Divesting University Endowments

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Abstract

The brutal conflict between Hamas and Israel convulsed higher education. Student protestors have demanded that university endowments "divest" from Israel. University leaders have largely resisted those demands on grounds of fiduciary obligation, institutional neutrality, or both. In response, protestors have pointed to prior instances of purported divestment. Confusion abounds over the applicable fiduciary principles and the scope of prior divestments. This paper synthesizes the law and finance of endowment divestment and applies that analysis to past divestments and present divestment demands. We show that under prevailing law endowment divestment for nonfinancial reasons is permissible only if: (1) the divestment is consistent with the university's charitable purpose of research and education, and (2) the divestment's effect on the portfolio is reasonable in light of that purpose. Applied to the current state of university endowment management, this is a highly restrictive standard. The charitable purpose of most secular universities is research and education, full stop. Moreover, contemporary endowment practice relies on external managers, making a divestment today more costly to implement than in the past. Under current endowment practice, therefore, even a de minimis divestment, whether from Israel or otherwise, would likely be a fiduciary breach, potentially exposing university trustees to out-of-pocket damages for any resulting loss to the endowment. We also examine current divestment policies and purported prior divestments, including South Africa under apartheid, tobacco, the Darfur war, and fossil fuels. Consistent with our legal analysis, but contrary to conventional wisdom, we find that universities have generally not engaged in broad divestments, not even from South Africa under apartheid. Instead, most large university endowments adhere to a narrow divestment policy for "moral abhorrence" that has rarely been invoked. We show that a divestment for moral abhorrence could pass fiduciary muster as consistent with the public benefit principle of charity law if supported by a clear public policy established by confirmatory governmental actions.

Keywords: divestment, endowment, prudent investor rule, loyalty, South Africa, Darfur, Fossil Fuels, fiduciary, Yale Model, charity, charitable purpose, public benefit, academic dissociation, endowment divestment

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We show that under prevailing law endowment divestment for nonfinancial reasons is permissible only if: (1) the divestment is consistent with the university's charitable purpose of research and education, and (2) the divestment's effect on the portfolio is reasonable in light of that purpose. Applied to the current state of university endowment management, this is a highly restrictive standard. The charitable purpose of most secular universities is research and education, full stop. Moreover, contemporary endowment practice relies on external managers, making a divestment today more costly to implement than in the past. Under current endowment practice, therefore, even a de minimis divestment, whether from Israel or otherwise, would likely be a fiduciary breach, potentially exposing university trustees to out-of-pocket damages for any resulting loss to the endowment.

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Table of Contents

Introduction

The brutal conflict between Hamas and Israel convulsed higher education.[1] Student protests and encampments roiled many university campuses.[2] A common demand of the protestors was for "divestment" from Israel. University leadership has largely resisted such demands on grounds of fiduciary obligation, institutional neutrality on political and social questions (i.e., refusing to "speak with the endowment"), or both.[3] In response, protestors invoked as contrary precedents earlier instances in which universities appeared to speak on social issues by divesting from South Africa under apartheid, tobacco, the Darfur war, and fossil fuels.[4] University constituencies, including faculty, students, and alumni, are deeply divided on the merits of divestment and justifiably confused about applicable law and policy.

This is no small fight. Aggregate university endowment value is nearly $1 trillion.[5] These funds are highly concentrated among a small number of schools. Although there are over 4,000 institutions of higher education,[6] the 25 largest university endowments account for nearly half of all endowment assets, and the top 120 account for almost 75 percent of the total.[7] The endowments of these universities provide critical financial support and stability. Indeed, the financial importance of endowments has grown,

[1] *See, e.g.*, Theo Baker, The War at Stanford, The Atlantic (Mar. 26, 2024), https://www.theatlantic.com/ideas/archive/2024/03/stanford-israel-gaza-hamas/677864/ [perma.cc/7BHP-4ADE] (detailing tensions on Stanford campus, including the use of racially charged language against Jewish students); Stephen Carter, College Is All About Curiosity. And That Requires Free Speech, N.Y. Times Mag. (Jan. 24, 2024), https://www.nytimes.com/2024/01/24/magazine/college-free-speech.html ("I have served happily as a professor at Yale for most of my adult life, but in my four-plus decades at the mast, I have never seen campuses roiled as they're roiling today.").

[2] *See* Robert Kelchen & Marc Novicoff, Are Gaza Protests Happening Mostly at Elite Colleges?, Wash. Monthly (June 23, 2024), https://washingtonmonthly.com/2024/05/24/are-gaza-protests-happening-mostly-at-elite-colleges/ [https://perma.cc/377N-MRW8] (finding that both encampments are protests "are overwhelmingly an elite college phenomenon," not a public-private distinction, based on a database on public protests and disruptions).

[3] *See infra* note __.

[4] *See, e.g.*., Presidential Task Force on Combating Anti-Muslim, Anti-Arab, and Anti-Palestinian Bias, Harv. Univ., at 51 (Apr. 29, 2025), [https://perma.cc/VVV9-7FCK] ("Moreover, students pointed to what they understood to be Harvard's historical precedent of divesting from certain industries and companies for non-financial reasons, such as ethical, social, or political considerations."); Harvard's Endowment and Financial (In)justice, Harv. Crimson, Apr. 27, 2025, at 2 [https://perma.cc/VQ29-JBXM] (anonymous mock student newspaper distributed by student activists pointing to Palestine-related divestment as "modeled after the successful movement to end South African apartheid"); As it Happened: More Than 1,000 Stage Walkout at Harvard Commencement Ceremony, Harv. Crimson, May 23, 2024, [https://perma.cc/UMG6-68AF] (recounting how student activists distributed pamphlets at Harvard's commencement including a timeline of Harvard's past divestments from controversial investments).

[5] *See* Nat'l Center for Educ. Stat., Table 333.90. Endowment funds of the 120 degree-granting postsecondary institutions with the largest endowments, by rank order: Fiscal year 2021, Digest of Educ. Stat. (2022), https://nces.ed.gov/programs/digest/d22/tables/dt22_333.90.asp [https://perma.cc/WP2G-PBDK] (data as of end of fiscal-year 2021).

[6] Id.

[7] Id.

especially at private universities, for which endowments fund an average of 11 percent of university operations as of 2024.[8] The payouts for the 29 largest university endowments (over $5 billion) cover 17.6 percent of their operating expenses, and the payouts for the next largest 115 endowments ($1 billion to $5 billion) cover 18.9 percent of their operating expenses.[9] The most vociferous demands for divestment have been at these elite schools, both public and private.[10] The trustees at these schools bear commensurately large risk. In addition to the risk to their own reputations, these trustees face personal out-of-pocket liability for damages if they approve a divestment contrary to applicable fiduciary law.[11]

Despite the high stakes, confusion over the law, finance, and history of university divestment abounds, even among sophisticated actors. For example, former Harvard President Lawrence Bacow progressed in the span of just six months from asserting that fossil fuel divestment would be a breach of fiduciary duty (March 2021) to claiming it was a fiduciary obligation (September 2021).[12]

Even the scope of what is meant by "divestment" is unclear. For simplicity, we will refer to the use of a nonfinancial factor in investing an endowment as a *divestment*. Demands by students and others for a university to consider nonfinancial factors typically take the form of calls to avoid investment in a particular firm, industry, or country on moral or ethical grounds (i.e., to "divest" from such an investment).[13] But nonfinancial factors can also skew the portfolio in favor of a nonfinancial purpose, a strategy that is sometimes called "impact investing." Because portfolio allocation is a zero-sum enterprise, there is no distinction in law or economics between a positive or negative skew. We will use the term *divestment* to refer to any reliance on a nonfinancial factor in managing a university's endowment.

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[8] Nat'l Assoc. Coll. & Univ. Bus. Officers, The NACUBO Endowment Study: A 50-Year Retrospective, NACUBO, at 5 (2024), [https://perma.cc/7MHC-3T4H].

[9] 2024 NACUBO-Commonfund Study of Endowments 44 (on file with authors).

[10] *See* Kelchen & Novicoff, *supra* note 2.

[11] *See infra* Part II.B.

[12] *Compare* Kelsey J. Griffin & Kevin A. Simauchi, Divest Harvard Meets With Mass. Attorney General's Office Over Complaint Against University, Harv. Crimson, (May 4, 2021), https://www.thecrimson.com/article/2021/5/4/divest-meets-healeys-office/[https://perma.cc/9T8D-85XK] ("University President Lawrence S. Bacow defended Harvard's fossil fuel investments in a March 18 interview, stating he believes the holdings are 'consistent with our charitable mission as well as our fiduciary obligations.'"), *with* Jasper G. Goodman & Kelsey J. Griffin, Harvard Will Move to Divest its Endowment from Fossil Fuels, Harv. Crimson (Sep. 10, 2021), https://www.thecrimson.com/article/2021/9/10/divest-declares-victory/ [https://perma.cc/2CL2-AYJK] (quoting Bacow: "Given the need to decarbonize the economy and our responsibility as fiduciaries to make long-term investment decisions that support our teaching and research mission, we do not believe such investments are prudent.").

[13] *See, e.g.*, Osama Alkhawaja, Anti-BDS Laws and the Politics of Political Boycotts, 26 U. Pa. J.L. & Soc. Change 211, 215–16 (2023) (discussing the Boycott, Divestment, and Sanctions Movement's calls for endowment divestment); Neil Gunningham, Divestment, Nonstate Governance, and Climate Change, 39 Law & Pol'y 309, 310 (2017) (discussing the fossil free divestment movement's "primary strategy" to encourage endowment divestment).

At the same time, we recognize that sometimes a call for "divestment" might refer to prohibiting the university's research or educational activities from contact with an objectionable firm, industry, or country.[14] For clarity, we will refer to this practice as *academic dissociation*, to differentiate it from endowment divestment. The current divestment protests appear to be aimed primarily at endowment divestment, but there have also been calls for academic dissociation.[15]

The goal of this paper is to synthesize the fiduciary principles surrounding the question of university (or other charitable nonprofit) endowment divestment. We also consider the fiduciary principles applicable to academic dissociation. These fiduciary principles are the law's answer to the agency costs inherent to the structure of a university or other charitable organization.[16]

Our primary contribution is to show that endowment divestment for nonfinancial reasons is permissible under applicable fiduciary principles only if two conditions are both satisfied: (1) the divestment is consistent with the university's research and educational purpose that qualify it as a charitable nonprofit, and (2) the divestment's effect on the endowment portfolio as a whole is reasonable in light of that purpose. Divestment for a reason outside of the university's charitable research and educational purpose may be disloyal, ultra vires, or both. Even if a divestment is within the university's research and educational purpose, it must still be prudent, which entails a balancing of the costs to the endowment portfolio with the anticipated benefits from the divestment. Such a balancing includes comparison against alternative means within the university's program to achieve those benefits. A useful heuristic is to ask whether a direct distribution of university funds for the same purpose would have been permissible. If so, the divestment could plausibly satisfy the duties of loyalty and care.

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14 *See, e.g.*, Student Statement in Solidarity with Palestinian Liberation, Nat'l Students for Just. in Pal. (May 18, 2021), https://www.nationalsjp.org/statement-12 [https://perma.cc/96CP-NEDB] (demanding "an end to university partnerships" and "institutional relationships"); Amanda Chu and Andrew Jack, Princeton Reverses Ban on Fossil Fuel Companies Funding Research, Fin. Times (Oct. 8 2024), https://www.ft.com/content/6aeabbf1-bfbe-4dbe-86be-ccc476578add (noting criticism of Princeton's decision to stop dissociating its research from fossil fuel company funding).

15 *See, e.g.*, Proposal for Princeton University's Divestment and Dissociation from Israel's Violations of International Law and Human Rights, Princeton Israeli Apartheid Divest 4 (June 2024) ("Princeton University divested and dissociated from South Africa in 1987 and Darfur in 2006, citing human rights violations, and from fossil fuels in 2022, citing companies' disinformation; the University must do the same in response to Israel's conflicts with values of human rights and trust-seeking scholarship."), available at https://perma.cc/NQW6-7PGX; Jack Perry, RISD protesters demand divestment saying, 'We will not bend an inch'; vow stay in building, Providence J. (May 8, 2024), available at https://perma.cc/8EDF-SU7K (demanding that the RISD university president "[commit] to a holistic divestment from companies, corporations and institutions that are implicated in sustaining Israeli Apartheid"); Open Letter From SJP to American Universities, Nat'l Students for Just. in Pal. (April 21, 2024), https://www.nationalsjp.org/statement-17 [https://perma.cc/6DR4-TZFM] (urging universities "[t]o completely divest our tuition dollars from—and to cut all institutional ties to—the Zionist entity as well as all companies complicit in the colonization of Palestine").

16 *See, e.g.*, Jonathan Klick & Robert H. Sitkoff, Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off, 108 Colum. L. Rev. 749, 781–82 (2008).

Endowment divestment, in other words, is an act of fiduciary discretion subject to a meaningful fiduciary review derived from trust law. Investing solely for prudent risk and return, by contrast, is practically speaking a fiduciary safe harbor. Moreover, the law grants universities much greater deference in implementing their academic programs, which are reviewed under more relaxed fiduciary standards derived from corporate law. The applicable legal structure thus pushes universities toward addressing social issues in the context of their academic rather than investment programs.

Our analysis also makes four secondary contributions. *First*, as best we can given the fragmentary public record, we clarify past divestment practices by recovering the lost history of what in fact transpired in the purported divestment precedents of South Africa under apartheid, tobacco, and the Darfur war.[17] What emerges from our excavation of the history of university divestment is a significant difference between perception and reality. In general, and consistent with our analysis of the applicable fiduciary principles, American universities for the most part have not engaged in broad or costly divestments. To the contrary, it appears that only one of the twenty-five largest endowments implemented a complete divestment from South Africa, divestments from Darfur involved only a handful of firms (and thus were likely de minimis), and only five endowments undertook a significant divestment from tobacco (and four of the five have since reversed course). For the most part, universities have adhered to the fiduciary principles canvassed below, although a few divestments likely involved fiduciary breach. For example, Harvard appears to have divested from tobacco in the 1990s at the direction of its president, Derek Bok, who on his own telling was heeding the suggestion of his spouse, implementing her advice later that day without further fiduciary analysis.[18]

Second, because the applicable fiduciary principles are so heavily dependent on context, we provide a foundational overview of university governance, the structure of university endowments, and the evolution of endowment management. This overview includes the rise of the "Yale Model," which emphasizes illiquid investments and outside managers. The shift from internal managers who picked individual publicly traded investments to external managers and illiquid investments has increased the administrative and portfolio costs of a divestment. In today's endowment practice, a divestment constraint would tend to reduce the pool of available managers, reduce diversification, and impede the use of low-cost index funds.

A further complication is that what in common parlance is called an "endowment" is in law a mix of two types of funds. One is unrestricted funds that the university has chosen to set aside. In the law of charities, these funds are called the "quasi-endowment" or "unrestricted endowment." The unrestricted endowment may be spent at the university's discretion on any purpose within the university's charitable mission. The

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[17] *See infra* Part III.A.

[18] *See infra* notes 312-313 and text accompanying.

other is funds that trace to gifts restricted by their donors to a prescribed timeframe or to support a more specific purpose within the university's charitable mission, such as academic chairs or student scholarships. In the technical legal jargon, these restricted funds are the "endowment."[19]

To avoid confusion, we will follow the vernacular and use the term "endowment" to refer to a university's combined pool of unrestricted and restricted endowment funds. We will refer to "restricted" and "unrestricted" endowment funds when we need to distinguish between them. The main relevance of the distinction is that a typical university holds its unrestricted and restricted endowment funds subject to different fiduciary duties of loyalty. Most universities are organized as nonprofit corporations, in which capacity they hold unrestricted endowment funds and to which a less rigorous corporate "best interests" duty of loyalty applies. By contrast, restricted gifts to a university are generally held by the university in trust with the university as trustee,[20] and trust law imposes a stricter "sole interest" duty of loyalty.[21] A typical university endowment is thus a pooling of unrestricted and restricted endowment funds subject to differing corporate and trust law loyalty rules.[22]

Third, we canvass the current divestment policies, stated or inferred from conduct, of the 25 largest university endowments. We find that most disclaim divestment, either categorically or with a narrow exception for "morally abhorrent" circumstances. The divestment policies that contain a moral abhorrence exception tend to emphasize the rarity of such circumstances, and some call for consideration of the likely effectiveness of a divestment in achieving its social purpose.

We conclude that a divestment for moral abhorrence could pass fiduciary muster as consistent with the public benefit principle of charity law if supported by a clear public policy. Establishing such a public policy, however, would typically require external validation by well-defined social consensus, such as governmental actions, rather than just the viewpoint of a vocal university constituency or vague allusions to avoiding reputational harm. For example, federal and state actions encouraged divestment during the Darfur war, and South African Apartheid was likewise subject to legislative action and near-universal condemnation.[23]

Fourth, we examine the handful of contemporary divestments from fossil fuels and current calls for divestment from Israel. With respect to fossil fuels, we find that not more

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[19] *See infra* Part I.D.2.

[20] *See infra* notes 59-60 and text accompanying.

[21] *See infra* Part II.C.1.

[22] *Cf.* Kenneth L. Karst, The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility, 73 Harv. L. Rev. 433, 435 (1960) ("At present in this area there is no unified law of charities. Rather there is a branch of trust law applicable to charitable trustees, and an entirely separate set of rules governing officers and directors of incorporated charities.").

[23] *See infra* Part III.C.1 and 3.

than three of the top 25 university endowments have openly and broadly divested from fossil fuels for nonfinancial reasons.[24] We conclude that these three are likely in breach of both the duty of loyalty and the duty of care. Several other universities in the top 25 claim that they have divested from "direct" ownership in fossil fuels companies, are winding down their private fossil fuels investments, or have divested from specific forms of fossil fuels, mainly thermal coal or tar sands oil. This group typically asserts that their limited divestments are taken for sound financial reasons as well as to fight climate change. These claims are muddled and therefore difficult to assess from the outside. A lurking irony is that several schools that claim to have divested from "direct" holdings in fossil fuels or to be winding down their private investments, including Harvard and Dartmouth, reportedly operate dirtier-than-typical fossil fuel energy plants for campus heat or electricity.[25] Under a strict fossil fuel divestment policy, these universities could not invest in themselves.

With respect to Israel, we show that such a divestment is unlikely to pass fiduciary muster whatever one's beliefs about the facts on the ground in Gaza.[26] To begin with, a secular university will have difficulty fitting such a divestment within its research and educational charitable purpose, particularly if it maintains (as is typical) broad contacts and investments across the world, including in China and petrol-states in the middle east. Moreover, in contrast to South Africa and Darfur, ongoing federal and state government support of Israel—including statutes that specifically discourage divestment from Israel—undermine the claim that divestment would be consistent with the public benefit principle of charity law. Finally, effectuating such a divestment would likely entail excluding large sectors of the economy, lowering risk-adjusted returns and increasing costs. Even a minor divestment, such as from a few firms that sell arms to Israel, could result in significant administrative costs given contemporary reliance on external managers of pooled funds.

* * *

Unique among the questions of free speech, academic freedom, and institutional neutrality made salient by the recent protests and encampments, the question of university endowment divestment is subject to a misunderstood fiduciary law constraint. Accordingly, setting aside these other fraught matters, our focus is on understanding the fiduciary principles applicable to endowment divestment.[27] Given the growing statutory

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[24] *See infra* Part III.C.1.

[25] Tim McLaughlin & M.B. Pell, U.S. Colleges Talk Green. But They Have a Dirty Secret, Reuters (Feb. 11, 2022), https://www.reuters.com/investigates/special-report/usa-pollution-universities/ ("Harvard. Dartmouth. NYU. UNC. These and other American colleges stress their green credentials. They also use some of the dirtiest fuels to power their campuses – and crank out carbon dioxide or smog-forming gases at higher rates than the typical commercial power plant.").

[26] *See infra* Part III.C.2.

[27] We offer our normative views on the prudential soundness of divestment elsewhere. *See* Max M. Schanzenbach & Robert H. Sitkoff, University Trustees Should Say No to Divestment, ___ Geo. Mason L Rev. (forthcoming 2026).

and caselaw recognition of donor standing, plus the political salience of university endowment divestment and so attention of state attorneys general and dissenting board members, an enforcement action for an improper divestment is hardly farfetched.

The remainder of this paper is organized as follows. Part I reviews the governance and endowment structure of a typical university, including the charitable purpose of most universities and the evolution from direct to indirect investment in endowment management. Part II provides an overview of the relevant fiduciary principles, which include a host of relatively strict rules for endowment divestment derived from trust law and more relaxed rules derived from corporate law for academic dissociation. Part III canvasses historic university divestment practices, recovering the lost history of what in fact transpired in the purported divestment precedents as well as the rise of formal divestment policies across the last 15 years. It also assesses the fiduciary issues that pertain to the current calls for divestment from fossil fuels and Israel, emphasizing the barriers of fidelity to charitable purpose and the prevailing practice of externalized management. A short conclusion follows.

I. Charities, Universities, and Endowments

A. What is a Charity?

A *charity* is an organization that operates for one or more *charitable purposes*. The list of what qualifies as a charitable purpose, which derives from a codification by the English Parliament more than 400 years ago,[28] is "the relief of poverty; the advancement of knowledge or education; the advancement of religion; the promotion of health, governmental or municipal purposes; and other purposes that are beneficial to the community."[29] Because the "fundamental distinction" between a charitable organization and other organizations is the "necessity of a charitable purpose with a public benefit,"[30] the concept of charitable purpose and public benefit is foundational.[31]

In return for the public benefit conferred via its charitable purpose, a charity is granted several legal advantages: (1) a charity can have perpetual existence (a charitable trust, for example, is exempt from the rule against perpetuities[32]); (2) the fiduciary duties of the persons who administer a charity run to the charitable purpose, not to shareholders

[28] The Statute of Charitable Uses Act 1601, 43 Eliz. I, c. 4 (Eng.). On the reception of this statute into American law, see Vidal v. Girard's Executors, 43 U.S. 127, 192–96 (1844).

[29] Restatement of Charitable Nonprofit Organizations § 1.01(b) (Am. Law Inst. 2021) (enumeration removed); *see also* Uniform Trust Code § 405(a) (Unif. Law Comm'n 2000) (similar); Restatement (Third) of Trusts § 28 (Am. Law Inst. 2003) (similar).

[30] Robert H. Sitkoff & Jesse Dukeminier, Wills, Trusts, and Estates 768 (12th ed. 2026).

[31] The very first section of the Restatement of Charitable Nonprofit Organizations, for example, defines "charitable purposes" and ties the meaning of a "charity" to an organization with "exclusively charitable purposes." Restatement of Charitable Nonprofit Organizations § 1.01 (Am. Law Inst. 2021).

[32] Sitkoff & Dukeminier, *supra* note 30, at 769.

or individual beneficiaries;[33] and (3) a charity's revenue is ordinarily exempt from federal and state taxation and donations to the charity are generally entitled to income or transfer tax deductions.[34] As the Supreme Court has observed, these advantages "are justified on the basis that the [charity] confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues."[35]

A charity can be organized as a trust, nonprofit corporation, unincorporated association, or other form.[36] A person who administers a charity is a fiduciary.[37] The ultimate fiduciary responsibility for the charity is normally in the hands of the charity's board of directors (often called a board of trustees).[38] The board's fiduciary duties run to the charitable purpose,[39] giving rise to obvious enforcement difficulties.[40] The state attorney general is the traditional enforcer of charities,[41] though recent law reform has recognized additional parties with standing, as discussed below.[42] This contrasts sharply with a for-profit corporation, in which the board's fiduciary duties run to the corporation, with direct or derivative enforcement by its shareholders,[43] and a personal trust, in which the trustee's fiduciary duties run to and are enforceable by the beneficiaries.[44]

B. Universities as Charitable Organizations

Universities are some of the largest and most complex charities today. Their purpose falls comfortably within the venerable charitable purpose of benefiting the public via "the advancement of knowledge and education."[45] But within that purpose they carry

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33 *See infra* Part II.A.

34 Although the tax law definition of "charity" is subtly different from that under state law, "[t]he vast majority of nonprofit organizations enjoy both federal and state income tax exemption." Restatement of Charitable Nonprofit Organizations § 1.01 cmts. i-j (Am. Law Inst. 2021).

35 Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983).

36 *See* Restatement of Charitable Nonprofit Organizations § 1.02 (Am. Law Inst. 2021).

37 *See* id. § 2.01.

38 *See* id. § 2.05.

39 *See, e.g.*, id. ("A board … has a duty to adopt policies to advance the purposes of the charity … and oversee implementation of those policies."); Restatement (Third) of Trusts § 78 (Am. Law Inst. 2007) (providing that a trustee of a charitable trust "has a duty to administer the trust . . . solely in furtherance of its charitable purpose").

40 *See infra* Part II.A.

41 *See* Restatement of Charitable Nonprofit Organizations § 5.01 cmts. a-b (Am. Law Inst. 2021).

42 *See infra* Part II.A.

43 *See, e.g.*, Restatement of Corporate Governance § 5.01 (Am. Law Inst., Tentative Draft No. 1, 2022) ("A director or officer has a duty to act in the good-faith belief that such actions are in the best interests of the corporation."); Stephen Bainbridge, Corporate Law §§ 8.1-8.2 (discussing enforcement of directors' duties to the corporation by shareholder direct and derivative suits).

44 *See, e.g.*, Restatement (Third) of Trusts § 78 (Am. Law Inst. 2007) (providing that "a trustee has a duty to administer the trust solely in the interest of the beneficiaries"); id. § 94 (recognizing beneficiary standing to enforce a trust).

45 Restatement of Charitable Nonprofit Organizations § 1.01(b)(2) (Am. Law Inst. 2021).

out an astonishingly diverse program. They educate students across hundreds of fields; maintain athletic programs; support research across an array of substantive fields; maintain professional schools in law, medicine, and otherwise; and some run large hospital systems.

Most universities are organized as nonprofit corporations. Today a nonprofit corporation is easy to form under applicable state law, such as the Model Nonprofit Corporation Act (MNCA),[46] a version of which has been adopted in most states.[47] The University of Chicago, for example, was originally incorporated in 1890 and today operates under articles of incorporation last amended in 2010.[48]

Older universities founded prior to the spread of enabling corporate acts in the late 19th century were commonly incorporated by legislative charter.[49] Harvard is the oldest corporation in the Western Hemisphere,[50] having been incorporated by a charter from the Colony of Massachusetts Bay in 1650,[51] which was last amended in 1976.[52] Some universities still operate under their legislative charters. Columbia operates under its charter of 1754 as amended in 1784, 1787, and 1810,[53] and Northwestern operates under its legislative charter of 1851 as amended in 1855, 1861, and 1867.[54] Stanford is something of a hybrid between a trust and corporation, organized under a deed of trust in 1885 but also granted corporate powers by an enabling statute that had been enacted earlier that year.[55]

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[46] *See, e.g.*, Willard L. Boyd III, The New Model Nonprofit Corporation Act, Bus. Law Today (Oct. 16, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-october/the-new-model-nonprofit-corporation-act/ [https://perma.cc/MC7E-JB8L].

[47] *See* Marilyn E. Phelan, Nonprofit Enterprises: Corporations, Trusts, and Associations § 1:11, at 1-31 (2000).

[48] *See* Restated Articles of Incorporation of the University of Chicago (filed Sept. 7, 2010), [https://perma.cc/V55C-C9ZB].

[49] Delaware, the leading corporate jurisdiction, did not have a general enabling corporate statute until 1875. *See* Joel Seligman, A Brief History of Delaware's General Corporation Law of 1899, 1 DEL. J. CORP. L. 249, 249-250 (1976).

[50] *See* Harvard Corporation, Harv. Univ., https://perma.cc/3PBC-UZ47] (noting that "the Harvard Corporation is the oldest corporation in the Western Hemisphere").

[51] *See* Harvard Charter of 1650, Harvard Univ. Libr., (last visited ___) https://guides.library.harvard.edu/c.php?g=880222&p=6323072 [https://perma.cc/DYC3-TQQQ].

[52] *See* The Charter of the President and Fellows of Harvard College [https://perma.cc/6USR-2A6W].

[53] *See* Columbia University, Charters and Statutes (2024) [https://perma.cc/BU29-2GDG].

[54] Northwestern was incorporated in 1851 by an act of the Illinois legislature. The act of incorporation—the charter—uses both trust and corporate terminology, granting "trust" powers to the board of trustees but still characterizing Northwestern as an incorporated entity. *See* An Act to Incorporate the Northwestern University [https://perma.cc/S9WG-TJUF].

[55] *See* Stanford University: The Founding Grant, with Amendments, Legislation, and Court Decrees 2, 31–32 (1987) [https://perma.cc/PYV2-QL3B] (describing Stanford's founding and the legislation "under which universities might be founded, endowed, and maintained in California through an ordinary deed of trust").

Because a typical university operates as a non-profit corporation, on the operational side the board owes corporate-like fiduciary duties to the university's charitable purpose.[56] Even if a university (or other charity) is organized as a nonprofit corporation, however, trust law remains relevant to its endowment management. As we shall see, virtually all states apply the prudent investor rule from trust law to endowment management.[57] Moreover, when a university accepts a restricted gift,[58] as compared to a gift immediately expendable on research or education in general, a charitable trust arises with the university as trustee subject to trust rather than corporate fiduciary principles. The Restatement (Third) of Trusts explains:

> An outright devise or donation to a … university … to be used for its general purposes[] is charitable but does not create a trust … . A disposition to [a university] for a specific purpose, however, such as to … establish a scholarship fund in a certain field of study, creates a charitable trust of which the institution is the trustee.[59]

Indeed, estate planners sometimes advise clients to make a restricted gift specifically to cause the gift to be subject to the rules governing a charitable trust.[60]

Accordingly, a typical university is subject simultaneously to nonprofit corporation law with respect to its operations and certain aspects of its unrestricted

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[56] *See infra* Part __. Courts have long recognized that a university and its board do not owe fiduciary duties to students except in rare circumstances. In general, the "educational malpractice doctrine" shields a broad range of university decisions from student fiduciary lawsuits; contract law, not charity fiduciary law, is thus at the center of the university-student relationship. *See* William A. Kaplin & Barbara A. Lee, The Law of Higher Education 372 at 597–98, 600–03 (6th ed. 2020) (noting rare exceptions and collecting cases).

[57] *See infra* Part __.

[58] *See, e.g.*, Harvard Law School receives $15 million to launch Emmett Environmental Law Center, HARV. L. TODAY (May 16, 2024), https://hls.harvard.edu/today/harvard-law-school-receives-15-million-to-launch-emmett-environmental-law-center/ [https://perma.cc/LKR3-5FTM] (gift for environmental law to Harvard); UCLA Law philanthropy program receives $8 million from Lowell Milken, CANDID (Jan. 16, 2024), [https://perma.cc/3APE-54E6] (gift for philanthropy law to UCLA).

[59] Restatement (Third) of Trusts § 28 cmt. a (Am. Law Inst. 2003); *see also* George Gleason Bogert et al., Bogert's The Law of Trusts and Trustees § 362 (rev. 2024) ("A gift to a charitable corporation for its general purposes does not create a trust, but if it is restricted to a particular purpose, it does."); Evelyn Brody, *Charity Governance: What's Trust Law Got to Do with It?,* 80 CHI.-KENT. L. REV. 641, 642 (2005) ("When it comes to enforcing restrictions on gifts—even those made to corporate charities—regulators and courts commonly apply charitable trust doctrines.").

The trust law merger doctrine does not apply to a charitable trust held by a charity for the benefit of its charitable purpose. *See* Restatement of Charitable Nonprofit Organizations § 1.02 cmt. b (Am. Law Inst. 2021) ("In addition, the merger rule in trust law, under which there is no valid trust if the trustee and the beneficiary are the same, does not apply under charity law. Thus, a charitable organization may serve as trustee of a trust of which it is also the named beneficiary, the rationale being that the beneficiaries of the trust are the indefinite beneficiaries of that charity.").

[60] *See* Nancy A. McLaughlin & Jeff Thede, Restricted Charitable Gifts: Practical Suggestions, ACTEC Found., (Sep. 2024), https://actecfoundation.org/podcasts/restricted-charitable-gifts/ [https://perma.cc/7SRX-3F8U] (Under common law, "restricted charitable gifts were treated as charitable trusts . . . . So consider making restricted gifts in trust.").

endowment, and to charitable trust law with respect to other aspects of its unrestricted endowment and its entire restricted endowment. We will return to the ramifications of this fiduciary duality later.[61] For now, it is enough to observe that the fiduciary lodestar in either case is fidelity to the university's charitable purpose. The question thus arises, what is the charitable purpose of a university?

C. The Charitable Purpose of a University

A charity's organizational documents—typically the charter or articles of incorporation, gift agreement, or trust instrument—is the main source for discerning the charity's charitable purpose.[62] Charities with federal tax-exempt status also declare their charitable purpose on their annual tax return, Form 990, the "Return of Organization Exempt from Income Tax." These statements, submitted to the IRS under penalty of perjury, confirm that the organization has a charitable purpose consistent with its tax-exempt status.

1. Organizational Documents

The key organizational document for a university is its charter or articles of incorporation. In contrast to a for-profit corporation, for which the articles of incorporation tend to allow for "any lawful purpose,"[63] university charters or articles of incorporation almost always state a narrowed purpose of research and education.[64]

For example, the charter for Princeton states that its purpose is "the conduct of a university not for profit," including "the promotion, advancement, evaluation and dissemination of learning by instruction, study and research."[65] The articles of incorporation for the University of Chicago state that its purpose is "higher education," including "to establish and maintain one or more colleges, … to provide instruction in all collegiate studies," and "to establish and maintain a university."[66] The charter for Duke

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[61] See *infra* Part II.

[62] *See* Restatement of Charitable Nonprofit Organizations § 3.01 cmt. c (Am. Law Inst. 2021) (observing that "state attorneys general and courts look to the organizational documents to identify a charity's purpose"); Restatement of Charitable Nonprofit Organizations § 3.01 cmt. e (Am. Law Inst. 2021) (following "the traditional common-law approach that treats a charity's existing unrestricted assets—including unrestricted gifts, earned and investment income, and other assets—as restricted to the charity's purpose at the time the assets were acquired").

[63] *See* Jill Fisch & Stephen Davidoff Solomon, Should Corporations Have a Purpose?, 99 Texas L. Rev. 1309, 1315–18 (2021) (discussing a few modern for-profit corporations with limited purposes).

[64] The MNCA and other nonprofit corporation acts are enabling statutes that, like the business corporation acts, authorize a nonprofit corporation to have "the purpose of engaging in any lawful activity *unless a more limited purpose is set forth in the articles of incorporation*." Model Nonprofit Corp. Act § 3.01(a) (Am. Bar Ass'n, 3d ed. 2008) (emphasis added).

[65] The Trustees of Princeton University Charter 5-6 (1963), available at https://perma.cc/BHK5-B99A.

[66] Restated Articles of Incorporation of the University of Chicago (filed Sept. 7, 2010), [https://perma.cc/V55C-C9ZB].

states that its purpose is to "maintain and perpetuate an institution of higher learning or other institutions of learning and all properties, facilities and services necessary or appropriate in connection therewith."[67] The charter for Northwestern prescribes that its trustees "shall hold the property of said institution solely for the purposes of education."[68] The charter Georgetown states that its purpose is for "a college for the instruction of youth in the liberal arts and sciences."[69]

This practice of prescribing in a university's charter the purpose of maintaining a college or university for research and education traces back to the earliest legislative charters. Harvard's original charter in 1650 formed a corporation to administer the "school or college" that had been created by earlier legislation in 1636.[70] Yale's original charter of 1701 states that its purpose was to form "a Collegiate School … wherein Youth may be instructed in the Arts & Sciences."[71] Columbia's original charter in 1754 provided for a "Body Corporate to erect and maintain a college … for the Instruction and Education of Youth in the Learned Languages and Liberal Arts and Sciences."[72] Likewise, Stanford's founding deed of trust from 1885 prescribes a purpose of creating "a University for both sexes, with the Colleges, Schools, Seminaries of Learning, Mechanical Institutes, Museums, Galleries of Art, and all other things necessary and appropriate to a University of high degree."[73]

2. Federal Tax Returns (Form 990)

Federal law requires "that tax-exempt organizations with gross receipts or total assets above certain thresholds annually disclose their assets, expenses, and governance structures" via Form 990, the "Return of Organization Exempt from Income Tax."[74] Form 990 has become the "primary tool for gathering information about tax-exempt organizations."[75] These returns, which are publicly available, require the nonprofit to state

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[67] Amended and Restated Charter of Duke University, Duke Univ. Bd. of Trs., https://trustees.duke.edu/amended-and-restated-charter-duke-university/ [https://perma.cc/GGX5-L74F].

[68] An Act to Incorporate the Northwestern University [https://perma.cc/S9WG-TJUF].

[69] Charter of the University, Georgetown Univ. Governance (last visited ___), https://governance.georgetown.edu/charter/[https://perma.cc/V792-SQXH].

[70] Harvard Charter of 1650, Harvard Univ. Libr. (last visited ___), https://guides.library.harvard.edu/c.php?g=880222&p=6323072 [https://perma.cc/DYC3-TQQQ] (the spelling in the 1636 legislative allocation was "schoale or colledge").

[71] The Yale Corporation, Charter and Legislation 4 (1976), [https://perma.cc/L2SC-XSHJ].

[72] Columbia University, Charters and Statutes 3 (2024), [https://perma.cc/BU29-2GDG].

[73] Stanford University: The Founding Grant, with Amendments, Legislation, and Court Decrees 3 (1987) [https://perma.cc/PYV2-QL3B].

[74] Sitkoff & Dukeminier, *supra* note 30, at 808.

[75] IRS, Form 990 Resources and Tools [https://perma.cc/WR5B-S8NS].

its charitable purpose: "Briefly describe the organization's mission or most significant activities."[76]

Here, too, universities almost always state a research and educational purpose. Some, like Northwestern, are pithy: "[e]ducation and research."[77] Others, like Columbia, are prolix:

> Columbia University is one of the world's most important centers of research and at the same time a distinctive and distinguished learning environment for undergraduates and graduate students in many scholarly and professional fields. The University recognizes the importance of its location in New York City and seeks to link its research and teaching to the vast resources of a great metropolis. It seeks to attract a diverse and international faculty and student body, to support research and teaching on global issues, and to create academic relationships with many countries and regions. It expects all areas of the University to advance knowledge and learning at the highest level and to convey the products of its efforts to the world.[78]

Most universities fall somewhere in between. Harvard states its mission as "undergraduate, graduate, and professional education and research across a broad array of academic domains."[79] Princeton states that it is a "non-sectarian institution of higher education a world renown research institution."[80] Dartmouth says it "educates the most promising students and prepares them for a lifetime of learning and of responsible leadership, through a faculty dedicated to teaching and the creation of knowledge."[81] Cornell reports it purpose as "education, research, medical services and other public services."[82] The University of Chicago says its mission "has been to sustain at the highest level of excellence, the communication of knowledge, the creation of knowledge, and the

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[76] Id. (line 1).

[77] Northwestern University, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/362167817/202531959349301243/full.

[78] Columbia University, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/135598093/202401369349302495/full; *see also* University of Pennsylvania, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/231352685/202541349349311824/full ("The trustees of the University of Pennsylvania (the 'University') sees itself as having a public service mission. In such regard, the University aims to provide a rich and diverse educational environment for its students; to pioneer research that pushes the boundaries of current human knowledge; and to provide the most current and highest quality patient care through the University Health System.").

[79] Harvard University, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/42103580/202531349349307548/full.

[80] Princeton University, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/210634501/202511349349305891/full.

[81] Dartmouth College, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/20222111/202501339349306270/full.

[82] Cornell University, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/150532082/202511339349300031/full.

fostering of a dynamic community of scholars and students."[83] MIT says its mission "is to advance knowledge and educate students in science, technology, and other areas of scholarship that will best serve the nation and the world in the 21st century."[84] Duke says its mission is "to provide a superior liberal education, to prepare future members of the learned professions, to advance the frontiers of knowledge, and to help those who suffer, cure disease, and promote health."[85]

3. Mission and Policy Statements

Universities sometimes publish mission statements or make statements of purpose in student handbooks or online. Such statements provide further evidence of purpose.[86] University handbook and online mission statements almost always state a research and educational purpose. Indeed, a recent sample of such statements from 40 universities concluded that they emphasize a broad educational mission with an emphasis on scholarly community.[87] They typically state no broader social mission distinct from the public benefit arising from research and education.[88] Consistent with these statements, some universities maintain internal policies that limit their ability to support charitable purposes outside their core research and educational mission.[89]

[83] University of Chicago, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/362177139/202541359349309109/full.

[84] MIT, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/42103594/202501359349301830/full.

[85] Duke University, Form 990 (2023), available at https://projects.propublica.org/nonprofits/organizations/560532129/202501359349302225/full.

[86] *See, e.g.,* Thomas Lee Hazen & Lisa Love Hazen, Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties, 14 U. Pa. J. Bus. L. 347, 389 (2012) ("Many charitable nonprofits have a limited mission statement and, if so, this would bear upon the board's duty . . . with respect to [the charitable] mission.").

[87] Max M. Schanzenbach & Kimberly Yuracko, What is the University-Student Contract?, 65 Ariz. L. Rev. 965, 970–81 (describing different models of higher education, surveying handbook and mission statements, and concluding that the human capital model of skill acquisition broadly defined best describe the basis of the university-student contract).

[88] The main exceptions are religious institutions. For example, Georgetown's statement of purpose flows from its "identity as a student-centered research university rooted in the Jesuit and Catholic tradition." 2019-2020 Undergraduate Bulletin 1, https://perma.cc/H6D6-ND4U. Yeshiva University is a "Jewish institution for higher education" and is "[r]ooted in Jewish thought and tradition . . . advancing the moral and material betterment of the Jewish community and broader society, in the service of God." Mission and History, Yeshiva Coll., https://www.yu.edu/yeshiva-college/about. Only a few nonsectarian institutions state a broader social purpose. For example, Oberlin College in Ohio says that it "shares an enduring commitment to a sustainable and just society." Mission and Values, Oberlin Coll. & Conservatory, https://www.oberlin.edu/about-oberlin/mission-and-values.

[89] For example, citing its status as a "not-for-profit, tax-exempt institution, chartered to fulfill certain educational, research, and public service missions," Princeton University authorizes only de minimis contributions to other charities that are "scholarly" in nature ($500), as memorials for employees ($100), or through its religious life center. Any other donations require approval by a high-level university officer. *See* Charitable Donations by University Policy, Princeton Univ. Finance, (July 1, 2016, last updated October 1, 2025) https://finance.princeton.edu/policies/charitable-donations-university-policy.

4. Charitable Purpose, Public Benefit, and Public Policy

A charity may change its purpose only if it has authorization to do so in its organizational documents or with court approval, such as under the *cy pres* doctrine.[90] If a charity is administering a gift held as trustee, it must likewise adhere to the terms of the trust or obtain a court order—for example, under the *cy pres* doctrine.[91] Even without a formal change in purpose, however, there may be room for a charitable fiduciary to invoke public policy in understanding of the scope of the charity's charitable purpose. As the Supreme Court has explained, a charitable organization "must serve a public purpose and not be contrary to established public policy."[92]

Probably the best example of a public policy gloss on charitable purpose is in the handful of cases that have authorized charities, including universities, to disregard race, gender, or religious limitations on restricted funds.[93] In some of those cases, the court approved a charity's refusal to adhere to the discriminatory term even though the term was otherwise enforceable, that is, the term was neither illegal under state or federal law nor literally inconsistent with the charity's stated charitable purpose.[94] Instead, those provisions were held to "be inconsistent with the nature of charitable purposes,"[95] that is, inconsistent with "the public benefit principle that is at the core of the charitable purpose doctrine."[96]

For example, even though accepting a bequest limited to "American born, Protestant, Gentile boys" was not literally inconsistent with a research and educational charitable purpose, Amherst College was allowed to keep the bequest but disregard the discriminatory limit.[97] In another case, Rice University was allowed to admit nonwhite students, contrary to the terms of its founding trust instrument.[98] In these and other such cases, courts allowed charitable fiduciaries to bring within their organization's charitable purpose the public policy against discrimination that had been expressed in state and federal statutes and other governmental actions.[99]

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[90] *See, e.g.,* Restatement of Charitable Nonprofit Organizations §§ 3.01–02 (Am. Law Inst. 2021).

[91] *See, e.g.*, Restatement (Third) of Trusts § 76(1) (Am. Law Inst. 2007) (duty to administer a trust "in accordance with the terms of the trust and applicable law").

[92] Bob Jones Univ. v. United States, 461 U.S. 574, 575 (1983).

[93] *See* Austin Wakeman Scott, Mark L. Ascher & William Franklin Fratcher, Scott and Ascher on Trusts § 39.5.5 (6th ed. 2024) (canvassing cases).

[94] *See id.* (collecting cases on "[w]hether, in the case of an enforceable restriction that the trustees are unwilling to enforce, the court will permit the trustees thus to disregard the terms of the trust and, if so, whether, as a result, cy pres is available to save the trust").

[95] Restatement (Third) of Trusts § 28 cmt. f (Am. Law Inst. 2003).

[96] Sitkoff & Dukeminier, *supra* note 30, at 784; *see also* Thomas P. Gallanis, Is Racial Discrimination Ever Charitable?, 2 Ill. L. Rev. Online 146 (2025).

[97] *See* Howard Sav. Inst. Of Newark, N.J. v. Peep, 34 N.J. 494, 515–17 (1961).

[98] *See* Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 285–87 (Tex. App. 1966).

[99] Sitkoff & Dukeminier, *supra* note 30, at 784.

The potential for charitable fiduciaries to gloss their organization's charitable purpose by reference to public policy is narrow, however, and dependent on external government actions that confirm the relevant public policy. For example, in upholding an IRS rule that private schools that discriminated on the basis of race could not qualify as charitable under the federal tax code, the Supreme Court cautioned that courts must "approach these questions with full awareness that determinations of public benefit and public policy are sensitive matters with serious implications for the institutions affected."[100] In upholding the IRS rule in that case, the Court emphasized that "[o]ver the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."[101] That context was crucial to the Court's conclusion that "there can be no doubt that [racial discrimination] is contrary to a fundamental public policy," and thus contrary to the public benefit principle that defines charitable purpose.[102]

D. University Governance and Endowment Management

1. Academic Operations Versus Endowment Management

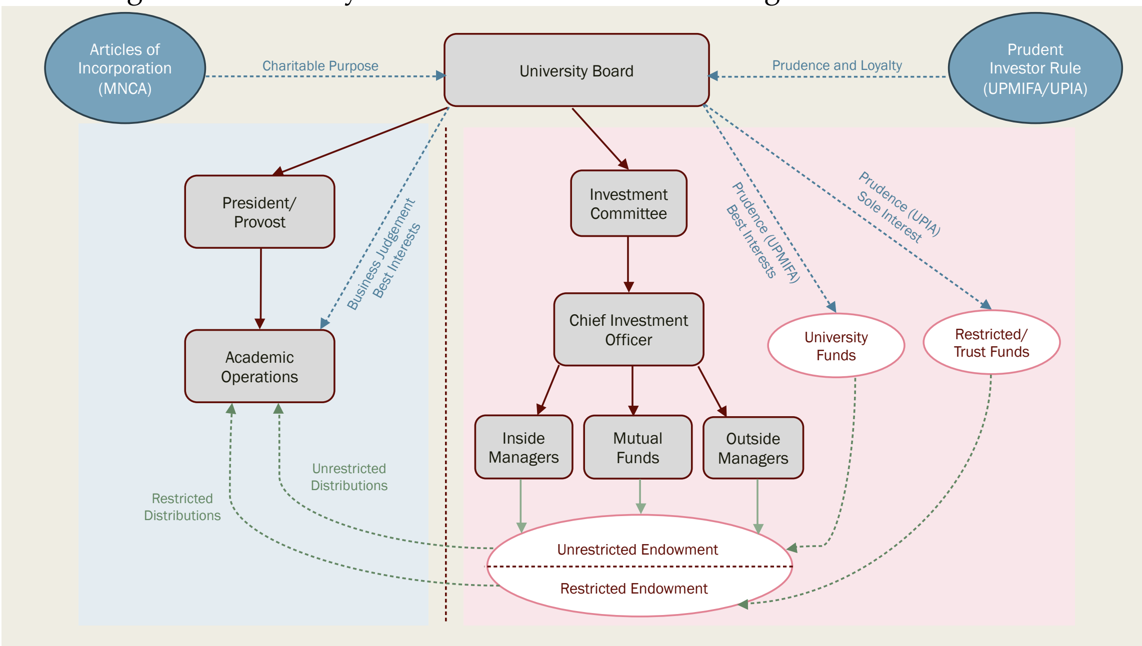
A typical university effectively has two governance structures: one for its academic operations, and another for its endowment. Each is subject to different bodies of law that prescribe different fiduciary standards. At the top of both is the university board, which is ultimately responsible in a fiduciary capacity for the university's academic operations and endowment management. The resulting complicated scheme is illustrated by Figure 1.

[100] Bob Jones Univ. v. United States, 461 U.S. 574, 592–93 (1983).

[101] Id.

[102] Id.

Figure 1: University Academic and Endowment Organizational Structure



In its academic operations, the typical university is a corporation with limited powers. The charter or articles of incorporation create the university and state its research and educational purpose. The board of trustees appoints the university's senior executives, typically a president (the chief executive officer) and a provost (the chief operating officer). These executives and subordinate appointees manage the academic operations of the university (the left side of Figure 1, shaded blue) subject to deferential corporate fiduciary standards of business judgement (care) and best interests (loyalty), as elaborated below in Part II. This governance structure traces back to the colonial period, and is distinct from the traditional English model, which emphasized faculty governance.[103]

The right side of Figure 1 (shaded pink) shows a typical governance structure for a university endowment. The board hires a chief investment officer, who reports not to the president but to the board or an investment subcommittee of the board.[104] The president of the university, despite being a common focus of student anger over

[103] *See* John R. Thelin, A History of American Higher Education 66 (2019) ("[C]olonial colleges had taken the Oxford-Cambridge corporate structure and turned it inside out"); *id.* at 39-42 (describing the basic president-board structure of colonial institutions and concluding that this innovation "is a legacy of the colonial colleges that has defined and shaped higher education in the United States to this day").

[104] For example, the University of California's investment policy statement provides, "Although the management of investment portfolios may be outsourced, investment oversight and risk management are primary fiduciary duties of the Board that are delegated to and performed by the Chief Investment Officer." University of California General Endowment Pool Investment Policy Statement, at 6 (amended July 15, 2025), https://regents.universityofcalifornia.edu/policies/6102.pdf.

divestment, often has no direct authority over the endowment's management.[105] The chief investment officer, aided by his or her staff, implements an investment program, which may involve direct investment overseen by inside managers, indirect investment via investment funds or outside managers, or some combination of the two.

2. What is an Endowment?

A university's "endowment" comprises those assets that are held by the university primarily for investment purposes, a portion of which is spent annually to support the charitable mission of the university. For example, money from a donor set aside to fund a scholarship in perpetuity is part of the endowment. By contrast, a university-owned classroom building, while an asset of the university, is not held primarily for investment purposes. Assets held primarily for programmatic purposes are not part of the endowment.[106]

A university's "endowment"—that is, its assets held primarily for investment purposes—is in law a mix of two types of funds. One is unrestricted funds that the university has chosen to set aside. In the law of charities, these funds are called the "quasi-endowment" or "unrestricted endowment." The unrestricted endowment may be spent immediately on any purpose within the university's charitable mission. The other funds are the "restricted endowment." These funds trace to gifts restricted by their donors to a prescribed timeframe or to support a more specific purpose within the university's charitable mission, such as academic chairs or student scholarships. In the technical legal jargon, only these restricted funds are the "endowment."[107]

To achieve economies of scale, most obviously by minimizing costs and maximizing investment opportunities, the typical university pools its unrestricted and restricted endowments, investing that pooled fund as a collective whole known colloquially as the "endowment." To account for the interests of the unrestricted endowment and the various gifts comprising the restricted endowment, each are

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[105] Some universities have created separate entities to manage their endowments. For example, Duke University transferred their endowment to a separate legal entity, the Duke Asset Management Company, which manages the Duke University endowment, Duke's defined benefit pension plan, the Duke University Medical System endowment, as well as the Duke Charitable Trust (of which Duke University is the primary beneficiary). See https://dumac.duke.edu/ [https://perma.cc/9G2W-KU24].

[106] *See, e.g.*, Uniform Prudent Management of Institutional Funds Act § 2(2), (5), (7) (defining an "endowment" to mean assets held "primarily for investment," and a "program-related asset" to mean "an asset held … primarily to accomplish a charitable purpose of the institution"); Restatement of Charitable Nonprofit Organizations § 2.04 cmt. c (Am. Law Inst. 2021) (discussing endowment versus program-related assets).

[107] *See* Restatement of Charitable Nonprofit Organizations § 2.04 cmt. a (Am. Law Inst. 2021) (explaining differences in law between a "true endowment" and a "quasi-endowment" or a "board designated endowment" and providing that "[a]ny assets that are not subject to externally imposed restrictions do not constitute a true endowment."); Unif. Prudent Mgmt. Institutional Funds Act § 2(2), (5), (7) (Unif. Law Comm'n 2006) (defining "endowment fund" as an "institutional fund" that "under the terms of a gift instrument[] is not wholly expendable by the institution on a current basis").

allocated shares in the pooled investment fund. Thus, each constituent part of the endowment writ large is invested identically as if it were a singular, cohesive "endowment."[108]

Because the restricted endowment reflects a pooling of various restricted gifts, it can be quite complex. Harvard, for example, reports that its endowment pools over 14,000 separate restricted gifts.[109] In a recent survey by the National Association of College and University Business Officers, 658 responding institutions with $873 billion in total endowment assets reported that, on average, 71 percent of their total endowments comprised restricted funds.[110] They also reported that about 90 percent of gifts received in 2023 were restricted.[111]

3. Why an Endowment? Prevailing Theories

A restricted gift gives rise to a charitable trust with the university as trustee. To repeat the words of the Restatement quoted above: "A disposition to [a university] for a specific purpose … creates a charitable trust of which the institution is the trustee."[112] In accordance with trust fiduciary law, therefore, after a university accepts such a gift, it must apply that gift only to its restricted purpose. A trustee is under a duty "to administer the trust … in accordance with the terms of the trust and applicable law."[113]

Unrestricted endowment funds, by contrast, are funds that are freely and immediately expendable but nonetheless set aside by the university in its discretion. The question why universities create unrestricted endowment funds—that is, why universities choose to set aside unrestricted funds as though they were restricted—has been explored by scholars across the years.[114] The literature offers several theories, which are not mutually exclusive. One is that an unrestricted endowment supports intergenerational equity by forcing boards to safeguard resources for future generations

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[108] Such pooling for economies of scale is a familiar practice explicitly authorized by Uniform Prudent Management of Institutional Funds Act § 3(d) (Unif. Law Comm'n 2006) and accommodated by prevailing trust law. *See, e.g.*, Uniform Trust Code § 810(d) (Unif. Law Comm'n 2000) ("If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts."); Restatement (Third) of Trusts § 84 cmt. c (Am. Law Inst. 2007) (similar).

[109] *See* Harvard's Endowment, Harv. Univ., https://finance.harvard.edu/endowment [https://perma.cc/REW2-GDK8] ("over 14,000 individual funds invested as a single entity.").

[110] 2024 NACUBO-Commonfund Study of Endowments, *supra* note 9, at 4. By way of further illustration, Stanford's "merged pool" is 16 percent "assets the University has elected to treat as long-term funds" (i.e., unrestricted endowment), 74 percent "endowment" (i.e., restricted endowment), and 9 percent hospital funds. Our Mission, Stanford Management Company, https://smc.stanford.edu/our-mission/ [https://perma.cc/Y962-3TW7]. Harvard reports that 80% of its endowment is "restricted to particular purposes." Harvard University, Financial Report: Fiscal Year 2024, [https://perma.cc/SC3S-ZDQ8].

[111] 2024 NACUBO-Commonfund Study of Endowments, *supra* note 9, at 75 fig 7.1s.

[112] Restatement (Third) of Trusts § 28 cmt. a (Am. Law Inst. 2003).

[113] Id. § 76(1).

[114] *See* Henry Hansman, Why Do Universities Have Endowments?, 19 J. Leg. Stud. 3, 29–32 (1990).

against present overspending.[115] On this view, an unrestricted endowment protects the university's long-run mission by creating a pool of resources to be redeployed as needs evolve. Another theory is that an unrestricted endowment protects the university's independence, insulating it against short-run political pressures.[116] Still another theory is that an unrestricted endowment allows for consumption smoothing, enabling the university to carry out its mission without excessive disruption from especially good or bad times and regardless of borrowing costs.[117]

An important implication of each of these theories is that the endowment, whether restricted or unrestricted, should hedge against risks to the university's academic operations over the long run. Given the high fixed costs borne by universities, such long-term management is critical to help universities weather hard times.[118] Similar considerations likely motivate donors' preferences for restricted giving, with the additional benefit of protecting the gift from (what the donor might consider to be) meddling by university boards or others.

4. The Rise of the "Yale Model"

Endowment management was a sleepy backwater in the 1970s. Universities typically maintained conservative portfolios of directly held publicly traded stocks and bonds.[119] In the mid-1980s, however, the so-called Yale Model of endowment management, developed by Yale University's endowment manager David Swenson, sparked a gradual but dramatic structural change in endowment management practices.[120]

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[115] James Tobin, What Is Permanent Endowment Income?, 64 Am. Econ. Rev. 427, 427 (1974).

[116] *See* id. at 429–32 (discussing insulation from government, outside donors, and students to preserve reputational integrity).

[117] *See, e.g.*, Robert C. Merton, Optimal investment strategies for university endowment funds, *in* Studies of Supply and Demand in Higher Education 216 (Charles T. Clotfelter & Michael Rothschild eds., 1993).

[118] There is evidence that universities do not actually consumption smooth or hedge quite as economic theory holds they should, likely owing to agency costs manifesting in reticence to shrink the endowment in the short run even if prudent to do so. *See* Jeffrey R. Brown et al., How University Endowments Respond to Financial Market Shocks: Evidence and Implications, 104 Am. Econ. Rev. 931 (2014) (finding that universities on average spend more from their endowments in good times, but less in bad times).

[119] In the 1970s and 1980s, roughly 30% of endowment assets were invested in fixed income. Nat'l Assoc. Coll. & Univ. Bus. Officers, The NACUBO Endowment Study: A 50-Year Retrospective, NACUBO, at 7 (2024), [https://perma.cc/7MHC-3T4H]. For an infinite time horizon, this would be a rather conservative portfolio.

[120] *See* David F. Swensen, Pioneering Portfolio Management: An Unconventional Approach to Institutional Investment (2008); *see also* Leanna Orr, How the Yale Model Ate Endowments—and Everything Else, Inst. Inv. (July 31, 2019), https://www.institutionalinvestor.com/article/2bswbzylw79gg3hrt3q4g/portfolio/david-swensen-is-great-for-yale-is-he-horrible-for-investing [https://perma.cc/N6UC-KNNJ (providing an overview of the promise and criticisms of the Yale Model).

The Yale Model has three core tenets. *First*, it ties payouts to a rolling average rather than the current value of the endowment.[121] Doing so smooths payouts notwithstanding fluctuations in current endowment value, allowing budgets to adjust slowly to even large shocks. *Second*, it recognizes the endowment's infinite time horizon, reflecting the university's anticipated perpetual existence and that restricted gifts are frequently perpetual. *Third*, it posits a high tolerance for illiquidity and short-run fluctuations in value, thanks to the budget smoothing and infinite time horizon.

In consequence, the Yale Model points toward a greater exposure to equities to take advantage of the equity premium—that is, the historical excess returns to equity over fixed income.[122] The Yale Model also points toward investing outside of public markets in illiquid equity-like investments, or even direct illiquid holdings, in pursuit of an illiquidity premium.[123] These premiums are paid for with risk that the Yale Model posits the endowment, with its long-run focus, can prudently bear. The Yale Model focuses the endowment's active management on non-publicly traded investments while pushing the endowment's publicly traded securities toward index funds.[124]

The Yale Model has been highly influential. Investments in nonmarketable assets are today pervasive in university endowment management.[125] For example, Harvard's endowment directly owned timberlands, farmlands, and even wineries.[126] As of 2023, about 55 percent of university endowment assets were in alternative investments, with

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121 Endowment distributions are usually set at a percentage, typically 4% of the average of several prior years of the endowment's value. *See* NACUBO, Your Endowment Questions Answered (2026), available at https://www.nacubo.org/Topics/Endowment-Management/Your-Endowment-Questions-Answered# (taking 4% spending rule, sometimes averaged over years or quarters, as an example). Some formulas are more complicated. Yale's spending rule, for example, is "equal to 80% of the prior year's spending plus 20% of the long-term spending rate applied to the previous year's beginning endowment market value … adjusted for inflation." Endowment Spending and Distributions, YALE Univ. https://your.yale.edu/policies-procedures/policies/2202-endowment-spending-and-distributions#2202.2.

122 *See* Swenson, *supra* note 120, at 55 ("Sensible investors approach markets with a strong equity bias, since accepting the risk of owning equities rewards long-term investors with higher returns."); *see also* J. Bradford DeLong & Konstantin Magin, The U.S. Equity Return Premium: Past, Present, and Future, 23 J. ECON. PERSP. 193 (2009).

123 *See* Swenson, *supra* note 120, at 83 ("In embracing less liquid assets, investors often identify opportunities to establish positions at meaningful discounts to fair value.").

124 *See* id. at 75 (noting small or nonexistent excess returns to active management in publicly traded securities).

125 *See* 2023 NACUBO-Commonfund Study of Endowments 7 [https://perma.cc/5QHT-5M6X] (adding up marketable alternatives, private equity/venture capital, real assets, and secondaries).

126 *See* Andrew G. Wilshire, An Irresponsible Campaign, Harv. Crimson (Apr. 16, 2024), https://www.thecrimson.com/article/2014/4/16/harvard-irresponsible-campaign/ (defending Harvard's investment in various timberlands); James Comptois, Rally takes aim at Harvard timber investments, PIOnline (Apr. 28, 2014), https://www.pionline.com/article/20140428/PRINT/304289993/rally-takes-aim-at-harvard-timber-investments (discussing a responsible investing petition regarding Harvard's natural resource management); Russell Gold, Harvard Quietly Amasses California Vineyards—and the Water Underneath, Wall St. J. (Dec. 10, 2018), https://www.wsj.com/articles/harvard-quietly-amasses-california-vineyardsand-the-water-underneath-1544456396 (discussing Harvard's foray into owning wineries and water rights in California).

publicly traded equities comprising only 24 percent of the total endowment portfolio.[127] Despite the misgivings of some experts, including Swensen himself, even smaller endowments in the $100 million to $250 million range have significant exposure to alternative investments of around 25 percent.[128]

Since the 1990s, a period that overlaps with a sharp increase in donations to universities,[129] the endowment returns of colleges and universities outperformed benchmarks tied to indices of publicly traded securities, though more recent returns are less impressive.[130] This success has created an increasing reliance of private universities on endowments to fund operations.[131] At the same time, there is growing concern that universities have overcommitted to illiquid and active investment strategies given the current political risks to university budgets and the potential for increased taxation of large endowments.[132] Private equity has lagged behind public market returns recently, leading some managers to question the future of the Yale Model.[133]

5. The Rise of Outside Managers

Another gradual development, which has accelerated in recent years, is increased reliance on outside managers and investment funds. This shift is in part an outgrowth of the Yale Model, as illiquid investments tend to require expertise in active management that internal endowment managers ordinarily do not possess. The internal endowment managers choose outside managers who they believe will be best at chasing returns or

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[127] *See* 2023 NACUBO-Commonfund Study of Endowments, supra note 125, at 29.

[128] *See id.*; Charles D. Ellis, Foreword to Pioneering Portfolio Management xv-xvi (2000) (relaying Swensen's concern that other institutions "might not have the internal staff or the organizational structure and discipline required to sustain commitments through the good and bad markets.").

[129] *See* American Council on Education, Key Issues Facing Higher Education Philanthropy 2, https://www.tiaa.org/public/institute/publication/2019/key-issues-facing-higher-education-philanthropy [https://perma.cc/ZX7A-RJ6G] (reporting a near-tripling in giving between 1971 and 2017 on an inflation-adjusted basis).

[130] *See* Julie Segal, Ivy League Endowment Returns Depended on One Decision: VC or PE?, Inst. Inv. (Feb. 14, 2024) (reporting that the "richest schools" had a 2.1 percent return in 2023 largely because of losses in venture capital, although the ten-year returns beat a 70/30 stock/bond portfolio).

[131] *See supra* notes 8-9 and text accompanying.

[132] *See* Maureen Farrell & Lauren Hirsch, Yale Is Rushing to Sell Billions in Private Equity Investments, N.Y. TIMES (June 10, 2025), https://www.nytimes.com/2025/06/10/business/yale-endowment-private-equity-trump.html (discussing Yale's decision to sell significant illiquid hedge fund investments, though Yale denied that it was wholesale restructuring its endowment model); Juliet Chung, Universities Map Out New Investment Strategies to Deal with Tax Hike on Endowments, Wall St. J. (May 27, 2025), https://www.wsj.com/us-news/education/universities-map-out-new-investment-strategies-to-deal-with-tax-hike-on-endowments-6638385a?st=eX3WCi&reflink=article_imessage_share ("Several endowment chiefs said they might consider moving part of their portfolio to indexes, where they could easily pull money from if their schools need cash, and away from active-trading strategies that could generate tax liabilities.").

[133] Heather Gillers, Yale's Trendsetting Private-Equity Strategy is Getting Harder to Pull Off, Wall St. J. (Aug. 31, 2025), https://www.wsj.com/finance/investing/yales-trendsetting-private-equity-strategy-is-getting-harder-to-pull-off-b06741eb?st=A3N5Cb&reflink=desktopwebshare_permalink, (reporting that private equity returns have lagged public markets recently and questioning whether the Yale Model depends on low interest rates).

managing a unique asset, such as timber or wineries. These outside managers are highly incentivized because many such funds pay a percentage of profits to their managers. As non-employees, they are also easily replaced.

Reliance on outside managers allows the university to reduce the liquidity and diversification costs of holding the non-publicly traded, less liquid part of its portfolio. Outside managers can pool the investments of many investors, allowing the university to take smaller shares of each illiquid investment and tap a larger number of managers than if the university owned and managed the endowment directly. By way of illustration, MIT today employs 200 outside managers,[134] far more than the 80 people who are employed in MIT's investment office.[135] Northwestern has only 12 internal portfolio managers.[136] Even Harvard, which long managed the bulk of its endowment internally, has moved since 2017 toward an outside manager model. Harvard closed its internal stock trading platform and unwound its substantial directly held natural resources portfolio.[137] By way of further illustration, Table 1 below shows the vanishingly small number and amounts of directly held public securities at five of the top endowments: Harvard, Yale, Stanford, Princeton, and MIT.

Table 1: Selected Endowments and Disclosed Public Securities Holdings

University	Endowment Value (FY 2025, billions)*	Number of Public Securities**	Total Value of Public Securities**	Percent of Endowment
Harvard	$56.9	18	$2,104,959,615	3.70
Yale	$44.1	4	$2,054,861	0.0047
Stanford	$40.8	20	$850,746,347	2.09
Princeton	$36.3	3	$7,773	0.00002
MIT	$27.4	10	$920,435,849	3.36

Sources: *Endowment values as of year-end 2025, taken from various sources; **source is the latest 2025 SEC Form 13F-HR filing; Princeton Form 13F-HER as of February 2024. Sources collected, with links, at https://perma.cc/55KQ-7HRF.

All told, a university's internal endowment managers have increasingly become managers of active investment managers or managers of investment funds rather than active investors themselves. Under this model, the role of the inside endowment managers is to understand the endowment portfolio's overall risks, ensure that the

[134] MIT's Environmental, Social, and Governance (ESG) Investment Framework, MITIMCo (last visited Jan. 26, 2025), [https://perma.cc/NQB9-AL4T].

[135] *See* MIT Investment Company Directory, MITIMCo (last visited February 24, 2026) https://mitimco.org/who-we-are/team/directory/ [https://perma.cc/NQB9-AL4T].

[136] *See* Northwestern Investment Office Staff Listing, Nw. (last visited Jan. 26, 2025) https://www.northwestern.edu/investment/about/staff-listing.html#tab-panel2 [https://perma.cc/3FHR-G624].

[137] Harvard University, Financial Report: Fiscal Year 2020, at 9, available at https://finance.harvard.edu/annual-report [https://perma.cc/K4DM-T8CU]; Harvard University, Financial Report: Fiscal Year 2017, at 8–10, available at https://finance.harvard.edu/annual-report [https://perma.cc/7F5U-Y2T7].

portfolio is appropriately balanced across asset classes, manage distributions, and identify outside talent.

II. Applicable Fiduciary Principles

Agency problems are endemic to fiduciary contexts. To contain the agency costs that result from a separation of ownership and control, the law imposes primary fiduciary duties of loyalty and care, which are reinforced by a host of subsidiary fiduciary duties, such as disclosure and recordkeeping.[138] The beneficiary of the fiduciary relationship ordinarily has standing to enforce these obligations on pain of damages and injunctive relief.[139]

But standing is complicated in the case of a charitable organization. The defining characteristic of a charity is that it is for the benefit of a charitable purpose. And a purpose cannot have an economic interest in or legal standing to enforce the duties of the charity's fiduciaries. "In the case of an entity having no owners and established for the benefit of indefinite beneficiaries, who is the principal on whom the law can rely to monitor the agents and enforce the charitable purposes?"[140] The traditional answer has been to rely on enforcement by state attorneys general. But their enforcement incentives are weak and their budgets are limited.[141]

The problem of enforcing the duties of charitable fiduciaries is exacerbated by the lack of protective institutional features that often exist in the for-profit context: votes on major transactions, alienation of shares, buy-out and sale of control provisions; the market for corporate control; and shareholder agreements. In addition, charitable organizations do not typically operate as member-organizations, which means that their boards are self-perpetuating and not subject to electoral discipline.

On the other hand, there are some offsetting features of charities not typically present in the for-profit context. Many charities, including universities, prescribe a particular charitable purpose in their organizational documents, disempowering the board from broader actions. A charity that accepts a restricted gift becomes subject to trust fiduciary law with respect to that gift,[142] and trust law has the strictest loyalty rule of all the fiduciary fields. Moreover, the standard of care for endowment management—the

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138 *See* Robert H. Sitkoff, An Economic Theory of Fiduciary Law, *in* Philosophical Foundations of Fiduciary Law 197, 198-200 (Andrew S. Gold & Paul B. Miller eds., 2014) ("Sitkoff, Fiduciary Law"); Robert H. Sitkoff, Other Fiduciary Duties: Implementing Loyalty and Care, *in* The Oxford Handbook of Fiduciary Law 419 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

139 *See, e.g.*, Restatement (Third) of Trusts § 94(1) (Am. Law Inst. 2012).

140 Evelyn Brody, The Limits of Charity Fiduciary Law, 57 Md. L. Rev. 1400, 1429 (1998).

141 *See* Jonathan Klick & Robert H. Sitkoff, Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off, 108 Colum. L. Rev. 749, 780-83 (2008).

142 *See supra* note 59 and text accompanying.

prudent investor rule from trust fiduciary law—is more rigorous than the corporate duty of care, and it is not softened by business judgment rule deference.

We now consider these issues with respect to endowment divestment and academic dissociation. We begin by reviewing (a) standing to sue; (b) trustee liability; (c) the duty of loyalty (and ultra vires); and (d) the duty of care or prudence. We then apply those principles to (e) endowment divestment and (f) academic disassociation, the latter including the closely related question of a university's accepting or rejecting a gift.

But first we must note an important caveat. Owing to a paucity of caselaw and sporadic enforcement, much of our analysis is derived from first principles as stated in the applicable statutes and canonical secondary authorities such as the Restatement (Third) of Trusts and the Restatement of Charitable Nonprofit Organizations. For some of our analysis, application of these authorities is clear. For a court to decide otherwise would reflect a change in the law. On other matters, application of these authorities is less clear. On these matters we offer our best predictive analysis, acknowledging the uncertainty while recognizing that such uncertainty is itself a fiduciary risk for those tasked with formulating divestment policy.

A. Standing to Sue

Under traditional law, the state attorney general has primary responsibility for enforcing the duties of a charitable fiduciary.[143] Given the one-two punch of resource constraints and the tendency of elected officials to prioritize political considerations, there is widespread belief that charitable supervision by state attorneys general is inadequate.[144] "In the usual case there simply is not enough of a political payoff to the attorney general to warrant the diversion of resources from other initiatives."[145] A familiar refrain is "that 'A.G.' stands not for 'attorney general' but for 'aspiring governor.'"[146] Indeed, when "the attorney general does intervene in response to political pressure, he or she will be tempted to promote his or her political interests at the expense of the … charitable purpose."[147] On the other hand, given the attention to universities in the current political moment, an enforcement action by a state attorney general against a university board for fiduciary breach does not seem farfetched.

[143] *See* Restatement of Charitable Nonprofit Organizations § 5.01 (Am. Law Inst. 2021).

[144] *See, e.g.*, Klick & Sitkoff, *supra* note __, at 781-82; Susan N. Gary, Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law, 21 U. Haw. L. Rev. 593, 622-24 (1999); *see also* Garry W. Jenkins, Incorporation Choice, Uniformity, and the Reform of Nonprofit State Law, 41 Ga. L. Rev. 1113, 1128-30 (2007) (reporting meager resources allocated to charity oversight).

[145] Klick & Sitkoff, *supra* note 141, at 781.

[146] Evelyn Brody, Whose Public? Parochialism and Paternalism in State Charity Law Enforcement, 79 Ind. L.J. 937, 946 (2004).

[147] Klick & Sitkoff, *supra* note 141, at 781-82.

Another potential plaintiff is a dissenting board member. In the current political climate, the possibility of such a suit likewise does not seem farfetched.[148] The MNCA unambiguously includes directors among the list of parties granted standing to bring a derivative action for a nonprofit corporation.[149] This clarity stands in contrast to a for-profit corporation, for which director standing to sue is less settled.[150]

A final category of potential plaintiffs is an individual donor of a restricted gift. Ordinarily a donor to a charitable corporation does not have standing to sue by reason of that donation.[151] However, "today a majority of states allows the settlor of a charitable trust to enforce the trust."[152] And as we have seen, when a university accepts a restricted gift, it takes the gift as trustee of a charitable trust for that purpose.[153] It follows, therefore, that a donor of a restricted gift to a university has standing to sue the university to enforce the terms of the donor's gift, including the associated fiduciary duties of loyalty and care.[154] Here, too, given the recent activism of university alumni, the prospect of an enforcement action—or class action—by a donor against a university is not farfetched.

B. Trustee Liability

Both trust law and corporate law provide for injunctive relief to redress a breach of fiduciary duty.[155] Thus, a state attorney general or other party with standing could obtain an injunction to prevent or unwind an impermissible university endowment divestment or to remove members of the board. Moreover, if a divestment can be shown to have caused a loss (such as by diminished returns or increased costs), there are at least

[148] *See, e.g.*, CBS News, Columbia University Trustee Calls on Board to Comply with Trump Administration Demands, July 10, 2025, available at https://perma.cc/8MWB-C8G6.

[149] MNCA § 502 (a)(2), (b).

[150] *Compare* Principles of Corp. Governance: Analysis & Recommendations § 7.02(c) ("A director of a corporation has standing to commence and maintain a derivative action unless the court finds that the director is unable to represent fairly and adequately the interests of the shareholders."), *and* N.Y. BUS. CORP. LAW §§ 719(a), 720 (providing for director standing for certain fiduciary breaches including mismanagement of assets), *with* Model Bus. Corp. Act § 7.41 (2016 Revision) (granting derivative standing only to shareholders), *and* Schoon v. Smith, 953 A.2d 196, 210 (Del. 2008) (allowing director standing only to avoid a "complete failure of justice").

[151] *See* Restatement of Charitable Nonprofit Organizations §§ 6.03 cmt. a, 6.04 cmt. a (Am. Law Inst. 2021).

[152] Sitkoff & Dukeminier, *supra* note __, at 795; *see also* Unif. Tr. Code § 405(c) (Unif. Law Comm'n 2000); Restatement (Third) of Trusts § 94(2) (Am. Law Inst. 2012).

[153] *See supra* note 59 and text accompanying.

[154] *Compare* Smithers v. St. Luke's-Roosevelt Hosp. Ctr., 723 N.Y.S.2d 426 (App. Div. 2001) (recognizing standing for a donor of a restricted gift), *with* Courtenay C. and Lucy Patten Davis Found. v. Colo. State Univ., 320 P.3d 1115 (Wyo. 2014) (denying standing for a donor of a gift subject to a memorandum of agreement); *see also* Nancy A. McLaughlin, Donor Standing to Enforce Charitable Gifts in the 21st Century, 60 Real Prop. Tr. and Est. L.J. 207, 211 (2025) (noting that "the trend is in favor of granting donors and certain others standing, although this trend is occurring in a haphazard way").

[155] *See, e.g.*, Unif. Tr. Code § 1001(b)(1)-(2) (Unif. Law Comm'n 2000); Model Nonprofit Corporation Act § 809 (director removal by judicial action); id. § 830 cmt. (implying transaction may be enjoined for fiduciary breach); id. § 870 cmt. (permitting "injunction, disgorgement or the imposition of a constructive trust in favor of the corporation" for breach of loyalty).

two potential paths toward imposing individual, personal liability on the university's trustees. These arguments, which sound variously in (1) trust law and (2) corporate law, are colorable but uncertain.

1. Trust Law

The first path toward imposing liability on a university's trustees is under trust law, which applies to the restricted endowment. As we have seen, when a university accepts a restricted gift, it takes that gift as trustee of a charitable trust for that purpose.[156] Under prevailing trust law, the trustee of a trust is liable for damages (called "surcharge," in the jargon) in "the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered."[157] Accordingly, if a divestment of the restricted endowment could be shown to be improper and to have caused a financial loss, the university could be surcharged for those losses. Such an order might require the university to use its unrestricted endowment to make the restricted endowment whole, constraining the university going forward by increasing the ratio of restricted to unrestricted funds.

Prevailing trust law also provides that if a trustee is a corporate entity, as most universities are, then an officer or director of that entity who participates in a breach of trust by the entity is herself jointly and severally liable with the entity. In the words of the leading treatise: "Any director or officer who knowingly causes the corporation to commit a breach of trust that results in a loss to a trust administered by the corporation is personally liable to the trust beneficiaries."[158] It follows, therefore, that a university trustee who approves an impermissible divestment that causes a financial loss to the restricted endowment could be held personally liable for that loss jointly and severally with the university.

The analysis is complicated, however, by a provision in the MNCA (if adopted in the relevant state). In its current form, the MNCA provides that a "director is not a trustee with respect to the nonprofit corporation or with respect to any property held or administered by the corporation, including property that may be subject to restrictions imposed by the donor or transferor of the property."[159] The official commentary says that this provision is meant to insulate a director of a nonprofit from liability "for a breach of trust by improperly using, disposing of, or otherwise dealing with assets held by the

[156] *See supra* note 59 and text accompanying.

[157] Restatement (Third) of Trusts § 100(a) (Am. Law Inst. 2012); *see also* Unif. Tr. Code § 1002(a)(1) (Unif. Law Comm'n 2000) (similar).

[158] Scott and Ascher on Trusts § 30.6.3 (6th ed. Supp. 2025). The rule is not limited to banks or trust companies. *See* id. ("Other cases have imposed liability on directors or officers of corporations that held property in trust and committed breaches of trust, although the corporations were not in the business of administering trusts.").

[159] MNCA § 830(f).

corporation in trust," provided that the director satisfied the director's corporate fiduciary duties.[160]

The words of the operative statutory text, however, are not as broad as the gloss given to them by the comment.[161] The text says only that a "director is not a trustee," not that a director cannot be held liable for a breach of trust under a theory other than direct trusteeship. An officer or director of a corporate trustee who participates in the entity's breach of trust is herself liable not by reason of being the trustee (manifestly, she is not the trustee), but rather by reason of "participating in the breach of trust."[162] There is a straightforward textual argument, therefore, that this provision does not override the trust law principle that holds officers and directors of a corporate trustee liable for participating in the entity's breach of trust. We are aware of no relevant caselaw.

2. Corporate Law

The second path toward imposing liability on a university's trustees is under corporate law. Conceptually, if a divestment could be shown to be improper and to have caused a financial loss, the trustees could be liable in a derivative suit for that loss. Practically, however, this theory collides with the mandatory exoneration provisions for uncompensated directors that are often included in nonprofit corporation acts.[163] The MNCA, for example, provides that an uncompensated director is not liable for money damages to the corporation as director except for criminal acts, intentional harm, improper compensation, or impermissible distributions.[164] Other statutes exempt bad faith, reckless, willful, and grossly negligent conduct from exoneration.[165]

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160 MNCA § 830 cmt. 7 (2016).

161 We acknowledge that a state legislature enacts the operative text with the backdrop of its commentary, giving that commentary persuasive authority. *Cf.* Gregory A. Elinson & Robert H. Sitkoff, When a Statute Comes with a User Manual: Reconciling Textualism and Uniform Acts, 71 Emory L.J. 1073 (2022).

162 Scott and Ascher on Trusts § 30.6.3 (6th ed. Supp. 2025).

163 University board members are generally uncompensated. *See* LaMont Jones, Jr., What College Trustees Are and Why They Matter, U.S. News and World Report (Nov. 16, 2023) (university trustees "serve without pay"), available at https://www.usnews.com/education/articles/what-college-trustees-are-and-why-they-matter [https://perma.cc/PQH9-FMBD].

164 MNCA §§ 831(d), 832 (2016). State for-profit corporation codes often allow for the exoneration of directors by a provision in their articles of incorporation. For example, the MBCA permits broad exoneration for monetary damages, carving out some exceptions such as for criminal conduct, intentional harm, or taking improper financial benefits. MBCA § 2.02(b)(4) (2024). Delaware allows more limited exoneration, excepting conduct that is bad faith, willful, or involves breaches of loyalty. Del. Gen. Corp. L. § 102(b)(7).

165 *See, e.g.*, 805 ILCS 105/108.70 ("No director or officer serving without compensation … shall be liable … unless the act or omission involved willful or wanton conduct."); Thomas Lee Hazen & Lisa Love Hazen, *Punctilios and Nonprofit Corporate Governance – A Comprehensive Look at Nonprofit Directors' Fiduciary Duties*, 14. U. PA. J. BUS. L. 347, 412-413 (2012) (collecting statutes, finding widespread adoption of gross negligence, willful, and reckless standard in non-MNCA states). Federal law imposes a gross negligence and willful misconduct standard for volunteer directors. *See* Volunteer Protection Act of 1997, 42 U.S.C. §§ 14501-14505; *see also* Jill R. Horwitz & Joseph Mead, Letting Good Deeds Go Unpunished: Volunteer Immunity Laws and Tort Deterrence, 6 J. Empirical Legal Stud. 585 (2009).

Yet such exoneration is not ubiquitous and has much nuance. New York's statute, which exonerates except for gross negligence and intentional harm, does not apply if the action is brought by the attorney general.[166] California's exoneration provision is similar to New York's but adds the requirement that directors obtain liability insurance coverage in amounts linked to the nonprofit's revenues.[167] Pennsylvania does not mandate exoneration of nonprofit directors, uncompensated or otherwise, but allows for a bylaw provision of indemnification of directors for conduct that does not constitute "self-dealing, willful misconduct or recklessness," similar to its for-profit statute.[168]

The viability of a corporate law derivative suit for imposing personal liability on a university trustee is thus uncertain on two margins. The first is whether the applicable state statute provides exoneration for a director of a nonprofit corporation. The second is whether, given the typicality of exoneration and indemnification provisions, the facts of the particular (by hypothesis improper) divestment take it outside the scope of that provision. For example, a divestment that breaches the duty of loyalty, is ultra vires, or was undertaken in the teeth of legal or financial advice to the contrary could potentially constitute bad faith, gross negligence, willfulness, or recklessness depending on the specific facts. Moreover, an improper divestment that reduces the value of the endowment is conceptually akin to an impermissible in-kind distribution, and the MNCA explicitly excludes impermissible distributions from exoneration.[169] As with the trust law theory of director liability, we are aware of little caselaw directly addressing these questions.[170]

C. The Duty of Loyalty (and Ultra Vires)[171]

Roughly speaking, the fiduciary duty of loyalty comes in two flavors: the *sole interest rule*, which applies under trust law, and the *best interest standard*, which applies

[166] N.Y. Not-For Profit Corp. Law § 720-a.

[167] *See* Cal. Corp. Code §§ 5047.5(e), 5239(a)(4) (2025); *see also* Attorney General's Guide for Charities: Best Practices for Nonprofits that Operate or Fundraise in California (2023) at 57-58 available at https://www.oag.ca.gov/system/files/media/Guide%20for%20Charities.pdf (explaining various sections of the California Corporate Code and how it limits or expands liability for volunteer directors of nonprofits).

[168] *Compare* 15 Pa. Cons. Stat. Ann. § 5713 (2022) (nonprofit), *with* 15 Pa. Cons. Stat. Ann. § 513 (2022) (for-profit).

[169] *See* MNCA § 832 (2016).

[170] In Off. Comm. of Unsecured Creditors ex rel. Est. of Lemington Home for the Aged v. Baldwin, No. 10cv800, 2013 WL 2158543 at 6-7 (W.D. Pa., May 17, 2013), the trial court upheld a jury verdict under Pennsylvania law against the board of a nonprofit nursing home in favor of creditors suing in the right of the corporation. Even though a bylaw exonerated the directors except for actions that "constituted self-dealing, willful misconduct, or recklessness," the court concluded there was sufficient evidence that the board had acted "recklessly" by knowingly hiring unqualified officers and failing to supervise or remove them. The Third Circuit affirmed on director liability without addressing the issue of exoneration (a punitive damages award was set aside). *See* In re Lemington Home for the Aged, 777 F.3d 620 (3d Cir. 2015).

[171] Portions of this section are adapted from Max M. Schanzenbach & Robert H. Sitkoff, Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee, 72 Stan. L. Rev. 381, 400-403, 420-22 (2020).

under corporate law. Accordingly, the content of the duty of loyalty applicable to endowment management turns on whether corporate law or trust law applies.[172] There is also a lurking third rail, the *ultra vires doctrine*. That doctrine, largely moribund in for-profit corporate law, still has significant bite in the charitable context. As we have seen, most secular universities prescribe a research and educational purpose, which narrows the powers of the corporation and its board. Acting outside the scope of those powers (i.e., an ultra vires action) carries with it similar remedial consequences to a breach of loyalty.

1. Sole Interest Rule

Because a university holds its restricted endowment as trustee,[173] the trust law duty of loyalty applies to the university's investment management of its restricted endowment. Under the trust law "sole interest" rule, a trustee must "administer the trust *solely* in the interest of the beneficiaries."[174] In the case of a charitable trust, the trustee must act "*solely* in furtherance of [the trust's] *charitable purpose*."[175] A trustee may not "be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust."[176]

The trust law sole interest rule is implemented by a "no-further-inquiry rule" under which "no further inquiry" is made after a showing of a conflict.[177] There is no de minimis exception or best interests defense. Acting with a mixed motive triggers "an irrebuttable presumption of wrongdoing,"[178] full stop. The sole interest rule is prohibitory rather than regulatory on prophylactic grounds. The rule is meant to induce trustees to refrain from conflicted actions or to disclose any conflict and obtain authorization from the beneficiaries or the court.[179]

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[172] The Uniform Prudent Management of Institutional Funds Act (UPMIFA), discussed below in Part II.C., preserved this distinction. *See* UPMIFA § 3(b); § 3 cmt. b (reporting that despite concerns, the Drafting Committee concluded that a unified standard was unnecessary and "the duty of loyalty under nonprofit corporation law will apply to charities organized as nonprofit corporations, and the duty of loyalty under trust law will apply to charitable trusts.").

[173] *See supra* note 59 and text accompanying.

[174] Restatement (Third) of Trusts § 78(1) (Am. Law Inst. 2007) (emphasis added); *see also* Unif. Tr. Code § 802(a) (Unif. Law Comm'n 2000) (substantively same).

[175] Id. § 78 (emphasis added).

[176] Restatement (Third) of Trusts § 78(1) cmt. f. (Am. Law Inst. 2007).

[177] *See* Robert H. Sitkoff, Fiduciary Principles in Trust Law, *in* The Oxford Handbook of Fiduciary Law 41, 44-45 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

[178] Daniel Fischel & John H. Langbein, ERISA's Fundamental Contradiction: The Exclusive Benefit Rule, 55 U. CHI. L. REV. 1105, 1114-15 (1988).

[179] *See* Restatement (Third) of Trusts § 78 cmt. b (Am. Law. Inst. 2007) ("This policy of strict prohibition also provides a reasonable circumstantial assurance (except as waived by the settlor or an affected beneficiary) that beneficiaries will not be deprived of a trustee's disinterested and objective judgment.").

Under blackletter trust law, therefore, a trustee of a charitable trust violates the duty of loyalty if the trustee has any motive or rationale for undertaking an action other than furthering the trust's charitable purpose. It follows that a trustee of a charitable trust who divests from a particular firm or industry because she finds the firm's business or the industry distasteful—or to "curry favor"[180] with her friends, family, or others who find it distasteful—is in breach of the duty of loyalty.

2. Best Interest Standard

By contrast, under the "best interest" standard, which is typical of corporate law (including a charity organized as a corporation), a fiduciary is not categorically prohibited from acting with a conflict of interest, but rather must act in the "best interest" of the corporation notwithstanding the conflict.[181] The best interest standard is commonly implemented by way of an "entire fairness" test that is sometimes expressed as requiring fair price and fair dealing.[182] Because a university holds its unrestricted endowment as corporate funds, the best interest standard applies to the university's investment management of its unrestricted endowment.[183]

Corporate law's best interest standard reflects a policy judgment that, in the corporate context, a conflicted action will be in the best interests of the corporation with sufficient frequency that a regulatory rather than prohibitory rule is welfare maximizing. Under the best interest standard, a de minimis cost to the corporation can still be fair and so permissible. Thus, under the best interest standard a board that divests from a firm or industry because the board members find the business distasteful—or to curry favor with friends, family, or others who find it distasteful—could argue in defense that the divestment's cost was de minimis.

3. Ultra Vires and Charitable Purpose

Whether acting in a trustee or corporate capacity, the board of a charity may act only within the powers granted to it. An often-repeated aphorism holds that every fiduciary action is "twice tested," first for power, and then second for duty.[184] A fiduciary

[180] Matter of Rothko's Est., 372 N.E.2d 291, 294 (N.Y. 1977).

[181] *See* Julian Velasco, Fiduciary Principles in Corporate Law, *in* The Oxford Handbook of Fiduciary Law 61, 66-69 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

[182] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983); *see also* Andrew S. Gold, The Fiduciary Duty of Loyalty, *in* The Oxford Handbook of Fiduciary Law 385, 388-89 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

[183] A similar best interests standard applies to a trustee if the terms of the trust waive the otherwise applicable sole interest rule. In such circumstances, the trustee is subject to "especially careful scrutiny," Restatement (Third) of Trusts § 37 cmt. f(1) (Am. Law Inst. 2007), of whether she acted "fairly, in good faith, and in the interest of the beneficiaries." Id. § 78 cmt. c.

[184] *See, e.g.*, A.A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049 (1931) ("[I]n every case, corporate action must be twice tested: first, by the technical rules having to do with the existence and proper exercise of the power; second, by equitable rules somewhat analogous to those which apply in favor

must act within the fiduciary's powers, and the action must be consistent with the fiduciary's duties. This principle, which applies to both trusts and corporations,[185] gives rise to two "conceptually distinct allegations of breach of trust: (a) the trustee lacked the *power* to act as she did, or (b) the trustee's act, even if within her powers, was a breach of *duty*."[186] A fiduciary act beyond the powers granted to the fiduciary is *ultra vires*, remediable by injunctive relief as well as surcharge to make the trust or corporation whole for any resulting losses.[187]

There is an academic debate over whether ultra vires acts are their own category of breach or are more properly classified as a breach of the duty of loyalty.[188] In theory, an act could be ultra vires—that is, beyond the scope of the fiduciary's powers—without involving a conflict of interest.[189] For our purposes, the classification does not matter because the available remedies, including injunctive relief and surcharge, does not turn on the classification.

D. The Duty of Care or Prudence

We divide our discussion of the duty of care or prudence into two parts: (1) the *endowment management*, and (2) the *charitable program*. Different rules apply to each. Endowment management is subject to trust law's prudent investor rule, a meaningful standard that is rooted in modern portfolio theory and applies across fiduciary investment contexts. By contrast, programmatic decisions are generally reviewed under a highly deferential care standard derived from corporate law.

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of a *cestui que trust* to the trustee's exercise of wide powers granted to him in the instrument making him a fiduciary.").

[185] *See, e.g.*, Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971) (corporate law: "inequitable action does not become permissible simply because it is legally possible"); Paradee v. Paradee, 2010 WL 3959604, at *11 (Del. Ch. 2010) (trust law: "Sterling's power to make the Trust Loan does not answer the separate question of whether he breached his fiduciary duties by doing so.").

[186] Sitkoff & Dukeminier, supra note __, at 605.

[187] *See, e.g.*, Stephen Bainbridge, Corporation Law and Economics at 59 (2002) ("The responsible officers and directors could be held personally liable for any losses resulting from the [ultra vires] action."); Restatement (Third) of Trusts § 100 (Am. Law Inst. 2012) ("A trustee who commits a breach of trust is chargeable with … the amount required to restore the values of the trust estate and trust distributions to what they would have been if the portion of the trust affected by the breach had been properly administered.").

[188] Leo E. Strine, Jr. et. al., Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law, 98 Geo. L.J. 629, 648-650 (2010) (arguing that it is disloyal for a "director to engage in consciously ultra vires conduct…."); Thomas Lee Hazen & Lisa Love Hazen, Punctilios and Nonprofit Corporate Governance—A Comprehensive Look at Nonprofit Directors' Fiduciary Duties, 14 U. Pa. J. Bus. L. 347, 386–87 (2012) (arguing that there is a duty of obedience to purpose that reflects the ultra vires concept, and this is particularly important in nonprofits).

[189] *See* Shorter Coll. v. Baptist Convention, 614 S.E.2d 37, 41 (Ga. 2005) (concluding that although "the Board fully complied with this standard of conduct, acting in the good faith belief that it was responding to a threat to the accreditation of the College," it lacked the power to undertake its transfer of assets which would have effectively removed some trustees in a manner inconsistent with its charter).

1. Endowment Management[190]

The trust law prudent investor rule applies to charitable endowment management regardless of whether the charity is organized as a charitable trust or a nonprofit corporation.[191] Trust fiduciary law, including the prudent investor rule as codified by the Uniform Prudent Investor Act (UPIA) and enacted in substance in every state,[192] applies directly to charitable trusts.[193] The Uniform Prudent Management of Institutional Funds Act (UPMIFA), enacted in nearly every state,[194] applies the prudent investor rule to nonprofit corporations on terms nearly identical to the UPIA.[195] The trust law prudent investor rule thus applies to the entirety of a university's endowment, restricted and unrestricted.

Under the prudent investor rule, a fiduciary investor must employ "an overall investment strategy having risk and return objectives reasonably suited to the" fiduciary account and, other than in exceptional circumstances, must "diversify the investments."[196] The rule thus points to what in modern portfolio theory is known as an "efficient portfolio," meaning a portfolio that maximizes return for a given level of risk.[197] Put more simply, the rule requires aligning overall risk and return with the terms and purposes of the fiduciary account.[198]

Under the prudent investor rule, "[s]pecific investments or techniques are not per se prudent or imprudent."[199] Instead, a fiduciary "may invest in any kind of property or type of investment," provided that the investment fits within a diversified overall investment strategy with portfolio-level risk and return objectives reasonably suited to the fiduciary account.[200] Canonical authority thus recognizes that a fiduciary may satisfy the duty of prudence through passive strategies, such as buying and holding low-cost

[190] Portions of this section are adapted from Schanzenbach & Sitkoff, supra note __, at 426-29.

[191] On the prudent investor rule, see Max M. Schanzenbach & Robert H. Sitkoff, The Prudent Investor Rule and Market Risk: An Empirical Analysis, 14 J. Empirical Legal Stud. 129 (2017).

[192] The UPIA or a nonuniform statute to similar effect has been enacted in all states. *See* Schanzenbach & Sitkoff, *supra* note 191, at 136, 167-68.

[193] *See* Sitkoff & Dukeminier, supra note __, at 790 ("The fiduciary principles applicable to a private trust apply also to a charitable trust."); Scott and Ascher on Trusts § 37.3.8 ("For the most part, the same principles that govern the investment practices of the trustees of private trusts also govern the investment practices of the trustees of charitable trusts.").

[194] *See* Uniform Law Commission, Prudent Management of Institutional Funds Act, Enactment History, available at https://perma.cc/7SAY-ZCYZ.

[195] *See* UPMIFA § 3.

[196] UNIF. PRUDENT INV. ACT § 2(b), 3; UPMIFA § 3(e)(2), (4) (same); *see also* RESTATEMENT (THIRD) OF TRUSTS § 90(a)-(b) (AM. LAW INST. 2007) (similar).

[197] *See* Schanzenbach & Sitkoff, *supra* note 191, at 134-37; Sitkoff, Fiduciary Principles in Trust Law, *supra* note 191, at 48-49.

[198] See Schanzenbach & Sitkoff, supra note 191, at 136-37.

[199] RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. f(2) (Am. Law Inst. 2003).

[200] UNIF. PRUDENT INV. ACT § 2(b), (e); UPMIFA § 3(e)(3).

index funds,[201] or through active strategies, involving a search for assets that are underpriced or illiquid.[202]

The prudent investor rule has attendant subsidiary duties of cost-sensitivity, ongoing monitoring, and recordkeeping. A fiduciary must balance costs and benefits, incurring only "costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee."[203] Ongoing monitoring applies to both a "trustee's decisions respecting new investments" as well as the trustee's "continuing responsibility for oversight of the suitability of investments already made."[204] Finally, a fiduciary must maintain adequate records, documenting important decisions and the reasons for those decisions.[205] A fiduciary's failure to keep such records would entitle a reviewing court "to resolve doubts against the trustee."[206]

A typical fiduciary investment practice, including that of university endowments, is to prepare an investment policy statement that prescribes investment guidelines such as asset allocation targets, risk tolerance and investment horizon, and overall investment strategy.[207]

2. The Charitable Program

By *charitable program*, we refer to the operational side of a charity—for a university, the academic program depicted by the left side of Figure 1.

As we have seen, the typical university is organized as a nonprofit corporation.[208] And it is now widely accepted that the corporate fiduciary duty of care, including some version of the highly deferential business judgment rule, applies to a charity organized as

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[201] *See* Restatement (Third) of Trusts § 90 cmt. h(2) (Am. Law Inst. 2007) ("Investing in index funds that track major stock exchanges or widely published listings of publicly traded stocks is illustrative of an essentially passive but practical investment alternative to be considered by trustees seeking to include corporate equity in their portfolios.").

[202] *See* id. § 90 cmt. h(2) ("Prudent investment principles also allow the use of more active management strategies by trustees.").

[203] UNIF. PRUDENT INV. ACT § 7; *see also* UPMIFA § 3(c)(1).

[204] UNIF. PRUDENT INV. ACT § 2 cmt. (UNIF. LAW COMM'N 1994); *see also* RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. e(1) (AM. LAW INST. 2007) (noting duty to "make portfolio adjustments if and as appropriate").

[205] *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 83 (AM. LAW INST. 2007).

[206] RESTATEMENT (THIRD) OF TRUSTS § 83 cmt. a(1) (AM. LAW INST. 2007).

[207] *See* Commonfund Institute, The Investment Policy Statement: Guiding and Guarding Nonprofit Endowments at 1-3 (2023) (discussing the importance of creating an investment policy statement, particularly for universities); Sitkoff & Dukeminier, *supra* note __, at 650-51; Schanzenbach & Sitkoff, *supra* note __ at 138-39. For an example, see University of California, General Endowment Pool Investment Policy Statement (2005), available at https://perma.cc/6N3S-973B.

[208] *See supra* Part I.B.

a corporation.[209] "When the business judgment rule is applicable, courts withhold substantive review of a challenged decision by a fiduciary and instead evaluate the adequacy of the fiduciary's decisionmaking process."[210] The business judgment rule thus shields the substance of a board's decision from judicial review if the board followed a rational process and the decision has some rational basis.[211] For that reason, the business judgement rule has been likened to an abstention doctrine.[212]

Accordingly, if a university board's decision in the academic program is not conflicted, the highly deferential corporate law standard of care will normally apply.[213] Such deference is all but a necessity. Subjecting frequent, contestable programmatic decisions to rigorous judicial review could be paralyzing. University boards or their agents set tuition, establish admissions and tenure standards, choose which departments to expand or contract, set budgets, make long-term strategic plans, and so on. Subjecting each such decision to substantive judicial review is impracticable.

There is little caselaw applying the duty of care to a university's programmatic decisions. We are, however, aware of two care cases brought against university boards, both of which resolved in settlements. In 2009, the New Jersey Attorney General agreed to a settlement with the board of the Stevens Institute of Technology, a university operating as a nonprofit corporation, based on allegations of the board's overpaying the university president, excessive borrowing, and process failures.[214] The board agreed to

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[209] *See* Restatement of Charitable Nonprofit Organizations § 2.03 cmts. a & d (Am. Law Inst. 2021); Janssen v. Best & Flanagan, 662 N.W.2d 876, 883 (Minn. 2003) (following "other jurisdictions" in applying the business judgment rule to a nonprofit). The Restatement suggests a somewhat less deferential version of the business judgment rule may be warranted for nonprofits. *See* Restatement of Charitable Nonprofit Organizations § 2.03 cmt. a (Am. Law Inst. 2021). Nonprofits face fewer institutional and market checks on charitable board discretion relative to for-profit corporations, which face shareholder votes, markets for corporate control, and greater market pressures. In all events, we caution that we are speaking only of fiduciary liability, setting aside other matters such as federal and state anti-discrimination laws.

[210] Restatement of Charitable Nonprofit Organizations § 2.03 cmt. d (Am. Law Inst. 2021).

[211] *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (requiring the board to make a decision on an "informed" basis); In re Citigroup Inc. Shareholder Derivative Litig., 964 A.2d 106, 122, (Del. Ch. 2009) (explaining that directors' duty of care "can never appropriately be judicially determined by reference to *the content of the board decision* that leads to a corporate loss, apart from consideration of the good faith *or* rationality of the process employed").

[212] *See* Stephen Bainbridge, The Business Judgment Rule as Abstention Doctrine, 57 Vand. L. Rev. 83 (2004).

[213] We acknowledge that there is a colorable argument that trust law rather than corporate law might apply to the academic program of a university such as Stanford, which arose from a deed of trust. *See supra* note __ and text accompanying. In theory, the trustee of a charitable trust is subject to a more intensive judicial review under trust law duty of care (called "prudence," in trust jargon). Indeed, trust law does not provide for business judgment rule deference. *See* Schanzenbach & Sitkoff, supra note __, at 425. However, Restatement of Charitable Nonprofit Organizations § 2.03 cmt. a (Am. Law Inst. 2021) would apply the corporate law duty of care to all charities without regard for form. And if a trustee is granted extended discretion by the terms of trust, as is a familiar drafting practice, the trust law standard of review becomes one of "abuse of discretion." Restatement (Third) of Trusts § 87 (Am. Law Inst. 2007).

[214] *See* Milgram v. Trs. of Stevens Inst. of Tech. (Complaint, Sep. 17, 2009), available at https://www.nj.gov/oag/newsreleases09/pr20090917a-complaint.pdf.

amend the Institute's bylaws and articles,[215] and the president agreed to step down.[216] In the 1990s, the board of Adelphi University, which operated as a nonprofit corporation, settled with the New York Attorney General after being sued for various breaches of care, including overspending, overcompensation, and poor internal controls.[217] The board members agreed to resign and pay out $1.5 million in damages.[218]

E. Fiduciary Principles and Endowment Divestment

Having canvassed the relevant fiduciary principles, we are now able to apply them to an endowment divestment by a university. As noted at the outset, by "divestment" we refer to the use of a nonfinancial factor in investing an endowment.[219] The paradigmatic divestment is the avoidance of a particular firm, industry, or country on moral or ethical grounds (i.e., to "divest" from such an investment). But nonfinancial factors can also skew an endowment portfolio in favor of a nonfinancial purpose (i.e., "impact investing"). Because there is no distinction in law or economics between a positive or a negative skew (portfolio allocation is zero sum), we treat both within the rubric of "divestment."

The fiduciary analysis for a university endowment divestment turns chiefly on two factors: (1) whether the divestment is consistent with the university's research and educational purposes that qualify it as a charitable nonprofit and is not otherwise conflicted (satisfying the duty of loyalty); and (2) whether the divestment's effect on the portfolio as a whole is reasonable in light of that purpose (satisfying the duty of prudence). A useful heuristic is to ask whether a direct distribution of university funds for the same purpose would have been permissible. If so, the divestment could plausibly satisfy the duties of loyalty and prudence. The Restatement makes this point thus:

> [S]ocial considerations may be taken into account in investing the funds of charitable trusts to the extent the charitable purposes would justify an expenditure of trust funds for the social issue or cause in question or to the extent the

[215] *See* Milgram v. Trs. of Stevens Inst. of Tech. (Final Consent Judgment, Jan. 15, 2010), https://www.nj.gov/oag/newsreleases10/011510-stevens-consent.pdf.

[216] Doug Leiderman, *President Resigns, Stevens Settles with N.J.*, Inside Higher Ed (Jan. 17, 2010) available at https://www.insidehighered.com/news/2010/01/18/president-resigns-stevens-settles-nj.

[217] *See* Courtney Leatherman, *New York Sues to Recover Millions from Adelphi's Ex-Trustees*, Chron. Higher Ed. (Apr. 4, 1997) available at https://www.chronicle.com/article/new-york-sues-to-recover-millions-from-adelphis-ex-trustees/.

[218] *See* Courtney Leatherman, *Ex-Officers of Adelphi U. to Pay Settlement in Long-Running Dispute with College*, Chron. Higher Ed. (Nov. 18, 1998) available at https://www.chronicle.com/article/ex-officers-of-adelphi-u-to-pay-settlement-in-long-running-dispute-with-college/?sra=true.

[219] *See supra* note 13 and text accompanying.

investment decision can be justified on grounds of advancing, financially or operationally, a charitable activity conducted by the trust.[220]

For clarity, we divide our analysis into three parts: (1) the duty of *loyalty* (and the *ultra vires* doctrine); (2) the duty of *prudence*; and (3) the role of *reputation* or *constituency management*.

1. The Duty of Loyalty and Divestment

In applying the duty of loyalty to an endowment divestment, we consider variously a divestment that is: (a) within the research and educational purpose of the university as well as the narrower varied purposes of each of the restricted gifts that comprise the restricted endowment; (b) within the public benefit principle applicable to all charities; or (c) outside the research and educational purpose of the university.

a. *Within the Charitable Purpose: Mission-Related Investing*

By definition, an endowment divestment that falls within the prescribed charitable purpose of a charity, sometimes called "mission-related investing,"[221] is consistent with the duty of loyalty. As implied by the Restatement provision quoted above, such a divestment is conceptually a substitute for direct expenditure.

The key loyalty question for such a divestment is thus factual, not legal—namely, was the divestment in fact within the applicable charitable purpose? For the unrestricted endowment, the answer is yes if the divestment is consistent with the university's research and educational purpose. For a restricted gift, the answer is yes if the divestment is consistent with the narrower research and educational purposes of that restricted gift. However, as we have seen most universities pool all assets held primarily for investment purposes into a single fund so that all restricted gifts (i.e., the restricted endowment) are pooled together along with the unrestricted endowment. For a typical university, therefore, the messy factual problem of establishing consistency with what can be many different specific research and educational purposes afflicts the entire endowment.

By way of illustration, recall that the Harvard endowment pools together its unrestricted endowment and over 14,000 separate restricted funds.[222] For Harvard to justify an endowment divestment as consistent with all applicable charitable purposes,

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[220] Restatement (Third) of Trusts § 90 cmt c. (Am. Law Inst. 2007). The IRS agrees that a charity may give "consideration [to its] charitable purposes … in properly managing and investing the organization's investment assets." IRS Notice 2015-62.

[221] *See* Susan N. Gary, Is It Prudent to Be Responsible? The Legal Rules for Charities That Engage in Socially Responsible Investing and Mission Investing, 6 Nw. J. L. & Soc. Pol'y. 106, 112 (2011) (a mission-related investment "may either yield an investment return similar to investments made without consideration of mission, or the mission-related benefits may outweigh any reduced financial benefits").

[222] *See supra* note 109 and text accompanying.

therefore, it would need to undertake 14,000 separate consistency checks, potentially a burdensome undertaking, in addition to the substantive difficulty of fitting the divestment within 14,000 distinct purposes. Given the myriad purposes contained within a university's restricted endowment, from medical research to student scholarships in classics to faculty chairs in astronomy, establishing that a divestment is consistent with each specific individual purpose is a daunting proposition.

b. *Public Benefit, Public Policy, and Moral Abhorrence*

Alternatively, a university endowment divestment could perhaps satisfy the duty of loyalty if the divestment was based on a clear public policy applicable to all charities through the public benefit principle of charity law.[223] In other words, the divested activity or region is so abhorrent that any charity could divest from it, thus encompassing all the varied restricted gifts held in trust. As discussed above, there is a thin caselaw that recognizes some activity as being "inconsistent with the nature of charitable purposes,"[224] that is, as being inconsistent with "the public benefit principle that is at the core of the charitable purpose doctrine."[225] This caselaw implies the viability of a public policy gloss on the meaning of charitable purpose, albeit the caselaw is modest and appears to be dependent on statutory or other government action for confirmation of the relevant public policy.

Crucially, this theory replaces the need to show consistency with a university's research and educational purpose as well as each individual restricted gift held by the university with the single requirement of consistency with the identified public policy. Indeed, for a university with a substantial restricted endowment consisting of numerous varied and narrower restricted gifts, this theory may be the only feasible path to satisfying the duty of loyalty.

The key question in justifying a divestment on this theory is whether the divestment is supported by a clear public policy, typically confirmed by governmental action, that may be drawn into the organization's charitable purpose via the public benefit principle.[226] As we shall see in greater detail in Part III, slavery, genocide, and apartheid are often suggested as examples. This theory will therefore be highly relevant in analyzing university endowment divestment from South Africa, the Darfur region, and Israel as well as general "moral abhorrence" divestment policies adopted by several of the universities with the largest endowments.[227]

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[223] *See supra* Part I.C.4.

[224] Restatement (Third) of Trusts § 28 cmt. f (Am. Law Inst. 2003).

[225] Sitkoff & Dukeminier, *supra* note __, at 784.

[226] *See supra* Part I.C.4.

[227] *See infra* Parts III.A.1, 3, and C.2.

c. *Outside the Charitable Purpose: "Sole" versus "Best" Interest*

An endowment divestment that neither falls within the charitable purpose of a charity nor the public benefit principle is legally problematic at best.

i. Ultra Vires. To begin with, the board of a charity may act only within the powers granted to it. As we have seen, a fiduciary act beyond the powers granted to the fiduciary is *ultra vires*.[228] Accordingly, a divestment outside the scope of a charity's charitable purpose would arguably expose the trustees of that charity to liability for acting beyond the scope of their powers, even before considering the fiduciary duty of loyalty.

ii. Restricted Endowment: Sole Interest. Trust law applies to the restricted endowment.[229] Under the trust law duty of loyalty, a trustee of a charitable trust must act "*solely* in furtherance of *its charitable purpose*."[230] Any motive or action other than furthering the trust's charitable purpose is a breach of the duty of loyalty, full stop.[231] A divestment of the restricted endowment that is not consistent with each affected individual restricted gift (or a public policy gloss via the public benefit principle) would thus be a textbook violation of the duty of loyalty.

We acknowledge a counterargument but find it unpersuasive. The argument is that a costless divestment—that is, a divestment that could be implemented with no administrative cost and with no negative effect on portfolio efficiency—should be permissible. As a practical matter, it is highly unlikely that in modern endowment practice a truly costless divestment exists, a point we will take up in connection with the duty of prudence below.[232] But setting this factual problem to the side, could a costless divestment be consistent with the prudent investor rule?

The only trust law authority of which we are aware that could fairly be argued as supporting this position is a dubious inference from a single sentence in the official comments to the UPIA: "No form of so-called 'social investing' is consistent with the duty of loyalty if the investment activity entails sacrificing the interests of trust beneficiaries—for example, by accepting below-market returns—in favor of the interests of the persons supposedly benefitted by pursuing the particular social cause."[233] By stating clearly that

[228] *See supra* Part II.C.3.

[229] *See supra* note 59 and text accompanying.

[230] Restatement (Third) of Trusts § 78 (Am. Law Inst. 2007) (emphasis added); *see also supra* Part II.C.1.

[231] *See supra* Part II.C.1.

[232] *See infra* Part II.E.2.a.

[233] UPIA § 5 cmt. We acknowledge that Restatement of Charitable Nonprofit Organizations § 2.04 cmt. e(3) (Am. Law Inst. 2021) takes the position if "non-purpose-related social concerns … do not lower expected returns," they may be considered by a charitable fiduciary. However, that Restatement follows the corporate law duty of loyalty, see id. § 2.02 & cmt. a, which as discussed below in connection with the unrestricted endowment, see text accompanying *infra* notes 239-241, might tolerate a divestment outside of a charity's charitable purpose if the effect was de minimis because it is less strict than the trust law duty of loyalty. We

a costly social investment breaches the duty of loyalty, the comment could be read as implying that a costless such investment would not breach the duty of loyalty.[234]

Crucially, however, the UPIA comment does not literally say that a costless social investment is permissible, only that a costly one is impermissible. Moreover, whatever the comment says, it must yield to the higher authority of the UPIA blackletter text.[235] And the blackletter text to which the comment applies states the familiar sole interest rule of ordinary trust law: "A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries."[236] The fundamental problem with reading that one sentence in the UPIA comments as blessing a costless divestment, therefore, is it wishes away the no-further-inquiry implementing rule that comes with the sole interest rule that is codified by the text of the UPIA itself.

The trust law authorities applying the sole interest rule are legion in doing so via the no-further-inquiry rule. As we have seen, under the no-further-inquiry rule any consideration other than the sole interest of the beneficiary, no matter the good faith of the trustee or the absence of harm, is a categorical breach of trust.[237] As the Supreme Court put the point more than 200 years ago, "the fairness or unfairness of the transaction … is not suffered to enter into the consideration of the Court."[238] Accordingly, to permit a costless divestment of a restricted endowment would be a significant break from prevailing and longstanding trust law.

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are aware of no authority, however, that follows the Restatement of Charitable Nonprofit Organizations in rejecting the no-further-inquiry principle of ordinary trust law as applied to a charitable trust, and the Restatement cites no supporting authority.

234 The comment also cites to an interpretive bulletin by the Department of Labor that took the position, not without controversy (see Schanzenbach & Sitkoff, *supra* note __, at 408-11), that an ERISA fiduciary may break a tie between two financially equivalent investments by reference to social considerations. *See* UPIA § 5 cmt.

235 As noted earlier, see *supra* note 161, we acknowledge that a state legislature enacts the operative text with the backdrop of its commentary, giving that commentary persuasive authority. *Cf.* Elinson & Sitkoff, *supra* note 161.

236 Id.

237 *See, e.g.*, In re Gleeson's Will, 124 N.E.2d 624 (Ill. App. 1955) ("The good faith and honesty of the petitioner or the fact that the trust sustained no loss on account of his dealings therewith are all matters which can avail petitioner nothing so far as a justification of the course he chose to take in dealing with trust property is concerned."). *see also* Restatement (Third) of Trusts § 78 cmt. b (Am. Law Inst. 2007 ("In transactions that violate the trustee's duty of undivided loyalty, under the so-called 'no further inquiry' principle it is immaterial that the trustee may be able to show that the action in question was taken in good faith, that the terms of the transaction were fair, and that no profit resulted to the trustee."); Scott and Ascher on Trusts § 17.2 ("Under this rule, a trustee who has violated the duty of loyalty is liable without further inquiry into whether the breach resulted in any actual benefit to the trustee, whether the trustee acted in good faith, whether the transaction was fair, or even, in some cases, whether the breach caused any actual harm to either the trust or its beneficiaries.").

238 Wormley v. Wormley, 21 U.S. 421, 463 (1823).

iii. Unrestricted Endowment: Best Interest. The loyalty analysis for the unrestricted endowment is different because it sounds in corporate law rather than trust law. As we have seen, under corporate law a board must act in the "best interest" of the corporation, a standard that is commonly implemented by way of an "entire fairness" test.[239] Under this standard, a divestment made outside the charitable purpose but with a de minimis cost could be defended as fair and so permissible in the unrestricted endowment.[240] For example, the cost of a reallocation of a small handful of directly held publicly traded securities could be de minimis, a point we elaborate below.[241]

Nonetheless, we sound three cautions. The first is a reminder that the *ultra vires* doctrine, discussed above, does not appear to recognize a de minimis exception. If that doctrine applies, then a divestment of a university's unrestricted endowment for reasons other than the university's research or educational purpose would be impermissible. Second, for the reasons explored in connection with the duty of prudence below, the plausibility of a de minimis divestment has been decreasing with the shift following the rise of the Yale Model to index funds and nonmarket holdings.[242] Third, given the pooling of the restricted and unrestricted endowment by most universities, the sound fiduciary practice is to follow the stricter trust law standard. It is possible for a university to separate its endowment pools, thereby enabling more defensible divestments in the unrestricted endowment. However, such a separation could increase administrative costs overall, undermining the defense that the divestment cost was de minimis.

2. The Duty of Prudence and Divestment

A divestment that is not ultra vires and satisfies the duty of loyalty must also satisfy the prudent investor rule. The prudent investor rule is more rigorous and less deferential than the corporate law standard of care.[243] As codified by UPMIFA (for the unrestricted endowment) and as typified by the UPIA (for the restricted endowment), the prudent investor rule requires an assessment of the reasonableness of the divestment, that is, a weighing of costs and benefits.[244]

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[239] *See supra* Part II.C.2.

[240] We acknowledge that Restatement of Charitable Nonprofit Organizations § 2.04 cmt. e(3) (Am. Law Inst. 2021) takes no position on "whether a charity may make investments considering factors that are both unrelated to its purposes and likely to jeopardize financial returns," characterizing that question as "difficult and as yet unanswered." We agree that the question is perhaps unanswered in the sense that there is not a direct decisional precedent. But even the UPIA comment recognizes the illegality of such a divestment. *See supra* note __ and text accompanying. To call this question "as yet unanswered" is thus misleading, if not disingenuous. The underlying legal principles surrounding the duty of loyalty, both in trust law and corporate law, are so well settled that the illegality of such a divestment under those principles is straightforward. To hold otherwise would work a dramatic change in the law.

[241] *See infra* Part II.E.2.a.

[242] *See id.*

[243] *See supra* Part II.D.1.

[244] *See id.*

a. *Assessing the Costs of a Divestment*

We start with the cost side of the ledger, focusing on administrative costs and portfolio efficiency. When university endowments held directly a basket of publicly traded securities, a divestment could plausibly be undertaken at low administrative cost and with minimal effect on portfolio efficiency. A one-time reallocation of a handful of publicly traded securities into a different handful of publicly traded securities might incur a brokerage commission, perhaps even a substantial one before computerized trading. But otherwise such a reallocation would be straightforward. Moreover, unless the divestment involved the removal of a significant industry or region, in theory the effect on portfolio efficiency could be de minimis.[245]

Since the rise of the Yale Model, however, and the concomitant shift to outside active managers for illiquid investments and to index funds for public securities, even a minor divestment is likely to incur substantial administrative and portfolio efficiency costs. For the outside active managers, a divestment constraint will tend to increase cost and decrease portfolio efficiency owing to the resulting smaller pool of managers from which to choose, higher fees for those managers, and fewer opportunities in which they may invest. For the index funds, screened funds are inevitably less diversified than broad market funds and are (today, at least) more expensive too.

By way of illustration, the expense ratio of Fidelity's "sustainability" index fund is 9.5 basis points higher than its total market index fund (11 versus 1.5 basis points).[246] A 9.5 basis points increase in fees on a $100 million investment is $95,000 per year, and that cost compounds over time. On a 10 percent annual return assumption, the fees would cost the portfolio $1 million within eight years. The sustainability fund is also less diversified than the total market fund, with only 268 holdings, and with three technology companies—NVIDIA (12.81%), Microsoft (10.18%), and Alphabet (5.56% + 4.89%)—

[245] *See* Richard A. Brealey, Stewart C. Myers, Franklin Allen & Alex Edmans, Principles of Corporate Finance 201 (14th ed. 2024) ("After about 20 or 30 companies, you've pretty much 'maxed out' the benefits of diversification").

[246] *Compare* Fidelity, U.S. Sustainability Index Fund, https://fundresearch.fidelity.com/mutual-funds/summary/31635V398 [https://perma.cc/SK4L-4QXF], *with* Fidelity, Total Market Index Fund, https://fundresearch.fidelity.com/mutual-funds/summary/315911693 [https://perma.cc/MUA6-46CD]. Vanguard offers a "social" fund with a slightly lower fee (7 basis points) but with a $5 million investment minimum, and even this lower fee is several basis points higher than the fee for Vanguard's total market index (2 basis points with a $100 million minimum or 3 basis points with a $5 million minimum). *Compare* Vanguard FTSE Social Index Fund Institutional Shares, https://investor.vanguard.com/investment-products/mutual-funds/profile/vftnx [https://perma.cc/HUS7-HN2S], *with* Vanguard, Total Stock Market Index Fund Institutional Plus Shares, https://advisors.vanguard.com/investments/products/vsmpx/vanguard-total-stock-market-index-fund-institutional-plus-shares [https://perma.cc/EG3S-JWRL] *and* Vanguard, Total Stock Market Index Fund Institutional Shares, https://advisors.vanguard.com/investments/products/vitsx/vanguard-total-stock-market-index-fund-institutional-shares [https://perma.cc/6X8U-AWL9].

comprising one-third of the fund's value.[247] The Fidelity total market fund, by contrast, has 3,818 holdings, of which the top three holdings represent less than one-fifth of the fund's value.[248]

b. *Assessing the Benefits of a Divestment*

The benefits side of the ledger will also discourage divestment. In general, sober analysis will conclude that a divestment is unlikely to affect the targeted activity. This is especially true of a publicly traded security. University endowments total an impressive $1 trillion, but that pales next to the volume of world capital markets. The average daily trading volume of public stocks in the U.S. alone is more than $500 billion.[249] A divestment by even a very large university endowment is thus unlikely to affect the cost of capital for a publicly traded firm (i.e., the stock price of a publicly traded firm is likely to be inelastic to university endowment divestment).

Analyzing the likely effect of a divestment of a private investment—that is, something that is not traded in a liquid public market—is more complicated. Whether the divestment will suppress the targeted activity will depend on the availability of substitute investors (i.e., the liquidity of capital in the relevant market). And even if the divestment suppresses the targeted activity, the overall welfare consequences will depend on hard-to-predict substitution effects in the broader market.

Suppose, for example, a university's divestment policy leads it to refuse a proposed investment in a private partnership to build a natural gas rig. The refusal of any singular endowment to invest in the rig will not prevent or diminish its construction if other willing investors are readily available. Even if the divestment does stop or diminish the production of natural gas, the overall environmental impact is uncertain and depends on the elasticity of the supply of substitutes. The reduction in gas production may be offset by other sources of energy that are cleaner (e.g., wind) or dirtier (e.g., coal).

Every report by a university investment policy committee that we have reviewed has concluded that the proposed divestment would have either no effect or possibly negative unintended consequences.[250] We are aware of no contrary analysis by a

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[247] *See* Fidelity, U.S. Sustainability Index Fund, https://fundresearch.fidelity.com/mutual-funds/composition/31635V398 [https://perma.cc/ZV5J-HRVH].

[248] *See* Fidelity, Total Market Index Fund, https://fundresearch.fidelity.com/mutual-funds/composition/315911693 [https://perma.cc/8RP5-PKXA].

[249] *See* FINRA, 2024 Industry Snapshot, Market Activity, available at finra.org/media-center/reports-studies/2024-industry-snapshot/market-data [perma.cc/74EF-V57F].

[250] *See, e.g.*, Final Report in Response to the Proposal to "Divest from Activities Arming, Financing, and Supporting the Humanitarian Crisis of Palestinians and Occupied Palestinian Territory," Johns Hopkins Univ. (Jan. 2025), available at provost.jhu.edu/wp-content/uploads/2025/01/PIIAC-Final-Report-January-2025.pdf [perma.cc/9DA5-5M54]; Advisory Committee on Investment Responsibility Report to President Vincent E. Price on Fossil Fuel Investment (May 2019), available at acir.duke.edu/wp-

university investment policy committee. An analysis by Northwestern University, for example, expressed doubt of any impact on public markets and cautioned against the unintended consequence of an impactful divestment from fossil fuels owing to substitution among fossil fuel types as well as disproportionate impacts on the poor.[251]

But this does not mean all divestment is imprudent. UPMIFA allows for consideration of an "asset's special relationship or special value, if any, to the charitable purposes of the institution."[252] The UPIA likewise allows for consideration of "an asset's special relationship or special value, if any, to the purposes of the trust."[253] As the reporter for the UPIA, Professor John Langbein, has explained, the prudent investor rule allows for consideration of "programmatic" benefits, such "as when the settlor directs that the family residence be retained as a home for the widow or that vacation property be held for the recreational use of family members."[254] In this light, consider again the Restatement language quoted above that an "investment decision can be justified on grounds of advancing, financially or operationally, a charitable activity conducted by the trust."[255]

Accordingly, although we are unaware of directly relevant caselaw, we predict that a court would allow, say, the Sierra Club to divest from the fossil fuel industry even though that divestment would almost certainly have no effect on the cost of capital for those companies and would necessarily impose a diversification cost on the endowment. Even without an impact, the divestment would have an expressive purpose. The hard question, for which there is a paucity of authority, is drawing the line between a prudent and an imprudent divestment in pursuit of a charity's charitable purpose. To our way of thinking, the example of the Sierra Club is an easy case. Not owning fossil fuel companies is readily located at the heart of the Club's charitable purpose, and the even a significant diversification cost could be understood as a reasonable price for staying within that purpose.

But there are limits to this "special purpose" line of reasoning. A trustee of a private trust would have difficulty justifying retention of a crumbling family vacation home that cost more in upkeep than funding an alternative family vacation, especially if

content/uploads/sites/41/2020/10/FINAL.ATT-ACIR-Report-to-Pres.-Price-2019-05-16.pdf [perma.cc/5EKB-GR9T].

[251] *See* Email from Nw. Univ. Bd. of Trustees to Nw. Univ. Cmty. on Fossil Fuels, Greenhouse Gas Emissions, and Energy Transition Investment Policy Guidelines (June 23, 2022), available at northwestern.edu/acir/docs/nu-fossil-fuels-greenhouse-gas-emissions-and-energy-transition-investment-policy-guidelines.pdf [perma.cc/Y7PU-MK29] (arguing that the university has "an obligation to carefully consider the potential unintended consequences" of fossil fuel divestment including "disproportionately impact[ing] lower income people" and increasing "usage of higher emission fuel sources such as thermal coal and heavy oil").

[252] Unif. Prudent Mgmt. of Institutional Funds Act § 3(e)(1)(H).

[253] Unif. Prudent Inv. Act § 2(c)(8).

[254] John H. Langbein, Mandatory Rules in the Law of Trusts, 98 Nw. U.L. Rev. 1105, 1114-16 (2004).

[255] Restatement (Third) of Trusts § 90 cmt c. (Am. Law Inst. 2007).

the beneficiaries' other needs were not being met. Likewise, suppose for the sake of argument that an environmental charity's complete divestment from fossil fuels would add 100 basis points per year in administrative costs and would constrain the portfolio to ten holdings. The trustees of that charity would likewise struggle to justify that cost to the endowment of an expressive benefit when other pressing needs were at hand.

3. Reputation and Constituency Management

In workshopping earlier drafts of this paper, a common suggestion was that a university endowment divestment could be justified on grounds of reputational benefits or constituency management. The theory is that pursuit of a university's research and educational purpose will be more efficacious—perhaps by attracting better faculty, mollifying students, or fostering alumni support—if the university avoids objectionable endowment holdings. On this theory, a divestment that would otherwise fall outside of the university's research and educational purpose is brought within that purpose by way of reputational and constituency management benefits. We conclude that, while reputational and constituency management provide colorable legal bases for a divestment, they are unlikely to pass a loyalty analysis for the entire endowment and face challenging practical issues of proof under a prudence analysis.[256]

A reputational or constituency management theory runs into the recurring problem of the diversity of purposes within the restricted endowment. The claimed reputational or constituency management benefits would need to further the specific narrower purpose of each restricted gift within the restricted endowment. Thus, although a reputational or constituency management benefits defense under a loyalty challenge is plausible in theory, it will be difficult to defend in fact owing to the many and varied narrower specific purposes within a large university's restricted endowment. It is not obvious, for example, that placating undergraduate protestors would advance the purpose of a restricted gift for medical school research on pancreatic cancer.

For the unrestricted endowment, by contrast, a reputational or constituency management basis for divestment is more plausible. These funds are held for the university's overall research and educational purpose, and reputational or constituency management benefits more clearly fit within that more general purpose. But the typical practice of a single pooled endowment prevents a separate divestment for the unrestricted endowment. Moreover, as before, separately managing the unrestricted and restricted endowments to facilitate a divestment on the unrestricted side would unwind the economies of scale that were the reason for the pooling in the first place.

Assessing a reputational or constituency management benefit under the duty of prudence is also fraught. Reputational benefits are easy to claim but hard to prove. Yet

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[256] We give further treatment to the normative and prudential challenges of divestment for reputational or constituency management benefits in Schanzenbach & Sitkoff, *supra* note 27, at ___-___.

the duty of prudence requires an assessment of costs and benefits such that a vague allusion to reputational benefits will not suffice.[257] But we can think of no way rigorously to assess reputational harm avoided. Moreover, the shift in university endowment practice from direct holdings to externally managed funds has decreased the connection of the university to the underlying activities of the firms in which the university is invested while increasing the costs of a divestment.[258] This shift, in other words, will tend to reduce the reputational payoff of a divestment while increasing its costs.

There are additional practical impediments to a reputational or constituency management divestment, which we explore in greater detail elsewhere.[259] To summarize here, justifying a divestment on the basis of reputation or constituency management necessarily rests on an acknowledgement that the divestment was undertaken to protect the reputation of the university or to mollify a constituency. Declaring some investments off limits for reputational reasons invites a reputational analysis of the remaining investments, which as a practical matter the board may have to defend to other constituencies. Such a declaration can itself introduce reputational harms as the university picks and chooses its positions or declares some divestments too costly—in effect, putting a price on those positions. Likewise, a divestment to mollify a constituency, such as disruptive student protestors, would be an acknowledgement that disruptive protests work, perhaps inviting additional such disruptions. While not categorically dispositive, these practical issues should be considered by the board as part of a prudent process.

All told, a reputation or constituency management basis for a university divestment is colorable but is likely to be factually difficult to apply in practice. Consistent with this analysis, as per Part III those major endowments that have policies that allow for divestment on the grounds of "moral abhorrence" emphasize the extreme standards required to find abhorrence and the rarity of such circumstances. In practice, abhorrence has been rarely invoked.

F. Fiduciary Principles and Academic Disassociation

As noted at the outset, by "academic dissociation" we refer to prohibiting the university's research or educational activities from contact with an objectionable firm, industry, or country.[260] Although less common than calls for endowment divestment, some student and faculty activists have also called for academic dissociation.[261] Because

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[257] To the extent a reputational benefits theory is meant to bring within the charitable purpose something that is on its face not otherwise within that purpose, arguably the trust law rule for a structural conflict of interest would apply, under which "the conduct of the trustee in the administration of the trust will be subject to especially careful scrutiny." Restatement (Third) of Trusts § 37 cmt. f(1) (Am. Law Inst. 2007).

[258] *See* Schanzenbach & Sitkoff, *supra* note 27, at ___-___.

[259] *See* Schanzenbach & Sitkoff, *supra* note 27, at ___-___.

[260] *See supra* note 14 and text accompanying.

[261] *See supra* note 15and text accompanying.

an academic dissociation would ordinarily be classified as a programmatic or operational decision, distinct from investment management, the fiduciary principles applicable to academic dissociation are less stringent. We divide our analysis into three parts: (1) academic dissociation; (2) the related question of accepting or rejecting a gift; and (3) porousness in the line between programmatic and investment decisions.

1. Academic Disassociation

In contrast to endowment management, a typical university's academic program is governed by the less rigorous corporate fiduciary duty of care, including some version of the business judgment rule.[262] A university board's decisions regarding the academic program will be shielded from judicial review so long as the board follows a rational process and its decisions have some rational basis.[263]

For example, a university board could conclude that its academic program should include a center for the study of climate change. A different board under the same circumstances could conclude that such a center was not warranted. Provided that the decision was rooted in a rational process, either outcome would fall comfortably within the range of fiduciary discretion shielded by the business judgment rule. As we have seen, the underlying policy judgment is that subjecting contestable programmatic decisions to rigorous judicial review would be impractical and paralyzing.[264]

Of course, in approving (or not) a center for the study of climate change, a board might be influenced by its members' personal political preferences. But unlike the sole interest rule of trust law, the best interest standard of the corporate law duty of loyalty tolerates mixed motives. As a practical matter, the decision would be reviewable only if there were more open conflicts of interest in the creation of the center, such as the naming of a spouse of a board member as the director of the center. And even then, such a conflict could be cleansed by disinterested board approval or defended as "fair" based on the spouse's qualifications.[265]

Accordingly, although we are aware of no directly applicable caselaw, we predict that an academic dissociation by a university organized as a corporation would likely survive fiduciary judicial scrutiny. Speaking only from a fiduciary perspective, and so setting aside state and federal antidiscrimination laws,[266] a university could likely close its Israel programs and dissociate from Israeli universities, just as it could open an Israel

[262] *See supra* II.D.2.

[263] *See id.*

[264] *See id.*

[265] *See, e.g.*, 8 Del. Gen. Corp. L. § 144(a); Bayer v. Beran, 49 N.Y.S.2d 2 (N.Y. Sup. 1944) (hiring of spouse was fair under the circumstances).

[266] *See, e.g.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

program and increase its associations with Israeli universities. In either case, the decision would be effectively unreviewable as a fiduciary matter.

2. Accepting and Rejecting Gifts

In workshopping earlier drafts of this paper, we were sometimes asked about the fiduciary principles applicable to accepting or rejecting a gift, and how they relate to those applicable to endowment divestment and academic dissociation. Although we are not aware of directly applicable caselaw, we believe that the doctrinal answer is clear. The decision to accept or reject a gift is fundamentally an operational decision to which the corporate law standard of care, including the business judgment rule, would apply.

Settled principles of property law and trust law provide the relevant context. Under property law, an intended donee cannot be compelled to accept a gift; a gift is not complete without the intended donee's acceptance.[267] Under trust law, an intended trustee cannot be compelled to accept a trusteeship; a trusteeship does not arise without the intended trustee's acceptance.[268] Under settled principles of property law and trust law, therefore, the decision to accept or reject a gift necessarily concerns assets that are not held yet by the university and over which the university has only a power of acceptance or rejection. It follows that the decision to accept or reject a gift is subject to the deferential corporate standard of care, including the business judgment rule. Until a gift is accepted, the prudent investor rule is not yet triggered, and the ordinary fiduciary principles applicable to an operational decision by a charitable corporation apply.

To be sure, this conclusion rests on a formal distinction. But the distinction reflects a longstanding fiduciary policy that grants the board broad discretion in managing the charitable program but subjects the investment program to a more constraining portfolio theory standard of review. If decisions concerning gift acceptance were subject to a more exacting standard of review, board discretion and, ultimately, the charitable purpose of the organization could be hijacked by donors.[269] Indeed, the connection between a donation and the loss of university independence, arising in part from the donor's resulting leverage and the prospect of additional donations, has been judicially recognized.[270] This concern is most evident for a restricted gift, for which an acceptance

[267] *See, e.g.*, Restatement (Third) of Property: Wills and Other Donative Transfers § 6.1(b) (Am. Law Inst. 2003) ("Acceptance by the donee is required for a gift to become complete. Acceptance is presumed, subject to the donee's right to refuse or disclaim.").

[268] *See, e.g.*, Restatement (Third) of Trusts § 35 (Am. Law Inst. 2003) ("A designated trustee may accept the trusteeship either by words or by conduct. … A designated trustee who has not accepted the trusteeship may decline it."); Unif. Tr. Code § 701(b) ("A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship.") (Unif. Law Comm. 2000).

[269] Similar concerns motivate arguments in favor of protecting director discretion in for-profit corporations. *See generally* Stephen M. Bainbridge, *Director Primacy*, in Research Handbook on the Economics of Corporate Law 17 (Claire A. Hill & Brett H. McDonnell eds., 2012).

[270] *See* In re Oracle Corp. Derivative Litig., 824 A.2d 917, 920-921, 942-946 (Del. Ch. 2003) (rejecting a special litigation committee as not independent in part because two committee members were Stanford

would bind the university, potentially in perpetuity, to effectuating the narrower purpose of the gift. But the point is true also for an unrestricted gift, even a modest one, as a charity's decisions about its scale and whether it can appropriately steward a gift are not investment decisions and cannot be classified as such if those decisions are to be within the board's fiduciary discretion. Consequently, a decision to accept or reject a gift is properly reviewed as a programmatic decision.

On a pragmatic level, accepting a donation will often tie the university, both formally and informally, to the donor in more concrete ways than an endowment holding. A restricted gift comes with the trust law sole interest rule and recognition of donor standing, giving rise to a potential new litigant. Even an unrestricted gift involves reputational risk because the potential for taint by association remains. These concerns are not theoretical. Qatari donations to universities have become a focus of public and Congressional concern,[271] and the ongoing Jeffrey Epstein scandal has likewise touched universities. MIT, for example, accepted $750,000 in donations from Jeffrey Epstein to support the work of a professor and an academic center after Epstein's conviction for sex offenses.[272] Harvard, likewise, is still working to address the taint of its associations with Epstein.[273] The more direct reputational tie arising from donations is a further justification for the different standards of review governing gift acceptance versus endowment divestment.

3. Distinguishing Investment and Programmatic Assets

As illustrated by the foregoing discussion, the fiduciary consequences of characterizing a decision as programmatic or investment are profound. Given the much more deferential standard of review applicable to programmatic decisions, there may be an incentive to characterize what would otherwise be an endowment divestment as a programmatic decision. For example, a university might purchase a wind farm with unrestricted endowment funds, but then recharacterize the holding as being primarily for

University faculty and the defendant corporation and its CEO had made substantial contributions to Stanford University); *see also* In re The Limited, Inc. S'holders Litig., 2002 WL 537692, at *6-*7 (Del.Ch. Mar. 27, 2002) (finding a lack of independence between a university president and a corporate officer due to "owingness" the president would likely feel due to a large donation request).

271 *See* Stephen Kalin et al., *How Qatar Spent Billions to Gain Influence in the U.S.*, Wall St. J. (May 15, 2025) (discussing concerns about Qatari influence in U.S. higher education).

272 Report Concerning Jeffrey Epstein's Interactions with the Massachusetts Institute of Technology at 5 (Jan. 10, 2020), available at facultygovernance.mit.edu/sites/default/files/20200121GoodwinProcterReport.pdf [perma.cc/2V5X-ECB2].

273 *See, e.g.*, Dhruv T. Patel & Cam N. Srivastava, Harvard to Launch New Investigation into Epstein's Ties to Summers, Other University Affiliations, Harv. Crimson (Nov. 19, 2025), https://www.thecrimson.com/article/2025/11/19/harvard-opens-investigation-into-summers-epstein/ [https://perma.cc/4JYQ-EY7U].

programmatic rather than investment purposes,[274] to shift the standard of review from the prudent investor rule to the business judgment rule.

We acknowledge that UPMIFA's test of "primarily for investment" versus "primarily to accomplish a charitable purpose of the institution" may indeed open the door in some cases to such a recharacterization. In the words of the Restatement, "[s]ome assets are difficult to categorize as they may serve equally investment and programmatic purposes."[275] But this potential for recharacterization is an edge case. So far as we can tell, recharacterization was not at issue in the salient historical examples of university divestment, nor does it pertain in the context of current divestment demands. We therefore set recharacterization aside and turn now to our survey of university divestment practice, past and present.

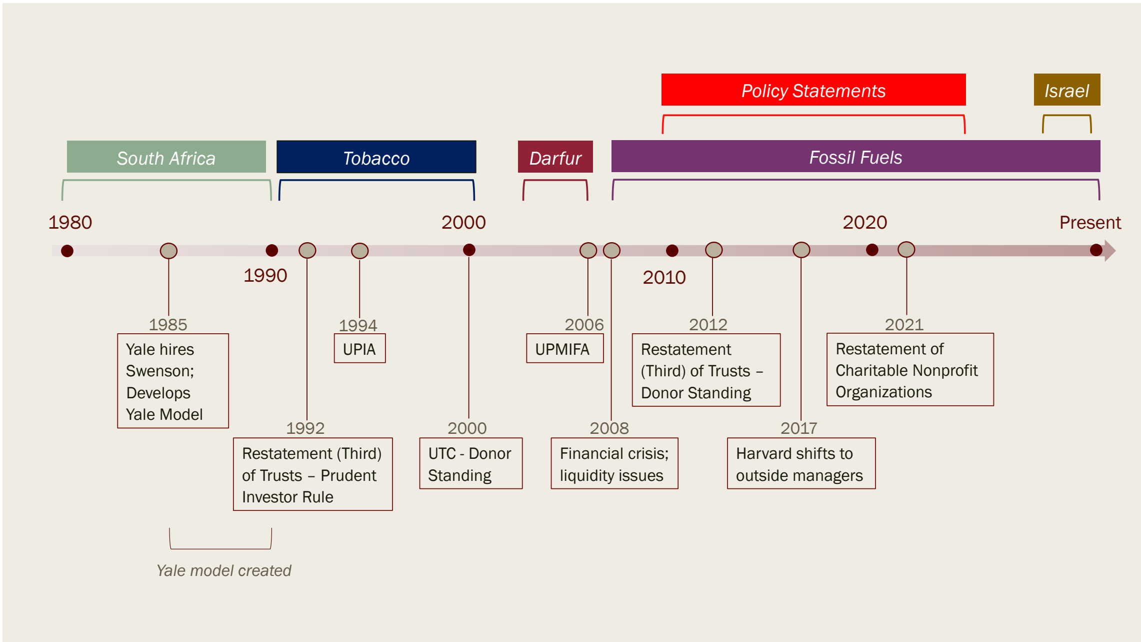
III. University Divestment in Practice: Past and Present

Have universities adhered to the fiduciary principles canvassed above? We now consider: (a) the divestment precedents of South Africa under apartheid, tobacco, and the Darfur war; (b) the proliferation of formalized divestment policies by universities with the largest endowments; and (c) the contemporary divestment from fossil fuels and current demands to divest from Israel. Figure 2 orients the analysis chronologically, situating South Africa, tobacco, the Darfur war, fossil fuels, and Israel on a timeline alongside the Yale Model and the key legal authorities discussed above. Consistent with our legal analysis, we find that American universities have for the most part not engaged in costly divestments.

274 *See, e.g.*, Ethical Investment Policy, Yale Investments Office (2016), available at web.archive.org/web/20161009235201/http://investments.yale.edu/social-responsibility/ ("Beginning in 2007, Yale's [endowment] managers, in conjunction with local wind power development firms, identified several sites with attractive [wind] capacity factors….One site in particular, Record Hill Wind, is fully operational and was transferred from the Endowment to the University, and is now maintained by the Yale Office of Facilities. This project will help meet Yale's goal of reducing 2020 emissions to 10 percent below 1990 levels, furthering Yale in its quest to become the world's greenest university.").

275 Restatement of Charitable Nonprofit Organizations § 2.04 cmt. c (Am. Law Inst. 2021) (discussing endowment versus program-related assets).

Figure 2: Divestment Action Timeline



We must, however, note an important caveat. The investment practices of university endowments are not subject to comprehensive public disclosure rules, and thus are often opaque, especially in view of the shift from holding public securities, which in some cases are disclosed in public SEC filings (as per Table 1), to private holdings. What follows reflects our best inferential analysis based on public statements by universities (where we could find them) and secondary media or other such reports. These sources are admittedly incomplete and sometimes contradictory. Some university divestment claims are unclear, confusing, or even misleading. Nonetheless, the quantity and variety of the evidence give us confidence in our overall conclusions, albeit we have less confidence in any given specific detail.

A. Historic Divestment: South Africa, Tobacco, and Darfur

What emerges from our excavation of the history of divestment before the mid-2000s is an enormous difference between perception and reality. In general, universities did not engage in significant divestments from South Africa under apartheid, and only a few divested from tobacco (with evidently all but one having since retreated from that divestment). Many universities divested during the Darfur war, but those divestments involved only a few firms. Moreover, the South Africa and Darfur divestments were encouraged by governmental policy, and they occurred when direct ownership of individual securities was more common.

1. South Africa

The first salient calls for university endowment divestment involved South Africa's apartheid regime, with widespread and sometimes disruptive student protests, including encampments.[276] But it was Congress, not university leadership, that was the primary driver of meaningful divestment. Congress passed the Comprehensive Anti-Apartheid Act in 1986, which barred directed flights to and trade of various items with South Africa, among other financial sanctions.[277] As a result of the Anti-Apartheid Act, many firms abandoned or at least restricted their business contacts with South Africa, with the second-order effect of reducing university endowment exposure to South Africa.[278]

Direct divestment by university endowments, as compared to divestment by individual firms following the Anti-Apartheid Act, was more limited than commonly assumed today. A 1988 study found that only 155 universities (out of thousands) had divested to any degree.[279] Of those divesting universities, two-thirds limited their divestments to firms that refused to sign the so-called Sullivan Principles, an anti-discrimination pledge for South African operations.[280] Such "selective" divestment involved only a few firms. For example, by the 1990s Harvard had reportedly divested from only 15 firms, and Yale had reportedly divested from only 17.[281]

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[276] *See, e.g.*, *1987 Divestment*, Brown Library, https://library.brown.edu/create/protest6090/1987-divestment/ [https://perma.cc/S85A-EMUG] (last visited Jan. 24, 2025) (describing disruption of Brown board meetings and construction of a "shanty town" on the Brown campus); John Besche, *The Shanties on the Plaza*, YALE ALUMNI MAGAZINE, Nov./Dec. 2024, at 50–51 (describing a "shanty town" at Yale).

[277] Comprehensive Anti-Apartheid Act of 1986, Pub. L. 99-440, 100 Stat. 1086 (1986).

[278] *See, e.g.*, Besche, *supra* [ ] at __ ("[C]orporations operating in South Africa shrank from 21 percent to 3 percent of Yale's endowment by 1991, largely because companies left on their own, and the Comprehensive Anti-Apartheid Act of 1986 mostly obviated any would-be resolutions the Yale Corporation could have introduced at shareholder meetings.").

[279] *See* THE AFRICA FUND, DIVESTMENT ACTION ON SOUTH AFRICA BY U.S. AND CANADIAN COLLEGES AND UNIVERSITIES (1988), https://perma.cc/4BDJ-FV45.

[280] The Sullivan Principles named for General Motors director Reverend Leon Sullivan. *See* Hauck, Voorhes & Goldberg, supra [ ], at 147; Paul Lewis, *Leon Sullivan, 78, Dies; Fought Apartheid*, N.Y. TIMES (Apr. 26, 2001), https://www.nytimes.com/2001/04/26/world/leon-sullivan-78-dies-fought-apartheid.html [https://perma.cc/7X43-SELX]. Sullivan eventually came to favor total divestment from South Africa. *See Sullivan Principles' Author Hopes for Change*, N.Y. Times (Oct. 22, 1986), https://www.nytimes.com/1986/10/22/business/sullivan-principles-author-hopes-for-change.html [https://perma.cc/5NBN-QF2K].

[281] *See* Randal S. Jeffrey, *Divest Completely . . .*, HARV. CRIMSON (Oct. 2, 1990), https://www.thecrimson.com/article/1990/10/2/divest-completely-pbobn/ [https://perma.cc/B6RK-K3BW] (criticizing Harvard's selective divestment); Matthew Lloyd-Thomas & Adrian Rodrigues, *After Corporation Decision Divestment Strategy Uncertain* (Sept. 5, 2014) https://yaledailynews.com/blog/2014/09/05/after-corp-decision-divestment-strategy-uncertain/ [https://perma.cc/78A2-ANPY] (reporting Yale divested from only 17 South Africa linked companies by the early 1990s). A 1985 news report, which predates the Comprehensive Anti-Apartheid Act, indicates that Columbia had planned to divest from 26 firms. *See* Robert D. McFadden, *Columbia Plans to Sell By '87 Stock Linked to South Africa*, N.Y. TIMES (Oct. 8, 1985), https://www.nytimes.com/1985/10/08/nyregion/columbia-plans-to-sell-by-87-stock-linked-to-south-africa.html [https://perma.cc/9ADX-C8L2].

Selective divestment from South Africa in the 1980s could plausibly pass fiduciary scrutiny. On the prudence side, a selective divestment was likely de minimis. The Yale Model had just been introduced, and universities tended to still hold directly a substantial amount of publicly traded securities. Replacing a few publicly traded securities with other publicly traded securities could plausibly be achieved at low cost and with little effect on portfolio efficiency.[282] On the loyalty side, both university and public policy had come to embrace strong anti-discrimination norms, with state and federal governmental actions, including direct sanctions, evidencing a strong public policy against South Africa's apartheid system in particular. A de minimis portfolio restructuring to avoid or minimize investment in South Africa could plausibly be defended as falling within that public policy, resolving the problem of myriad restricted funds and the sole interest rule applicable to them.

Some universities that resisted more substantial divestment from South Africa pointed to the harm to the portfolio and the lack of effect on the problem itself. For example, Harvard President Derek Bok rejected a broader divestment by pointing to the portfolio cost, the incongruity of failing to divest from other countries with terrible human rights records, and the probability of divestment being ineffective or counterproductive.[283] "I believe that moral judgments require rational arguments," Bok was quoted as saying, and "I would consider it quite wrong and probably illegal to make important decisions involving Harvard's finances on the basis of 'non-rational' judgments."[284]

While making a limited, Sullivan-style selective divestment, Harvard did not ignore apartheid or student concerns over it. Consistent with the law's greater deference to academic programming, Bok emphasized two actions taken within the academic program. First, Harvard launched a variety of academically-oriented pursuits around the

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[282] *See* Blake R. Grossman & William F. Sharpe, *Financial Implications of South African Divestment*, 42 FIN. ANALYSTS J. 15, 17 (1986) (finding that selective divestment would leave unchanged traditional measures of portfolio risk and return).

[283] Jeffrey C. Wu, *Bok and Activists Reach Standoff on Divestment*, HARV. CRIMSON (Apr. 2, 1990), https://www.thecrimson.com/article/1990/4/2/bok-and-activists-reach-standoff-on/ [https://perma.cc/KY78-6R7T] (reporting that Harvard President Bok pointed that the arguments by pro-divestment activists were "irrational" and pointing to the fiduciary obligation to properly manage the portfolio); HARVARD UNIVERSITY, PRESIDENT'S REP. 1989–1990 7–9 (1989–1990), https://iiif.lib.harvard.edu/manifests/view/drs:427018319$11i [https://perma.cc/94HA-XGMU]. At least one analysis on the effectiveness of South African divestment concluded that it did little to hasten the fall of Apartheid. *See* Siew Hong Teoh, Ivo Welch & C. Paul Wazzan, *The Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott*, 72 J. BUS. 35 (1999) (empirically assessing the effect of divestment and concluding no measurable significant effect on South African economy). Dow Chemical argued against divestment by pointing out that its South African factory made anti-tuberculosis drugs. *See* Richard C. Paddock, *Governor Signs South African Divestiture Bill*, L.A. TIMES (Sept. 27, 1986), https://www.latimes.com/archives/la-xpm-1986-09-27-mn-10376-story.html [https://perma.cc/RQ2V-GPAX].

[284] Wu, *supra* note [ ]. As part of the rational moral calculus, Bok pointed to the potential harm to South African Blacks arising from divestment.

issue of apartheid, including scholarships for Black South Africans and other academic initiatives.[285] Second, Bok emphasized shareholder voice, committing Harvard to vote its shares "to induce companies in its portfolio to implement" anti-apartheid policies aligned with the Sullivan Principles.[286] Selling shares would increase, Bok argued, the number of shareholders who "have no qualms" about the issue at hand.[287]

By contrast, a broad divestment from all firms with any business connection to South Africa, as many protestors advocated, would have been almost impossible to defend. Such a divestment would cause a skew away from large-cap firms with international operations and toward small-cap firms in mostly domestic industries,[288] significantly impairing portfolio efficiency. Moreover, notwithstanding the strong public policy against apartheid, a university probably could not have made a direct expenditure against apartheid, which as recognized by the Restatement is the functional equivalent to investing for that purpose.[289]

Contemporary legal commentators, most prominently John Langbein and Richard Posner,[290] and some investment managers reached the same conclusion.[291] Indeed, a few

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[285] *See, e.g.*, Bok, *supra* note [ ], at 65 (discussing Harvard's successful scholarship program for Black South Africans). Partnerships with non-discriminating universities in South Africa were possible too. *See* Pierre J. Hugo, *Academic Dissent and Apartheid in South Africa*, 7 J. BLACK STUD. 243, [ ] (1977), http://www.jstor.org/stable/2783706 (discussing the opposition of South African English-language universities to Apartheid).

[286] *See Bok's Statement on South Africa*, Harv. Crimson (Feb. 15, 1985), https://www.thecrimson.com/article/1985/2/15/boks-statement-on-south-africa-pbifollowing/ [https://perma.cc/NDW3-YBQN].

[287] Bok, *supra* note [ ], at 62.

[288] *See* Richard M. Ennis & Roberta L. Parkhill, *South African Divestment: Social Responsibility or Fiduciary Folly?*, FIN. AN. J. 30, 34–35 (Jul.–Aug. 1986) (listing the percentage of various economic and market sectors in the S&P 500 that would be subject to divestment); *see also* Langbein & Posner, supra [ ], at 85–88.

[289] *See supra* note __ and text accompanying.

[290] *See* Langbein & Posner, supra [ ], at 96; *see also* Robert J. Lynn, *Investing Pension Funds for Social Goals Requires Changing the Law*, 53 U. COLO. L. REV. 101, 110 (1981) (concluding that "there is little support from traditional sources for using social criteria for investment"); Ennis & Parkhill, supra [ ], at 35 (concluding that divestment to any degree violates the exclusive purpose test); Robert H. Jerry & O. Maurice Joy, *Social Investing and the Lessons of South Africa Divestment: Rethinking the Limitations on Fiduciary Discretion*, 66 OR. L. REV. 685, 747–748 (1987) (concluding that trustees may consider collateral benefits if investments are "economically equal" but predicting trustees would not do so given lack of clear law); *but see* Ann-Catherine Blank, Comment, The South African Divestment Debate: Factoring "Political Risk" into the Prudent Investor Rule, 55 U. CIN. L. REV. 201, 213–16 (1986) (arguing that fiduciary investors should consider political risks, which could make investments in South Africa unattractive, thus making a risk-return ESG point without using the term); Thomas A. Troyer, Walter B. Slocombe & Robert A. Boisture, *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds*, 74 GEO. L.J. 127, 149–50 (1985) ("More traditional trust law principles suggest that a trustee who approves a divestment policy breaches his or her duty of loyalty because he or she is pursuing an objective extraneous to the purposes of the trust. However, this analysis fails to account for the various ways in which divestment may advance a trust's charitable purposes.").

[291] *See* Barnaby J. Feder, *A Wary Reception for the Sullivan Stand*, N.Y. TIMES, (June 8, 1987), https://www.nytimes.com/1987/06/08/business/a-wary-reception-for-sullivan-stand.html

commentators who were strongly in favor of divestment on moral grounds conceded that fiduciary principles did not permit total divestment and therefore advocated for law reform.[292] The University of California's divestment from South Africa, which appears to be the only substantial total divestment by 1988,[293] is a telling anecdote. The Regents had declined a broad divestment until the state enacted legislation promising indemnification for any resulting fiduciary liability.[294] The divestment involved selling $3.1 billion of assets (roughly $9 billion in present dollars), with inescapable portfolio efficiency consequences, and taking a one-time administrative cost estimated at $118 million.[295]

2. Tobacco

In contrast to widespread, though largely de minimis, selective divestment from South Africa during Apartheid, most universities have declined any degree of divestment from tobacco. The most prominent endowment divestments from tobacco were in the 1990s or early 2000s by Harvard, Michigan, Johns Hopkins, and the University of California, and by Dartmouth in 2012.[296] At least one press report claims that Stanford

[https://perma.cc/45KH-DBQD] (reporting that some fund managers, citing fiduciary obligation, refuses divestment).

[292] *See, e.g.*, Joel C. Dobris, *Arguments in Favor of Fiduciary Divestment of South African Securities*, 65 NEB. L. REV. 209, 225, 233–36, 241 (1986) (arguing that costless divestment is permissible, but acknowledging that costly divestment might require changing the law); Joel C. Dobris, SRI—Shibboleth or Canard (Social Responsible Investing, That Is), 42 REAL PROP. PROBATE & TRUST J. 755, 788–90 (2008).

[293] *See* THE AFRICA FUND, DIVESTMENT ACTION ON SOUTH AFRICA BY U.S. AND CANADIAN COLLEGES AND UNIVERSITIES (1988), https://perma.cc/4BDJ-FV45. A 1985 report indicates that Columbia had planned an extensive divestment.

[294] *See* Jay Mathews, *California Regents Vote to Divest $3.1 Billion in South Africa Holdings*, WASH. POST (July 18, 1986), https://www.washingtonpost.com/archive/politics/1986/07/19/california-regents-vote-to-divest-31-billion-in-south-africa-holdings/bf29e8db-655f-4c40-9b62-4e9a08d02959/ [https://perma.cc/NQU8-XQDW] (reporting that trustees agreed to South Africa divestment only after Governor Deukmejian, who supported divestment, agreed to sign a law indemnifying the trustees from liability arising out of divestment).

[295] *See id.*

[296] Goldie Blumenstyk, *Many Wealthy Universities Drop Tobacco Stocks*, CHRONICLE OF HIGHER ED. (Oct. 13, 1993), https://www.chronicle.com/article/many-wealthy-universities-drop-tobacco-stocks/ [https://perma.cc/MS9W-EWTN] ("Harvard and the Johns Hopkins University adopted tobacco-divestment policies in 1989 and 1991, respectively."); *U-M to Divest Its Holdings in Tobacco Manufacturing Companies*, MICHIGAN NEWS (Jun. 16, 2000), https://news.umich.edu/u-m-to-divest-its-holdings-in-tobacco-manufacturing-companies/ [https://perma.cc/4PL7-SLA7]; Kenneth R. Weiss, *UC Regents Drop Plan to Buy Tobacco Stocks*, L.A. TIMES (Jan. 18, 2001), https://www.latimes.com/archives/la-xpm-2001-jan-18-mn-13627-story.html. Dartmouth College Advisory Committee on Investor Responsibility Executive Summary Prepared for the Dartmouth Community Fiscal 2018 (hereinafter "Dartmouth 2018"), available at https://www.dartmouth.edu/investments/docs/2018_acir_annual_report.pdf [https://perma.cc/FJ95-XL7S] ("On June 2, 2012, Dartmouth's Board of Trustees voted to divest Dartmouth's tobacco holdings."). In addition, Northwestern was reported to have had a "tradition" against tobacco investments. Blumenstyk, supra.

divested from tobacco in the 1990s,[297] but we were unable to find corroborating evidence that Stanford in fact did so.

Other universities with substantial endowments, such as Yale and the University of Pennsylvania, explicitly rejected tobacco divestment.[298] Moreover, Harvard, Michigan, Hopkins, and Dartmouth are evidently no longer fully divested from tobacco. Harvard has since held index funds that own shares in tobacco companies,[299] and the University of Michigan and Hopkins appear likewise to have moved to equity holdings via investment funds without a tobacco screen.[300] Dartmouth imposed a tobacco screen on its outside managers at least as of 2018.[301] But Dartmouth's most recent disclosure of its direct public market holdings shows that it holds at least one broadly diversified index fund that includes tobacco companies.[302]

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[297] *See, e.g.*, Randall Smith, *Fossil Fuels are the New Tobacco*, THETECH (Sept. 6, 2013), https://thetech.com/2013/09/06/wire2-v133-n35# [https://perma.cc/73LG-R7N3] (reporting that "Harvard, Stanford and CalPERS all sold their tobacco stocks" in the 1990s).

[298] *See* Scott Jaschik, *Penn Rejects Divestment of Tobacco Company Stock*, INSIDE HIGHER ED. (Jun. 22, 2014), https://www.insidehighered.com/quicktakes/2014/06/23/penn-rejects-divestment-tobacco-company-stock [https://perma.cc/9VT4-P5FG]; Susie Poppick, *Report Outlines Tobacco Policies*, YALE DAILY NEWS (Oct. 28, 2004), https://yaledailynews.com/articles/report-outlines-tobacco-policies [https://perma.cc/RP53-DV77] (reporting on the Yale board's rejection of tobacco divestment).

[299] *See* Ruoqi Zhang, *Harvard Indirectly Holds Nearly $100,000 Worth of Stocks in Tobacco Companies*, HARV. CRIMSON (Mar. 10, 2020), https://www.thecrimson.com/article/2020/3/10/harvard-tobacco-stocks-divestment/ [https://perma.cc/DHU3-GCT3] (estimating from Harvard's public disclosures of only 2% of its ownership interests that it had about $100,000 worth of shares in tobacco companies through exchange-traded funds).

[300] *See* ENDOWMENT INVESTMENT REP. 2023, UNIV. OF MICH. 13 (2023), https://drive.google.com/file/d/1O583spU73r14V-rrpFQhWrRyzwmPQDXO/view [https://perma.cc/7ZNP-4C6V] ("The university invests in public equities through both commingled funds . . . and through separate accounts, where securities are selected by managers but held at the university's custodian. The portfolio has a global mandate and *can hold stocks in any investable market*." (emphasis added)); PUBLIC INTEREST INVESTMENT ADVISORY COMMITTEE, FINAL REPORT (Jan. 2025), JOHNS HOPKINS UNIV. 33 (2025) ("Today, most universities—including JHU—invest their endowments through external managers and have very few if any directly held investments in stocks and bonds. Much of the directly held investments universities hold are in vehicles *such as market index products like ETFs*. This modern structure … makes divestment of any kind costly, difficult, and highly impractical." (emphasis added)), https://provost.jhu.edu/wp-content/uploads/2025/01/PIIAC-Final-Report-January-2025.pdf [https://perma.cc/6T5X-8JYD].

[301] *See* Dartmouth 2018, *supra* note __, at 3 ("Further, the Board of Trustees directed the Investment Office to create a mechanism with which to ensure that none of Dartmouth's investment managers purchase tobacco stocks for Dartmouth's portfolio in the future. The current tobacco list is based on MSCI's ACWI Tobacco Index.").

[302] Dartmouth's most recent Form 13F-HR, filed with the SEC on January 14, 2026 for year-end 2025, shows more than $225 million invested in the SPDR S&P 500 ETF, *see* Dartmouth, Form 13f-HR (Jan. 14, 2026) https://www.sec.gov/Archives/edgar/data/1599404/000159940426000002/xslForm13F_X02/dartc13f20251231.xml [https://perma.cc/E8SH-BR63], which includes tobacco firms. *See* State Street SPDR S&P 500 ETF Trust, Annual Report, https://www.ssga.com/us/en/intermediary/resources/doc-viewer#spy&annual-report [https://perma.cc/3LKQ-R8ZS] (listing tobacco firms such as Altria and Philip Morris International among its holdings).

So far as we can tell, only the University of California remains completely divested from tobacco. When the University of California endowment shifted to index funds in the early 2000s, it eventually created its own bespoke fund that filtered out tobacco and fossil fuels.[303] We have not found an assessment of the costs relative to public index funds of this in-house index fund. But the diversification costs of excluding entire industries are apparent. Indeed, the professional investment advisors to the UC system warned at the time that tobacco divestment would harm portfolio efficiency.[304] And a 2009 self-assessment concluded that the tobacco divestment had indeed resulted in $377.8 million in losses.[305] Similarly, a twenty-year retrospective study by California's public pension system found that its parallel tobacco divestment had cost that portfolio $3.7 billion (from 2001 to 2021).[306] Based on their relative sizes, this would be about a $236 million loss to the UC system as of 2021.[307]

The legality of tobacco divestment is a harder case than the selective divestments from South Africa. On the prudence side, whereas selective divestment from South Africa typically involved selling off a handful of stocks across multiple industries, which could be replaced with other stocks in those same industries, tobacco divestment involves exiting an entire industry. Textbook finance teaches that exclusion of an entire industry

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[303] *See Regents Policy 6110: University of California Blue and Gold Endowment Investment Policy Statement* 3, (May 13, 2021) available at https://regents.universityofcalifornia.edu/policies/6110.pdf (describing the Blue and Gold Endowment Fund as a passively managed fund "established by the Regents with the objective to provide a low cost, liquid, diversified investment vehicle in which the various UC organizations can invest their long-term excess capital reserves"). The fund does not invest in tobacco or fossil fuels. *See* Regents Policy 6110, *supra* at 5–6 (benchmarking the fund's equity holdings to a tobacco and fossil fuels free index). As of 2025, the UC Endowment held almost 22% of its endowment assets in the Blue and Gold Endowment Fund. Off. of the Chief Invest. Officer of the Regents (UC Investments) at 2 (May 13, 2025) available at https://regents.universityofcalifornia.edu/regmeet/may25/i1.pdf.

[304] *See* Kenneth R. Weiss, *UC Regents Drop Plan to Buy Tobacco Stocks*, L.A. TIMES (Jan. 18, 2001), https://www.latimes.com/archives/la-xpm-2001-jan-18-mn-13627-story.html [https://perma.cc/5MAN-TMUS] ("Ignoring professional investment advice, University of California regents Wednesday instructed their staff to snuff out plans to purchase $55 million in tobacco stocks."). Later advice to the state employee retirement system was in accord. *See CalPERS to Sell Off $550 Million in Tobacco Investments,* NBC BAY AREA (Dec. 19, 2006), https://www.nbcbayarea.com/news/local/calpers-to-sell-off-550-million-in-tobacco-investments/143233/ [https://perma.cc/9WEK-NRLC] ("In a 9-3 vote, the CalPERS investment committee disregarded the advice from its own financial advisers who recommended reversing a sell-off of tobacco stock that was approved in 2000, which has cost the system more than $3 billion in lost earnings.").

[305] OFF. OF THE TREASURER OF THE REGENTS, ANNUAL REPORT ON DIVESTMENT POLICIES – IMPACT OF REGENTS' INVESTMENT POLICIES ON TOBACCO AND SUDAN 3 (Sept. 10, 2009), https://regents.universityofcalifornia.edu/regmeet/sept09/i8attach.pdf [https://perma.cc/4KYC-EVHP].

[306] *See* CalPERS Inv. Comm., *Five-Year Divestment Review* 4 (Mar. 15, 2021), https://www.calpers.ca.gov/docs/board-agendas/202103/invest/item09a-01_a.pdf [https://perma.cc/W5B6-JGAH] (showing a "return impact" of negative $3,692 million).

[307] CalPERS reported $502 billion under management in July 2024. *CalPERS Reports Preliminary 9.3% Investment Return for 2023-24 Fiscal Year*, CalPERS (July 15, 2024), https://www.calpers.ca.gov/newsroom/calpers-news/2024/calpers-preliminary-investment-return-fiscal-year-2023-24 [https://perma.cc/47F2-ZLKD]. The UC system reported about $29 billion in assets under management. U.C. Off. of the President, *Stocks and Real Estate Power UC's Investments to $180 Billion at Fiscal Year End*, U.C. (Aug. 1, 2024), https://www.universityofcalifornia.edu/press-room/stocks-and-real-estate-power-ucs-investments-180-billion-fiscal-year-end [https://perma.cc/J5BZ-2G5N].

comes with a diversification cost, as noted by the University of California's investment advisors. Moreover, as we have seen the added costs associated with screened index funds are not trivial.[308]

There is also the question of balancing costs against benefits. For the reasons discussed earlier, a divestment by university endowments of public holdings is unlikely to affect activity levels.[309] Indeed, when Yale's Advisory Committee on Investment Responsibility considered tobacco divestment in 1991, it concluded that retaining shareholder voice would be a more efficacious way of reducing tobacco harm than sale of shares:

> Yale's divestment of tobacco stocks, either alone or as a spur to other investors, would not cause tobacco companies to cease producing and marketing their products. Instead, it would be a one-time symbolic act; once Yale divested, it would relinquish any continuing influence over the companies' policies. Divestment can—and in the case of tobacco, would—also impose a non-trivial cost (through lower expected market returns and decreased portfolio diversification) on Yale's endowment and thus on its essential educational and community service missions, including promotion of public health.[310]

Tobacco divestment is hard to square with loyalty as well. For selective divestment from South Africa, university and public policy had come to embrace strong anti-discrimination norms. State and federal governmental actions evidenced a strong public policy against South Africa's apartheid system in particular. By contrast, university and public policies against tobacco use, especially in the 1990s and early 2000s, were weaker. In the relevant timeframe tobacco was legal for purchase by the typical university student and staff member, and its use was commonly permitted on university campuses. To be sure, tobacco divestment could be consistent with some restricted gifts, especially those targeted to public health. The Johns Hopkins trustees, for example, took the position that public health had long been a core function of that university, justifying a significant tobacco divestment as to the entire endowment.[311] But it is hard to see how divesting from tobacco is consistent with the charitable purpose of most university restricted gifts, say a long-standing restricted gift to support research by the classics department.

Harvard's tobacco divestment is an especially problematic example, as it was evidently executed in a manner grossly deviant from fiduciary process norms. Harvard

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308 *See supra* Part II.E.2.a.

309 *See supra* Part II.E.2.b.

310 *See* Recommendation by Advisory Committee on Investor Responsibility Concerning Tobacco Products at 1 (1991), available at https://perma.cc/8VHJ-NTGX.

311 *See Johns Hopkins Drops Tobacco Investments*, CHRON. HIGHER ED. (Mar. 6, 1991), https://www.chronicle.com/article/johns-hopkins-drops-tobacco-investments/ [https://perma.cc/NNT4-5XLS] (quoting the university trustees' statement that "holding of tobacco stocks is incompatible with the university's mission to disseminate information on the treatment and prevention of disease and illness").

apparently divested from tobacco at the behest of then-President Derek Bok, who on his own telling was heeding the suggestion of his spouse, implementing her suggestion later that day without further fiduciary analysis.[312] "To me," Bok has since explained, "selling tobacco stocks was not done to bring pressure on the companies involved to stop producing cigarettes. Such an effort would have been fruitless. I simply believed that Harvard should not make money from investing in companies whose product cause great harm to millions of people while offering virtually no redeeming benefit."[313]

But Harvard's public health and medical schools continued to accept tobacco industry funding for faculty research for nearly 15 years after its tobacco divestment (until 2002 and 2004, respectively).[314] The use of tobacco products was permitted on campus for nearly 25 more years after the divestment (until 2014).[315] Against this backdrop, Bok's description of the motivations and process for Harvard's tobacco divestment, if accurate, is all but an admission of loyalty and prudence breaches. The divestment was motivated by considerations outside its charitable purpose, and there was no assessment of portfolio costs or benefits. Ironically, Harvard chose the path that was least effective and least defensible, when programmatic options, such as an on-campus tobacco ban, were available, legally defensible, and likely more impactful. Eventually, Harvard abandoned tobacco divestment while implementing a campus tobacco ban and academic disassociation.

3. Darfur

A bloody conflict in Darfur, a region in western Sudan, began in 2003 between Sudan's Arab-dominated government and Black African rebel groups, which quickly took a horrific turn for civilians, many of whom were subject to deliberate attacks.[316] By 2004, the U.S. Congress and U.S. State Department declared that the Sudanese government was committing genocide.[317] The UN balked at declaring genocide, but agreed war crimes were likely being committed.[318]

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[312] *See* DEREK BOK, ATTACKING THE ELITES: WHAT CRITICS GET WRONG—AND RIGHT—ABOUT AMERICA'S LEADING UNIVERSITIES 55 (2024).

[313] *Id.*

[314] *See* J. Hale Russell, *HSPH Rejects Tobacco Funding*, HARV. CRIMSON (Jan. 30, 2002), https://www.thecrimson.com/article/2002/1/30/hsph-rejects-tobacco-funding-the-faculty/ [https://perma.cc/2AZP-KMR7]; *Policy on Acceptance of Tobacco Related Research Funding*, Harv. Med. Sch., https://researchadmin.hms.harvard.edu/sites/default/files/Files/Policies/tobaccopolicy.pdf [https://perma.cc/4QF8-MWM2].

[315] Quynh-Nhu Le, *Harvard Yard Goes Tobacco-Free*, HARV. CRIMSON (Sept. 4, 2014), https://www.thecrimson.com/article/2014/9/4/harvard-yard-tobacco-free/ [https://perma.cc/BP5D-SG3L].

[316] *SEE* JULIE FLINT & ALEX DE WAAL, DARFUR: A SHORT HISTORY OF A LONG WAR (2008).

[317] *See* Scott Straus, *Darfur and the Genocide Debate*, 84 FOREIGN AFFAIRS 123 (2005) (discussing the politics around the declaration of genocide in Darfur).

[318] INT'L COMM'N OF INQUIRY ON DARFUR, REP. TO THE U.N. SECRETARY-GENERAL PURSUANT TO SEC. COUNCIL RESOL. 1564 158 (Jan. 25, 2005), https://www.legal-tools.org/doc/1480de/pdf/ [https://perma.cc/WML4-

In 2007, President George W. Bush signed the "Sudan Accountability and Divestment Act," which declared the "sense of Congress" that divestment from Sudan by state and local governments, investment companies, and pension fiduciaries was to be encouraged.[319] Some states passed legislation authorizing divestment of state funds from corporations doing business in Sudan.[320] Of particular concern was a robust arms and oil trade between China and Sudan, facilitated by agreements with Chinese state-owned oil companies.[321] PetroChina, affiliated with China's state-owned oil company, was targeted as providing needed oil revenues for Sudan's government to continue prosecution of the war.[322]

Student groups advocated vociferously for divestment from Darfur, but without disruptive demonstrations, and their demands were focused on a few companies.[323] Darfur divestment found a positive reception among many university boards. At least 61 university endowments reportedly divested from Darfur, including 15 of the 25 largest endowments.[324]

The divesting endowments generally effectuated the divestment by selling a small handful of directly held securities. The effect on portfolio efficiency was therefore almost certainly de minimis. For example, Harvard reportedly sold shares in two corporations.[325] Yale reportedly sold shares in one corporation and put three other companies on a do-not-invest list.[326] MIT announced divestment "as appropriate" of direct holdings

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QES9] (concluding that both the militias and the Sudanese government had committed crimes against humanity and "likely" war crimes).

319 S. 2271, 110th Cong. (2007).

320 *See* Perry S. Bechky, *Darfur, Divestment, and Dialogue*, 30 U. PA. J. INT'L L. 823 (2009) (listing 27 states that, as of 2009, had authorized state agencies to divest from Sudan).

321 Phillip Manyok, *Oil and Darfur's Blood: China's Thirst for Sudan's Oil*, J. POL. SCI. & PUB. AFF. Vol. 4:1, 2016 (documenting the correlation between China's arms sales to Sudan and Sudan's oil sales to China).

322 *See Harvard Announces Decision to Divest PetroChina Stock*, HARV. GAZETTE (Apr. 4, 2005), https://news.harvard.edu/gazette/story/2005/04/harvard-announces-decision-to-divest-petrochina-stock/ [https://perma.cc/9ZGH-MR5X].

323 *See* Scott Warren, *I Protested for Divestment from Sudan. What Today's Protestors Should Know*, TIME (May 3, 2024), https://time.com/6974567/divestment-sudan-lessons-israel-protestors/ [https://perma.cc/RW7V-5NXJ] (student leader attributing success to careful engagement and focused demands); Philip Rucker, *Student-Driven Sudan Divestment Campaign Grows*, N.Y. TIMES (Apr. 26, 2006), https://www.nytimes.com/2006/04/26/nyregion/studentdriven-sudan-divestment-campaign-grows.html [https://perma.cc/TYA9-QRJQ] (discussing the student divestment campaign tactics).

324 *See* Investors Against Genocide, *Colleges and Universities that Divested from Sudan*, https://www.investorsagainstgenocide.org/about/resources/colleges-and-universities-that-divested-from-sudan/ [https://perma.cc/U33Q-D4ZH] (last visited Feb. 23, 2026).

325 *Statement on Sinope Divestment*, HARV. GAZETTE (Mar. 23, 2006), https://news.harvard.edu/gazette/story/2006/03/statement-on-sinopec-divestment/ [https://perma.cc/R652-4QZS].

326 *See Yale Dumps Investments Linked to Sudan*, NBC NEWS (Feb. 16, 2006), https://www.nbcnews.com/id/wbna11386152 [https://perma.cc/P7P9-R6T9]; YALE ADV. COMM. ON INV.

connected to the "abhorrent acts" in Sudan.[327] But MIT never identified any actual sales, and when challenged for failing to do so, the school decline further comment.[328]

At least two major endowments explicitly declined divestment. Texas enacted a statute directing state agencies to divest from Darfur. But the Texas university system did not divest, noting that the statute did not apply to it.[329] The University of Chicago likewise rejected divestment, citing a long-standing policy against speaking with its endowment.[330] Others equivocated. Johns Hopkins and Michigan stated that they did not have Darfur investments, but they also refused student demands to commit not to make such an investment in the future.[331]

A fiduciary analysis of the Darfur divestments echoes that for selective divestment from South Africa. On the prudence side, selling directly held shares in one or two corporations will tend to impose little administrative cost or harm to portfolio efficiency. On the loyalty side, a strong public policy confirmed by state and federal governmental actions encouraged divestment from Darfur, and the divestment targets were narrow and tightly related to the conduct at issue: specific oil companies whose relationships with the Sudanese government were likely financing the war. As with South Africa, therefore, a de minimis portfolio restructuring in this vein could plausibly be defended as falling within that public policy, resolving the problem of myriad restricted funds and the sole interest rule.

B. The Spread of Formal Divestment (and ESG) Policies

A handful of universities with large endowments have long had standing committees to advise on divestment—that is, on nonfinancial factors in endowment management. Yale was among the first universities to create such a committee, doing so

RESP., REP. ON INVESTING IN THE SUDAN 7 (2006), https://acir.yale.edu/sites/default/files/files/ACIRReport.pdf [https://perma.cc/8WVK-YFKG].

327 *See MIT Rejects Abhorrent Acts in Darfur, Will Divest as Necessary*, MIT NEWS (May 14, 2007), https://news.mit.edu/2007/sudan-statement [https://perma.cc/3A75-JQXN].

328 *See Groups Question Extent of MIT Divestment*, DAILY FREE PRESS (Sept. 3, 2007), https://dailyfreepress.com/09/04/00/39817/groups-question-extent-of-mit-divestment/ [https://perma.cc/N3RS-7NP6].

329 Laura Burke, *UT's Dirty Investments*, TEX. OBSERVER (Feb. 28, 2011), https://www.texasobserver.org/uts-dirty-investments/ [https://perma.cc/EJL8-R3P7].

330 *See* University of Chicago Magazine, *Response to Darfur*, (Mar/Apr 2007), https://magazine.uchicago.edu/0734/chicagojournal/darfur.shtml [https://perma.cc/7XB8-ACQ3] (reporting board's decision to not divest and citing Kalven principles as basis for non-divestment policy).

331 *See* Lena Denis, *University Has No Plans to Divest from Sudan - Administration Says It Has No Investments in Sudan, but Has Not Considered Formally Divesting*, JOHNS HOPKINS NEWS-LETTER (Dec. 5, 2007), https://www.jhunewsletter.com/article/2007/12/university-has-no-plans-to-divest-from-sudan-administration-says-it-has-no-investments-in-sudan-but [https://perma.cc/D7CR-KYL7]; Brian Tengel, *'U' Has no Stock in Sudan, Won't Rule Out Investing*, THE MICHIGAN DAILY (Mar. 9, 2007), https://www.michigandaily.com/uncategorized/u-has-no-stock-sudan-wont-rule-out-investing/ [https://perma.cc/6F9P-BXDC].

in 1972.[332] Princeton followed the following year.[333] Other universities created a mechanism for ad hoc committees to consider divestment issues as they came up from time to time.[334] More recently, in the wake of the Darfur divestments and in light of increasing student demands for fossil fuel divestment, a movement arose toward formal divestment guidelines, standing advisory committees, or both. For example, in the mid-2010s Northwestern and Stanford each created an advisory committee charged with drafting an updated divestment policy statement.[335]

We collected the current divestment policies for the 25 largest endowments.[336] This undertaking was challenging. There is no central repository of university divestment policies, some universities lack a formal policy, and in some instances the divestment policy is split across multiple documents. A few universities do not seem to have formal policies on divestment but rather make ad hoc assessments. For schools that lack a formal policy, we have inferred policy from observed practice, that is, we have coded based on their conduct. We acknowledge that our results are qualitative and, for any given school, perhaps incomplete.

The rise of environmental, social, and governance (ESG) investing is a particular complication because it may or may not qualify as a divestment. As noted at the outset, by divestment we mean reliance on a nonfinancial factor, that is, consideration of a factor other than prudent risk and return.[337] Accordingly, use of ESG factors to improve risk-adjusted returns, what we have elsewhere called risk-return ESG, would not be a divestment.[338] By contrast, the use of ESG factors to screen firms or industries for nonfinancial reasons, what we have elsewhere called collateral benefits ESG, would be a divestment.[339]

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[332] *Investor Responsibility*, Yale Invest. Off., https://investments.yale.edu/social-responsibility/ [https://perma.cc/S6HA-SLJN].

[333] *CPUC Resources Committee*, Princeton Univ., https://cpucresources.princeton.edu/about [https://perma.cc/U6AE-RR8F] (last visited Feb. 23, 2026).

[334] *See, e.g.*, *Divestment*, Penn Univ. Sec'y, https://secretary.upenn.edu/trustees-governance/divestment [https://perma.cc/V9VZ-5FR7] (last visited Feb. 23, 2026) (maintaining an "ad hoc" committee to advise on specific investment responsibility issues if referred by "steering committee").

[335] *Growing Responsibly. Advancing Our Future.*, Nw. Comm. On Inv. Resp., https://www.northwestern.edu/acir/ [https://perma.cc/M8RB-YZE] (last visited Jan. 26, 2025); *Update from the Board of Trustees on Investment Responsibility Issues*, Stan. Rep. (Oct. 11, 2017), https://news.stanford.edu/stories/2017/10/update-board-trustees-investment-responsibility-issues [https://perma.cc/Q39K-8LNC].

[336] Because the University of Texas and Texas A&M systems are managed by the same company, we count them as one. *See Investment Strategies That Support World-Class Education*, The Univ. of Texas/Texas A&M Invest. Mgmt. Co., https://www.utimco.org [https://perma.cc/E5LZ-PGF] (last visited Feb. 23, 2026).

[337] *See supra* note 13 and text accompanying.

[338] *See* Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381 (2020).

[339] *Id.*

To the extent universities state that they use ESG factors, they tend to frame that use in terms of risk and return.[340] If a university states that it relies on ESG factors to improve risk and return, we take it at its word and do not treat that statement as a divestment policy. Of course, not all universities say they use ESG factors, including the University of Chicago and the Texas system, which make no reference to ESG.[341]

In all events, we are struck by the lack of consistency across the universities with the 25 largest endowments. The most common policy among the top 25 largest endowments allows for the possibility of divestment but emphasizes its limitation to certain abhorrent practices and that financial returns are paramount. Roughly speaking, the policies (or our inference of policy from observable ad hoc practice) fall into four groupings: (1) no divestment; (2) rare divestment in extreme cases; (3) "direct holdings" divestment (which in substance may be the same as (2)); and (4) significant divestment, chiefly fossil fuels. Table 2 summarizes our divestment policy assessment for each university with a top 25 endowment.

Table 2: Summary of Top 25 Endowment Divestment Policies

Non-Divestment Policy	Abhorrence/Rare Divestment	"Direct Holdings" Divestment	Significant Divestment
MIT	Stanford University	Harvard University	Princeton University
University of Texas Systems	Duke University	Columbia University	Yale University
University of Chicago	Johns Hopkins University	Cornell University	UC System
Washington University	Northwestern University	University of Southern California	
Vanderbilt University	University of Notre Dame	Dartmouth College	
University of Virginia	Emory University	University of Michigan	
Rice University	Ohio State University	University of Pennsylvania	
	Brown University		

340 *See, e.g.*, *Sustainable Investing Policy*, Harv. Mgmt. Co. (Aug. 2020), https://www.hmc.harvard.edu/wp-content/uploads/2020/11/HMC-Sustainable-Investment-Policy.pdf [https://perma.cc/9KH8-D6YD] (stating that "external managers . . . are expected to consider relevant ESG factors that may have a material impact on the financial performance of their portfolios"); *Investing for the Long-Term*, Harv. Mgmt. Co. (2019), https://www.hmc.harvard.edu/sustainable-investing/ [https://perma.cc/9CN9-M8X2] ("As a long-term investor, HMC focuses on environmental, social, and governance (ESG) factors that may impact the performance of our investments."); *Responsibility*, DUMAC Inc., https://dumac.duke.edu/responsibility/ [https://perma.cc/EU69-AV39] (last visited Jan. 26, 2025) (discussing integration of ESG risks into manager selection and monitoring); *Environmental, Social and Governance Investing*, Nw. Inv. Off., https://www.s.edu/investment/responsibility/esg-investing.html [https://perma.cc/XS2P-9QSU] (last visited Jan. 26, 2025) (committing to consider ESG factors).

341 *See How University Investment Offices Often Fail to Conduct Due Diligence when Investing in Venture Capital Funds*, Amnesty Int'l (last visited Jan. 26, 2025), https://www.amnestyusa.org/wp-content/uploads/2023/04/FINAL-university-vc-report.pdf at 10–11 (reporting no ESG commitments from University of Chicago or UT System).

1. Divestment

Seven schools have strong non-divestment policies: MIT,[342] the Texas systems,[343] University of Chicago,[344] Washington University,[345] Vanderbilt,[346] Virginia,[347] and Rice.[348] The reasons given vary. Some emphasize that the endowment's function is to support the university's research and educational mission, and that divestment could impair that function.[349] The University of Chicago emphasizes its commitment to institutional neutrality such that it will not speak with the endowment.[350] Others point to practical problems with divestment, including costs and the shift from direct holdings to outside managers and pooled funds. For example, MIT emphasizes that its endowment is managed almost entirely by outside managers in "commingled funds."[351] MIT acknowledges that divestment might have been plausible when it "used to hold a

[342] *See MIT's Environmental, Social, and Governance (ESG) Investment Framework*, Mass. Inst. of Tech. Inv. Mgmt. Co., https://mitimco.org/mits-environmental-social-and-governance-esg-investment-framework/ [https://perma.cc/QX6F-8FVL] (last visited Jan. 24, 2025).

[343] *See* Laura Burke, *UT's Dirty Investments*, TEXAS OBSERVER (Feb. 28, 2011), https://www.texasobserver.org/uts-dirty-investments/ [https://perma.cc/KQY4-W7SD]; *22.02 System Investment*, Texas A&M Univ. Sys., https://assets.system.tamus.edu/files/policy/pdf/annotated/22-01/22-02-ANN-200820.pdf [https://perma.cc/N2MC-CT3L].

[344] *See Statement Reaffirming the University's Position on Divestment and Academic Boycotts*, UNIV. OF CHICAGO NEWS (Apr. 14, 2016), https://news.uchicago.edu/story/statement-reaffirming-universitys-position-divestment-and-academic-boycotts [https://perma.cc/2YUP-7VVS] ("The University does not take social or political stances on issues outside its core mission.").

[345] *See Endowment 101: Socially Responsible Investing*, Washington Univ. Off. of the Chancellor, https://andrewdmartin.wustl.edu/endowment-101-socially-responsible-investing/ [https://perma.cc/3GQS-PL9M] (last visited Feb. 23, 2026).

[346] *See* Oung, Lele & Johnson, *Debrief with Diermeier: Leadership, Al Gore, the omicron variant and more*, THE VAND. HUSTLER (Dec. 8, 2021), *https://vanderbilthustler.com/2021/12/08/debrief-with-diermeier-leadership-al-gore-the-omicron-variant-and-more/* [https://perma.cc/LY97-9JDB].

[347] *See* UNIV. OF VIRGINIA INV. MGMT. CO., 2025 INVESTOR RESPONSIBILITY REPORT, 4 (2025) https://uvimco.org/wp-content/uploads/2025/05/UVIMCO_Investor-Responsibility-Report_2025.pdf [https://perma.cc/6FHG-92G9] ("UVIMCO views engagement as a more effective tool than divestment to encourage climate action and emissions reduction.").

[348] *See Rice Divestment Statement*, Rice Mgmt. Co., https://investments.rice.edu/ (last visited Feb. 16, 2026) [https://perma.cc/H674-CYNE] ("Divestment mandates restrict the endowment's access to top performing investment managers, impeding the endowment's ability to generate the returns necessary to support the University and the Board's fiduciary obligations.").

[349] For example, Washington University's position is that "investment restrictions introduce adverse selection and could directly impair WUIMC's core mission to provide maximum financial support to the university." *Endowment 101: Socially Responsible Investing*, Washington Univ. Off. of the Chancellor, *supra* note [ ].

[350] *Statements Reaffirming the University's Position on Divestment and Academic Boycotts*, UNIV. OF CHICAGO NEWS, *supra* note [ ].

[351] *MIT's Environmental, Social, and Governance (ESG) Investment Framework*, *supra* note [ ] ("As a result, we do not have real-time transparency into portfolio holdings, we do not control which securities are bought and sold, and we have exposure to many individual positions that are de minimis in size."). MIT claims to have chosen not to employ a manager who displayed "nonchalance" on issues of child labor and another who was unconcerned about tar sands. *Id.* But MIT does not impose screens on managers.

relatively small number of securities . . . directly in MIT's control," but that is no longer the case.[352]

2. Abhorrence: Rare Divestment in Extreme Cases

Some universities with a top 25 endowment have publicly declared policies that permit divestment for moral abhorrence (or other similar such language) but have not invoked those policies to divest other than for the Darfur war or, in a few cases, specific fossil fuels such as tar sands or thermal coal. These abhorrence policies typically emphasize that divestment will be extremely rare and decided on a case-by-case basis.[353] At least six universities fall into this category: Stanford,[354] Duke,[355] Johns Hopkins,[356] Northwestern,[357] Emory,[358] and Ohio State.[359]

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352 *Id.*

353 *See, e.g.*, *Growing Responsibly, Advancing Our Future.*, Nw. Comm. On Inv. Resp. (last visited Jan. 26, 2025), https://www.northwestern.edu/acir/ [https://perma.cc/M8RB-YZE]; *Update from the Board of Trustees on Investment Responsibility Issues*, Stan. Rep. (Oct. 11, 2017), https://news.stanford.edu/stories/2017/10/update-board-trustees-investment-responsibility-issues [https://perma.cc/Q39K-8LNC].

354 *See Ethical Investment Framework*, Stan. Mgmt. Co., https://smc.stanford.edu/wp-content/uploads/2018/12/SMC-Ethical-Investment-Framework.pdf [https://perma.cc/Z9SE-L5P6] ("In rare instances, the University's Board of Trustees may elect to divest specific companies or categories of investment that are deemed abhorrent and ethically unjustifiable. Such divestment decisions are only reached after careful deliberation by the Trustees, who apply consistent principles and a thorough process.").

355 *See Guideline on Investment Responsibility*, Duke Univ. Bd. of Trs. (May 8, 2020), https://dumac.duke.edu/wp-content/uploads/sites/30/2020/10/Guideline-on-Investment-Responsibility-5.8.20.pdf [https://perma.cc/84PT-UC5L] ("In rare cases, the Duke community may call upon ACIR to review investment that is engaged in activity considered morally abhorrent, such as apartheid, genocide, or slavery.").

356 *See Report in Response to the Proposal "Divest from Activities Arming, Financing, and Supporting the Humanitarian Crisis of Palestinians and Occupied Palestinian Territory,"* JHU Pub. Int. Inv. Adv. Comm. (Jan. 2025), https://provost.jhu.edu/wp-content/uploads/2025/01/PIIAC-Final-Report-January-2025.pdf [https://perma.cc/W5QB-GRSU].

357 *See Statement on Investment Responsibility*, Nw. Bd. of Trs. (2019), https://www.northwestern.edu/about/board-of-trustees/docs/bot-statement-on-investment-responsibility_approved-2019.11.15.pdf [https://perma.cc/L8GM-EW4Z] ("[T]he Trustees recognize that, on very rare occasions, a continued investment may be so morally reprehensible, such as investments that directly support slavery, apartheid, or genocide, that such investment would necessitate the University's divestment.").

358 *See Investment Framework for Environmental, Social and Governance ("ESG") Issues*, Emory Inv. Mgmt., https://sustainability.emory.edu/wp-content/uploads/2021/01/Emory-Investment-Management-_ESG-Policy_6.7.19-1.pdf [https://perma.cc/JBC5-XELK] ("The Executive Committee of Emory University indicated that in extraordinary circumstances, the truste es may determine that direct financial investment in particular companies associates Emory with actio ns or positions that violate the university's most deeply held values and should be avoided, regardless of p otential financial return. In such instances divestment from those particular companies may be necessary to separate the Emory community from the morally abhorrent activity of the company or companies in questi on.").

359 *See* Ohio State Univ., https://policies.osu.edu/sites/default/files/documents/2024/09/investment-policy.pdf [https://perma.cc/M29A-4DWK] ("Divestment for non-economic reasons should be

Two additional universities seemingly fall into this category as a matter of practice. Brown does not have a formal policy, but rather an ad hoc process of review of divestment suggestions by a standing committee that advises the board.[360] Brown has not divested since Darfur and South Africa and, while reducing its fossil fuel holdings, explicitly disclaimed that reduction as a divestment, attributing it to a prudent risk and return analysis.[361] Likewise, Notre Dame lacks a formal policy, though it references Catholic principles in its investment standards and so far as we can tell has not reported a divestment other than the Darfur war.[362]

The Northwestern and Stanford policies, which as noted above came out of advisory committees charged with drafting them following Darfur and calls for fossil fuels divestment,[363] are representative of abhorrence/rare divestment category in both policy and application. Each allows for possibility of divestment for moral abhorrence. Each emphasizes that such circumstances will be rare. And each has declined to divest in practice since South Africa or Darfur.

Northwestern's policy, adopted in 2019, states that divestment "is an ineffective means of exercising investment responsibility, especially in comparison to the value of encouraging the University community to engage in education, research, and debate."[364] However, "on very rare occasions," such as investments that "directly support slavery, apartheid, or genocide," Northwestern may divest. Such a divestment "will be reviewed on a case-by-case basis," including "the extent to which the proposed divestment would generate tangible and positive change with respect to the issue at hand" and the financial

recommended through an appropriate university governance process, i.e., student government, University Senate, or another appropriate committee or decision-making body. That recommendation must be brought forward for a vote by the Board of Trustees, accompanied by an impact review report from the senior vice president for business and finance regarding the potential impact of the proposed divestment on the LTIP.").

[360] *See* Brown Univ., *Q&A with Jane Dietze: The Brown Endowment, Divestment and Ethical Investing*, News from Brown (Apr. 19, 2024), https://www.brown.edu/news/2024-04-19/dietze [https://perma.cc/N79S-DXJ7] (reporting on a Q&A session with Jane Deitze, Brown's Chief Investment Officer, in which she described divestment process).

[361] *See id.* (disclaiming reduction in fossil fuel exposure as divestment and emphasizing older divestments from South Arica, Darfur, and tobacco were solely from direct holdings).

[362] Notre Dame has not publicly announced any divestments that we could find and has explicitly rejected fossil fuel divestment. *See* Rev. John I. Jenkins, President's Annual Address to Faculty 2016 (Sept. 20, 2016), https://president.nd.edu/about/history-of-the-presidency/president-emeritus-rev-john-i-jenkins-csc/father-jenkins-communications-archive/presidents-annual-address-to-the-faculty-2016/ [https://perma.cc/76ED-LFRA]. Notre Dame declares that it invests according to Catholic social principles, but focuses its application of those principles on supporting its mission without mentioning divestment. Notre Dame, *Sustaining Impact: How Notre Dame's Endowment Pool Helps Support Its Mission* (last visited Feb. 23, 2026), https://fightingfor.nd.edu/stories/sustaining-impact/#:~:text=How%20the%20Endowment%20Works,purpose%20of%20the%20donor's%20choosing. [https://perma.cc/SJY9-SD2A]. We code Notre Dame as at least open to divestment given its focus on Catholic social mission.

[363] *See supra* note 335 and text accompanying.

[364] Nw. Univ. Bd. of Trs., *Statement on Investment Responsibility*, *supra* note [ ].

impact on the portfolio.[365] It appears that Northwestern has never divested under this policy.[366]

Stanford's policy is of similar vintage and to similar effect. The policy is framed as an embrace of risk-return ESG and speaks of an obligation "to place proper weight on ethical issues that can have a bearing on economic results."[367] Pointing to "state and federal laws governing trust fiduciaries," the policy rejects "use [of] the endowment to pursue other agendas."[368] However, "[i]n rare instances, the University's Board of Trustees may elect to divest specific companies or categories of investment that are deemed abhorrent and ethically unjustifiable." Stanford's board has separately confirmed "that very rare occasions may arise when companies' actions or inactions are so abhorrent and ethically unjustifiable as to warrant the University's dissociation from those investments."[369] As with Northwestern, it appears that Stanford has never divested under this policy.

3. "Direct Holdings" Divestment

There are seven universities that have in recent years claimed to have divested from "direct holdings," or certain primary-purpose private equity vehicles, mainly

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[365] *Id.*

[366] Northwestern divested from four companies related to the Darfur war but declined a broader divestment. *See* Olivia Exstrum, *Deciding Divestment: Northwestern Student Activists Face Obstacles Beyond Their Control*, DAILY NW. (May 22, 2015), https://dailynorthwestern.com/2015/05/22/campus/deciding-divestment-northwestern-student-activists-face-obstacles-beyond-their-control/ [https://perma.cc/ZRE9-HUMB]. Northwestern did not then have a publicly declared divestment policy. Although Northwestern has not had a standing committee to advise on divestment since the policy, as part of an "agreement" with campus protestors following the start of the war in Gaza, Northwestern committed to appoint a new advisory committee to hear student demands. *Agreement on Deering Meadow*, Nw. Univ. (Apr. 29, 2024), https://www.northwestern.edu/leadership-notes/2024/agreement-on-deering-meadow.pdf [https://perma.cc/4HRS-UL5S].

[367] *Ethical Investment Framework*, Stan. Mgmt. Co., https://smc.stanford.edu/wp-content/uploads/2018/12/SMC-Ethical-Investment-Framework.pdf [https://perma.cc/Z9SE-L5P6].

[368] *Id.*

[369] Stan. Univ. Bd. of Trs., *Statement on Investment Responsibility*, available at https://drive.google.com/file/d/1hG17KRtClhHRm7w9wES2fCxzAx0qaKeK/view [https://perma.cc/LF2T-VF5L].

concerning fossil fuels.[370] Harvard,[371] Columbia,[372] Cornell,[373] USC,[374] Dartmouth,[375] Michigan,[376] and the University of Pennsylvania[377] all fall into this category to varying degrees. Some of these universities, such as Dartmouth, have formal policy statements that limit divestment to rare abhorrent circumstances.[378] Others, such as Harvard, do not have a formal policy statement but have divested from direct holdings in fossil fuels ad hoc.[379]

By implication, a "direct holdings" divestment allows investment funds and outside managers not trading in the university's name to invest in fossil fuels (or whatever else was divested from direct holdings), unless stated otherwise. Given the limited scope

370 Private prisons have episodically been targeted for divestment. *See, e.g.*, Lee Bollinger, Statement on Divestment, (May 15, 2015), https://president.columbia.edu/news/statement-divestment [https://perma.cc/C2LY-9HAE] (announcing divestment from "any direct stock ownership interests in companies engaged in the operation of private prisons").

371 *See infra* Part III.C.1.b.

372 *See* id.

373 *See* James Dean, *Cornell Announces Moratorium on Fossil Fuel Investments*, Corn. Chron. (May 22, 2020) (reporting Cornell has no direct holdings of any securities but that "the moratorium applies to new private equity and bond vehicles focused on fossil fuels" and not to mutual funds), available at https://news.cornell.edu/stories/2020/05/cornell-announces-moratorium-fossil-fuel-investments [https://perma.cc/NQ4J-F544].

374 *See infra* [ ].

375 *See* Dartmouth Coll. Advisory Comm. on Inv. Resp.; Executive Summary Prepared for the Dartmouth Community Fiscal 2018 at 3–4 https://www.dartmouth.edu/investments/docs/2018_acir_annual_report.pdf [https://perma.cc/NWS4-3LPP] (reporting Dartmouth will not have direct holdings in fossil fuels or tobacco companies). Dartmouth has chosen not to dissociate from fossil fuel producers and named a center after an oil company founder. *See generally* Investigating Irving: A Fossil Free Dartmouth Report (Oct. 18, 2023) https://www.fossilfreedartmouth.com/uploads/1/4/7/4/147414802/investigating_irving_-_fossil_free_dartmouth.pdf [https://perma.cc/3U3W-V9PN].

376 *See* Don Jordan, *UM Shifts Strategy for Natural Resource Investments*, THE UNIV. REC. (Mar. 25, 2021) (reporting Michigan will "stop investing in funds primarily focused on certain fossil fuels and discontinue direct investments in publicly traded companies that are the largest contributors to greenhouse gases."), available at https://record.umich.edu/articles/u-m-shifts-strategy-for-natural-resources-investments/ [https://perma.cc/8HFV-B55D].

377 A Message about Penn's Endowment and Sustainability, Penn Today, (Nov. 29, 2022), available at https://penntoday.upenn.edu/announcements/message-about-penns-endowment-and-sustainability [https://perma.cc/2JB5-T5DE] (statement from University of Pennsylvania President's office that, as a matter of policy, "Penn does not directly hold investments in any companies focused on the production of fossil fuels").

378 *See* Dartmouth, Statement on Invest. and Soc. Resp. Issues, (Amended Mar. 20, 2017), https://trustees.dartmouth.edu/sites/trustees.prod/files/trustees/wysiwyg/statement_of_investment_and_social_responsibility_issues.pdf [https://perma.cc/LQJ2-TZ2E] (stating that "[i]n extraordinary circumstances, the Board of Trustees may consider divestment an appropriate response to social, environmental or governance-related considerations" if shareholder action would be ineffective, the "[d]ivestment will make a material impact on correcting the company's injurious behavior," and the divestment "will not compromise Dartmouth's ability to address the target issue" in its charitable program).

379 *See infra* Part III.C.1.b.

of direct holdings in contemporary endowment practice, these universities that are open to "direct holdings" divestment are in substance not dissimilar from the prior group. The Columbia divestment from direct holdings in fossil fuels is illustrative, because as elaborated below, it did not foreclose indirect investment in fossil fuels, yet the overwhelming bulk of the endowment is invested indirectly.[380]

4. Significant Divestment

Finally, there are three top 25 endowments that are open to significant divestment as evidenced by their broad divestment from fossil fuels: Princeton, Yale, and the University of California system. As elaborated below, these universities openly undertook a broad divestment for ethical reasons, acknowledging additional administrative costs and losses to portfolio efficiency.[381] The openness of the University of California system to significant divestment is also evidenced by its ongoing exclusion of tobacco, as discussed above.[382]

C. Modern Divestment Controversies: Fossil Fuels and Israel

1. Fossil Fuels

In the early 2010s, a push by student groups and others for divestment from fossil fuels began. At about the same time, several universities with a top 25 endowment began clarifying their divestment policies based on moral abhorrence. This was probably not a coincidence. We suspect that these universities, following Darfur, acted to get out ahead of the fossil fuels divestment movement.

Among the 25 largest endowments, responses to fossil fuel divestment proposals were mixed. Some universities, particularly those that refuse divestment generally, took no discernable action. Others singled out thermal coal and tar sands, which have especially high carbon and pollution impacts, for exclusion on a mix of ethical and risk-return grounds but sometimes limited this divestment to direct holdings. Still other universities reduced their fossil fuels investments more broadly but asserted that they did so on grounds of risk and return, connecting the decision to an ESG risk-return framework. Only three universities made broad (though probably not complete) divestments from fossil fuels on explicitly nonfinancial grounds. This point bears repeating. So far as we can tell, only three of the schools with a top 25 endowment admit to having undertaken a broad divestment from fossil fuels for nonfinancial reasons. The rest took no or limited action and often tied that action to a risk-and-return framework.

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[380] *See infra* Part III.C.1.b.

[381] *See infra* Part III.C.1.c.

[382] *See supra* Part III.A.2.

a. *Rejecting Fossil Fuels Divestment or Minimally Divesting*

Most top 25 endowments have rejected broad fossil fuel divestment citing: (1) failure to meet the abhorrence standard; (2) portfolio harm; (3) ineffectiveness; and (4) the university's own reliance on fossil fuels.[383]

For example, Duke rejected fossil fuel divestment owing to a lack of evidence that it would positively affect global warming and out of concern that it could be counterproductive.[384] Northwestern cautioned that a blanket divestment, if effective, could push energy production toward dirtier sources such as coal and disproportionately harm the poor.[385] We did not find any university divestment analysis concluding that fossil fuel divestment was likely to have a positive environmental impact.

Some universities that rejected broad divestment left the door open to divestment from thermal coal or tar sands oil. In 2016, Stanford rejected a broad fossil fuels divestment on the grounds that it could not be shown to satisfy the university's divestment standards of social harm: society needs fossil fuels, and Stanford uses them.[386] The advisory committee that studied the issue did recommend divestment from "companies whose primary business is oil sands extraction."[387] But the board took "no action" on that recommendation because the endowment already had "no direct exposure to companies whose primary business is oil sands extraction."[388]

Two years later, in 2018, Stanford adopted a risk-return ESG framework for ethical investing, stating that it had an obligation "to place proper weight on ethical issues that can have a bearing on economic results, but not to use the endowment to pursue other

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[383] Large universities consume significant amounts of electricity, and some have their own power or heating plants powered by fossil fuels, including fuel oil. *See* Mclaughlin & Pell, *supra* note __, and text accompanying.

[384] Adv. Comm. on Inv. Resp., Duke University's Contribution to Reducing Greenhouse Gasses: Toward A Climate-Responsible Investing Approach (2019), https://acir.duke.edu/wp-content/uploads/sites/41/2020/10/FINAL.ATT-ACIR-Report-to-Pres.-Price-2019-05-16.pdf [https://perma.cc/X9ZN-84FJ] (concluding fossil fuel divestment would be merely "symbolic," as well as "hypocritical" and possibly "counterproductive").

[385] Letter from Nw. Univ. Bd. of Trs. To Nw. Univ. Cmty. (June 23, 2022), https://www.northwestern.edu/about/board-of-trustees/docs/fossil-fuels-guidelines.pdf [https://perma.cc/27F4-RLNG] ("Indiscriminate divestment from all energy production could result in unintended consequences such as higher income inequality, a shift back to higher emission production sources such as coal or a disengagement by responsible investors from the field of energy production overall.").

[386] *See Stanford and Climate Change: A Statement from the Board of Trustees*, Stan. Univ. (Apr. 25, 2016), https://news.stanford.edu/2016/04/25/stanford-climate-change-statement-board-trustees/ [https://perma.cc/P4AL-A5Z4] (declining to divest from "the fossil fuel industry more broadly," and concluding that "it could not evaluate whether the social injury caused by the fossil fuel industry outweighs the social benefit it provides").

[387] *Id.*

[388] *Id.*

agendas."[389] Two years after that, in 2020, Stanford again rejected "blanket" fossil fuels divestment, but endorsed the exclusion of thermal coal and tar sands, and reported that its "active holdings in energy" had fallen from 16 percent to 1.5 percent,[390] though it did not specify what "active holdings" meant. The extent of Stanford's fossil fuel exposure therefore remains unclear, and it has identified no specific company as having been divested.

In 2017 the Johns Hopkins trustees voted similarly to divest only from thermal coal.[391] The school's divestment advisory committee had recommended exclusion of the "CU-200" list of the worst carbon emitters.[392] But the committee also acknowledged that the cost of its recommended divestment, including constraints on the school's outside managers, would amount to "millions of dollars" and that it might have no effect on global emissions.[393]

All told, the schools that divested from thermal coal or tar sands oil wrapped those decisions in a risk-return ESG framework, thereby staying within the duty of loyalty, and they did not exclude the industry generally, answering the diversification problem posed by a categorical divestment. Accordingly, in the absence of a good reason to find that the stated reasonings were pretextual, the minimal divestments of the schools in this category would almost certainly be judged as satisfying the applicable fiduciary standards.

b. *Divesting from "Direct" Fossil Fuels Investments*

Some universities with a top 25 endowment have charted a middle course on fossil fuels by announcing that they will foreclose "direct" investment in fossil fuels. As noted above, to varying degrees Harvard, Columbia, Cornell, USC, Dartmouth, Michigan, and the University of Pennsylvania fall into this category.[394]

The extent of such a divestment, or whether it even constitutes a nonfinancial divestment, is difficult to assess. The scope of "direct" investment covered by these announcements is not always clear. The term is typically used to refer to an investment

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[389] Stan. Mgmt. Co., *supra* note [ ].

[390] *Decision on the Divestment Request of Fossil Free Stanford*, Stan. Bd. of Trs. (Jun. 12, 2020), https://news.stanford.edu/__data/assets/pdf_file/0025/127456/BOT_Statement_06.12.20_915am.pdf [https://perma.cc/K9FW-RQUF].

[391] *See Johns Hopkins University to Divest Holdings in Major Coal Producers*, HUB (Dec. 12, 2017), https://hub.jhu.edu/2017/12/12/thermal-coal-divestment-board-vote/ [https://perma.cc/4683-AR3N].

[392] JHU Pub. Int. Inv. Adv. Comm., report in Response to Proposal of Refuel Our Future 7–8 (2017), https://provost.jhu.edu/wp-content/uploads/2017/09/PIIAC-Report-final.pdf [https://perma.cc/4PP4-D9QE].

[393] *Id.* at 4. ("By limiting access to certain managers and their strategies, constraining the University's financial engagement with fossil fuel companies may affect the endowment by millions of dollars over the next decade. Nonetheless, with a total endowment of over $4 billion, the University is expected to have the ability to evaluate fully, bear, and possibly offset the costs associated with alternative divestment options.").

[394] *See supra* Part II.B.3.

traded in an account in the university's name, as distinct from an investment in a mutual fund, an exchange traded fund, or other pooled fund administered by an outside manager.[395] But as we have seen, universities with the largest endowments today hold relatively few investments as direct holdings whether measured in number or dollars.[396]

The Columbia and Harvard divestments from "direct" fossil fuel holdings are representative anecdotes. When Columbia announced its fossil fuel divestment, it treated its direct and indirect holdings differently. Columbia acknowledged that it already had no direct investments in fossil fuels—that is, no direct investment in "publicly traded oil and gas companies"—and was merely "formalizing this policy of non-investment for the foreseeable future."[397] As for "private funds," Columbia announced that it would avoid those that "*primarily* invest in oil and gas companies,"[398] which is not a categorical screen on private funds that include fossil fuel holdings. In consequence, we cannot ascertain whether this policy in fact reduced the endowment's exposure to fossil fuels.

As for Harvard, recall that its president shifted from asserting in March 2021 that fossil fuel divestment would be a breach of fiduciary duty to claiming in September 2021 that it was a fiduciary obligation.[399] Crucially, however, both positions were tied to a claim of prudent risk-and-return analysis, and not just worry over climate change. Thus, although the September 2021 announcement of a direct holdings divestment opened by stating that "[c]limate change is the most consequential threat facing humanity," the portion of the statement addressing the endowment asserted that, given "our responsibility as fiduciaries to make long-term investment decisions that support our teaching and research mission, we do not believe such investments are prudent."[400]

The Harvard announcement was thus not a clear nonfinancial divestment thrice over. First, Harvard holds a very small portion of its endowment directly, and at the time of the announcement there were already no fossil fuels holdings among its direct

[395] For example, Harvard's policy states that "When, on rare occasions, the University issues investment restrictions to [Harvard Management Company], these restrictions extend to direct internal holdings, as well as to direct holdings by investment managers trading in [Harvard's name]. These restrictions do not extend to investment advisers of commingled funds . . . ." *Sustainable Investing at HMC*, Harv. Mgmt. Co., https://www.hmc.harvard.edu/wp-content/uploads/2020/02/HMC-Sustainable-Investing-Overview.pdf [https://perma.cc/2TNT-7TB].

[396] *See supra* Table 1.

[397] *See University Announcement on Fossil Fuel Investments*, COLUM. NEWS (Jan. 22, 2021), https://news.columbia.edu/news/university-announcement-fossil-fuel-investments [https://perma.cc/X3XC-ZTDG].

[398] *See id* (emphasis added).

[399] *See supra* note __ and text accompanying.

[400] Harv. Off. of the Pres., *Climate Change: Update on Harvard Action* (Sept. 9, 2021), https://www.harvard.edu/president/news-and-statements-by-president-bacow/2021/climate-change-update-on-harvard-action/ [https://perma.cc/QQ3J-WSKU].

holdings.[401] Second, as Harvard acknowledged, fossil fuel holdings would continue among its private equity indirect investments, albeit those investments would be "in runoff mode" until divested at an unspecified future date.[402] Third, in spite of general language about climate change, the rationale for the divestment was repeatedly tied a fiduciary risk-and-return analysis.[403] In all events, we note parenthetically that Harvard has since invested almost $500 million in cryptocurrency via an exchange traded fund.[404] The Department of Energy estimates that "electricity use from cryptocurrency mining probably represents from 0.6% to 2.3% of U.S. electricity consumption."[405]

As in the case of Harvard, some other universities that divested direct holdings also reduced fossil fuels exposure in their (possibly indirect) private holdings. While allowing existing private fossil fuel investments to phase out, these universities made a commitment not to make future such private investments. This process would gradually reduce fossil fuel exposure. For example, Dartmouth and USC reported that, in addition to divesting direct holdings, a phase out of private fossil fuel focused investments reduced their endowment's overall exposure to fossil fuels to less than 5 percent from over 10 percent with a goal toward eventually removing all fossil fuel investments.[406] Thus far, however, those reductions are equivalent to a rebalancing of their portfolios to align with market weights. As of early 2026, 3.41 percent of a typical S&P 500 index fund was in the energy sector and 2.45 percent was classified as utilities.[407] In a related vein, MIT, which has a policy against divestment,[408] reported that it had previously overweighted fossil

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[401] *Id.* ("As we reported last February, HMC has no direct investments in companies that explore for or develop further reserves of fossil fuels.").

[402] *Id.* The announcement did not speak of mutual funds or exchange traded funds.

[403] *Id.*; *see also* HARV. MGMT. CO., CLIMATE REPORT at 1 (Mar. 2024), https://www.hmc.harvard.edu/wp-content/uploads/2024/04/2024-Climate-Report.pdf, [https://perma.cc/E3KH-H6TV] ("As part of its fiduciary duty to account for all material risks to the endowment portfolio, HMC has long considered the climate transition and physical risks more generally in making investment decisions.").

[404] Harvard invested roughly $443 million in the iShares Bitcoin Trust ETF, as per Harvard's Form 13F-HR, *see* Harv. Mgmt. Co., Form 13f-HR (Nov. 14, 2025) https://www.sec.gov/Archives/edgar/data/1082621/000119312525283114/xslForm13F_X02/47098.xml [https://perma.cc/4YSB-RVLD].

[405] U.S. Energy Info. Admin., *Tracking electricity consumption from U.S. cryptocurrency mining operations* (Feb. 1, 2024), https://www.eia.gov/todayinenergy/detail.php?id=61364 [https://perma.cc/N8CX-HBGZ].

[406] *Environmental, Socia & Governance Policy*, Dartmouth Inv. Off. https://www.dartmouth.edu/investments/environmental_social_governance/policy/index.php [https://perma.cc/RNU4-6PQB] (last visited Jan. 26, 2025) (though setting the goal of "zero over time."); *Fossil Fuel Factsheet*, Univ. of S. Cal. (Mar. 2024), https://acir.usc.edu/wp-content/uploads/2024/07/Fossil-Fuels-Fact-Sheet-March-2024-1.pdf [https://perma.cc/9GW9-BPQL].

[407] *See* State Street SPDR S&P 500 ETF Trust, https://www.ssga.com/us/en/intermediary/etfs/state-street-spdr-sp-500-etf-trust-spy [https://perma.cc/E6Y9-RNWN]. Dartmouth's public disclosure of its direct holdings shows that it invested in this SPDR S&P 500 index fund. *See supra* note 302.

[408] *See supra* Part III.B.1.

fuels as a hedge against its enormous energy needs but has since abandoned the overweight because it increasingly relies on alternative sources of energy.[409]

The "direct" holdings divestments from fossil fuels would probably pass fiduciary scrutiny. As with thermal coal and tar sands oil, the "direct" holdings divestments were wrapped in a risk-return ESG framework. A similar analysis applies to the schools that reduced their holdings to align with market weights. Accordingly, as before, in the absence of a good reason to find that the stated risk-and-return reasonings were pretextual, the "direct" holdings divestments would likely be judged as satisfying the applicable fiduciary standards. Additionally, it appears that most of these divestments, involving only direct holdings, were de minimis and so likely without significant cost or effect on portfolio efficiency, albeit this additional point has less purchase for the restricted endowment, which is subject to the trust law sole interest rule. To continue to satisfy the prudent investor rule, however, an avoidance of fossil fuels based on risk and return would need to be regularly assessed for ongoing prudence.[410] If a university continued to avoid fossil fuels in the face of contrary evidence of portfolio harm, the risk-and-return rationale would no longer apply and the earlier claim of a risk-and-return basis might be found to be pretextual.

c. *Nonfinancial Fossil Fuel Divestment*

Of the universities with a top 25 endowment, it appears that only Princeton, Yale, and the University of California system have committed to a broad fossil fuel divestment that for the most part applies to both direct and indirect holdings. The Princeton and Yale divestments were explicitly nonfinancial. The California divestment was couched, dubiously, in terms of risk and return.

Princeton reports that, as of February 2024, it had completely divested from "publicly traded fossil fuel companies" for reasons other than risk and return.[411] With respect to "indirectly held companies where an immediate sale was not possible," Princeton took "offsetting positions, known as 'hedges,' that effectively neutralize the endowment's ownership of those companies."[412] Not only did Princeton divest from fossil fuel investments for reasons other than risk and return, it bore additional costs to extricate itself from its illiquid fossil fuel holdings instead of letting those positions unwind over time.

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409 *MIT's Environmental, Social, and Governance (ESG) Investment Framework*, Mass. Inst. of Tech. Inv. Mgmt. Co., https://mitimco.org/mits-environmental-social-and-governance-esg-investment-framework/ [https://perma.cc/QX6F-8FVL] (last visited Jan. 24, 2025) ("Fifteen years ago, we pro-actively sought out fossil fuel investments to add to the portfolio given their ability to hedge against the Institute's energy costs.").

410 *See supra* note 204 and text accompanying.

411 *Fossil Fuel Dissociation*, Princeton Univ., https://fossilfueldissociation.princeton.edu/ [https://perma.cc/3B9D-UDHR].

412 *Id*.

Yale adopted a fossil fuel policy in 2021 that, for various nonfinancial reasons, resulted in a list of more than a hundred fossil fuel companies from which it bars investment.[413] The list includes large firms such as Exxon, Chevron, and ConocoPhillips, which were banned among other reasons for not "supporting sensible government regulation and industry self-regulation addressing climate change."[414] Although Yale's position is not pellucid, it appears (but we are not certain) that these exclusions apply to its outside managers.[415] On the other hand, "Yale's ethical investment policy does not prevent the holding of [index] funds."[416] Yale's most recent SEC filing shows that it has a small position (less than $1 million) in a total market index fund that by definition would include all or nearly all of excluded firms.[417] We confirmed that this index fund does indeed include at least Exxon, Chevron, and ConocoPhillips.[418]

The University of California system reports that it completely divested from direct and indirect fossil fuel holdings as of 2020.[419] The chief investment officer expressed a risk-and-return basis for the divestment: "Today we remain convinced that continuing to invest in fossil fuels poses an unacceptable financial risk to UC's portfolios and therefore to the students, faculty, staff and retirees of the University of California."[420] But the

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[413] Advisory Comm. on Inv. Resp., *Implementation of the Fossil Fuel Investment Principles*, https://acir.yale.edu/implementation-fossil-fuel-investment-principles [https://perma.cc/ETX9-K37A].

[414] *Id.*

[415] Yale's fifth fossil fuel principle is that fossil fuel companies "should be transparent with Yale *and Yale's Investment Managers* about their compliance" with the other four principles. Advisory Comm. on Inv. Resp., *Implementation of the Fossil Fuel Investment Principles*, https://acir.yale.edu/implementation-fossil-fuel-investment-principles [https://perma.cc/ETX9-K37A]. Failure to comply with any of the principles results in being put on the no-buy list. *Id.* In addition, Yale's chief investment officer "asked Yale's external investment managers to avoid companies that refused to acknowledge the social and financial costs of climate change and that failed to take economically sensible steps to reduce GHG emissions." YALE UNIV., REPORT OF THE COMMITTEE ON FOSSIL FUEL INVESTMENT PRINCIPLES 7, https://president.yale.edu/sites/default/files/2024-08/CFFIP%20-%20Final%20Report%20%28with%20Appendix%29-1.pdf [https://perma.cc/5P2L-XCV8]. Failure to comply with Yale's fossil fuel principles would, we suppose, constitute grounds under this direction to avoid the firm.

[416] *Investor Responsibility*, Yale Invest. Off., https://perma.cc/S6HA-SLJN (specifying that Yale's divestment policy does not preclude ownership via mutual funds).

[417] Yale Univ., Form 13F-HR (Nov 14, 2025), https://www.sec.gov/Archives/edgar/data/938582/000199937125017769/xslForm13F_X02/infotable.xml [https://perma.cc/Z3JM-F8EK] (showing nearly $1 million invested in the iShares Core S&P Total Stock Market ETF).

[418] iShares, iShares Core S&P Total U.S. Stock Market ETF, https://www.ishares.com/us/products/239724/ishares-core-sp-total-us-stock-market-etf [https://perma.cc/3REE-NB9B].

[419] *See* University of California, *UC's Investment Portfolios Fossil Free; Clean Energy Investments Top $1 Billion* (May 19, 2020), https://www.universityofcalifornia.edu/press-room/ucs-investment-portfolios-fossil-free-clean-energy-investments-top-1-billion [https://perma.cc/L2JU-78UF].("The University of California Office of the Chief Investment Officer of the Regents announced today (May 19) that its investment portfolios are fossil free.").

[420] *Id.*

announcement also referenced "UC's systemwide sustainability efforts."[421] And we have not been able to locate any report or other documentation of the underlying risk-and-return analysis.

As with its tobacco divestment, the California system implemented its divestment from fossil fuels by creating its own bespoke index fund for which we couldn't locate relative cost information that filtered out tobacco and fossil fuels.[422] In 2024, however, a student journalist discovered that in the years following the 2020 announcement the University of California system continued to vote shares in numerous publicly traded fossil fuel companies, including Exxon Mobil, Chevron, and Shell, that had purportedly been divested years earlier, implying that the University of California system continued to own those shares.[423]

A broad fossil fuel divestment for nonfinancial reasons is almost certainly a fiduciary breach. For the restricted endowment, which is subject to the trust law sole interest rule and no-further-inquiry principle, there is no tolerance for any purpose other than the stated purpose of each individual restricted gift. For the unrestricted endowment, which is subject to the corporate law best interest standard implemented by way of a fairness test, it would be hard to show fairness for a costly divestment. That these broad divestments were costly is implied by Princeton's hedging positions, and textbook finance teaches that a reduction in portfolio efficiency is the consequence of exclusion of an industry. In these respects, a broad fossil fuel divestment resembles broad (rather than selective) divestment from South Africa, which at the time was widely agreed would be a fiduciary breach.

2. Israel

A "Boycott, Divest, Sanction" or "BDS" movement has long advocated for universities to divest from Israel and dissociate from academic ties to Israeli institutions.[424] After the war in Gaza, the BDS movement gained traction among student protestors, with much of the focus on endowment divestment, but also with some calls for academic dissociation.[425] Some of the divestment proposals focused on a handful of

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421 *Id.*

422 *See id.*; *supra* note 303 and text accompanying.

423 *See* Fatima Yousuf, *Did UC System Ever Really Divest From Fossil Fuels?*, THE DAILY CALIFORNIAN (Jun. 21, 2024), https://www.dailycal.org/opinion/the_soapbox/did-uc-system-ever-really-divest-from-fossil-fuels/article_442b6648-3043-11ef-8051-7b62cd14e9ca.html [https://perma.cc/SY8M-H75W] ("However, the UC system's proxy voting record reveals that the institution has held shares in public oil and gas companies, including Exxon Mobil Corp., Chevron Corp. and more, well beyond when it announced it had already divested from fossil fuels.").

424 *See* Palestinian Campaign for the Academic and Cultural Boycott of Israel, *PACBI Guidelines for the International Academic Boycott of Israel*, BDS (Jul. 9, 2014), https://bdsmovement.net/pacbi/academic-boycott-guidelines [https://perma.cc/JM5Q-SLV] (discussing dissociation from and boycott of Israeli universities).

425 *See supra* notes 13-15.

firms with military ties to Israel.[426] Other proposals sought a broad divestment, encompassing any firm doing business in Israel.[427] Universities have thus far almost uniformly resisted divestment from Israel.[428]

We are not aware of any university with a top 25 endowment that has agreed to divest from Israel to any extent. To the contrary, many those universities have explicitly rejected such a divestment. For example, Harvard's president reiterated the university's "consistent position that it has no intention of 'divesting from Israel.' … Harvard will not use its endowment funds to endorse a contested view on a complex issue that deeply divides our community."[429] The president's message, posted on a Harvard webpage, continued:

> Generations of supporters have directed their philanthropy to Harvard rather than the many other causes they could pursue because they wanted to enable the University to pursue excellence in education and research and to make that excellence more widely available. That is the fundamental purpose of the endowment funds that have resulted from their generosity. And that is why the investment strategy is designed to support the academic mission, not to serve as a direct instrument of social or political change.[430]

Although Harvard does not have a publicly declared divestment policy, this sort of expansive statement about neutrality and charitable purpose could tie its hands in the

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[426] *See, e.g.*, Letter from Christina H. Paxson, President, Brown Univ., to Members of the Brown Cmty. 7-8 (Oct. 9, 2024), https://acurm.brown.edu/sites/default/files/ACURM-Report-on-2024-Proposal-by-Brown-Divest-Coalition.pdf [https://perma.cc/UTD2-6XBK] (Brown University student groups proposing divestment from ten companies, rejected by the board of trustees).

[427] *See, e.g.*, Josh Moody, *Brown Trustee Resigns in Protest Over Divestment Vote*, INSIDE HIGHER ED. (Sept. 10, 2024), https://www.insidehighered.com/news/governance/trustees-regents/2024/09/10/brown-trustee-resigns-protest-over-divestment-vote [https://perma.cc/MC9E-6CRG] (discussing the "broad" divestment demands of many protestors in the spring of 2024).

[428] The handful of exceptions that we could find are modest. *See* Union, *Union Theological Seminary Board of Trustees Endorses Divestment and Other Strategies for Companies Profiting From War in Palestine/Israel*, https://utsnyc.edu/blog/2024/05/09/union-theological-seminary-board-of-trustees-endorses-divestment-and-other-strategies-for-companies-profiting-from-war-in-palestine-israel/ [https://perma.cc/4G5S-4BXL] (divesting from "companies … benefiting from the war in Palestine"); Christie Smith & Andrew Mendez, *SFSU divests from 3 arms makers in deal with pro-Palestinian students*, NBC BAY AREA (Aug. 31, 2024), https://www.nbcbayarea.com/news/local/san-francisco/sfsu-divests-from-3-arms-makers-in-deal-with-pro-palestinian-students/3638810/ [https://perma.cc/4GPP-ZFBC] ("In the agreement reached with students, the university will sell its corporate bond position in aerospace and defense company Lockheed Martin, stock positions in Italian defense company Leonardo, and U.S.-based data analysis enterprise Palantir Technologies."). Portland State University announced a "pause" on its relationship with the Boeing Corporation owing to its ties to the war in Gaza. Message from Ann Cudd, President, Portland State Univ., to Campus Cmty. (last visited Jan. 25, 2025), https://www.pdx.edu/president/april-26-2024-message [https://perma.cc/2XU8-QTBP].

[429] Harv. Univ., Correspondence from President Alan M. Garber, (Oct. 3, 2024), https://www.harvard.edu/media-relations/2024/10/28/oct-3-2024-correspondence-from-president-alan-m-garber/ [https://perma.cc/L87K-LSZY].

[430] *Id.*

future, not just rhetorically but also legally. The common law "treats a charity's existing unrestricted assets—including unrestricted gifts, earned and investment income, and other assets—as restricted to the charity's purpose at the time the assets were acquired."[431]

In any event, Harvard is hardly alone among the top 25 endowments in explicitly rejection of divestment from Israel. For example, Johns Hopkins rejected a proposal to divest "from companies with ties to … Israel" as being in conflict with "the university's core commitment to free inquiry and its obligation to foster a diversity of perspectives," and because the divestment would have only "a de minimis impact on the targeted corporations but a significant negative impact on the university's finances."[432] Brown rejected a proposed divestment of ten companies on the grounds that the divestment would have no effect, "Brown's mission doesn't encompass resolving or adjudicating global conflict," and the divestment would violate Brown's principals of academic freedom grounded in viewpoint neutrality.[433] The University of Pennsylvania stated on several occasions that it "does not support boycotts, divestment, or sanctions against Israel."[434]

Other universities with a top 25 endowment rejected divestment from Israel but promised attentive advisory committee review of further divestment proposals. For example, as part of deal with campus protestors, Northwestern agreed to resurrect an advisory committee on investment responsibility.[435] Similarly, although reaffirming that Columbia "will not divest from Israel," its president also "offered to develop an expedited timeline for review of new proposals from the students by the Advisory Committee for Socially Responsible Investing, the body that considers divestment matters."[436] Nonetheless, neither has since reversed course from their stated position of not divesting from Israel.

A divestment from Israel by a typical secular university would be difficult to square with fiduciary principles. Opposition to the war in Gaza is not an obvious fit with the research and educational charitable purpose of the typical university. This loyalty

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431 RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 3.01 cmt. e (Am. Law Inst. 2021).

432 Johns Hopkins, Final Report from PIIAC, *supra* note __, at ii–iii (emphasis removed).

433 *See* Brown Univ., *Brown Corporation Votes to Reject Divestment* (Oct. 9, 2024) available at https://www.brown.edu/news/2024-10-09/divestment-decision [https://perma.cc/CY8V-P2L9].

434 Neema Baddam & Katie Bartlett, *Penn rebuffs student referendum vote in favor of divestment from Israel*, THE DAILY PENNSYLVANIAN (Jun. 27, 2024), https://www.thedp.com/article/2024/06/penn-muslim-student-association-referendum-vote [https://perma.cc/W3DS-4Z74?type=standard] (quoting messages from the University).

435 The promise was part of the "Deering Meadow Agreement," which can be accessed at https://www.northwestern.edu/leadership-notes/2024/agreement-on-deering-meadow.pdf https://perma.cc/4HRS-UL5S.

436 Colum. Univ., Statement from Columbia University President Minouche Shafik (Apr. 29, 2024), https://president.columbia.edu/news/statement-columbia-university-president-minouche-shafik-4-29 [https://perma.cc/6WAM-38L6].

problem looms even larger for the restricted endowment, which is subject to the trust law sole interest rule and is an amalgam of gifts with a wide array of narrower research and educational purposes, many of which will have no plausible connection to the war in Gaza. Nor can those advocating Israeli divestment invoke a strong public policy evidenced by clear governmental action and applicable via the public benefit principle of charity law, as divestment advocates could in South Africa and Darfur. Indeed, objective indicators of the public benefit principle point in the opposite direction. As the Johns Hopkins committee that rejected divestment from Israel observed, "the official stance of the United States government continues to be support for Israel, and at least 38 state governments … have outlawed or created retaliatory measures against divestment."[437]

Divestment from Israel would also be difficult to square with the prudent investor rule. In contrast to selective divestment from South Africa under apartheid and divestment from the Darfur war, a broad divestment from Israel could not be implemented by selling a small handful of directly held firms and replacing them with other firms. The Johns Hopkins committee contrasted current endowment practice to that prevailing during the South Africa and tobacco divestments:

> Today, most universities—including JHU—invest their endowments through external managers and have very few if any directly held investments in stocks and bonds. Much of the directly held investments universities hold are in vehicles such as market index products like ETFs. This modern structure is necessary to ensure the university maximizes the endowment's return…the committee acknowledged throughout its process that this structure also makes divestment of any kind costly, difficult, and highly impractical.[438]

This is not to say that no university could skew its portfolio for or against Israel. For example, a reasonable argument could be made that a university with a profound pacificist commitment (such as a Quaker school) or a university with a Jewish mission or identity could plausibly skew its portfolio for or against Israel, just as the Sierra Club could skew its portfolio against fossil fuels.[439] Further, because a university has significantly more leeway in its academic program than in its endowment management,[440] it would have wider fiduciary latitude to increase or decrease its programmatic engagements with Israel, Palestine, or otherwise.[441] But given the current state of public

[437] Johns Hopkins, Final Report from PIIAC, *supra* note __, at 24; *see also* H.R. 246, 116th Cong. (2019) (passed 398-17) (Congressional resolution against BDS movement); *Anti-Semitism: State Anti-BDS Legislation*, Jewish Virtual Library, https://www.jewishvirtuallibrary.org/anti-bds-legislation (last visited Jan. 23, 2025) [https://perma.cc/GHX7-LKNP] (listing anti-BDS laws in 38 states, some of which bar state pension investments and others bar any contracting with businesses engaged in boycotting Israel).

[438] Johns Hopkins, Final Report from PIIAC, *supra* note __, at 33.

[439] *See supra* Part II.E.2.b.

[440] *See supra* Part II.D.

[441] We are focusing exclusively on fiduciary principles, setting aside state and federal anti-BDS and anti-discrimination laws.

policy and endowment practice, the inconsistency of an endowment divestment from Israel with fiduciary principles is not a close call.

Conclusion

We have synthesized the law and finance of university (or other charitable nonprofit) endowment divestment. Under prevailing law, endowment divestment for nonfinancial reasons is permissible only if: (1) the divestment is consistent with the university's charitable purpose of research and education or the narrower purpose attached to a restricted gift, and (2) the divestment's effect on the portfolio is reasonable in light of that purpose. Divesting in compliance with this fiduciary obligation is thus challenging. The stated charitable purpose of most secular universities is research and education. The bulk of their endowments consists of restricted gifts, which have narrower purposes and are subject to trust law's strict fiduciary principles. Divestment for reasons outside the applicable charitable purpose is ultra vires, disloyal, or both.

Even if within the applicable charitable purpose, the divestment must also satisfy the duty of care as elaborated by the prudent investor rule. Contemporary endowment practice relies largely on externally managed funds, however, making divestment from even a few corporations or a single region costly and thus by definition harmful to the portfolio. In today's endowment practice, therefore, even a de minimis divestment from Israel would likely be a loyalty and prudence fiduciary breach, exposing university trustees to potential out-of-pocket damages for any resulting costs or losses. A useful heuristic is to ask whether a direct distribution of university funds for the same purpose would have been permissible. If not, the divestment is unlikely to satisfy the duties of loyalty and care.

This paper also considered the fiduciary principles applicable to academic dissociation, which are much more relaxed than those applicable to endowment divestment. Instead of the prudent investor rule, programmatic decisions are evaluated under the corporate law duty of care, which comes with business judgement rule deference. Accordingly, there is far more latitude within the university's educational and research programs to address almost any issue of concern, and with a variety of tools, including research funding, education, scholarships, and investments in facilities. As the name "university" itself implies, the scope of inquiry is virtually unlimited.

Finally, so far as the fragmentary public record allows, we have undertaken to excavate the lost history of purported prior divestments: South Africa under apartheid, tobacco, the Darfur war, and fossil fuels. Consistent with our analysis of prevailing law, but contrary to conventional wisdom, we find that universities have for the most part not engaged in broad divestments, not even from South Africa under apartheid. Instead, most large endowments adhere to a narrow divestment policy for "moral abhorrence" that has been rarely (if ever) applied. We show that a divestment for moral abhorrence could pass fiduciary muster as consistent with the public benefit principle of charity law if supported by a clear public policy established by confirmatory governmental actions.

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