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Maryland Counters Apartheid: Board of Trustees v. City of Baltimore

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MARYLAND COUNTERS APARTHEID: *BOARD OF TRUSTEES v. CITY OF BALTIMORE*[1]

Board of Trustees v. Baltimore is the first opinion in the nation[2] where a state's highest appellate court has upheld the constitutionality of a municipal ordinance requiring the divestment from city workers' pension fund of investments in companies doing business in South Africa. The local law at issue in this case expressed the moral outrage of the citizens of Baltimore against the system of apartheid and translated this outrage into concrete action to direct the City's investments away from enterprises connected with South Africa.

Other jurisdictions have passed statutes to express anti-apartheid sentiments, but not all have survived intensive judicial scrutiny. The Baltimore Ordinance may serve as a blueprint for citizens in other state or local jurisdictions to articulate similar attitudes and effect positive results. In fact, one commentator estimates that if all the state and local legislation relating to divestment of United States funds in South Africa were enacted, a cumulative liquidation of more than $17.8 billion worth of investments in banks and companies with business in South Africa would result.[3]

The purpose of this note is to synthesize the complex array of factual and legal issues facing the Maryland Court of Appeals, to place this decision within the context of other state and local divestment legislation, and to offer some insight on how this particular decision may affect the trend of the law. Part I sets out the facts of the case. Part II analyzes the treatment of the issues by the Maryland Court of Appeals. Part III briefly compares the Baltimore Ordinance to legislation in other state jurisdictions. Part IV discusses the impact of this case on United States foreign policy.

I. FACTS OF THE CASE

A. The Divestiture Ordinance

On July 3, 1986, the Mayor of Baltimore signed Ordinance Num-

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1. 317 Md. 72, 562 A.2d 720 (1989).

2. Feeley, *CA Rules Baltimore City Divestment Law is Legal*, Daily Record, Sept. 5, 1989 at 1, col. 3

3. Lewis, Kevin P. *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L. REV. 469, 473-475 (1989). This section of the article describes the various statutes that have been enacted and their total estimated impact on investments in South Africa.

ber 765 as an amendment to the City Code.[4] It provides that no funds of the Employees Retirement System (ERS) and the Fire and Police Retirement System (F&P) "shall remain invested in, or in the future shall be invested in banks or financial institutions that make loans to South Africa or Namibia[5] or companies 'doing business' with those countries."[6] Later, to avoid a possible oversight, the City Council passed, and the Mayor signed, Ordinance Number 792 which applied the City's divestiture program to the Elected Officials Retirement System (EOS).[7]

The Ordinance requires that organizations doing business with or in South Africa "shall be identified by reference to the most recent annual report of the Africa Fund entitled 'Unified List of United States companies with Investments or Loans in South Africa and Namibia.' "[8] The Ordinance further stipulates that the divestiture program shall occur within a two-year period, beginning January 1, 1987. The Board of Trustees for each of the systems would be empowered to suspend the program during this two-year transition period for a maximum of ninety days if the following specific findings are made: (1) the rate of return on the funds is substantially lower than the average annual earn-

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4. BALTIMORE, MD., CITY CODE, art. 22, § 7 (a)(13) (1987) (1983 & Supp. 1987).

5. Since 1921 until March 21, 1990, Namibia or "South West Africa" was a territory administered by South Africa. In November 1989, Namibia held free, democratic elections and is currently in the process of adopting a new constitution. In Board of Trustees v. Baltimore, the Court included Namibia in its reference to South Africa. It is unclear whether the Trustees will be required to divest funds from companies doing business exclusively in or with Namibia after Namibia's independence. Presently, companies doing business in or with Namibia are identified through correspondence with the United Nations Office of the Commisssion for Namibia and the United Nations Center for Transnational Corporations. *See*, Board of Trustees v. Baltimore, 317 Md. at 80-81, n. 4, 562 A.2d at 724.

6. BALTIMORE, MD., CITY CODE, art. 22, § 23(b) (1987) (1983 & Supp. 1987).

7. The total value of the three pension systems is approximately $1.2 billion. Of the total, 40-50% of the funds are invested in either equity or common stock, and 40-50% are invested in fixed income instruments or cash and short-term equivalents. Board of Trustees v. Baltimore, 317 Md. 79-80. 562 A.2d at 723.

Each of the City's three pension funds is administered by a separate Board of Trustees which is reponsible for ensuring that members and beneficiaries ultimately receive the benefits to which they are entitled, including specific benefits and "variable" benefits which depend on the rate of return of the funds. Under the variable benefits program, if the rate of return exceeds 7.5%, then the amount greater than 7.5% and less than 10% goes to the payment of additional benefits. If the rate of return exceeds 10%, then one-half of the amount over 10% goes toward the payment of additional benefits, and the remaining half goes to Baltimore City. *Id.* at 80, 562 A.2d at 723.

8. *Id.* at 80-81, 562 A.2d at 724.

ings on the funds over the past five years; (2) continued divestiture under the Ordinance will be inconsistent with generally accepted investment standards for conservators of pension funds, notwithstanding the Ordinance; and (3) divestiture under the program will cause financial losses to the funds.[9]

B. The Challenge to the Ordinance

On December 31, 1986, Trustees for each of the three pension systems and two employee beneficiaries filed an action against the Mayor and City Council in the Circuit Court for Baltimore City. They asked that the Court declare the Ordinance invalid for the following reasons: (1) The Ordinance impermissibly delegated legislative power to a private entity, the Africa Fund; (2) the Ordinance unconstitutionally impaired the obligation of the City's pension contracts with the beneficiaries under the systems; (3) the Ordinance was preempted by the federal Comprehensive Anti-Apartheid Act of 1986; (4) the Ordinance intruded on the federal government's exclusive power to conduct foreign policy; and (5) the Ordinance violated the Commerce Clause of the U.S. Constitution.

On January 9, 1987, four pension beneficiaries moved to intervene on the side of the Trustees. They raised similar arguments and, in a three-count complaint, asserted that the Ordinance intrudes on the federal government's exclusive foreign policy power, violates the Commerce Clause, and violates the property rights of the beneficiaries under the "takings" clause of the Fifth and Fourteenth Amendments.[10]

C. Crucial Findings of Fact by the Trial Court

The Trustees and applicants for intervention filed motions for summary judgment, both of which were denied because the Circuit Court found it necessary to determine the facts related to the financial impact of the Ordinance on the pension systems. During a lengthy trial, both parties presented massive amounts of technical information through a variety of expert witnesses in the field of financial management.[11]

At the outset of the trial, both parties agreed that the Ordinance would not affect the funds' fixed income investments.[12] Later, the trial judge held that the Ordinance would not impair the performance of the

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9. *Id.* at 81, 562 A.2d at 724.

10. *Id.* at 83 n. 7, 562 A.2d at 725.

11. *See* Brief for Appellants, Board of Trustees v. Baltimore, Md. Court of Appeals, Nos. 95 and 104, September Term, 1987

12. Board of Trustees v. Baltimore, 317 Md. at 84 n.10, 562 A.2d at 725.

pensions' equity funds.[13] However, the trial judge did find that the Ordinance would affect the pensions' Short Term Investment Fund (STIF) because the STIF included investments in companies doing business in South Africa. Since comparable substitutes for the STIF investments may not be immediately available, the pension systems may be forced to increase their investments in lower-yielding obligations.[14] The trial judge also found that the divestiture required by the Ordinance would entail both initial one-time costs and on-going costs.[15] Ultimately, the trial judge calculated that the initial cost of divestiture to the beneficiaries would amount to only 1/32 of 1% of the total value of the funds and that the on-going costs of the divestiture program would amount to 1/20 of 1% of the total value of the funds.[16]

In addition to the inquiry concerning the costs of divestiture, the trial judge considered the financial risk to the beneficiaries from divestiture. The trial judge found that the Ordinance did not hinder the Trustees from investing in a diversified portfolio, although it may have affected their pursuit of an "active" management style. Rather, the Trustees could manage a South Africa free portfolio without failing to fulfill their duty of loyalty and prudence to the funds' beneficiaries.[17]

Due to the minimal impact of the divestiture program on the beneficiaries and the "salutary moral principle" underlying the Ordinance, the trial judge rejected all of the arguments by the Trustees and applicants for intervention.[18] They subsequently appealed to the Maryland Court of Special Appeals. At the request of the Trustees, the applicants for intervention, and the City, the Court of Appeals issued a writ of certiorari to review the case.[19]

II. Analysis of Issues Addressed by the Court of Appeals

In its lengthy seventy-six page opinion, the Court of Appeals carefully considered the merits of the issues presented by the petitioners. To simplify the Court's analysis, the issues can be divided into three major

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13. *Id.* at 84, 562 A.2d at 726.

14. *Id.* at 85-86, 562 A.2d at 726.

15. Initial costs would include, for example, the cost of replacing certain holdings with South Africa-free investments. Ongoing costs would be associated with replacing investments in the STIF and additional commissions. *Id.* at 86, 562 A.2d at 726-727.

16. The Court calculated the initial and ongoing costs of divestiture to be $750,000 and $1.2 million, repectively, out of a total fund value of $1.2 billion. *Id.* at 87, 562 A.2d at 727.

17. *Id.* at 85, 562 A.2d at 726.

18. *Id.* at 87-88, 562 A.2d at 727.

19. *Id.* at 88, 562 A.2d at 727.

categories: (1) procedure; (2) the specifics of the divestiture ordinance as it relates to pension funds; and (3) the impact of local laws on the conduct of foreign policy. This note will primarily focus on the latter two categories.[20]

A. The Impact of the Ordinance on Public Pension Funds

1. Permissible Delegation of Legislative Power

The Trustees initially attacked the Ordinance on the ground that it impermissibly delegated a governmental function to a private entity, the Africa Fund. According to the Trustees, by linking the divestment to the companies identified by the list supplied by the Africa Fund, the Ordinance would render the Trustees unable to make decisions about investments for the beneficiaries of the pension systems.[21] The Court responded by noting that the list from the Africa Fund was only a reference for the Trustees, and, as such, it constituted a reasonable standard for guidelines about United States companies doing business in South Africa. The Court clearly held that the Trustees, not the Africa Fund, had the final word on investment decisions.[22] In addition, the Court suggested that the term "doing business" in or with South Africa should be construed in the same way as it had been used in other Maryland cases.[23] Thus, the Court of Appeals effectively connected the

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20. In essence, the key procedural issue in this case concerned the motion by the four pension fund beneficiaries to intervene on the side of the Trustees. The Court of Appeals disagreed with the trial judge's application of Maryland Rule 2-214 (a)(2) which states in pertinent part:

> Upon timely motion, a person shall be permitted to intervene in an action. . .
>
> (2) when the person claims an interest relating to the property or transaction that is the subject of the action, and the person is so situated that the disposition of the action may as a practical matter impair or impede the ability to protect that interest, unless it is adequately represented by existing parties.

The Court of Appeals reasoned that because the Trustees have obligations to the City, as well as to the beneficiaries, the beneficiaries' interests are not identical to those of the Trustees. *See* Board of Trustees v. Baltimore, 317 Md. at 91, 562 A.2d at 729.

The Court of Appeals modified the Circuit Court's decision and permitted the applicants for intervention to have the status of a party in the case. *Id.* at 91-92, 562 A.2d at 729. It should be mentioned that this is the *only* point which challengers to the divestment ordinances won in this case.

21. *Id.* at 92, 562 A.2d at 730.

22. *Id.* at 98, 562 A.2d at 732.

23. *Id.* at 98-99, 562 A.2d at 733. The Court noted that it has previously construed "doing business" in a geographical area to mean "doing a substantial amount of

issue of divestment based on moral principles to more ordinary issues, such as contract disputes, that were typically resolved by the courts.

2. No Impairment of Contractual Obligations with Beneficiaries

The Trustees next argued that because the Ordinance interfered with the relationship between the City and pension beneficiaries,[24] it violated Article I, Section 10 of the U.S. Constitution, familiarly known as the Contracts Clause, which states, "[n]o State. . .shall pass any. . . .Law impairing the Obligation of Contracts. . . ." The Court broke down this claim into three distinct sub-issues.[25] First, the Court held that the City unquestionably imposed contractual obligations between itself and the pension beneficiaries by establishing a pension system. Second, the Court rejected the Trustees' contention that the Ordinance constituted an indirect change in the way the pension funds could be invested. Third, the Court, relying strongly on the trial court's finding of fact which was held to be not clearly erroneous, firmly stated that the insubstantial way in which the Ordinance modified Trustees' investment decisions did not approach the constitutional standard for an impairment of contract.[26]

3. No Change in Trustees' Duty of Prudence and Loyalty to Beneficiaries

The Trustees asserted that the Ordinance would significantly alter their duty of loyalty and prudence to the beneficiaries in the following ways: (1) The Ordinance would disturb the beneficiaries' expectations that their benefits will be well secured;[27] (2) the Ordinance would imprudently and radically alter the universe of eligible investments for the pension systems;[28] (3) the Ordinance would mandate that the Trustees consider social factors unrelated to investment performance;[29] and (4) the Ordinance would require the Trustees to consider the interests of

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business" or "engaging in significant business activity." *See, e.g.*, Yangming Transport v. Revon Products, 311 Md. 496, 504-509; 536 A.2d 633, 637-640 (1988); S.A.S. Personnel Consultants v. Pat-Pan, 286 Md. 335, 339-340, 407 A.2d 1139, 1142 (1979); and GEM Inc. v. Plough Inc., 228 Md. 484, 488-489. 180 A.2d 478, 481 (1962).

24. Board of Trustees v. Baltimore, 317 Md. at 99, 562 A.2d at 733.

25. In addressing this issue, the Court applied the framework for analysis that it used previously in Robert T. Foley Co. v. W.S.S.C., 283 Md. 140, 151-152, 389 A.2d 350, 357 (1978).

26. Board of Trustees v. Baltimore, 317 Md. at 100-101, 562 A.2d at 733-734.

27. *Id.* at 102, 562 A.2d at 734.

28. *Id.* at 103, 562 A.2d at 735.

29. *Id.* at 105, 562 A.2d at 736.

persons other than the beneficiaries and to manage the systems for purposes other than providing benefits.[30] The Court easily set aside these arguments by noting that economically competitive investments were available to the Trustees and that the Ordinance permitted a gradual two-year transition period; coupled with a suspension of divestiture under certain conditions, before the divestiture program was completed.[31] In addition, the Court held that consideration of social factors is perfectly proper in making an investment decision and emphasized that trustees are not forced to achieve a maximum return on their investments, only a reasonable return while avoiding undue risks.[32]

4. No Taking by the Government

Intervenors in the case next argued the initial and ongoing costs of divestiture would reduce the future earnings of the pension funds and consequently reduce the amount of variable benefits payable to the beneficiaries. They reasoned that such a reduction in the variable benefits was a violation of due process under the Fifth and Fourteenth Amendments of the Constitution and amounted to a taking of property from citizens by the government.[33] The Court did not even find a due process argument[34] and completely rejected any argument for compensation for a taking for three reasons: (1) The Intervenors' right to receive benefits does not mean that they have the right to direct or control the investment of funds in the City's pension systems; (2) there can be no distinct investment expectations from variable benefits which are, by definition, speculative and uncertain; and (3) there is no taking because the Ordinance promotes the common good and does not shift funds from the beneficiaries to the government or anyone else.[35]

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30. *Id.* at 109, 562 A.2d at 738.

31. *Id.* at 105, 562 A.2d at 736-737.

32. *Id.* at 106-107, 562 A.2d at 736-737. The Court relied on the commentary of Professor Austin W. Scott in his authoritative treatise, III A. W. SCOTT, THE LAW OF TRUSTS, Section 227.17 (4th ed. 1988). *See Also*, Troyer, Slocomb, and Boisture, *Divestment of South African Investments: The Legal Implications for Foundations, Other Charitable Institutions and Pension Funds*, 74 GEO. L.J. 127, 156-157 (1985). The authors of the above article note that the legal guidelines for directors who would make decisions concerning the divestment of corporate stock from holdings in South Africa are more flexible than those for trustees. Corporate directors need only appply the "business judgment rule" to comply with the required duty of loyalty and care to the stockholders. *Id.* at 134-136.

33. Board of Trustees v. Baltimore, 317 Md. at 110, 562 A.2d at 738.

34. *Id.* at 111 n. 38, 562 A.2d at 739.

35. *Id.* at 113-114, 562 A.2d at 739-740.

B. Impact of the Ordinance on Foreign Policy

Much of the recent legal literature on U.S. anti-apartheid efforts through the divestment of funds focuses on state or municipal divestment statutes in terms of their constitutionality and their impact on the conduct of foreign policy.[36] As in the earlier part of the Maryland opinion, the Court of Appeals refused to accept any of the Trustees' or Intervenors' arguments on the impact of the Ordinance on U.S. foreign policy.

1. No Federal Preemption of Ordinance

The Trustees argued that the Ordinance violates the Supremacy Clause of the Constitution and therefore is pre-empted[37] by the Comprehensive Anti-Apartheid Act of 1986 (CAAA).[38] The Court reasoned that a federal law can preempt a state or local ordinance in three fundamental ways: (1) by expressly stating its intention to do so; (2) by "occupying the field," i.e., by including a federal regulatory scheme that is so comprehensive that there is in effect nothing more that the states can do; and (3) by conflicting directly with the state law. At the outset, the Court observed that preemption is not lightly presumed, especially in areas that are traditionally regulated by states such as the pension systems at issue in this case.[39]

The Court of Appeals proceeded to analyze the preemption argument by examining the legislative history of the CAAA. Preemption was first addressed in 1985 when Senators Roth and McConnell circulated an amendment expressly calling for preemption under in the CAAA. This amendment was subsequently withdrawn, according to

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36. *See, e.g.*, Bowden, *North Carolina's South African Divestment Statute*, 67 N.C.L. REV. 949, (1989); Lewis, *Dealing with South Africa: The Constitutionality of State and Local Divestment Legislation*, 61 TUL. L.REV. 469 (1987); Note: *State and Municpal Governments' React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L.REV. 543 (1985); Note: *State and Local Anti-South African Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813 (1986). For an excellent general overview of the constitutional implication of the states' involvement in foreign affairs, *see* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION, Chapter IX (1972).

37. Board of Trustees v. Baltimore 317 Md. at 114, 562 A.2d at 740.

38. Among other things, the CAAA prohibits loans to, other investments in, and certain other activities in South Africa, prohibits U.S. imports from companies owned or controlled by the South African Government, and prohibits new investments in South Africa. Pub. L. No. 99-440, 100 Stat. 1089 (1986); 22 U.S.C. §§ 2151 n(f), (g), 2150, 2346(d), 5001-50016 (West Supp. 1989).

39. Board of Trustees v. Baltimore 317 Md. at 115, 562 A.2d. at 740-741.

Senator Kennedy, "in the face of certain defeat."[40] In addition, at the time of the amendment's withdrawal, Senators Pell, Cranston, Hart, and Proxmire strongly objected to preemption.[41]

The Court viewed the legislative history of section 5116 of the CAAA as having a possible "preemptive effect" limited to state or local procurement legislation which might cause a federally-funded contract not to be awarded to the lowest bidder.[42] However, the Court of Appeals discounted this possible preemptive effect in light of the forceful remarks of Senator Kennedy, the CAAA's co-author, who vigorously asserted that the CAAA was to have no preemptive effect.[43] Further, the proceedings in the House of Representatives strongly indicated no Congressional intent to preempt.[44] Thus, the Court concluded that there was no express Congressional intent to preempt state or local legislation or to "occupy the field."

The Trustees also tried to show that the Ordinance represented inflexible sanctions toward South Africa and therefore conflicted with the approach of the CAAA.[45] However, the Court interpreted the Ordinance as merely relating to the conduct of businesses in which the City invests, and not as sanctions against the government of South Africa.[46] This interpretation may serve to broaden the scope of the market participant exception to include foreign nations, as well as the more familiar application to "foreign" states within the United States.

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40. 132 CONG. REC. S12533 (daily ed., Sept. 15, 1986)

41. *See* 131 CONG. REC. S18835 and S 18330, S18224, S18787, S18784 (daily ed. July 11, 1985)

42. 317 Md. at 118, 562 A.2d at 742. Section 5116 of the CAAA states the following:

> Notwithstanding section 210 of Public Law 99-349 or any other provision of the law -
>
> (1) No reduction in the amount of funds for which a state or local government is eligible or entitled under any Federal law may be made, and
>
> (2) No other penalty may be imposed by the Federal Government by reason of application of any state or local law concerning apartheid to any contract entered into by a state or local government for 90 days after October 2, 1986.

43. 132 CONG. REC. S12533 (daily ed. Sept. 15, 1986)

44. *See* remarks of Representatives Gray, Leland, Solarz, Weiss, Levine, Rangel, Biaggi, Dixon, and Wheat. 132 CONG. REC. H.R. 6758-6767 (daily ed. Sept. 12, 1986)

45. Board of Trustees v. Baltimore, 317 Md. 72, 562 A.2d 720.

46. *Id.* at 120, 562 A.2d at 743.

2. No Interference with Federal Authority to Conduct Foreign Policy

The Trustees next argued that the Ordinance impermissibly interfered with the federal government's general authority to execute foreign policy of the United States.[47] The Court rejected this argument by distinguishing the holding of an important case, *Zchernig v. Miller*,[48] from this case. In *Zchernig*, the Supreme Court barred the application of a state alien inheritance law which required inquiry into the type of government existing in particular foreign countries because it would intrude into the field of foreign affairs which the Constitution entrusts to the President and Congress.[49] As interpreted by Professor Laurence Tribe, the *Zchernig* court held that "all state action, whether or not consistent with federal foreign policy, that has significant impact on the conduct of American diplomacy is void as an unconstitutional infringement upon an exclusively federal sphere of responsibility."[50]

Once again, the Court relied heavily on the trial judge's finding of fact to overcome the hurdles presented by *Zchernig*. Because the Ordinance represented a single general decision of the City to manage its own investments, as opposed to addressing the intricacies of South Africa's apartheid laws, the Court reasoned that the Ordinances did not cross the boundary into federal areas of responsibility.[51] In addition, the Court stressed that the purpose of the Ordinance was to express the City's moral indignation towards apartheid, but that in fact, the Ordinance had only a minimal and indirect impact on South Africa.[52] The Court reiterated the internal focus of the Ordinance, especially when it compared the ordinance with other cases where state or local jurisdictions have unsuccessfully tried to enact anti-apartheid legislation or administrative rulings.[53] Whether or not the Baltimore Ordinance and

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47. *Id.* at 121, 562 A.2d at 744.

48. 389 U.S. 429, (1968).

49. *Id.* at 432.

50. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 230 (1988).

51. Board of Trustees v. Baltimore, 317 Md. at 126, 562 A. 2d. at 746.

52. *Id.* at 131, 562 A.2d at 748-749.

53. The Court distinguished its holding here with the decisions of other courts that have faced apartheid issues. *See, e.g.*, New York Times v. City Commission on Human Rights, 41 N.Y. 2d 345, 393 N.Y.S. 2d 312, 361 N.E. 2d 963 (1977) (where newspaper advertisements for employment opportunities located in South Africa which merely referred to that country as the situs of employment, and which did not recite on the surface any discriminatory conditions, did not violate New York City's anti-discrimination laws.); Springfield Rare Coins Galleries, Inc. v. Johnson, 115 Ill. 2d 221, 503 N.E. 2d 300 (1986) (where disapproval of political and social policies of a foreign nation does not provide a valid basis for a tax classification, and the state may not

other sanctions embodied in federal legislation have had, in fact, only a minimal and indirect impact on South Africa will undoubtedly be re-examined in light of recent changes in the South African political landscape.

3. No Violation of the Commerce Clause

The Commerce Clause of the Constitution affirmatively empowers the Congress "to regulate commerce with foreign Nations, and among the several States. . . ."[54] In addition to this affirmative grant of power, a judicially created doctrine, the "negative" or "dormant" Commerce Clause has developed since the early days of our nation.[55] The dormant Commerce Clause limits by implication the power of state and local governments to enact legislation which affects foreign or interstate commerce.

The Court of Appeals rejected the petitioners' arguments that the Ordinance violated the dormant Commerce Clause by applying a relatively new exception to the Commerce Clause, the market participation doctrine. Enunciated initially in *Hughes v. Alexandria Scrap Corporation*,[56] this doctrine permits state and local governments to escape the constraints of the dormant Commerce Clause when acting as a buyer or a seller in the market, as opposed to a regulator in a distinct governmental capacity. Just as a private merchant may elect not to do business in South Africa, so too may the City choose not to do business with a South African company under the reasoning of the market participation doctrine. As the *Hughes* Court reiterated, the purpose of the Ordinance was not to punish anyone, but to remove a "perceived moral taint" from the City's investments.[57]

The Court of Appeals had no guidance from the Supreme Court as to whether the market participation doctrine applied to the conduct

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exercise its wide-ranging taxing power for the purpose of encouraging the boycott of a single nation's products.); Regents of the University of Michigan v. State of Michigan, 166 Mich. App. 314, 419 N.W.2d 773 (1988)(where State statute that prohibits state educational institutions from making or maintaining an investment "in organizations operating in South Africa" is unconstitutional as applied because the state constitution grants the Regents plenary authority to allocate university funds); and Associated Students of the University of Oregon v. Oregon Investment Council, 82 Or. App. 145, 728 P.2d 30 (1986)(where complaint dismissed for lack of standing by plaintiff).

54. U.S. CONST. art. I, § 8, cl. 3.

55. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, (1824) and Cooley v. Bd. of Wardens, 53 U.S. (12 How.) 299, (1851).

56. 426 U.S. 794, (1976).

57. Board of Trustees v. Baltimore 317 Md. at 136, 562 A.2d at 751. *See Also*, 69 Op. Att'y. Gen. of Md. 87 (1984).

of state and local governments that affects foreign commerce. However, the Supreme Court has indicated that a more extensive constitutional inquiry is needed if the issue to be resolved involves foreign commerce, as contrasted with interstate commerce issues.[58] Nevertheless, the Court of Appeals reasoned that the purposes behind the dormant Commerce Clause and the foreign Commerce Clause were essentially the same, i.e., to prevent individual states from adversely affecting relations with foreign countries that were properly coordinated at the federal level.[59]

The Court further noted that the power of the federal government over foreign commerce is not totally exclusive. While the Court acknowledged that the United States should speak with one voice in matters of foreign policy, it declared that this voice need not solely belong to the federal government. Because the Ordinances were broadly consistent with federal policy as articulated in the CAAA and because they did not undermine the federal government's ability to develop uniform trade regulations toward South Africa, it is constitutional.[60]

The Court further eroded the Trustees' dormant Commerce Clause argument by stating that the Ordinance would survive constitutional scrutiny even without the market participation exception.[61] In reaching this conclusion, the Court relied on the three-pronged test established in *Pike v. Bruce Church, Inc.*[62] which requires that the statute at issue effectuate a legitimate public purpose, affect interstate commerce only incidentally, and not burden such commerce excessively. In applying the *Bruce Church* test, the Court found that the Ordinance applies equally to the residents of Baltimore and to residents of all other states; that the purpose of the Ordinance is indisputably legitimate; and that the burden of the Ordinance is minimal in relation to its benefits.[63]

III. Other State Statutes Aimed at Divestment from South Africa

Although the Maryland Court of Appeals wrote the first opinion in the nation to rule on the constitutionality of divestment legislation, neither Maryland nor Baltimore City were the first jurisdictions to en-

58. *See, e.g.* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, (1979).
59. Board of Trustees v. Baltimore 317 Md.at 138, 562 A.2d at 752.
60. *Id.* at 146-147, 562 A.2d at 756-757.
61. *Id.* at 141, 562 A.2d at 753.
62. 397 U.S. 137 (1974).
63. Board of Trustees v. Baltimore 317 Md. at 142-143, 562 A.2d 754-755.

act divestment statutes. Connecticut was the first state to enact divestment legislation in 1982[64], and many other state and local governments followed Connecticut's lead. According to the American Committee on Africa, as of November 1989, twenty-five states, nineteen counties, eighty-two cities, and the Virgin Islands have taken some form of economic action against apartheid.[65]

State statutes approach divestment of public funds from holdings in South Africa in two alternative ways. The approach taken by Massachusetts typifies the first alternative, full or absolute divestment. Simply stated, no public pension funds from Massachusetts can be invested in South African banks or in companies doing business with South Africa.[66]

Other states do not use such a bright line test in their divestment statues. In addition to determining whether a financial institution or company is doing business with South Africa, these statutes forbid states from investing in entities that do not comply with specific standards of conduct. For example, North Carolina applies this additional condition to its divestment statute by prohibiting investments in companies or financial institutions which are not signatories to the Sullivan Principles[67] or which have received a failing performance rating for compliance with the Sullivan Principles.

The Baltimore Ordinance represents a compromise between the two general approaches used by states in divestment statutes. The Bal-

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64. CONN. GEN. STAT. ANN., §§ 3-13(f)(1985).

65. *See* AMERICAN COMMITTEE ON AFRICA, SUMMARY CHART: STATES, COUNTIES AND CITIES THAT HAVE TAKEN ECONOMIC SANCTIONS AGAINST APARTHEID (1989).

The American Committee on Africa classifies economic actions against South African apartheid into three distinct categories:

(1) Divestment - the sale of stock and/or bonds from companies that do business in South Africa;

(2) Banking - the withdrawal of funds and/or business from banks on the basis of their ties to South Africa; and

(3) Purchasing - the policy that gives preference in the bidding process for the purchasing of goods and services to those companies that do *not* do business in South Africa.

66. MASS. GEN. LAWS. ANN., ch. 32, § 23(1)(d)(ii).

67. As noted in Bowden, *North Carolina's South African Divestment Statute*, 67 N.C.L. REV., n.3, at 949 (1989), the Sullivan Principles were developed in 1978 by the Reverend Leon H. Sullivan, a Philadelphia minister and Director of the General Motors Corporation. In essence, the Sullivan Principles provide for equality in compensation, employment, and access for South Africans of all races. It is interesting to note that as of 1984, the Reverend Sullivan has repudiated his principles and has suggested severing business ties between the United States and South Africa. The Sullivan Principles are incorporated directly into North Carolina's divestment statute. *See* N.C. GEN. STAT., §§ 147-69.2(c)(2).

timore Ordinance does not mandate absolute and total divestment by a specific date like the Massachusetts statute, nor does it impose an elaborate code of conduct on entities involved with South Africa like the North Carolina statute. Instead, the Baltimore Ordinance, as interpreted by the Maryland Court of Appeals, permits the expression of two legitimate and occasionally competing interests: the financial interests of pension beneficiaries who in retirement depend on the income generated by their pension funds and the political and moral interests of citizens who wish to direct public monies away from investments they consider to be unacceptable.[68]

IV. CONCLUSIONS

In evaluating the significance of this case, the court's interpretation goes beyond the immediate concerns of the citizens of Baltimore and general animosity towards apartheid. The structure of the Ordinance and the reasoning of this opinion make it possible for citizens to direct investments in public pension funds away from other entities that are undesireable.

With respect to the impact of state or local laws on foreign policy, it seems improbable that these types of statutes would survive judicial scrutiny unless they were clearly harmonious with federal policy. Unquestionably, the Court found the Ordinance to be consistent with the federal CAAA. Absent a strong federal statute, there are too many hurdles that the state and local governments must overcome in order to assert themselves in the foreign policy arena.

In addition, the Maryland Court of Appeals repeatedly found that the purpose of the Ordinance was to express the moral outrage of the citizens of Baltimore at the legacy of slavery that South African apartheid represents. As such, this opinion may significantly broaden the impact of the market participant doctrine by allowing states greater discretion to direct their financial and business choices without violating the Commerce Clause. Absent a clear federal policy, however, this type of legislation cannot be used to force divestment from public pension funds of investments in companies doing business with or in foreign regimes whose policies may be repugant to Americans.

At this time, much of the world's attention is focused on the issue of apartheid. The election of President De Klerk and the recent release of Nelson Mandela, the leader of the African National Congress, after a twenty-seven year prison term have prompted intense media coverage

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68. *See supra* at note 9 and accompanying text.

of South Africa.[69] In the intricate negotiations that will inevitably follow, it is obvious that some new type of political arrangement among South Africans of all races will emerge.

The extent to which the United States can influence this process through the continuation of sanctions established by the CAAA, traditional diplomatic measures, and legislation such as the Baltimore Ordinance, remains to be seen. However, it is unlikely that the United States government will move immediately to revise the sanctions contained in the CAAA.[70] Not only have influential legislators in Congress expressed their support for keeping economic sanctions against South Africa in place[71], but Bush Administration spokesman, Herman Cohen, Assistant Secretary of State for African Affairs, characterized the 1986 sanctions as "wise" and helpful in encouraging "many whites [in South Africa] to come to their senses." Ambassador Cohen added that the Bush Administration is committed to "full implementation of all provisions" of the sanctions law.[72]

In sum, the Baltimore Ordinance upheld by the Maryland Court of Appeals represents one of many elements in the mix that makes up United States foreign policy on South Africa. Without question, the Ordinance represents an idealistic strand of our policy which is not based solely on classical "real politick," but extends the moral judgment of citizens that is occasionally expressed through local and state governments.

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69. *See e.g.*, Whitaker et al., *Mandela is Free: Breakthrough in South Africa*, Newsweek, Feb. 19, 1990, at 36; *Escape from Apartheid*, Washington Post, Feb. 18, 1990, at B6, col.1; and Eddings, *The Challenges Ahead for Mandela, de Klerk*, Baltimore Sun, Feb. 18, 1990, at 7G, col.1.

70. In contrast, the Thatcher government in the United Kingdom has already lifted its bans on new investments in South Africa and on the promotion of tourism to South Africa. *See* Los Angeles Times, Feb. 23, 1990, Part P, at 2, col.3.

71. S. Con. Res. 94, 136 CONG. REC. S1525, S1526 (daily ed., Feb. 22, 1990).

72. *Quoted* in Friedman, *U.S. Law Makers: Don't Lift Sanctions*, Newsday, Feb. 23, 1990, at 15.