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# THE CONSTITUTIONALITY OF STATE AND LOCAL GOVERNMENTS' RESPONSE TO APARTHEID: DIVESTMENT LEGISLATION

## I. Introduction

Of the twenty-nine million people living in apartheid<sup>1</sup> South Africa,<sup>2</sup> only the five million member white minority<sup>3</sup> enjoys the full rights of citizenship.<sup>4</sup> The remaining black population, gradually, is being

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1. The Afrikaner word "apartheid" means separateness or apartness. J. DUGARD, *HUMAN RIGHTS AND THE SOUTH AFRICAN LEGAL ORDER* 5 (1978); see WEBSTER'S *NEW WORLD DICTIONARY* 27 (1979) (defining apartheid as "strict racial segregation as practiced in South Africa"). The term "apartheid" first was used in the 1948 election campaign in which the Nationalist Party came to power. The Nationalists coined the term in order to capitalize on the electorate's racial anxieties. *THE REPORT OF THE STUDY COMM'N ON U.S. POL'Y TOWARD SOUTHERN AFRICA, SOUTH AFRICA: TIME RUNNING OUT* 40 (1981) [hereinafter cited as *SOUTH AFRICA: TIME RUNNING OUT*]; see G. SHEPARD, JR., *ANTI-APARTHEID: TRANSNATIONAL CONFLICT AND WESTERN POLICY IN THE LIBERATION OF SOUTH AFRICA* 3 (1977). Since 1948, apartheid has developed as an ideology and the government consistently has followed an elaborate policy of racial separation. D. MYERS III, *U.S. BUSINESS IN SOUTH AFRICA* 1 (1980) [hereinafter cited as *MYERS*].

2. The Union of South Africa was formed in 1910 and consisted of the former self-governing British colonies of the Orange Free State, Transvaal, Natal, and the Cape of Good Hope. *THE STATESMAN'S YEAR-BOOK 1984-1985* 1067 (J. Paxton 121st ed. 1984) [hereinafter cited as *STATESMAN'S YEAR-BOOK*]. The Union remained a member of the British Commonwealth until 1961 at which time it became a republic. *Id.* For a discussion of the historical development of South Africa, see generally G. FREDRICKSON, *WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY* (1981).

3. For at least 300 years whites have dominated every aspect of life in the Western Cape. R. PRICE & C. ROSBERG, *THE APARTHEID REGIME? POLITICAL POWER AND RACIAL DOMINATION* vii (1980) [hereinafter cited as *THE APARTHEID REGIME*]. The South African government is controlled by the Afrikaners, a people of Dutch, French Huguenot, and German descent who settled the region in the seventeenth century and who today constitute the National Party. *Id.* at vii. The white population in South Africa is divided into two groups: the Afrikaners, who constitute 60% of the whites, and the English-speakers, who began to settle in the region in the beginning of the nineteenth century and make up the majority of non-Afrikaner whites. *SOUTH AFRICA: TIME RUNNING OUT*, *supra* note 1, at 43.

4. *SOUTH AFRICAN FACT SHEET, SOUTH AFRICAN PERSPECTIVES* 1 (Africa Fund Mar. 1984) (Africa Fund is associated with The American Comm. on Africa, New York, NY) [hereinafter cited as *SOUTH AFRICAN FACT SHEET*]; *The Sudden Focus on S. Africa*, *Newsday*, Dec. 9, 1984, at 9, col. 1, at 17, col. 1 [hereinafter cited as *Spotlight on South Africa*]. Under the Population Registration Act of 1950, every person is assigned to one of three groups: white, Colored, or African. *SOUTH AFRICA: TIME RUNNING OUT*, *supra* note 1, at 48. The government has divided the Colored classification into subgroups which include Asians as well as persons of

exiled into the barren "homelands."<sup>5</sup> The government dictates where

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mixed racial origin. The Africans are subdivided further into eight major tribal groups. *Id.* The African population in South Africa consists of approximately 21 million people (72% of the total population); the white population comprises about five million people (16% of the population); the Colored and Asian population consists of the remaining 3.5 million people (12% of the population). SOUTH AFRICAN FACT SHEET, *supra*, at 1. Apartheid not only discriminates against Africans, or blacks, but also against persons of mixed race. The blacks, however, receive the worst treatment of all of the nonwhite groups. REPORT OF THE MAYOR'S PANEL ON CITY POLICY WITH RESPECT TO SOUTH AFRICA 6 n.2 (July 11, 1984) [hereinafter cited as MAYOR'S PANEL]. The Mayor's Panel was established by Mayor Edward Koch of New York City on May 30, 1984. The Mayor asked the panel to provide recommendations as to the manner in which the city should fulfill its moral responsibility to racial equality in formulating its policies with South Africa. *Id.* at 1.

5. The term homelands, also known as bantustans, refers to ten African reserve areas, which are rural territories inhabited mostly by Africans following traditional patterns of life. Stultz, *Some Implications of African Homelands in South Africa*, in THE APARTHEID REGIME, *supra* note 3, at 194. Blacks are sent to the homelands according to their ethnic background. Cowell, *Poverty Said To Grow for South Africa Blacks*, N.Y. Times, April 22, 1984, § 1, at 9, col. 1, at col. 3 [hereinafter cited as *Poverty for South African Blacks*]. The homelands consist of approximately 13% of the land in South Africa, *id.* at col. 3; Cowell, *Vote Comes to a 'Homeland,' But African Problems Linger*, N.Y. Times, Nov. 19, 1984, at A1, col. 2, at A17, col. 3 [hereinafter cited as *Vote Comes to a Homeland*], and presently house over one-half of the black population. *Pretoria Promises City Blacks 'a Say,'* N.Y. Times, Jan. 26, 1985, at A2, col. 3, at col. 4. The remaining 87% of the land which is reserved for the whites, contains the bulk of South Africa's mineral resources and almost all of its agricultural production and its industry. MYERS, *supra* note 1, at 3.

The South African government's long-term goal is to have no black citizens by moving the blacks out of the white areas and into the homelands. HUMAN RIGHTS VIOLATIONS IN APARTHEID SOUTH AFRICA, SOUTHERN AFRICA PERSPECTIVES No. 1/83, 2 (Africa Fund 1983) [hereinafter cited as HUMAN RIGHTS VIOLATIONS]. Once a homeland is declared independent, the blacks become citizens of their respective homelands and they lose their South African citizenship. *Vote Comes to a Homeland*, *supra*, at A17, col. 4. Of the ten homelands, four already have been declared independent: Transkei, Bophuthatswana, Venda, and Ciskei. STATESMAN'S YEAR-BOOK, *supra* note 2, at 1070. The remaining six territories have a limited degree of self-government under the Bantu Authorities Act of 1951 and the Bantu Homelands Constitution Act of 1971. *Id.* at 1070-71. The territories, however, are still part of the Republic. *Id.* Since 1960, the government has removed 3.5 million blacks from the white areas; 1.7 million people are under the threat of removal. SOUTH AFRICAN FACT SHEET, *supra* note 4, at 1. In February, 1985, the South African government announced that it was temporarily halting the relocation of black people from the white areas into the homelands. Cowell, *South Africa Temporarily Halts the Relocation of Black Settlements*, N.Y. Times, Feb. 2, 1985, at A2, col. 1 [hereinafter cited as *Temporary Halt of Relocations*]. P.W. Botha, President of South Africa, promised changes both in the policy of moving blacks and in the restrictions of black movement in the white areas. *Id.* at col. 2. The government stated that the policy of moving blacks would be limited to the absolute minimum, and when moving was deemed necessary, it would be done through

blacks can work<sup>6</sup> and live, whom they can marry, and where they are to be buried.<sup>7</sup> Blacks are subject to random searches and seizures,<sup>8</sup> and their every activity is scrutinized.<sup>9</sup> South African blacks are

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negotiation. *Id.* at col. 3. In fact, however, this action is probably part of a series of cosmetic reforms by the South African government whose promises are hedged and ambiguous. Cowell, *South Africa's Iron Hand*, N.Y. Times, Feb. 21, 1985, at A1, col. 1, at A6, col. 2 [hereinafter cited as *South Africa's Iron Hand*]; see *South Africa Turns the Screws Again*, U.S. NEWS & WORLD REP., Mar. 4, 1985, at 14 (recent bloody crackdown on black Nationalists "seem[s] to contradict a series of reform pledges by the country's white-minority rulers") [hereinafter cited as *Turning the Screws*].

6. Pursuant to a policy called influx control, the South African government traditionally has attempted to limit blacks in urban areas to the number needed for the maintenance of a stable economy. *Temporary Halt of Relocations*, *supra* note 5, at A2, col. 4. Influx regulation has seriously impeded the black access to employment. See INT'L LABOUR CONFERENCE, 69TH SESS., SPECIAL REPORT OF THE DIRECTOR-GENERAL ON THE APPLICATION OF THE DECLARATION CONCERNING THE POLICY OF APARTHEID IN SOUTH AFRICA 28 (Int'l Labour Office Geneva 1983) [hereinafter cited as 1983 DIRECTOR-GENERAL REPORT]. Blacks are barred from living in the white areas unless they qualify for work permits. Lewis, *Enough is Enough*, N.Y. Times, Feb. 5, 1984, at E19, col. 1 [hereinafter cited as *Enough is Enough*].

7. Trimble, *In Divided South Africa, 'No One Is Satisfied,'* U.S. NEWS & WORLD REP. Feb. 11, 1985, at 35 [hereinafter cited as Trimble].

8. See, e.g., SOUTH AFRICAN FACT SHEET, *supra* note 4, at 3; HUMAN RIGHTS VIOLATIONS, *supra* note 5, at 4. The Internal Security Act 74 of 1982, which permits random governmental searches and seizures, is a consolidation of existing security legislation with a few additional provisions. UNIVERSITY OF WITWATERSRAND JOHANNESBURG SCHOOL OF LAW, ANNUAL SURVEY OF SOUTH AFRICAN LAW 1982 8 (1983) (series provides, *inter alia*, synopsis of and amendments to South African law). Unprovoked searches are a common phenomena in South Africa. See, e.g., *South Africa's Iron Hand*, *supra* note 5, at A1, col. 3. For example, at two o'clock on a morning in October, 1984, 7000 soldiers and policemen surrounded a black township, and searched the city's 140,000 residents. The Minister of Law and Order, Louis LeGrange, said the purpose of the search was to "rid the area of criminal and revolutionary elements." Lewis, *Anger Doesn't Hide*, N.Y. Times, Oct. 25, 1984, at A27, col. 1 [hereinafter cited as *Anger Doesn't Hide*].

9. The Internal Security Act 74 of 1982 allows the government to prohibit the printing and/or dissemination of any publication, declare unlawful any organization and dispose of its assets, restrict the right of any person to communicate, associate, or participate in any activity, and detain a person who is not charged with an offense for an indefinite period. HUMAN RIGHTS VIOLATIONS, *supra* note 5, at 4; SOUTH AFRICAN FACT SHEET, *supra* note 4, at 3. Moreover, "[t]he government can by fiat declare a person 'banned,' which may mean house arrest, a bar on being in the same room with more than one person—including family—and a declaration that the person's words may not be repeated, printed, or possessed on pain of imprisonment." MAYOR'S PANEL, *supra* note 4, at 7. Pursuant to the pass laws, all blacks are required to carry passbooks indicating where they can work and live legally. The police may stop a person at any time and demand to see his passbook. If the passbook has the wrong stamp the party will be fined or imprisoned after

beset by poverty,<sup>10</sup> disease,<sup>11</sup> and housing shortages.<sup>12</sup> The disparity in educational<sup>13</sup> and health expenditures<sup>14</sup> between blacks and whites is unmistakable. In addition, South Africa has the highest per capita prison population in the world; forty percent of the black prison

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a trial lasting only a few minutes and, subsequently, will be relocated to one of the homelands. *Enough is Enough*, *supra* note 6, at E19, col. 1. Between 1967 and 1980, at least 6.1 million blacks were tried for pass laws violations. HUMAN RIGHTS VIOLATIONS, *supra* note 5, at 2. In 1982, more than 200,000 blacks were arrested under these laws, a 20% increase over the 1981 figure. *Id.* In 1983, over 300,000 blacks also were arrested under the pass laws. MAYOR'S PANEL, *supra* note 4, at 7 n.4.

10. See Mufson, *Why South Africa's White Businessmen Oppose Apartheid: It's Good for Business*, Wall St. J., Jan. 18, 1985, at 26, col. 1. Studies have indicated a radical increase in poverty among South African blacks in recent years. *Poverty for South African Blacks*, *supra* note 5, at col. 1. A study conducted by Dr. Charles Simkins of Cape Town University indicated that the number of blacks receiving almost no income increased from 250,000 in 1960 to 1.43 million in 1980, whereas the number living below the poverty line increased from 4.9 to 8.9 million. *Id.* at cols. 3-4. In addition, the average salaries for whites are four times greater than those of blacks. Trimble, *supra* note 7, at 36. Blacks who can find employment generally work in low-skilled, low-paying jobs because they are systematically restricted from educational and training opportunities. MAYOR'S PANEL, *supra* note 4, at 6.

11. *Poverty For South African Blacks*, *supra* note 5, at cols. 5-6; see Coles, *Anti-Apartheid Medicine*, N.Y. Times, Jan. 29, 1985, at A27, col. 1 [hereinafter cited as Coles]; 1983 DIRECTOR-GENERAL REPORT, *supra* note 6, at 34. Many of the frequent outbreaks of disease relate to malnutrition. 1983 DIRECTOR-GENERAL REPORT, *supra* note 6, at 34. Almost three million blacks under the age of fifteen suffer from malnutrition. Cowell, *Hunger Selective in South Africa*, N.Y. Times, Jan. 12, 1985, at A1, col. 1, at A4, col. 1.

12. MYERS, *supra* note 1, at 14-15; SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 106; 1983 DIRECTOR-GENERAL REPORT, *supra* note 6, at 34. For example, in the sixteen proclaimed towns in the homeland of Bophuthatswana, 340,000 people lived in 26,000 houses, an average of 13.08 persons per house. 1983 DIRECTOR-GENERAL REPORT, *supra* note 6, at 34. The housing shortage is likely to escalate throughout the 1980's, SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 106, especially since the African population is rising at a much higher rate than that of other races in South Africa. *Id.* at 45.

13. MYERS, *supra* note 1, at 22-23; see Coles, *supra*, note 11, at A27, col. 1, at cols. 1-2. Although there have been recent increases in educational expenses, the government is still spending ten times more per capita on white children than on black children, SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 396; see Trimble, *supra* note 7, at 36, and the teacher/student ratio in white schools averages 1 to 20, compared to 1 to 48 in African schools. SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 396.

14. See Coles, *supra* note 11, at A27, col. 1 (there are only 300 black doctors—90,000 blacks per one doctor). Most health care institutions for blacks are overcrowded, under-staffed, and poorly equipped. SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 123. The infant mortality rate, regarded as a health index, is high. The mortality rate for black infants between one and four years old is ten times higher than that for whites. *Id.* Fifty percent of the deaths among blacks and Coloreds are those of children under the age of five years old. *Id.*

population consists of people who have violated the pass laws, which apply only to blacks.<sup>15</sup>

Despite a recent surge in political activity,<sup>16</sup> blacks have been unable to alter their plight largely because they are precluded from significant participation in the country's government,<sup>17</sup> and they lack the necessary organization and allies to exercise effective political

15. HUMAN RIGHTS VIOLATIONS, *supra* note 5, at 3 (citing Sunday Times, Johannesburg, April 12, 1981); SOUTH AFRICAN FACT SHEET, *supra* note 4, at 4. In South Africa, 440 people are jailed for every 100,000 people. The comparable figure for the U.S. is 189 people. SOUTH AFRICAN FACT SHEET, *supra* note 4, at 4. For a discussion of the pass laws, see *supra* note 9 and accompanying text.

16. Schlemmer, *Change in South Africa: Opportunities and Constraints*, in THE APARTHEID REGIME, *supra* note 3, at 236-37 [hereinafter cited as Schlemmer]. For a discussion of black politics in South Africa, see generally Karis, *Revolution in the Making: Black Politics in South Africa*, 62 FOREIGN AFFAIRS 378 (1983). This politicization has been evidenced by the growth of organized labor, the impact of black consciousness organizations and banned nationalist movements, numerous black political trials, and the increase in the radical inclinations of the South African black youth. See SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 199-205; Schlemmer, *supra*, at 236-37. In addition, mass strikes, riots, and violence have permeated life in South Africa in 1984. *Spotlight on South Africa*, *supra* note 4, at 17, col. 1; Trimble, *supra* note 7, at 36 ("black protests are frequent and are expected to rise in number and violence"); see Cowell, *Neighbors Reported Helping South Africa to Curb Rebels*, N.Y. Times, Jan. 20, 1985, § 1, at 14, col. 1. In the early part of 1984, strikes closed mines and factories. Two thousand students boycotted segregated schools in the fall. *Spotlight on South Africa*, *supra* note 4, at 17, col. 1. In November of 1984, there was a two-day work stoppage strike by 800,000 black workers in the industrial area encircling Johannesburg. Trimble, *supra* note 7, at 36; see Cowell, *Toll Rises to 16 in South African Rioting*, N.Y. Times, Nov. 7, 1984, at A3, col. 5. This strike was the most successful mass action since the Soweto uprising in 1976. *Spotlight on South Africa*, *supra* note 4, at 17, col. 1. In 1984, at least 200 blacks died in violent confrontations, and over 1,000 political prisoners were detained, including 21 trade union leaders. *Id.*

17. E.g., STATESMAN'S YEAR-BOOK, *supra* note 2, at 1070 (black representation by whites in Parliament and Cape Provincial Administration was abolished in June, 1960); *Anger Doesn't Hide*, *supra* note 8, at A27, col. 1; *Turning the Screws*, *supra* note 5, at 14 ("I hope the world will note that in this country, effective, vocal opposition to apartheid is high treason," stated Bishop Desmond Tutu). Moreover, the government has sanctioned the use of violence in repressing any black opposition to apartheid. See SOUTH AFRICAN FACT SHEET, *supra* note 4, at 4; *South African Restrictions: Hearing on H.R. 1693 Before Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the Comm. on Banking, Finance and Urban Affairs*, 98th Cong., 1st Sess. 64 (1983) (testimony of Parren J. Mitchell) [hereinafter cited as *South African Restrictions*]. For a discussion of the recent governmental violence inflicted on blacks, see generally Cowell, *Inquiry is Sought in South Africa*, N.Y. Times, Feb. 12, 1985, at A5, col. 1. For a discussion of the government's military, police, and security forces in South Africa, see R. LEONARD, *SOUTH AFRICA AT WAR* 98-130 (1983) [hereinafter cited as LEONARD].

Astonishingly, in September, 1984, the South African government implemented a new constitutional change which, for the first time, created separate parliamentary chambers for Asians and Coloreds. *Anger Doesn't Hide*, *supra* note 8, at A27,

pressure.<sup>18</sup> Consequently, the impetus for change must come, at least in part, from outside sources.<sup>19</sup>

Outside sources may influence South Africa's policies by the manipulation of economic sanctions,<sup>20</sup> which are a particularly effective means of causing change in South Africa because foreign investments have played a pivotal role in the development of the South African economy.<sup>21</sup> Foreign investment has been paramount in key industries including motor vehicle production, computers, telecommunications, oil refining, petrochemicals and mining.<sup>22</sup> It is estimated that foreign capital alone is responsible for approximately one-third of South Africa's annual growth rate.<sup>23</sup>

The United States, as its largest trading partner<sup>24</sup> and second

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col. 1; see Cowell, *Kennedy's Trip: 'Stirring Things Up' in South Africa*, N.Y. Times, Jan. 15, 1985, at A2, col. 3, at col. 4 [hereinafter cited as *Stirring Things Up in South Africa*]. The constitutional reforms, however, continue to deny political representation to the black majority, who comprise approximately 72% of the population of 29 million people. *Desmond TuTu: South Africa's Apostle of Peace*, U.S. NEWS & WORLD REP., Oct. 29, 1984, at 13; see *Black Workers Stage Mass Strike to Protest Government Policies*, 2 South Africa Rev. Serv. Rep. 53 (IRRC Dec. 1984) (published by Investor Responsibility Research Center, Inc., Washington, D.C.).

18. Trimble, *supra* note 7, at 35.

19. "Apartheid will truly die and South Africa will be free only when South Africa's Government finally realizes that the world will never accept its denationalization of blacks and its spurious homelands." *Priority in the Fight Against Apartheid*, N.Y. Times, Jan. 28, 1985, at A14, col. 5 (letter to editor).

20. For a discussion of the advantages of and impediments to implementing economic sanctions against South Africa, see Davis, Cason & Hovey, *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment*, 15 LAW & POL'Y INT'L BUS. 529 (1983) [hereinafter cited as Davis, Cason & Hovey]; Wasserman, *Apartheid and Economic Sanctions*, 15 J. WORLD TRADE L. 366 (1981); Note, *Economic Sanctions Against South Africa: Problems and Prospects for Enforcement of Human Rights Norms*, 22 VA. J. INT'L L. 345 (1982).

21. The country's economic stability is rooted in its vast supply of natural resources. South Africa produces approximately 60% of the world's gold and the country is the world's major producer of gem-quality diamonds. SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 129. Gold sales are South Africa's most important source of foreign income. *Id.* See *infra* notes 36-38 and accompanying text for a discussion of U.S. dependence on four of South Africa's rare minerals.

22. MYERS, *supra* note 1, at 39; SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 137.

23. S. FISHER, *COPING WITH CHANGE: UNITED STATES POLICY TOWARD SOUTH AFRICA* 36-37 (1982) [hereinafter cited as FISHER]; MYERS, *supra* note 1, at 32. Foreign investment has helped significantly to offset the balance of payments deficit that has accompanied every period of rapid growth in the South African economy. SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 134.

24. Conyers, Jr., *Getting Tough With Pretoria*, N.Y. Times, Jan. 23, 1985, at A23, col. 1 [hereinafter cited as *Tough With Pretoria*]. Its other major trading

largest foreign investor,<sup>25</sup> has a significant economic stake in South Africa.<sup>26</sup> Direct investment by American corporations in South Africa stands at approximately \$2.3 billion.<sup>27</sup> Loan monies received from American banks have risen steadily through the past few years<sup>28</sup> and presently total nearly five billion dollars.<sup>29</sup>

Since the rate of return on investments in South Africa is extremely high in comparison with American investment in other geographical areas,<sup>30</sup> it has provided an attractive opportunity for domestic corporations.<sup>31</sup> Consequently, approximately 350 corporations have direct investments in South Africa and about 8000 corporations do business there.<sup>32</sup> It is estimated that twelve United States corporations, which control three-fourths of the direct investment in South Africa,

partners are the U.K., West Germany, Japan, and Switzerland. *See South Africa—Economic Profile*, 83 U.S. DEP'T ST. BULL. 28 (May 1983). In 1982, South Africa's imports from/exports to in millions of dollars were: U.S.: 2,470/1,215; U.K.: 2,024/1,300; West Germany: 2,500/780; Japan: 1,705/1,530; Switzerland: 290/936. SOUTH AFRICAN FACT SHEET, *supra* note 4, at 2.

25. *Tough With Pretoria*, *supra* note 24, at col. 1.

26. *Dealing With Apartheid*, NEWSWEEK, Mar. 11, 1985, at 28, 30 [hereinafter cited as *Dealing With Apartheid*].

27. *Investment Beyond the Factory Gates*, U.S NEWS & WORLD REP., Feb. 11, 1985, at 37 [hereinafter cited as *Investment Beyond Factory Gates*]; Campbell, *More Municipalities Joining Drive to Cut South Africa Links*, N.Y. Times, Sept. 25, 1984, at A1, col. 6, at A25, col. 1 [hereinafter cited as *More Municipalities Cutting Links*]. This figure includes outlays for factories, real estate, and other similar expenditures, but excludes gold stocks and bank loans. *Id.* at A25, col. 1. The U.S.'s percentage of foreign direct investment in South Africa, which is approximately 20%, is second only to that of Great Britain. SOUTH AFRICAN FACT SHEET, *supra* note 4, at 3. Moreover, some writers say that this U.S. foreign investment contributes to the maintenance of apartheid because the U.S. provides high level technology and sophisticated capital-intensive equipment. These types of innovations also have the effect of reducing South Africa's dependence on black labor. U.S. CORPORATIONS IN SOUTH AFRICA: A SUMMARY OF STRATEGIC INVESTMENTS, SOUTHERN AFRICA PERSPECTIVES No 1-80, 2 (1980) [hereinafter cited as SUMMARY OF U.S. CORPORATE INVESTMENTS].

28. *IRRC Directory Examines Recent U.S. Investment in S. Africa*, 2 SOUTH AFRICA REV. SERV. REP. 67 (IRRC Dec. 1984). As of mid-1984, U.S. bank loans had more than doubled since 1978 and more than tripled since 1980. *Id.* However, there was a three-year decline in lending following the 1976-1977 widespread civil unrest in South Africa. *Id.*

29. Farnsworth, *Export Bill Conferees Back Pretoria Curbs*, N.Y. Times, Oct. 3, 1984, at D1, col. 1, at D19, col. 1 [hereinafter cited as *Pretoria Curbs*]. Loans to the South African government and its instrumentalities consisted of less than 10% of this total. *Id.*

30. MYERS, *supra* note 1, at 46; Davis, Cason & Hovey, *supra* note 20, at 545.

31. MYERS, *supra* note 1, at 46.

32. *Investment Beyond Factory Gates*, *supra* note 27, at 37. American firms employ about 120,000 workers, most of whom are black. *Id.*



operate in strategic sectors such as energy,<sup>33</sup> computers,<sup>34</sup> and transportation.<sup>35</sup>

In addition, current dependence on South African minerals<sup>36</sup> is a major strategic consideration because these rare minerals are of great industrial and military importance.<sup>37</sup> Since the Soviet Union and South Africa dominate current world production and possess a vast majority of the world's reserves of these minerals, South Africa's cooperation with the United States is crucial.<sup>38</sup> The United States also desires to minimize Soviet influence in the southern region of the African continent.<sup>39</sup> Further, South Africa's cooperation is essential to secure trade use of the sea route around the Cape of Good Hope.<sup>40</sup>

These economic and military connections account for the United States' amicable relations with South Africa,<sup>41</sup> a country with few

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33. SUMMARY OF U.S. CORPORATE INVESTMENTS, *supra* note 27, at 2. United States oil companies control at least 40% of the petroleum market in South Africa, with Mobil and Caltex sharing most of the U.S. market. Mobil and Caltex also control 42% of South Africa's refining capacity. *Id.* Moreover, Mobil Oil Co., which has invested over \$425 million in South Africa, has provided fuel for the South African police and military forces. *South African Restrictions*, *supra* note 17, at 64-65 (testimony of Parren J. Mitchell).

34. SUMMARY OF U.S. CORPORATE INVESTMENTS, *supra* note 27, at 3. Computers are probably the most strategic of all U.S. investments. United States computer companies dominate the South African market, controlling an estimated 70% of sales. *Id.* IBM's estimated market share ranges from 38-50%. *Id.* IBM and Control Data, which control about 13% of the computer market, have supplied the South African government with an enormous amount of computers. *Id.*

35. SUMMARY OF U.S. CORPORATE INVESTMENTS, *supra* note 27, at 2. At least one-third of all motor vehicle sales in South Africa are made by Ford, General Motors, and Chrysler. *Id.* at 3. "Together these three firms account for nearly one-fifth of all direct U.S. investments in South Africa." *Id.* General Motors and Ford sell vehicles to the country's police and military establishment. *South African Restrictions*, *supra* note 17, at 65 (testimony of Parren J. Mitchell).

36. South Africa produces four minerals that are of particular importance to the United States: chromium, manganese, vanadium, and the platinum-group metals. FISHER, *supra* note 23, at 40. South African imports of the platinum-group metals, manganese, and chromium comprise more than 90% of U.S. consumption, *id.* at 47, and it supplies the U.S. with more than 55% of its imported vanadium. *Id.* at 44.

37. *See id.* at 39-47.

38. *Id.* at 40.

39. SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at xviii. It is argued that, in the end, beneficial black political change may be accompanied by both Communism and violence. *Troublemaking in South Africa*, N.Y. Times, Jan. 15, 1985, at A18, col. 1, at col. 2 (editorial).

40. SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at xviii; FISHER, *supra* note 23, at 36-37. The Cape of Good Hope's sea route is where much of the West's oil passes. SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at xxiii.

41. Trimble, *supra* note 7, at 35. For a comprehensive discussion of forty-eight

foreign friends.<sup>42</sup> Americans, however, increasingly have become aware of the acute realities in apartheid South Africa.<sup>43</sup> Public pressure, therefore, has prompted many state and local legislatures to promulgate divestment<sup>44</sup> legislation which mandates the withdrawal of public funds and/or public pension funds from corporations and financial institutions that do business in or with South Africa.<sup>45</sup>

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countries' adverse diplomatic, investment, and economic relations with South Africa, see 1983 DIRECTOR-GENERAL REPORT, *supra* note 6, at 48-77.

42. Trimble, *supra* note 7, at 35. See *infra* notes 208-28 and accompanying text for a discussion of the federal government's foreign policy with South Africa. It is not surprising that these economic and military interests in South Africa are reflected in the Reagan Administration's political stance with that country.

43. *Enough is Enough*, *supra* note 6, at E19, col. 1. Divestment campaigns are not recent occurrences. Churches, universities, student groups, and other organizations have been divesting for quite some time. *Dealing With Apartheid*, *supra* note 26, at 28. It has been only in the last few years that state and local governments have entered the divestment campaign arena. CHURCH AND UNIVERSITY ACTION AGAINST APARTHEID: A SUMMARY OF WITHDRAWALS AND DIVESTMENT 1-2 (Africa Fund 1983) [hereinafter cited as SUMMARY OF CHURCH AND UNIVERSITY ACTION]. Over forty U.S. colleges and universities have divested a total of approximately \$175 million in South Africa-linked holdings from their portfolios since 1977, AMERICAN COMM. ON AFRICA, STUDENT ANTI-APARTHEID MOVEMENT NEWSLETTER 1 (Fall 1984) [hereinafter cited as ANTI-APARTHEID NEWSLETTER], and actions calling for divestment have taken place on hundreds of campuses throughout the country. SUMMARY OF CHURCH AND UNIVERSITY ACTION, *supra*, at 2. For a discussion of university and college divestment, see generally Reidhaar, *Memorandum: The Legal Implications of University Investments in Companies Doing Business in South Africa*, 7 J. COLLEGE & UNIV. L. 164 (1980-1981). In addition, many national church bodies have divested church funds from banks and corporations doing business in or with South Africa. SUMMARY OF CHURCH AND UNIVERSITY ACTION, *supra*, at 2-6. Most recently, Americans, across the country, are demonstrating against the South African government. Black civil rights leaders in the U.S. organized a "Free South Africa Movement" commencing on Thanksgiving eve in 1984 which has launched daily demonstrations against the South African government. Subsequent demonstrations have occurred at the South African embassies and consulates in 16 cities around the country. *Free South Africa Movement Focuses U.S. Attention on S. Africa*, 2 SOUTH AFRICA REV. SERV. REP. 55 (IRRC Dec. 1984); see Ayres, Jr., *Weicker is Arrest No. 190 in Protests at Embassy*, N.Y. Times, Jan. 15, 1985, at A13, col. 2, at cols. 2-3, and nearly two thousand people have been arrested. *Dealing With Apartheid*, *supra* note 26, at 28.

44. Divestment may take any of the following forms: (1) the removal of stock in U.S. corporations that have investments in South Africa from investment portfolios; (2) the removal of stock in American corporations that do any business with the South African government; (3) the removal of stock in U.S. corporations with operations in South Africa that have not signed the Sullivan principles of fair employment practices; or (4) the physical removal of all U.S. corporations that do business in South Africa. Chettle, *The Law and Policy of Divestment of South African Stock*, 15 LAW & POL'Y INT'L BUS. 445, 445-46 (1983) [hereinafter cited as Chettle]. For a discussion of the Sullivan principles, see *infra* note 54.

45. See *infra* Section II of this Note. "Whether [U.S. boycotts and restrictions

of U.S. investments] would have a good effect is yet another question for debate." *Troublemaking in South Africa*, Jan. 15, 1985, at A18, col. 1, at col. 2 (editorial). This Note does not purport to discuss the effectiveness of divestment legislation. There are many possible objectives which could be sought through a divestment campaign. Divestment efforts may be undertaken in an attempt to make a moral statement to the South African government. MYERS, *SUPRA* note 1, at 128. Its purpose could be to apply pressure on the American and South African business community to improve conditions of the black employees, Chettle, *supra* note 44, at 446, to reform its South African operation from contributing to apartheid, or to force a corporation to leave that country. Note, *University Investments With a South African Connection: Is Prudent Divestiture Possible?*, 11 N.Y.U. J. INT'L L. & POL. 543, 553 (1979). It may be designed to provide direct support for the apartheid struggle by cutting South Africa's supply lines either to isolate or weaken the regime, Davis, Cason & Hovey, *supra* note 20, at 555, or to exacerbate their economic condition so that blacks will rise in revolt. Chettle, *supra* note 44, at 446. Divestment could serve as a gesture to distance the institution or government concerned from the practice of apartheid. *Id.* Divestment may be intended to constrict the South African economy. FISHER, *supra* note 23, at 31. Because there are a number of objectives or goals that can be sought through divestment, it is difficult to ascertain whether a particular jurisdiction's goal or goals can be attained through divestment legislation. For instance, it has been contended that if the peaceful abolition of apartheid is divestment's goal, the practicality of this goal must be reviewed. Lansing, *The Divestment of United States Companies in South Africa and Apartheid*, 60 NEB. L. REV. 304, 325-26 (1981) [hereinafter cited as Lansing].

The impracticality of divestment programs is evidenced by the high costs of such actions. It has been argued that divestment is an imprudent way to handle state and city public and pension funds. See, e.g., Dunlap, *Some Trustees Want City Pension Funds To Cut Pretoria Ties*, N.Y. Times, March 7, 1984, at A1, col. 6, at B24, col. 6 [hereinafter cited as *Pension Fund Trustees Want To Cut Pretoria Ties*]; cf. *SAG Pension & Health rejects South Africa divestiture*, Screen Actor News, Dec. 1984, at 3 (trustees of private pension plan refused to divest because of imprudence). The elimination of viable, profitable corporations from the list of investment choices could result in a financial loss, sacrifice of safety, and, perhaps, an increase in risk. See Hutchinson & Cole, *Legal Standards Governing Investment of Pension Assets For Social and Political Goals*, 128 U. PA. L. REV. 1340, 1386 (1980); Note, *Socially Responsible Investment of Public Pension Funds: The South Africa Issue and State Law*, 10 N.Y.U. REV. L. & SOC. CHANGE 407, 416-18 (1980-1981) [hereinafter cited as *Socially Responsible Investment*]. But see *More Municipalities Cutting Links*, *supra* note 27, at A25, col. 2 (Connecticut and Michigan officials claim they suffered no financial loss as result of their South African divestment). The transactional costs sustained as a result of voluminous amounts of trading may be tremendous. Chettle, *supra* note 44, at 509 ("the brokerage fees required to sell Harvard's shares in companies with South African investments might range from \$5.7 million to \$16.5 million"). There is also a possibility that law suits would be brought by the beneficiaries of the pension funds against the state and local governments on a contractual claim of impairment of their funds. See *Kirshner v. United States*, 603 F.2d 234 (2d Cir.), *cert. denied*, 442 U.S. 909, *cert. denied*, 444 U.S. 995 (1979).

In *Kirshner*, the beneficiary of a municipal pension fund sued the Trustees of the New York City Teachers Retirement System (Trustees) because the Trustees had purchased extremely risky New York City bonds. 603 F.2d at 237. The

This Note discusses state and local governmental divestment legislation.<sup>46</sup> It then analyzes the constitutional difficulties posed by legislation in the areas of foreign affairs<sup>47</sup> and interstate and foreign commerce.<sup>48</sup> This Note concludes by considering alternatives to the state and local legislation and urges the adoption of federal measures to restrict United States investment in South Africa.<sup>49</sup>

## II. State and Local Divestment Action

### A. State Divestment Statutes

Many state legislatures have considered implementation of divestment legislation.<sup>50</sup> Five states—Connecticut, Massachusetts, Michigan, Nebraska, and Maryland—have succeeded in passing such legislation.<sup>51</sup> Although these statutes seek the common goal of divestment, they vary considerably in detail and breadth.

#### 1. Connecticut

In 1982, Connecticut passed a law requiring the state to divest all public funds<sup>52</sup> and not to invest new funds in any corporation doing business in South Africa unless the following three requirements were met:<sup>53</sup> (1) the corporation must have pledged to adhere to the

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beneficiary alleged a New York State constitutional claim of impairment of the obligation of contract. *Id.* at 239. The court denied the impairment claim because the protection of New York City's fiscal integrity was a "legitimate state goal [which could be pursued] without bar by the contract clause." *Id.* at 239 (citing *City of El Paso v. Simmons*, 379 U.S. 497 (1965)). If a state or local government's divestment legislation is not found to have a legitimate state goal, an impairment claim may be present.

46. See *supra* notes 50-94 and accompanying text.

47. See *supra* notes 97-153 and accompanying text.

48. See *supra* notes 154-99 and accompanying text.

49. See *supra* notes 200-33 and accompanying text.

50. It is estimated that as many as 24 states presently are considering divestment proposals. *States and Cities Consider Many Types of Divestiture Bills; In Boston, Newark and New York City Tough Proposals Became Law*, 11 NEWS FOR INVESTORS 178 (IRRC Oct. 1984).

51. CONN. GEN. STAT. § 3-13f (1983); MD. ANN. CODE art. 95, § 21 (Supp. 1984); MASS. ANN. LAWS ch. 32, § 23(1)(d)(ii) (Michie/Law. Co-op. Supp. 1984); MICH. COMP. LAWS ANN. § 37.2402(f) (West Supp. 1984-1985); MICH. COMP. LAWS ANN. § 21.145(5) (West 1981); NEB. REV. STAT. § 72-1270-1276 (1984).

52. "Public funds" are generally defined as "[m]oneys belonging to government, or any department of it, in hands of public official." BLACK'S LAW DICTIONARY 1106 (rev. 5th ed. 1979).

53. CONN. GEN. STAT. § 3-13f (1983).

Sullivan principles<sup>54</sup> and must be obtaining a high rating in conforming to these principles;<sup>55</sup> (2) the corporation does not supply strategic products or services to the South African government, military or police; and (3) the corporation recognizes the right of all South African employees to organize and strike in support of economic and social objectives.<sup>56</sup> As of July 30, 1984, almost \$350 million of the state's shareholdings were in domestic corporations with direct investments in South Africa.<sup>57</sup> By July, 1984, the state successfully divested forty-three million dollars in securities and was in the process of divesting a further thirty-six million dollars.<sup>58</sup>

## 2. Massachusetts

The Massachusetts legislature enacted a comprehensive divestment law in 1983 which has served as the model for other bills.<sup>59</sup> The statute provides for the withdrawal of public pension funds<sup>60</sup> from

54. The Sullivan principles, instituted by the Reverend Leon Sullivan, a Director of the General Motors Board, are a voluntary code of fair employment practices. Approximately 125 corporations have signed a pledge to comply with the principles. *Sullivan Group Announces Four Amplifications of the Principles, Releases Eighth Report Evaluating Performance of Signatories*, 11 NEWS FOR INVESTORS 222, 224 (IRRC Dec. 1984). There are six principles:

1. Non-segregation of the races in all eating, comfort and work facilities.
2. Equal and fair employment practices for all employees.
3. Equal pay for all employees doing equal or comparable work for the same period of time.
4. Initiation of and development of training programs that will prepare, in substantial numbers, blacks and other non-whites for supervisory, administrative, clerical and technical jobs.
5. Increasing the number of blacks and other non-whites in management and supervisory positions.
6. Improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation and health facilities.

MYERS, *supra* note 1, at 327-28.

55. The Connecticut statute requires that the U.S. corporation must obtain a performance rating in the top two categories of the Sullivan principles pursuant to the rating system prepared by Arthur D. Little, Inc. CONN. GEN. STAT. § 3-13f (1983).

56. *Id.*

57. *Divestment Action Roundup*, 2 SOUTH AFRICA REV. SERV. REP. 71 (IRRC Dec. 1984) [hereinafter cited as *Divestment Action Roundup*].

58. *Id.*; see BOYER, DIVESTING FROM APARTHEID: A SUMMARY OF STATE AND MUNICIPAL LEGISLATIVE ACTION ON SOUTH AFRICA 2 (American Comm. on Africa Mar. 1983) ("[i]t is estimated that this law will result in the sale of \$70 million worth of securities") [hereinafter cited as BOYER].

59. BOYER, *supra* note 58, at 2-3.

60. Private pension funds are regulated exclusively by federal law. Employee

any financial institution<sup>61</sup> which has outstanding loans to the government of South Africa or its instrumentalities or from any corporation doing business in or with South Africa.<sup>62</sup> The divestment was to take place within a period of three years, and no less than one-third of the value of the investments was to be sold in any one year.<sup>63</sup> Massachusetts already has divested approximately \$110 million of the fund's total value of almost \$2.5 billion.<sup>64</sup>

### 3. Michigan

A Michigan law was passed in 1982 requiring public educational institutions to divest all of their funds in United States firms operating in South Africa.<sup>65</sup> This divestment law affected investments totaling approximately forty-five million dollars of state university funds in securities, of which forty million dollars had been sold by December, 1984.<sup>66</sup> This 1982 law supplemented a 1980 law which prohibited the state treasurer from depositing state funds in financial institutions that make or maintain loans either to the government of South Africa, a national corporation thereof or to a subsidiary of an American firm operating in South Africa.<sup>67</sup> When the 1980 law was enacted, no banks in Michigan had any loans which fell into these categories, and, therefore, no funds had to be withdrawn.<sup>68</sup>

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Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a) (1982). Conversely, public pension plans are regulated by state legislatures and state common law. *Socially Responsible Investment*, *supra* note 45, at 409-10.

61. The definition of a financial institution, however, must be ascertained from the particular divestment statute in order to determine its precise meaning. *Compare* MICH. COMP. LAWS ANN. § 21.145, § 5(5)(a) (West 1981) (defined as "bank chartered under the laws of this state or of the United States") *with* NEB. REV. STAT. § 72-1271(2) (1984) (defined as any bank "or any other institution permitted by state or federal law to receive deposits of money and to pay out such money through loans, draft accounts, or the sale of financial institution securities"). A financial institution is defined generically as "an enterprise specializing in the handling and investment of funds (as a bank, trust company, insurance company, savings and loan association, or investment company)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 851 (4th ed. 1976). This Note defines financial institution according to its generic meaning.

62. MASS. ANN. LAWS ch. 32, § 23(1)(d)(ii) (Michie/Law. Co-op. Supp. 1984).

63. *Id.* § 23(1)(d)(iv).

64. *Divestment Action Roundup*, *supra* note 57, at 71.

65. MICH. COMP. LAWS ANN. § 37.2402(f) (West Supp. 1984-1985).

66. *Divestment Action Roundup*, *supra* note 57, at 72.

67. MICH. COMP. LAWS ANN. § 21.145(5) (West 1981).

68. *Divestment Action Roundup*, *supra* note 57, at 71.

#### 4. Nebraska

In April, 1984, legislation was passed in Nebraska<sup>69</sup> mandating divestment in three stages. First, state funds are to be divested from the stock of any United States corporation or financial institution doing business in South Africa unless the corporation or financial institution has signed and is making progress in implementing the Sullivan principles.<sup>70</sup> Second, the state treasurer must sell the stock of any financial institution which has outstanding loans to the government of South Africa or its instrumentalities.<sup>71</sup> Third, the state cannot make any new investment of state funds in the bonds of (1) any financial institution which has outstanding loans to the South African government;<sup>72</sup> or (2) any corporation that does business in or with South Africa which has not signed and is not making progress in implementing the Sullivan principles.<sup>73</sup> As of August, 1984, Nebraska had sold almost fifteen million dollars in stock, and thirteen million dollars remained to be sold.<sup>74</sup> In 1980, the Nebraska Legislature passed a resolution which asked the Nebraska Investment Council to remove the names of corporations and financial institutions doing business in South Africa from the list of entities approved for the investment of state funds.<sup>75</sup> This resolution, however, was not binding.<sup>76</sup>

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69. NEB. REV. STAT. § 72-1270-1276 (1984).

70. *Id.* §§ 72-1274(1), 72-1275. These sections provide for a gradual stock divestment. The statute mandates that "[a]fter January 1, 1987, no state funds shall remain invested in the stocks of any financial institution or United States-based corporation." *Id.* § 72-1274. Total divestment of stocks from corporations and financial institutions doing business in South Africa, therefore, will not occur until January 1, 1987. See *supra* note 54 for a discussion of the Sullivan principles.

71. *Id.* § 72-1272(1). Divestment is not required, however, if the financial institution makes a complete listing of its outstanding South African public sector loans, states the purposes for which the loans were made, and makes a public commitment not to renew any existing loans or to make any new loans to the South African government or its instrumentalities. *Id.* § 72-1272(2).

72. *Id.* § 72-1273. New investment may be undertaken in the bonds of any financial institution where the financial institution has made a complete listing of any outstanding loans to the South African government or any national corporations and has stated the purposes for which the loans were made. In addition, the financial institution must make "[a] public commitment not to renew any existing loans or make any new loans to the South African public sector." *Id.* § 72-1273(2).

73. *Id.* § 72-1273, 72-1275. See *supra* note 54 for a discussion of the Sullivan principles.

74. *Divestment Action Roundup*, *supra* note 57, at 72.

75. See *Socially Responsible Investment*, *supra* note 45, at 414.

76. Resolutions of the Nebraska Legislature are not binding laws. NEB. CONST. art. III, § 13.

### 5. Maryland

In 1984, Maryland enacted a law<sup>77</sup> which prohibits the state treasurer from depositing state funds in any financial institution that has outstanding loans to the South African government or any national corporation of South Africa.<sup>78</sup> The law further requires the financial institution to certify in writing to the treasurer that it does not have any outstanding loans to the South African government or any national corporation of South Africa in order to avoid withdrawal by the treasurer.<sup>79</sup>

### B. Local Divestment Action

Sixteen cities and counties have passed binding divestment measures:<sup>80</sup> Berkeley, Cotati, Davis, and Santa Cruz, California; Hartford, Connecticut; Wilmington, Delaware; Boston and Cambridge, Massachusetts; Atlantic City, Newark, and Rahway, New Jersey; New York City, New York; Cuyahoga County, Ohio; Philadelphia, Pennsylvania; Charlottesville, Virginia; and Washington, D.C.<sup>81</sup>

In 1980, the cities of Hartford, Connecticut<sup>82</sup> and Cambridge, Massachusetts<sup>83</sup> refused to invest any more of their funds in corporations doing business in or with South Africa. Six local gov-

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77. MD. ANN. CODE art. 95, § 21 (Supp. 1984).

78. *Id.* § 21(b)(1), (2).

79. *Id.* § 21. This statute, which merely restricts further investment of state funds, is not a true divestment law because it does not mandate the withdrawal of state funds. In addition to mandating divestment, the other state laws proscribe future investments in South Africa-linked corporations and/or financial institutions. See CONN. GEN. STAT. § 3-13f (1983); MICH. COMP. LAWS ANN. § 37.2402(f) (West Supp. 1984-1985); MICH. COMP. LAWS ANN. § 21.145(5) (West 1981); MASS. ANN. LAWS ch. 32, § 23(1)(d)(ii) (Michie/Law. Co-op. Supp. 1984); NEB. REV. STAT. §§ 72-1273, 72-1275 (1984).

80. Non-binding divestment resolutions have been passed in many jurisdictions including: Atlanta, Portland, East Lansing, Grand Rapids, and Multnomah County. ANTI-APARTHEID NEWSLETTER, *supra* note 43, at 1.

81. See *infra* notes 82-94 and accompanying text for the legal citations to these local ordinances and divestment actions.

82. BOYER, *supra* note 58, at 2 (Hartford, Ct.); *Pension Fund Trustees Want To Cut Pretoria Ties*, *supra* note 45, at B24, col. 1. Hartford's ordinance, however, mandates divestment only from those corporations which have not signed the Sullivan principles. BOYER, *supra* note 58, at 2.

83. On November 6, 1979, the citizens of Cambridge overwhelmingly agreed to advise the city government to "refrain from investing monies in banks and other financial institutions doing business in or with the Republic of South Africa." Cambridge, Mass., City Council Order Regarding Divestment from South Africa (Feb. 11, 1980). The City Council ordered the City Manager to request that the Assistant City Manager for Fiscal Affairs and the Retirement Board report to the City Council with their suggestions for implementing the citizens' vote. *Id.* That



ernments—Berkeley, Davis and Santa Cruz, California;<sup>84</sup> Rahway, New Jersey;<sup>85</sup> Cuyahoga County, Ohio<sup>86</sup> and Charlottesville, Virginia<sup>87</sup>—have pursued measures to withdraw their public funds from financial institutions that do business in or with South Africa. The remaining eight cities—Cotati, California;<sup>88</sup> Wilmington, Delaware;<sup>89</sup> Boston, Massachusetts;<sup>90</sup> Atlantic City and Newark, New Jersey;<sup>91</sup> New York City, New York;<sup>92</sup> Philadelphia, Pennsylvania<sup>93</sup> and Washington, D.C.<sup>94</sup>—have taken actions to remove their public funds and/or public pension funds from both corporations and financial institutions that do business in or with South Africa.

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same month, the Cambridge Retirement Board announced that it would not make any new investments in companies that do business with South Africa nor would it invest any more money in corporations presently in its portfolio that do business with South Africa. BOYER, *supra* note 58, at 3.

84. Berkeley, Cal., Responsible Investment Ordinance Requiring the Withdrawal of City of Berkeley Funds From Banks Doing Business With South Africa (April 17, 1979); Davis, Cal., City Council Minutes (Jan. 24, 1980); Santa Cruz, Cal., Ordinance (Nov. 8, 1983) (PUBLIC INVESTMENT AND SOUTH AFRICA 1 (American Comm. on Africa 1984)). Divestment in the cities of Berkeley and Davis, California, resulted in the withdrawal of more than \$11 million of public funds from banks making loans to the South African government. FISHER, *supra* note 23, at 30-31.

85. *Divestment Action Roundup*, *supra* note 57, at 75 (Rahway, N.J.).

86. Cuyahoga County, Ohio, Board of Commissioners Res. 411331 (Mar. 12, 1984).

87. *Divestment Action Roundup*, *supra* note 57, at 73 (Charlottesville, Va.). The ordinance requires the divestment of six or seven corporations' securities that have operations in South Africa. The ordinance will affect securities worth between \$700,000 and \$1 million. *Id.*

88. BOYER, *supra* note 58, at 1 (Cotati, Cal.).

89. WILMINGTON, DEL., CODE ch. 28A, art. V, §§ 28A-69, 28A-70 (1982).

90. ANTI-APARTHEID NEWSLETTER, *supra* note 43, at 1; *More Municipalities Cutting Links*, *supra* note 27, at A25, col. 1 (Boston, Mass.). Approximately \$10 to \$20 million of public funds should be affected by this measure. ANTI-APARTHEID NEWSLETTER, *supra* note 43, at 1. In August, 1984, Mayor Raymond Flynn of Boston wrote to 100 mayors throughout the country urging them to copy Boston's sweeping divestment ordinance, which makes no exceptions for corporations that have signed the Sullivan principles. *More Municipalities Cutting Links*, *supra* note 27, at A25, col. 1.

91. *Divestment Action Roundup*, *supra* note 57, at 72, 74-75 (Atlantic City and Newark, N.J.).

92. New York City Employees' Retirement System Res. 110 (Aug. 3, 1984). It is estimated that this measure will mandate the withdrawal of approximately \$665 million invested in corporations and banks doing business in South Africa. ANTI-APARTHEID NEWSLETTER, *supra* note 43, at 1.

93. PHILADELPHIA, PA., RETIREMENT SYSTEM ORDINANCE § 113 (1982). The City Finance Department estimated that this measure will result in the sale of approximately \$60 to \$70 million in securities from the city's pension funds. BOYER, *supra* note 58, at 4.

94. *Divestment Action Roundup*, *supra* note 57, at 75; ANTI-APARTHEID NEWS-

### III. The Constitutionality of State and Local Divestment Action

The response to apartheid becomes increasingly fragmented as more and more divestment legislation is enacted from local sources. This fragmented approach may impair the federal government's ability to deal with apartheid South Africa. This impairment calls into question the constitutionality of these local responses.<sup>95</sup> Although the constitutionality of these divestment laws has not been challenged judicially,<sup>96</sup> constitutional analysis under the foreign affairs power and the commerce clause is necessary to ascertain whether state and local divestment action is permissible.

#### A. The Foreign Affairs Power

It is well settled that the constitutional power to regulate foreign affairs is vested in the President and Congress.<sup>97</sup> Although the

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LETTER, *supra* note 43, at 1 (Washington, D.C.). It is estimated that between April 30 and September 30, 1984, Washington, D.C. sold \$34.9 million of the \$46.9 million of holdings that were affected by this legislation. *Divestment Action Roundup*, *supra* note 57, at 75.

95. See Chettle, *supra* note 44, at 515-26; Lansing, *supra* note 45, at 313-21; Note, *Constitutionality of the No Discrimination Clause Regulating University of Wisconsin Investments*, 1978 Wis. L. REV. 1059 [hereinafter cited as *Constitutionality of Wisconsin Investments*]. But see Letter from Stephen H. Sachs, Maryland Attorney General, to Governor Hughs of Maryland (May 24, 1984) (copy available at Fordham Law School library) [hereinafter cited as *Maryland Opinion*]. This informal opinion approved of the constitutionality of Maryland's divestment statute. In addition, a 1975 Wisconsin statute regulating the investment of state funds provided that "[n]o such investment shall knowingly be made in any company, corporation, subsidiary or affiliate which practices or condones through its actions discrimination on the basis of race, religion, color, creed or sex." WIS. STAT. ANN. § 36.29(1) (West Supp. 1984-1985). The Board of Regents asked Attorney General Bronson C. LaFollette to advise it on the scope and validity of § 36.29(1). The Wisconsin Attorney General made a formal opinion to H. Edwin Young, President of the University of Wisconsin System, on January 31, 1978. 67 Wis. Op. Att'y Gen. 20 (1978) [hereinafter cited as *Wisconsin Opinion*], in which he found the statute constitutional. This opinion has been attacked by some commentators. See *Constitutionality of Wisconsin Investments*, *supra*; Chettle, *supra* note 44, at 517-26. Moreover, it should be noted that "[w]here a question of law is before a court for determination, an opinion previously rendered by the attorney general on such question, while entitled to careful consideration and quite generally regarded as highly persuasive, is not binding on the court." 7 AM. JUR. 2D *Attorney General* § 11 (1980).

96. See *Maryland Opinion*, *supra* note 95, at 1 n.1.

97. *E.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950); *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941); *Fong Yue Ting v. United States*, 149 U.S. 698, 705-07 (1893); *Simmons v. United States*, 406 F.2d 456, 459-60 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969); *Luftig v. McNamara*, 373 F.2d 664, 665-66 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *In re Alien Children Educ. Litig.*, 501 F. Supp. 544, 590 (S.D. Tex. 1980).

Constitution does not expressly provide for federal power over foreign affairs,<sup>98</sup> this power emerges from the doctrine of national sovereignty.<sup>99</sup> The power over foreign relations,<sup>100</sup> therefore, is not shared with the states but rather is controlled exclusively by the federal government.<sup>101</sup> A state or local statute must fall if it interferes with the conduct of this Nation's foreign policy.<sup>102</sup> It is clear that "[n]o

98. "The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 315-16 (1936); see *Cunard S.S. Co. v. Lucci*, 92 N.J. Super. 148, 156, 222 A.2d 522, 527 (N.J. Super. Ct. Ch. Div. 1966), *aff'd*, 94 N.J. Super. 440, 228 A.2d 719 (N.J. Super. Ct. App. Div. 1967) ("[m]ost of the powers of our Federal Government have their immediate source in the Constitution, but not its power to deal in foreign affairs"). Specific powers of the executive branch regarding foreign affairs are contained in article II of the Constitution. U.S. CONST. art. II.

99. See, e.g., *Burnet v. Brooks*, 288 U.S. 378, 396 (1933); *Fong Yue Ting v. United States*, 149 U.S. at 711; *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. 1365, 1377 (D.N.M. 1980); *Cunard S.S. Co.*, 92 N.J. Super. at 157, 222 A.2d at 527.

100.

Within the Federal Government itself, the foreign affairs power is divided between the President and the Congress. As it has turned out, however, it is the President who has the paramount role. . . . The President alone has the constitutional power to conduct external relations and guide every step of diplomacy. The Constitution may appear to leave open the question of who is to have the decisive voice in foreign affairs. In practice, the President and those appointed by him are the architects of American foreign policy.

B. SCHWARTZ, *CONSTITUTIONAL LAW: A TEXTBOOK* 185 (2d ed. 1979) [hereinafter cited as SCHWARTZ]. The President is the "sole organ of the federal government in the field of international relations." *United States v. Pink*, 315 U.S. 203, 229 (1942) (quoting *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936)). The Congress, of course, has the power to enact legislation regarding foreign countries. See *infra* notes 214-33 and accompanying text for a discussion of congressional action regarding South Africa.

101. E.g., *Zschemig v. Miller*, 389 U.S. 429, 440-41 (1968); *United States v. Pink*, 315 U.S. at 233; *Hines v. Davidowitz*, 312 U.S. at 63; *United States v. Belmont*, 301 U.S. 324, 331 (1937); *Tayyari v. New Mexico State Univ.*, 495 F. Supp. at 1376-77; *Bjarsch v. DiFalco*, 314 F. Supp. 127, 131 (S.D.N.Y. 1970); *New York Times Co. v. City of N.Y. Comm'n on Human Rights*, 41 N.Y.2d 345, 352-53, 361 N.E.2d 963, 968, 393 N.Y.S.2d 312, 317 (1977). The exclusivity of the federal government's power in the area of foreign affairs is predicated on the "irrefutable postulate that though the states were several their people in respect of foreign affairs were one." *Curtiss-Wright*, 299 U.S. at 317.

102. See, e.g., *Zschemig*, 389 U.S. at 440; *United States v. Belmont*, 301 U.S. at 331-32; *In re Alien Children Educ. Litig.*, 501 F. Supp. at 590; *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 229, 80 Cal. Rptr. 800, 805 (1969); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 172 (1978) [hereinafter cited as TRIBE].

state can rewrite our foreign policy to conform to its own domestic policies."<sup>103</sup> A state statute is not invalid if it merely has an incidental effect on foreign affairs,<sup>104</sup> rather it will be struck down only if it has a "direct impact" on national foreign policy.<sup>105</sup>

This direct impact test was enunciated in the landmark case of *Zschernig v. Miller*.<sup>106</sup> At issue in *Zschernig*, was the disposition of the estate of an Oregon resident whose sole heirs were residents of East Germany. The State Land Board petitioned the state probate court for escheat.<sup>107</sup> The Oregon statute provided for escheat in cases where a nonresident alien claimed real or personal property unless certain reciprocity requirements with the recipient's country were met.<sup>108</sup>

The Supreme Court held that the Oregon statute was unconstitutional because it had a "direct impact" upon foreign relations,<sup>109</sup> which matters were solely within the province of the federal government.<sup>110</sup> The Court expressed concern that local legislation involving a state in foreign affairs would impair the federal government's

103. *United States v. Pink*, 315 U.S. at 233.

104. *See, e.g., Zschernig*, 389 U.S. at 432-33; *Clark v. Allen*, 331 U.S. 503, 517 (1947); *cf. DeCanas v. Bica*, 424 U.S. 351 (1976) (upholding California statute regulating alien employment even though it may have touched upon exclusive power to regulate immigration).

105. *See Zschernig*, 389 U.S. at 440; *Bethlehem Steel Corp.*, 276 Cal. App. 2d at 228-29, 80 Cal. Rptr. at 807 (Aiso, J., concurring); *TRIBE, supra* note 102, at 172.

106. 389 U.S. 429 (1968).

107. *Id.* at 430.

108. The three reciprocity requirements are as follows:

- (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country;
- (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and
- (3) the right of the foreign heirs to receive the proceeds of Oregon estates 'without confiscation.'

389 U.S. at 430-31.

109. *Id.* at 441. The Court distinguished this case from *Clark v. Allen*, 331 U.S. 503 (1947). In *Clark*, the Court held that a general reciprocity statute did not, on its face, intrude on the federal domain. The California statute would have only "some incidental or indirect effect in foreign countries." *Id.* at 517. *Clark* involved "no more than a routine reading of foreign laws." *Zschernig*, 389 U.S. at 433.

110. *Zschernig*, 389 U.S. at 436. Until *Zschernig*, cases involving constitutional challenges under the foreign affairs power generally dealt with express foreign policy as established in treaties and executive agreements. *See, e.g., United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *United States v. Curtiss-Wright Export Corp.*, 229 U.S. 304 (1936); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). A state

ability to regulate foreign policy<sup>111</sup> and could cause far-reaching national repercussions.<sup>112</sup> In reaching this conclusion, the Court relied on the language in *Hines v. Davidowitz*<sup>113</sup> that: "[e]xperience has shown that the international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted, by the government."<sup>114</sup>

One of the primary purposes of divestment legislation is to pronounce state and local disapproval<sup>115</sup> of apartheid and to transmit this message to the South African government.<sup>116</sup> In seeking to affect the South African government and American firms doing business in that country,<sup>117</sup> divestment legislation has a direct impact on the United States' foreign relations with South Africa. Moreover, that the South African government is concerned about American public opinion of its activities<sup>118</sup> is evidenced by the enormous amount of time and money spent on propaganda and lobbying activities by the South African government in the United States.<sup>119</sup>

State and local divestment action are largely responses to the antithetical position of the executive branch in dealing with South Africa.<sup>120</sup> Dissatisfied with the federal government's diplomatic measures, state and local governments, in effect, are establishing their own foreign policies.<sup>121</sup> Dissension between the state and federal

law that conflicts with a treaty or executive agreement is preempted by the supremacy clause. U.S. CONST. art. VI, cl. 2. In *Zschernig*, however, the Court established a negative implications doctrine in the foreign relations field. The Court stated that "even in absence of a treaty, a State's policy may disturb foreign relations." 389 U.S. at 441. The presence of a treaty or executive agreement, therefore, is not necessary for a state statute to be invalidated under the foreign affairs power of the Constitution. See Comment, *Constitutional Law—Negative Implications of Foreign Relations Power—State Alien Reciprocity Inheritance Statute Unconstitutional as Applied*, 53 IOWA L. REV. 1347, 1349 (1968).

111. 389 U.S. at 441.

112. *Id.* at 440-41.

113. 312 U.S. 52 (1941)

114. 389 U.S. at 441 (quoting *Hines v. Davidowitz*, 312 U.S. at 64).

115. See *supra* notes 1-19 and accompanying text for a discussion of apartheid in South Africa.

116. See *supra* note 45 for a discussion of the objectives of divestment legislation.

117. *Id.*

118. *Enough is Enough*, *supra* note 6, at E19, col. 1.

119. See *Busting Pretoria's Propaganda Ring*, 17 ACOA ACTION NEWS 1 (American Comm. on Africa Spring 1984). For a discussion of the various propaganda and lobbying activities by the South African government, see LEONARD, *supra* note 17, at 179-88.

120. See *infra* notes 208-13 and accompanying text.

121. See, e.g., MAYOR'S PANEL, *supra* note 4, at 2; *A District of Columbia Law*

governments as to what our foreign policy with South Africa should be, to some extent, places the President in a precarious position when dealing with South African officials. Moreover, because of its sensitivity to American perceptions, the South African government may respond adversely to divestment legislation. For example, retaliation by the South African government against the United States<sup>122</sup> could take the form of either a trade embargo on its valuable mineral resources<sup>123</sup> or a confiscation of corporate property located in South Africa. Ultimately, it would be the federal government's, not the locality's, responsibility to resolve such a situation.<sup>124</sup>

The Supreme Court in *Zschernig* was also concerned that the application of the Oregon statute and others like it would lead to judicial "inquiries concerning the actual administration of foreign law [and] into the credibility of foreign diplomatic statements."<sup>125</sup> It is possible that a legal action involving a divestment law would necessitate inquiries into both the administration of South African law and the credibility of statements by South African officials.<sup>126</sup> In addition, when states and localities are satisfied that apartheid policies have changed, the repeal or modification of divestment legislation may occur. Judicial intervention into such an occurrence may trigger inquiries into foreign affairs which *Zschernig* sought to avoid.<sup>127</sup>

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on *South Africa is Backed*, N.Y. Times, Feb. 1, 1984, at A6, col. 3 (statement of Illinois Rep. Philip M. Crane). The Supreme Court has unequivocally prohibited states from establishing their own foreign policy. See *supra* note 103 and accompanying text.

122. Maryland Opinion, *supra* note 95, at 4.

123. See *supra* notes 36-37 and accompanying text.

124. See *Chy Lung v. Freeman*, 92 U.S. 275, 279-80 (1875).

125. 389 U.S. 429, 435. The Court distinguished reciprocal inheritance statutes which only permit the state court to "read, construe and apply laws of foreign nations," 389 U.S. at 433, from those that permit courts to "[launch] inquiries into the type of governments that obtain in particular foreign nations." *Id.* at 434. The Court noted that state courts are permitted to read, construe, and apply the laws of foreign countries although it was possible for a court's holding to disturb a foreign nation. *Id.* at 433.

126. For example, the New York City Employees' Retirement Resolution provides that:

The Trustees shall periodically evaluate the situation in the Republic of South Africa and Namibia and determine whether the divestiture program shall be accelerated, decelerated or otherwise modified, including whether, as a result of lack of improvement in conditions in those countries, or for other reasons, it is necessary to seek complete divestiture of the securities covered by this resolution.

New York City Employees' Retirement System Res. 110 § 4 (Aug. 3, 1984).

127. "The [Oregon] statute as construed seems to make unavoidable judicial

In the recent case of *Tayyari v. New Mexico State University*,<sup>128</sup> the Regents of New Mexico State University passed a motion that any student whose home government permitted the holding hostage of United States citizens would be denied admission or readmission to the state university.<sup>129</sup> This action, motivated by the Iranian hostage crisis, involved an attempt by the Regents to retaliate against the Iranian government and Iranian students by depriving the latter of the right to receive an education at the university.<sup>130</sup> The court found that the Regents' true purpose in passing the motion was to make a political statement.<sup>131</sup> The court held the action invalid as an impermissible burden on the federal government's power to conduct foreign affairs<sup>132</sup> and reasoned that the Regents, cloaked in state power, entered into the arena of foreign affairs which was entrusted exclusively to the federal government.<sup>133</sup> The Regents' motion frustrated the exercise of the federal government's authority to deal with Iran.<sup>134</sup> The situation in *Tayyari* is analagous to state and local divestment action. State and local governments, through divestment legislation, are making a political statement against the South African government.<sup>135</sup> It is also likely that divestment legislation may frustrate the federal government's ability to deal with South Africa.<sup>136</sup>

In addition, the decision in *Bethlehem Steel Corp. v. Board of Commissioners*<sup>137</sup> reinforces the conclusion that the federal government *alone* must deal with the nation's diplomatic relations with foreign countries. In *Bethlehem Steel*, a California appellate court

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criticism of nations established on a more authoritarian basis than our own." *Zschernig*, 389 U.S. at 440. This concern would be present in a judicial inquiry into divestment legislation. Moreover, a "political question" involves the conduct of the federal government's diplomatic relations with other countries. SCHWARTZ, *supra* note 100, at 41 (citing *In re Baiz*, 135 U.S. 403 (1890)). The resolution of political questions is committed by the Constitution to a branch of the federal government other than the judiciary. *Elrod v. Burns*, 427 U.S. 347, 351 (1976) (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

128. 495 F. Supp. 1365 (D.N.M. 1980).

129. *Id.* at 1367-68.

130. *Id.* at 1376.

131. *Id.*

132. *Id.* at 1380.

133. *Id.* at 1376.

134. *Id.* at 1378. "Attempts to solve the hostage crisis must come from the federal government. State officials in New Mexico must not impede those efforts." *Id.* at 1380.

135. See *supra* note 45 for a discussion of the objectives of divestment legislation.

136. See *supra* notes 115-24 and accompanying text.

137. 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).

struck down a state "Buy American" statute containing a requirement that only materials manufactured in the United States could be used in the construction of public work or as supplies for public use.<sup>138</sup> The court stated that the statute "in effectively placing an embargo on foreign products, amounts to a usurpation by the state of the power of the federal government to conduct foreign trade policy."<sup>139</sup> The court held that the statute was "an unconstitutional intrusion into an exclusive federal domain,"<sup>140</sup> because it had a direct effect on foreign relations and was an impermissible attempt by the state to formulate its own foreign policy.<sup>141</sup> Unlike the Californian "Buy American" statute in *Bethlehem Steel*, state and local divestment statutes are aimed at only one country—South Africa. An even stronger argument can be made to strike down a state statute which is aimed specifically at one country given the dangers inherent in allowing a state to "structure national foreign policy to conform to its own domestic policies."<sup>142</sup>

In *New York Times Co. v. City of New York Commission on Human Rights*,<sup>143</sup> the New York Times published advertisements of employment opportunities in South Africa. A complaint was filed with the New York City Commission on Human Rights (Commission).<sup>144</sup> The Commission found that the New York Times, by publishing the advertisements, aided in an unlawful discriminatory practice and ordered the New York Times to cease and desist from printing the advertisements.<sup>145</sup> The New York State Court of Appeals set aside the Commission's order and held that the city agency was without power to enforce its own foreign policy.<sup>146</sup> The court stated that:

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138. *Id.* at 223-24, 80 Cal. Rptr. at 801-02.

139. *Id.* at 225, 80 Cal. Rptr. at 803.

140. *Id.* at 229, 80 Cal. Rptr. at 806.

141. *Id.* at 228-29, 80 Cal. Rptr. at 805. *But see* K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978) (court rejected contention that New Jersey Buy American statute was violative of foreign affairs power).

142. 276 Cal. App. 2d at 229, 80 Cal. Rptr. at 805.

143. 41 N.Y.2d 345, 361 N.E.2d 963, 393 N.Y.S.2d 312 (1977).

144. *Id.* at 347, 361 N.E.2d at 965, 393 N.Y.S.2d at 314.

145. *Id.* at 347-48, 361 N.E.2d at 965, 393 N.Y.S.2d at 314-15. The New York Times moved to dismiss the complaint, *inter alia*, on the ground that the Commission could not intrude on matters of foreign policy. *Id.* at 347, 361 N.E.2d at 965, 393 N.Y.S.2d at 314. The Commission, however, rejected this argument. *Id.* at 348, 361 N.E.2d at 965, 393 N.Y.S.2d at 315.

146. *Id.* at 353, 361 N.E.2d at 969, 393 N.Y.S.2d at 318.



[T]he Commission conducted an inquiry that might have been considered offensive by the Republic of South Africa and which might have been an embarrassment to those charged with the conduct of our Nation's foreign policy. . . . Each locality in each state may not adopt its own foreign policy. This would be disastrous, not only because of multiplicity and divergence of policies, but because local decisions are often influenced by pragmatic local considerations which are not necessarily controlling or even relevant to national policy as determined by the Federal Government at Washington.<sup>147</sup>

A finding that state and local divestment legislation impinges on the arena of foreign affairs would be consistent with the holding of *New York Times*. The Commission's actions in *New York Times*, like divestment legislation, seeks to modify the economic conditions in South Africa.<sup>148</sup> Divestment legislation, however, has a greater impact on the South African economy since divestment involves tremendous amounts of money<sup>149</sup> and is aimed directly at influencing American corporate presence in South Africa.<sup>150</sup> Although *New York Times* dealt with the Commission's application of a local anti-discrimination law and not legislative action, the reasoning behind the court's decision is pertinent to divestment legislation analysis.<sup>151</sup>

It appears that divestment legislation interferes with the firmly established foreign affairs power vested exclusively in the federal government.<sup>152</sup> To permit state legislation to operate concurrently in

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147. *Id.*

148. *See id.*

149. *See supra* Section II of this Note for a discussion of the amount of monies involved in divestment legislation.

150. *See supra* note 45 for a discussion of the objectives of divestment legislation.

151. The court in *New York Times* stated:

The government of the Republic of South Africa is, at the present, the legitimately constituted governmental authority for that country and has been recognized as such by our government. Although we believe, as a matter of principle, that the governments of all Nations should act in accord with natural justice, fairness and equity, it is beyond the province of the State courts, much less municipal agencies, to sit in review of the laws of foreign governments.

41 N.Y.2d 345, 352, 361 N.E.2d 963, 968, 393 N.Y.S.2d 312, 317. State and local legislatures should be restrained, as are state courts and agencies, from sitting in judgment of foreign laws.

152. *See A District of Columbia Law on South Africa is Backed*, N.Y. Times, Feb. 1, 1984, at A6, col. 3 (in response to D.C.'s divestment law, Rep. Philip Crane contended that "the city's action interfered with United States foreign policy").

foreign affairs would "imperil the amicable relations between governments and vex the peace of nations." <sup>153</sup> A state or local government's divestment legislation, therefore, may collapse under a constitutional challenge of the foreign affairs power.

## B. The Commerce Clause

The United States Constitution provides that "Congress shall have the Power . . . [t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes."<sup>154</sup> The commerce clause not only authorizes Congress to promulgate laws for the protection of commerce among the states but also it creates an area of trade free from undue interference by the states.<sup>155</sup> The commerce clause limits the states' power to enact legislation which substantially affects commerce even where Congress has remained silent.<sup>156</sup> It has been clearly established, however, that the states may regulate matters of local concern which incidentally affect commerce.<sup>157</sup>

153. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 304 (1918).

154. U.S. CONST. art. I, § 8, cl. 3. "The purpose of [the commerce clause] is to protect commercial intercourse from invidious restraints, to prevent interference through conflicting or hostile state laws and to insure uniformity in regulation." *Pennsylvania v. West Virginia*, 262 U.S. 553, 596 (1923); see *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944) ("very purpose of the Commerce Clause was to create an area of free trade among the several states").

155. *Freeman v. Hewitt*, 329 U.S. 249, 252 (1946); see, e.g., *Western & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 652 (1981); *Pennsylvania v. West Virginia*, 262 U.S. at 596.

156. E.g., *Hunt v. Washington Apple Advertising Comm'n.*, 432 U.S. 333, 350 (1977); *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 370-71 (1976); *Freeman v. Hewitt*, 329 U.S. at 252; *Morgan v. Virginia*, 328 U.S. 373, 378-79 (1946); *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 767 (1945); *North Star Int'l v. Arizona Corp. Comm'n.*, 720 F.2d 578, 583 (9th Cir. 1983); *Washington State Bldg. and Constr. Trades v. Spellman*, 684 F.2d 627, 630 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1891 (1983) (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 440 (1978)); *American Trucking Ass'ns v. Larson*, 683 F.2d 787, 790 (3rd Cir.), *cert. denied*, 459 U.S. 1036 (1982).

157. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 669 (1981); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960); *Southern Pac. Co. v. Arizona*, 325 U.S. at 766-67; *Milk Control Bd. v. Eisenberg Co.*, 306 U.S. 346, 351 (1939); *Gutridge v. Virginia*, 532 F. Supp. 533, 538 (E.D. Va. 1982); *Mid-Fla Coin Exch., Inc. v. Griffin*, 529 F. Supp. 1006, 1014 (M.D. Fla. 1981); *Epstein v. Lordi*, 261 F. Supp. 921, 941 (D.N.J. 1966), *aff'd per curiam*, 389 U.S. 29 (1967).

Congress' power to regulate the states' interstate and foreign commerce was not a surrender of the states' power to enact legislation pursuant to its police powers. Although it is difficult to define a state police power, see *H.P. Hood & Sons*,

The permissible ambit of state regulation is not always easy to ascertain.<sup>158</sup>

Commerce has been described broadly as "a term of the largest import [which] comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different States."<sup>159</sup> Commerce has been interpreted to cover every type of movement of persons and things, tangible and intangible.<sup>160</sup> The act of divesting securities from corporations and financial institutions and investing the funds in other sources, therefore, is clearly a subject of commerce.<sup>161</sup>

In determining whether state legislation violates the commerce clause, the extent to which a state can regulate interstate commerce must be determined.<sup>162</sup> A commerce clause analysis<sup>163</sup> of state and local divestment legislation, however, would be unnecessary if the

*Inc. v. DuMond*, 336 U.S. 525 (1949), generally, it is said to encompass the "making of regulations promotive of domestic order, morals, health, and safety." *Railroad Co. v. Husen*, 95 U.S. 465, 470-71 (1877). The Court in *Husen* stated that:

Under [the police power] a state may legislate to prevent the spread of crime, or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases . . . [or] would justify the exclusion of property dangerous to the property of citizens of the State. . . . They are self-defensive.

*Id.* at 471. A state statute enacted under its police powers is subject to commerce clause analysis. *See, e.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 54-55 (1941); *Railroad Co. v. Husen*, 95 U.S. at 471-72. In addition, the tenth amendment does not prohibit Congress from displacing state police power laws. *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290-92 (1981).

158. *Kassel v. Consolidated Freightways Corp.*, 450 U.S. at 670.

159. *Welton v. Missouri*, 91 U.S. 275, 280 (1875).

160. *See, e.g.*, *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

161. *See North Am. Co. v. S.E.C.*, 327 U.S. 686, 695 (1946) ("[i]nterstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution"); *Pennsylvania v. West Virginia*, 262 U.S. at 596 (transmission of gas from one state to another for sale is interstate commerce).

162. *See Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. at 349-50; *Pike v. Bruce Church, Inc.*, 397 U.S. at 142 ("[i]f a legitimate local purpose is found, then the question becomes one of degree").

163. When state legislation touches upon the federal interest in maintaining the free flow of commerce, the rule in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), must be applied in order to ascertain whether the legislation is unconstitutional. *See, e.g.*, *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979); *Wisconsin Opinion, supra* note 95, at 22-23. The Court in *Pike* stated that:

legislation fell within the protection afforded states in *Hughes v. Alexandria Scrap Corp.*<sup>164</sup>

### 1. Interstate Commerce

In *Alexandria Scrap*, a Maryland statute provided that anyone in possession of an inoperable automobile over eight years old could transfer it to a licensed scrap processor, who could receive a bounty from the state for its destruction.<sup>165</sup> It was enacted in order to encourage disposal of abandoned automobiles for environmental purposes.<sup>166</sup> A subsequent amendment to the statute altered the submission of title documentation provision which distinguished between in-state and out-of-state processors.<sup>167</sup> An out-of-state processor brought the action claiming, *inter alia*, that the amendment violated the commerce clause by impeding the free interstate flow of junk automobiles.<sup>168</sup>

The Court, for the first time,<sup>169</sup> held that in the absence of congressional action, the commerce clause does not prohibit a state<sup>170</sup> from entering "into the market as a purchaser, in effect, of a potential article of interstate commerce."<sup>171</sup> The Court reasoned that Maryland had not sought to regulate the flow of the inoperable automobiles. Instead, it had entered the market to raise up their price.<sup>172</sup> Maryland was a "market participant" and not a "market regulator."<sup>173</sup>

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Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. . . . And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and in whether it could be promoted as well with a lesser impact on interstate activities.

397 U.S. at 142.

164. 426 U.S. 794 (1976). "*Alexandria Scrap and Reeves* . . . stand for the proposition that when a state or local government enters the market as a participant it is not subject to the restraints of the Commerce Clause." *White v. Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983).

165. 426 U.S. at 798-99.

166. *Id.* at 809.

167. *Id.* at 800-01.

168. *Id.* at 802.

169. *Id.* at 815 (Stevens, J., concurring) ("[t]here is no prior decision of this Court even addressing the critical Commerce Clause issue presented by this case").

170. *Id.* at 810.

171. *Id.* at 808.

172. *Id.* at 806.

173. *White*, 460 U.S. 204, 206-07 (1983).

Most recently, in the Supreme Court case of *White v. Massachusetts Council of Construction Employers, Inc.*,<sup>174</sup> the Mayor of Boston issued an executive order requiring that all construction projects funded in whole or in part by city funds should be performed by a work force consisting of a certain percentage of Boston residents.<sup>175</sup> The Court held that, to the extent the city expended only its own funds in entering into contracts for public construction projects, it was a "market participant" under *Alexandria Scrap*.<sup>176</sup>

Whether state or local action falls within the market participant exemption:

turn[s] primarily on whether a particular state action more closely resembles an attempt to impede trade among private parties, or an attempt, analogous to the accustomed right of merchants in the private sector, to govern the State's own economic conduct and to determine the parties with whom it will deal.<sup>177</sup>

State and local governments, through divestment legislation, are deciding how and with whom their public funds should be utilized. They operate as purchasers and sellers of securities.<sup>178</sup> They are not attempting to "impede trade" through regulations, but rather are acting as "merchants in the private sector."<sup>179</sup> Although the line between "market participant" and "market regulator" is not always bright,<sup>180</sup> state and local divestment legislation appears to fall within

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174. 460 U.S. 204 (1983).

175. *Id.* at 205-06.

176. *Id.* at 214-15; see *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980). The Supreme Court in *Reeves* held that South Dakota, in restricting the sale of cement from its state-owned plant to interstate residents, was a market participant and, thus, the commerce clause did not apply. *Id.* at 440.

177. *White*, 460 U.S. at 218 (Blackmun, J., concurring).

178. See Wells & Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073, 1122 (1980). "Governmental activity signifies regulation of the general citizenry; proprietary activity signifies the government's dealings as a buyer or seller of goods or services." *Id.*

179. *White*, 460 U.S. at 218 (Blackmun, J., concurring).

180. *Transport Limousine, Inc., v. Port Auth. of N.Y.*, 571 F. Supp. 576, 581 (E.D.N.Y. 1983) (quoting *Reeves, Inc. v. Stake*, 447 U.S. at 440). In *Transport Limousine*, a limousine company challenged a fee of 8% on gross receipts imposed by the Port Authority for certain services which it provided at the New York airports. *Id.* at 581. The limousine company alleged that the fee was irrational and arbitrary and, thus, was an unreasonable burden on interstate commerce. *Id.* at 581. The court held that the Port Authority was a "market participant" under *Reeves* and *White*. *Id.* at 581-82. The court concluded that "the Port Authority's activities in determining to whom it will provide permittee services more closely resembles the activities of a merchant in the private sector." *Id.* at 581.

the market participant exception and, therefore, interstate commerce analysis does not apply.<sup>181</sup>

## 2. Foreign Commerce

The applicability of the *Alexandria Scrap* exception to the "foreign" commerce clause<sup>182</sup> is equivocal.<sup>183</sup> The Supreme Court noted in *Reeves, Inc. v. Stake*<sup>184</sup> that it would not explore the limits imposed on state proprietary actions under the foreign commerce clause since the case at hand involved interstate commerce and that "[c]ommerce [c]ause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged."<sup>185</sup> Although it is possible that the market participant theory also encompasses actions by state and local governments involving foreign commerce, this unresolved question coupled with the Supreme Court's notation in *Reeves* necessitates using a foreign commerce analysis with divestment legislation.

According to one court, a statute involving foreign commerce will be upheld if the burden it imposes on foreign commerce and on the national interest is justified by the character of the local interests

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181. See Maryland Opinion, *supra* note 95, at 2-3.

182. "[C]ongressional power to regulate commerce among the states stands on an equal footing with its power to regulate commerce relating to foreign nations." J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 139 (1978) [hereinafter cited as NOWAK, ROTUNDA & YOUNG]. The power of Congress to regulate foreign commerce "is buttressed by the express provision of the Constitution denying to the States authority to lay imposts or duties on imports or exports without the consent of Congress." Board of Trustees of the Univ. of Ill. v. United States, 289 U.S. 48, 57 (1933) (citing U.S. CONST. art. I, § 10). Obviously states and cities, by withdrawing funds from corporations and financial institutions doing business in or with South Africa, affect the flow of foreign commerce with South Africa.

183. See Note, *Foreign Commerce and State Power: The Constitutionality of State Buy American Statutes*, 12 CORNELL INT'L L.J. 109 (1979). But see *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978). In *K.S.B.*, the court was faced with the constitutionality of a New Jersey "Buy American" statute. The statute provided that only U.S. manufactured products could be used and specified in all contracts for state work for which the state paid for part of its cost. 75 N.J. 272, 279, 381 A.2d 774, 777. When faced with a commerce clause challenge, the court applied *Alexandria Scrap* to the statute and held that, in limiting its purchases of materials and equipment, the state was merely a "market participant." *Id.* at 300-02, 381 A.2d at 788-789. The court stated: "[t]hat this case involves foreign commerce, and not interstate commerce, does not disturb our analysis." *Id.* at 299, 381 A.2d at 788. "[W]e see no need in this factual context to differentiate between [foreign and interstate commerce]." *Id.* at 300, 381 A.2d at 788.

184. 447 U.S. 429 (1980).

185. *Id.* at 438 n.9 (citing *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S.

involved and the lack of alternative means to protect these interests.<sup>186</sup> Through divestment legislation, state and local governments are voicing their disapproval of apartheid policies.<sup>187</sup> Divestment from corporations and financial institutions doing business in South Africa is a national rather than a local concern.<sup>188</sup> Moreover, other alternatives to state and local divestment legislation,<sup>189</sup> such as federal action, provide a superior alternative to this legislation.<sup>190</sup>

It must also be determined whether a state's divestment statute has a burdensome effect on foreign commerce. Since millions of dollars are involved in a locality's divestment,<sup>191</sup> clearly, foreign commerce is burdened.<sup>192</sup> The currently existing divestment legislation

434 (1979)). The Supreme Court's decision in *Japan Line* requires that a more stringent analysis be applied when foreign rather than interstate commerce is involved. See Note, *Constitutional Law—The Scope of the Commerce Clause in International Commerce—Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979), 55 WASH. L. REV. 885, 891 (1980). The Supreme Court held that a tax on an instrumentality in foreign commerce is unconstitutional if it "creates a substantial risk of international multiple taxation," or if it "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.'" 441 U.S. at 451 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)).

186. *Epstein v. Lordi*, 261 F. Supp. 921, 936-37 (D.N.J. 1966), *aff'd per curiam*, 389 U.S. 29 (1967); see *Cunard S.S. Co. v. Lucci*, 92 N.J. Super. 148, 222 A.2d 522 (N.J. Super. Ct. Ch. Div. 1966), *aff'd*, 94 N.J. Super. 440, 228 A.2d 719 (N.J. Super. Ct. App. Div. 1967) (holding N.J. statute invalid which prohibited advertising of passage on any vessel unless advertising clearly indicated country of registry of such vessel).

187. See *supra* note 45 for a discussion of the objectives of divestment legislation.

188. In response to the question of whether there was a legitimate local public interest, Wisconsin's Attorney General LaFollette merely stated that "[t]he legitimacy of the state's interest in determining how state finances are to be managed and in setting public policy on an issue which concerns the general welfare, fundamental rights, and individual dignity of its citizens is beyond argument." Wisconsin Opinion, *supra* note 95, at 23. The Attorney General's statement is implausible for two reasons. First, it fails to address the necessarily "local" nature of the state's interest and only mentions the legitimacy thereof. In order for a state statute to withstand foreign commerce scrutiny, the purpose of the statute must be the furtherance of local interests. Second, the main purpose of the Wisconsin statute, as applied to South African investments, is not to protect Wisconsin citizens but to set what it has decided should be the national policy.

189. See *infra* notes 200-33 and accompanying text.

190. See *infra* notes 207-33 and accompanying text.

191. See *supra* section II of this Note.

192. At issue in *Pike* was an Arizona statute which required that all canteloupes grown and offered for sale in Arizona must be packaged in the state. 397 U.S. at 138. A state supervisor issued an order prohibiting a corporation from transporting uncrated cantaloupes from Arizona to California for packaging and processing. *Id.* A corporation whose packaging facility was located outside the state brought an action claiming that the statute was unconstitutional under the commerce clause.

collectively may overburden foreign commerce in general<sup>193</sup> and the operations of the South African-linked firms in particular.

If a state statute restricting foreign commerce is to be permitted, it must be shown not to affect national interests to any significant degree.<sup>194</sup> Federal power over foreign commerce is "closely allied to its exclusive authority in foreign relations."<sup>195</sup> The situation in South Africa is a national concern, and maintaining foreign relations with South Africa should be accomplished under the auspices of the federal government.<sup>196</sup> Divestment legislation has a significant impact on a national interest. Moreover, the Supreme Court in *Kelly v. Washington*<sup>197</sup> held that state regulation involving foreign commerce is invalid if the subject matter of the statute is one demanding uniformity of regulation even in the absence of federal action.<sup>198</sup> Foreign policy, by its very nature, dictates that "[f]or local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people,

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*Id.* The Supreme Court held that the statute was an unconstitutional burden on interstate commerce, *id.* at 146, and concluded that the state's interest in having the corporation's cantaloupes identified as originating in Arizona could not justify constitutionally the burden on interstate commerce that the corporation build a \$200,000 packaging plant in Arizona. *Id.* at 145. This monetary amount represents a fraction of the monies involved in divestment legislation and, therefore, it is clear that divestment legislation burdens foreign commerce.

193. The Court in *Katzenbach v. McClung*, 379 U.S. 294 (1964), held that the restaurant which purchased approximately \$70,000 worth of food from outside the state was subject to regulation by Congress. The Court stated:

It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard v. Filburn*, 317 U.S. 111 (1942): "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.

379 U.S. at 300-01. It is clear that the monetary amount involved in interstate commerce by a locality's divestment legislation, taken together with all other divestment legislation, is significant.

194. *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 40 (1948); *TRIBE, supra* note 102, at 370.

195. *Epstein v. Lordi*, 261 F. Supp. at 931.

196. *See supra* notes 97-153 and accompanying text.

197. 302 U.S. 1 (1937).

198. *Id.* at 9. *Kelly* involved both interstate and foreign commerce and, therefore, is applicable to foreign commerce cases. The Court, in *Kelly*, held that a statute requiring the inspection of the hull and machinery of tugs to insure their safety and seaworthiness was not a subject which required uniformity of regulation. 302 U.S. at 15.



one nation, one power."<sup>199</sup> Thus, the burden imposed by divestment legislation on foreign commerce and on the national interest cannot be justified by the character of the local interests and the lack of alternatives.

If a state's divestment legislation does not fit within the market participant exemption of the foreign commerce clause, a state statute may be unable to withstand foreign commerce scrutiny. Although it is possible that *Alexandria Scrap* is also applicable to foreign commerce cases, divestment legislation still may fall under the foreign affairs power which is vested exclusively in the federal government.

#### IV. Proposal

In light of the practical problems<sup>200</sup> and the possibility that state and local divestment legislation is unconstitutional, other alternatives must be explored.<sup>201</sup> The imposition of mandatory international economic sanctions by western governments is the optimal alternative.<sup>202</sup>

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199. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (citing *Chinese Exclusion Case*, 130 U.S. 581, 606 (1889)).

200. See *supra* note 45 for a discussion of the practical problems inherent in divestment legislation.

201. Since only about 1% of the black work force is employed by U.S. corporations, Davis, Cason & Hovey, *supra* note 20, at 551, it is doubtful whether the application of the Sullivan principles, which are codified in a number of divestment laws, has had a significant impact on black working conditions. AMERICAN COMM. ON AFRICA, A PUBLIC STATEMENT, THE SULLIVAN PRINCIPLES: NO CURE FOR APARTHEID 1 (1980); Davis, Cason & Hovey, *supra* note 20, at 551; see SUMMARY OF U.S. CORPORATE INVESTMENTS, *supra* note 27, at 6. *But see* Note, *United States Labor Practices in South Africa: Will a Mandatory Fair Employment Code Succeed Where the Sullivan Principles Have Failed?*, 7 FORDHAM INT'L L.J. 358, 363-65 (1983-84). Moreover, it is contended that not only have the Sullivan principles failed to threaten "the basic structure of apartheid," SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 100, but also it has failed to even "address directly the question of apartheid." Davis, Cason & Hovey, *supra* note 20, at 551; see Cowell, *Fight Apartheid, TuTu Tells Investors*, N.Y. Times, Jan. 3, 1985, at A3, col. 1 ("[m]any black activists now view these principles . . . as insufficient to bring about change"); see also MAYOR'S PANEL, *supra* note 4, at 18 ("there is significant debate as to whether compliance [with the Sullivan principles] is responsive to South African injustice or is largely irrelevant or even counterproductive").

202. Davis, Cason & Hovey, *supra* note 20, at 559; see SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 426. It is likely, however, that "Europeans would not follow an American lead under current circumstances. . . . Instead, companies from Europe and elsewhere would probably move to fill the gap left by a voluntary U.S. withdrawal." SOUTH AFRICA: TIME RUNNING OUT, *supra* note 1, at 426. For a discussion of various countries' investment and economic sanctions implemented against South Africa (Australia, Brazil, Canada, Member States of the European Community, Finland, German Democratic Republic, Hungary, Japan, Kuwait, Lib-

Local governmental efforts, instead, could be funneled into private action. Churches, universities, student groups, and other "conscience-stricken" organizations have urged the cessation of American investments in South Africa for some time<sup>203</sup> and have used shareholder resolutions as a means of influencing American corporate operations in South Africa.<sup>204</sup> State and local governments also could utilize shareholder resolutions directly to encourage corporations to withdraw from or adjust their activities in South Africa.<sup>205</sup> Shareholder resolutions would provide an efficient and beneficial means to effect withdrawal since the majority of American investments in South Africa is concentrated in a small number of corporations.<sup>206</sup> In addition, state and local governments could apply pressure on the federal government to undertake a stronger anti-apartheid stance. It is the federal government, however, which ultimately has the most leverage with the South African government.<sup>207</sup>

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eria, Mexico, Norway, Philippines, and Sweden), see 1983 DIRECTOR-GENERAL REPORT, *supra* note 6, at 62-63.

203. See *Dealing With Apartheid*, *supra* note 26, at 28.

204. Institutional investors, including churches and universities, have used shareholder resolutions as a means of influencing corporate operations in South Africa. MYERS, *supra* note 1, at 286-87; FISHER, *supra* note 23, at 30. For a discussion of churches and universities as institutional investors, see *supra* note 43. Shareholder resolutions relating to South Africa are regularly raised at the annual meetings of Fortune 500 corporations such as IBM, GM, U.S. Steel, and Eastman Kodak. FISHER, *supra* note 23, at 30. Major financial institutions, including Bank of America, Citibank, Morgan Guaranty Trust Co., and Manufacturers Hanover Trust Co., also have been the target of South Africa-related shareholder resolutions. *Id.* The 1984 proxy season showed consistently high levels of support for South Africa-related shareholder resolutions. *IRRC Survey Finds Strong Support for South Africa Resolutions*, 11 NEWS FOR INVESTORS 179 (IRRC Oct. 1984). Twelve of the twenty top-scoring resolutions related to South Africa. The top-scoring resolution was a request to International Flavors & Fragrances to sign the Sullivan Principles. *Id.* A survey revealed that it received favorable votes from 85% of the institutions which held its stock. *Id.*

205. For example, in 1985, the New York City Employees' Retirement System will be one of the main initiators of social responsibility shareholder resolutions as it begins to implement a section of its divestment resolution. New York City Employees' Retirement System Res. 110, § 8 (Aug. 3, 1984). The Retirement System is sponsoring twenty South Africa-related shareholder proposals, some of which will be conducted jointly with church proponents. *NYCERS Begins To Carry Out Divestment Mandate, Will Propose 20 South Africa-Related Resolutions*, 11 NEWS FOR INVESTORS 218 (IRRC Dec. 1984).

206. See *supra* notes 33-35 and accompanying text.

207. MAYOR'S PANEL, *supra* note 4, at 13; see Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 LAW & POL'Y INT'L BUS. 427, 440 (1983) [hereinafter cited as Sullivan].

The Reagan Administration<sup>208</sup> consistently has followed a policy known as "constructive engagement" with South Africa.<sup>209</sup> This policy advocates the maintenance of both economic and political ties and an open dialogue with South Africa in order to bring about the peaceful change of apartheid policies.<sup>210</sup> Although the Reagan Administration has condemned South Africa's segregation policies,<sup>211</sup> it opposes divestment<sup>212</sup> and the use of other sanctions as a means of affecting change in South Africa. The Reagan Administration believes that divestment will eliminate jobs, schools, training programs, and other opportunities for South African blacks.<sup>213</sup>

Since the Reagan Administration's position appears to be firm, Congress must enact legislation implementing financial sanctions against South Africa.<sup>214</sup> Although a Congressional bill regarding

208. For a discussion of the Executive's role in conducting relations with foreign countries, see *supra* note 100 and accompanying text.

209. See, e.g., Cowell, *Kennedy to Ask Congress to Punish South Africa*, N.Y. Times, Jan. 13, 1985, § 1, at 10, col. 1; *Turning the Screws*, *supra* note 5, at 14; *South African Restrictions*, *supra* note 17, at 199 (testimony of Congressman Stephen J. Solarz); *Anger Doesn't Hide*, *supra* note 8, at A27, col. 1; *South Africa's Iron Hand*, *supra* note 5, at A1, col. 3. For a discussion of the evolution of the Administration's policy of "constructive engagement," see generally LEONARD, *supra* note 17, at 221-41.

210. See, e.g., Cowell, *Mozambique Rebels Said to Sever Key Railway Link to South Africa*, N.Y. Times, Jan. 25, at A4, col. 3, at col. 4; Ayers, *Weicker is Arrest No. 190 in Protests at Embassy*, N.Y. Times, Jan. 15, 1985, at A13, col. 2, at col. 5; *Economic Sanctions Against South Africa*, U.S. NEWS & WORLD REP., Feb. 25, 1985, at 48. The Reagan Administration's position has been severely criticized by many people. See, e.g., Cowell, *Fight Apartheid, TuTu Tells Investors*, N.Y. Times, Jan. 3, 1985, at A3, col. 1; *Reagan Rebukes South Africa*, Newsday, Dec. 11, 1984, at 7, col. 1; *Desmond TuTu: South Africa's Apostle of Peace*, U.S. NEWS & WORLD REP., Oct. 29, 1984, at 13; *Spotlight on South Africa*, *supra* note 4, at 17, col. 2; Boyd, *Demonstrators Link South Africa Protest to Activism in U.S.*, N.Y. Times, Dec. 6, 1984, at B15, col. 2, at col. 5 [hereinafter cited as *U.S. Activism*]. The Carter Administration also regarded U.S. corporate investment in South Africa as a component of change and resisted pressure to impose financial sanctions on South Africa. *Apartheid's Ally: Reagan's Southern Africa Policy*, 13 BLACK ENTERPRISE, April 1983, at 29. For a summary of previous U.S. policy toward South Africa, see generally FISHER, *supra* note 23, at 7-23.

211. E.g., *U.S. Activism*, *supra* note 210, at B15, col. 4; *Reagan Denounces Apartheid as Repugnant*, N.Y. Times, Nov. 1, 1984, at A5, col. 1; *Reagan Rebukes South Africa*, Newsday, Dec. 11, 1984, at 7, col. 1.

212. *More Municipalities Cutting Links*, *supra* note 27, at A25, col. 1.

213. *Id.* at A25, col. 1.

214. See Sullivan, *supra* note 207, at 440; see also HOUSE COMM. ON FOREIGN AFFAIRS, EXPORT ADMINISTRATION AMENDMENTS ACT OF 1983, H.R. REP. NO. 257, part 1; 98th Cong., 1st Sess. 11 (1983) (Foreign Affairs Committee believed that South Africa-related provisions in House bill were "warranted in view of . . . the failure of the U.S. policy of 'constructive engagement' to alter significantly South Africa's domestic or international behavior") [hereinafter cited as HOUSE REPORT ON EXPORT ADMINISTRATION ACT AMENDMENTS].

South Africa, H.R. 3231,<sup>215</sup> has recently been introduced,<sup>216</sup> it has failed to become law. The bill was shelved last session when Congress adjourned without acting upon it.<sup>217</sup>

H.R. 3231 which contained four major provisions regarding South Africa would: (1) establish a set of legally-enforceable fair employment principles,<sup>218</sup> substantially similar to the Sullivan principles,<sup>219</sup> for all American firms with more than twenty employees operating in South Africa;<sup>220</sup> (2) interdict all new investments in South Africa;<sup>221</sup> (3) prohibit American bank loans to the South African government

215. H.R. 3231, 98th Cong., 1st Sess. (1983).

216. The U.S. Policy Toward South Africa Act of 1983 (H.R. 1693) was introduced in the House of Representatives on February 25, 1983 by Congressman Stephen J. Solarz. H.R. 1693 subsequently was amalgamated by the Foreign Affairs Committee into H.R. 3231 as Title III of the Export Administration Amendments Act of 1983. H.R. 3231, 98th Cong., 1st Sess. (1983). On October 27, 1983, H.R. 3231 was approved by the House of Representatives. Letter from Congressman James H. Scheuer to the author (Jan. 30, 1985) (discussing H.R. 3231) (copy available at Fordham Law School library) [hereinafter cited as Scheuer Letter]; see 129 CONG. REC. E3027 (daily ed. June 20, 1983). The Export Administration Amendments Act of 1983 and the comparable Senate bill, S. 979, 98th Cong., 1st Sess. (1983), sought to amend the Export Administration Act of 1979, 50 U.S.C. §§ 2401-2420 (Supp. IV 1980). The bill which was passed by the Senate, however, did not contain any provisions relating to South Africa. *Pretoria Curbs*, *supra* note 29, at D1, col. 2.

217. A House-Senate conference committee attempted to work out a compromise between S. 979 and the House's Export Administration Amendments Act of 1983 which would be acceptable to both bodies. The House bill died, however, when the 98th Congress adjourned in October, 1984, without coming to any decision regarding its amendments to the Export Administration Act. See *South Africa Provisions Added to Export Administration Act, But Compromise Unravels in the Closing Hours of Congress*, 11 NEWS FOR INVESTORS 200, 200-02 (IRRC Nov. 1984); *Economic Sanctions Against South Africa*, U.S. NEWS & WORLD REP., Feb. 25, 1985, at 48. Had the House bill become law, it would have represented the first U.S. financial sanction implemented against South Africa. *Pretoria Curbs*, *supra* note 29, at D19, col. 1.

218. H.R. 3231, 98th Cong., 1st Sess. subtit. 1, §§ 312-316 (1983).

219. HOUSE REPORT ON EXPORT ADMINISTRATION ACT AMENDMENTS, *supra* note 214, at 29. For a listing of the Sullivan principles, see *supra* note 54.

220. H.R. 3231, 98th Cong., 1st Sess. subtit. 1, § 311 (1983). The Secretary of State would be able to issue guidelines, criteria, and advisory opinions relating to compliance with the set of fair employment practices. *Id.* § 312(b). The Secretary would appoint two advisory councils, one in the U.S. and one in South Africa, to advise the Secretary with respect to such issuances. *Id.* § 313.

221. H.R. 3231, 98th Cong., 1st Sess. subtit. 3, § 331 (1983). The term investment was defined as:

- (1) establishing or making a loan or other extension of credit for the establishment of a business enterprise in South Africa, including a subsidiary, affiliate, branch, or office in South Africa; and
- (2) investing funds in an existing enterprise in South Africa, including making a loan or other extension of credit, except that this paragraph shall not be construed to prohibit—(A) an investment which consists of earnings

or its instrumentalities except for those made for housing, education, and health facilities which would be available to the general populace;<sup>222</sup> and (4) disallow the importation into the United States of the krugerrand or any other gold coin minted or offered for sale by the South African government.<sup>223</sup> This bill represents the ultimate measure that could have been taken by Congress against the South African government.<sup>224</sup> These provisions collectively<sup>225</sup> can have an impact on the curtailment of American investments in South Africa<sup>226</sup> and, consequently, on the policies of the South African government.<sup>227</sup>

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derived from an enterprise in South Africa established before the date of the enactment of this Act and which is made in that enterprise; or (B) the purchase of securities on a securities exchange.

*Id.*

222. H.R. 3231, 98th Cong., 1st Sess. subtit. 2, § 321(a) (1983). This provision would not extend to any loan entered into before the enactment of the bill. *Id.* § 321(b). This loan prohibition, however, was intended to extend to private entities in South Africa. See HOUSE REPORT ON EXPORT ADMINISTRATION ACT AMENDMENTS, *supra* note 214, at 32.

223. H.R. 3231, 98th Cong., 1st Sess. subtit. 2, § 322 (1983).

224. "Such [legislation] would begin to make it clear to Pretoria that its intransigence on matters of democratic enfranchisement and regional peace will be met with decisive changes in its relationship with the United States—changes that will prove costly." *Tough With Pretoria*, *supra* note 24, at col. 3.

225. Enactment of any of these provisions alone would not constitute sufficient congressional action. For example, enactment of the mandatory fair employment practices would not be effective by itself since American firms employ approximately 120,000 workers in a country of 29 million people. See *supra* note 201 for a discussion of the effectiveness of the Sullivan principles. Enactment of the ban on U.S. bank loans to the South African government would likewise prove to be inconsequential since only 10% of all U.S. bank loans are made to the government. See *supra* notes 28-29 and accompanying text for a discussion of U.S. bank loans to South Africa.

226. That the ban on U.S. loans was the only provision which survived the negotiation in the House-Senate Conference, see *Pretoria Curbs*, *supra* note 29, at D1, col. 1, before the bill died, may be illustrative of what will happen when South African legislation is eventually passed by Congress.

227. The Foreign Affairs Committee's intent in adopting H.R. 3231 would be fulfilled if the bill was passed. The Committee's intent was:

- (1) To demonstrate to the South African Government that the United States is unalterably opposed to apartheid and will not countenance policies aimed at reinforcing the apartheid regime; and (2) to send a clear political message to the black majority in South Africa, as well as to other African and Third World nations, that the United States is both allied with their legitimate aspirations and is willing to back up its opposition to apartheid with deeds as well as words.

HOUSE REPORT ON EXPORT ADMINISTRATION ACT AMENDMENTS, *supra* note 214, at 11.

Support for federal legislation regulating American investment in South Africa is building in Congress.<sup>228</sup> Passage of this legislation would be a viable solution to issues relating to state and local divestment legislation. It would offer a unified response to the apartheid problem rather than a scattered reaction by a number of local governments. In order to ensure a concerted federal response, the statute should expressly preempt any other state action in this area.<sup>229</sup> Moreover, congressional action would be aimed directly at the South African government whereas current divestment legislation seeks to apply pressure on United States corporations in the hope that they either will change their activities in or will withdraw from South Africa.<sup>230</sup> However, in the absence of responsive progress by the South African government as a result of anticipated congressional action, a gradual exodus of American firms from South Africa may be appropriate.<sup>231</sup>

The time has come for the United States to implement emphatic measures to alter the reality that the "whites who hold power in South Africa see only American support for them."<sup>232</sup> This session

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228. See, e.g., Scheuer Letter, *supra* note 216, at 1; *More Municipalities Cutting Links*, *supra* note 27, at A25, col. 1; *Bill Calls for Sanctions Against South Africa*, N.Y. Times, Mar. 8, 1985, at A9, col. 4. For example, Senator Kennedy is supposedly considering a variety of measures, including sponsoring legislation which would set a timetable for progress on three key issues: citizenship for blacks, black voting power, and the end to forced removals. *Stirring Things Up in South Africa*, *supra* note 17, at A2, col. 4.

229. When Congressional legislation regarding South Africa is promulgated, the issue of whether the Congressional statute "preempts" state and local divestment laws will arise. The preemption doctrine has its roots in the supremacy clause, *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 152 (1982), and this clause states: "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. "Pre-emption . . . is designed to shield the system from conflicting regulation of conduct." *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971). Congress may expressly prohibit, or preempt, parallel state legislation. *NOWAK, ROTUNDA & YOUNG*, *supra* note 182, at 292. Congress has the absolute authority to define the distribution of federal and state regulation over interstate commerce. *TRIBE*, *supra* note 102, at 377. Incompatible state action, therefore, loses all validity, even if the state action is otherwise proper. *SCHWARTZ*, *supra* note 100, at 49. Preemption may also be implied. *Fidelity*, 458 U.S. at 152-53. For the most recent enunciation by the Supreme Court of the test to be used in an implied preemption situation, see *Silkwood v. Kerr-McGee Corp.*, 104 S. Ct. 615 (1984).

230. See *supra* note 44 for a discussion of the different forms which divestment may take.

231. See *Tough With Pretoria*, *supra* note 24, at A23, col. 3.

232. *Anger Doesn't Hide*, *supra* note 8, at A27, col. 1.

offers the perfect opportunity for Congress to pass legislation comparable to H.R. 3231, which would change this reality.<sup>233</sup>

#### IV. Conclusion

Americans have become increasingly aware of the misery of black life in apartheid South Africa. Incited by the extensive American investments in South Africa, public pressure has been directed at state and local governments to oppose these investments by enacting divestment legislation which mandates the withdrawal of public funds and/or public pension funds from corporations and financial institutions that do business in or with South Africa.

Unfortunately, state and local divestment legislation may fall in the face of constitutional challenges. It is likely that this legislation impinges on the foreign affairs power, which is vested exclusively in the federal government. Under the commerce clause, it is not as clear that divestment legislation is impermissible. Arguably, divestment legislation is enacted pursuant to the locality's function as a "market participant," thereby exempting it from interstate commerce clause analysis. It is questionable whether the "market participant" theory extends to foreign commerce cases as well. Under a foreign commerce analysis, there is a weaker basis for the constitutional validity of divestment legislation. This Note concludes that the most viable alternative to disparate divestment legislation is concerted congressional action.

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233. See *Stirring Things Up in South Africa*, *supra* note 17, at A2 col. 5 ("[i]n the view of many blacks, the protestations of commitment to racial equality in Western nations ring hollow when compared with the West's economic stake in South Africa").