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Paul Lansing*

The Divestment of United States Companies in South Africa and Apartheid

I. INTRODUCTION

The Republic of South Africa and the United States are thousands of miles apart, yet their histories share one important characteristic: the attempt to establish multi-racial societies *peacefully*. In the United States, solutions have been temporary and ever-changing throughout our history. From our Constitution's statement that blacks were to be counted for three-fifths representational worth as compared to white freemen,¹ to the *Dred Scott*² decision just before the Civil War which held a black slave to be not more than a mere piece of property, to the *Plessy v. Ferguson*³ Supreme Court decision at the turn of the twentieth century which established the separate but equal rule, to our present one-man-one-vote standard,⁴ the United States has experienced considerable difficulty in achieving equality among its various racial groups.

South Africa also has struggled with this perplexing problem. As a British colony, South Africa abolished slavery in 1834, long before its abolition in the United States.⁵ After the Anglo-Boer War of 1899-1902,⁶ the Act of Union, which gave South Africa her independence, benignly neglected the problem of the franchise for

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1. U.S. CONST. art. I, § 2, cl. 3: "Representatives and direct Taxes shall be apportioned among the several States . . . by adding to the whole Number of free Persons . . . three fifths of all other Persons."

2. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

3. 163 U.S. 537 (1896).

4. *Baker v. Carr*, 369 U.S. 186 (1962).

5. It is estimated that there were 39,000 slaves in South Africa when, on 1 December 1834, they were declared free men, as were the slaves in other British possessions. See R. LACOUR-GAYET, *A HISTORY OF SOUTH AFRICA* 71 (1977).

6. In South Africa, this war is referred to as the South African War.

all nonwhites.⁷ Since the four provinces which were joined had different laws affecting the nonwhite franchise,⁸ there seemed no possibility of compromise were the issue raised. This arrangement lasted until 1948, about the same time that the United States Supreme Court rejected the doctrine of separate but equal.⁹

In the general election of 1948, the Afrikaner-dominated Nationalist Party won its first election, and has remained in power ever since.¹⁰ By its rejection of a one-man-one-vote standard, the Nationalist Party squarely faced the nonwhite franchise problem and adopted a policy of separate development for racial groups in South Africa.¹¹ Throughout the world, this policy has come to be known by its Afrikaans name: "apartheid."¹² Advocates of apartheid once feared that, because the nonwhite population outnumbered the white population by a four-to-one ratio,¹³ the white

7. The Act of Union of 1910 debate expressed the hope that the people of "South Africa, in the exercise of their undoubted and unfettered freedom, should find it possible, sooner or later, and sooner rather than later, to modify the provisions regarding the natives." R. LACOUR-GAYET, *supra* note 5, at 242.

8. The Union of South Africa comprised four provinces: the Cape of Good Hope, Natal, the Transvaal, and the Orange Free State. In the Transvaal and Orange Free State, non-Europeans had no right to vote; in Natal there was a theoretical right to the franchise; in the Cape, however, a long tradition of the colored franchise was accepted at the time of union. *See generally* 2 OXFORD HISTORY OF SOUTH AFRICA 325-64 (1971). This right to vote by coloreds in the Cape was taken away by the Nationalist Party-controlled Parliament in 1952, amid much controversy which exists to this day. *See* R. LACOUR-GAYET, *supra* note 5, at 299-300.

9. *Brown v. Board of Educ.*, 347 U.S. 483 (1954). *See* Kentridge, *The Pathology of a Legal System: Criminal Justice in South Africa*, 128 U. PA. L. REV. 603 (1980).

10. *See* S. VAN DER MERWE, *THE ENVIRONMENT OF SOUTH AFRICAN BUSINESS* 75 (1976). Prior to 1948, the English-speaking white minority population had been able to maintain political control of the country. Since the 1948 election, the Afrikaner-dominated Nationalist Party has steadily increased its parliamentary dominance. In the last general election, the Nationalist Party gathered 134 of the 165 seats in the South African House of Assembly. 1980-1981 STATESMAN'S YEAR-BOOK 1069.

11. *See* Greenberg, *South Africa and the American Experience*, 54 N.Y.U. L. REV. 3 (1979).

12. *See generally* SOUTH AFRICAN INFORMATION SERVICE, *SOUTH AFRICA* 192-222 (1976).

13. The different population groups of South Africa are composed as follows:

Group	Population	Percentage
Whites	4,320,000	16.5
Coloreds	2,434,000	9.3
Asians	746,000	2.9
Blacks	18,629,000	71.3
	26,129,000	100.0

S. VAN DER MERWE, *supra* note 10, at 55.

population one day might be dominated if a common franchise were ever adopted. Therefore, it became imperative to separate the races and let them develop in their own territories.¹⁴ This concept of separation of the races in South Africa has led to the establishment of separate homelands for all black South Africans.¹⁵ These homelands, or *bantustans*, compose the traditionally black rural parts of the country and amount to about thirteen percent of the land area of South Africa.¹⁶ When these homelands become independent black states, black South Africans will lose all claims to any political rights in the remainder of white South Africa.¹⁷ Independent black homelands, therefore, will mean that South Africa, legally, will have no black citizens. Even though most blacks would continue to live and work in South Africa, they would have no political rights there.¹⁸ The Transkei became the first homeland to receive its independence from South Africa on October 26, 1976. Since then Bophuthatswana and Venda also have received their independence.¹⁹

Since the American civil rights movement of the 1960s,²⁰ the United States has grown more aware of the racial situation in South Africa. That awareness has accompanied growing concern about corporate social responsibility.²¹ In the American business community, the debate about South Africa has focused upon the propriety of American corporate investment in that country. Those who protest the American corporate presence and participation in the apartheid system have pursued two tactics. First, shareholders have presented resolutions to encourage corporate

14. The central statute on race classification is the Population Registration Act, Act 30 of 1950, which provides for the Secretary of the Interior to register the entire South African population according to race.

15. These homelands were created by the Bantu Homelands Constitution Act No. 21 of 1971.

16. Richardson, *Self-Determination, International Law and the South African Bantustan Policy*, 17 COLUM. J. TRANS. L. 185, 187 (1978).

17. Bantu Homelands Citizenship Act No. 26 of 1970.

18. *Id.*

19. It should be noted that certain homeland leaders have refused to participate in the procedure to gain independence. Most notable of these leaders has been Chief Buthelezi of the KwaZulu homeland, who maintains that he and his people have the right to South African citizenship. See Richardson, *supra* note 16, at 189.

20. This movement was highlighted by passage of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000e (1970), which guarantees full and equal treatment without discrimination or segregation on the ground of race, color, religion, or national origin. The constitutionality of the Civil Rights Act was upheld by the Supreme Court in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

21. See, e.g., Note, *Influencing Multinational Corporations: The Infant Formula Marketing Controversy*, 10 N.Y.U. J. INT'L L. & POL. 125 (1977).

management to evaluate the role of U.S. corporations in South Africa in order to determine whether the investments serve to perpetuate or to discourage apartheid. These resolutions prompted more than one hundred American companies to adopt the Sullivan Principles, a code of conduct governing corporate investment written by the Rev. Leon H. Sullivan, a black director of the General Motors Corporation. The code calls for corporations to observe the following principles:

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

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

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

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

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

Principle 6—Improving the quality of employees' lives outside of work in such areas as housing, transportation, schooling, recreation, and health facilities.²²

Unfortunately, the impact of the Sullivan Principles has been limited, largely because of South African laws, racially based job categories, pressures on corporate management in South Africa, and the lack of enforcement mechanisms.²³

The second form of corporate protest concerns corporate divestment by investors who want to express disfavor with apartheid and with American corporate complicity in it. Columbia University, Amherst College, Smith College, University of Wisconsin,²⁴ and Tufts University all have divested themselves of either some or all of their holdings in firms that do business in South Africa.²⁵ Although gaining some notoriety, the divestment movement has had little practical effect on American corporate presence in South Africa.²⁶

In fact, shareholder resolutions and the corporate divestment

22. Note, *University Investments with a South African Connection: Is Prudent Divestiture Possible?*, 11 N.Y.U. J. INT'L L. & POL. 543, 547-48 (1979).

23. *Id.* at 548.

24. See Wall St. J., Aug. 18, 1978, at 8, col. 1 (University of Wisconsin). The University of Wisconsin trustees decided to divest after being informed by the Wisconsin Attorney General that continuing to hold stock in corporations doing business in South Africa would violate Wis. STAT. § 36.29(1) (1975), which forbids investments by the trustees in any corporation that discriminates on the basis of race, religion, color, creed, or sex.

25. However, some university trustees have rescinded resolutions calling for the sale of their stock in companies doing business with South Africa. See Wall St. J., June 6, 1978, at 19, col. 2 (discussing Miami (Ohio) University's rescission of its divestiture decision).

26. See §§ V & VI of text *infra*.

movement have had little, if any, consequence on American business in South Africa. While American corporations and their critics argue about the proper role for responsible business concerns, American investment has continued to expand.²⁷ Corporate officials have defended their investment in South Africa on the grounds that (1) it is not the place of private corporations to judge the internal affairs of another nation; (2) the purpose of a business entity is to make profits for its owners, not moral judgments;²⁸ (3) there are many other competitors available to trade with South Africa;²⁹ and (4) if anyone would be adversely affected by foreign withdrawal, it would be the black population of South Africa.³⁰ In short, American businesses do not favor the termination of their profitable operations in South Africa.

II. THE POLITICAL ARENA

Groups which consider American investment in South Africa to be supportive of apartheid have used various political forums to oppose it. Opponents have considered organizing an international divestiture movement. A draft resolution calling for termination of public and private financial ties to South Africa is currently before the United Nations Security Council.³¹ Under this proposal, the Security Council would prohibit loans, investments, and financial guarantees for South Africa by governments and private business.³² In addition, the Council would call upon governments to terminate all incentives for trade and investment in South Africa, such as the export insurance provided by the United States Export-Import Bank.³³

However, the main difficulties with trade and investment sanctions at this level concern the criteria for Security Council consensus and universal enforcement. The recently disclosed British violations of Rhodesian sanctions demonstrate the lengths to which nations can and will go to avoid sanctions which they believe work to their economic detriment.³⁴ Even during the recent

27. Note, *supra* note 22, at 546.

28. *South Africa: Hearings Before the Subcomm. on African Affairs of the Senate Comm. on Foreign Relations*, 94th Cong., 2d Sess. 684 (1976) (statement of Gilbert Jones).

29. *Id.* at 267 (statement of Dwight N. Wait).

30. *Id.*

31. Draft Resolution of Gagon, Mauritius and Nigeria, U.N. Doc. 5/12548 (1978).

32. *Id.*

33. *Id.* Export-import bank guarantees and insurance in South Africa were suspended by the Export-Import Bank Act, Amendments of 1978, Pub. L. No. 93-630, tit. XIX, § 1901, 92 Stat. 3724 (codified at 12 U.S.C. § 635(b)(9) (Supp. II 1978)).

34. *Economist*, Sept. 23, 1978, at 23-24. A recent report commissioned by the Brit-

Iranian crisis, the United States was unable to convince its European allies to join in a trade embargo to precipitate the release of the American hostages.

The United Nations Security Council has condemned apartheid as a violation of human rights,³⁵ and the United States is bound by the U.N. Charter to follow that resolution.³⁶ However, the Carter Administration continued the longstanding American policy of neither encouraging nor discouraging U.S. investment in South Africa.³⁷ Instead, it urged firms doing business in South Africa to adopt progressive labor policies.

The U.S. government has consistently favored this limited approach and has opposed more drastic measures. However, Congress has established a statutory framework for the prohibition on arms exports to South Africa. The International Security Assistance and Arms Export Control Act of 1976³⁸ "provides a comprehensive scheme for regulating arms sales both by the Government and by private companies."³⁹

In part, this government response is based on political reality and other factors beyond its control. As much as the Carter Administration championed human rights as a world-wide issue,⁴⁰ it realized the importance of South Africa as a political ally. From its unique geopolitical position, South Africa controls the shipping routes around the Cape of Good Hope, which are vital for transporting Persian Gulf oil upon which the West so heavily relies. In

ish government indicates that British oil companies, with the knowledge of government officials, regularly violated Security Council sanctions and provided Rhodesia with a major source of oil until 1978. *Id.*

35. Security Council Res. 417, 32 U.N. SCOR (2045th Mtg.) 1, U.N. Doc. S/INF 2045 (1977).

36. U.N. CHARTER art. 41.

37. STAFF OF SENATE COMM. ON FOREIGN RELATIONS 95TH CONG., 2D SESS., REPORT ON U.S. CORPORATE INTERESTS IN SOUTH AFRICA (Comm. Print 1978) [hereinafter cited as CLARK REPORT].

The newly elected Reagan administration has given some signals which indicate a different attitude towards South Africa. In March 1981, President Reagan said in a television interview that he favored good relations with South Africa because it is a friendly nation of great strategic value. "Can we abandon a country that has stood beside us in every war we've ever fought, a country that strategically is essential to the free world in its production of minerals we all must have and so forth." Wall St. J., March 23, 1981, at 5, col. 1. In addition, the Reagan administration is seeking the repeal of the Clark Amendment to the International Security Assistance and Arms Export Control Act of 1976, P.L. No. 94-329, tit. IV, § 404, 90 Stat. 957, which bars U.S. assistance to rebel groups in Angola. Wall St. J., March 23, 1981, at 5, col. 1.

38. 22 U.S.C. §§ 2751-2794 (1976).

39. Mehlman, Milch & Toumanoff, *United States Restrictions On Exports To South Africa*, 73 AM. J. INT'L L. 581, 585 (1979).

40. See, e.g., *President Carter's Address to the United Nations*, N.Y. Times, Mar. 18, 1977, at 10, col. 1.

addition, the Portuguese revolution and the subsequent withdrawal of its forces from Mozambique and Angola left the United States with few friends in southern Africa. South Africa also was instrumental in the negotiated independence of Zimbabwe, her neighbor to the north. However, the most important factor is that South Africa controls huge reserves of natural resources, such as deposits of platinum and chromite,⁴¹ which are vital to the West and to the United States. The importance of those resources to the American government should not be underestimated. Not long ago, the United States signed a United Nations resolution which called for an embargo of Rhodesia.⁴² Nevertheless, the United States Congress voted to violate that embargo because of the need to import chromium from Rhodesia.⁴³

Thus, a combination of the American business community's desire to avoid the apartheid issue and the federal government's unwillingness to challenge American support of apartheid might have led one to expect the controversy to die quietly. However, this was not to be the case.

III. STATE ACTION

Critics of apartheid have found surprising support for their efforts in certain state legislatures. Last year, the Nebraska legislature proved especially responsive. While one could expect the rather conservative Nebraska lawmakers to be generally disinterested in an international political controversy, during the 1980 session they passed a resolution which condemned apartheid in South Africa.⁴⁴

Legislative Resolution 43, introduced by State Senators Chambers⁴⁵ and Fowler and adopted 28-0,⁴⁶ declared that the investment of state funds in institutions which support the South African apartheid system is contrary to Nebraska's stand on human rights

41. Nickel, *The Case For Doing Business In South Africa*, FORTUNE, June 19, 1978, at 62.

42. Security Council Res. 253, 23 U.N. SCOR (1428th Mtg.) 5, U.N. Doc. S/INF/23/Rev. 1 (1968).

43. Act of Nov. 17, 1971, Pub. L. No. 92-156, § 503, 85 Stat. 427 (amending 50 U.S.C. § 98h-1 (1970)) (current version at 50 U.S.C. § 98h-4 (1976)) (commonly known as the Byrd Amendment) (repealed with respect to Rhodesia, 22 U.S.C. § 287(c) (1978)). The Byrd Amendment allowed United States imports of Rhodesian chromium for "strategic" purposes.

44. Neb. Legis. Res. 43, 86th Legis., 2d Sess. (1980) [hereinafter cited as Resolution 43]. Resolutions of the Nebraska Legislature are not binding laws. NEB. CONST. art. 3, § 13.

45. State Senator Ernest Chambers was the only black member of the Nebraska Legislature during the 1980 session. NEBRASKA LEGISLATIVE COUNCIL, NEBRASKA BLUE BOOK 245 (1978-1979).

46. 1980 NEB. LEGIS. J., 86th Legis., 2d Sess. 1596.

and social equality.⁴⁷ In addition, the Resolution asked the Investment Council, which oversees investment of Nebraska's trust funds by the state investment officer, to review the list of approved investments and to remove the names of those corporations and banks that invest in South Africa.⁴⁸

During debate on the Resolution, the market value of Nebraska's 1979 holdings in U.S. parent corporations investing in South Africa was established at approximately twenty-five million dollars.⁴⁹ In commenting upon the Resolution, the Nebraska Investment Officer suggested that the withdrawal of investments from such firms would have no measurable effect on South African racial policies, but would reduce Nebraska's investment opportunities.⁵⁰ This is an interesting view, for it closely parallels a frequent American corporate response to charges that investment in South Africa supports apartheid policies; that is, the purpose of a business entity is to make profits for its owners, not moral judgments. Just as private investors expect corporations to maximize the return on their investment capital, those who have funds invested by the state investment officer also expect the maximum return on their investments. However, in a private corporation a majority of shareholders may establish investment policies which reflect their position on moral issues, despite the danger that such "principled" investments may yield less than maximum returns. In Resolution 43, the Nebraska Legislature made a similar determination regarding the investment of public funds.

Although divestment by Nebraska would withdraw only a relatively small amount of capital from certain corporations, substantially more funds would be withdrawn if more states, including those which control substantially more capital, were to enact similar legislation.⁵¹ Such legislation has been considered in Illinois,⁵²

47. Resolution 43, *supra* note 44.

48. *Id.*

49. *Resolution 43: Hearing on L.R. 43 Before the Banking, Commerce & Insurance Comm.*, 86th Legis., 2d Sess. 2 (1979) (statement of Steve Fowler) [hereinafter cited as *Hearing on Resolution 43*].

50. *Id.* at 32 (statement of Don Mathes).

51. The Michigan state treasurer has reported that the state's pension fund has approximately \$400 million invested in corporations with South African connections. He further reported that disinvestment would require the reinvestment of nearly one billion dollars, with a loss of \$73.2 million to state pension funds. *Detroit News*, Mar. 31, 1980, § B, at 1, col. 1.

52. H.B. 1256 (1980). This bill would have prevented the deposit of state monies in banks making loans to South Africa and would have affected some \$150 million in the First National Bank of Chicago and the Continental Illinois Bank and Trust. The bill did not receive a sympathetic hearing. Centre Against Apartheid, Dep't of Political and Security Council Affairs, United Nations, March, 1981.

Michigan,⁵³ and Minnesota.⁵⁴ Michigan was the first state to take action in this area. Michigan Resolution 462, adopted February 6, 1978, urged Congress to impose immediate sanctions against the South African government as a response to that country's disregard for human rights and dignity.⁵⁵ However, the legislation currently before these state legislatures no longer asks Congress to respond, but rather requires state action.

State divestment would touch mainly funds on deposit at banks, state educational funds, and state pension funds.⁵⁶ Support for divestment legislation in these states has come primarily from church groups, universities, and labor unions. For example, the National Council of Churches' governing board declared its support for efforts to end all economic collaboration between South Africa and the United States government, and for the withdrawal of all funds in financial institutions which have investments in South Africa or which make loans to the South African government.⁵⁷ The AFL-CIO Executive Council has asked that all U.S. corporations immediately divest themselves of South African affiliates and sever all ties with South African corporations.⁵⁸ In addition, Douglas Fraser, president of the 1.5 million member United Auto Workers has announced that the union would withdraw funds from institutions making loans to South Africa.⁵⁹

When considering such legislative pronouncements as Resolution 43, one should remember that a resolution is only a statement of the legislature's opinion.⁶⁰ Nevertheless, although the Resolution is not a law,⁶¹ it may be interpreted as a statement of legislative intent to move toward a policy of divestment.⁶² The legislation contemplated in other states⁶³ would have the effect of law. Of major importance in assessing the significance of this divestment ac-

53. H.B. 5446, 80th Legis., Reg. Sess. (1980).

54. Senator Allan Spear has introduced such a bill in the Minnesota Senate, and Representative Phyllis Kahn has introduced a similar bill in the Minnesota House of Representatives.

55. H.R. Con. Res. 462, 78th Legis., Reg. Sess. (1978).

56. *Hearing on Resolution 43, supra* note 49, at 30-31.

57. SOUTHERN AFRICA PERSPECTIVES, No. 1, 1978, at 5 (The Africa Fund, publisher) (reprinting statement of National Council of Churches governing board, adopted Nov. 10, 1977).

58. *Id.* (reprinting AFL-CIO Executive Council statement of Feb. 24, 1978).

59. *Id.* (reprinting statement of Douglas A. Fraser, president of United Auto Workers, Mar. 3, 1978).

60. *See generally* *Hawks v. Bland*, 156 Okla. 48, 48, 9 P.2d 720, 721 (1932).

61. *See generally* *Van Hoveenberg v. Holeman*, 201 Ark. 370, 374, 144 S.W.2d 718, 721 (1940).

62. *See generally* *W.B. Gibson Co. v. Warren Metro. Hous. Auth.*, 65 Ohio App. 84, 87, 29 N.E.2d 236, 238 (1940).

63. *See* notes 52-54 *supra*.

tivity is that these states are now considering enforceable legislation to bring about their goals.⁶⁴

IV. CONSTITUTIONAL IMPLICATIONS OF RESOLUTION 43

Despite the commendable intentions of its drafters, Resolution 43 may violate the commerce clause⁶⁵ of the United States Constitution. However, in order to question the Resolution's constitutionality, the challenger would have to establish his standing to sue.⁶⁶ Although the focus of this article precludes an analysis of how to establish standing, it is nevertheless appropriate to note this substantial obstacle to any constitutional challenge.⁶⁷ Similarly, a potential challenger also must bring a claim which is "ripe" for adjudication,⁶⁸ a requirement which could preclude a constitutional attack mounted solely on the ground that the Resolution may cause injury at some future date. Although these requirements are somewhat collateral to the following discussion, their importance should not be underestimated.

An analysis of whether Resolution 43 violates the commerce clause must begin with the preliminary question of whether Resolution 43 "regulates commerce" within the meaning of the clause. The Supreme Court has interpreted the commerce clause broadly, observing that "to regulate commerce is to prescribe . . . the conditions upon which it shall be conducted; to determine how far it shall be free and untrammelled, how far it shall be burdened by duties and imposts, and how far it shall be prohibited."⁶⁹ Because the Resolution's principal purpose is to discourage investment in South Africa through withholding state funds from corporations

64. *Id.*

65. U.S. CONST. art. I, § 8, cl. 3. The clause provides, as one of the enumerated legislative powers, that Congress shall have power to "regulate Commerce with foreign Nations." *Id.*

66. Generally, to have standing to sue, the party must have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 68-83 (1978).

67. Cf. Note, *Constitutionality of the No Discrimination Clause Regulating University of Wisconsin Investments*, 1978 WIS. L. REV. 1059. The author suggests that a similar statute, WIS. STAT. § 36.29(1) (1975), may go unchallenged because no party will suffer the concrete injury required to establish standing. *Id.* at 1070.

68. The ripeness doctrine requires that the plaintiff state a claim which is so mature as to make it unnecessary for the court to speculate as to how the law might be applied to a particular set of facts. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 66, at 64-66.

69. *Welton v. Missouri*, 91 U.S. 275, 279-80 (1875).

which make such investments, it seems clear that it regulates commerce within the meaning of the commerce clause.

A second preliminary question is whether Resolution 43 applies to activity which constitutes "commerce." The Supreme Court has defined commerce as "something more than traffic—it is intercourse."⁷⁰ Subsequent decisions have held that Congress may, under the commerce clause, regulate various types of interstate activity, or even intrastate conduct which affects interstate commerce.⁷¹ In light of this expansive interpretation, it is likely that Nebraska's investment of public funds in commercial institutions would constitute "commerce" under the commerce clause.

However, predicting the result of a challenge to Resolution 43 based on the commerce clause is no easy task, for courts' reactions to state laws which affect foreign commerce have varied from case to case.⁷² The United States Supreme Court now appears willing to tolerate certain types of state regulation of foreign commerce, despite its earlier opposition to any such regulation. Nevertheless, the following analysis will reveal several grounds upon which Resolution 43 might be found to violate the commerce clause.

In the landmark case of *Brown v. Maryland*,⁷³ the Supreme Court held unconstitutional a Maryland act⁷⁴ which imposed a tax upon importers of foreign-made goods. The defendants, who had been convicted for selling foreign dry goods without the requisite license contended, *inter alia*, that the Maryland act unconstitutionally encroached upon Congress's exclusive power over commerce.⁷⁵ In holding the Maryland act repugnant to the commerce clause, the Court, speaking through Chief Justice John Marshall, disapproved of state regulation of commerce with foreign nations,⁷⁶ largely because it feared that federal power would be dangerously weakened if states were permitted to independently regulate their commercial relationships with foreign countries.⁷⁷

70. The Lottery Case (*Champion v. Ames*), 188 U.S. 321, 348 (1903).

71. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 66, at 150.

72. Compare *Zschernig v. Miller*, 389 U.S. 429 (1968), and *Bethlehem Steel Corp. v. Board of Comm'rs*, 276 Cal. App. 2d 221, 80 Cal. Rptr. 800 (1969), with *K.S.B. Technical Sales Corp. v. North Jersey Dist. Water Supply Comm'n*, 75 N.J. 272, 381 A.2d 774 (1977), *appeal dismissed*, 435 U.S. 982 (1978).

73. 25 U.S. (12 Wheat.) 419 (1827).

74. The Act supplemented an act imposing duties on licenses to retailers of dry goods. Ch. 246, § 2, 1821 Md. Laws. The Act required that "all importers of foreign articles or commodities, of dry goods, wares, or merchandise . . . shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars . . ." 25 U.S. (12 Wheat.) at 436.

75. 25 U.S. (12 Wheat.) at 436-37.

76. *Id.* at 448-49.

77. *Id.* at 446.

In commenting upon the power of Congress to regulate commerce, Chief Justice Marshall observed: "It is not, therefore, matter of surprise, that the grant should be as extensive as the mischief, and should comprehend all foreign commerce"⁷⁸

Several subsequent Supreme Court decisions have reaffirmed the rule announced in *Brown*.⁷⁹ For example, in *United States v. Belmont*,⁸⁰ the Court observed that "[g]overnmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government."⁸¹

The danger inherent in state regulation of foreign commerce has not declined since the era of John Marshall. One author recently concluded that such regulation, when viewed from a national perspective, is problematic for two principal reasons.⁸² First, state-imposed regulations which burden commercial activity with a foreign country may precipitate a response from that country which affects all states, not just the state which imposed the regulation.⁸³ Consequently, "the nation, not the state, would have to answer for state created difficulties with foreign powers."⁸⁴ Secondly, the foreign nation's response to a state regulation is not limited by the constitutional constraints which restrict the responses of an American state to regulations on commerce imposed by other states.⁸⁵ This could result in the imposition of retaliatory regulations by foreign countries which, in turn, could have substantial adverse affects on the national level. Moreover, as the dependency of the United States upon foreign nations for raw materials has grown, the importance of maintaining healthy relationships with other nations has also increased.

Despite *Brown v. Maryland* and its progeny, other decisions have sustained the constitutionality of state statutes which regulate commerce with foreign countries. While the following cases are factually distinguishable from the type of case which could arise under Resolution 43, they nevertheless provide some support for finding that Resolution 43 may be constitutional.

78. *Id.*

79. *E.g.*, *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941); *Welton v. Missouri*, 91 U.S. 275, 280 (1875).

80. 301 U.S. 324 (1937).

81. *Id.* at 330.

82. Note, *Foreign Commerce and State Power: The Constitutionality of State Buy American Statutes*, 12 CORNELL INT. L.J. 109, 117 (1979).

83. *Id.*

84. Recent Decisions, 6 TEX. INT. L.F. 134, 138 (1970).

85. Note, *supra* note 82, at 117.

*Bob-Lo Excursion Co. v. Michigan*⁸⁶ has been cited as principal authority for the view that states are not absolutely precluded from enacting regulations which affect foreign commerce.⁸⁷ In *Bob-Lo*, the defendant owned a small Canadian island, commonly known as "Bob-Lo," which was only fifteen miles upstream from Detroit on the Detroit River. The defendant operated an amusement park on the island which served Detroit residents who reached the island via the defendant's two steamships. The park was open to everyone except those who were either disorderly or black. The case arose when the defendant refused a black woman passage on one of the steamships and, as a result, was prosecuted and convicted under the Michigan Civil Rights Act.⁸⁸ On appeal, the defendant argued that application of the Michigan Civil Rights Act to his steamship operation between Detroit and the Canadian island constituted state regulation of foreign commerce in violation of the federal commerce clause.⁸⁹ The Court upheld the constitutionality of applying the Michigan Act to the defendant's conduct, which was found to be "foreign commerce" within the meaning of the Constitution.⁹⁰

The Court's decision in *Bob-Lo* was based upon certain findings which would be difficult to establish should Resolution 43 be challenged under the commerce clause. In *Bob-Lo*, the Court emphasized that the island was used exclusively by residents of Detroit and was, in effect, an extension of Detroit which was more important to Michigan than to Canada.⁹¹ The Court also noted that the Michigan Civil Rights Act was consistent with both federal policy and Canadian law.⁹² Those findings may be contrasted with the relationship which exists between the United States and South Africa. Resolution 43 was intended to undermine indirectly a legal policy which discriminates against South African blacks. Yet it directly affects few if any Americans. The opposite was true in *Bob-Lo*, where the defendant's discriminatory practices were directed exclusively at American blacks.

A second distinction emerges when the relationship between the Michigan Civil Rights Act and Canadian law is compared with the relationship between the South African policy of apartheid and

86. 333 U.S. 28 (1948).

87. Recent Decisions, *supra* note 84, at 140-41.

88. 333 U.S. at 31. The Michigan Civil Rights Act, MICH. COMP. LAWS §§ 17115-146 to -148 (Supp. 1940), prohibited any proprietor of a means of public transportation or amusement from withholding such services on account of race, creed, or color. 333 U.S. at 32.

89. 333 U.S. at 34.

90. *Id.*

91. *Id.* at 36.

92. *Id.* at 37.

Resolution 43's opposition to racial discrimination. From the *Bob-Lo* finding that the Michigan Act was consistent with Canadian law,⁹³ one can reasonably infer that a different result might have been obtained had the laws of Michigan and Canada been in conflict. Because the objectives of Resolution 43 conflict with South African law, the Resolution may violate the commerce clause by conditioning American commerce with South Africa on terms (*i.e.*, the abolition of apartheid) which are unacceptable to that country.

The Court further noted that the amusement park's discriminatory policies affected Michigan residents almost exclusively.⁹⁴ Thus, it would have been anomalous to have held unconstitutional the application of an act which protected the rights of Americans, yet neither conflicted with Canadian law nor affected Canadian citizens other than the defendant. Those facts are clearly distinguishable from the situation arising from an application of Resolution 43. The Resolution is intended not to protect the rights of Americans, but rather to advance the rights of blacks in South Africa. Additionally, the impact of the Resolution, if successful, will be felt almost exclusively by South Africans.

Finally, and perhaps most importantly, the *Bob-Lo* Court observed that the application of the Michigan statute to the defendant's conduct could not reasonably be found to adversely affect any national interest.⁹⁵ Canadian law was harmonious with the Michigan Act; consequently, the Court was unable to see how the prosecution of the defendant under Michigan law could lead to a hostile Canadian reaction directed at the United States. However, adherence to the policy of Resolution 43 might precipitate an adverse South African reaction directed at the United States rather than at Nebraska alone. While it is hard to believe that the action of a single state could provoke a hostile response, such a response would be more likely should several states enact legislation similar to Resolution 43. In light of American dependence upon South Africa for certain resources, any state action which might jeopardize our national access to those resources would appear to be unconstitutional, especially under *Brown v. Maryland*.⁹⁶

While *Bob-Lo* indicates that states are not absolutely prohibited from regulating "foreign commerce," the legislation challenged in that case is clearly distinguishable from Resolution 43. Therefore, it is useful to apply a commerce clause analysis to Resolution 43. In *Pike v. Bruce Church, Inc.*,⁹⁷ the Court articulated the

93. *Id.*

94. *Id.* at 40.

95. *Id.*

96. 25 U.S. (12 Wheat.) 419 (1827).

97. 397 U.S. 137 (1970).

following test for state statutes which affect interstate commerce:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree.⁹⁸

Although *Pike* held an Arizona act to be unconstitutional as an unreasonable burden on interstate commerce, the Court's decision in *Ray v. Atlantic Richfield Co.*⁹⁹ indicated a willingness to apply the preceding test, or at least portions of it, to cases involving the constitutionality of state regulations affecting foreign commerce.¹⁰⁰

In *Ray*, a federal district court had held that a Washington law regulating the size, design, and movement of oil tankers in Puget Sound violated the supremacy and commerce clauses of the Federal Constitution. The Supreme Court affirmed the lower court's finding that certain provisions were preempted by federal regulation, yet sustained the constitutionality of provisions requiring tug boat escorts for tankers in certain instances.¹⁰¹ The Court reasoned that such regulations need not be nationally uniform. Moreover, the cost imposed by the regulations upon tankers was so slight that it "in no way impede[d] the free flow of interstate and foreign commerce."¹⁰²

The *Pike* test and the preceding findings may be profitably applied to and contrasted with the likely effects of Resolution 43. Initially it must be recognized that Resolution 43 is intended to promote an interest which is largely, if not exclusively, foreign in nature. Conceivably, Nebraskans may derive some satisfaction from knowing that their legislation has advanced the cause of human rights in South Africa. However, it is hard to believe that this satisfaction constitutes a "legitimate local public interest" as envisioned by *Pike*.¹⁰³

Resolution 43 appears to be especially questionable in light of the second element of the *Pike* test, which permits only an "incidental burden" on commerce. The Resolution will not merely burden the flow of commerce between the United States and South Africa; if successful, it would substantially reduce investment by American institutions in South Africa. While incidental burdens on commerce have been tolerated as relatively harmless side effects of otherwise valid regulations, the principal objective of this

98. *Id.* at 142 (citations omitted).

99. 435 U.S. 151 (1978).

100. *Id.* at 179-80.

101. *Id.*

102. *Id.*

103. See generally Note, *supra* note 67, at 1064.

Resolution is to discourage institutions from investing in South Africa.

Finally, under the *Pike* test, no statute is constitutional if the burden it imposes upon commerce exceeds the local benefits it yields.¹⁰⁴ If the Resolution is measured under this standard, further doubt is cast upon its constitutionality, for its local benefits appear minimal compared with its substantial burden on foreign commerce.

Resolution 43 may also be invalid under the supremacy clause.¹⁰⁵ One author has concluded that a similar Wisconsin statute¹⁰⁶ is unconstitutional because it violates the exclusive power of the federal government in foreign affairs.¹⁰⁷ That conclusion is based largely upon an application of the test articulated by the Supreme Court in *Zschernig v. Miller*.¹⁰⁸

In *Zschernig*, the appellants, East German residents who were the sole heirs of an Oregon resident, sought to receive the decedent's property under the Oregon law of intestate distribution. However, members of the State Land Board contended that the decedent's property should escheat to the state because the appellants could not satisfy the requirements of Oregon law,¹⁰⁹ which restricted the rights of non-resident aliens to claim property left by deceased Oregon residents. In holding the statute unconstitutional, the Supreme Court concluded that it made "unavoidable judicial criticism of nations established on a more authoritarian basis than our own."¹¹⁰ The Court further relied upon the lan-

104. 397 U.S. at 142.

105. U.S. CONST. art. VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . ."

106. WIS. STAT. § 36.29(1) (1975): "No such investment shall knowingly be made in any company, corporation, subsidiary or affiliate which practices or condones through its actions discrimination on the basis of race, religion, color, creed, or sex."

107. Note, *supra* note 67, at 1066.

108. 389 U.S. 429 (1968).

109. OR. REV. STAT. § 111.070 (1957). The Supreme Court restated the requirements of the Oregon statute:

- (1) the existence of a reciprocal right of a United States citizen to take property on the same terms as a citizen or inhabitant of the foreign country;
- (2) the right of United States citizens to receive payment here of funds from estates in the foreign country; and
- (3) the right of the foreign heirs to receive the proceeds of Oregon estates "without confiscation."

389 U.S. at 430-31.

110. 389 U.S. at 440.

guage of *Hines v. Davidowitz*,¹¹¹ where it had observed that "[e]xperience has shown that international controversies of the gravest moment, sometimes even leading to war, may arise from real or imagined wrongs to another's subjects inflicted, or permitted by a government."¹¹²

The preceding language provides a solid foundation for finding that Resolution 43 violates the supremacy clause, especially when read in conjunction with the Court's statement that responsibility for foreign affairs is entrusted solely to the federal government.¹¹³ Resolution 43 unequivocally condemned the South African government for enforcing the policy of apartheid. Moreover, supporters of the Resolution hoped that it would adversely effect that country and precipitate the abolition of apartheid. If successful, the Resolution could provoke a hostile South African response in the form of an embargo on resources vital to the United States. Thus, adherence to Resolution 43 may violate the Federal Constitution by involving the State of Nebraska in establishing American foreign policy.

Closely related to the doctrine of federal supremacy is that of federal preemption. Although the Supreme Court has articulated various standards for determining whether federal preempts state legislation,¹¹⁴ the test set out in *Rice v. Santa Fe Elevator Corp.*¹¹⁵ is especially applicable to Resolution 43 because it affects foreign affairs, an area traditionally dominated by the federal government. In *Rice*, the Court observed that state legislation may affect a field "in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."¹¹⁶ Because the federal government has promulgated a variety of laws and regulations which affect American commercial intercourse with South Africa,¹¹⁷ a court could reasonably conclude that Nebraska is precluded from enacting legislation which affects that relationship. Similarly, Nebraska should not assume that it may attempt to regulate American investment in South Africa merely because the federal government has failed to do so. The lack of federal restrictions on certain aspects of American commercial intercourse with South Africa is intended to promote a relationship with that country which will assure continued American access to vital resources.¹¹⁸ Consequently, legislation,

111. 312 U.S. 52 (1940).

112. 389 U.S. at 441 (quoting *Hines v. Davidowitz*, 312 U.S. at 64).

113. 389 U.S. at 436.

114. See generally J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 66, at 267.

115. 331 U.S. 218 (1947).

116. *Id.* at 230.

117. See generally Mehlman, Milch & Toumanoff, *supra* note 39, at 581.

118. *Id.*

such as Resolution 43, which could jeopardize that relationship is, in all likelihood, preempted by federal law. That is, however, a somewhat speculative conclusion, for the Supreme Court is not likely to find a state law preempted when its conflict with federal law is unripe,¹¹⁹ or when congressional intent to dominate a field is unclear.¹²⁰

V. THE SOUTH AFRICAN REACTION

The South African reaction to the divestment movement in the United States has been mixed. The South Africa Foundation, a non-governmental research group reporting on matters affecting South Africa, conducted a year-long detailed investigation into the divestment movement. One of its main conclusions was that the potential of the movement is more serious than most South Africans realize.¹²¹ Its report included the following findings:

There are now more than 2,000 local, state, regional and national organizations across the United States committed to some action in this area.

These groups have a total financial power—operating funds, institutional support and personal donations—estimated at nearly [\$100,000,000].

In 1978 and 1979 alone, they were able to compel United States universities to divest [\$50 million] in stock.

They have succeeded in getting nearly all major United States banks to stop lending money to the South African government and to parastatal corporations.¹²²

A total of thirty-five of the United States' fifty states now have some kind of organizational network devoted to the anti-apartheid movement. Consequently, the Foundation report was very concerned about the growth of the divestment movement in the United States and the effects that the movement could have on South Africa in the immediate future.

A somewhat different response came from the Rand Daily Mail after the passage of the Nebraska resolution. The newspaper recognized that the divestment resolution condemned South African apartheid, but questioned whether proponents of divestment fully realized where this might lead.¹²³ The newspaper contended that divestment, if taken to its logical conclusion and applied on a sufficiently wide scale, would create the danger of wide-spread social unrest in South Africa.¹²⁴ It suggested that social unrest, economic

119. J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 66, at 270.

120. See *Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

121. *Disinvestment campaign in U.S. against SA 'serious'*, Star (Johannesburg), Apr. 19, 1980, at 1, col. 4 (int'l ed.).

122. *Id.*

123. *An ominous vote in America*, Rand Daily Mail (Johannesburg), Apr. 11, 1980, at 8, col. 1 (editorial). The Rand Daily Mail is perhaps the most influential English language newspaper in South Africa.

124. *Id.*

decline, and greater unemployment would preclude a peaceful resolution of the controversy over South African apartheid, so the divestment movement would not be desirable for South Africa or for anyone who wishes to avoid violence and destruction. In the view of the newspaper, rapid economic development and meaningful change are the only ways to halt divestment and save the country.¹²⁵

The South African Government's response is reflected in recent statements made by Vere Stock, the South African Consul-General in New York. Mr. Stock is convinced that South Africa has won the battle against pressure groups in the United States which oppose investment in South Africa.¹²⁶ In a statement to the press, Mr. Stock said:

Major United States companies are still under pressure on the campuses and at shareholder meetings, where there is still a lot of activity. But we have passed through the roughest time. It would be an overstatement to suggest that the disinvestment campaign has been defused. But we have come through the watershed period, at the very least.¹²⁷

This cross-section of South African opinion regarding the divestment movement in the United States should be considered in view of recent history in southern Africa. Since the Portuguese Revolution in 1974, South Africa has become increasingly isolated in the world community,¹²⁸ a feeling intensified by the recent grant of independence to Zimbabwe.¹²⁹ In Afrikaans, the word *laager* refers to the formation used by the early Dutch settlers in which they would make a circle of their wagons when under attack.¹³⁰ This word has recently come into greater use by South Africans who believe that, should the rest of the world wish to shun them, they will circle their wagons and prepare for the outside attack. In light of the prevailing psychology in South Africa, one must question whether the divestment movement, if successful, could bring about the desired result: the peaceful end to apartheid.

125. *Id.*

126. *Disinvestment battle won*, South African Digest, May 30, 1980, at 6, col. 3.

127. *Id.*

128. As a result of the Portuguese Revolution, Mozambique gained its independence in 1974, and Angola received its independence in 1976 after a long battle for power among various rival groups.

129. Zimbabwe gained its independence in April 1980 from Great Britain. In 1965, Rhodesia had made a unilateral declaration of independence, which went unrecognized by the rest of the world community and was the cause for United Nations-sponsored trade sanctions and economic embargo. A guerrilla war for independence started in 1973 after talks between Ian Smith and Joshua Nkomo regarding an end to racial discrimination broke down.

130. Both Afrikaans and English are official languages of South Africa. Afrikaans is a derivative of the Dutch language which was an official language until 1925.

VI. DIVESTMENT—THE PROBABLE RESULTS

Despite the widespread American disdain of apartheid, American investment in South Africa increased by 300% between 1960 and 1975.¹³¹ Furthermore, "American firms provide 70% of the computers used in South Africa, 43% of its petroleum, and 23% of its automobiles. United States firms employ approximately 100,000 South Africans, 70% of whom are black."¹³²

In light of these statistics, the question must be asked: "What would be the effect of divestment on South Africa?" An analysis suggests that the increase in American investment in South Africa is impressive only because the original figure in 1960 was so low. The United States has not been one of South Africa's traditional trading partners, which explains the low 1960 investment figures. Great Britain and West Germany have been and remain South Africa's most important trading partners¹³³ and exhibit no inclination to withdraw from that position.

Concerning the computers, petroleum, automobiles, and other products that South Africa imports, it has long been believed that petroleum is the Achilles heel of South Africa.¹³⁴ However, South Africa depends upon petroleum for only about 20% of its energy requirements.¹³⁵ Coal, which South Africa has in abundance, remains the primary energy source. Moreover, South Africa has anticipated potential oil embargoes by stockpiling petroleum reserves.¹³⁶ Current oil supplies can provide South Africa with an estimated three-¹³⁷ to six-year¹³⁸ cushion against any embargo. Additionally, the South African Oil, Coal and Gas Corporation, known as Sasol, is a world leader in the production of synthetic fuels deprived from coal; this provides an additional buffer against any possible embargo.¹³⁹

These factors, along with a general inability of apartheid opponents to muster coordinated international trade and investment sanctions,¹⁴⁰ make it clear that any embargo or divestment of busi-

131. CLARK REPORT, *supra* note 37, at 8.

132. Note, *supra* note 22, at 547 (citing CLARK REPORT, *supra* note 37).

133. See Nickel, *supra* note 41, at 62.

134. Malan, *South Africa and Economic Sanctions*, South African Digest, March 13, 1981, at 2 (Supp.).

135. A. SEIDMAN & N. SEIDMAN, SOUTH AFRICA AND U.S. MULTINATIONAL CORPORATIONS 63 (1978).

136. CLARK REPORT, *supra* note 37, at 57; Malan, *supra* note 134, at 2.

137. Malan, *supra* note 134, at 2.

138. Economist, June 17, 1978, at 97.

139. It was one of these Sasol installations that was raided by urban guerrillas, who set off explosions causing more than \$7.3 million of damage. See Wall St. J., June 3, 1980, at 16, col. 3.

140. See notes 31-34 & accompanying text *supra*.

ness by the United States would have little effect on the South African economy. During the recent worldwide embargo of trade with Rhodesia,¹⁴¹ that country had little problem obtaining whatever goods it could not produce itself and, ironically, became more self-sufficient than ever before. A similar embargo of South Africa, a country far more prepared for such a possibility and far more self-sufficient than Rhodesia was, seems ill-advised on a practical level.¹⁴²

Lastly, there is the matter of the 70,000 black South Africans employed by American corporations. The American divestment movement asks that if U.S. companies cannot effectively abide by the Sullivan Principles,¹⁴³ then it is their corporate responsibility to withdraw from South Africa and not cooperate with the apartheid regime. However, should this suggestion be followed, it would be black South African workers who would be most adversely affected by the American corporate withdrawal. In a country whose total black population is about 18 million people,¹⁴⁴ an additional 70,000 people unemployed will bring little relief to a population already struggling with high unemployment.¹⁴⁵

VII. CONCLUSION

The United States has a history of serious racial problems, yet it is the home of a movement which seeks to impose its belief in racial equality on other nations.¹⁴⁶ The American divestment movement has taken upon itself the task of imposing corporate responsibility on corporate managers doing business with the Republic of South Africa. It disregards the fact that the South African situation differs from the situation in this country and that apartheid is an internal domestic problem of a sovereign nation.

The propriety of mandatory divestment must be seriously questioned on two principal grounds. First, current demands for divest-

141. See Security Council Res. 253, *supra* note 42.

142. See N.Y. Times, Dec. 4, 1977, § 3, at 1, col. 1. "South African Finance Minister Horwood says the South African government would not be forced to its knees by withdrawal of American capital, and [former] U.S. Ambassador Young has stated that South Africa is one of the most self-sufficient countries in the world." *Id.*

143. See Note, *supra* note 22, at 547-48.

144. S. VAN DER MERWE, *supra* note 10, at 55.

145. A nationwide survey by the Department of Statistics found that half a million economically active blacks are out of work today in South Africa. See Star (Johannesburg), May 24, 1980, at 3, col. 5 (int'l ed.). But see L.A. Times, April 9, 1978, § V, at 2, col. 1.

146. In view of the racial confrontation that occurred in 1980 in Miami, Fla., one might question how much progress has been made in this country toward the peaceful integration of the races.

ment come when the United States is growing ever more dependent upon foreign countries for vital natural resources. American dependence upon South African platinum and chromite should not be ignored, but must be included in a balancing test which weighs the benefits of divestment against the risks it may create. Such a balancing suggests that widespread American divestment may risk resource shortages which will be borne largely by the American people, while the hoped-for, but unlikely, benefits will be enjoyed exclusively by South African blacks. Thus, American dependence upon South African resources should temper the American reaction to the deplorable practice of apartheid in South Africa.

Second, divestment is ill-advised, for it may precipitate an economic decline in South Africa which will have the most adverse affect upon South African blacks. Instead of advocating divestment, opponents of apartheid should strive to organize international diplomatic and political pressure which would threaten to isolate South Africa in the international community.¹⁴⁷ Finally, opponents of apartheid might provide direct support to those South African resistance movements which oppose apartheid.¹⁴⁸ However, despite these alternatives, the divestment movement has continued to express its opposition to American corporate involvement with South Africa's apartheid regime.

Finding only minimal corporate support through shareholder resolutions and institutional withdrawal of funds,¹⁴⁹ supporters of divestment have tried to persuade the federal government to act. The response has been constrained by various political and economic concerns: Washington too has failed to meet the goals of the divestment movement. However, somewhat surprisingly, certain state legislatures have responded positively to the movement. Unfortunately, such divestment legislation as Nebraska's Resolution 43 may be held unconstitutional as violative of the commerce or supremacy clauses of the Federal Constitution. State regulation of foreign commerce has been upheld in only a few instances, while federal supremacy in the area of foreign affairs is an established doctrine.

The reaction in South Africa to the recent events in this country has been mixed. Nevertheless, if the peaceful abolition of

147. Feimpong & Tiewel, *Can Apartheid Successfully Defy the International Legal System?*, 5 BLACK L.J. 287, 310 (1977).

148. *Id.*

149. Perhaps the most publicized corporate cooperation with the divestment movement came when Polaroid Corporation agreed to withdraw all of its operations because its film was being used by the South African police to enforce the pass laws.

apartheid is the goal of the divestment movement, it is time to review the practicality of pursuing this goal through divestment. In light of the South African state of mind and previous attempts at economic embargo by both the United Nations and this country, one must wonder if this is the best way of achieving the stated goal. The system of formal apartheid in South Africa is morally reprehensible and unjust in that it deprives millions of people of their basic human rights, but one must question whether divestment will have any positive effect.