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Rayan Jamal Alkhalawi
Indiana University Maurer School of Law, ralkhala@iu.edu

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DEVELOPING A LEGAL FRAMEWORK GOVERNING PUBLIC UNIVERSITY ENDOWMENTS IN SAUDI ARABIA: LESSONS FROM THE AMERICAN EXPERIENCE WITH UMIFA AND UPMIFA

Rayan Jamal Alkhalawi

Submitted to the faculty of Indiana University Maurer School of Law in partial fulfillment of the requirements for the degree

Doctor of Juridical Science

August 2019

ACCEPTANCE PAGE

Accepted by the faculty, Indiana University Maurer School of Law, in partial fulfillment of the requirements for the degree of Doctor of Juridical Science.

Doctoral Committee:

Donald H. Gjerdingen

Feisal Amin Rasoul Al-Istrabadi

Jody L. Madeira

August 22, 2019

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Rayan Jamal Alkhalawi

In the Name of God, the most Gracious,

the most Merciful

DEDICATIOPN

To my parents, my wife and my children

For your support, love, inspirations and prayers

I could not have done it without you.

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ABSTRACT

Saudi universities have recently started building and growing their endowments. Despite the increasing interest in university endowments, there is currently no specific legal framework that governs the area of university endowments in Saudi Arabia. The lack of a specific legal framework obstructs the advancement of university endowments. Therefore, this dissertation delineates the development and characteristics of the prevailing legal framework governing university endowments in the United States. The dissertation focuses on the development of the Uniform Management of Institutional Fund Act and the Uniform Prudent Management of Institutional Fund Act. The dissertation also uses in depth interviews with professional working in the field of university endowments in the United States. This description of the American case is useful for thinking about how to institute a legal framework in Saudi Arabia.

Key Words:

Endowment, University Endowment, Uniform Management of Institutional Fund Act, UMIFA, Uniform Management of Institutional Fund Act, UPMIFA.

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Chapter One: Introduction

First: Preface:

Saudi Arabia has undergone rapid developments in the recent years in many areas including higher education. In the last 15 years, for example, the number of Saudi public universities has increased from only 8 universities in 2004 to 30 universities in 2019.[1] These public universities depend completely on the governmental support for their yearly operation budgets. Recently, however, some of these universities have started to build their own endowments aiming for more financial stability and independence. Most of these endowments were founded in the past 15 years and some of these endowments were very successful in securing large endowments funds in a short period of time. For example, King Abdullah University for Science and Technology, KAUST, established in 2009, has one of the largest endowments in the world with $20 billion dollars.[2] Other universities that have also built their endowments rapidly include King Saud University with an endowment of almost 4 billion Saudi Riyals ($1 billion U.S. dollars), and King Fahad

---

[1] Ministry of Higher Education, *Saudi Public Universities, (April, 2019),* https://www.moe.gov.sa/ar/docs/Doc1/saudi-universities-arabic.pdf (Arabic)

[2] *Foster the KAUST Waqf, (April 2019),* https://www.kaust.edu.sa/en/about/university-development/foster-the-kaust-waqf

University for Petroleum and Minerals with an endowment of almost 2 billions Saudi Riyals ($500 Million U.S. dollars).[3]

Moreover, the country's current plan, known as 2030 vision, has specified one of the major goals for the education sector is to increase the financial efficiency of public universities.[4] It is important to note that despite the increasing interest in university endowments, there is currently no specific legal framework that governs the area of university endowments in Saudi Arabia. Notwithstanding this absence of a legal framework, there are some general principles from the Islamic Trust law, Awqaf, and other laws that can be applied by legal professionals to university endowments now.

Second: Importance of the topic:

Instituting a legal framework for university endowments in Saudi Arabia is essential as the absence of such a framework obstructs the advancement of university endowments for two major reasons. First, the lack of a specific legal framework could create legal ambiguities for donors and universities to establish and operate endowments as intended. This uncertainty could encourage both universities and donors to establish their endowments in a different country with a preferred

---

[3] Ali Alessa, *University Endowments Are Successful* (April 2019), http://www.al-madina.com/article/432944/(Arabic)

[4] *Saudi Vision 2030 Goals*, (April 2019) http://vision2030.gov.sa/en/goals

legal system. King Abdullah University of Science and Technology, for example, has established its $20 billion endowment in Guernsey. Several Saudi donors have also made generous donations to universities in the other countries. For example, Prince Alwaleed bin Talal, Saudi billionaire and member of the royal family, made a $20 million gift to Harvard University in 2005.[5] The lack of university endowment laws prevents both the country as well as the Saudi universities from utilizing such generous donations in the advancement of the economy and education.

The second problem that emerges from the absence of university endowments laws is the lack of direction for endowment officers. The lack of direction affects decisions made in relation to fund raising, investment, expenditures, and modification of endowments. Without guidance, it is difficult to assess whether endowment performance is too conservative, moderate, or too risky. While the current legal framework is too vague to provide any directions, it is also very flexible and can be adjusted to adopt a new, modern, and detailed legal framework to improve the performance of university endowments.

[5] The Harvard Gazette ,*Harvard receives $20M gift for Islamic Studies Program*, (April, 2019) https://news.harvard.edu/gazette/story/2005/12/harvard-receives-20m-gift-for-islamic-studies-program/

Third: Significant of the Research:

In this dissertation, I delineate the development and characteristics of the prevailing legal framework governing university endowments in the United States. This description of the American case is useful for thinking about how to institute a legal framework in Saudi Arabia for two main reasons. First, the legal framework governing university endowments in the United States prior to the passage of UMIFA in 1973 was similar to the current rudimentary Saudi legal framework governing university endowments. Second, since the passage of UMIFA, American universities have proven to be successful in raising funds and managing investments in endowments. The professional practices in the management and investments of university endowments have advanced resulting in more than 400 universities with endowments worth more than $100 million.[6] The legal framework in the US has also developed substantially and this system provides an important starting point for thinking about how an analogous successful legal framework might operate in a very different context.

[6] NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS (NACUBO), 2018 NACUBO-TIAA STUDY OF ENDOWMENTS (NTSE)–NUMBER OF U.S. INSTITUTIONAL RESPONDENTS TO THE 2018 NTSE, AND RESPONDENTS' TOTAL ENDOWMENT MARKET VALUE, BY ENDOWMENT SIZE AND INSTITUTION TYPE (2019), https://www.nacubo.org/Research/2019/Public-NTSE-Tables.

Fourth: Research Methodology

Beside using detailed case studies of UMFA and UPMIFA, this dissertation also uses in-depth interviews to gain additional insights on the topic. These interviews shed light on professional practices and current legal challenges that face university endowments.

A total number of 8 interviews were conducted. Participants in the interviews were recruited among professionals working in public university endowments at different public universities in the United States. Among the participant there were males and females some of whom with a legal background and others with financial or administrative backgrounds. Some of these interviews were conducted in person. Other interviews were conducted over the phone.

Participant were asked open ended questions about their views and opinions on the current laws in the United States that govern university endowments. Later, participants answers were coded and divided into themes using NVivo software. Following the Ground Theory, these themes were then used in the dissertation.

Fifth: Research Structure:

So far, this dissertation has introduced the reader to the importance of university endowments in Saudi Arabia and the importance of having a specific and detailed legal framework that govern university endowments. The rest of this dissertation is organized into five chapters and a conclusion. The second chapter explains the role endowments play within a university and distinguishes between different types of gifts: donations and endowments. In addition, the second chapter describes and compares the internal and external channels that universities use to manage and invest their endowments.

The third, fourth and fifth chapters provide an in-depth analysis of the legal status of university endowments in the United States. The third chapter starts by introducing the Uniform Law Commission and the important role this organization has played in the creation and adoption of university endowments laws. The third chapter also discusses the legal situation prior to the introduction of the first uniform law, UMIFA. The fourth chapter discusses UMIFA explaining the legal solutions and challenges that it created. The fifth chapter discusses UPMIFA including the current legal challenges that university endowments face. The sixth chapter provides an evaluation of the legal framework of university endowments in the United States and discusses the potential benefits and lessons from the American experience in formulating a legal framework for university endowments in Saudi Arabia.

Chapter Two: Background

First: University Finance and budget

Public universities have several sources of revenue they depend on to support their annual operations. These sources of revenue can be categorized into two principle categories: operating and non-operating revenue.[7] The operating revenue is the major source of income for universities, and it provides most of the annual budget. Operating revenue is the revenue that a university receives in exchange for providing its normal activities such as education. However, to provide education to students, a university must hire faculty and staff members, maintain classrooms and laboratories and provide other related resources such as libraries and research centers. In other words, in order for a university to provide its normal activities, it will incur major expenses.

Therefore, operating revenue needs to cover operating expenses such as salaries, wages and utilities. In an ideal situation, the annual operating revenue matches or exceeds the operating expenses. However, operating expenses are usually significantly higher than the operating

---

[7] This categorization is based on the accounting standards from the Governmental Accounting Standards Board (GASB). GOVERNMENTAL ACCOUNTING STANDARDS BOARD, STATEMENT NO. 34, BASIC FINANCIAL STATEMENTS—AND MANAGEMENT'S DISCUSSION AND ANALYSIS—FOR STATE AND LOCAL GOVERNMENTS ¶ 102 (June 1999), https://www.gasb.org/jsp/GASB/Document_C/DocumentPage?cid=1176160029121.

revenue. Even with the rapid increase in students' tuitions, as one of the major, if not the major, revenue source, the overall operating expenses are still higher than operating revenue in public universities.[8] The following figure illustrates the relationship between the operating revenue and operating expenses at two of the major public research universities in the United States, Indiana University and Michigan State University.

[8] Students' tuition has been increasing rapidly in the United States. Data published by the National Center for Education Statistics shows that the cost of attending a 4-year undergraduate public institution has increased from $3,682 in 1985 to $18,632 in 2015. Thomas D. Snyder, Cristobal de Brey, and Sally A. Dillow, *Digest of Education Statistics, 2016—Postsecondary Education*, 52 NAT'L CTR. FOR EDUC. STAT. 399, 403 (2018), https://nces.ed.gov/pubs2017/2017094.pdf.

Chart 1 shows the relationship between the annual operating revenue and expenses at Indiana University in three different years. Chart 1 shows that the operating expenses exceed the operating revenue by a significant margin.[9]

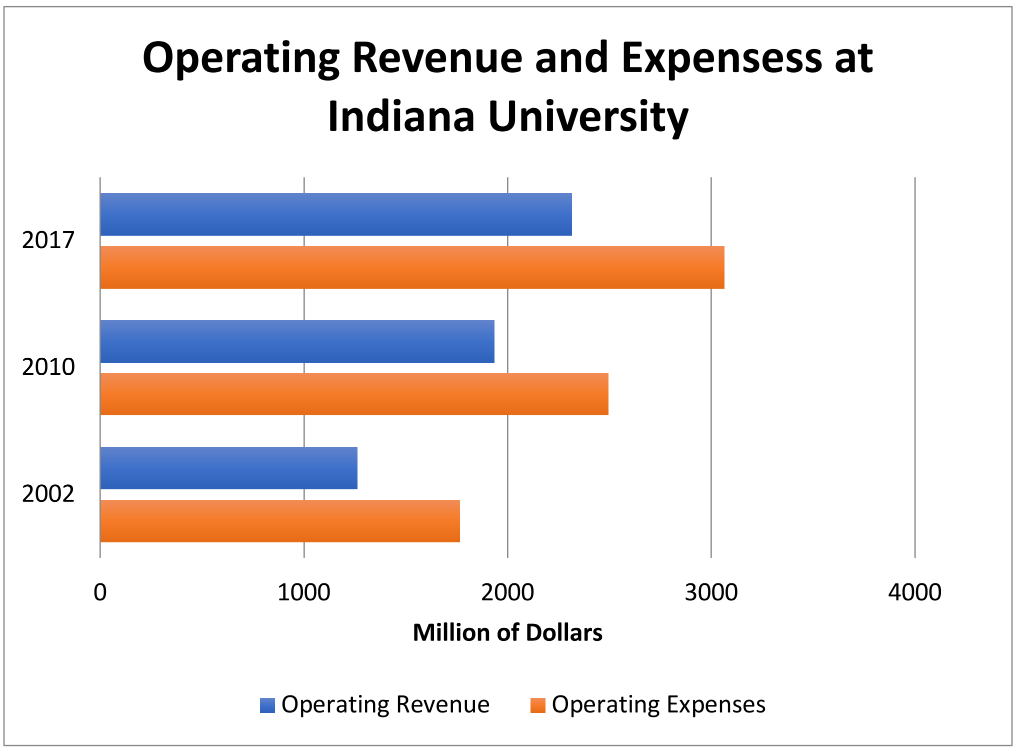


Chart 1

[9] 2016–2017 IND. UNIV. ANN. FIN. REP. 15, https://vpcfo.iu.edu/_assets/doc/fy2017.pdf; 2009–2010 IND. UNIV. ANN. FIN. REP. 10, https://vpcfo.iu.edu/_assets/doc/fy2010.pdf; 2001–2002 IND. UNIV. ANN. FIN. REP. 18, https://vpcfo.iu.edu/_assets/doc/fy2002.pdf.

Chart 2 shows the relationship between the annual operating revenue and expenses at Michigan State University in three different years[10]. Similar to Chart 1 on Indiana University, Chart 2 shows that the operating expenses exceed the operating revenue by a significant margin.

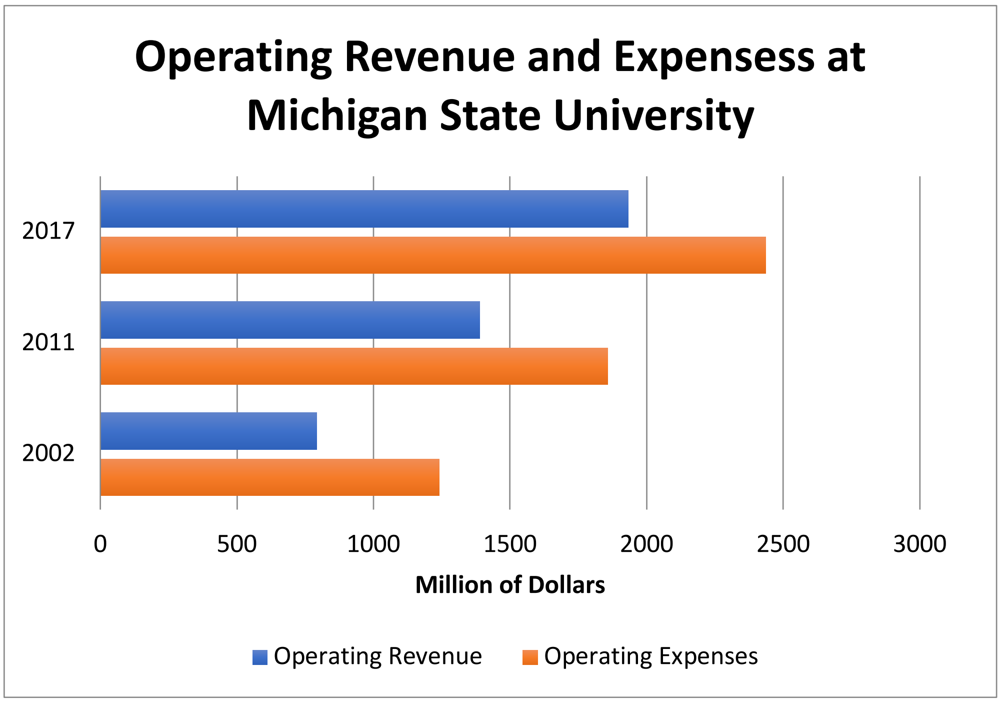


Chart 2

[10] 2016–2017 MICH. ST. U. ANN. FIN. REP. 17, http://ctlr.msu.edu/download/fa/financialstatements/FinRpt20162017.pdf; 2010–2011 MICH. ST. U. ANN. FIN. REP. 10, http://ctlr.msu.edu/download/fa/financialstatements/FinRpt20102011.pdf; 2001–2002 MICH. ST. U. ANN. FIN. REP. 6, http://ctlr.msu.edu/download/fa/financialstatements/FinRpt20012002.pdf.

On the other hand, non-operating revenue such as state appropriations, return on investments, and gifts and donations or philanthropy are received with nominal expenses. Therefore, universities rely on non-operating revenue to balance the difference between operating revenue and expenses. There are two major sources of non-operating revenue for public universities in the United States: state appropriations and philanthropy, including spendable gifts and endowments. Through state appropriations, states' legislatures and governments provide financial support to public universities on an annual basis. The amount of state appropriation can vary between different universities within the same state and between different years for the same university. While public universities in the United States have historically relied heavily on state appropriations more than any other source of revenue, recent data shows that public universities in the majority of the states have relied more on students' tuition and fees.[11] Public universities, as not for profit organizations, determine their prices initially based on the difference between the expenses and subsidies.[12]

The decrease in state appropriations will result in rapid and

---

[11] Andy Carlson, *SHEEO Releases State Higher Education Finance FY 2017*, STATE HIGHER EDUCATION EXECUTIVE OFFICERS ASSOCIATION (SHEEO) (March 29, 2018), http://www.sheeo.org/news/sheeo-releases-state-higher-education-finance-fy-2017. Also, during the 1970s, funds for public universities started to decrease. Timothy Arthur Reilley, A Study of Four Year State University Related Foundations (Dec. 1980) (unpublished dissertation, Western Michigan University) (on file with the Graduate College, Western Michigan University), https://scholarworks.wmich.edu/dissertations/2613.

[12] LARRY GOLDSTEIN, A GUIDE TO COLLEGE AND UNIVERSITY BUDGETING, FOUNDATIONS FOR INSTITUTIONAL EFFECTIVENESS 41 (4th ed. 2012).

significant increases in students tuition and other operating revenue unless public universities find other sources of revenue to balance the difference between operating revenue and expenses. Public universities need to take into consideration not only the affordability of their tuition prices, but also the national and international competition in attracting qualified students.[13] The following charts show the effect of the decrease in state appropriations on students' tuition Indiana University and Michigan State University.

[13] *Id.*

Chart 3 shows the relationship between declines in revenue from state appropriations and increases in revenue from students' tuition at Indiana University in three different years. [14]

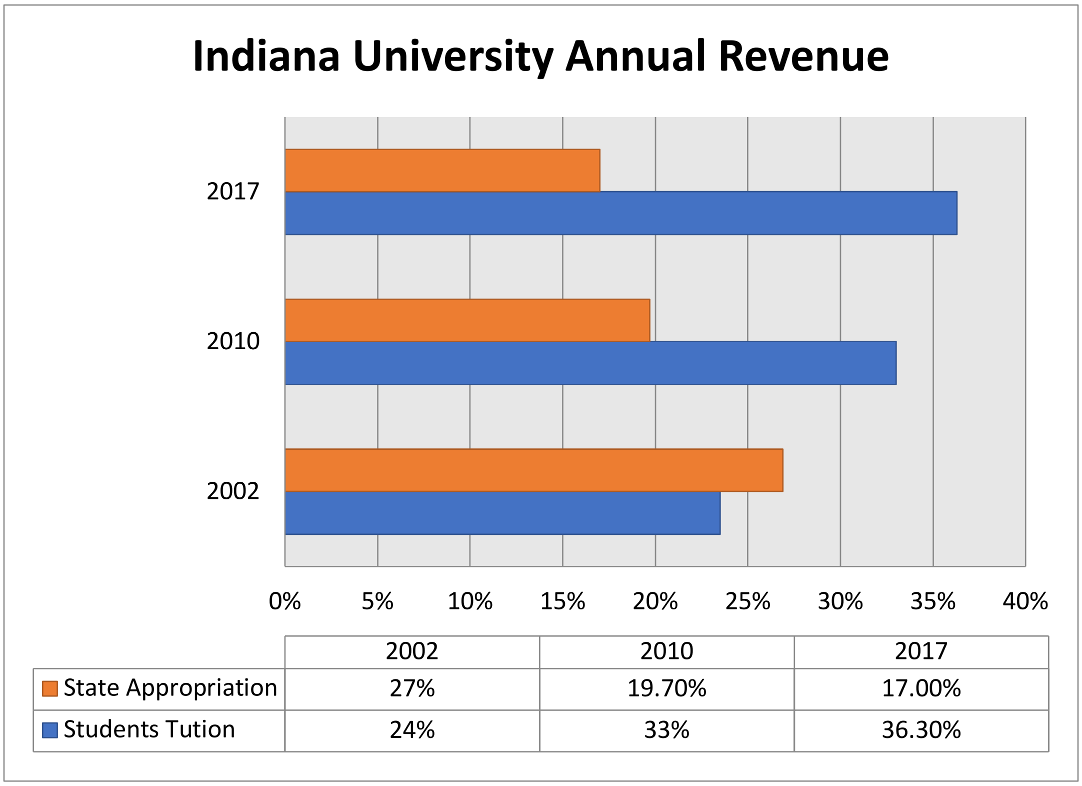
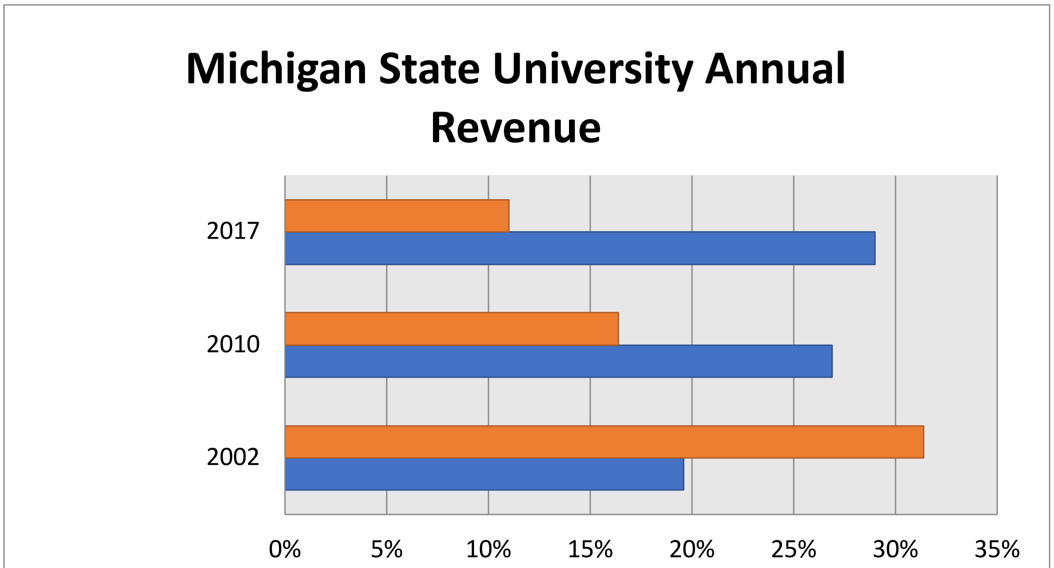


Chart 3

[14] 2016–2017 Ind. Univ. Ann. Fin. Rep., *supra* note 9, at 15-16; 2009–2010 Ind. Univ. Ann. Fin. Rep., *supra* note 9, at 10-11; 2001–2002 Ind. Univ. Ann. Fin. Rep. *supra* note 9, at 10-11.

Chart 4 shows the relationship between declines in revenue from state appropriations and increases in revenue from students' tuition at Michigan State University in three different years. Just like Indiana University in Chart 3, the Char 4 shows that the state appropriations decrease throughout the years while the students' tuition and fees increases at Michigan State University too.[15]



	2002	2010	2017
State Appropriation	31%	16.40%	11.00%
Students Tution	20%	27%	29.00%

Chart 4

[15] 2016–2017 MICH. ST. U. ANN. FIN. REP., *supra* note 10, at 4; 2010–2011 MICH. ST. U. ANN. FIN. REP. *supra* note 10, at 15-16; 2001–2002 MICH. ST. U. ANN. FIN. REP. *supra* note 10, at 7.

As state appropriations decreases, public universities in the United States started to rely more on philanthropy, including current gifts and returns on endowed gifts, as one of the new major sources of revenue. One of the major benefits of endowments is that their revenue, unlike all other revenue resources, can be determined more accurately.[16] Realizing the important role they play in stabilizing the annual budget by closing the gap between the operating expenses and revenue, public universities started to encourage donations and gifts from alumni, charitable foundations and corporations. Furthermore, these endowments and donations can provide a sustainable source of income in case the universities suffer any future shortage in governmental support.[17]

Public universities started to receive large gifts and donations from donors. For example, Indiana University received a $6 million dollars gift from an alumnus to start a center for investigative journalism.[18] Another such example was a $30 million gift recently received by Michigan State University from an alumnus.[19] While these gifts might seem significantly large, they only play a small part in the annual budget for universities.

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[16] GOLDSTEIN, *supra* note 12, at 42.
[17] Reilley, *supra* note 11, at 2.
[18] *Media School Receives $6 Million Gift for Investigative Journalism Center at IU Bloomington*, IND. U: NEWS AT IU BLOOMINGTON (Sept. 6, 2018), https://news.iu.edu/stories/2018/09/iub/releases/06-media-school-gift-investigative-journalism-center.html.
[19] Lois Furry, *Alumnus Makes Largest Single Gift in MSU History*, MICH. ST. U.: MSUTODAY (Sept. 6, 2018), https://msutoday.msu.edu/news/2018/alumnus-makes-largest-single-gift-in-msu-history/.

Chart 5 shows how important gifts and investments are in Indiana University's annual budget. While the overall percentage is small compared to the annual budget, the percentage is slowly increasing over the years.

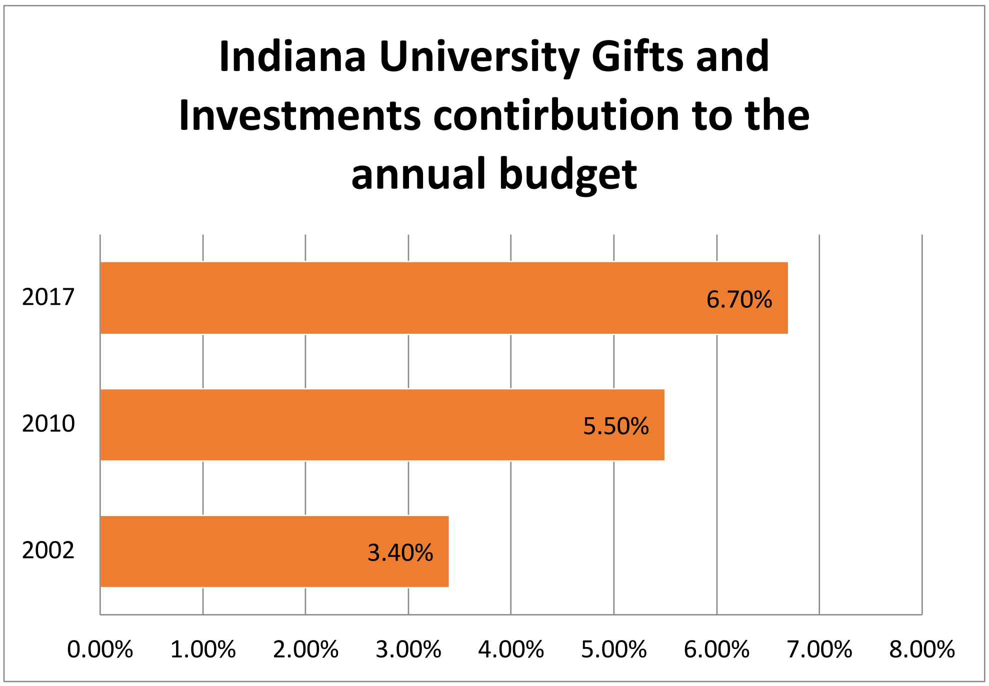

Chart 5[20]

[20] 2016–2017 IND. UNIV. ANN. FIN. REP., *supra* note 9, at 15; 2009–2010 IND. UNIV. ANN. FIN. REP., *supra* note 9, at 10-11; 2001–2002 IND. UNIV. ANN. FIN. REP. *supra* note 9, at 11.

Chart 6 shows the relationship between the percentage the annual gifts and investments at Michigan State University's annual budget. Just like Indiana University in Chart 5, Chart 6 shows that the annual gifts and investments percentage is increasing[21]. However, it is important to note the difference in annual support between Michigan State University and Indiana University as two of the largest donations' accepting public universities.

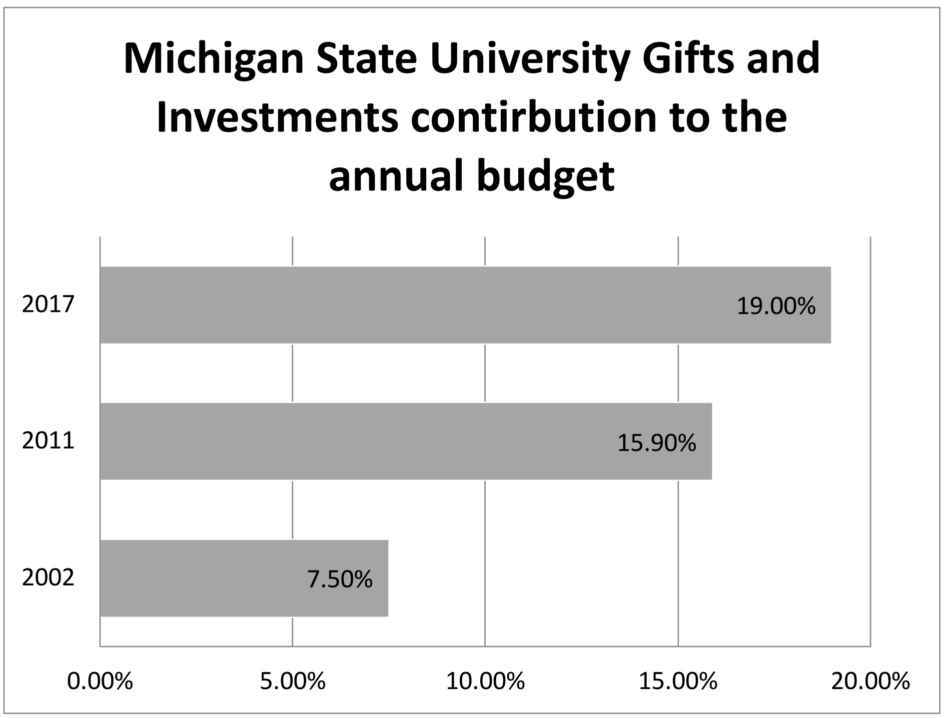

Chart 6

[21] 2016–2017 MICH. ST. U. ANN. FIN. REP., *supra* note 10, at 4; 2010–2011 MICH. ST. U. ANN. FIN. REP. *supra* note 10, at 15; 2001–2002 MICH. ST. U. ANN. FIN. REP. *supra* note 10, at 7.

Second: Gift and Donations to Universities

Gifts and donations to public universities can be categorized based on the nature of the gift, the purpose restriction, and the time restriction. The differences in the nature or restrictions of a gift are essential because they affect the legal outcomes for both the donor and the university receiving the gift.

A. Nature of The Gift

While the ultimate goal for universities when receiving most gifts is to liquidate these gifts into cash funds that can be used to fund various educational activities, a university might receive other types of gifts based on the donor's preferences. These gifts can include but are not limited to cash, stocks, bonds, personal or real property. Several factors can affect the donor's choice of a gift or donation type such as its personal and economical value to the donor and to the receiving university. Another factor that can affect the choice of gift is the tax deduction for the donor, because that varies based not only on the value, but also the type of the gift.[22]

B. Purpose of The Gift

[22] For more details on tax deductions for charitable giving, see https://www.irs.gov/charities-non-profits/charitable-organizations/charitable-contribution-deductions

Whether a gift is donated as cash, stocks, bonds, personal or real property, it can also be categorized based on the donor's designated purpose for the gift. The gift can be made for the benefit of the receiving university without a specific purpose, or it can be restricted toward a specific designated purpose chosen by the donor at the time of the donation. These purpose restrictions are most likely toward creating and maintain students' scholarships, but the restrictions can also be for other purposes designated by the donor's intent such as supporting professorships, building new centers, maintaining facilities, or buying books or related materials. The purpose restriction is usually a collaboration based on the needs of the receiving department, college, or university as well as the intent and purpose of the gift by the donor.

To illustrate this collaboration, Chart 7 shows the Indiana University Foundation support to the annual budget at Indiana University in the year 2016-17 based on the purpose of the gift according to the donor's intent.[23]

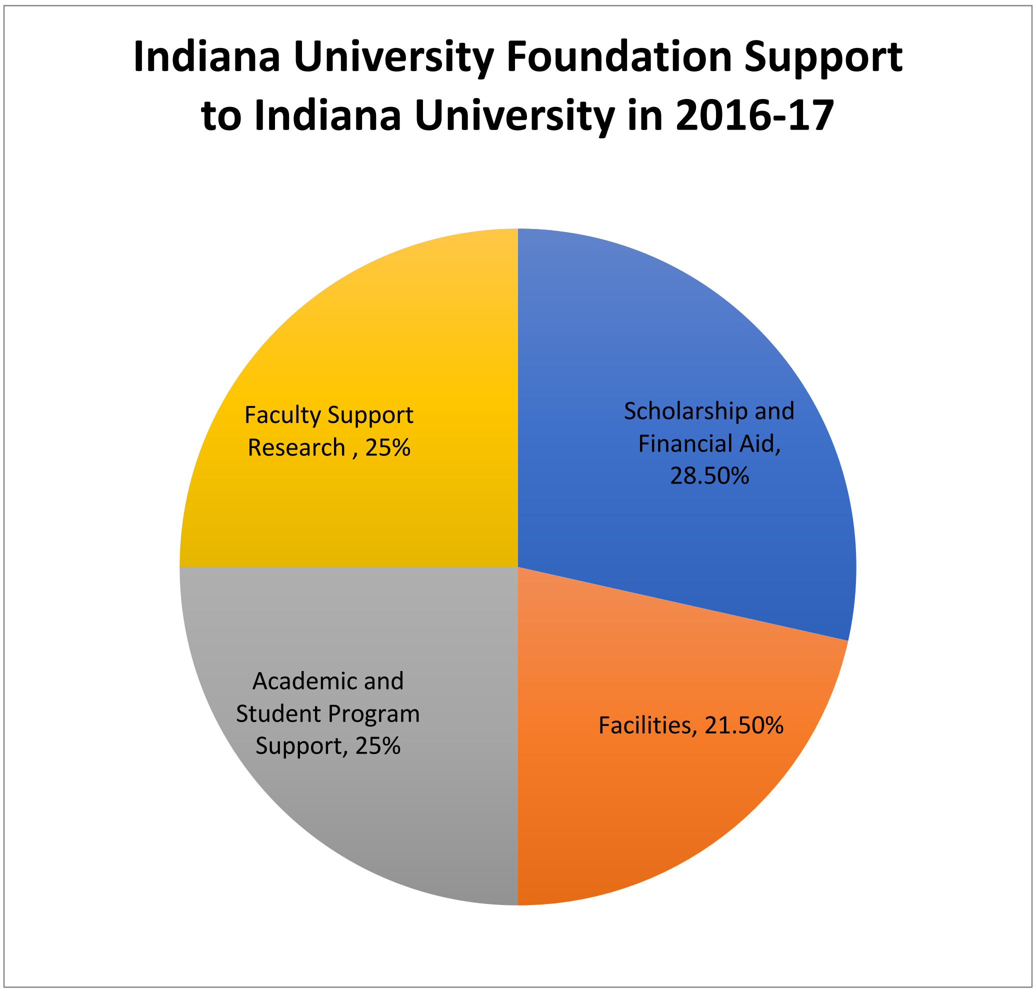

Chart 7

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[23] 2016–2017 IND. U. FOUND. FIN. HIGHLIGHTS 7, https://iufoundation.iu.edu/about/financial/Financial-Highlights_16-17.pdf.

C. Time Restriction Of A Gift

Gifts can be categorized based on the time restriction. Some gifts are fully expendable at any time the receiving university deems reasonable and some gifts are restricted or endowed.

To illustrate that with a hypothetical example, let us assume a donor makes a $100,000 donation to university of ABC to support a scholarship program that allows students in the Asian culture studies program to study overseas in an Asian country for a semester. If each student's trip costs $4,000 for the entire trip, and the donation did not have time restrictions, the university of ABC can spend the entire amount according to other factors such as the number of deserving applicants each year. That means the university of ABC can support an average of five students a year for five years for a total number of twenty-five students receiving the scholarship support within five years from the day of the donation.

Using a similar example, let us assume the donation was designated by the donor as an endowment. That means the university of ABC will have to invest these $100,000 dollars for at least a year. After a year, on the assumption that the investment produced good returns, and that the university spending policy is 4.5% a year, the Asian culture studies overseas scholarship program will only have $4,500 dollars to support applicants. If each student's trip costs $4,000 dollars, that means in five years, only four students will be supported by this scholarship donation fund. The first year will be only for investment, and one student per year for the next four years will be funded.

Thus, on one hand, the Asian culture studies overseas scholarship program in the first example will support a total number of twenty five students in five years compared to only four students in the second hypothesis. One the other hand, in the first example, the university of ABC will have already spent the entire $100.000 dollars within the first five years. After that, if the Asian culture studies overseas program does not have any other funding resources, the university might terminate, or reduce the program. In the second example, however, the university of ABC will have not only the entire $100.000 dollars, but also the total returns within these five years. That will likely help support the Asian culture studies overseas program in perpetuity, and the university of ABC will never risk terminating the program for a lack of funding.

Therefore, the donor's purpose of the donation makes the difference in the donation's time restriction. As participant 2 describes, the donor will ask herself "what kind of impact am I going to be able to really have on the university" before making the donation. If the donor prefers to see the short-term benefits or impact of their donation, then an unrestricted gift might be favorable in that case. A restricted or endowment fund is favorable if the donor is looking for a long-term legacy and a long-lasting impact as participant 2 describes "what they may want is that scholarship in their name or their father's name or their favorite professor's name to exist forever.”

1. Unrestricted Gifts

The first category is known as unrestricted gifts. That means the donor makes the gift to the receiving university without specifying a timeline in which the gift should be spent. The receiving university, in this case, has the discretion to spend all or part of the gift at any time. Some donors prefer this type of gifts as it allows them to see the immediate results of their donations. Participant 3 explains that “donors want to give for something that allows them to see results …for example, a donor wants to give to a program where he/she sees the professors doing great research that he/she helped funded.” Participant 3 adds that some donors prefer to give to unrestricted gifts versus endowment gift because “unless it is, the endowment, really enormous, it is not going to really fund a lot.” Participant 3 adds that “donors love seeing something like that where their money is real, and It is really doing something…”

If the donor does not require the university to spend the gift immediately, the receiving university can also designate all or part of unrestricted gifts to function as an endowment, which is known as quasi endowment. That means the gift will be preserved and invested, and the university will only spend the income or part of it, similar to its spending policy for endowment gifts. As participant 3 explains, these quasi endowments "look like they have a principal and an income side, but they are not really endowments." Participant 3 adds "that is very useful. If that is what you need to do, you can invade the principal as long as it is within the purpose." That means while these quasi endowments might look and function like endowments, the university has the legal right to spend the entire amount or fund held as quasi endowments since these gifts are restricted by the university not the donor. Clearly, unrestricted gifts provide a great deal of flexibility for universities to determine the time and amount to be used.

2. Restricted Gifts (Endowments)

Restricted gifts are gifts made by donors who have specified in the gift instrument that their gift should be held as an endowments fund. An endowment fund is defined under UPMIFA as "an institutional fund or part thereof that, under the terms of a gift instrument, is not wholly expandable by the institution on a current basis."[24] Under UPMIFA, the general idea is that the purchasing power of the principal of the gift should remain intact in perpetuity, and distributions from the income should be spent on the donor's designated purpose. These endowment gifts are usually invested in the first year after they are received. After that, annual distributions are used toward fulfilling the donor's

[24] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 2(2) (2006).

designated purpose or intent. While these endowments gifts might provide a smaller income annually compared to unrestricted gifts, they are designed to last longer, or ideally, in perpetuity.

The tradition of creating and accumulating endowments among universities is widely accepted. A recent survey of 802 colleges and universities by the National Association of College and University Business Officers, NACUBO, found that 104 colleges and universities have an affiliated endowment that exceeds one billion U.S. dollars.[25] Furthermore, more than 50% of the participating universities and colleges hold an endowment that exceeds $100 million U.S. dollars.[26] The reasons that American universities started creating and growing endowments is not clear.[27] Answering this question is significant as it provides a measurement that can be used when assessing any laws concerning university endowments.[28] Neither the law nor the literature provides a specific answer that justifies the creation and accumulation of endowments. There are, however, multiple theories that attempt to explain the reasons for which universities have endowments.[29] While

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[25] NAT'L ASS'N OF COLL. & UNIV. BUS. OFFICERS (NACUBO), 2018 NACUBO-TIAA STUDY OF ENDOWMENTS (NTSE)–NUMBER OF U.S. INSTITUTIONAL RESPONDENTS TO THE 2018 NTSE, AND RESPONDENTS' TOTAL ENDOWMENT MARKET VALUE, BY ENDOWMENT SIZE AND INSTITUTION TYPE (2019), https://www.nacubo.org/Research/2019/Public-NTSE-Tables.
[26] *Id.*
[27] Henry Hansmann, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3 (1990).
[28] *Id.* at 8.
[29] In his paper, Hansmann discuss multiple theories, 11 reasons, that justifies have endowment for private universities, while some of these reasons might also affect public universities, I discuss the reasons that are more related to public universities than private.

these theories might not provide specific reasons that justify the creation and accumulation of endowments, endowments clearly provide benefits to public universities. These benefits can be categorized into financial and nonfinancial benefits.

i: Financial Benefits

The main function of university endowments is to provide financial support. These financial benefits vary between universities as well as between endowment funds accounts. Some of the common financial benefits that endowments give to their universities are supplementing the shortage in state appropriations, providing short term emergency funds, and providing long term stability.

a. Supplement State Appropriations

Arguably, the main reason that justifies the creation and accumulation of endowments in public universities is to supplement the shortage of governmental support. As explained earlier, the percentage of state support in the annual budget for public universities has been declining over the years. Consequently, universities will have to supplement that shortage through other revenue resources including private support and students' tuition. Participant 7 explains that public universities started to think more about philanthropy as the governmental support declined. "The state government funding of public universities has decreased a lot, so as the government funding decreases, the state universities have to start thinking more about philanthropy, and so they had started building endowments."

Participant 1 also agrees that endowments have played an important role in supplementing governmental support. "Obviously one of the main reasons is to supplement revenue that they (public universities) get from tuition and from the states. Historically there's always been a gap between what a university would want to spend and, frankly, what it needs to spend, and what it's going to get through tuition revenue and through revenue from the state."

Participant 3 argues that having public universities endowments plays an important role in stabilizing students' tuition during times of shortage in governmental support. As participant 3 explains, "running a university or a college is expensive, and if you do not want to charge the full price to students, because it would be prohibitively expensive for them, endowments help them (public universities) operate their entities."

b. Rainy day fund

Another reason for public universities to have endowments is the role they could play during financial difficulties.[30] Any university might face a decline in its income in any given year because of a shortage in governmental support, private donations, or number of applicants. However, having large endowments protects universities against any

[30] Hansmann, *supra* note 27, at 21.

short-term decline in their income.[31] Universities can depend on spending from their endowments for a certain period of time instead of making sudden decisions that might affect their students, faculty and staff.[32]

Participant 2 explains that "the endowment ensures that through market forces or times of unrest or instability that the university has the funding it needs." To illustrate that, if a university decided to close a specific program for a lack of funding, money from the unrestricted endowment could cover a phase-out period. Instead of terminating that program immediately, the university could use the endowment money to supplement the shortage in the program funding until the current students graduated instead of forcing them to either change their major or leave the university.

c. Economic Stability and Sustainability

Providing long-term stability and sustainability is another benefit that endowments can provide for public universities. The importance of this stability is that it provides job security and assurance for the university's faculty and staff.[33] Participant 4 explains that the sustainability is the major difference and advantage for having an endowment compared to other types of funding or support. Participant 4

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[31] *Id.*
[32] *Id.* at 23.
[33] *Id.* at 36.

argues that “the importance and the value of the endowment, and why I personally place a priority on endowment money, is the sustainability factor. The idea that an endowment has both the ability to meet the needs of today’s students and the needs of students in the future.”

Participant 4 argues that the structure and purpose of an institutional funding model should mirror the institution itself: “if you’re supporting something like a university, you’re supporting an institution that is in its very definition has that longevity. It’s not a cause du jour … when you’ve got a cause or an institution or a program that is meant to exist in perpetuity, the funding model needs to follow that existence.” Participant 2 also agrees that the if a university is expected to last in perpetuity, the funding should follow a similarly long time-frame: “well, this was started basically to perpetuate the life of the university so that there would be funding basically in perpetuity for various programs at the university.”

Participant 1 also agrees, adding that having an endowment helps universities develop long-term plans since the funding for different programs is already secured: “Obviously part of the fact of the endowment is that you’re accumulating earnings so that the power of today’s money also has a staying power, so you funded that scholarship, but if you’ve endowed it, I have a scholarship today, I have a scholarship tomorrow, and I have a scholarship in 10 years.” Participant 6 concurs, adding that endowments as a long-term funding model contribute to the success of universities: “Historically universities have looked at endowments for the long-term success of the university, so that they can show that they know that they have adequate funding to keep a proper program going or scholarships going. I think that’s the overall value of a university endowment.”

Finally, participant 7 adds that an endowment serves as a long-term reliable source not only for the current generation but also for future generations of students. “The advantage of an endowment is to be able to have a steady income stream for the university. If they build a big endowment then they know every year we have four percent of this endowment that’s going to help with our operating expenses, so they have an endowment they can count on for the spending that they need to do each year, and they do not rely every year on new gifts because that’s very difficult … If you have an endowment you can count on that, so you have it now, but you also have it for the next generation students.” Participant 3 states: “permanent endowments are something you can always rely on.”

ii: Non-Financial Benefits

Besides the financial benefits, there are also other non-financial benefits that result from having endowments. Some of these benefits are the creation of new programs and opportunities, status and prestige for the university and its alumni, and the opportunity to give back for alumni.

a. Creating new programs and opportunities

Universities use most of their budget to cover their annual expenses, which leaves minimal or no possibility for enhancements. Therefore, endowments can be used to offer more flexibility for universities to spend more on advancing the university resources such as professors, facilities or equipment. Participant 1 suggests that “there are so many different things that can be funded through the endowment that they (universities) are unable to fund from those other sources, so certainly I think that is one of the biggest primary reasons (for having endowments).”

Participant 3 also agrees adding that “most of it though, I mean endowments and donations, usually funds enhancements to the basic functioning. You do not take your endowment and use that to pay all of your professors, but you do use it to recruit a really important professor who might not otherwise come and put some money on top of the regular salary for example. It’s usually at the margins for enhancing the way that the university runs.”

b. Connection opportunity for alumni

Another major benefit of university endowment is to serve as a charitable channel and opportunity for alumni. After graduation, many graduates choose to keep the connection and involvement with their universities since the reputation of these universities can affect its graduates positively or negatively.[34] Participant 5 explains that "another purpose of endowments would be the charitable giving opportunity. It represents a vehicle for donors to support the programs and services of the university both now and in the future."

c. Presumption of the University's quality

Another nonfinancial benefit of university endowment is the presumption that a well-endowed university is a better-quality university. Participant 6 explains that "with public universities, the amount of money in the endowment has a direct correlation to the perceived quality of the institution."

D. Conclusion

It is essential, therefore, for universities to have clear distinction between the received gifts. The type of the gift can determine the actual cash value received by the university. Knowing the purpose restrictions is also important since the university is legally responsible to fulfill the donor's intent. Finally, it is important for the university to have a clear distinction between unrestricted or fully expendable funds, endowment funds and quasi-endowment funds since the legal rules that apply to

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[34] *Id.* at 27.

them differ.[35] A university might unnecessarily restrict the use of a quasi-endowment fund if it was mistakenly classified as a pure endowment fund, which might lead to avoidable restrictions on the use of valuable gifts.[36]

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[35] WILLIAM L. CARY & CRAIG B. BRIGHT, THE LAW AND THE LORE OF ENDOWMENT FUNDS 10 (1969).
[36] *Id.*

Third: University Foundations [37]

Endowment gifts are created by the donors and then transferred to the receiving university to provide specific or general designated support to the university in perpetuity. That means the receiving university must continuously manage, invest, and distribute these endowment accounts according to the donors' intent. Furthermore, as the university improves its fundraising practices, the number of endowment accounts increases. Also, given the annual growth of these endowment accounts and the addition of new endowment gifts, public universities have to deal with considerably large, both in number and size, endowments. For example, in 2018, the Indiana University Foundation holds 6,297 individual endowment accounts valued at more than $2 Billion U.S dollars.[38]

Traditionally, these gifts and endowments funds made to public universities are received, invested and managed by the public universities through the development of investments departments.[39] In 1891, however, the first public university foundation was established at

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[37] Although they are called foundations, it is important to note that universities foundations such as the Indiana University Foundation or the Kansas University Foundation are legally different from private foundations such as the Ford Foundation or the Bill and Melinda Gates Foundation. That distinction has a legal significance, as the laws applied to private foundations are different that the laws applied to university foundations managing universities endowments. For example, the payout rules for private foundations mandate a specific percentage to be spent yearly, %5 which does not apply to public universities foundations.

[38] IND. UNIV. FOUND., 2018 FINANCIAL AUDIT (2018), https://iufoundation.iu.edu/doc/2018-financial-audit.pdf

[39] Reilley, *supra* note 11, at 6.

the University of Kansas[40]. The foundation, known as the KU Endowment, is registered as a 501 (c) 3, not for profit corporation to support the University of Kansas. Since its creation, the Kansas University Endowment has served as "the fundamental prototype for more than a 1000 college and university foundations throughout the United States."[41]

Currently, most public universities have a university related foundation.[42] Similar to KU Endowment, these university related foundations are usually registered as not for profit corporations.[43] The primary purpose of these foundations is to administer endowments and other private gifts to public universities.[44] For example, the Indiana University Foundation and the Indiana University Trustees created a formal operating agreement between the two entities that illustrate the relationship between the Foundation and the University. The agreement between the foundation and the university states that:

> "…Foundation is organized as a foundation under the laws of the State of Indiana as a not-for-profit institution for the sole purpose of supporting University by all means at its disposal and with a special emphasis on soliciting public support for University

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[40] *Overview*, UNIV. OF KAN.: KU ENDOWMENT, https://www.kuendowment.org/Who-We-Are/Overview (last visited April 2019).
[41] JOSEPH F. PHELAN, COLLEGE AND UNIVERSITY FOUNDATIONS: SERVING AMERICA'S PUBLIC HIGHER EDUCATION 3 (1997).
[42] David Bass, *The Foundation-Institution Partnership: The Role of Institutionally Related Foundations In Public Higher Education, 2010 New Directions for Higher Education* 19 (2010), https://doi.org/10.1002/he.377.
[43] Alexa Capeloto, *A Case for Placing Public-University Foundations Under the Existing Oversight Regime of Freedom of Information Laws*, 20 COMM. L. & POL'Y 311, 319 (2015), https://doi.org/10.1080/10811680.2015.1078617.
[44] Bass, *supra* note 42, at 17.

> from national and international sources beyond the State of Indiana, as well as within, and to manage and invest the securities, monies and real and personal property it receives from such sources, and to expend its income (beyond that required to cover its costs of operation) to and for the benefit of University;… Foundation is organized to promote educational and charitable activities, to receive, hold, manage, use, and dispose of properties of all kinds, whether given absolutely or in trust, or by way of agency or otherwise, for the benefit of the University; more specifically, to finance research work and educational programs, to hold and exploit patents and copyrights, to subsidize publications, to found and establish fellowships, and to endow scholarships, to supplement all of the services that University should render to society; …"[45]

Since these foundations are legally separate entities from the university, they have their own board of directors and executive officers. Sometimes, however, one or more university officials, such as the president of the university, also serves on the foundation board to advise the foundation board on the university related policies and plans.[46]

In general, the practice of fundraising, investing and spending endowment funds has been improving as participant 5 explains: "the management of endowments have become much more sophisticated over the last 50 years in the United States … sophistication has been a byproduct of large volumes of dollars in endowments and the necessity to be better stewards from an investment, spending and management perspective." While receiving private support in the form of gifts and endowments does not require a university to have a related foundation,

[45] *Proud to be a Leader in Good Corporate Governance for Nonprofits*, IND. UNIV. FOUND., https://iufoundation.iu.edu/about/mission/corporate.html (last visited April 2019).
[46] Reilley, *supra* note 11, at 8.

having a separate foundation can provide benefits to the university specifically in the areas of privacy, expertise, and endowment protection.

A. Privacy of donors' information

The protection of information at the public university related foundations might be one of the major benefits of having an independent university related foundation.[47] In order for a university to fundraise donations from the public, fundraising professionals collect sensitive private information from donors. If this information is disclosed, donors' personal information will most likely affect the public university negatively financially or politically. Furthermore, this personal information could be obtained if they are stored at the public university as a public entity based on the particular state's open records laws.[48] In contrast, having a separate foundation as a private not for profit corporation means that none of the state public records laws can be applied to obtain any private information stored at the foundation,[49] and therefore, donors' financial and personal information can remain private at the public university's related foundations.[50] Participant 1 states: "the (public university related) foundation is not subject to (states') open records laws. We (at these foundations) can protect donors, and we can

[47] Thomas Arden Roha, *State University-Related Foundations and the Issue of Independence* 1-13 (Assoc. of Governing Bds. of Univs. & Colls., Occasional Paper No. 39, 2000), https://eric.ed.gov/?id=ED442326.
[48] *Id.*; Capeloto, *supra* note 43.
[49] That includes for example state sunshine law, public information act, and state audits.
[50] Roha, *supra* note 47.

protect usage. There is a lot that we can protect over here (at the foundations).” Participant 5 also adds “The other issue is the protection of donor records … so the public university in many states is subject to a public records law, whereas the (public university’s related) foundation may not be.”

However, it is important to note that the rules determining whether a university-related foundation is considered independent from the university and therefore not subject to public information laws differs between states.[51] Courts in different states have ruled differently when adjudicating whether a public university’s related foundation is subject to public information laws or not.[52] In general, courts answer the question of independence after considering several tests.[53] These tests are mainly to determine whether the university related foundation benefits from the public tax fund or not.[54]

B. Level of Expertise

The process of receiving, investing and managing endowments involves a wide range of operations that require a specific level of

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[51] *Id.* at 9.
[52] *Id.*
[53] *Id.* at 4-5.
[54] *The author summarizes some of the factors that can increases the likelihood that a university foundation is independent form the university based on the reading of several states’ courts’ rulings on whether the foundation has: 1. has a separate board of trustees from the university board 2. has a separate office spaces from the university property, or pays market value rent for university spaces 3. services performed by university employees 4. received legal advices from the state attorney general 5. suspicions of involvement in improper conduct 6. information about public refund released periodically 7. a clear written agreement with university.*

professional skills and expertise including fundraising, legal, investments and auditing, which are not a usual set of skills possessed by academics in public universities. Requiring all this professional expertise to be within a university staff might create a burden for the administration of public universities. Participant 5 explains that a public university can manage its endowment better through a related foundation: "Generally, I think it is prudent or best strategy to let the (public university related) foundation manage the endowment. The point in some regards is (for the public university) to delegate responsibility for specific things to people who have the time and expertise to do it, and that is why you have a foundation. In part to help manage this piece of public university's business that demands care and attention with particular expertise." Therefore, having a separate university related foundation means that highly trained and talented professionals can be hired to administer the endowments and obtain better results.[55]

Furthermore, the donors will be assured that their donations are being managed properly by professional with relevant credentials and records.[56] In fact, some donors might question public universities capabilities to administer and operate large endowments as participant 3 explains: "some donors would prefer that (public university endowment) is separate (from the public university) and more corporate and managed

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[55] Bass, *supra* note 42.
[56] *Id.*

by a different organization (university related foundation). Sometimes they (donors) do not trust the public university (managing the endowment)."

C. Protection of donor's interest

A university related foundation is mainly concerned about the expansion of the university's endowment capacity and improving the fundraising to provide the highest possible perpetual support to the university while maintaining the purchasing power and value of the available endowment funds.[57] On the other hand, the public university administration is usually more concerned about the annual budget that supports various operations rather than the long term support to future generations at the university.[58] As participant 7 explains, "one issue that can create problems is that if the university faces a big problem financially. It is very tempting to use the endowment if they can." Compelled by the immediate needs and annual budgeting, the public university's administration might put pressure on endowment funds to be spent in the short term to contribute to the annual budget. Participant 7 explains that this pressure from the university to use endowment funds can take several forms: "Sometimes the university might be tempted to borrow against the endowment, and sometimes just to increase spending from the endowment." While such acts might

[57] *Id.*
[58] *Id.*

support a university facing financial difficulties in the short-term, participant 7 suggests that such behavior would endanger the endowment: "That puts pressure on the endowment and the endowment might not be able to maintain that kind of distribution." However, having a separate university related foundation that has some of the major donors on its board helps protect the endowment funds from such a pressure. [59]

Participant 6 explains the different financial focus of the university related foundation and public university administration: "There are so many pressing needs at the university that the current administration (of the public university) are not concerned about the future. They are concerned about the effectiveness of their administration (to the university) and they want more money." Therefore, participant 6 argues that there must be a legal separation between the public university and the university related foundation that manages the endowment. Participant 6 adds "it is actually quite necessary to have some separation between the administration (of the public university) and the endowment because there is typically a lot of money in endowments and there are a lot of demands and needs for (public university) president who can be pretty influential at times." Therefore, having a separate foundation provides more protection for the endowment and donor's intent.

[59] *Id.*

Participant 6 states, “the ultimate responsibility university related foundations have is being stewards for the donor so that foundations have the ability to say no if they do not think something is going well (with the use of endowments) and they do have the ability to call out the administration (of the public university) if they are not spending the endowment funds appropriately.” Finally, participant 6 explains that “if the administration of the university related foundation reported to the president of the university, that would be a harder conversation to have.”

Participant 3 also argues that having the endowment managed by a legally separate entity, the foundation, provides protection against any possible conflict of interest. Participant 3 explains that “there might be conflicts of interest between the interest of the managers of the endowment versus the administration of the university.” Participant 3 adds that “the endowment managers want to keep that endowment as long as they can, in perpetuity. Whereas university administration like the presidents and deans want as much as they can for funding current projects and expanding … they want to make their name and they want to make their own project. Whereas for the endowment, the administration does not think about that one year or that president. They think in the very long term.” Therefore, participant 3 believes that “some donors would prefer that the foundation is a separate corporate and managed by a different organization.”

Participant 1 also agrees that having a separate university foundation helps the staff to focus on building the university's overall endowment adding that "the nice thing about having a separate university related foundation … staff do not have divided loyalties between big projects and little projects or between this unit or that unit. University related foundation staff are completely agnostic as to all of it. The staff brain power is put towards that overall big picture for the public university as a whole." Participant 4 also argues that not having a separate related foundation to administer the public university endowment might result in risking the endowment. Participant 4 explains that "the biggest risk for exploitation in that scenario (having the endowment administrated by the public university, not a separate related foundation) is that you have now opened this up, and we have pushed the line a little more towards current needs versus long term preservation of capital (endowment) ,and the person who is going to push the current needs always is the university."

Moreover, the board of the university related foundations usually have some of the most involved donors at that particular university. [60] Donors who participate as board members usually do not only provide financial support, but also devote their time and professional skills and expertise to support the university endowments in different ways. [61] Most importantly, donors serving on the board of a public university related

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[60] *Id.*
[61] *Id.*

foundation serve as guardians for the donors endowments, intent and interest.[62] Participant 1 states: “There is this separate entity (the university related foundation) with fiduciary obligations that also has corporate fiduciary obligations to make sure that your money (as a donor) is shepherded appropriately.” Participant 6 also explains that “oftentimes there is a concern of what happens if the leadership changes at the university or what happens when I'm long gone because donors lose their voting power by making a charitable contribution.” Having a separate entity that administers and stewards the public university endowments means that the donors’ intent will be better protected. Participant 6 adds: “it is the foundation’s job as a fiduciary to represent the interests of the donors.” Finally, having a separate university related foundation means that the staff of the foundation do not report to the administration of the public university.

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[62] *Id.*

Chapter Three: The Legal Status of University Endowments Before 1972

First: Introduction

In the United States, as a federal country, some areas of law are considered federal issues where the federal legislative branch, the House of Representatives and the Senate, enacts federal laws that apply to all states. Other areas of law have a state-specific where each state's legislative branch enacts state laws that only apply in that state's jurisdiction. The laws and regulations of public university endowments are considered a state legal issue, which means that there could be a wide variety of laws governing public university endowment based on their jurisdiction[63]. However, to reduce variation and differences between states, the Uniform Law Commission (ULC)[64] has considered the issue of endowments as one of the legal areas that would benefit from unified laws among all the United States Jurisdictions. Therefore, the ULC

[63] There are still federal laws that might affect state issues. For example, the federal tax law, specifically, the IRS code 26 U.S. Code § 501 - Exemption from tax, affects university endowments. To read more about the IRS tax code: https://www.irs.gov/privacy-disclosure/tax-code-regulations-and-official-guidance.

[64] The Uniform Law Commission was formerly known as the National Conference of Commissioners on Uniform State Laws, or NCCUSL. At the time the organization promulgated uniform acts on endowments, it was still called NCCUSL, but this dissertation will use the current name.

promulgated uniform laws[65] that would address the issues facing endowments across all states.[66]

Second: The Uniform Law Commission

The Uniform Law Commission (ULC) is a nonprofit organization that was established in 1892.[67] The ULC consists of licensed legal professionals including judges, lawyers, law professors, and politicians from all jurisdictions in the United Sates.[68] Each state chooses its representatives to serve in the ULC.[69] The purpose of the ULC is to provide uniform laws that have been studied extensively and approved by the ULC members through a voting process. [70] These laws target state issues in which the ULC has determined that uniformity between jurisdictions would be preferred.[71]

Once an act is approved by the ULC, it does not automatically become a law in any state.[72] The act becomes effective in a state only if the legislative branch of that jurisdiction decides to adopt the uniform

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[65] There are also other laws or acts suggestions made by other legal organizations such as the American Bar Association. These suggestions might be a model act or a uniform law. The difference between mode acts and uniform acts is that states are encouraged to adopt a uniform law as it is or with little modification, whereas a model act purpose is to serve only as a guideline for each state when drafting and enacting its own individual law based on its needs.
[66] Bass, supra note **Error! Bookmark not defined.**.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

act to govern a state legal issue.[73] Jurisdictions can adopt the uniform law as it was approved by the ULC, make modifications to better serve the need of that particular jurisdiction, or adopt only part of the uniform law.[74] Therefore, it should not be assumed that a uniform law approved by the ULC and then adopted by two different states is identical.[75]

Since there is some variation in UPMIFA versions based on each state's adoption of the uniform law, for the purpose of this dissertation, I will discuss only the original uniform act promulgated and approved by the ULC. Also, it is important to note that these uniform acts also govern other institutions such as hospitals or religious institutions; however, for the purpose of this research I will only examine their effect on university endowments. Specifically, I will examine the Uniform Management of Institutional Fund Act of 1972, and the Uniform Prudent Management of Institutional Fund Acts of 2006.

The Uniform Law Commission On University Endowments

University endowment laws in the United States have been developing and changing in response to the growing and dynamic endowment practices as well as the growing number of donations and funds held by universities and their foundations. Some of these legal

[73] *Id.*
[74] *Id.*
[75] *Id.*

developments were designed to provide more flexibility for university endowment directors in enhancing endowment performance and returns.[76] Other legal changes were introduced to respond to the emerging issues or impracticalities that were facing university foundations managing endowments.[77] In general, the development of university endowment laws in the United States can be divided into three main stages, before 1972, between 1972 and 2006, and after 2006.

This chapter will discuss each of the three phases in detail including the main issues facing endowments in the areas of management, investment, and expenditure of endowments funds. It will also include a discussion of laws governing university endowment in each phase and how it responded to the main challenges facing endowments. Finally, this chapter will conclude by discussing the current questions and pressing issues related to university endowment and provide potential answers and recommendations.

Third: The legal status of university endowment before 1972

As discussed earlier, the gift instrument is the main legal document that has authority over endowment funds. These gift instruments should be the main guide for all actions related to the endowment funds. Over time, however, gift instruments might fall short in providing guidance for university foundations dealing with endowment

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[76] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (1972) (prefatory note).
[77] *Id.*

funds for several reasons. Since they are created for individual cases, some gift instruments might not provide clear and complete instructions on managing endowment funds. Even in the case of well-thought-out gift instruments, they might be outdated at some point in time, given the nature of the endowment funds to exist in perpetuity. In these cases, university foundations had to rely on another legal authority that could provide answers to emerging issues facing endowments funds.

Before the introduction and approval of the first uniform law on the management and investments of university endowments, university foundations had no specific legal framework that governed the administration of endowments funds.[78] In the absence of statutory laws and judicial precedents, university foundations managing endowment funds and courts in cases of disputes would rely on other laws such as trust, corporate, or contract law.[79] While these laws and regulations have been developed to cover other areas of law that have distinctive nature, they were also applied to endowment funds held by public universities since there was no other specific law that applied to them.[80]

During this time, endowment funds were generally treated very conservatively with university foundations aiming primarily to preserve

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78 *Id.*

79 Rachel M. Williams, *Transitioning from UMIFA to UPMIFA: How the Promulgation of the Uniform Prudent Management of Institutional Fund Act Will Affect Donor-Initiated Lawsuits Brought Against Colleges and Universities*, 37 J.C. & U.L. 201, 204 (2010).

80 Susan N. Gary, *Charities, Endowments, and Donor Intent: The Uniform Prudent Management of Institutional Funds Act*, 41 GA. L. REV. 1277, 1283 (2007).

the endowment funds' value.[81] Whether this treatment was based on the legal advice to follow trust laws or only to avoid any potential legal liability, it is apparent that university foundations managing endowment funds had no clear answers for several questions. This section will introduce some of the major issues that faced university foundations managing endowment funds when it comes to the legal authority and limitations in the management, investment and expenditure of endowment funds.[82] These issues include the treatment of capital gains, investment authority, and standards of care.

A. Appreciations of endowment funds

Since endowments are meant to exist in perpetuity, the first and most important rule of endowments was that the principal of the endowment fund should always be preserved intact and only the income or part of it could be spent on the donor's designated purpose. In general, the difference between the principal of an endowment fund and its income was clear. For example, if the principal of an endowment fund is invested in bonds, a fixed income will be generated annually. This income, or part of it, can be spent on the designated purpose. The issue arises, however, with other types of investment methods such as growth stocks. In growth stocks, the primary investment goal is to increase the capital gain as supposed to generate ordinary income. While this

[81] CARY & BRIGHT, *supra* note 35, at 5.
[82] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (prefatory note).

investment method might, in some cases, generate high total returns, the question here is how a university foundation should treat the capital gain. In other words, should realized and unrealized capital gains be treated as part of the principal of an endowment fund that is to be preserved, or should it be treated as part of the income and used for the designated purpose. Since neither statutory laws nor judicial precedents provided a clear answer in the case of capital gains in endowment funds, university foundations would rely either on trust or corporate law.[83]

One of the issues with interpreting the meaning of income in endowment funds is that the word "income" is interpreted differently in corporate and trust law.[84] If a university foundation decided to follow corporate law standards, then it would treat the capital gain as part of the income, and therefore, the university could spend it on the designated purpose.[85] If a university foundation, on the other hand, decided to follow trust law standards, then it would consider capital gain as part of the principal. That means the capital gain must be preserved and not be spent on the designated purpose.[86]

Moreover, some scholars argued that university foundations were allowed to treat capital gain as income, and therefore, spend it on the

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[83] CARY & BRIGHT, *supra* note 35, at 12.
[84] Gary, *supra* note 80, at 1311.
[85] CARY & BRIGHT, *supra* note 35, at 14.
[86] *Id.*

donor's designated purpose.[87] Others argued that using capital gain as an income would violate the basic endowment rule and donor's intent, to keep the principal intact.[88] They argued that capital gains had traditionally been treated by university foundations as part of the principal and not the income, which means that it cannot be spent on the designated purpose.[89] Supporters of this view also claim that using any part of the endowment fund, such as capital gains, without a clear and expressed intent from the donor would consequently decrease the donations received by university foundations.[90]

The answer to this theoretical question plays an essential role as it affects [91]the university foundation policies not only in spending, but also in investment strategies. To illustrate, assume that University of ABC Foundation received an endowment fund of $100,000 from Donor D to fund students' scholarships in English Literature graduate program. University of ABC Foundation received the gift and decided to invest it in company K stocks. At the end of the year, company K stocks distributed profit of $2,000 by issuing dividends. The company's performance during the year also raised its stocks value by 10%. That means the value of the

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[87] *Id.* at 33.
[88] *Id.* at 6.
[89] *Id.*
[90] *Id.* at 8.
[91] This example is oversimplified to explain the idea. In practice, university foundations do not usually invest endowment funds in stocks only rather than the stocks of one company exclusively as this practice is not prudent.

stocks of the initial gift now is $110,000. After one year, the principal is $100,000, the capital gain is $10,000 and the dividend income is $2,000.

Assuming that the gift instrument does not specify how the capital gain should be treated, if the university of ABC foundation treats the capital gain as part of the principal, that means the amount available for scholarships from Donor D's endowment fund account is $2,000. However, if the university of ABC foundation treats the capital gain as part of the income, then the amount available for scholarship from Jan Doe endowment fund is $12,000.

A university foundation's treatment of capital gains will also affect its investment decisions. To illustrate that using the previous example, Company K stocks total return was $12,000, $10,000 as capital gain and $2,000 as dividend income. Let us assume that Company L stocks total returns for the same year is $6,000, $2,000 as capital gain and $4,000 as dividend income. If the university foundation is treating the capital gain as part of the income, the foundation would, more likely, prefer to invest in company K since it yields more spendable income. However, if the university foundation decided to treat capital gain as part of the principal, then the foundation would, more likely, prefer to invest in company L stocks because it yields more spendable income.

Regardless of the importance of the issue and its influence on both investment and expenditure policies, it was not clear for university foundations how they should treat capital gain of endowment funds. Some argued that university foundations should follow flexible standards, similar to corporate law, and others argued that university foundations should follow a conservative approach like trust law.

B. Investments of endowment funds

Ideally, the university foundation would invest the principal of each endowment fund and spend the income or part of it on the donor's designated purpose. In practice, however, a university foundation manages a large number of endowment funds. There are also an overwhelming number of possible investment opportunities. Therefore, two major issues surfaced when it came to the investments of endowment funds that university foundations needed to deal with.

The first issue was the delegation of investment authority. When a donor makes an endowment fund gift, the managing board of the university foundation is responsible for managing and investing that fund. With an increasing number of endowments accounts, it was not possible for the board to manage all the accounts within the university foundation. It was not clear, however, if the university foundations board could delegate the investment authority. The delegation of the investment authority could be either internal, to investment officers working at the university foundation, or external, to other professional investment entities such as banks and other financial firms.[92]

The second issue university foundations faced when it came to the investments of endowment funds was the question of permissible investments. It was not clear if university foundations had the flexibility to invest in any type of investment, such as hedge, mutual, and pooled funds. Some states, aiming to protect endowment funds, allowed only specific types of investment that were considered safe.[93] Other states went beyond that providing a list of permissible investments for university foundations and other charities.[94]

Finally, the treatment of capital gain discussed earlier, has also affected the types of investments of endowment funds. There is a clear connection between the investment and spending policies of an endowment fund.[95] Following either trust or corporate standards in treating capital gain affected a university foundation's investments decisions.[96] Based on the standards it followed, a university foundation might prefer to invest in prospective higher income or growth. It can be concluded that university foundations had no clear answer when it came to the delegation and permissible types of investments.

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[92] CARY & BRIGHT, *supra* note 35, at 65.
[93] Gary, *supra* note 80, at 1283.
[94] *Id.*
[95] Gary, *supra* note 80, at 1296.
[96] Gary, *supra* note 80, at 1283.

C. Standard of care

In general, the standard of conduct applied in trust law also applied to university foundations when managing endowment funds.[97] University endowments, just like other trusts, were treated in a very conservative way that resulted in real estate as the main investment option.[98] Later on, a new standard was introduced that provided more flexibility and changed the investment practices over time.[99] The new standard, known as the Prudent Man Rule was established by Massachusetts court in Harvard College v. Amory. [100] The court ruled that:

> *"All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested …Trustees are not to be made chargeable but for gross neglect and willful mismanagement."*[101]

Instead of focusing mostly on real estate investments, the introduction of the prudent man rule allowed university foundations to invest endowment funds in other low risk or safe investment options such as bonds.[102] The Prudent Man Rule also required the prudent

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97 CARY & BRIGHT, *supra* note 35, at 57.
98 Christopher J. Ryan, Jr., TRUSTING U: EXAMINING UNIVERSITY ENDOWMENT, MANAGEMENT, 42 J.C. & U.L. 159, 168 (2016).
99 *Id.* at 169.
100 Harvard Coll. v. Amory, 26 Mass. (9 Pick.) 446, 461 LEXIS 38, at *28 (1830).
101 *Id.*
102 Gary, *supra* note 80, at 1282.

treatment of each and every investment account individually.[103] The prudent man rule evolved later to include broader investments options such as income generating stocks.[104] Even though the prudent man rule has developed over time and provided more flexibility for university endowments, it has not developed quick enough to keep up with the developments in the market and finance practices.[105] Since the Prudent Man Rule was introduced by the court mainly to protect trusts, it has placed unnecessary burdens on university endowment funds in the investment and management of their funds.[106]

D. Courts and endowment funds

When dealing with cases involving university endowments, courts would also use different standards based on the issue or questions presented and the socially desired outcome.[107] The outcome of court decisions, in general, would reserve the property to the charitable entity as supposed to private hands. When it comes to the administration of an endowed fund, courts tend to provide the most flexible terms that would allow university foundations to administer their endowments as long as it is considered prudent.[108]

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[103] *Id.*
[104] Ryan, *supra* note 98, at 169.
[105] *Id.* at 173.
[106] Gary, *supra* note 80, at 1283.
[107] CARY & BRIGHT, *supra* note 35, at 15-18.
[108] *Id.* at 26-27.

Third: Conclusion

It can be concluded for the time before 1972 that beyond the instructions included in the gift instruments, university foundations did not have a clear legal direction when managing endowment funds.[109] Neither statutory law nor court precedents provided a comprehensive legal authority that covered the administration of endowment funds.[110] Therefore university foundations, for various reasons, followed the law of trusts or corporations. [111]

Nevertheless, a report to the Ford Foundation by Cary and Bright on the law governing endowment funds found that many of these legal limitations had no legal support.[112] The study concluded that university foundations did not have any true legal barriers that prevented advanced practices in administering endowment funds.[113] The Cary and Bright study found that university foundations and endowment funds should be held to different standards than trusts.[114] While trust laws and standards were created to protect private and charitable trusts, they created unnecessary burdens on university foundations in the investment and management of their endowment funds.[115] Some

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[109] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (prefatory note).
[110] *Id.*
[111] *Id.*
[112] CARY & BRIGHT, *supra* note 35.
[113] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (prefatory note).
[114] Gary, *supra* note 80, at 1285.
[115] Gary, *supra* note 80, at 1283.

university foundations were also following the trust guidance when it comes to endowment funds spending, which affected the view of the capital gain as part of the principal.[116] It can be concluded that applying trust rules had negatively impacted the growth of endowment funds.[117] The study also recommended that it was necessary to implement an affirmative legislative action to address the legal uncertainty for university foundations managing endowment funds.[118]

For all the reasons discussed in this section, there was a clear demand for a comprehensive, well-defined law to govern the issues facing endowment funds and provide more flexibility to university foundations to make effective use of their endowment funds. The report to the Ford Foundation by Cary and Bright led to the creation of UMIFA.[119]

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116 *Id.*
117 Gary, *supra* note 80, at 1295.
118 CARY & BRIGHT, *supra* note 35, at 26-27.
119 Gary, *supra* note 80, at 1284.

Chapter Four: The legal status of university endowment between 1972 – 2006

First: Introduction

For the reasons discussed in the previous section, there was an apparent need for either the courts or the legislature to clarify the permissible legal practices for endowment funds held by university foundations. An alternative option was the creation of a model or uniform act by one of the private legal professional organizations such as the American Bar Association, the American Law Institute, or the National Conference of Commissioners on Uniform State Laws.[120] While these organizations do not have legislative powers, their members possess high levels of legal skills and expertise and they usually provide highly persuasive suggestions for legislation on specific issues that are later introduced and adopted by the legislatures in most jurisdictions.[121]

Therefore, the National Conference of Commissioners on Uniform States Laws, also known as the Uniform Law Commissioners,

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[120] The main difference between uniform laws and model acts is that the uniform laws are expected to be enacted entirely, whereas the model acts are designed to be an example a state can follow when enacting a legislation for a specific area of law. For more information about uniform law and model acts: https://guides.library.harvard.edu/law/unifmodelacts

[121] As an example of how widely these laws are adopted by states, the legislative reports for The Uniform Acts only for 2018 by the National Conference of Commissioners on Uniform States Laws can be found on: http://www.uniformlaws.org/Shared/LegReports/LegRpt_Act.pdf

promulgated the Uniform Management of Institutional Fund Act in 1972. Although university endowments laws and regulations are considered state, not federal issues, the National Conference of Commissioners on Uniform States Laws regarded the management and investment of university endowment funds as an area of law that would benefit from a unified act across states.[122] Since it is a uniform law produced by a private not-for-profit organization, the ULC, it only becomes effective in a state if that particular state's legislative branch decides to adopt UMIFA. State legislatures can adopt the uniform law as it is, or they can modify it to suit their jurisdiction's specific legal needs. After the promulgation of UMIFA, many, but not all, states have adopted a version of it over the years.

It is important to note that even after the adoption of UMIFA by a specific state's legislature, the main governing document of an endowment fund is the gift instrument. Also, the charter of incorporation of the university foundation as a not for profit entity serves as another legal authority that govern endowment funds before UMIFA. In other words, UMIFA will only apply in the absence of a clear direction in either the gift instrument or the charter of incorporation of the university foundation. That also means that in case of any conflict, UMIFA should

[122] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (prefatory note).

be ignored and the gift instrument and the charter of incorporation for the university foundation should be followed in that order.[123]

Aiming primarily to provide more flexibility and clarity to improve the efficiency of managing and investing endowment funds, the Uniform Management of Institutional Act contained eleven articles.[124] First of all, the approval of UMIFA in a state meant that university endowment funds at that state were not bound by trust law.[125] In general, UMIFA provided greater flexibility for university foundations managing endowment funds than trustees in trust law in some areas such as investments and expenditure.[126] This section will layout the major issues UMIFA encountered in facilitating the management and investment of endowment funds.

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[123] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT §2(3).
[124] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (1972) (prefatory note).
[125] A university foundation organized as a trust will still be governed by trust law; UMIFA applies to not for profit corporations but not to trusts unless the trustee is a charity. Most university foundations are organized as not for profit corporations, so this dissertation will focus on the rules for that organizational form.
[126] Gary, *supra* note 80, at 1305.

Table 1. UMIFA Year of Enactment by State[127]

Jurisdiction	Year of Enactment	Jurisdiction	Year of Enactment
Colorado	1973	West Virginia	1979
Connecticut	1973	Georgia	1984
Illinois	1973	North Carolina	1985
Maryland	1973	Indiana	1989
Minnesota	1973	Florida	1990
New Hampshire	1973	South Carolina	1990
Vermont	1973	Iowa	1990
Virginia	1973	California	1991
Washington	1973	Wyoming	1991
Delaware	1974	Oklahoma	1992
Kansas	1974	Arkansas	1992
North Dakota	1975	Maine	1993
Oregon	1975	Hawaii	1995
Massachusetts	1976	Nebraska	1996
Missouri	1976	Utah	1997
New Jersey	1976	Nevada	1997
Ohio	1976	New Mexico	1997
District of Columbia	1977	Mississippi	1998

Second: Investment of endowment fund

A. Investment Authority

UMIFA gives the governing board of endowment funds greater flexibility than trustees when it comes to the permissible types of investments.[128] First, UMIFA authorizes the governing board to keep any gift in the form of property for a period of time before liquidating it into an endowment fund or even hold it as a non-liquid assets.[129] Furthermore, UMIFA allows the governing board to invest and reinvest the endowment funds even if the investment does not produce returns immediately such as growth stocks.[130] The governing board can also invest any endowment fund that it holds in any pooled or common fund accounts.[131] These pooled or common funds can be maintained and managed by the governing board as part of the university foundation or by an external entity such as private firms, trust companies, or banks.
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B. Delegation of Investment

UMIFA allows the governing board to delegate the investment

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[127] UNI. LAW COMM'N, UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT, https://www.uniformlaws.org/committees/community-home?CommunityKey=63a66841-533c-419d-8b26-82152512c14f (last visited April, 2019).
[128] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 4.
[129] *Id.* § 4(2).
[130] *Id.* § 4(1).
[131] *Id.* § 4(3).
[132] *Id.* § 4(4).

authority internally or externally.[133] First of all, the board can create an investment committee within the governing board that takes the responsibility for all investment decisions.[134] Such a committee will, most likely, include board members with special expertise in investments. With the involvement of a fewer number of the governing board members who have the related expertise, an investment committee can make higher quality, time efficient investment decisions. The main concern in forming such a committee would be the availability of governing board members to participate actively in making these decisions. Typically, governing board members participate on a part time basis with little or no compensation.

The second way to delegate the investment authority internally is by hiring professionals as investment officers at the university foundations.[135] A prudent governing board would hire qualified and experienced professionals. These officers would work on a full time basis and be compensated as employees working for the university foundation. UMIFA also allows the governing board to delegate investment authority externally.[136] That means the governing board can contract with one or more investment or fund managers to deal with some or all investment decisions.[137] The board can also delegate the investment decisions to

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133 *Id.* § 5.
134 *Id.* § 5(1).
135 *Id.*
136 *Id.* § 5(2).
137 *Id.*

other entities such as banks and trust companies.[138]

Third: Expenditure of An Endowment Fund

A. Use of Appropriations

The use of appreciation of an endowment fund as income has been a controversial topic. Allowing the use of appreciation can provide more resources for the governing board to be spent on the donor's designated purpose. If used imprudently, however, it can also endanger the principal of an endowment fund. If the donor states clearly in the gift instrument how the appreciation should be treated, UMIFA allows the governing board to spend as much as permitted by the donor.[139] The donor can, on the other hand, limit or prohibit the use of appreciation entirely.[140]

If the gift instrument is silent on the use of appreciation, UMIFA permits the governing board to spend all or part of any realized or unrealized gain of an endowment fund.[141] In order to protect the principal, UMIFA created two measures for the governing board before using the appreciations of an endowment fund.[142] The first measure stipulates that the governing board should use the standard of ordinary business care and prudence in dealing with the endowment fund.[143] The

138 *Id.*
139 *Id.* § 2.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.* § 6.

second measurement to protect the principal of an endowment fund is the creation of the new concept of historic dollar value.[144]

B. Historic Dollar Value

The concept of Historic dollar value was introduced for the first time by UMIFA. Since UMIFA provides flexibility to the governing board in using the capital gain of an endowment fund, the historic dollar value was created to act as a protection shield to the principal of an endowment fund against any possible overspending.[145] The historic dollar value was defined by UMIFA as the total value in dollars of the amounts contributed by donors to an endowment fund without appreciation or depreciation.[146] Furthermore, the historic dollar value of any subsequent donations or contributions to an original endowment fund are measured at the time they are made, not the time of the original fund.[147] Also, if a gift instrument requires the accumulation of the income until it reaches a specific value before the governing board can spend from it, that value is set to be the historic dollar value of that endowment funds.[148]

Beyond the traditional view before UMIFA, the historic dollar value created a new standard for the expenditure of endowment funds.

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[144] *Id.* § 2.
[145] Gary, *supra* note 80, at 1310.
[146] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(5).
[147] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(5)(2).
[148] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 1(5)(3).

Regardless of the definition of principal and income, the governing board cannot spend any amount of appreciation unless it exceeds the historic dollar value of an endowment fund. If the sum of the total returns and the initial investment does not exceed the historic dollar value, then the governing board cannot use any amount of that endowment fund. While the historic dollar value protects the endowment fund from overspending, it does not protect against inflation.[149] In other words, the purchasing power of an endowment fund is not protected by the concept of historic dollar value.

Fourth: Management of an endowment fund:

A. Standard of Care

UMIFA clearly describes the standard of care for governing board as the standard of care of a businessperson, not that of a private trustee, which was discussed earlier as the prudent man standard.[150] Under UMIFA, the governing board is held to the standard of ordinary business care and prudence under the circumstances of a decision. [151]

That means the governing board needs to take into consideration all the relevant facts and circumstances before making any related decision.[152] These facts and circumstances can be either relevant to the

[149] Gary, *supra* note 80, at 1312.
[150] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 6.
[151] *Id.*
[152] *Id.*

university or the economy.[153] Some of the facts relevant to the university are its educational mission, the purpose of the endowment fund, and the costs associated with managing endowment funds.[154] Other factors related to the economy would be the general economic conditions, expected investment returns, and inflation and deflation.[155]

B. Release of Restrictions

As discussed earlier, the gift instrument is the main legal authority that governs any endowment fund. That means that when managing an endowment fund, the governing board is legally bound by all the restrictions set by the donor in the gift instrument. While the reason behind this is to protect the donor intent as well as the endowment funds from any potential abuse, it can also, in some cases, prevent the governing board from using endowment funds appropriately. As endowment funds become old, the restrictions and limitations set in the original gift instrument might become a burden in carrying out the endowment fund purpose. UMIFA, therefore, describes the circumstances in which the release and modifications of restrictions on endowment funds will be allowed.

First of all, the release of any restriction on an endowment fund must be within the general purpose of the educational mission of the

[153] *Id.*
[154] *Id.*
[155] *Id.*

university.[156] The governing board can acquire a written approval from the donor to release either a restriction on the use of the endowment fund or part of it set in the original gift instrument.[157] UMIFA also recognizes that, in some cases, the governing board may not be able to acquire the donor's written consent.[158] Therefore, in order to protect the donor's intent from any potential abuse, UMIFA allows the governing board to request the release of any restrictions on the use or investment of an endowment fund from the court.[159] Moreover, UMIFA requires the governing board to notify the attorney general of any changes to restriction on endowment funds as an extra protection to the donor's intent set in the gift instrument.[160] If the governing board is seeking a release, not modification, or a specific restriction in the gift instrument, the court must find that restriction to be "obsolete, inappropriate, or impracticable".[161] Finally, the governing board cannot request the release of the time restriction to transform an endowment fund into an expendable fund.[162]

This UMIFA provision allows the release of a specific restriction but it does not allow the modification of any restrictions.[163] That means the

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[156] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(c).
[157] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(a).
[158] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(b).
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] *Id.*
[163] Gary, *supra* note 80, at 1326.

governing board and the court do not have to take into consideration the original intention of the donor when releasing a restriction on an endowment fund. The only consideration under this provision is the restriction itself and how it affects carrying out the purpose of the endowment fund. Therefore, UMIFA also allows the use of the cy-pres doctrine.[164]

Unlike the UMIFA release provision, cy-pres doctrine requires the governing board and the court to consider the intention of the donor. In order to make any modification to an existing restriction, the modification must be as close as it can be to the original intent of the donor. While UMIFA provides two provision that allows the governing board and court to either release or modify a restriction on an endowment fund, it does not provide any further instructions to the governing board or the court as to which provision to use and when.[165]

Fifth: Conclusion

UMIFA was introduced to provide clear answers to the ambiguity and uncertainty in the legal questions related to university endowments. UMIFA applies only after a jurisdiction adopts it, and in case the gift instrument is silent on a specific issue. In general, UMIFA offers legal flexibility to the governing boards in issues related to the investment,

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[164] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(d).
[165] Gary, *supra* note 80, at 1327.

management, and expenditure of endowment funds.[166] At the same time, UMIFA created several methods to protect the donor's intent and endowment funds from any potential abuse.

Overtime, however, some UMIFA provisions created burdens on the governing board of endowment funds. Thirty years after the creation of UMIFA, some of its provisions were naturally outdated.[167] The National Conference of Commissioners on State Laws realized the need to revise the Uniform Management of Institutional Fund Act to solve some of these issues. Therefore, the Uniform Prudent Management of Institutional Funds Act was introduced to repeal and replace Uniform Management of Institutional Fund Act in 2006.

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[166] UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT (prefatory note).
[167] Gary, *supra* note 80, at 1297.

Chapter five: The legal status of university endowment after 2006

First: Introduction

The Uniform Management of Institutional Fund Act (UMIFA) was promulgated because universities' officials and their legal counsel assumed that trust or nonprofit corporation rules governed university endowments. At that time, trust and nonprofit corporations' laws had not provided the flexibility and guidance required for investing and managing university endowments effectively. Over the years, however, both trust and nonprofit corporations' rules have been modernized and updated. For example, in the year of 1994 the Uniform Prudent Investor Act, also known as the UPIA, was promulgated and later adopted by 45 states.[168] This law contains 16 articles.[169] The UPIA was created to update the investment practices for trustees.[170] While these rules do not govern university endowments, they govern similar entities such as charitable trusts. Also, several unforeseen legal issues had emerged in connection with university endowments that UMIFA did not provide an answer for. Therefore, there was a need to update the UMIFA to reflect provide

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168 UNIF. PRUDENT INV'R ACT, https://www.uniformlaws.org/viewdocument/final-act-with-comments-70?CommunityKey=58f87d0a-3617-4635-a2af-9a4d02d119c9&tab=librarydocuments (last visited April, 2019).

169 *Id.*

170 *Id.*

solutions to some of these issues and to reflect the new updates in other related laws.[171]

In 2002, the National Conference of Commissioners on State Laws started reviewing UMIFA and decided that some of its provisions were outdated.[172] In 2006, the Uniform Prudent Management of Institutional Fund Act (UPMIFA) was introduced as a new version of the uniform law that repels and updates the (UPMIFA).[173] The 12-article UPMIFA aimed to develop the legal standard provided by UMIFA in order to improve the efficiency of managing and investing endowment funds.[174] Since its promulgation, UPMIFA has been enacted in 49 states, Washington D.C. and the U.S. Virgin Islands.[175] While the adoption of UPMIFA replaces UMIFA in these states, it only applies to decisions made after its enactment.[176] In general, UPMIFA updates some of the standards related to the management and investment of endowments, repels some of the ineffective regulations imposed in UMIFA, such as the historic dollar value, and introduces new rules that facilitate the modification of endowments in certain conditions. This section discusses the major

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[171] Gary, *supra* note 80, at 1297.
[172] UNI. LAW COMM'N, 2006 PRUDENT MGMT. INSTITUTIONAL FUNDS ACT, https://my. uniformlaws.org/committees/community-home?CommunityKey= 043b9067-bc2c-46b7-8436-07c9054064a3 (last visited April, 2019).
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*

issues UPMIFA addressed to facilitate the management and investment of endowment funds.

Table 2. UPMIFA Year of Enactment by State [177]

State	Enactment Year	State	Enactment Year
Indiana	2007	Michigan	2009
Oklahoma	2007	Wisconsin	2009
Oregon	2007	New Jersey	2009
Texas	2007	Arkansas	2009
Nebraska	2007	Massachusetts	2009
Idaho	2007	California	2009
Connecticut	2007	Maine	2009
Delaware	2007	Hawaii	2009
Montana	2007	Rhodes Island	2009
Utah	2007	Maryland	2009
Tennessee	2007	Illinois	2009
Nevada	2007	Ohio	2009
South Dakota	2007	New Mexico	2009
Iowa	2008	Vermont	2009
Kansa	2008	Missouri	2009
Arizona	2008	Wyoming	2009
South Carolina	2008	Washington	2009
Minnesota	2008	North Dakota	2009
Georgia	2008	Kentucky	2010
Virginia	2008	Louisiana	2010
Alabama	2008	Alaska	2010
West Virginia	2008	New York	2010
New Hampshire	2008	US Virgin Island	2010
Colorado	2008	Florida	2011
District of Columbia	2008	Mississippi	2012
North Carolina	2009		

[177] UNI. LAW COMM'N, *supra* note **Error! Bookmark not defined.**.

Second: Investment Of Endowment Fund

When it comes to the investment of endowment funds, UPMIFA emphasizes that a gift instrument expressing the donor's intent is the main document that governs the endowment funds.[178] Therefore, the governing board should always consult the gift instrument when making decisions with respect to endowment funds.[179] In case of the absence or shortage of some governing terms in the gift instrument, UPMIFA provides the governing board with several factors that must be considered when making investment decisions to protect the endowment fund.[180]

In general, UPMIFA follows the modern portfolio theory in the investment decisions applying the standards of prudence and diversification.[181] UPMIFA updated directions on investment decision making by incorporating the investment rules from the Uniform Prudent Investment Act, UPIA.[182] Although UPIA applies to charities organized as trusts, UPMIFA considered the UPIA rules appropriate for any prudent investor and were added to UPMIFA to provide guidance to decision makers for endowment funds.[183]

A. Endowment and ethical investment

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178 UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3(a).
179 *Id.*
180 *Id.* § 3(e)(1).
181 *Id.* § 3 cmt. at 13.
182 *Id.*
183 *Id.*

An increasingly popular area of interest related to the investment of endowment funds, is the idea of ethical and mission related investment, also known as socially responsible investment.[184]This investment practice “refers to the integration of environmental, social, and corporate governance considerations (ESG) into the investment process”. [185] While an investment decision will normally take into consideration the financial profit or monetary benefits, ethical investment also considers social, environmental benefits and consequences.[186] The idea of taking into consideration social and environmental factors when investing an endowment fund seems consistent with public universities’ mission. Several types of stakeholders at universities including professors, students and sometimes board members have pressured their universities to either invest or divest from certain businesses. In response to the growing pressure for ethical and mission related investment, some universities have rejected the proposals and demands to divest from certain businesses or companies arguing that it would negatively affect the overall performance of the endowment, while other universities have altered their investments strategies accordingly.

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[184] Gunther Capelle-Blancard & Stéphanie Monjon, *Trends in the Literature on Socially Responsible Investment: Looking for the Keys Under the Lamppost*, 21 BUS. ETHICS: EUR. REV. 239, 240 (2012).
[185] *Id.*
[186] Joakim Sandberg, *Socially Responsible Investment and Fiduciary Duty: Putting the Freshfields Report into Perspective*, 101 J. BUS. ETHICS 143 (2011).

On the one hand, some universities argue that the main mission of a university endowment is to maximize the income to be spent on the donor's designated purpose. Therefore, the only factor a university endowment should consider is the financial growth and return. According to this argument, limiting any investments based on non-financial reasons contradicts with the diversification of the endowment, and therefore, with the university's fiduciary responsibility toward its donors. For example, the Central Students Government at the University of Michigan called the university Board of Regents to reconsider the university endowment's investment strategies.[187] The students called for the formation of a committee that will investigate the endowment divestment from certain companies allegedly participated in human rights violations in the Middle East.[188] The Board of Regents declined to form such a committee.[189] In a statement, the Board emphasized that "we remain committed to the university's longstanding policy to shield the endowment from political pressures."[190] The university also issued a response to the Central Students Government demands explaining that from such a committee would contradict with the university's investment

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187 Martin Slagter, *University of Michigan Unlikely to Divest from Companies Tied to Israel*, MLIVE (Nov. 15, 2017), https://www.mlive.com/news/ann-arbor/2017/11/university_of_michigan_doesnt.html.
188 *Statement Regarding CSG Vote on Resolution A.R. 7-019*, UNIVERSITY OF MICHIGAN (Dec. 14, 2017), https://publicaffairs.vpcomm.umich.edu/resolution-regarding-divestment/statement-regarding-csg-vote-on-resolution-a-r-7-019/.
189 *Id.*
190 *Id.*

policy and commitment to its donors.[191] The university explains that subjecting the investment strategies of the endowment to any political pressure would "increase our investment risk and decrease our investment returns."[192]

Participants in the interview agree with that point of view. Participant 1 explains that "foundations are not there to be involved in social issues, and they should not use endowments in any way to shape, form or try to influence social policy." Participant 1 explains that the maximization of investment returns is the only factor that a university related foundation should consider. "Foundations take investment policy and apply that to the investments that are going to most promote the investments returns." Participant 8 also agrees that only the financial factors should be considered arguing that involving other factors will risk the financial returns. "In terms of managing the portfolio, every time you shrink the universe of potential investments, you reduce your potential return and you increase your potential risk." Therefore, "foundations' incentive should be to make money. As long as something is legal and it is not proven obviously immoral, a foundation should consider it."

Participant 4 also agrees that investing endowments should not be subject to any nonfinancial factors explaining that "all that (ESG

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[191] *Regarding Divestment*, UNIVERSITY OF MICHIGAN (Nov. 15, 2017), https://publicaffairs.vpcomm.umich.edu/resolution-regarding-divestment/.
[192] *Id.*

investing) is either time specific or some individual's agenda and perception of value." Therefore, participant 4 argues that endowment investments "should not be compromised by any individual or any time-specific agenda." According to participant 4, asking university related foundations to invest or divest in specific business based on nonfinancial reasons "is too much of a slippery slope, and it is too much of where you draw the line." Participant 4 further explains that "once you say we really do not like fossil fuel, so we will create a portfolio that does not have fossil fuel. Then somebody else is going to say tobacco. So now we create a portfolio that does not have fossil fuels or tobacco or diamonds or whatever the cause de jour is." Participant 4 also explains that even creating different portfolios will not provide a solution because "the problem is that it is all cause de jour, and no two people are going to agree on it." According to participant 4, following these cause de jour issues is challenging because "you have now taken this investment pool of money and again, you have dwindled down the possible investment." In other words, "you have taken away the diversity out of a pool."

Participant 8 also argues that there is no place for ESG investing in university related foundations. Participant 8 argues that students and faculty member who often pressure university related foundations do not understand how divesting from a certain business would affect the endowment. "I think people are coming from a good place when they give foundations their opinions, but I also do not think they have, Oftentimes, a good grasp on what that can do to a portfolio.” Participant 8 further explains that even if a foundation divests from a certain business or company based on the ESG investing criteria, that will not make any negative effect on the company. “Divestment does not have any impact. The company has already received their money when they floated the stock, it is (divestment) not going to affect them at all” Participant 2 also agrees adding that a university related foundation “cannot just drop out, you have to operate in the world as it exists today.” Finally, participant 8 questioned who has the right to decide if an investment is or is not appropriate stating that “marijuana is becoming legal … it may not be to my liking, but it makes money. if it makes money, then what is wrong, and who am I to judge?” Participant 7 argues that ethical investing is difficult to achieve “my concern is that we all have different ethical opinions.” Therefore, participant 7 concern would not be whether or not a university foundation should adopt ethical investment but how one defines “ethical” investment.

Other universities argue that divesting from certain companies on the grounds of ethical and mission-related considerations does not contradict with the university’s fiduciary responsibilities toward the endowment. For example, a student group at the University of Massachusetts called the UMass Fossil Fuel Divestment Campaign petitioned the university to divest from coal and fossil fuel companies that allegedly exacerbates climate change.[193] The students' request escalated to protests that even involved the arrest of several students.[194] In response, the Board of Directors at the University of Massachusetts Foundation announced its plans to divest its endowment, worth 770 million U.S. dollars,[195] from direct investments in fossil fuel companies.[196] The president of the university agreed with the foundation's decision explaining "This action is consistent with the principals that have guided our university … and reflects our commitment to take on the environmental challenges that confront us all"[197] The Chairman of the Board of Trustees at the university describes the decision to divest from fossil fuel companies as moral one that does not conflict with the fiduciary duty to protect the endowment.[198] "We do so, in part, because members of the UMass community have urged us to consider divestment in moral terms… but we're also mindful of our moral and fiduciary obligation to safeguard the University's endowment … we believe this conclusive action balances those two priorities."[199]

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[193] Robert P. Connolly, *UMass Becomes First Major Public University to Divest from Direct Fossil Fuel Holdings*, UMASSAMHERST (May 25, 2016), https://www.umass.edu/newsoffice/article/umass-becomes-first-major-public.
[194] Ira Kassiel, *UMass Amherst Arrests Students Protesting Fossil Fuel*, THE MASS MEDIA (Apr 16, 2016), http://www.umassmedia.com/news/umass-amherst-arrests-students-protesting-fossil-fuel/article_90ace33a-0409-11e6-91bf-43be1d2cfa44.html.
[195] Connolly, *supra* note 193.
[196] *Id.*
[197] *Id.*
[198] *Id.*
[199] *Id.*

Participant 6 also agrees that investment decision at university related foundation should not only consider the legality of an investment. Participant 6 explains that university related foundations should be careful in choosing their investments "because foundations have ethical, moral and legal responsibility to invest in appropriate areas." However, participant 6 clarifies that a university related foundation cannot extend social and moral issues to all investment opportunities. Participant 6 explains that "anything that is more restrictive will only reduce the playing field and the opportunities for investment, which in turn can increase the risk of the endowment because a number of investments are limited." Participant 6 adds that "foundations have a very clear responsibility, and it is to maintain the long-term health of the endowment." Therefore, participant 6 explains that these divestment demands should be limited and precise. Participant 6 adds "what does it mean, for example, divest from fossil fuels investments? Is that oil producers? Is that natural gas? Is that distributors or retail? Is it anything that uses fossil fuel?" Participant 6 adds that these demands to divest from certain businesses are difficult in practice. Participant 6 explains "these divestment demands sounds very idealistic on the surface, but without any clear guidelines, it does not make any sense …asking foundations to divest from all businesses on the social or ethical issues is a noble thought process, but it is not rational."

Participant 5 also agrees that ESG investing should be taken into consideration by university related foundations. “The hope is that we can balance total return with socially responsible investing … If done correctly, a socially responsible investing or ESG investing does not necessarily reduce the total return.” Participant 5 adds that while a university related foundation can manage to balance total returns and ESG investing, it should monitored that closely as this approach “is complex, and it changes over time. It is very dynamic, not static. It is a new variable, a variable that would have to be carefully weighed.”

B. Delegation of investment

UPMIFA allows university foundation to delegate the investment of endowment funds either internally or externally unless the gift instrument does not allow delegation.[200] In case the board of the foundation does its due diligence and decides to delegate an endowment fund to external mangers, UPMIFA does not hold the board liable beyond that.[201]

Third: Expenditure of an endowment fund[202]

One of the major updates in UPMIFA, is the elimination of the historic dollar value principle.[203] While the doctrine of historic dollar

[200] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 5.
[201] *Id.*
[202] *Id.* § 4.
[203] Although UPMIFA has eliminated the historic dollar value doctrine, some university foundations still refer to it as baseline guidance, but not legal requirement, to protect their endowments from overspending such as the University of West Florida Foundation at (https://uwf.edu/media/university-of-west-florida/university-

value was created to act as a protection to the principal of endowment funds, it created issues for universities that deprived them, in some cases, from using the endowments for the donor's designated purpose. To illustrate that, assume that University of ABC Foundation received an endowment fund of $100,000 U.S. Dollars from Donor D to fund students' scholarships in English Literature graduate program. University of ABC Foundation received the gift and decided to invest it in company K stocks. At the end of the year, company K had financial difficulties that decreased its stock price by 3%. That means the donor's endowment fund investment decreased from $100,000 to $97,000. While the change might not be significant, the endowment fund cannot be used to support the students' scholarship at the English literature as donor D desired because it fell below its historic dollar value, or original value of the endowment at the time of the donation.

In general, the first issue the historic dollar value doctrine created is that the market value of the fund might decrease between the time the donor makes the endowment donation and the time the university receives the donation. Also, if the value of an endowment fund exceeds the historic dollar value doctrine significantly, the doctrine becomes meaningless since it does not protect against excessive spending. For example, if the total returns of the endowment fund of a $100,000 in the

advancement/departments/foundation/policies/EndowmentAllocations062817.pdf) and the University of Connecticut Foundation at (https://www.foundation.uconn.edu).

previous example grew steadily at the rate of 10% for ten years to reach $200,000, the doctrine of historic dollar value will most likely never apply to this endowment fund again. In other words, this endowment fund will likely not be protected against overspending in the future.

Therefore, UPMIFA eliminated the historic dollar value doctrine. Participant 5 explains that "eliminating the historic dollar value requirement was a prudent strategy that enhanced the ability of university related foundation boards to better manage endowments." Participant 5 adds that eliminating the historic dollar value "creates increased burden on foundation boards to understand what their job is, how that job has implemented to make sure they are using very wise investment and legal counsel and accounting counsel, so it is ,in a sense, required foundations to up their game and do a better job." For that reason, and to protect the endowment against overspending the new presumption of imprudence was introduced by UPMIFA.

A. Presumption of Imprudence

While the elimination of the historic dollar value doctrine provided flexibility for university foundations when it comes to spending from endowment funds, it also exposed endowment funds to the possibility of excessive spending. Therefore, UPMIFA requires any spending from an endowment fund to be prudent. Furthermore, UPMIFA introduced a new standard that creates a rebuttable presumption that deems any spending of more than 7% of the value of an endowment fund to be imprudent.

The creation of the rebuttable presumption means that if a university foundation spent more than 7% of the endowment fund value, the foundation automatically designates this spending to be imprudent. In this case, the burden will be on the university foundation to provide evidence supporting that spending more than 7% is prudent. Furthermore, the presumption does not create a safe harbor below 7%. In other words, if a university foundation spent less than 7% of an endowment fund, it is not presumed to be prudent. Because some university foundations might assume that the creation of the rebuttable presumption creates a safe harbor for any spending under 7%, not all jurisdictions adopted this section from UPMIFA. Finally, regardless of the adoption of this section, UPMIFA states clearly that if the gift agreement requires spending that exceeds the 7%, then a university foundation must apply the gift instrument terms.

Fourth: Release And Modification Of Restrictions[204] (Cy Pres And Deviation)

In general, restrictions added by donors in gift instruments aim to protect the endowment fund and the donors' intent from any potential

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[204] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6.

misuse. This misuse might be a clear diversion of the gift instrument, such as spending a restricted students' scholarships endowment fund on improving or maintaining facilities. This misuse can also be a slight diversion from the donor's intent, such as using an endowment fund designated for students' scholarships in English literature to purchase English literature books and materials. Therefore, the gift instrument plays an essential role in clarifying restrictions to protect the donor's designated intent on the usage of the endowment fund.

However, these restrictions might eventually place a burden on the university foundation that either prevents or reduces the effectiveness of the endowment fund. This might also be predicted in some cases since endowment funds are expected to last in perpetuity, and neither the donor nor the university can precisely anticipate future needs. For example, a donor might create an endowment fund to support scholarships for students working on a specific graduate degree. Years after the scholarship fund started, the university might decide to close that particular program. Recently, the University of Wisconsin at Stevens Point announced some changes to its academic plans.[205] These changes included the creation of new programs, but most importantly, the termination of 13 different programs.[206] While this decision has a direct

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[205] Colleen Flaherty, *U Wisconsin-Stevens Point to Eliminate 13 Majors*, INSIDE HIGHER ED (Mar. 6, 2018), https://www.insidehighered.com/quicktakes/2018/03/06/u-wisconsin-stevens-point-eliminate-13-majors.
[206] *Id.*

impact on professors, staff and students, it also affects the endowment funds designated to support any of these majors.

Therefore, UPMIFA allows university foundations to either release or modify restrictions on endowment funds in one of three different methods depending on the time of the requested change and the value of the endowment fund. First, a university can release or modify restrictions by receiving the consent of the donor in record.

The second way to modify a restriction, is by getting the court's permission. A university foundation can seek the court's authorization to modify a restriction if it is proved to be impractical or wasteful, applying the Cy-pres doctrine. Requiring foundations to acquire the court permission before releasing or modifying an endowment terms is both costly and time-consuming. Participant 6 states, "I think that there needs to be some rigor associated with it, and while it can be expensive and time consuming to change the language of some endowments and sometimes it can take a year with the state's attorney general… I believe it is important and I would not want to make it any easier." Participant 6 adds "I believe that the current process is effective because it is hard, and I think it should be hard to change the terms of an endowment."

Finally, the university foundation can release or modify restrictions for small (less the $25,000) or old (more than 20 years old) endowment funds after 60 days of notifying the attorney general. It is important to note that in this case, the university foundation does not need to receive the court permission. This method was first introduced by UPMIFA. It allows university related foundations to utilize unused small endowment funds without requiring them to go to court, which is costly and time-consuming. As participant 3 explains, "it used to be that foundations had to go to court for every single one (each endowment fund no matter how small it is). Foundations were taking all kinds of stuff to Court. It was just a waste of time."

Fifth: Standard Of Conduct

UPMIFA sets mandatory standards of conduct for university foundations that manage endowment funds. These standards are the duty of loyalty,[207] the duty of care,[208] the duty to minimize cost[209] and investigation[210]. UPMIFA does not define the duty of loyalty for governing boards of endowment funds referring that definition to the law that governs the entity, the foundation, based on the way it is organized either as a trust or nonprofit corporation.[211] The duty of care, however, was defined as practices of an "ordinarily prudent person in a like position … under similar circumstances".[212] That means the standard of

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[207] UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3(b).
[208] *Id.* § b.
[209] *Id.* § 1c.
[210] *Id.* § 2 c.
[211] *Id.* § b.
[212] *Id.* § 3(b)

care would take into consideration each decision individually based on the nature of the university and the current circumstances at the time of the decision. Finally, UPMIFA requires the governing board to minimize the cost associated with managing and investing the endowment fund and to examine related facts, borrowing language from trust and nonprofit corporation rules.

Sixth: Conclusion

The Uniform Prudent Management of Institutional Fund Act was promulgated to update and replace the Uniform Management of Institutional Fund Act. This update was necessary to follow in the footsteps of other legal updates in similar areas such as Trust and Nonprofit Corporation Laws. Furthermore, after more than 30 years of the promulgation and enactment of UMIFA, some of its provisions had not provided the expected protection or flexibility for university endowment funds.

Therefore, UPMIFA updated some of these provisions such as the adoption of the prudence standards and the elimination of the Historic Dollar Value doctrine. UPMIFA also facilitated the terms and rules for the release and modification of endowment funds by adding the small and old provision. Finally, UPMIFA, like UMIFA, is a default law that only applies in case of the absence of a provision governing the issue in the gift instrument.

Nonetheless, UPMIFA has also created some confusion in some areas, such as the presumption of prudence if the spending does not exceed 7%. Lastly, UPMIFA has not provided answers to all issues related to endowment funds. For example, UPMIFA is silent on one of the major issues currently facing university endowment funds: the role the university foundation plays in ethical and mission-related investment.

Chapter Six: Remarks On The United States Legal Framework And Blueprint For Saudi Arabia

First: Introduction

The previous chapters provided a comprehensive description and analysis of the laws and legal issues related to the management and investment of public university endowments in the United States. Following this analysis, this chapter will describe a potential starting point for a legal framework for university endowments in Saudi Arabia. This suggested blueprint for Saudi Arabia will not suggest specific laws or codified rules but will provide general legal principles that might serve as a foundation for a comprehensive legal framework. These general principles are the major legal foundations that the US laws, UMIFA and UPMIFA, were built on.

While this chapter recognizes that these legal rules and laws are created to serve a particular jurisdiction, it proposes that these general legal principles can serve as a foundation for a legal framework for endowments in any jurisdiction. These principles could also be adopted by universities and foundations as an internal guide for their endowments. Additionally, these principles can provide directions and recommendations for donors and their advisors to use in their gift agreements when creating endowments at public universities in Saudi

Arabia. Finally, these general legal principles could also serve as a foundation for a legal framework not only in Saudi Arabia, but also in other countries as it builds on the US experience in the development of the legal status of public university endowments.

Therefore, this chapter will start by summarizing the general legal principles of the United States laws in UMIFA and UPMIFA. These general legal principles will then be applied to create practical suggestions for Saudi Arabian legislation, public universities, and donors.

Second: Remarks on The United States Experience in UMIFA and UPMIFA

First, it is essential to recognize the valuable contribution of nonprofit private organizations in the creation and subsequent adoption of UMIFA and UPMIFA by most of the jurisdictions in the United States. As discussed earlier, both UMIFA and UPMIFA were originally created by the Uniform Law Commission. The involvement of the ULC made available the experience of highly qualified legal professionals from various backgrounds in the formulation of UMIFA and later UPMIFA. Also, the Cary and Bright report to the Ford Foundation was instrumental in the ULC starting the conversation about legal issues facing university endowments and the eventual creation of UMIFA.

Second, the laws in both UMIFA and UPMIFA generally followed the professional practices by university endowments. In other words, the professional practices in managing and investing university endowments created legal questions, issues, and limitations that had no clear answers. Consequently, these limitations reduced the potential financial benefits of the university endowments. Therefore, UMIFA and UPMIFA were introduced to solve these issues and maximize the utility of university endowments. An example discussed earlier in UMIFA is the conservative treatment of the capital gains. Another example in UPMIFA was the elimination of the historic dollar value doctrine. The laws in both UMIFA and UPMIFA responded to these limitations and created more flexible rules to enhance the management and investment of university endowments.

Third, while the laws in UMIFA and UPMIFA followed the professional practices in general, it also established some rules that aims to protect endowments. UMIFA and UPMIFA provided several rules that aim to provide protection for the donor intent, the perpetuity and purchasing power of endowments. The laws in UMIFA and UPMIFA are default laws that apply only in the case of the absence of the donor intent. Also, the creation of the historic dollar value in UMIFA, and later the prudence standards and imprudence presumption in UPMIFA aimed to protect the perpetuity and purchasing power of endowments.

Finally, the laws in both UMIFA and UPMIFA provided limited guidance in specific areas which creates both flexibility and complications. For example, the law in both UMIFA and UPMIFA does not provide any guidance for moral or any other nonfinancial goals and objectives of university endowments. While this flexibility means that endowments could be invested widely in the market solely based on financial considerations, it has also resulted in faculty and students at some universities calling for the divestment from certain business based on moral and ethical standards. These divestment demands are based on the belief that some endowments investments are not consistent with the mission and values of public universities. Neither UMIFA nor UPMIFA have provided any guidance to deal with the moral or nonfinancial goals of endowments.

Third: Proposal for a Legal Framework in Saudi Arabia

First, similar to the US experience in the creation and development of UMIFA and UPMIFA, it is vital to acknowledge the importance of the involvement of nonprofit organizations and the expertise of legal professionals in the creation and development of university endowment laws in Saudi Arabia. Therefore, nonprofit organizations in Saudi Arabia should be involved in supporting research and studies of the current state of university endowments to determine the issues and limitations facing public universities in the creation, investment, and management of endowments. Also, other professional organizations such as the Saudi Bar Association[213] should be actively involved in the conversation about improving the current legal status of university endowments. Furthermore, law professors and scholars at public universities should also play a dynamic role in the description, critique, and development of public university endowments. The collaboration between multiple legal professionals in understanding and improving the current university endowment practices could lead to the proposal of a law that can be later adopted by, or at least influence, the legislation. Also, such collaboration could result in suggestions for best practices in the creation of university related foundations and also gift agreements.

Second, similar to the US experience prior to the passage of UMIFA, unless there are explicit legal constraints, professionals working in the management and investments of university endowment in Saudi Arabia should take advantage of the flexibility of the current legal status by working creatively to advance the professional practices in the field. The development of these professional practices will eventually lead to legal uncertainty and limitations in some areas. Then, these legal uncertainties and limitations will provide a base for the creation of a specific law that covers the university endowments practices. In other

[213] The Saudi Bar Association is a general authority that was created by the Saudi Council of Minister, therefore, it is not a nonprofit organization. More information about the SBA can be obtained from the website at: https://sba.gov.sa/en/.

words, professionals working in the field of university endowments should not postpone developing endowments practices in areas like fundraising, investment, and management until a precise law is passed by the legislation. While the absence of a specific law might not provide specific guidance, it provides greater flexibility for professionals working in the field.

Third, unlike the US experience, it is essential for all professional practices and any potential legal developments in Saudi Arabia to take into consideration nonfinancial goals when creating endowment laws, university foundations, or gift agreements. As these endowments serve public educational institutions, nonfinancial goals should be consistent with both the overall country's vision and university's mission. For example, the promotion of bridging the gap between different social and economic classes of a society could be adopted as a nonfinancial goal for university endowments. In practice, that means such an endowment will take this goal into consideration when accepting new donations, investing current endowment funds, and providing funds for the university to spend on projects.

Fourth, similar to the US experience, an essential aspect that will promote the idea of private giving in Saudi Arabia is to assure donors that their generous donations will be managed, invested, and spent according to their intent and following the best professional practices. While a law adopted by the legislation should cover these topics, the absence of such a law should not prevent public universities from creating several measures that appeal to donors as protection for their endowments. For example, universities can encourage the creation of separate legal entities, similar to university related foundations, that can serve as stewards for endowments. These foundations should not only provide the best professional practices, but also protect the endowment from any financial pressures from the public and the university administration.

Finally, since the implementation of the recommendations discussed above will require a considerable period of time, public universities will need to be creative in finding alternative ways to encourage private donations. For example, a public university could suggest to a hesitant potential donor to place the endowment, or part of it, at another well-established financial institution such as a trust company or a bank either domestically or internationally. These well-established financial institutions could play the role of the host and managers of these endowments with the public universities, or designated purposes within public universities, named as beneficiaries. After that, once a university-related foundation starts to build its financial and practical records earning donor trust, the endowment could be moved later to be hosted at the university related foundation. While this situation might not be ideal, it provides assurance for the donor that their donation will not be misused, and it provides the public university with the ongoing private support consistent with the donor's designated purpose.

Conclusion

Historically, public universities in the United States have relied on the support of the state appropriations as one of the main sources to fund annual budgets. However, as the percentage of state appropriation decreases in many states, public universities started to rely more on private gifts and donations. Among the different types of private donations, perpetual endowments stand out as providing stability and ongoing, long term support. As public universities' endowments grew, many universities relied on university related foundations to receive, manage, and invest their endowment funds.

As the professional practices in investing and managing university endowments developed, the laws governing university endowments have also changed. Private nonprofit organizations such as the Ford Foundation and the ULC played an important role in the development of the legal framework for university endowments. First, UMIFA was introduced to provide more flexibility for the management and investment of university endowments. Later, UPMIFA was introduced as an updated version of UMIFA to provide solutions for the some of the emerging legal issues as the practice of investing and managing endowment advanced. Overall, the United States not only has multiple public universities with relatively large endowments, but it has also undergone considerable legal development in the area of investing and managing endowments with more than 47 years of experience.

This valuable experience should be used either as a model, or at least, as general guidance for other countries that are building their legal framework for university endowments. Therefore, this dissertation proposes general principles for a legal framework for university endowments in Saudi Arabia that draws on the US experience. Further, future research on Saudi universities' endowments from a legal perspective should focus on describing the current practices in the fundraising, investing, management, and distribution of university endowments. Similar to the Ford Foundation report, these descriptions should analyze the current legal challenges facing university endowments, including the areas of legal limitations and legal uncertainty. Also, private and professional organizations should play an active role in supporting research on the legal status of university endowments, providing model gift agreements for public universities, and proposing legal regulations to be adopted.

Finally, public universities in Saudi Arabia should encourage donations and participation in building their endowments from alumni, friends, corporations, and nonprofit organizations. Public universities should discuss issues related to fundraising and acquiring professional assistance and expertise with different public stakeholders in society. .

After all, the advancement and progress of public universities in teaching and research will benefit society at large.

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