
UNIVERSITIES, CAPITAL, AND DEMOCRATIC VULNERABILITY

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INTRODUCTION

For many, the university serves as a crucial guardian of democracy. Still, the capitulation of leading American private universities to authoritarian pressure from the Trump Administration should not be terribly surprising. This Essay offers one reason why. It does so by focusing on the law governing private nonprofit universities. It examines both the origins and the impact of a fundamental tension between their charitable missions and their need for capital. It shows how the legal framework designed to protect these nonprofit universities from market pressures can actually intensify their vulnerability.

The so-called “nondistribution constraint” stands at the core of U.S. nonprofit law.¹ It prohibits nonprofit entities from distributing their profits to those who control them, thereby focusing those governing them on pursuing charitable missions, not lining their own pockets. By eliminating the availability of traditional equity financing, the nondistribution constraint also protects a university’s stakeholders, including students and faculty, from the hypothetical threat shareholders pose. By its terms, the nondistribution constraint does not prohibit the existence of shareholders. In practice, however, the crucial role financial returns play in the decision-making of equity investors ensures that the notion of a nonprofit shareholder remains an oxymoron.

That said, the nondistribution constraint emphatically does not put profit-seeking by nonprofits out of bounds.² It merely eliminates one reason that a university might pursue capital and profits—to distribute them to shareholders or others with a role in governance. Effectively forbidding private nonprofit universities from raising equity capital spares them from the relentless pressure faced by for-profit ventures to deliver financial rewards to equity investors. Unfortunately, the nondistribution constraint offers such universities only imperfect immunity from the threat capital—or, more precisely, the absence of it—poses to their missions.

Along with its protections, the nondistribution constraint produces weaknesses. Although legally bound to pursue their educational missions, private universities still operate as market actors. Without access to equity capital, such universities must depend on donors, lenders, state funding, and revenue-generating activities to secure the capital essential to pursuing their

¹ Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980) (“A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees.”); *see also* I.R.C. § 501(c)(3) (prohibiting net earnings from “inur[ing] to the benefit of any private shareholder or individual”); REVISED MODEL NONPROFIT CORP. ACT §§ 13.01-.02 (A.B.A. 1987) (barring distributions except for certain mutual-benefit-corporation repurchases and dissolution distributions).

² *See* Hansmann, *supra* note 1, at 838 (“It should be noted that a nonprofit organization is not barred from earning a profit. Many nonprofits in fact consistently show an annual accounting surplus.”).

charitable mission. This financial vulnerability can create a susceptibility to, among other dangers, authoritarian pressure.

Simply put, universities face many of the same competitive pressures as for-profit entities while being expected to prioritize stakeholder commitments in ways conventional companies ordinarily are not.³ The unavailability of equity capital eliminates one threat, but it simultaneously heightens others. Institutional capture by donors or state actors represents the most salient threat in today's political context. But mission drift, as universities scramble to find the capital necessary to thrive, can take many forms. To the extent that we expect universities dependent on government financing to preserve democratic values by resisting authoritarian interventions against students and faculty, the nondistribution constraint becomes both a vulnerability and a strength.

I. DEMOCRACY & NONPROFITS

When Alexis de Tocqueville toured America in the 1830s, he observed a phenomenon that would become central to his understanding of American democracy: the extraordinary proliferation of voluntary associations. "Americans of all ages, all conditions, and all dispositions, constantly form associations," he wrote in *Democracy in America*.⁴ These associations—what we now call nonprofits—served as crucial intermediaries between the individual and the state, creating what Tocqueville termed "the art of association" that made democratic self-governance possible.⁵

Tocqueville understood that these voluntary associations performed functions essential to democratic life that neither markets nor government could adequately fulfill. They educated citizens in the habits of democratic participation,⁶ provided forums for deliberation and debate, and nurtured pluralism by creating alternative centers of power that could check both governmental overreach⁷ and the atomizing effects of pure individualism.⁸ They

³ For an argument that the nondistribution constraint provides nonprofits with a "head start" over for-profits with respect to the authenticity of their purposes, see Cathy Hwang & Dorothy S. Lund, *Purpose and Nonprofit Enterprise*, 125 COLUM. L. REV. 2267, 2274 (2025).

⁴ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 559 (Francis Bowen ed., Henry Reeve trans., Dover Publ'ns 2017) (1863).

⁵ *Id.* at 569.

⁶ See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* 309-13 (1995); Barbara K. Bucholtz, *Reflections on the Role of Nonprofit Associations in a Representative Democracy*, 7 CORN. J.L. & PUB. POL'Y 555, 556 (1998) (articulating nonprofits' value in "teach[ing] the skills of self-government," "inculcat[ing] the habits of tolerance and civility," and "mediat[ing] the space between the individual and the [government and business sectors]").

⁷ Daniel J. Hemel, *Madisonian Nonprofit Law*, 64 HARV. J. ON LEGIS. (forthcoming 2027) (manuscript at 4-7) (on file with authors).

⁸ See generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000) (linking erosion of social capital to declining participation in American civic and associational life).

embodied the idea of interest rightly understood, the idea that individuals could pursue their own welfare while simultaneously serving the common good.

The American nonprofit sector that emerged from this Tocquevillian vision has long been understood as democracy's bulwark. Private nonprofit universities can embody that ideal, serving as places where citizens develop critical thinking skills, where knowledge is pursued for the public benefit, and where diverse perspectives can be tested against evidence and reason. From that perspective, the tax exemptions and charitable deductions that support these institutions reflect a price we collectively pay to protect democracy.⁹

In other words, in exchange for serving public purposes, these nonprofits receive public subsidies. The nondistribution constraint offers a flawed immunity from the profit motive to buttress that bargain. But a crack has formed in this bargain's foundation that Tocqueville could not have anticipated.

Private nonprofit universities operate in an economic environment that represents a radical departure from the world he knew. As a result, the very legal frameworks designed to preserve nonprofits' charitable character create pressures that make them acutely vulnerable. Private nonprofit universities, despite their charitable status, compete for students, faculty, donors, and prestige. The nondistribution constraint that was meant to protect their public purpose raises the stakes of those contests.

This paradox suggests that universities are vulnerable not despite their nonprofit status, but at least in part because of it. The legal architecture of American charity, built on Tocquevillian assumptions, may be inadequate to protect universities from the realities of modern capitalism. Understanding why requires examining how the tension between mission and capital plays out in practice. Exploring regulatory attempts to manage this tension can also suggest potential remedies.

II. MISSION VERSUS CAPITAL: THE NONDISTRIBUTION CONSTRAINT

The nondistribution constraint serves as the defining feature of American nonprofit law.¹⁰ Unlike for-profit corporations, which exist largely to generate returns for shareholders, nonprofits are legally prohibited from distributing their earnings to owners.¹¹ This constraint aims to ensure that charitable organizations serve public rather than private purposes.

Yet this legal protection creates a structural vulnerability: Nonprofits need capital to operate and grow, but they cannot access equity markets. All ventures require capital, particularly those that aim to deliver goods or services at

⁹ See ROB REICH, *JUST GIVING: WHY PHILANTHROPY IS FAILING DEMOCRACY AND HOW IT CAN DO BETTER* 155-56 (2018) ("[T]he provision of tax subsidies for nonprofits . . . 'is one indispensable means of limiting the influence of government orthodoxy on important areas of community life.'" (quoting *Bob Jones Univ. v. United States*, 461 U.S. 575, 609 (1983) (Powell, J., concurring in part))).

¹⁰ See Hansmann, *supra* note 1, at 838.

¹¹ I.R.C. § 501(c)(3); REVISED MODEL NONPROFIT CORP. ACT §§ 13.01-.02 (A.B.A. 1987).

significant scale. Yet, by their nature, charities forswear one of capitalism's greatest engines of growth.

Today's universities, with their grand ambitions and enormous infrastructure needs, feel this constraint acutely. Many areas of research have become highly capital-intensive, requiring resources on a massive scale to make even incremental discoveries.¹² Tocqueville's homespun voluntary associations they are not.

Their need for capital produces relentless pressure to generate revenue, a pressure that the nondistribution constraint only heightens. Obviously, that pressure can impinge on institutional missions. Universities must constantly balance educational and research goals—more broadly, their commitments to stakeholders—against their need for financial resources.

The only meaningful sources they can draw on for capital are philanthropic contributions, investment income, earned revenues from tuition or other revenue-generating activities, debt, and government grants.¹³ When universities compete for wealthy donors, they may need to court those whose interests do not align with their missions.¹⁴ They may seem to hoard endowment funds to deploy in the search for alpha.¹⁵ They may feel compelled to accept loans¹⁶ and research funding that come with restrictive strings attached.¹⁷ They may pursue profitable programs irrespective of their relationship to the institution's values.¹⁸

¹² See Graham Andrews, *University Investments in Research Continue to Grow, According to New Data*, ASS'N AM. UNIV. (Jan. 8, 2026), <https://www.aau.edu/newsroom/leading-research-universities-report/university-investments-research-continue-grow> [<https://perma.cc/Y49S-5SH3>] (reporting \$117.7 billion in university research and development spending in FY24, including more than \$7 billion in unrecovered indirect costs).

¹³ See Denise-Marie Ordway, *Higher Education Funding in the US: A Broad Overview*, JOURNALIST'S RES. (May 8, 2025), <https://journalistsresource.org/home/higher-education-funding-college-tuition-overview> [<https://perma.cc/L3P3-P6R7>].

¹⁴ See Avital N. Nathman & Jake Lowe, *Protecting Academic Freedom with Transparent Funding: Challenging Harmful Donor Influence*, ACADEME MAG. (Winter 2023), <https://www.aaup.org/academe/issues/winter-2023/protecting-academic-freedom-transparent-funding> [<https://perma.cc/L8ME-PKVY>] (documenting how donor funding agreements can condition hiring and programmatic decisions).

¹⁵ Although the efforts to strip federal research funding have received greater media attention, elite universities are also the targets of endowment income taxes introduced in the first Trump Administration and enormously increased in the 2025 tax reforms. See Act of Dec. 22, 2017, Pub. L. No. 115-97, § 13701, 131 Stat. 2054, 2167-68 (codified as amended at I.R.C. § 4968) (promulgating endowment income taxes), *amended by*, Act of July 4, 2025, Pub. L. No. 119-21, § 70415, 139 Stat. 72, 221-23 (raising endowment income taxes).

¹⁶ For an extensive discussion of loan covenants accepted by capital-intensive nonprofit healthcare entities, see generally Elizabeth King, *The Hidden Hand of Debt* (forthcoming) (on file with authors).

¹⁷ See Nathman & Lowe, *supra* note 14.

¹⁸ See SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION* 23-42 (paperback ed. 2010).

When that happens, the nondistribution constraint—rather than protecting mission—creates conditions in which mission can succumb to a university’s need for capital.

III. THE LESSONS OF SOCIAL ENTERPRISE

The rise of social enterprise illustrates both the appeal and the dangers of attempting to resolve this tension by giving mission-driven enterprises access to equity capital. Social enterprises explicitly embrace the goal of pursuing both profit and social benefit, rejecting the traditional boundary between business and charity. In the United States, benefit corporations and similar hybrid legal forms promise to strike a balance between the demands of the capital marketplace and the needs of stakeholders.¹⁹ But by eschewing the nondistribution constraint, these hybrid forms tend to give markets the upper hand.²⁰

While social enterprise represents a global phenomenon, it embraces distinct legal technologies in each jurisdiction. In the United States, an array of similar state laws has produced a mix of legal forms to house social enterprises, often but not always denoted as “benefit corporations.”²¹ These forms openly embrace the pursuit of benefits for stakeholders as well as shareholders, clearly rejecting the notion that for-profit vehicles must exclusively prioritize the financial interests of shareholders. But the absence of a nondistribution constraint nevertheless allows financial considerations to predominate.

Consider the case of Embrace, the social enterprise that developed low-cost incubators for vulnerable newborns.²² Founded by Stanford graduate students, Embrace initially operated a complex hybrid structure designed to raise equity capital for product development while seeking charitable contributions for global distribution.²³ The founders could have pursued multiple paths: They could have formed a traditional charitable nonprofit, bound by the nondistribution constraint but eligible for tax-deductible donations; they could

(describing universities’ pursuit of market and market-like activities to generate external revenues).

¹⁹ See DANA BRAKMAN REISER & STEVEN A. DEAN, *SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT, AND CAPITAL MARKETS* 52-60 (2017).

²⁰ See *id.* at 67-69 (explaining benefit-corporation statutes typically require balancing instead of prioritizing social good); see also, e.g., DEL. CODE ANN. tit. 8, § 362 (“[A] public benefit corporation shall be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct, and the public benefit or public benefits identified in its certificate of incorporation.”).

²¹ See, e.g., DEL. CODE ANN. tit. 8, §§ 361-68 (2026) (enabling “public benefit corporations”); MASS. GEN. LAWS ch. 156E, § 9 (2026) (requiring “benefit corporations” to have purpose of creating general public benefit); D.C. CODE § 29-1302.01 (2025) (same).

²² EMBRACE, <https://www.embraceglobal.org> [<https://perma.cc/9C4S-XHAL>] (last visited Feb. 19, 2026).

²³ STEFANOS ZENIOS, LYN DENEND, AMY LOCKWOOD & STACEY MCCUTCHEON, *EMBRACE: DECIDING ON A HYBRID STRUCTURE* 4 (2013), https://www.gsb.stanford.edu/sites/default/files/publication-pdf/embrace_0.pdf [<https://perma.cc/82NV-FD3T>].

have created a for-profit corporation, able to access equity markets but accountable primarily to shareholders; or they could have continued their effort to create a hybrid form balancing both imperatives.²⁴ In the years since, Embrace appears to have emphasized impact.²⁵

The contrast with Etsy is instructive. Etsy still boasts of its “mission to keep human connection at the heart of commerce” and once touted its Certified B Corporation (“B Corp”) status.²⁶ That label denotes not a legal form, but a designation granted by the nonprofit B Lab to ventures that meet specified benchmarks indicating a commitment to balancing profit with purpose.²⁷ But after Etsy went public in 2015, launching an initial public offering of stock, it abandoned that B Corp status.²⁸

Etsy did so rather than accept even the very modest demands of B Lab. B Lab does not impose a nondistribution constraint by requiring its B Corps to embrace nonprofit status.²⁹ All it asks is that they embrace a hybrid social enterprise corporate form. As a result, B Corps face no legal barrier to going public, and others have done so since.³⁰

But in a competitive marketplace, even a minor obstacle to accessing capital can be a risk. B Lab’s rules at the time Etsy went public would have required Etsy to convert from a conventional corporation to a hybrid social enterprise form.³¹ Etsy’s failure to do so meant forfeiting its certification. Although the benefit corporate form B Lab required—in Etsy’s case, Delaware’s public

²⁴ See *id.*

²⁵ See EMBRACE, *supra* note 22 (“Embrace Global is working to ensure that every baby—no matter where they are born—has the warmth they need to survive and thrive.”).

²⁶ *About*, ETSY, <https://etsy.com/about> [<https://perma.cc/NG2D-P8XZ>] (last visited May 4, 2026); *Mission & Values*, ETSY, <https://web.archive.org/web/20171119153516/https://www.etsy.com/mission> (last visited May 4, 2026) (advertising Etsy’s B Corp status on website on November 19, 2017).

²⁷ See *About B Corp Certification*, B LAB, <https://www.bcorporation.net/en-us/certification> [<https://perma.cc/4TX6-QRQG>] (last visited May 4, 2026).

²⁸ See *FAQ*, ETSY, <https://investors.etsy.com/resources/faq> [<https://perma.cc/6UVE-VJUZ>] (last visited May 4, 2026); Josh Silverman, *Business as a Force for Good: Defining Etsy’s Path*, ETSY (Nov. 25, 2017), <https://www.etsy.com/news/business-as-a-force-for-good-defining-etsys-path> (announcing Etsy would relinquish B Corp status).

²⁹ See *Explore the B Lab Standards*, B LAB, <https://www.bcorporation.net/en-us/standards/performance-requirements> [<https://perma.cc/GDQ9-NDZH>] (last visited May 4, 2026).

³⁰ See MICHAEL B. DORFF, *BECOMING A BENEFIT CORPORATION: EXPRESS YOUR VALUES, ENERGIZE STAKEHOLDERS, MAKE THE WORD A BETTER PLACE* 191-92 (2023) (proposing internal financial reporting mechanisms of publicly traded companies may encourage corporate social missions); see also B Lab, *Public B Corps*, DATA.WORLD (Dec. 18, 2025, 09:48 ET), <https://data.world/blab/public-b-corps/workspace/file?filename=Public+B+Corps.csv> (listing 112 public B Corps).

³¹ See Hiroko Tabuchi, *Etsy I.P.O. Tests Pledge to Balance Social Mission and Profit*, N.Y. TIMES (Apr. 16, 2015), <https://www.nytimes.com/2015/04/17/business/dealbook/etsy-ipo-tests-pledge-to-emphasize-social-mission-over-profit.html>.

benefit corporate form—permitted both equity ownership and the public trading of a corporation’s shares, Etsy opted out. Even a perception that it might value stakeholders at the expense of shareholders seemed to dissuade Etsy from attempting to retain its B Corp certification.³²

Etsy instead fully embraced the for-profit model. It used the billions of dollars of capital it secured partly through its public offering as a conventional Delaware company to pursue acquisitions.³³ These transactions clearly prioritized the interests of shareholders over stakeholders.

Etsy’s evolution from certified mission-driven marketplace to conventional growth-focused corporation illustrates how market pressures can overwhelm even explicit commitments to stakeholders. Juxtaposed against Embrace’s consequential rejection of equity capital, Etsy highlights the fundamental tension at the heart of nonprofit law. The nondistribution constraint creates a clear choice: organizations can either access capital markets or they can safeguard their mission by accepting draconian capital constraints.

Like Embrace, private nonprofit universities cannot issue stock or offer equity stakes to investors. But unlike Embrace, they need enormous amounts of capital. As a result, these mission-driven institutions become increasingly dependent on other revenue sources that may conflict with their core purposes.

Social enterprise represents an attempt to escape this binary. But in the United States, embracing a hybrid social enterprise legal form strikes no such balance. All that stands in the way of a conversion to a conventional, shareholder-focused corporation is a shareholder vote.

IV. REJECTING THE BINARY: LESSONS FROM OVERSEAS

The flexibility that makes the U.S. approach to regulating social enterprises attractive also makes them unreliable guardians of long-term mission commitment. But the U.S. approach represents only one of many possibilities. For example, rather than rejecting the nondistribution constraint entirely, the United Kingdom crafted a variant that limits—rather than prohibits—distributions of profit.³⁴

Etsy, having rejected even B Corps far more permissive approach to equity funding, would find little to love in such an approach. But universities might

³² David Gelles, *Inside the Revolution at Etsy*, N.Y. TIMES (Nov. 25, 2017), <https://www.nytimes.com/2017/11/25/business/etsy-josh-silverman.html> (describing post-IPO shareholder pressure leading Etsy to allow B Corp certification to lapse).

³³ See Anna Hensel, *With Depop Acquisition, Etsy Is Building a ‘House of Brands’ to Fend Off Marketplace Competition*, MOD. RETAIL (June 3, 2021), <https://www.modernretail.co/retailers/with-depop-acquisition-etsy-is-building-a-house-of-brands-to-fend-off-marketplace-competition> [<https://perma.cc/JE8M-JQM3>].

³⁴ See *Community Interest Companies Guidance*, GOV.UK (Apr. 4, 2025), <https://www.gov.uk/government/publications/community-interest-companies-how-to-form-a-cic/community-interest-companies-guidance-chapters> [<https://perma.cc/YAN8-7ARN>]; see also *infra* note 37-40 and accompanying text (expanding on community interest company form).

respond differently. Although for-profit colleges do exist, Harvard seems unlikely to join their ranks, no matter how acute its need for capital might become.

In part, that refusal reflects a commitment to stakeholders Etsy lacked. But it also acknowledges that nonprofit status delivers an array of subsidies and other benefits Etsy could not access.³⁵ Access to equity funding would need to complement—rather than displace—those sources of support.

To understand what that sort of funding might look like, experiments abroad offer insights. Social enterprise regulation in several European jurisdictions imposes partial distribution constraints.³⁶ Rather than foreclosing equity investment altogether, specialized legal forms or certifications for social enterprises permit shareholders or their equivalents but limit distributions to them.

The United Kingdom’s community interest company (“CIC”) form, for example, is available to for-profit firms called “companies limited by shares.”³⁷ Their shareholders, however, do not look like traditional for-profit shareholders, with equity in their companies entitling them to uncapped midstream profits as determined by their directors and residual profits on dissolution. CIC shareholders, by contrast, can receive dividends only up to a cap of “no more than 35% of CIC’s profits” and no assets on dissolution.³⁸ On dissolution, a CIC’s assets must be transferred to other CICs or “asset-locked” bodies, like charities, rather than to their shareholders.³⁹ These limits are designed to attract investors with mixed profit-making and social goals, though it is not yet clear the caps involved have right-sized the appeal.⁴⁰

The CIC’s dual approach is only one option. Other jurisdictions use different methods to calculate dividend caps, frequently also joining them with asset

³⁵ See Nathan Born & Adam Looney, *How Much Do Tax-Exempt Organizations Benefit from Tax Exemption on Their Income*, TAX POL’Y CTR. URB. INST. & BROOKINGS INST. (July 27, 2022), <https://taxpolicycenter.org/taxvox/how-much-do-tax-exempt-organizations-benefit-tax-exemption-their-income> (noting universities saved about \$1.7 billion from the income-tax exemption in 2018).

³⁶ See Dana Brakman Reiser & Steven A. Dean, *The Social Enterprise: A New Form of Business Enterprise?*, in *SOCIAL ENTERPRISE LAW: A MULTIJURISDICTIONAL COMPARATIVE APPROACH* 1, 18-20 (Dana Brakman Reiser, Steven A. Dean & Giedre Lideikyte Huber eds., 2023) [hereinafter *COMPARATIVE SOCIAL ENTERPRISE LAW*] (exploring how many European jurisdictions prohibit “distribution of residual assets on dissolution” but allow “limited distribution of profits midstream”).

³⁷ See GOV.UK, *supra* note 34.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ See BRAKMAN REISER & DEAN, *supra* note 19, at 75 (describing continuing efforts of CIC’s regulator to set dividend cap attracting investors, as well as U.K. experiments with tax incentives for CIC investments).

locks.⁴¹ Still other models employ a more holistic approach, imposing a reinvestment mandate that social enterprises within their purview must reinvest a majority of their net earnings or revenues in their missions.⁴² This type of partial distribution constraint demands partial devotion to mission, while also allowing equity finance. With this broad instruction in place, individual organizations are left to structure distributions to equity holders however they choose.

Of course, capped equity distribution structures are not entirely a foreign innovation. U.S. nonprofit OpenAI used a capped profit structure in its 2020 arrangement for Microsoft's investment in its for-profit subsidiary.⁴³ Its well-publicized experiment demonstrates that investors can be attracted to capped distribution entities if the value proposition is strong enough. OpenAI's evolution since 2020 shows that, at least at the greatest levels of capital need, attracting some investors will require more.⁴⁴ The funding needs and potentially shareable benefits of university production, at least for elite research universities, likely fall somewhere in the middle.

Paring back, as opposed to entirely eliminating, the nondistribution constraint for private, nonprofit universities would be no panacea. But providing a path for them to access equity funding could reduce some of the pressure to comply with the demands of those in control of other funding sources.

CONCLUSION: NONPROFIT VULNERABILITY & DEMOCRATIC FRAGILITY

These dynamics—the democratic expectations placed on nonprofits and the capital hunger created by the nondistribution constraint—combine to create a situation in which universities appear vulnerable because of, rather than despite, their nonprofit status. Ironically, the legal frameworks designed to protect their missions can expose them to the kind of donor and government influence that threatens democratic institutions. And this vulnerability is not accidental but structural. It reflects fundamental tensions in American political economy between market efficiency and democratic accountability, between individual

⁴¹ See, e.g., Sofie Cools & Maxime Verheyden, *Social Enterprises in Belgium*, in *COMPARATIVE SOCIAL ENTERPRISE LAW*, *supra* note 36, at 81, 98-99 (discussing distribution structure for certified social enterprises in Belgium with asset lock set at 6% per year).

⁴² See Jérôme Chacornac, *Les Entreprises Sociales en France* [*Social Enterprises in France*], in *COMPARATIVE SOCIAL ENTERPRISE LAW*, *supra* note 36, at 225, 237 (exploring French model requiring at least 50% of distributable profits go towards specific funds and purposes).

⁴³ See *Why OpenAI's Structure Must Evolve to Advance Our Mission*, OPENAI (Dec. 27, 2024), <https://openai.com/index/why-our-structure-must-evolve-to-advance-our-mission>; see also Ellen P. Aprill, Rose Chan Loui & Jill R. Horwitz, *Board Control of a Charity's Subsidiaries: The Saga of OpenAI*, 182 TAX NOTES FED. 289, 289-91 (2024) (explaining OpenAI's structure was designed to center mission-based purposes).

⁴⁴ See *Our Structure*, OPENAI, <https://openai.com/our-structure> (last visited May 4, 2026) (noting OpenAI shifted to conventional equity participation to support capital raising and growth).

freedom and collective governance, and between entrepreneurial innovation and institutional stability. The nonprofit sector, positioned at the intersection of these tensions, has become a site where they play out with particular intensity.

Understanding this vulnerability is crucial for developing strategies to strengthen democratic institutions. Rather than simply calling for better governance or more ethical leadership, we need to recognize that the problem lies—at least in part—in the legal and economic structures that shape how nonprofits operate. Universities will continue to face pressure to serve elite interests as long as they depend on elite resources for their survival.

The solution might not be to abandon the nonprofit form but to reform it in ways that better align institutional incentives. This could involve creating alternative funding models that reduce dependence on the limited funding sources currently available to private nonprofit universities. While the prevailing U.S. approach to social enterprise would represent a capitulation to capital markets, allowing ventures to raise capped equity would not.

Such reforms would confront the question of the durability of the Tocquevillian assumption that voluntary associations can serve democratic purposes in the era of modern capitalism. In a time of extreme wealth concentration and sophisticated capital markets, the “art of association” that Tocqueville celebrated may need to be reimagined for capital-intensive democratic institutions to fulfill their essential functions. The vulnerability of universities suggests that this reimagining is not just an academic exercise but a democratic imperative.