but not similarly situated religious institutions) *and* College Endowment Accountability Act of 2023, S. 3514, 118th Cong. (2023) (same).

[182] *See supra* Part I.B (describing the traditional availability of state and federal tax exemptions for private colleges and universities regardless of their religious affiliation or lack thereof); Woke Endowment Security Tax Act of 2023, S. 3465 (taxing secular private educational institutions but not similarly situated religious institutions); College Endowment Accountability Act of 2023, S. 3514 (same).

[183] *See* Handler, *supra* note 29 (describing how both congressional Democrats and Republicans have expressed support for taxing college and university endowments); Melanie Hanson, *College Tuition Inflation Rate,* Educ. Data Initiative, https://educationdata.org/college-tuition-inflation-rate [https://perma.cc/BN5F-5PBE] (Aug. 13, 2023) (observing that the annual cost of attending a public college is twenty-three times what it was in 1963).

[184] *See infra* notes 183–223 and accompanying text.

[185] *See infra* notes 189–195 and accompanying text.

[186] *See infra* notes 196–201 and accompanying text.

[187] *See infra* notes 202–213 and accompanying text.

[188] *See infra* notes 214–223 and accompanying text.

A. Historical Practices and Understandings of the Establishment Clause

Even under *Kennedy*'s ambiguous historical approach to the Establishment Clause, the Supreme Court could still find that Senator Cotton's and Senator Vance's endowment tax bills are unconstitutional.[189] First, even though most institutions of higher education were religious in nature when the Bill of Rights was ratified, the very first school tax exemptions recognized education as an exempt purpose apart and distinct from religion.[190] Both religious and secular colleges and universities have enjoyed federal tax exemption for over one hundred years, and choosing to impose an excise tax on only secular institutions would be a significant and unjustifiable departure from this tradition.[191]

Furthermore, although the tax proposals would only apply to certain very wealthy institutions, even Senator Cotton's more modest six percent tax could be considered coercive.[192] Most educational institutions have arguably garnered a significant reliance interest in their tax exemption.[193] Colleges and universities

---

[189] *See* 142 S. Ct. 2407, 2428, 2429 (2022) (instructing lower courts to interpret the Establishment Clause with "reference to historical practices and understandings" and in accordance with "the understanding of the Founding Fathers," but noting that government coercion of religious practice is impermissible); Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (taxing secular private educational institutions but not similarly situated religious institutions); College Endowment Accountability Act of 2023, S. 3514, 118th Cong. (2023) (same).

[190] *See* Colombo, *supra* note 27, at 845 (observing that every federal income tax law since the first federal income tax law in 1894 has included a broad tax exemption for nonprofit organizations, including colleges and universities).

[191] *See id.* at 844 (noting that under seventeenth-century English law, from which American law traces the origins of many of its legal doctrines, education was considered a charitable purpose that the Crown ought to promote); Bittker & Rahdert, *supra* note 74, at 301 (highlighting the existence of educational tax exemptions in the earliest American state constitutions).

[192] *Cf.* Alexander Lazaro Mills, *Reliance by Whom? The False Promise of Societal Reliance on Stare Decisis Analysis*, 92 N.Y.U. L. REV. 2094, 2095 (2017) (noting that reliance is often a relevant factor for the Supreme Court to consider when determining whether to overrule a precedent under the doctrine of stare decisis); Bittker & Rahdert, *supra* note 74, at 301 (highlighting the longstanding practice of granting tax exemption to nonprofit organizations); Colombo, *supra* note 27, at 845 (observing that every federal income tax law since the first federal income tax law in 1894 has included a broad tax exemption for nonprofit organizations, including colleges and universities); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580–81 (2012) (reasoning that the significant financial role that Medicaid funding plays in state budgets and the "intricate statutory and administrative regimes" that states have developed in reliance on this funding over the course of many years made the new federal condition attached to the funding "a gun to the head").

[193] *Cf.* Cara J. Chang & Isabella B. Cho, *Bacow Presses Lawmakers on University Endowment Tax, Foreign Funding Disclosures During Trip to Washington*, HARV. CRIMSON (May 24, 2022), https://www.thecrimson.com/article/2022/5/24/bacow-lobbies-lawmakers-endowment-tax/ [https://perma.cc/EKS4-9BEB] (describing how current and former presidents of Harvard University have spent hundreds of thousands of dollars lobbying against endowment excise taxes); *Tax-Exempt Status of Universities and Colleges*, ASS'N AM. UNIVS. (Oct. 2, 2022), https://www.aau.edu/key-issues/tax-exempt-status-universities-and-colleges [https://perma.cc/S23Z-WX6R] (observing that the majority of colleges and universities in the United States are tax-exempt because of their educational purposes and that the federal government has recognized education as a valid tax-exempt purpose for many years).

have structured their finances upon the well-founded assumption that they will continue to be exempt from most state and federal taxes.[194] This reliance interest could put pressure on certain institutions to become "religious," even when they would otherwise prefer to offer a wholly secular educational experience to their students.[195]

B. Taxing Endowments and Unintended Consequences

When considering the wisdom of endowment taxes generally, it is also important to acknowledge how they might work counter to important policy goals.[196] Perhaps most significantly, colleges and universities have argued that additional endowment taxes will inhibit their ability to provide financial aid to low-income students.[197] They note that endowment returns directly and substantially support the scholarships and grants that they are able to offer incoming students, and these proposed taxes could have the unintended effect of making college even harder to afford.[198]

Another possible danger is that increased federal endowment taxes could discourage colleges and universities from making voluntary property tax payments to state and local governments.[199] Although colleges and universities are typically exempt from property taxes, many higher education institutions make voluntary payments in order to support the public infrastructure that makes their

---

[194] *See* HENRY HANSMANN, WHY ARE COLLEGES AND UNIVERSITIES EXEMPT FROM TAXES? 12, 13, 14–15 (2013) (noting that colleges and universities have incentives to put money in their endowments in order to preserve fixed investments, save for large capital expenditures, and realize higher returns on their exempt educational purpose in the future).

[195] *See id.* (describing how exemption from corporate income taxes affects the financial behavior of colleges and universities); Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (taxing secular and private educational institutions but not similarly situated religious institutions); College Endowment Accountability Act of 2023, S. 3514, 118th Cong. (2023) (same).

[196] *See* Mark J. Perry, *Ten Examples of the Law of Unintended Consequences*, AM. ENTER. INST. (Nov. 19, 2023), https://www.aei.org/carpe-diem/ten-examples-of-the-law-of-unintended-consequences/ [https://perma.cc/HN76-NPUU] (listing ten practices that are intended to achieve one outcome but actually further the opposite outcome).

[197] *See* Chang & Cho, *supra* note 193 (describing the former president of Harvard University's belief that endowment taxes make higher education less affordable).

[198] *See id.* ("Taxing charitable resources away from higher education institutions does not make them more affordable—it has exactly the opposite effect . . . . With the growth in endowment returns, there are now a far larger number of colleges and universities that are subject to this tax than were previously, so it just keeps capturing more and more institutions.") (quoting the former president of Harvard University).

[199] *See* Alison Kimball, *End the Request: It's Time for Boston's Biggest Landowners to Pay Their Fair Share*, B.U. SCH. L. DOME (Aug. 11, 2023), https://sites.bu.edu/dome/2023/08/11/end-the-request-its-time-for-bostons-biggest-landowners-to-pay-their-fair-share/ [https://perma.cc/8HRW-7NT6] (observing that Northeastern University, Boston University, and Harvard University each paid voluntary property taxes to the City of Boston).

educational missions possible.[200] If schools cut back on these voluntary payments to compensate for increased federal taxation, this could have harmful ripple effects for state and local budgets.[201]

C. Suggestions for Future Endowment Taxes

Despite these and other potential challenges, more substantial taxation of higher education institutions might be inevitable.[202] Colleges and universities are receiving unprecedented attention from Republicans and Democrats alike, on issues ranging from college affordability, admissions policies, student activism, and foreign relations.[203] This heightened scrutiny makes it unlikely that excise tax proposals like those put forth by Senator Cotton and Senator Vance will disappear entirely.[204] Meanwhile, the severity of the college affordability crisis is

---

[200] *See Payment in Lieu of Tax (PILOT) Program*, CITY OF BOS. (Nov. 11, 2023), https://www.boston.gov/departments/assessing/payment-lieu-tax-pilot-program [https://perma.cc/HFV3-Q64M] (describing the program by which large nonprofit and tax-exempt organizations in the City of Boston make voluntary contributions to the city in recognition of the burden their operations place on public city services); Mathew Haag & Meredith Kolodner, *"The Untouchables": How Columbia and N.Y.U. Benefit From Huge Tax Breaks*, N.Y. TIMES (Sept. 26, 2023), https://www.nytimes.com/2023/09/26/nyregion/columbia-university-property-tax-nyc.html [https://perma.cc/E8TF-5MMN] (reporting that although seven of the eight Ivy League schools pay some sort of property tax, neither Columbia nor New York University does). Over 50% of Boston's real estate is tax-exempt, and $14 billion of that percentage is owned by private charitable organizations. Kimball, *supra* note 199. In fiscal year 2023, Boston's tax-exempt educational institutions were asked to pay $69,335,346 in Payments in Lieu of Tax. These institutions met 68% of this request by making $15,065,528 in cash contributions to the City's budget and providing $31,962,386 in the form of "community programs that uniquely benefit the City's residents." *Payment in Lieu of Tax (PILOT) Program*, *supra*. The City of Boston's total operating budget for fiscal year 2023 was $3.99 billion. *Fiscal Year 2023*, CITY OF BOS., https://www.boston.gov/finance/fiscal-year-2023 [https://perma.cc/ENS5-JAJ7] (July 1, 2022).

[201] *See Payment in Lieu of Tax (PILOT) Program*, *supra* note 200 (indicating that collectively, Boston-area nonprofits contributed almost $36 million to the City's budget).

[202] *See* Alex Muresianu, *Should We Tax University Endowments?*, TAX FOUND. (Oct. 19, 2022), https://taxfoundation.org/blog/university-endowment-tax/ [https://perma.cc/R7AC-DUMQ] (observing that university endowment tax proposals have gained popularity across the political spectrum as a potential means of addressing a myriad of policy goals—including college affordability, "punish[ing] ideological opponents," and "tamp[ing] down tuition rates"). While outside the scope of this Note, it should be acknowledged that colleges and universities provide a number of social benefits beyond education—which also weigh in favor of their tax exemption and caution against imposing onerous taxes of any kind. *Id.* These additional benefits include, but are not limited to, contribution to academic research, concentrating intellectual talent, and cultivating a productive and innovative work force. *Id.*

[203] *See* SCHLEIFER ET AL., *supra* note 14 (describing bipartisan support for addressing the college affordability crisis); Knott, *supra* note 22 (noting that while congressional Democrats and Republicans disagree on how to make college more affordable to more Americans, they have "largely agreed that student debt loads are too high and completion rates are too low").

[204] *See* SCHLEIFER ET AL., *supra* note 14 (discussing the emergence of a bipartisan coalition around the issue of college affordability); Knott, *supra* note 22 (noting that there is some common ground amongst congressional Democrats and Republicans on higher education issues); Woke Endowment Security Tax Act of 2023, S. 3465, 118th Cong. (2023) (increasing the endowment tax burden on certain college and university endowments); College Endowment Accountability Act of 2023, S.

worsening, and voters across the political spectrum are demanding government action.[205] President Biden's loan forgiveness plans continue to face legal challenges, but an endowment tax has the potential of appealing to members of both political parties.[206]

If lawmakers choose to craft a new endowment tax, they should be sure to make the tax apply to religious and secular institutions of higher education alike to avoid constitutional issues.[207] The tax should also be framed and imposed in an otherwise ideologically neutral way.[208] For example, in a press release about his bill, Senator Cotton suggested that revenue generated by his proposed tax should be used to provide funding for various armed conflicts around the world and increased southern border security.[209] Ideologically charged legislation such as this will work against forging the political coalition required to effectively confront the college affordability crisis.[210]

Lawmakers should also consider making any endowment tax subject to offset by financial aid awards for low-income students.[211] This would help incentivize colleges and universities to take meaningful steps to make tuition more affordable.[212] In 2021, Senator Brendan Boyle (D-PA) proposed an endowment tax structured in this way.[213]

3514, 118th Cong. (2023) (proposing an increased tax burden on certain college and university endowments).

[205] *See* Hanson, *supra* note 63 (noting that outstanding student loan debt in the United States has reached $1.727 trillion); Carolyn Fast, Robert Shireman & Alex Edwards, *College Tuition Is Out of Control. Voters Want Government to Do Something.*, CENTURY FOUND. (July 26, 2023), https://tcf.org/content/commentary/college-tuition-is-out-of-control-voters-want-government-to-do-something/ [https://perma.cc/CB9H-VXER] (reporting that 87% of 1,000 voters belonging to different political parties believe the cost of higher education was "too high," and 67% of those voters think that the federal government should do "[m]ore than they are currently doing").

[206] *See* Handler, *supra* note 29 (describing Democrat and Republican support for different versions of endowment tax proposals).

[207] *See* Muresianu, *supra* note 202 (expressing some skepticism about the wisdom of endowment taxes but calling on lawmakers to make any endowment tax they do enact ideologically neutral).

[208] *Id.*

[209] Press Release, Cotton, *supra* note 26.

[210] *See* Muresianu, *supra* note 202 (arguing that the tax code should not be used as a weapon to be wielded against ideological adversaries); Katherine Knott, *Partisan Divides Over Student Loans*, INSIDE HIGHER ED (Mar. 23, 2023), https://www.insidehighered.com/news/2023/03/24/house-hearing-highlights-partisan-divides-over-student-loans [https://perma.cc/8BKP-2TAE] (reporting that Representative Frederica Wilson, a Democrat, had remarked that she looked forward to collaborating with Representative Burgess Owens, a Republican, on crafting meaningful solutions to the student loan debt crisis).

[211] *See, e.g.*, Higher Education Endowment Tax Reform Act, H.R. 5152, 117th Cong. (2022) (making the endowment excise tax subject to offset by colleges' and universities' financial aid contributions).

[212] *See id.* (allowing colleges and universities to lower their tax liability by increasing their financial aid awards).

[213] *Id.* Massachusetts State Representatives Natalie M. Higgins and Christine P. Barber introduced a bill in the Massachusetts General Court that would seek to tackle educational accessibility in the Commonwealth through an endowment tax. *See* Dylan Mealey, *Massachusetts State Bill Proposes*

D. Thinking Beyond Endowment Taxes

Taxing college and university endowments is just one potential way of tackling the college affordability crisis.[214] At the individual college level, industry professionals and policy makers have pointed to the complexity of the college admissions process generally and the financial aid process specifically as serious barriers to educational equity.[215] Many students, especially first-generation college students, struggle to make sense of the confusing, multifaceted, and frequently changing financial aid process.[216] Individual schools can do more to help students find scholarships and grants, choose loan packages, and understand the long-term financial implications of attending a given institution—in doing so, they can better allow students to pick the school that will match their personal, academic, and financial goals.[217]

Another solution that some policy analysts advocate for is doubling the Pell Grant.[218] The Pell Grant is a federal grant available to students from low-income families to helps pay the costs of a college education.[219] The maximum Pell Grant award is $6,895; increasing the grant to $13,790 could help close the gap between what students are asked to pay to attend college and what they can truly afford.[220]

Tax on College Endowments Exceeding $1 Billion, WILLIAMS REC. (Feb. 21, 2024), https://williamsrecord.com/465964/news/massachusetts-state-bill-proposes-tax-on-college-endowments-exceeding-1-billion/ [https://perma.cc/FA7N-67ED] (describing a new Massachusetts state endowment tax proposal). On February 16, 2024, Representatives Higgins and Barber proposed their bill, which is titled "An Act to Support Educational Opportunity for All." Mealey, *supra*. If passed, the bill would impose a 2.5% tax on the endowment revenues of higher education institutions in the commonwealth with assets over $1 billion. *Id.*; An Act to Support Educational Opportunity for All, H.R. 2824, 193d Leg. (Ma. 2024). The funds collected from the tax would then be used to support educational initiatives throughout Massachusetts—such as reducing tuition at public universities and supporting the development of universal pre-K education programs. An Act to Support Educational Opportunity for All, H.R. 2824; Mealey, *supra*.

[214] *See* Rebecca S. Natow, *What Will It Take to Make College More Affordable?*, CHRON. HIGHER ED. (Sept. 13, 2022), https://www.chronicle.com/article/what-will-it-take-to-make-college-more-affordable [https://perma.cc/NR5M-UNFH] (noting that Congress has considered increasing the Pell Grant, forgiving student loan debt, expanding Public Service Loan Forgiveness eligibility, state and federal alliances, and granting tax deductions for tuition as possible policy solutions).

[215] *See* Levine et al., *supra* note 14 (describing certain higher education professionals' belief that the college admissions and financial aid processes are extremely complicated and impede access to higher education).

[216] *Id.*

[217] *See id.* (recommending that colleges and universities update their admissions and financial aid processes).

[218] *See, e.g.*, *Report: How Middle-Income Families Benefit When the Maximum Pell Award Is Increased*, NAT'L ASS'N OF STUDENT FIN. AID ADM'RS (Oct. 29, 2021), https://www.nasfaa.org/double_pell_report [https://perma.cc/6K6C-2HPS] (encouraging Congress to double the Pell Grant).

[219] *See* Melanie Hanson, *Pell Grant Statistics*, EDUC. DATA INITIATIVE, https://educationdata.org/pell-grant-statistics [https://perma.cc/8TPQ-CKM6] (Jan. 28, 2024) (describing how 51% of Pell Grants are awarded to students from families who make less than $20,000 annually).

[220] *See id.* (reporting that the Pell Grant amount cannot exceed $6,895 for an individual student).

Finally, lawmakers should take steps to address the root causes of economic and educational disparities.[221] By the time students turn eighteen, they have had vastly different life experiences that affect their ability to pay for, apply to, and succeed in college in myriad ways.[222] Improving early childhood, primary, and secondary education programs and expanding state and federal welfare programs will enhance any policy interventions targeted at institutions of higher education.[223]

CONCLUSION

Although American colleges and universities have traditionally enjoyed a broad tax exemption, lawmakers are increasingly considering endowment taxes as a solution to the college affordability crisis. At least two of the endowment tax bills before Congress, however, include a provision expressly exempting religious institutions that would otherwise be financially eligible for the tax. Nevertheless, under *Kennedy v. Bremerton County School District*'s historical approach to Establishment Clause questions, these express exemptions are likely unconstitutional. If lawmakers choose to enact additional endowment taxes, they should ensure that such taxes apply to religious and secular institutions of higher education alike. Furthermore, to address the issue of college affordability, lawmakers should consider making any endowment taxes subject to offset by increased funding to college financial aid programs. Endowment taxes are not a panacea, and if enacted, they must be coupled with other policy initiatives to improve access to higher education—such as increased funding for primary and secondary schools and state and federal welfare programs. Only then can we begin to ensure that a college education is meaningfully available to those who wish to pursue it.

EMILY W. SAULNIER

---

[221] *See* Amy Ellen Duke-Benfield, *20 Years After Welfare Reform: College Students and Benefits*, CENT. L. SOC. POL'Y, https://www.clasp.org/blog/20-years-after-welfare-reform-college-students-and-benefits/ [https://perma.cc/93HU-SV22] (advocating for expanded public benefits to support low-income students, and noting how current welfare rules make it difficult for low-income students to obtain higher education and receive benefits).

[222] *See* Levine et al., *supra* note 14 (noting that making college marginally more affordable will not do enough to make our society more equal without broader structural changes).

[223] *See id.* (highlighting the need for better and more equal elementary and high school education in order to improve college outcomes for all students).