University Trustees Should Say No to Divestment

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Abstract

This essay argues that universities should commit their endowments to a non-divestment policy, investing solely for risk and return. We acknowledge that there are narrow conditions under which divestment may be legally permissible. Instead, our argument is pragmatic and informed by our normative view of the university. Pragmatically, divestments do not pass a cost-benefit test. They are unlikely to produce the desired social benefits but are likely to complicate endowment management and create litigation risk. By contrast, investing solely for prudent risk and return minimizes management costs and is all but a fiduciary safe harbor. We consider the possibility that a divestment could be justified on reputational grounds but conclude that such a divestment would be legally problematic and is as likely to damage the university's reputation as to improve it. Normatively, we argue that a non-divestment policy is most consistent with higher education's long-standing ethos of open-ended inquiry and that universities will best serve society by focusing solely on their charitable purpose of research and education.

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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Abstract. This essay argues that universities should commit their endowments to a non-divestment policy, investing solely for risk and return. We acknowledge that there are narrow conditions under which divestment may be legally permissible. Instead, our argument is pragmatic and informed by our normative view of the university. Pragmatically, divestments do not pass a cost-benefit test. They are unlikely to produce the desired social benefits but are likely to complicate endowment management and create litigation risk. By contrast, investing solely for prudent risk and return minimizes management costs and is all but a fiduciary safe harbor. We consider the possibility that a divestment could be justified on reputational grounds but conclude that such a divestment would be legally problematic and is as likely to damage the university's reputation as to improve it. Normatively, we argue that a non-divestment policy is most consistent with higher education's long-standing ethos of open-ended inquiry and that universities will best serve society by focusing solely on their charitable purpose of research and education.

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Introduction

Universities face regular pressure to make endowment investment decisions on the basis of moral, ethical, or other nonfinancial factors. Because such factors are typically implemented by avoiding investment in a specific firm, industry, or country, this practice is commonly called "divestment." This essay argues that universities should commit to a non-divestment policy and invest their endowments solely on the basis of financial risk and return factors.

In other work, we assess the permissibility of university endowment divestment under prevailing law. We show that divestment is legally permissible in narrow circumstances.[1] But permissible does not mean wise. Our argument against university endowment divestment in this essay is based on pragmatic and normative claims. Pragmatically, divestments do not pass a cost-benefit analysis. Divestment creates legal risk for universities and their trustees; it compounds transactional, managerial, and agency costs; and it is highly unlikely to affect the targeted activity. Normatively, we argue that a non-divestment policy is most consistent with higher education's long-standing ethos of open-ended inquiry. Universities

[1] Max M. Schanzenbach & Robert H. Sitkoff, *Divesting University Endowments*, HARV. BUS. L. REV. (forthcoming 2026) [hereinafter Schanzenbach & Sitkoff].

best serve society by focusing solely on their charitable purpose of research and education.[2]

Part I briefly recaps our other work on the law governing endowment divestment. Under prevailing law, a charity may divest its endowment for nonfinancial reasons if the divestment fits the charity's charitable purpose and the harm to the portfolio is reasonable. Most secular universities have a limited charitable purpose of research and education. The charitable purpose of a restricted gift held in trust by a university is narrower still, and such gifts comprise most of a typical endowment's value.[3] As such, opportunities for legally sound divestments by a university are rare.

Part II advocates for a non-divestment policy on pragmatic grounds. First, as a discretionary fiduciary act, divestment carries legal risks. Investing solely for prudent risk and return, by contrast, is all but a safe harbor. Second, a non-divestment policy minimizes the administrative costs of endowment management, particularly given the rise of the so-called "Yale Model" and the shift from internal management to pooled investment funds and outside managers. Screened funds are usually more expensive, and investment restrictions complicate delegation to outside managers. Third, a non-divestment commitment keeps the board focused on the charitable purpose—a key aim of charitable governance—and avoids the costs associated with fashioning divestment standards and debating their application. Finally, in almost all cases a sober analysis will conclude that divestment is unlikely to produce the desired social benefits.

Part III considers in the best possible light two pragmatic grounds sometimes offered in support of divestment: university reputation and constituency management. On this view, the investment of the endowment is intertwined with the efficacy of the university's charitable program such that a divestment policy, even one that could result in an impairment to portfolio efficiency, could be justified by an offsetting programmatic benefit. For example, if a divestment would end a disruptive student encampment with less cost to the university than an enforcement action, the university's board could perhaps defend a divestment as providing a programmatic benefit.

We agree that such an argument has a colorable legal basis. But there are countervailing pragmatic factors. First, universities have largely stopped managing their endowments directly, weakening reputational linkages and increasing divestment costs. Second, any divestment carries its

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[2] We set aside the conceptually and legally distinct questions, treated in our other work, of whether a university may decline a gift for reputational or other nonfinancial reasons. *See id*.
[3] *See infra* note 7 and accompanying text.

own reputational risks with those opposed to it and with the next constituency that requests but is denied divestment. Finally, litigation risk remains, especially with respect to the restricted gifts contained within the endowment, which tend less easily to accommodate a reputational or constituency divestment.

Part IV provides two normative groundings for our preferred policy. First, secular universities, as heirs of the enlightenment, have long adhered to an ethos of open-ended inquiry. In Professor Steven Pinker's arresting formulation, a university "is a forum for debate, not a protagonist in debates."[4] Normatively, risk-return investing is most consistent with this long-standing ethos. Divestment for ethical reasons is, in effect, speaking with the endowment and thus a declaration of a university's position. Second, universities best serve society by focusing solely on their charitable purpose of research and education. Any meaningful divestment will reduce resources for this purpose, especially in the long run.

We conclude by recommending that universities commit to a non-divestment policy. Some have already done so. Such a commitment obviates the need for a standing ethical investment committee, which tends to become the locus of lobbying and, given their lack of actual power (the board is the ultimate fiduciary decisionmaker), a source of frustration, friction, and distraction. Many schools hold out the possibility of divestment, or misleadingly claim to have divested, to buy student peace. Marketing to students by disingenuously proclaiming divestment of "directly" held investments is contrary to the university's truth-seeking research and educational purpose. Instead, universities should take the opportunity, as some have, to educate students about university purpose, finance, the structure of the endowment, and fiduciary obligation.

I. The Law of Divestment in Charitable Endowments[5]

In other work, we show that under prevailing law charitable endowments may be divested within narrow conditions. We also show that, with only a few notable exceptions, universities with large endowments have generally behaved in a legally defensible manner.[6] We briefly summarize the law and our findings here.

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[4] Steven Pinker, *A Five-Point Plan to Save Harvard from Itself*, BOSTON GLOBE (Dec. 11, 2023, 14:07 ET), https://perma.cc/4QGC-LPWK.

[5] This section provides a condensed overview of the legal analysis in Schanzenbach & Sitkoff, *supra* note 1. A fuller exposition with supporting citations may be found there.

[6] *Id.*

A. *Defining Endowment and Divestment*

Let us first define *endowment* and *divestment* in relation to the law of charitable organizations. By *endowment*, we refer to those institutional funds that are held primarily for investment (rather than programmatic) purposes. The endowment, in the vernacular, is comprised in law of two types of funds. The first are *restricted funds*, which comprise the great majority of most large university endowments.[7] Restricted funds trace to gifts limited 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. Under prevailing law, the university holds such funds as trustee.[8] These restricted gifts are what the law of charitable organizations classifies as the endowment.

The vernacular use of the term endowment also includes *unrestricted funds* that are set aside by the university for future use even though they could have been expended immediately on anything within the university's charitable purpose. Within the law of charitable organizations, such unrestricted funds are sometimes called the *quasi-endowment*, in contrast to the *true endowment* of restricted funds. The university holds its quasi-endowment not as trustee, but as property owned outright by the corporate entity that is the university. In practice, the true or restricted endowment and the quasi- or unrestricted endowment are pooled, invested collectively, and referred to colloquially as the endowment.

By *divestment*, we mean management of the endowment on the basis of moral, ethical, or other nonfinancial factors. Because such factors are typically implemented by avoiding investment in a specific firm, industry, or country, this practice is commonly called "divestment."[9] In any event, because portfolio allocation is a zero-sum game, a skew in favor of one firm or industry is a pull away from another, with a consequent effect on risk and return.

The hallmark of a divestment is a nonfinancial motive, that is, consideration of factors other than prudent risk and return. By way of

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[7] For example, Stanford's "merged pool" is 17% "assets the University has elected to treat as long-term funds" (i.e., unrestricted endowment), 74% "endowment" (i.e., restricted endowment), and 9 percent hospital funds. *Our Mission*, STANFORD, INVESTMENT OFFICE, https://perma.cc/Y962-3TW7. Harvard reports that 80% of its endowment is "restricted to particular purposes." HARVARD UNIVERSITY, FINANCIAL REPORT (FISCAL YEAR 2024) 4, https://perma.cc/SC3S-ZDQ8.

[8] *See* RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (A.L.I. 2003) ("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."); BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 362 (rev. 2025) ("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.").

[9] We set aside mission- and program-related investments. *See* Schanzenbach & Sitkoff, *supra* note 1.

illustration, use of environmental, social, or governance factors (ESG investing) is popular in contemporary investment and, depending on the motive, may or may not qualify as a "divestment" as we are using that term.[10] Use of ESG factors in a multifactor asset-pricing model to improve risk-adjusted returns would not be a divestment. Use of ESG factors to screen firms or industries for ethical reasons or in pursuit of other collateral benefits, by contrast, would be a divestment.

B. *Applicable Fiduciary Principles*

The investment management of a charitable endowment, both restricted and unrestricted, is subject to a fiduciary duty of care elaborated by the trust law prudent investor rule. The prudent investor rule applies to the restricted endowment by operation of ordinary trust law, typified by the Uniform Prudent Investor Act,[11] and to the unrestricted endowment under the Uniform Prudent Management of Institutional Funds Act, adopted in virtually every state.[12] Under the prudent investor rule, a charitable endowment must hold a diversified portfolio with risk-and-return objectives reasonably suited to the charitable purpose it supports.

The applicable fiduciary duty of loyalty differs for the unrestricted versus restricted endowments.[13] If the charity is organized as a nonprofit corporation, the unrestricted endowment is held subject to the corporate law duty of loyalty. The corporate law duty of loyalty generally permits conflicted transactions if they are in the best interest of the corporation. Thus, a de minimis divestment of little to no cost may be defensible as "fair" to the corporation.

The restricted endowment, by contrast, is held in trust and thus is subject to trust law's stricter duty of loyalty. Under the trust law sole interest rule, a trustee must "administer the trust *solely* in the interest of the beneficiaries."[14] In this context, sole means sole and applies to any conflict of interest, not only self-dealing.[15] A "trustee has a duty . . . not to

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[10] *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, 395–97 (2020) (providing a brief overview of the rise of ESG investing).

[11] *See* UNIF. PRUDENT INV. ACT (UNIF. LAW COMM'N 1994).

[12] *See Prudent Management of Institutional Funds Act*, UNIF. LAW COMM'N, https://perma.cc/7CCF-725W.

[13] *See* UNIF. PRUDENT MGMT. INST. FUNDS ACT, § 3(b) & cmt. b (UNIF. LAW COMM'N 2006) (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").

[14] RESTATEMENT (THIRD) OF TRUSTS § 78(1) (A.L.I. 2007) (emphasis added); *see also* UNIF. TRUST CODE § 802(a) (UNIF. LAW COMM'N 2000) (similar).

[15] Subject to exceptions not relevant here, the blackletter rule is that "the trustee is strictly prohibited from engaging in transactions that involve self-dealing *or that otherwise involve or create a conflict*

be influenced by the interest of any third person or by motives other than the accomplishment of the purposes of the trust."[16] Acting with mixed motive triggers "an irrebuttable presumption of wrongdoing,"[17] full stop. 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."[18] There is no de minimis exception or best interests defense under the sole interest rule. The fact of a trustee's mixed motive, even without self-dealing, is by itself a breach.

The law of endowment divestment follows from these basic fiduciary principles. Divestment is consistent with fiduciary duty if two conditions are both satisfied: (1) the divestment is consistent with the university's research and educational purposes that qualify it as a charitable nonprofit (satisfying the duty of loyalty), and (2) the divestment's effect on the portfolio as a whole is reasonable in light of this charitable purpose (satisfying the duty of care). A useful heuristic is to ask whether a direct distribution of university funds for the same purpose would have been permissible.[19] If not, the divestment could not plausibly satisfy the even stricter fiduciary duties applicable to endowment management.

Accordingly, divestment for a reason outside of a university's research and educational charitable purpose is likely disloyal, ultra vires, or both. If a university wishes to alter or expand its charitable mission, it must follow the applicable procedures to do so, such as amending its articles of incorporation.[20] Under prevailing law, the new purpose would apply only prospectively, however, limiting it to newly raised funds.[21] The individual gifts that make up the restricted endowment are limited to even narrower purposes that cannot be altered without court approval or in accordance with the terms of the gift agreement, further constraining divestment. Moreover, even if a divestment is within a university's research and

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between the trustee's fiduciary duties and personal interests"). RESTATEMENT (THIRD) OF TRUSTS § 78(2) (A.L.I. 2007) (emphasis added). Thus, for example, a trustee who does "not act for personal advantage," and instead is "motivated by a desire to assist a worthy project," still violates the duty of loyalty because such a motive or desire is something other than the sole interest of the beneficiary. Conway v. Emeny, 96 A.2d 221, 225 (Conn. 1953).

[16] RESTATEMENT (THIRD) OF TRUSTS § 78(1) cmt. f. (A.L.I. 2007).

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

[18] Wormley v. Wormley, 21 U.S. 421, 463 (1823).

[19] *See* RESTATEMENT (THIRD) OF TRUSTS § 90 cmt c. (A.L.I. 2007) ("[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 . . . .").

[20] *See* Schanzenbach & Sitkoff, *supra* note 1.

[21] *See* RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 3.01 cmt. e (A.L.I. 2021) (Adhering to "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.").

educational purpose, it must still be prudent, which entails a balancing of the costs to the portfolio with the anticipated benefits from the divestment. Such a balancing should ordinarily include comparison against alternative means within the university's academic program to achieve those benefits.

A divestment not directly falling within a university's research and educational purpose could, in limited circumstances, plausibly be defended on the grounds that the activity avoided is so abhorrent that all charities may avoid it on grounds of public policy. The idea is that the public benefit principle that underlies the very concept of charitable purpose excludes certain abhorrent activities in all events. There is only limited precedent to guide us on this point, mostly related to the public policy against racial or other forms of invidious discrimination.[22] Reasoning from those limited precedents and first principles within the law of charities, we argue in our other work that a divestment grounded on this public policy theory requires external validation, such as governmental endorsement of the divestment, rather than merely the viewpoint of a vocal constituency.[23] For example, federal and state statutes encouraged divestment during the war in Darfur, and South African Apartheid was likewise subject to legislative action and near-universal condemnation.

C. *Historical Practice*

We show in our other work that, with only a handful of exceptions, most universities have acted within the basic legal framework just described. Universities have supposedly divested or, more accurately, said they have divested from South Africa during Apartheid, tobacco, certain firms allegedly complicit in the Darfur war, and fossil fuels.[24] But those divestments were nuanced and highly contextual. Contrary to popular misconceptions, South African (1980s) and Darfur war (2000s) divestments were typically de minimis. They involved selling only a few directly held stocks at little cost to the portfolio in either fees or diminished diversification, and those divestments had the backing of strongly supportive and explicitly declared public policies. Of the major endowments, the most significant divestment from South Africa was by the University of California system, which engaged in a near total divestment.

[22] *See* SCOTT AND ASCHER ON TRUSTS § 39.5.5 (6th ed. 2025) (canvassing cases); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 784–85 (12th ed. 2026) ("The issue is that the public policy against such forms of discrimination informs the public benefit principle that is at the heart of the charitable purpose doctrine."); *see also* Thomas P. Gallanis, *Is Racial Discrimination Ever Charitable?*, 2 ILL. L. REV. ONLINE 146, 146 (2025).

[23] Schanzenbach & Sitkoff, *supra* note 1.

[24] *See id.*

But California's Board of Regents did so only after the state agreed to indemnify them for any resulting fiduciary liability.[25]

Harvard, Michigan, Johns Hopkins, and the University of California system divested from tobacco in the 1990s, and Dartmouth did so in 2012, but all except California have apparently since reversed course.[26] Finally, except for the University of California system, Princeton, and Yale, most universities have not broadly divested from fossil fuels for nonfinancial reasons.[27] To be sure, several universities advertise that they have divested from "direct" fossil fuel holdings, in some cases limited to specific sources such as tar sands or thermal coal. But in most cases this is a disingenuous claim. Given the predominance (since the rise of the Yale Model) of outside managers and pooled investment funds, most universities today hold few if any direct investments in anything.

II. Pragmatic Arguments Against Divestment

Setting aside issues of fiduciary duty, it is hard to posit a divestment that would pass a basic cost-benefit assessment. In addition to any cost to portfolio efficiency, divestment will in the usual case increase litigation risk, administrative costs, and agency costs. An offsetting benefit is unlikely because a divestment will rarely have a substantive impact on the activity targeted. Indeed, we think the pragmatic case against divestments is so strong that university boards would be better off categorically rejecting divestment on these consequentialist grounds rather than case-by-case debating, say, the definition of genocide or the scope of the university's purpose.

This conclusion is rooted in the current practices of university endowment management. From a sleepy backwater in the 1970s, endowment management underwent a transformation beginning in the 1980s owing to the success of the so-called Yale Model, which favored using the university's (theoretically) perpetual time horizon to take advantage of the premium offered by less liquid, non-publicly traded investments.[28] Such investments require more care and expertise, typically obtained through outside managers. As a result of the Yale Model's predominance, today

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[25] *See* Jay Mathews, *California Regents Vote to Divest $3.1 Billion in South Africa Holdings*, WASH. POST (July 18, 1986), 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).

[26] *See* Schanzenbach & Sitkoff, *supra* note 1.

[27] *See id.*

[28] *See* DAVID F. SWENSEN, PIONEERING PORTFOLIO MANAGEMENT: AN UNCONVENTIONAL APPROACH TO INSTITUTIONAL INVESTMENT 30–31 (2000).

most university endowment offices are effectively managers of managers. They choose low-cost, broad market index funds to form the core of their publicly traded portfolio to which actively managed funds may be added. The rest of the portfolio is allocated to external active managers, who may trade public shares or make private equity investments. Even Harvard, long known for direct management, today holds only around $1.6 billion of its $53.2 billion endowment directly.[29]

A. *Divestment Creates Legal Risks*

A divestment can be consistent with fiduciary duty, but only if it satisfies a complicated fiduciary standard of review for loyalty and prudence that in application is highly dependent on the facts and circumstances. Discovery in such a litigation may be onerous and embarrassing. By contrast, investing solely for prudent risk and return is all but a fiduciary safe harbor.[30] Adhering to a categorical non-divestment policy thus minimizes fiduciary and related litigation risks.

Endowments have not yet been the subject of much litigation, probably because standing to sue historically has been limited to state attorneys general and dissenting board members, who have been hesitant to litigate these matters. However, with increasing political polarization and the recent recognition in trust law of donor standing,[31] there is good reason to suppose that the present litigation risk is higher than in the past. This is true for all charitable non-profits. But a university in particular faces additional idiosyncratic complications in squaring a divestment with the duty of loyalty.

First, the powers of the modern, secular university are confined to its charitable purpose, almost always limited to "research and education."[32] The duty of loyalty and the ultra vires doctrine tie the university to this purpose in its investment program. And it is hard to identify commercial

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[29] *See* HARVARD MGMT. CO., SEC Form 13F (filed May 10, 2024), https://perma.cc/L4TE-CYBY (reporting about $1.6 billion in publicly traded securities in 2024); Message from the Chief Executive Officer, Harvard Mgmt. Co., https://perma.cc/5ZFX-BK3Y (reporting a $53.2 billion endowment as of 2024).

[30] Might divestment ever be legally required? One can conjure a hypothetical in which a directly held investment violates a charity's charitable purpose. Suppose, for example, that Greenpeace invested its endowment directly in a whale-blubber processing facility in Japan or Iceland. *Cf. Save the Whales*, GREENPEACE, https://perma.cc/FG4Z-TP22. A colorable case could be made that such a direct investment would be so contrary to Greenpeace's charitable purpose as to be a breach of the duty of loyalty. We are aware of no relevant case law.

[31] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 22, at 787–96 (noting the spread "[o]ver the last 30 years" of donor standing in trust law).

[32] *See* Schanzenbach & Sitkoff, *supra* note 1.

relationships that directly conflict with research and education.[33] Slavery and child labor would appear to conflict with education, but these activities probably also satisfy the public policy abhorrence standard independently. For-profit education arguably conflicts with providing education through nonprofit institutions. But divesting from firms that provide for-profit education is not typically demanded by divestment advocates.

Second, the bulk of university endowments are comprised of restricted gifts, which typically have prescribed narrower purposes within research and education and are subject to both trust law's stricter loyalty standard and its recently liberalized standing rules.[34] For example, a gift to support a cancer research center would be held by the university in trust for that narrower purpose. If the gift is used to support research into other diseases (or any other purpose), no matter how pressing, the university would be in breach of the trust law sole interest rule and, thanks to recent law reform in most states, would be sueable by the donor of that gift.

To satisfy the fiduciary duty of loyalty, a divestment must be consistent with both the university's general research and educational mission and that of each restricted gift invested collectively. Since administrative efficiency militates toward pooling restricted gifts and unrestricted institutional funds, universities likely face a highest common denominator standard: any divestment applied to the endowment must be consistent with the purposes of all the individual restricted gifts (i.e., separate charitable trusts) that make up the endowment.

B. *Divestment Increases Administrative Costs*

A divestment that satisfies the duty of loyalty must still be prudent, which entails a balancing of costs and benefits. Selling a few directly held shares and replacing them with shares in firms with similar risk-and-return characteristics will tend to be low cost. But since the rise of the Yale Model, universities generally own few significant investments directly. In consequence, even a minor divestment would require either restructuring the portfolio to enable direct management or the imposition of costly screens (costly in both administrative expenses and diminished diversification). The addition of, say, even 10 basis points of expense on a billion-dollar endowment translates to a million dollars a year of

[33] There is also tension between divestment and the model of a university as an open forum for debate of ideas, which we take up below. *See infra* Part IV.
[34] *See* Schanzenbach & Sitkoff, *supra* note 1.

compounding added costs.[35] Bearing these costs to avoid a few firms, an industry, or a region would be to allow the tail (divestment) to wag the dog (endowment structure).

Some universities forthrightly acknowledge these barriers to divestment.[36] Less remarked upon are the harder to quantify decision-making and opportunity costs introduced by a divestment policy. For example, many universities adopted carefully crafted divestment statements around genocide and apartheid, hoping to limit the scope of divestment conversations to rare and abhorrent matters. Instead, they invited a contentious debate about whether Israel's policies are genocidal or constitute apartheid. That debate could replicate itself in myriad contexts, as evidenced by the suggestion that climate change may qualify as "genocide."[37] Instead of focusing on risk and return, boards and endowment managers have been thrust into a free-ranging and contentious moral decision-making process for which they are ill-suited.

By entertaining divestment as a possibility, a university increases the administrative costs of managing its endowment—even if it never undertakes a divestment. The board must spend scarce time implementing its divestment policy and assessing divestment petitions. University leaders must manage the process instead of attending to other critical tasks, such as recruiting faculty and students or raising money. If a board decides a divestment would fall within the university's charitable purpose or the public benefit principle, fiduciary compliance will still require a documented assessment of the costs and benefits of that divestment. Unless the divestment is on its face de minimis, that assessment itself will be costly and may require the use of outside experts, after which the university may ultimately decide not to divest. Committing to a blanket non-divestment

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[35] For example, the expense ratio of Fidelity's "sustainability" index fund is roughly 10 basis points higher than its total market index fund (0.11% versus 0.015%). The screened fund is also less diversified than the total market fund. Moreover, three technology companies—NVIDIA (12.81%), Microsoft (10.18%), and Alphabet (5.56% + 4.89%)—comprise one-third of the sustainability fund, which has only 268 holdings, less than one-tenth of the 3,818 holdings in the total market fund. *See Fidelity U.S. Sustainability Index Fund*, FIDELITY, https://perma.cc/ZV5J-HRVH [hereinafter FIDELITY SUSTAINABILITY]; *Fidelity Total Market Index Fund*, FIDELITY, https://perma.cc/8RP5-PKXA [hereinafter FIDELITY TOTAL MARKET]. 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). *See Vanguard FTSE Social Index Fund Institutional Shares*, VANGUARD, https://perma.cc/HUS7-HN2S; Total Stock Market Index Fund Institutional Plus Shares, VANGUARD, https://perma.cc/EG3S-JWRL; Total Stock Market Index Fund Institutional Shares, VANGUARD, https://perma.cc/6X8U-AWL9.

[36] *See, e.g.*, *MIT's Environmental, Social, and Governance (ESG) Investment Framework*, MASS. INST. OF TECH. INV. MGMT. CO., https://perma.cc/J5TT-MCHA [hereinafter MITIMCo] ("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.").

[37] James Robins, *The Case for Calling Climate Change "Genocide"*, NEW REPUBLIC (Sep. 23, 2020), https://perma.cc/X782-G7TQ.

policy, by contrast, avoids all these costs, including the social and political costs of constituencies contesting individual divestment proposals.

C. *Divestment Increases Agency Costs*

A categorical non-divestment policy furthers a key aspect of charitable governance—keeping the board focused on the charitable mission. The agency costs attendant to the separation of ownership and control are aggravated by the nonprofit form.[38] Nonprofits generally lack the protective internal governance and contractual features that usually exist in for-profit entities, including shareholder votes on major transactions, the market for corporate control, competitive product markets, and share prices on informationally efficient exchanges. But a nonprofit board faces a powerful constraint that a for-profit board typically does not—limited powers under the organization's prescribed charitable purpose.

Even a board disinclined toward divestment will benefit from the precommitment of a formal policy. Keeping the door open to divestment, especially through a standing committee on divestment, may invite persistent lobbying. And the board, faced with a crisis of student activism, may seize the short-term solution of divestment to avoid further controversy. Holding out the possibility of divestment opens the door to mission creep—a legal risk if the university's organizational documents prescribe (as is typical) a sole purpose of research and education. Moreover, an announced non-divestment policy will be hard for a future board to undo. There is a colorable argument that a university is bound to that policy with respect to any gifts made to the endowment while that policy was in effect.[39]

D. *Divestment Almost Never Has a Substantive Effect*

Divestment will almost never produce the desired social benefits. Many universities have tasked their investment policy committees with assessing the likely effect of a divestment on the targeted activity. Every

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[38] *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); Evelyn Brody, *The Limits of Charity Fiduciary Law*, 57 MD. L. REV. 1400, 1429–1434 (1998).

[39] Prevailing 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." RESTATEMENT OF CHARITABLE NONPROFIT ORGANIZATIONS § 3.01 cmt. e (A.L.I. 2021). The argument, therefore, would be that the non-divestment policy was part of the donor's understanding of the university's purpose at the time of the gift.

report we have reviewed has concluded that the particular divestment under consideration would have no effect.[40] We are aware of no contrary conclusions.

In the case of public markets, this conclusion follows inexorably from the liquidity of those markets and the tiny fraction held by university endowments. In the case of illiquid markets and direct university investments, limited knowledge of second- and third-order effects clouds assessment of likely outcomes. Another investor may step forward, or if the project fails, other projects elsewhere may be substituted. Accordingly, whether a divestment will produce the intended social benefit depends on the liquidity of the relevant capital market and what substitutes arise in the absence of the university's investment. Let us elaborate on both points.

Public capital markets in developed nations are, in general, liquid and efficient. In such a market, a firm's share price depends on its expected risk and return. If a university endowment sells shares in an oil company, necessarily someone else will have purchased it at that market price. Even if the sale causes a reduction in the share price, the effect will be short lived, as other investors step in to take advantage of the mispricing. In economic parlance, for a divestment to affect the targeted harm, capital markets would need to be inelastic.

By way of illustration, assume that universities hold fossil fuel investments in proportion to their contribution to U.S. gross domestic product of 3.3% (a high-end estimate).[41] Even if all university endowments divested from fossil fuels, the total divestment would amount to only $33 billion (3.3% of the $1 trillion of university endowment value). This is a drop in the bucket. To put this figure in perspective, the average *daily* trading volume of public stocks in the U.S. in 2023 was $516 billion.[42] Starving publicly traded fossil fuel companies of capital via university divestment is not possible.

Capital markets may be less elastic for a non-publicly traded investment for which the university is the marginal investor, that is, if the project will not occur or will be reduced in scope without the university's investment. To illustrate, suppose a university is offered to invest in a gas field. If the university's investment is critical to the gas field's construction,

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[40] *See, e.g.*, PUB. INT. INV. ADVISORY COMM., JOHNS HOPKINS UNIV., FINAL REPORT IN RESPONSE TO THE PROPOSAL TO "DIVEST FROM ACTIVITIES ARMING, FINANCING, AND SUPPORTING THE HUMANITARIAN CRISIS OF PALESTINIANS AND OCCUPIED PALESTINIAN TERRITORY", at iii (Jan. 2025); *see also* ADVISORY COMM. ON INV. RESP., DUKE UNIVERSITY'S CONTRIBUTION TO REDUCING GREENHOUSE GASSES: TOWARD A CLIMATE-RESPONSIBLE INVESTING APPROACH 3 (May 2019).

[41] *See* PRICEWATERHOUSECOOPERS, IMPACT OF THE OIL AND NATURAL GAS INDUSTRY ON THE US ECONOMY IN 2021 6–7 (2023) (providing estimates of 1.1 to 3.3% of U.S. economy directly attributable to fossil fuel production).

[42] *See 2024 Industry Snapshot: Market Activity*, FINRA, https://perma.cc/74EF-V57F.

such as if there were no ready alternative investor, the university's nonparticipation could meaningfully reduce the probability that the gas field is constructed or diminish its scope. On the other hand, given the increasing scale of private equity markets, inelasticity in even non-publicly traded investments is an ebbing possibility.

Even if a divestment were successful in affecting the targeted activity, however, there remains the issue of substitution effects (what economists call the "general equilibrium" outcome). That a specific project does not take place does not mean that the aggregate amount of the overall targeted activity will be reduced. In the example in the prior paragraph, natural gas prices might rise because of the reduced supply from the gas field project being scrapped. But what is the substitute energy source? A different but dirtier project elsewhere, perhaps coal instead of gas?[43] What other companies benefit? Are they cleaner producers or not? Does successfully starving private oil and gas firms of capital advantage competitors that are state-owned, financed, and headquartered in countries with poor human rights and environmental records?

Even if the costs of divestment are low, consideration should be given to whether the goal of the divestment would be better effectuated within the university's academic program. "I would consider it quite wrong and probably illegal to make important decisions involving Harvard's finances on the basis of 'non-rational' judgments," former Harvard President Derek Bok was quoted as saying in response to pressures to implement a broad divestment from South Africa.[44] Ultimately, Harvard declined a general divestment from South Africa but undertook initiatives within its academic program to address apartheid, including targeted scholarships for Black South Africans.[45]

Professor William Nordhaus, the Nobel prize winning scholar of the economics of climate change, casts doubt on any strategy to fight global warming that does not involve concerted government action.[46] He identifies three necessary conditions to reducing carbon emissions. First, there must be an increased study of the costs of climate change to focus public attention and reduce uncertainty.[47] Second, there must exist a global

[43] *See* Email from Nw. Univ. Bd. of Trustees to Nw. Univ. Cmty. (Jun. 23, 2022), https://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").

[44] Jeffrey C. Wu, *Bok and Activists Reach Standoff on Divestment*, HARV. CRIMSON (Apr. 2, 1990), https://perma.cc/KY78-6R7T.

[45] *See* DEREK BOK, ATTACKING THE ELITES 65–66 (2024) (describing his refusal of a broad divestment but Harvard's other approaches).

[46] *See* WILLIAM NORDHAUS, THE SPIRIT OF GREEN 258–63 (2021).

[47] *Id.* at 292–93.

carbon tax or other system "that raise[s] the price of . . . greenhouse-gas emissions" to internalize those costs.[48] Third, there must be rapid technological advances to support a switch to non-carbon emitting energy sources.[49]

There is, to be sure, a profound role for universities in generating the knowledge required to satisfy Nordhaus's first and third conditions. But universities have no role to play in the second condition—voluntarydivestment by university endowments does not constitute coordinated global action. Moreover, direct investments in facilities, particularly for those universities that own aging fossil fuel powered heating and electricity plants, could reduce emissions and do not rely on unlikely assumptions about the inelasticity of capital markets.

We can generalize this point beyond the Nordhaus emissions framework. If a university board chooses to maintain a divestment policy, fiduciary principles counsel toward making an assessment of the efficacy of a proposed divestment. Such an assessment should also include consideration of alternative programmatic approaches to the same issue. With few exceptions, a policy requiring such an assessment would be the functional equivalent of a non-divestment policy. Divestments would almost always be rejected, although the university would continue to bear the agency, administrative, and opportunity costs associated with evaluating proposed divestments.

III. Divestment as Programmatic Benefit

The prudent investor rule generally requires a diversified portfolio with risk-and-return objectives appropriate to "the purposes, terms, distribution requirements, and other circumstances of the trust."[50] The nature of a charity's charitable program is thus relevant to the investment program. For example, a university faces variation in its programmatic costs (such as energy and employee health care) and in tuition revenue. A prudent trustee would consider these risks, perhaps hedging against them, in crafting the university's investment program.[51]

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[48] *Id*.
[49] *Id*.
[50] RESTATEMENT (THIRD) OF TRUSTS § 90 (A.L.I. 2007); *see also* UNIF. PRUDENT INV. ACT. §§ 2, 3 (UNIF. LAW COMM'N 1994) (similar); UNIF. PRUDENT MGMT. INST. FUNDS ACT § 3(e)(2), (4) (UNIF. LAW COMM'N 2006); Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis,* 14 J. EMP. LEGAL STUD. 129, 130–31 (2017) (assessing the effect of the prudent investor rule in practice).
[51] MIT reports that it hedged its energy price risk at times by overweighting fossil fuels in its portfolio. *See* MITIMCO, *supra* note 36 (observing that "we pro-actively sought out fossil fuel investments to add to the portfolio given their ability to hedge against the Institute's energy costs").

The question thus arises, to what extent may a university endowment likewise be managed for reputational risks? If an endowment could overweight fossil fuels to hedge against energy costs, then the same logic would support underweighting fossil fuels to hedge against the reputational costs of owning fossil fuels or, relatedly, to placate students or other university constituencies. Such motives were likely at play in the prior (small) divestments from South Africa, Darfur, and fossil fuels.

A divestment for reputational benefits or constituency management could plausibly be defended as loyal and prudent, but the argument is hardly a slam dunk. Unlike a purely programmatic decision, which is subject to a highly deferential fiduciary standard of review, endowment investment is subject to a more invasive fiduciary review. Loyalty requires that the divestment not only advance the research and educational purpose of the university, but also that it fit the narrower purpose of every restricted gift within the endowment. At the same time, prudence requires a balancing of costs and benefits. A vague allusion to reputation or constituency management benefits is not enough to justify a divestment.

A. *Divestment, Reputation, and Loyalty*[52]

The loyalty defense for a reputational benefits divestment 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. In application, however, this theory runs into the problem of the diversity of purposes within the restricted endowment. The claimed reputational benefits would need to further the specific narrower purpose of each restricted gift within the restricted endowment. A reputation benefits theory will therefore 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 benefits basis for divestment is more plausible. These funds are held for the university's overall research and educational purpose, and reputational benefits more clearly fit within that more general purpose. But the typical practice of a single pooled endowment prevents a separate divestment for

[52] Portions of this section are adapted from Schanzenbach & Sitkoff, *supra* note 1.

the unrestricted endowment. And 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.

Finally, as we elaborate in Part IV, divestment for reputation sits uneasily alongside the charitable mission of open research and education of most modern, secular universities. The university's role as a forum for ideas embraces countless controversial positions and offensive arguments. Creating a space for uncomfortable discussions—ranging from human sexuality to wealth redistribution to religion—is hard to square with institutional divestment for reputational reasons.

B. *Divestment Costs and Reputation Benefits*

Assuming that a reputational divestment satisfies the duty of loyalty, the duty of prudence requires weighing the divestment's costs and benefits. To make tractable the problem of quantifying the value of reputation, we posit a relationship between the degree of control exercised by the university over an investment and its associated reputational costs.

Thus, for example, if a university holds an investment widely held by other fiduciaries, the reputational cost of that investment should be lower relative to a more unusual investment. Likewise, the reputational cost of an investment held in a pooled investment fund run by external managers should be lower than an investment directly made by the university. If a university is criticized for a pooled investment or one that is otherwise typical of fiduciary investors, it can point to the attenuated connection of the investment to the university or the overlap with prevailing fiduciary investment norms. By contrast, if a university has a direct ownership stake, a controlling interest, or a significant bloc of shares conferring meaningful voice, the university faces greater reputational risks.

Divestment costs are typically inverse to their reputational benefits. On our theory, broad market index funds have the lowest reputational risk. They are widely popular forms of investing; the investor does not choose the underlying investments; and the investor's interest in any holding within the fund is small. But restructuring an index-based passive public equity portfolio to avoid a particular firm or industry for most universities entails added costs, as does choosing a "sustainable" or "social" index fund that has less diversification and higher fees.[53] By contrast, in the pre-Yale Model days, when universities actively chose individual stocks or had direct

[53] The Fidelity and Vanguard funds discussed in *supra* note 35 are illustrative.

interests in a business, dropping one investment and replacing it with a reputationally safer one was simpler. And if the replacement investment had a similar expected risk-and-return profile, portfolio efficiency would be largely unaffected.

To clarify these tradeoffs, consider against the backdrop of the rise of the Yale Model a divestment in three types of situations: (1) index funds; (2) external managers; and (3) directly held assets.

1. Index Funds

Broad market index funds comprise most of the publicly traded equity portfolio of the typical endowment. Index funds are also the most common vehicle for equity holdings for individual investors. But index fund managers do not pick and choose among firms. Instead, the composition of the fund reflects the fund managers' effort to align the fund with its index. Practically speaking, choosing among index funds is choosing among indexes.

Relative to broad market index funds, sustainability or social index funds that exclude certain firms or industries have significantly higher fees, are less diversified, and remain a small share of the overall index fund market.[54] And sustainable or social index funds do not have tailored exclusions or allow the investor to impose particular exclusions. Instead, they reflect the fund managers' effort to track the "sustainable" or "social" choices of the underlying index provider.[55] These underlying indices often avoid entire industries, such as nuclear power, fossil fuels, alcohol, or defense. It is unlikely that any "sustainable" or "social" index, and so any fund based on such an index, will neatly align with the typical secular university's charitable purpose of research and education. A large endowment could perhaps entice an asset manager to create a bespoke screened fund at low cost. But for a large endowment, even a single basis point of additional cost will compound over time to a large figure in absolute terms.

Index investing is now the predominant form of retirement savings. Broad market index funds attempt to represent the entire publicly traded market or a significant part thereof. We are dubious that a university's reputation is seriously put at risk by investing in the market as a whole, a

[54] For example, the more expensive and less diversified Fidelity "sustainability" index fund discussed in *supra* note 35 holds $4.9 billion, in comparison to the cheaper and better diversified Fidelity total market index, which holds $122.6 billion. *See* FIDELITY SUSTAINABILITY, *supra* note35; FIDELITY TOTAL MARKET, *supra* note 35.

[55] The Fidelity "sustainability" index, for example, tracks the MSCI USA ESG Index. *See* FIDELITY SUSTAINABILITY, *supra* note 35.

preferred form of investing by the public in general and many universities' own employees.[56] We accept that many individual investors and university constituencies are not sophisticated investors who understand index funds, and that even if informed, people can hold inconsistent (and even hypocritical) preferences. But an alternative to divestment is to explain the purpose and legal constraints on an endowment, the fact that broad market index funds are widely used in endowments and retirement plans, and that they are typically the most cost effective way to achieve diversification in public markets.

2. External Managers

External management, whether through actively managed funds or individual managers, presents a more complicated picture. As with choosing an index fund, the choice of an actively managed fund or individual manager does not give the university a say over specific investments. Nor are the underlying investments held in the university's name. But unlike the managers of an index fund, who commit to following an identified external index wherever it goes, active managers are chosen for their investment philosophy or track record. In consequence, the university's connection to the underlying investments of an active manager is arguably less attenuated than for an index fund. But placing constraints on external managers may reduce the pool of managers available to the university and result in higher fees.

3. Directly Held Investments

Investments chosen by the university itself and held directly in the university's name create a clearer reputational risk. But the magnitude of this reputational risk should depend on the degree of control associated with that ownership. For example, publicly traded stock ownership seldom gives any single investor meaningful control. By contrast, an investment that is not publicly traded may grant significant control rights. In a practical sense, such an investment is the university doing business, so it is easier to see how such an affiliation (like an academic affiliation) can do reputational harm. For example, Harvard suffered significant negative publicity when it directly owned Brazilian forest land, leading to criticism from environmental

[56] Around 45% of 403(b) plans, the predominant ERISA retirement plan offered by universities and other nonprofits, are in index funds. *See* ICI, THE BRIGHTSCOPE/ICI DEFINED CONTRIBUTION PLAN PROFILE: A CLOSE LOOK AT ERISA 403(B) PLANS, 2021 2 (Dec. 2024).

and human rights groups.[57] Arguments for reputational divestment are strongest in such circumstances, but we hasten to add that direct ownership and control by universities is rare.

C. *Divestment, Reputation, and Student (or Other Constituent) Peace*

Buying student (or other constituent) peace is another motive for divestment that could arguably be consistent with fiduciary obligation on reasoning similar to that for reputational divestments. But there are practical issues within such a decision. Essentially, the required fiduciary process will force the board to yield some control to a constituency while also putting a price on its values.

First, to defend a divestment as buying student peace, the university would need to admit it. If called to account, the trustees would need to defend the divestment by saying, "We considered the threat to our operations from student protests and, given the low cost to the portfolio, we agreed to divest. We would not have otherwise divested." Put more bluntly, this ground for divestment requires admitting to paying extortion.

Second, some divestments would be rejected on cost grounds, which raises its own reputational and constituency management issues. Suppose a university divested from Israel because students convinced the board that the benefit of student peace, weighed against the cost to the endowment, was worth it. The next week, students ask for divestment from China or Qatar on the grounds of human rights abuses. Even if the board agreed about the scope of the abuse, it might still need to decline to divest if the financial cost to the endowment would be too great. The board would effectively be saying, "We have values, but those values have a price." Yet assessing precisely this tradeoff would be required by the duty of prudence.

Adopting student consensus as a basis for divestment tends to put the board in an intractable fiduciary bind. For example, Princeton claims it "dissociated" from over 90 firms, including endowment divestment from those firms, to protect its academic reputation.[58] Princeton's divestment guidelines also call for a survey of students and faculty, requiring a consensus prior to dissociation.[59] Yet Princeton has refused to put Israeli

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[57] *See, e.g.*, Sazi T. Bongwe & Jade Lozada, *Assets to Axes: How Harvard's Land Investments Inspired Fear in Brazil's Cerrado*, HARV. CRIMSON (Apr. 13, 2023), https://perma.cc/XJ3H-C9XA; Friends of the Earth US, GRAIN, Nat'l Fam. Farm Coal. & Rede Soc. de Justica e Direitos Humanos, *Harvard and TIAA's Farmland Grab in Brazil Goes Up in Smoke*, FRIENDS OF THE EARTH (Oct. 23, 2019), https://perma.cc/NK2J-58WT.

[58] *Fossil Fuel Dissociation*, PRINCETON UNIV. (Jan. 2025), https://perma.cc/6PUE-AZYJ.

[59] *See Guidelines for Resources Committee Consideration of Investment-Driven "Social Responsibility" Issues*, PRINCETON UNIV. (Jan. 25, 1997), https://perma.cc/PT6D-LKSR (requiring "considerable, thoughtful, and sustained campus interest" in a divestment prior to beginning the decision process and requiring "consensus" to support a divestment).

divestment to a vote without much explanation.[60] A spokesperson for Princeton wrote:

> How do we measure consensus? The trustee guidelines on dissociation don't offer a distinct mechanism for determining consensus, and the Committee decided not to rely on counting methods, such as the outcomes of polls, the number of signatures on a petition, or the sheer volume of messages sent in an email campaign. That kind of data is not by itself indicative of deliberative consideration.[61]

This statement begs the questions of why the board did not pursue "deliberative consideration" (however defined) and why previous dissociations were undertaken following student votes.

D. *Reputation, Student Peace, and a Non-Divestment Policy*

We conclude that the best strategy for protecting a university's reputation while maintaining peace across all constituencies is a commitment to a strict non-divestment policy. Reputational advantages are easy to claim but hard to prove. Unlike hedging the portfolio against quantifiable program costs, such as energy costs, we can think of no credible way to quantify reputational harm from remaining invested in a region or industry. Some of the top schools in the country, including the University of Chicago and MIT, do not divest.[62] Most top schools reject anything beyond de minimis divestment in special circumstances. We fail to detect a reputational harm to these top-ranked institutions.

Indeed, divestment itself can create or exacerbate reputational risk and lead to allegations of inconsistency. Predicting public reaction to a divestment, associated political risks, and whether the divestment will aid or hinder aggregate faculty or student contentment is fraught with uncertainty. Israeli divestment is (supposedly) popular among college students at the moment, but it has not been popular with the general

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[60] At some universities, votes of students show strong backing for Israeli divestment. *See, e.g.*, Caroline G. Hennigan & Bradford D. Kimball, *Harvard Law School Students Pass Referendum Urging University to Divest from Israel*, HARV. CRIMSON (Mar. 14, 2025, at 00:27 ET), https://perma.cc/2DD4-QKFW (reporting 72.7% support for divestment among Harvard Law School students who voted in a student government referendum).

[61] John T. Groves, *Why the Resources Committee is Not Recommending Dissociation from Israel*, DAILY PRINCETONIAN (Mar. 5, 2025, at 10:02 ET), https://perma.cc/RK5Z-RAMF (the author was the chair of Princeton's committee advising on divestment).

[62] *See Statement Reaffirming the University's Position on Divestment and Academic Boycotts*, UNIV. OF CHI. NEWS (Apr. 14, 2016), https://perma.cc/6QRC-76GD; MITIMCo, *supra* note 36 ("[W]e 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."). For a more detailed discussion of elite university endowment policies, see Schanzenbach & Sitkoff, *supra* note 1.

public,[63] and numerous red and blue states have anti-divestment laws addressing Israel in particular.[64] Fossil fuel divestment has likewise divided public opinion.[65]

Divestment exposes universities to allegations of hypocrisy and bias because consistency in divestment is all but impossible. Large universities have relationships with institutions and industries the world over. For example, although some universities list slavery or child labor as grounds for divestment, we are unable to find any university that has divested on these grounds.[66] But child labor and slavery unfortunately remain common throughout large regions of the world, particularly in the mining industry.[67] Qatar and China, both nations with deep ties to prominent American universities, have come under intense criticism for their labor practices, yet we are aware of no university dissociations or divestments from those countries.[68]

IV. Divestment is Inconsistent with Open Inquiry

Academic freedom has become the foundational ethos of the university's commitment to research and education. Many American universities began as sectarian institutions, embracing a core set of values

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[63] *See Modest Warming in U.S. Views on Israel and Palestinians*, PEW RSCH. CTR. (May 26, 2022), https://perma.cc/GB99-AQSL (reporting strong support for Israel). But attitudes are changing, with disapproval of the war in Gaza growing. *See, e.g.*, Ted Van Green, Steven Shepard, Andy Cerda, Gabriel Borelli & Jocelyn Kiley, *How Americans View the Israel-Hamas Conflict 2 Years into the War*, PEW RSCH. CTR. (Oct. 3, 2025), https://perma.cc/37LB-A2AE (finding that "39% [of Americans] now say Israel is going too far in its military operation against Hamas," which is "up from 31% a year ago and 27% in late 2023").
[64] *See Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIB., https://perma.cc/5FN5-8AQA (listing anti-BDS laws in 38 states).
[65] *See* Brian Kennedy, Cary Funk & Alec Tyson, *What Americans Think About an Energy Transition from Fossil Fuels to Renewables*, PEW RSCH. CTR. (June 28, 2023), https://perma.cc/3GR3-B5BK (reporting substantial differences between Republicans and Democrats on whether the U.S. should currently be using a mix of fossil fuels and renewable energy sources, and whether the U.S. should ever entirely phase out fossil fuels).
[66] With the possible exception of MIT, which claimed it dropped a manager for a "cavalier" attitude toward child labor. *See* MITIMCo, *supra* note 36.
[67] *See Child Lab.*, INT'L LAB. ORG., https://perma.cc/LF7E-BEHW (estimating 138 million child laborers worldwide); INT'L LAB. ORG., INT'L ORG. FOR MIGRATION & WALK FREE, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 2 (2021), (estimating 49.6 million enslaved persons worldwide in various industries); Dionne Searcey & Eric Lipton, *Hunt for the 'Blood Diamond of Batteries' Impedes Green Energy Push*, N.Y. TIMES (June 22, 2023), https://perma.cc/3JKG-ZCH5 (describing attempts to reform Congolese mining by reducing the prevalence of child labor and dangerous working conditions).
[68] Labor practices during Qatar's hosting of the World Cup drew some negative attention to Northwestern, Georgetown, and Texas A&M's branch campuses in Qatar in 2013. *See* Robert Siegel, *Instead of Sending Students Abroad, Qatar Imports U.S. Colleges*, NPR (Dec. 24, 2013, at 13:32 ET), https://perma.cc/YL8C-HZYE. China faces criticism for its treatment of Uyghurs in its western regions. *See OHCHR Assessment of Human Rights Concerns in the Xinjiang Uyghur Autonomous Region, People's Republic of China*, OFF. OF THE UNITED NATIONS HIGH COMM'R FOR HUM. RTS., ¶¶ 118, 128 (Aug. 31, 2022), https://perma.cc/5CWZ-6GCF (reporting forced labor among Muslim Uyghurs in Xinjiang).

to which faculty and students had to adhere. Beginning in the late nineteenth century, sectarian standards fell away at private universities and a wave of new schools, such as Stanford and the University of Chicago, were founded as explicitly nonreligious institutions. These schools became committed to open inquiry, including resisting pressure from donors and alumni.[69] The development of free inquiry at public universities followed a different path. Public universities were threatened with subjugation to state governmental whims until a series of Supreme Court decisions limited state regulation of faculty and student speech on First Amendment grounds.[70]

The research mission of a university is broad and can encompass challenging, even offensive ideas. If the university's research and educational purpose makes it a forum for open inquiry, it is hard to identify activities that are in tension with that purpose and thus could be divested consistent with the duty of loyalty. Indeed, even a divestment for moral abhorrence is in some tension with the notion that academic freedom permits arguing for positions that polite society finds objectionable. Ironically, even if other charities could divest for abhorrence, abhorrence seems less amenable to a university, which by design is meant to allow for consideration of even abhorrent ideas.

In 1967, the University of Chicago adopted the recommendations of the Kalven Report, which rejected university statements as inimical to the central mission of the university.[71] "The university is the home and sponsor of critics; it is not itself the critic. It is, to go back once again to the classic phrase, a community of scholars."[72] As such, a university "is a community only for these limited and distinctive purposes," and therefore "cannot take collective action on the issues of the day without endangering the conditions for its existence and effectiveness."[73] This was not a new position for the University of Chicago. As Professor Tom Ginsburg has noted, the Kalven Report formalized a university policy dating back to 1900.[74]

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[69] *See 1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, AM. ASS'N UNIV. PROFESSORS, at 13–14 (1970), https://perma.cc/2YWD-PWCZ.

[70] *See, e.g.,* Healy v. James, 408 U.S. 169, 180 (1972) (rejecting campus order arguments about speech restrictions and holding that to the contrary "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." (alteration in original) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960))); Widmar v. Vincent, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities."); ERWIN CHEMERINSKY & HOWARD GILLMAN, FREE SPEECH ON CAMPUS 77 (2017) (discussing the application of the First Amendment to the public university campus).

[71] KALVEN COMM., UNIV. OF CHI. OFF. OF THE PROVOST, REPORT ON THE UNIVERSITY'S ROLE IN POLITICAL AND SOCIAL ACTION (1967).

[72] *Id.*

[73] *Id.*

[74] Tom Ginsburg, *Can Academic Freedom Survive the AAUP?*, CHRON. OF HIGHER EDUC. (Feb. 18, 2025), https://perma.cc/3284-PNTJ.

Over the last several years, at least forty-one major institutions, including many with the largest endowments (such as Harvard, Yale, Stanford, Johns Hopkins, Northwestern, Vanderbilt, and Brown) have embraced neutrality, often with direct reference to the Kalven Report.[75] Arguably, universities that embrace neutrality should likewise not divest. Divestment for ethical reasons is, in effect, speaking with the endowment and thus a declaration of an official university position. For this reason, the University of Chicago has had a consistent non-divestment policy,[76] and other schools have taken the same position.[77]

To be clear, we do not endorse a blanket legal conclusion that a university's commitment to academic freedom means that the university must invest solely for risk and return. Rather, we make the more modest claim that risk-return investing is most consistent with academic freedom because non-divestment is, in essence, an embrace of institutional neutrality.

Conclusion

Universities aid society best by focusing on their mission of research and education. A non-divestment policy has the further advantage of focusing trustees and endowment managers on the objective portfolio efficiency criteria of risk and return, diversification, and costs. Higher education's present difficult financial situation, not entirely attributable to fights with the current presidential administration,[78] illustrates the importance of sound financial management. Even a small portfolio inefficiency will compound over time, and a university's research and educational mission is never satisfied. Given the limited scope for legal divestment, it is a small step for most universities to embrace non-divestment. True, a future board may try to undo a non-divestment policy.

[75] *Adoptions of an Official Position of Institutional Neutrality*, FOUND. FOR INDIVIDUAL RTS. AND EXPRESSION, https://perma.cc/ZE3D-98SC.

[76] *See* Tyler Warner, *Activists Criticize University Endowment Investments*, CHI. MAROON (Nov. 25, 2008), https://perma.cc/NR9Z-2ESL (quoting university spokesperson as saying that taking a political stance through divestment "would only diminish [the University's] distinctive contribution, which is to provide a home in which scholars and students can freely hold and challenge the widest range of social institutions and beliefs").

[77] *See* Schanzenbach & Sitkoff, *supra* note 1.

[78] For example, both Chicago and Northwestern experienced serious budget crises even during periods of rising markets and prior to the second Trump administration. *See* Clifford Ando, *The Crisis of the University Started Long Before Trump*, COMPACT MAG. (Aug. 14, 2025), https://perma.cc/CX64-NU8X (discussing Chicago's present budget crisis involving large cuts to graduate education and the "merger" of departments); Joshua Irvine & Danny Vesurai, *University Drew from Endowment to Resolve $94 Million Deficit*, DAILY NW. (Jan. 17, 2019), https://perma.cc/3KDY-KMTW (reporting on a surprising $100 million deficit and negative credit outlook in 2018).

But a public non-divestment commitment, combined with neutrality declarations, will be hard to reverse for at least two reasons. First, it encodes in policy what is the norm in practice. Second, there is a reasonable argument that a university is bound to a stated non-divestment policy with respect to any gifts made to the endowment while that policy was in effect.[79]

We conclude with a plea to universities to stop dissembling about endowment divestment. Consistent with the university's charitable mission of truth-seeking through research and education, students who ask for divestment should be educated, not misled. Statements such as "we have no direct investments in X" are disingenuous when universities hold almost no direct investments. Instead of educating students through honest explanations of fiduciary obligation, the purpose of an endowment, the practical issues of divestment, and the general ineffectiveness of divestments, some universities have avoided one of their chief purposes—education.

[79] *See supra* note 39.

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