

# DISCOURSE AND DUTY: UNIVERSITY ENDOWMENTS, FIDUCIARY LAW, AND THE CULTURAL POLITICS OF FOSSIL FUEL DIVESTMENT

BY

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*Taking a multidisciplinary approach in the constructivist tradition, this Article combines discourse analysis, a survey, and legal analysis in an exploration of the fossil fuel divestment campaigns at Harvard and Stanford. The legal analysis identifies the fiduciary framework through which divestment decisions must be made, while the survey and discourse analysis give insight into whether campaigners exhibit a sophisticated approach to that framework. Specifically, this Article argues that because fiduciary law and the rules governing divestment set the bounds of the possible in the endowment management arena, and because those rules contain specific prohibitions against politically motivated divestment, the way campaigners talk about divestment matters. By contextualizing divestment law and the campaign discourse within the broader cultural politics of climate change, the article reveals the relationship between discourse and policy formation in the divestment movement.*

*Ideally, the campaigners should align their discourse with the rules governing divestment if the endowment trustees are the target audience. Yet as the analysis reveals, the campaign is simultaneously targeting multiple audiences and advancing multiple goals. Distinct and at times disparate discursive narratives are employed, symptomatic of the broader ideological clashes within the cultural politics of climate change. While the neoliberal-managerial discourse variant aligns fairly well with the rules governing divestment, its rhetorical gains are undermined by a politicized eco-radical discourse that chafes against*

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*the divestment rules (viz., prohibitions against politically motivated and blanket industry-wide divestment). The dual discursive deployment and discursive misalignment incurs opportunity costs for the campaigners. Additionally, the survey and discourse analysis results reveal an agenda well beyond the scope of endowment management.*

*The final analysis revisits the goals of the campaign and argues that fiduciary law can accommodate environmental, social, and governance concerns. Those seeking to “green” the endowments are more likely to succeed if they frame their arguments and methods as consistent with fiduciary duty and endowment finance. Ultimately, however, such accommodation will fail to satisfy some campaigners. Those seeking radical political and socioeconomic reform through the divestment movement are unlikely to find it in the realm of endowment management.*

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## I. INTRODUCTION

U.S. college and university endowments hold vast sums of wealth.<sup>1</sup> Harvard's endowment, the largest in the world, reported a value of \$35.7 billion in 2016.<sup>2</sup> Coinciding with the strength of endowments has been a shift in the expectations placed on universities to solve economic and social problems,<sup>3</sup> and a growing trend in fiduciary finance towards greater inclusion of socially responsible investment (SRI) in charitable fund management.<sup>4</sup> The broader cultural clashes in environmental politics and the debates over the role of universities and finance in a climate-conscious

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<sup>1</sup> Press Release, Nat'l Ass'n of Coll. & Univ. Bus. Officers, Educational Endowments Report -1.9% Return for FY2016 as 10-Year Return Falls to 5.0%, at 2 (Jan. 31, 2017), <https://perma.cc/JN7W-G95X> (noting that the 805 participating endowments represented a collective \$515.1 billion). Despite poor returns in 2016, the National Association of College and University Business Officers study found an average growth rate of 5.0% over a ten-year-long period for participating endowments. *Id.* According to the United States Department of Education, the value of all American university endowments totaled \$535 billion in 2014 (the most recent year for which the Department makes statistics available), a 15% increase year-on-year from \$466 billion in 2013. THOMAS D. SNYDER ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2016-014, DIGEST OF EDUCATION STATISTICS 2015, at 441, 744 tbl.333.90 (2016) [hereinafter 2015 EDUCATION STATISTICS], <https://perma.cc/DL7K-WQWD>. The 2013 reported value of \$466 billion represented a nearly 10% increase from the \$425 billion reported in 2012. THOMAS D. SNYDER ET AL., NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., NCES 2016-006, DIGEST OF EDUCATION STATISTICS 2015, at 441, 707 tbl.333.90 (2016).

<sup>2</sup> 2015 EDUCATION STATISTICS, *supra* note 1, at 441; HARVARD MGMT. CO., ANNUAL ENDOWMENT REPORT 1 (2016) [hereinafter 2016 HMC ANNUAL REPORT], <https://perma.cc/8DNX-CA2U>. Harvard's endowment was \$37.6 billion in 2015, up from \$36.4 in 2014 and \$32.6 billion in 2013. 2015 EDUCATION STATISTICS, *supra* note 1, at 744 tbl.333.90. As a point of reference, both Harvard and Stanford have endowments comparable to or greater than the GDPs of some countries. *Id.* (noting Stanford's endowment totaled \$21.4 billion in 2014); CENT. INTELLIGENCE AGENCY, THE WORLD FACTBOOK 2016-17, at 64, 342, 426, 529 (2015) (estimating Bahrain's GDP to be \$33.86 billion, Iceland's GDP to be \$17.04 billion, Latvia's GDP to be \$31.97 billion, and Nepal's GDP to be \$19.76 billion). The strength of university endowments is consistent with the rise of institutional investors as a whole; institutional investors held 34% of total market value of U.S. common stocks in 1980, which by 2010 had grown to 67%, representing \$11.5 trillion. Marshall E. Blume & Donald B. Keim, Institutional Investors and Stock Market Liquidity: Trends and Relationships 5 (Aug. 21, 2012) (unpublished manuscript), <https://perma.cc/Q373-Y2UF>.

<sup>3</sup> BURTON A. WEISBROD ET AL., MISSION AND MONEY: UNDERSTANDING THE UNIVERSITY 1 (2008); *see also* Dan Apfel, *Missing the Point on College Endowment Returns*, HUFFINGTON POST (Mar. 15, 2012), <https://perma.cc/8BDF-EJ8N> (calling for endowments to focus on the school's educational mission and the needs of the community and society). *See generally* RESPONSIBLE ENDOWMENT PROJECT, RESPONSIBLE RETURNS: A MODERN APPROACH TO ETHICAL INVESTING FOR THE YALE ENDOWMENT 3, 15, 17 (2009), <https://perma.cc/S2CV-3TFU> (arguing that Yale's Advisory Council on Investor Responsibility needs updating); *About*, RESPONSIBLE ENDOWMENTS COAL., <https://perma.cc/RC3U-NEZ2> (last visited Apr. 15, 2017) ("We empower young people to defend human rights and the environment while making both corporations and universities accountable to global stakeholders. Our goal is to foster social and environmental change by making responsible investment common practice amongst colleges and universities.").

<sup>4</sup> FRESHFIELDS BRUCKHAUS DERINGER, U.N. ENVTL. PROGRAMME FIN. INITIATIVE, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL, AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT 18, 23, 37 (2005) [hereinafter FRESHFIELDS REPORT], <https://perma.cc/A5U8-Y3CX>.

society converge in the arena of fossil fuel divestment by endowments.<sup>5</sup> Campaigners promoting divestment may find the state of flux in SRI and endowment management to be advantageous.<sup>6</sup> Yet because the bounds of the possible in the arena of endowment management are circumscribed by fiduciary law, it is essential that the divestment campaign discourse “benefit from a façade of legitimacy” that presents divestment as consistent with and supportable by the structures, principles, and rules governing endowment divestment.<sup>7</sup> Taking a multidisciplinary approach in the constructivist vein, this Article argues that the ideological origins and radical political undertones of the campaign may impact the ability of the campaigners to effectively harvest that benefit.<sup>8</sup>

This Article uses the fossil fuel divestment campaigns at Harvard and Stanford, home to two of the world’s largest endowments,<sup>9</sup> as case studies to explore how fiduciary law and the cultural politics of climate change shape the campaigns. A combination of discourse analysis, a survey of campaigners, and legal analysis are employed. The analysis focuses on the

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<sup>5</sup> See WEISBROD ET AL., *supra* note 3, at 278 (noting that for universities, this tension manifests in the means universities employ to raise revenue and how and for what purpose revenue is spent, as every revenue-raising method endowments employ risks compromising the very missions for which that money is raised); JOSHUA HUMPHREYS ET AL., CTR. FOR SOC. PHILANTHROPY & TELLUS INST., EDUCATIONAL ENDOWMENTS AND THE FINANCIAL CRISIS: SOCIAL COSTS AND SYSTEMIC RISKS IN THE SHADOW BANKING SYSTEM 4, 45 (2010), <https://perma.cc/B72H-5PK4> (discussing the causes and effects of riskier endowment portfolios in light of the 2008 financial crisis); see also Christopher Wright, *Global Finance and the Environment*, in THE HANDBOOK OF GLOBAL CLIMATE AND ENVIRONMENT POLICY 428, 442 (Robert Falkner ed., 2013) (“[T]he structure of global finance has given rise to new forms of environmental investment, but also increased financial instability and encouraged short-term investing.”); FRESHFIELDS REPORT, *supra* note 4, at 23 (noting investment decision making which considers environmental, social and governance considerations is “becoming increasingly mainstream”).

<sup>6</sup> See JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 20, 94–95, 165–66 (2d ed. 1997) (expounding the “three streams” framework whereby the “problem stream”, the “policy stream,” and the “political stream” converge via a “focusing event” to push policy issues through a “policy window” and onto the political action agenda). While Kingdon’s work tends to be applied in the context of the federal government, see, e.g., Paul J. Larkin, Jr., *John Kingdon’s “Three Streams” Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J.L. & POL. 25, 26 (2012), it is useful for understanding the dynamics of climate politics and divestment as well.

<sup>7</sup> David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & BUS. ETHICS 395, 403 (2012).

<sup>8</sup> See Robert J. Brulle, *Politics and the Environment*, in HANDBOOK OF POLITICS: STATE AND CIVIL SOCIETY IN GLOBAL PERSPECTIVE 385, 401 (Kevin Leicht & J. Craig Jenkins eds., 2010) (calling for a combined approach recognizing the “common and unique factors that comprise environmental politics”). Here, “radical” is used to denote anything challenging the dominant regime. See, e.g., BENJAMIN J. RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW: REGULATING THE UNSEEN POLLUTERS 284–85, 512 (2008) [hereinafter RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW] (discussing how neoliberal eco-modernists rely on markets, reform of existing institutions, and technological innovation to solve societal problems whereas radical environmentalists view current political and economic institutions as incapable of meaningfully responding to ecological problems).

<sup>9</sup> 2015 EDUCATION STATISTICS, *supra* note 1, at 441.

campaign's arguments for divestment over and before attempting insider strategies<sup>10</sup> because this issue is both a point of cleavage between competing ideologies and a pivotal cog in the legal standard for divestment, thus providing insight into the "real" agendas and ideologies of the campaigners.<sup>11</sup> The results identify costly rhetorical and strategic tensions within and between the campaigns and fiduciary law that are symptomatic of tensions between the competing worldviews dominating climate politics. In the final analysis, the goals of the campaign are re-examined, and fiduciary law is revisited as a means of reconciling environmental, social, and governance concerns with endowment management.

## II. BACKGROUND

### A. *The Fiduciary Law of Endowments*

Endowments are charitable trusts and endowment managers are trustees whose fiduciary duties are legally enforceable. As such, for endowment managers, fiduciary law is the framework through which all investment decisions must be guided. It speaks a specific language that the ears of fiduciaries are attuned to hear (and legally obligated to listen to) as their guiding voice. In the language of rhetoric, fiduciary law can be thought of as a vocabulary and a grammar governing the debate over divestment; it defines acceptable words and terminology while providing the rules by which those words and terms may be accepted.<sup>12</sup> Thus, fiduciary law defines the boundaries of possible outcomes in the endowment arena while also providing the rules of play.

Fiduciary law is a particular breed of law that arises from a relationship of trust—the word "fiduciary" comes from the Latin *fiducia*, meaning "trust" or "confidence."<sup>13</sup> Based in common law, fiduciary law differs from state to

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<sup>10</sup> The term "insider strategies" is used in this Article to describe the exercise of corporate shareholder rights, including proxy voting and engagement with management. See Michelle Edkins, *The Significance of ESG Engagement*, in 21ST CENTURY ENGAGEMENT: INVESTOR STRATEGIES FOR INCORPORATING ESG CONSIDERATIONS INTO CORPORATE INTERACTIONS 4, 4 (2015) (describing methods of shareholder engagement on environmental, social and governance matters).

<sup>11</sup> Maarten A. Hajer, *Discourse Coalitions and the Institutionalization of Practice: The Case of Acid Rain in Britain*, in THE ARGUMENTATIVE TURN IN POLICY ANALYSIS AND PLANNING 43, 45 (Frank Fischer & John Forester eds., 1993).

<sup>12</sup> Cf. Christopher J. Borgen, *The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia*, 10 CHI. J. INT'L L. 1, 2 (2009) (explaining the discursive role of international law and diplomacy in shaping the rhetoric of political decisions).

<sup>13</sup> 1 OXFORD ENGLISH DICTIONARY 191 (compact ed. 1971) (1993); accord Tamar Frankel, *Fiduciary Law in the Twenty-First Century*, 91 B.U. L. REV. 1289, 1291 (2011) [hereinafter Frankel, *Twenty-First Century*] (discussing how fiduciary law regulates relationships based on trust); Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 829–32 (1983) [hereinafter Frankel, *Fiduciary Law*] (discussing the moral features of fiduciary law); Benjamin J. Richardson,

state, but both California and Massachusetts have adopted the Uniform Law Commission's Uniform Prudent Management of Institutional Funds Act<sup>14</sup> (UPMIFA), which governs endowments. Fiduciary law applies in relationships of trust where property is granted by one party—the grantor—and discretionarily managed by another party—the trustee (here, the managing boards)—for the benefit of a third party—the beneficiary (here, the university).<sup>15</sup> In order to ensure the trust relationship remains honest and trustworthy,<sup>16</sup> fiduciary law imposes strict duties on trustees, including duties of loyalty, care, and prudence.<sup>17</sup> Fiduciary duty is the highest standard of duty implied by law.<sup>18</sup>

The duty of loyalty requires endowments to be managed consistently with the endowment's purpose.<sup>19</sup> At most schools, including Harvard and Stanford, the purpose of the endowment is to fund the school's academic mission.<sup>20</sup> Thus, the goal of endowment management is to generate as much income as possible for the support of the school's mission; in turn, the mission colors endowment management by placing mission-related restrictions on certain types of investments (e.g., by allowing divestment

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*Keeping Ethical Investment Ethical: Regulatory Issues for Investing for Sustainability*, 87 J. BUS. ETHICS 555, 562–63 (2009) [hereinafter Richardson, *Keeping Ethical Investment Ethical*] (discussing the basics of fiduciary law in the context of socially responsible investing).

<sup>14</sup> UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (UNIF. LAW COMM'N 2006). The duties of care and loyalty are also iterated in the law governing charitable corporations. *See, e.g.*, MODEL NONPROFIT CORP. ACT (THIRD) § 8.30(a) (AM. BAR ASS'N 2008).

<sup>15</sup> *Fiduciary Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also* Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13, at 562 (summarizing classic tenets of trust law); Note that in the case of endowments, the university as an institution is the beneficiary, not the students. UPMIFA § 2(5) & cmt.

<sup>16</sup> Frankel, *Twenty-First Century*, *supra* note 13, at 1297; Frankel, *Fiduciary Law*, *supra* note 13, at 829–32.

<sup>17</sup> UPMIFA § 3(a); *Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014) (noting that fiduciary duty is also referred to as a “duty of loyalty; duty of fidelity; duty of faithful service; [or] duty to avoid conflicts of interest.”); *see also* David L. Ponet & Ethan J. Lieb, *Fiduciary Law's Lessons for Deliberative Democracy*, 91 B.U. L. REV. 1249, 1257 (2011) (noting that fiduciary duties are routinely described as duties of loyalty and care).

<sup>18</sup> *Duty*, BLACK'S LAW DICTIONARY (10th ed. 2014) (“A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as an agent or a trustee) to the beneficiary (such as the agent's principal or the beneficiaries of the trust).”).

<sup>19</sup> UPMIFA § 3(b), § 3(a)–(b) cmts. (distinguishing the duty of loyalty for nonprofit corporations as the best interest of the corporation as reasonably believed by the director, cf. the duty of loyalty for charitable trusts as the sole interest of the beneficiary); *Id.* § 4 cmt. (explaining that persons managing endowment spending decisions must focus on the purpose of the endowment fund, not the purpose of the institution in general); *see also* John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 931 (2005) [hereinafter Langbein, *Sole Interest or Best Interest*]; Benjamin J. Richardson, *Putting Ethics into Environmental Law: Fiduciary Duties for Ethical Investment*, 46 OSGOODE HALL L.J. 243, 270–71 (2008) [hereinafter Richardson, *Putting Ethics into Environmental Law*].

<sup>20</sup> HARV. MGMT. COMPANY, <https://perma.cc/V9R2-YW8C> (last visited Apr. 15, 2017); STAN. MGMT. COMPANY, <https://perma.cc/RM6S-B985> (last visited Apr. 15, 2017).

where grave social injury is occurring).<sup>21</sup> To preserve the atmosphere of neutrality, inclusiveness, and tolerance considered integral to educational environments, the duty of loyalty prohibits politically motivated investment decisions.<sup>22</sup> Like many modern institutional investors,<sup>23</sup> both Harvard and Stanford have SRI guidelines outlining approved consideration of environmental, social, and governance (ESG) factors.<sup>24</sup> Adherence to those guidelines forms part of the duties of loyalty and care.<sup>25</sup> However, the duty of loyalty ensures that even with SRI, the financial benefit of the endowments remains paramount.<sup>26</sup>

The duties of prudence and care require fiduciaries to “manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances,” keeping in mind the charitable purpose of the trust.<sup>27</sup> This “prudent investor rule”

<sup>21</sup> WEISBROD ET AL., *supra* note 3, at 145.

<sup>22</sup> RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW, *supra* note 8, at 205–06; JOHN G. SIMON ET AL., THE ETHICAL INVESTOR: UNIVERSITY AND CORPORATE RESPONSIBILITY, 135–36 (1972); John H. Langbein & Richard Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72, 75 (1980); Richardson, *Putting Ethics into Environmental Law*, *supra* note 19, at 266–67.

<sup>23</sup> See, e.g., RICHARD BARON & DAVID FISCHER, DIVESTMENT AND STRANDED ASSETS IN THE LOW-CARBON TRANSITION, 19–20 (2015), <https://perma.cc/7UE3-9RJQ> (discussing the rising trend of ESG disclosures and wide range of climate reporting initiatives).

<sup>24</sup> *Investing for the Long-Term: Integrating ESG Factors*, HARV. MGMT. COMPANY, <https://perma.cc/SH4Y-DM23> (last visited Apr. 15, 2017); Stanford Univ., Social Issue Proxy Voting Policy Statements and Guidelines 14–15 (Apr. 5, 2016) [hereinafter Stanford Proxy Voting Guidelines], <https://perma.cc/R3X3-4D42>.

<sup>25</sup> UPMIFA § 4(a)(7) (listing an institution’s investment policy as one of seven factors to be considered as part of the duty of prudence and care); Benjamin J. Richardson, *Do the Fiduciary Duties of Pension Funds Hinder Socially Responsible Investment*, 22 BANKING & FIN. L. REV. 145, 165–69 (2007) [hereinafter Richardson, *Hinder Socially Responsible Investment*] (discussing the relationship between SRI and fiduciary duty); see also Langbein, *Sole Interest or Best Interest*, *supra* note 19, at 932 (arguing for an evolving standard in the duty of loyalty).

<sup>26</sup> Bd. of Trs. v. City of Baltimore, 562 A.2d, 720, 736–737 (Super. Ct. Md. 1989) (holding that the duties of loyalty and prudence are not in question so long as returns are unharmed); UNIF. PRUDENT INVESTOR ACT § 5 cmt. (UNIF. LAW COMM’N 1994) (“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 . . . supposedly benefitted by pursuing the particular social cause.”); FRESHFIELDS REPORT, *supra* note 4, at 13 (establishing that ESG factors may also be used as a tie-breaker to decide between otherwise value-neutral alternatives); JAMES P. HAWLEY & ANDREW T. WILLIAMS, THE RISE OF FIDUCIARY CAPITALISM: HOW INSTITUTIONAL INVESTORS CAN MAKE CORPORATE AMERICA MORE DEMOCRATIC 28–29 (2000); SIMON ET AL., *supra* note 22, at 137–38. See generally Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13.

<sup>27</sup> UPMIFA § 3(a)–(b); RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 (Am. Law Inst. 1992). See generally BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986) (presenting the arguments for reconciling the prudent investor rule with modern portfolio theory that led to the issuance of the *Restatement (Third) of Trusts* in 1992 and the Uniform Prudent Investor Act in 1994, incorporating modern portfolio theory into the prudent investor rule); Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 27 REAL PROP. PROB. & TR. J. 407 (1992) (discussing the development of the prudent investor rule and principles of fiduciary investment); Stewert E. Sterk, *Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851 (2010)

inherently encourages conservative investment.<sup>28</sup> Endowment managers must consider variables including the fund's purpose, general economic conditions, and tax implications.<sup>29</sup> Economic, regulatory, litigation, and reputational risk present material threats that must be proactively managed.<sup>30</sup> While endowments are inherently more conservative than some other types of finance due to their fiduciary nature and long-term investment strategies, modern portfolio theory allows for riskier assets properly diversified and the UPMIFA imposes a duty to diversify.<sup>31</sup>

### *B. Fiduciary Law and Socially Responsible Investing*

The SRI movement has led to changes in the norms of fiduciary finance. The rules governing trust management have traditionally called for maximization of profits and little else.<sup>32</sup> Fiduciaries were warned of potential liability for violating the duty of loyalty if they considered noneconomic factors in their investment decisions.<sup>33</sup> Over the past few decades, the role of noneconomic factors has shifted as the trend in SRI has taken hold.<sup>34</sup> Now,

(arguing for further reform of the prudent investor rule); Harvey P. Dale, *Prudence Perverted: Politics, Perceptions, and Pressures* (Feb.15, 2006) (unpublished manuscript), <https://perma.cc/H3JR-EJHM> (discussing history of the prudent investor rule and issues arising in regard to its implementation).

<sup>28</sup> See UPMIFA § 3(b) cmt.; *accord* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT, § 6 cmt. (UNIF. LAW COMM'N 1972); see also Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1282 (2007) (discussing the development of fiduciary duty in trust law and effect).

<sup>29</sup> UPMIFA § 3(e).

<sup>30</sup> FRESHFIELDS REPORT, *supra* note 4, at 6; Richardson, *Putting Ethics into Environmental Law*, *supra* note 19, at 246.

<sup>31</sup> UPMIFA §3(e)(4) & cmt.; SIMON ET. AL., *supra* note 22, at 139–40; WEISBROD ET AL., *supra* note 3, at 148; see also Surbhi Sarang, Note, *Combating Climate Change Through a Duty to Divest*, 49 COLUM. J.L. & SOC. PROBS. 295, 322 (2016) (discussing the prudent investor rule).

<sup>32</sup> Langbein & Posner, *supra* note 22, at 96–97; MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133–34 (40th anniversary ed. 2002); see also Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 1970, reprinted in CORPORATE ETHICS AND CORPORATE GOVERNANCE (Walther Ch. Zimmerli et al eds., 2007) (calling social responsibility “fundamentally subversive” and reiterating his thesis from the 1962 book, viz., that the one business of business is profit).

<sup>33</sup> See, e.g., FRESHFIELDS REPORT, *supra* note 4, at 6; Langbein & Posner, *supra* note 22, at 74.

<sup>34</sup> ORG. FOR ECON. CO-OPERATION & DEV., 2007 OECD ROUNDTABLE ON CORPORATE RESPONSIBILITY: RECENT TRENDS AND REGULATORY IMPLICATIONS IN SOCIALLY RESPONSIBLE INVESTMENT FOR PENSION FUNDS 13 (2007), <https://perma.cc/7NQM-45W6> (discussing four factors responsible for increased interest in SRI); Richardson, *Hinder Socially Responsible Investing*, *supra* note 25, at 147 (discussing a stronger demand for socially responsible investing); Joel C. Dobris, *SRI—Shibboleth or Canard (Socially Responsible Investing, That Is)*, 42 REAL PROP. PROB. & TR. J. 755, 757–71 (2008) (recounting the surge in SRI); see also BARON & FISCHER, *supra* note 23, at 3 (noting the role climate change has played in prompting discussions of SRI); Stephanie Pfeifer & Rory Sullivan, *Public Policy, Institutional Investors and Climate Change: A UK Case Study*, 89 CLIMATIC CHANGE 245, 252–57 (2008) (outlining the history of investor interest in climate change beginning in the late 1980s).

the advice tends towards the converse—i.e., failing to account for ESG risk factors may expose fiduciaries to liability for violating the duties of prudence and care.<sup>35</sup> As the 2005 Freshfields Report found, “integrating ESG considerations into an investment analysis so as to *more reliably predict financial performance* is clearly permissible and is arguably required.”<sup>36</sup> As the words “financial performance” reveal, the financial materiality standard remains paramount: ESG considerations are permissible so long as economic performance is not disadvantaged.<sup>37</sup> While SRI can be a tool for advancing change and pushing corporations beyond the letter of the law, fiduciary law restrains that push in order to protect the interest of the beneficiary.

The consideration of ESG factors in fiduciary finance is not merely about “doing well by doing good”;<sup>38</sup> at its core, it is about risk management.<sup>39</sup> SRI acknowledges that in an increasingly globalized and interconnected world, investment value is impacted by noneconomic factors, such as environmental harm and political unrest.<sup>40</sup> There are also legal and regulatory risks that adherence to ESG guidelines can monitor and help reduce.<sup>41</sup> Therefore, consideration of ESG factors is increasingly recognized as part of the obligations of universal investors not because it is right to do

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<sup>35</sup> See FRESHFIELDS REPORT, *supra* note 4, at 8 (arguing that including ESG considerations in the day-to-day fund management duties of investment decision makers is not inconsistent with fiduciary duties); ASSET MGMT. WORKING GRP., U.N. ENV’T PROGRAMME FIN. INITIATIVE, FIDUCIARY RESPONSIBILITY: LEGAL AND PRACTICAL ASPECTS OF INTEGRATING ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT 25–28 (2009), <https://perma.cc/5PLD-59WT> (quoting Quayle Watchman Consulting and the law firm Arnold & Porter for the proposition that insofar as U.S. law is concerned, ESG considerations are permissible and arguably required where the considerations are relevant and material to the fund, as they provide powerful tools for economical assessment and valuation).

<sup>36</sup> FRESHFIELDS REPORT, *supra* note 4, at 13 (emphasis added).

<sup>37</sup> See *supra* note 26.

<sup>38</sup> This idiom is parried about frequently in relation to corporate social responsibility and socially responsible investment. For a sample of its use and meaning, see *Doing Well by Doing Good*, ECONOMIST (Apr. 20, 2000), <https://perma.cc/5N36-V5MM>; see also Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment*, 57 BUS. LAW. 681 (2002) (testing the claim that investors can simultaneously “do well” and “do good”).

<sup>39</sup> See generally Robert Repetto, *It’s Time the SEC Enforced its Climate Disclosure Rules*, INT’L INST. FOR SUSTAINABLE DEV.: BLOG (Mar. 23, 2016), <https://perma.cc/T8ES-AQ5Q> (summarizing climate risk management response efforts in the financial industry); *Climate Policies Needed to Mitigate Risk in the Financial System*, EUROPAWIRE (Apr. 18, 2017), <https://perma.cc/E3SJ-BL2W> (same). SRI is also about social risk management. See, e.g., Robert Falkner, *American Hegemony and the Global Environment*, 7 INT’L STUD. REV. 585, 594 (2005).

<sup>40</sup> FRESHFIELDS REPORT, *supra* note 4, at 23.

<sup>41</sup> See, e.g., Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290, 6,296 (Feb. 8, 2010) (reviewing risks from domestic and international regulation and legislation); U.N. ENV’T PROGRAMME FIN. INITIATIVE, INVESTOR BRIEFING: PORTFOLIO CARBON: MEASURING, DISCLOSING, AND MANAGING THE CARBON INTENSITY OF INVESTMENTS AND INVESTMENT PORTFOLIOS (2013), <https://perma.cc/DU4Z-7R5B> (discussing range of regulatory and economic risks associated with climate change, the benefits of proactive risk management, and how investors should be managing those risks).

so from a moral imperative, but because it is right to do so from a risk management and prudent investment imperative.<sup>42</sup> Many institutional investors, including the Harvard and Stanford endowments, have SRI policies governing how fiduciaries may consider ESG issues without breaching their duties, e.g., by helping fiduciaries objectively identify purely social issues from those materially affecting the fund.<sup>43</sup>

The two primary approaches to addressing ESG performance are investment screening and shareholder activism.<sup>44</sup> Investment screening involves choosing investments using a set of criteria.<sup>45</sup> Shareholder activism, or fiduciary activism, has grown more common in recent decades.<sup>46</sup> Shareholder activism can take the form of proxy voting, direct engagement with management, and, as a last resort, exercising the right to exit by divesting.<sup>47</sup> The two approaches are not mutually exclusive; for example, investment screening is predicated on measuring and reporting performance characteristics that can inform shareholder activism.<sup>48</sup>

The growing recognition of the severe and systemic risks from climate change has spawned numerous voluntary initiatives to encourage socially responsible investment.<sup>49</sup> These include the United Nations Global Compact,<sup>50</sup> the Ceres Principles<sup>51</sup>, and the Global Reporting Initiative.<sup>52</sup>

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<sup>42</sup> *E.g.*, FRESHFIELDS REPORT, *supra* note 4, at 11; HAWLEY & WILLIAMS, *supra* note 26, at 5; Richardson, *Putting Ethics into Environmental Law*, *supra* note 19, at 269–70; Benjamin J. Richardson & Wes Cragg, *Being Virtuous and Prosperous: SRI's Conflicting Goals*, 92 J. BUS. ETHICS 21, 27–28 (2010).

<sup>43</sup> JANE L. MENDILLO, HARVARD MGMT. CO., HARVARD MANAGEMENT COMPANY ENDOWMENT REPORT: MESSAGE FROM THE CEO 1, 4 (2013), <https://perma.cc/7ETJ-3FCQ>; Stanford Univ., Statement on Investment Responsibility 1–2 (2015) [hereinafter Stanford SIR], <https://perma.cc/MU3B-EYNN>.

<sup>44</sup> FRESHFIELDS REPORT, *supra* note 4, at 24.

<sup>45</sup> *Id.* at 25.

<sup>46</sup> *See* James P. Hawley, *Political Voice, Fiduciary Activism, and the Institutional Ownership of U.S. Corporations: The Role of Public and Noncorporate Pension Funds*, 38 SOC. PERSP. 415, 424 (1995) (arguing that as institutional shareholders have found it harder to exit the market and have adopted long-term investment policies, they choose instead to target underperformers, whether economically or socially, with activist engagement. Such engagement has been shown to increase stock prices, lead to major leadership changes, and overhaul governance structures).

<sup>47</sup> *See, e.g.*, Stanford SIR, *supra* note 43, at 1–2 (listing shareholder engagement strategies); FRESHFIELDS REPORT, *supra* note 4, at 25–27 (delineating shareholder engagement strategies).

<sup>48</sup> FRESHFIELDS REPORT, *supra* note 4, at 25–27.

<sup>49</sup> *See* Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290, 6,292 (Feb. 8, 2010); BARON & FISCHER, *supra* note 23, at 19; U.N. ENV'T PROGRAMME FIN. INITIATIVE, PORTFOLIO CARBON: MEASURING, DISCLOSING AND MANAGING THE CARBON INTENSITY OF INVESTMENTS AND INVESTMENT PORTFOLIOS 19 (2013), <https://perma.cc/X8L7-HEXC>.

<sup>50</sup> U.N. GLOBAL COMPACT, <https://perma.cc/9HEV-DFML> (last visited Apr. 15, 2017).

<sup>51</sup> *The Ceres Principles*, CERES, <https://perma.cc/H6W4-XERH> (last visited Apr. 15, 2017).

<sup>52</sup> GLOBAL REPORTING INITIATIVE, <https://perma.cc/88KH-BVQY> (last visited Apr. 15, 2017). Stanford adheres to all three voluntary standards in its proxy guidelines. Stanford Proxy Voting Guidelines, *supra* note 24, at 14–15 (resolving to adopt the Ceres Principles and Global Reporting Initiative standards and generally support resolutions bringing companies into closer compliance with United Nations Global Compact practices).

Membership is strong and growing; for example, the Institutional Investors Group on Climate Change represents some €13 trillion in assets.<sup>53</sup> The United Nations Principles for Responsible Investment (UNPRI), which Harvard recently joined,<sup>54</sup> boasts over 1,500 signatories worldwide representing over \$60 trillion in assets.<sup>55</sup> Other efforts to help manage investment-related climate risk by encouraging climate-related disclosures are underway,<sup>56</sup> such as the international Task Force on Climate-Related Financial Disclosure<sup>57</sup> and the CDP (formerly known as the Carbon Disclosure Project).<sup>58</sup> Many companies have adopted corporate responsibility and sustainability guidelines in an effort to manage ESG-related risk,<sup>59</sup> including applying an internal price on carbon to gauge climate risk.<sup>60</sup> Process guidelines such as ISO 14001 and 26000 standards aim to reduce emissions and increase sustainable business practices at the operational level.<sup>61</sup> Corporate managers

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<sup>53</sup> *Our Members*, INSTITUTIONAL INV. GROUP ON CLIMATE CHANGE, <https://perma.cc/9KKU-SSBA> (last visited Apr. 15, 2017).

<sup>54</sup> Letter from Drew Faust, President, Harvard Univ., to Members of the Harvard Community (Apr. 7, 2014) [hereinafter Faust, *Confronting Climate Change Statement*], <https://perma.cc/73HB-P2WT>. The Carbon Disclosure Project also counts Harvard among its newest members, likely owing at least in part to the pressure placed on the trustees by the divestment campaign. *Id.* However, as the proxy voting record of Harvard Management Company (HMC) shows, ESG issues were being considered by HMC prior to the founding of the divestment campaign at Harvard. CORP. COMM. ON S'HOLDER RESPONSIBILITY, HARVARD UNIV., ANNUAL REPORT, 2010–2011, at 1, 4, 9 (2011), <https://perma.cc/9ASQ-XZB8> (disclosing committee votes related to greenhouse gas reduction goals at ExxonMobil and environmental impacts of mountaintop mining by Dominion Resources, among others).

<sup>55</sup> U.N. ENV'T PROGRAMME FIN. INITIATIVE, ANNUAL REPORT 2016, at 8 (2016), <https://perma.cc/35VM-CPMD>.

<sup>56</sup> See generally SONIA LABATT & RODNEY R. WHITE, CARBON FINANCE: THE FINANCIAL IMPLICATIONS OF CLIMATE CHANGE (2007) (explaining the implications of a market-based approach to addressing climate change, including investors' concerns regarding carbon risk).

<sup>57</sup> TASK FORCE ON CLIMATE-RELATED FIN. DISCLOSURE, <https://perma.cc/F2MX-8SRC> (last visited Apr. 15, 2017). Michael R. Bloomberg serves as the chairman of the organization. *Id.*

<sup>58</sup> CDP, <https://perma.cc/D96S-PMX2> (last visited Apr. 15, 2017). The CDP is one of the (if not *the*) world's leading global disclosure systems for measuring and managing environmental impacts. The network of investors and purchasers represents over \$100 trillion and includes companies, cities, states, and regions. *About Us*, <https://perma.cc/F7H4-48D6>, CDP (last visited Apr. 15, 2017).

<sup>59</sup> See Commission Guidance Regarding Disclosure Related to Climate Change, 75 Fed. Reg. 6,290, 6,290 (Feb. 8, 2010) ("Many companies are providing information to their peers and to the public about their carbon footprints and their efforts to reduce them."); see also BARON & FISCHER, *supra* note 23, at 19 (noting development of private sector, climate-related reporting guidelines and frameworks).

<sup>60</sup> See Repetto, *supra* note 39 ("Hundreds of firms . . . now apply an internal proxy 'price on carbon' to guide investments decisions . . .").

<sup>61</sup> Rachel E. Deming, *A Tale of Two Continents: Environmental Management-Based Regulation in the European Union and the United States*, 46 ENVTL. L. 811, 821–23 (2016) (discussing ISO 14001); Richard Perkins & Eric Neumayer, *Geographic Variations in the Early Diffusion of Corporate Voluntary Standards: Comparing ISO 14001 and the Global Compact*, 42 ENV'T & PLAN. A 347, 348 (2010) ("ISO 14001 is a process-based environmental management system (EMS) standard . . . Briefly, an EMS is composed of a set of formalized and systemized procedures designed to help firms reduce their environmental impacts."); *ISO 26000 - Social*

and investors alike see the value in voluntary initiatives as a means of managing risk, staving off onerous regulations, gaining competitive advantage, and appeasing activist stakeholders.<sup>62</sup>

In addition to voluntary initiatives, there are more formal obligations to consider ESG factors in investment analysis as well. Several common law jurisdictions, including the United Kingdom and Australia, have ESG disclosure obligations.<sup>63</sup> In 2010, the United States Securities and Exchange Commission (SEC) issued interpretive guidance indicating how climate change disclosures may be required as part of adherence to existing disclosure requirements.<sup>64</sup> Companies in carbon-intensive fields are also facing scrutiny regarding climate risk disclosures; for example, the New York attorney general has led investigations into whether Peabody Energy and ExxonMobil intentionally misled shareholders and the public about the climate risks associated with their products and operations.<sup>65</sup>

When contextualizing the fossil fuel divestment campaign, it is important to bear in mind how and why SRI came to be a more accepted norm. Numerous social and political factors contributed to the trend in ESG investing in addition to an evolved comprehension of the environment–

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*Responsibility*, INT'L ORG. STANDARDIZATION, <https://perma.cc/4F49-QT84> (last visited Apr. 15, 2017) (“ISO 26000:2010 provides guidance rather than requirements, so it cannot be certified to unlike some other well-known ISO standards. Instead, it helps clarify what social responsibility is, helps businesses and organizations translate principles into effective actions and shares best practices relating to social responsibility, globally. It is aimed at all types of organizations regardless of their activity, size or location.”). Many of these standards are process standards, meaning “mechanisms requiring financial institutions to report their SRI policies, proxy voting activities and environmental impacts of financial significance.” Richardson & Cragg, *supra* note 42, at 30. Less readily available are normative standards. *Id.*

<sup>62</sup> Robert Falkner, *Business and Global Climate Governance: A Neo-Pluralist Perspective*, in BUSINESS AND GLOBAL GOVERNANCE 99, 110–11 (Morten Ougaard & Anna Leander eds., 2010) [hereinafter Falkner, *A Neo-Pluralist Perspective*]; David L. Levy, *Private Actors and Strategies in Global Environmental Governance: The Role of Information Disclosure*, in HANDBOOK OF GLOBAL ENVIRONMENTAL POLITICS 308, 309–12 (Peter Dauvergne ed., 2d ed. 2012).

<sup>63</sup> FRESHFIELDS REPORT, *supra* note 4, at 11. Other countries include Germany, France, and Italy. *Id.* The G7 group of countries have committed to the Sustainable Development Goals in principle, though not all have formally adopted them in domestic legislation. Communiqué, G7 Environment Minister’s Meeting at Toyama Japan (May 15–16, 2016), <https://perma.cc/XWF9-UUXU> (“We also commit to advancing a number of specific measures to achieve the SDGs.”).

<sup>64</sup> 75 Fed. Reg. at 6,290. The SEC has been criticized for not doing more to require climate-related disclosures. David Gelles, *When Investors Aren’t Told About Climate Change*, N.Y. TIMES, Jan. 24, 2016, at BU7 (clarifying that SEC’s view is that the 2010 guidance was not a new rule but rather voluntary); see also Repetto, *supra* note 39 (“Adequate financial disclosure would not only protect investors and help allocate capital efficiently, but would also put pressure [on] corporations to manage their exposure to climate risks more prudently. The SEC should step up to its responsibilities.”).

<sup>65</sup> Clifford Krauss, *For Peabody, A Settlement on Disclosure*, N.Y. TIMES, Nov. 9, 2015, at B1; Justin Gillis & Clifford Krauss, *Inquiry Weighs Whether Exxon Lied on Climate*, N.Y. TIMES, Nov. 6, 2015, at A1. Peabody Energy, the world’s largest coal company, filed for Chapter 11 bankruptcy protection in April 2016. John W. Miller & Matt Jarzensky, *Peabody Energy Files for Chapter 11 Bankruptcy Protection*, WALL STREET J. (Apr. 14, 2016), <https://perma.cc/M7VK-ZHBG>.

performance nexus.<sup>66</sup> The responsible investment movement can be understood in part as a manifestation of a sustained public outcry over the social and environmental harm caused by corporate activity and the failure of government to prevent that harm.<sup>67</sup> Against the backdrop of a “greening” of society<sup>68</sup> and the rise of environmentalism cultured by the social movements of the 1960s, the issue of corporate environmental responsibility was brought into relief by a series of environmental “focusing events” that drew attention to the environmental damage tied to corporate activity.<sup>69</sup> For example, the Ceres Principles, formerly known as the Valdez Principles, were founded in 1989 after the disastrous Exxon Valdez oil spill.<sup>70</sup> As evidence of transnational corporations causing environmental and social damage grew, stakeholders became increasingly concerned over the failure of traditional forms of corporate governance to provide adequate

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<sup>66</sup> FRESHFIELDS REPORT, *supra* note 4, at 24 (stating that among the factors contributing to the consideration of ESG is the “[i]ncreasing evidence of the nexus between performance on ESG issues and financial performance”); C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 77, 81–82 (2002) (discussing differing historical justifications for corporate social responsibility); Richardson & Cragg, *supra* note 42, at 21 (“The movement for socially responsible investment (SRI), which was once more commonly known as ‘ethical investment,’ increasingly downplays ethics. Historically it was a different story.”); *see also* RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW, *supra* note 8, at 13, 20 (asserting that SRI is motivated by businesses concerns or ethical necessity); Hawley, *supra* note 46, at 424–26 (discussing how the success of public pension funds and trade union pension funds increased interest in greater social investing); Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13, at 555 (“Traditionally, [SRI] championed an explicit ethical agenda. . . . Responsible investors increasingly pitch their case for taking social or environmental issues into account on business grounds . . .”). *See generally* ERIC NEUMAYER, GREENING TRADE AND INVESTMENT: ENVIRONMENTAL PROTECTION WITHOUT PROTECTIONISM (2001) (analyzing interactions between investment, trade, and the environment).

<sup>67</sup> *See* Janet E. Kerr, *A New Era of Responsibility: A Modern American Mandate for Corporate Social Responsibility*, 78 UMKC L. REV. 327, 339–42 (2009) [hereinafter Kerr, *A New Era of Responsibility*] (tracing the development of international and domestic corporate social responsibility standards).

<sup>68</sup> *See generally* Robert Falkner, *Global Environmentalism and the Greening of International Society*, 88 INT’L AFF. 503, 503–04, 519, 522 (2012) [hereinafter Falkner, *Global Environmentalism*] (describing the “greening” of society as “[e]nvironmental ideas and norms . . . [being gradually] woven into the normative fabric” of society).

<sup>69</sup> *See* Brulle, *supra* note 8, at 400–01 (discussing focusing events and defining them as “large disasters” that “draw increased attention to the problem”); *see, e.g.*, Mindy S. Lubber, *Exxon Valdez Oil Spill Still Leaves a Painful Legacy*, HUFFINGTON POST (Mar. 24, 2014), <https://perma.cc/4ZT2-SDW5> (stating that the Exxon Valdez oil spill “inspired a much-needed re-evaluation of the role and responsibility of companies as stewards of the global environment.”). Corporate responsibility is not a new concept however; companies involved with producing chemicals and goods for the Nazis came under scrutiny after World War II, as did the makers of Agent Orange during the Vietnam War. Edmund L. Andrews, *I.G. Farben: A Lingering Relic of the Nazi Years*, N.Y. TIMES (May 2, 1999), <https://perma.cc/KD9R-N2DN>; Dien Luong, *55 Years After Agent Orange Was Used in Vietnam, One of Its Creators Is Thriving Here*, HUFFINGTON POST, (Aug. 30, 2016), <https://perma.cc/KSBK-45D9>.

<sup>70</sup> *The Ceres Principles*, *supra* note 51; *see also* Lubber, *supra* note 69 (recalling that the spill “inspired a much-needed re-evaluation of the role and responsibility of companies as stewards of the global environment”).

environmental and social standards.<sup>71</sup> In the absence of strong governmental reform, new forms of governance emerged, shifting away from traditional command-and-control regulatory approaches towards new multilevel governance approaches based on disclosure and third-party involvement.<sup>72</sup> These disclosure-based, more deliberative approaches fueled the growth of SRI.<sup>73</sup> In so doing, environmentalism tilted closer towards eco-modern managerialism, taking ESG concerns seriously but offering solutions through revisions to existing market, governance, and institutional frameworks.<sup>74</sup> Thus, SRI came to some to represent a form of neoliberal accommodation of ESG concerns.<sup>75</sup>

The pro-SRI movements at Harvard and Stanford were thus crucially enabled by, and symptomatic of, fiduciary law's adaptation to ESG concerns.

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<sup>71</sup> See David Hess, *Public Pensions and the Promise of Shareholder Activism for the Next Frontier of Corporate Governance: Sustainable Economic Development*, 2 VA. L. & BUS. REV. 221, 229–35 (2007) (noting a new trend in corporate governance); Kerr, *A New Era of Responsibility*, *supra* note 67, at 362–63 (describing the driving factors and impacts of SRI). See generally CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* (1975) (on the failure of traditional legal mechanisms to regulate corporate behavior).

<sup>72</sup> See Hess, *supra* note 71, at 230–35 (describing new forms of governance); Kerr, *A New Era of Responsibility*, *supra* note 67, at 339–42 (discussing the evolution of corporate standards in response to governmental, public, and nonprofit pressure); see also Falkner, *A Neo-Pluralist Perspective*, *supra* note 62, at 113 (arguing that nonstate actors like corporations are influential in global climate politics but that inter-business conflict inhibits business dominance, enabling other actors to contest power). See generally *THE BUSINESS OF GLOBAL ENVIRONMENTAL GOVERNANCE* (David L. Levy & Peter J. Newell eds., 2005); Thomas Bernauer & Carola Betzold, Editorial, *Civil Society in Global Environmental Governance*, 21 J. ENV'T & DEV. 62, 63–65 (discussing the role of nongovernmental actors in civil society).

<sup>73</sup> Hess, *supra* note 71, at 229–35; Kerr, *A New Era of Responsibility*, *supra* note 67, at 362–63; Levy, *supra* note 62, at 315.

<sup>74</sup> See Jeremy Moon & David Vogel, *Corporate Social Responsibility, Government, and Civil Society*, in *THE OXFORD HANDBOOK OF CORPORATE SOCIAL RESPONSIBILITY* 303 (Andrew Crane et al. eds., 2008); see also Richardson, *Putting Ethics into Environmental Law*, *supra* note 19.

<sup>75</sup> See David L. Levy & Daniel Egan, *A Neo-Gramscian Approach to Corporate Political Strategy: Conflict and Accommodation in the Climate Change Negotiations*, 40 J. MGMT. STUDIES 803, 824–25 (2003) (describing the shift in fossil fuel companies towards more cooperative climate policy approaches through a neo-Gramscian lens: “Efforts by the fossil fuel industry to preserve its hegemonic position, in terms of market dominance, autonomy, and political influence, can be understood in terms of a ‘war of position’ in which actors coordinate sources of power and build alliances. . . . Fossil fuel companies . . . move[d] toward a strategy of accommodation, or ‘passive revolution’. . . . [T]he emerging climate regime, which provides for modest emission cuts but secures the broader hegemonic position of affected industries, can be understood in terms of the historical process of reconfiguring an unstable bloc.”); see also Daniel C. Apfel, *Exploring Divestment as a Strategy for Change: An Evaluation of the History, Success, and Challenges of Fossil Fuel Divestment*, 82 SOC. RES. 913, 935 (2015) [hereinafter Apfel, *Exploring Divestment*] (arguing that corporate engagement and focusing on the financial case for divestment risks undermining the “more transformative demands of divestment”); Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13, at 555 (arguing that as the “financial materiality” standard for SRI grows in popularity and acceptance, whereby SRI is permissible so long as returns are either aided or unharmed by the SRI actions, “risks perpetuating business-as-usual and reducing the SRI movement’s capacity to leverage lasting change for environmental sustainability”).

In thinking about how law, as a distinct form of discourse, is both a construct and constructor of social and political forces, it is helpful to recall that the modern rules governing SRI and divestment reflect an accommodation of the concerns presented by previous campaigns. The relationship between SRI, divestment, and the cultural politics of climate change is explored further in the context of university endowments, below.

### *C. Socially Responsible Investing and University Endowments*

Harvard's endowment was \$35.7 billion in 2016, while Stanford's was \$22.4 billion.<sup>76</sup> The power of such large institutional investors to impact ESG issues has led to pressure on university endowments to adopt SRI policies for exercising their investment power ethically and responsibly.<sup>77</sup> Universities were among the first to adopt SRI principles in the 1970s in response to student protests over perceived endowment complicity in civil rights violations and the Vietnam War.<sup>78</sup> Both Harvard and Stanford formed shareholder responsibility committees in the early 1970s.<sup>79</sup>

#### *1. Socially Responsible Investing at Harvard*

Harvard's endowment exists to support Harvard's educational mission<sup>80</sup> and is managed by the Harvard Management Company (HMC), a 501(c)(3) nonprofit corporation.<sup>81</sup> HMC's two shareholder responsibility committees, the Corporation Committee on Shareholder Responsibility (CCSR) and the Advisory Committee on Shareholder Responsibility (ACSR), exercise HMC's

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<sup>76</sup> 2016 HMC ANNUAL REPORT, *supra* note 2, at 1; STANFORD MGMT. CO., STANFORD UNIVERSITY INVESTMENT REPORT 2016, at 1 (2016) [hereinafter SMC ANNUAL REPORT 2016], <https://perma.cc/JE5J-QS64>.

<sup>77</sup> INV'R RESPONSIBILITY RESEARCH CTR. INST. & TELLUS INST., ENVIRONMENTAL, SOCIAL AND GOVERNANCE INVESTING BY COLLEGE AND UNIVERSITY ENDOWMENTS IN THE UNITED STATES: SOCIAL RESPONSIBILITY, SUSTAINABILITY, AND STAKEHOLDER RELATIONS 2 (2012) [hereinafter ESG INVESTING] ("[T]he primary driver behind SRI on college campuses – unlike many other institutional investors – has repeatedly been the demands of a sometimes bewildering array of voices, including students, faculty, alumni, donors, campus staff, labor unions, surrounding communities, and nonprofit and civil society organizations concerned about the underlying environmental, social and governance issues that endowment investments commonly affect."); *see also* Press Release, Nat'l Ass'n of Coll. & Univ. Bus. Officers, *supra* note 1, at 9 (reporting 17% of the 805 study participants incorporated ESG factors into their investment decisions (a 2% increase from 2015), 8% were considering doing so (a 1% increase from 2015), and 7% reported acting to exclude responsible investing considerations).

<sup>78</sup> SIMON ET AL., *supra* note 22, at 1–3 (discussing campaigns in the early 1970s to leverage higher-education endowments to challenge civil rights violations in South Africa and the production of napalm for use in the Vietnam war).

<sup>79</sup> CORP. COMM. ON S'HOLDER RESPONSIBILITY, HARVARD UNIV., ANNUAL REPORT 2015–2016, at 1 (2016) [hereinafter CCSR 2015–2016 REPORT], <https://perma.cc/FC9B-4AXQ> (noting that Harvard established its committees on shareholder responsibility in 1972); Stanford SIR, *supra* note 43 (the first version of the statement was adopted in 1971).

<sup>80</sup> *Endowment*, HARV. U., <https://perma.cc/NMD4-6U6A> (last visited Apr. 15, 2017).

<sup>81</sup> *Id.*; Harvard Mgmt. Co. Inc., Form 990 (2014), <https://perma.cc/CEG3-H4TZ>.

fiduciary duty to decide how Harvard votes on ESG proxies.<sup>82</sup> The ACSR is responsible for “analyzing proxy issues,” and makes recommendations to CCSR based on its own findings, with research assistance from the nonprofit Sustainable Investments Institute (Si2).<sup>83</sup> The CCSR is more precedent-minded and sees its role as emphasizing consistency, with the ACSR taking the lead on any change on shareholder issues.<sup>84</sup> In February 2013, Harvard created and appointed a new Vice President of Sustainable Investing to the HMC,<sup>85</sup> and in April that year joined the UNPRI and the Carbon Disclosure Project.<sup>86</sup>

There was considerable ESG-related proxy activity by CCSR prior to the founding of Divest Harvard in the fall of 2012.<sup>87</sup> The 2010–2011 CCSR Annual Report states, “[i]n 2011, nearly half of the proposals considered by Harvard’s two shareholder committees addressed environmental issues.”<sup>88</sup> The report also notes, “[f]or several years, both committees have supported resolutions calling on companies to increase efforts to use renewable energy sources.”<sup>89</sup> Proxy issues that year included a split vote on requiring Chevron to provide more information regarding its climate risks, with those abstaining and opposing noting that Chevron is highly rated in sustainability metrics and already addresses the risks in its 10-K filing and annual report.<sup>90</sup> Other proxy issues from that year included a vote in favor of requiring ExxonMobil to report on the long-term ecological, social, and financial risks

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<sup>82</sup> *Shareholder Responsibility Committees*, HARV. U., <https://perma.cc/5FKF-4USG> (last visited Apr. 15, 2017).

<sup>83</sup> CCSR 2015–2016 REPORT, *supra* note 79, at 1–2.

<sup>84</sup> *Id.* at 1.

<sup>85</sup> Nikita Kansra & Samuel Y. Weinstock, *HMC Creates New VP Position for Sustainable Investing*, HARV. CRIMSON (Feb. 15, 2013), <https://perma.cc/UQ6P-ZLLS>.

<sup>86</sup> *Harvard to Sign on to United Nations-Supported Principles for Responsible Investment*, HARV. GAZETTE (Apr. 7, 2014), <https://perma.cc/6FQT-VWSP>; Faust, *Confronting Climate Change Statement*, *supra* note 54.

<sup>87</sup> *See* HARVARD UNIV., CORP. COMM. ON S’HOLDER RESPONSIBILITY ANNUAL REPORT, 2012–2013, at 2–3, (2013) [hereinafter CCSR REPORT 2012–2013], <https://perma.cc/TS5W-KXYY> (reporting fifty-six social proxies in 2013, twelve of which were environmental). CCSR considered proxies regarding greenhouse gas reduction, climate risk, nuclear power risk, recycling, and genetically engineered products. Among the proxies CCSR voted to support were several calling for greenhouse gas emissions reductions at fossil fuel companies like ExxonMobil and others regarding environmental impact disclosure requirements related to hydraulic fracturing for ExxonMobil and Chevron. *Id.* at 3–11; *see also* HARVARD UNIV., CORP. COMM. ON S’HOLDER RESPONSIBILITY ANNUAL REPORT, 2014–2015 2, 10 (2015) [hereinafter CCSR REPORT 2014–2015], <https://perma.cc/3RTX-TSZU> (reporting 54 social proxies and 18 environmental). Several of the 2015 proxies directly addressed climate risk related to stranded assets, emissions reductions, climate risk calculation in financial portfolios. *Id.* at 10–15. Further research might compare the incidence of climate related proxies, the proposed language, and the outcome with a view to determining if there has been an increase in number and/or a change in rhetoric, and which rhetoric has been most effective at gaining support.

<sup>88</sup> CORP. COMM. ON S’HOLDER RESPONSIBILITY, HARVARD UNIV., ANNUAL REPORT 2010–2011, at 3 (2011) [hereinafter CCSR 2010–2011 REPORT], <https://perma.cc/C9TC-9TC2>.

<sup>89</sup> *Id.* at 4.

<sup>90</sup> *Id.* at 5.

associated with its oil sands operations, and a vote against electing a climate specialist to the board of Chevron.<sup>91</sup> In their latest 2015–2016 report, CCSR considered seventy-seven social proxies,<sup>92</sup> eighteen of which were environmental.<sup>93</sup>

## 2. Socially Responsible Investing at Stanford

While Harvard College's mission is "to educate the citizens and citizen-leaders for our society . . . through our commitment to the transformative power of a liberal arts and sciences education,"<sup>94</sup> Stanford's Founding Grant includes an express social welfare purpose.<sup>95</sup> Stanford is dedicated to "all things necessary for the study of agriculture" with an express purpose "to promote the public welfare by exercising an influence on behalf of humanity and civilization."<sup>96</sup> Stanford established the Commission on Investment Responsibility—later renamed the Advisory Panel on Investment Responsibility and Licensing (APIRL)—and adopted a Statement on

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<sup>91</sup> *Id.* at 6, 9–10. The second issue was not supported on the basis that environmental expertise was already a qualification for those board members. *Id.* at 10. Another resolution related to mountaintop mining. *Id.* at 8–9.

<sup>92</sup> CCSR 2015–2016 REPORT, *supra* note 79, at 2. Proxies supported included political contributions and lobbying by Chevron and ConocoPhillips. *Id.* at 3–5. The divestment campaigns are unlikely to have dampened proxy activity and there is likely to have been some impact weighing towards climate proxies; however, since there was already considerable environmental proxy activity prior to the founding of Divest Harvard in 2012, it would be beyond the scope of this article to attempt to delineate the impact of the campaign on such proxy activity. CCSR 2010–2011 REPORT, *supra* note 88, at 3.

<sup>93</sup> CCSR 2015–2016 REPORT, *supra* note 79, at 10. It is worth bearing in mind that when a committee does not support a proxy on a given issue, it does not necessarily mean that the committee is unsympathetic to the issue; procedural factors such as appropriateness of taking up the issue in a proxy vote and concerns over wording of the proxy are examples of why a proxy might not pass. *See, e.g.*, CORP. COMM. ON S'HOLDER RESPONSIBILITY, HARVARD UNIV., ANNUAL REPORT 2014–2015, at 11 (2015), <https://perma.cc/3TAR-4G37> (noting a 5–2–5 vote on a proposal to require Chevron to manage and limit the greenhouse gas emissions in its products and operations, with those opposing or abstaining citing operational management and mitigation plans already in place, and shareholder resolutions as inappropriate venues for taking up issues concerning product attributes); *id.* at 12–13 (voting to abstain on proxy requiring reporting on threat of and strategy for managing "stranded assets" because of wording and questionable requirement of company to disclose strategy); *id.* at 13–14 (recommending, despite supporting the principle of greenhouse gas emissions disclosures, abstention on a proposal requiring Bank of America to disclose greenhouse gas emissions and climate risk related to its financing of mining, oil and gas, and fossil-fuel generated electricity projects).

<sup>94</sup> *Mission, Vision, and History*, HARV. C., <https://perma.cc/H6M9-9T5P> (last visited Apr. 15, 2017). Harvard University does not have a formal mission statement. *Harvard at a Glance*, HARV. U., <https://perma.cc/6FMX-RA8W> (last visited Apr. 15, 2017).

<sup>95</sup> Leland Stanford & Jane Lathrop Stanford, *The Founding Grant* 4 (Nov. 11, 1885) [hereinafter *The Founding Grant*], *reprinted in* THE FOUNDING GRANT: WITH AMENDMENTS, LEGISLATION, AND COURT DECREES 3, 4 (1987), <https://perma.cc/J6SZ-UESJ>. Stanford also has historical ties to agriculture, which may influence the endowment's openness to environmentally responsible investing. *See id.*

<sup>96</sup> *Id.*

Investment Responsibility (SIR) in 1971.<sup>97</sup> Stanford has had a formal SRI policy in place since that time, which includes portfolio composition standards and asset selection criteria.<sup>98</sup> Although Stanford's founding mission includes "promot[ing] the public welfare,"<sup>99</sup> the endowment was founded to financially support Stanford's mission of "teaching, learning, and research."<sup>100</sup> Stanford's endowment is managed by the Stanford Management Company (SMC), a division of Stanford University, which is also a 501(c)(3) nonprofit organization.<sup>101</sup>

Like Harvard's committees, APIRL routinely handles social and environmental proxy issues. APIRL policy requires that proxy voting and a range of other remedies be attempted first before divestment may be considered appropriate, and then only in accordance with the standards for divestment.<sup>102</sup> Stanford's proxy guidelines support resolutions bringing company policy in line with principles of responsible investing in accordance with the United Nations Global Compact, the Ceres Principles, and the G3 Sustainability Reporting Guidelines, as well as Stanford's own policies and principles.<sup>103</sup>

#### *D. The Law of Divestment*

##### *1. The Standard for Divestment*

Divestment disassociates investors from an improper enterprise where the primary product causes social injury so that "the very nature of [the] company's business makes it inappropriate for a university to invest in the enterprise."<sup>104</sup> The social injury standard derives from the premise that all members of society are obliged not to harm others, and from the duty to proactively and prudently manage regulatory and litigation risk.<sup>105</sup> Harvard's

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<sup>97</sup> Stanford Univ., Statement on Investment Responsibility 5–6 (2013), <https://perma.cc/3KYK-857K>.

<sup>98</sup> *Id.*

<sup>99</sup> The Founding Grant, *supra* note 95, at 4.

<sup>100</sup> *University Finances*, STAN. U., <https://perma.cc/GNR7-2Z7A> (last updated Feb. 27, 2017).

<sup>101</sup> STANFORD MGMT. CO., STANFORD UNIV., ANNUAL REPORT 1 n.3 (2015), <https://perma.cc/8QAE-83TS>; Bd. of Trs. of the Leland Stanford Jr. Univ., Form 990 (2014), <https://perma.cc/2HJS-AJ54>.

<sup>102</sup> Stanford SIR, *supra* note 43, at 1–2. The results of Stanford's proxy votes were not available and therefore are not discussed here.

<sup>103</sup> Stanford Proxy Voting Guidelines, *supra* note 24.

<sup>104</sup> CORP. COMM. ON S'HOLDER RESPONSIBILITY, HARVARD UNIV., ANNUAL REPORT 2013–2014, at 34 (2014), <https://perma.cc/C9RB-LP25> [hereinafter CCSR 2013–2014 REPORT]; *accord* SIMON ET AL., *supra* note 22, at 105. There is a distinction between divestment and disassociation; divestment is a disassociative act but disassociation can refer to the act of disposing of physical assets without any underlying social message. ATIF ANSAR ET AL., SMITH SCH. OF ENTER. & THE ENV'T, STRANDED ASSETS AND THE FOSSIL FUEL DIVESTMENT CAMPAIGN: WHAT DOES DIVESTMENT MEAN FOR THE VALUATION OF FOSSIL FUEL ASSETS? 21 (2013), <https://perma.cc/C3E5-MZ8Z>.

<sup>105</sup> SIMON ET AL., *supra* note 22, at 5–6.

threshold for divestment is *substantial and unjustified risk of harm*,<sup>106</sup> and Stanford's is *substantial social injury*.<sup>107</sup> Because the greater includes the lesser, and because the specific guidelines for Harvard are not readily available, Stanford's standard for divestment is the focus here.

After finding substantial social injury, Stanford's SIR guidelines permit divestment if all of the following are met: 1) corporate action (or inaction) is the direct cause of the social injury; 2) all practicable shareholder rights have been exhausted or deemed to be futile; 3) there is redressability—i.e., “[t]he desired change in the company’s behavior will clearly, directly, and materially diminish the social harm caused by the company”; 4) the benefits of the company action over the long term do not outweigh the social injury caused; 5) the company has been afforded the “maximum reasonable opportunity” to change its behavior and has failed to do so in a way that materially alleviates the injury; and 6) divesting does not infringe on the university’s capacity to carry out its mission.<sup>108</sup> Then, if the action is “consistent with fiduciary obligations,” the stock may be divested.<sup>109</sup>

Stanford's SIR works in tandem with its proxy voting guidelines, which specify divestment is a “last resort.”<sup>110</sup> This sentiment is echoed by Harvard's CCSR.<sup>111</sup> Divestment decisions “are made on the merits of individual companies or clearly defined groups of like companies.”<sup>112</sup> As the Stanford SIR cautions, “[t]he Trustees will not consider requests to divest from broad categories of companies or requests to divest from a company when they determine the primary purpose of the request is to express disapproval of any other business, social or political organization.”<sup>113</sup> Formulated as a necessary–sufficient relationship, then, substantial social injury is a necessary but insufficient condition for divestment. As such, “a security will be sold where the company is committing [unjustified] grave social injury *and where all methods of correcting these practices have failed or appear doomed to fail.*”<sup>114</sup>

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<sup>106</sup> *Harvard's Investment Policy with Regard to Tobacco*, HARV. U., <https://perma.cc/594U-3SW7> (last visited Apr. 15, 2017).

<sup>107</sup> Stanford Proxy Voting Guidelines, *supra* note 24 (citing “substantial social injury” as the divestment standard for each category of social issue). The language of the standards does differ as to the language used to denote harm, viz., “harm” versus “social injury”, but for purposes of this Article the differences appear insignificant.

<sup>108</sup> Stanford SIR, *supra* note 43, at 2.

<sup>109</sup> *Id.*

<sup>110</sup> Stanford Proxy Voting Guidelines, *supra* note 24, at 6 (noting that divestment is the “last resort” for each category of social issue).

<sup>111</sup> See *Harvard's Investment Policy with Regard to Tobacco*, *supra* note 106 (explaining that the divestment decision was based upon the University's belief that it was unable to influence the harmful policies of the tobacco companies).

<sup>112</sup> Stanford SIR, *supra* note 43, at 2.

<sup>113</sup> *Id.*

<sup>114</sup> SIMON ET AL., *supra* note 22, at 91 (emphasis added); *accord* Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll., No. SUCV201403620H, 2015 WL 1519036, at \*7 (Mass. Super. Ct. Mar. 17, 2015), *aff'd*, 60 N.E.3d 380 (Mass. App. Ct. 2016).

## 2. *Presumption Against Divestment*

The standards for divestment at Harvard and Stanford draw from the same legal traditions. Foremost, there is a strong presumption against divestment, “not because there are not many worthy political causes or deeply troubling injustices in the world, but because the Universit[ies are] first and foremost . . . academic institution[s].”<sup>115</sup> The presumption against divestment is long-standing and is buttressed by concerns over breaching fiduciary duties of loyalty and prudence.<sup>116</sup> Universities strive to be places of intellectual cultivation where students and faculty can openly exchange ideas without fear of institutional repression or intimidation.<sup>117</sup> Once the endowment starts making decisions favoring one social or political group or idea over another, it risks creating an appearance of bias that jeopardizes the mission of the school.<sup>118</sup>

A related reason for the presumption against divestment is that morals and ethics can be subjective, and there is a risk of a slippery slope that could jeopardize the duties of loyalty and prudence.<sup>119</sup> If divestment were permissibly applied to any industry with an unethical underbelly, there could be divestment claims against a swath of major industries whose products people rely on every day.<sup>120</sup> It would be difficult for trustees to render

<sup>115</sup> CCSR 2013–2014 REPORT, *supra* note 104, at 34; Statement, Harvard Corp. Comm. on S’holder Responsibility, Regarding Stock in PetroChina Company Limited 1 (Apr. 4, 2005) [hereinafter Harvard’s Statement on PetroChina Co.], <https://perma.cc/3GSV-GWBN> (“Harvard maintains a strong presumption against divestment of stock for reasons unrelated to investment purposes . . .”).

<sup>116</sup> See Langbein & Posner, *supra* note 22, at 76; Richardson, *Putting Ethics into Environmental Law*, *supra* note 19, at 270.

<sup>117</sup> See Harvard’s Statement on PetroChina Co., *supra* note 115, at 4 (“The University maintains a strong presumption against divesting itself of securities for reasons unrelated to investment purposes, and against using divestment as a political tool or a ‘weapon against injustice’—not because there are not many worthy political causes or deeply troubling injustices in the world, but because the University is first and foremost an academic institution.”).

<sup>118</sup> Derek Bok, *Statement of Derek Bok on Investment Policy*, HARV. GAZETTE, Oct. 5, 1984, reprinted in DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE?: AN ANALYSIS OF POLITICIZING INVESTMENT DECISIONS 99, 100–01 (1985) [hereinafter DISINVESTMENT: IS IT LEGAL?]; Letter from Drew Faust, President, Harvard Univ., to Members of the Harvard Community (Oct. 3, 2013) [hereinafter Faust, Fossil Fuel Divestment Statement], <https://perma.cc/JM39-NMXQ>.

<sup>119</sup> Langbein & Posner, *supra* note 22, at 96–99. See generally John H. Langbein, *Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal*, in DISINVESTMENT: IS IT LEGAL?, *supra* note 118, at 1 (arguing against divestment and socially responsible investment).

<sup>120</sup> See, e.g., ORG. FOR ECON. CO-OPERATION & DEV., SUMMARY OF ENVIRONMENTAL OUTLOOK FOR THE CHEMICALS INDUSTRY 9 (2001), <https://perma.cc/U646-749G> (discussing the environmental impacts of the chemicals industry); Robert L. Payton, *Tainted Money: The Ethics and Rhetoric of Divestment*, CHANGE, May–June 1987, at 55, 57 (“Doing business successfully at all in the modern world is difficult. Being ethically sensitive makes it more so. To the extent that being ethical means being consistent, a moral stand on one issue requires a similar stand on similar issues.”); Roy A. Schotland, *Divergent Investing of Pension Funds and University Endowments: Key Points About the Pragmatics, and Two Current Case Studies*, in

objective opinions as to what constitutes a substantial and unjustified harm and what does not in part because of their personal biases. For example, a vegan trustee might think the environmental impacts of the farming industry are unjustified because raising and killing animals for meat is unethical, while a carnivore trustee might think the benefits outweigh the harms. Ethical difficulties arise here too. Again using the example of animal husbandry, if animals are valued as living beings on a par with humans,<sup>121</sup> then the social injury caused by intensive factory farming would appear to be considerably more egregious than it would be if animals are not valued on a par with humans. Everyday decisions would become mired in debate, consuming time and resources the trustees should be devoting to the financial management of the endowment.<sup>122</sup>

Another key reason for the presumption against divestment is the professional consensus that divestment is not effective at changing corporate behavior.<sup>123</sup> Insider strategies are generally more successful at influencing corporate behavior than divesting.<sup>124</sup> This is partly because corporations are more likely to respond to shareholders than to reputational

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DISINVESTMENT: IS IT LEGAL?, *supra* note 118, at 31, 65 (1985) (querying why South Africa was singled out among a slew of other states with significant civil rights shortcomings); Josephine Moulds, *Child Labour in the Fashion Supply Chain: Where, Why and What Can Be Done*, GUARDIAN (London), <https://perma.cc/5QZ5-KR4V> (discussing child labor in the garment industry) (last visited Apr. 15, 2017); *Dairy's Dark Side: The Sour Truth Behind Milk*, MERCY FOR ANIMALS, <https://perma.cc/PK5M-JMJZ> (last visited Apr. 15, 2017) (discussing animal cruelty in the meat and dairy industry).

<sup>121</sup> See generally GARY L. FRANCIONE, ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION 1 (2008). Another example would be if nature were, like corporations, afforded the rights of a person. See, e.g., Isaac Davison, *Whanganui River Given Legal Status of a Person Under Unique Treaty of Waitangi Settlement*, N.Z. HERALD (Mar. 15, 2017), <https://perma.cc/PJ54-77YJ>; Chip Colwell, Opinion, *What if Nature, Like Corporations, Had the Rights of a Person?*, GUARDIAN (London) (Oct. 12, 2016), <https://perma.cc/MNL2-9ACC>.

<sup>122</sup> Langbein & Posner, *supra* note 22, at 110; see also Derek C. Bok et al., *The Policy of American Universities Towards Divestment in South Africa*, 24 MINERVA 246, 248 n.1 (1986) ("In view of the disadvantages of taking institutional positions on political and ethical issues, few undertakings would be so awkward than the task of determining which countries [or companies] are so immoral as to justify a total ban on investments. The burden would be substantial; the risk of making arbitrary and opportunistic distinctions great.")

<sup>123</sup> See ANSAR ET AL., *supra* note 104, at 18 (noting that communicating can be more effective in changing corporate behavior than divesting). It is important to distinguish between divestment's efficacy as a means of changing corporate behavior and divestment as a catalyst for social change. See Nancy Schneider, Note, *Revisiting Divestment*, 66 HASTINGS L.J. 589, 592 ("[T]here are strong arguments refuting [divestment's] efficacy as a tool for social change.")

<sup>124</sup> STONE, *supra* note 71, at 128–33; see also Joel Schlesinger, *Institutional Investors are Heeding Climate Warnings, Should You, Too?*, GLOBE & MAIL (Toronto) (Aug. 4, 2016), <https://perma.cc/N4JU-64FZ> (stating that likely winners will be those ahead of the curve in implementing climate friendly measures and does not recommend divesting altogether); Erin M. Reid & Michael W. Toffel, *Responding to Public and Private Politics: Corporate Disclosure of Climate Change Strategies*, 30 STRATEGIC MGMT. J. 1157, 1170 (2009) (noting strength of carbon disclosure rates among environmentally sensitive industries subject to public scrutiny).

pressure from the public.<sup>125</sup> When divested ex-shareholders are disenfranchised on sale of assets, the opportunity to use shareholder rights to push for change is lost.<sup>126</sup> Furthermore, in cases where the industry is profitable—such as the fossil fuel industry—assets are likely to be bought by a neutral investor unopposed to business as usual.<sup>127</sup> The direct financial impacts on share prices from divestment are thus thought to be inconsequential; this may be true even if every university endowment divested.<sup>128</sup> Reputational effects may occur,<sup>129</sup> but large companies and whole industries in particular are resilient to public outrage.<sup>130</sup> Moreover, portfolio-based SRI strategies are much better equipped to address pan-industry concerns like climate change because they are low-cost, capable of reaching multiple industries without jeopardizing the strength of the portfolio,<sup>131</sup> and can account for the short-term risk against the benchmark divestment entails.<sup>132</sup> For all of these reasons, divestment remains exceptional.

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<sup>125</sup> STONE, *supra* note 71, at 247–49; *see also* Sally Wheeler, *Climate Change, Hans Jonas and Indirect Investors*, 3 J. HUM. RTS. & ENV'T 92, 99 (2012) (“[A] positive [corporate] stance on [environmental stewardship] . . . ultimately depends on investor pressure and on capitalising upon the market advantages created by innovation.”).

<sup>126</sup> BARON & FISCHER, *supra* note 23, at 17. *See* ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSE TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 35 (1970) (arguing the power of shareholder voice as a recuperation mechanism). In addition to shareholder opportunity costs, there are other costs to divestment. *See* ANSAR ET AL., *supra* note 104, at 17; Salar Ghahramani, *Divestment Laws, Fiduciary Duty, and Pension Fund Management: an Empirical Examination*, 56 INT'L J.L. & MGMT. 29, 31 (2014) (finding that in the case of federal laws requiring public pension divestment in certain circumstances, “divestment regimes are costly”).

<sup>127</sup> ANSAR ET AL., *supra* note 104, at 18.

<sup>128</sup> *Id.* at 70.

<sup>129</sup> *See* Richardson & Cragg, *supra* note 42, at 28–29 (noting that reputational risk has been shown to influence corporate behavior, although it is neither guaranteed nor a comprehensive solution).

<sup>130</sup> ANSAR ET AL., *supra* note 104, at 36–38, 68–69 (discussing stigmatization of bad actors and phenomena of stigma dilution whereby industries tend as a whole to survive intact, save for a scapegoat who does not fare as well). The systemic reliance on fossil fuels in the global economy likely gives a reputational buffer to big oil companies. For example, BP's business bounced back after the Deepwater Horizon spill. Byrony Jones, *BP Profits Hit \$5.3 Billion, Year on from Gulf Spill*, CNN (July 26, 2011), <https://perma.cc/TED3-XK56>. ExxonMobil has survived numerous scandals (and lawsuits) involving alleged human rights violations in the Nigerian Delta, the Exxon-Valdez oil spill, and more recently, allegations of fraud and misrepresentation. Neela Banerjee, *Lawsuit Says Exxon Aided Rights Abuses*, N.Y. TIMES (June 21, 2001), <https://perma.cc/5KCW-4S7W>; Sheldon Whitehouse & Elizabeth Warren, *Opinion, Big Oil's Master Class in Rigging the System*, WASH. POST (Aug. 9, 2016), <https://perma.cc/3R6W-WDSR>.

<sup>131</sup> *See* Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13, at 557–58; *see also* Jeff Tollefson, *Reality Check for Fossil-Fuel Divestment: Academics Urge Other Ways to Reduce Carbon Emissions*, 521 NATURE 16, 16 (2015) (quoting Julian Poulter, CEO of the Asset Owners Disclosure Project) (“We don't believe in divestment as a strategy – it's naive, and it doesn't solve the problem.”). Poulter recommends building green investment portfolios instead. *Id.*

<sup>132</sup> REMY BRIAND ET AL., MSCI, *BEYOND DIVESTMENT: USING LOW CARBON INDEXES 1* (2015), <https://perma.cc/MV99-RXUA>.

*E. History of Divestment at Harvard and Stanford*

Because divestment decisions are fact-specific, the relative success of past campaigns cannot be extrapolated to the fossil fuel campaign. Nonetheless, looking at prior divestment issues reveals how the standard for divestment operates in practice and helps contextualize the arguments made for fossil fuel divestment. Both Harvard and Stanford have divested in the past. Harvard selectively (though never fully) divested from companies operating in apartheid South Africa in the 1980s,<sup>133</sup> fully divested from tobacco in the 1990s,<sup>134</sup> and selectively divested from companies operating in the Darfur region of Sudan related to incidents of genocide.<sup>135</sup> Stanford also divested from assets related to apartheid in South Africa, tobacco, and genocide in Sudan.<sup>136</sup> The degree and scale of the harm in past divestment cases varies. Although the degree of harm in both the apartheid and genocide cases was serious, the scale was geographically contained. By contrast, the scale of harm posed by tobacco is broad: an estimated six million people die from tobacco-related illness each year, and half of all tobacco users will eventually die from the product.<sup>137</sup> In each of the three cases—apartheid, genocide, and tobacco—there was no countervailing social benefit.

In all three of the past divestment issues, insider strategies were deemed exhausted or doomed to fail prior to divestment. In the case of apartheid in South Africa, apartheid had been official government policy since 1948, and did not end until 1994.<sup>138</sup> During the near fifty-year period of

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<sup>133</sup> Payton, *supra*, note 120, at 57–60 (noting that Harvard did divest from five oil companies, including Exxon, after those companies failed to comply with the Sullivan Principles establishing corporate responsibility guidelines for companies operating in apartheid South Africa); Melissa C. Rodman & Yehong Zhu, *Calls for Divestment: A Retrospective*, HARV. CRIMSON (May 27, 2015), <https://perma.cc/9C4X-9FSQ> (revisiting the Harvard tobacco and South Africa divestments); Shari Rudavsky, *Harvard Treasurer Links Divestment to Protests*, HARV. CRIMSON (Oct. 4, 1986), <https://perma.cc/8AUL-XDRH>; Simon Rottenberg, *The Universities and South Africa: The Campaign for Divestment*, 24 MINERVA 223, 226 (1986); *see also* Bok et al., *supra* note 122, at 246–48, 252 (discussing Harvard’s approach to divestment). Bok was the President of Harvard during both the apartheid and tobacco divestment movements. Rodman & Zhu, *supra*.

<sup>134</sup> *Harvard’s Investment Policy with Regard to Tobacco*, *supra* note 106.

<sup>135</sup> *See* Harvard’s Statement on PetroChina Co., *supra* note 115 (outlining reasons for divesting from PetroChina related to complicity in the Sudanese genocide).

<sup>136</sup> Hugh Biggar, *Making a Financial Statement: Student-led Divestment Campaign Targets Fossil Fuels*, STAN. MAG. (Jan./Feb. 2014), <https://perma.cc/T3GN-U9VK>. Stanford also divested from coal in 2014, which is considered a part of the fossil fuel divestment movement. Press Release, Stanford Univ., Stanford to Divest from Coal Companies (May 6, 2014) [hereinafter Press Release, Stanford Divesting from Coal], <https://perma.cc/RC4U-49K8>.

<sup>137</sup> *Tobacco Fact Sheet*, WORLD HEALTH ORG., <https://perma.cc/JZ3G-7XRL> (last Updated June 2016). More than five deaths million are from direct tobacco use, and some six-hundred thousand are from second-hand smoke. *Id.*

<sup>138</sup> William Beinart & Saul Dubow, *Introduction: The Historiography of Segregation and Apartheid*, in SEGREGATION AND APARTHEID IN TWENTIETH-CENTURY SOUTH AFRICA 1, 12–20 (William Beinart & Saul Dubow eds., 1995). *See generally* NANCY L. CLARK & WILLIAM H.

apartheid, numerous domestic<sup>139</sup> and international efforts preceded divestment by the endowments, including a United Nations General Assembly resolution in 1973;<sup>140</sup> a United Nations Security Council mandatory arms embargo in 1976;<sup>141</sup> the 1977 founding of the Sullivan Principles on corporate responsibility for companies operating in South Africa;<sup>142</sup> and the U.S. passage of the 1986 federal Anti-Apartheid Act.<sup>143</sup> In the case of tobacco, both Harvard and Stanford first attempted insider strategies, including proxy voting and management engagement, to address concerns over potential adverse health effects and unethical advertising.<sup>144</sup> After finding the companies to be unresponsive or disingenuous, Harvard divested in 1990 followed by Stanford in 1998.<sup>145</sup> By contrast, neither school attempted insider strategies before divesting from oil companies that were operating in Sudan and found to be providing integral support for the Sudanese government,

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WORGER, SOUTH AFRICA: THE RISE AND FALL OF APARTHEID (3d ed. 2011) (providing a detailed chronology in the preface as well as a detailed account of apartheid).

<sup>139</sup> In the United States, a legal case over a Baltimore ordinance prohibiting pension funds from investing in South Africa led to a judicial affirmation that SRI is permissible so long as the fund is not negatively impacted. *Bd. of Tr. v. City of Baltimore.*, 562 A.2d 720, 737, 757 (Md. 1989) (noting fiduciary prudence and loyalty of trustees are not in question so long as social investment yields competitive economic rates of return); Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13, at 563 (noting the court in *Board of Trustees* “cautiously endorsed the SRI policies”) Garrett M. Smith, Note, *Board of Trustees v. City of Baltimore: Public Pension Fund Divestment of South African Securities Upheld*, 49 MD. L. REV. 1030 (discussing the case).

<sup>140</sup> G.A. Res. 3068 (XXVIII), annex, International Convention on the Suppression and Punishment of the Crime of Apartheid (Nov. 30, 1973). Article I declares apartheid a crime against humanity. *Id.* art. I(1). Article III criminalizes abetting, encouraging, or cooperating in crime of apartheid. *Id.* art III(b). Article IV commits parties “to adopt any legislative or other measures necessary to suppress as well as to prevent any encouragement of the crime of apartheid.” *Id.* art. IV(a) (emphasis in original). The General Assembly subsequently passed a resolution declaring the South African regime illegitimate and condemning the actions of states that continue to supply political, economic, or military collaboration and support. G.A. Res 3151, art G. (7), (11) (XXVIII) Policies of Apartheid of the Government of South Africa (Dec. 14, 1973).

<sup>141</sup> S.C. Res. 418 (Nov. 4, 1977) (imposing a mandatory arms embargo against South Africa). This Security Council resolution followed a previous resolution condemning apartheid. S.C. Res. 392 (June 19, 1976).

<sup>142</sup> Mzamo P. Mangaliso, *South Africa: Corporate Social Responsibility and the Sullivan Principles*, 28 J. BLACK STUD. 219, 228–30 (1997); *The Global Sullivan Principles*, U. MINN. HUM. RTS. LIBR., <https://perma.cc/9YKQ-NB6L> (last visited Apr. 15, 2017).

<sup>143</sup> Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, 100 Stat. 1086, *repealed by* South African Democratic Transition Support Act of 1993, § 4(a), Pub. L. No. 103-149, 107 Stat. 1503, 1504–05; Schneider, *supra* note 123, at 594–95 (discussing the passage of the Act). The Act was passed in 1986; the anti-apartheid movement at Harvard was during the late 1980s and early 1990s. Rodman & Zhu, *supra* note 133.

<sup>144</sup> Stanford Proxy Voting Guidelines, *supra* note 24, at 25–29; *Harvard's Investment Policy with Regard to Tobacco*, *supra* note 106.

<sup>145</sup> *Harvard's Investment Policy with Regard to Tobacco*, *supra* note 106; Samantha Neuber, *Fossil Free Stanford Campaigns for Divestment*, STAN. DAILY NEWS (May 19, 2013), <https://perma.cc/3BU2-Q593>.

which had been found complicit in genocide.<sup>146</sup> In that case, several factors made attempting insider strategies before divestment inappropriate: the severity of the harm (genocide and war crimes); the fact that the parent company had been blacklisted by the United States; the fact that the parent company and its subsidiaries were condemned by the United Nations for being complicit in genocide; and the fact that the corporate ownership structure precluded any realistic expectation of exerting shareholder influence.<sup>147</sup>

One of the factors in the standard for divestment is whether divesting will ameliorate the harm. The South African apartheid divestment campaign has been hailed by some as the most successful divestment campaign to date.<sup>148</sup> While the divestment campaign played a role in changing the approach of the U.S. government and building international pressure,<sup>149</sup> there were other economic and political factors at play.<sup>150</sup> The apartheid divestment campaign led to greater awareness in the United States of the problem in South Africa,<sup>151</sup> but cannot be said to have ended apartheid by itself. Nor can it be said that divestment worked to end genocide in South Sudan because there were other major forces at play prior to the divestment

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<sup>146</sup> See, e.g., Harvard's Statement on PetroChina Co., *supra* note 115, at 4–7 (“Finally, the ACSR report recommends that Harvard divest itself of PetroChina stock, recognizing the strong presumption against divestment for reasons unrelated to investment purposes, but also pointing to the unusual combination of circumstances presented by this particular holding.”); Press Release, Stanford Univ., University to Divest from Four Companies Connected to Sudan (June 9, 2005) [hereinafter Stanford's Statement on Sudan], <https://perma.cc/9QX5-UVNR> (highlighting Stanford's reliance on recommendations from APIRL in coming to their decision).

<sup>147</sup> Harvard's Statement on PetroChina Co., *supra* note 115, at 5–6; Stanford's Statement on Sudan, *supra* note 146.

<sup>148</sup> See, e.g., Apfel, *Exploring Divestment*, *supra* note 75, at 919–20; *What Is Fossil Fuel Divestment?*, FOSSIL FREE, <https://perma.cc/A7RE-G7N3> (last visited Apr. 15, 2017) (calling the South African apartheid divestment campaign “the largest and most impactful”).

<sup>149</sup> Apfel, *Exploring Divestment*, *supra* note 75, at 919–20. However, the divestment campaign did not visibly affect the financial valuation of the targeted companies or the South African financial markets. Siew Hong Teoh et al., *The Effect of Socially Activist Investment Policies on the Financial Markets: Evidence from the South African Boycott*, 72 J. BUS. ETHICS 35, 83 (1999) (finding no discernible impact on targeted companies or the financial markets as a result of the South African divestment movement, and stating “[t]he sanctions may have been effective in raising the public moral standards or public awareness of South African repression, but it appears that financial markets managed to avoid the brunt of the sanctions.”).

<sup>150</sup> CLARK & WORGER, *supra* note 138, at 67–120 (discussing the growing contradictions of apartheid and its collapse); Apfel, *Exploring Divestment*, *supra* note 75, at 919–20 (recounting the South African divestment campaign and affirming that “[d]ivestment by itself did not end the regime in South Africa”); see also Schneider, *supra* note 123, at 594–95 (recounting factors that led to divestment and noting that because the South African government relied heavily on American corporations and bank financing, divestment by major companies and governmental sanctions were capable of delivering a severe blow to the governing regime); Cecelie Counts, Opinion, *Divestment Was Just One Weapon in Battle Against Apartheid*, N.Y. TIMES (Jan. 27, 2013), <https://perma.cc/W4RG-TY8L>. A local resistance movement had been entrenched for decades. Apfel, *Exploring Divestment*, *supra* note 75, at 919–20.

<sup>151</sup> See Teoh et al., *supra* note 149, at 83.

decisions, such as U.N. charges of war crimes and international sanctions.<sup>152</sup> Moreover, there is still considerable unrest in Darfur and the Doha peace talks have failed to bring peace.<sup>153</sup> As for tobacco companies, they have weathered the divestment storm well;<sup>154</sup> there are an estimated 1 billion tobacco smokers worldwide,<sup>155</sup> 36.5 million of whom are adult Americans.<sup>156</sup> The harm of smoking and its incumbent ills continues with seemingly little impact from the divestment campaign. Divestment has been found to be effective at stigmatizing “bad” actors and increasing issue awareness, but it has not been shown to be particularly effective at ending the harmful behavior.<sup>157</sup> As such, claims that endowments should divest from fossil fuels because divestment “works” must be weighed in light of what exactly divestment works at doing.<sup>158</sup>

While all of the past divestment issues have moral or ethical justifications, they also show how divestment is at its core an act of disassociation.<sup>159</sup> As trustees, the endowment managers have a duty to protect the endowment, whether from legal liability (e.g., for complicity in war crimes) or economic impacts as part of the duties of prudence and care.<sup>160</sup> For example, tobacco companies were selling products that posed “substantial and *unjustified* harm to human health” while flouting World Health Organization codes for marketing tobacco and engaging in unethical sales tactics in developing countries—including marketing to children and not disclosing health impacts.<sup>161</sup> By the time endowments divested, tobacco companies were increasingly facing litigation<sup>162</sup> and had refused to address the legal risks and ethical concerns of endowment shareholders.<sup>163</sup> Thus, while past divestment cases may have had moral or political subtexts, the

<sup>152</sup> S.C. Res 1556 (July 30, 2004) (imposing an arms embargo); S.C. Res 1593 (Mar. 31, 2005) (referring the matter to the International Criminal Court).

<sup>153</sup> Kalid Abdelaziz & Ahmed Aboulenein, *Sudan Sets Date for Darfur Administrative Status Referendum*, REUTERS, (Jan. 12, 2016), <https://perma.cc/N4FA-YXL5>.

<sup>154</sup> William MacAskill, *Does Divestment Work?*, NEW YORKER (Oct. 20, 2015), <https://perma.cc/8877-5ZLZ>.

<sup>155</sup> *Tobacco Fact Sheet*, *supra* note 137.

<sup>156</sup> Ahmed Jamal et al., *Current Cigarette Smoking Among Adults—United States, 2005–2015*, 65 MORBIDITY & MORTALITY WKLY. REP. 1205, 1206 (2016).

<sup>157</sup> ANSAR ET AL., *supra* note 104, at 65; *see also* Teoh et al., *supra* note 149, at 83 (finding little effect on the financial sector, the market valuation of targeted companies, and the South African financial markets resulting from the South African boycott and divestment movement).

<sup>158</sup> *See* Rottenberg, *supra* note 133, at 223 (“Divestment . . . can only serve to clear the conscience of the divesting institutions, and to gratify the moral and political demands of the campaign.”). This relates to the issue of what the real goal of the campaign is; in the past cases, we can say divestment worked to add to a political conversation, and worked to disassociate the endowments from illegal or unethical corporate behavior, but it cannot be said that divestment was the main reason things changed.

<sup>159</sup> *See* discussion *supra* notes 104, 119 (regarding the primary purpose of divestment).

<sup>160</sup> *See supra* Part II.A.

<sup>161</sup> *Harvard’s Investment Policy with Regard to Tobacco*, *supra* note 106 (emphasis added).

<sup>162</sup> N. Wander & R.E. Malone, *Fiscal Versus Social Responsibility: How Philip Morris Shaped the Public Funds Divestment Debate*, 15 TOBACCO CONTROL 231, 231 (2006).

<sup>163</sup> *Harvard’s Investment Policy with Regard to Tobacco*, *supra* note 106.

decisions to divest were firmly rooted in the fiduciary obligations of prudence and care.

### *F. Climate Change as a Unique Divestment Issue*

There is no dispute here as to the role of fossil fuels in contributing to climate change,<sup>164</sup> nor is there a dispute over the risk of stranded assets and the economic implications for fossil fuel companies who fail to change their business models in response to this risk.<sup>165</sup> There are also factors that would support a case for divestment of certain companies with particularly egregious environmental and human rights records (e.g., Exxon).<sup>166</sup> Trustees who are obligated by the terms of the trust's founding instrument to consider social, environmental, or moral factors in their trust management (e.g., trustees of a church pension) may find divestment from fossil fuels readily palatable.<sup>167</sup> However, there are several aspects of climate change which complicate the issue of fossil fuel divestment in the endowment context and distinguish it from past divestment issues in important ways.

First, climate risk is one of the most severe and systemic risks known to mankind, in part because it amplifies so many other major risks, including food security, water security, migration, diseases, and sociopolitical unrest.<sup>168</sup> It is well established that the combustion of fossil fuels contributes substantially to climate change, and therefore, action on the part of fossil fuel companies is required in order to help address climate change.<sup>169</sup> Yet, many different sectors contribute to climate change, including agriculture

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<sup>164</sup> See JAMES LEATON ET AL., CARBON TRACKER INITIATIVE & GRANTHAM RESEARCH INST. ON CLIMATE CHANGE & THE ENV'T, UNBURNABLE CARBON 2013: WASTED CAPITAL AND STRANDED ASSETS 4 (2014), <https://perma.cc/F7NY-LW8K> (discussing the economic and environmental impacts of carbon emissions). See generally ANSAR ET AL., *supra* note 104, at 49; BARON & FISCHER, *supra* note 23, at 3.

<sup>165</sup> LEATON ET AL., *supra* note 164, at 5; see also NICHOLAS STERN, HER MAJESTY'S TREASURY, THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW 369 (2007).

<sup>166</sup> Philip Mattera, *Exxon Mobil: Corporate Rap Sheet*, CORP. RES. PROJECT, <https://perma.cc/M4L2-LLE8> (last updated June 30, 2016); see ANSAR ET AL., *supra* note 104, at 65.

<sup>167</sup> SAM COLLIN, EIRIS FOUND., THE VALUE OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE FACTORS FOR FOUNDATION INVESTMENTS 3 (2009), <https://perma.cc/KE7S-9LYN>.

<sup>168</sup> WORLD ECON. FORUM, GLOBAL RISKS 2015, 10TH EDITION 15, 17, 34 (2015) [hereinafter GLOBAL RISKS REPORT], <https://perma.cc/3BNH-FTMD>. See generally Myles Allen, *The Spectre of Liability: Part 1 – Attribution*, in THE FINANCE OF CLIMATE CHANGE: A GUIDE FOR GOVERNMENTS, CORPORATIONS AND INVESTORS 367 (Kenny Tang ed., 2005) (discussing climate-related litigation risk).

<sup>169</sup> See, e.g., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT 5 fig.SPM.3 (Rajendra K. Pachauri et al. eds., 2007) [hereinafter 2007 IPCC REPORT], <https://perma.cc/QFJ8-VXQV> (reporting energy supply contributes to 25.9% of total global anthropogenic greenhouse gas emissions and fossil fuel use in all sectors contributes to 56.6%; the remaining percentage is mostly composed of emissions from forestry, agriculture, and industry).

and industry,<sup>170</sup> and it would be both impractical and imprudent to divest from them all. Fossil fuel divestment focuses on only one industry—albeit an important one—at a time when a global, systemic, and pan-industry approach is required to address climate change.<sup>171</sup>

Second, few if any of the previous divestment issues approached the scale of climate change. In the past campaigns, the harm posed by the continuation of the condemnable behavior was for the most part limited to one country (e.g., Sudan or South Africa)<sup>172</sup> or one segment of the population (e.g., smokers).<sup>173</sup> This means that while such an outcome would be morally undesirable, divestment could afford to be ineffective at changing the undesirable behavior without jeopardizing the whole of the world as it is known today. Climate change is different in that the moral, economic, human health, and environmental cost of business as usual is global, intergenerational, and potentially astronomical.<sup>174</sup> Therefore, from the perspective of ethical responsibility, the approach must be about engendering effective and systemic behavior change, rather than merely dissociating.<sup>175</sup>

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<sup>170</sup> See, e.g., EDGAR G. HERTWICH ET AL., U.N. ENV'T PROGRAMME, ASSESSING THE ENVIRONMENTAL IMPACTS OF CONSUMPTION AND PRODUCTION: PRIORITY PRODUCTS AND MATERIALS, 37 fig.3.1 (2010), <https://perma.cc/4GAC-XSQ9> (reporting global greenhouse gas contributions by sector, with forestry contributing 17%, industry 19%, agriculture 14%, and energy supply 26%); Felicity Carus, *UN Urges Global Move to Meat and Dairy-Free Diet*, GUARDIAN (London) (June 2, 2010), <https://perma.cc/LE36-W2NB> (reporting that agriculture is on a par with fossil fuel consumption in terms of environmental impact because both rise with economic growth, and while fossil fuel replacements can be made it is more difficult to replace food).

<sup>171</sup> 2007 IPCC REPORT, *supra* note 169, at 5; see also *Zero Zone Inc. v. U.S. Dep't of Energy*, 832 F.3d 654, 677–78 (7th Cir. 2016) (finding it is appropriate for the Department of Energy to include global impacts in calculating the social cost of carbon because climate change is a global issue with global externalities); Nicholas Stern, *What is the Economics of Climate Change?*, WORLD ECON. Apr.–June 2006, at 1, 4 (“[T]he international community, if it is to act effectively, must find a collective global way forward . . .”); Wheeler, *supra* note 125, at 97 (“The most appropriate framework for understanding response to climate change is ultimately a global one.”);

<sup>172</sup> Sarang, *supra* note 31, at 299–300. While Apartheid may have had social and political implications for the United States and other countries in its support of institutionalized racism, the direct harm was heavily concentrated in South Africa.

<sup>173</sup> *Id.* at 337 n.270 (“Because of the wide ranging impacts from health on climate change, fossil fuel divestment has been compared to the tobacco divestment campaign.”). While secondhand smoke affects those in the vicinity, climate change will impact the whole planet. The same principal applies (that it is immoral to poison the environment of other people who have not contributed to the harm), but unlike smoking, nearly everyone contributes to climate change, and everyone will be impacted in some form or another.

<sup>174</sup> See 2007 IPCC REPORT, *supra* note 169, at 30–31, 33; GLOBAL RISKS REPORT, *supra* note 168, at 14–15, 20.

<sup>175</sup> See Apfel, *Exploring Divestment*, *supra* note 75, at 924 (“The most important question investors should ask is: what are the most effective options for action on climate change?”); Bok et al., *supra* note 122, at 248 (arguing divestment is ethically problematic because it “reflects a hope that one can somehow achieve moral purity by separating oneself from evil. Aspirations of this kind can be attacked for counseling us to run from evil rather than work to overcome it (for example, by voting our shares.)”); Mike Hulme, *Why Fossil Fuel Divestment is*

Third, although the long-term impacts may well outweigh the benefits, there have historically been some social benefits to fossil fuels, such as poverty reduction and increased mass mobility of peoples and goods.<sup>176</sup> Petroleum-based personal care, food, clothing, and packaging products feature heavily in the daily lives of billions of people.<sup>177</sup> Bill McKibben, founder of the divestment movement, acknowledges the complications arising from the pervasive global reliance on fossil fuels, likening it to “trying to build a movement against yourself.”<sup>178</sup> The countervailing social benefits and systemic pervasivity complicate the issues of ethical culpability and redressability. Harvard’s President Faust noted this ethical dilemma in his justification for not supporting divestment, finding it a “troubling inconsistency” that “as an investor, we should boycott a whole class of companies at the same time that, as individuals and as a community, we are extensively relying on those companies’ products and services for so much of what we do every day.”<sup>179</sup> By comparison, in the case of tobacco, the product was a personal luxury product that produced no such countervailing social benefit, and the product was not integrated into almost every aspect of modern life in a manner similar to fossil fuel products. Therefore, while tobacco’s harm was “unjustified,” to use the language of the standard for divestment, it is more difficult to argue that the harm produced by fossil fuels has been unjustified as well.

Fourth, the issue of whether there has been and foreseeably will continue to be a substantial social injury is further complicated by the potential for technology to mitigate the harm posed by fossil fuels.<sup>180</sup> One

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*a Misguided Tactic*, GUARDIAN (London) (Apr. 17, 2015), <https://perma.cc/35QB-94A9> (arguing divestment will at best “heighten awareness of the energy challenges ahead . . . but it won’t take us any closer to meeting the challenge”); Alicia Seiger, *Inside Stanford’s Coal Divestment Decision*, INSTITUTIONAL INV’R: UNCONVENTIONAL WISDOM (May 28, 2014), <https://perma.cc/9YAA-H3AQ> (noting the ineffectiveness of divestment at reducing emissions).

<sup>176</sup> *Pros and Cons of Fossil Fuels*, CONSERVE ENERGY FUTURE, <https://perma.cc/L3QF-7XKF> (last visited Apr. 15, 2017).

<sup>177</sup> Office of Fossil Energy, *Common Products Made from Oil and Natural Gas*, U.S. DEP’T OF ENERGY, <https://perma.cc/A8UE-JQ46> (last visited Apr. 15, 2017).

<sup>178</sup> Bill McKibben, *Global Warming’s Terrifying New Math*, ROLLING STONE (July 19, 2012) [hereinafter McKibben, *Terrifying New Math*], <https://perma.cc/BH87-F9HE>. Compare fossil fuels with genocide or cigarettes, which have no such countervailing benefit besides labor in the case of cigarettes, although tobacco’s track record is also stained with slavery and Jim Crow.

<sup>179</sup> Faust, Fossil Fuel Divestment Statement, *supra* note 118 (continuing, “Given our pervasive dependence on these companies . . . it is hard for me to reconcile that reliance with a refusal to countenance any relationship with these companies through our investments.”). One commentator on the South African divestment movement called the movement “a looking-glass self, an endeavor to transfer your sense of guilt towards minority groups.” Paul H. Möller, *Disinvestment: An Analysis of Politicizing Investment Decisions*, 4 INT’L J. ON WORLD PEACE 199, 203 (1987) (reviewing JOHN H. LANGBEIN ET AL., *DISINVESTMENT: AN ANALYSIS OF POLITICIZING INVESTMENT DECISIONS* (1985)). Climate guilt could be an underlying factor fueling the fossil fuel divestment movement.

<sup>180</sup> See generally Ralph E.H. Sims et al., *Energy Supply*, in CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING III TO THE FOURTH ASSESSMENT REPORT OF THE

example is carbon capture and storage (CCS), which despite being slow moving, expensive to date, and full of setbacks, has seen some notable advances.<sup>181</sup> The Paris Conference in 2015 saw a surge of support for CCS.<sup>182</sup> Scientists and economists continue to rely heavily on CCS in their climate change predictions.<sup>183</sup> The point here is not to laud CCS, but to point out that technological stasis cannot be assumed, especially when it is in the best interest of the fossil fuel industry to deliver on that technology.<sup>184</sup>

Fifth, “fossil fuel industry” is really an umbrella term for several industrial sectors, such as coal, oil, and natural gas.<sup>185</sup> These industrial sectors do not all perform at the same level. With the rise of natural gas and the imposition of stricter environmental controls, coal has declined significantly and some of the world’s biggest coal companies are in serious trouble.<sup>186</sup> Nor are the environmental impacts of fossil fuels the same. Coal is widely regarded as one of the most polluting forms of fossil fuels<sup>187</sup> and

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INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 254–55 (Bert Metz et al. eds., 2007) (finding a range of technological solutions will be required to transition to a zero or low-carbon economy).

<sup>181</sup> *Carbon Dioxide Capture and Sequestration*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/MJU4-CTP2> (last visited Apr. 15, 2017). *See, e.g.*, INT’L ENERGY AGENCY, CARBON CAPTURE AND STORAGE: LEGAL AND REGULATORY REVIEW 5 (5th ed. 2016) <https://perma.cc/X59Z-QLL8> (noting the transition from creating regulatory frameworks for CCS to permitting projects within these frameworks, albeit acknowledging the novelty of the technology is inhibiting assessment of the effectiveness and suitability of these frameworks); Yang Song et al., *High-Selectivity Electrochemical Conversion of CO<sub>2</sub> to Ethanol Using a Copper Nanoparticle/N-Doped Graphene Electrode*, 1 CHEMISTRY SELECT 6055, 6055 (2016), (reporting results of successful carbon dioxide conversion into ethanol using nanomaterials and recounting other efforts to convert carbon dioxide, including the ability to use copper to electrochemically convert carbon dioxide into “over 30 products”); Zahra Hirji, *Iceland Experiment Successfully Turns CO<sub>2</sub> Emissions into Rock*, INSIDECLIMATE NEWS (June 9, 2016), <https://perma.cc/Z6XL-JVXT>.

<sup>182</sup> Katie Lebling & Xiaoliang Yang, *Carbon Capture and Storage: Prospects after Paris*, WORLD RESOURCES INST.: INSIGHTS (Apr. 19, 2016), <https://perma.cc/43RY-LRPR>. Ten countries, including Canada and China, included CCS in their national commitment plans for Paris. *Id.* There was also produced from the conference a roadmap for CCS in China and a report on CCS plans endorsed by environmental organizations. *Id.* As this Article was being prepared for press, President Donald J. Trump announced that he was withdrawing the United States from the Paris Agreement. Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 373 (June 1, 2017); Editorial, *Our Disgraceful Exit from the Paris Pact*, N.Y. TIMES, June 2, 2017, at A24.

<sup>183</sup> Ryan Cooper, *Climate Scientists Are Now Relying on a Terrifying Assumption*, WEEK (Aug. 11, 2016), <https://perma.cc/YA6R-LKZ9>.

<sup>184</sup> Sims et al., *supra* note 180, at 253 (declaring current rates of carbon emissions to be unsustainable unless CCS technologies can be widely deployed).

<sup>185</sup> *E.g.*, ARABELLA ADVISORS, MEASURING THE GROWTH OF THE GLOBAL FOSSIL FUEL DIVESTMENT AND CLEAN ENERGY INVESTMENT MOVEMENT 1 (2015).

<sup>186</sup> Bloomberg, *Coal Slump Sends Mining Giant Peabody Energy into Bankruptcy*, CRAIN’S CHI. BUS. (Apr. 13, 2016), <https://perma.cc/4RTW-VHRP>.

<sup>187</sup> *E.g.*, CLEAN AIR TASK FORCE, CRADLE TO GRAVE: THE ENVIRONMENTAL IMPACTS FROM COAL 1 (2001), <https://perma.cc/4QDV-JNRL>; *see also* ENERGY INFO. ADMIN., U.S. DEPT OF ENERGY, NATURAL GAS 1998: ISSUES AND TRENDS 50–57 & fig.22 (1999), <https://perma.cc/9H5M-WJNK> (showing that coal emits more nitrous oxide, sulfur dioxide, particulates, and carbon

consequently represents the largest exposure to the risk of stranded assets because of the amount of carbon in its reserves.<sup>188</sup> However, coal made up only 1% of major public market indexes at the time Stanford chose to divest.<sup>189</sup>

Sixth, “fossil fuel companies” are not homogeneous in their product offerings, management style, or approach to environmental issues. This is especially noteworthy given the prohibition against generalized whole-sector divestment.<sup>190</sup> Most of the major energy companies, including the latecomer ExxonMobil, have publicly acknowledged that climate change is happening and is caused by humankind.<sup>191</sup> Several big energy companies came out in support of the Paris Agreement in 2015,<sup>192</sup> and others, including Shell, BP, and Statoil signed the 2012 Carbon Price Communiqué in favor of putting a global price on carbon.<sup>193</sup> These companies are preparing for soft landings and edging in for low-carbon market advantages by, for example, pricing in a carbon tax to their planning, devoting more revenue to CCS research, expanding their alternative energy portfolios, funding R&D on adaptation technologies, and staying ahead of the future renewables market game.<sup>194</sup> While some see fossil fuel company investments in renewable energy as greenwashing “token efforts,”<sup>195</sup> others argue that climate risk “occurs against [the] backdrop of opportunity,”<sup>196</sup> and the big energy companies are

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dioxide than does natural gas and oil); *Sources of Greenhouse Gas Emissions*, U.S. ENVTL. PROTECTION AGENCY, <https://perma.cc/25NG-7FKZ> (last visited Apr. 15, 2017) (acknowledging coal combustion is generally more carbon intensive than natural gas or petroleum).

<sup>188</sup> ARABELLA ADVISORS, *supra* note 185, at 12; LEATON ET AL. *supra* note 164, at 14–20, 30–34; *see also* BARON & FISCHER, *supra* note 23, at 7 n.1 (noting the IEA estimates of coal exposure to stranded assets are limited by a strict definition whereby an asset is stranded if it has not recovered its initial investment costs, and noting that most coal mines have already recovered those costs).

<sup>189</sup> *See* Seiger, *supra* note 175.

<sup>190</sup> *See* Stanford SIR, *supra* note 43, at 2.

<sup>191</sup> Press Release, ExxonMobil, ExxonMobil Releases Reports to Shareholders on Managing Climate Risk (Mar. 31, 2014), <https://perma.cc/G3JQ-QM6E>; *Engaging on Climate Change*, EXXONMOBIL, <https://perma.cc/4HR7-D96D> (last visited Apr. 15, 2017).

<sup>192</sup> Natasha Geiling, *Even Fossil Fuel Companies Support an International Climate Agreement*, THINKPROGRESS (Oct. 15, 2015), <https://perma.cc/56BH-9N93>.

<sup>193</sup> UNIV. OF CAMBRIDGE INST. FOR SUSTAINABILITY LEADERSHIP, THE CARBON PRICE COMMUNIQUÉ: A CALL FROM BUSINESS FOR A CLEAR, TRANSPARENT AND ROBUST PRICE ON CARBON (2012), <https://perma.cc/XH4Y-V6C8>. The support for a price on carbon stems from the desire to address uncertainty and regulatory risk. *Fossil Fuel Companies: Evaluating Climate Change*, CLIMATE NEXUS, <https://perma.cc/KD9C-CVG3> (last visited Apr. 15, 2017). That some big fossil fuel companies are supporting a carbon tax weakens the campaign argument that endowments should divest from those companies in order to signal support to government for a carbon tax. *See infra* note 225 and accompanying text. On the shift in the fossil fuel industry from climate denial to a more accommodating stance, *see* Levy & Egan, *supra* note 75, at 804–05 and Falkner, *A Neo-Pluralist Perspective*, *supra* note 62, at 105–10.

<sup>194</sup> *See, e.g., Fossil Fuel Companies: Evaluating Climate Change*, *supra* note 193, at 4; Schlesinger, *supra* note 124.

<sup>195</sup> CCSR REPORT 2014–2015, *supra* note 87, at 14.

<sup>196</sup> Veerle Heyvaert, *Europe in a Climate of Risk: Three Paradigms at Play* 9 (London Sch. of Econ. & Political Sci. Law, Soc’y & Econ. Working Paper, No. 06, 2010),

simply positioning for the take.<sup>197</sup> Should all energy companies with sizeable fossil fuel holdings be divested from, including those that have responded favorably to environmental shareholder activism, are reporting and reducing their emissions, and have diversified product offerings?<sup>198</sup>

Seventh, there is already a considerable amount being done by institutional investors to address climate risk. Although the degree and method of action varies between them, both Harvard and Stanford have ESG proxy standards and have incorporated climate risk into their management strategies.<sup>199</sup> Stanford adheres to three sets of responsible investment guidelines in addition to its own,<sup>200</sup> while Harvard just recently joined the United Nations Global Compact.<sup>201</sup> Arising in this context, the divestment campaign can be understood in part as a challenge to the suitability and legitimacy of the climate actions already being taken.

Finally, there are financial considerations to divesting from fossil fuels that affect the strategic and legal appropriateness of divestment.<sup>202</sup> The size and strength of oil and gas investments makes divesting procedurally off-putting and costly in the short term.<sup>203</sup> Additionally, replacing lost returns from divesting all fossil fuel assets would be challenging.<sup>204</sup> The combination of scale, growth, and yield make oil and gas difficult to match.<sup>205</sup> Only information technology's market capitalization exceeds that of oil and gas.<sup>206</sup> Furthermore, alternative-energy finance has made advances in recent years but is not yet sophisticated enough to absorb and return the value of fossil fuel holdings.<sup>207</sup> This means that in the current market, divested funds could

2APG; accord Kristian Jessen et al., *Increasing CO<sub>2</sub> Storage in Oil Recovery*, 46 ENERGY CONVERSION & MGMT. 293, 302 (2005) (suggesting oil fields are attractive grounds for carbon sequestration projects despite the reverse engineering challenges).

<sup>197</sup> See *Fossil Fuel Companies: Evaluating Climate Change*, *supra* note 193, at 4, 6.

<sup>198</sup> See, e.g., CCSR REPORT 2014–2015, *supra* note 87, at 11 (noting Chevron scored 95% in an Si2 analysis, is a member of the Carbon Disclosure Project, and is considered to have favorable emissions reductions policies); see also Reid & Toffel, *supra* note 124, at 1171–72 (listing Chevron, Allegheny Energy, and Amoco as companies that responded to shareholder pressure by increasing climate-related disclosures.).

<sup>199</sup> See *supra* Part II.C.

<sup>200</sup> See *supra* Part II.C.2.

<sup>201</sup> See *supra* note 54. This was arguably in response to pressure from the divestment campaign; however, there were already environmental proxies in place prior to the founding of the campus divestment movement, including related to climate change. See *supra* Part II.C.1.

<sup>202</sup> See *supra* Part II.B. (discussing the duty of prudence and care).

<sup>203</sup> BARON & FISCHER, *supra* note 23, at 17.

<sup>204</sup> *Id.*; NATHANIEL BULLARD, BLOOMBERG NEW ENERGY FIN., FOSSIL FUEL DIVESTMENT, A \$5 TRILLION CHALLENGE 1 (2014), <https://perma.cc/B9UV-437L>.

<sup>205</sup> BARON & FISCHER, *supra* note 23, at 17.

<sup>206</sup> BULLARD, *supra* note 204, at 13.

<sup>207</sup> *Id.* at 12, 16–17 (noting the progress made in green finance but acknowledging that clean energy is not a like-for-like investment tradeoff because of relatively small scale, liquidity, and yield); U.N. ENVTL. PROGRAMME, THE FINANCIAL SYSTEM WE NEED: FROM MOMENTUM TO TRANSFORMATION 12 (2nd ed. 2016), <https://perma.cc/FB4M-MVXQ> (“Progress has been made in mobilizing both public and private finance aligned to sustainable development. Current levels of financing for sustainable development, however, remain wholly inadequate.”)

not be completely reinvested in green energy funds.<sup>208</sup> It is not currently possible to swap fossil fuel and alternative energy assets like-for-like without harming returns, and, in so doing, violating the duty of prudence.<sup>209</sup>

All of the above factors may influence the fiduciary case for divestment, and, like climate change, none of them is a simple matter. The ethical case at first blush would seem to support divestment, but if the ethical thing to do is that which will be most effective at addressing climate change, divestment may not be the most ethical choice. If the ethical stance is accepted as justification for divestment, it follows that other industries with large carbon footprints should also be divested from. This leads back to the issues of prudence and loyalty. On the issue of prudence, there are also competing claims. Divesting can cost the fund in the short-term,<sup>210</sup> and does not account for systemic risk or the risk divesting poses to fossil-related assets like power stations and energy infrastructure.<sup>211</sup> Because of the complexity of fossil fuel divestment, there is room for argument on both sides of the issue. Whether campaigners can effectively frame the issue to suit their purpose depends in part on their campaign discourse and, more fundamentally, on what their purpose is. Complexities within the movement, as within the American environmental movement writ large, may impact the strength of their arguments and their ability to garner support from endowment trustees.

### *G. The Fossil Fuel Divestment Campaigns*

Journalist-activist and Harvard alumnus Bill McKibben founded the national Fossil Free fossil fuel divestment campaign.<sup>212</sup> His book, *The End of Nature*,<sup>213</sup> is self-described on his website as an “impassioned plea for radical and life-renewing change.”<sup>214</sup> A *New York Times* review called McKibben “a man preaching apocalypse.”<sup>215</sup> McKibben espouses the deep ecology perspective that nature should be valued in and of itself and economic

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<sup>208</sup> BULLARD, *supra* note 204, at 16–17; GLOB. COMM’N ON THE ECON. & CLIMATE, THE SUSTAINABLE INFRASTRUCTURE IMPERATIVE: FINANCING FOR BETTER GROWTH AND DEVELOPMENT 14–16 (2016), <https://perma.cc/B45J-BCGQ> (noting that sustainable growth and transitioning to a low-carbon economy depends on the growth of sustainable financing, and calling for new green finance tools and a greening of the existing financial system).

<sup>209</sup> BULLARD, *supra* note 204, at 16–17. Although this may not be a current possibility, this may well be possible in the not-so-distant future.

<sup>210</sup> ANSAR ET AL., *supra* note 104, at 61; BRIAND ET AL., *supra* note 132, at 6.

<sup>211</sup> BRIAND ET AL., *supra* note 132, at 2.

<sup>212</sup> *Bill McKibben*, 350.ORG, <https://perma.cc/WYG5-GN XR> (last visited Apr. 15, 2017). The idea of divesting from fossil fuels was not his idea, however. Julie Ayling & Neil Gunningham, *Non-State Governance and Climate Policy: The Fossil Fuel Divestment Movement*, 17 CLIMATE POLICY 131, 133 (2015).

<sup>213</sup> BILL MCKIBBEN, *THE END OF NATURE* (1989).

<sup>214</sup> *Books: The End of Nature*, BILL MCKIBBEN, <https://perma.cc/VVJ3-4JSW> (last visited Apr. 15, 2017).

<sup>215</sup> Nicholas Wade, *The Sky is Melting*, N.Y. TIMES (Oct. 8, 1989), <https://perma.cc/Y66E-53AL> (reviewing MCKIBBEN, *supra* note 213).

growth deprioritized.<sup>216</sup> Many of the campus campaign arguments are similar and reflect McKibben's founding influence, espousing a more radical approach.<sup>217</sup>

Fossil Free makes several arguments for divestment, the rhetoric of which is examined in greater detail below. The basic moral argument is that fossil fuels contribute to climate change and climate change is bad for the environment; therefore, fossil fuel companies are bad and should be divested from.<sup>218</sup> Fossil fuel companies could theoretically switch to profitable renewables-based models, but will not do so without government intervention.<sup>219</sup> Campaigners also argue it is hypocritical for universities spending millions researching climate solutions to financially support an industry that is helping to cause climate change.<sup>220</sup> The universities are under a moral obligation to divest in order to pressure governments to intervene not only because it is "the right thing to do," but because the government has been politically "captured" by special fossil fuel interests and therefore it is up to universities to lead the way.<sup>221</sup>

Fossil Free also makes an equity argument that fossil fuel companies emit carbon dioxide for free, those emissions harm the environment, and the companies should be made to internalize the costs associated with those emissions via a carbon tax.<sup>222</sup> This is in essence the "polluter pays principle."<sup>223</sup> Shareholder activism is supposedly impotent because imposing

<sup>216</sup> Matthew C. Nisbet, *Nature's Prophet: Bill McKibben as Journalist, Public Intellectual and Activist* 20–22 (Joan Shorestein Ctr. on the Press, Politics and Public Policy, Discussion Paper Series, Paper No. D-78, 2013), <https://perma.cc/D6BY-B22T>.

<sup>217</sup> Ayling & Gunningham, *supra* note 212, at 133 (comparing the more radical divestment campaign with the more common transnational climate initiatives that rely on institutional worldviews and market liberalism).

<sup>218</sup> See *Frequently Asked Questions*, FOSSIL FREE, <https://perma.cc/J2AD-DQLN> (last visited Apr. 15, 2017).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.* (explaining that it is immoral to profit from fossil fuel industry because it is wrecking the planet); Sarang, *supra* note 31, at 337–38 (asserting that it is "antithetical to the mission of an institution" to be invested in the fossil fuel industry). *But see* Michael McDonald, *Harvard Won't Divest from Fossil Fuels, Faust Says*, BLOOMBERG (Oct. 3, 2013), <https://perma.cc/5LCR-GBFB> (reporting on Faust, Fossil Fuel Divestment Statement, *supra* note 118, which argued that Harvard should not divest because there is evidence the school is already doing its part to address climate change and that it is not the role of the endowment to address such issues).

<sup>221</sup> *Frequently Asked Questions*, *supra* note 218.

<sup>222</sup> *Id.*

<sup>223</sup> ORG. FOR ECON. CO-OPERATION & DEV., ENVIRONMENTALLY RELATED TAXES IN OECD COUNTRIES 9 (2001), <https://perma.cc/B557-QSSJ> (explaining that a carbon tax is consistent with the polluter pays principle, which makes emitters responsible for the cost of the pollution they emit); accord Simon Caney, *Cosmopolitan Justice, Responsibility, and Global Climate Change*, 18 *Leiden J. Int'l L.* 747, 752–53 (2005); see also Barbara Luppi et al., *The Rise and Fall of the Polluter-Pays Principle in Developing Countries*, 32 *INT'L REV. L. & ECON.* 135, 136 (2012) (discussing polluter pays as a form of victim compensation); Eric Neumayer, *In Defense of Historical Accountability for Greenhouse Gas Emissions*, 33 *ECOLOGICAL ECON.* 185, 187–88 (2000) (discussing the need to ensure that past polluters do not escape accountability); Candice Stevens, *Interpreting the Polluter Pays Principle in Trade and the Environment*, 27 *CORNELL INT'L L.J.* 577 (1994) (discussing the interplay between the pollute pays principle and

a carbon tax would be against the corporation's self-interest.<sup>224</sup> While arguing that divestment is necessary to support government imposition of a carbon tax, the campaign also argues that an imminent carbon tax will fatally devalue fossil fuel companies; therefore, endowments must divest to protect themselves.<sup>225</sup>

The primary economic argument is that 80% of known fossil fuel reserves must be kept in the ground if the world is to stay below the 2 degree Celsius—or aspirational 1.5 degree Celsius—target agreed upon in the Paris Accord.<sup>226</sup> These reserves will become “stranded assets,” incurring significant write-offs and rendering fossil fuel stocks financial liabilities.<sup>227</sup> Divestment is necessary to protect investors from the imminent massive devaluation. The campaign argues that “no group of shareholders would ever vote for willingly” leaving the reserves in the ground, and therefore insider strategies are pointless.<sup>228</sup>

The Fossil Free campaign arose not out of a concern about the environmental ethics of institutional investment, but out of the desire to create a climate movement.<sup>229</sup> The founders recall, “We didn't know how to fix things, but we knew that one missing ingredient was a climate movement

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commercial trade). However, carbon taxes can be regressive and must be designed to minimize regression. *See* ORG. FOR ECON. CO-OPERATION & DEV., *supra*, at 11.

<sup>224</sup> *Frequently Asked Questions*, *supra* note 218. *But see* CDP N. AM., USE OF INTERNAL CARBON PRICE BY COMPANIES AS INCENTIVE AND STRATEGIC PLANNING TOOL 2 (2013), <https://perma.cc/T35G-CP5Y> (noting many energy companies are already internally pricing a carbon tax in anticipation of future regulations or taxes).

<sup>225</sup> *Frequently Asked Questions*, *supra* note 218. *But see* Editorial, *Even Big Oil Wants a Carbon Tax*, BLOOMBERG (June 1, 2015), <https://perma.cc/CUD8-E9RL> (discussing the energy industry's support for a carbon tax and that the government is the entity to impose such a tax).

<sup>226</sup> BARON & FISCHER, *supra* note 23, at 3; LEATON ET AL., *supra* note 164, at 4 (confirming that the majority of fossil fuels are “unburnable” in order to stay beneath the targeted 2 degree Celsius limit); Nicholas Stern, *The Economics of Climate Change*, 98 AM. ECON. REV. (PAPERS & PROC.) 1, 7 (2008) (acknowledging the difficulty in remaining below 2 degrees Celsius of change); Bill McKibben, *Recalculating the Climate Math: The Numbers on Global Warming are Even Scarier Than We Thought*, NEW REPUBLIC (Sept. 22, 2016), <https://perma.cc/U67K-MTFV> (affirming that the majority of fossil fuel sources need to be kept in the ground, and discussing the 2 degree Celsius vs. 1.5 degree Celsius “red line”); Mark Carney, Governor, Bank of Eng., *Breaking the Tragedy of the Horizon – Climate Change and Financial Stability*, Speech Before Lloyd's of London 10–11 (Sept. 29, 2015), <https://perma.cc/42FX-Z4US> (discussing the challenges associated with staying below the 2 degree Celsius threshold); *Frequently Asked Questions*, *supra* note 218. *But see* ANSAR ET AL., *supra* note 104, at 66 (explaining the reasons that pushing for fossil fuel companies to leave the fossil fuels “down there” will likely fail); Michael Lynch, *Threat to Value of Fossil Fuel Resources Misplaced*, FORBES (Mar. 22, 2016), <https://perma.cc/UDU5-VEF5> (arguing that fossil fuels have overcome many such scares in the past); Daniel Abbasi, *How Activists Should Engage Fossil Fuel Companies*, INSTITUTIONAL INV'N: UNCONVENTIONAL WISDOM (Jan. 17, 2014), <https://perma.cc/BSK6-LTLQ> (arguing that fossil fuel companies are too integrated into the global economy for governments to permit a massive write down).

<sup>227</sup> *See* LEATON ET AL., *supra* note 164, at 5; STERN, *supra* note 165, at 369.

<sup>228</sup> *Frequently Asked Questions*, *supra* note 218.

<sup>229</sup> *See* Apfel, *Exploring Divestment*, *supra* note 75, at 925, 936.

that reflected the scale of the crisis.”<sup>230</sup> The campaign strategy is not “primarily an economic strategy, but a moral and political one” with the goal of “[creating] uncertainty about the viability of the fossil fuel industry’s business model.”<sup>231</sup> Rather than targeting fossil fuel companies or government directly, the campaign primarily targets institutional investors in the hopes of influencing fossil fuel companies and the government.<sup>232</sup> The origination of the campaign as a moral and political effort to address climate change by undermining the fossil fuel industry, and the decision to focus that effort on institutional investors as opposed to directly engaging with industry and government, likely contributed to the campaign’s discursive and strategic traits.<sup>233</sup>

### 1. *Divest Harvard*

Divest Harvard (DH), was founded in August 2012, inspired by McKibben’s viral *Rolling Stone* article.<sup>234</sup> DH’s demands are for Harvard University to:

1. Immediately freeze any new investments in fossil fuel companies
2. Immediately divest direct holdings from the top 200 publicly traded fossil fuel companies
3. Divest indirect holdings in the top 200 fossil fuel companies within 5 years, and reinvest in socially responsible funds.<sup>235</sup>

A DH student referendum supporting divestment passed in November 2012.<sup>236</sup> In February 2013, six months after the campaign was founded, DH

<sup>230</sup> *Our History*, 350.ORG, <https://perma.cc/NC3A-J9D5> (last visited Apr. 15, 2016).

<sup>231</sup> *Frequently Asked Questions*, FOSSIL FREE, <https://perma.cc/J2AD-DQLN> (last visited Apr. 15, 2017); accord Ayling & Gunningham, *supra* note 212, at 133 (noting that the campaign’s legitimacy claims “rest primarily and very strongly on morality (that is, the movement should be listened to because of the rightfulness of its position) rather than on any other basis”); Rick Cohen, *5 Questions About Divestment Strategies as Fossil Fuels Take Center Stage*, NONPROFIT Q. (May 15, 2014), <https://perma.cc/AL5Q-D94U> (“fossil fuel divestment is a political movement, not a narrow political campaign . . . . The targets of divestment . . . are Congress and the White House”).

<sup>232</sup> See, e.g., *Annual Report 2016*, 350.ORG, <https://perma.cc/GDG5-CXZA> (last visited Apr. 15, 2017).

<sup>233</sup> See *supra* Part III.A. Had the campaign instead originated in response to the question, “What can institutional investors do about climate change?” it may have taken a different strategic and discursive tack.

<sup>234</sup> *General Information*, DIVEST HARV., <https://perma.cc/FM3M-5L3Q> (last visited Apr. 15, 2017).

<sup>235</sup> DIVEST HARV., <https://perma.cc/UR9D-CM77> (last visited Apr. 15, 2017).

<sup>236</sup> Justin Gillis, *The Divestment Brigade*, N.Y. TIMES, Dec. 5, 2012, at B1; *Campaign Narrative*, DIVEST. HARV., <https://perma.cc/L52M-WEPP> (last visited Apr. 15, 2017).

met with CCSR.<sup>237</sup> CCSR offered to engage with fossil fuel companies over the next three to five years, but DH refused, claiming the trustees did not comprehend the urgency of the issue.<sup>238</sup> In April 2014, DH blocked the entrance to President Faust's office, resulting in the arrest of one protester.<sup>239</sup> A year later, DH staged a "Heat Week" that saw several campus buildings blockaded and ended in a rally of several hundred people.<sup>240</sup> Also in 2015, several Harvard students sued the Harvard trustees, alleging mismanagement of charitable funds and intentional investment in abnormally dangerous activities.<sup>241</sup> The trial court dismissed the claims and the Massachusetts Appeals Court affirmed the dismissal.<sup>242</sup> In April 2016, four protesters were arrested at a DH sit-in staged in the lobby of the Boston Federal Reserve, where HMC is headquartered.<sup>243</sup> DH members met with HMC again in the fall of 2016 and HMC reiterated it would not divest from fossil fuels, although it did state that Harvard was not currently invested in coal because of coal's poor financial performance.<sup>244</sup>

Although Harvard has to date refused to divest from fossil fuels, it has visibly increased its commitment to SRI.<sup>245</sup> Harvard's commitments include

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<sup>237</sup> Nikita Kansra & Samuel Y. Weinstock, *Students, Corporation to Discuss Social Choice Fund*, HARV. CRIMSON (Jan. 28, 2013), <https://perma.cc/A6NT-E6J8>; Press Release, Divest Harvard, Harvard Corporation Members to Continue Discussion on Fossil Fuel Divestment Student Activists Leave Hard-Won Meeting with Promise to Continue Negotiations in Near Future (Feb. 4, 2013), <https://perma.cc/FB5E-HKHT>.

<sup>238</sup> *Campaign Narrative*, *supra* note 236.

<sup>239</sup> Amna H. Hashmi, *Undergraduate Protester Arrested for Blocking Entrance to Mass. Hall*, HARV. CRIMSON (May 1, 2014), <https://perma.cc/MX6A-32GB>.

<sup>240</sup> Theodore R. Delwiche & Mariel A. Klein, *Divest Harvard Ends 'Heat Week' Protests*, HARV. CRIMSON (Apr. 18, 2015), <https://perma.cc/GD4B-9UHF>.

<sup>241</sup> Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll., No. SUCV201403620H, 2015 WL 1519036, at \*2 (Mass. Super. Ct. Mar. 17, 2015), *aff'd*, 60 N.E.3d 380 (Mass. App. Ct. 2016).

<sup>242</sup> *Id.* at \*10.

<sup>243</sup> Luca F. Schroeder, *Divest Harvard Protesters Arrested at HMC Building*, HARV. CRIMSON (Apr. 13, 2016), <https://perma.cc/4KRF-RRVX>.

<sup>244</sup> Andrew M. Duehren & Ignacio Sabate, *Harvard Corp. Leaders Tell Divest Activists University Moving Away from Coal*, HARV. CRIMSON (Oct. 14, 2016) <https://perma.cc/BQY2-G4YR> (reporting that HMC does not hold coal assets because they are "not currently financially prudent").

<sup>245</sup> Marcella Bombardieri, *Harvard Takes Steps to Promote Environment*, BOS. GLOBE (Apr. 7, 2014), <https://perma.cc/3LLY-HRNX>. Just prior to finalization of this Article for publication, Colin Butterfield, HMC's head of Natural Resources, announced the endowment was "pausing [direct investments in] minerals and oil and gas" due to financial reasons, saying that although the university continues to invest indirectly in fossil fuels, "I doubt that we would ever make a direct investment with fossil fuels" for financial reasons. Julia E. Debenedictis and Ike J. Park, *Harvard 'Pausing' Investments in Some Fossil Fuels*, HARV. CRIMSON (Apr. 24, 2017), <https://perma.cc/7S4L-864H>. Mr. Butterfield was brought on board HMC in 2016 to "refine our [direct] natural resources investment strategy" after a poor 2016 performance due to challenging commodity prices, limited market transactions in timber and agriculture, severe drought, and high production costs. 2016 HMC ANNUAL REPORT, *supra* note 2, at 4–5. Although Mr. Butterfield did not reveal how much HMC directly holds in fossil fuel investments, there are some clues suggesting it is not much. HMC allocates 10% of its assets to natural resources. *Id.* at

setting campus emissions reductions targets and carbon offset schemes, soliciting donors for an additional \$20 million to fund innovative climate research, and becoming the first U.S. endowment to join the UNPRI.<sup>246</sup> While the campaigners hoping for divestment are likely disappointed at the refusal of Harvard to divest, these steps can be viewed as partial victories for climate action and for ESG-responsible investing more generally.

## 2. *Fossil Free Stanford*

Similar to DH, Fossil Free Stanford (FFS) was founded in November 2012, after a McKibben visit.<sup>247</sup> FFS demands that Stanford:

1. Immediately *freeze any new investment* in the top 100 oil and gas companies, and,
2. *Divest within five years* from direct ownership in those top 100 companies and from any commingled funds that include their equities or corporate bonds.<sup>248</sup>

FFS does not demand divestment from indirect holdings, and allows five years for divestment of direct assets.<sup>249</sup> Also, possibly because Stanford already has a strong SRI policy in place, FFS does not include the demand to “reinvest in socially responsible funds” that DH included.<sup>250</sup> FFS also passed a student referendum in May 2013, and in September 2014, submitted a

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2. The 2016 Report does not break down that 10% further into specific asset categories and makes no mention of fossil fuel assets, but does name timber and agriculture as specific assets. *Id.* at 4. Mr. Butterfield is experienced in agriculture and timber investing and the HMC Natural Resources website lists only timber and agriculture investments. *Id.* at 5; *Sustainable Investment in Natural Resources*, HARV. MGMT. COMPANY, <https://perma.cc/JAS7-UN2X> (last visited Apr. 15, 2017) (noting HMC requires timber properties to be Forestry Stewardship Council (FSC) certified; has planted 100 million trees since 2005 and set aside 300,000 acres for conservation; and holds its farmland investments to Global G.A.P. and Sustainability in Practice certification standards). In addition, *Forbes* reported that the natural resources portfolio focuses on timber and agriculture. Zack Friedman, *Harvard Endowment Shifts Investment Strategy, Cuts Half Its Staff*, FORBES (Jan. 25, 2017), <https://perma.cc/WE48-T5ET>. HMC’s focus on timber and agriculture may partially explain why, in his refinement of HMC’s natural resources strategy, Mr. Butterfield, is “not looking at energy at the moment.” Debenedictis & Park, *supra*.

<sup>246</sup> Faust, Fossil Fuel Divestment Statement, *supra* 118.

<sup>247</sup> *About Us*, FOSSIL FREE STAN., <https://perma.cc/5ZRE-P82F> (last visited Apr. 15, 2017).

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> See *supra* note 235 and accompanying text.

formal request for review to APIRL.<sup>251</sup> In May 2014, Stanford announced divestment from coal companies.<sup>252</sup> The press release stated that

“coal is one of the most carbon-intensive methods of energy generation and that other sources can be readily substituted for it. . . .”

APIRL also noted that the use of coal for electricity production generates higher greenhouse gas emissions per unit of energy generated than other fossil fuels, such as natural gas, and that alternatives to coal are sufficiently available.

[B]ut fewer alternatives are readily available for these other energy sources on the massive scale that will be required to replace them broadly in the global economy.<sup>253</sup>

In April 2016, the Board of Trustees’ Special Committee on Investment Responsibility declined to divest from fossil fuels entirely, but did note that, owing to APIRL’s advice, they would have divested from tar sands companies had there been any exposure, which there was deemed not to be.<sup>254</sup>

### 3. *General Success to Date*

Divestment is a decision that must be made on an individual basis. Nationwide, forty educational institutions have made partial or full divestment commitments.<sup>255</sup> To provide some context, in the 2015–2016

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<sup>251</sup> Yari Greaney et al., Fossil Free Stanford, A Resolution in Support of Divestment from Fossil Fuel Companies at Stanford (May 28, 2013), <https://perma.cc/LAKZ-EUR5>; Fossil Free Stanford, Advisory Panel on Investment Responsibility and Licensing Request for Review (Sept. 23, 2014), <https://perma.cc/QSX3-HSU3>.

<sup>252</sup> Press Release, Stanford Divesting from Coal, *supra* note 136. *But see* Seiger, *supra* note 175 (noting Stanford’s coal divestment does not apply to comingled funds, private equity ownership, or to coal used in making steel).

<sup>253</sup> Press Release, Stanford Divesting from Coal, *supra* note 136 (quoting Stanford President John Hennessy).

<sup>254</sup> Statement of the Bd. of Trs. of the Leland Stanford Junior Univ. on Stanford and Climate Change 4 (Apr. 25, 2016) [hereinafter Stanford Statement on Climate Change], <https://perma.cc/2T7E-Q7KG>.

<sup>255</sup> *Divestment Commitments*, FOSSIL FREE, <https://perma.cc/S8HY-863E> (last visited Apr. 15, 2017) (many of the commitments are partial divestments of coal and tar sands). Several of these schools have missions specifically dedicated to the environment or social causes, meaning their endowment managers are obliged to consider those commitments as part of their duty of loyalty to the school’s mission. *E.g.*, *Mission & History*, C. ATLANTIC, <https://perma.cc/F2JW-Z5WD> (last visited Apr. 15, 2017) (“[E]nriches the liberal arts tradition through a distinctive education philosophy—human ecology.”); *Purposeful, Personal, Practical*, GREEN MOUNTAIN C., <https://perma.cc/K76P-CVNM> (last visited Apr. 15, 2017) (“First in Sustainability”); *Mission and Vision*, HAMPSHIRE C., <https://perma.cc/KB55-7J48> (last visited Apr. 15, 2017) (“[F]oster a lifelong passion for learning, inquiry, and ethical citizenship that inspires students to contribute to knowledge, justice, and positive change in the world.”); *Mission & Values*, NAROPA U., <https://perma.cc/DW9N-JJFR> (last visited Apr. 15, 2017) (“Buddhist-inspired.”); *Mission and*

academic year there were 4,147 degree-granting institutions in the United States.<sup>256</sup> Fossil Free claims divestment commitments representing approximately \$3.4 trillion in institutional value, with 13% of that coming from universities, colleges, and schools.<sup>257</sup> However, this value represents the total value of the institution divested, not the value of fossil fuel assets held by that institution and committed to divestment. While there has been greater success with faith-based organizations (25%) and foundations (21%),<sup>258</sup> those funds are typically not bound by the same impartiality requirements as university endowments.<sup>259</sup> For faith-based organizations, the converse is especially likely to be true, i.e., their mission statements may contain express requirements to use the fund to advance certain social or moral causes in line with their faith.<sup>260</sup> Pension funds also tend to have social purposes.<sup>261</sup>

Despite the relatively low rate of securing divestment thus far,<sup>262</sup> the Fossil Free campaign has had some success in stigmatizing the fossil fuel industry and contributing to the climate change and stranded assets discussion.<sup>263</sup> The stigmatization of fossil fuels is likely to be the most impactful over time<sup>264</sup> and almost certainly played a role in the demise of the coal industry.<sup>265</sup> However, it is hard to cast the campaign's role in coal's demise as more than supporting. Coal reserves comprise the top unburnable carbon reserves, representing a market value estimated at \$62 trillion—more

*Values*, PITZER C., <https://perma.cc/QX8L-HHA6> (last visited Apr. 15, 2017) (“[P]roduces engaged, socially responsible citizens of the world through an academically rigorous, interdisciplinary liberal arts education emphasizing social justice . . . and environmental sensitivity.”); *Mission Driven*, STERLING C., <https://perma.cc/F9RD-LNB2> (last visited Apr. 15, 2017) (“[S]trongly linked to . . . the critical environmental challenges facing humanity.”).

<sup>256</sup> MCFARLAND ET AL., NAT’L CTR. FOR EDUC. STATISTICS, U.S. DEPT OF EDUC., NCES 2017-144, THE CONDITION OF EDUCATION 2017, at 242 (Thomas Nachazel et al. eds., 2017), <https://perma.cc/584Z-8C4K>.

<sup>257</sup> *Divestment Commitments*, *supra* note 255. *But see* ARABELLA ADVISORS, *supra* note 185, at 8 fig.2 (reporting that globally, only 5% of divestment commitments are from educational institutions).

<sup>258</sup> *Divestment Commitments*, *supra* note 255. *But see* ARABELLA ADVISORS, *supra* note 185, at 8 fig.2 (finding 56% of total divestment commitments to be from pension funds, with 37% from private companies).

<sup>259</sup> Sarang, *supra* note 31, at 304.

<sup>260</sup> *See id.* at 337 (discussing how investing in fossil fuel companies may conflict with the stated mission of an organization).

<sup>261</sup> Editorial, *Fulfilling a Valuable Purpose*, PENSIONS & INV. (Apr. 6, 2015), <https://perma.cc/M9S6-VTLM>.

<sup>262</sup> *See* Ayling & Gunningham, *supra* note 212, at 135 (noting the small number of divestment commitments, most being partial divestment commitments, and citing attention and reputation as the campaign’s greatest impacts); *see also* BARON & FISCHER, *supra* note 23, at 14 (“The majority [of institutional investors] have not divested in any way.”).

<sup>263</sup> ANSAR ET AL., *supra* note 104, at 13; Ayling & Gunningham, *supra* note 212, at 135–36.

<sup>264</sup> *See* ANSAR ET AL., *supra* note 104, at 13.

<sup>265</sup> Krauss, *supra* note 65 (reporting that Peabody Energy’s filing with the SEC would list divestment campaigns as a risk facing the business). Coal was already on the way out due to the natural gas boom and the phasing out of more carbon-intensive fossil fuels occurring as part of the international climate agreements. ANSAR ET AL., *supra* note 104, at 13, 15, 51.

than oil (\$25 trillion) and gas (\$24 trillion) combined.<sup>266</sup> While the campaign did help to highlight that fact, coal has for decades been targeted as one of the most polluting forms of fuel<sup>267</sup> and more recently has faced significant market pressure from cheap natural gas.<sup>268</sup> When an entire industry is targeted for bad behavior, there are likely to be scapegoats who suffer as a result while the rest of the industry survives largely intact, a process called stigma dilution.<sup>269</sup> The stigmatization of fossil fuels, and coal in particular, is undoubtedly underway. What remains to be seen is the extent to which stigma dilution occurs with coal and the impact of that dilution on the rest of the fossil fuel industry.

#### 4. A Comparative Note on Campaign Strategy

Assessing what cultural and institutional factors were at play in FFS having a more favorable outcome than DH is outside the scope of this Article.<sup>270</sup> However, there are noteworthy differences in the campus cultures and the institutionalization of SRI that may have contributed to the difference in outcomes. For example, Stanford already had a progressive SRI policy in place and was one of the first university endowments to have one.<sup>271</sup> The membership of Stanford's APIRL is inclusive, comprised of students, faculty, and alumni.<sup>272</sup> Moreover, Stanford's mission includes an express social benefit principle,<sup>273</sup> meaning Stanford's trustees appear not to be prohibited by the duty of loyalty from considering the social benefits of asset management decisions under the right circumstances.<sup>274</sup> Harvard has no formal mission statement,<sup>275</sup> and Harvard has historically not been predisposed to SRI.<sup>276</sup>

<sup>266</sup> JASON CHANNELL ET AL., CITIGROUP, ENERGY DARWINISM II: WHY A LOW CARBON FUTURE DOESN'T HAVE TO COST THE EARTH 84 fig.94 (2015), <https://perma.cc/7F9K-B5RM>.

<sup>267</sup> See, e.g., JORDAN SCHNEIDER ET AL., ENV'T AM. RESEARCH & POLICY CTR., AMERICA'S DIRTIEST POWER PLANTS: THEIR OVERSIZED CONTRIBUTION TO GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT 28 tbl.A-2 (2013), <https://perma.cc/P8RN-23HF> (ninety-eight of the hundred dirtiest power plants are coal power plants); Bruce A. Ackerman and William T. Hassler, *Beyond the New Deal: Coal and the Clean Air Act*, 89 YALE L.J. 1466 (1980) (detailing the environmental, political, and economic role of coal in the passage of the Clean Air Act Amendments of 1970); Eric Schaeffer, *Coal and the U.S. Economy*, 13 VT. J. ENVTL. L. 131, 140 (2011) ("Our coal plants are aging, and our environmental bills are coming due. Let us hope we find the political will to retire this outdated infrastructure and the pollution that comes with it.")

<sup>268</sup> Clifford Krauss & Diane Cardwell, *Policy Promise for Coal Power Has Its Limits*, N.Y. TIMES, Mar. 29, 2017, at A1.

<sup>269</sup> ANSAR ET AL., *supra* note 104, at 68–69, 72 (discussing stigma dilution).

<sup>270</sup> Favorable insofar as the goal of divestment is concerned, with Stanford committing to partial divestment. See *supra* Part II.C.1–2 (discussing the divestment decisions made by both universities).

<sup>271</sup> See *supra* Part II.C.2.

<sup>272</sup> Seiger, *supra* note 175.

<sup>273</sup> The Founding Grant, *supra* note 95.

<sup>274</sup> Sarang, *supra* note 31, at 377.

<sup>275</sup> *Harvard at a Glance*, *supra* note 94.

<sup>276</sup> See RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW, *supra* note 8, at 128.

Perhaps encouraged to do so given the campus politics, FFS campaigners took what appears to be a more cooperative approach to working with the administration than did DH. For example, FFS submitted a formal request to the administration two months after FFS was formed, whereas DH took twice as long.<sup>277</sup> Further, the demands of FFS were less radical in that they did not demand immediate divestment, whereas DH's demands were for total and immediate divestment.<sup>278</sup> Stanford campaigners met with trustees,<sup>279</sup> while Harvard campaigners staged protest sit-ins, rebuffed negotiation offers,<sup>280</sup> and sued Harvard's trustees.<sup>281</sup>

Whatever the cause of the difference in campaign styles, their effect may have been to bias the two different audiences. The Harvard student campaigners, for example, may have been predisposed to dismiss offers to negotiate SRI reform because they may have been seeking to challenge the dominance of the administrators and trustees endorsing such reform. Stanford students may have known Stanford's history of social investing and the campus social movements that produced it, and may have perceived trustees as more helpful to begin with. These circumstances may have shaped the discourses and outcomes at the schools but exactly how or to what extent it is beyond the scope of the inquiry here.

### III. DISCOURSE AND THE CULTURAL POLITICS OF DIVESTMENT

Discourse analysis, or "the study of language-in-use,"<sup>282</sup> emerged with Michel Foucault,<sup>283</sup> but has its roots in the study of rhetoric, ideology, language, and philosophy,<sup>284</sup> and thus shares its heritage with the study of law.<sup>285</sup> Reviewing the role discourse plays in law and politics provides a platform from which to examine the discourse of duty and divestment.

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<sup>277</sup> AD HOC COMM., DIVEST NE. UNIV., REPORT AND RECOMMENDATION 9–10 (2014), <https://perma.cc/A653-VB53>; *Campaign Narrative*, *supra* note 236.

<sup>278</sup> *Id.* at 9–10; *About Us*, *supra* note 247.

<sup>279</sup> Seiger, *supra* note 175.

<sup>280</sup> Apfel, *Exploring Divestment*, *supra* note 75, at 916 (reporting that DH protestors occupied two administrative buildings and blockaded the entrances in the spring of 2015, a tactic repeated at Yale and Swarthmore).

<sup>281</sup> Complaint ¶¶ 41–70, *Harvard Climate Justice Coal. v. Harvard Corp.*, No. SUCV201403620H, 2015 WL 1519036 (Mass. Super. Ct. Mar. 17, 2015), *aff'd*, 60 N.E.3d 380 (Mass. App. Ct. 2016).

<sup>282</sup> Maarten Hajer & Wytse Versteeg, *A Decade of Discourse Analysis of Environmental Politics: Achievements, Challenges, Perspectives*, 7 J. ENVTL. POL'Y & PLAN. 175, 176 (2005).

<sup>283</sup> See W. Neil Adger et al., *Advancing a Political Ecology of Global Environmental Discourses*, 32 DEV. & CHANGE 681, 683 n.2 (2001); Gerald Berger et al., *Ecological Modernization as a Basis for Environmental Policy: Current Environmental Discourse and Policy and the Implications on Environmental Supply Chain Management*, 14 INNOVATION 55, 62 (2001).

<sup>284</sup> MAARTEN A. HAJER, *THE POLITICS OF ENVIRONMENTAL DISCOURSE: ECOLOGICAL MODERNIZATION AND THE POLICY PROCESS* 43–44 (1995).

<sup>285</sup> Like the law, discourse analysis is temporal-spatially constructed. Jeff Everett & Dean Neu, *Ecological Modernization and the Limits of Environmental Accounting?*, 24 ACCT. F. 5, 7

*A. Discourse and Dominance*

Constructivist social theories posit that human social activity both reflects and constructs meaning that defines the social realm.<sup>286</sup> In the constructivist tradition, discourse is “an ensemble of ideas, concepts, and categories through which meaning is given to phenomena.”<sup>287</sup> Discourse consists of a body of expressions in which there is homogeneity in message (i.e., shared knowledge and perceptions of the issue and shared beliefs in causes and solutions) and in that message’s expressive means (i.e., the ways discursive messages are communicated).<sup>288</sup> “[D]iscourses shape what can and cannot be thought, delimit the range of policy options and thereby serve as precursors to policy outcomes.”<sup>289</sup> One of the ways discourse shapes policy options and outcomes is by “framing.” Framing refers to how a particular problem, or a solution, is talked about.<sup>290</sup> Framing functions as “a way of selecting, organising, interpreting and making sense of a complex

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(2000); see also Jeffrey R. Dudas, *Little Monsters, Wild Animals, and Welfare Queens: Ronald Reagan and the Legal Constitution of American Politics*, in 49 STUDIES IN LAW, POLITICS AND SOCIETY 157, 165–66 (Austin Sarat ed., 2009) (discussing the role discourse plays in law and society).

<sup>286</sup> See, e.g., JOHN S. DRYZEK, THE POLITICS OF THE EARTH: ENVIRONMENTAL DISCOURSES 3, 6, 9–11 (3d ed. 2013) (discussing environmental discourses and their consequences); Lisa Rosen & Hugh Mehan, *Reconstructing Equality on New Political Ground: The Politics of Representation in the Charter School Debate at the University of California, San Diego*, 40 AM. EDUC. RES. J. 655, 676–80 (2003) (discussing how discourse changed interpretations of equality). This Article draws at times (though not exclusively) on the neo-Gramscian framework for climate politics developed by David L. Levy, Daniel Egan, and others following the work of Antonin Gramsci, whose work helped pave the way for constructivist theorists such as Foucault. The neo-Gramscian view acknowledges that culture, discourse, and ideology are all contested areas in which the dominant actors, or hegemonies, seek to reproduce and perpetuate their power. Levy & Egan, *supra* note 75, at 805–07. Culture, discourse, and ideology are all integral to the discussion of the cultural politics of the divestment campaign, socially responsible investment, and climate change politics more generally, and this Article adopts the view that they are arenas for and tools of power contests. The neo-Gramscian framework and the concept of hegemony are helpful for considering the sustained economic, political, technological, and cultural power of fossil fuel companies in the face of environmental backlash; the rise of SRI as a form of accommodation of that backlash; the divestment campaign as a challenge to the hegemony of fossil fuel industry; and the role of law in both perpetuating the ideologies and discursive norms essential to the maintenance of that power and in providing an opportunity for contest. See *id.* at 819–24 (examining international climate change negotiations using a neo-Gramscian framework). For more discussion of the neo-Gramscian framework, see generally David L. Levy & Peter J. Newell, *Business Strategy and International Environmental Governance: Toward a Neo-Gramscian Synthesis*, 2 GLOBAL ENVTL. POL. 84, (2002); Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515 (2000). There are other frameworks for climate politics, and while this article does draw on a neo-Gramscian view it does not adhere strictly to it.

<sup>287</sup> Hajer, *supra* note 11, at 45.

<sup>288</sup> *Id.*

<sup>289</sup> Hajer & Versteeg, *supra* note 282, at 178.

<sup>290</sup> Heather Lovell, *Framing Sustainable Housing as a Solution to Climate Change*, 6 J. ENVTL. POL'Y & PLAN. 35, 39 (2004) (noting framing literature typically focuses on the framing of the problem).

reality . . . . A frame is a perspective from which an amorphous, ill-defined, problematic situation can be made sense of and acted on.”<sup>291</sup> In this way, discourse shapes social outcomes while also providing a set of justifications for those outcomes.<sup>292</sup> Discourse analysis sheds light on how framing a discussion in a particular way has the effect of making some elements seem appropriate and fixed, while others appear problematic.<sup>293</sup>

Because discourse is a powerful means of perpetuating and challenging power, there is competition in socially constitutive processes between unequally situated actors seeking to assert a dominant discourse and thereby define the situation and their position of authority therein.<sup>294</sup> In the politics of contestation, “at any given time, ‘the terrain of dominant discourse is the only plausible arena of struggle.’”<sup>295</sup> Thus, discourse becomes a tool of political power produced, reproduced, and transformed by actors seeking to either perpetuate or challenge dominant regimes through oral and written imposition of particular frames.<sup>296</sup> Discourse that dominates thinking and appears in institutional arrangements is hegemonic.<sup>297</sup> These institutional arrangements serve to freeze relations of power to the advantage of the authoritative group.<sup>298</sup> When confronted with uncertainty or instability, the tendency is to interpret and respond to the

<sup>291</sup> Martin Rein & Donald Schön, *Reframing Policy Discourse*, in THE ARGUMENTATIVE TURN IN POLICY ANALYSIS AND PLANNING, *supra* note 11, at 145, 146.

<sup>292</sup> See Lovell, *supra* note 290, at 39 (“Framing of an issue is judged to be an important precursor to more detailed policy-making . . . because it sets the boundaries around an issue and allows ownership of it by certain actors. It is a particularly critical stage in policy making if dealing with complex, interdisciplinary issues which require action across a range of different sectors and institutions; characteristics of most environmental problems.”).

<sup>293</sup> HAJER, *supra* note 284, at 54.

<sup>294</sup> See Rosen & Mehan, *supra* note 286, at 657; Sally Engle Merry, *Courts as Performances: Domestic Violence Hearings in a Hawai’i Family Court*, in CONTESTED STATES: LAW, HEGEMONY AND RESISTANCE 35, 54 (Mindie Lazarus-Black & Susan F. Hirsch eds., 1994).

<sup>295</sup> Ronald R. Krebs & Patrick Thaddeus Jackson, *Twisting Tongues and Twisting Arms: The Power of Political Rhetoric*, 13 EUR. J. INT’L REL. 35, 45 (2007) (quoting JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 103 (1990)).

<sup>296</sup> Adger et al., *supra* note 283, at 683; Hajer & Versteeg, *supra* note 282, at 177; Thomas Wanner, *The New ‘Passive Revolution’ of the Green Economy and Growth Discourse: Maintaining the ‘Sustainable Development’ of Neoliberal Capitalism*, 20 NEW POL. ECON. 21, 21–24 (2015). See generally Dudas, *supra* note 285 (discussing the constitutive impacts of Reagan’s political discourse).

<sup>297</sup> Adger et al., *supra* note 283, at 685.

<sup>298</sup> For example, neoliberalism can be said to be the hegemonic discourse of the post-Cold War era, with its emphasis on free market capitalist principles, cost-benefit analyses of political and social decisions, and expectations of economic growth. See, e.g., Simon Springer, *Neoliberalism as Discourse: Between Foucauldian Political Economy and Marxian Poststructuralism*, 9 CRITICAL DISCOURSE STUD. 133, 135–37 (2012) (discussing the rise of neoliberalism as a field of academic enquiry, the accompanying lack of consensus on its definition, and identifying four variations of neoliberalism); Wanner, *supra* note 296, at 36–37 (noting the emergence of counter-hegemonic discourse challenging neoliberalism and seeking to reassert the social and political dimensions of environmental economics).

situation according to the existing dominant meanings and practices.<sup>299</sup> In the divestment movement, campaigners are unequally situated vis-à-vis the endowment managers, who have discretion over the management of the endowment. The campaign discourse challenges the dominant neoliberal ideology of fiduciary finance while attempting to persuasively frame divestment as consistent with that same ideology. This is tricky; the campaigners will need to be consistent if they want their discourse to be as convincing to the endowment managers as possible.

### *1. Narratives*

To focus the discourse analysis, this Article examines the “narratives” that appear in the campaigns.<sup>300</sup> As a form of discursive rhetoric, narratives tell stories about actors using familiar archetypes (for example, heroes versus villains, David versus Goliath).<sup>301</sup> Narratives “are the glue that unite discourse coalitions, defined as ‘the essential discursive cement that creates communicative networks among actors with different or at best overlapping perceptions and understandings.’”<sup>302</sup> Although narratives and archetypes are meant to serve as shorthand, their meaning presumptively mutually understood, this presumption is often false.<sup>303</sup> Moreover, rhetorical reliance on archetypes is less flexible in terms of pivoting between different audiences.<sup>304</sup> Narratives as a vehicle for framing are important to divestment discourse because “[w]hether or not a situation is perceived as a political problem depends on the narrative in which it is discussed,” as does whether or not a proposed solution is deemed acceptable.<sup>305</sup> Therefore, whether climate change, stranded assets, and fossil fuel companies are accepted as problems, and divestment as the preferred method of dealing with those problems, will depend in part on the narratives used to frame the issue.

### *B. Legal Discourse*

Common law’s reliance on precedent means that language is especially important in the law because the weight of precedent demands conformity

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<sup>299</sup> Rosen & Mehan, *supra* note 286, at 657 (discussing organizational responses to instability in the context of campus affirmative action politics as mechanisms for defusing challenges of authority).

<sup>300</sup> Or “story lines,” as Hajer calls them. Hajer, *supra* note 11, at 47.

<sup>301</sup> In the broader cultural politics of climate change, the use of the villain–hero archetype is recurrent in climate change discourse, as is the closely related David versus Goliath narrative. *Id.* at 44–45; Adger et al., *supra* note 283, at 687; *see also* PETER J. NEWELL, CLIMATE FOR CHANGE: NON-STATE ACTORS AND THE GLOBAL POLITICS OF THE GREENHOUSE 86–95 (2000).

<sup>302</sup> Lovell, *supra* note 290, at 37 (quoting HAJER, *supra* note 284, at 63).

<sup>303</sup> Hajer & Versteeg, *supra* note 282, at 177.

<sup>304</sup> Krebs & Jackson, *supra* note 295, at 38–39.

<sup>305</sup> HAJER, *supra* note 284, at 45.

with its discourse.<sup>306</sup> Legal discourse provides and reinforces shared social expectations, norms, and beliefs that function as interpretative signals for peoples' personal and social actions and experiences.<sup>307</sup> Law's vocabulary, grammar, and knowledge as "methods of sense-making are potent . . . because they rely upon widely accepted ideals, such as due process, equal treatment, and individual freedom."<sup>308</sup> Thus like all law, the legal discourse of endowment law functions as a sanctioned and codified order of norms and practices governing the procedure and outcomes of the endowment's management while perpetuating the dominant, institutionally sanctioned power structure.<sup>309</sup> Backed by an authoritative system of justice, the law functions as an authoritative tool through which certain justifications are sanctioned and others rejected.<sup>310</sup> As such, "Law is a surface over which political opponents engage in hegemonic practices, trying to enlist its rules, principles and institutions on their side, making sure they do not support the adversary."<sup>311</sup> The law is thus an explicit and controlling discursive "order of justification" that can be used as a political tool.<sup>312</sup> Law's discursive conventions are at the core of politics, because they are constitutive both in terms of perception and in terms of articulated action.<sup>313</sup> For those pursuing individual or collective interests and agendas, the constitutive impacts of legal discourse can provide instrumental and strategic political resources.<sup>314</sup>

Constructivist legal scholarship posits that "social action depends upon law."<sup>315</sup> Discourse and normative framing that align with existing frameworks

<sup>306</sup> For the sake of brevity, the Article does not delve further here into the rabbit hole of the epistemology of law. See, e.g., Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 729 (1989). Suffice it for now to consider law as a hegemonic tool of power, dominance, and legitimacy. Susan F. Hirsch & Mindie Lazarus-Black, *Performance and Paradox: Exploring Law's Role in Hegemony and Resistance*, in CONTESTED STATES: LAW HEGEMONY AND RESISTANCE, *supra* note 294, at 1, 2–3.

<sup>307</sup> Dudas, *supra* note 285, at 164; see also Richardson & Cragg, *supra* note 42, at 31 ("What the law can accomplish is contingent on the kind of economic, cultural and political conditions in which it functions.").

<sup>308</sup> Dudas, *supra* note 285, at 165. In the law of endowments, the laudable fiduciary principles of trust, loyalty, prudence, care, and impartiality help the law derive similar potency.

<sup>309</sup> See *id.* at 164; see also Litowitz, *supra* note 286, at 516, 519, 548 (explaining that the legal system and concepts within it strengthen certain beliefs and practices as "common sense," and become the dominant structure that is "very difficult to subvert"). See generally RAINER FORST, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE (Jeffrey Flynn trans. 2012).

<sup>310</sup> Litowitz, *supra* note 286, at 547–48.

<sup>311</sup> Martti Koskeniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197, 200 (2004).

<sup>312</sup> FORST, *supra* note 309, at 1 ("[W]e can call a social context 'political' when human beings find themselves in an 'order of justification,' which consists of norms and institutions that are to govern their lives together in cooperation as well as in conflict—in a justified or justifiable way.").

<sup>313</sup> Dudas, *supra* note 285, at 165.

<sup>314</sup> *Id.*

<sup>315</sup> *Id.* (quoting John Brigham, *Right, Rage, and Remedy: Forms of Law in Political Discourse*, 2 STUD. AM. POL. DEV. 303, 304 (1998)).

are more likely to be successful,<sup>316</sup> just as legal arguments that align closely with the weight of authority are more likely to be successful. Thus, the outcome of the divestment campaign will be affected by how closely aligned the campaign discourse is with the discourse of endowment law. Therefore, campaigners should ideally be making their rhetoric fit as closely as possible within the law of divestment if their goal is to persuade the trustees to divest.

Yet, as this Article explores, the act of divestment is not the final goal of the divestment movement; rather, it is an intermediary objective.<sup>317</sup> While addressing climate change as the core issue, the underlying motive for divestment is political.<sup>318</sup> This means there are two discursive frameworks the campaigners are attempting to target simultaneously: one related to the divestment procedure that targets the trustees and administration, and the other to the political agenda promoted through divestment that targets students, the public, the fossil fuel companies, and ultimately, the government. Campaigners will want to deploy discourse that appeals to both goals and audiences, but the seemingly antipodal nature of the worldviews embodied in and perpetuated by these different objectives makes such discursive dualities problematic. Placing the fossil fuel divestment within the broader cultural politics of climate change sheds light on why the movement's straddling of two discursive frameworks is such a tricky act to pull off.

### *C. Climate Discourse and the Cultural Politics of Climate Change*

To understand the cultural politics of divestment, divestment must be contextualized within the cultural politics of climate change.<sup>319</sup> The past one hundred years has seen a “greening of international society,” whereby environmental norms have contributed to the reconceptualizations of global economic thinking to include ecological responsibility.<sup>320</sup> This greening has colored multiple levels of governance, from nongovernmental organizations and civil society to nation states and international institutions, such as the United Nations and the World Bank.<sup>321</sup> Moreover, “whilst corporations

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<sup>316</sup> See Falkner, *Global Environmentalism*, *supra* note 68, at 515 (“[C]onstructivism reminds us that norm change is likely to succeed if an emerging norm resonates with the existing normative framework . . .”).

<sup>317</sup> See *infra* Part VI.B.

<sup>318</sup> See *id.* at 49, 73 (asserting that the goal of the fossil fuel divestment is “to achieve far-reaching changes in the energy sector.”).

<sup>319</sup> The term “cultural politics” is used loosely here to refer to the interplay between culture and politics, as in the term “political economy,” i.e., the interplay between law, economics, and politics. *E.g.*, Amita Baviskar, *For a Cultural Politics of Natural Resources*, 38 *ECON. & POL. WKLY.*, 5051, 5051 (2003); David Kennedy, *Law and the Political Economy of the World*, 26 *LEIDEN J. INT’L L.* 7, 8 (2013).

<sup>320</sup> See Falkner, *Global Environmentalism*, *supra* note 68, at 504–05, 520.

<sup>321</sup> *Id.* at 516 (“Global green politics has augmented the range of governance mechanisms at work and enhanced the role [of] non-state actors . . . . Global environmentalism has led to an

dominate climate change as drivers of the phenomenon, the governance of climate change takes place on a global political level” that requires cooperation between different stakeholders operating at different levels of governance.<sup>322</sup> This multilevel environmental governance has successfully advanced ecological norms, but retains tensions between different ideological and economic disparities among multiple stakeholders.<sup>323</sup>

The divestment movement originates in the modern environmentalist movement, which tends to view global politics as ecologically dysfunctional, takes issue with the dominant market-based growth paradigm, and casts capitalism and its expansionist, industrial logic as the root of global, ecological evil.<sup>324</sup> While the “green agenda” has become mainstream, it has had to conform with and adapt to the essential tenets of market-based capitalism.<sup>325</sup> Such a “compromise of liberal environmentalism” has become institutionalized and “predicates environmental protection on the promotion and maintenance of a liberal economic order.”<sup>326</sup> The framing of the climate issue in the international climate regime is “in accord with broader understandings, concerning the primacy of markets and the promotion of globalized economic processes.”<sup>327</sup> The divestment movement and its expression of frustration with the slow progress in the international climate regime and domestic implementation thereof can consequently be understood as stemming from the tensions between eco-economic perspectives historically embedded in the global politics of climate change.

Environmental discourse, then, takes the form of cultural politics presenting a set of claims as to what the real problem is<sup>328</sup> and becomes a tool through which deeper social change is sought:

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ever denser web of treaty commitments, institutional linkages and actor networks that nudge states into routinized international environmental cooperation.”); Wheeler, *supra* note 125, at 97 (explaining that corporate actors’ activities and business models may respond to national policies shaped by intergovernmental agreements, such as the United Nations Framework Convention on Climate Change).

<sup>322</sup> Wheeler, *supra* note 125, at 97–98 (“The most appropriate framework for understanding response to climate change is ultimately a global one . . . [and thereby] a clear need for global action to confront a global problem, to encourage all to play a part and to prevent free riding.”).

<sup>323</sup> See Falkner, *Global Environmentalism*, *supra* note 68, at 504–05, 520, 522; Levy & Newell, *supra* note 286, at 85.

<sup>324</sup> Herman E. Daly, *Reconciling the Economics of Social Equity and Environmental Sustainability*, 24 *POPULATION & ENV’T* 47, 48 (2002) (asserting that economic growth viewed as a financial regime fails to account for ecological boundaries and is at odds with ecological sustainability); Robert Goodland & Herman Daly, *Environmental Sustainability: Universal and Non-Negotiable*, 6 *ECOLOGICAL APPLICATIONS* 1002, 1006 (1996) (discussing tensions between human-made and natural capital); Gay W. Seidman, *Divestment Dynamics: Mobilizing, Shaming, and Changing the Rules*, 82 *SOC. RES.* 1015, 1015 (2015) (establishing a link between divestment movements and environmental concern).

<sup>325</sup> Falkner, *Global Environmentalism*, *supra* note 68, at 520.

<sup>326</sup> STEVEN BERNSTEIN, *THE COMPROMISE OF LIBERAL ENVIRONMENTALISM* 213 (2001).

<sup>327</sup> JOHN VOGLER, *CLIMATE CHANGE IN WORLD POLITICS* 175 (2016).

<sup>328</sup> Hajer, *supra* note 11, at 45–48.

As much as the environmental dilemma is a problem of ethics and epistemology, it is also a problem of discourse. Various proposals to resolve the crisis are put forth by different social groups . . . . All groups have a particular perspective and use a specialized language developed specifically to describe and stimulate the practices characteristic of their particular outlook on the world.<sup>329</sup>

Within American environmental politics, which operates “as a set of tacit commitments, tendencies, stereotypes, and prejudices rather than as a reflective worldview or a coherent philosophy,”<sup>330</sup> the dominant discourses reflect this divide between more radical ecological factions and neoliberal managerialism.<sup>331</sup> When faced with value conflicts, the gap between these perspectives comes sharply into relief.<sup>332</sup> As evidenced in its discourse, the divestment campaign serves as a flashpoint for those value conflicts.

### *1. Managerial and Radical Climate Discourses*

Studies of climate discourse identify two common discourses: managerialism and profligacy.<sup>333</sup> These discourses may overlap or be inconsistently subscribed to.<sup>334</sup> Despite these irregularities, they provide a useful classification and proxy for identifying elements of cultural politics. Accordingly, they are adopted here and used as the basis for the discourse analysis. Discourses are “seldom, if ever, fundamentally coherent.”<sup>335</sup> However, the discourse of endowment management is distinctly managerial. Managerialism is consistent with corporatist eco-modernization,<sup>336</sup> which “applauds market efficiency, technological innovation, and managerial

<sup>329</sup> M. JIMMIE KILLINGSWORTH & JACQUELINE S. PALMER, *ECOSPEAK: RHETORIC AND ENVIRONMENTAL POLITICS IN AMERICA* 6 (1992).

<sup>330</sup> Dale Jamieson, *Energy, Ethics, and the Transformation of Nature*, in *THE ETHICS OF GLOBAL CLIMATE CHANGE* 16, 19 (Denis G. Arnold ed., 2011). In this way, environmentalism “function[s] more like an American political party (a large, diverse set of interest groups) than a set of philosophical commitments or worldviews.” *Id.* at 20.

<sup>331</sup> Much of the American discussion until recently has focused predominantly on whether or not climate change is occurring, as opposed to what the best approaches to addressing it are, although this has been shifting. See William C. Tucker, *Deceitful Tongues: Is Climate Change Denial a Crime?*, 39 *ECOLOGY L.Q.* 831, 845–50 (2012) (providing a general overview of climate change denial, including a history of why and how people deny climate change as a valid proposition).

<sup>332</sup> Jamieson, *supra* note 330, at 20.

<sup>333</sup> Adger et al., *supra* note 283, at 697–98.

<sup>334</sup> See *id.* at 698.

<sup>335</sup> Everett & Neu, *supra* note 285, at 8; accord HAJER, *supra* note 284, at 45 (“Environmental discourse . . . should not be understood as one coherent whole. In fact a discussion of a typical environmental problem involves many different discourses.”).

<sup>336</sup> See Everett & Neu, *supra* note 285, at 10; see also Lovell, *supra* note 290, at 37 (defining ecological modernism as a policy discourse “that recognizes the structural character of the environmental problematique, but none the less assumes existing political, economic, and social institutions can internalize the care for the environment.” (quoting HAJER, *supra* note 284, at 25)).

know-how as the way to get to the root of many problems, while still enhancing firms' competitiveness and profitability.<sup>337</sup> Managerialism is reformist in nature, not revolutionary, and while taking environmental-ecological problems seriously, does not challenge the capitalist system head on or pose deeply uncomfortable questions about capital accumulation.<sup>338</sup> It is consistent with neoliberalism in its faith in markets and technology to address social crises.<sup>339</sup> Managerialism is the predominant worldview and is typified by the SRI movement.<sup>340</sup> The approach the Harvard and Stanford endowments take to ESG issues is managerial: addressing the issues through the existing system of fiduciary finance rather than challenging the system as a whole. This is arguably an outcome of the institutionalization of neoliberalism embodied in modern institutional investment.

Conversely, profligacy discourse is consistent with the deep-ecology perspective espoused by McKibben and others in the related environmental justice and green movements.<sup>341</sup> Profligacy is the more radical in that it challenges the dominance of the neoliberal managerial regime. Profligacy alleges that “the carbon economy has run riot,” drawing from scientific and moral imperatives emphasizing climate catastrophe and depicting global capitalism and corporations as villains.<sup>342</sup> This view considers a fundamental change in business models necessary in order to create an ecologically sustainable economic model, one that accounts for the inherent value of nature and looks to long-term sustainability.<sup>343</sup> Deep ecology advocates

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<sup>337</sup> RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW, *supra* note 8, at 387.

<sup>338</sup> David Harvey, *What's Green and Makes the Environment Go Round?*, in THE CULTURES OF GLOBALIZATION 327, 343 (Fredric Jameson and Masao Miyoshi eds., 1998).

<sup>339</sup> More specifically, neoliberalism as policy and program. Springer, *supra* note 298, at 136.

<sup>340</sup> Everett & Neu, *supra* note 285, at 10; Richard Perkins, *The Internationalisation of Managerial Environmentalism: Globalisation, Diffusion and Territorialisation*, 4 GEOGRAPHY COMPASS 1069, 1076 (2010).

<sup>341</sup> Brulle, *supra* note 8, at 386 tbl.21.1 (describing the deep ecology discursive frame in the U.S. environmental movement); Lovell, *supra* note 290, at 35–36 (referring to this idea as “deep green environmentalism.”); Nisbet, *supra* note 216, at 21–22 (discussing the deep ecology movement). There are differences between the terms profligacy and radical—namely that radical can be applied to anything that challenges the dominant regime, whereas profligacy refers to a discourse presenting a particular type of radical challenge; and recognizing that not all radical environmental challenges are the same. Nevertheless, this Article uses the terms interchangeably and loosely classes together all of the eco-radical movements, such as deep ecology, eco-feminism, and deep green. Brulle, *supra* note 8, at 386 tbl.21.1 (describing various eco-radical movements); Jamieson, *supra* note 330, at 19–20 (discussing heterogeneity of American environmental politics).

<sup>342</sup> Adger et al., *supra* note 283, at 699, 704.

<sup>343</sup> *Id.* at 699; see also DRYZEK, *supra* note 286, at 146 (referencing WORLD COMM'N ON ENV'T & DEV., OUR COMMON FUTURE (1987)) (discussing the Commission's definition of sustainability); BRUNO LATOUR, POLITICS OF NATURE: HOW TO BRING THE SCIENCES INTO DEMOCRACY 22, 24–24 (Cathrine Porter trans., 2004) (describing political ecology as a “crisis of objectivity” rather than a crisis of nature: “We are not witnessing the emergence of questions about nature in political debates, but the progressive transformation of all matters of facts into disputed states of affair, which nothing can limit any longer to the natural world alone—which nothing, precisely, can naturalize any longer.”); Andrew Dobson, *Nature (and Politics)*, 17 ENVTL. VALUES 285, 288–89

“believe radical societal changes are necessary in order to achieve environmental sustainability, such as governance via small-scale communities.”<sup>344</sup> Responsible investing, technological efficiency, and institutional reform are inadequate and inappropriate for solving environmental problems like climate change; rather, a conscientious attitudinal shift is required.<sup>345</sup>

As such, profligacy and managerialism are ideologies seemingly at cross-purposes regarding the role of SRI and constitute desirable and justifiable approaches to climate change more generally.<sup>346</sup> The solutions to climate change presented under the profligacy and managerial discourses are consequently diametrically opposed.<sup>347</sup>

## 2. *Ecospeak*

The dynamics between radical and managerial discourses and dichotomous narratives can be better understood through the concept of Ecospeak. Ecospeak “produce[s] its own rhetorical analysis of environmental politics, which emerges . . . as an oversimplified dichotomy.”<sup>348</sup> This dichotomy is between environmentalists seeking “long-term protection of endangered environments regardless of short-term economic costs,” and “developmentalists seeking short-term economic gain regardless of long-term environmental consequences.”<sup>349</sup> This oversimplified dilemma divides two “stages of liberal consciousness” against each other in an allegory of good guys and bad guys demanding value judgments about each side’s “goodness” or “badness.”<sup>350</sup> Such “stark alignment” is a discursive device used by one or both sides to gather opposition against a palpable villain,<sup>351</sup> and is similar to the way managerial and radical profligacy discourses approach the climate issue.<sup>352</sup> This type of divisive language and

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(2008) (discussing a view of sustainability that begins with a straightforward “recogni[tion] that non-human nature exists”).

<sup>344</sup> Lovell, *supra* note 290, at 36 (citing ANDREW DOBSON, GREEN POLITICAL THOUGHT 16 (3d ed. 2000)).

<sup>345</sup> *Id.*

<sup>346</sup> KILLINGSWORTH & PALMER, *supra* note 329, at 16–17. Thus, the perception persists of a “huge gap between a financial materiality model of SRI and an ecologically sustainable economy.” RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW, *supra* note 8, at 383.

<sup>347</sup> Adger et al., *supra* note 283, at 699.

<sup>348</sup> KILLINGSWORTH & PALMER, *supra* note 329, at 9.

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*; accord Jamieson, *supra* note 330, at 17 (observing that energy sources become “value-valenced” by factors other than their ability to do work with which they are associated, for example, nuclear power and the shift from “atoms for peace” to high-risk and harmful). This phenomenon appears in the value judgments Ecospeak makes about fossil fuels.

<sup>351</sup> KILLINGSWORTH & PALMER, *supra* note 329, at 10.

<sup>352</sup> See Dorceta E. Taylor, *The Rise and Fall of the Environmental Justice Paradigm: Injustice Framing and the Social Construction of Environmental Discourses*, 43 AM. BEHAV. SCI. 508, 510 (2000). Drawing on the work of Joel Best, Taylor refers to a “rhetoric of rectitude” that speaks to our values, morals, and desire to “do good” and which is used early in the claims-

argumentative framing “stops thinking and inhibits social cooperation rather than extending thinking and promoting cooperation through communication.”<sup>353</sup> Ecospeak’s undermining of “cooperation through communication” thus acts as a sort of rhetorical handicap.<sup>354</sup> Ecospeak can contribute to rhetorical stridency, which occurs when clear technical understanding of means is sacrificed in the pursuit of high-minded ends.<sup>355</sup>

Since it has been identified in the politics of climate change writ large, Ecospeak is anticipated to also appear to some extent in the campaign discourse. Because Ecospeak is divisive and perpetuates a hero–villain archetype of opposition rooted in divergent ideologies, such as managerial versus radical, its appearance in the campaign discourse would likely have a negative impact on the success of the campaign.

It has been argued that “the environmental movement has failed in part due to the inability of disparate environmental discourses to seek consensus.”<sup>356</sup> As an outcrop of the cultural politics of climate change, divestment discourse is likely to exhibit the same, at times disparate, narratives as the broader cultural politics of climate change. However, narratives that work in the broader social setting may not be as effective a form of rhetoric as would be narratives that align with the fiduciary duties of the trustees, including the specific criteria that divestment trustees are bound to follow. In practice this means that while both campaigners and endowment managers may agree that climate change and the stranded assets issue need to be addressed, they may disagree on the course of action, particularly when the justifications for that action perpetuate the ideological divisiveness of Ecospeak.

#### *D. The Political Climate*

This Article focuses on fossil fuel divestment campaigns and does not explore other student movements. However, it is important to mention the general political climate in which the fossil fuel divestment campaigns have manifested.<sup>357</sup> American campuses are thought to be undergoing a period of “re-politicization,” with campus movements addressing a range of racial,

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making process to call attention to the issue and garner potential supporters to act. Once attention and support is secured, there is a shift to a “rhetoric of rationality” proposing specific policy alternatives in order to justify the claims. *Id.* (citing Joel Best, *Rhetoric in Claims-Making: Constructing the Missing Children Problem*, 34 SOC. PROBS. 101 (1987)).

<sup>353</sup> KILLINGSWORTH & PALMER, *supra* note 329, at 9.

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 77 (discussing RACHEL CARSON, *SILENT SPRING* (1962))

<sup>356</sup> Ryan Gunderson, *Habermas in Environmental Thought: Anthropocentric Kantian or Forefather of Ecological Democracy?*, 84 SOC. INQUIRY 626, 636 (2014).

<sup>357</sup> No attempt is made here to measure or otherwise discern the impact of these forces on the divestment campaign. For the purposes of this Article it is enough to note their existence and to assume that they are impacting in some way the divestment campaign and its discourse.

sexual, environmental, and economic injustices.<sup>358</sup> One *New York Times* Op-Ed calls the situation “a patina of genteel progressivism atop a churning engine of amoral meritocracy,” opining that students feel disillusioned by the broken promises of the meritocratic American capitalist dream, “hunger[ing] for a vehement crusade that will fulfill their moral yearnings and produce social justice.”<sup>359</sup> This resurgence of campus politicization arises from the same impulses—egalitarianism, constitutive social democracy, rebellion against perceived oppressive power regimes and economic justice—behind the divestment campaign.<sup>360</sup>

Outside of the campuses, there are similarly restive political forces at play. Neoliberalism, which has been the dominant worldview since the end of the Cold War and which is embedded in the managerial worldview discussed above,<sup>361</sup> is supposedly in decline after what has for many been an invisible recovery from the Great Recession, paired with the sharp rise in income inequality and a continued failure to mete out more proportionate benefits of the global economic engine.<sup>362</sup> Americans’ faith in Congress is low,<sup>363</sup> as is approval of President Donald J. Trump.<sup>364</sup> A poisonous branch of

<sup>358</sup> Adrienne Green, *The Re-Politicization of America’s Colleges*, ATLANTIC (Feb. 11, 2016), <https://perma.cc/ZZAM-A75A>.

<sup>359</sup> David Brooks, Op-Ed., *Inside Student Radicalism*, N.Y. TIMES, May 27, 2016, at A21 (“The current identity politics movement, like all previous forms of campus radicalism, is sparked by genuine social injustices. Agree or disagree with these students, it’s hard not to admire the impulse to serve a social good and commit to some lofty purpose. On the other hand, this movement does not emerge from a place of confidence and strength. It emerges from a place of anxiety, lostness and fragility. It is distorted by that soil. . . . People who try to use politics to fill emotional and personal voids get more and more extreme and end up as fanatics.”). This interpretation would be consistent with the divestment campaign as a manifestation of climate anxiety and existential dread, leading to a sense of anger and desperation. See SUSAN CLAYTON ET AL., AM. PSYCHOLOGICAL ASS’N & ECOAMERICA, BEYOND STORMS & DROUGHTS: THE PSYCHOLOGICAL IMPACTS OF CLIMATE CHANGE 6 (2014), <https://perma.cc/EY6F-ZZ2H>.

<sup>360</sup> See Brooks, *supra* note 359. For purposes of this Article these are considered as separate movements, despite overlaps in membership.

<sup>361</sup> See *supra* note 298.

<sup>362</sup> See Jonathan D. Ostry et al., *Neoliberalism: Oversold?*, FIN. & DEV., June 2016, at 38, 39, <https://perma.cc/Z7H9-ENLC>. That this article was published in the quarterly publication of the International Monetary Fund, a bastion of neoliberalism, is ironic. Aditya Chakraborty, Opinion, *You’re Witnessing the Death of Neoliberalism – From Within*, GUARDIAN (London) (May 31, 2016), <https://perma.cc/SQ6F-F8C7>. Not all scholars see neoliberalism in decline. See, e.g., COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM 1-2 (2011) (arguing neoliberalism is more about corporate oligarchy than free market economics, and opining it will survive challenges to its dominance). The present discussion however, does not address whether or to what effect there is a decline of neoliberalism, other than to note that whether or not it is actually in decline, this uncertainty and state of economic and political flux could contribute to leveraging a policy window for climate action. Otherwise it is sufficient for purposes here that there continues to be a strong neoliberal trend amongst political and economic regimes and a politically viable alternative has yet to present itself in the mainstream. Future research could pick up the question of how the supposed death of neoliberalism might impact SRI generally and endowments specifically.

<sup>363</sup> R.J. Reinhart, *Americans’ Approval of Congress Unchanged in May*, GALLUP (May 10, 2017), <https://perma.cc/H88Y-9JVU> (20% of Americans approve of Congress, 74% disapprove).

partisan U.S. politics has taken hold, with Europe too experiencing a rise in populism and partisanship.<sup>365</sup>

Coinciding with these political shifts has been a shift in the role rhetoric plays in public engagement. Former BBC Director General Mark Thompson recently opined, “we are living through what amounts to a crisis in public language” whereby traditional political rhetoric has lost its effectiveness, giving way to a chasm between technocratic elites and the public, with one side hiding behind data and the other assuming a conspiracy theory behind every dataset presented as truth.<sup>366</sup> Since social activism does not take place in a vacuum, it is assumed for the purposes of this Article that the politicization of college campuses; the supposed decline of neoliberalism; the rise, both nationally and internationally, of partisan populist politics; and the “crisis” in political rhetoric may all be shaping the divestment campaign and its discourse to some extent.

#### IV. METHODS AND LIMITATIONS

##### *A. School Selection Methods*

Harvard, a nondivested school, and Stanford, a partially divested school, were chosen using the primary selection criteria of endowment size and school prominence on the basis of two assumptions: a large endowment is likely to have a larger real sum of money invested in or exposed to fossil fuel assets, and a prominent school is likely to have more clout as a social catalyst. To begin, a list of divested schools was found on *FossilFree.org*<sup>367</sup> and cross-referenced with a list of the top fifty U.S. endowments<sup>368</sup> and the *U.S. News and World Report* ranking of top U.S. national schools.<sup>369</sup> Stanford was chosen as it is the only partially divested school in the top fifty U.S. endowments that is also a top-tier school. Because there are dozens of nondivested top-tier schools, a third criterion was employed—whether the

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<sup>364</sup> Press Release, Quinnipiac Univ. Poll, U.S. Voters Send Trump Approval to Near Record Low; Quinnipiac University National Poll Finds; No Winner in Media War, but Voters Trust Media More 1, 8 (May 10, 2017), <https://perma.cc/7PLW-G45X> (finding only 36% of poll respondents approved of President Trump, with the top three words respondents said were brought to mind at the thought of President Trump being “idiot,” “incompetent,” and “liar”).

<sup>365</sup> As epitomized by the election of Donald J. Trump to the office of President of the United States, the Brexit decision in the UK, and the popularity of far-right politicians in France, Austria, the Netherlands, and Hungary. Mark Thompson, *From Trump to Brexit Rhetoric: How Today's Politicians Have Got Away with Words*, *GUARDIAN* (London) (Aug. 27, 2016), <https://perma.cc/D4MJ-8B4Q>.

<sup>366</sup> *Id.*

<sup>367</sup> *Divestment Commitments*, *supra* note 255.

<sup>368</sup> NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS, U.S. AND CANADIAN INSTITUTIONS LISTED BY FISCAL YEAR (FY) 2014 ENDOWMENT MARKET VALUE AND CHANGE IN ENDOWMENT MARKET VALUE FROM FY2013 TO FY2014 (2015), <https://perma.cc/DM59-4X2D>.

<sup>369</sup> *U.S. News & World Report Announces the 2014 Best Colleges*, *U.S. NEWS & WORLD REP.*, (Sept. 10, 2013), <https://perma.cc/5F5D-3APU>.

school's administration had made a public decision on divestment—to protect against an outdated dataset.<sup>370</sup> Harvard was selected because Harvard has *the* largest endowment, had decided not to divest, and pairs well with Stanford in several respects: Harvard is private, like Stanford, which is a controlling factor for endowment autonomy;<sup>371</sup> both Massachusetts and California have adopted the UPMIFA;<sup>372</sup> and Harvard does not have an explicit social mission, which Stanford does.<sup>373</sup> Stanford is also colloquially known as the “Harvard of the West.”<sup>374</sup>

### *B. Discourse Analysis Methods and Limitations*

Discourse analysis was chosen because it is widely used in constructionist literature and is a powerful tool for delineating cultural politics as expressed in political rhetoric.<sup>375</sup> Moreover, it relies on language and argumentative rhetoric, which are also integral to legal scholarship. The primary sources for the discourse analysis were online campaign materials from the campaign websites.<sup>376</sup> Secondary materials included all other publicly available print materials, such as campus news articles or op-ed pieces written by the campaign or those identifying with the campaign. Before analyzing the campaign literature, a list of all possible campaign argumentative narratives was devised separately, including moral, legal, social, and economic arguments. These arguments were coded for ideological affiliation, viz., neoliberal/managerial and eco-radical, using the literature on the politics of climate change and climate discourse as guides.

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<sup>370</sup> There is of course the possibility that the schools will signal a policy shift at a later date and reverse or alter their decisions. The divestment campaign continues (as of the publication of this Article), and time will tell. That being said, the fact that the administrations had publicly made decisions on divestment goes some way to providing a more stable set of facts with which to proceed with the analysis.

<sup>371</sup> Public universities, like public pensions such as CalPers, may be subject to governmentally controlled criteria on endowment management. ASS'N OF AM. UNIVS., MYTHS ABOUT COLLEGE AND UNIVERSITY ENDOWMENTS 4 (2009), <https://perma.cc/2EXA-2GJ4>.

<sup>372</sup> Uniform Prudent Management of Institutional Funds, MASS. GEN. LAWS ch. 180A §§ 1–9 (2016); Uniform Prudent Management of Institutional Funds Act, CAL. PROB. CODE §§ 18501–18510 (West 2016).

<sup>373</sup> See *supra* notes 94–95 and accompanying text.

<sup>374</sup> E.g., Edward J. Back, *Stanford Cultivates 'School Spirit' and Rallies in Drive to Become 'The Harvard of the West'*, HARV. CRIMSON (Sept. 26, 1949), <https://perma.cc/YM8F-P6AQ>; Richard Pérez-Peña, *High School Seniors See Stanford as Harvard of the West*, HONOLULU STAR-ADVERTISER (May 29, 2014), <https://perma.cc/37YG-SFM6>.

<sup>375</sup> HAJER, *supra* note 284, at 43; DRYZEK, *supra* note 286, at 21.

<sup>376</sup> DIVEST HARV., *supra* note 235; FOSSIL FREE STAN., <https://perma.cc/S9GX-Q73V> (last visited Apr. 15, 2017). Just as the divestment movement does not operate in a vacuum, neither do the trustees. Ayling & Gunningham, *supra* note 212, at 6–7. This Article assumes that trustees investigating the issue of divestment will, as part of their duty to investigate, run an online search and consider the materials on the campaign website. See UPMIFA § 3 cmt. (explaining the trustees' duty to investigate). The online campaign material is accessible by all stakeholders; therefore, this Article takes the position that such material should, in theory, strategically target the endowment decision makers as well as other stakeholders, such as student recruits.

*NVivo* (version 10), a popular discourse analysis software, was used to code the primary sources and perform the analysis. “Nodes” were manually identified based on groupings of similar language. For example, “catastrophic,” “famine,” and “extreme” were grouped in one node, while “carbon bubble,” “stranded assets,” and “share prices” were grouped a second node. These nodes served as proxies for strands of discourse, the first for profligacy and the second for managerial. The campaign text was uploaded to *NVivo* and the program identified and calculated the nodal occurrences. The results were then cross-checked with the list of arguments to determine affiliation with political climate ideology.

There are numerous limitations to the discourse analysis. The depth of data was limited to textual sources from the campaign websites.<sup>377</sup> All audio-visual and social media content, such as tweets and Facebook posts, were ignored. Further research could elucidate whether social media content such as tweets made by campaigners reflect a mix of radicalism and managerialism.<sup>378</sup> Arguments in the online literature may have evolved over time and not have been updated, and may have also been tailored specifically to suit the website audience.<sup>379</sup>

### *C. Survey Methods and Limitations*

A survey of Harvard and Stanford campaigners was chosen to complement the discourse analysis by providing qualitative insight into whether individuals subscribed to the same discourses evident in the campaign literature and to determine whether, if any, discernible discursive consistency with fiduciary duty was intentional. The scope of the hypothesis was narrowed after the survey was circulated and responses received.<sup>380</sup> Only a few select questions are examined herein due to spatial constraints.

After piloting among several neutral volunteers, the survey was administered through the website *Survey Monkey* to the campaigners whose emails were listed on the websites and the campaigns’ general account.<sup>381</sup> At both schools, the general account manager agreed to forward the survey to

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<sup>377</sup> The court filings in the suit brought by DH campaigners against the Harvard trustees were not included. *Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll.*, No. SUCV201403620H, 2015 WL 1519036, at \*7 (Mass. Super. Ct. Mar. 17, 2015), *aff’d*, 60 N.E.3d 380 (Mass. App. Ct. 2016). This decision was made in order to keep the focus on the campaign rhetoric itself rather than on legal arguments made in a court of law. The case being filed signals a failure of the campaign to win gains through its rhetorical and campus tactics; the focus here is on the discursive dynamics of the pretrial campaign efforts rather than the litigation strategy.

<sup>378</sup> A mix is likely, although it would be interesting to see whether the tone was more political.

<sup>379</sup> *But see supra* note 376 (noting that the campaigns should attempt to target endowment decision makers with their website).

<sup>380</sup> Many questions are still relevant to the present issue but others have been omitted from the results and analysis.

<sup>381</sup> Prior informed consent was obtained.

the student campaign mailing lists and students self-selected to participate. This method of self-selected sampling is imperfect but was the most practical given the lack of contact information for more than a few campaigners. This method also allowed for the contact information of those on the mailing list to be protected. Prior informed consent was obtained and no personally identifiable information was collected. The response rate was expected to be low because at the time of the survey distribution it was mid-summer when many students were on vacation, and there was no compensation for participating. Based on estimates from the general account managers, there were approximately fifty potential respondents in total. Because of the intent to use the survey for qualitative data collection and the small number of respondents, no statistical analysis was performed. The percentages used in this paper are percentages of respondents and should not be extrapolated to mean percentages of the campaigners as a whole.

The survey asked respondents to identify their school and their relationship to the campaign. The questions were targeted to elicit information related to divestment and fiduciary duty. Fill-in answers were provided along with comment boxes in order to elicit qualitative data. The design sought to mitigate several forms of potential bias. Selection bias could not be controlled, given that this was an ex post facto survey reliant on self-reporting. Cognitive bias was countered by having the respondents identify their personal views on divestment, fiduciary law, and the management of their school's endowment. The survey questions were ordered so as to minimize bias, e.g., by asking why they chose to support divestment before asking about fiduciary duty. Space for comments was left after most questions and at the end of the survey in order to counter ambiguity and allow for related but otherwise unsolicited responses. *Survey Monkey's* reporting metrics were used to manage the survey distribution and results. The responses were coded for managerial and profligacy discourses using the same matrix and coding as used for the discourse analysis, and were also read through for cognitive comprehension of arguments.

Like the discourse analysis, the survey has numerous limitations. The low survey response rate reflects a small portion of the campaign population within a snapshot of time. A random sample would have reduced the bias inherent in self-selection, as those inclined to respond may correlate more or less with particular views on divestment. Moreover, only two schools were surveyed, and both are elite institutions where the perspectives and ideologies of the students may be skewed accordingly. Therefore, only anecdotal weight can be given as to its representativeness of the movement as a whole, and no statistical significance can be given to the results. Nevertheless, the campaign literature acts as a balance and the responses color the literature in a helpful (albeit anecdotal) way.

A second survey was initially conceived to be administered to endowment trustees, but this was dropped due to concerns over space and scope. Interviews would have worked instead of, or in addition to, surveys, but surveys were chosen for ease of distribution, collection, and analysis. In

an effort not to confuse respondents, and for sake of brevity, the survey did not distinguish between the different management companies, boards of trustees, and advisory committees despite the nuances between the laws governing these stakeholders. Rather, the terms “(board of) trustees” or “endowment managers” were used generally. This may have been confusing despite the intention otherwise.<sup>382</sup> Also, it is possible respondents were biased by the author’s self-identification, perhaps using different discourse than they otherwise would have.<sup>383</sup>

This analysis does not break down the results on a school-by-school basis. The discourse and narrative results are distinguished by school but are considered in the aggregate. The decision to approach the analysis in this way was based on the broad consistencies in the discourse at both schools. Nor does the analysis seek to determine differences in outcome, such as why FFS was more successful than was DH, although some musings on this are included in the Discussion. Finally, this Article does not delve deeply into the legal case for divestment other than as discussed below.<sup>384</sup>

## V. ANALYSIS

### A. Discourse Analysis

Three primary narratives were identified in the justification of immediate divestment as the preferred strategy over insider strategies: 1) “Time Is Up” (hereinafter Time); 2) “Fossil Fuel Companies Are Villains” (hereinafter Villains); and 3) “Divestment Is Heroic” (hereinafter Heroic), which underpins the other two narratives.<sup>385</sup>

#### 1. Time Is Up

There are two variants of the Time narrative, one moral-ecological and the other techno-managerial. The moral-ecological time variant is a narrative of imminent climate chaos. There is not enough time to pursue insider strategies because climate chaos is happening at this moment, with global, disproportionate, and intergenerational impacts. Insider strategies are theoretically commendable, only there is not sufficient time to attempt them. This node appeared thirty-six separate times and takes two imperatives: a moral-ecological profligacy variant and a managerial variant.

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<sup>382</sup> The instructions ought to have explained the choice of terminology and provided a definition.

<sup>383</sup> At the time the survey was administered, the author was an M.Sc. candidate in Environmental Policy and Regulation at the London School of Economics, and self-identified as such.

<sup>384</sup> See *infra* Part VII.

<sup>385</sup> This analysis focuses on narratives justifying rapid divestment before insider strategies.

The rhetoric of the moral-ecological Time narrative is generally apocalyptic, presenting “climate chaos” as “extreme,” already “wreaking havoc,” and thus requiring immediate action or else civilization will be beyond saving.<sup>386</sup> This is the rhetoric of climate catastrophe integral to the profligacy discourse typified in McKibben’s work.<sup>387</sup> It liberally employs adjectives and imagery to make an emotionally charged urgent appeal, with words like “alarming,” “catastrophic,” and “extreme.”<sup>388</sup> This narrative uses temporal language paired with drastic imagery to justify a call for drastic action. For example:

At that level of warming, *tens or hundreds of millions of people* will be displaced by rising sea levels and many more by increased flooding and storm surges; *extreme* heat waves and droughts will *decimate* crop yields, leading to *famine and starvation*; *critical* ecosystems such as the world’s coral reefs and the Amazon rainforest may be *destroyed*; and . . . [p]erhaps *most frighteningly*, *positive feedback cycles may be set in motion that will perpetuate the warming and make it irreversible*.<sup>389</sup>

“Frighteningly” sparks fear, while imagery of mass famine and starvation of hundreds of millions of people employs a rhetoric of rectitude to ignite action based on moral outrage and existential terror.<sup>390</sup> The biblical scale of the depicted events is consistent with the Villains narrative in its reliance on a David–Goliath archetype and the language of fear.<sup>391</sup>

A less apocalyptic, more techno-managerial mode of the Time narrative can also be discerned. An example is DH’s factsheet, titled, *The Science of the Climate Crisis: The Urgency of Climate Change and Why We Have to Act Now*.<sup>392</sup> This fact sheet is meant to stress climate change as an *urgent crisis* compelling drastic action, yet few of the facts utilize temporal rhetoric and those that do are vague. Cod population thresholds “will be met *sometime this coming century*,” and northeast heat waves will increase “in the future.”<sup>393</sup> The sense of urgency is downplayed from the frantic rhetoric of the climate apocalypse. The impacts listed appear relatively modest, “[s]ki and snowboard seasons will be cut short,” and even benign, “[d]eforestation produces [carbon] but *most has been offset by the carbon uptake in tropical*

<sup>386</sup> *E.g.*, *Rebuttals*, DIVEST HARV., <https://perma.cc/6WFR-WF6H> (last visited Apr. 15, 2017); *Harvard Heat Week Student Call to Action*, DIVEST HARV. (Apr. 12, 2015), <https://perma.cc/CWZ7-GUHX>.

<sup>387</sup> *E.g.*, McKibben, *Terrifying New Math*, *supra* note 178.

<sup>388</sup> Taylor, *supra* note 352 (discussing idioms and motifs used in profligacy discourse); *e.g.*, FOSSIL FREE STANFORD, THE CASE FOR FOSSIL FUEL DIVESTMENT AT STANFORD UNIVERSITY 2, 6 (2015) [hereinafter FFS, THE 2015 CASE FOR DIVESTMENT], <https://perma.cc/9MGK-YC53>.

<sup>389</sup> FFS, THE 2015 CASE FOR DIVESTMENT, *supra* note 388, at 6 (emphasis added) (footnotes omitted).

<sup>390</sup> Taylor, *supra* note 352.

<sup>391</sup> *See* discussion *infra* Part V.A.2.

<sup>392</sup> *The Climate Crisis*, DIVEST HARV., <https://perma.cc/Q3MU-NT8A> (last visited Apr. 15, 2017).

<sup>393</sup> *Id.* (emphasis added).

*regrowth forests.*<sup>394</sup> The result is not that climate change is diminished as a problem, but the temporal justification for skipping insider strategies in favor of rapid divestment is diminished.

Whereas the moral-ecological Time variant focuses on the socioecological ramifications of the imminent climate apocalypse, the neoliberal-managerial variant focuses on the economic ramifications of imminent climate regulation—i.e., stranded assets. Fossil fuel companies are not “bad guys,” just bad investments. This node appeared twenty-three separate times. The rhetoric is about share prices and credit: “Climate legislation will impact the *share prices* of fossil fuel *corporations*. *Standard and Poor’s* warned that oil *corporations* could face a *credit downgrading* if governments achieve meaningful climate *legislation*.”<sup>395</sup>

The language also stresses the role of government: “*If government action takes place*, trillions of dollars of fossil fuel reserves are worthless”<sup>396</sup>; emphasizing regulatory risk and appealing to concerns over prudence and care. The imperative is eco-managerial, acknowledging the utility of shareholder action but arguing there is no time to try it because of the imminence of climate regulation and climate impacts: “We could have talked about using *shareholder resolutions* 30 years ago, but *now that we have a rapidly closing window for action*, we need to act *swiftly and boldly*.”<sup>397</sup> However, there is some tension between accepting the eco-managerial variant of the Time narrative and accepting the Villains narrative.

## 2. Fossil Fuel Companies Are Villains

The Villains narrative presents fossil fuel companies as actors in bad faith from whom endowments should disassociate for ethical and risk-management reasons. The three variations are that fossil fuel companies are villains because they are reckless and unethical, they do not respond meaningfully to shareholders, and they have politically captured the government.

In the first formulation, the companies are *reckless* and *unethical* entities. For example, “As long as fossil fuel companies continue with business as usual, they must be thought of as an *unethical* industry, *recklessly pushing us toward global catastrophe*.”<sup>398</sup> Recklessness may evoke the specter of legal liability in the minds of fiduciaries, who could face liability for engaging in reckless decision making and ignoring material

<sup>394</sup> *Id.* (emphasis added).

<sup>395</sup> *Why Divestment?*, DIVEST HARV., <https://perma.cc/6XCS-J7ZA> (last visited Apr. 15, 2017) (emphasis added) (referencing SIMON REDMOND & MICHAEL WILKINS, STANDARD & POOR’S RATING SERVS., WHAT A CARBON-CONSTRAINED FUTURE COULD MEAN FOR OIL COMPANIES’ CREDITWORTHINESS (2013), <https://perma.cc/7B5N-QFU6>).

<sup>396</sup> *Economic Arguments*, DIVEST HARV., <https://perma.cc/LGD2-MMEW> (last visited Apr. 15, 2017) (emphasis added).

<sup>397</sup> *Rebuttals*, *supra* note 386 (emphasis added).

<sup>398</sup> FOSSIL FREE STANFORD, THE CASE FOR FOSSIL FUEL DIVESTMENT AT STANFORD UNIVERSITY 6 (2014), <https://perma.cc/B2AD-XKRN>.

risk.<sup>399</sup> The companies will push the world to disaster whatever the cost to everyone else. This “rhetoric of rectitude” appeals to the audience’s morals, values, and “desire to do good” in an attempt to justify divestment.<sup>400</sup>

The second variant of the Villain narrative alleges that the companies will not respond meaningfully to shareholder action because they are *unethical*. The narrative adopts the refrain that efforts to negotiate with the villains have repeatedly failed. For example, “*attempt after failed* attempt of discussing change with these companies has shown us that it’s going to take more than asking nicely.”<sup>401</sup> And, “our seat at the table *has not and will not allow* us to address the challenge at hand.”<sup>402</sup> Bad faith is implied; the corporations will ignore shareholders’ concerns and keep on with their reckless conduct without managing the risks.<sup>403</sup> Recall that the inability to influence company policy through shareholder action is a key element of the standard for divesting at both Harvard and Stanford,<sup>404</sup> making the strength of this narrative essential to a winning divestment argument.

However, the third variant of the Villains narrative threatens to undermine the persuasive gains to be had from the other two variants. The third variation alleges that the government has been politically captured by the villainous fossil fuel companies. For example, “Fossil fuel companies have a stranglehold on the American and global economic systems.”<sup>405</sup> Divestment is both righteous and necessary because of the “entrenched interests and *political* power of the fossil fuel industry.”<sup>406</sup> This is classic profligacy, calling for a “new economic order” to correct a “carbon economy run riot.”<sup>407</sup> The challenge at hand that insider strategies are futile at addressing is not climate change per se; rather, it is the global economic and political dominance of fossil fuel companies. For example, “The divestment

<sup>399</sup> Recklessness is “[c]onduct whereby the actor does not desire harmful consequences but nonetheless foresees the possibility and consciously takes the risk.” *Recklessness*, BLACK’S LAW DICTIONARY (10th ed. 2014). Ignoring recklessness by a company whose assets are held by the endowment could expose the trustees to breach of prudence and care claims. See *Prefatory Note* to UPMIFA 1, 2 (noting that the Act imposes a “modern, well accepted, prudence standard based on [the Uniform Prudent Investor Act]”); cf. *Bullock v. Bankchampaign, N.A.*, 133 S. Ct. 1754, 1759–60 (2013) (interpreting defalcation to include situations “[w]here, . . . the fiduciary ‘consciously disregards’ (or is willfully blind to) ‘a substantial and unjustifiable risk’ and explaining that such conduct will ‘violate a fiduciary duty’”).

<sup>400</sup> Taylor, *supra* note 352.

<sup>401</sup> *Rebuttals*, *supra* note 386 (emphasis added).

<sup>402</sup> FFS, THE 2015 CASE FOR DIVESTMENT, *supra* note 388, at 9 (emphasis added).

<sup>403</sup> In the case of tobacco, this type of bad faith on the part of the tobacco companies was cited in the justifications the trustees gave for divesting. The endowments’ poor experience with the companies in response to shareholder proxies related to health and safety concerns was supporting evidence. See *Harvard’s Investment Policy with Regard to Tobacco*, *supra* note 106.

<sup>404</sup> See *supra* Part II.E.

<sup>405</sup> Beck Goodloe et al., Op-Ed., *Fossil Free Freshman Respond to Criticism of Civil Disobedience*, STAN. DAILY (Oct. 27, 2015), <https://perma.cc/6H5S-ZUWU>.

<sup>406</sup> FFS, THE 2015 CASE FOR DIVESTMENT, *supra* note 388, at 9 (emphasis added).

<sup>407</sup> Adger et al., *supra* note 283, at 699–700.

movement confronts that sophistry [of consumers having the choice not to purchase fossil fuels], revealing how the fossil fuel industry coerces consumers into using carbon-based energy.”<sup>408</sup> Consumer choice is a fiction, consumers are coerced, and the divestment movement must confront the villains perpetrating these injustices. This narrative is problematic for fiduciaries because it is politically radical and obscures the teleological issue of what the campaign’s motives are.

### 3. *Divestment is Heroic*

A related rhetorical thread is the Heroic narrative, which ties together the Time and Villains narratives. The Heroic narrative presents divestment as a course of both necessary and effective action. Divestment “confronts sophistry,” and pulls the wool back from the eyes of “coerce[d] consumers.”<sup>409</sup> This narrative assumes divestment is capable of getting to the core of the issue and presents divestment as the savior standing between business as usual and a catastrophic wipe-out. “There is no reason to think that business as usual will work in the future. We must get at the root of the problem—the business model of the fossil fuel companies—or else all of Harvard’s good research and education will be, quite literally, wiped out.”<sup>410</sup> The endowments must divest, *or else* everything will be *literally, wiped out*.

The Heroic narrative works in tandem with the Villains and Time narratives—time is up and only divestment can save the world from the villainous fossil fuel companies who have a “stranglehold on our government.”<sup>411</sup> Insider strategies, when addressed at all, are presented as either ineffective or temporally inefficient. “We could have talked about using shareholder resolutions 30 years ago, but now that we have a rapidly closing window for action, we need to act *swiftly* and *boldly*.”<sup>412</sup> The underlying assumption is that divestment is capable of swift and bold action to address the challenge at hand, whereas insider strategies are not. When it comes to stopping discreet climate-related projects, “the numbers just don’t add up,”<sup>413</sup> but supposedly the numbers can and will add up when it comes to divestment.

### B. *Narrative Tensions*

The campaign narratives create tensions that impact the persuasiveness of the arguments presented. These tensions, evident in looking at the

<sup>408</sup> *Why Divestment?*, *supra* note 395.

<sup>409</sup> *Id.*

<sup>410</sup> *Rebuttals*, *supra* note 386.

<sup>411</sup> *The Fossil Fuel Industry*, DIVEST HARV., <https://perma.cc/2QVZ-PQCH> (last visited Apr. 15, 2017); accord Adam Pearson et al., Op-Ed., *Why Stanford Must Divest from Fossil Fuels*, STAN. DAILY (Dec. 4, 2012), <https://perma.cc/4PV7-HR9N>.

<sup>412</sup> *Rebuttals*, *supra* note 386 (emphasis added).

<sup>413</sup> *Frequently Asked Questions*, *supra* note 218.

narratives in isolation, become even more problematic when considered in the context of the legal standard for divestment and the body of professional literature on divestment.

One such tension is between the techno-managerial Time narrative, asserting that time is up because regulation is impending, and the argument put forth by Fossil Free that divestment is necessary to put pressure on governments to enact regulation.<sup>414</sup> If the purpose of the campaign is to build support for government action that does not yet exist, then the argument that divestment is necessary to avoid stranded costs resulting from imminent crippling regulation is weakened. There is a related discursive tension between accepting the narrative of fossil fuel companies as ruthless villains who have captured government and accepting the argument that impending government regulation will create stranded assets.<sup>415</sup> Thus the managerial “rhetoric of rationality” claiming an economic imperative to divest before the imminent regulatory bursting of the carbon bubble, clashes rhetorically with a profligacy “rhetoric of rectitude” claiming divestment is the only means forward because of political capture by fossil fuel companies. It is hard to agree that fossil fuel companies are under imminent threat from government regulation if those same companies are governmental puppet masters.

There is also tension between the moral-ecological Time narrative and the Heroic narrative. The Heroic narrative positions divestment as the “right thing to do,”<sup>416</sup> with the assumption that devastating business as usual will otherwise continue unless the endowments divest. Yet, the Fossil Free campaign admits divestment is unlikely to have a significant economic impact on the companies and that it “won’t be enough to fuel a clean energy revolution.”<sup>417</sup> If the right thing to do is that which is most effective in addressing climate change, then there remains an unresolved question as to why one would chose to support a strategy that is admittedly weak in its ability to change corporate behavior.<sup>418</sup>

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<sup>414</sup> See *id.* (“[W]e need to loosen the grip that coal, oil, and gas companies have on our government and financial markets . . .”).

<sup>415</sup> Compare *Economic Arguments*, *supra* note 396 (“If government action takes place . . .”), and *Why Divestment?*, *supra* note 395 (“[I]f governments achieve meaningful climate legislation.”), with *The Fossil Fuel Industry*, *supra* note 411 (“Only when we have loosened [the fossil fuel corporations] stranglehold on our government . . .”), and FFS, *THE 2015 CASE FOR DIVESTMENT*, *supra* note 388, at 9 (“The entrenched interests and political power of the fossil fuel industry . . .”).

<sup>416</sup> *Frequently Asked Questions*, *supra* note 218.

<sup>417</sup> *Id.* (“While sale of stock might not have an immediate impact on a fossil fuel company, especially one as gigantic as Exxon, what it does do is start to sow uncertainty about the viability of the fossil fuel industry’s business model.”).

<sup>418</sup> See *ANSAR ET AL.*, *supra* note 104, at 14–15 (finding that the most effective impact of divestment is likely to be stigmatization of industry scapegoats, viz., coal—with oil and gas emerging largely unscathed—and stigmatization is unlikely to be fatal to the oil and gas industry, even insofar as it may encourage a legislative response).

### C. Survey Analysis

#### 1. Survey Results

The survey received nine responses in total: seven from FFS and two from DH.<sup>419</sup> The low response rate precludes any statistically significant analysis and the responses should not be extrapolated to represent the campaign as a whole. Nevertheless, the responses do provide some anecdotal evidence further contextualizing the campaign literature with regard to the underlying motives of the campaigners vis-à-vis divestment and their views on fiduciary duty. The responses evidence both managerial and profligacy worldviews consistent with the discourse analysis, reflecting conflicting views of the role of endowments and finance and mixed preferences over climate action. The responses suggest an inconsistent understanding of fiduciary duty both within and across campaigns, although a larger study would be needed to ascertain whether these results represent the broader movement.

##### a. *What do you hope to achieve through the divestment of fossil fuels?* (Q4)

Seven out of nine respondents expressly indicated political motives. These varied from seeking to “stigmatize the fossil fuel companies so that their political power decreases”<sup>420</sup> to hoping “that the political climate will change on climate issues.”<sup>421</sup> Several hoped to decrease the political power of fossil fuel companies, e.g., “show[ing] that big oil’s rule is not unbreakable.”<sup>422</sup> One respondent replied that a “large fraction of US population conceives of climate change as an issue requiring *citizen action*” and that a “significant fraction of the US population conceives of climate change as a *voting issue*.”<sup>423</sup> Another acknowledged:

The ultimate goal is to fight climate change. However, the more immediate goal is to shift the public and political dialogue around climate change. Divestment helps to cast climate change as a moral issue and to stigmatize the fossil fuel industry . . . I would like to see a similar result [to the legislative

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<sup>419</sup> The survey contained twenty-seven questions in total, including school affiliation and bias questions. For sake of brevity, a selection of the most relevant questions were chosen. Further research could seek to administer this survey or a similar one to other campus campaigns. Additional analysis can also be drawn from profiling the respondents based on their answers and exploring in more detail the discursive frameworks used by each individual.

<sup>420</sup> See *infra* Appendix, Respondent 5, Question 4 (FFS); *accord* Respondent 6, Question 4 (DH) (“Stigmatization of the fossil fuel industry . . .”).

<sup>421</sup> See *infra* Appendix, Respondent 2, Question 4 (FFS).

<sup>422</sup> See *infra* Appendix, Respondent 8, Question 4 (FFS).

<sup>423</sup> See *infra* Appendix, Respondent 1, Question 4 (DH) (emphasis added).

result in apartheid] from fossil fuel divestment, that is, a carbon tax or other comprehensive climate policy.<sup>424</sup>

Yet another hoped to “take back the political system.”<sup>425</sup> The politicization of climate change is plainly evident in the respondents’ language. This is consistent with the discourse analysis and the information gleaned from the Fossil Free website.<sup>426</sup>

Several responses employed the villain–hero and David–Goliath archetypes typical of the radical-profligacy discourse, with fossil fuel companies cast as the villainous Goliaths and divestment supporters as heroic Davids.<sup>427</sup> Divestment is not “from any sort of industry—we’re tackling a monolith that has wreaked havoc on the planet and its institutions, from political bodies to free speech to the prospect of peace.”<sup>428</sup> Another wrote, “We are heading towards climate disaster because of the corrupt practices of the fossil fuel companies. Divestment shows we won’t stand for such irresponsible behavior.”<sup>429</sup> Of the two nonpolitical responses, one FFS respondent wanted to solidify Stanford’s position as a sustainability leader and set an example for others.<sup>430</sup> The other response sought to generate more carbon-sensitive behavioral change locally and nationally.<sup>431</sup>

*b. Why divestment over other forms of climate activism? (Q5)*

The responses to this question were more mixed. Two responded that it was because divestment has worked in the past, with one specifying, “Divestment has been successful in the past at stigmatizing dangerous industries/governments and at motivating governments to pass restrictive legislation.”<sup>432</sup> Three expressly considered divestment necessary to “battle” fossil fuel companies.<sup>433</sup> Two mentioned that divestment addresses supply and demand aspects of climate change<sup>434</sup> with one noting divestment was one of many forms of climate activism in which the respondent

<sup>424</sup> See *infra* Appendix, Respondent 7, Question 4 (FFS).

<sup>425</sup> See *infra* Appendix, Respondent 6, Question 4 (DH). Notably, this respondent self-identifies as one of the founders of DH.

<sup>426</sup> See *Frequently Asked Questions*, *supra* note 218 (stressing the need for government action to force the transition away from fossil fuels and noting that divestment will build political momentum).

<sup>427</sup> See discussion *supra* Part V.A.2; see also Adger et al., *supra* note 283, at 698–700 (discussing common archetypes in profligacy).

<sup>428</sup> See *infra* Appendix, Respondent 3, Question 4 (FFS).

<sup>429</sup> See *infra* Appendix, Respondent 8, Question 4 (FFS).

<sup>430</sup> See *infra* Appendix, Respondent 9, Question 4 (FFS).

<sup>431</sup> See *infra* Appendix, Respondent 4, Question 4 (FFS).

<sup>432</sup> See *infra* Appendix, Respondent 7, Question 5, (FFS); *accord* Respondent 5, Question 5 (FFS).

<sup>433</sup> See *infra* Appendix, Respondent 9, Question 5; *accord* Respondents 3, 8, Question 5 (FFS).

<sup>434</sup> See *infra* Appendix, Respondent 1, Question 5 (DH); Respondent 2, Question 5 (FFS).

participated.<sup>435</sup> One said divestment is “about agency” and “taking control of . . . destiny,” and that divestment is the only tactic achieving this.<sup>436</sup>

The radical-profligacy narratives were also evident in the responses. For example, “We are headed towards climate disaster” because of “them,” the “corrupt” fossil fuel companies and “[d]ivestment shows we won’t stand for such irresponsible behavior.”<sup>437</sup> Managerial discourse was also evident, for example, in the two responses indicating divestment was preferable because it addresses supply–demand market failures.<sup>438</sup> One respondent replied that divestment is “[s]calable. Targets root of problem of short-term reward vs. long-term risk management. . . . Facilitates both theoretical and practical progress in discourse.”<sup>439</sup> Economies of scale, short-term profit versus long-term risk management, and progress in discourse all appeal to a managerial perspective that envisions climate change as being manageable through reforming existing economic and political norms.<sup>440</sup> Considered together, these responses indicate varying perspectives among the campaigners, consistent with the heterogeneous nature of the environmental movement.<sup>441</sup>

*c. How familiar are you with “fiduciary duty”? (Q12)*

Only one respondent claimed to be “very” familiar with fiduciary duty; this respondent self-identified as a “founder of Divest Harvard.”<sup>442</sup> The other Harvard respondent replied “somewhat.”<sup>443</sup> The response at Stanford was similarly uneven, containing a mix of “somewhat” (three responses), “not very” (two responses) and “not at all” (two responses).<sup>444</sup> These responses indicate that most of the respondents had at least some passing familiarity with fiduciary duty. However, the mixed responses within the same campus campaigns suggests that fiduciary duty may not have played a significant role in the campaign strategy and may not have been an issue on which campaigners were briefed in depth (although a larger survey would be needed to confirm this).<sup>445</sup>

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<sup>435</sup> See *infra* Appendix, Respondent 2, Question 5 (FFS).

<sup>436</sup> See *infra* Appendix, Respondent 6, Question 5 (DH).

<sup>437</sup> See *infra* Appendix, Respondent 8, Question 5 (FFS).

<sup>438</sup> See *infra* Appendix, Respondent 1, Question 5, (DH); Respondent 2, Question 5 (FFS).

<sup>439</sup> See *infra* Appendix, Respondent 1, Question 5 (DH).

<sup>440</sup> See *supra* Part III.C.1.

<sup>441</sup> See, e.g., Jamieson, *supra* note 330, at 20 (noting ideological hodge-podge of American environmentalism).

<sup>442</sup> See *infra* Appendix, Respondent 6, Question 12 (DH).

<sup>443</sup> See *infra* Appendix, Respondent 1, Question 12 (DH).

<sup>444</sup> See *infra* Appendix, Respondents, 2, 7, 9, Question 12 (FFS) (somewhat); Respondents 4, 9, Question 12 (FFS) (not very); Respondents 3, 8, Question 12 (FFS) (not at all).

<sup>445</sup> It is also possible that those who replied they were not familiar were not involved in higher level strategizing and briefing sessions. The DH respondent who indicated they were a founder of DH very familiar with fiduciary duty did not consider fiduciary duty to mean anything beyond profit maximization; possibly this sort of attitude at the top of the campaign

*d. Did you intentionally frame your arguments to address the fiduciary obligations of the Board of Trustees? (Q18)*

Both campaigns showed inconsistent responses to the intentional framing question, with a relatively even split among those who responded at both schools.<sup>446</sup> The mixed responses within and across campaigns again suggest an inconsistent formulation of campaign arguments and strategy to align with the fiduciary obligations of the trustees. A larger survey would shed more light on this. Anecdotally at least, these responses indicate either an unawareness of, or an unwillingness to craft the campaign to suit, the audience of trustees. This may be because the trustees are not the primary target audience,<sup>447</sup> or, because for some campaigners, fiduciary duty is not perceived as a helpful frame of argument.

*e. Do you feel the fiduciary obligations of the Board of Trustees and endowment managers help or hurt the divestment campaign's efforts? How so? (Q19).*

Of the respondents to this question, three-fourths replied "Help" and one-fourth replied "Hurt," with one abstention.<sup>448</sup> These answers provide further anecdotal evidence that the understanding of fiduciary duty was inconsistent both across and within campaigns. For example, one DH respondent self-identified as a campaign leader and replied, "Hurt. Their definition centers around maximizing financial returns. So that means investing in anything, fossil fuels or guns. That hurts our efforts."<sup>449</sup> This respondent indicated "very" when asked how familiar with fiduciary duty, which is interesting given that the response here indicates a lack of understanding as to the role SRI plays in fiduciary duty.<sup>450</sup> By contrast, another DH respondent replied:

Help . . . They \*should\* help . . . However, there is a common misunderstanding of fiduciary duty to mean maximization of short-term profit.

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precluded those at lower levels in the organization from being briefed on its utility. *See infra* Part V.C.1.d (showing an even mix of respondents who intentionally framed their arguments to align with fiduciary duty and those who did not).

<sup>446</sup> DH respondents were evenly split; two-thirds of FFS respondents replied that they did not intentionally frame their arguments to address the fiduciary obligations of the board. *See infra* Appendix, Question 18. Again, the ratios and percentages used here as elsewhere in this Part cannot be said to be representative of the broader campaign. It is important that these numbers not be used to create a false sense of accuracy about the wider target group. Their inclusion is intended only to anecdotally illustrate (in)consistencies within and across campaigns.

<sup>447</sup> *See* discussion *infra* Part VI.A.

<sup>448</sup> *See infra* Appendix, Question 19. DH again had an evenly split response, while five of the six FFS respondents selected help. *Id.*

<sup>449</sup> *See infra* Appendix, Respondent 6, Question 19 (DH).

<sup>450</sup> *See infra* Appendix, Respondent 6, Question 12 (DH).

For this reason, fiduciary duty has been used as an argument against divestment. If the divestment movement can meet this argument on its own turf and reframe using the real definition of fiduciary duty, then it may ultimately be a powerful argument for divestment.<sup>451</sup>

The second response says that misunderstandings about fiduciary duty are “common” and makes the point that this article also makes: fiduciary duty, properly understood, can be helpful to the campaigners, and they should reframe their arguments accordingly.

Most of the respondents who answered “Help” seemed to have a cogent understanding of the utility of fiduciary duty.<sup>452</sup> One Stanford respondent, who reported a “somewhat” understanding of fiduciary duty, found that using an eco-managerial frame helped prove divesting was in line with fiduciary duty: “Framing the discussion from an economic perspective turned it from a campaign based on ideals to a campaign based on science.”<sup>453</sup> Yet another FFS campaigner wrote, “Many people argued that fiduciary obligations would make divestment impossible, which at times hurt the case for divestment. But I feel that there’s enough research that shows in the long run, investing in renewables is more financially responsible than investing in fossil fuels, and that ultimately helped the campaign.”<sup>454</sup>

The fact that the majority of respondents from both schools felt that fiduciary duty, as they understood it, ultimately helps the campaigners suggests at least some campaigners are aware of the utility of fiduciary duty as an effective argumentative frame. Bringing campaign discourse more in line with this understanding and with a fuller understanding of fiduciary duty in general could help the campaigners even more.<sup>455</sup>

#### *D. Summary of Discourse and Survey Analyses*

The results of the discourse and survey analyses can be summarized as follows: a) both profligacy and managerial discourses are exhibited in the campaign justifications for divestment; b) the tensions created by the at times conflicting discursive narratives point to a political subtext to the campaign, a finding which is further supported by survey responses; and c) there is some anecdotal evidence of inconsistency within and across campaigns as to perceptions of fiduciary duty and its role in the campaign. Larger surveys of more campaigners from more schools would be needed in

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<sup>451</sup> See *infra* Appendix, Respondent 1, Question 12 (DH).

<sup>452</sup> Most but not all; for example, one respondent wrote that “[t]he student poll in favor of divestment helped,” although this respondent admitted to not having a good understanding of fiduciary duty. See *infra* Appendix, Respondent 8, Question 19 (FFS).

<sup>453</sup> See *infra* Appendix, Respondent 4, Question 19 (FFS).

<sup>454</sup> See *infra* Appendix, Respondent 5, Question 19 (FFS).

<sup>455</sup> For example, broadening beyond merely economic returns to include SRI guidelines (duties of prudence and loyalty) and risk management (prudence).

order to extrapolate the results to the larger movement. Nevertheless, the results provide anecdotal evidence that helps fill in the picture painted by the discourse analysis and campaign material.

## VI. MISALIGNMENT AND OPPORTUNITY COSTS

Harvard and Stanford noted in their statements on fossils fuel divestment that they considered divestment, whether partial or full, inappropriate for a range of reasons, including that insider strategies are preferred, oil and gas remain integral to the economy, and the endowments are not the proper arena in which to address climate change.<sup>456</sup> While the campaign has had some commendable success in spite of the low rate of divestitures,<sup>457</sup> it is fair to assume that the campaigners would have liked to have been more successful.<sup>458</sup> The analysis of the campaign literature and surveys reveals campaign narratives that are at times inconsistent, creating tensions that may have incurred opportunity costs for the campaign. At points, the campaign discourse veers into the territory of the distinctly political.<sup>459</sup> These inconsistencies point to inherent tensions in the campaigns' arguments and strategy, and suggest a strategic misalignment between the campaigns' more radical political goals and the bounds of the possible in the endowment arena.

### *A. Audience and Arena*

There are multiple stakeholders involved in the divestment campaign including students, endowment managers, school administrators, the public, government, and fossil fuel companies. McKibben's movement targets students in order to build a grassroots "movement."<sup>460</sup> For students,

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<sup>456</sup> Faust, Fossil Fuel Divestment Statement, *supra* note 118; Stanford Statement on Climate Change, *supra* note 254; *see also* Colleen Walsh, *Q&A with Harvard President Dean Faust: Faust Discusses University's Priorities and Challenges*, HARV. GAZETTE (Sept. 17, 2015), <https://perma.cc/CPG3-SUGU> (quoting Faust: "I don't think divestment is an appropriate tool, because I don't think the endowment should be used for exerting political pressure.")

<sup>457</sup> The chief success of the campaign thus far has been stigmatization and publicity. *See supra* Part II.G.3.

<sup>458</sup> The lawsuit of Harvard students against Harvard trustees for not divesting from fossil fuels shows that for some students, they will not be satisfied with an outcome that is not divestment. *Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll.*, No. SUCV201403620H, 2015 WL 1519036, at \*2–3, \*9 (Mass. Super. Ct. Mar. 17, 2015), *aff'd*, 60 N.E.3d 380 (Mass. App. Ct. 2016).

<sup>459</sup> *See discussion supra* Part V.D.

<sup>460</sup> *See generally How We Work*, 350.ORG, <https://perma.cc/BR9Q-2W3S> (last visited Apr. 15, 2017). Recall that McKibben's campus visits seeded the formation of the campus contingents at both Harvard and Stanford. *See supra* Part II.G. For more discussion of movement's progress, *see Apfel, Exploring Divestment, supra* note 75, at 927 (the divestment campaigns are "key to developing a larger movement"); *see also ARABELLA ADVISORS, supra* note 185 (taking a rosy view of the movement's progress); Ayling & Gunningham, *supra* note 212, at 4 (discussing McKibben's 350.org movement).

university endowments have strategic importance in that they represent a tangible arena with an accessible authority structure, whereas government officials may seem more removed and less approachable.<sup>461</sup> University students have a history of protesting against their administrations and doing so is something of a liberal university tradition.<sup>462</sup> Yet, the targeting of multiple audiences in an era where campaign materials are openly accessible by all stakeholders via the internet, will invariably lead to some discursive misalignment; an audience of students is fundamentally different from an audience of endowment trustees. Endowment trustees operate in a sphere that is legally restricted by fiduciary duties, which are restrictions that do not apply to most of the other stakeholders, such as the faculty, students, the press, and government officials.<sup>463</sup> Employing divisive Ecospeak and archetypal narratives can make pivoting between these audiences especially difficult because discourse that appeals to one audience may alienate another.<sup>464</sup> The strength of the divestment movement will depend on the ability of the disparate discourses to find consensus.<sup>465</sup> Discursive misalignment between the campaign discourse and endowment management may be particularly costly to the campaigners when it obfuscates the goals of the campaign.<sup>466</sup> If the endowment is merely a kind of staging arena from which to launch the issue of fossil fuels onto the national stage, with students and the public as the “real” audience, then movement organizers may not care as much about isolating endowment trustees with radical politicized rhetoric. But if the goal is to convince endowment managers to divest, then the campaign discourse should be more carefully tailored to that audience.

### *B. Motives and Goals*

The divestment campaign’s mixed discourse appears to be consistent with the heterogeneous ideologies of the environmental movement writ large,<sup>467</sup> and these inconsistencies create some confusion as to what the

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<sup>461</sup> Apfel, *Exploring Divestment*, *supra* note 75, at 925.

<sup>462</sup> See, e.g., Thomas Fuller, *A Free Speech Battle at the Birthplace of a Movement*, N.Y. TIMES, Feb. 3, 2017, at A9 (discussing early student activism movements in the 1960s). And in fact, the SRI policies at both Harvard and Stanford originated in student protests. See *supra* Part II.C.

<sup>463</sup> See *supra* Part II.A.

<sup>464</sup> See *supra* Part III.C.2.

<sup>465</sup> ROBERT J. BRULLE, AGENCY, DEMOCRACY, AND NATURE: THE U.S. ENVIRONMENTAL MOVEMENT FROM A CRITICAL THEORY PERSPECTIVE 272–276 (2000).

<sup>466</sup> See, e.g., Apfel, *Exploring Divestment*, *supra* note 75, at 934 (cautioning that while the campaign has contributed to the fossil fuel and stranded assets conversation, the responses to the campaign may choose to address the issue by using alternate means such as engagement, and “may not encourage—or may even undermine—the more vocal and potentially more transformative demands of divestment, especially those encouraging consideration of the impact of fossil fuels on communities and the need to transition to a fossil free economy.”).

<sup>467</sup> See *supra* Part III.C.

“real” goal of the campaign is. Is it encouraging universities and their endowments to “go green?” Is it spurring the government into passing legislation to tackle climate change? Protesting the political entrenchment of fossil fuel companies in a revolt against the dominance of special interests in American politics and the neoliberal consumer capitalist world order? While it is likely some mix of the above, the ambiguity is costly because only some of those goals are justifiable under the law governing divestment.<sup>468</sup>

The campaigners are relatively candid about the political motivations behind the campaign. The Fossil Free website declares that the primary motivation of the campaign is not economic but moral and political.<sup>469</sup> “Transforming business” and “pressuring government” form a core part of their objectives.<sup>470</sup> The campaigners self-describe themselves as a “movement,”<sup>471</sup> underscoring the political subtext, and admit that divestment is predominantly a symbolic gesture.<sup>472</sup> The political element in the campaign goes beyond signaling to politicians’ support for climate legislation and carbon taxes; it extends to a particular approach that challenges neoliberal norms and attempts to frame fossil fuel companies as exploitative owners of capital from whom power must be wrested if the earth as we know it is to survive.<sup>473</sup> In their discourse, political capture by fossil fuel companies is a recurring theme.<sup>474</sup> Daniel Apfel, who worked with the divestment campaigners at Skidmore College, asserts that, “From the beginning, the fossil fuel divestment campaign’s plan was to spark serious public and *confrontational organizing* on the issue of climate change and fossil fuel extraction.”<sup>475</sup>

Because endowments cannot justify divestment campaigns that are primarily politically motivated or that otherwise seek to use divestment as a

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<sup>468</sup> See *supra* Part II.A.

<sup>469</sup> *Frequently Asked Questions*, *supra* note 218.

<sup>470</sup> *Id.* (explaining that “transforming business” is not about transforming from the inside using insider strategies and shareholder engagement; rather, it refers to forcing a sea change in energy markets by attempting to hurt fossil fuel companies through divestment and stigmatization, and through the ultimate imposition of legislation penalizing carbon intensive industries); see also Apfel, *Exploring Divestment*, *supra* note 75, at 925. There is evidence the energy industry is already undergoing a transformation absent any impact from the divestment campaign; for example, alternative energy has reached market parity with fossil fuels, and the wind and solar industries continue to increase capacity. See Diane Cardwell, *Renewable Energy Starts to Win on Price*, N.Y. TIMES, Nov. 24, 2014, at B1.

<sup>471</sup> *E.g.*, DIVEST HARV., *supra* note 235.

<sup>472</sup> Tollefson, *supra* note 131, at 16. There may be some bias in the dataset here, which included documents such as frequently asked questions posted on the campaign websites, since web content may be targeted for a more general audience—i.e., students being the primary target, since these are university student campaigns.

<sup>473</sup> Apfel, *Exploring Divestment*, *supra* note 75, at 935; Ayling & Gunningham, *supra* note 212, at 10.

<sup>474</sup> See *supra* Part V.A.2 (discussing the discourse employed by campaigns to cast fossil fuel companies as villains).

<sup>475</sup> Apfel, *Exploring Divestment*, *supra* note 75, at 925 (emphasis added).

form of protest,<sup>476</sup> the political core of the campaign is problematic when it comes to securing endowment divestment. While attempting to break the political entrenchment of fossil fuel companies may be a worthy cause, it is a cause that can gain little ground when taken up in an arena bound by legally enforced rules that are specifically designed to prevent an endowment from being hijacked for political causes. This is especially so given the strong presumption against divestment and the specific prohibitions on politically charged divestment decisions.<sup>477</sup> The campaigners thus seem to be wearing their cloak of legitimacy a bit askew in the endowment arena.<sup>478</sup>

If the fundamental goal is to draw attention to the fossil fuel issue in the hopes of supporting some kind of climate action, then the conversation ends up rather circuitously at, “something must be done about climate change.” While this conversation is well worth having, there are opportunity costs incurred by taking this roundabout approach.

### C. Opportunity Costs

It appears that at least some of the campaigners may have intentionally gone into the endowment divestment arena knowing they were unlikely to win their case in terms of securing divestment but nevertheless hoping to draw publicity, support, and ultimately government attention to the issue.<sup>479</sup> There are undoubtedly some benefits to such a strategy, most notably publicity and stigmatization.<sup>480</sup> However, it is argued here that this misalignment between the goals of the campaign and the limits of what can be achieved in the endowment arena defined by fiduciary law leads to considerable opportunity costs. When it comes to climate change, high opportunity costs, where the “economic, social, or environmental cost of the approaches are high relative to alternatives,” are maladaptive.<sup>481</sup> While some costs arise from the pursuit of fossil fuel divestment regardless of the

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<sup>476</sup> *E.g.*, Stanford SIR, *supra* note 43, at 2.

<sup>477</sup> *Id.*; *See also supra* Part II.A (discussing fiduciary rules governing divestment and the prohibition on politically motivated divestment decisions).

<sup>478</sup> *See supra* text accompanying note 7.

<sup>479</sup> Apfel, *Exploring Divestment*, *supra* note 75, at 925 (“From the beginning, the fossil fuel divestment campaign’s plan was to spark serious public and confrontational organizing on the issue of climate change and fossil fuel extraction.”).

<sup>480</sup> *See, e.g.*, BARON & FISCHER, *supra* note 23, at 17 (“The fossil fuel divestment campaign has, for example, put a spotlight on fossil fuel companies and high-carbon investments. It has also put stranded assets on the public policy agenda.”); *see also* ASS’N OF CHARTERED CERTIFIED ACCOUNTANTS, DIVESTMENT FROM FOSSIL FUEL COMPANIES 7 (2014), <https://perma.cc/27RW-42NN> (“Past divestment campaigns have shown that their main effect is to raise awareness of an issue rather than reducing company share prices”); Apfel, *Exploring Divestment*, *supra* note 75, at 925–27 (noting that fossil fuel divestment campaigns are “target rich,” thus providing many opportunities for victories).

<sup>481</sup> Jon Barnett & Saffron O’Neill, Editorial, *Maladaptation*, 20 GLOBAL ENVTL. CHANGE 211, 212 (2010).

justification, such as short-term financial costs to the endowment, others are exacerbated by justifying divestment with a discourse that is misaligned with the controlling discourse of endowment management and that advocates for a cause beyond the scope of what endowment fiduciaries may consider.

### *1. Rhetorical Costs*

From a rhetorical persuasiveness perspective, there is a cost to using discourse that does not coincide with the dominant discourse of the arena of action.<sup>482</sup> Ideally, the justifications should be couched in the dominant discourse of the target audience if the goal is to convince that audience.<sup>483</sup> For example, using a socialist discourse to advocate for social security reform would not be persuasive to a room full of conservative Republicans. Giving political justifications for divestment is rhetorically costly vis-à-vis the trustees because they are prohibited from making politically motivated divestment decisions. While students and members of the public may find the political arguments convincing, gaining their support in this manner comes at a cost that weighs negatively when it comes to those who actually make the divestment decision. Moreover, rhetorical tensions and mixed narratives create uncertainty, and in situations of uncertainty the outcome tends to align with the incumbent regime or the more conservative option.<sup>484</sup> This too impacts persuasiveness.

There are other rhetorical costs associated with the deployment of conflicting narratives. The more radical agenda risks being marginalized when arguments are framed as managerial and economic.<sup>485</sup> The focus becomes economic and centered on owners of capital rather than sociopolitical and ecological, and outcomes in turn are less likely to go beyond economic solutions.<sup>486</sup> Conversely, framing divestment as necessary to promote an eco-radical agenda risks sidelining the fundamental issues of climate risk and stranded assets.<sup>487</sup> Taking a moral stance that archetypes

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<sup>482</sup> See Falkner, *Global Environmentalism*, *supra* note 68, at 515, 520 (noting the importance of issue framing and that environmental activism will likely have to adopt a discourse aligning with market-based capitalism to gain traction).

<sup>483</sup> See Adger et al., *supra* note 283, at 708–09; Rosen & Mehan, *supra* note 286, at 658, 677–78.

<sup>484</sup> Although recent events in the United Kingdom raise questions as to this theory. See Thompson, *supra* note 365.

<sup>485</sup> See Apfel, *Exploring Divestment*, *supra* note 75, at 934–36 (explaining that while framing climate change as a financial issue can broaden investor action, it may undermine the “vocal” demands of full divestment from fossil fuels); Ayling & Gunningham, *supra* note 212, at 2–3 (noting that divestment campaigns’ moral approach is on track to achieve more radical results).

<sup>486</sup> Apfel, *Exploring Divestment*, *supra* note 75, at 935.

<sup>487</sup> Faust, Fossil Fuel Divestment Statement, *supra* note 118 (“I also feel compelled to ask whether a focus on divestment does not in fact distract us from more effective measures, better aligned with our institutional capacities.”).

fossil fuel companies as villains risks alienating key allies<sup>488</sup> and reduces opportunities for stakeholder engagement and behavioral change.<sup>489</sup>

## 2. Climate Action Costs

Divestment of fossil fuels incurs opportunity costs related to addressing systemic climate risk. Regarding the endowment's exposure to climate risk, divesting may be a means of managing one risk—the endowment's exposure to fossil fuel assets—but it does little to manage the host of other climate-related risks that may impact investments, including water security, food security, and critical infrastructure.<sup>490</sup> On the “source” side of the climate problem, there are sources of emissions other than the fossil fuel industry that contribute significantly to climate change, such as emissions from agriculture and manufacturing.<sup>491</sup>

By disengaging rather than taking the opportunity to work with companies to effect change, there is a temporal cost incurred which could lead to longer horizons before companies change their behavior. Recall that one of the key underlying policy justifications for divestment being a method of last resort is that divestment is the least effective option for changing corporate behavior.<sup>492</sup> There is a risk that in the absence of strong shareholder pressure, the fossil fuel companies will continue with business as usual.<sup>493</sup> This occurred in the case of tobacco; despite all of the publicity and a slew of high-profile divestments, tobacco companies continue to operate profitably.<sup>494</sup> In the context of climate change, where the scale of the risk is enormous, the same result would be disastrous. Even if every university endowment divested, the economic impact on fossil fuel companies would be negligible.<sup>495</sup> Therefore, “If our goal is a rapid, dramatic

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<sup>488</sup> *E.g.*, Hulme, *supra* note 175; *see also* Abbasi, *supra* note 226 (arguing fossil fuel companies will need to be part of the climate solution); Reid & Toffel, *supra* note 124, at 1170 (arguing that firms in environmentally-sensitive industries are more likely to respond to investment pressure regarding public disclosure of climate change strategies).

<sup>489</sup> *See* BENJAMIN J. RICHARDSON, FIDUCIARY LAW AND RESPONSIBLE INVESTING: IN NATURE'S TRUST 245 (2013) [hereinafter RICHARDSON, IN NATURE'S TRUST] (establishing that engagement and disassociation are not mutually exclusive; for example, engagement can occur in the run up to disassociation).

<sup>490</sup> *See* GLOBAL RISKS REPORT, *supra* note 168, figs.3 & 4.

<sup>491</sup> *See supra* note 170 and accompanying text.

<sup>492</sup> Nell Minow, *Against Divestment—Why Walking Away Won't Make a Difference*, HUFFINGTON POST (Aug. 22, 2014), <https://perma.cc/T7SR-D9JS>.

<sup>493</sup> This risk is mitigated by the threat of regulation, which is likely to happen regardless of the divestment campaign because of the Paris Agreement and the support from the private sector; however, depending on the type of regulation the companies may not be deeply impacted. *See supra* notes 191–198 and accompanying text. For example, a carbon tax may mean the companies become less profitable but with the size of the balance sheets they may just keep emitting and pay for it, or because of its own exposure to stranded assets, the government may negotiate a means of compensating fossil fuel companies for the loss of their assets. *See generally* Abbasi, *supra* note 226.

<sup>494</sup> ANSAR ET AL., *supra* note 104, at 60–61; MacAskill, *supra* note 154.

<sup>495</sup> ANSAR ET AL., *supra* note 104, at 61.

and cost-effective transition to a low-emissions economy, we need to do more than find moral high ground and stigmatize fossil fuel companies.”<sup>496</sup>

If the real goal is to stigmatize fossil fuel companies in the hopes of gaining the attention and support of legislators who can in turn enact pro-climate legislation such as a carbon tax or drilling bans, there is a temporal cost in not directly advocating with the government in the first place. While the divestment campaign has been helpful in stigmatizing fossil fuel companies—particularly coal—and can garner support for legislative action,<sup>497</sup> there is time lost in waiting for government to take notice while the campus campaigns wage on. It may be “easier” for students to target their school endowments, but in so doing they lose not only time but valuable lessons that they will need if they intend to carry their movement beyond the confines of the campus.<sup>498</sup> Similarly, if the goal is to advance SRI in a broader sense, it seems inefficient to carry out the debate over fossil fuel divestment with a view to eventually arriving back at the issue of SRI policies. The debate prompts attention to the issue, but could that attention not also be garnered by beginning with SRI in the first place?<sup>499</sup> Time is of the essence in the fight against climate change, as the campaign itself argues in the Time narrative;<sup>500</sup> therefore, the temporal costs incurred should not be easily dismissed as negligible.

### 3. Social Costs

By endorsing a strategy of disassociation as the optimal outcome of the campaign and rejecting alternatives to divestment as less significant or genuine, the campaign essentially dismisses SRI and other engagement

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<sup>496</sup> Seiger, *supra* note 175; *accord* Hulme, *supra* note 175 (“[Divestment] diverts campaigning and political attention away from the multiple causes of climate risk and removes potential allies from positions of shareholder influence.”); Tollefson, *supra* note 131, at 16 (quoting Robert N. Stavins, Professor of Business & Government at Harvard) (“We need to focus on actions that are going to make a real difference.”); Faust, Fossil Fuel Divestment Statement, *supra* note 118, at 2 (“Because I am deeply concerned about climate change, I also feel compelled to ask whether a focus on divestment does not in fact distract us from more effective measures, better aligned with our institutional capacities.”).

<sup>497</sup> See ANSAR ET AL., *supra* note 104, at 66 (noting the success in publicity but finding that the tactics of divestment campaigns render certain campaigns likely to fail on the legislative agenda).

<sup>498</sup> Apfel argues that divestment is a better tactic for students than is lobbying government officials because the latter “requires spending energy engaging with legislators, who often have other political priorities,” while policy change “requires a special skill set and can be demoralizing, in part because there are . . . few meaningful milestones or victories.” Apfel, *Exploring Divestment*, *supra* note 75, at 925. But as Robert Payton points out, the point of a university education is “to learn to understand the complexity of things” and this mission becomes “fatally compromised” when students chose slipshod arguments and moral fervor over the complex realities of climate change and complex finance. Payton, *supra* note 120, at 60.

<sup>499</sup> See Hulme, *supra* note 175 (noting that divestment campaigns offer “symbolic success” while at the same time “divert[ing] campaigning and political attention away from the multiple causes of climate risk”).

<sup>500</sup> See *supra* Part V.A.1.

strategies as less worthy of support, casting them as at best ineffective and at worst part of the neoliberal machine.<sup>501</sup> This divides stakeholders into facile categories of divestment supporters who truly care about climate change, and nonsupporters of divestment who are not serious about it.<sup>502</sup> In discursively privileging those methods of addressing climate change that the campaign perceives as ideologically consistent with its environmentalist core (viz., divestment), the campaigns risk perpetuating through rhetorical stridency a blindness to the benefits of broad collaborative approaches that engage with a range of stakeholders, including the fossil fuel industry.<sup>503</sup> For example, some of the fossil fuel companies are working towards the same goals as the campaign, such as a carbon tax.<sup>504</sup> By disassociating and polarizing, the opportunity to join forces is missed. This type of stridency may have unintended negative consequences when it comes to building the broader climate movement.

Taking a single-issue approach to climate change also risks hindering campaigner's ability to leverage the divestment issue into broader support for climate change policies.<sup>505</sup> As occurred in the case of apartheid divestment campaigners at the University of Illinois Urbana-Champaign, in "[the campaign's] failure to address more general issues related to apartheid, divestment activists had created the conditions for a collapse of support after the divestment resolution was passed."<sup>506</sup> Regardless of what decision each endowment makes on fossil fuel divestment, further action will be required to address climate and environmental risk and socially responsible endowment management more generally. The single-issue approach focuses attention and resources on fossil fuel divestment without building support for broader issues and measures. Further, the more polarized the discourse,

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<sup>501</sup> See, e.g., Apfel, *Exploring Divestment*, *supra* note 75, at 927 (creating a false dichotomy between divesting and not acting on climate change—i.e., if endowment managers do not divest it is because they do not take climate change seriously); see also KILLINGSWORTH & PALMER, *supra* note 329, at 6–7 (explaining that many environmental dilemmas are problems of discourse).

<sup>502</sup> See, e.g., Apfel, *Exploring Divestment*, *supra* note 75, at 927 (discussing the polarizing tendencies of divestment campaigns).

<sup>503</sup> See, e.g., Abbasi, *supra* note 226 (“[T]he world may not be able to transition urgently to a low-carbon economy without harnessing [fossil fuel companies’] cash flow, political power, and large-scale execution capabilities.”); see also Joint Statement of L. Rafael Reif, President, Mass. Inst. of Tech., et al., A Plan for Action on Climate Change 2 (Oct. 21, 2015), <https://perma.cc/XFL3-N78D> (“Divestment would interfere with [Massachusetts Institute of Technology’s] ability to collaborate and to convene opposing groups to drive progress, at what may be a historic tipping point.”).

<sup>504</sup> See *Fossil Fuel Companies: Evaluating Climate Change*, *supra* note 193, at 2–3 (listing examples of industry’s support for a carbon tax).

<sup>505</sup> See Payton, *supra* note 120, at 60 (discussing divestment as single-issue politics).

<sup>506</sup> Claudia Gastrow, *Struggling for Freedom: The Divestment Movement at the University of Illinois at Urbana-Champaign, 1977–1987*, 6 SAFUNDI, no. 4, 2005, at 1, 25.

the harder it will be for campaigners to use the momentum they have created to gather broad-based support for the climate movement.<sup>507</sup>

There is also a social cost in terms of engendering goodwill and leveraging the policy window vis-à-vis the trustees. Divisive tactics can have negative impacts on the ability of different campus stakeholders to unite in the fight against climate change, and may affect the psychological health of the stakeholders and the broader campus community. “Lower levels of social cohesion and connectedness . . . lack of trust between community members and institutions, and other factors that inhibit community members from working together are all associated with greater vulnerability to [psychological climate] impacts.”<sup>508</sup> This cost is more acutely visible at Harvard, where the campaign approach was markedly more combative.<sup>509</sup> In perpetuating an “us-versus-them” narrative, the DH campaign tacitly demonizes endowments as “them” or “part of the problem” if they choose not to fully divest, and in so doing perpetuates an uncooperative engagement sphere. Endowment managers and the school administration are “against us” if they decide not to divest and become the enemy to be defeated. While the court case brought by associates of DH campaigners against the Harvard trustees is not being analyzed here,<sup>510</sup> the act of bringing a claim for mismanagement of the trust is a political act in itself, signifying the campaigners’ view of the trustees as quite literally, the opposing side, rather than as cooperative partners.<sup>511</sup> The survey results also suggest some campaigners perceive fiduciary law as harmful to their cause, including one of the DH founders.<sup>512</sup> It is harder to work together towards a common end such as taking action on climate change—when you are on opposing sides of the field.<sup>513</sup> This opposition may inhibit cooperation between the campaigners and the trustees and reduce opportunities for leveraging the campaign movement into sustained normative change that survives the divestment issue cycle.

Similarly, promoting divestment incurs a risk of damaging donor relations.<sup>514</sup> While donations from energy companies may experience a

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<sup>507</sup> Cf. Brulle, *supra* note 8, at 12 (“[I]f the pro-change community is well organized, and the policy community is not highly polarized, focusing events can lead to a process of event related learning, in which new ideas and information are applied to environmental policy decisions and greater potential for policy change.”).

<sup>508</sup> CLAYTON ET AL., *supra* note 359, at 14.

<sup>509</sup> See *supra* Part II.G.1.

<sup>510</sup> Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll., No. SUCV201403620H, 2015 WL 1519036 (Mass. Super. Ct. Mar. 17, 2015), *aff’d*, 60 N.E.3d 380 (Mass. App. Ct. 2016).

<sup>511</sup> Even prior to the Suffolk County case, the Divest Harvard campaigners were exhibiting more aggressive strategies and rhetoric signifying the administration was the opposition. See *supra* Part II.G.1.

<sup>512</sup> See *supra* Part V.C.1.

<sup>513</sup> See generally ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (Bruce Patton ed., 3rd ed. 2011) (discussing negotiation strategy).

<sup>514</sup> See Payton, *supra* note 120, at 57 (discussing complications in donor relations in the context of Harvard’s divestment of Exxon stock related to South Africa).

chilling effect for obvious reasons, so too might donations from other types of donors, including individual donors and family foundations. Donors may be put off by the endowment's use of its funds to support what might appear to be political causes.<sup>515</sup> Further, if the endowment takes a stance on fossil fuel companies as unethical, this raises other questions about ethical guidelines for donations. "To the extent that being ethical means being consistent, a moral stand on one issue requires a similar stand on similar issues. Knowing where closure comes is difficult."<sup>516</sup> For example, would a donation from a family foundation funded by an oil tycoon's legacy have to be rejected? What about a bequest from an engineer who spent a lifetime working on coal plants? Fiduciaries weighing divestment will consider potential material impacts to the endowment, including those from affected donor relations.

Since "[a]ll risk issues become risk choices and risk trade-offs,"<sup>517</sup> all of these risks and costs should be weighed against the benefits of endowment divestment campaigns. The divestment movement may "spark a big discussion" and "mov[e] the case for action forward,"<sup>518</sup> but the path it moves the case along is not without dead ends and pitfalls. None of this is to say that the campaigners have not had some success; on the contrary, the campaign has had particular success in adding to the publicity and subsequent stigmatization of fossil fuels, bolstering the concept of stranded assets as an accepted phenomena to be incorporated in financial decisions, and securing divestment (most notably from coal) from hundreds of institutions worldwide.<sup>519</sup> Nevertheless, some of the costs incurred could be mitigated or avoided by taking a different tack when it comes to endowments; for example, one that is better aligned with what is achievable in the endowment arena and that seeks to utilize the law of endowments to the advantage of climate change action, rather than using the campaign primarily as a platform for launching the issue into another arena (*viz.*, that of government).

## VII. FIDUCIARY LAW AND THE LAW OF DIVESTMENT, REVISITED

The first thought of activists starting a campaign on a college campus is typically not "what does the law say about it so we can plan our campaign strategy accordingly?" Yet that question can have significant value if asked early on when considering the end goal of the campaign, especially when the

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<sup>515</sup> See *id.* at 59 (suggesting moderates may be turned off by divestment actions if their morals are not aligned).

<sup>516</sup> *Id.* at 57.

<sup>517</sup> Heyvaert, *supra* note 196, at 9.

<sup>518</sup> *Frequently Asked Questions, supra* note 218.

<sup>519</sup> See *supra* Part II.G.3. This process of stigmatizing fossil fuel companies had arguably already begun with the global climate effort. Pfeifer & Sullivan, *supra* note 34, at 252–57 (discussing the evolution of success the climate change activism has had in persuading institutional investors to consider climate change risk over the years).

campaign is operating in an arena circumscribed by the law. The campaigners evidence in their discourse and survey responses an inconsistent understanding of the law governing the endowments.<sup>520</sup> The discourse of the campaigns, while at times in line with the divestment rules (viz., the economic and moral narratives) appears elsewhere to be misaligned with the rules by virtue of being politically motivated.

### A. *The Law of Divestment*

The more politicized the discourse, the less justifiable divestment will be to the trustees because of the prohibition against politically motivated divestment.<sup>521</sup> Campus divestment campaigns are, of course, not court proceedings.<sup>522</sup> Nor are campus environmental movements typically executed with diplomatic forethought and military precision. However, because divestment is governed by legally enforceable rules, there are some notable “soft” legal implications of the campaign discourse.

Foremost, the emphasis on the campaign as a means of pressuring government to act and challenging the economic and political power of fossil fuel companies appears in contrast to both the duty of neutrality in endowment management and the express prohibition on divestment as a form of protest. Although climate change is in many ways a political issue,<sup>523</sup> targeting the fossil fuel companies specifically rather than the broader issue of carbon emissions and carbon accounting is similarly problematic because it is not a neutral decision; it is a choice to target and demonize only one group of actors among several while doing little else to address the systemic, pan-industry risks of climate change.<sup>524</sup>

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<sup>520</sup> See discussion *supra* Part V.C.1.

<sup>521</sup> See *supra* notes 119–120 and accompanying text.

<sup>522</sup> *But see* Harvard Climate Justice Coal. v. President & Fellows of Harvard Coll., No. SUCV201403620H, 2015 WL 1519036 (Mass. Super. Ct. Mar. 17, 2015) (signifying the divestment campaign having moved off campus and into the courtroom), *aff’d*, 60 N.E.3d 380 (Mass. App. Ct. 2016).

<sup>523</sup> See discussion *supra* Part II.C. Fossil fuels too are in many ways political. See, e.g., ERNST & YOUNG, NAVIGATING GEOPOLITICS IN OIL AND GAS: BUSINESS SOLUTIONS FOR A COMPLEX WORLD 6 (2014), <https://perma.cc/A6U5-KBVL> (detailing supply side explanations of how geopolitics cause oil market uncertainty); Apfel, *Exploring Divestment*, *supra* note 75, at 926–27 (arguing that “students feel” investing in fossil fuels is already a political position (referencing Faust, Fossil Fuel Divestment Statement, *supra* note 118)).

<sup>524</sup> See *supra* note 176 and accompanying text. Fossil fuel companies certainly contribute significantly to climate change but they are not the only ones, and using them as scapegoats without addressing the systemic issue of decarbonizing all of society risks allowing the other contributors to continue with business as usual. See RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW, *supra* note 8, at 128 (discussing how investment approaches that take a stand on one particular issue without incorporating more systemic SRI into general fund management are less impactful in ESG terms and contribute to undermining the potential of SRI); see also Möller, *supra* note 179 (reviewing John Langbein’s questioning of why the divestment campaign singled out South Africa and not other states—such as Libya or the Soviet Union).

There is some room for interpretation on the primacy of the political agenda, given the environmental, social, and historical factors at play in the case of fossil fuels. Nor is it clear that the political element in the movement would exert so much influence as to rise to the degree of reversing what would otherwise be a vote in favor of divesting. Nevertheless, the uncertainty created by the deployment of politically charged discourse might work against a decision in favor of divestment. Campaigners would do well to realize that they are not helping themselves vis-à-vis the endowment with highly politicized rhetoric.

Second, the campaign's mixed rhetoric regarding insider strategies impacts the weight of their evidence. They argue, alternatively, that insider strategies are doomed to fail because there is not enough time to try them;<sup>525</sup> shareholders are unlikely to vote to keep the majority of corporate assets in the ground;<sup>526</sup> and fossil fuel companies are villains who will not in good faith respond meaningfully to shareholder activism.<sup>527</sup> The first assumes divestment would be a faster and more effective means of taking action on climate change than shareholder engagement; the second assumes that keeping it in the ground is the only option, and that companies will lose out in this scenario;<sup>528</sup> and the third assumes that fossil fuel companies are not taking steps to address climate risk and see little value in responding to shareholder and customer pressure to do so. The uncertainty created by the campaign's narrative tensions undermines the safety of these assumptions, as does the inconsistent application of the authority from which they are derived. For example, the argument that there is not enough time to use insider strategies to try and change corporate behavior tacitly acknowledges a worldview that considers shareholder activism as effective and efficient in theory, but ignores the weight of opinion against the efficacy of divestment produced by that same worldview. The collective result is that the arguments for a key element of divesting—exhaustion of insider strategies—is not sufficiently buttressed.

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<sup>525</sup> DIVEST HARV., *supra* note 235; FOSSIL FREE STAN., *supra* note 376; *see also supra* Part V.A.1.

<sup>526</sup> *E.g.*, FFS, THE 2015 CASE FOR DIVESTMENT, *supra* note 388, at 9

<sup>527</sup> *See supra* Part V.A.2.

<sup>528</sup> While the risk of stranded assets is real, the assumption that energy companies will be destroyed by those assets is questionable. It is entirely plausible, especially taking both political capture and the significant stake governments have in royalties and revenues into account. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-15-290, HIGH-RISK SERIES: AN UPDATE 94 (2015) (reporting federal oil and gas resources as "one of the federal government's largest nontax source of revenue," bringing in \$48 billion from 2009–2013). Fossil fuel companies may well negotiate favorable terms with legislators so that their companies are not overly burdened by regulations, and potentially may even be compensated for the loss of stranded assets. This could take the form of, for example, a carbon tax credit rewarding companies for keeping the fuel in the ground. Abbasi, *supra* note 226 (suggesting returning a substantial portion of carbon tax revenue back to fossil fuel companies on the condition that the entire return be allocated to clean-energy investment, with a committed proportional internal match).

Third, there is not a strong case for a “duty to divest.” While managing climate risk can be said to fall under a fiduciary’s duties of prudence and care, the means of that management is left to the reasonable discretion of the fiduciaries.<sup>529</sup> Furthermore, even where ESG forms part of the decision-making process, the materiality standard still applies, and there are significant short-term risks entailed in divesting from fossil fuels that fiduciaries would be imprudent to ignore.<sup>530</sup>

### *B. Legal Constructivism Revisited*

Law shapes the social and political spaces we inhabit, but it can at times be difficult to see how and to what extent. It has been said that legal discourse is caught in an “epistemic trap”: “The simultaneous dependence on and independence from other social discourses is the reason why modern law is permanently oscillating between positions of cognitive autonomy and heteronomy.”<sup>531</sup> Here, the law governing divestment is both of the social movements that spawned the SRI programs at both schools and other than.<sup>532</sup> The very notion of an ESG-related divestment action was made possible in part by fiduciary law’s integration of ESG concerns as a result of earlier SRI movements. But in integrating those concerns into the dominant discourse of fiduciary law and finance, the connection to the social movement becomes less readily obvious.

To conceptualize it as a matter of us (the campaigners) or them (the endowment trustees), once the ESG concerns become part of “their” dominant discourse, it is no longer “ours”. And because it is no longer “ours,” it becomes perceived as part of the neoliberal establishment (“them”) whom the counter movement seeks to challenge. This false dichotomy can obscure the more reciprocal nature of legal discourse.<sup>533</sup> In a democracy, the law is fundamentally “ours”. Although the rule of law dictates that sociopolitical outcomes must ultimately be consistent with the law, the law is constantly evolving (however slowly) in response to the concerns and will of citizens. Thus as much as fiduciary law is the controlling discourse of endowment management, its dominance does not mean it is solely for the utility of “them” (i.e., the trustees).<sup>534</sup> To reclaim the dominant discourse as

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<sup>529</sup> RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW, *supra* note 8, at 490, 551.

<sup>530</sup> ANSAR ET AL., *supra* note 104, at 61; BRIAND ET AL., *supra* note 132, at 6.

<sup>531</sup> Teubner, *supra* note 306, at 730.

<sup>532</sup> See discussion *supra* Part II.B on the origins of the SRI movements nationally and at both schools.

<sup>533</sup> See Springer, *supra* note 298, at 134–39 (arguing those who produce and those who are constrained by neoliberal discourse engage in a responsive and recursive process of sociospatial transformation that reconstitutes the discourse in all four of its variations (as state form, as ideological hegemonic project, as policy and program, and as governmentality). For an illustration of the recursive and responsive process of neoliberalism, see *id.* at 138 fig.1.

<sup>534</sup> See generally Hirsch & Lazarus-Black, *supra* note 306 (on law as a tool of both hegemony and resistance).

“ours” as well as “theirs” is to reclaim legal discourse and in so doing, meet it on its own terms.<sup>535</sup>

Nor is law’s utility as a discursive tool confined to the venue of a courtroom. Law can be used as an oppositional weapon in litigation (as exemplified in the case of the Harvard students who sued the trustees),<sup>536</sup> and in popular culture is often confined to the realm of courtroom battles. But litigation by design holds legal discourse in an oppositional frame and confines it to a venue that is removed from the everyday citizen’s experience. While a courtroom may be where legal issues are decided, it is by no means the only venue wherein legal discourse frames issue outcomes. Nor is legal discourse merely a tool of opposition, only to be wielded in courtroom battles. Recognizing that legal discourse shapes social outcomes outside of the courtroom, while understanding that it is both “ours” and “theirs”, helps to open up the cooperative, collaborative, and reciprocal utilities of that discourse.

Just as law is of both “us” and “them,” divestment too is both of and other, simultaneously radical and conformist. It is a method of last resort and thus is an extraordinary move for investors to take, but it remains an institutionally legitimized action that challenges the wisdom of certain assets but does not challenge the wisdom of the financial system as a whole.<sup>537</sup> Divestment is not a viable means of mounting a radical challenge to that system. If the real goal of the movement is in fact a more radical reconceptualization of politics and economics, it may be counterproductive to rely on a solution that is part and parcel of the same institutionalized socioeconomic paradigms the campaign seeks to radically reform.

The assumption that publicity and stigmatization were the best outcomes that campaigners could hope to achieve through their campus campaigns suggests campaigners considered endowments to be venues capable of only limited means of advancement towards their goals. This limited view is certainly true for the more radical goals of profound and systemic socioeconomic reform.

While the campaigners have signaled, via their support for government action, their faith in the ability of law and regulation to address climate change, they may have overlooked how fiduciary law can be useful to advancing their climate agenda within the venue of endowment

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<sup>535</sup> Litigating against the trustees is one way of using the law as a tool, but litigation by design perpetuates an oppositional mindset and is issue-specific rather than conducive to longer-term reciprocal engagement on governance issues like how best to address ESG issues through the endowment.

<sup>536</sup> See discussion *supra* Part II.G.1.

<sup>537</sup> In this way, divestment as an action is itself a weak form of neoliberal accommodation. Exit allows for the investor to distance from the bad actor but does little to change or stop the bad actions other than through a symbolic distancing. HIRSCHMAN, *supra* note 126, at 2, 23–24, 28–29; ANSAR ET AL., *supra* note 104, at 2.

management.<sup>538</sup> The campaign's discourse may have predisposed campaigners to perceive fiduciary-based approaches other than divestment as insincere or ineffective. If the goal is to make the endowment more progressive in its management of ESG factors in investment, then the campaigners may gain more ground by thinking of the endowments as partners rather than opponents. Likewise, conceiving of fiduciary discourse and the law of endowments not as an inhibitor but as a catalyst for promoting institutional leadership on ESG issues could advance the cause further.

### *C. Fiduciary Approaches to Socially Responsible Investing and Climate Change, Revisited*

Although certain ways of talking about climate action are difficult for endowment managers to justify, e.g., radical politicized narratives, this does not mean that climate action is itself unjustifiable under fiduciary law.<sup>539</sup> As discussed in this Article, socially responsible investing and fiduciary law are consistent with each other, and fiduciary law arguably requires the consideration of ESG factors when doing so addresses a material risk to returns.<sup>540</sup> Fiduciary law is flexible and well poised to “accommodate new situations and changes in social morals and norms, yet maintain its core values and norms.”<sup>541</sup> The SRI movement began as a voluntary movement in the private sector because of the failure of the legal system to supply sufficient environmental and social standards.<sup>542</sup> Evolutions in behavioral and social norms deeply influence the development of law,<sup>543</sup> and fiduciary law is currently adapting to shifts in concerns over the environmental, social, and governance impacts of large institutional investors.

For example, there is a movement among some legal scholars to prize ethical investment on a par with financial returns, ensuring that accounting, performance standards, and sustainability indicators become part of the

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<sup>538</sup> See, e.g., Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13, at 556 (arguing that redefining the fiduciary duties of investment institutions is “most crucial” to furthering environmental sustainability).

<sup>539</sup> See, e.g., Schneider, *supra* note 123, at 594–95 (discussing Harvard's successful, politically charged, anti-apartheid divestment campaign). See generally Sarang, *supra* note 31.

<sup>540</sup> See discussion *supra* Part II.B.

<sup>541</sup> Frankel, *Twenty-First Century*, *supra* note 13, at 1290; accord Onnig H. Dombalagian, *Investment Recommendations and the Essence of Duty*, 60 AM. U. L. REV. 1265, 1283 (2011) (noting that “[t]he concept of fiduciary duty is sufficiently elastic in its depth and scope” to cover a wide range of issues). The values and norms of trust law—loyalty, prudence, impartiality, and care—are admirable and consistent with social justice advocacy.

<sup>542</sup> Richardson & Cragg, *supra* note 42, at 22; see also Frankel, *Fiduciary Law*, *supra* note 13, at 802–03 (“We are turning to fiduciary law to replace social controls that have weakened.”).

<sup>543</sup> See Claire Woods & Roger Urwin, *Putting Sustainable Investing into Practice: A Governance Framework for Pension Funds*, 92 J. BUS. ETHICS (Supp.) 1, 15 (2010).

standard fiduciary toolkit.<sup>544</sup> In this way, the fiduciary standards would evolve to reflect societal returns as a whole rather than privileging financial returns.<sup>545</sup> There is also a current trend towards reform of fiduciary duty to embrace a “best interests” standard over a financial materiality standard, allowing consideration of nonfinancial factors while still protecting the interests of the beneficiaries and removing the threat of liability from trustees who employ noneconomic factors.<sup>546</sup> While policies privileging ethics over economics will remain problematic for institutional funds whose purpose is economic,<sup>547</sup> these changes show how fiduciary law is capable of promoting a more sustainable and ethical financial realm.<sup>548</sup> This moment of flux in the evolution of SRI in fiduciary finance may be ripe for campaigners to support bringing responsible investment more firmly into the legally enforceable folds of fiduciary duty as a means of improving the ethics of ethical investment.<sup>549</sup>

There is ample room to advance climate action through fiduciary law as it currently stands, not only via the duty of prudence but also the duty of loyalty.<sup>550</sup> Endowment investment policy reform, such as implementing a “green screen” portfolio standard, greening asset selection criteria, or revising ESG proxy guidelines, would require the endowment managers to abide by those policies when managing the fund as part of the duty of loyalty. SRI policies also allow a range of issues to be addressed, rather than

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<sup>544</sup> See Frankel, *Fiduciary Law*, *supra* note 13, at 830–32 (describing justifications for incorporating morality into investment law). See generally Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13.

<sup>545</sup> See Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13, at 566 (“While the language of ‘returns’ may sound too instrumental for ecological ethicists, it simply is one way of articulating in the vocabulary of financial analysts the goals of maintaining and enhancing ecological integrity.”). See generally PRINCIPLES FOR RESPONSIBLE INV. & U.N. ENV’T PROGRAMME FIN. INITIATIVE, UNIVERSAL OWNERSHIP: WHY ENVIRONMENTAL EXTERNALITIES MATTER TO INSTITUTIONAL INVESTORS (2010), <https://perma.cc/KMH9-YWPC> (discussing the concept of universal ownership).

<sup>546</sup> *E.g.*, Langbein, *Sole Interest or Best Interest*, *supra* note 19, at 933–34; see also UPMIFA § 3(b) cmt.

<sup>547</sup> See Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13, at 563.

<sup>548</sup> See Woods & Urwin, *supra* note 543, at 15 (“If sustainable investing were to become increasingly conventional, then it is arguable that trust law would treat it increasingly as a prudent manner of investing, obviating the need for inquiry into whether sustainable investing . . . met with fiduciary standards.” (citation omitted)); HAWLEY & WILLIAMS, *supra* note 26, at 28–29 (discussing the mainstreaming of concerns about the tobacco industry); Janet E. Kerr, *Sustainability Meets Profitability: The Convenient Truth of How the Business Judgment Rule Protects a Board’s Decision to Engage in Social Entrepreneurship*, 29 CARDOZO L. REV. 623, 634–35 (2007) (arguing corporate governance rules, including the fiduciary duty of care, allow for and can nurture social projects in the private sector).

<sup>549</sup> See generally Richardson, *Keeping Ethical Investment Ethical*, *supra* note 13.

<sup>550</sup> See *id.* at 564–65 (discussing how SRI fits in with the duties of prudence and care and arguing social accounting and sustainability indicators can help fiduciaries further ethical sustainability investments). See generally Langbein, *Sole Interest or Best Interest*, *supra* note 19, at 980–82 (advocating for reform to the duty of loyalty to allow trustees to defend decision making on the basis of the “best interest” of the beneficiary rather than the older standard of “sole interest”).

just one, in a sustained and low-cost manner. The prudent investor rule protects fiduciaries who make reasonable decisions on the basis of information available to them at the time.<sup>551</sup> While the prudent investor rule could be used to justify continued investment in fossil fuel stocks given their economic value, it could also be used to justify climate risk mitigation measures given what is known now about climate risk.<sup>552</sup> Building more on what past campaigns have achieved, recognizing the climate efforts already undertaken by the trustees,<sup>553</sup> and gaining a better understanding of the utility of fiduciary law could lead to new ideas and approaches better suited to addressing the ESG concerns of the campaigners than single-issue divestment.

There is also room in the endowment sphere for advancing the more governance-oriented concerns of the campus divestment movement. If the concern is the risk of political capture by special interests,<sup>554</sup> students can help counter the risk of capture vis-à-vis the corporations and the endowment managers by, for example, encouraging the endowment to strengthen proxy voting guidelines related to lobbying and political donations,<sup>555</sup> form coalitions with other institutional investors, and disclose its guidelines and proxy histories related to those issues.<sup>556</sup> Concerned students can also address the issue through other means such as supporting civic efforts to increase transparency in lobbying.<sup>557</sup> While there are limits to how much students can be involved in endowment management, multistakeholder investor responsibility committees that include students, such as Stanford's APIRL, and even innovative opportunities such as student-run SRI funds can accommodate the voices and concerns of students in a way that engages the politicized student conscience.<sup>558</sup>

One of the successes of the of the fossil fuel divestment campaign is that it has bolstered student interest in climate change and responsible investing issues and given them a space in which they feel their concerns are being heard. Working with the endowments on ESG issues over the long-

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<sup>551</sup> See *supra* note 27.

<sup>552</sup> RICHARDSON, IN NATURE'S TRUST, *supra* note 489, at 137.

<sup>553</sup> See, e.g., Stanford Proxy Voting Guidelines, *supra* note 24 at 7–13.

<sup>554</sup> See Hess, *supra* note 71, at 262–63 (discussing the threat of capture in public pension fund management).

<sup>555</sup> E.g., CCSR REPORT 2012–2013, *supra* note 87, at 22–25.

<sup>556</sup> See, e.g., Hess, *supra* note 71, at 262–63 (noting that to encourage sustainable development, public pensions should disclose the extent of their reliance on long-term responsible, which can “spur greater consideration of long-term responsible investor issues throughout the financial industry.”).

<sup>557</sup> See, e.g., Faust, Fossil Fuel Divestment Statement, *supra* note 118 (listing examples of ways Harvard works on climate governance issues, including the Kennedy School's Belfer Center's acclaimed work on climate policy and economics).

<sup>558</sup> ESG INVESTING, *supra* note 77, at 35–40 (discussing multistakeholder investor committees, student-run SRI funds, and endowment transparency trends). Stanford's APIRL consists of twelve members, including students and alumni. *Advisory Panel on Investment Responsibility: Mission and Operational Guidelines*, STAN. U. 2–3, <https://perma.cc/3H9Y-SXQH> (last visited Apr. 15, 2017).

term can help ensure that momentum continues and reaches beyond the single issue of fossil fuel divestment. SRI is far from perfect,<sup>559</sup> but one of its foundational merits is the ability for nongovernmental actors to hold influential positions. As discussed above, ESG and fiduciary law are consistent, and fiduciary law arguably requires the consideration of ESG factors when doing so addresses a material risk to returns. As such, “Fiduciary law can accommodate new situations and changes in social morals and norms, yet maintain its core values and norms.”<sup>560</sup>

In the end, reforms such as enacting stronger SRI policies and creating student advisory boards may not be enough to satisfy the more radical element in the movement. For those campaigners for whom the real problem underlying fossil fuels is not the endowment’s investment in fossil fuels per se but the unsustainable consumption-growth model of the global neoliberal hegemony, and for whom the divestment movement is a means of venting their “hunger for a vehement crusade that will fulfill their moral yearnings,”<sup>561</sup> the venue of endowment management is highly unlikely to ever host a solution capable of gratifying their demands. Those issues lie far beyond the scope of what endowments can achieve. Publicity and stigmatization is probably the best those campaigners can expect.<sup>562</sup> For those seeking a more environmentally- and socially-responsible endowment, however, working with endowments using the nontraditional governance mechanisms permitted by fiduciary law—e.g., SRI—could offer a more attractive route for promoting climate action and furthering socially responsible causes.<sup>563</sup> Rather than turning to endowment engagement as merely a means to an ends of pressuring government to enact climate legislation,<sup>564</sup> the campaigners could alternatively look to how endowments

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<sup>559</sup> See, e.g., RICHARDSON, SOCIALLY RESPONSIBLE INVESTMENT LAW, *supra* note 8, at 1–36, 103–180; Hess, *supra* note 71, at 244 (suggesting that social investing does “little to promote sustainable economic development amongst a large number of corporations”); see also Falkner, *A Neo-Pluralist Perspective*, *supra* note 62, at 103–06.

<sup>560</sup> Frankel, *Twenty-First Century*, *supra* note 13, at 1290.

<sup>561</sup> Brooks, *supra* note 359.

<sup>562</sup> See *supra* notes 255–269 and accompanying text.

<sup>563</sup> This is in part because fiduciary law is less prone to political capture, whereas the process of lawmaking leaves traditional legislation open to special interests. See Richardson & Cragg, *supra* note 42, at 32 (“Legal systems often fail to supply adequate social and environmental standards. Legal theorists have long identified a series of explanations for this problem, which include the ability of powerful corporate interests to ‘capture’ the regulatory process and block the enactment and implementation of laws unfavorable to their interests.” (citation omitted)). Divestment campaign weariness over the prevalence of special interests—evidenced in the Villains narrative—stems from this concern. See *supra* Part V.A.2 (discussing the Villains narrative); see also Frankel, *Twenty-First Century*, *supra* note 13, at 829–32 (discussing the moral features of fiduciary law which open it to ethical purposes).

<sup>564</sup> Which is, by the logic of the campaign’s arguments, unlikely to be effective because of political capture. See *supra* Part IV.B. This is in part because nontraditional corporate governance mechanisms such as SRI evolved because of the impotency of traditional government regulations, and in part because fiduciary law is less prone to political capture, whereas the process of lawmaking leaves traditional legislation open to special interests. See, e.g., Richardson & Cragg, *supra* note 42, at 32.

can be responsibly managed in order to have positive environmental, social, and governance impacts beyond the single issue of fossil fuel divestment.

#### VIII. CONCLUSION

Much has been left unsaid here and many paths have not been taken. What this Article hopes to have accomplished is to have set the scene for thinking about the interaction between the law, discourse, and cultural politics in the context of climate change and fossil fuel divestment.

The evidence uncovered here shows that the discourse of the campaigners is consistent with the broader climate movement in its heterogeneous composition, exhibiting both managerial and radical approaches. While the campaign discourse may align well with the political discourses of climate change, it is not so closely tailored to the language of the law and the rules governing divestment. This misalignment may have weakened the persuasiveness of the campaign arguments vis-à-vis the trustees and incurred some opportunity costs for the climate movement. In pursuit of the means (divestment as a means of weakening fossil fuel companies), the ends (using the power of institutional investment to stop climate change) seem to have become secondary.

The primary goals of the campaign evidenced in the discourse—addressing climate change through the power of the endowment by divesting, and thereby breaking the power of the fossil fuel hegemony—do not have equal chances of success in the endowment arena. Divestment may work at bringing attention to an issue, and certainly it works as a means of disassociation from unethical companies. In the case of climate change, however, the question campaigners may wish to ask themselves is whether disassociation is enough. If the answer is no, then what else can be accomplished here in this venue?

Law in popular culture is often depicted as esoteric and removed from our daily life, despite being woven into nearly every aspect of modern life. In the space of endowment management, where the bounds are clear and well-defined by trust law and its incumbent fiduciary duties, understanding the law can help strengthen the justification of arguments for addressing climate change through the endowments. In order to get there, however, it would be helpful to speak the same language.

## APPENDIX

*Survey of Pro-Divestment Campaigners**Respondent 1 (DH)*

## Question 4

1) Dependence on fossil fuels widely acknowledged as intolerable, 2) Behaviors that aid, abet, and entrench dependence on fossil fuels acknowledged as intolerable, 3) large fraction of US population conceives of climate change as an issue requiring citizen action, 4) signification fraction of the US population conceives of climate change as a voting issue.

## Question 5

Scalable. Targets root of problem of short-term reward vs. long-term risk management. One-way ratchet action. Actionable on part of individuals and institutions. Creates choice points for individuals and institutions. Facilitates both theoretical and practical progress in discourse. Sustainable tactic for activists.

## Question 12

Somewhat.

## Question 18

No.

## Question 19

Help.

They *should* help, as continued investment in fossil fuel companies is not in the long-term interest of students nor society at large. However, there is a common misunderstanding of fiduciary duty to mean maximization of short-term profit. For this reason, fiduciary duty has been used as an argument against divestment. If the divestment movement can meet this argument on its own turf and reframe using the real definition of fiduciary duty, then it may ultimately be a powerful argument for divestment.

*Respondent 2 (FFS)*

## Question 4

I hope that political climate will change on climate issues. I want politicians and citizens to have a more humanitarian consideration of all the people harmed in the present and future by our environmental negligence.

## Question 5

I participate in multiple forms of climate activism, from education to donation to preserve wildlife. Divestment is merely one form of activism in which I participate. We all acknowledge the power money wields in society, and so divestment is my opportunity to make over 17 billion influences on politics. The two ways we make an influence as normal citizens are in who we vote for and what we buy. This is the buying side. I also enjoy that divestment is so interdisciplinary: it deals with economic and environmental topics, and allows me to educate people on climate topics, to have open conversations with people about their opinions. People like to talk about their school and

how to make it better, so divestment is a wonderful window to bridge environmental issues using the framework of Stanford University itself!

Question 12

Somewhat.

Question 18

No.

Question 19

Help,

Divestment from fossil fuels does not hurt the endowment and could actually help. Divestment is negligible in terms that it will almost certainly not lose the endowment any money. Moreover, in a political climate of changing discussion on environmental issues, fossil fuels could become bad investments, which makes divestment a safer bet. Then there are concerns that carbon is an economic bubble. No one wants to be invested in a bubble.

*Respondent 3 (FFS)*

Question 4

Divestment, greater awareness of the problem (that being the economic, environmental, and political harms of fossil fuel companies and their business plan), and change. Divestment of fossil fuels doesn't just mean divestment from any sort of industry—we're tackling a monolith that has wreaked havoc on the planet and its institutions, from political bodies to free speech to the prospect of peace.

Question 5

It hits 'em where it hurts. If these corporations don't get money, the entire purpose of their work is futile. Can you say the same for a carpet manufacturing company or a bakery? Sure. But divestment from these have much less of a far reaching impact. Due to the nature of the monopoly that we are up against, their inability to change to renewable technologies on their own choice and their ability to induce immense damage to the people and planet in so many forms, divestment one of the more (hopefully) influential routes.

Question 12

Not at all.

Question 18

No.

Question 19

Respondent skipped this question.

*Respondent 4 (FFS)*

Question 4

I hoped to generate action on behalf of students, administrators, and leaders on local and national levels to change their behavior to be more carbon sensitive.

## Question 5

It seemed like a large, powerful way of sending a message to the public that we were done with coal.

## Question 12

Not very.

## Question 18

Yes.

## Question 19

Help.

Using numbers from the Aperio Group's analysis, which show that divestment from fossil fuels is unlikely to jeopardize the size of the endowment (and might even grow it), helped prove that divestiture is aligned with the fiduciary obligations of the Board as well as the greater, more holistic duties of the Board, students, and the school. Framing the discussion from an economic perspective turned it from a campaign based on ideals to a campaign based on science.

*Respondent 5 (FFS)*

## Question 4

I hope to stigmatize fossil fuel companies so that their political power decreases, thus paving the way for congress to pass climate policies.

## Question 5

Student activists are most effective when they take action where they are, and divestment has been a successful strategy in the past.

## Question 12

Somewhat.

## Question 18

Yes.

## Question 19

Help.

Many people argued that fiduciary obligations would make divestment impossible, which at times hurt the case for divestment. But I feel that there's enough research that shows that in the long run, investing in renewables is more financially responsible than investing in fossil fuels, and that ultimately helped the campaign.

*Respondent 6 (DH)*

## Question 4

1) Stigmatization of the fossil fuel industry 2) Build the climate movement 3) Take back the political system.

## Question 5

Divestment at its core is about agency. It's about leaders, students, and the wider movement taking control of its destiny. There are no other tactics that achieve this.

Question 12

Very.

Question 18

Yes.

Question 19

Hurt.

Their definition centers around maximizing financial returns. So that means investing in anything, including fossil fuels or guns. That hurts our efforts.

*Respondent 7 (FFS)*

Question 4

The ultimate goal is to mitigate climate change. However, the more immediate goal is to shift the public and political dialog around climate change. Divestment helps to cast climate change as a moral issue and to stigmatize the fossil fuel industry that is not only causing the problem, but blocking all efforts to solve it. In the case of the apartheid divestment campaign, public outcry led congress to pass sanctions over the veto of President Reagan. I would like to see a similar result from fossil fuel divestment, that is, a carbon tax or other comprehensive climate policy.

Question 5

As already mentioned, other forms of climate activism have proven to be ineffective and difficult to rally around. Divestment has been successful in the past at stigmatizing dangerous industries/governments and at motivating governments to pass restrictive legislation.

Question 12

Somewhat.

Question 18

No.

Question 19

Help.

I helped that Stanford has a Statement on Investment Responsibility, which allows the BOT to take into consideration factors beyond maximizing returns.

*Respondent 8 (FFS)*

Question 4

Two things: make the world a little greener, and show that big oil's rule is not unbreakable.

Question 5

We are headed towards climate disaster because of the corrupt practices of fossil fuel companies. Divestment shows we won't stand for such irresponsible behavior.

Question 12

Not at all.

Question 18

No.

Question 19

Help.

The student poll in favor of divestment helped our cause.

*Respondent 9 (FFS)*

Question 4

I want to send a message that Stanford cares about a sustainable future and to set an example for other schools to follow.

Question 5

At this point in the climate crisis, it will take large amounts of money to combat the power of fossil fuel companies. The endowments of universities like Stanford can be a part of that battle.

Question 12

Not very.

Question 18

Yes.

Question 19

Hurt.

The fiduciary obligations of the Board should have helped the case for divestment because, in the long run, divestment is the most financially responsible choice, given that we must eventually stop using fossil fuels. In reality though, it seems like the Board used their fiduciary obligations as an excuse to argue against divestment by telling the story of a very short-term future.