Journal of Urban & Contemporary Law - Note

State Law, Divestiture and South
"The House of the Seven Gables" Africa

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March 3, 1986

I. Introduction

Since in 1980-81 the repression of South Africa's black majority and the violence in reaction to that repression has increased.[1] In the last 17 months this has led to more than 1,100 deaths.[2] As this violence rages, the search for solutions continues. The government, under Prime Minister P.W. Botha recently announced the creation of a "national statutory council"[3] which would include black leadership and which P.W. Botha would chair.[4] Prime Minister Botha, in his speech opening the 1986 session of the South African Parliament, also stated "we have outgrown . . . the outdated concept of apartheid."[5] Whether the South African system of apartheid is changing and how that change will occur are open questions.[8]

In the United States, public pressure has led to state and local divestment legislation[9] calling for the withdrawal of public funds from businesses that operate in South Africa or deal with the South African government.[10] The debate as to whether divestiture is effective is part of the debate on whether states have the power to redirect their investments based on moral considerations.[11] Although states may have this power, the nature of the South African government's control may preclude the effective use of divestiture as a device for change.[12] A basic assumption in this debate, however, is that change within South Africa will only occur with pressure from outside of South Africa.[13] Such pressure has taken the form of United Nations' Resolutions,[14] weapons embargoes,[15] legislation condemning South African policies and imposing investment restrictions,[16] and support for those engaged in armed resistance.[17] In order to present a viable recommendation for state action this Note will examine: how the current government came into and maintains its power[18]; American involvement in South Africa[19]; and the prudent investor rule[20] and the federal preemption arguments against state divestment legislation.[21] The Note concludes that if the states want to divest from South Africa they have that power.[22] Nevertheless, more effective action for positive change is available.[23]

II. Afrikaner Control

A. The Rise to Power

At about the same time that the Pilgrims began to settle in Massachusetts (1620), the Dutch East India Company set up a colony at the Cape of Good Hope (1652).[24] Bantu-speaking Africans[25] were living in political units from a few hundred to 50,000 people and farming the arable land in the eastern half of southern Africa.[26] Great Britain conquered the Cape Colony in 1806 and in the 1830's Afrikaner[27] dissatisfaction with British rule led to the "Great Trek" from the Colony to central and eastern southern Africa.[28] In 1834 the British Cape Colony abolished slavery,[29] but during the course of the 19th century a racially stratified society developed with the subjugation of the different Black communities and the new laws controlling Africans.[30] The Bantu-speaking Africans continued to occupy much of the land, but it was not sufficient for economic autonomy.[31] In order to survive, the African communities needed to export labor into the areas that the whites occupied.[32] With the discovery of diamonds in 1867 and the discovery of gold in 1886,[33] the color lines maintained in agrarian South Africa became a part of industrial policy.[34] After the discovery of diamonds the British annexed the Transvaal[35] (1877) and the power struggle between the British and the Afrikaners led to the Boer War in 1899.[36]

Because of the disruptions of the Boer War and closing of the frontiers, poverty among Afrikaners became a serious problem.[37] The English were predominantly urban and had a much higher standard of living than the Afrikaners.[38] As one author has noted, however, "[i]n the long run . . . the losers triumphed."[39] The Afrikaners migrated to the towns where they not only benefited from discrimination against the Blacks, but from policies within the

Afrikaner community designed to coordinate the utilization of the Afrikaners' limited resources.[40] The "sine qua non of Afrikaner petty-bourgeois policies"[41] was the mobilization of Afrikaners in the accumulation of wealth and the solving of Afrikaner poverty.[42] In order to achieve these goals the Afrikaners separated themselves from English institutions creating various secret and cultural societies, as well as separate schools and colleges.[43] The Afrikaner community also founded banks,[44] investment companies,[45] life insurance companies,[46] construction companies,[47] agricultural cooperatives[48] and a mining company.[49] After the Nationalist Party came to power in 1948 and began using the state to advance its supporters' interests Afrikaner wealth increased dramatically.[50] The government placed contracts with Nationalist firms and used state controlled corporations as training grounds for Nationalist managers.[51] Afrikaner capital is now able to collaborate with English-speaking capital on equal terms[52] and corporations such as

Federale Mynbou illustrate the extent of Afrikaner power within South Africa.[53]

The Black population of South Africa numbers approximately 21 million people comprising 72% of the total South African population[54] and the Nationalist government controls where they can work, live, travel and be buried.[55] The government also controls and hinders African education by teaching Africans in their tribal language and then in half English and half Afrikaans.[56] The official policy of influx control limits the number of Blacks in urban areas to those needed for the maintenance of a stable economy.[57] As one author has stated, "A vast web of statutes . . . confine the African to his tribal homeland and release him only in the interest of the agricultural and industrial advancement of the white community."[58]

B. Foreign Investment in South Africa

It is almost axiomatic that South Africa is important politically and economically to the Western world.[59] South

Africa controls the shipping routes around the Cape of Good Hope[60] and controls strategic minerals such as chrome, vanadium, manganese and platinum.[61] American investment in South Africa between 1960 and 1975 increased 300%[62] and from 1978-1980 American exports to South Africa rose 128%.[63] The United States has become South Africa's largest trading partner[64] and its second largest foreign investor.[65] Because of this involvement many question whether or not American corporations or the United States government is truly interested in bringing about apartheid's demise.[66] Even though 144 American companies have signed the Sullivan Principles,[67] the critics of American involvement point out that the large number of American and western corporations gives the South Africa government access to valuable resources through capital and technology transfers.[68] This in turn provides fuel for the economy, thus strengthening the government.[69] This argument is valid if foreign investment enters the Afrikaner community, supporting government businesses or Afrikaner firms, furthering Afrikaner capital accumulation.[70] The current United States policy ("Constructive Engagement") is to support investment and trade in southern Africa in order to promote economic development.[710] Constructive Engagement seeks to bring about peaceful change through a system of investment incentives.[72] Thus far, the policy's effectiveness has come under a great deal of criticism.[73]

The South African government also favors increased foreign investment.[74] The government has created incentives, such as tariff protections for foreigners that produce goods in South Africa and special tax allowances.[75] Under the Terrorism Act[76] it is high treason to advocate divestment of foreign funds from South Africa.[77] The government usually responds to sanctions or threats of outside control by enacting mitigating legislation.[78] This legislation may take many forms including the stockpiling of petroleum reserves[79] or giving the Minister of Economic

Affairs the power to demand a company to produce any product the government deems necessary to national security.[80] The Protection of Business Act[81] provides criminal penalties for furnishing information about a South African business to foreign countries without prior approval from the Minister of Economic Affairs.[82] Laws such as these make it difficult for foreign nations and businesses to affect change in South Africa without taking direct political and economic action.

III. The American Response

Although many American corporations follow the Sullivan principles,[83] South African law[84] and the fear of antagonizing white workers[85] limits the corporations' ability to reform South Africa. Protesting American corporate presence in South Africa, organizations have pushed shareholder resolutions to encourage socially responsible corporate action[86] or have encouraged divestment by investors.[87] Support for divestiture has come primarily from church groups, labor unions and universities.[88] In response, corporations argue that the purpose of a business entity is to make profits, not moral judgments.[89] American corporations further argue not only is South Africa a profitable country for business,[90] but American business can influence positive change by stimulating growth and providing jobs.[91]

Although the effectiveness of divestiture on influencing change in South Africa is debatable,[92] divestment supporters have convinced five states to enact divestment legislation.[93]

Several cities and counties have also passed binding and non-binding divestment resolutions.[94] These laws cover not only public funds, but public pension funds[95] which in some cases are worth billions of dollars.[96] These measures generally require the withdrawal of public funds from financial institutions with outstanding loans to the South African government,[97] the divestment of shareholdings in corporations operating in South Africa,[98] or the refusal to invest further funds in corporations dealing in or with South Africa.[99] Many of the divestment policies make reference to the Sullivan principles[100] and take several years for complete implementation.[101] Because of their size, pension funds have the potential of exerting a great deal of economic and political power.[102] The debate continues, however, over whether governmental entities and the trustees have the power to divest these funds based on moral considerations.[103] The two main arguments against divestment based on South African involvement are that the trustees risk violating the prudent investor rule[104] and that such decisions encroach on the federal government's primacy in formulating American foreign policy.[105]

A. The Prudent Investor Rule

The prudent investor rule was first articulated by Harvard College v. Amory.[106] This rule posits that the trustee should preserve the estate and attain an adequate return.[107] Investment decisions are to be made only for the benefit of the beneficiaries

[108] and Professors Richard A. Posner and John H. Langbein argue that a trustee who sacrifices the beneficiaries' well-being under the guise of social investing breaches both his duty of prudence in investing and his duty of loyalty to the beneficiary.[109] Because of inflation and considerable unfunded liabilities,[110] one author stresses that trustees currently need to invest pension funds where they will receive the greatest returns.[111] The dilemma is that rates of return on investment in South Africa for foreign investors are usually above the world average.[112] Others argue against divesting from corporations which operate in South Africa because these companies are primarily large multinationals and diversification means dealing with smaller companies with higher potential risks.[83] Another reason given for not divesting the South Africa related stocks is that the transaction costs involved may lead to financial losses.[114]

Although its legislation serves as the model for other divestiture bills,[115] Massachusetts has not divested approximately $20 million in securities because divestment would result in losses of $12 million.[116] However, by diversifying the pension portfolio, investment experts, such as the Franklin Management Corporation in Boston, maintain that pension funds can successfully divest themselves of South Africa related stock.[117] The state legislature sets up detailed guidelines for the operation of public pension funds[118] and advocates of socially responsible investing argue that the legislature can expand the concept of prudence and benefit to include benefits besides maximized earnings.[119] South Africa related portfolios, it is argued, also present a greater risk in the long run because of the possibility of revolution and subsequent losses.[120] It is generally agreed that, in reviewing corporations with a view toward investment, good corporate citizenship weighs as a positive consideration[121] and it appears that if divestiture can be accomplished without economic losses trustees can make investment decisions based on political or moral considerations.[122]

B. The Commerce Clause and the Foreign Affairs Power

Those who argue that the states do not have the power to create South Africa-free portfolios base their arguments on the commerce clause and on the exclusive federal power over foreign affairs.[123] Courts interpret the Commerce Clause[124] broadly to include the transportation, purchase, sale, and exchange of goods.[125] State regulations that affect commerce need to further a legitimate local public interest and if the regulations have incidental effects on interstate commerce the scheme will be upheld unless the burden clearly outweighs the putative local benefits.[126] An analysis of Nebraska Resolution 43,[127] which condemned apartheid and called for the withdrawal of investments from corporations and banks that invest in South Africa,[128] concluded that because the Resolution's principal purpose is to discourage investment in South Africa it improperly regulates commerce.[129] The analysis argues that such state legislative action should be discouraged because of the possibility of retaliatory actions by South Africa which would affect all states.[130] The states' ability to direct and redirect its pension funds, however, is a traditional state power protected under the tenth amendment.[131] As an important governmental activity states place numerous restrictions on pension fund investments which exclude many corporations from the funds and have never been considered violations of the commerce clause.[132] The states, then, can create South Africa-free portfolios without violating the Commerce Clause.[133]

Opponents of this state power also argue that divestiture intrudes into foreign affairs[134] by involving the state in the establishment of foreign policy.[135] Federal power over external relations is expansive and it gives the government the power to regulate relations with foreign countries and to prohibit "any disturbance or interference with external affairs."[136] In Brown v. Maryland,[137] the Supreme Court stated that this power, in some cases, necessarily includes all foreign commerce.[138] The federal promulgation of a variety of laws and regulations affecting American commercial involvement with South Africa[139] provides a strong argument against divestiture that does not comply with federal laws. It is also crucial to note that the present policy of Constructive Engagement seeks to encourage American investment.[140] Thus, by enacting divestment legislation the state acts directly against the President's command.[141] States, however, are not formulating foreign policy when they redirect their pension funds.[142] These state decisions are merely the culmination of routine procedures, couched in inherent state powers, that happen to interface with American foreign policy.[143] Further support for the state's divestment power comes from the House Committee on the District of Columbia which upheld divestment legislation by the District of Columbia City Council.[144]

IV. Conclusion

If the states' power to create South Africa-free portfolios does not violate the commerce clause or the federal power over foreign affairs, the states need to consider whether or not divestiture is effective. The goal of divestiture is to raise a company's cost of capital, and influence business practices.[145] By depressing the value of the stock, the divestor's goal is to make American corporate operations in South Africa unprofitable. Thereby forcing the corporation to reform its policies, pressure the South African government to change apartheid, or withdraw from South Africa.[146] This circuitous method of trying to change the South African system may only result in a well intentioned moral statement.[147] As noted earlier, the South African government encourages foreign investment while also acting to curb the same investments.[149] This is not an anomaly if we consider foreign investment a double-edged sword. Although this investment brings with it the possibility of outside control and influence, as long as the money goes into the Afrikaner community it increases the Afrikaners' economic power vis-a-vis other South African groups.[150] Afrikaner power is further enhanced when this inflow of capital circulates within the Afrikaner community.[151] Thus, western capital in South Africa supports the Nationalist Party when this money passes into the hands of apartheid's supporters. Neither will total divestiture or increased investing change South Africa unless investors look beyond the American corporation or financial institution to the ultimate beneficiaries. In order to bring about positive change in South Africa the inflow of foreign capital needs to shift away from apartheid's supporters to those who oppose apartheid.[152] The Sullivan principles have made some changes,[153] but without more their effects will be remain limited.[154] The added bite could take the form of a principle stating that American corporations will only contract with, buy goods from, or support individuals and businesses in South Africa that oppose apartheid. A form contract similar to the State Department's questionnaire under the Evans Amendment[155] would provide the beginning of needed and meaningful change. Other action could include precluding Afrikaner corporations, such as Federale Mynbou, from investing in American corporations, thereby limiting the Afrikaners' ability to tie their success to American success.[156] The apartheid regime is firmly entrenched in South Africa[157] and because the government continually enacts laws protecting itself from outside influence[158] the western world needs to creatively deal with South Africa's economic realities. The policy of "Selective Investment," with the support of state and local governments, will alter the power structure within South Africa. This in turn will help to undermine apartheid and change South Africa where divestiture could not.

Footnotes

1. Karis, Revolution in the Making: Black Politics in South Africa, 62 Foreign Affairs 378, 385-387 (1983-1984).

The repression includes an increased number of government soldiers raiding neighboring states and towns believed to support terrorist activities, mass arrests and detentions, Id., as well as police shooting into protesting crowds. Ad by Botha Pledges to Share-Power with South Africa's Blacks, St. Louis Post-Dispatch, Feb. 3, 1986, at 1. Bombings by such groups as the African National Congress, the most prominent anti-apartheid organization, have also been part of the spiraling violence. Karis, 62 Foreign Aff. at 385-87. In the year 1980-81 the incidents of sabotage organized by the African National Congress (ANC) increased from ten to forty. Khatami, Attacks Mark Growing ANC Strength, Southern Africa, Jan-Feb. 1983, at 19. Two particular incidents prior to 1980 are important in understanding Black frustration. In 1960, the Pan-African congress (PAC) organized a peaceful anti-pass demonstration in Sharpeville. The police opened fire, killing 67 Africans. Most were shot in the back as they ran; 186 were wounded. The government then outlawed the Pan-African Congress and the African National Congress. Karis, 62 Foreign Aff. at 382. Sharpeville is an African township south of Johannesburg. The Report of the Study Comm'n on United States Policy Toward Southern African, South Africa: Time Running Out 173 (1981). In 1976, in Soweto, also outside of Johannesburg, students peacefully demonstrating against instruction in the Afrikaans language again met with gunfire. In the shooting and rioting that followed 575 people died, of which 134 were under 18. Karis, 62 Foreign Aff. at 384.

2. St. Louis Post-Dispatch, supra note 1, at 8a. Blacks make up the vast majority of the dead. Id. On July 21, 1985, the government issued an emergency decree to rule the nation's most troubled areas. Botha Woos South Africa's Blacks with an Advertisement, New York Times, Feb. 3, 1986, at 2, col. 4 ("Botha Woos Blacks"). Since imposition of the emergency, the death rate has risen to an average 3.6 deaths per day. Levis, Editorial: Change in South Africa, New York Times Feb. 3, 1986, at 19, col. 1.

3. Botha Woos Blacks, supra note 2, col. 1.

4. Id.

5. Lewis, Editorial, supra note 2.

6. Apartheid is the "official policy of racial segregation promulgated in the Republic of of South Africa with a view to promoting and maintaining white ascendancy." This is the Afrikaans' word meaning "apartness." American Heritage Dictionary 60 (1976)

7. Lewis, Editorial, supra note 2. "If Mr. Botha wanted to reach out to the Black citizens of South Africa in ways that count . . . He would have ended the emergency, and freed Nelson Mandela." Id. By 1961 Nelson Mandela was the leading figure of the African National Congress. After Sharpeville he no longer believed nonviolence could change South Africa's apartheid policy. Time Running OUt, supra note 1, at 174-75. In 1962 he was imprisoned and in 1964 he was sentenced to confinement for life. Id. at 192. The author concludes that P.W. Botha's speech to Parliament tells "us that he cannot do what is necessary." Lewis, Editorial, supra note 2. Max du Preez, a commentator in the Sunday Times of Johannesburg, noted that P.W. Botha had failed to come to grips with South Africa's most pressing problems. Id.

8. Prime Minister Botha's policy is a program of "cautious political change." Botha Woos Blacks, supra note 2.

The United States Government, under the Reagan administration, pushes a policy of "constructive engagement" supporting peaceful change and protecting the United States' economic interests. Note, United States Investment in South Africa, 2 Int'l Prop. Inv. J. 451, 451-53 (1985). The African National Congress pursues a policy of "armed struggle" coordinated with mass demonstration, boycotts, and strikes. The ANC has camps in neighboring countries to train guerrillas for armed resistance. Karis, 62 Foreign Aff., supra note 1, at 384.

9. Note, The Constitutionality of State and Local Government's Response to Apartheid: Divestment Legislation, 13 Fordham Urb. L.J. 763, (1984-85).

10. Policies and Practices of Transnational Corporations Regarding Their Activities in South Africa and Namibia, United Nations Centre on Transnational Corporations 9

(1984). Lezin & Milocov, Divesting from South Africa: Public Protest v. Public Trust, 8 L.A. Law. 12 (1985); Note, supra note 9, at 771.

11. Lansing, The Divestment of United States Companies in South Africa and Apartheid, 60 Neb. L. Rev. 304 (1981); Note, Socially Responsible Investment of Public Pension Funds: The South Africa Issue and State Law, 10 N.Y.U. Rev. L. & Soc. Change 407 (1980-81); Note, supra note 9.

12. See infra notes 145-147 and accompanying text.

13. Note, supra note 9, at 767-68. This is because of the government's police, military, and economic control over South Africa and the preclusion of Black participation. Id. However, the Black labor unions have continued to grow and have shown a willingness to exert their power. One example was a two day work stoppage strike by 800,000 Black workers near

Johannesburg in November of 1984. Id. at 767 n.16. It appears to some observers that the January 31, 1986, speech by P.W. Botha to the South African Parliament, calling for power sharing and change was a response to Western banks which have refused to reschedule $13 billion of the nation's $24 billion foreign debt unless major political changes take place. Botha Woos Blacks, supra note 2.

14. Policies and Practices of Transnational Corporations, supra note 10. This report was prepared pursuant to the Economic and Social Council Resolution 1982/69 of October 27, 1982, which requested the Secretary General, inter alia: "To prepare a report on the policies and practices of transnational corporations regarding their activities in South Africa and Namibia . . . and to include . . . a list of transnational corporations which continue to operate in strategic sectors . . . in violation of United Nations

resolutions. Id. The United Nations because passing resolutions denouncing South Africa's racial policies even before the Nationalist victory in 1948. Time Running Out, supra note 1, at 31 (1981).

15. S. Hopkins, An Analysis of U.S.-South African Relations in the 1980's: Has Engagement Been Constructive?, 7 J. Comp. Bus. Cap. Market L. 89, 90 (1985). The United Nations Security Council has condemned apartheid as a violation of human rights. 32 U.N. SCOR (2045th Mtg.) 1, U.N. Doc. S/RES/417, S/INF 2045 (1977). The Security Council also called for an embargo of arms, munitions, military equipment and material for arms manufacture and maintenance. 32 U.S. SCOR (2056 Mtg.) 5, U.N. Doc. S/RES/418, S/INF/33 (1977). In 1980, the United States imposed an arms embargo. 15 C.F.R. § 385.4(a)(1)(1980).

16. Policies and Practices of Transnational Corporations, supra note 10, at 8-9. The Government of Sweden passed

a law prohibiting new investment in and capital exports to South Africa. In 1977 the Governments of Denmark and Norway adopted measures to stop export credit guarantees and the United States passage of the Evans Amendment of 1978 greatly restricted these guarantees. Japan prohibits equity participation of individuals or companies in South Africa. *Id.* at 9.

17. Karis, *supra* note 1.

18. *See infra* notes 24-58 and notes 74-82 accompanying text.

19. *See infra* notes 59-73 and accompanying text.

20. *See infra* note 106-122 and accompanying text.

21. *See infra* notes 123-144 and accompanying text.

22. *See infra* notes 145-151 and accompanying text.

23. *See infra* notes 152-158 and accompanying text.

24. *Time Running Out*, *supra* note 1, at 26. The Pilgrims founded Plymouth Colony in 1620. The American Heritage Dictionary, 993 (1976). European settlement of the

Cape Colony began in 1652. Time Running Out, _supra_ note 1, at 26.

25. These Africans began migrating into southern Africa in about the third century A.D. The aboriginal hunters occupying this area were either killed, driven away, or blended into the farming communities. _Time Running Out_, _supra_ note 1, at 25.

26. _Time Running Out_, _supra_ note 1, at 25. The Africans were living in settled, largely self-sufficient villages. The Chief ruled in consultation with his close relatives and advisors and all the men were involved in decision making. _Id._ at 25-26.

27. The Afrikaners descend from the Dutch, French Hugeunot, and German settlers of the seventeenth century. Note, _supra_ note 9, at 763. Dutch was the official language of the Cape Colony, but it gradually became a distinct language which the Cape inhabitants called Afrikaans. _Time Running Out_, _supra_ note 1, at 27.

28. Time Running Out, supra note 1, at 27. The Afrikaners traveled by the thousands in organized parties with their cattle, sheep and wagons. Their early settlements were in, what is today, upper Natal an the plateau on either side of the Vaal River. At the end of the 18th century the African population on the eastern half of southern Africa was competing for scarce land and water. This gave rise to the Zulu kingdom and a disciplined standing army, under Chief Shaka (1787-1828). Id. at 26-27.

29. P. Lansing, supra note 11, at 304.

30. Time Running Out, supra note 1, at 33. By 1898, with the defeat of the Venda in the northern Transvaal, the conquest of the southern African communities was complete. Other peoples included the Basotho, the Zulus, and the Xhosa. Id. at 32. The Afrikaners wrote into their constitution "No equality in church or

state," and they imposed tight controls on Africans including the prohibition from being in "white areas" without an officially signed pass. The British settlers in Natal adopted the Afrikaners racial ideas, but applied them more systematically. This included placing Africans on reserves. Id. at 34.31 . Id. at 32. This is mainly because the White farmers controlled most of the fertile land. Id. at 35.

32. Id. at 32. In the latter half of the 19th century a rigid color line emerged with people of mixed racial origins and Blacks making up the subordinate caste and relegated to manual labor. Id. at 28-33.

33. Id. at 29.

34 . Id. at 35. Under the newly formed government of the Union of South Africa (1910), the Chamber of Mines set the conditions of employment and eliminated competition in the recruitment of labor. In 1911, the White gold miners acquired a legal monopoly on skilled jobs and

were earning nine times as much as Blacks. Id. The White trade unions would also strike if management or the Chamber of Mines tried to change the color bars or reduce the number of white miners. In one particular incident the White miners staged a rebellion in which more than 200 people were killed. Id. at 36.

35. The Transvaal is one of South Africa's four provinces. Lansing, supra note 11, at 305.

36. Time Running Out, supra note 1, at 29-30. In 1881 the Afrikaners rebelled and the British withdrew from the Transvaal. The British recognized Afrikaner independence in the 1850's after an unsuccessful attempt to take control of what later became the Orange Free State and the Transvaal. The Transvaal and the Orange Free State declared war on Great Britain in 1899. The Afrikaners surrendered in 1902.

37. Id. at 36. The British burnt farms and jailed many Afrikaners after the war. Lecture by Professor William Finlay, Northwestern University (Sept. 25, 1980).

38. Time Running Out, supra note 1, at 43. While the Afrikaners owned most of the land, the English dominated industry, commerce, and the upper echelons of the civil service. Id.

39. Id. at 30.

40. Bernard Makhosezwe Magubane, The Political Economy of Race and Class in South Africa 167 (1979). Time Running Out, supra note 1, at 37. By 1909 the Transvaal economy was booming. Since 1909 the economic disparity between the English-speakers and the Afrikaners has continued to decrease. In 1948, the per capita income of the English-speakers was more than double that of Afrikaners. The ratio had narrowed to 1 to 1.4 by 1976 and the trend continues. Id. at 43.

41. Magubane, supra note 40, at 182.

42. Id. The accumulation of wealth includes the policy of keeping wealth that comes into the Afrikaner community within the community that supports apartheid policies. Lecture for Professor William Finlay, supra note 37 (Sept. 30, 1980). The process of recycling buying power within the ethnic group is correlated with the wealth of that particular group. The more times money changes hands within the community the greater that community's wealth. The Council for the Economic Development of Black Americans ("EDBA"), Tony Brown, Chairman. (The author fully supports the EDBA's use of this economic concept.)

43. Magubane, supra note 40, at 169-70. The Afrikaners also established a separate scout movement, (the Voortrekkers), separate student unions, and separate teacher's associations. Id. at 170.

44. Lecture by Professor William Finlay, supra note 37 (Sept. 30, 1980). Volkskas, founded in 1935, is not

the third largest bank in South Africa with assets by 1968 of R538 million. Magubane, supra note 40, at 178-79. Trustbank, formed in 1955, has assets of over R300 million and is South Africa's fourth largest bank. Id. at 179.

45. Founded in 1946, Bonuskor increased its assets between 1962 and 1974 from R16 million to R25 million. Id. at 80.

46. SANLAM, formed in 1918, had R34 million assets in 1949. By 1968, SANLAM had R334,043,000 in assets. Id.

47. SAAMBOU, founded in 1942, is one example. Id.

48. Id. at 180. Afrikaners control the majority of the agricultural cooperatives.

49. Federale Mynbou, formed in 1953, is the only Afrikaner controlled mining company. Id.

50. Time Running Out, supra note 1, at 43. Today Afrikaners dominate the public service and the corporations controlled and mostly owned by the

government. Id. See footnote 46. SANLAM is a good example of the dynamic economic growth within the Afrikaner community. Magubane notes that the key to the Afrikaner success in capital accumulation was the consolidation of the Afrikaner behind the Nationalist Party and the subsequent monopolization of state power. Magubane, supra note 40, at 188.

51. Magubane, supra note 40, at 178-79. The government established corporations such as Iscor, Sasol, Fosker, Escom, and the Industrial Development Corporation which give Afrikaners opportunities in management which they otherwise would not have had. B. Bunting, The Rise of the South African Reich (1969). Afrikaner capital accumulation is also enhanced by the free movement of Afrikaner politicians between government and business. Magubane, supra note 40, at 179.

52. Magubane, supra note 40, at 189.

53. Federale Mynbou, formed in 1953, began with R200,000 in capital. By 1976, Federale Mynbou's assets totaled R350,000. *Id.* at 180-81. As of 1969, Federale Mynbou controlled 37% of South Africa's uranium production, 20% of its coal production, and 32% of its asbestos production. The company also has extensive interests in sugar, diamonds, gold, platinum, salt and chrome. *Bunting*, *supra* note 51, at 391. By 1979 Federale Mynbou had increased its ties with English financial interests having a large stake in Stewart and Lloyds, Union Carriage and Wagon, and Hall and Longmore. Federale Mynbou also has a 10% interest in the R100 million Highveldt steel and vanadium development undertaken by Anglo-American. *Magubane*, *supra* note 40, at 181-82.

54. South African Fact Sheet, South African Perspectives 1 (Africa Fund, March 1984). The White population totals about 5 million people or 16% of the population and the

Colored and Asian population has 3.5 million people or 12% of the population. Id.

55. Note, supra note 9, at 764-65. The Black (Urban Areas) Consolidation Act makes it a criminal offense for a Black person to be in an urban area for longer than 72 hours without work. Exceptions to this law are limited and include residence since birth, lawful residence for 15 years, or continuous employment with the same employer for 15 years. Black South Africans are subject to curfews and most are restricted to designated Black townships away from the urban center. These laws are vigorously enforced accounting for about 25% of South Africa's criminal prosecutions. Lentz, Apartheid Goes to Court, Human Rights 15, 15 (Spring 1985). South Africa has the highest per capita prison population in the world. Note, supra note 9, at 766. For every 100,000 people, 440 are in jail. In the United States, for every 100,000 people, 189 are in

jail. South African Fact Sheet, _supra_ note 54, at 4. The Pass Laws require every Black South African over the age of 16 to possess a pass book containing an identity card and employment information. It is a criminal offense not to produce the book on demand. (Black Abolition of Passes and Coordination of Documents Act), Lentz, Apartheid Goes to Court, at 15. Forty percent of the Black prison population consists of those have violated the pass laws. Note, _supra_ note 7, at 766-67.

56. Lecture by Professor William Finlay, _supra_ note 37 (Sept. 30, 1980).

57. Note, _supra_ note 9, at 765.

58. Lentz, _supra_ note 355, at 15. Citing John Dugard, the author of "Human Rights and the South Africa Legal Order." The Bantu Homelands Constitution Act No. 21 of 1971 separates the races and established separate "homelands" for Black South Africans. The homelands

make up 13% of the land in South Africa. Lansing, supra note 11, at 306. The Bantu Homelands Citizenship Act No. 26 of 1970 was enacted to establish the homelands as independent states so that Black South Africans would no longer be South African citizens. Id. So far, only four (Transkie, Bophuthatswana, Venda and Ciskei) of the ten homelands have opted for independence. Note, supra note 9, at 764. South Africa continues on the same path that it began 35 years ago and white supremacy is more entrenched than ever. Karis, supra note 1, at 403-04. In the 1980-81 general election the National Party held 134 seats of the 165 seats in the House of Assembly. Lansing, supra note 11, at 304 n.10. It is important to note that variations in white opinion as to racial superiority are regional rather than ethnic. Time Running Out, supra note 1, at 38.

59. Lansing, _supra_ note 11, at 309-10; _Time Running Out_, _supra_ note 1, at xviii.

60. Lansing, _supra_ note 11, at 309.

61. Note, _supra_ note 8, at 452. The United States is dependent upon South Africa for these minerals, because the only other major supplier is the Soviet Union. These minerals are essential to specialty steel production and petroleum refining as well as to the aerospace industry. _Id._ Citing to U.S. Mineral Dependence on South Africa, A Report to the Committee on Foreign Relations, United States Senate, 97th Cong., 2d Sess. 1, 4 (1982).

62. Lansing, _supra_ note 11, at 323.

63 Vance, _The Export-Import Bank of the United States and South Africa: The Effects of the Evans Amendment_, _Vanderbilt J. of Transnational L._ 801, 855 (1984). Citing 1974-1980 Direction of Trade Statistics, U.B. 230 (1981). This was a greater increase than that

realized by other Western nations. The United Kingdom saw an 82% increase, id. at 377, West Germany had a 64% increase, id. at 168, Japan an 83% increase, id. at 226, France at 58% increase, id. at 161, and Italy an 88% increase, id. at 218. United States trade with South Africa amounts to over $4 billion annually and more than $2 billion represents direct investment. Note, supra note 8, at 453. Another estimate puts overall American investment at $14 billion. (This includes loans and gold stocks.) Hopkins, supra note 15, at 90.

64. Hopkins, supra note 15, at 91.

65. Note, supra note 9, at 768-69.

66. Comment, In Support of Azania: Divestiture of Public Funds as One Answer to United States Private Investments in South Africa, 9 Black L.J. 167, 176-78 (1985). Arguing that the current policy of

Constructive Engagement has failed. Hopkins, _supra_ note 15, at 104. Note, _supra_ note 9, at 770-71.

67. Hopkins, _supra_ note 15, at 95. These principles developed by Reverend Leon H. Sullivan are a corporate code of conduct for American corporations. The signing 144 companies employ 85% of the workforce employed by American subsidiaries. _Id._ However, less than one percent of the South African labor force (about 80,000) works for American firms. _Id._ at 94. The Sullivan Principles state:

Principle 1--Nonsegregation of the races in all eating, comfort, and working facilities.

Principle 2--Equal and fair employment practices for all employees.

Principle 3--Equal pay for all employees doing equal or comparable work for the same period of time.

Principle 4--Initiation and development of training programs that will prepare, in substantial numbers, blacks and other nonwhites for supervisory, administrative, clerical, and technical jobs.

Principle 5--Increasing the number of blacks and other nonwhites in management and supervisory positions.

Principle 6--Improving the quality of employees' lives outside of work in such areas as housing, transportation, schooling, recreation, and health facilities.

Lansing, supra note 11, at 307.

68. Note, supra note 8, at 466. Hopkins, supra note 15, at 91. Vital ingredients in South Africa's economic development have been foreign capital and trade. Hopkins, supra note 15, at 91. See also Note, supra note 9, at 769.

69. Note, supra note 8, at 458-59. The United Nations Commission on Human Rights posits the view that increased investment perpetrates apartheid by creating a stronger, more self-sufficient economy. Id. The South African economy is almost self-sufficient.

Wasserman, Apartheid and Economic Sanctions, 15 *J. World Trade L.* 366, 367 (1981). "[T]he net effect of American investment has been to strengthen the economic and military self-sufficiency of South Africa's apartheid regime . . ." and United States corporations have not made a significant impact on apartheid. *Staff of Senate Subcomm. on African Affairs*, 95*th Cong.*, 2*d Sess.*, *United States Corporate Interests in Africa* 9, 13 (Comm. Print 1978)(Statement by Senator Dick Clark (D.Ia.)).

70. The United Nations Centre on Transnational Corporations states that some transnational corporations are involved in governmental programs aimed at achieving the South African goal of self-sufficiency. Policies and Practices of Transnational Corporations, supra note 10, at 5. The majority of financing for new investments by transnational corporations derive from reinvested earnings. In 1981, United States-based

corporations reinvested almost 50 percent of their South African earned income. Id. at 8. The government also encourages transnational corporations to take local partners. Id. at 15. If these local partners are Afrikaner firms, foreign investment enters the Afrikaner community, increasing Afrikaner capital relative to capital-starved groups such as the Africans.

71. Note, supra note 9, at 455. Chester Crocker, Assistant Secretary for African Affairs also stated that the United States would not support severing ties from South Africa because this would only harm American interests. U.S. Dept. of State Current Policy No. 308, Regional Strategy for Southern Africa, 2 and 3 (Aug. 29, 1981).

72. Note, supra note 8, at 451. Supporters of this policy believe that economic growth in South Africa will facilitate apartheid's destruction. They cite to the

increased educational and employment opportunities for South African Blacks because of foreign investment and the shortage of skilled White labor as the economy expands. Id. at 459-60. However, as one author states, forty years of increasing investments have failed to eradicate or even meaningfully reform apartheid. Comment, supra note 66, at 178. One study has also shown that the number of Blacks living below the poverty level rose from 4.9 million persons in 1960 to 8.9 million in 1980. Note, supra note 9, at 766.

73. Hopkins, supra note 15, at 103-104. Hopkins states that Constructive Engagement has failed and has only served to reinforce apartheid and alienate Black South Africans. Id. A policy favoring increased investments will not alter the South African apartheid system if the investments only go into the Afrikaner community. See footnote 70 and Magubane, supra note 40.

74. Note, supra note 8, at 463. For its economic well-being South Africa is dependent on foreign investment. Id. Former Prime Minister J.B. Vorster stated, "Each trade agreement, each bank loan, each new investment is another brick in the wall of our continued existence." E. Schmidt, Decoding Corporate Camouflage: U.S. Business Support for Apartheid 76 (1980). However, Magubane concludes that the Afrikaner state policies attempt to curb the predominant role of foreign capital and advance the Afrikaners' economic interests. Magubane, supra note 40, at 164. The South African urban-based commerce and industry entered the country through British finance capital and Great Britain developed this economy primarily for Britain's benefit. Id. at 165.

75. Note, supra note 8, at 462. A foreign business operating in South Africa can apply to have a protective tariff imposed on imports coming into the

country from overseas competitors. Exporters of goods manufactured in South Africa receive special tax allowances for depreciation, investment and development. Foreign investors are allowed to buy land and the government recently lifted controls on the repatriation of investment proceeds. Id. at 462-64.

76. No.   of 1967, Statutes of the Republic of South Africa.

77. Note, supra note 8, at 463. This crime has a maximum penalty of death. Id.

78. Hopkins, supra note 15, at 97.

79. Lansing, supra note 11, at 323. A boycott by the oil-exporting nations led to the vast development of the local coal-mining industry. Wasserman, supra note 69, at 376. Presently, petroleum accounts for only about 20% of South Africa's energy requirements and government stockpiled reserves could last from 3 to 6 years. Lansing, supra note 11, at 323. After a world-

wide arms embargo beginning in the mid-seventies, South Africa established a local arms industry which now meets all of the country's requirements. Wasserman, _supra_ note 69, at 367.

80. Hopkins, _supra_ note 15, at 97. The National Supplier Procurement Act gave the government the power, if a company refuses, to "seize the goods in question" without legal process or to take over the company's production processes. _Id._ The 1978 Patent Act gives South African businesses the power to violate patent rights of foreign holders refusing to make technology available. _Id._ at 97.

81. No. 99 of 1978, amended by the Protection of Business Amendments Act, No. 114 of 1979.

82. Vance, _supra_ note 63, at 832-33. The Protection of Business Act, No. 99 of 1978, amended by the Protection of Business Amendments Act, No. 114 of 1979. "No person shall in compliance with any order, direction or

letters of request issued or emanating from outside the Republic furnish any information as to any business whether carried on in or outside the Republic." Id., at 832-33. The language is unclear as to whether this law applies to all requests, public or private, or only to governmental requests. Id. at 833. The Evans Amendment, 12 U.S.C. § 635-635 (1982), amended the Export-Import Bank Act of 1945, thus restricting financial support given by the Bank to purchasers of U.S. exports in South Africa. South African purchasers now need to answer a detailed questionnaire (Reprinted as Appendix 2, page 866 and Appendix 4, page 878 of Vance, supra note 63) before they can become eligible for Exim Bank support. Vance, supra note 63, at 856. Since passage of the Evans Amendment in 1978, Exim has not been involved in any South African transactions, id. at 802, although the Secretary of State has certified two companies. Id. at 856.

83. The Sullivan Principles, supra note 67.

84. Note, University Investments with a South African Connection: Is Prudent Divestiture Possible?, 11 N.Y.U.J. Int'l L. & Pol. 543, 548 (1979). Critics maintain that the Principles are written to stay within South African law. The Principles' effectiveness is also limited by lack of enforcement mechanisms and job categorization based on race. Id.

85. Hopkins, supra note 15, at 96.

86. Lansing, supra note 11, at 306-307. Late in 1982, the General Electric Co. withdrew from a major mining project in South Africa because of anti-apartheid pressure in Connecticut, where General Electric is headquartered. Policies and Practices of Transnational Corporations, supra note 10, at 7. Activists of social responsibility argue that investors have an ethical obligation to prevent the corporation from supporting and furthering immoral practices. Note, supra note 84,

at 416. Activists, however, are divided over whether the ethical course is to cut all ties from South Africa or to use the corporate presence to achieve positive change. Id. at 430.

87. Lansing, supra note 11, at 306-07.

88. Id. at 312. The National Council of Churches board declared its support for efforts to end all economic collaboration between the governments of South Africa and the United States and for a withdrawal of all money in financial institutions which make loans to the South African government or have investments in South Africa. (November of 1977) Id. In 1978, the AFL-CIO Executive Council asked that ann United States corporations divest from South African affiliates and break all connections with South African corporations. Also in 1978, the United Auto Workers announced the withdrawal of UAW funds from institutions making loans to South Africa. Id. The South African Investments Study

Committee for the University of Toledo recently recommended that the university take action to sell its investments in companies doing business in South Africa if significant progress toward ending apartheid is not made by December 31, 1987. Recommendations and Report of the South African Investments Study Committee, The University of Toledo, col. 1 (Feb. 1986).

89. Lansing, *supra* note 11, at 308. Corporate officials also argue that private corporations are not in a position to judge the internal affairs of another country, that there are many other competitors who will trade with South Africa, and that the Black South Africans would be the groups most adversely affected by foreign withdrawal. *Id.*

90. Policies and Practices of Transnational Corporations, *supra* note 10. See note *infra* 112

91. Hopkins, *supra* note 15, at 93.

92. See discussion <u>infra</u> at notes 145-147 and accompanying text.

93. Note, <u>supra</u> note 9, at 773. These states are Connecticut, Massachusetts, Michigan, Nebraska and Maryland.

948. <u>Id.</u> at 777-78. There are over 21 localities that have passed such legislation. These include: Berkeley, Colati, Davis and Santa Cruz, California; Hartford, Connecticut; Wilmington, Delaware; Boston and Cambridge, Massachusetts; Atlantic City, Newark and Rehway, New Jersey; New York City, New York; Cuyahoga County, Ohio; Philadelphia, Pennsylvania; Charlottesville, Virginia; and Washington, D.C. <u>Id.</u> The City of Los Angeles recently joined this list. Lezin & Milicov, <u>supra</u> note 10, at 12.

95. Public Pension funds are regulated by state legislatures and the common law, Note, <u>supra</u> note 11, at 409-10, and are administered for public employees

such as school teachers, police, and firemen. Lezin & Milicov, supra note 10, at 12.

96. Note, supra note 9, at 773-778. The Massachusetts public pension fund total approximately $2.5 billion. Id. at 775. The Los Angeles pension funds total $4 billion. Lezin & Milicov, supra note 10, at 12. The California Public Employees Retirement System and the State Teachers Retirement System have $20 billion in assets. Nationwide public and private pension funds total $650 billion. Comment, supra note 66, at 179.

97. Mass. Ann. Laws ch. 32, § 23(1)(d)(ii) (Michie/Law. Co-op Supp. 1984). This also includes a prohibition in some legislation from depositing state funds into these financial institutions. Mich. Comp. Laws Ann. § 21.145(5) (West 1981). The recent Los Angeles City Council program also includes this provision. Lezin & Milicov, supra note 10, at 12. See also Neb. Rev.

Stat. § 72-1270-1276 (1984); Md. Ann. Code at 95, § 21 (Supp. 1984).

98. Mass. Ann. Laws ch. 32, § 23(1)(d)(ii)(Michie/Law Co-op. Supp. 1984); Mich. Comp. Laws Ann. § 37.2402(f) (West Supp. 1984-85). See also Wilmington, Del., code ch. 28A, art. V, §§ 28A-69, 28A-70 (1981); New York City Employees' Retirement System Res. 110 (Aug. 3, 1984).

99. Note, supra note 9, at 777. Examples include the Hartford, Connecticut, and Cambridge, Massachusetts, ordinances. Id.

100. The Connecticut statute (Conn. Gen. Stat. § 3-13f (1983)) and the Nebraska statute (Neb. Rev. Stat. § 1270-1276 (1984)) use criteria such as whether or not the corporation has signed and made progress in implementing the Sullivan Principles. Neb. Rev. Stat. § 72-1270-1276 (1984). The United States Department of State limits government assistance to American

corporations doing business in South Africa to those corporations that subscribe to the Sullivan Principles and maintain a Category I, II, or IIIA standing or otherwise meet Department of State good conduct standards.South Africa and Fair Labor Standards, 22 C.F.R. pt. 63 (1986). A Category I corporation is "Making Good Progress," a Category II corporation is "Making Progress," and a Category IIIA corporation "Needs to Become More Active." A Category IIIA corporation meets the minimum requirements for Principles 1, 2, and 3, but does not meet the minimum for Principles 4, 5, and 6. Recommendations and Report, supra note 88, at col. 2.

101. Mass. Ann. Laws ch. 32, § 23(1)(d)(ii) (Michie/Law. Co-op. Supp. 1984). The Los Angeles City Council will implement its divestiture plan over a five-year period. In the first year the city will refuse to buy stocks of and will sell holdings in companies selling strategic

and military goods to South Africa. Refusal to buy stocks of and selling holdings in companies during the second year will involved companies not signing the Sullivan Principles; year three, Sullivan signatories whose compliance rates below Category II; year four, Sullivan signatories whose compliance rates below Category I; and year five, any corporations doing business in South Africa. Lezin & Milicov, supra note 10, at 13.

102. Comment, supra note 66, at 178-79.

103. See discussion supra at notes 86-91 and accompanying text.

104. See discussion infra at notes 106-122 and accompanying text.

105. See discussion infra at notes 123-144 and accompanying text.

106. 26 Mass. (9 Pick. 446)(1837).

107. Note, supra note 11, at 441. The trustee should "exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." Harvard College v. Amory, 26 Mass. (9 Pick 446, 461) (1831).

108. Note, supra note 84, at 544-45. Frank W. Clark, Jr., a University of California Regent, noted the Internal Revenue Code, 26 U.S.C. § 401(a), requires trustees to invest for the exclusive benefit of the beneficiaries, thereby limiting the trustees' "authority to divest pension if the states purpose . . . is to influence the social and political situation in South Africa." If the trustee violates the exclusive benefit rule, this could nullify tax benefits such as earnings exemptions and

deferred taxation on contributions to the plan. Lezin & Milicov, supra note 10, at 17.

109. Langbein & Posner, Social Investing and the Law of Trusts, 79 Mich. L. Rev. 72 (1980). The trustees must also act within administrative guidelines, rules, or state statutes. Note, supra note 84, at 572.

110. Note, supra note 11, at 419. Trustees are also personally liable for losses resulting from a breach of their fiduciary duties. Id. at 425.

111. Id. at 419.

112. Policies and Practices of Transnational Corporations, supra note 10, at 4. The Commission polled 303 multinational corporations with substantial business in South Africa regarding the corporations' future plans. Id. at 2-4. The corporations consider investment in South Africa as offering opportunities for good profits. For American-based corporations, the rates of return on direct investment in South Africa were 29% in

1980 and 19% in 1981. The average rates of return from all geographic areas for American direct investment overseas were 18.4% in 1980 and 14.4% in 1981. Id. at 4.

113. Note, supra note 11, at 418. This then increases the volatility of the portfolio. Id. The Treasurer of the University of California advised that it would not be possible to reinvest a divested portfolio in comparable, high quality holdings. Reidhaar, Memorandum: The Legal Implications of University Investments in Companies Doing Business in South Africa, 7 J. College & Univ. L. 164, 170 (1980-81).

114. Note, supra note 84, at 544. A recent study shows that divesting stocks and bonds that equal 50% of a portfolio value would increase pension costs by 0.742%. Divesting stocks and bonds that equal 10% of a portfolio would increase pension costs by only 0.144%. Note, supra note 11, at 416.

115. Note, _supra_ note 9, at 774.

116. Note, _supra_ note 11, at 414-15. In 1978 the Regents of the University of Wisconsin began selling $10 million worth of stock. This action cost about $420,000. Note, _supra_ note 84, at 543. During the debate over divestiture the fund's money manager resigned stating that it would be too difficult to effectively manage a portfolio without large multinational corporations. Note, _supra_ note 11, at 717. The possibility of financial loss has led other universities to rescind South Africa-free portfolio resolutions. Note, _supra_ note 84, at 544.

117. Lezin & Milicov, _supra_ note 11, at 15. Several studies have concluded that over time the risk and return ratios are the same for South Africa related portfolios as for South Africa free portfolios. _Id._ at 16. Trustees can create equivalent portfolios through

acquisitions in the real estate or bond market. Note, supra note 84, at 568.

118. Note, supra note 11, at 410.

119. Id. at 420. The state also has a legitimate interest in determining state public policy and how state finances will be managed. Id. at 425. Austin W. Scott, author of "The Law of Trusts" (3A Scott, The Law of Trusts (3d ed. 1967 & Supp. 1979) and former ERISA (Employee Retirement Income Security Act) administrator, states that trustees can consider a corporation's social performance when making investment decisions if the activities are "contrary to generally accepted ethical principles." Scott at § 227.17.

120. Note, supra note 11, at 424. South Africa's growing political instability is viewed by some as pre-revolutionary. Note, supra note 8, at 465.

121. Reidhaar, supra note 113, at 170.

122. Note, supra note 84, at 545.

123. Chettle, The Law and Policy of Divestment of South African Stock, 15 Law & Pol'y Int'l Bus. 445 (1983). Note, supra note 9; Lansing, supra note 11.

124. U.S. Const. art. 1, § 8, cl. 2.

125. Welton v. Missouri, 91 U.S. 275, 280 (1875) "[T]o regulate commerce is to prescribe . . . the conditions upon which it shall be conducted; to determine how far it shall be free and untrammeled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited." Id. at 279-80.

126. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

127. Lansing, supra note 11. Neb. Legis. Res. 43, 86th Legis., 2d Sess. (1980).

128. Neb. Legis. Res. 43, 86th Legis. 2d Sess. (1980)

129. Lansing, supra note 11, at 313-14.

130. Id. at 315. The author notes that by conditioning commerce with South Africa on terms which that country finds unacceptable violates the commerce clause. Id.

at 317. Foreign nations are also not constrained from responding by constitutional limits which restrict state responses to regulations on commerce imposed by other states. Id. at 315.

131. Comment, supra note 66, at 183.

132. Id. Some requirements include that a corporation have a certain level of total assets, be registered on a national securities exchange, or must have paid cash dividends for a certain period. Id. States should emphasize that they have a strong interest in a policy of social responsibility as part of their pension regulations. Note, supra note 11, at 431, and that the United States has a long-standing public policy against racial discrimination. Comment, supra note 66, at 182.

133. Comment, supra note 66, at 183-84.

134. Note, supra note 11, at 424. Note, supra note 9, at 779-87. If a state statute merely has an incidental effect on foreign affairs it is not invalid, Zschernig

v. Miller, 389 U.S. 429, 432-33 (1968), however, the statute is invalid if it has a "direct impact" on national foreign policy. Zschernig v. Miller, at 440. Professor Henkin criticized the _Zschernig_ opinion, stating that "until 1968 there was not sign of such a principle." _L. Henkin_, _Foreign Affairs and the Constitution_ 239 (1972).

135. Lansing, _supra_ note 11, at 320.

136. United States v. Peace Information Center, 97 F. Supp. 255, 260 (D.D.C. 1951). These powers include the authority to take preventative measures against actions which may cause misunderstandings and possibly lead to war. _Id._ at 261. In United States v. Elliott, 266 F. Supp. 318 (S.D.N.Y. 1967), the district court found defendants guilty of conspiring to destroy a bridge in the Republic of Zambia so that they might profit from the resulting copper shortage. Although this involved a criminal prosecution for violation of a specific

statute (18 U.S.C. § 956), the court's rationale could apply to South Africa and state divestment legislation. The court stated that it "cannot help being aware of the delicacy of American foreign relations particularly in such areas as Africa. The offense charged, if consummated, clearly would have disrupted the economy of a nation. It is inconceivable that such an act . . ., would not have seriously affected American relations with Zambia." United States v. Elliott, 266 F. Supp. at 323. Whether divestiture would have the same effect is the subject of considerable debate. See infra notes 145-152 and accompanying text.

137. 125 U.S. (12 Wheat.) 419 (1827).

138. Id. at 446. ("It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce . . .").

139. Lansing, *supra* note 11, at 320; South Africa and Fair Labor Standards, 22 *C.F.R.* pts. 50-65 (1985); Exec. Order No. 12,532, *C.F.R.* (1985)(Economic Sanctions Against South Africa: Prohibiting Trade and Certain Other Transactions Involving South Africa).

140. *See supra* notes 71-73 and accompanying text.

141. Note, *supra* note 9, at 782-83. The President conducts the United States foreign relations through the State Department, ambassadors, and consuls. As John Marshall stated while he was a Congressman: "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." United States v. Hooker, 607 F.2d 286, 289 (9th Cir. 1979).

142. Comment, *supra* note 66, at 184-85. Although divestiture may represent frustration with the policy of Constructive Engagement, the states are not attempting to supplant that policy. *Id.*

143. Id. Discussing zschernig v. Miller, supra note 134, Professor Henkin notes that "[i]n the government of their affairs, states have variously and inevitably impinged on American foreign relations." Henkin, supra note 134. at 239.

144. H.R. Rep. No. 372, 98th Cong., 1st Sess. (1984). This legislation was upheld by a ten to two vote over objections that the City Council measure violated the commerce clause and the federal power to set foreign policy. Comment, supra note 66, at 185.

145. Interview with John P. Hussman, President of Equimax, Inc., a Chicago investment advisory firm. January 15, 1986. Divestiture makes it harder for a company to raise funds because this depresses the price of the stock and fewer people are willing to buy into the company. In order to induce people to buy, the company will artificially raise the return. Because most investors are value conscious, and all other things

being equal, the stock will return to its normal value within four to five years. Id.

146. Note, supra note 84, at 554-55. Divestment proponents assume that South Africa is dependent on U.S. investments. Not only does the South African government refute this claim, Id. at 555, but statistics show that only 10% of the investment in South Africa is foreign. Of that 10%, less than 20% is American. A Conversation About South Africa: State Department Officer Discusses U.S. Efforts to End Apartheid, St. Louis Post-Dispatch, Feb. 7, 1986, at 3C.

147. Note, supra note 9, at 772. Embargoes or divestment by the United States will have little effect on the South African economy. Lansing, supra note 11, at 323-24. Since less than one percent of the African labor force works for American corporations, divestiture would hardly affect unemployment. Hopkins, supra note 15, at

94. American competitors also do not appear ready to withdraw from South Africa and would simply fill the gaps left by American withdrawal. Lansing, supra note 11, at 323.

148. See supra note 74 and accompanying text.

149. Magubane, supra note 40, at 164.

150. See supra notes 40=50 and accompanying text.

151. See supra note 42 and accompanying text. For example, the capital goes into an Afrikaner bank, which will then make loans to Afrikaner businesses, which will purchase goods and services from other Afrikaner businesses. The seller will use some of the proceeds to pay workers, who in turn buy food produced by Afrikaner cooperatives, etc. Magubane, supra note 40 and Brown, supra note 42.

152. See supra note 42 and accompanying text. In this way, the opposition gains economic and political power.

153. Hopkins, _supra_ note 15, at 95-96. Some initial desegregation in the work place and equal pay for equal work are two boasted accomplishments of a limited number of companies. _Id._ at 96.

154. _Id._ at 95-97. _See also_ Note, _supra_ note 84, at 548-49.

155. _See supra_ note and accompanying text.

156. _See supra_ note 53 and accompanying text.

157. _See supra_ notes 50-58 and accompanying text.

158. _See supra_ notes 75-82 and accompanying text.