

The logo consists of a solid orange square. Inside the square, the word "INSIDE" is written in a large, white, bold, sans-serif font. Below it, the words "HIGHER ED" are written in a smaller, white, sans-serif font.

Why the Endowment Tax Is Unconstitutional

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In December, Republicans in the U.S. Congress passed a tax bill aimed at helping the very, very rich. Meanwhile, the rest of us will be paying for it the rest of our lives, as it adds trillions to the national debt. But the Republicans excluded one group of rich institutions from the gift it gave to big corporations: elite colleges and universities.

In fact, the tax legislation includes a big bill for the wealthiest higher education institutions: a 1.4 percent tax on endowment income for any college with more than 500 students and an endowment worth over \$500,000 per full-time student. For about 30 colleges, the Republicans are the Grinch who taxed Christmas.

It might be tempting for some of us not to cry any tears for overprivileged colleges, run by wealthy administrators to serve the children of the affluent, which waste vast sums of money to prove how much better they are than everybody else. But doing so would miss a vital point: the endowment tax is an attack on academic freedom, and it is an attack on all colleges and universities. This is a warning shot across the bow of higher education, done for explicit ideological reasons to try to pressure institutions to silence leftists and lift up conservatives.

Although the endowment tax will raise a few hundred million dollars a year to offset the massive tax cut for the wealthy, both supporters and opponents of the tax acknowledge that its true purpose is to send a political message to American colleges and universities deemed hostile to Republican interests.

Columnist George Will argued that “the Republicans, without public deliberations, and without offering reasons, would arbitrarily make university endowments uniquely subject to a tax not applied to similar entities.” Neal McCluskey of the Cato Institute said it “amounts to little more than a politicized, ‘Take that, Harvard!’”

Harvard Law professors Jack Goldsmith and Adrian Vermeule blamed elite universities themselves for the endowment tax, citing “the public contempt of so many university academics

for those who fund their subsidies.” According to Goldsmith and Vermeule, “Conservative politicians and their constituents hear, on the one hand, that government owes universities a continuance of largesse and, on the other, that conservatives are ignorant, unworthy or corrupt. This sounds suspiciously like special pleading by an intellectual elite that wants to indulge in social criticism at the expense of the criticized, in both figurative and literal senses.”

Yes, it sounds like educators want the government to fund education and yet they want to have the freedom to criticize the government. Since when is free speech considered “special pleading”? Since when is supporting the ideology of the government in power considered part of a professor’s job in a free society?

The few Republican politicians who have commented on the endowment tax have tried to disguise the obvious ideological motives. Tom Reed, a Republican congressman from New York, claimed that the tax would be aimed at pushing colleges to address the “college debt crisis.” Reed did propose to tax only colleges that fail to spend a minimum amount of endowment dollars on financial aid. But the endowment tax that passed has no such provisions, and taking away endowment money that’s used for financial aid has the exact opposite effect.

Kevin Brady, a Republican congressman from Texas and the lead sponsor of the Republican tax bill, claimed that the endowment tax “ensures that private endowments are placed on equal footing with private foundations.” Private foundations, which disperse money to charities, are required to pay a tax. But colleges are the only kind of charity being targeted by Congress. Just as Democrats could not target churches for leaning conservative and demand that they should pay extra taxes, right-wing Republicans cannot target universities based on ideological beliefs.

The political motives behind the bill were also revealed by how hard Republicans worked to exempt conservative colleges from the tax. Passage of the Republican tax bill was delayed by a day as part of a failed attempt to exempt a Christian college in Senator Mitch McConnell’s Kentucky from the endowment tax. Only four Senate Republicans voted against a special exemption for Hillsdale College, the college beloved by conservatives for its right-wing political correctness. But because that special exemption didn’t pass, Republicans protected Hillsdale by raising the threshold for taxes to an endowment of \$500,000 per student. That indicates a clear political motive in passing this special tax and a desire to punish colleges perceived (incorrectly) as being too liberal.

In short, it’s clear that the point of the endowment tax is not to tax wealthy universities. It’s to send a warning shot at all colleges and universities to restrain academic freedom or risk further economic assaults on higher education.

Punching Progressives in the Mouth

Richard Vedder and Justin Strehle at *Minding the Campus* attribute the endowment tax to “growing hostility by Republican lawmakers angered over the large political donations and public criticism that academics have made attempting to oust them from office. Lawmakers are growing tired of feeding the mouths that bite them.”

Vedder and Strehle praise the endowment tax because it “does send a warning to politically relatively clueless college administrators that their special privileges as institutions should not be taken for granted, and, indeed, are under intense scrutiny.”

But the First Amendment does not allow Congress to punish people or institutions as a way to send politically motivated warnings aimed at silencing criticism. And that is what makes it unconstitutional. Congress cannot impose “ideology taxes” on particular types of corporations they believe are antithetical to the political interests of the party in power.

What’s more, tax-avoidance schemes are notorious among the wealthy, and there’s no reason to think rich universities won’t adopt them if taxes become onerous enough. In fact, there might be an easy way every college could refuse to pay the endowment tax. They could perhaps avoid it by simply offering online courses and declaring that anyone who takes free online classes is an enrolled “student.” Students don’t need to be eligible for a degree and don’t even need to pay anything, since earlier provisions about “tuition-paying” students were ruled out of order by the Senate parliamentarian. Harvard’s online Introduction to Computer Science, with about 350,000 registrants from around the world, should be more than enough students to exempt Harvard from a \$43 million annual tax. That would be a very real act of resistance if universities are courageous enough to risk retaliation from Republican politicians by refusing to pay a politically motivated tax.

But will colleges challenge the constitutionality of the new endowment tax as retaliation for the expressions of controversial ideas by their employees? The First Amendment protects freedom of speech and academic freedom, so a law by Congress that punishes colleges hated by the party in power is deeply suspect.

The Constitution also specifically bans bills of attainder, when Congress targets an individual or a group for punishment. If Congress passed a law imposing a 1.4 percent tax specifically on Warren Buffett or Planned Parenthood, it would be unconstitutional. Attacking a small group of elite colleges for their perceived political offense of being too liberal should also be unconstitutional. Although courts have interpreted the bills of attainder provision narrowly, it adds to the argument of a constitutional prohibition on congressional retaliation against their ideological enemies.

No, rich colleges won’t be bankrupted by this law. That’s not the point. The point is the principle. If Congress passed a law imposing a 1.4 percent excise tax on college professors making over \$100,000 a year, it might not bankrupt anyone. But it would still be wrong, and unconstitutional.

David Horowitz, who long ago pushed for the Academic Bill of Rights, has written *Big Agenda: President Trump's Plan to Save America*, which proposes massive repression of liberal institutions as a tool of political power. According to Horowitz, Republicans cannot “continue to allow the left to use the trillion-dollar structures of the university system as a political base to destroy the society that created them.” He argues that Republican politicians must target universities for repression by using the power of money: “Republicans control the purse strings that can be used to restrain the progressive juggernaut. Why should half the country fund

institutions that regard them as racists, sexists, homophobes, Islamophobes and xenophobes -- in a word, 'deplorables'?"

Horowitz believes that conservatives "must begin every confrontation by punching progressives in the mouth." The endowment tax is the first punch. More taxes, and other efforts to silence criticism of President Trump and his Republican supporters in Congress, will follow.

If the Republicans are allowed to target universities (even wealthy ones) for political retaliation, the repression will only escalate. The endowment tax is an unconstitutional attack on higher education by powerful conservatives who see universities as an enemy to be destroyed. And that means we are all vulnerable.