

COMMENTS

IN SUPPORT OF AZANIA* : DIVESTITURE OF PUBLIC PENSION FUNDS AS ONE ANSWER TO UNITED STATES PRIVATE INVESTMENT IN SOUTH AFRICA

This paper is submitted in memory of organizers Stephan Bantu Biko, medical student and founder of the Black Consciousness Movement of South Africa, who was bludgeoned to death while held in detention in 1977; to Mangliso Robert Sobukwe, university lecturer, philosopher, attorney at law, and co-founder of the Pan-Africanist Congress of Azania, who was slow-poisoned to death while held in detention in 1978; and to Nelson Mandela, attorney at law and President of the African National Congress of South Africa, who has been imprisoned from 1964 to the present.

The purpose of this paper is to meet and challenge the premises, analyses, and conclusions of a recent law review publication¹ which argues for increased United States investment in South Africa, and which suggests that the rate and significance of reforms in South Africa merit international support for the apartheid regime. The analysis of that work attempts to determine whether divestment, as a methodology, is capable of actually influencing social change away from facism² in terms that are a "good" result for United States foreign policy. Author John Chettle explains that the intended scope of his article is to

deal with matters of policy involving the United States and South Africa, as they touch on the subject of corporate divestment. It will seek to determine what is happening in South Africa and how important U.S. investment there is. It will discuss who in South Africa is in favor of divestment and whether it would alleviate that country's racial situation. Finally, and perhaps most pertinently for the short term, the article will examine the possibility that divestment by universities that hold securities of corporations conducting business in South Africa violates the prudent investor rule of trust law, and that divestment by state and local governments violates the commerce and supremacy clauses of the U.S. Constitution.³

* Azania is a term used by Africans in South Africa as the new name of the country once independence is achieved.

1. Chettle, *The Law and Policy of Divestment of South African Stock*, 15 LAW & POL'Y INT'L BUS. 445 (1983).

2. W. RODNEY, HOW EUROPE UNDERDEVELOPED AFRICA 216, (1972):

Fascism is a deformity of capitalism. It heightens the imperialist tendency towards domination which is inherent in capitalism, and it safeguards the principle of private property. At the same time, fascism immeasurably strengthens the institutional racism already bred by capitalism, whether it be against Jews (as in Hitler's case) or against African peoples (as in the ideology of Portugal's Salazar and the leaders of South Africa). Fascism reverses the political gains of the bourgeois democratic system such as free elections, equality before the law, parliaments, etc., and it also extols authoritarianism and the reactionary union of the church with the state. In Portugal and Spain, it was the Catholic Church—in South Africa, it was Dutch Reformed Church.

3. Chettle, *supra* note 1, at 448.

Although Chettle's considerable abilities as a researcher have yielded a plethora of materials which suggest, at first reading, a point-for-point refutation, this reply shall confine itself to his most important and most rational positions.

This paper shall begin with an explanation of why the African-American⁴ community in North America must unite and oppose United States federal support for the apartheid regime. It will then describe the justification, nature, and extent of increasing United States private investment in South Africa as well as the objective material conditions of the African⁵ majority in view of government reforms. This paper will next illustrate the extent and potential of United States public pension funds as a stimulant to domestic economic revitalization as well as the feasibility and proven profitability of divestiture of public pension funds from South Africa.

This paper shall then turn to the constitutional propriety of state divestiture of public pension funds in light of congressional authority to regulate commerce between the states and presidential authority to design and articulate foreign policy. The paper will conclude with an analysis of three divestiture attempts in the California legislature. It will suggest an alternative strategy of linking divestiture from South Africa with partial reinvestment in the California economy and submitting this linkage for public consideration via the voter referendum process.

I. NECESSITY FOR ORGANIZED OPPOSITION

At this very moment, the Union of South Africa is building up a military machine comparable with those of the foremost nations of Western Europe. This presents a most ominous danger, not just to the struggle of those African peoples still fighting for freedom, but to the very existence of the independent African states. Unless we meet this obvious and very powerful threat with a unified African front, based upon a common economic and defense policy, the strategy will be to pick us off and destroy us one by one.⁶

Over twenty years ago, Dr. Kwame Nkrumah, then president of Ghana, singled out the settler colonial regime in South Africa as the principal obstacle to the total liberation and unification of Africa, and to the eventual construction of a geopolitically unified, economically integrated continental state.⁷ President Nkrumah singled out South Africa despite the entrenched colonial presence in Namibia, Mozambique, Angola, Zambia, Botswana, Lesotho, Swaziland, and Zimbabwe which existed at the same time.

The government of South Africa uses direct and indirect military intervention, and economic as well as political manipulation to influence political activities in Africa. South Africa's mission of regional balkanization has persistently thwarted the Pan-Africanist objective of a "United States of Africa." The South African Development Coordinating Council (SADCC), a regional grouping of independent countries excluding South Africa, has undergone predictable hardship as the economic imperatives of its nine member states are

4. "African-American" is used to distinguish between blacks in the United States and those in Africa.

5. "African" and "European" are used rather than "black" or "white" South African, since the latter terms are used by the settler colonial regime to implicitly preserve the white minority's claim of being indigenous to the region.

6. K. NKUMAH, *AFRICA MUST UNITE* xvii (1963).

7. *Id.*

continually sabotaged by South Africa.⁸ Occupied illegally by South Africa since 1966, Namibia is locked out of the program altogether.⁹ With the southern portion of Angola infested with UNITA forces¹⁰ backed by South Africa and the CIA, Angola's role as energy supplier for the region remains a fiction.¹¹ The joined forces of South Africa, UNITA, and the CIA failed to topple Angola's government during a 1975 invasion of 6,000 troops, but subsequently coordinated repeated attacks on Angola throughout 1977, 1981, and 1982, inflicting losses in excess of \$10 billion.¹² It was also in 1975 that Angola won its independence from five centuries of Portuguese imperialism.¹³

It is at least equally difficult for Mozambique to execute its mission as chief supplier of transportation throughout the region.¹⁴ Armed and financed by South Africa, the Mozambique National Resistance Movement (MNR) has engineered a series of raids in Zimbabwe and Mozambique; demolition, assassination, and mutilation being its principle calling cards.¹⁵ Although the "Nkomati Accords" of mutual non-aggression between Mozambique and South Africa hold out the promise of ending South African support for the MNR, in exchange for Mozambique severing its ties to the African National Congress (ANC),¹⁶ the accords make no attempt to curb South Africa's ability to wage economic war. Nor do they guarantee that the MNR will not continue to operate independent of South Africa's support. The unwritten option of South Africa merely to redirect MNR destruction to other states was dramatically demonstrated by recent MNR attacks inside Zimbabwe.¹⁷

The conditions in Zimbabwe exemplify the economic instability which South Africa is capable of inflicting. Upon the convenient destruction of an oil pipeline at the port of Beira in Mozambique (1982),¹⁸ Zimbabwe was left with a mere two-week supply of reserves and, forced to look to South Africa as the only alternative source, was informed that oil shipments would be delayed for some time.¹⁹ In 1981, Zimbabwe had been critical of South African investments there. In retaliation, South Africa unilaterally terminated a preferential trade agreement which had been in effect since 1964.²⁰ Botswana, Zambia, Lesotho, and Swaziland, all economically very dependent upon South Africa, have each been militarily victimized by South Africa. Botswana and Zambia were both attacked by South Africa throughout the Zimbabwean Revolution. South Africa is presently training over 500 terrorists to destabilize Zambia.

8. Address by Carol Thompson, Fifth Annual Conference of the UCLA African Activists Association (May 23, 1984).

9. G. HOVEY, *NAMIBIA'S STOLEN WEALTH: NORTH AMERICAN INVESTMENT AND SOUTH AFRICAN OCCUPATION* 4-5 (1982).

10. WASHINGTON OFFICE ON AFRICA, *STOP THE APARTHEID WAR!* April 1984, at 2 [hereinafter cited as *STOP THE APARTHEID WAR!*]. UNITA is the Union for the Total Independence of Angola, a guerrilla movement given financial and military support by South Africa and the CIA.

11. Thompson, *supra* note 8.

12. *Id.*

13. *Id.*

14. *Id.*

15. J. DAVIS, *SOUTH AFRICA: DESTABILIZING THE REGION 2* (1984).

16. *FULL TEXT OF HISTORIC ACCORD OF NKOMATI* (1984). Founded in 1910, the ANC is South Africa's oldest African nationalist organization.

17. *NEWSWEEK*, June 4, 1984, at 17.

18. J. DAVIS, *supra* note 15, at 3.

19. *Id.*

20. *Id.*

Lesotho and Swaziland are the continuing targets of South African sabotage, with Lesotho in particular facing the Lesotho Liberation Army, reportedly backed by South Africa.²¹

South Africa is also an immediate, costly, and continuing threat to efforts at regional economic development. However, for the African world beyond South Africa, the necessity of international agitation against apartheid exceeds general humanitarian concerns or more specific ones stemming from an identity as African people. For African-Americans, action is mandated in light of growing United States federal support for apartheid, with no significant difference between Democratic and Republican control of the national government.

For example, in the face of mounting anti-apartheid agitation after the international exposure of apartheid in practice during the bloody "Soweto Rebellion" of 1976, the Democratic Carter administration scrutinized an array of policy options aimed at frustrating the African-American citizenry and its participation in the international anti-apartheid effort.²² The National Security Council Memorandum 46 specifically recommended:

1. Specific steps should be taken with the help of appropriate government agencies to inhibit coordinated activity of the black movement in the U.S.
2. Special clandestine operations should be launched by the CIA to generate mistrust and hostility in American and world opinion against joint activity of the two forces, and to cause division among black African radical national groups and their leaders.
3. U.S. embassies to black African countries specially interested in southern Africa must be highly circumspect in view of the activity of certain political circles and influential individuals opposing the objectives and methods of U.S. policy toward South Africa. It must be kept in mind that the failure of U.S. strategy in South Africa would adversely affect American standing throughout the world. In addition, this would mean a significant diminution of U.S. influence in Africa and the emergence of new difficulties in our internal situation due to worsening economic prospects.
4. The FBI should mount surveillance operations against black African representatives and collect sensitive information on those, especially at the UN, who oppose U.S. policy toward South Africa. The information should include facts on their links with the leaders of the black movement in the U.S., thus making possible at least partial neutralization of the adverse effects of their activity.²³

Nor is the Republican Party any less responsible for continuing United States support of apartheid. Initiated under President Eisenhower, the "Atoms for Peace" program established a fifty year agreement on nuclear cooperation in which the United States would provide South Africa with nuclear training, its first reactor, and the highly enriched weapons grade fuel to operate it.²⁴ Thus far South Africa has advanced to a nuclear weapons capability, exploding its first nuclear device in 1979.²⁵ This development can hardly be dismissed as unforeseeable:

South Africa designed that program to make it energy self-sufficient and able to resist an international oil boycott or other economic sanctions. Yet,

21. STOP THE APARTHEID WAR! *supra* note 10, at 3.

22. NATIONAL SECURITY COUNCIL MEMORANDUM—46, 2-3, March 17, 1978.

23. *Id.* at 2.

24. J. SINDAB, K. ZINN, C. COLLINS, J. COBEN & B. LAWRENCE, STOP THE APARTHEID BOMB! 2 (1983) [hereinafter cited as J. SINDAB].

25. *Id.* at 5.

"peaceful" nuclear power and nuclear weapons are just two sides of the same coin.

Nuclear reactor technology was originally designed to produce plutonium for nuclear weapons. As nuclear critic Amory Lovins has noted: "[N]uclear reactors are essentially bomb factories that produce electricity as a by-product." When the Koeberg reactor is running at full capacity, it will produce enough plutonium to produce an atom bomb every two weeks.²⁶

The threat of nuclear catastrophe is a credible one. "Information Minister Mulder, asked in 1977 if South Africa had the bomb, stated: 'If we are attacked no rules apply at all if it comes to a question of our existence. We will use all means at our disposal whatever they may be.'"²⁷ The implications of this position are readily perceived, given the existence of government reservations ("bantustans") located throughout South Africa's deserts, into which the regime has already "relocated" or "endorsed" over 3.5 million Africans while 1.7 million more are threatened with the same.²⁸

On the other side of the apartheid question, the ANC, using explosives, sabotaged the Koeberg Reactor in December of 1982.²⁹ Despite a clear threat of calamity, the Reagan administration is increasing the export of enriched uranium to South Africa.³⁰ South African Foreign Minister Pik Botha visited Washington, D.C. in 1982 to discuss nuclear relations with the Reagan administration. Less than a year later, South African engineers visited United States nuclear facilities while a nuclear team appointed by President Reagan visited South Africa to negotiate the export of enriched uranium to South Africa.³¹

Aside from the political and military support of the federal government for the apartheid regime, the necessity for organized opposition also stems from unabashed economic support for South Africa by United States private investors. This aspect of United States involvement is the principal focus of this discussion.

II. PRIVATE INVESTMENT AND APARTHEID

Although public agitation has been largely unable to effectuate the divestiture of privately held investments from apartheid,³² private investors have nevertheless tried to justify such investments using four lines of argument: 1) as the South African economy strengthens with increased United States private investment, the increased returns will "trickle-down" to the material benefit of the African masses; 2) as the economy strengthens, the resulting increased employment and increased wages will precipitate positive social change; 3) as more skilled labor is necessitated by economic progress, South Africa will turn to the African masses as suppliers, thus devolving apartheid into extinction; and 4) United States private investors, having experience as equal opportunity employers, offer African employees more humane treat-

26. *Id.* at 2-3.

27. *Id.* at 5.

28. THE AFRICA FUND, BLACK DISPOSSESSION IN SOUTH AFRICA: THE MYTH OF BANTUSTAN INDEPENDENCE 4 (1984).

29. J. SINDAB, *supra* note 24, at 5.

30. *Id.* at 5.

31. *Id.*

32. E. SCHMIDT, DECODING CORPORATE CAMOUFLAGE: U.S. BUSINESS SUPPORT FOR APARTHEID 4-6 (1980).

ment as well as setting trends for South African firms to follow.³³

Here then, "supply side" economics is used in an attempt to address the cultural, political, and economic inequities inherent in apartheid, in a manner not unlike the application of "supply side" economics to the inflation question in the United States. However, if United States experience is instructive, the conclusion that stimulating private investment, whether through tax incentives or otherwise, can foster economic expansion for the betterment of society as a whole remains checked by the burden of increasing military expenditures. These expenditures increase the federal deficit such that a tight money supply, extraordinary interest rates, and a paucity of social spending make any significant "trickling down" unlikely if not fanciful.

Similarly, South Africa's expanding economy cannot eradicate or meaningfully reform apartheid while simultaneously engineering a military build-up which has already catapulted 600% from 1960 to 1970, and another 400% from 1977 to 1978.³⁴ Approximately 21 million Africans are foreclosed from contributing to economic growth to their fullest potential. The remaining 4.5 million European population is too small to allow the South African economy to aspire beyond anything other than a decadent consumer market, whose only claim to international economic significance stems from the rents derived from the uncompensated expropriation of 87% of the land and the enslavement of 72% of the population.³⁵

Whether dubbed "supply side" economics under President Reagan or "neutrality" under President Roosevelt, United States private investment in South Africa grew from \$50 million in 1943 to \$2 billion in 1978, an increase of 4000%.³⁶ This popular estimate has been upwardly adjusted by a recent figure of \$14.6 billion quoted by the United States Consulate in Johannesburg in a secret cable obtained by Trans-Africa, a Washington, D.C. lobby of African-American citizens.³⁷ According to the cable, United States citizens own 57% of all foreign held stock listed in the Johannesburg exchange, valued at \$7.6 billion. This figure combines with \$4 billion in United States commercial bank loans and nearly \$3 billion in direct private investments, for a total of nearly \$15 billion.³⁸

Under the now suspect \$2.3 billion figure, United States private investors were said to have controlled nearly 70% of the South African computer market, 39% of the auto market, and 40% of the petroleum market.³⁹ The \$14.6 billion figure cited by the United States Consulate, of course, questions the accuracy of these estimates. Accurate information, to which all sides will admit, may well remain elusive because South Africa's Protection of Business Act⁴⁰ prohibits the passage of business information out of South Africa without the permission of the Minister of Economic Affairs.

33. *Id.*

34. SCHMIDT, *supra* note 32, at 10.

35. THE AFRICA FUND, SOUTH AFRICA FACT SHEET, Jan. 1984, at 1 [hereinafter cited as SOUTH AFRICA FACT SHEET].

36. SCHMIDT, *supra* note 32, at 4.

37. Fleishman & Cason, *South Africa: Divestiture Could Hurt*, 237 NATION 167 (1983).

38. *Id.*

39. THE AFRICA FUND, U.S. CORPORATIONS IN SOUTH AFRICA: A SUMMARY OF STRATEGIC INVESTMENTS 3 (1980).

40. No. 99 of 1978, as amended by Act No. 114 of 1979, Statutes of the RSA—Trade & Industry.

Across the Atlantic, the Export-Import Bank (Exim), an independent agency of the United States federal government, accounted for nearly sixteen percent of non-agricultural United States exports to South Africa from 1972-78.⁴¹ Exim provides the only publicly owned source of information on trade related financing, and only for transactions of which it is a part.⁴² The vast majority of United States trade with South Africa is not publicly documented,⁴³ yet is of critical importance given the United States's role as South Africa's largest trading partner.⁴⁴ Protected by the reach of Exim's information monopoly, by the inadequacy of United States disclosure regulations,⁴⁵ and by the refusal of the Federal Reserve Board to disclose much of the information it collects,⁴⁶ an informal "code of confidentiality" allows private investors to pander misleading, inaccurate information.

Private investors routinely argue that they are not lending to the government or agencies of South Africa, but are only "at this time," leaving open the possibility of future loans to the public sector.⁴⁷ Further, no statements mention a cessation of lending to the private sector.⁴⁸ Motivated less by a disapproval of apartheid than by the fact that they have reached their lending limits, private investors float new loans by "rolling over" (renewing) mature short term loans.⁴⁹ Even less information may be available in the future, given a two-pronged trend toward secrecy in which large loans are syndicated by United States bankers via the Eurodollar market on the one hand, and a shift to less detectable transactions using interbank and trade financing on the other.⁵⁰

Given the forty year period in which increased private investment in South Africa has proceeded with the permission of official United States policy,⁵¹ an examination of the objective material conditions within which South Africa's population exists provides a practical test for the supply side hypothesis.

In 1978, a Senate Subcommittee chaired by Senator Dick Clark (D. Ia.) reached the following conclusion, in contradiction to the private recommendations of the NSC that were made during the same year:

Collectively, U.S. corporations operating in South Africa have made no significant impact on either relaxing apartheid or in establishing company policies which would offer a limited but nevertheless important model of multinational responsibility. Rather, the net effect of American investment has been to strengthen the economic and military self-sufficiency of South Africa's apartheid regime, underlying the fundamental goals and objectives of U.S. foreign policy.⁵²

Yet, in the article that is the focus of this comment, John Chettle, who is

41. CORPORATE DATA EXCHANGE, U.S. BANK LOANS TO SOUTH AFRICA 5-6 (1978).

42. *Id.* at 6.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 8.

48. *Id.*

49. *Id.* at 8-9.

50. *Id.*

51. SCHMIDT, *supra* note 32, at 4.

52. STAFF OF SENATE SUBCOMM. ON AFRICAN AFFAIRS, 95TH CONG., 2D SESS., U.S. CORPORATE INTERESTS IN AFRICA 9, 13 (Comm. Print 1978).

director of the South Africa Foundation in Washington, D.C., outlines a number of economic, political, educational, and health care reforms which attempt to advance the utility of increased investment.

Having somehow satisfied the requirements of the Protection of Business Act, Mr. Chettle projects that the number of Africans employed in professional and managerial positions should double between 1979 and 1987 from 180,000 to 370,000.⁵³ If accurate, the 180,000 base figure represents .82% of the regime's estimated 22 million African population,⁵⁴ while the leap to 370,000 represents 1.68%. This paltry level of increase does not represent a commitment to equitable employment practices; rather, it is South Africa's decision to establish a token African buffer class to protect the apartheid economy. As Prime Minister Botha's top economic adviser, Simond Brand, flatly states:

Blacks must be allowed to take part fully in the free enterprise system if we want then to accept it and defend it and make it their own. . . . It is an implied intention to create a black middle class.⁵⁵

Even if the goal of a 370,000 strong African middle class is realized by 1987, whether it can persuade the remaining 98.32% of the African population that capitalism is in their best interests is questionable at best.

For the remaining 8 million African labor force,⁵⁶ Mr. Chettle points to current laws which "permit mixed labor unions, treat black unions on the same basis as white unions, and make no reference to race or sex."⁵⁷ As a result, he states, "the number of black trade union members increased from 16,000 in 1969 to over 300,000 in 1981."⁵⁸ Further, "[t]he reservation of particular occupations solely for whites has been abolished in most categories, and the government has accepted the recommendation of the Wiehahn Commission that the remaining categories be abolished as well."⁵⁹ But Chettle's synopsis of the changing labor situation is contradicted by other interpretations of South Africa's Wiehahn and Riekert Commission Reports,⁶⁰ and by the generally acknowledged failure of General Motor's "Sullivan Principles" to exact meaningful change.⁶¹

First, Professor Nicolas Wiehahn, in articulating the premise of his commission's study, argues that the Sullivan Principles interfere with the "sanctus" relationship between employer and employee.⁶² Under capitalism, collective bargaining should occur without foreign influence, particularly when it encourages African trade unionism, a traditional rival of South African management. Such influence is "contrary to the basic premise of labor science, namely that each party in the labor conflict should draw its growth and development from its own inner strength."⁶³

53. Chettle, *supra* note 1, at 453.

54. SOUTH AFRICA FACT SHEET, *supra* note 35, at 1.

55. SCHMIDT, *supra* note 32, at 89-90.

56. Chettle, *supra* note 1, at 453-54.

57. *Id.*

58. *Id.*

59. *Id.* at 454.

60. SCHMIDT, *supra* note 32, at 90-94.

61. *Id.* at 14-58. For an explanation of the Sullivan Principles *see infra* text accompanying notes 80 & 81.

62. SCHMIDT, *supra* note 32, at 91.

63. *Id.*

Thus, while Africans are counseled to draw upon their "inner strength," employers draw their support from the South African government. The abolition of job reservations based upon race, to which Chettle alludes, means only that the exclusion of Africans from "European only" positions is no longer mandatory.⁶⁴ Instead, exclusion is now based upon the whims of European trade unions, who may still deny membership according to race.⁶⁵ "Closed shop" agreements between these unions and employers there continue to lock Africans out of apprenticeship programs and the skilled positions that would normally follow such training.⁶⁶ The touted "equal pay for equal work" slogan is therefore irrelevant if Africans are disallowed work that is equal to that of Europeans. If anything, the average wage gap between the two has widened from 1975 figures of \$447 per month for manufacturing and \$665 per month for mining/quarrying, to 1979 gaps of \$665 and \$880, respectively.⁶⁷

Moreover, contracts between European unions and employers forbid promotion of Africans to skilled positions, particularly those involving supervision of Europeans.⁶⁸ Once a skilled post is vacated by a European, its functions are divided into low wage tasks to be filled by Africans "promoted" to them.⁶⁹ The Wiehahn Commission also recommends desegregated unions at the option of European workers only, who may then restrict the voting rights of migrant African employees who represent fully one-third of the total African labor force.⁷⁰

Further, the commission recommendation of government recognition of African labor unions only means governmental control over their politics.⁷¹ This is the case because African unions were immune from laws prohibiting political activity by labor unions as long as they were not recognized as such. Now the laws require African unions to also register, and registration with the Industrial Registrar is revocable at any time if the union is perceived as unable to "serve to maintain peace and harmony" within the national interest.⁷² "Endorsement" to desert reservations called "bantustans," "banning" (communication restricted to one person at a time), and torture remain the cure for recalcitrant organizers.⁷³

Additional limits on union organizing are detailed in the Internal Security Amendment Act of 1976 in which unions may be declared illegal and strikers arrested under the crime of communism, defined as ". . . any doctrine that aims at bringing about any political, industrial, social, or economic change within the union by the promotion of disturbance or disorder. . . ."⁷⁴ The Riotous Assemblies Act authorizes local magistrates to forbid public or private gathering which they believe threaten public order.⁷⁵ The General Law Amendment Act of 1962 defines "sabotage" as any attempt "to cripple or

64. Chettle, *supra* note 1, at 453.

65. SCHMIDT, *supra* note 32, at 92.

66. *Id.* at 92-93.

67. *Id.*

68. *Id.* at 28.

69. *Id.* at 29.

70. *Id.* at 93.

71. *Id.* at 92.

72. *Id.*

73. *Id.* at 7.

74. No. 79 of 1976, Statutes of the RSA—General Laws.

75. No. 17 of 1956, as amended by Acts No. 34 of 1960, No. 39 of 1961, No. 76 of 1962, No. 30

seriously prejudice any industry, to cause substantial financial loss to any person or state, [or] to further or encourage the achievement of any political aim, including bringing about social or economic change."⁷⁶

South Africa's second commission study, the Riekert Study, advised in May 1979 that the Pass Laws, under which all Africans must carry passes showing where an African is allowed to live and work, be continued.⁷⁷ Over 1,000 Africans were arrested each day for refusing to present passes, after which they face fines, imprisonment, "endorsement" to the bantustans, or forced labor on European farms as punishment.⁷⁸ The government has since accepted the Riekert Commission's recommendation that employers be fined \$575 for hiring Africans living in European areas without passes, resulting in large scale discharges and "endorsement" to the bantustans.⁷⁹

The attempt to reform South Africa's labor situation stems from the six "Sullivan Principles" enunciated by Reverend Leon H. Sullivan of General Motors Corporation.⁸⁰ The principles called for 1) non-segregation of the races in all eating, comfort, and work facilities; 2) fair and equal employment practices for all employees; 3) equal pay for all employees doing equal or comparable work for the same period of time; 4) initiation and development of training programs that will prepare, in substantial numbers, Africans and other non-Europeans for supervisory, administrative, clerical, and technical jobs; 5) increasing the number of Africans and other non-Europeans in management and supervisory positions; and 6) improving the quality of employee's lives outside the work environment in such areas as housing, transportation, schooling, recreation, and health facilities.⁸¹

The voluntary attempt to regulate United States corporations operating inside South Africa relies upon the scrutiny of voluntary compliance reports to monitor the progress of change. There are no penalties for violations.⁸² Of six annual reports compiled by the Arthur D. Little Company, the latest report in 1982 cited nearly one quarter of all signatories as failing to cooperate, with more than one-third of those cooperating receiving the lowest possible rating.⁸³ Moreover, the veracity of the Arthur D. Little Company itself is questioned by its status as 50% owner of the Space Research Corporation, which engineered clandestine shipments of \$50 million in arms from the United States to South Africa from 1976 to 1980.⁸⁴

General Motors Corporation, of which Rev. Sullivan serves as a director, has itself agreed to cooperate with South Africa in the event of "civil unrest,"

of 1974, No. 79 of 1976, No. 72 of 1982, and No. 74 of 1982, Statutes of the RSA—Criminal Law and Procedure.

76. No. 76 of 1962, Statutes of the RSA—Criminal Law and Procedure.

77. SCHMIDT, *supra* note 32, at 93.

78. INTERNATIONAL DEFENCE AND AID FUND, THIS IS APARTHEID 20 (1978).

79. SCHMIDT, *supra* note 32, at 93.

80. Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 LAW & POL'Y INT'L BUS. 427 (1983).

81. See, generally, *id.* at 427-34.

82. SCHMIDT, *supra* note 32, at 19.

83. SCHMIDT, ONE STEP IN THE WRONG DIRECTION: AN ANALYSIS OF THE SULLIVAN PRINCIPLES AS A STRATEGY FOR OPPOSING APARTHEID 5 (1983).

84. SCHMIDT, *supra* note 32, at 55.

encouraging its employees to join local militias.⁸⁵ As Chairman of the Board, T. A. Murphy said of the agreement, "[a]ny of our plants can be converted to war production as clearly demonstrated in the United States in 1941."⁸⁶ The agreement was made public in the very year the Sullivan Principles were announced.⁸⁷

Overall then, the list of labor reforms Chettle offers as proof of increasing private investment's ability to effect positive economic change is not convincing. Politically, he argues that progress can be seen in the independent status the government has accorded four of ten government-created bantustans.⁸⁸ Yet, neither the United Nations, the Organization of African Unity, nor any sovereign state has recognized these desert reservations as independent countries. Life there is characterized by an infant mortality rate of nearly ten percent and a doctor/patient ratio of one doctor to 19,000 Africans.⁸⁹ Nor has Chettle proffered any evidence that the bantustan legislatures are allowed to deal with matters concerning defense, foreign affairs, immigration, banking, customs, excise, post, telegraph, telephone, press, television, radio or any other features rationally associated with sovereignty.

In describing constitutional reforms, which were accepted by the European voters, Chettle all but concedes the chicanery of the proposed tricameral Parliament which creates segregated chambers for Europeans, Indians, and "Coloreds," but none for the seventy-two percent African majority.⁹⁰ He admits: "It has been suggested that the reforms represent an effort on the part of the government to co-opt Coloreds and Indians."⁹¹ No mention is made of the prohibition on African voting rights. Prime Minister Botha has pointed out, however, that "One man, one vote is out in this country. That is, never."⁹² Implementation of the tricameral Parliament in August 1984 resulted in riots, bombings, and several fatalities. Over 90,000 students boycotted classes and another 90,000 gold miners went on strike.⁹³ By the end of September 1984, eighty Africans had been killed.⁹⁴

Legislation enacted in 1982 delineates the progress of political change:

The Internal Security Act of 1982 consolidates a series of laws, including the Terrorism Act, Unlawful Organization Act and the General Laws Amendment Act, with minor revisions, into one law. This act allows: 1) indefinite incommunicado detention without charge or trial; 2) the outlawing of any organization alleged to be threatening to public safety or order; 3) the prohibition of the printing, publication or dissemination of any periodical or any other publication; 4) the prohibition of any gathering or meeting; 5) random police searches; 6) the curtailment of travel rights of any person, and restriction of rights of communication, association and participation in any activity (banning). Further it is illegal under this act to render any assistance to any campaign, at home or abroad, that protests or seeks to modify or repeal any

85. Davis, *Economic Disengagement and South Africa: The Effectiveness and Feasibility of Implementing Sanctions and Divestment*, 15 LAW & POL'Y INT'L BUS. 529, 548-49 (1983).

86. SCHMIDT, *supra* note 32, at 62.

87. *Id.*

88. Chettle, *supra* note 1, at 454.

89. SOUTH AFRICA FACT SHEET, *supra* note 35, at 1.

90. Chettle, *supra* note 1, at 455-458.

91. *Id.* at 458.

92. SCHMIDT, *supra* note 32, at 95.

93. L.A. Times, Sept. 30, 1984, at 1, col. 5.

94. *Id.*

law if such a campaign furthers the aims of a banned organization.⁹⁵

The final attempt to prove the efficacy of increasing private investment emphasizes the strides in African education and health care. Highlighting an enrollment figure of twenty two percent of the African population, Chettle posits new "compulsory" education for 40,000 first graders as progress (although education is compulsory only to grade six). Chettle is careful not to describe the curriculum.⁹⁶ Annual per capita spending on education averages \$1,115 for whites and \$170 for Africans.⁹⁷

Frustration with inferior education, taught in the marginally useful Afrikaans language, sparked the 1976 Soweto Rebellion, the largest demonstration in South Africa's history. Over 1,000 African students were killed, while thousands more were wounded. Approximately 10,000 detentions were recorded and hundreds were imprisoned. In all, nineteen anti-apartheid organizations were banned, as well as two African newspapers with significant readerships.⁹⁸

Chettle cites his country's Minister of Information for proof of a national health plan in which Africans pay a maximum of \$1.33 for outpatient treatment of any kind.⁹⁹ Yet, as has been already mentioned, the doctor/patient ratio stands at one doctor to 19,000 Africans in the bantustans; infant mortality at ten percent; life expectancy at fifty five for African males and sixty for females, while malnutrition afflicts nearly 3 million children.¹⁰⁰

On economic, political, educational, and health care grounds, the forty year reign of increasing private investment in South Africa has failed in its promise to eradicate or meaningfully reform apartheid. Given this conclusion, this discussion will turn to the alternative hypothesis of public divestiture as a means for positive change.

III. PUBLIC DIVESTITURE CHALLENGE

In light of the failure of the supply side hypothesis, the international movement against apartheid seeks to reverse the flow of private investment into South Africa as a strategy to press for the reformation, or better, the elimination of apartheid. The experience of attempting to persuade large private investors to remove or even halt their investments has yielded marginal results.¹⁰¹ Contemporary efforts, therefore, seek to disassociate the formidable portfolios of America's public pension funds from any involvement with South Africa (and Namibia) and from any involvement with private investors who invest there.

In *The Unseen Revolution*, Peter Drucker opines that the growth of pension funds "is a bigger shift in ownership than any other that has occurred since the end of the feudalism."¹⁰² The conspicuous lack of public control over investment policy borders on the incredible since "with pension fund cap-

95. No. 72 of 1982 & No. 74 of 1982, Statutes of the RSA.

96. Chettle, *supra* note 1, at 451.

97. SOUTH AFRICA FACT SHEET, *supra* note 35, at 3.

98. INTERNATIONAL DEFENCE AND AID FUND, *supra* note 78, at 26.

99. Chettle, *supra* note 1, at 452.

100. SOUTH AFRICA FACT SHEET, *supra* note 35, at 3.

101. SCHMIDT, *supra* note 32, at 4-6.

102. STATE OF CAL., GOVERNOR'S PUB. INV. TASK FORCE, FINAL REPORT 9 (Oct. 1981) [hereinafter cited as FINAL REPORT] (quoting P. DRUCKER, *THE UNSEEN REVOLUTION* (1976)).

ital, millions of American workers now have the power, through their state and local governments, to claim control over their economic destiny."¹⁰³

Public and private pension funds total \$650 billion nationwide, of which 65.8% of equity investments are in America's 100 largest companies and 94% in the "Fortune 500" corporations.¹⁰⁴ California has an aggregate fund of \$30 billion, with the state's largest funds, the Public Employees Retirement System (PERS) and the State Teachers Retirement System (STRS), having \$20 billion in assets with a daily cash flow of \$13 million.¹⁰⁵ PERS and STRS combine to form the nation's sixth largest institutional investor, the fourth largest bondholder, and the twenty-second largest owner of corporate equities.¹⁰⁶ PERS and STRS are among the major owners of the America's largest banks and corporations.¹⁰⁷ Unfortunately, few of California's public employees realize that they are Bank of America's fourth largest stockholder and Chase Manhattan Bank's fifth largest stockholder.¹⁰⁸

However, California constitutional provisions restrict investment to the largest and oldest firms,¹⁰⁹ and this restriction has had a stagnating effect:

These conditions have led many economists to conclude that one of the problems of capital formation today is that funds available for productive investment are increasingly held by large institutional investors that are risk-averse. This pattern, they say, has led to a bias against innovation. . . . From this perspective, new investment by institutional investors, including pension funds, represents a massive and continuing commitment to the past growth of the American economy rather than to its future.¹¹⁰

The failure of the private investors to future orient investing in South Africa is illustrated by the persistence of those investments despite an escalating armed conflict throughout the region.¹¹¹ The 1982 bombing of a Mobil Oil Corporation fuel storage tank was only one of nine acts of sabotage of oil depots between 1980 and 1982.¹¹² Despite a government news bias which consistently understates the magnitude of the war in an attempt to bolster European morale,¹¹³ the CIA reports that the incidents of sabotage organized by the African National Congress (ANC) rose from ten to forty in one year alone (1980-81).¹¹⁴ The ANC, however, considers the armed struggle as embryonic and views sabotage only as a means of gaining political support inside South Africa.¹¹⁵ Monitoring this "armed propaganda" campaign, the CIA reports that the ANC is, in fact, "rapidly gaining influence among blacks, particularly in labor unions and students movements,"¹¹⁶ warning that "U.S. businessman

103. FINAL REPORT, *supra* note 102, at 9 (quoting J. RIFKIN, *THE NORTH WILL RISE AGAIN: PENSIONS, POLITICS, AND POWER IN THE 1980s* (1980)).

104. FINAL REPORT, *supra* note 102, at 10.

105. *Id.* at 9-10.

106. *Id.* at 10.

107. *Id.*

108. *Id.*

109. *Id.* at 11.

110. *Id.*

111. Khatami, *Attacks Mark Growing ANC Strength*, SOUTHERN AFRICA, Jan.-Feb. 1983, at 18, 19.

112. *Id.* at 19.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 20.

and diplomats could be personally threatened, particularly if Blacks believe—as many already do—that the United States tacitly supports the policy of the South African government.”¹¹⁷

With the inevitability of the destruction of apartheid, private investors place the security of their investments at substantial risk given the lengthy, well-documented effort to persuade them to abandon their status as economic collaborators. Chester Crocker, a Reagan-appointed diplomat for the region, limits South Africa's ability to withstand “guerilla pressure” to only “most” of the decade of the 1980's.¹¹⁸

Thus, public pension funds are chained to a private investment which is hamstrung by a peculiar construction of the prudent investor rule. The short-sighted insistence on increasing investment as the key to change in South Africa counterposes forty years of documented failure and the resort to armed violence which epitomizes popular dissatisfaction with the supply side theory.

Moreover, this lack of innovative theory is symptomatic of an overall inability to sustain growth, innovation, or price competition. Net new jobs generated by Fortune 1000 firms between 1970 and 1977 totaled 498,000 jobs, for an annual growth rate of .82%. But this figure pales in light of the 2.4% annual growth rate for smaller firms, a net increase of 8,258,000 jobs for the same period.¹¹⁹ Regarding innovation, between 1953 and 1973 companies with 1,000 employees or less were responsible for four times as many innovations per research dollar as medium sized firms (1,000-10,000 employees), and twenty four times as many innovations per research dollar as large firms (over 10,000 employees).¹²⁰ And, with respect to price competition, Robert Berney, former chief economist for California's Small Business Administration, argues that “a growing small- and medium-scale business sector will contribute to improve price competition at a time when a large and growing segment of the economy has enough market and political power to make the economy essentially non-competitive.”¹²¹ University of California Professor Carl Stahlr Edmunds adds “[T]he vitality of the state's economy is uniquely associated with the development of small firms, particularly those in high technology.”¹²²

Nor has the investment of public monies in firms investing in South Africa necessarily been profitable. As far back as 1978, it had been observed that the investment policies and practices of the University of California lacked direction, an apparent result of the University of California Regents' failure to develop particular economic assumptions about the future and to develop a logical investment strategy based upon those assumptions.¹²³ It was further observed that the investment choices resulting from Regents' policies led to an “admitted loss of 5.11%” during fiscal 1977, but actually exceeded eleven percent when adjusted for inflation.¹²⁴ In fact, throughout most of the decade, the University of California's common stock investments failed to even keep

117. Douglis & Davis, *Revolt on the Veldt*, HARPERS, Dec. 1983, at 30.

118. *Id.*

119. FINAL REPORT, *supra* note 102, at 36.

120. *Id.*

121. *Id.*

122. *Id.*

123. CAL. PUB. POLICY CENTER, SOUTH AFRICAN ROULETTE: INVESTMENT POLICIES OF THE BOARD OF REGENTS OF THE UNIVERSITY OF CALIFORNIA 9 (Apr. 1978).

124. *Id.* at 11.

pace with inflation, and could have performed better by merely depositing the funds in a passbook savings account.¹²⁵

Questioning the economic propriety of public divestiture, Chettle argues that the cost of divestiture is prohibitive, citing a defeated divestiture resolution of the University of California Regents in which the Regents were warned of court challenges should divestment foster greater costs or economic losses. Yet, in the same paragraph, Chettle admits that the University of California treasurer offered no analysis as to what the costs and potential losses from divestiture might actually be.¹²⁶

Chettle next offers Michigan as an example of a state where public divestiture could entail costs and losses even greater than the unspecified costs and losses for California.¹²⁷ But it is precisely in Michigan where a \$12 million divestiture from apartheid firms by Michigan State University in 1979 resulted in a profit of more than \$2 million less than two years later from a return of sixteen percent.¹²⁸ Chettle's similar concern for the Connecticut portfolio,¹²⁹ is assuaged by that state's 1983 report of \$5.7 million profit (14.6% on a \$39.025 million divestiture enacted in 1982).¹³⁰

Chettle's view that divestiture somehow violates the portfolio diversity rule of the Management of Institutional Funds Act (governing the University of California) is hard to take seriously since less than 400 of the 6,350 companies listed on major United States stock exchanges do business in South Africa.¹³¹ On this issue, Franklin Research and Development Corporation recently concluded: "In our opinion there is no material disadvantage created by excluding less than 10% of the listed companies from the approved investment list."¹³² Also on this question, the United States Trust Company recently analyzed the last ten year performance of the Standard & Poors 500 and found that the 380 firms which do not do business in South Africa outperformed the entire index, saying "there is no more risk in owning the 380 than in owning the entire 500."¹³³

Thus, divestment of public funds does not necessarily mean extraordinary costs and losses. Nor would it affect the stock prices of the divested firms. Chettle himself quotes the authors of *The Ethical Investor*, who insist, "it would take a vastly greater deluge than any we can contemplate to make a substantial impact on market prices."¹³⁴

Shifting to the impact of public divestiture on South Africa itself, Chettle frets that violence could result, ignoring decades of military and institutional violence which apartheid has already heaped upon the majority of his fellow countrymen.¹³⁵ If anything, public divestiture seeks to reduce the governmental violence issued daily in South Africa. It seeks to avoid nuclear/armed cat-

125. *Id.*

126. Chettle, *supra* note 1, at 509.

127. *Id.*

128. AMERICAN COMM. ON AFRICA, SUMMARY OF MEMORANDUM ON FINANCIAL CONSEQUENCES OF DIVESTMENT (Jan.1984) [hereinafter cited as SUMMARY MEMORANDUM].

129. Chettle, *supra* note 1, at 511.

130. SUMMARY MEMORANDUM, *supra* note 128.

131. *Id.*

132. *Id.*

133. *Id.*

134. Chettle, *supra* note 1, at 514.

135. *Id.* at 503.

astrophy by promoting non-violent economic pressure on apartheid as an alternative to the military conflict presently escalating on both sides of the apartheid struggle.

Chettle's concern for the economic welfare of South Africa's bordering states is equally unpersuasive.¹³⁶ In an unimaginative application of the centuries-worn divide and conquer strategy, Chettle cites South Africa's labor conditions (described above) as providing needed employment for migrant laborers from neighboring countries.¹³⁷ Correctly understanding the "last hired, first fired" addage, he warns that the ten percent of the African work force employed by United States private investors would be the first to suffer the effects of divestiture. This concern is commendable, but as Stephan Biko points out:

The argument is often made that the loss of foreign investment would hurt blacks the most. It would undoubtedly hurt blacks in the short run, because many of them would stand to lose their jobs. But it should be understood in Europe and North America that foreign investment supports the present economic system of political injustice. . . . We blacks are perfectly willing to suffer the consequences! We are quite accustomed to suffering."¹³⁸

Chettle points to the increased level of export of foodstuffs to bordering states as rising from six percent to twenty percent by 1980.¹³⁹ Despite an overall food export of \$2 billion in 1980, a report during the same year found malnutrition "endemic" to the bantustans inside South Africa.¹⁴⁰

Chettle asserts that public divestiture might initiate a stream of moral causes that might look to divestiture as a focus.¹⁴¹ But this fear ignores the well-documented United States public policy against racial discrimination, as well as the unique importance ascribed to the subject as demonstrated by the internal political, economic, and cultural struggle it has precipitated throughout United States history.

Lastly, Chettle warns that the American worker could suffer from divestment should reduction in United States exports to South Africa occur, proffering a job loss ratio of 28,000 for every \$1 billion in reduced exports.¹⁴² However, reinvesting the same \$1 billion in, for example, construction of new single family homes in California would result in 19,000 on-site jobs, 14,600 indirect jobs, and 103,400 induced jobs.¹⁴³ The figures for construction of new multi-unit housing are considerably higher;¹⁴⁴ thus, the benefits of reinvestment far outweigh any speculative concern for divestiture-induced job losses.

IV. CONSTITUTIONAL PROPRIETY OF DIVESTMENT

Chettle opposes public divestment on constitutional grounds as violative of the congressional regulatory prerogative granted in the commerce clause.¹⁴⁵

136. *Id.* at 485.

137. *Id.*

138. AMERICAN COMM. ON AFRICA, SOUTH AFRICA: QUESTIONS AND ANSWERS ON DIVESTMENT 2 (Dec. 1984).

139. Chettle, *supra* note 1, at 486.

140. SOUTH AFRICA FACT SHEET, *supra* note 35, at 3.

141. Chettle, *supra* note 1, at 506.

142. *Id.* at 473.

143. FINAL REPORT, *supra* note 102, at 22.

144. *Id.*

145. Chettle, *supra* note 1, at 517.

The commerce clause of the United States Constitution stipulates that Congress shall regulate commerce between the states.¹⁴⁶ However, the authority of the states to collect, invest, and reinvest public pension funds derives from the exclusion of such funds from federal control via the tenth amendment, in which "[t]he powers not delegated to the United States by the Constitution, nor prohibited by the states, are reserved to the states respectively, or to the people."¹⁴⁷ Under the banner of states rights, then, the California Constitution explicitly empowers the state legislature to "authorize the investment of moneys of any public pension or retirement fund, not to exceed 25 percent of the assets of such fund determined on the basis of cost in the common stock or shares and not to exceed 5 percent of the assets in preferred stock or shares of any corporation."¹⁴⁸ Thus far, the legislature has authorized the \$14 billion multi-unit PERS fund under the Government Code,¹⁴⁹ the \$7.5 billion STRS fund under the Education Code,¹⁵⁰ the \$3 billion Los Angeles County Employees Retirement Fund under the Government Code,¹⁵¹ and the \$2.5 billion University of California fund under the Civil Code.¹⁵²

The focus of Chettle's analysis is that the application of investment authority offends congressional control over interstate commerce when it seeks to exclude private investors dealing in South Africa.¹⁵³ But in light of the constitutional parameters attached to California pension funds, a charge that excluding such private investors is more an infringement upon the commerce clause than the numerous other financial requirements that recipients of pension funds investments must satisfy is difficult to credibly sustain. As investment opportunities, small and medium-sized firms are clearly discriminated against. The California Constitution requires, for example, that stocks be registered (with some exceptions not applicable here) on a national securities exchange,¹⁵⁴ that a corporation have total assets of at least \$100 million,¹⁵⁵ and that the corporation must have paid cash dividends on its common stock in at least eight of the ten years preceding the investment.¹⁵⁶ Similar restrictions govern the Los Angeles County pension funds.¹⁵⁷ In fact, such restrictions exclude a number of large firms as well. Although the PERS, STRS, and University of California funds may each be invested at the discretion of their respective directorships,¹⁵⁸ all are bound by the constitutional restrictions.

California's constitutional discrimination against small, medium, and some large firms has yet to be attacked or even questioned as violative of the commerce clause. Given these circumstances, it is inconsistent to suppose that the addition of an added restriction excluding private investors which invest in

146. U.S. CONST. art. I, § 8, cl. 2.

147. U.S. CONST. amend. X.

148. CAL. CONST. art. 16, § 17 (Deerings 1981).

149. Pub. Employee's Retirement Law, CAL. GOV. CODE § 20200 (Deerings 1973).

150. CAL. EDUC. CODE § 22222 (Deerings 1978) (Supp. 1984).

151. CAL. GOV. CODE § 31588 (Deerings 1981) (Supp. 1984).

152. CAL. CIV. CODE § 2290.1-2290.12 (Deerings 1981).

153. Chettle, *supra* note 1, at 515.

154. CAL. CONST. art. 16, § 17(a) (Deerings 1981).

155. *Id.* at § 17(b).

156. *Id.* at § 17(d).

157. CAL. GOV. CODE § 31595.4 (Deerings 1981) (Supp. 1984).

158. CAL. GOV. CODE § 20205 (Deerings 1973); CAL. GOV. CODE § 22222 (Deerings 1978) (Supp. 1984); CAL. GOV. CODE § 2290.4 (Deerings 1981).

South Africa would suddenly violate the commerce clause. Such an addition would, if anything, vindicate California public policy against racial discrimination.¹⁵⁹ The prohibitions of the state's Unruh Civil Rights Act¹⁶⁰ already reaches any person, firm, association, organization, or company practicing racial discrimination.

Concern is arrested for extraterritorial application of the act and the authority of California to police the behavior of American private investors operating in South Africa for the same reason that the commerce clause is not disturbed. In neither case does the prohibition attempt to regulate the behavior of the private investors affected. Rather, such an exclusion exemplifies the political imperative of linking policy to practice. Nowhere is the implementation of a public policy against racial discrimination more reasonable than in the investment of the pension funds of the state's large, racially diverse pool of public employees. This is particularly true when those same funds are earmarked, in whole or in part, for reinvestment in the state with a view toward economic revitalization.

Attention must also be directed at Chettle's position that public divestiture thwarts the ability of the executive branch to determine and articulate foreign policy.¹⁶¹ Federal case law has long overlooked the conspicuous absence of direct constitutional authority here. Article II of the United States Constitution provides that the president shall "appoint Ambassadors" and "make Treaties."¹⁶² Court decisions have added several admonitions generally stating that foreign policy is the realm of the national government alone.¹⁶³ It is, however, unlikely that such conclusions have eluded the judgment of the twenty one state legislatures who have or are presently attempting to divest their portfolios from apartheid.¹⁶⁴ In a tangential sense, the bills may in fact represent collective frustration with the unbearable irrationality of the Reagan administration's apologist stance of "constructive engagement," but this does not mean that they attempt to supplant that policy. No state emissaries have ventured to South Africa, to the United Nations, or to the Organization of African Unity. No legislature has articulated an intention to forge a new foreign policy on the question. In fact, the sheer variety of anti-apartheid legislation¹⁶⁵ underscores the lack of multistate coordination of the various efforts, suggesting that they are instead a culmination of routine procedures whereby state legislatures, through the exercise of their sovereign powers, interface with foreign policy without necessarily reshaping it.

Exemplifying this point, a recent District of Columbia divestment measure was recently approved by the City Council prohibiting investment of city funds in financial institutions and companies that do business in South Africa and Namibia. It was immediately attacked by Rep. Phillip M. Crane (Republican, Illinois) on precisely the grounds that Chettle raises: that local govern-

159. *Winchell v. English*, 62 Cal. App. 3d 125 (1976).

160. CAL. CIV. CODE § 51.5 (Deerings 1971) (Supp. 1984).

161. Chettle, *supra* note 1, at 518-19.

162. U.S. CONST. art II, § 2, cl. 2.

163. *Brown v. Maryland*, 25 U.S. (12 Wheat) 419, 445 (1827); *Zschernig v. Miller*, 389 U.S. 429, 436 (1968); *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976); *United States v. Pink*, 315 U.S. 203, 233 (1942).

164. *Davis*, *supra* note 85, at 531-32 n.8.

165. *Id.*

mental divestment violates the commerce clause and is a usurpation of the federal government's constitutional power to set foreign policy.¹⁶⁶ Yet, Rep. Crane's disapproval of the legislation was rejected by the House Committee on the District of Columbia, by a ten to two roll-call vote of the full committee.¹⁶⁷ Although legislative vetoes over District of Columbia City Council acts have already been pronounced as unconstitutional,¹⁶⁸ an additional reason for the rejection of Crane's proposed attack was the potential for a deterioration of race relations in the predominantly African-American District of Columbia. Demographic concerns do not, however, extend to Michigan, Connecticut and Massachusetts where divestiture has also been enacted free of constitutional impediment.¹⁶⁹

In arguing that public divestiture nevertheless violates Article II, Chettle quotes the case of *Zschernig v. Miller*¹⁷⁰ in support of his position that divestiture is more than "diplomatic bagatelle" and therefore merits constitutional prohibition.¹⁷¹ But *Zschernig* is unprecedented and unreliable doctrine. Professor Louis Henkin suggests that the case

imposes additional limitations on the state but what they are and how far they reach remains to be determined. While the political branches might prescribe for particular cases or even provide some guidelines, as under the Commerce Clause, it will be largely for the courts and will take many years and many cases to develop the distinctions and draw the lines that will define the new limitations on the States.¹⁷²

Henkin adds that "until 1968, there was no sign of such a principle. In the government of their affairs, States have variously and inevitably impinged on American foreign relations."¹⁷³ Some state regulations have been struck down because they were inconsistent with federal policies underlying treaties, statutes, executive acts or judicial decisions. However, in *Clark v. Allen*,¹⁷⁴ the Supreme Court rejected as "far fetched," the contention that such regulations exceed constitutional limitations, thereby preventing impingement on foreign relations even when the federal government has not acted.

Thus *Zschernig's* status as an isolated, ahistorical about-face undercuts its utility in overturning the broad grey area where state acts "impinge" upon United States foreign relations. Divestiture of public pension funds is part of a state's constitutionally authorized control over the investment of those funds. The context of the phrase "diplomatic bagatelle" is itself an express refusal to overrule *Clark*:

The Government's acquiescence in the ruling of *Clark v. Allen* certainly does not justify extending the principle of that case, as we would required to do here to uphold the Oregon statute as applied; for it has more than "some incidental or indirect effect in foreign countries," and its great potential for disruption or embarrassment makes us hesitate to place it in the category of diplomatic bagatelle.¹⁷⁵

166. N.Y. Times, Jan. 27, 1864, at 16, col. 4.

167. H.R. Rep. 372, 98th Cong., 1st Sess. (1984).

168. See *Immigration and Naturalization Serv. v. Chadha*, 462 U.S. 919 (1983).

169. Davis, *supra* note 85, at 531.

170. 389 U.S. 429 (1968).

171. Chettle, *supra* note 1, at 523.

172. L. HENKIN, FOREIGN AFFAIRS AND THE CONST 239 (1972).

173. *Id.*

174. 331 U.S. 503, 517 (1947).

175. *Zschernig*, 389 U.S. at 434-35.

As applied in *Zschernig*, the Oregon statute sought to prevent an East German resident from inheriting property in Oregon unless that resident could prove that American citizens could inherit property in East Germany; and that estate payments would not be confiscated.¹⁷⁶ Unlike this statutory attempt to regulate property relations between American and foreign citizens, public divestiture merely adds to the many controls a state may exercise over its public pension funds.¹⁷⁷ Further, the critical aspect of *Zschernig* is not the Oregon statute, but the Supreme Court's disapproval of it despite the United States Justice Department's *amicus curiae* brief stating that the law did not unduly interfere with United States foreign policy. Thus, state acts which the Supreme Court believes to intrude upon United States foreign policy may be ruled unconstitutional even where the federal government has not acted, or has expressly approved of the act.

But the unavoidable inference of the Supreme Court effectively dictating foreign policy is not realistic. Indeed, "[it] is difficult to believe that the Court would find constitutionally intolerable state intrusions on the conduct of foreign relations which the political branches formally approve or tolerate."¹⁷⁸ Hence, it becomes strikingly significant that both the legislative and executive branches tolerate, if not formally approve, the divestiture laws of the District of Columbia, eight American cities and counties, as well as the divestiture bills pending in over twenty states.

V. CONCLUSION

The apartheid regime has long been recognized as an obstacle to the overall Pan-Africanist objective of a politically unified and economically integrated United States of Africa. Regional economic coordination in southern Africa has undergone substantial hardship as a result of South Africa's role as protagonist in the military and economic destabilization of the newly independent states.

The black people of South Africa, by virtue of the objective material conditions within which they are forced to exist, personally disprove the forty-year-old notion that increased private investment is the key to the elimination or meaningful reformation of apartheid. In place of this disproved hypothesis is posited one of divestiture of public pension funds having direct investments in South Africa or in banks and corporations doing business there. Although the precise impact of divestiture on apartheid is difficult to assess at this point in history, some effects are readily, reliably predictable. Large-scale public divestiture voices political and economic solidarity with the disenfranchised South African masses. It also signals to the international financial and business communities that South Africa no longer warrants acceptance as an investment opportunity. Moreover, the non-violent political pressure of multi-million dollar divestiture may protect Azania's hard-earned industrial infrastructure from the otherwise inevitability of wartime destruction or from the tradition in Africa whereby colonial regimes raze capital generators upon expulsion.

Azania's industrial infrastructure is essential for industrial expansion not

176. *Id.* at 430-31.

177. See CAL. CONST. art. 16, § 17 (Deerings 1981).

178. HENKIN, *supra* note 172, at 241.

only for southern Africa, but for the Pan-Africanist objective of continental industrialization. The inherent promise of African control of the South African economy can be seen by the existing economic links between South Africa and several other African states despite the existence of apartheid. Most importantly, reinvestment of pension funds in state economies has the potential to initiate substantial economic growth within the states themselves.

In California, two attempts to legislate divestment of the state's \$8 billion apartheid investment have failed.¹⁷⁹ The first, spearheaded by African-American Assemblyman Willie Brown in 1978 attempted to amend the Revenue and Taxation Code to exclude expense deductions relating to investments in South Africa.¹⁸⁰ The second, authored by African-American Assemblywoman Maxine Waters in 1984, approached divestment from the pension fund perspective.¹⁸¹ Despite loopholes which allowed funds to remain in stocks and bonds of banks promising not to renew existing loans, and forestalling total divestment from apartheid corporations until 1989, the bill was defeated in Committee.¹⁸² Another attempt comes from another African-American, State Senator Bill Greene, and narrows the pension fund approach further by targeting PERS funds, but only divesting funds from financial institutions doing business in South Africa.¹⁸³ There was no provision for businesses merely investing there.

As anti-apartheid organization within South Africa intensifies in late 1984 through 1985, the California state legislature has been barraged by a series of bills and resolutions calling for: the immediate release of ANC President Nelson Mandela;¹⁸⁴ prohibition of state nuclear/energy relations;¹⁸⁵ supporting federal legislation denying visas to South African athletes;¹⁸⁶ supporting federal legislation barring nuclear relations;¹⁸⁷ divesting state public utility retirement funds;¹⁸⁸ supporting federal legislation granting political asylum to individuals refusing to serve in the South African military;¹⁸⁹ supporting federal legislation limiting the advertisement of Krugerrands;¹⁹⁰ forbidding scientific/cultural exchanges with the University of California;¹⁹¹ divesting (for 5 years) Public Employee Retirement System (PERS) funds from "dirty" United States lenders and corporations;¹⁹² protesting the sale of South African gold within state borders;¹⁹³ and divesting all state funds from the South African government and prohibiting new investment in "dirty" United States lenders and corporations.¹⁹⁴

179. L.A. Times, Aug. 15, 1983 at 20, col.1; Cal. Assembly Bill No. 2541 (1978); Cal. Assembly Bill No. 808 (1983).

180. Cal. Assembly Bill No. 2541 (1978) (1st Extra Sess. 18721 (died)).

181. Cal. Assembly Bill No. 808 (1983).

182. *Id.*

183. Cal. Senate Bill No. 1368 (1984).

184. A.J. Res. 32, 1985-86 Reg. Sess., Cal. Legis.

185. A.B. 1023, 1985-86 Reg. Sess., Cal. Legis.

186. A.J. Res. 21, 1985-86 Reg. Sess., Cal. Legis.

187. A.J. Res. 20, 1985-86 Reg. Sess., Cal. Legis.

188. A.B. 1023, 1985-86 Reg. Sess., Cal. Legis.

189. A.J. Res. 22, 1985-86 Reg. Sess., Cal. Legis.

190. A.J. Res. 25, 1984-86 Reg. Sess., Cal. Legis.

191. A.C. Res. 27, 1985-86 Leg. Sess., Cal. Legis.

192. S.B. 9, 1985-86 Leg. Sess., Cal. Legis.

193. A.C. Res. 30, 1985-86 Leg. Sess., Cal. Legis.

194. A.B. 134, 1985-86 Leg. Sess., Cal. Legis.

It is hoped that these latest efforts will fare better than previous ones. A critical problem with present divestiture measures is the strategic soundness of pushing a divestment bill through a state legislature complicated by the influence of big business lobbies. Such interests effectively blocked the Willie Brown effort in the past. Instead, the strategy of a voter referendum should be implemented. State law restricts the number of signatures needed to qualify such a measure for the general election ballot to a fraction—five percent of the voters participating in the preceding general election.¹⁹⁵ Qualification is therefore a matter of organization. An initiative campaign is also an excellent vehicle for coalition building. The several hundred thousand signatures required forges a base of popular support and mobilization for public divestiture in particular and the anti-apartheid struggle in general. Regardless of the cost of organizing a campaign once the measure is qualified, the fact of qualification itself may very well force proponents of apartheid investments into the public forum they have conspicuously avoided for several years.

Regarding re-investment, existing restrictions on the nature of public investments pose obstacles to certain kinds of reinvestment strategies. Previous efforts to amend the state constitution so as to eliminate the restriction of investment to the largest private investors have failed in general elections.¹⁹⁶ One problem here is persuading a justifiably conservative public to abandon the security of low-return, low-risk investments. Thus, organizers should also address ways of making reinvestment easier in light of the state's constitutional restrictions. There are grounds, in fact, for cooperation between the anti-apartheid organizers in the legislature and those wishing to unleash the economic potential of pension funds through a relaxation of these restrictions. The issue may also be taken to the California electorate via the ballot initiative process. Divestiture from South Africa may be specifically linked to partial reinvestment in California itself. Seen in this light, divestiture thus provides a politically, economically, legally, and morally justifiable formula for control by the California public of its pension funds while simultaneously accomplishing the moral imperative of South African divestment.

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195. CAL. CONST. art. II, § 8(b) (Deerings 1981).

196. Cal. Senate Const. amend. 21 (1982) (rejected by the people Nov. 2, 1982).