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North Carolina's South African Divestment Statute

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NOTES

North Carolina's South African Divestment Statute

On March 17, 1987, the state of North Carolina had a 13.9 million dollar investment in the Raytheon Company.[1] If the state still maintained that investment on July 1, 1987, the State Treasurer would have been legally obligated to withdraw a minimum of 4.6 million dollars of the Raytheon investment from the state's investment portfolio.[2] The reason: North Carolina's Act to Prohibit the Investment of Retirement and University Trust Funds in Certain Companies Involved with South Africa which became effective July 1, 1987.[3] As a result of

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1. MINUTES OF HOUSE COMM. ON COURTS AND ADMIN. OF JUSTICE, 1987 Gen. Assembly, 1st Sess. 2-3 (March 17, 1987) [hereinafter MINUTES] (statement of Mr. C. Douglas Chappell, Director, Investment and Banking Division, Department of State Treasurer).

2. *See infra* notes 28-31 and accompanying text.

3. Act of June 22, 1987, ch. 446, 1987 N.C. Sess. Laws 588 (codified at N.C. GEN. STAT. § 147-69.2(c) (1987)). North Carolina's Divestment Act is based on the Sullivan Principles. The Principles were developed in 1978 by the Reverend Leon H. Sullivan, a Philadelphia minister, who also served on the Board of Directors of General Motors Corporation. INTERNATIONAL COUNCIL FOR EQUALITY OF OPPORTUNITY PRINCIPLES, INC., NINTH REPORT ON THE SIGNATORY COMPANIES TO THE SULLIVAN PRINCIPLES 1 (1985) [hereinafter NINTH REPORT]. Reverend Sullivan has since repudiated the Principles. Barnaby, *Sullivan Asks End of Business Links With South Africa*, N.Y. Times, June 4, 1987, § A, at 1, col. 1. The Principles amount to a set of employment standards outlining equality in pay, employment opportunity, and access. Specifically, the principles are:

> (1) Nonsegregation of the races in all eating, comfort, locker room and work facilities; (2) Equal and fair employment practices for all employees; (3) Equal pay for all employees doing equal or comparable work for the same period of time; (4) Initiation and development of training programs that will prepare blacks, coloureds, and asians in substantial numbers for supervisory, administrative, clerical, and technical jobs; (5) Increasing the number of blacks, coloureds, and asians in management and supervisory positions; (6) Improving the quality of employees' lives outside the work environment in such areas as housing, transportation, schooling, recreation, and health facilities; (7) Working to eliminate laws and customs that impede social and political justice.

N.C. GEN. STAT. § 147-69.2(c)(1)-(7) (1987).

To become a signatory to the Principles, companies must express written commitment to them, prepare and submit an annual report or self-evaluation of progress on compliance with the principles, and pay a fee based on their aggregate worldwide sales. As of October 25, 1985, 186 United States companies were signatories to the Sullivan Principles. Eight of these companies had subscribed too late to be included in the Ninth Report. NINTH REPORT, *supra*, at 22-23. In 1986 the annual fee ranged between $1200 and $8400. NINTH REPORT, *supra*, at 1. The annual report published by the International Council for Equality is developed from the signatory companies' individual reports. These reports, in turn, are based on "self-reported responses by signatories to a rather lengthy questionnaire prepared and distributed by Arthur D. Little, Inc." Paul, *The Inadequacy of Sullivan Reporting*, 57 BUS. & SOC. REV. 61, 62 (1986); *see also* LEGISLATIVE RES. COMM'N, STATE INVESTMENTS WITH SOUTH AFRICAN INVESTORS, REPORT TO THE 1987 GENERAL ASSEMBLY OF NORTH CAROLINA 6, 7 (1986) [hereinafter LRC REPORT] (describing reporting procedures); NINTH REPORT, *supra*, at 1-3 (same).

Based on the questionnaires, signatories receive one of three ratings. To receive the highest rank—Category I—a company must complete a full-length survey and be "making good progress" on all Principles. A company receives a Category IIA rank if it is "making progress" on fulfilling the Principles and completes a full length survey. A Category IIB rank indicates the company completed the short form. A company receives a Category IIIA rank if it has fulfilled Principles 1-3, but has not made satisfactory progress on Principles 4-7, on which it "needs to become more active." A company receives a Category IIIB rank if it has failed to comply with Principles 1-3. NINTH REPORT, *supra*, at 10.

the Divestment Act North Carolina joined at that time approximately twenty other states[4] that had taken some form of action expressing disagreement with South Africa's policy of apartheid,[5] and also placed itself in the midst of a national legal debate on the constitutionality of state and local divestment actions.[6]

This Note reviews the history and possible effects of North Carolina's Divestment Act and compares North Carolina's legislation with steps other states have taken. The Note then analyzes the constitutionality of the Act under several principles: the interstate commerce clause,[7] the foreign commerce clause,[8] federal preemption,[9] and federal control over matters of foreign policy.[10] The

4. LRC REPORT, *supra* note 3, at 5 app. C. As of February 1987 32 states, 76 cities, and 16 counties had enacted some form of divestment legislation. Brief for Appellants at 16 n.7, Lubman v. Mayor and City Council of Baltimore, No. 87-104 (Md. filed Oct. 9, 1987).

5. Apartheid is the South African government's policy of "separate development" by which the government denies blacks the rights enjoyed by whites in nearly every facet of life. The policy deprives blacks of equal treatment in governmental representation, voting, housing, work, and education, and denies them freedoms of speech, assembly, and mobility. *See* LRC REPORT, *supra* note 3, at 1-3; Gosiger, *Strategies for Divestment from United States Companies and Financial Institutions Doing Business With or In South Africa*, 8 HUM. RTS. Q. 517, 517-18 (1986).

6. It has been noted that divestment is to be differentiated from disinvestment, which more often refers to a company's withdrawal from South Africa. Note, *State and Local Anti-South Africa Action As An Intrusion Upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 816 n.21 (1986) [hereinafter VIRGINIA Note]. The following commentaries argue the unconstitutionality of divestment statutes. Retirement System: Investment Policies, 87 Tenn. Op. Att'y Gen. No. 84 (May 5, 1987); DISINVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE? (Nat'l Legal Center for the Pub. Interest 1985) [hereinafter Nat'l Legal Center]; Note, *Challenges to the Constitutionality of the California Divestment Statute*, 19 PAC. L.J. 217 (1987) [hereinafter PACIFIC Note]; VIRGINIA Note, *supra*, at 813. The following works generally support the constitutionality of divestment statutes. 87 Kan. Op. Att'y Gen. No 62 (Apr. 3, 1987); Lewis, *Dealing With South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469 (1987); Note, *Socially Responsible Investment of Public Pension Funds: The South Africa Issue and State Law*, 10 N.Y.U. REV. L. & SOC. CHANGE 407 (1981) [hereinafter N.Y.U. Note]; Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543 (1985) [hereinafter CINCINNATI Note]; The Constitutionality of State and Local Divestiture Legislation (Lawyers' Comm. for Civil Rights Under Law, Aug. 1984 memorandum) [hereinafter Lawyers' Comm.].

In light of the lack of any conclusive legal opinion on the constitutionality of divestment acts, one commentator has advocated that states not adopt disinvestment legislation until a definitive ruling emerges. Blaustein, *Disinvestment—The Constitutional Question*, in Nat'l Legal Center, *supra*, at 76-80. Since that comment was made, there have been several legal challenges to divestment statutes. Only one of these involved a federal constitutional challenge. *See* Board of Trustees v. Mayor of Baltimore, No. 86365065/CE-59858, slip op. (Cir. Ct. Balt. July 17, 1987) (upholding Baltimore divestment ordinances). The Baltimore ordinance called for total divestment of monies and other funds in the city's Retirement System invested in companies or financial institutions doing business in or with the Republic of South Africa or Namibia or subsidiaries of those companies. Divestment was required within two years of enactment. The ordinance contained an escape clause during which divestment could be halted if the Board of Trustees for the Retirement System could demonstrate that it would not be able to divest without incurring unacceptable financial losses. BALTIMORE, MD. ORDINANCES 765, 792 (July 3, 1986). Both parties filed appellate briefs in fall 1987 following the grant of certoriari 530 Md. 567, 530 A.2d (1987). No decision had been rendered as of mid-April 1989. The other two court challenges were decided on nonconstitutional grounds. See *infra* note 10 for discussion of these cases.

7. *See infra* notes 82-117 and accompanying text.

8. *See infra* notes 118-44 and accompanying text.

9. *See infra* notes 43-81 and accompanying text.

10. *See infra* notes 145-225 and accompanying text. Divestment statutes raise other issues related to a trustee's fiduciary duty in making investments, interference with contract, and equal protection. These will not be addressed in this Note. *See generally* 85 Haw. Op. Att'y Gen. No. 26 (Nov. 25, 1985) (discussing investment standards); 87 Kan. Op. Att'y Gen. No. 62 (Apr. 3, 1987) (discussing trustee's standard of care in investing); Retirement System: Investment Policy, 87 Tenn.

Note concludes that North Carolina's Divestment Act clearly would survive a challenge based on preemption and arguably would survive the interstate commerce clause challenge. To survive a challenge based on the foreign commerce clause, however, the general assembly would need to amend the Act to limit its scope. The Note acknowledges that the greatest constitutional challenge to the Divestment Act lies in Congress' power to dictate foreign affairs, but argues that the case law in this area is not sufficiently analogous or developed to constitute an adequate basis on which to evaluate the North Carolina General Assembly's decision regarding how to manage its fiscal responsibilities. In light of the shortcomings of foreign affairs case law, and in response to a leading foreign affairs commentator's suggestion that a new balancing test may need to be developed to address the constitutionality of state actions having foreign affairs implications, this Note presents a model balancing test and applies it to the North Carolina Act.

The 1985 North Carolina General Assembly authorized the Legislative Research Commission[11] to conduct a feasibility study on withdrawing certain retirement system funds and University of North Carolina system trust fund investments from companies either doing business in or with South Africa, or holding outstanding loans extended to the Republic of South Africa.[12] The general assembly authorized the study in response to two proposed pieces of legislation. These proposals encouraged North Carolina corporations to end all forms of financial involvement with South Africa[13] and required the state to withdraw from its retirement and University trust fund portfolios investments held in companies and financial institutions with loans and business dealings in South Africa.[14]

During 1986 the Divestment Study Subcommittee considered three distinct divestment options: full or absolute divestment,[15] divestment from companies

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Op. Att'y Gen. No. 84 (May 5, 1987) (discussing interference with contract and equal protection issues); N.Y.U. Note, *supra* note 6 (discussing pension investment standards); *see also* Regents of the Univ. of Michigan v. State of Michigan, 166 Mich. App. 314, 419 N.W.2d 773 (1988) (holding that state statute prohibiting state educational institutions from making or maintaining an investment "in organizations operating in South Africa" unconstitutional as applied because state constitution granted Regents plenary authority to allocate University funds); Associated Students of the Univ. of Oregon v. Oregon Inv. Council, 82 Or. App. 145, 728 P.2d 30 (1986) (complaint dismissed for lack of standing by plaintiffs). Nor will this Note discuss with any specificity the constitutionality of complementary statutes the general assembly passed that enabled cities, counties, and local school boards to take a company's involvement in South Africa into account in developing public contract bid requirements. N.C. GEN. STAT. §§ 153A-141, 160A-197, 115C-49 (1987) (referring respectively to the county, city, and local school board enabling laws); *see* MINUTES OF HOUSE STATE GOVERNMENT COMMITTEE (July 22, 1987) (legislative history maintained in the General Assembly library); MINUTES OF SENATE JUDICIARY I COMMITTEE (May 21, 1987).

11. The Legislative Research Commission exists to study and investigate public policy issues for the general assembly and to report and recommend action to that body. N.C. GEN. STAT. § 120-30.17(1) (1986).

12. Act of July 18, 1985, ch. 790, § 2.1, 1985 N.C. Sess. Laws 1314, 1320.

13. The proposed, but unenacted, legislation was House Resolution 527, 1985 General Assembly. *See* LRC REPORT, *supra* note 3, at B-1 to -4.

14. The proposed, but unenacted, legislation was House Bill 744, 1985 General Assembly. *See* LRC REPORT, *supra* note 3, at B-5 to -6.

15. Full divestment requires withdrawing all funds from companies conducting business in or

that were nonsignatories of the Sullivan Principles,[16] and divestment from companies that were either not Sullivan Principles subscribers or were subscribers but had not received one of the highest two rankings companies can earn based on the Sullivan criteria.[17] The committee selected the last option as the least extreme and least expensive to the state's investment program.[18] Specifically the committee's proposed bill required divesting from companies, incorporated within or without the United States, and financial institutions holding outstanding loans in South Africa when these companies were not Sullivan Principles signatories or were signatories but had not received a Category I or II rating.[19] Each general assembly committee that considered the bill after reviewing the opinions of actuaries on the bill's potential effects on the retirement and trust funds reported it favorably.[20]

The general assembly ratified the bill on June 22, 1987, after adopting three significant changes at the committee's suggestion.[21] The first change provided that funds held in financial institutions with outstanding loans in South Africa would not be divested if the lending institutions maintained contact with South Africa solely to collect their loans.[22] The second change clarified the sources of information the State Treasurer was authorized to use in deciding which companies were doing business in or with South Africa and which had received favorable Sullivan Principles compliance ratings.[23] Finally, the enacted bill included a newly-adopted Principle requiring companies to work to "eliminate laws and customs [in South Africa] that impede social and political justice."[24]

The Divestment Act performs two functions: (1) it prohibits *future* investments in companies incorporated either in the United States or in a foreign country which do business in or with South Africa and do not subscribe to the Sullivan Principles or do subscribe but receive a "failing" grade; and (2) it requires divestment of all *current* investments held in companies similarly incorporated that do not meet either of these criteria. The Act does not affect investments in companies that are first-year signatories to the Sullivan Princi-

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with South Africa without regard to the companies' employment practices in that country. *See* Gosiger, *supra* note 5, at 535-37.

16. See *supra* note 3 for discussion on signatories.

17. See *supra* note 3 for discussion on rankings.

18. LRC REPORT, *supra* note 3, at 29. See generally *id.* at 10-15, 25-27, E-6 to -8 for a description of how each option the committee considered would have affected the funds at the end of the first and last fiscal quarter of 1986.

19. See *supra* note 3 for a discussion of rankings. The committee's final version was modeled after Connecticut's 1980 divestment statute, the first state divestment law. CONN. GEN. STAT. ANN. § 3-13f (West Supp. 1981) (effective May 27, 1980); *see also* N.Y.U. Note, *supra* note 6, at 413 (discussing Connecticut's statute).

20. *See* N.C. GEN. STAT. § 120-114 (1988) (describing the actuarial note requirements); *infra* notes 33-36 and accompanying text discussing these findings.

21. *See* MINUTES, *supra* note 1, at 2.

22. *See* MINUTES, *supra* note 1, at 2.

23. N.C. GEN STAT. § 169.2(c) (1987); *see* MINUTES, *supra* note 1, at 2; proposed bill, *reprinted in* LRC REPORT, *supra* note 3, at 17-21.

24. N.C. GEN. STAT. § 169.2(c)(2)(7) (1987); *see* NINTH REPORT, *supra* note 3, at 3 (discussing adoption of new principle).

ples.[25] Moreover, the bill affects only certain funds maintained by the State Treasurer, namely state pension funds[26] and trust funds of the University of North Carolina system and its constituent institutions.[27]

The Divestment Act does not require immediate withdrawal of funds from companies that fail to meet the investment criteria. The State Treasurer is authorized to extend the divestment process over a three-year period should "sound investment policy so require[ ]."[28] When the treasurer decides this clause applies, however, a minimum of one-third of the investment must be withdrawn during each of the first two years.[29] The Act does not affect the two lending institutions in which the State has investments as long as those institutions are maintaining contact only to collect outstanding debts.[30] This comports with the federal ban placed on the ability of United States companies to "make or approve any loan or . . . extension of credit . . . to the Government of South Africa or to any corporation . . . owned or controlled by the Government of South Africa" after the enactment of the federal law.[31]

It is difficult to predict with any accuracy the long-term financial effect of North Carolina's Divestment Act. The actuarial notes and Legislative Study Commission findings emphasized the speculative nature of the bill's effects.[32] The Study Commission concluded that the effect would be negligible because of the "rapid withdrawal of companies from South Africa and the fact that more companies are signing the Sullivan Principles and achieving acceptable performance ratings."[33] The general assembly's consulting actuary also concluded that the bill's effect would be negligible because as of November 26, 1986, all companies in which the state held investments could have met the Act's requirements.[34] The State Treasurer and the Retirement Systems Plan Administrator actuary concluded, however, that the Act would have the effect of increasing the employers' costs of subsidizing retirement plans because of the restrictions under

25. These companies cannot be evaluated until the end of one year. NINTH REPORT, *supra* note 3, at 5.

26. The bill erroneously refers to N.C. GEN STAT. § 147-69.2(b)(6) for the listing of affected retirement system funds. The correct cross reference, is N.C. GEN. STAT. § 147-69.2(b)(8) which lists the Teachers' and State Employees' Retirement System, the Consolidated Judicial Retirement System, the Firemen's and Rescue Workers' Pension Fund, the Local Government Employees' Retirement System, and the Legislative Retirement System.

27. *See* N.C. GEN. STAT. § 116-36.1 (1987) (defining trust funds). Trust funds include fee generated monies, but do not include University endowment funds over which each individual institution maintains investment autonomy. *Id.*

28. Act of June 22, 1987, ch. 446, § 2, 1987 N.C. Sess. Laws 588, 591.

29. *Id.*

30. Act of June 22, 1987, ch. 446, § 3, 1987 N.C. Sess. Laws 588, 591. In 1985 two lending institutions, National Bank of North Carolina (NCNB) and BankAmerica Corporation, were affected by this provision. Memorandum from C. Douglas Chappell to Harlan E. Boyles 2 (Mar. 10, 1986), *reprinted in* LRC REPORT, *supra* note 3, at E-7; Memorandum from C. Douglas Chappell to Tom Covington (Sept. 26, 1985), *reprinted in* LRC REPORT, *supra* note 3, at E-5.

31. Comprehensive Anti-Apartheid Act, Pub. L. No. 99-440, § 305, 100 Stat. 1086 (codified at 22 U.S.C.A. § 5055 (West Supp. 1988)).

32. LRC REPORT, *supra* note 3, at 25-26; Letter from Charles R. Dilts to Sam Byrd, Fiscal Research Division, North Carolina General Assembly (May 4, 1987) [hereinafter Dilts Letter]; *accord* N.Y.U. Note, *supra* note 6, at 418-19 (discussing uncertain effects of divestment actions).

33. LRC REPORT, *supra* note 3, at 27.

34. Dilts Letter, *supra* note 32.

which the State Treasurer would have to operate.[35]

The Legislative Research Commission report identified its proposed legislation as a compromise among alternative means of divestment.[36] Another option would have been to pass a resolution urging divestment, but not mandating it under any circumstance.[37] A third option would have been to require full or absolute divestment. Massachusetts and California have both adopted this form of action.[38]

These various options have practical advantages and disadvantages. A full divestment plan is easier to implement than North Carolina's plan for the sole reason that it uses a "bright line test" of "doing business in South Africa" as the standard for divesting.[39] The review required under North Carolina's plan is more extensive because it involves discerning not merely whether a company does business in South Africa, but whether the company's conduct in South Africa meets acceptable Sullivan Principles standards. The resolution of the dissatisfaction option lacks an action-inducing quality and, as a result, may not provide as forceful a statement as a state might desire.

A divestment statute based on the Sullivan Principles has serious practical infirmities. First, critics argue that the Sullivan Principles approach fails to take into account legitimate reasons a company could have for not subscribing to the Sullivan Principles. Some companies may employ so few employees in South Africa that the financial and administrative burdens of subscribing to the Principles outweigh the company's interests in subscribing.[40] Second, legislation based on the Sullivan Principles relies on a rating system that depends completely on companies' self-reporting. The absence of any independent verification system calls the objectivity of the rating results into question.[41]

Despite these drawbacks the Sullivan Principles provide the safest divestment option. Divestment statutes in general raise a number of constitutional issues, several of which are "close calls." A state that wishes to voice its opinion on apartheid, therefore, must adopt a cautious position to minimize these constitutional threats. Various constitutional challenges to the Act will be addressed, beginning with the preemption challenge. The analysis concludes that North Carolina's Act has a good chance of surviving these constitutional attacks precisely because it is based on the Sullivan Principles.[42]

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35. Letter from Donald M. Overholser, Consulting Actuary, to E.T. Barnes (Apr. 7, 1987); Memorandum from C. Douglas Chappell to Harlan E. Boyles, State Treasurer 2 (May 24, 1985), *reprinted in* LRC REPORT, *supra* note 3, at E-3.

36. *See supra* note 18 and accompanying text.

37. *See* LRC REPORT, *supra* note 3, at C-10 (noting Alaska's pending Resolution of 1986).

38. *See* LRC REPORT, *supra* note 3, at C-13; PACIFIC Note, *supra* note 6 (discussing California divestment bill).

39. VIRGINIA Note, *supra* note 6, at 820.

40. Slater, *Companies That Hide Behind the Sullivan Principles*, 49 INTL. BUS. & SOC. REV. 15, 16 (1984).

41. Paul, *The Inadequacy of Sullivan Reporting*, 57 INTL. BUS. & SOC. REV. 61, 62 (1986); *see also* Gosiger, *supra* note 5, at 528-35 (criticizing Sullivan Principles compliance program).

42. Schotland, *Divergent Investing Of Pension Funds And University Endowments: Key Points About The Pragmatics, And Two Current Case Studies*, in Nat'l Legal Center, *supra* note 6, at 31, 66-67.

The United States Supreme Court has stated that in deciding if federal law preempts state law, its "sole task is to ascertain the intent of Congress" and that "preemption is not to be lightly presumed."[43] The Court determines congressional intent in several ways. First, it looks to see if Congress included an express preemption statement in its legislation.[44] The Court also infers preemption when, by the language and structure it uses, Congress demonstrates an implicit intent to "occup[y] the field" so that states have no room to operate.[45] Finally, the Court finds preemption when there is an actual conflict between state and federal action.[46] This can arise when "compliance with both federal and state regulations is a physical impossibility"[47] or the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[48]

A preemption challenge to the North Carolina Act would be based on Congress' 1986 enactment of the Comprehensive Anti-Apartheid Act (CAAA).[49] The stated purpose of the CAAA "is to set forth a comprehensive and complete framework to guide the efforts of the United States in helping to bring an end to apartheid in South Africa."[50] The legislative history contains the following description of the Act's purpose: "to promote political, economic and social change leading to the dismantling of apartheid and the establishment of a nonracial, democratic political system in the Republic of South Africa."[51]

To "undermine apartheid"[52] the congressional Act bans both private and public actors from engaging in a number of activities including extending new loans to the South African government;[53] making new investments in South Africa unless it involves a black South African-owned firm;[54] importing krugerrands,[55] military articles,[56] and products from parastatal organizations;[57]

43. California Fed. Sav. & Loan Ass'n v. Guerra, 107 S. Ct. 683, 689 (1987); 132 CONG. REC. S12,535 (daily ed. Sept. 15, 1986) (Professor Tribe memorandum stating "a strong presumption against finding federal preemption by mere implication").

44. *Guerra*, 107 S. Ct. at 683; Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

45. *Guerra*, 107 S. Ct. at 689; *see also* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) ("Congress here legislated in a field which the States have traditionally occupied.").

46. *Guerra*, 107 S. Ct. at 689; *Rice*, 331 U.S. at 230; Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

47. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

48. *Hines*, 312 U.S. at 67.

49. Pub. L. No. 99-440, 100 Stat. 1086 (codified at 22 U.S.C.A. §§ 5001-5116 (West Supp. 1988)).

50. 22 U.S.C.A. § 5002 (West Supp. 1988).

51. S. REP. NO. 370, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2335. *But see id.* at 2355 (the legislative history of the Act contains a commentary of North Carolina Senator Jesse Helms who stated that the purpose of the CAAA was "to force the South African Government to legitimize and negotiate a transfer of power to the Communist and terrorist movements which espouse these methods." S. REP. No. 370, 99th Cong., 2d Sess. 24, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2334, 2355 ("Additional Views of Senator Jesse Helms")).

52. 22 U.S.C.A. § 5051 (West Supp. 1988).

53. *Id.* § 5055.

54. *Id.* § 5060.

55. *Id.* § 5051.

56. *Id.* § 5052.

57. *Id.* § 5053. A parastatal organization is defined as a "corporation or partnership owned or

banning computer exports to South Africa[58] halting air transportation with South Africa[59] and prohibiting nuclear trade.[60] In addition, the CAAA prescribes "Employment Practices of United States Nationals in South Africa."[61] These practices codify the Sullivan Principles.[62] The CAAA states that "(a)ny national of the United States that employs more than 25 persons in South Africa *shall* take the necessary steps to *insure* that the Code of Conduct is implemented with respect to the employment of these persons."[63] United States companies "not implementing the Code of Conduct with respect to the employment of these companies" may not receive assistance from any "department or agency of the Unites States . . . regarding [their] export market activities in any country."[64] Moreover, while the CAAA enforcement section specifically disallows imposition of a penalty on a United States company "for failure to implement the Code of Conduct,"[65] under certain conditions it would be possible for a company to be subjected to civil penalties. Specifically, if the President of the United States were to require companies to report on their progress in complying with the Code of Conduct,[66] and a company were either to refuse to comply with such an order or were to supply false information, the Secretary of State would be obligated to "impose on [the company] a civil penalty of not more than $10,000."[67]

The CAAA also contains a "sense of the Congress" statement which elaborates on principles for United States companies to follow outside the workplace. One of these principles involves "supporting the rescission of all apartheid laws."[68]

Congress did not include express preemption language in the CAAA. Referring to the CAAA text, Representative Solarz pointedly demonstrated that there was not "a single paragraph, a single sentence or a single word in the Senate bill which explicitly preempts the right of State and local governments to

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controlled or subsidized by the Government of South Africa," excluding those begun with assistance of the South African Industrial Development Corporation. *Id.* § 5053(b).

58. *Id.* § 5054.

59. *Id.* § 5056.

60. *Id.* § 5057.

61. *Id.* § 5034. Section 5001(5) defines the term "nationals" as:

> (A) a natural person who is a citizen of the United States or who owes permanent allegiance to the United States or is an alien lawfully admitted for permanent residence in the United States . . .; or
>
> (B) a corporation, partnership, or other business association which is organized under the laws of the United States, any State or territory thereof, or the District of Columbia . . . .

Id. § 5001(5).

62. *See id.* § 5035; S. REP. NO. 370, 99th Cong. 2d Sess. 1, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2336.

63. *See* 22 U.S.C.A. § 5034(a) (West Supp. 1988) (emphasis added).

64. *Id.* § 5034(b).

65. *Id.* § 5113(d)(3).

66. This measure is authorized under 22 U.S.C.A. § 5113(a)(2)(A).

67. *Id.* § 5113(d)(1).

68. *Id.* § 5035(b)(4).

take action on South Africa."[69]

Furthermore, evidence exists to show that Congress did not intend to occupy the field by its legislation and thereby did not deprive states and municipalities of the ability to act on divestment. One factor courts consider in deciding whether preemption implicitly exists is the congressional debate on the legislation. Representative Wolpe's statement offers initial instruction in this regard. Commenting on an earlier apartheid bill which was substantially similar to the CAAA, he noted that "there was not a single suggestion made in the entire course of that debate by Members of either side . . . that the legislation has anything to do whatsoever with an effort at preempting or superseding State and local laws."[70]

The 1986 Senate debates on the CAAA included some narrowly focused debate on preemption. The Senate was aware that a number of states and local municipalities had adopted statutes requiring companies that had submitted procurement contract bids to demonstrate as a criterion for bid offers that they conducted no business in or with South Africa. Concerned that the CAAA would cause these governments to lose federal subsidies they might have on those contracts, Senator D'Amato introduced an amendment to protect against such losses.[71] The Senator characterized his amendment as "not address[ing] the question of those State legislatures who have begun to undertake a policy of disinvestment in terms of their pension funds with those companies who do business or are located in South Africa."[72] Senator Lugar vigorously opposed the D'Amato amendment which was eventually defeated.[73] In response to Senator Lugar's statements that the amendment "muddied the waters" on preemption and created an impression that the CAAA was not meant to preempt all nonfederal government actions,[74] House of Representatives members created in debate a legislative history for the purpose of demonstrating unequivocally that

69. 132 CONG. REC. H6764 (daily ed. Sept. 12, 1986); *see also id.* at H6766 (prepared statement of Representative Siljander stating the Senate bill is silent on issue of federal preemption of local divestment actions); *id.* at H6762 (memorandum from Paul T. Rephen, Chief Division of Legal Counsel, The City of New York to Representative Solarz restating Senator D'Amato's intent not to affect state and local divestment acts with his amendment concerning the bill's impact on state laws requiring companies with which the governmental entity has contracts and that are funded in part with federal money not to conduct business with South Africa). Parties to a suit involving the validity of a Baltimore divestment ordinance indicated in their briefs that the CAAA did not contain an express preemption. *See* Brief for Appellants at 33, Lubman v. Mayor and City Council of Baltimore, No. 87-104 (Md. filed Oct. 9, 1987); Brief for Appellees at 44, Board of Trustees of the Employees' Retirement Sys. v. Mayor and City Council of Baltimore City, No. 95-104 (Md. filed Nov. 16, 1987); *accord* Board of Trustees of Employees' Retirement Sys. of Baltimore v. Mayor and City Council of Baltimore City, No. 86365065/CE-59858, slip op. at 20 (Cir. Ct. Balt. July 17, 1987) (decision of Greenfield, J.).

70. 132 CONG. REC. H6779 (daily ed. Sept. 12, 1986) (statement of Senator Wolpe).

71. 132 CONG. REC. S11,815 (daily ed. Aug. 15, 1986) (Senator D'Amato introducing Amendment No. 2753).

72. *Id.* at S11,817.

73. *Id.* at S11,817-818. The amendment as originally proposed was defeated by a 64-35 vote. A second amendment passed that gave states and municipalities 90 days within which to amend their procurement contract restrictions without the threat of having their federal subsidies withdrawn. *Id.* at S11,818 (Senators D'Amato and Moynihan proposing Amendment No. 2754) (codified at 22 U.S.C.A. § 5116 (West Supp. 1988)).

74. 132 CONG. REC. S11,817 (daily ed. Aug. 15, 1986).

the House of Representatives at least did not intend for the CAAA to preempt state and local government divestment action.[75] This concern produced House Resolution 548 which emphatically states: "[I]t is not the intent of the House of Representatives that the bill limit, preempt, or affect, in any fashion, the authority of any State . . . to restrict or otherwise regulate any financial or commercial activity respecting South Africa."[76] Because the House of Representatives clearly did not intend to preempt divestment acts, at a minimum, the resolution raises sufficient doubt about congressional intent to prevent a court from inferring preemption.[77]

There remains the question whether North Carolina's Divestment Act serves either to stymie congressional purpose or to render compliance with both the state and federal statutes impossible. North Carolina's Act is not susceptible to challenge on either basis. As noted earlier, Congress incorporated the Sullivan Principles in its Act, as did North Carolina.[78] The standards by which companies are judged under either statute are, therefore, the same. As a result, a company could comply with both laws without undergoing any hardship or having to follow any inconsistent practices. Nor does the North Carolina Act obstruct congressional purpose in the area of apartheid. The Act mirrors congressional purpose in guiding United States companies' workplace behavior in South Africa. The CAAA has a dual purpose of imposing federal economic and trade sanctions against the Republic of South Africa using the United States government, its businesses and citizens as the instruments for carrying out these sanctions, and encouraging a policy of constructive engagement between American companies in South Africa and that nation.[79] The goal of the federal Act is to eliminate apartheid. As the South African government makes changes to reach that goal, the CAAA allows for a lessening of the sanctions against the government.[80] The effect of loosening the sanctions, when combined with the goal of encouraging American companies to help end apartheid, is to provide companies with a reason to become antiapartheid advocates in South Africa. North Carolina provides the same type of incentive to companies by connecting companies' productive involvement in South Africa with the economic benefit of becoming or remaining eligible as investment targets of the state's funds. Neither the CAAA nor the North Carolina Act provide for punitive measures against companies. Both acts attempt to entice a company to remain in South Africa under circumstances that will strengthen the possibility of establishing a democratic, nonracist government. In conclusion, the legislative history of the

75. 132 CONG. REC. H6760 (daily ed. Sept. 12, 1986) (statements of Representatives Gray and Leland).

76. H.R. Res. 548, 99th Cong., 2d Sess., 132 CONG. REC. H6758 (daily ed. Sept. 12, 1986).

77. *See supra* text accompanying note 43. Professor Tribe has stated that the individual comments of Senator Lugar should not dictate finding Congress intended to preempt local actions or receive greater weight than other congress members' comments. 132 CONG. REC. S12,535 (daily ed. Sept. 15, 1986) (memorandum of Professor Tribe's argument that giving Senator Lugar's "isolated comments" a determinative effect would "violate the spirit" of INS v. Chadha, 462 U.S. 919 (1983), which struck down the single house legislative veto).

78. *See supra* note 3 and text accompanying notes 61-66.

79. 22 U.S.C.A. § 5011 (West Supp. 1988).

80. *Id.* § 5061.

CAAA and the fact that North Carolina's Divestment Act is based on the Sullivan Principles combine to make a strong case that the Divestment Act would survive a preemption attack.[81]

The commerce clause of the United States Constitution poses a more serious threat to the North Carolina Act.[82] Under a commerce clause analysis, the constitutionality of the Act probably will turn on whether the state qualifies as a market participant when it invests state retirement and trust funds.[83] If the state does qualify, the commerce clause inquiry ends.[84] If the state does not qualify as a market participant, the commerce clause analysis must proceed under the balancing test enunciated in *Pike v. Bruce Church, Inc.*[85] Whether the Act could survive the *Pike* analysis is uncertain.

The United States Supreme Court enunciated the market participant doctrine in *Hughes v. Alexandria Scrap Corp.*[86] There the Court considered whether the state of Maryland was involved in the scrap metal market as a participant or as a regulator of the market when it paid scrap processors a bounty for each abandoned car for which they showed a Maryland title existed.[87] Because in-state scrap dealers had to provide less documentation to prove title, they were treated more favorably than out-of-state processors.[88] The Court concluded that Maryland was not acting as a regulator and that "[n]othing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."[89]

The Court elaborated on the market participant doctrine in *Reeves, Inc. v. Stake*[90] and *White v. Massachusetts Council of Construction Employers, Inc.*[91] In *Reeves* the Court stated that it had developed the doctrine out of a recognition that the traditional commerce clause analysis ignored several important qualities of state proprietary actions. First, the tenth amendment and state sovereignty— the role of each state " 'as guardian and trustee for its people' "—

81. Appellants in the Baltimore divestment ordinance case implied strongly in their brief that had the Baltimore ordinance been based on the Sullivan Principles, allowing companies to demonstrate progress in their labor practices, it would have been safe from a preemption challenge. After characterizing the CAAA as making the Sullivan Principles a "federally-mandated Code of Conduct binding on American employers," appellants criticized the Baltimore ordinance for its lack of flexibility in recognizing when a company makes progress on meeting the Code's standards. Brief for Appellants at 44-46, Board of Trustees of the Employees' Retirement Sys. v. Mayor of Baltimore, No. 87-95 (Md. filed Oct. 9, 1987); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-22, at 469 n.9 (1988) (local and state divestment acts not preempted by the CAAA).

82. U.S. CONST. art. I, § 8, cl. 3.

83. Blaustein, *supra* note 6, at 80.

84. White v. Massachusetts Council of Constr. Employers, Inc., 460 U.S. 204, 208 (1983).

85. 397 U.S. 137 (1970). In *Pike* the Court wrote: "Where the statute regulates evenhandedly to effectuate a legitimate public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

86. 426 U.S. 794 (1976).

87. *Id.* at 797.

88. *Id.* at 802.

89. *Id.* at 810.

90. 447 U.S. 429 (1980).

91. 460 U.S. 204 (1983).

warranted a different stance than which the *Pike* approach provided in analyzing state actions.[92] The Court noted that this sensitivity was required not only when "integral operations" of the state were implicated, but in additional areas in which "[s]tates may fairly claim some measure of a sovereign interest in retaining freedom to decide how, with whom, and for whose benefit to deal."[93] Second, the Court counseled restraint in light of the " 'long recognized right of trader . . . engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' "[94] When states act as participants they should "similarly share existing freedoms from federal constraints."[95] Third, the Court noted that the issues state legislatures would be considering relative to their proprietary activity would "often . . . be subtle, complex, politically charged, and difficult to assess under traditional Commerce Clause analysis."[96] As a result, Congress was more appropriately situated than the judiciary to address these issues.[97]

White further contributed to an understanding of the market participant doctrine by addressing, although not conclusively, the scope of the doctrine. In *White* the Court addressed the question whether the Mayor of Boston's order that "all construction projects funded in whole or in part by city funds, or funds which the city had the authority to administer, should be performed by a work force consisting of at least half bona fide residents of Boston" fell within the market participant doctrine.[98] The Court held that when the city used only its own funds for public construction projects, it acted as a market participant.[99] The Court stated that governments did not have free rein to develop restrictions that "reach beyond the immediate parties with which the government transacts business."[100] It concluded, however, that the outer limit was not defined by "formal privity of contract."[101] Because the mayor's order "cover[ed] a discrete, identifiable class of economic activity in which the city [was] a major participant," the order fell within the limits of the doctrine.[102]

Proponents of divestment argue simply that when a state is engaged in the buying and selling of securities, it is involved in the investment market as a participant,[103] not as a regulator. As an investment market participant, the

92. *Reeves*, 447 U.S. at 438.
93. *Id.* at 438 n.10 (citing *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 1, 56, 63 (1976)).
94. *Id.* at 438-39 (quoting United States v. Colgate & Co., 250 U.S. 300, 307 (1919)).
95. *Id.* at 439.
96. *Id.*
97. *Id.*
98. *White*, 460 U.S. at 205-06.
99. *Id.* at 214-15.
100. *Id.* at 211 n.7.
101. *Id.*
102. *Id.*
103. Board of Trustees of the Employees' Retirement Sys. v. Mayor of Baltimore, No. 86365065/CE-59858, slip op. at 9-10 (Cir. Ct. Balt. July 17, 1987) (holding market participant doctrine applies to investment activity); Brief for Appellees at 36-37, *Board of Trustees*, (No. 87-95); Lawyers' Committee, *supra* note 6, at 12-15. See also the pre-*Alexander Scrap* decision, American Yearbook Co. v. Askew, 339 F. Supp. 719, 725 (M.D. Fla.) ("Trade regulations are clearly subject to Commerce Clause restrictions, but statutes that merely specify the conditions of state purchases are not."), *aff'd*, 409 U.S. 904 (1972).

state has the right, as does a private investor, to decide with whom it will conduct its business.[104] Antidivestment voices argue that the state is not engaged in a proprietary action as a market participant when it dictates to a private industry how to conduct its business. Opponents of divestment argue the state divestment action is, therefore, purely regulatory.[105]

The Court's decision in *Wisconsin Department of Industry, Labor and Human Relations v. Gould, Inc.*[106] is helpful in forecasting how a court might view North Carolina's involvement with the securities industry. In *Gould* the state of Wisconsin enacted legislation that forbade the state's purchasing agents from buying products from manufacturers found guilty of three separate National Labor Relations Act violations within a five year period.[107] The state raised a market participant doctrine defense to the preemption challenge. In this context the Court addressed the nature of regulatory versus proprietary state activity.[108] Holding that the Wisconsin action was not proprietary, the Court stated that "by flatly prohibiting state purchases from repeat labor law violators Wisconsin 'simply is not functioning as a private purchaser of services'; for all practical purposes, Wisconsin's debarment scheme is tantamount to regulation."[109] *Gould*, therefore, suggests that when a statute has qualities of finality and inflexibility, it will probably be viewed as regulatory.

Gould presented a situation analogous to North Carolina's Divestment Act in that it involved a state legislature enacting a specific criterion for deciding from whom the state could procure goods or services. The similarity stops there, however. North Carolina does not use the Sullivan Principles to "flatly prohibit" investments in particular companies. It uses the Principles flexibly. Should a company not meet the appropriate Sullivan rankings in one year, it is quite possible for it to meet them in subsequent years and thereby regain eligibility for investment consideration by the state. Because it is within a *company's* control whether or not to meet the state's investment criteria, the criteria do not act as a penalty, a prohibition, or regulation, and the state, therefore, qualifies as a market participant when it purchases and sells stocks for those funds under its control. Moreover, the Divestment Act covers only the state's involvement in buying and selling securities, an action that would appear to meet the *White* test

104. *Board of Trustees*, No. 86365065/CE-59858, slip op. at 9-10; Brief for Appellees at 36-37, *Board of Trustees* (No. 87-95); Lawyers' Committee, *supra* note 6, at 12-15.

105. Brief for Appellants at 54, *Board of Trustees* (No. 87-95); Blaustein, *supra* note 7, at 84. It is apparent that how the question is framed can be crucial to the holding on this issue. A focus on a state's right to decide with whom it will conduct business by virtue of its criteria is vastly different from a focus on the state as dictating to business how it can become a candidate for a state's business. *Cf.* L. TRIBE, *supra* note 81, § 6-11, at 433 (market participant-regulator decision may depend on how facts or transaction is cast). Regulatory action includes preventing the sale or prohibiting the flow of "privately owned articles of trade" in interstate commerce or requiring certain conditions to be met before the sale or flow of goods within a state may occur. *Reeves*, 447 U.S. at 433 n.4, 435, 437 (citing examples of regulatory behavior).

106. 106 S. Ct. 1057 (1986).

107. *Id.* at 1059-60. Such violators' names would remain on a list the state maintained for three years. *Id.* at 1060 n.1.

108. *Id.* at 1062-64.

109. *Id.* at 1062-63 (quoting Gould, Inc. v. Wisconsin Dep't of Indus., Labor & Human Relations, 750 F.2d 608, 614 (7th Cir. 1984) (citation omitted)).

of a "discrete, identifiable class of economic activity in which the state is a major participant."[110]

Critics of divestment also attack the appropriateness of applying the market participant theory by arguing that it applies only when a state action operates to favor *that state's citizens economically.*[111] Although some of the market participant cases use language from which that requirement might fairly be implied,[112] a few commentators have interpreted the holding of *Alexandria Scrap* to support a state's goal of promoting state aesthetic and environmental concerns.[113] Additionally in *K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission.*[114] the New Jersey Supreme Court acknowledged that the market participant doctrine could apply to the public health and welfare interests of the state.[115] These holdings, combined with the Court's original explanations for why situations where the state was acting in a market participant capacity required different analysis than the traditional commerce clause situation,[116] demonstrate that the market participant doctrine probably applies to the Divestment Act, and the state, like a private investor, may decide with whom it wishes to conduct its business, using criteria that will best promote the goals it wishes to attain.[117]

In addition to its grant of congressional power over interstate commerce, the commerce clause grants Congress power "to regulate Commerce with foreign Nations."[118] The Divestment Act directly implicates the foreign commerce clause because it applies its criteria to companies incorporated outside of the United States as well as to those incorporated within the United States.[119] Foreign commerce clause analysis varies from the interstate commerce analysis in

110. *White*, 460 U.S. at 211 n.7.

111. *See* Brief for Appellants at 52-53, *Board of Trustees* (No. 87-95).

112. *See White*, 460 U.S. at 211 n.7 (everyone affected by mayoral order "is, in a substantial if informal sense, 'working for the city' "); Reeves, Inc. v. Stake, 447 U.S. 429, 430 & n.1 (1980) (construction of cement plant and subsequent confinement of sale of cement to residents of the state was rooted in the history of progressive political party and in the sense that cement shortages were "threatening the people of this state"); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (commerce clause does not prohibit a state from "participating in the market and exercising the right to favor its own citizens over others").

113. *Board of Trustees*, No. 86365065/CE-59858, slip op. at 11 (citing *Alexandria Scrap*, 426 U.S. at 809); Brief for Appellees at 36-37, *Board of Trustees* (No. 87-95). *Contra Reeves*, 447 U.S. at 442 n.16 (characterizing environmentalism as state's goal in *Alexandria Scrap* as "oversimplification;" "[t]he central point of *Alexandria Scrap* was that the demonstration of an 'independent justification' was unnecessary to sustain the State's program").

114. 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

115. *Id.* at 298, 381 A.2d at 787.

116. *See supra* notes 90-97 and accompanying text.

117. A number of congressional leaders voiced this opinion repeatedly during the debates on the CAAA, although it is likely that they did not have either the commerce clause or the market participant theory in mind. Their statements more probably reflect the common-sense notion that the states should not be told how they can invest their own money. Because divestment represents a highly emotional matter on a number of fronts, including states' rights, general public sentiments relating to divestment issues should be borne in mind. *See* 132 CONG. REC. H6760, H6764, H6778 (daily ed. Sept. 12, 1986) (statements of Representatives Gray, Weiss, Levine, and Wolpe); *see also* L. TRIBE, *supra* note 81, § 6-21, at 469 (state is "free to pass laws forbidding investment of the state's pension funds in companies that do business with South Africa" under market participant doctrine).

118. U.S. CONST. art I, § 8, cl. 3.

119. N.C. GEN. STAT. § 147-69.2(b)(8) (1987).

that it is more "rigorous" and may well preclude a state from invoking the market participant doctrine.[120] To withstand a foreign commerce clause challenge, the general assembly would need to amend the Act to limit its scope to companies incorporated only within the United States.

The more extensive scrutiny that has evolved for foreign commerce clause cases requires two inquiries. One inquiry is whether the state law "impair[s] federal uniformity in an area where federal uniformity is essential."[121] The character of this inquiry is one of preemption[122] and is not involved in considering North Carolina's Divestment Act.[123] The second inquiry is whether the state law "prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments.' "[124] A state law at odds with "federal policy will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive."[125] Under the "one voice" test, the Court has said, "[I]f a state [law] merely has foreign resonances, but does not implicate foreign affairs," the Court will not infer that the subject requires uniformity among the states without a direct instruction from Congress.[126]

As a preliminary matter, it must be noted that the foreign commerce clause applies to regulation.[127] As discussed earlier, North Carolina's Act should not be held to be a regulation because it is not tantamount to a total prohibition under the *Gould* test.[128] The Act covers a discrete economic activity under the *White* test—buying and selling securities—and involves an activity in which the state acts " 'like private individuals and businesses [and should, as a result], enjoy[ ] the unrestricted power to . . . determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.' "[129]

Beyond this argument, however, it is necessary to decide if the Act rises to the level of "implicating foreign affairs." One analysis is required to answer this question as it relates to companies incorporated in the United States, and a second analysis is required for the Act's application to companies incorporated outside the United States. The next issue to be addressed is whether the Act

120. *See* South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 95-96 (1984) (*Reeves* decision does not allow states complete freedom to adopt any regulations they please); Reeves, Inc. v. Stake, 447 U.S. 429, 437-38 n.9 (1980) ("Commerce Clause scrutiny may well be more rigorous when a restraint on foreign commerce is alleged").

121. Japan Line, Ltd. v. City of Los Angeles, 441 U.S. 434, 448 (1979).

122. *Id.*

123. See *supra* notes 43-81 and accompanying text for preemption discussion.

124. *Japan Line*, 441 U.S. at 451 (quoting Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976)). A further concern involves the risk of multiple taxation which is not relevant to the divestment issue. *Id.* at 446.

125. Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983).

126. *Id.*

127. *See supra* note 118 and accompanying text; *see also* Brief for Appellees at 60, *Board of Trustees* (No. 87-95) (Baltimore ordinance not violative of foreign commerce clause because it "govern[s] . . . [the] investment of City funds" and does not regulate foreign commerce).

128. *See supra* notes 106-09 and accompanying text.

129. Reeves, Inc. v. Stake, 447 U.S. 429, 439 n.12 (1980) (quoting Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940)); Brief for Appellees at 60, *Board of Trustees* (No. 87-95); *see supra* notes 98-110 and accompanying text.

implicates foreign affairs when it prescribes investment criteria that United States companies must meet before the state can consider investing in them.

The appropriate precedent for this situation is *Container Corp. of America v. Franchise Tax Board*[130] This case involved a challenge to a California statute that authorized the state to tax income of domestic corporations without regard to whether they had foreign subsidiaries.[131] The crucial question for the Court was whether the tax would implicate foreign policy issues by "offending" a foreign nation or causing "significant foreign retaliation."[132] The Court prefaced its discussion by noting its lack of competence in second guessing how a foreign nation might react to a state's actions. As a consequence, its decision could be guided only by "general observations about the imperatives of international trade and international relations."[133] The Court placed great emphasis on the fact that the tax was imposed on domestic, and not foreign, corporations.[134] It also emphasized that the "legal incidence" of the tax would fall only on domestic corporations.[135] The Court concluded that any offense to a foreign nation would be indirect, based solely on a foreign country's general interest in the state action and, therefore, would be "attenuated at best."[136] The Court further emphasized that the "nuances" of foreign policy were best left to the control of the executive and legislative branches of government. Because Congress had shown no desire to control a state's domestic corporation tax plan and the federal government had not filed an amicus brief in the case, the Court concluded that the state statute was "in reality of local rather than international concern."[137]

As far as North Carolina's Divestment Act affects domestically incorporated companies, it parallels *Container Corp.* First, the statute's effect relates to American companies. Second, any effect on South Africa is collateral and would involve the courts in second guessing that country's reactions. The economic and trade sanctions the CAAA imposes on South Africa[138] would compel a court to find that the Divestment Act could not realistically result in a "significant retaliatory" response from South Africa. Third, as the preemption discussion above demonstrated, Congress took no steps to preclude states from enacting divestment statutes related to pension fund investments, thus supporting a view that Congress considers the issue of retirement fund investment to be one of local concern.[139] Finally, the Divestment Act presents essentially the same message to American companies involved in South Africa (and to the Republic of South Africa for that matter) as does the CAAA.[140] The North Caro-

130. 463 U.S. 159 (1983).
131. *Id.* at 162-63.
132. *Id.* at 194.
133. *Id.*
134. *Id.* at 195.
135. *Id.*
136. *Id.*
137. *Id.* at 195-96.
138. See *supra* text accompanying notes 53-60 for listing of the federal bans on trading with South Africa.
139. *See supra* notes 69-77 and accompanying text.
140. *See supra* notes 78-80 and accompanying text.

lina Divestment Act, as it applies to domestically incorporated companies, does not rise to the level of implicating foreign affairs by presenting a danger of causing offense or violating the one voice standard.[141]

The next inquiry—whether the Divestment Act's application to companies incorporated in a foreign nation mandates a finding that it implicates foreign affairs— presents difficulties. This inquiry calls for a comparison of the Court's rationale in *Container Corp.* with its holding in *Japan Line, Ltd. v. City of Los Angeles.*[142] *Japan Line* was the forerunner of *Container Corp.* and also involved a state statute providing for a tax on corporations. Unlike the tax considered in *Container Corp.*, the *Japan Line* tax was imposed on property of both domestic and foreign incorporated companies. This fact contributed to the finding that the statute directly affected foreign commerce and could reasonably result in offense to foreign nations.[143] The Court in *Container Corp.* partially relied on this distinction in holding that the income tax limited to domestic corporations was constitutional.[144] *Japan Line* and *Container Corp.* argue strongly for the position that the general assembly should revise the Divestment Act to limit its application solely to companies incorporated domestically. With this change, the Divestment Act would refrain from directly affecting relations with the nation's foreign trading partners and so would be more likely to avoid a foreign commerce clause challenge.

The final constitutional challenge to the Divestment Act is whether Congress' power over foreign affairs matters should prohibit the state from enacting a divestment act. Professor Louis Henkin has identified both express and implicit sources of Congress' power over foreign affairs matters.[145] No explicit constitutional limitation applies to the divestment context.[146] The question therefore revolves around whether an implicit limitation bears on the state's involvement with foreign nations through the Divestment Act. Beyond the implicit limitations the commerce clause places on states,[147] Henkin describes a "larger [limiting] principle" of federal control over foreign affairs.[148] This second implicit limitation is the doctrine proscribing state action in foreign affairs

141. *But see* Brief for Appellants at 57, *Board of Trustees*, No. 87-95 (risk of offense is great because divestment ordinance focuses on one nation); Brief for Appellants at 32, Lubman v. Mayor of Baltimore, (No. 87-104) (danger great because of cumulative effect of divestment statutes); VIRGINIA Note, *supra* note 6, at 837 (discrimination against one nation makes "offense a virtual certainty and retaliation a strong possibility").

142. 441 U.S. 434, 451 (1979). The *Japan Line* decision did not purport to apply to a tax imposed on "domestically owned instrumentalities engaged in foreign commerce." *Id.* at 444 n.7.

143. *Id.* at 444 & n.7, 452-54.

144. *Container Corp.*, 463 U.S. at 187-89, 195. In *Board of Trustees* it was significant to the Baltimore Circuit Court judge's decision that the Baltimore ordinance applied only to "domestically owned companies engaged in foreign commerce, rather than foreign companies doing business in the United States." *Board of Trustees*, No. 86365065/CE-59858, slip op. at 18.

145. L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 228-244 (1972).

146. U.S. CONST. art I, § 10 (prohibiting states from entering into treaties, alliances, and confederations; from imposing duties on imports or exports without Congressional consent and without a showing that such duties are "absolutely necessary for executing [their] inspection Laws"; and from entering into agreements with foreign countries without congressional consent).

147. *Id.* art. I, § 8, cl. 3; *see* L. HENKIN, *supra* note 145, at 234-35. See *supra* notes 118-44 for discussion of foreign commerce clause and divestment.

148. L. HENKIN, *supra* note 145, at 238.

when the federal government has *not* acted.[149] He notes this implied limitation is a "new constitutional doctrine" that emerged in the Supreme Court's 1968 decision *Zschernig v. Miller*.[150] This case has become the focus of discussions on the constitutionality of divestment acts on a foreign affairs basis.[151]

In *Zschernig* the Court considered the constitutionality of an Oregon probate statute. The statute contained a reciprocity provision requiring that American citizens be able to take property left to them in a foreign country in the same manner as that country's citizens before foreign nationals could receive American based property. The statute also required that "foreign heirs [be able] to receive the proceeds of Oregon estates 'without confiscation.' "[152] Although a treaty existed that potentially could have answered the constitutionality issue on a preemption ground, the Court framed the issue solely in terms of whether the statute, as applied, infringed on the power of the federal government to handle foreign affairs matters when there had been no federal action.[153] The Court's foreign affairs power discussion drew heavily on statements from an earlier case in which a state statute involving foreign affairs was challenged on a preemption ground.

> "[T]he supremacy of the national power in the general field of foreign affairs . . . is made clear by the Constitution, was pointed out by the authors of The Federalist in 1787, and has since been given continuous recognition by this Court . . . . For local interests the several States of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power. Our system of government . . . requires that federal power in the field affecting foreign relations be left entirely free from local interference."[154]

Against this backdrop, the *Zschernig* Court declared that the Oregon statute's confiscation inquiry required courts to examine "whether there is in the actual administration in the particular foreign system of law any element of confiscation."[155] This demanded "minute inquiries" into how the foreign nation actually applied its laws and "into the credibility of foreign diplomatic statements."[156] Such excursions went beyond the permissible "routine reading" standard previously enunciated.[157]

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149. L. HENKIN, *supra* note 145, at 238-44.

150. 389 U.S. 429 (1968); L. HENKIN, *supra* note 145, at 238-39.

151. Board of Trustees v. Mayor of Baltimore, No. 86365065/CE-59858, slip op. at 11-16; Brief for Appellants at 13-16, Lubman v. Mayor of Baltimore, No. 87-104; Brief for Appellants at 35-41, *Board of Trustees* (No.87-95); Brief for Appellees at 48-57, *Board of Trustees* (No. 87-95); Blaustein, *supra* note 6, at 91-94; *see* Lewis, *supra* note 6, at 509-16; CINCINNATI Note, *supra* note 6, at 568-74; PACIFIC Note, *supra* note 6, at 227-28; VIRGINIA Note, *supra* note 6, at 842-46.

152. *Zschernig*, 389 U.S. at 431 (quoting OR. REV. STAT. § 111.070 (1957)).

153. *Id.* at 443, 457 (Harlan, J., concurring).

154. Hines v. Davidowitz, 312 U.S. 52, 62-63 (1941) (quoting The Chinese Exclusion Case, 130 U.S. 581, 606 (1889)) (footnotes omitted).

155. *Zschernig*, 389 U.S. at 434.

156. *Id.* at 435.

157. *Id.* at 433 (characterizing the Court's ruling in Clark v. Allen, 331 U.S. 503 (1947)). *Clark* is discussed *infra* at text accompanying notes 174-83.

The case does not fully clarify the scope of the doctrine of federal control over foreign affairs. The statements the Court drew from the preemption arena suggest complete inflexibility, a per se standard that any state action involving foreign affairs in any way will automatically be found unconstitutional. Opponents of divestment statutes interpret the case as presenting such a per se rule.[158]

The weight of authority, however, is against interpreting *Zschernig* as presenting a per se rule. Professor Henkin has stated that *Zschernig*'s scope "is yet to be determined."[159] Another commentator has said that the answer to whether *Zschernig* stands for a per se holding can "not be found in restudying opinion."[160] A New Jersey court has interpreted *Zschernig* to permit "state regulation which does not result demonstrably in a significant and direct impact upon foreign affairs."[161] An Illinois court has stated that it would be an "oversimplification and wrong to assert that no State law which has any impact whatsoever upon foreign relations may ever stand."[162] Language in *Zschernig* itself also appears to leave room for states to act in ways that affect foreign affairs, as long as the action would have only an "incidental or indirect effect in foreign countries,"[163] not cause "great potential for disruption or embarrassment,"[164] or would not "impair the effective exercise of the Nation's foreign policy."[165]

The issue that arises, therefore, is what level of state action touching on foreign affairs is permissible. The answer is far from clear. Professor Henkin has suggested that it may emerge from developing a new balancing test that weighs the state's interest in a particular action against that action's potential to impair the federal government's ability to deal with foreign affairs.[166] This Note acts on that suggestion and proposes such a balancing test, identifying and applying its elements to several foreign affairs cases and North Carolina's Divestment Act.

Before embarking on a foreign affairs analysis, it is essential to inquire whether the federal government has acted in the area which the state action addresses. If the federal government has acted and the state law conflicts with it, preemption principles should control to declare the state action unconstitutional.[167] Several cases cited for foreign affairs analysis purposes are really pre-

158. *See* Brief for Appellants at 14, *Board of Trustees* (No. 87-104) (once it is established that a state statute has a foreign affairs "purpose," it is automatically invalid); Blaustein, *supra* note 6, at 93 (asking whether *Zschernig* established a per se rule); *cf.* VIRGINIA Note, *supra* note 6, at 846 (*Zschernig* "unmistakably" forbids states from condemning foreign nations). *Contra* Brief for Appellees at 51, *Board of Trustees* (No. 87-95) ("*Zschernig* is precedent of limited force").

159. L. HENKIN, *supra* note 145, at 238.

160. Blaustein, *supra* note 6, at 93.

161. K.S.B. Tech. Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 293, 381 A.2d 774, 784 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

162. Springfield Rare Coin Galleries, Inc. v. Johnson, 115 Ill. 2d 221, 233, 503 N.E.2d 300, 306 (1986).

163. Zschernig v. Miller, 389 U.S. 429, 434 (1968).

164. *Id.* at 435.

165. *Id.* at 440.

166. L. HENKIN, *supra* note 145, at 241 (comparing the commerce clause balancing test); Lewis, *supra* note 6, at 509, 516 (discussing parallel to commerce clause); *cf. Zschering*, 389 U.S. at 441.

167. *See Zschernig*, 389 U.S. at 443 (Harlan, J., concurring).

emption cases and, therefore, are not particularly fitting precedents for foreign affairs issues.[168]

If the preemption analysis does not serve to strike down a state statute, two possibilities emerge. First, the federal government has not acted in the area with which the state action is concerned, or second, the government has acted, but insufficient evidence exists to find the state law is preempted. The distinction between these alternatives will become important later in applying the proposed balancing test.[169]

A second major distinction within the balancing test is whether the state law involves the state acting in a regulatory or a proprietary role. Regulatory roles, as defined under commerce clause analysis, generally involve state taxing measures or efforts that impede free trade by providing for embargoes or boycotts of goods or services, or otherwise restricting how or whether trade can be conducted within a state's borders.[170] A state acts in a proprietary capacity when it enters the marketplace as a purchaser of goods or services for its own use.[171] The distinction between regulatory and proprietary capacities is important because courts have generally acknowledged that "[l]ike private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."[172]

The majority of cases involving a foreign affairs challenge to state action involve regulatory behavior. Two of the leading cases, *Zschernig*[173] and *Clark*

168. *See, e.g.*, Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (Court held the Pennsylvania Alien Registration Act stood in conflict with the federal Alien Registration Act and was, as a result, preempted); *see also* Blaustein, *supra* note 6, at 91 (result in *Hines* may be explained "as much by the Supremacy Clause as by any inherent inability of states to act in any matter affecting foreign affairs"). The Court explicitly left unanswered whether the federal power over foreign affairs, "exercised or unexercised, is exclusive." *Hines*, 312 U.S. at 62. Clark v. Allen, 331 U.S. 503 (1947), properly disposed of one aspect of the constitutionality of a California probate statute that required reciprocity by stating that when a pertinent federal treaty's provisions were in conflict with the state's provisions, the federal law took precedent over the contrary state law. *Id.* at 506 n.1, 508-10, 516. Tayyari v. New Mexico State Univ., 495 F. Supp. 1365 (D. N. Mex. 1980), could have been handled solely on a preemption basis. In this case the New Mexico State University Board of Regents had passed a resolution denying Iranian students admission or readmission to the University until American hostages in Iran were released unharmed. *Id.* at 1368. In discussing the constitutionality of the action, the court stated "[t]he federal government has already spoken with respect to how Iranians in our land should be treated." *Id.* at 1378. The government had taken no action to revoke Iranians' visas; therefore, the university motion intruded on that federal position. *Id.*

169. *See infra* text following note 210.

170. Reeves, Inc. v. Stake, 447 U.S. 429, 435, 437, 445 (1980) (describing state regulatory actions).

171. *Id.* at 435, 437.

172. Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940) (establishing federal government's right to require those from whom it buys materials to pay their employees minimum wage). The Court in *Lukens Steel* specifically characterized the federal act requiring vendors to pay minimum wages as not being an "exercise by Congress of regulatory power over private business or employment." *Id.* at 128; *see also Reeves*, 447 U.S. at 439 n.12 (citing *Lukens Steel* as support for a state government's right to fix conditions on state purchases); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 824 (1976) (Brennan, J., dissenting) (state acting in a proprietary capacity of "purchasing items of commerce for end use" falls outside commerce clause restraints).

173. *See supra* notes 150-57 and accompanying text.

v. Allen,[174] involved state statutes regulating descent and distribution of probate estates.

One issue before the *Clark* court was whether a California probate statute which contained a reciprocity provision like that in *Zschernig*, but without the *Zschernig* statute's confiscation element,[175] represented a facially unconstitutional intrusion by the state into foreign affairs.[176] The Court characterized as "farfetched" the argument that the statute "promote[d] the right[s] of American citizens to inherit abroad by offering to aliens reciprocal rights of inheritance in California."[177] The Court then proceeded to discuss the constitutionality of the statute from three perspectives. First, probate laws were matters of "local law."[178] Second, no federal law, treaty, or policy existed that preempted the state's law on the issue of the disposition of personal property.[179] Third, the state law did not violate any express constitutional provision concerning state involvement with foreign nations.[180] Concluding on the basis of this analysis that the statute was constitutional, the Court stated that although the statute would "have some incidental or indirect effect in foreign countries . . . [t]hat is true of many state laws which none would claim cross the forbidden line."[181] This aspect of the *Clark* analysis thus supports the proposition that a state law relating to a matter of foreign affairs can withstand a foreign affairs constitutional challenge even when the government has not acted if the law deals with a matter traditionally local and has only an indirect effect on foreign affairs.[182] The holding was later characterized by the Court in *Zschernig* as permitting a "routine reading" of foreign law.[183]

New York Times Co. v. City of New York Commission on Human Rights[184] is another regulatory case. There the court addressed whether the New York Times had aided or abetted in violating a city antidiscrimination law by publishing advertisements for employment in the Republic of South Africa.[185] The law was clearly regulatory in nature. The Commission on Human Relations held, after conducting an inquiry on South Africa's employment practices and laws, that the use of "South Africa" in employment advertisements was "code" for the "principle of white supremacy."[186] The New York Court of Appeals found

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

175. *Zschernig*, 389 U.S. at 430-31.

176. *Id.* at 508, 516. See *supra* note 168 for a brief statement concerning the Court's initial preemption inquiry.

177. *Clark*, 331 U.S. at 516-17.

178. *Id.* at 517.

179. *Id.*

180. *Id.*

181. *Id.*

182. Lewis, *supra* note 6, at 513; *see* CINCINNATI Note, *supra* note 6, at 572.

183. *Zschernig*, 389 U.S. at 433.

184. 41 N.Y.2d 345, 361 N.E.2d 963 (1977).

185. *Id.* at 346, 361 N.E.2d at 964. The law prohibited employers from printing " 'any statement, advertisement or publication [which] express[ed], directly or indirectly, any limitation, specification or discrimination as to . . . race . . . or any intent to make such limitation . . . .' (Administrative Code, § B1-7.0, subd 1, par [d].)." *Id.* at 349-50, 361 N.E.2d at 966.

186. *Id.* at 348, 361 N.E.2d at 965.

that "South Africa" was not such a code and, therefore, the paper had not aided in violating the antidiscrimination law by printing advertisements that allegedly implied discrimination. The court stated, however, that finding was "not at the heart of [the] case."[187] The real issue, in the court's view, was that the Commission's decision in effect "impose[d] an economic boycott . . . [on] the Republic of South Africa."[188] Thus, the application of the antidiscrimination law amounted to the city adopting its own foreign policy—an intrusion on the federal government's authority over foreign affairs.[189] The court further stated that the "commission [had] conducted an inquiry that might have been considered offensive by the Republic of South Africa and which might have been an embarrassment to those charged with the conduct of our Nation's foreign policy."[190]

Springfield Rare Coin Galleries, Inc. v. Johnson[191] presents another case of a state regulatory action affecting the Republic of South Africa. In this case the state of Illinois had enacted a tax exemption for legal tender, including gold, issued by all governments except South Africa.[192] The court ignored the Federal Anti-Apartheid Act insofar as it affected prospectively the importation of South African krugerrands[193] and, therefore, addressed only whether "Illinois may impose a discriminatory tax on the sale of products of a single foreign nation as an expression of disapproval of that nation's policies, and as a disincentive to invest in that nation's products."[194] The court held the statute unconstitutional on three grounds. First, the law was motivated by disapproval of South Africa's apartheid policy.[195] Second, by focusing on a single nation, the "ability of this country to choose between a range of policy options in developing its foreign policy in relation to the Republic of South Africa would be compromised by the existence of State-sponsored sanctions which the Federal government could not remove or modify to fit changing conditions."[196] Third, the effect of the statute was to create an embargo or boycott which was "outside the realm of permissible State activity."[197]

Two cases involved a state acting in a proprietary capacity.[198] Both involved "Buy American" statutes. In *Bethlehem Steel Corp. v. Board of Commissioners of the Department of Water & Power of Los Angeles*[199] a California court considered a foreign affairs challenge to a California statute requiring that "contracts for the construction of public works or the purchase of materials for pub-

187. *Id.* at 351, 361 N.E.2d at 968.

188. *Id.*

189. *Id.* at 352-53, 361 N.E.2d at 968.

190. *Id.* at 353, 361 N.E.2d at 969. See *supra* note 164 and accompanying text for comparison of quoted language with the *Zschernig* court's language.

191. 115 Ill. 2d 221, 503 N.E.2d 300 (1986).

192. *Id.* at 225, 503 N.E.2d at 302.

193. *Id.* at 227, 503 N.E.2d at 303; *see supra* note 55 and accompanying text.

194. *Springfield Rare Coin*, 115 Ill. 2d at 227, 503 N.E.2d at 303.

195. *Id.* at 236, 503 N.E.2d at 307.

196. *Id.*

197. *Id.*

198. *See supra* notes 170-72 and accompanying text.

199. 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969).

lic use be awarded only to persons who . . . agree to use or supply materials . . . manufactured . . . [or substantially produced] in the United States."[200] The statute provided no flexibility in meeting this requirement. After reviewing the foreign affairs power, the court concluded that the statute "effectively plac[ed] an embargo on foreign products [and] amount[ed] to a usurpation by [the] state of the power of the federal government to conduct foreign trade policy."[201] Policy reasons that may have motivated the state's action were irrelevant to the court in holding the statute unconstitutional. The court also did not consider relevant whether the state law was in conflict with any federal trade policy, stating that the federal power to determine foreign trade policy "whether or not exercised, is exclusive."[202]

K.S.B. Technical Sales Corp. v. North Jersey District Water Supply Commission[203] involved a New Jersey "Buy American" statute. This statute provided that state contracts for which the state paid any portion had to use products manufactured in the United States " 'whenever available.' "[204] Another section of the statute elaborated on the "availability" stipulation by permitting nondomestic items to be used when the use of domestic products would be " 'impracticable . . . or . . . would unreasonably increase the cost.' "[205]

The court initially found that the New Jersey statute was not preempted by the General Agreement on Tariffs and Trade, an international pact to which the United States was a party.[206] It then considered whether the statute nonetheless violated the federal government's power over foreign affairs. The court found that the statute did not fall prey to the problem of evaluating the administration of foreign governments.[207] Because the statute applied to all foreign nations, it was not motivated by disagreement with a particular country's political stances or political climate.[208] Moreover, the statute provided public officials with the flexibility to purchase or use foreign products when cost, public welfare, and practicality dictated.[209] Finally, the court viewed the state action as consistent with the federal government's approach to foreign trade policy so that the state law did not have a "significant and direct impact upon foreign affairs."[210]

From these cases it is possible to identify the elements of the proposed balancing test and what effect each would have on the decisions discussed and the North Carolina Divestment Act. First, does the state law in question represent the state government acting in a regulatory or a proprietary capacity? A finding

200. *Id.* at —, 80 Cal. Rptr. at 801-02.

201. *Id.* at —, 80 Cal. Rptr. at 803.

202. *Id.* at —, 80 Cal. Rptr. at 804 n.9. The quoted phrase seems to be a direct answer to the question that the *Hines* court expressly left open. *See supra* note 168.

203. 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

204. *Id.* at 278, 381 A.2d at 776 (quoting N.J. STAT. ANN. § 52:32-1 (West 1939)).

205. *Id.* at 279, 381 A.2d at 777 (quoting N.J. STAT. ANN. § 52:33-3 (West 1939)).

206. *Id.* at 280-89, 381 A.2d at 777-82. See also *supra* notes 167-68 and accompanying text discussing the preemption analysis as a necessary prelude to conducting the foreign affairs analysis.

207. *Id.* at 291, 381 A.2d at 783.

208. *Id.*

209. *Id.* at 293, 381 A.2d at 784.

210. *Id.*

that the state is acting in a proprietary capacity should weigh heavily on the side of favoring the constitutionality of the state action. A finding that the state is engaging in a regulatory action will weigh heavily against its constitutionality. Second, has the federal government acted in the area with which the state law is concerned? A finding that the federal government has not acted should weigh heavily against the constitutionality of the state law. If the government has acted—and presuming the federal law has not preempted the state law—a court must ascertain whether Congress has granted discretion to the executive branch to carry out the federal law and if so, how much. The greater the level of discretion the federal law grants to the executive branch in carrying out the law, the greater the possibility that the existence of state and local actions on the subject could create a subtle pressure on the executive which would interfere with its ability to exercise its discretion in selecting a course of action. As a result, as the amount of discretion given to the executive branch increases, there is a correspondingly greater need to counter the ability of localities to impede the use of that discretion. Thus, high discretion will weigh against the state's ability to act in the same area.[211] If the federal government has acted, it is also important to consider whether the state act serves to reiterate federal positions. Third, does the state law effectively operate as an embargo or boycott on foreign goods or services? An affirmative answer to this question will weigh against the constitutionality of the state statute. Fourth, does the state law single out a particular nation or nations? If it does, the strength of the state's interest will be weakened. Fifth, is the state statute motivated by disapproval for a foreign country's political ideology or climate? Again, an affirmative response will weigh against the state. Finally, does the state law require more than a routine reading of foreign laws? If it does, the statute will fall prey to the shortcoming of the Oregon probate statute considered in *Zschernig*.[212]

The proposed balancing test produces results consistent with the cases discussed in the foreign affairs area. The *Zschernig* statute would be unconstitutional under the balancing test approach. The statute was regulatory in nature. The federal government had not acted. As applied, the statute was viewed as being motivated by disapproval of the political nature of foreign governments. The law required "minute inquiries" into the actual administration of a country's laws.[213] The effect of the statute was to impose an embargo of sorts on the ability of foreign citizens to receive estate proceeds. These factors overwhelm the fact that the statute applied to all foreign nations.[214] Because the proposed balancing test gives great weight to finding a state statute unconstitutional when the state action is regulatory and the federal government has not acted, the *Clark* statute would be likely to fail under the balancing test in spite of the fact that it did not require a searching inquiry into the actual administration of a

211. *Cf.* Springfield Rare Coins, Inc. v. Johnson, 115 Ill. 2d 221, 236, 503 N.E.2d 300, 307 (1986) (federal government's foreign policy options would be compromised by existence of state sanctions against foreign countries).

212. *See supra* text accompanying notes 152-56.

213. Zschernig v. Miller, 389 U.S. 429, 435 (1968); *see supra* note 156 and accompanying text.

214. See *supra* notes 150-65 and accompanying text for the discussion of *Zschernig*.

foreign nation and applied to all nations without regard to political considerations.[215] The *New York Times* decision would not change under the balancing test. The state interest was regulatory. The federal government had not acted. The law's effect was to create an economic boycott against a particular nation. In applying the law, the commission engaged in an inquiry of how the Republic of South Africa operated and what its laws were. The commission decision, therefore, resulted in singling out a nation and expressing disapproval towards its racist policies.[216] The *Springfield Rare Coin* decision also would not change by applying the balancing test. The state action was regulatory. The federal government had not acted. The statute singled out a particular country against which a boycott was imposed in order to express disapproval for that nation's policies. These factors overwhelm the fact that the statute did not require conducting a detailed inquiry into the administration of the South African government.[217]

Although the *Bethlehem Steel* decision under the balancing test would result in holding the statute unconstitutional, it would be an easy task to amend the law to make it constitutional. The state action was proprietary, thereby weighing strongly in favor of the statute. The federal government had acted and the state law was broadly consistent with that federal policy if the *K.S.B.* court's findings on these points are accepted.[218] The statute applied to all foreign nations, was not motivated by considerations of foreign ideology, and did not require any inquiry into how foreign nations conducted their governmental operations. The sole element weighing against the constitutionality of the statute—its embargo effect— easily could be amended by permitting state officials to use or purchase foreign products under reasonable circumstances.[219] It follows from the *Bethlehem Steel* discussion that the New Jersey statute in *K.S.B.* would be found constitutional under the balancing test as long as the level of federal discretion under the international trade agreement was not high.[220]

Before applying the balancing test to the North Carolina Divestment Act it is useful to note the advantages the test provides compared to current foreign affairs analysis. First, the test puts to rest the controversy over whether *Zschernig* presents a per se rule and demonstrates the fallacy of that argument.[221] Second, the test gives appropriate consideration and weight to two crucial factors: a state's sovereign interest in performing proprietary actions[222] and the level of discretion the federal government needs in carrying out its foreign affairs policy when the federal government has acted.[223] Third, the test clearly enunciates additional elements that could impede the federal govern-

215. See *supra* notes 174-83 and accompanying text for a discussion of *Clark*.
216. See *supra* notes 184-90 and accompanying text for a discussion of *New York Times*.
217. See *supra* notes 191-97 and accompanying text for a discussion of *Springfield Rare Coins*.
218. *See supra* text accompanying notes 206, 210.
219. See *supra* notes 199-202 and accompanying text for a discussion of *Bethlehem Steel*.
220. See *supra* notes 203-10 and accompanying text for a discussion of *K.S.B.*
221. *See supra* notes 158-65 and accompanying text.
222. *See supra* notes 170-72 and accompanying text.
223. *See supra* note 196 and accompanying text and text accompanying note 211.

ment's ability to conduct foreign affairs and thus provides states with guidance on how to avoid interfering with that function.[224]

In applying the balancing test to North Carolina's Divestment Act, it is clear that the Act falls within a proprietary realm and, therefore, begins with a favored status. The fact that the Act does not impose or result in an embargo or boycott, but provides some level of flexibility also weighs in favor of its constitutionality.[225] Furthermore, the Act does not require a searching inquiry into how the South African government operates. Countering these elements favoring the Divestment Act, however, are the facts that the Act expressly singles out one nation to voice dissatisfaction with the Republic of South Africa's policy of apartheid. Because the federal government has acted, the inquiry must proceed to consideration of the CAAA and the amount of discretion the federal Anti-Apartheid Act grants to the executive branch in carrying out federal policy. The fact that the CAAA itself singles out the Republic of South Africa for the express purpose of trying to eliminate its policy of apartheid should nullify the negative weight given to those same elements in the North Carolina Act. Moreover, the CAAA provides no discretion concerning how American companies are to conduct their operations in South Africa.[226] As a result, the federal government needs little protection in enacting its policy. If Congress were to amend the CAAA to provide discretion, a preemption analysis might serve to strike down the Divestment Act as might the need to protect the federal government's ability to use its discretion to respond to changing situations. In conclusion, applying the balancing test to the North Carolina Divestment Act results in finding the Act constitutional.

The constitutionality of the various divestment acts has been a focus of debate for several years. Thus far, there has been no conclusive answer to the question of their constitutionality. The greatest strength of North Carolina's Divestment Act is that it mirrors the Comprehensive Anti-Apartheid Act which Congress passed in 1986 and which incorporates the Sullivan Principles as a mandatory Code of Conduct American companies must follow in their South African operations. Because the North Carolina Divestment Act mirrors the federal Act, it should survive a constitutional challenge based on preemption as long as the state legislature amends the Act to exclude foreign incorporated companies from its scope. This change will also assist the Act in withstanding a foreign commerce clause challenge. The Act has the best chance of surviving the interstate commerce clause challenge if it is found that the state is acting as a market participant when it buys and sells securities for the funds it controls. Adoption of a new balancing test that weighs a number of factors evaluating the state's interest in deciding with whom to conduct its business against the federal power over foreign affairs should permit the North Carolina Divestment Act to withstand a foreign affairs challenge. The Divestment Act is an important means by which the State of North Carolina can voice its opinion about the

224. *See supra* text accompanying note 211.

225. *See supra* text accompanying notes 199-202.

226. *See supra* text accompanying note 63.

policy of apartheid in the Republic of South Africa. The particular means the general assembly selected to express this view is, for the most part, in keeping with constitutional mandates so that with minimal amendments North Carolina's voice may continue to be heard.

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