



Digital Commons@
Loyola Marymount University
LMU Loyola Law School

Loyola of Los Angeles International and Comparative Law Review

Volume 10
Number 3 *Symposium—International Dispute
Resolution: Enforcement of Awards or
Agreements Resulting from Arbitration,
Mediation and Conciliation*

Article 9

6-1-1988

Federal Preemption and the South African Sanctions: A Survival Guide for States and Cities

Cinthia R. Fischer

Follow this and additional works at: <https://digitalcommons.lmu.edu/ilr>



Part of the [Law Commons](#)

Recommended Citation

Cinthia R. Fischer, *Federal Preemption and the South African Sanctions: A Survival Guide for States and Cities*, 10 Loy. L.A. Int'l & Comp. L. Rev. 693 (1988).

Available at: <https://digitalcommons.lmu.edu/ilr/vol10/iss3/9>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

Federal Preemption and the South African Sanctions: A Survival Guide for States and Cities

I. INTRODUCTION

On Thursday, August 17, 1986, Fluor Construction Company, a subsidiary of Fluor Corporation, was stripped of a 2.5 million dollar contract to perform part of the expansion on the Los Angeles Convention Center.¹ Los Angeles' anti-apartheid policy was responsible for removing Fluor Construction Company from the contract.² Fluor Corporation had conducted about 40 million dollars worth of business in South Africa during 1985.³ This was the first time that the city's unanimously enacted anti-apartheid policy had been invoked.⁴ On the state level, Governor George Deukmejian signed California's Divestiture Bill on September 26, 1986, that would demand the state to sell its investments in firms that conduct business in South Africa.⁵

While California's laws are not unique, they are the most controversial since California could have the greatest effect on the South African economy.⁶ The California divestment bill will affect an estimated 11.4 billion dollars in investment,⁷ whereas the next highest estimate, according to the American Committee on Africa, is Iowa's divestiture bill which could affect 110 million dollars.⁸ As of 1985,

1. Decker, *Fluor Stripped of Convention Work*, L.A. Times, Aug. 22, 1986, § I, at 1, col. 5.

2. Los Angeles has two separate anti-apartheid ordinances. One prohibits contracts with companies that have investments in South Africa or subsidiaries whose parent companies invest in South Africa. The other ordinance restricts the city from investing its funds in companies that do business in South Africa.

3. See Decker, *supra* note 1. On Tuesday, September 17, 1986, one month after removing Fluor Construction Company from the contract for the Convention Center, the Los Angeles County Board of Supervisors awarded another subsidiary of Fluor Corporation a \$304,345 contract to conduct engineering studies for the expansion of a jail in Saugus. L.A. Times, Sept. 17, 1986, § II, at 3, col. 4.

4. See Decker, *supra* note 1.

5. L.A. Times, Sept. 26, 1986 (late final) § I, at 1, col. 1.

6. Not only does California have the largest gross product of all the United States, it has the eighth largest gross product of all the nations in the world. NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ATLAS OF THE WORLD, at 68-69 (5th ed. 1981).

7. L.A. Times, Aug. 28, 1986, § I, at 1, col. 5.

8. Summary Chart on Public Fund Divestment, Am. Comm. on Africa, (Oct. 2, 1985) (on file in the Loy. L.A. Int'l & Comp. L.J. office) [hereinafter Summary Chart]. It should be

sixty-two cities and nineteen states have enacted some type of legislation to protest the oppressive South African government.⁹ However, in light of the recent federal legislation, these local laws may no longer be valid. A debate has begun in Congress and in the municipalities and states as to whether the federal Act¹⁰ preempts all state and local laws.¹¹ So far, there have been no cases that specifically address this issue,¹² nor has Congress definitively stated that the state

noted that the Committee has not determined the dollar effect that many of the state statutes will have on South Africa, although it is unlikely that any of them will even approach California's estimated effect.

9. Summary Chart, *supra* note 8. The states that have enacted measures against South Africa include, but are not limited to: Connecticut (divestment from companies that sell strategic products to the South African government, and from businesses not in the top two categories of the Sullivan Principles); Iowa (similar to Connecticut's law but also requires divesting funds from banks with loans to South Africa and divestment from companies doing business there); Maryland (prohibits depositing state funds in banks that make loans to the South African government or to South African companies, moratorium on investing state funds in companies which invest in South Africa that do not meet the first two categories of the Sullivan Principles); Massachusetts (divestment of all state pension funds from firms doing business in South Africa); Michigan (prohibits depositing state funds in banks making loans to South Africa, requires public educational institutions to sell all investments in companies doing business in South Africa); Nebraska (requires divestment of pension funds from businesses in South Africa not meeting the highest category of the Sullivan Principles); Wisconsin (investment of state educational funds in companies doing business in South Africa violates the state's Civil Rights Act); Virgin Islands (requires divestment of the state's pension funds from South African linked holdings within two years). The cities and counties that have ordinances regarding dealings with South Africa include, but are not limited to: Amherst, Mass.; Atlantic City, N.J.; Baltimore, Md.; Berkeley, Cal. (enacted in 1979, this may be the earliest city ordinance regarding South Africa); Boston, Mass.; Boulder, Colo.; Burlington, Vt.; Cambridge, Mass.; Charlottesville, Va.; Cincinnati, Ohio; Cuyahoga County, Ohio; Davis, Cal.; East Lansing, Mich.; Flint, Mich.; Fort Collins, Colo.; Fresno, Cal.; Gainesville, Fla.; Gary, Ind.; Grand Rapids, Mich.; Hartford, Conn.; Jersey City, N.J.; Madison, Wis.; Miami, Fla.; Middletown, Conn.; Montgomery County, Md.; Newark, N.J.; New Orleans, La.; New York, N.Y.; Oakland, Cal.; Philadelphia, Pa.; Pittsburgh, Pa.; Rahway, N.J.; Richmond, Va.; Rockland County, NY; San Diego, Cal.; San Francisco, Cal.; San Jose, Cal.; Santa Cruz, Cal.; St. Louis, Mo.; Seattle, WA; Stockton, Cal.; Washington, D.C.; Wilmington, Del.; Youngstown, Ohio. *Id.*

10. Comprehensive Anti-Apartheid Act, 22 U.S.C. §§ 5000-116 (Supp. IV 1986).

11. L.A. Times, Sept. 10, 1986, § I, at 1, col. 5; Warburg, *Divestiture Will Survive: Claims that Congress Silences States on S. Africa Are Wrong*, L.A. Times, Sept. 12, 1986, § II, at 5, col. 3; L.A. Times, Sept. 11, 1986, § I, at 6, col. 1; Varat, *State Actions on Divestiture Will Survive*, L.A. Times, Sept. 19, 1986, § II, at 5, col. 1; Smith, *Apartheid Act Casts Doubt on Local Laws*, L.A. Times, Mar. 16, 1987, § II, at 5, col. 3.

12. In the author's opinion, a case challenging local sanctions will most likely arise in one of two scenarios. In the first scenario, a company which desires a contract from the city will be denied the contract, even though it may be the lowest bidder. This denial results because the company has holdings in South Africa contrary to the city's ordinance prohibiting the city from contracting with companies that have economic ties to South Africa. The company will then seek damages by having the courts declare the ordinance invalid under the preemption doctrine. Under the second scenario, the state could begin selling the stocks that it has in a

laws are valid or invalid.¹³ In two places, the language of the Act may arguably evince congressional intent to preempt the state and local laws.¹⁴ However, the intent to preempt is both refuted¹⁵ and upheld.¹⁶ The primary reason that this debate has become so heated is

company which have either investments or does business in South Africa. As the state withdraws its funds, the company will be coerced into selling its South African investments in order not to lose the state as a valuable investor. To keep from having to make this choice, the company will challenge the divestment law under the preemption doctrine.

13. See generally Comprehensive Anti-Apartheid Act, 22 U.S.C. §§ 5000-116 (Supp. IV 1986) (no provision explicitly preempts state and local anti-apartheid laws).

14. 22 U.S.C. §§ 5002, 5116 (Supp. IV 1986). Section 4 embodies the purpose of the Act which is to "set forth a *comprehensive* and *complete* framework to guide efforts of the United States in helping to bring an end to apartheid in South Africa . . ." *Id.* § 5002 (emphasis added). Section 606 of the Act prohibits Congress from withdrawing federal funds from cities or states that condition contracts on the absence of South African ties "for 90 days after the date of enactment of this Act." *Id.* § 5116. Presumably, after that time, Congress may withdraw federal funds from states and cities that have anti-apartheid laws. Although neither provision expressly preempts state and local laws, they may express some congressional dissatisfaction with the laws. However, it may be argued that section 606, by giving Congress the ability to withdraw federal funds from localities with anti-apartheid legislation, implicitly recognizes that they will continue to exist even after the federal laws and thus intends that the federal Act will not preempt state and local laws.

15. H.R. Res. 548, 99th Cong., 2d Sess. (1986). This resolution states:

Resolved, That in passing the bill, H.R. 4868, as amended by the Senate, it is not the intent of the House of Representatives that the bill limit, preempt, or affect, in any fashion, the authority of any State or local government or of the District of Columbia or any Commonwealth, territory or possession of the United States or political subdivision thereof to restrict or otherwise regulate any financial or commercial activity respecting South Africa.

Id.

Statements in the Senate include: "I believe that it should be the right of any municipality to undertake a conscious decision not to do business with those who might be giving aid and comfort to the practice of apartheid"), 132 CONG. REC. S13,526 (daily ed. Sept. 24, 1986) (statement of Sen. D'Amato (R - N.Y.)); "Preemption would remove . . . pressures and deny Americans an opportunity to express their outrage over apartheid through activities directed by State and local governments."), 132 CONG. REC. S14,645 (daily ed. Oct. 2, 1986) (statement of Sen. Rockefeller (D - W. Va.)); "It is characteristic of our country that when people feel strongly about ethical issues, moral issues, they act in local ways; and often in our history, policy has come up from the lower levels of government rather than come down from the higher ones."), 132 CONG. REC. S13,525 (daily ed. Sept. 24, 1986) (statement of Sen. Moynihan (D - N.Y.)).

16. 132 CONG. REC. S11,817 (daily ed. Aug. 15, 1986) (statements of Sen. Lugar (R - Ind.) that Congress had occupied the field and left no room for state and local anti-apartheid laws); 132 CONG. REC. S11,839 (daily ed. Aug. 15, 1986) (Sen. Cranston's (D - Cal.) proposed amendment to require divestiture in the federal Act was defeated); 132 CONG. REC. S13,526-28 (daily ed. Sept. 24, 1986) (amendment proposed by Sen. D'Amato to specify that the federal Act did not preempt state law was defeated). With respect to Sen. D'Amato's proposed amendment, Gerald Warburg, Sen. Cranston's adviser, has pointed out that the proposal was only to keep the federal government from withdrawing funds from cities that refused to do business with South African related companies where the federal law required cities to accept the lowest bid. Warburg, *supra* note 11.

that the federal sanctions against South Africa are much milder than some state sanctions, especially California's. Republicans are arguing for federal preemption, while the Democrats have delineated reasons for maintaining the state and local sanctions. This is the opposite of what generally occurs in a preemption debate. Usually, the conservative factions, armed with a philosophy of federalism, argue for preserving states' rights while the liberals support uniform federal action.¹⁷ There has also been speculation that some states and many cities secretly hope for a federal preemption of their own laws.¹⁸

This Comment addresses the issue of whether the state and local laws must give way to the federal law under the preemption doctrine. First, this Comment discusses the issue of apartheid and the debates over the necessity of sanctions. Second, it will familiarize the reader with the doctrine of preemption. Third, this Comment promotes reasons why federal preemption does not invalidate state and local anti-apartheid laws.

II. SOUTH AFRICAN APARTHEID

Reports about the violent, oppressive South African government are in the news almost daily. The government of South Africa follows a system of apartheid¹⁹ which racially segregates the majority blacks from the white minority. The British originally colonized South Africa in 1806 after defeating the Boers.²⁰ The Boers continued to fight against Britain. In 1899, the British again fought and defeated the Boers.²¹ In 1948, the Boers' Nationalist Party disrupted Britain's plan of racial equality by taking over control of South Africa from the British and establishing apartheid.²² The blacks comprise almost seventy-five percent of the population, while whites make up fifteen percent of the total population.²³ The remaining ten percent is Asian or

17. Varat, *supra* note 11.

18. L.A. Times, Sept 10, 1986, § I, at 1, 27, col. 5-6. Many cities, notably San Francisco, have been hurt economically by their anti-apartheid ordinances. Some cities have also been threatened by the federal government to ease the ordinances or face the possibility of decreased federal funding. New York's Sen. D'Amato made a temporary deal with the Senate to keep the federal government from withdrawing funds from the New York Transit Authority. [Telephone interview with Mark Fabiani, Counsel to Mayor Bradley.]

19. "Apartheid" comes from the Afrikaans word for "separateness." Keegan, *Is South Africa Invulnerable?*, U.S. NEWS & WORLD REP., Mar. 23, 1987, at 31.

20. *Id.* at 30-31.

21. *Id.*

22. *Id.* at 31.

23. *Id.* at 32-33.

colored.²⁴ Yet the whites dominate the country, holding virtually every governmental position. Blacks do not have the right to vote.²⁵ Education in South Africa is segregated and extremely unequal. Approximately 913 rand are spent on white school children per capita per year, while only 176 rand are spent on black school children.²⁶ The blacks have been assigned to thirteen percent of the land of South Africa²⁷ called the "Bantustans" or homelands²⁸ while "pass laws" prescribe the conditions under which the blacks may remain outside of these assigned areas.²⁹ Other laws mandate the separation of facilities and prohibit mixed marriages.³⁰ While some commentators believe that progress is being made, especially in the areas of political representation and the work force,³¹ apartheid remains firmly entrenched in South Africa.

To protest this situation, many states and municipalities have enacted legislation to curb investments and business enterprises with companies that do business in South Africa.³² It may have been this flurry of action in the state and municipal governments that spurred the federal government to adopt its own sanctions.³³ To impose or not to impose sanctions has been hotly debated. Proponents of sanctions, generally Democrats, claim that sanctions are the only way to dismantle apartheid. Republican opponents hold that sanctions will only worsen the plight of the blacks because they will be the first to feel the impact of the sanctions.³⁴ Many commentators also believe

24. *Id.*

25. 1986 U.S. CODE CONG. & ADMIN. NEWS, 2334, 2338 (Nov. 1986).

26. Chettle, *The Law and Policy of Divestment of South African Stock*, 15 LAW & POL'Y INT'L BUS., 445, 467 n.100 (1983) (quoting M. VOORHEES, *THE MODERNIZATION OF APARTHEID* 39-44 (1982)).

27. *Id.* at 448 (citing U.S. Dep't of State, Country Reports on Human Rights, 232 (1981)).

28. *Id.* at 448-49 (citing U.S. Dep't of State Country Reports on Human Rights, 232 (1981)). The Bantustans are areas within South Africa to which blacks are assigned depending upon their physical characteristics. *Id.* Currently, there are ten different homelands and seven identified black tribal groups. Keegan, *supra* note 19, at 32-33. The Bantustans are: Ciskei, Transkei, Bophuthatswana, KwaZulu, Lebowa, Gazankulu, Venda, KaNgwane, Ndebele, and Qwa Qwa. *Id.* The tribal groups are: Zulu, 30%; Xhosa Transkei, 25%; North Sotho, 15%; Tswana, 13%; Xhosa Ciskei, 8%; Shangaan, 4%; and Venda, 4%. *Id.*

29. Chettle, *supra* note 26, at 448-49 (citing U.S. Dep't of State Country Reports on Human Rights, 232 (1981)).

30. *Id.* (citing U.S. Dep't of State Country Reports on Human Rights, 232-33 (1981)).

31. See generally Chettle, *supra* note 26, at 450-57.

32. See *supra* note 9 and accompanying text.

33. L.A. Times, Sept. 12, 1986 § I, at 1, 27, col. 5-6.

34. See generally, Veto of H.R. 4868, Comprehensive Anti-Apartheid Act of 1986, 132 CONG. REC. H88,648 (H.R. DOC. NO. 273) (Sept. 26, 1986), reprinted in 1986 U.S. CODE

that the sanctions against the Pretoria government will adversely affect blacks more than the whites that control the country.³⁵ Few people disagree on this premise; however, many think that it is the only way to end apartheid.³⁶ Many prominent black leaders in South Africa and the United States, while agreeing that sanctions will at least temporarily make conditions worse for the oppressed majority, hold that the changes will not be significant and that in the end, sanctions may liberate the blacks.³⁷

Amid much speculation about the wisdom of sanctions against South Africa, a bill that finally became law was introduced in the House of Representatives on May 21, 1986.³⁸ The Republican Senate approved the bill on August 15, 1986,³⁹ and the House passed the bill with a resounding 308 to 77 vote on September 12, 1986.⁴⁰ The bill was then sent to President Reagan who vetoed the legislation.⁴¹ Despite President Reagan's strong opposition towards initiating sanctions,⁴² the House voted to override the veto with a 313 to 83 vote on September 29, 1986.⁴³ When President Reagan was unable to muster support from his own party, the Senate also overrode the veto, by a

CONG. & ADMIN. NEWS, D95-98; S. REP. NO. 370, 99th Cong., 2d Sess. 1, 48, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS, 2334, 2365 (additional views of Sen. Pressler (R. - S.D.)); HOUSE COMM. ON FOREIGN AFFAIRS, REPORT TOGETHER WITH MINORITY AND SUPPLEMENTARY VIEWS, H.R. REP. NO. 99-638, 99th Cong., 2d Sess. 11-14 (1986); Chettle, *supra* note 26, at 469-73; Keegan, *supra* note 19, at 30-33; L.A. Times, Sept. 12, 1986, § I, at 12, col. 3; Szulc, *To Impose Sanctions: Failures and Fiascoes*, L.A. Times, Sept. 14, 1986, § V, at 2, col. 1; L.A. Times, Sept. 15, 1986, § I, at 1, col. 5; L.A. Times, Sept. 24, 1986, § I, at 6, col. 1; L.A. Times, Sept. 27, 1986, § I, at 12, col. 1; L.A. Times, Oct. 3, 1986, § I, at 11, col. 5; L.A. Times, Oct. 4, 1986, § I, at 1, col. 6; L.A. Times, Oct. 7, 1986, § I, at 6, col. 1.

35. See, e.g., Veto of H.R. 4868, Comprehensive Anti-Apartheid Act of 1986, 132 CONG. REC. H88,648, (H.R. DOC. NO. 273) (Sept. 26, 1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS, D95-96; Chettle, *supra* note 26, at 469-73.

36. See, e.g., Chettle, *supra* note 26, at 469-73. Bishop Desmond Tutu has been an adamant supporter of economic sanctions against South Africa stating that they are the only way to peacefully end apartheid. *Id.* at 471 (citing J. Lelyveld, *Cheerfully Defiant, Tutu is Home but Botha is Firm Over Passport*, N.Y. Times, Apr. 10, 1981, at A6, col. 2.)

37. *Id.* at 471 n.111.

38. H.R. 4868, 99th Cong., 2d Sess. 132 CONG. REC. H3157 (daily ed. May 21, 1986).

39. 132 CONG. REC. S11,880 (daily ed. Aug. 15, 1986).

40. 132 CONG. REC. H6790 (daily ed. Sept. 12, 1986).

41. Veto of H. R. 4868, Comprehensive Anti-Apartheid Act of 1986, 132 CONG. REC. H88,648 (H.R. DOC. NO. 273) (Sept. 26, 1986), *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS, D95 (Nov. 1986).

42. President Reagan has consistently opposed the sanctions contending that they will "seriously impede the prospects for a peaceful end to apartheid." *Id.* at D95. He has stated that they are "sweeping and punitive," and that "[b]lack workers—the first victims of apartheid—would become the first victims of American sanctions." *Id.*

43. 132 CONG. REC. E3349 (daily ed. Sept. 29, 1986).

vote of 78 to 21 on Thursday, October 2, 1986.⁴⁴ The override was expected by most.⁴⁵ It was spurred by a phone call on Wednesday night, October 1, 1986, from Roelof F. Botha,⁴⁶ the Foreign Minister of South Africa, to several senators warning them not to override the presidential veto or else the South African government would cease buying United States' grain and would block shipments of grain to neighboring countries.⁴⁷

Yet despite the phone call, or perhaps because of it, sanctions against South Africa became law.⁴⁸ Now, with the newly enacted federal law, the courts will have to address the issue of preemption.⁴⁹

III. ANALYSIS OF THE LAWS

A. *The Federal Sanctions*

The Comprehensive Anti-Apartheid Act of 1986 (the Act),⁵⁰ is indeed comprehensive. Not only does the Act contain the controversial sanctions, it provides for educational, social, and economic support for the dispossessed peoples of the apartheid regime.⁵¹ The Act also stresses the need for peaceful negotiations between the South African government and leaders of the African National Congress (ANC) and the Pan African Congress⁵² (PAC) and other movements opposed to apartheid. The Act notes Congress' strong distaste of all

44. 132 CONG. REC. S14,661 (daily ed. Oct. 2, 1986).

45. L.A. Times, Sept. 13, 1986, § I, at 1, col. 2; L.A. Times, Sept. 17, 1986, § I, at 1, col. 6; L.A. Times, Sept. 18, 1986, § V, at 1, col. 1; L.A. Times, Sept. 24, 1986, § I, at 5, col. 1.

46. Botha is not to be confused with Pieter W. Botha, the President of South Africa.

47. L.A. Times, Oct. 3, 1986, § I, at 11, col. 1. Botha told the Times that the warnings were not meant as threats but to "explain the consequences of these [sanctions] intended actions," and to impress the United States that "'we [the South African government] are not pushovers.'" *Id.*

48. Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5000-116 (Supp. IV 1986).

49. There have been suggestions that the state laws could have been preempted when the federal government first began considering sanctions against South Africa. Note, *State and Municipal Governments React Against South African Apartheid: An Assessment of the Constitutionality of the Divestment Campaign*, 54 U. CIN. L. REV. 543, 569 (1985).

50. Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. §§ 5000-116 (Supp. IV 1986).

51. See, e.g., Pub. L. No. 99-440, §§ 201-03, 100 Stat. 1086, 1094-96 (1986). Section 201 provides four million dollars for the fiscal years 1987 to 1989 to help victims of apartheid finance their "education, training, and scholarships for the victims of apartheid;" section 202 allocates 1.5 million dollars every year beginning in fiscal year 1986 for direct and other legal fees and assistance for political prisoners and their families who have opposed the apartheid system through non-violent means; section 203, requires all departments of the United States government which buy goods or services from South Africa to buy from enterprises that are 50% or more black. *Id.*

52. The ANC and PAC are black organizations that actively, and often violently, oppose the apartheid government. Nelson Mandela was a former leader of the ANC.

forms of violence committed by the South African government and the opponents of apartheid, most notably the ANC.⁵³ Some members of Congress have expressed concern regarding the communist infiltration and backing of the ANC,⁵⁴ and the Act specifically addresses this "communist concern." In section 102(b)(4) it "encourage[s] the ANC and Pan African Congress, . . . to . . . reexamine their ties to the South African Communist Party."⁵⁵ The Act emphasizes the need to dismantle apartheid and establish in its place democracy.⁵⁶ The Act also requires the President to report on the communist activities in South Africa ninety days after its enactment.⁵⁷ A rider prohibits United States citizens from importing Soviet gold coins.⁵⁸

However, sections 301 through 323, which embody the economic sanctions have garnered the most attention.⁵⁹ These provisions apply mainly to United States nationals, which includes individuals and corporations,⁶⁰ and to entities or agencies of the United States government.⁶¹ These sections prohibit the importation of Krugerrands,⁶² all

53. Several sections of the Act emphasize non-violence; and funds to the black organizations are hinged on the condition that the violent demonstrations against the apartheid government will end. See generally 22 U.S.C. §§ 5012(b)(1), 2151n., 5036, 5038 (Supp. IV 1986) (section 5012(b)(1): the United States supports the end of terrorist activities sponsored by the African National Congress and the Pan African Congress; § 2151n.: funds for legal aid to political prisoners to fight apartheid through non-violent means; § 5036: no assistance will be given to an organization which has any member that has committed "gross violations of internationally recognized human rights"; § 5038: prohibits any aid from going to groups that practice "necklacing," which is execution by fire). Necklacing is accomplished by encircling the victim with an automobile tire filled with burning fuel.

54. See S. REP. NO. 99-370, 99th Cong., 2d Sess. 1, 23, reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2334, 2354 (Nov. 1986) (additional views of Sen. Helms (R. - N.C.)). Sen Helms' main complaint with the Act is that it will make the ANC which he describes as "communist-backed" the "preferred successor to the present Government of South Africa." *Id.*

55. 22 U.S.C. § 5012(b)(4) (Supp. IV. 1986).

56. *Id.* §§ 5012(b)(5), 5016(a)(2) & (d)(2), 5061-62.

57. *Id.* § 5099.

58. *Id.* § 5100.

59. *Id.* §§ 5051-73. These provisions are contained under the heading "Measures by the United States to undermine apartheid." *Id.*

60. *Id.* § 5001(5). This section defines a national as a "natural person who is a citizen of the United States . . . or is an alien lawfully admitted for permanent residence in the United States," and as any "corporation, partnership, or other business association which is organized under the laws of the United States, any State or territory thereof, or the District of Columbia." *Id.*

61. See generally *id.* §§ 5051-73.

62. 22 U.S.C. §§ 5000-116 (Supp. IV 1986). Krugerrands are the gold coins sold by the South African government to raise revenues.

military articles made in South Africa,⁶³ and articles produced or manufactured by corporations owned or controlled by the South African government.⁶⁴ The section exempts strategic minerals that cannot be obtained elsewhere because of the ban on importing items produced in South Africa.⁶⁵ This section also anticipates attempts to circumvent the importation bans by prohibiting South African goods from being imported to the United States indirectly via third countries.⁶⁶

In addition, there are export prohibitions on computers and computer software to any governmental agency of the apartheid system.⁶⁷ This section prohibits United States businesses from exporting computer software to the South African military, the police, prison systems, and national security agencies.⁶⁸ The statute disallows airplanes owned by South African nationals or the South African government from landing in the United States.⁶⁹ Reciprocally, planes controlled by United States nationals may not land in South Africa, except for emergencies.⁷⁰ Another provision prohibits United States banks from holding deposits from the South African government except where the President of the United States has specifically authorized the deposits for diplomatic purposes.⁷¹

The most sweeping provisions of the Act prohibit United States nationals from making any new investments in South Africa.⁷² One provision prohibits loans from being made to the South African government;⁷³ the other section prohibits loans to the private sector.⁷⁴ These sections make all new investments⁷⁵ in South Africa unlawful.

63. *Id.* § 5052.

64. *Id.* § 5053.

65. *Id.* South Africa is among the top producers of uranium and manganese which are strategic minerals. NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ATLAS OF THE WORLD 203 (5th ed. 1981).

66. S. REP. NO. 99-370, 99th Cong., 2d Sess. 1, 13, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2334, 2347 (Nov. 1986).

67. 22 U.S.C. § 5054 (Supp. IV 1986).

68. *Id.*

69. *Id.* § 5056(a)(1).

70. *Id.* § 5056(b)(3).

71. *Id.* § 5058(a).

72. *Id.* §§ 5055, 5060(a).

73. *Id.* § 5055.

74. *Id.* § 5060.

75. A new investment is defined as a "commitment or contribution of funds or other assets," and loans or extensions of credit. *Id.* § 5001(4)(A)(i) & (ii). New investments do not include reinvesting profits "generated by a controlled South African entity back into that same controlled South African entity," or assets which are necessary "to enable a controlled South

In effect, these sections prohibit any United States citizen or corporation from lending money in the form of loans or other credit extensions to either the government of South Africa or to private corporations in South Africa.⁷⁶ These sections do not prohibit regular sales to South Africa on open account or the refinancing of existing loans, as long as no new credit is extended.⁷⁷ Additionally, the prohibition on loans to the government of South Africa does not apply to loans for education, housing, and humanitarian benefits that will be "available to all persons on a nondiscriminatory basis,"⁷⁸ while the section outlawing new investment to the private sector "does not apply to a firm owned by black South Africans."⁷⁹

The federal law does not contain a mandate for individuals and corporations to disinvest their holdings in South Africa. The Senate Committee on Foreign Relations, by a vote of seven nays to ten yeas, defeated an amendment proposed by California Senator Alan Cranston requiring firms to disinvest their South African holdings.⁸⁰ This mandatory disinvestment is one of the major differences between the federal and the California laws. The California and City of Los Angeles laws both require the state and the city, respectively, to rid their pension funds of South African investments.⁸¹

B. *The California State Law*

On Friday, September 27, 1986, California Governor George Deukmejian signed Assembly Bill 134, the precursor to California Government Code section 16640. Section 16640 imposes strict state sanctions against businesses and financial institutions that do business

African entity to operate in an economically sound manner, without expanding its operations." *Id.* § 5001(4)(B)(i). New investment also excludes debts and credits issued to South African entities before the enactment of this Act. *Id.* § 5001(4)(B)(iii). The Act also allows transfers of funds, shares, or credits issued before Congress enacted this Act as long as the transfer does not result in the "payment, contribution of funds or assets, or credit to a South African entity, a controlled South African entity, or the Government of South Africa." *Id.*

76. *Id.* §§ 5055, 5060.

77. *Id.*

78. *Id.* § 5055.

79. *Id.* § 5060(c).

80. S. REP. NO. 99-370, 99th Cong., 2d Sess. 1, 5, *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS 2334, 2338 (Nov. 1986).

81. CAL. GOV'T CODE § 16640 (West 1980 & Supp. 1987), LOS ANGELES, CAL., ADMIN. CODE div. 10, ch. 1, art. V (1986), Los Angeles City Employees' Retirement System's Anti-Apartheid Plan, Proposed Final Draft, Aug. 22, 1985 (on file in the Loy. L.A. Int'l & Comp. L.J. office) [hereinafter *The Plan*].

in South Africa.⁸² The statute will effect an estimated twelve billion dollars of the state's money.⁸³ The law requires the state to cease investing its pension funds in businesses with ties to South Africa.⁸⁴

The introduction to the statute declares that "South Africa is the only political system on this planet which constitutionally enshrines a political system whereby a small minority of the population has the power . . . to separate, discriminate against, and deny fundamental political, social, and economic rights to 83 percent of the population solely on the basis of race."⁸⁵ Although most of the introduction of the statute denounces apartheid and declares California's opposition to the system, it further states that investments with businesses in South Africa are financially imprudent "given the political and economic instability of South Africa."⁸⁶ Additionally, the statute states that restricting investment with businesses that do business in South Africa will minimize the potential risk of loss that the instability in South Africa creates.⁸⁷ These words define the purpose of the statute and are crucial to upholding the law in the face of the federal sanctions.⁸⁸

The statute took effect on January 1, 1987, and will continue until California has completely divested itself of investments in South Africa.⁸⁹ Divestiture will be complete by January 1, 1991.⁹⁰ The stat-

82. CAL. GOV'T CODE § 16640 (West 1980 & Supp. 1987).

83. L.A. Times, Sept. 27, 1986, § 1, at 1, col. 5. The fiscal impact of the bill would depend on several variables including:

- 1) the investment performance of the affected business entities' stock, bonds, securities, and/or other evidences of indebtedness;
- 2) the comparison between the performance of affected business' stocks and the performance of all other investment instruments;
- 3) the number and value of these investments in each fund's portfolio;
- 4) the investment performance of alternative investments;
- 5) the financial effect on businesses that do "pull out" of South Africa.

ARCHIBALD, DIGEST AB 134, PUB. I., FIN. & B.I. COMM. 3 (Aug. 27, 1986). Generally, the more investment opportunities are restricted, the more the rate of return declines. However, the trust funds that would be affected are so diverse that they may be able to adapt very well to the South Africa restrictions. The state would incur additional costs in divesting the portfolio, estimated between a few million dollars to hundreds of millions of dollars. Additionally, the state would incur the costs of indemnifying officers who manage the trust funds and make the divestment decisions. *Id.*

84. CAL. GOV'T CODE §§ 16644-45 (West 1980 & Supp. 1987).

85. 1986 Cal. Stat. ch. 1254(a).

86. *Id.* ch. 1254(h).

87. *Id.* ch. 1254(i).

88. See *infra* notes 159-84 and accompanying text.

89. CAL. GOV'T CODE § 16641 (West 1980 & Supp. 1987).

90. *Id.* § 16644.

ute has four basic parts. First, it prohibits officials from using state trust moneys⁹¹ to make new or additional investments;⁹² or to renew existing investments with business firms⁹³ that have business operations⁹⁴ in South Africa;⁹⁵ or business arrangements⁹⁶ with the South African government.⁹⁷ Second, it prohibits state moneys from being deposited in financial institutions⁹⁸ that make new or additional loans to any South African corporation⁹⁹ or to the government of South Africa.¹⁰⁰ Third, beginning January 1, 1988, the statute requires state trust funds¹⁰¹ which have been invested or deposited in businesses and financial institutions that do business with, or make loans to, either South African corporations or the government, to be reduced by one-third each year until 1991. By that year, the state will no longer have

91. "State trust moneys" is defined in the statute as "funds administered by the Public Employees' Retirement Fund, the Legislators' Retirement Fund, the State Teachers' Retirement Fund, the Judges' Retirement Fund, the Volunteer Firefighter Fund, the General Fund portion if the University of California Retirement Fund, and any funds invested pursuant to this part." *Id.* § 16640(i).

92. The statute defines "investment" or "invest" as committing to a business funds or assets including loans, extensions of credit, security given for other assets, or "the beneficial ownership or control of a share or interest in that business firm, or of a bond or other debt instrument issued by that business firm." *Id.* § 16640(a).

93. The term "business firms" denotes "any organization, association, corporation, partnership, venture, or other entity, its subsidiary, or affiliate, which exists for profitmaking purposes or to otherwise secure economic advantage." *Id.* § 16640(b). This definition does not include non-profit businesses.

94. "Business operations" includes maintaining equipment, facilities, personnel, and the ownership or possession of real or personal property in South Africa. *Id.* § 16640(d).

95. "South Africa" is the Republic of South Africa, the "Bantustans" or "homelands" or any territory which is under the legal or illegal administration of South Africa. *Id.* § 16640(f).

96. "Business arrangements" refers to "projects, ventures, undertakings, contractual relations, or other efforts requiring ongoing periodic performance by either or both parties." *Id.* § 16640(e).

97. "'Government of South Africa' means the government of the Republic of South Africa or its instrumentalities." *Id.* § 16640(g).

98. "Financial institution" is any bank, savings and loan association, credit union or bank holding company licensed by the State of California or the United States, along with "any insurance company, brokerage firm, securities firm, investment company, mortgage banking company, finance company, personal property broker, mortgage loan broker, or consumer credit company licensed to do business in this state" and any of its affiliates or subsidiaries. *Id.* § 16640(c).

99. "South Africa corporation" refers to any business firm that is located in South Africa, that does business principally in South Africa, or that is controlled by any business organized under the laws of South Africa. *Id.* § 16640(h).

100. *Id.* §§ 16642, 16646.

101. "Trust funds" refer to the same funds as state trust moneys with the exclusion of the General Fund portion of the University of California Retirement Fund. *Id.* § 16640(j); see *supra* note 90.

any trust funds associated with South Africa.¹⁰² The fourth part of the statute indemnifies state officials and the Regents of the University of California from legal costs and judgments incurred as a result of decisions to alter investments or deposits with South Africa or to divest from South Africa.¹⁰³

The statute does exclude some businesses from its provisions. A business firm which resolves not to expand or establish new business, or not to renew existing business in South Africa is exempt from section 16641. That section prohibits state trust moneys from being invested in such business firms.¹⁰⁴ Similarly, state trust moneys can be deposited in financial institutions that resolve not to renew existing loans or make new or additional loans to any South African corporation or to the government of South Africa.¹⁰⁵ The statute also allows financial institutions to renew existing loans or make new or additional loans to a South African corporation or the government of South Africa to the extent necessary for repayment of loans made before January 1, 1987.¹⁰⁶ If a trust fund continues to hold investments in businesses or financial institutions that have business arrangements with South African corporations or the South African government, it must report to the Governor on the last day of January every year that it holds such investments.¹⁰⁷ The report must include: a) the name of the issuer of the investment; b) the book value of the investment; c) the investment's amount, yield and maturity date; d) the business of the firm in South Africa and its business arrangements with South African corporations or the government.¹⁰⁸

The statute does not state what penalties, if any, those refusing to comply with the statute will suffer, although it does state that any resolutions that the statute requires must be filed under the penalty of perjury.¹⁰⁹ The statute also fails to specify the length of its duration, although it is probably intended to last as long as apartheid continues.

102. *Id.* §§ 16644-45.

103. *Id.* §§ 16649-50.

104. *Id.* § 16641.5.

105. *Id.* § 16642.5.

106. *Id.* §§ 16642.7, 16647.

107. *Id.* § 16648.

108. *Id.*

109. *Id.* § 16643.

C. *The Sanctions of the City of Los Angeles*

Los Angeles has instituted several ordinances,¹¹⁰ as a market participant,¹¹¹ that require the city to halt buying goods and services from the government of South Africa, and allow the city to refuse to contract with companies that do business in South Africa.¹¹² The Board that manages the city's employees' pension funds has also adopted plans to divest the pension funds of all investments in South Africa.¹¹³ Each ordinance is considered separately.

1. The Divestiture Plan

The Divestiture Plan proposed by Mayor Tom Bradley and adopted unanimously by the City Council¹¹⁴ is intended to put pressure on the South African government to end apartheid.¹¹⁵ The mayor attacked apartheid as "the most vicious and morally reprehensible form of institutionalized racism in the world today."¹¹⁶ Like the California state sanctions, the Divestiture Plan is also based on a market participant theory that the city has the right to determine with whom it will conduct business.¹¹⁷

The city is required to phase in divestiture of the pension funds over a period of five years in accordance with the Los Angeles City Employees' Retirement System's Anti-Apartheid Plan (the Plan).¹¹⁸ Under phase one, within the first year, the Los Angeles City Employees' Retirement System (the Board) is required to inform all companies in which the Board has investments of the Plan.¹¹⁹ The Board is

110. LOS ANGELES, CAL., ADMIN. CODE div. 10, ch. 1, art. V (1986) (contracting ordinance); The Plan, *supra* note 81.

111. See *infra* notes 159-84 and accompanying text.

112. LOS ANGELES, CAL., ADMIN. CODE div. 10, ch. 1, art. V (1986).

113. The Plan, *supra* note 81. Because the Pension Board is a separate entity from the Los Angeles City Council, the City Council cannot control the Board's investment decisions or policies. However, the Pension Board has adopted the Divestiture Plan which is being enforced.

114. L.A. Times, Aug. 22, 1986, § 1, at 1, col. 5.

115. Bradley, Memorandum to the Media, Los Angeles City Initiatives Against South Africa: Background Paper (May 7, 1985) [hereinafter Background Paper] (on file in the Loy. L.A. Int'l & Comp. L.J. office).

116. News Release from the Mayor's Office, May 7, 1985 (on file in the Loy. L.A. Int'l & Comp. L.J. office).

117. See *supra* notes 86-88 and accompanying text.

118. The Plan, *supra* note 81; see also The Los Angeles Fire and Police Pension System Divestiture Plan, Draft, Aug. 13, 1985 (on file in the Loy. L.A. Int'l & Comp. L.J. office). Both of these plans are substantially similar. Further references will be made to the City Employees' Retirement Plan since it is more comprehensive.

119. The Plan, *supra* note 81, at II(A)(3).

to implement phase two within twelve months after adoption of the Plan. This phase requires the Board to encourage companies in which the Board has investments and that do business in South Africa to do everything in the company's power to end apartheid.¹²⁰ This includes engaging in dialogues to encourage changes and reforms that will help end apartheid¹²¹ and using the Board's stock voting rights to promote the changes necessary to put apartheid to rest. Under phase three, which is to take effect eighteen months after the Board adopts the Plan, the Board must divest its assets in companies that furnish military supplies and services to the South African Military, police, prisons, and other government agencies that enforce apartheid.¹²² Phase four, which begins in the third year of the Plan, requires the Board to divest assets from firms doing business in South Africa that have not signed the Sullivan Principles.¹²³ Phase five, which the Board shall implement within four years of adopting the Plan, requires the Board to divest assets from companies that do business in South Africa and have signed the Sullivan Principles, but which do not submit to the monitoring of the Arthur D. Little Company, or obtain the highest rating from the Arthur D. Little Company.¹²⁴ The sixth and final phase is to take place five years after the Board adopts the Plan and requires the Board to divest its assets of all companies that do business in South Africa.¹²⁵ The Plan excludes companies that are taking active steps to eliminate apartheid from each of these phases.¹²⁶ It

120. *Id.* at II(B).

121. *Id.*

122. *Id.* at II(C)(4).

123. *Id.* at II(D)(4). The Reverend Leon Sullivan of Philadelphia established principles for United States corporations to follow governing equal employment and living conditions. The six principles are briefly: 1) Nonsegregation of all eating, comfort, locker room, and work facilities; 2) Equal and fair employment practices for all employees; 3) Equal pay for all employees doing equal or comparable work; 4) Initiation and development of training programs that will prepare blacks in substantial numbers for supervisory, administrative, clerical, and technical jobs; 5) Increasing the number of blacks in management and supervisory positions; and 6) Improving the quality of employees' lives outside the work environment including housing, transportation, education, recreation, and health facilities. Sullivan, *Agents for Change: The Mobilization of Multinational Companies in South Africa*, 15 LAW & POL'Y INT'L BUS. 427 (1983).

124. The Plan, *supra* note 81, at II(E)(4). Arthur D. Little Co. is an accounting and management firm which has developed a questionnaire to determine whether corporations involved in South Africa have adhered to the Sullivan Principles. These questionnaires are submitted annually and the results are available to investors. Attachment I, Sullivan Principles (from the Mayor's office) (on file in the Loy. L.A. Int'l & Comp. L.J. office).

125. The Plan, *supra* note 81, at II(F)(4).

126. *See generally id.*

also requires the Board to obtain the advice of independent financial and legal counsel before each phase goes into effect.¹²⁷

2. The Contracting Ordinance

The purpose of the Contracting Ordinance, enacted on July 2, 1986, is to allow the City of Los Angeles, as a market participant, to restrict the city's contracts to persons or entities¹²⁸ which do not do business¹²⁹ in South Africa.¹³⁰ The Contracting Ordinance precludes the city from entering into new contracts, renewing existing contracts, or exercising contract options with the "(1) [the] government of South Africa; (2) [a]ny person or entity organized under the laws of South Africa; (3) [a]ny person or entity who owns property or is doing business in South Africa."¹³¹ The Contracting Ordinance also requires all persons or entities seeking to contract with Los Angeles to fill out a form declaring all business ties the person or entity has with South Africa.¹³²

To protect the city's financial interests, the Contracting Ordinance contains exemptions.¹³³ These exemptions include contracts that must be awarded through competitive bidding; contracts for sole source goods and services; contracts where the ordinance would exclude all but one bidder; and contracts for news publication services and transportation.¹³⁴ Furthermore, the Contracting Ordinance excludes contracts where its application would result in significant loss of quality or additional costs to the city.¹³⁵

Although these exemptions to the ordinance may appear to

127. *Id.*

128. "Person or entity" includes corporations, partnerships, clubs, associations, parent, subsidiary, and affiliated companies. LOS ANGELES, CAL., ADMIN. CODE div. 10, ch. 1, art. V, § 10.31.1(f) (1986).

129. "Doing business" refers "to any person or entity engaged in the activity of business, commercial enterprise, trade, calling, vocation, profession or any means of livelihood, whether or not carried on for gain or profit." *Id.* § 10.31.1(c).

130. *Id.* § 10.31. "South Africa" includes the government of the Republic of South Africa and any public or quasi-public agencies. *Id.* § 10.31.1(e).

131. *Id.* § 10.31.2.

132. *Id.* § 10.31.3.

133. *Id.* § 10.31.4. The exemptions are necessary because under the Charter of the City of Los Angeles, certain contracts must be bid for competitively. Where the city is awarding competitively bid contracts, it cannot exclude companies that have business dealings in South Africa. Bradley, Memorandum to the Media, The City of Los Angeles' Anti-Apartheid Contracting Policy, (March 18, 1986) (on file in the Loy. L.A. Int'l & Comp. L.J. office) [hereinafter Contracting Policy].

134. *Id.*

135. *Id.*

render the city's laws almost ineffectual in its fight against apartheid, the Contracting Ordinance does apply to all personal service contracts with law firms, accounting firms, and other private consultants,¹³⁶ and all contracts under \$25,000.¹³⁷ In addition, the ordinance will affect all bond underwriting work by the Community Redevelopment Agency, Department of Water and Power, and all other city agencies,¹³⁸ as well as all Requests for Proposals.¹³⁹ The Contracting Ordinance will affect an estimated \$101,199,000 annually.¹⁴⁰ Therefore, despite the seemingly endless exemptions, the impact of the Contracting Ordinance will be substantial. At the same time, the exemptions are necessary to preserve Los Angeles' financial stability and fulfill its obligation not to waste revenues.

IV. THE PREEMPTION DOCTRINE

The preemption doctrine is a useful tool created by the Supreme Court pursuant to the supremacy clause¹⁴¹ to invalidate state laws. The Court invokes the doctrine when it decides that a state law cannot coexist with a federal law because they both regulate the same area. There are various other clauses in the Constitution on which the Court can draw to invalidate state laws, most commonly the commerce clause,¹⁴² the due process clause,¹⁴³ the equal protection clause,¹⁴⁴ and the privileges and immunities clause.¹⁴⁵ However, the Court prefers to invalidate state laws under the preemption doctrine¹⁴⁶ to avoid a constitutional inquiry into the validity of the state law.¹⁴⁷ Even under this approach, the Court cannot completely evade

136. Summary: Anti-Apartheid Contracting Ordinance, Second Draft (on file in the Loy. L.A. Int'l & Comp. L.J. office).

137. Contracting Policy, *supra* note 133, at 7.

138. Summary: Anti-Apartheid Contracting Ordinance, Second Draft (on file in the Loy. L.A. Int'l & Comp. L.J. office).

139. Contracting Policy, *supra* note 133, at 7.

140. *Id.* at 8. This total comes from an estimated annual expenditure of \$40,577,000 in Requests for Proposals, and \$60,199,000 in contracts awarded under \$25,000 each. *Id.*

141. U.S. CONST., art. VI, § 2.

142. U.S. CONST., art. I, § 8, cl. 3.

143. U.S. CONST., amend. XIV, § 1, cl. 2.

144. *Id.*

145. *Id.*

146. See generally Note, *Preemption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 308 (1959). This is also similar to the *Younger* doctrine, where the court will only decide the constitutionality of a state law after it has tried to invalidate it on other non-constitutional grounds. *Younger v. Harris*, 401 U.S. 37 (1971).

147. Note, *supra*, note 146, at 318.

the Constitution since it must determine whether the federal law is constitutional.

Preemption arises from the supremacy clause in the Constitution¹⁴⁸ which provides that the Constitution and the federal laws shall be "the Supreme Law of the Land."¹⁴⁹ From this simple clause, the courts have developed an analysis composed of five separate parts. First, there must be a valid federal law.¹⁵⁰ Second, there must be a valid state law. Once these primary elements are established, the court will determine whether the federal law displaces the state law by making three inquiries: first, whether the state law conflicts with federal law;¹⁵¹ second, whether Congress intended to occupy the field;¹⁵² and third, whether the area is of dominant federal concern and therefore closed to the states.¹⁵³ While both of the first two elements must be present for federal law to preempt state or local laws, only one of the three elements needs to be present.¹⁵⁴ Each of these elements is considered independently as it pertains to the area of federal sanctions against South Africa and to local divestment legislation on the state and municipal levels.¹⁵⁵

148. U.S. CONST., art. VI, § 2.

149. *Id.*

150. For the remainder of this Comment, the analysis for preemption of state laws will also apply to municipal ordinances since the doctrine applies to both without distinction. The only difference in the analysis for state and municipal laws is that municipal acts are subject to "double" preemption first by state laws, second by the federal laws. State preemption of municipal ordinances will not be addressed here.

151. L. TRIBE, CONSTITUTIONAL LAW 377 (1978).

152. *Id.* at 384.

153. *Id.* at 378.

154. See *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) (federal law occupied the field); *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984) (federal law occupied the field); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (state law conflicted with federal law); *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (state law conflicted with federal law); *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985) (state law conflicted with federal law); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (state law conflicted with federal law); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (area of dominant federal interest); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (area of dominant federal interest and federal law occupied the field); *Zschernig v. Miller*, 389 U.S. 429 (1968) (area of dominant federal interest).

155. "Divestment" and "disinvestment" are commonly interchanged. "Disinvestment" actually refers to withdrawing money that has previously been invested. "Divestment" refers to ridding oneself of stocks. Chettle, *supra* note 26, at 445.

A. Federal and State Laws

1. Federal Law

“Throughout U.S. history, economic sanctions have been used as an important instrument of U.S. foreign policy.”¹⁵⁶ Economic sanctions are a means by which the United States’ people, through their government, can espouse ideals and incite change. The sanctions against South Africa join a long list of economic sanctions that the United States has enforced against many countries including: Rhodesia, Uganda, Cuba, Iran, Vietnam, Korea, Cambodia, Libya, the U.S.S.R., Poland, Afghanistan, and Nicaragua.¹⁵⁷ Congress can, consistent with the Constitution, enact federal legislation imposing economic sanctions against other nations as part of its foreign policy.

2. State Laws

State laws that come before the courts carry with them a presumption of validity. Under their police powers, states may regulate for the health, safety, and welfare of their citizens. The divestment laws can be seen to protect the welfare of the states’ citizens. For example, the laws ensure that pension funds to which state employees are entitled upon retirement are not invested in South Africa’s unstable economy. The Supreme Court has held that protecting the state’s money is a local concern and within the province of the police powers.¹⁵⁸

The legitimacy of state laws may, however, meet up with a constitutional challenge. The federal government has the exclusive power under the Constitution to regulate foreign affairs.¹⁵⁹ Where Congress has regulated in the area of foreign affairs, the states may neither add to nor alter the federal laws.¹⁶⁰ At first glance, the state and local actions certainly appear to regulate foreign affairs. Yet, the State of California and the City of Los Angeles have been very careful to articulate that the purpose of the laws is to protect their investments. There may be some effect on foreign affairs; however, because the state laws stem from legitimate state power they will not be held as

156. *House Comm. On Foreign Affairs, Report Together with Minority and Supplementary Views*, H.R. REP. No. 99-638, 99th Cong., 2d Sess. 11 (1986).

157. *Id.*

158. *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976).

159. *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941). U.S. CONST. art. I, § 8, cl. 3, art. I, § 10, cl. 2, art. I, § 10 cl. 3.

160. *Id.* For a discussion of *Hines*, see *infra* notes 338-40 and accompanying text.

interfering with foreign affairs.¹⁶¹ Where federal laws and state laws regulate the same area but for different purposes the federal law will not preempt the state law.¹⁶² For these reasons, the state laws are not unconstitutional regulations of foreign affairs.

Moreover, state and local governments, under their police powers, have the ability to determine their own investments and how and where they will spend their money under the market participant theory.¹⁶³ The market participant theory allows the state to be treated as a private party when it is acting in the market as any other private individual. Under this theory, where the state is buying or selling goods, or contracting for services, it is allowed to decide with whom it will do business, just as a private corporation does. In this "private capacity" the state is free from all federal regulations except for those that would be imposed on private businesses. Although the market participant theory was developed to combat challenges against state regulations under the commerce clause,¹⁶⁴ the theory is equally applicable to state decisions to divest their portfolios of South African investments.¹⁶⁵ In the divestment context, the state is like any other individual deciding to whom it will entrust its retirement funds. Therefore, the state laws could withstand a constitutional commerce clause attack.

B. *Conflict Between the Federal and State Laws*

One way in which a federal law can preempt a state law is if the laws conflict. A conflict can arise in two ways. First, it may be impossible to follow both the state and federal laws. This is referred to as an actual or direct conflict. The second type of conflict is not an actual or direct conflict in the sense of impossibility, but rather, that the state law interferes with the "purposes and objectives" of the federal laws.¹⁶⁶ Each type of conflict will be considered separately.

1. Actual Conflict

Where there is an actual conflict between the state and federal

161. Note, *supra* note 49, at 572.

162. See *infra* notes 253-84 and accompanying text.

163. Note, *supra* note 49; Varat, *supra* note 11.

164. See generally *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976); *White v. Massachusetts Council of Constr. Employers*, 460 U.S. 204 (1983); *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980).

165. Note, *supra* note 49, at 554-66.

166. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

law, federal law will prevail.¹⁶⁷ The analysis in this context is fairly simple. If a person or entity cannot follow both the federal and state laws at the same time, then the state law cannot exist. This is true no matter how much interest the state has in the matter nor how local the concern.¹⁶⁸ *Ridgway v. Ridgway*¹⁶⁹ illustrates both an actual conflict and that federal law may prevail even where there is a strong state interest.

In *Ridgway*, a Sergeant in the United States Army had designated his second wife as the beneficiary of his life insurance policy which was provided pursuant to a federal law.¹⁷⁰ When the insured service member died, the federal law required the proceeds to be paid to the named beneficiary or to the surviving spouse, and further stated that the policy could not be attached or seized.¹⁷¹ Upon Sergeant Ridgway's death, his first wife filed a claim for the insurance proceeds on behalf of their children.¹⁷² The state court awarded the policy to the former wife on behalf of the children from the first marriage who were not beneficiaries under the law.¹⁷³ The Supreme Court reversed this decision stating that although the state had an interest,¹⁷⁴ federal law must prevail because there was an actual conflict.¹⁷⁵

The conflict existed because it was impossible to follow both the federal and state laws. The federal law required the policy to be paid to the second wife and prohibited attachment, whereas, the state law required it to be paid to the first wife and put in trust for the children.¹⁷⁶ This case demonstrates the strength of the preemption doctrine. Family law has traditionally been left to the states with little federal interference since the state has a very strong interest in the

167. See generally *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 164 (1978); *Ridgway v. Ridgway*, 454 U.S. 46 (1981); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982); *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256 (1985); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986).

168. *Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 258-60 (1985) (federal statute which ensured that states could use revenues from federal lands for any government purpose preempted the state statute which required the money to be spent just as other general taxes). *Id.*

169. 454 U.S. 46 (1981).

170. *Id.* at 48-49.

171. *Id.* at 53-54.

172. *Id.* at 49.

173. *Id.*

174. *Id.* at 54.

175. *Id.*

176. *Id.* at 52-53.

welfare of its residents. However, even this strong state interest in familial well-being can be displaced by federal law when there is a conflicting state law.

The Court in *De Canas v. Bica*,¹⁷⁷ stated that where there is a state and a federal statute on the same subject, they should be read together and that only the parts of the state statute that actually conflict with the federal law should be invalidated.¹⁷⁸ This is also the approach that the Court took in *Ray v. Atlantic Richfield Co.*¹⁷⁹ There, the Court struck down parts of a Washington state law that conflicted with the federal law but upheld the parts that were not actually in conflict with federal laws.¹⁸⁰ Partial invalidation is not necessary with the state and city anti-apartheid laws because no part of the state anti-apartheid law conflicts with the federal sanctions.

Furthermore, simply because the state law regulates in the same area as the federal law does not mean that the two laws conflict. *De Canas* involved a California statute that prohibited employers from hiring aliens if it would adversely affect California residents.¹⁸¹ The Court upheld the California statute because it did not conflict with the federal statute regulating aliens. Moreover, admitting aliens into the United States was exclusively a congressional concern and not every statute involving aliens dealt with admitting them.¹⁸² Therefore, according to the court in *De Canas*, the state and local anti-apartheid statutes would be valid if they regulate the same area but do not directly conflict with the federal statute.

The state and local anti-apartheid laws will survive the "actual conflict" test because it is not impossible to enforce both laws simultaneously. A businessperson can adhere to both laws at the same time without violating either law. Thus, there is no actual conflict between the state and federal laws.

2. Conflict with the Object and Purpose

Where there is no direct conflict with the federal law, the Court will only preempt a state law if it is the "clear and manifest purpose of Congress" to do so.¹⁸³ To determine the intent of Congress, the Court

177. 424 U.S. 351 (1976).

178. *Id.* at 357-58 n.5.

179. 435 U.S. 151 (1978).

180. *Id.* at 171-73.

181. 424 U.S. 351, 352-53 (1976).

182. *Id.* at 351-52.

183. *Id.* at 357.

will look to the language of the statute and its legislative history.¹⁸⁴ With the South African sanctions, Congress' intent is unclear. The language of the Act evinces congressional dissatisfaction with the local statutes,¹⁸⁵ yet it also seems to recognize that they will continue to exist alongside the federal sanctions.¹⁸⁶

The legislative history is also ambiguous. According to Senator Lugar, the Senate Foreign Relations Committee Chairperson and co-author of the Act, the federal law leaves no room for local actions.¹⁸⁷ There was also an amendment introduced declaring that the federal sanctions would not preempt the state and city laws. That amendment was defeated.¹⁸⁸ However, the record is equally supportive on the other side. The House of Representatives passed a resolution that the federal laws would not oust the local actions.¹⁸⁹ While a resolution is not binding law, it certainly demonstrates the intent of Congress not to preempt state laws. Thus, the actual intent of Congress is unclear and the courts will have to decide the preemption issue according to their previous preemption decisions.

In some cases, the Court has held that federal law could preempt state law where the state law stood as an "obstacle to the full purposes and objectives of Congress."¹⁹⁰ This is essentially an argument that the laws conflict since the federal law cannot fully perform its purpose with the state laws. In *Michigan Canners & Freezers v. Agricultural Marketing & Bargaining Board*,¹⁹¹ the Court preempted a state law that allowed producers to form exclusive associations to represent other producers in the area.¹⁹² The law required all producers, whether they chose to belong to the association or not, to pay fees and to be bound by the contracts that the association formed with agricultural processors.¹⁹³ In invalidating the state law, the Court looked to the language of the statute, which explicitly prohibited coercing a pro-

184. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 84, 85 (1983).

185. Comprehensive Anti-Apartheid Act, Pub. L. No. 99-440, §§ 4, 606, 100 Stat 1086, 1089, 1116.

186. *Id.* § 606.

187. 132 CONG. REC. S11,817 (daily ed. Aug. 15, 1986).

188. 132 CONG. REC. S13,526 (daily ed. Sept. 24, 1986).

189. H.R. Res. 548, 99th Cong., 2d Sess. (1986); 132 CONG. REC. H6767 (daily ed. Sept. 12, 1986).

190. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

191. 467 U.S. 461 (1984).

192. *Id.* at 469-78.

193. *Id.* at 477.

ducer to enter into an association.¹⁹⁴ The Court also examined the legislative history of the Agricultural Fair Practices Act and found that Congress had intended to leave farmers free and independent of an association unless they chose to join.¹⁹⁵ The state law required all farmers to comply with the bargains and pay fees to the exclusive association regardless of their desire to belong to an association or not. This operated as an obstacle to the Congressional purpose, which was to allow the farmers to remain independent of associations.¹⁹⁶ The state and local anti-apartheid sanctions which go beyond the federal sanctions do not create an obstacle in Congress' attempt to eliminate apartheid. The state sanctions further this purpose. They clear the path, rather than create an obstacle.

A state law can conflict with the object and purpose of a federal law if it regulates "further" than its federal counterpart. A state law is said to go "further" than a federal law when the state law regulates in the same area as the federal law but is stricter in that it imposes more obligations, or more restrictions than the federal law. At one point, the Supreme Court held that state laws that did not conflict but went further than federal laws were invalid.¹⁹⁷

[T]he Court has tempered its undifferentiated hostility to state regulation of matters already regulated by the federal government. Generally speaking, the Court will now sanction state regulations that supplement federal efforts so long as compliance with the letter or effectuation of purpose of the federal enactment is not likely to be significantly impeded by the state law.¹⁹⁸

Under this view, the Court should uphold the state and local sanctions. They do not impede the federal purpose. The federal laws can be followed and given full effect even if the state laws are enforced. In fact, rather than impairing the federal laws, the state laws actually augment them.

The Supreme Court has invalidated state laws that did not directly conflict with the federal law but went further.¹⁹⁹ The Court has

194. *Id.* at 470-71.

195. *Id.* at 471-77.

196. *Id.*

197. L. TRIBE, *supra* note 152, at 379.

198. *Id.*

199. *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (city regulation requiring a strike to be settled before it would renew a taxi cab company's franchise was invalid because it interfered with the NLRA which did not condition franchises on the settlement of a strike); *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218 (1947) (state law regulating the conduct of grain storage warehouses and grain dealers was invalidated because it went further

also upheld state laws that have gone further than federal laws. In *Florida Lime & Avocado Growers v. Paul*,²⁰⁰ the Court upheld a California law requiring that avocados sold within California be at least eight percent oil by weight where the federal standards certified avocados as ready for sale according to age not weight.²⁰¹ The result of the California statute was that some avocados grown in Florida and ready for sale according to the federal standards were excluded from sale in California because they did not meet the oil content test.²⁰² The purpose of both the federal and the California statutes was to maintain quality in the avocado market, so that consumers who had been disappointed by unpalatable avocados, would not stop purchasing avocados.²⁰³

The Court reasoned that the California law was not preempted by federal law because it was not impossible to follow both the federal and the California statutes.²⁰⁴ Florida's avocados were not completely excluded from the market,²⁰⁵ and the Florida growers could also comply with both statutes by leaving the avocados on the tree for a longer period of time to develop the oil content required by California law.²⁰⁶ Therefore, although the statutes were different and aimed at the same purpose,²⁰⁷ the state law was nonetheless valid because "both regulations [could] be enforced."²⁰⁸

This argument also serves to uphold the validity of the California state and local laws against South Africa. The state and city sanctions certainly differ from the federal sanctions, yet they can all be complied with simultaneously without "impairing the federal superintendence of the field."²⁰⁹ For example, a trust held by the state of California could make no new investment in firms doing business in South Africa according to federal²¹⁰ or state law.²¹¹ Further, the state

than the federal laws, the court also found congressional intent to preempt state law to provide for uniformity).

200. 373 U.S. 132 (1962).

201. *Id.* at 133-34.

202. *Id.* at 134.

203. *Id.* at 137-38.

204. *Id.* at 142-43.

205. *Id.* at 140.

206. *Id.* at 143.

207. See *infra* notes 253-284 and accompanying text for discussion on the importance of the purpose.

208. 373 U.S. at 143.

209. *Id.*

210. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 § 310, 100 Stat. 1086, 1102.

would have to reduce its investments in South Africa until it had completely divested its South African holdings to comply with the state statute.²¹² Although divestment is not required by federal law, the state's divestment requirement in no way contravenes the federal statute or purpose. Rather it aids the law by putting additional pressure on the South African government.

The California law actually complies with the federal law and then goes further. The state law is more stringent than the federal laws. The Court has upheld state laws that go further than federal laws.²¹³ *Cloverleaf Butter Co. v. Patterson*²¹⁴ is very similar to *Florida Lime & Avocado Growers*.²¹⁵ In *Cloverleaf*, the court upheld a state law that excluded butter from the markets because it did not meet the state standards even though it was marketable according to the federal laws.²¹⁶ The Court stated that absent specific congressional intent to the contrary, a state could impose higher standards for its consumers.²¹⁷ With the state anti-apartheid sanctions, the public has an interest in investing the state pension funds in stable economies to ensure maximum return on its investments. Where the consumers have an important interest, federal regulations do not automatically displace the state regulations.²¹⁸ Certainly a worker's interest in her

211. CAL. GOV'T CODE § 16641 (West 1980 & Supp. 1987).

212. *Id.* § 16645.

213. *Cloverleaf Butter Co. v. Patterson*, 315 U.S. 148 (1942) (upheld a state law that imposed higher standards on butter than the federal laws federal laws); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1962) (upholding a state law that excluded avocados from sale in California although they were marketable according to federal law); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (upholding a state law requiring additional inspection of federally licensed seagoing vessels). *But see Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926) (invalidating a state law that regulated more stringently the same area as federal law). *Napier* can be distinguished from the cases upholding state laws that have gone further than their federal counterparts. In *Napier*, the Court not only found that the state law regulated the same area as the federal law, but also that Congress intended to preempt the state laws. *Id.* Additionally, the state laws in *Napier* regulated for safety which was for the same purpose as the federal law. *Id.* at 609-10. In *Florida Avocado Growers*, *Huron*, and *Cloverleaf*, neither of those two elements existed. The court did not find congressional intent to preempt state law, nor were the state and federal laws enacted for the same purpose.

214. 315 U.S. 148 (1942).

215. *See supra* notes 201-28 and accompanying text.

216. *Cloverleaf Butter Co.*, 315 U.S. at 162.

217. *Id.*

218. *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 145 (1962). The Court there held that minimum federal standards over agricultural commodities could not be displaced absent congressional intent where the state has regulated in the interest of the "consumers of the commodity within the State." *Id.* The same argument can be applied to public state workers who have an interest in what investments the state makes for its employees' pension

pension is an important one that the state should be able to regulate. It is undisputed that the state regulations go further than the federal sanctions, but the state regulations have not been specifically invalidated by Congress and they are in the interest of the people of California.

The Court has also invalidated state laws that go further than federal laws. In *Fidelity Federal Savings & Loan Association v. De la Cuesta*, a recent and very lengthy opinion, the Supreme Court held that a federal regulation preempted state law even though there was no actual conflict in the sense of physical impossibility.²¹⁹ In this case a federal law allowed the savings and loan associations to enforce due-on-sale clauses²²⁰ but did not compel savings and loans to enforce them. The California law did not allow due-on-sale clauses to be enforced.²²¹ Therefore, a savings and loan association could follow both laws by not enforcing the due-on-sale clause. This appears to be very similar to the sanctions against South Africa. A company could follow both the federal and California laws by divesting itself of South African investments even though such a drastic measure is not required by the federal laws.

At this point, however, the similarity between *De La Cuesta* and the anti-apartheid laws stops. In *De La Cuesta*, the Court, after noting that there was no impossibility in complying with both laws at the same time, went on to hold that the California law nevertheless conflicted with the federal law because the Federal Home Loan Bank Board had expressly intended to give the savings and loans flexibility and the state law deprived them of this.²²² The express intention was found in the language of the regulation and its preamble²²³ which stated that savings and loans would be governed exclusively by federal law without regard to conflicting state laws.²²⁴ This type of explicit

funds, and that state regulations of investments in South Africa are in the interest of the "consumers" of those funds.

219. *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982).

220. *Id.* at 145-46. Due-on-sale clauses allow the lender to declare that the balance of the loan is due when the property is sold or transferred. This allows the lender to expire old loans and issue new ones at the current interest rate. *Id.* This became important in the early eighties when interest rates were rising and lenders needed to issue loans at higher interest rates in order to be able to pay out higher rates and attract investors.

221. *Id.* at 148-49.

222. *Id.* at 155.

223. *De La Cuesta*, 458 U.S. 157-58 (discussing 41 Fed. Reg. 18,286-87 (1976)). The Court further held that a federal regulation is just as preemptive as a law. *Id.*

224. *Id.*

intent, on which the Court relied to preempt state law in *De la Cuesta*, does not exist in the federal Anti-Apartheid Act.

Furthermore, the *De La Cuesta* Court also rested its opinion on the fact that the state law stood as an obstacle to the accomplishment of federal objectives.²²⁵ These objectives were to give the saving and loan institutions the option to enforce due-on-sale clauses to maintain their economic stability.²²⁶ The state law denied them this option and, therefore, completely thwarted Congress' purpose. This is not the case with the anti-apartheid laws. The state laws may impose additional requirements, but these additional requirements do not stand as obstacles to Congress' purpose of eliminating apartheid.

In another recent case, *Golden State Transit v. City of Los Angeles*,²²⁷ the Supreme Court invalidated a city regulation that went further than the federal laws.²²⁸ In doing so, the Court found that the City of Los Angeles had regulated in an area that Congress had intentionally left unregulated.²²⁹ The case involved a taxi cab company that sought to renew its franchise with the City of Los Angeles.²³⁰ The employees of the cab company had gone on strike and Los Angeles conditioned the franchise renewal on the company's ability to settle the strike.²³¹ The Court held that this interfered with the congressional purpose behind the National Labor Relations Act (NLRA).²³² Relying on both the language of the NLRA and its legislative history,²³³ the Court found that Congress had intentionally left this area of labor/management disputes unregulated to maintain a balance between the negotiating powers of labor and management.²³⁴ While Congress had specifically contemplated some state regulation in this area, the city had not shown that this was a contemplated regulation.²³⁵

The Supreme Court's invalidation of the city regulation in *Golden State Transit* that went further than the federal regulation does not mean that the Court will strike down the state and local

225. *Id.* at 156.

226. *Id.* at 154-55.

227. 475 U.S. 608 (1986).

228. *Id.*

229. *Id.* at 615-19.

230. *Id.* at 609-10.

231. *Id.* at 610-11.

232. *Id.* at 613-18.

233. *Id.* at 615-19.

234. *Id.* at 616.

235. *Id.*

actions against South Africa because, by requiring divestment, they go further than the federal laws. In *Golden State Transit*, the Court pointed out that Congress, when promulgating the NLRA, had intended some areas to be unregulated. Essentially, the conscious decision not to regulate operated in itself as a regulation; the National Labor Relations Board (NLRB) with Congress' authority, had regulated for a free area. Congress has not done this with the South African sanctions. It is not clear either from the language of the Act or its legislative history that Congress, by not *requiring* divestment, was not allowing divestment. Congress merely voted down an amendment for divestment with no evident reason.²³⁶ Furthermore, in *Golden State Transit*, there was a Board set up specifically to regulate in this area. Where Congress has set up an office, the courts are much more likely to interpret the absence of a regulation as preempting state regulation in that area.²³⁷ With the South African sanctions, Congress has not delegated any authority to a regulatory agency and therefore the likelihood of preemption is lessened.

Moreover, the holding in *Golden State Transit* is bolstered by the Court's decision in *Metropolitan Life Insurance Co. v. Massachusetts*.²³⁸ There, the Court upheld a state regulation against both Employee Retirement Income Security Act (ERISA) and NLRA preemption. The state law required insurance plans to cover mental health, while the federal law, ERISA, did not.²³⁹ The Court stated that this was not preempted by ERISA because it came within one of the specific exemptions to ERISA's broad preemption.²⁴⁰ As for the second challenge, appellants argued that the NLRB had not regulated in this area intentionally, so as to maintain a balance of negotiating power between management and labor. They claimed that the state's regulation upset this balance by giving employees a benefit for which they did not have to bargain.²⁴¹ Noting that there was no specific language mandating preemption, the Court derived congressional intent from the purpose of the NLRA and by examining whether Congress had so occupied the field as to leave no room for state

236. 132 CONG. REC. S11,839 (daily ed. Aug. 15, 1986), reprinted in 1986 U.S. CODE CONG. & ADMIN. NEWS 2338 (Nov. 1986).

237. L. TRIBE, *supra* note 151, at 387.

238. 471 U. S. 724 (1985).

239. *Id.* at 730.

240. *Id.* at 732-33.

241. *Id.* at 747-51.

regulations.²⁴² In holding that the state laws did not conflict with congressional purpose, the Court relied on the presumption that Congress did not intend to preempt traditional areas of state concern.²⁴³ Regulating the contents of insurance contracts was traditionally a local concern, and it did not interfere with the negotiating process.²⁴⁴ The Court further stressed that the NLRA had been enacted in light of state regulation of insurance and that it was unlikely that Congress intended to displace all state laws.²⁴⁵

This case illustrates that absent explicit or implicit congressional intent to preempt state laws, the Court will not use federal laws to preempt state laws that regulate further than the federal laws. As in *Metropolitan Life Insurance Co.*, the state South African sanctions do not conflict with Congress' purpose; rather, the state laws supplement the federal objectives. Indeed, the case for preemption was arguably stronger in *Metropolitan Life Insurance Co.* than in the South African situation. There, Congress intentionally did not regulate certain areas so that they would be free for negotiation. The state regulation, by mandating mental health care, took those areas out of the realm of negotiation. With the South African laws, although Congress did not regulate to the extent of the states, Congress was not trying to set up a precarious balance of power that the state laws undercut.

Additionally, Congress, in enacting the South African sanctions, acted in an area that states and cities had already begun regulating. Since these regulations are for local interest within the police powers of the states and cities, the presumption is in favor of their survival. Absent intent from Congress to preempt state laws that it knew existed, state laws are still valid. Although there is some congressional intent to preempt the state sanctions against South Africa, there is also the opposite intent. With knowledge of these various state actions it is very likely that Congress would have done something more if it had intended to preempt them.

Ray v. Atlantic Richfield Co.,²⁴⁶ is another example of the Court's willingness to uphold state laws that impose additional requirements than parallel federal laws. In *Ray*, the Supreme Court invalidated the portions of a Washington state law that conflicted with the federal shipping statute but upheld some requirements of the Washington law

242. *Id.* at 746-47.

243. *Id.* at 740.

244. *Id.* at 754-55.

245. *Id.* at 756-58.

246. 435 U.S. 151 (1978).

that regulated shipping and did not conflict with the federal law. The state had imposed a requirement on tankers. Those that did not comply with the state's designs, even though they complied with the federal statutes, had to have a tug boat pull them into the harbor.²⁴⁷ The Supreme Court upheld this requirement reasoning that even though the Washington law imposed an additional cost on the owners of tankers who did not meet the state's standards, it would not induce the owners to change the design on their tankers.²⁴⁸ The Court also held that although the tug requirement might appear to be a penalty to tankers that do not comply with the state's design standards, it was valid because it was not "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."²⁴⁹

Similarly, while Los Angeles' refusal to do business with entities that have ties with South Africa may be an inducement to those entities to cut those ties or even a penalty for their continued support of the apartheid system, these actions are not an obstacle to Congress' purpose. Quite the contrary, they work in tandem with Congress towards the same goal — elimination of an oppressive government. The requirement that companies wishing to secure contracts with the City of Los Angeles must discontinue doing business with South Africa is "in no way inconsistent with the [sanctions] as [they are] currently being implemented."²⁵⁰ The state and municipal sanctions should not be invalidated just because an entity complying with the federal sanctions might not be complying with state and city sanctions where the state's sanctions are consistent with the underlying federal purpose.

3. Conflicting Purposes

Besides an actual conflict and a conflict that is an obstacle to congressional objectives, the Supreme Court has also focused on the purposes of the state and federal statutes to determine whether the laws conflict. Where the federal government has legislated for a specific purpose, a state that imposes regulations that are different from the federal laws but were enacted for the same purpose is preempted by the federal government.²⁵¹ "The Supremacy clause dictates that

247. *Id.* at 171-73.

248. *Id.* at 173 n.25. The tug requirement would cost an additional \$227,000 a year whereas changing the design of a tanker to meet the Washington law would cost \$8,000,000 per tanker.

249. *Id.* at 173 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

250. *Ray*, 435 U.S. at 173 n.25.

251. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Ray v. Atlantic*

the federal judgment . . . prevail[s] over the contrary state judgment."²⁵²

In *Huron Portland Cement Co. v. City of Detroit*,²⁵³ the Court upheld a Detroit ordinance that required inspection of federally licensed ships.²⁵⁴ The purpose of the city's ordinance was to control pollution.²⁵⁵ The Court held that the inspection ordinance was not preempted by federal inspection laws because the federal laws were to ensure the safety of seagoing vessels.²⁵⁶ Because the city ordinance was for a different purpose, it did not bow to federal law. The Court held that controlling air pollution was "peculiarly a matter of state and local concern," and that it was within the city's police powers to regulate this area.²⁵⁷ It should also be noted that it was possible to follow the city and the federal laws at the same time.²⁵⁸ In *Ray v. Atlantic Richfield Co.*,²⁵⁹ the Court struck down the state's design, tonnage and pilotage regulations for tankers under the *Huron* rationale; the federal scheme "thus aim[ed] precisely at the same ends as [did the Washington State law]."²⁶⁰

As for the South African sanctions, the federal government has stated that the purpose is to initiate an end to apartheid in South Africa.²⁶¹ The State of California, while denouncing the system of apartheid in South Africa, has also stated as a purpose the need to protect the state's investments in a "rapidly deteriorating political climate" that will have an adverse impact on state money invested in firms that do business in South Africa.²⁶² The purpose of the California statute, in addition to bringing about an end to an oppressive governmental system,²⁶³ is to protect the state financial stability.²⁶⁴

Richfield Co., 435 U.S. 151, 164 (1978); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983).

252. *Ray*, 435 U.S. at 164.

253. 362 U.S. 440 (1960).

254. *Id.* at 441-42.

255. *Id.* at 445.

256. *Id.*

257. *Id.* at 446.

258. The local law prohibited some federally licensed ships from entering the state's ports. *Id.* at 451 n.3 (Douglas, J., dissenting). However, if the federally licensed vessels complied with the more stringent city standards, they would not then necessarily be in conflict with federal law.

259. 435 U.S. 151 (1978).

260. *Id.* at 165.

261. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 § 4, 100 Stat. 1086, 1089.

262. 1986 Cal. Stat. ch. 1254(g).

263. Undeniably this is one of the purposes of the state's law. The introduction to the law

Similarly, the Los Angeles city ordinance opens with a preamble recognizing the oppressiveness and injustice of apartheid.²⁶⁵ The city ordinance also clearly states that the purpose of its laws is to allow the City of Los Angeles to make its own economic decisions based on the market participant doctrine.²⁶⁶ Thus, although the ultimate goal of all three laws is the same — the elimination of apartheid — the stated purposes are different. The courts should accept these stated purposes as the actual rationale for enacting the laws.²⁶⁷

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*,²⁶⁸ the Court upheld a California law²⁶⁹ requiring energy companies to find a permanent storage site for the disposal of radioactive nuclear waste before the state would allow energy companies to build nuclear reactors.²⁷⁰ The federal laws which exclusively regulated the safety of nuclear power plants did not require energy companies to have a permanent storage site located for disposal of the waste before being issued a license to build the reactor.²⁷¹ The California legislature stated that its law was for economic not safety purposes.²⁷² Rather than “attempting to ascertain California’s true motive[s],” the Court “accept[ed] California’s avowed purpose.”²⁷³ The Court stated that inquiring into the true legislative motive for enacting the law was “pointless” because what motivates one legislator into voting for a law does not necessarily motivate another.²⁷⁴ Here, California’s purpose is to protect the state fisc from a volatile and unstable economy. This may not be the sole purpose of the law, but it is an actual purpose.²⁷⁵

adamantly deplores apartheid as “repressive,” “repugnant to the principles of individual liberty,” and “inconsistent with the moral and political values of the people of California.” *Id.* ch. 1254(h).

264. *Id.* ch. 1254(g)-(h) & (j).

265. See *supra* notes 114-17 and accompanying text.

266. LOS ANGELES, CAL., ADMIN. CODE div. 10, ch. 1, art. V; see also, *supra* notes 116-17, 128-44 and accompanying text.

267. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n*, 461 U.S. 190, 216 (1983).

268. 461 U.S. 190 (1983).

269. *Id.* at 203.

270. *Id.* at 194.

271. *Id.* at 217.

272. *Id.* at 213-14.

273. *Id.* at 216.

274. *Id.*

275. In *Pacific Gas & Electric*, the Court did not require that the avowed purpose be the sole purpose. The Court in *Huron Cement Co. v. Detroit*, upheld a Detroit City ordinance that imposed additional requirements on federally licensed ships because the “sole” aim of the

In *Golden State Transit Corp. v. City of Los Angeles*,²⁷⁶ the Court invalidated a city regulation that regulated a local concern, transportation.²⁷⁷ The Court held that the regulation was prohibited under the NLRA which regulated management/labor disputes.²⁷⁸ The Court did not deny the local character of the city's regulation nor that it regulated for a different purpose.²⁷⁹ This can be distinguished from the states' and cities' laws against South Africa. In *Golden State Transit*, the city's regulation was intentionally prohibited by Congress.²⁸⁰ The fact that it regulated for a different purpose than the federal law did not validate the city's law where that regulation was prohibited. Congress, in enacting the Comprehensive Anti-Apartheid Act did not specifically prohibit states from enacting their own laws. The federal government can deny funds to states and cities that enact anti-apartheid laws, but that power does not prohibit the laws themselves.²⁸¹ Here, the state laws and their purpose differ from the federal laws. For these reasons and because Congress did not prohibit them, local sanctions should be upheld under an ordinary preemption theory.

A different purpose also helped save the state laws requiring mental health care in *Metropolitan Life Insurance Co.*²⁸² The Court stated that the purpose of the NLRA to balance wage bargaining, did not conflict with the purpose of the state law, which was to protect the health and safety of residents.²⁸³

Because the purposes of the federal and state anti-apartheid laws are different, the court should follow its approach in *Huron, Ray, Pacific Gas & Electric*, and *Metropolitan Life Insurance Co.* The state and local governments did not enact the laws to regulate the same purpose as the federal laws. The federal laws aim exclusively at eliminating apartheid, whereas the state and city laws are intended to ensure financial stability. The federal government has exercised its

ordinance was controlling pollution. 362 U.S. 440, 445 (1960). After *Pacific Gas & Electric*, the Court would not seem to require that the sole purpose of the state or city law be one that does not conflict with federal law, if indeed the Court ever did require a sole aim.

276. 475 U.S. 608 (1985).

277. *Id.* at 619-20.

278. *Id.*

279. *Id.* at 611-12.

280. *Id.* at 613-17.

281. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440 § 606, 100 Stat. 1086, 1115.

282. 471 U.S. 724 (1985).

283. *Id.* at 758.

judgment with respect to regulations that seek to end apartheid and state laws enacted for this purpose would have to cede to the federal judgment. However, the federal government has not sought to regulate so as to preserve the financial stability of states and their subdivisions. In this area, there is no superior federal judgment to which the states and cities must defer. Because the state and local laws seek to regulate for a different purpose than the federal laws, the purposes do not conflict. Since it is not impossible to satisfy the federal and the state regulations simultaneously, the state and local laws are valid.

C. Federal Intent to Occupy the Field

Whether Congress has occupied the field is evidenced through congressional intent. To determine Congress' intent, the courts look to the language, the scope and the detail of the statute, and the legislative history.²⁸⁴ Where Congress specifically preempts state and local laws within the language of the statute or in the legislative history, there is no issue to resolve.²⁸⁵ With regard to the South African sanctions, Congress did not clearly state in the Act that it intended to preempt state laws. Therefore, the court must derive the intent of Congress elsewhere.²⁸⁶

The courts also look to the legislative history to determine whether Congress intended to preempt state laws.²⁸⁷ Although Congress may not specifically state that it preempts state laws in the legislative history, the type of legislation and the arguments from the House and Senate may lead the courts to believe that it was Congress' actual intent to preempt. This was the case in *Ray v. Atlantic Richfield Co.*²⁸⁸ In that case, Atlantic Richfield Co. was challenging a Washington state law that required ships licensed by the federal government to comply with additional laws that the state imposed.²⁸⁹

284. *De Canas v. Bica*, 424 U.S. 351, 358-59 (1976).

285. *Michigan Canners & Freezers Ass'n v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461 (1984) (federal law regarding agricultural processor and producer bargains preempted a state law that coerced producers to join associations was preempted by specific language in the federal statute and legislative history); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (federal grain storage laws preempted state laws regarding federally licensed warehouses because Congress specifically intended to preempt to maintain uniformity).

286. *See supra* notes 14-17 and accompanying text.

287. *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985); *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 142 (1982); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 166-68 (1977); *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132 (1962); *Napier v. Atlantic Coast Line R.R.*, 272 U.S. 605 (1926).

288. 435 U.S. 151 (1978).

289. *Id.* at 156.

Nowhere in the bill or in the legislative history did Congress actually state that the federal shipping laws preempted state laws.²⁹⁰ Congress had, however, expressed a desire for uniform international rules that would facilitate trade.²⁹¹ By declaring that this was an area of international interest and not one for unilateral state standards, Congress was saying that uniformity was important.²⁹²

Where Congress has expressed a need for uniformity, the courts have historically held that it is an area of exclusive federal interest, and that states can no longer regulate the area.²⁹³ In *Ray*, uniformity was important because international standards arrived at by treaty or convention would facilitate trade since a vessel that met the standards in the treaty could sail anywhere without having to meet different design or weight requirements every time it entered a different port. In the area of South African sanctions, it is clear that it is an area of international interest because Congress has called to other nations to enact sanctions.²⁹⁴

However, it does not follow, as it did in *Ray*, that a desire for international sanctions evinces a need for uniformity. Uniformity is clearly vital to Congress' purpose in facilitating trade among nations. Uniformity is not necessary for the purpose of issuing sanctions against South Africa to eliminate apartheid. Sanctions do not need to be uniform to work. In fact, to truly achieve the congressional purpose and end apartheid, different sanctions could and should be encouraged. Stricter sanctions would produce a greater effect on the South African government, while more lax sanctions, although not as effective, would be better than nothing. Nor could Congress realistically expect that all states and nations could adopt the same sanctions since different states and nations have different trade and production problems and goals. Therefore, although in some instances a congressional announcement that an area is one of international concern leads courts to the conclusion that uniformity and hence exclusivity is the congressional intent, this rationale does not apply to the South African sanctions and it is not the approach that the courts should take.

Courts have held that where the federal statute or scheme is "so

290. *Id.* at 160-64.

291. *Id.* at 166-68.

292. *Id.*

293. *Id.*

294. Comprehensive Anti-Apartheid Act of 1986, Pub. L. No. 99-440, § 107, 100 Stat. 1086, 1093.

pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,"²⁹⁵ the state law will be invalid.²⁹⁶ Where Congress has given an agency a broad grant of power to regulate in a particular field, the Court has held that the federal regulations preempt state law even if there is no federal regulation specifically in conflict with the state regulations.²⁹⁷

This was what the Court did in *Napier v. Atlantic Coastline Railroad*.²⁹⁸ Congress had given the Interstate Commerce Commission (ICC) power to regulate "the entire locomotive."²⁹⁹ The ICC had made numerous regulations for the safety of locomotives and their passengers, but did not have regulations similar to those of Georgia and Wisconsin. Georgia required an automatic door to close off the firebox and Wisconsin required a curtain.³⁰⁰ The federal law was silent on this point.³⁰¹ The Court invalidated both state laws because of the broad grant of authority given to the ICC.³⁰²

The difference between this rationale and the issue of South African sanctions, is that in *Napier*, there was a specific agency, the ICC, that Congress had set up to deal with locomotive regulations. Where Congress has given regulatory power to an office, the absence of that office's regulations acts to preempt state law in an area that the agency has decided not to regulate.³⁰³ However, because Congress has not delegated authority to a specific office to regulate the field of South African sanctions, the decision not to regulate does not operate to preempt state laws that regulate in the area. Therefore, under *Napier*, Congress' decision not to require divestment of funds from South African companies in no way eliminates the states' or cities' ability to require divestment.

Further, *Napier* represents the willingness of earlier Courts to apply federal preemption to oust state laws. Recent Courts have been much more reticent in applying the preemption doctrine. The Court's opinion in *Ray v. Atlantic Richfield Co.*,³⁰⁴ exemplifies this shift. In

295. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

296. *Id.* at 230-31.

297. L. TRIBE, *supra* note 152, at 386; *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

298. 272 U.S. 605 (1926).

299. *Id.* at 608.

300. *Id.* at 607.

301. *Id.* at 609.

302. *Id.* at 613.

303. See *supra* notes 239, 298-302, and *infra* notes 304-22 and accompanying text.

304. 435 U.S. 151 (1978).

Ray, the Court struck down state laws that conflicted with the federal vessel regulations, but allowed tug and design requirements where there was no federal law in the area and Congress had given authority to a federal office, the Secretary of Transportation.³⁰⁵ In *Pennsylvania v. Nelson*,³⁰⁶ the Court held that the federal scheme was so pervasive as to leave no room for local legislation because various other acts had been enacted to regulate similar conduct.³⁰⁷ This case involved preemption of Pennsylvania's sedition act by the Smith Act of 1940, The Internal Security Act of 1950, and the Communist Control Act of 1954.³⁰⁸

The federal anti-apartheid sanctions regulate a large area: the importation of Krugerrands, new investments in South Africa, loans to South Africa, refusal of landing rights, import and export limitations, and penalties for violating the statute.³⁰⁹ This could be evidence that Congress has occupied the field and left no room for the states to regulate. The legislative history and language of the Act may tend to refute this.³¹⁰ Nonetheless, Senator Lugar thinks that the federal Act occupies the field.³¹¹ His view, however, met with opposition from those who still believe that there is indeed room for state and local action.

D. Area of Dominant Federal Interest

Where Congress has enacted legislation in an area that is of great national interest, the regulation may preempt state law. Foreign relations is one of those areas. However, the Court has upheld state laws that touch on foreign affairs under some circumstances.

1. States' Police Powers

The federal government may regulate an area and occupy a limited field while not precluding state laws altogether.³¹² The states maintain an interest in regulating the health, safety, and welfare of their citizens even though the federal government has enacted regula-

305. *Id.* at 171-72.

306. 350 U.S. 497 (1956).

307. *Id.* at 502.

308. *Id.* at 499, 503-04.

309. 22 U.S.C. §§ 5051-56, 5059-60, 5067, 5069-71, 5113 (Supp. IV 1986).

310. *See supra* notes 13-15 and accompanying text.

311. *See supra* notes 16 and accompanying text.

312. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960).

tions that touch those areas.³¹³ Where the states have regulated within their police powers, there is a presumption that the federal law does not conflict with the state laws.³¹⁴ California's divestiture law is aimed at protecting the state's pension funds by realizing the maximum return for the residents of California who have contributed to the funds and will receive pensions at retirement.³¹⁵ This is within the state's police powers since it directly regulates the welfare of the state's residents. Therefore, the presumption will be in favor of not preempting state law. Under this rationale, the state anti-apartheid laws should not fail.

2. Regulating Foreign Relations

Foreign relations is an area of predominantly federal interests.³¹⁶ The need to project a united front to the nations of the world has made foreign policy a federal area. Additionally, uniformity is often a reason given for the federal interest especially in the areas of foreign commerce and alienage.³¹⁷ The Constitution puts states on notice that in the area of foreign affairs the federal government has the dominant voice.³¹⁸

These constitutional limitations do not completely curtail state action in foreign affairs. In *Huron Portland Cement Co. v. City of Detroit*,³¹⁹ the state regulation requiring inspection of federally licensed ships was not preempted by the federal inspection laws because the regulation was an "incident[] of local police power not

313. *Id.*

314. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960); *Ridgway v. Ridgway*, 454 U.S. 49 (1981); *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985).

315. *See supra* notes 85-88 and accompanying text.

316. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Pennsylvania v. Nelson*, 350 U.S. 497 (1956); *De Canas v. Bica*, 424 U.S. 351 (1976).

317. *See supra* notes 289-314 and accompanying text.

318. Congress has the power to "regulate Commerce with foreign Nations." U.S. CONST., art. I, § 8, cl. 3. Additionally, the Constitution prohibits some state action in foreign affairs. The Constitution provides that "[n]o State shall, without the Consent of Congress lay any Imposts or Duties on Imports or Exports except as what may be absolutely necessary for executing its inspection Laws . . ." *Id.* § 10, cl. 2. "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact . . . with a foreign Power." *Id.* § 10, cl. 3. Although the state laws regarding South Africa do not fall into the category of Agreement or Compact or as a Duty or Impost, the message of the Constitution is fairly clear—state's abilities to conduct foreign policy is very limited. However, states do have the ability to promote the interests of the states' residents.

319. 362 U.S. 440 (1960).

constituting a direct regulation of commerce."³²⁰ *Huron* dealt with the regulation of commerce, but an analogy can be drawn to the South African laws since uniformity is a federal interest in commerce as well as foreign affairs. Although the incidents of the state anti-apartheid divestment laws may affect foreign relations, the laws are not direct regulations on foreign affairs. The laws directly regulate California's investments in South Africa, but this is a police power within the state's ability to regulate. Therefore, the state laws do not infringe on an area of dominant federal interest simply because the operation of the state's police powers has an affect on foreign affairs.

The federal interest in foreign affairs is analogous to the cases which deal with state laws regulating aliens.³²¹ The Constitution has given Congress exclusive power to regulate the admission of aliens into the country.³²² This is similar to Congress' exclusive power over foreign affairs. Indeed, in *Hines v. Davidowitz*,³²³ the Court stated that the exclusivity in the regulation of aliens is based on the fact that it is a component of foreign affairs.³²⁴

Not every statute that has as its subject an area of federal interest necessarily regulates that area of federal interest.³²⁵ In *De Canas v. Bica*,³²⁶ the Supreme Court upheld a California statute that made it a crime for employers to knowingly hire illegal aliens if it would operate to take jobs away from lawful California residents.³²⁷ Petitioners in that case argued that since the California statute regulated aliens, it was preempted by the Immigration and Naturalization Act (INA)³²⁸ because regulating aliens was an area given exclusively to the federal government by the Constitution. The Court held that the California statute did not regulate the admission of aliens into the country which is what the INA did.³²⁹ Rather, the Court held that the California law was tailored to protect the local fiscal interest and lawful resident labor force from having to compete for jobs with illegal aliens who

320. *Id.* at 447.

321. *Hines v. Davidowitz*, 312 U.S. 52 (1941); *Zschernig v. Miller*, 389 U.S. 429 (1968); *De Canas v. Bica*, 424 U.S. 351 (1976).

322. U.S. CONST., art. I, § 8, cl. 4.

323. 312 U.S. 52 (1941).

324. *Id.* at 62-63.

325. *De Canas v. Bica*, 424 U.S. 351, 355 (1976).

326. 464 U.S. 351 (1976).

327. *Id.* at 352 n.1.

328. *Id.*

329. *Id.* at 355.

would drive wages down and take work from California residents.³³⁰

This case makes a strong argument for upholding state and local actions against investments in South Africa. Using the rationale of the Court in *De Canas*, although foreign affairs is an area of national importance, not every law that involves foreign affairs actually regulates in an area of dominant federal interest. Here, the laws are aimed at a foreign arena to protect local fiscal interests. The focus of the laws is on local concerns of protecting the state's money so that California residents will have funds available to support them in their retirement years. Therefore, although the California law involves foreign affairs, it does not regulate them.

Another factor to which the Court gave weight in upholding the California law regulating the hiring of illegal aliens was the lack of Congressional intent to preempt the state laws.³³¹ Nothing in the language of the federal laws or in the legislative history in that case evinced a congressional intent to preempt state laws aimed at regulating illegal alien labor.³³² The Court held that Congress' failure to regulate in that specific area or enact general laws did not justify an "inference of congressional intent to pre-empt all state regulation in the employment area."³³³ The Court also noted that Congress had intended to allow states to regulate employment.³³⁴

Regarding the federal sanctions against South Africa, there is congressional intent to preempt the state laws in the legislative history

330. *Id.* at 357.

331. *Id.* at 360-61.

332. *Id.*

333. *Id.* at 360 n.9. *Napier v. Atlantic Coast Line R.R.* seems to go against this proposition. 272 U.S. 605 (1926). There, the Court held that the Interstate Commerce Commission (ICC) had full authority to regulate all parts of trains using interstate lines and if the ICC did not regulate, then the decision not to regulate preempted any state regulation. *Napier* can be distinguished from *De Canas* on several counts. First, the state regulations under review in *Napier* regulated the boiler in the trains for safety which was the same area that the ICC had the right to regulate, whereas in *De Canas*, the state laws regulated employment and the federal laws were aimed at immigration in the sense of admission and stay in the country. Second, Congress in *Napier* had given the ICC a very broad grant of authority to regulate, and it had regulated everything from steam gauges on locomotives to the glass in the windows. *Id.* at 609 n.1. In *De Canas*, the INA could regulate admission into the country and the right to stay, employment had been left to the states.

334. *Id.* at 361. The Court cited the Farm Labor Contractor Registration Act, 7 U.S.C. § 2051 (1970 ed. Supp. IV) which specifically allowed the states to regulate hiring of illegal aliens. *De Canas v. Bica*, 424 U.S. 351, 361-62 (1976). Although the Court noted that this applied only to agricultural employment, it was "persuasive evidence" that the federal immigration laws should not be taken to preempt state laws "on matters affecting employment of illegal aliens." *Id.* at 362.

and the language of the statute, but there is also the intent not to preempt.³³⁵ According to *De Canas*, Congress' decision not to require divestment of holdings in South Africa does not indicate that Congress intended to preempt state laws that regulated in this area. Additionally, the California divestment statute is consistent with the federal laws because it operates to further Congress' purpose. The Court has stated that where state employment laws are consistent with the federal immigration and naturalization laws, the state law will fail only if Congress elaborated a clear purpose that the Federal law preempted all state laws in that area.³³⁶ There is no clear and manifest purpose of Congress to preempt state and local laws requiring divestment from South African companies.

In *Hines*, the Court used preemption to strike down a Pennsylvania statute that required all aliens over eighteen to register annually with the state and carry an identification card.³³⁷ Congress had passed The Federal Alien Registration Act of 1940,³³⁸ which required aliens fourteen years or older to register just once and did not require aliens to carry registration cards.³³⁹ The federal Act also differed from the Pennsylvania Act in that the federal Act did not make failure to register a crime unless it was willful or wanton, whereas the Pennsylvania statute made it a crime on any account.³⁴⁰

By invalidating the state law, the Court held that this was an area of dominant federal interest because it dealt with aliens, an area of exclusive federal power.³⁴¹ The Court stated that state laws may have some validity regarding foreign relations.³⁴² However, although states do have legitimate local interests, these interests do not exist in areas "embracing our relations with foreign nations."³⁴³ Under this analysis, local actions against investments in South Africa may be invalid since they undeniably affect foreign nations. Not only would the South African laws run into some difficulty, but the alien/employment laws in *De Canas v. Bica*³⁴⁴ would not have been upheld under

335. See *supra* notes 14-17 and accompanying text.

336. *De Canas v. Bica*, 424 U.S. 351, 357 (1976).

337. *Hines v. Davidowitz*, 312 U.S. 52, 59 (1941).

338. *Id.* at 60 n.5.

339. *Id.* at 60.

340. *Id.* at 60-61.

341. *Id.*

342. *Id.* at 63.

343. *Id.*

344. *De Canas v. Bica*, 424 U.S. 351 (1976).

this foreign affairs analysis of the Court in *Hines*. All of this can be reconciled.

In *Hines*, the Court did not rest its entire decision to invalidate the state laws solely on the fact that it regulated in an area of dominant federal interest. Much of the opinion is devoted to the equal protection issue of seeking out aliens and requiring them to carry stigmatizing registration cards.³⁴⁵ Congress had explicitly decided not to require aliens to carry registration cards. Thus, this part of Pennsylvania's law actually conflicted with the congressional intent behind the federal laws. Further, the Court pointed out that where the states are regulating people, as opposed to merely fiscal matters, such as taxing, their powers are limited.³⁴⁶ Additionally, it recognized Congress' desire for uniform alien registration laws.³⁴⁷ Therefore, the fact that the states were regulating in an area of dominant federal interest was not the only reason for invalidating the state's laws. Furthermore, the *Hines* Court was a much more activist bench than the present Court or the Court in *De Canas v. Bica*, and was much more disposed to using the preemption doctrine to strike down unpalatable state laws.³⁴⁸ Finally, the Court decided that the state law would be an obstacle to accomplishment of Congress' purpose for a uniform "harmonious whole."³⁴⁹

All of these factors help to reconcile the holding in *Hines* with that of *De Canas* as well as giving support to the argument that the local laws against South Africa should be upheld. Although the South African laws may raise an equal protection issue, it is of a different sort than that in *Hines*. Here, the issue would probably arise where cities do business with companies that do not have ties with South Africa, but refuse to do business with entities that do have South African holdings. This does not involve the type of individual social stigmatizing in *Hines*. Some people who previously did not know of a company's ties to South Africa may decide not to patronize that company, but this is not the type of stigma that Congress was trying to avoid in *Hines*. Congress in enacting the federal sanctions against South Africa was not doing it to protect individuals from being stigmatized at all. And, since the state and local laws only involve

345. *Hines v. Davidowitz*, 312 U.S. 52, 69-74 (1941).

346. *Id.* at 68.

347. *Id.* at 72-73.

348. See generally Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COL. L. REV. 623 (1975).

349. *Hines*, 312 U.S. at 72.

the liberty to contract and there is no suspect class involved, such as alienage, the local laws would be upheld on a rational basis analysis.

Congress has also failed to identify a need for uniformity in enacting the Anti-Apartheid Act as it did in enacting the Alien Registration Act. Additionally, there is no indication that local and state laws prohibiting investment in South Africa will stand as an obstacle to the accomplishment of Congress' goal, namely eliminating apartheid. As previously mentioned, the state acts are more likely to help rather than hinder this federal goal. Furthermore, the state and local actions involve regulations regarding the state fisc as opposed to individuals. The Court in *Hines* expressly recognized a greater state power to regulate taxes than to regulate individuals.³⁵⁰ The state anti-apartheid laws are more similar to the state's ability to tax since the anti-apartheid laws involve state fiscal matters.

Finally, the philosophy of the Court has changed. Under the Warren Court, many state laws were preempted by federal law. This signified the expansion of federal powers after the Roosevelt administration and a more liberal court. Conversely, the Burger Court retreated from the activist mode of the Warren Court. Principles of federalism and state's rights have dominated the reasoning in the Burger Court which has been much less willing to displace state laws under the doctrine of federal preemption. It is likely that these principles of federalism will continue to reign in the Rehnquist Court.

In *Zschemig v. Miller*, the Court invalidated an Oregon probate law regarding foreign legatees.³⁵¹ The Oregon law did not allow foreign heirs to inherit property if the foreign government would confiscate the property upon their return.³⁵² It also conditioned the ability to inherit on reciprocity, that is, whether a United States heir could inherit in that country. The Court did not object to the requirement of reciprocity because it did not invade foreign affairs but merely had "some incidental or indirect effect in foreign countries."³⁵³

The Court did however object to the confiscation requirement because it involved "minute inquiries concerning the administration of foreign law,"³⁵⁴ and determined that this had more than just an incidental effect on foreign affairs.³⁵⁵ In essence, what the Supreme

350. *Id.* at 68.

351. *Zschemig v. Miller*, 389 U.S. 429 (1968).

352. *Id.* at 430-31 n.1.

353. *Id.* at 433 (citing *Clark v. Allen*, 331 U.S. 503, 516-17 (1947)).

354. *Zschemig*, 389 U.S. at 435.

355. *Id.* at 441.

Court was objecting to was the state court's power to look to the foreign laws and determine whether they were democratic or not.³⁵⁶ If the court disliked the foreign laws or found that they were not democratic, then the state court could refuse to allow a foreign heir to inherit under the state's probate laws.³⁵⁷ According to the Supreme Court, this served no legitimate local purpose and adversely affected the federal government's ability to deal with those foreign governments.³⁵⁸ The Court also stated that absent the state laws, the state courts would not be thrust into foreign inquiries.

The holdings in *Zschernig* do not apply to the state's South African laws. The South African laws do not require courts to probe into the laws of South Africa and determine whether or not they comport with the court's ideas of democracy. Instead, the state legislatures have issued directives requiring divestment of the states' pension funds to protect their residents. As long as the law remains in effect, the courts need only decide if there are investments in South Africa. The legislatures, not the courts, will determine when the laws should cease. The legislature will not decide this by probing into and interpreting South African law, but by determining if investments in companies in South Africa are stable. This will involve minimal, if any, inquiry into South African laws. Although the state laws will have more than an incidental effect in South Africa, neither the courts nor the legislatures are involved in interpreting and administering foreign laws which was the Court's objection in *Zschernig*.

Unlike the state law in *Zschernig*, which served no legitimate purpose, the state anti-apartheid law does serve a legitimate purpose of ensuring that pension funds will be invested in stable economies so that California residents can receive maximum yield at retirement. Another difference between the local South African laws and the state laws involved in *Zschernig*, is that the state anti-apartheid laws will not place the state courts in an area of foreign concern to which they would not otherwise have been subjected. Even without the state laws, the courts, under the federal laws, would have had to look to whether there are investments in South Africa. The state laws may increase the volume of these inquiries but they do not create them. The inquiry necessary under the state law is also consistent with that

356. *Id.* at 437-39 n.8.

357. *Id.*

358. *Id.* at 441.

required by the federal laws and will therefore not disrupt or embarrass United States' dealings with South Africa.

What the Court seems to be saying is that a "dominant federal interest," without more, is not enough to preempt state law. The Court in *De Canas*, after recognizing a potential federal interest, looked for congressional intent to preempt state law.³⁵⁹ In *Napier v. Atlantic Coast Line Railroad Co.*, the Court preempted state law after finding that Congress had occupied the field and there was a specific intent to preempt state law.³⁶⁰ In *Pennsylvania v. Nelson*, the court preempted state law after finding a dominant federal interest, an actual conflict with the federal law, and congressional occupation of the field.³⁶¹ If this is indeed the case, then the state and local sanctions will almost certainly survive. There is arguably no dominant federal interest since the state laws regulate local problems within the state's police power. Even if there were a dominant federal interest, there is nothing else to supplement a preemption argument as the Court has seemingly required. There is federal intent, but it is conflicting in the legislative history and the language of the statute, the federal government has not so pervasively occupied the field so as to leave no room for the state laws, and there is no actual conflict between the state and federal laws. The state and local laws meet none of the criteria that mandate preemption.

V. CONCLUSION

The issue concerning federal preemption of state and local sanctions against South Africa will arise because most state laws are stricter than the federal laws. The California law requires the state to divest its pension funds of all investments with ties to South Africa. This is intended to both protect the pension funds from being unwisely invested and pressure businesses to withdraw from South Africa, thus forcing the South African government to end its apartheid regime. These are undeniably noble purposes. The Los Angeles ordinance and the Divestiture Plan require the city to divest its pension funds, prohibit purchasing South African goods, and disallow city contracts to be awarded to companies with business in South Africa. The federal Act imposes import and export prohibitions along with

359. See *supra* notes 332-49 and accompanying text.

360. See *supra* note 215 and accompanying text.

361. *Pennsylvania v. Nelson*, 350 U.S. 497 (1956).

other provisions to aid Blacks, but it does not go so far as to require divestment.

The Court does not need to invalidate the state and local actions under the supremacy clause. The Court will look to the Act and its legislative history to determine whether Congress intended to preempt state and local laws. However, this inquiry will not get the Court very far. Congress, while noting dissatisfaction with the state and city laws, recognized their continued existence. As for the legislative history, it reveals several attempts by senators to require federal preemption, yet it also discloses congressional opposition to federal preemption. Because Congress' intent is unclear, the Court should apply the preemption doctrine that it has developed. The state and local actions should survive the Court's preemption test.

First, there is no actual conflict between the state and federal laws. It is possible to follow them both without violating either. Nor do the state laws conflict with the object and purpose of the federal laws. If anything, the state laws enhance Congress' goal of eliminating apartheid.

Second, the state laws do not need to bow to superior congressional judgment because they do not regulate for the same purpose. The stated purpose of state and local laws is to protect the state fisc. This is different than the federal purpose, which is to eliminate apartheid. Certainly, no one would deny that eliminating apartheid is also a main thrust of the state laws. Yet the Court should rely on the stated purpose, which is to protect pension funds.

Third, even though the federal scheme is "comprehensive," there is still room for state laws. Although there is conflicting congressional intent here, the state laws did exist at the time Congress enacted the federal law and indeed the federal Act recognizes their continued existence.

Fourth, the state laws, while having an effect on foreign relations, regulate fiscal matters not foreign affairs. Even if the state laws are seen as regulations on foreign affairs, which is a dominant federal interest, that alone may not be enough to preempt the state laws.

Cynthia R. Fischer

