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Garrett M. Smith

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BOARD OF TRUSTEES V. CITY OF BALTIMORE: PUBLIC PENSION FUND DIVESTMENT OF SOUTH AFRICAN SECURITIES UPHELD

INTRODUCTION

In Board of Trustees of the Employees' Retirement System of Baltimore v. Mayor of Baltimore, the Court of Appeals upheld Baltimore City Ordinance No. 765 (the Ordinance), which decreed that none of Baltimore City's three employee pension plan funds could remain invested in companies doing business "in or with" South Africa, or in banks that make loans to South Africa. The Baltimore City Council passed the Ordinance, with the Mayor's approval, in the wake of nationwide political pressure during the last years of the Reagan administration to enact sanctions disapproving South Africa's apartheid system. Since the enactment of the Ordinance and many other state and local measures, however, the courts have neither upheld nor struck down any regulation similar to Baltimore's Ordinance. As such, the Court of Appeals' decision breaks new ground.

Although the Board of Trustees of each pension plan (the Trustees) challenged the Ordinance on numerous constitutional grounds, a unanimous court upheld it. In so doing, the court rejected six constitutional lines of attack on the Ordinance, which al-

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2. BALTIMORE CITY, MD., CODE art. 22 §§ (7)(a)(13), (35)(a)(13) (Supp. 1989). With the passage of Ordinance No. 792, the City Council also affirmatively resolved the question of whether Ordinance No. 765 applied to one of the three pension funds that did not appear in the text of Ordinance No. 765. Board of Trustees, 317 Md. at 82, 562 A.2d at 724. Any reference to "the Ordinance" hereinafter incorporates Ordinance No. 792 as well as Ordinance No. 765. See infra notes 12 & 16.
3. 317 Md. at 80-81, 562 A.2d at 724.
5. Board of Trustees, 317 Md. at 148, 562 A.2d at 757.
leged that: (1) it impermissibly delegated legislative authority to a private entity, the Africa Fund, which compiles a list of companies that do business in or with South Africa, (2) it impaired Baltimore City's (the City) pension contracts with its employees, (3) it constituted an unconstitutional taking, (4) it was pre-empted by congressional sanctions against South Africa, (5) it infringed upon the federal government’s power to make foreign policy, and (6) it violated the commerce clause.

This Note first outlines the Court of Appeals’ response to each of these challenges. It then discusses two problems with the court’s decision. First, the Note argues that with respect to the delegation challenge and the court’s interpretation of the Ordinance as providing a nonbinding reference list, the court should have inquired as to whether or not as a matter of fact the Trustees behaved as though they were bound by the list. Second, the Note addresses the court’s finding that the Ordinance had only minimal and indirect impact on South Africa, and therefore did not impinge upon the federal government’s primacy in foreign affairs. In so finding, the court ignored that the Baltimore City Council passed the divestment legislation as part of a pervasive national movement intended to impact substantially on South Africa’s internal affairs. The Note next focuses on one commentator’s suggestion that because the Ordinance is a form of community speech, the first amendment may be raised in its defense. The Note concludes with the argument that Baltimore City might have avoided the most serious challenges to the Ordinance by permitting employees to opt out of the divestment program.

I. FACTS

At the time of the Ordinance’s enactment, the City maintained three employee pension plans, each administered by a board of trustees. When the parties commenced the suit, the three plans

6. Id. at 83, 562 A.2d at 725.
7. See infra notes 26-96 and accompanying text.
8. See infra notes 97-66 and accompanying text.
9. See infra notes 107-139 and accompanying text.
10. See infra notes 140-173 and accompanying text.
11. See infra notes 174-176 and accompanying text.
12. Board of Trustees, 317 Md. 72, 79, 562 A.2d 720, 723 (1989), cert. denied, 110 S. Ct. 1167 (1990). These pension plans were the Elected Officials Retirement System, the Fire and Police Employees Retirement System, and the Employees Retirement System. Id.
13. Id.
controlled a total sum of $1.2 billion. The beneficiaries under each of the plans were entitled both to defined future benefits and to variable benefits.

On July 3, 1986, the Mayor of Baltimore signed Ordinance No. 765, as passed by the City Council. The Ordinance provides that no pension funds shall remain in or be invested in banks or financial institutions which make loans to South Africa or in companies which transact business in or with South Africa. The Ordinance states that business entities doing business in or with 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.'" The Ordinance requires that divestiture occur within a two-year period, commencing on the first day of the third quarter of fiscal 1987. The Board of Trustees, however, is empowered to suspend divestiture efforts if it finds them injurious to the fund. In adopting the resolution, the trustees must set forth in writing the standards, conclusions, and duration of the suspension. Each suspension period may last no longer than ninety days, and the time period for divestiture is tolled during the suspension.

14. *Id.* at 79-80, 562 A.2d at 723. The plans had invested 40 to 50% of these funds in equities or common stock, and fixed income instruments, respectively, or in cash and short-term equivalents. *Id.* at 80, 562 A.2d at 723.

15. *Id.* at 80, 562 A.2d at 723. The variable benefits depend directly on the fund's rate of return, and accrue only when the annual rate of return exceeds 7.5%. *Id.*

16. BALTIMORE CITY, Md., CODE art. 22, §§ (7)(a)(13), (35)(a)(13) (Supp. 1987); Board of Trustees, 317 Md. at 80, 562 A.2d at 724. By its terms, this Ordinance applied only to the Employees Retirement System and the Fire and Police Employees Retirement System. *Id.* at 82, 562 A.2d at 724. Later, the Baltimore City Council enacted Ordinance No. 792 to provide expressly that the Elected Officials Retirement Fund was subject to the City's divestiture initiatives. *Id.; see supra* note 2.


20. *Id.* §§ (7)(a)(13) n.1, § 2(d), (35)(a)(13) n.1, § 2(d).

21. *Id.* §§ (7)(a)(13) n.1, § 2(e), (35)(a)(13) n.1, § 2(e). Before adopting a resolution that suspends divestiture, the Board of Trustees must find:

   (1) That the rate of return on the funds [is] substantially lower than the average of the annual earnings on the funds over the past five years, and

   (2) That continued divestiture under this Ordinance will be inconsistent with generally accepted investment standards for conservators of pension funds notwithstanding the intent of this ordinance, or

   (3) That divestiture under the divestiture ordinance will cause financial losses to the funds.

*Id.*

22. *Id.* §§ (7)(a)(13) n.1, § 2(f), (35)(a)(13) n.1, § 2(f).

23. *Id.* The court noted that as of November 1987, the two-year period for divesti-
On December 31, 1986, the Trustees filed suit in the Baltimore City Circuit Court seeking a declaration that the Ordinance was invalid. After a three-week trial, the trial court upheld the validity of the Ordinance. The Trustees appealed this ruling.

II. THE COURT OF APPEALS' HOLDING

A. Impermissible Delegation of Legislative Power

On appeal, the Trustees first challenged the Ordinance on the ground that it impermissibly delegated legislative power to a private entity by its provision that the Africa Fund's annual Unified List of United States Companies with Investments or Loans in South Africa and Namibia (the Unified List), should be used exclusively to target companies for divestment. The court agreed with the Trustees that such a delegation would violate Article XI-A of the Maryland Constitution if the Africa Fund's conclusions actually bound the Trustees; the "Baltimore City Council has the sole power to enact local legislation for the people of Baltimore City." The court, however, then relied on the principle that courts whenever possible must construe statutes so that they are constitutional, and agreed with the circuit court that the Ordinance's use of the word "reference" was...
reasonably subject to the construction that the *Unified List* did not bind the Trustees.\textsuperscript{50}

**B. Contracts Clause Challenge**

The court next turned to the Trustees' contention that the Ordinance impaired in three ways the obligations of the beneficiaries' pension funds in violation of the contracts clause of the federal Constitution.\textsuperscript{31} First, the Trustees argued not that divestiture would impair retirees' benefits,\textsuperscript{32} but that the Ordinance indirectly changed the pension contracts by altering the way the plans invested the funds.\textsuperscript{33} The court agreed with the trial court's finding that of the two types of benefits—defined benefits and variable benefits—\textsuperscript{34} which the pension funds provided, divestment would alter only the variable benefits.\textsuperscript{35} Moreover, because the circuit court found to be minimal both the initial and ongoing costs of divestiture,\textsuperscript{36} the Court of Appeals determined that the impairment to variable benefits was not unconstitutional.\textsuperscript{37}

Second, the court rejected the Trustees' argument that divestment unconstitutionally impaired the plan's obligation to the beneficiaries by changing the Trustees' common-law fiduciary duties of prudence and loyalty.\textsuperscript{38} The Trustees argued that the Ordinance increased risk and reduced income by excluding a significant segment of the investment universe.\textsuperscript{39} But the court was unconcerned that the Ordinance would inhibit the Trustees from pursuing an

\textsuperscript{30. Id. at 98, 562 A.2d at 732.}
\textsuperscript{31. Id. at 99, 562 A.2d at 733.}
\textsuperscript{32. Id.}
\textsuperscript{33. Id. at 100, 562 A.2d at 734.}
\textsuperscript{34. See supra note 15.}
\textsuperscript{35. Board of Trustees, 317 Md. at 101, 562 A.2d at 734.}
\textsuperscript{36. Id. The circuit court found that the initial cost of divestiture would be .32\% of the pension systems' assets and that the ongoing annual cost would be .20\%. Id. For two studies that discuss the financial impact of divestment on portfolios, see Grossman & Sharpe, *Financial Implications of South African Divestment*, FIN. ANALYSTS J., July-Aug. 1986, at 15; Investor Responsibility Research Center (IRRC), *South Africa Review Service*, The Impact of South Africa-Related Divestment on Equity Portfolio Performance (Jan. 1985) (reviewing nine other studies); see also Jerry & Joy, *Social Investing and the Lessons of South Africa Divestment: Rethinking the Limitations on Fiduciary Discretion*, 66 OR. L. REV. 685 (1987).}
\textsuperscript{37. Board of Trustees, 317 Md. at 101, 562 A.2d at 734.}
\textsuperscript{38. Id. at 102, 562 A.2d at 734.}
\textsuperscript{39. Id. at 104, 562 A.2d at 735. The court noted that the Ordinance did place some constraints on investment possibilities. Id. at 103, 562 A.2d at 735. For example, the Trustees argued that the Africa Fund's *Unified List* banned investment in nearly one-half of the companies listed on the Standard & Poor 500. The court, however, reasoned that viable investment alternatives were available. Id. at 103-04, 562 A.2d at 735.}
“active” style of investment management—the beneficiaries contractually were not entitled to “a particular management style,” nor would “passive” portfolio management necessarily fail to duplicate the returns that more active management could earn. In addition, certain provisions in the Ordinance allowed the Trustees to mitigate any harm brought about by divestiture.

Finally, the court rejected the Trustees’ contention that the Ordinance impermissibly alters fiduciary duties by requiring the consideration of social factors “unrelated to investment performance.” To the contrary, the court reasoned, the Trustees may “properly consider the social performance of the corporation[s],” in which they invest. Indeed, when the impairment to benefits that resulted from factoring social consequences into the investment decision is de minimis, neither the Trustees’ prudence nor loyalty could be called into question.

C. Takings Clause Challenge

The court next rejected the intervening beneficiaries’ argument that the Ordinance, by reducing the variable benefits that the beneficiaries would receive, constituted a governmental confiscation of property without compensation in violation of due process. After determining that a property interest existed under Maryland law, the court applied the three-part takings test set forth in Penn Central Transportation Co. v. New York City. It concluded that: (1) the Ordinance’s economic impact was not constitutionally signif-
cant, (2) the Ordinance did not interfere with "distinct investment-backed expectations," and (3) the character of the governmental action was innocuous. 49

D. Federal Sanctions Did Not Pre-empt Local Divestment

Turning to the argument that the Comprehensive Anti-Apartheid Act of 1986 (the Act) 50 pre-empts the Ordinance, the court noted as a general matter that regulations passed in the traditional sphere of local authority "enjoy a strong presumption that they are not preempted." 51 Nevertheless, and even in the absence of explicit pre-emptive language in the Act, 52 the court reviewed the Act’s legislative history for evidence of an implicit congressional intent to pre-empt local laws. 53 After a careful review, the court found ample evidence that Congress had no such intent when it passed the Act. 54

The court also rejected the argument that an actual conflict existed between the two laws. 55 The court reasoned that the Ordinance did not conflict with the Act’s "carrot and stick" approach to South Africa because the Ordinance focused on "the conduct of businesses in which the City has investments," rather than on the conduct of the South African Government. 56 Further, the court was persuaded that the Act neither required nor affirmatively encouraged American companies to remain in South Africa. As such, it did not pre-emptively conflict with the Ordinance on that basis either. 57

E. Infringement of Federal Foreign Policy Powers

The court then addressed the question of whether the Ordinance impinged on the federal government's authority to decide and implement foreign policy. 58 Of particular concern to the court was the Supreme Court's decision in Zschernig v. Miller, 59 in which

51. Board of Trustees, 317 Md. at 116, 562 A.2d at 741.
52. Id.
53. Id. at 113-18, 562 A.2d at 740-42.
54. Id. at 116-20, 562 A.2d 741-43.
55. Id. at 120, 562 A.2d at 743.
56. Id.
57. Id. at 120-21; 562 A.2d at 743-44.
58. Id. at 121, 562 A.2d at 744.
the Court held that an Oregon statute unconstitutionally affected international relations because it required "minute inquiries concerning the actual administration of foreign law."\textsuperscript{60} The court, however, decided that under certain circumstances, \textit{Zschernig} does not eliminate a state's ability to take "actions involving substantive judgments about foreign nations."\textsuperscript{61} Here, because the Ordinance was "a single, general decision" by the City, the court concluded that it was "beyond the scope of \textit{Zschernig}."\textsuperscript{62} In any event, the court determined that whatever impact the Ordinance had on South Africa was incidental and minimal.\textsuperscript{63} The court also distinguished two state cases\textsuperscript{64} and one federal case\textsuperscript{65} on which the Trustees relied for the proposition that the Ordinance was an unconstitutional exercise of foreign policy power.\textsuperscript{66}

\textbf{F. Commerce Clause Challenges}

Lastly, the court focused on the Trustees' claim that the Ordinance violated the implied limitations on state power which flow from the "dormant" commerce clause—that is, even though Congress has not enacted legislation which governs this issue and its commerce power thus lies dormant, the State transcended implied boundaries because the Ordinance unduly burdened interstate commerce and attempted to regulate foreign commerce.\textsuperscript{67} Accepting this premise, the court turned its attention to the City's defense and the Trustees' rebuttal.\textsuperscript{68} The City argued that as an investor in the

\textsuperscript{60} \textit{Board of Trustees}, 317 Md. at 124-25, 562 A.2d at 745 (quoting \textit{Zschernig}, 389 U.S. at 435).
\textsuperscript{61} \textit{Id.} at 126, 562 A.2d at 746.
\textsuperscript{62} \textit{Id.} (quoting on both occasions from Troyer, Slocombe & Boisture, \textit{Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds}, 74 Geo. L.J. 127, 159 (1985)).
\textsuperscript{63} \textit{Id.} at 127, 562 A.2d at 747.
\textsuperscript{64} The state cases were Springfield Rare Coin Galleries, Inc. \textit{v.} Johnson, 115 Ill. 2d 221, 232, 503 N.E.2d 300, 305 (1986) (holding that because a statute which denied a tax exemption on South African coins was motivated solely by disapproval of South Africa's policies, the statute encroached on federal authority over foreign affairs) and New York Times Co. \textit{v.} City of New York Comm'n on Human Rights, 41 N.Y.2d 345, 352, 361 N.E.2d 963, 968, 398 N.Y.S.2d 312, 317 (1977) (holding that because an agency was powerless to set and implement foreign policy, the newspaper did not violate an antidiscrimination law forbidding the advertisement of job opportunities in South Africa when it did so advertise).
\textsuperscript{65} \textit{Tayyari v. New Mexico State Univ.}, 495 F. Supp. 1365, 1376-77 (D.N.M. 1980) (holding unconstitutional a school regents' political decision to deny admission to Iranian students in light of a State Department warning against such actions).
\textsuperscript{66} \textit{Board of Trustees}, 317 Md. at 127-31, 562 A.2d at 747-50.
\textsuperscript{67} \textit{Id.} at 131, 562 A.2d at 749.
\textsuperscript{68} \textit{Id.}
pension plans, it was acting as a market participant and therefore the Ordinance was not a regulation.\textsuperscript{69} The Trustees countered that: (1) the City was not a market participant, but rather a governmental actor, and (2) that the market participant doctrine is available as a defense only when interstate, and not foreign, commerce is at issue.\textsuperscript{70}

The Trustees first posited that the Supreme Court and the Maryland Court of Appeals have applied the market participant doctrine only when states (or counties) bought, sold, or invested to advance their citizens' economic interests at the expense of another region's citizens.\textsuperscript{71} The court, however, reasoned that the Supreme Court's choice of language suggests a broader application for the doctrine,\textsuperscript{72} and found it illogical that the defense would be available when overt discrimination took place but unavailable in the absence of favoritism toward the citizens of a given region.\textsuperscript{73} The court then distinguished the two cases that the Trustees relied upon\textsuperscript{74} and instead followed \textit{White v. Massachusetts Council of Construction Employers},\textsuperscript{75} in which the Court endorsed Boston's use of economic leverage over contractors to insure that they employed a certain percentage of local workers.\textsuperscript{76} The Court of Appeals found that situation similar to \textit{Board of Trustees} in that both cases involved "an ongoing commercial relationship in which the city retained a contin-

\begin{itemize}
\item \textsuperscript{69} \textit{Id.} at 131-32, 562 A.2d at 749; see, e.g., Reeves Inc. v. Stake, 447 U.S. 429, 438-39 (1980) (distinction between regulator and market participant was found in considerations of (1) state sovereignty, (2) the state's role as guardian and trustee of its people, and (3) the traditional right of actors engaged in private business to exercise discretion regarding with whom to deal); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 810 (1976) (in considering the terms of a Maryland subsidy that disfavored out-of-state businesses, the Court held that the commerce clause did not forbid a state participating in the market to favor its own citizens).
\item \textsuperscript{70} \textit{Board of Trustees}, 317 Md. at 131-32, 562 A.2d at 749.
\item \textsuperscript{71} \textit{Id.} at 133, 562 A.2d at 749-50.
\item \textsuperscript{72} \textit{Id.} at 134, 562 A.2d at 750 (citing Reeves, 447 U.S. at 438-39).
\item \textsuperscript{73} \textit{Id.} at 134-35, 562 A.2d at 750.
\item \textsuperscript{74} The Trustees cited Wisconsin Dep't of Indus. v. Gould, 475 U.S. 282, 289 (1986) (finding that the act of prohibiting state purchases from labor law violators did not give the state market participant status) and South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 97-98 (1984) (finding that a state requirement, which mandated that timber purchasers from outside the State process the timber inside the State, could not be defended on market participant grounds because the State burdened a market other than that in which it participated). The Court of Appeals thought the Trustees' reliance on \textit{Gould} was misplaced because the Supreme Court struck down the Wisconsin regulation on grounds of pre-emption and because the Court held that the market participant doctrine was inapplicable when pre-emption existed. \textit{Board of Trustees}, 317 Md. at 136, 562 A.2d at 751.
\item \textsuperscript{75} 460 U.S. 204, 214-15 (1983).
\item \textsuperscript{76} \textit{Board of Trustees}, 317 Md. at 136-37, 562 A.2d at 751-52.
\end{itemize}
uing proprietary interest'' in the subject. The court noted that the Supreme Court distinguished its acceptance of the market participant doctrine in White from its rejection of that doctrine in South-Central Timber Development, Inc. v. Wunnucke, on the basis that the latter case involved the regulation of commercial activity for some time after the State had completed its transaction.

The court also rejected the Trustees' second argument—that the market participant doctrine is not available as a defense when the State burdens foreign, as opposed to interstate, commerce. In reaching this conclusion, the court relied on decisions by the Supreme Courts of New Jersey and South Carolina, an opinion of the Attorney General of Maryland, and on a treatise written by Harvard's Professor Lawrence Tribe.

As a final measure, the court also considered whether the Ordinance violates the commerce clause absent the market participant defense. Applying the balancing test set forth in Pike v. Bruce Church, Inc., it determined that the burden imposed on interstate commerce by requiring the sale of "hundreds of millions of dollars" of investments was not excessive in relation to the legitimate, local public interests the City had in divesting.

Further, the court decided that a divestment plan designed to

77. Id. at 137, 562 A.2d at 752.
78. 467 U.S. at 97, 99.
79. Board of Trustees, 317 Md. at 137, 562 A.2d at 751-52.
80. Id. at 138, 562 A.2d at 752.
81. K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n, 75 N.J. 272, 299-300, 381 A.2d 774, 788 (1977) (no need to differentiate between foreign and interstate commerce in a case in which the constitutionality of a "Buy American" statute was challenged under the commerce clause).
83. 69 Op. Md. Att'y Gen. 87, 88-89 (1984) (in considering a similar state proscription, Maryland's Attorney General opined that the market participant doctrine applies when foreign commerce is involved even when restrictions are imposed on private banks as a condition of receiving state deposits).
84. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-21, at 469 (2d ed. 1988) (state laws similar to Baltimore City's Ordinance No. 765 are constitutional under the market participant doctrine).
85. Board of Trustees, 317 Md. at 141, 562 A.2d at 753.
86. 397 U.S. 137 (1970). To determine the validity of a state statute that affects interstate commerce, the Court balanced the legitimate local public interest and its incidental effects on interstate commerce against the burden imposed on such commerce. Id. at 142.
87. Board of Trustees, 317 Md. at 143, 562 A.2d at 755.
88. Id. at 144, 562 A.2d at 755.
promote adherence to the Sullivan Principles, instead of the discontinuation of business activities in or with South Africa, would be ineffective because such a plan would not constitute a less intrusive way to accomplish the City's purpose. Nor did the court accept the proposition that the Ordinance created a "blockage" of interstate commerce by preventing purchases of securities of firms that did business in South Africa.

Lastly, the court concluded that even under the more searching scrutiny that is called for when foreign commerce is burdened, the Ordinance passes constitutional muster under the commerce clause. The court supported this conclusion by noting that the Ordinance did not violate the foreign commerce clause because it did not violate a federal directive or implicate a foreign policy decision which must be left exclusively to the federal government. Moreover, the court determined that the likelihood that South Africa would retaliate and thereby injure innocent states or localities was remote.

III. Analysis

In upholding the Ordinance, the court rejected the six constitutional arguments posited by the Trustees. Many commentators have advocated striking down divestiture initiatives on grounds that the Court of Appeals repudiated. Of the six grounds raised, two

89. The Sullivan Principles are a code of fair employment practices created by the Rev. Leon Sullivan and directed at American companies that do business in South Africa. See id. at 82 n.6, 562 A.2d at 724 n.6; Lewis, supra note 4, at 472 n.18.
90. Board of Trustees, 317 Md. at 143-44, 562 A.2d at 755.
91. Id. at 144-45, 562 A.2d at 755; see Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978) ("[i]nterstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another"), aff'g Governor of Maryland v. Exxon Corp., 279 Md. 410, 370 A.2d 1102 (1977).
92. Board of Trustees, 317 Md. at 145, 562 A.2d at 756 (citing Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446 (1979)).
93. Id. at 146, 562 A.2d at 756-57.
94. Id. at 145-47, 562 A.2d at 756-57; see Container Corp. v. Franchise Tax Bd., 463 U.S. 159, 194 (1983) (state legislation violates the foreign commerce clause if it "either implicates foreign policy issues which must be left to the Federal Government or violates a clear federal directive.").
95. Board of Trustees, 317 Md. at 147, 562 A.2d at 756-57.
96. Commentators have condemned the wholesale use of constitutional arguments to attack similar legislation. See, e.g., Troyer, Slocombe & Boisture, supra note 62, at 158 n.11.
97. Numerous commentators projected a different result. They relied on grounds almost as numerous as those that the court rejected in Board of Trustees. See Retirement System: Investment Policies, 87 Op. Tenn. Att'y Gen. 84 (May 5, 1987); Lewis, supra note 4,
seem particularly compelling: Namely, that the Ordinance improperly delegated legislative power to the Africa Fund, and that the Ordinance intruded upon the federal government's primacy in foreign affairs.

A. The Delegation Issue

The Ordinance only narrowly survived the court's scrutiny of the City's delegation to a private entity of the power to define permissible investment opportunities.\textsuperscript{98} The court's decision to uphold the Ordinance hinged on the conclusion that the Trustees are not "bound"\textsuperscript{99} by the determinations of the Africa Fund. It stands to reason, however, that the court also should have inquired into how the Africa Fund compiles and annotates the \textit{Unified List} and, finally, into how the Trustees employ it.\textsuperscript{100}

By failing to inquire into the nexus between the \textit{Unified List}'s recommendations and the Trustees' investment decisions, the court undermined its analysis. Having stated that a binding list would raise serious constitutional problems, it circumvented the issue by

at 482-87 (the market participant doctrine should not be applied blindly in a foreign commerce context); McArdle, \textit{In Defense of State and Local Government Anti-Apartheid Measures: Infusing Democratic Values Into Foreign Policymaking}, 62 TEMP. L. REV. 813, 822-23 (1989) (expressing little hope that state or local divestment action can survive a foreign affairs challenge); Note, \textit{State and Local Anti-South African Action as an Intrusion Upon the Federal Power in Foreign Affairs}, 72 VA. L. REV. 813, 815, 850 (1986) (challenges based upon foreign affairs powers, the foreign commerce clause, and pre-emption all could prevail); infra note 105.

98. \textit{Board of Trustees}, 317 Md. at 92, 562 A.2d at 730.
100. The \textit{Unified List} provides a wide array of information. It addresses questions that relate to the identity of the corporate entity doing business in South Africa, i.e., parent, subsidiary, affiliate, or licensee of the listed entry. It identifies the nature of the investment and the product that the corporate entity sells in South Africa. It also provides the number of employees who work in South Africa and quantifies the company's financial involvement. The \textit{Unified List} provides sources of information for each entry, including contrary sources, and short discussions in paragraph form when a simple chart entry cannot convey information adequately. Nevertheless, the \textit{Unified List} offers this disclaimer:

Corporate connections with South Africa and Namibia are constantly in flux and additional information becomes available almost daily. Thus this list should be used as a starting point for further investigation. Before taking final divestment action users of the \textit{Unified List} should seek confirmation r.e. corporate involvement from the companies themselves, especially where an investment portfolio held in trust is concerned. The information appearing in the \textit{Unified List} is derived from a wide variety of sources, including secondary sources. While we have striven for accuracy, we can not [sic] guarantee the correctness of information appearing in the list.

\textit{R. Knight \& R. Walke, supra} note 26, at ii (emphasis original).
applying the rule of statutory interpretation which demands that courts construe legislation so as not to conflict with the Constitution. Instead, the court should have determined whether the **Unified List** was in fact used as a nonbinding reference list. It would have been reasonable for the court to have required the Trustees to demonstrate that they acted with some degree of independence in making divestment decisions as evidence of the nonbinding effect of the **Unified List**. In practical terms, if such a requirement imposed high research costs on the pension funds and resulted in diminished variable returns, then the City could have provided its employees with optional investment programs that relied upon investor ratification of such research costs. An increased demand for less expensive data also might drive local governments to share the research burden, which eventually could reduce the cost of such information.

The issue is of great importance because the Africa Fund could be thrust into a position of great power, depending on the number of state or local governments that rely upon the **Unified List**. The Africa Fund’s decisions can indirectly but decisively affect South Africa’s population and government, scores of owners and employees of America’s corporations, and millions of pension fund beneficiaries. It is not in the best interest of pension beneficiaries to remain wedded to this or any other organization—particularly one whose principle objective has nothing to do with earning a satisfactory return on their pension dollars. The success of the divest-

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101. *Board of Trustees*, 317 Md. at 97-98, 562 A.2d at 732.
102. See IRRC, *supra* note 36, at 27.

Active managers who rely on security analysts to investigate the return prospects of stocks will incur higher research costs under divestment because they will have to follow a larger number of smaller stocks, which may require more intensive research where little “street” analysis exists for them.

The extent of the increase in research costs depends in part on the size of the manager’s investment organization and, in part, on the manager’s style.

*Id.*
103. See infra notes 174-176 and accompanying text (discussing the proposal of providing trust beneficiaries with investment options).
104. Langbein and Posner, as well as others noted below, would argue that the court was wrong to find that the Ordinance does not violate the Trustees’ fiduciary duties of loyalty and care found in §§ 404(a)(1) and 404(a)(1)(B) of the Employee Retirement Income Security Act (ERISA) of 1974, 29 U.S.C. §§ 1001-1381 (1982), and also found in the common law. Langbein & Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980); see Blankenship v. Boyle, 329 F. Supp. 1089, 1098-99, 1106, 1113 (D.D.C. 1971) (trustees of union pension fund violated duty of loyalty when they invested not for the purpose of maximizing return, but to provide collateral advantages to the union). Langbein and Posner also strongly attacked both Professor Scott’s endorsement of social investment as inconsistent with his emphasis on loyalty and prudence, *see*
ment movement already has inspired other activists to use investment funds to achieve other social ends.Indeed, it seems clear that investment decisions made with an eye toward social and political ends are likely to become an increasingly important part of modern fund management. And if cities choose to become socially conscious investors, they should do so only if either pension fund beneficiaries' financial interests remain protected or the beneficiaries are given an investment alternative.

B. The Foreign Affairs Analysis

Although the court's decision that the Ordinance does not unconstitutionally intrude upon the federal government's authority to conduct foreign relations ultimately may prove correct, its reasoning is flawed in more than one respect. First, the court mistakenly discounted the impact that local divestment legislation has had on South Africa. It also disregarded that the Ordinance is designed to do more than absolve the City of its guilt for perpetuating apartheid through its investments: it is, in part, a coercive measure designed to promote change in South Africa. Finally, the court failed in its attempt to distinguish *Board of Trustees* from *Zschernig v. Miller*.

The Court of Appeals' unwillingness to acknowledge all of the Ordinance's underlying purposes hurts the decision's credibility. The court stated that the Ordinance simply ensures that the pension


106. *See J. HANLON & R. OMOND, THE SANCTIONS HANDBOOK* (1987). The strategy is to place pressure on companies, who by their withdrawal from South Africa, injure the South African economy and place pressure on its government. Thus, the coercive process involves two distinct steps. *Id.* at 9, 28-29, 31, 201-03, 284-85, 287-88, 335, 337.

funds will "not be invested in a manner that [is] morally offensive to many Baltimore residents and many beneficiaries of the pension funds."\textsuperscript{108} Unfortunately, however, it is implausible to suggest that the majority of City employees are cognizant of where and how their pension funds are invested. To the extent that they are concerned, it is much more likely that they care about the financial performance of their pension funds.

Even assuming that the beneficiaries care deeply about the social impact of their investments, the court should have confronted the fact that a more important rationale lay behind the Ordinance than simply the beneficiaries' moral absolution.\textsuperscript{109} While the text of the Ordinance does not explain fully why the City chose to divest,\textsuperscript{110} it is clear that divestiture is a national movement, and that much can be learned about the Ordinance by comparing it to similar legislation.\textsuperscript{111} Indeed, in the minds of some commentators, promoting governmental change in South Africa is the most important goal of divestment.\textsuperscript{112} Measured against this objective, divestment has achieved considerable success. Although the ultimate social goal of dismantling the apartheid system has not yet been achieved,\textsuperscript{113} the

\textsuperscript{108} Board of Trustees, 317 Md. at 127, 562 A.2d at 746.

\textsuperscript{109} In its rejection of the foreign affairs challenge, the court stated that "Baltimore City's purpose in enacting the Ordinances was simply to ensure that the City's pension funds would not be invested in a manner that was morally offensive to many Baltimore residents and many beneficiaries of the pension funds." \textit{Id.} But this statement takes such a restricted view of the purposes of divestment that it could not escape contradiction elsewhere in the opinion. As the court discussed the definition of "doing business" in or with South Africa, it remarked that "[c]learly, however, the City Council did not contemplate a definition so narrow as to frustrate the objectives of divestiture." \textit{Id.} at 98, 562 A.2d at 732-33. "[O]bjectives" is in the plural form. The implication, of course, is that some objective exists beyond merely avoiding the moral taint of having invested indirectly in South Africa.

\textsuperscript{110} The preamble of the Ordinance simply states: "FOR the purpose of ending the investment of public pension funds in firms doing business in or with South Africa AND NAMIBIA." Baltimore, Md., Ordinance 765 (July 3, 1986).

\textsuperscript{111} See Prince George's County, Md., Res. CR-190-1985 (Nov. 19, 1985) (citing similar divestment action in other jurisdictions); Note, \textit{supra} note 98, at 817-18 n.28 (citing numerous efforts of divestment activists to coordinate). The \textit{Zschernig} Court took a similar approach to discovering the purpose behind the Oregon courts' interpretations of the State's probate reciprocity provision. It provided numerous examples of explanatory dicta in other jurisdictions and extrapolated the "real desiderata" behind the decisions it cited. 389 U.S. 429, 437 n.8 (1968).

\textsuperscript{112} See Dobris, \textit{supra} note 105, at 212-14 (divestment brings the potential for change through evolution or revolution); B. Baldwin \& T. Brown, \textsc{Economic Action Against Apartheid: An Overview of the Divestment Campaign and Financial Implications for Institutional Investors} 1-9 (1985) (discussing economic impact of divestment on South Africa); Note, \textit{supra} note 98, at 822 (divestment may hasten demise of apartheid through economic pressure).

\textsuperscript{113} At the time of this Note, the South African government recently had released
United States as a whole has applied substantial economic pressure against South Africa.\textsuperscript{114} The campaign has led to the loss of billions of dollars of new United States investments\textsuperscript{115} and to a serious decline in existing United States investments in South Africa.\textsuperscript{116} Economically, the cessation of new foreign investments will have long term impacts that will result in a decline in South African growth.\textsuperscript{117}

Of course, these impacts on South Africa and on the United States' relations with South Africa are not the product of Baltimore's Ordinance alone. It took the concerted effort of many states, cities, and companies to produce statistically significant corporate withdrawals.\textsuperscript{118} The trend of divestment legislation has been pervasive and has had an impact approaching that of a national policy. The Court of Appeals ignored this fact and instead accepted the circuit court's premise that the Ordinance had only "minimal" effect.\textsuperscript{119} Characterizing the Ordinance as ineffective and inconsequential does not do it justice. Given the divestment movement's nationwide appeal in the United States and its impact in South Africa,\textsuperscript{120} this finding is disingenuous. It is worth remembering

\textsuperscript{114} See B. BALDWIN & T. BROWN, supra note 113, at 1-9 (reporting some of the pressure applied against South Africa); J. HANLON & R. OMOND, supra note 107, at 336 (noting that 200 corporations have disposed of their equity investments; 90 have withdrawn equity investments, including IBM, GM, GE, and Coca-Cola; and a handful have attempted total withdrawals, including Eastman Kodak, AT&T, and CBS); Mufson, supra note 106, at H1, col. 1 (divestment has not only contributed to change in South Africa, but also has led to other social investment efforts because of its success).

\textsuperscript{115} B. BALDWIN & T. BROWN, supra note 113, at 2 (quoting a registered foreign agent of South Africa in the United States as saying in early 1985 that "[i]n one respect at least, the divestment forces have already won. They have prevented—discouraged, dissuaded, whatever you call it—billions of dollars of new U.S. investments in South Africa.").

\textsuperscript{116} See Note, supra note 98, at 825-26 (United States investments dropped from $2.6 billion in 1982 to $1.8 billion in 1984).


\textsuperscript{118} See supra note 4 (by September 1986, scores of cities and counties had passed divestment laws).

\textsuperscript{119} Board of Trustees, 317 Md. at 127, 516 A.2d at 746-47 (citing Clark v. Allen, 351 U.S. 503, 517 (1947) for the proposition that a local law is valid as long as its impact on foreign countries is only incidental or indirect). The court further discounted the effect of the Ordinance by noting that it would have no immediate effect on foreign relations and that it would only affect companies that did a significant amount of business in South Africa. In addition, divestment would occur gradually and would not cause political instability by itself. Id., 562 A.2d at 747.

\textsuperscript{120} See supra note 115.
ing that in Zschernig, the Court was concerned with the impact of one state's regulation on foreign relations: "The present Oregon [probate] law is not as gross an intrusion in the federal domain as those others might be. Yet, as we have said, it has a direct impact upon foreign relations and may well adversely affect the power of the central government to deal with those problems." The Court distinguished Zschernig from its lineal predecessor Clark v. Allen, primarily because Zschernig had more than "some incidental or indirect effect in foreign countries." The Court hesitated to categorize the Oregon statute as mere "diplomatic bagatelle." Concededly, the impacts that the Baltimore Ordinance produces are not "direct" in the purest sense. But the court seemed to place form before substance when it ignored the fact that the City Council intended the Ordinance to impact South Africa, whether indirectly or directly. The Zschernig Court, for example, noted disapprovingly of a California probate statute's reciprocity provision that "[t]he statute is not an inheritance statute, but a statute of confiscation and retaliation." Any acknowledgement of the antagonistic character of the local divestment statutes would have led inevitably to the conclusion that they are more closely akin to the statute in Zschernig than to the less intrusive legislation upheld in Clark.

It is difficult to deny that Baltimore's "voice"—even if indistinguishable from that of other states and localities—was heard. It is even more difficult to deny that divestiture late in the Reagan administration had the effect of splitting the United States' voice in international affairs. Indeed, President Reagan and his spokespersons never agreed with Congress and the public that either sanctions or divestment were the appropriate response to apartheid.

121. 389 U.S. 429, 441 (1968); see McArdle, supra note 98, at 820-21 (the Court framed the relevant inquiry in Zschernig as one of "direct impact," yet did not detail any need to show measurable effects on an articulated national policy).

122. 331 U.S. 503 (1947) (general reciprocity clause on its face does not intrude on the federal foreign powers).


124. Id. at 435.

125. See id. at 434-35, 441 (establishing a direct impact standard). The Court of Appeals argued that the impact on foreign relations is "incidental or indirect" and therefore does not cross the line which forbids states to make foreign policy. Board of Trustees, 317 Md. at 127, 562 A.2d at 746 (citing Clark, 331 U.S. at 517).

126. Board of Trustees, 317 Md. at 106, 562 A.2d at 737.


128. See Note, supra note 98, at 829-31 (citing President Reagan's remarks as he signed his executive order of September 9, 1985, which imposed more moderate sanctions on South Africa than Congress would have imposed; Reagan said that the sanc-
Although the court correctly noted that the Comprehensive Anti-Apartheid Act of 1986\(^{129}\) did not pre-empt the Ordinance because the City and congressional policies were not in conflict, the Ordinance did conflict with the broad goals of the President's policy of constructive engagement.\(^{130}\) In effect, the United States articulated foreign policy in three voices: those of the Administration, the Congress, and the local governmental entities.

The court's distinction of \textit{Zschernig} was not persuasive. It adopted the trial court's interpretation of \textit{Zschernig} as forbidding only "continuing investigation, assessment or commentary by local government officials or employees into the laws or operations of the South African government."\(^{131}\) But \textit{Zschernig} purports to limit states and localities far more than the circuit court admitted.\(^{132}\) \textit{Zschernig} disapproves of "minute inquiries" into the administration of law,\(^{133}\) and of local laws that affect international relations "in a subtle and persistent way."\(^{134}\) The Baltimore Ordinance arguably crosses both of these lines.\(^{135}\) Moreover, lest it be argued that \textit{Zschernig} backhandedly condones regulations that do not "impair the effective exercise of the Nation's foreign policy,"\(^{136}\) the probate reciprocity statute at issue in \textit{Zschernig} was entirely consistent with the generally antagonistic policies the United States pursued towards the communist block during the Cold War. Nor can the Ordinance's supporters reasonably argue that the position of the \textit{Zschernig} Court rested on antipathy towards local judicial actions as opposed to legislative

\begin{itemize}
  \item 130. See supra note 4.
  \item 131. \textit{Board of Trustees}, 317 Md. at 126, 562 A.2d at 746 (quoting from Board of Trustees of the Employees' Retirement Sys. v. Mayor of Baltimore, No. 865665065/CE-59858 (Baltimore City Cir., July 17, 1987)).
  \item 132. See McArdle, supra note 98, at 822-23 (given \textit{Zschernig}'s low threshold for direct impact and a lack of criteria for identifying impact, the case leaves little hope for state or local actions attacked under the foreign affairs clauses); see also Note, \textit{North Carolina's South African Divestment Statute}, 67 N.C.L. REV. 949, 966-67 (1989) (presenting arguments that the \textit{Zschernig} case established a per se rule).
  \item 134. 389 U.S. at 440.
  \item 135. \textit{But see} Note, supra note 133, at 974 (developing a balancing test and concluding that North Carolina's divestment statute which requires corporations to adhere to the Sullivan Principles is constitutional).
  \item 136. 389 U.S. at 440.
\end{itemize}
acts. The mere fact that the Ordinance represents a "single general decision," seems insufficient to justify distinguishing Board of Trustees from Zschernig—the Ordinance very likely would have a more lasting impact on relations with South Africa than a single judicial decision. In summary, it appears that the court ought to have found a sturdier basis for its decision to reject the foreign powers challenge.

C. The First Amendment Issue

In an article responsive to the initial circuit court decision that led to Board of Trustees, Professor Andrea L. McArdle suggests that the first amendment right of free speech shields subnational governments' decisions to divest. McArdle recognizes that divestment legislation is more than an economic lever or means by which a community can absolve itself of moral liability for apartheid. Such legislation also serves as an expression of community sentiment deserving of first amendment protection. Although no other commentator has raised this argument, intuitively it seems clear that divestment legislation, like many boycotts, has expressive as well as coercive aims. As such, McArdle focuses not on whether the first amendment protects state and local governments, but on

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137. See Lewis, supra note 4, at 514. The Zschernig Court struck down the legislation as well as the Oregon judicial decisions that had denied East German nationals their inheritance. 389 U.S. at 440.
138. Board of Trustees, 317 Md. at 126, 562 A.2d at 746 (quoting Troyer, Slocombe & Boisture, supra note 62, at 159).
139. McArdle, supra note 98, at 813, 833.
140. Board of Trustees v. Mayor of Baltimore, No. 863665065/CE-59898 (Baltimore City Cir. July 17, 1989).
141. McArdle, supra note 98, at 832.
142. Id. at 833.
143. McArdle argues that regardless of whether subnational governments are entitled to first amendment protections, they possess political rights inherent to the federal system which permit them to engage in political bargaining and coalition-building. McArdle, supra note 98, at 834. Most notably, these rights are exercised in the United States Senate, in which states are represented in the national government and are collectively given the foreign affairs power to ratify treaties. Id. at 835. McArdle also refers to L. Henkin, Foreign Affairs and the Constitution 476 n.51 (1972), for the proposition that the existence of specific constitutional prohibitions of state action with respect to foreign affairs may imply that other activities are permissible. Id. at 822 n.67. But see Hines v. Davidowitz, 312 U.S. 52, 63 (1941) (interest of subnational governments requires that they not infringe upon federal power over foreign relations); United States v. Belmont, 310 U.S. 244, 331 (1967) (the state as an entity does not exist for purposes of foreign relations). Moreover, although the structure of the federal government allows states a voice in the Senate, that structure also suggests that the Senate is the only appropriate forum in which states may express themselves by approving a foreign policy. The mere fact that states are represented in the Senate does not imply that they should
the expressive nature of divestment initiatives.\footnote{144}  

[L]ocal government expression that relates to public affairs promotes a societal interest in the free flow of information pertaining to government. By its nature, such expression implicates first amendment values and merits protection, even if the vehicle for this speech, the local government entity or its policymaking organ, does not.\footnote{145}  

Noting that conduct mixed with speech may be regulated more closely than pure speech, Professor McArdle identifies the “speech plus” situation as the potential Achilles’ heel of the first amendment defense for divestment.\footnote{146}  The Supreme Court in United States v. O’Brien\footnote{147} set forth the test that courts are to apply when a plaintiff wants to prevent the government from regulating conduct that has both speech and non-speech elements.\footnote{148}  The test asks the court to identify whether the government’s interest in regulating the non-speech aspect of the individual’s conduct is sufficiently important to justify the incidental constraints that such regulation places upon the communicative aspects of the conduct.\footnote{149}  As such, O’Brien’s conviction was based on the non-speech element of burning his draft card, not on the communicative component of that conduct.\footnote{150}  In O’Brien, the Court found that the governmental interest in ensuring the smooth operation of the Selective Service System outweighed any first amendment limitations.\footnote{151}  In applying the O’Brien test to divestment legislation, McArdle explains that challengers of divestment complain primarily that the federal government, and not subnational entities, must be the unique source of our country’s voice in international affairs.\footnote{152}  She views the expressive component of divestment legislation as the only constitutional culprit.

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feel free to disregard treaties which are repugnant to them, but which the Senate nevertheless ratified. Of course, if McArdle is correct that first amendment protection depends not upon the speaker’s identity but upon the nature of the communication, then this debate may not be decisive.
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145. McArdle, supra note 98, at 837.  
146. Id. at 841.  
147. 391 U.S. 367 (rejecting first amendment challenge to conviction for burning draft card), reh’g denied, 393 U.S. 900 (1968).  
148. Id. at 377.  
149. Id.  
150. Id. at 382.  
151. Id.  
152. McArdle, supra note 98, at 842; see United States v. Pink, 315 U.S. 203, 229, 233-
under a foreign affairs challenge. Under the O'Brien test, McArdle posits that the strength of the first amendment protections for the Ordinance are at their maximum because expression, not conduct, is being attacked.

In the next step of the decision-making process—the actual balancing of the right of free speech against the integrity of the federal government’s foreign affairs powers—McArdle argues that the former generally will prevail. Although the Supreme Court has abjured an explicit balancing of first amendment and foreign powers interests, the Court’s practice of according great weight to speech, and permitting only a greater constitutional interest to offset it, effectively constitutes a balancing test “heavily skewed” in favor of the first amendment values. Thus, McArdle’s analytical framework leaves little doubt that divestment legislation should be upheld.

Professor McArdle’s analysis raises two important questions. The first relates to her perception that because the Ordinance represents a “voice” in foreign affairs, the foreign affairs challenge addresses primarily the speech aspects of the Ordinance. In so doing, McArdle mistakenly disregards the Ordinance’s significant coercive function. The economic impact that divestment has had on South Africa is analogous to the impact produced by a national economic policy. Clearly, economic policies may be composed of elements other than speech. Both the President’s 1985 sanctions, and the

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34 (1942) (President, without consent of Senate, has power to establish United States foreign policy; states do not share in power over external affairs).

153. McArdle, supra note 98, at 842.

154. Id. at 838-41.

155. The Court in United States v. Robel, 389 U.S. 258 (1967) stated:

We recognize that both interests are substantial, but we deem it inappropriate for this Court to label one as being more important or more substantial than the other . . . . We have ruled only that the Constitution requires that the conflict between constitutional power and individual rights be accommodated by legislation drawn more narrowly to avoid such conflict.

Id. at 268 n.20.

156. McArdle, supra note 98, at 839-40 (citing New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (prior restraint imposed on the press through an injunction against publishing the Pentagon Papers was presumed constitutionally invalid as are all prior restraints; the government thus carries heavy burden of justifying such prior restraint)).

157. Exec. Order No. 12,532, 3 C.F.R. § 387 (1985). The President derived the powers to implement the sanctions from the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. §§ 1701-1706 (1982). The President probably overstepped his authority because the IEEPA supplies the President with supplementary powers only when an “unusual and extraordinary threat,” whose source is outside the United States, arises. Id. § 1701(a). The President also invoked authority that a number of other enabling
more sweeping congressional act of 1986\textsuperscript{158} contained both expressive and coercive components. These two components are most easily distinguishable when a rift arises between them, such as that which appeared in the President’s 1985 sanctions: the economically coercive aspect of the 1985 sanctions was antithetical to Reagan’s articulation, even as he signed the Executive Order mandating the sanctions, of the United States policy of constructive engagement.\textsuperscript{159}

Viewed in light of this incongruous Executive Order, the Ordinance’s coercive component becomes more evident—even though it exists in harmony with the expressive component. The problem this poses for Professor McArdle’s emphasis on the expressive element of divestment is that some harm to South Africa’s economy would occur even if that country somehow failed to receive Baltimore’s disapproving message. In other words, the coercion might exist even in the absence of the expression. As a result, under \textit{O'Brien}, the first amendment power to protect divestment would not be at its apogee, as she suggests. Whether it is still strong enough to counterbalance a foreign powers challenge remains to be seen.

The second problem, which McArdle herself noted,\textsuperscript{160} is that the minority’s expressions are likely to be squelched in a community that chooses to express itself through its political organs. She argues, though, that the “public scrutiny and discussion,” which generally will arise in a local legislative body, constitutes a “reasonable accommodation” to the minority.\textsuperscript{161} Her counterargument unfortunately ignores the existence of an even more glaring problem.

Beyond merely deterring minority speech, using government as a vehicle for expression co-opts minority voices by adding them to those of the majority. For example, those who support a policy of constructive engagement may prefer to see their pension funds invested in companies that do business in South Africa. The passage of the Ordinance, however, forced them to join in the symbolic and coercive act of divesting and infringed on their first amendment rights to refrain from speaking.\textsuperscript{162}

\textsuperscript{158} See Lewis, supra note 4; supra notes 145-147 and accompanying text.
\textsuperscript{159} See supra note 129 and accompanying text.
\textsuperscript{160} See supra note 98, at 837-38.
\textsuperscript{161} See \textit{id.}, at 838, notes 139-141 and accompanying text.
\textsuperscript{162} See, \textit{e.g.}, \textit{Riley v. National Fed’n of the Blind, Inc.}, 487 U.S. 781, 797 (1988) (compelled speech and compelled silence are constitutionally equivalent); \textit{West Virginia State Bd. of Educ. v. Barnette}, 319 U.S. 624, 642 (1943) (no official may prescribe polit-
Addressing state-mandated symbolic acts, Chief Justice Burger wrote in *Wooley v. Maynard* that "[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable." The *Wooley* Court found that the State infringed on two Jehovah's Witnesses' rights "to refuse to foster" by prosecuting them for placing tape over the state motto on their license plate. The majority felt that any difference between mandating display of the state motto and requiring citizens to make symbolic gestures such as saluting the flag was merely one of degree. It then balanced the injury inflicted on the Jehovah's Witnesses against the State's countervailing interests and found the former to be weightier.

In *Board of Trustees*, the City could justify the Ordinance by arguing that it: (1) demonstrates the City's disapproval of apartheid, (2) relieves the pensioners of moral culpability for sustaining apartheid with their investments, and (3) contributes to an effort to apply economic pressure indirectly against South Africa for the reform of apartheid. Whether or not these rationales are more weighty than those proffered in *Wooley* may make little difference: The *Wooley* Court emphatically stated that "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."

Similarly, focusing on second party attempts to require political conduct, courts have condemned the imposition of compulsory union fees designated for political purposes that fee-paying nonunion members found objectionable. In *Abood v. Detroit Board of Ed*.
ucation, the Court held unconstitutional the use of such fees for political activities that certain employees objected to and that were not related to the collective bargaining process. As such, the Court ruled that if the union wished to make political contributions, it would be required to finance such activities with contributions made by employees who did not object to the contributions and who were not coerced into making them. If the Abood rule applies to politically motivated public divestment in addition to political contributions, then an analogous accommodation by the City to dissenters would lay this and other problems to rest.

CONCLUSION

This Note concludes that the reasoning which the Court of Appeals used to uphold the Baltimore divestment ordinance was flawed in two areas. First, the court should have required the circuit court to determine, as a matter of fact, whether the City had delegated authority to the Africa Fund. The Unified List provides the Trustees with enough data to allow them to make discretionary decisions or to steer them in the direction of further research. But to escape the conclusion that the Trustees' use of the list constituted a de facto improper delegation of authority, the City should have been required to show that the Trustees did exercise some discretion and did not rely unthinkingly on the list. Similarly, the trial court's determination that the Unified List was nonbinding as a matter of law was reviewable, and the Court of Appeals might have paid closer attention to conduct of the Board of Trustees which might evidence its interpretation in fact of the Ordinance.

Second, the court also sidestepped the Trustee's argument that the City impinged on the federal government's foreign policy powers. As discussed, the Ordinance has both expressive and coercive components; and these, together with the divestment legislation of other subnational entities, have had a notable impact on foreign relations. The court should have explored more carefully than it did

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169. 431 U.S. 209, 234-37 (1977) (compelling nonunion members to make contributions for political purposes infringes on their first amendment rights just as would prohibiting contributions).
170. Id. at 235-36.
171. Id.
172. See infra text accompanying notes 174-76 (discussing such an accommodation).
in *Board of Trustees* the principle that primacy in foreign relations is lodged in the federal government.

Finally, Professor McArdle has proposed an argument that balances the constitutional requirements of the federal structure against the speech values embodied in the first amendment. The effectiveness of McArdle's argument, however, is contingent upon acknowledging only the expressive elements of divestment legislation and ignoring the coercive elements. The Court of Appeals adopted a functionally similar view when it found that the Ordinance had minimal economic impact on South Africa, and focused almost exclusively on the City's desire merely to remove the moral taint of having supported the system of apartheid through its investments. Essential to this approach was the court's decision to dissociate the Ordinance from the large, national movement against apartheid and to treat it as an isolated legislative act. This approach is disingenuous considering the economic repercussions that divestment has had on South Africa which resulted from the coercive element of the legislation.

Simply focusing on the Ordinance's expressive component also implicates other first amendment concerns that cut against McArdle's view. For example, some employees undoubtedly prefer not to see their pension funds become vehicles for objectionable symbolic speech. Even if all of the City's employees agree that apartheid is the scourge of South Africa, some still may adhere to the belief that divestment is counter-productive, and that a proactive American policy is preferable. Local divestment programs arguably force such people to foster symbolic speech and to join in political conduct that they find objectionable.

The problems that this Note raises can be resolved by instituting a change in the City's divestment program. A degree of flexibility should be introduced to counter the problem raised by the delegation issue (and potential violations of fiduciary duty), the foreign affairs challenge, and the minority's first amendment rights. This could be accomplished by an option under which employees who object to the divestment program for any reason may opt to place pension funds in a separate trust fund that does not divest from South Africa. Relying on the trust law doctrine of ratification, Professors Langbein and Posner have suggested that divesting public pension funds should allow beneficiaries to choose between traditional plans or divesting plans.173 Those who opted for the di-

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vesting plan would be estopped from complaining that the divesting plan's financial performance was inferior to that of the market and that they were forced to foster speech that they found objectionable.\textsuperscript{174}

In addition to the first amendment and fiduciary duty problems, this approach would blunt the challenges brought under the nondelegation doctrine and the federal foreign affairs powers. The City could argue that it merely was responding to public demands for pension fund investment options. Private citizens invest their dollars as they see fit without implicating a challenge to the foreign affairs powers. Through ratification, the pension fund beneficiaries can be given the same opportunity to make private investment choices. The inclusion of a ratification component would transform the divestment legislation from a local government policy into an opportunity for individual citizens to accomplish the same result through private initiatives. This logic also deflects charges of improper delegation: the beneficiaries, and not the City, are the parties who confer authority on the Trustees to divest the funds.\textsuperscript{175} Of course, if the Trustees rely too heavily on the Unified List, they may have to answer the beneficiaries' breach of fiduciary duty claims. But no delegation problem arises because the Trustees' power to divest derives from a private source, not the legislature. By adopting such a change, the City could realize a divestment strategy as principled as the ideals it advances.

\textbf{Garrett M. Smith}

addressed the possibility that a social investment policy such as that which the Trustees opposed would violate the common and statutory law of trusts. In outlining their proposal, they felt that the voluntaristic approach would be acceptable when variable benefits were at issue. But if fixed benefits were concerned, the City would be liable to its employees to make up any shortfall in their benefits, regardless of whether the employees opted for a divestment strategy. \textit{Id.} at 106.

\textsuperscript{174} \textit{Id.} at 106.

\textsuperscript{175} \textit{Id.} at 105-06. This argument is premised, as is Langbein and Posner's argument, on the understanding that employee contributions to the pension funds are required, and the employees are therefore settlors of the funds. \textit{Id.} at 105.