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PROFESSOR LANGBEIN AND SOCIAL INVESTING: A COMMENT*

WINSTON P. NAGAN**

John H. Langbein, Max Pam Professor of American and Foreign Law at the University of Chicago, has been a prolific writer on the subject of social investing.¹ In a field that most frequently attracts the commentary of liberals, Professor Langbein stands out as a voice of reactionary radicalism. Seeking to sever liberals from their favorite divestment campaign targets, pension trusts and university endowments, he concentrates on the trust responsibilities deemed to bind the managers of such funds. In advocating a course of maximum diversification, he concludes that the prudent course for such fiduciaries is to avoid making any decision on either economic or social grounds.² By holding every stock in proportion to its share of the aggregate value of the market, a trustee can minimize risk,

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** Professor of Law, University of Florida. Prof. Nagan will explore some related issues in *Economic Sanctions Against South Africa, International Law, U.S. Foreign Policy, and the Anti-Apartheid Act of 1986*, 2 FLA. INT'L L.J. (1986) (forthcoming).

1. Langbein, *Social Investing of Pension Funds and University Endowments: Unprincipled, Futile, and Illegal*, in NAT'L LEGAL CENTER FOR THE PUBLIC INTEREST, DIVESTMENT: IS IT LEGAL? IS IT MORAL? IS IT PRODUCTIVE? (1985)[hereinafter Langbein]; Langbein & Posner, *Social Investing and the Law of Trusts*, 79 MICH. L. REV. 72 (1980)[hereinafter Langbein & Posner III]; Langbein & Posner, *Market Funds and Trust-Investment Law: II*, 1977 AM. B. FOUND. RES. J. 1 [hereinafter Langbein & Posner II]; Langbein & Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RES. J. 1 [hereinafter Langbein & Posner I].

2. "From the standpoint of economic analysis, there are two types of social-investing outcomes — the futile and the wealth-impairing." Langbein, *supra* note 1, at 16.

Pension trusts have been designed to provide retirement security, and charitable trusts have been designed to serve specialized purposes—in education, the arts, research, and so forth. A board of trustees is not well suited to be a forum for the resolution of complex social issues largely unrelated to its work. There is every reason to think that trustees will best serve the cause of social change by remitting the advocates of social causes to the political arena, where their proposals can be fairly tested and defined, and if found meritorious, effectively implemented.

Id. at 28.

avoid research costs, and shrug off the demands of divestment activists as contrary to this eminently rational investment strategy.³

Langbein's general strategy is to condemn social investing as unlawful and immoral. His article has been primarily, but not exclusively, concerned with the problems associated with private and public sanctions against South Africa. We may note parenthetically, that South Africa, with its highly visible race problems, is a particular concern in American politics.⁴ Langbein's core ideological concern seems to be the eradication of "social investing;" indeed, his objective appears to be the extinction of social investing as a form of political and moral pressure on the American corporate and economic presence in South Africa. From the perspective of what we may for convenience call the "Chicago School," social investing may be viewed as a negative economic externality.⁵ That is to say, social investing is an alien, intrusive, liberal, socialistic idea the insidiousness of which erodes both the economic purity and the moral foundations of the investment market.⁶

Langbein's thesis grounds two claims. First, that social in-

3. Langbein, *supra* note 1, at 14-15, Langbein & Posner I, *supra* note 1, at 27, and at 29-30. "The essence of this strategy is to buy and hold a very broadly diversified portfolio— ideally, one in which all securities would be held in proportion to the market value of the companies issuing them." Langbein & Posner II, *supra* note 1, at 3. The reduction in administrative costs by maximum diversification at some point increases administrative costs in handling the amount of material generated by each corporation for its stockholders, requiring the trustee to limit the size of his portfolio. *See id.* at 4-5 n. 9, for the genesis of this trade-off.

4. *See, e.g.*, Buchanan, *Destroy South Africa to Save It?*, N.Y. Times, Sept. 18, 1986, at A31, col. 1. *Cf.* Baker, *A Matter of No Fact*, N.Y. Times, July 23, 1986, at A23, col. 1: One of the mysteries is why President Ronald Reagan is soft on South Africa. He is government apparently operating under the fatal decision that Nazi Germany did things right. It now has more people imprisoned without due process of law than the United States Immigration Service and exercises a press censorship that makes the Soviet Union's seem sissified by comparison.

5. Langbein, *supra* note 1, at 8, "[s]ocial investing proposals are directed at pension funds not in order to further the interest of the pensioners, but in disregard of their interests."

6. Langbein, *supra* note 1, at 8, "the causes that are grouped under the social-investing banner are *those that have failed to win assent in the political and legislative process.*" (emphasis in the original). *Cf.* Barber, *A New Language for the Left: Translating the Conservative Discourse*, HARPER'S, Nov. 1986, at 47, 48. "It is through city and county institutions that government achieves many of its most innovative and satisfying solutions."

vesting in the context of pension trusts and charity law is unlawful.⁷ Second, that if social investing were not prohibited under existing law, it ought to be prohibited.⁸ Langbein maintains that social investing is unlawful and that there are external reasons, possibly moral ones, that support his legal conclusion. Langbein does not state that fields such as charity or trust law forbid social investing. Instead, he suggests that "the traditions" of these fields require trustees to ignore social investing. Should the law fail to generate enough legal support for his conclusions, he would ostensibly seek support in the "rightness" of his view about those "traditions."⁹ In other words, the conservative position on social investing would appeal to non-legal or "not technically legal" sources of law and morality.

Where one's ideological adversary does not confine himself to the analysis of the state of the law as it is, one cannot narrow one's focus of analysis, or the conclusions reached would not be useful from a policy-oriented perspective.¹⁰ Therefore, this article will discuss not only the legal issues Langbein raises, but the ancillary themes which are clearly present, and those that are at least incipient. The themes of this article will be presented in the following sequence: (1) some moral concerns about the nature of social investing;¹¹ (2) the context of human rights values and international law;¹² (3) social investing in the context of United States domestic policy;¹³ and (4) ideology, intellectual integrity, and academic law.¹⁴

7. Langbein, *supra* note 1, at 16-25.

8. *Id.* at 12-16.

9. *Id.* at 1, "This article is concerned to explain why the traditions of trust law, pension law, and the law of charity rightly forbid social investing." The ensuing discussion of the Social Security system seeks to demonstrate "the dangers of exposing the retirement income system to the winds of electoral politics." *Id.* at 2-3. Congress is not bound by the same restraints as trustees, and the entire program is more of a "social investment" than a trust. The difference between social spending and private property makes this analogy tenuous at best.

10. Many sections of this paper draw heavily on the insightful work of Walter Probert, a pioneer of "words consciousness." His jurisprudential writings are seminal for the interrelationship of lawyering and communication responsibility. *See generally* W. PROBERT, *LAW, LANGUAGE AND COMMUNICATION* (1972); Probert, *Words Consciousness and the Control of Language*, 23 *CASE W. RES. L. REV.* 374 (1972).

11. *See infra* notes 15-20 and accompanying text.

12. *See infra* notes 21-70 and accompanying text.

13. *See infra* notes 71-101 and accompanying text.

14. *See infra* notes 102-117 and accompanying text. *See also* Bell, *Strangers in Aca-*

I. THE NATURE OF SOCIAL INVESTING

Since the concept of social investing is a central focus of Langbein's article and serves as his point of departure, a closer examination of that concept is warranted. The concept of "social investment" is an extremely broad one, so broad that one should be skeptical about the sheer breadth it assumes in Langbein's analysis. Since, in Langbein's terms, social investing seems to function as an explanatory concept, it is worth noting the requisite caution that accompanies all forms of conceptualization. All concepts about any phenomenon are of limited utility.¹⁵ The "bottom line" is that all investment is "social investment"¹⁶ and

demie Paradise: Law Teachers of Color in Still White Schools, 20 U.S.F. L. REV. 385 (1986), for a description of the academic castle inhabited by most, if not all, law professors which may explain their ability to distance themselves from a subject.

15. The concept cannot be allowed to replace the reality it is meant to describe. The convenience of defining that which you will criticize is not to be minimized. "Meaning is no more *in words* than color is *in things*, actually less so. Words may trigger meaning, but no, we let them trigger meaning. What meanings we let them trigger turns on what assumptions operate, or in the current vernacular, what conventions." Probert, *Interpretation: Its Relevance in Courts, Criticism and Jurisprudence*, 25 WASHBURN L.J. 1 (1985) (emphasis in original).

16. "Social investment" can be defined as "[t]he use of pension fund assets to achieve various social and political goals in addition to the traditional goals of asset enhancement and security." Murrmann, Schaffer, & Wokutch, *Social Investing by State Public Employee Pension Funds*, 35 LABOR L.J. 360 (1984).

Society depends on the processes of economics to meet its material needs, and where society feels a need not recognized as important by economics, other value-institutional priorities are called into play. Economics may be the prime method for determining what needs are met, but it is not the only method. Indeed, the wealth variable is not the only variable crucial to the realization of the common interest in human dignity, contrary to the position of the Marxists in the Kremlin and the neo-scholastics of the Chicago School. Where investment funds are not readily provided to bring a new product to market, social discontent can cause a reallocation of investment funds. For example, the cost of testing a drug must be "invested" before it can be made available to its potential market of patients. "[I]t takes capitalized costs of about seventy million dollars to bring the average new drug to market nowadays." Miles, *Hail to the Orphan*, FORBES, May 23, 1983, at 83. A newly developed drug for a rare disease may have too small a potential market to justify an investment of such magnitude on economic grounds. Activism on behalf of patients who need such "orphan drugs" lead pharmaceutical companies to subsidize the production of some drugs; consequently, "a patient with heart disease may have to pay more for his medication so that a child with cystinosis can obtain cysteamine." Martindale, *The Drugs Nobody Will Make*, HEALTH, Aug. 1982, at 40. Eventually, when activism could not sufficiently affect the economics of drug companies, Congress passed the Orphan Drug Act of 1983 (codified at 21 U.S.C.A. 360aa-360ee (West Supp. 1986)).

The bill authorized tax credits and grants to promote the development of these rare-disease drugs. It also authorized seven years of exclusive marketing rights

investment decisions to maximize profit, or anything else, are as much a matter of social investment as purchasing an athletic booster membership.¹⁷ Since the conceptual basis behind Langbein's idea of social investing is largely undefined, it provides little, if any, guidance between the trivial and the salient. In Langbein's schema, it functions more as a straw man than an analytical tool. In an open society, or at least a relatively open one, any "demand perspective"¹⁸ within the social process involving investment could merit Langbein's stigma of "social investing." What Langbein has done is to provide a slippery slope with an endless slide, rather than a framework which requires careful characterization and deep thinking. That framework, if it were supplied, would place social investing in the context of a social process, much of which cuts across state and national lines. To create a defensible moral and legal analysis of the financial world, the critical question must be whether the investment process, or particular activities within that process, promote or frustrate the major purposes of the political and legal culture of the entire community.¹⁹ To pose the issue starkly, one might balance the rights of the beneficiaries of private pension trust plans in Winnetka or Hyde Park, who may be concerned about their economic security, against the rights of black South

for rare-disease drugs that were not patentable. Other sections of the measure were designed to ease regulatory barriers for orphan drug approval by directing the FDA to tell a manufacturer precisely what tests it would require before granting approval to market a drug.

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In a similar vein, medical research may be driven by fund-raising, where economic and social forces reach a confluence. For example, telethons sponsored by Jerry Lewis and Dennis James have raised millions of dollars for muscular dystrophy and cerebral palsy, which were previously orphan diseases. The grandfather of such efforts, the March of Dimes Campaign, contributed significantly to the development of polio vaccine.

17. One could specify that one's donation to the University of Chicago be used to revive its extinct football program in the belief that football scholarships would bring diverse viewpoints to the school's classrooms and provide a tougher proving ground for economic ideas that may become associated with the school; academic investment, if you will.

18. See Langbein, *supra* note 1, at 9. The trustee must decide from an office with only one window: a window on economics. The "perpetual wave of political demands," *id.*, will still wash upon him, but only deeply ingrained, or economically oriented principles will influence his decisions.

19. It is beyond the scope of this article to lay out a framework for how the world should be organized, but all possible, peaceful tools should be available to philosophical and political debates.

African youths, who may be tortured with a sophisticated apparatus bankrolled by the investment practices of the trustees of these pension plans, but the balancing should be done on a conceptual basis informed by the fundamental policies of the entire community.²⁰

II. THE CONTEXT OF HUMAN RIGHTS VALUES AND INTERNATIONAL LAW

Antagonists of social investing, at least indirectly, profess a moral predicate to their arguments.²¹ Therefore, academic protocol will not be violated by an appraisal of Langbein's position on social investing in relation to the normative standards to which he seems implicitly committed, and more importantly to the normative standards of the inclusive community where investments take place. That inclusive community is the international community, and its normative standards are the United Nations Charter and the International Bill of Rights.²²

20. B. Baldwin & T. Brown, *Economic Action Against Apartheid: An Overview of the Divestment Campaign and Financial Implications for Institutional Investor* (a study funded by The New World Foundation & the Africa Office of the National Council of Churches, and available from The Africa Fund, 198 Broadway, New York, NY 10038)(undated)[hereinafter B. Baldwin & T. Brown]. "In short, the apartheid regime has conducted business with U.S. corporations in South Africa in fields directly related to the oppression of blacks." *Id.* at 7. The Internal Security Act, §§ 51(1)(a) & 51(2)(b), maintains that support for divestment is "subversion," punishable by five years to life imprisonment. *Id.* at 3.

21. Langbein's most recent article was published by the National Legal Center for the Public Interest. The name of the organization implies a moral predicate for the positions it propounds. However, while Langbein takes a poke at "social activism on the political," Langbein, *supra* note 1, at 10, most advocates of social investing are associated with the left. Langbein prefers to reserve decision-making power from emotional demagogues who disrupt or redistribute, *id.* at 2-3, to rational economic actors who maximize benefits through the free market. His strategy of depicting other advocates as extreme does not quite eventuate in a view of Langbein as a cool-headed moderate.

22. The U.N. Charter is part of the law of the United States, 59 Stat. 1031, T.S. No. 993. See also Universal Declaration of Human Rights, GA Res. 217, U.N. Doc. A/810 at 71 (1948).

Although the Universal Declaration and the Charter provided an important foundation, many important human rights were not binding upon states until the passage of the International Covenant on Civil and Political Rights, and the International Convention on Economic, Social, and Cultural Rights [G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) 49]. These 1966 covenants and the Universal Declaration form what has been termed the International Bill of Rights. Hassan, *Solidarity Rights: Progressive Evolution of International Human Rights Law?*, 1 N.Y.L.S. HUM. RTS. ANN. 51 (1983). See also Sohn, *The New International Law: Pro-*

To make the values at stake more explicit, in this article, the word "responsibility" will be used, at times, to normatively constrain the concept of investment itself. The value questions implicit in Langbein's articles raise concerns of personal responsibility for the protection and enhancement of values.²³ The central issue here, as elsewhere in private and public life, concerns responsibility. The concerns of responsibility mean that the individual or institution is accountable for the consequences or results of political, corporate, or investment behaviors.²⁴ The question of responsibility has at least two salient levels within this context. The first is the perspective of scholarly responsibility. The scholar does not live in a moral vacuum.²⁵ If he is to explain, describe, appraise, evaluate, and recommend, his value scheme must be founded upon honesty and accountability. Second, active decision-makers often become associated with institutions in relevant fields, and have institutional values and stan-

tection of the Rights of Individuals Rather than States, 32 AM. U.L. REV. 1 (1982). By forcing the world of investors to consult the world of international law, I mean only to be consistent. Investments are made worldwide, and all standards should be considered. Conservatives, on the other hand, tend to be less adventurous than they should be in searching for laws that bind the individual.

23. Langbein's theory is "intrinsically standardless," Langbein, *supra* note 1, at 9, but that just begs the question of where standards are necessary or allowed, and must be accounted for in a theory. Corporations are allowed to make charitable gifts under the assumption that as entities in our society they can decide to benefit society, and with the understanding that such gifts will not ruin the corporation. W. FLETCHER, 6A CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2939 (rev. permanent ed. 1981). The law of trusts is now in the embryonic stage of not allowing such donations, or at most allowing them where directly related to the trust's purpose, a stage corporations had to outgrow. *Id.* at § 2938. As elements of society, these entities can articulate the concerns of society as well as any other entities can.

24. Our greatest asset is our spirit: the spirit of political liberty and civic activism evident in the towns Tocqueville toured on his journey across America in the early 1830's; the spirit of adventure that once opened up the West; the spirit of giving by which Americans have always shown themselves prepared to help their neighbors and participate in voluntary associations without calculating the return on their altruism; the spirit of tolerance that permitted the victims of a hundred worldly persecutions to find sanctuary here, and that made America a nation that saw equality as a function of will rather than birth; the spirit of patriotism that inspired the young to serve their country without the promise of a free ticket to college; the spirit of democracy that made liberty not merely a private matter but a matter of respect for the dignity of others.

Barber, *supra* note 6, at 51.

25. Of course, some academicians are merely apologists. See Bell, *supra* note 14, at 389-91, recounting the interaction of slavery and law in American history.

dards impressed upon them.²⁶ Since Langbein's work obscures an appropriate focus of inquiry, the perspectives of scholarly observer, institutional apologist, and decision-maker are largely undifferentiated, and the critic does not know whether his disagreement should be theoretical or practical.

Having raised the problem of values, Langbein does little to illuminate the roles important in value clarification; nor does he describe what values are at stake and in what contexts they are important. Langbein apparently shares the attitude of those lawyers who project conservative ideology as conventional morality, and then selectively cull from legal sources those elements that support their ideological predispositions. A cardinal tenet of conservative ideology is that corporations and other fiscal institutions have no responsibility for their conduct other than profit maximization.²⁷

The values that animate Langbein are those concerning the protection of retirement income in the private sector.²⁸ Langbein makes an excellent case for the special status of the private sector retirement system and the importance it has for the financial security of its elderly beneficiaries. If, as Langbein maintains,

26. The question of who should make investment decisions does not end with trustees. Bankers, corporate functionaries, arbitrageurs, and congressmen can benefit from public debate by divestment advocates, no matter what the particular avocation is. Somewhere in the chain a decision will be made, and Langbein's obfuscation denies the eventual decision-makers a social basis for their decisions.

Many of the demands that are most intensely promoted are often less than comprehensive. Divided by the contending ideologies and systems of public order (especially in the wealth process), conditioned by many variations of parochialism, and oriented toward the calculation of short-term payoffs, the constellation of effective demands gives emphatic priority to the assertion of special interests in defiance of the common interests that give expression to human dignity values.

M.S. McDUGAL, H.D. LASSWELL & L.C. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 45 (1980).

27. The goal of a business corporation is to make profit. . .The *only* goal of a business corporation is to make profit. . .More fully, the only goal of a business corporation is to make the *maximum possible profit*. . .*Completely*, the only goal of a business corporation is to make the maximum possible profit *over a long period*.

Simpson, *The Decomposition of Antitrust: Testing a Multi-level, Longitudinal Model of Profit-Squeeze*, 51 AM. SOC. REV. 859 (1986)(emphasis in original) (quoting J.E. CONKLIN, ILLEGAL BUT NOT CRIMINAL: BUSINESS CRIME IN AMERICA 41 (1977)).

28. Langbein, *supra* note 1, at 1-3.

the elderly are "neither affluent nor politically adventurous,"²⁹ why do social investment ideologists target pension funds for the fulfillment of their social agendas?³⁰ Langbein's principal criticism of social investment seems to lie in the strategies that he presumes to be typical of social investing advocates. Their "hidden dynamic," he claims, seeks to take "advantage of the separation between the ownership and control of pension savings."³¹ Phrased thusly, the conspiratorial overtones become palpable.³² The reality of pension funds, with their unimaginable amounts of capital, on the other hand, is that not only are they promoted by federal and state law, but controlled and regulated as well.³³

29. *Id.* at 7.

30. The colloquy between Socrates and Cephalus that introduces Plato's Republic addresses many salient issues for the uses of the wealth of the elderly. *THE REPUBLIC OF PLATO* 27, Chapter I (F. Cornford trans. reprint 1980). Although the appetite of his mind remains sharp as his other passions diminish, and although the imminence of death makes him ponder whether there is an afterlife and whether he has "cheated or deceived anyone even unintentionally or [was] in debt to some god for sacrifice," Cephalus, the old man, bequeaths the philosophic discussion to younger men. *Id.* at 47. Socrates contributes:

Those who have [made their own fortunes] are twice as fond of their possessions as other people. They have the same affection for the money they have earned that poets have for their poems, or fathers for their children: they not merely find it useful, as we all do, but it means much to them as being of their own creation. That makes them disagreeable company; they have not a good word for anything but riches.

Id. at 6.

31. Langbein, *supra* note 1, at 8.

32. It would not be a far leap to put words in Langbein's mouth accusing divestment advocates of being Marxists alienating workers, who are pension beneficiaries, from the fruits of their labor. But it would be quite an ideological pirouette.

In addition, there may be a class bias in market-holding against union members. Part of the union member's pay is withheld from him for his retirement. The pension beneficiary may thus be deprived of the chance to use this extra money as an entrepreneur, and provide for his own retirement.

Traditionally, the trustee has not been regarded as an entrepreneur. Trustees are generally not compensated for taking entrepreneurial risks or for being able to spot promising new ventures; they tend to be selected for reliability in preserving the capital of the trust rather than for flair in speculating and taking risks.

Langbein & Posner II, *supra* note 1, at 12. More aggressive investors with available capital will take advantage of opportunities denied to the little man personally and to his trustee.

33. See Employee Retirement Income Security Act, 29 U.S.C.A. §§ 1001-1461 (West 1985). See also *infra* at note 73. One big question is who owns these funds. If the pension plan is underfunded, Langbein accuses divestment advocates of stealing from old widows, see Langbein, *supra* note 1, at 4; if the plan is fully funded, Langbein advocates

Since investment decisions, however complex, are hardly to be viewed as politically or fiscally neutral, the central question of any defensible moral order is how to prioritize the range of responsibilities that inhere in the management of such funds.³⁴ Preservation and enhancement of the corpus are, of course, central and practical objectives. The framework of these concerns, however, can surely accommodate other values, and the difficulty in finding universal answers does not mean that questions cannot be posed for each individual to answer: What ethical and normative standards besides the traditional standards of prudence and probity are important to the ethically responsible investor? And what level of risk is permissible in the diversification of the portfolio where the current investment advances goals that are possibly inconsistent with the purposes of a charity trust or a university foundation? Also, how does one trade off matters of risk in diversification against the possibility that one's investment strategem yields corporeal gains at the expense of the larger community's concerns for the protection of fundamental human rights?³⁵ These "conspiratorial hidden dynamics" are the heart of ethical responsibility. These issues constitute a significant challenge to the legal system and moral order. The challenge, as I see it, is to employ institutions, resources, human wit and ingenuity to satisfy as many key values as possible without undermining social process and exhausting economic and political capital.

Professor Langbein's claim that political causes should be pursued in the "political" arena³⁶ assumes that matters of eco-

speculative investment so that gains may be withdrawn and added to company profits, or losses made up as convenient, *see* Langbein & Posner I, *supra* note 1, at 33-34.

34. The basic assumption of Langbein's economic analysis is that investors are averse to risk: "Economic theory implies and empirical study has confirmed that investors are generally risk averse. . ." Langbein & Posner III, *supra* note 1, at 78; *see also* Langbein & Posner I, *supra* note 1, at 9, and Langbein, *supra* note 1, at 20. More important values than risk are recognized by our legal system in order to protect the innate dignity of man.

35. The "systematic risk," *see* Langbein & Posner III, *supra* note 1, at 80, of the world community may be reduced by a reduction in political tension, an "investment strategy" not countenanced by the strategy of riding the market.

36.

Why not pursue political causes in the political arena? It is vital to understand that, almost by definition, the causes that are grouped under the social-investing banner are *those that have failed to win assent in the political and legislative*

conomic salience have nothing to do with politics or law. More than that, he suggests that investment decisions have nothing to do with the distribution of power in society.³⁷ Going beyond the "classic liberal" position that allocation of economic power to the private sector promotes democracy,³⁸ Langbein suggests that private actors may remain unaccountable for the social and political consequences of the exercise of their economic power.³⁹ In short, private tyranny is seemingly more acceptable than public tyranny; a brave moral conclusion indeed.

process. . . . The reason, therefore, that the proponents of social investing are bullying pension trustees is that they have been unable to get their political programs accepted in the political process.

Langbein, *see supra* note 1, at 8 (emphasis in original).

Joseph Schumpeter suggested that democracy was little more than the name of a system in which elites competed via the ballot for the support of an otherwise docile electorate, whose sole exercise of liberty was the occasional filling out of a ballot. Both political parties embraced this definition. They nurture bureaucrats and "experts" to carry out the everyday functions of government and seek charismatic leaders to act as media figureheads.

Barber, *supra* note 6, at 51. Cf. Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965).

37. "This approach makes social investing a branch of interest group politics." Langbein, *see supra* note 1, at 9. "Interest group politics" has its place and is outweighed by the importance of preserving trusts. This merely reserves economic power for those interested in preserving the status quo. Cf. Barber, *supra* note 6, at 49:

To the right, politics is a function of economics, without autonomy or sovereignty. As a consequence, important political issues are often decided on the basis of whether one outcome or another will promote the free-market capitalist economy or take us down the road toward a planned protosocialist economy.

38. Liberals in the nineteenth century sense "advocated freedom of the individual and reduction of government power and control." Malloy, *Equating Human Rights and Property Rights — The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163, 164 (1986). This article delineates the major strains of economic thought growing out of this tradition. For a prime example, see F. HAYEK, *THE ROAD TO SERFDOM* (1944). See also Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 34, for the application of this viewpoint to foreign affairs.

39. The coercion of an individual by others is a prime evil for "classic liberals" except for general rules enforced fairly by the government. See Malloy, *supra* note 38, at 168-71. According to Langbein, the settlor of a trust can bind another individual, the trustee, to his will as part of his employment. But the trustee should be immune to all other coercion except officially pronounced rules of society, or the settlor's liberty will be violated.

Were the left to advance a vision of local civic organizations using power for public ends, neoliberals and conservatives alike would be put in the uncomfortable position of having to denounce such organizations in order to maintain their support for the private market—which would then be revealed for the home of oligarchy and monopoly that it is.

Barber, *supra* note 6, at 48.

Langbein lets the "political" cat out of the bag when he demands to know why South Africa, with its monumental race relations problems, remains a particular target of social investors, while Libya and Russia are ethically treated with benign circumspect.⁴⁰ It is by no means clear that moral condemnation is reserved exclusively for South Africans.⁴¹ But it is a strange doctrine which suggests if one cannot address every conceivable human rights violation in the world, one cannot address any of them.⁴²

If there is any commendable assumption pervading the democratic ethos, it is that we are all in some degree responsible for the decisions in public and private life that allocate weal and woe. Langbein's proposition that there can never be a "consensus" about socially worthy causes is true,⁴³ but beside the point. The whole point of taking a value such as human dignity seriously requires recognition that its realization cannot ultimately depend on someone else's action. The responsibility in the first instance must be with the self. The most elementary forms of republican government appreciate and understand this.

I do not intend to add an extended analysis to Langbein's

40. Langbein, *supra* note 1, at 10.

41. Never before has the United States witnessed such an explosion of non-federal legislation directed against a particular nation. State, county, and municipal governing bodies have enacted dozens of statutes, ordinances, resolutions, and orders, which, in the aggregate, almost certainly have affected relations between the United States and South Africa.

Note, *State and Local Anti-South Africa Action as an Intrusion upon the Federal Power in Foreign Affairs*, 72 VA. L. REV. 813, 815 (1986). See also *id.* at 815 n. 14, discussing "similar measures against other nations," including Iran, Libya, Northern Ireland, and the Soviet Union.

42. Such an argument draws on the principles of equal protection, but in such a manner as has long been disfavored. "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all." *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949). But see J. CAREY, UN PROTECTION OF CIVIL AND POLITICAL RIGHTS (1970), especially at 143-53, Chapter 12, "The UN's Double Standard on Treatment of Complaints."

43. "[T]here can be no consensus about which social principles to pursue and about which investments are consistent or inconsistent with those principles." Langbein, *supra* note 1, at 9-10. In mathematical terms, trust principles are constants, and social principles are variables; only a person just being introduced to algebra could think that he had truly found the value of "x". Cf. *Is Nothing Sacred? Constants of Science Submit to Revision*, N.Y. Times, Feb. 24, 1987, at C3, col. 1 (discussing among other developments the redefinition by Codata (Committee on Data for Science and Technology) of the meter as "the distance over which light will travel in one 299,792,458th of a second").

theory of the economics of investing. As a lawyer, I may indulge myself in little more than the often made criticism of the dismal science—it is a poor predictor.⁴⁴ After disavowing expertise or inclination to assail the academic tower of neo-scholastic economics, I still think it appropriate to harry Langbein's flanks with some skepticism on that subject. Since Langbein's concept of social investing is so broad that it can be used to prove almost anything, including the assumption that it is futile,⁴⁵ or impairs the corpus and performance of pension trust funds, the question of investor responsibility could more sensibly be explored in specific contexts, rather than generalization and speculation.⁴⁶ Indeed, the question of divestment by firms doing business in

44. See WHY ECONOMICS IS NOT A SCIENCE YET (A. Eichner ed. 1983). The business judgment rule for corporate directors and the prudent man rule for trustees are in part based on the presumption that predictions cannot be entirely accurate. W. FLETCHER, 3A CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 1039-1041 (rev. permanent ed. 1986).

45. However one wants to define "futility," some commentators contend "[i]n one respect at least, the divestment forces have already won. They have prevented — discouraged, dissuaded, whatever you call it — billions of dollars of new U.S. investments in South Africa. They have discouraged new companies, new investors who were looking for foreign opportunities from coming to South Africa." See B. Baldwin & T. Brown, *supra* note 20, at 2 (quoting Financial Mail (Johannesburg, Feb. 1, 1985)).

46. Business Environment Risk Information (BERI SA), which specializes in risk analysis for international corporations, has confirmed the wisdom of both the general trend away from investments in South Africa and the decision of the corporate insurance "troubleshooter" to move in, by recommending against long commitments in a country which it sees as approaching high operational risk and prohibitive political risk.

B. Baldwin & T. Brown, *supra* note 20, at 3.

By law, a black father who, being fortunate to get a job, must leave his family in the bantustan homelands to eek [sic] out a miserable existence there while he comes to the white man's town as a migrant laborer to live an unnatural existence in a single sex hotel for eleven months of the year. He is, then, prey to prostitution, drunkenness, and sodomy. The migratory labor system is the legal policy of the land, eating away at the vitals of black family life, again, not accidentally, but of set deliberate government intent. That is how you keep the costs of production low because the migrant is paid as if he were single. Now it is important for those who invest in South Africa to know that it is this kind of system, whether they like it or not, whether they intend it or not, it is this kind of system which they buttress by their involvement there. To do this to human beings, separate families in this kind of way, to a layperson seems wrong and immoral. However, the sanctions and buttresses this system which even the white Dutch Reform Church, which does not easily criticize the South African [sic] government, has long ago condemned as a cancer in our society.

Tutu, *The United States and South Africa: Human Rights and American Policy*, 17 COLUM. HUM. RTS. L. REV. 1, 4-5 (1985).

South Africa requires a more careful assessment before the notion of futility is interposed. One needs to examine the conditions in South Africa, focusing particularly on the extent to which involvement in the economy of apartheid reinforces the institutions of apartheid, or conversely, serves to transform South African society in ways that make it more consistent with international law and morality.⁴⁷ If the divestment strategies are seen to provide possibilities for political change, then the question of economic futility is irrelevant since the more important political and legal objectives of international moral order may be realized. The question might then be one of political success at an economic price. The question of the impairment of funds, again in the context of South Africa, raises many more questions of fact. Included among these are the escalating risks of investing in a society caught within the throes of great economic and political turbulence, the political price of retaining investment in South Africa to the exclusion of fiscally attractive possibilities elsewhere, and of course the attendant transaction costs of divestment.⁴⁸ The point is that investment strategies are often tailored to specific situations. Therefore, generalization about socially conscious investment practices outside of a careful appraisal of all the factors that condition performance in a given place at a given time is a futile exercise.⁴⁹

47. See, e.g., Universal Declaration of Human Rights, *supra* note 22. Cf. "If the collapse of apartheid had to depend on the moral achievement of millions, on the simultaneous mass conversion of the oppressors and oppressed, it would probably never happen." J. LELYVELD, *MOVE YOUR SHADOW: SOUTH AFRICA, BLACK AND WHITE* 278 (1985).

48. Langbein would reply that the risk of investing in unstable countries has been factored into the price of a stock by investment analysts and by the market quicker and easier than any individual could calculate. The obligation to make one's own moral decisions is thus placed in another's hands. Plato's guardians made moral decisions based on planes of philosophy unreached by the *hoi polloi*; Langbein cloaks his investment analysts with no advantage besides speed. There are more things on heaven and earth, Horatio, than are dreamt of in your economics.

The market holder still has to decide whether the market is efficient or not to decide whether to maintain the market-holding strategy.

They [critics of this strategy] fail to realize that if these costs materialized—if the efficiency of the market declined to the point where increased search would yield a positive expected return, rather than negative as today—some passive investors would shift back to an active strategy, and the process would continue until the efficiency of the market was restored.

Langbein & Posner II, *supra* note 1, at 12.

49. According to Langbein, the strategy of picking stocks is futile, because the analyst can never have sufficient information to predict the future. Langbein, *supra* note 1,

When we examine the context of South Africa, we may note several things. First, there is thorough documentation on all aspects of South African economic, political, and social processes.⁵⁰ Second, without providing a detailed analysis, South Africa's ubiquitous migratory labor system can fairly be characterized as having some elements of a forced labor system.⁵¹ Its political processes take place under a constitution that explicitly precludes direct participation by the black population.⁵² As a result of its continuous and systematic torture of its opponents, the South African regime has earned the unenviable reputation of being a leading force for repression in the world.⁵³ The system of

at 12-16. For the socially concerned, the strategy of guessing whether a corporation will act in a socially responsible manner is futile. For Langbein, the "competitive nature of the capital markets," *id.* at 12, means divestors forgo opportunities that more aggressive investors will snap up. But if the moral level of the marketplace is raised by divestment advocates, the targets of aggressive investors will involve less aggression.

On the other hand, divestment may involve the sale of assets to groups of South African managers who are more susceptible to the commands of the system of apartheid. *The Ambiguity of South African Divestment*, N.Y. Times, Dec. 31, 1986, at A1, col. 1. These managers may finance their purchase by borrowing against the same plant that the American company thought an unsafe investment, so that the asset of the divesting company is no more secure.

50. The literature on this is vast, and much data is collected in the United Nations Center Against Apartheid. See also, *Possibility of a Resource War in Southern Africa: Hearings Before the Subcommittee on Africa*, 97th Cong., 1st Sess. (1981); K. DANAHER, *IN WHOSE INTEREST* (1984); G.S. HULL, *PAWNS ON A CHESSBOARD: THE RESOURCE WAR IN SOUTHERN AFRICA* (1981); *THE APARTHEID REGIME* (R.M. PRICE & C.G. ROSENBERG EDS. 1980).

51. On the extent of repression in South Africa, see AMNESTY INT'L, *SOUTH AFRICA: IMPRISONMENT UNDER THE PASS LAWS* (1986). For a description of forced labor, see *id.* at Chapter 7. For an overview of South Africa's human rights record, see AMNESTY INT'L REP. 1984 92-96, and AMNESTY INT'L REP. 1986 88-93.

52. L.J. BOULLE, *CONSTITUTIONAL REFORM AND APARTHEID* (1984), for a history of the rewritings of the South African constitution and some proposals for change.

53. See AMNESTY INT'L REP. 1986. The expression of public opinion through the media and polls has reflected itself in the divestment debate. The poll taken by Professor Schlemmer that shows blacks disfavor divestment was commissioned, some believe, "to torpedo the divestment movement." See B. Baldwin & T. Brown, *supra* note 20, at 9. The London Sunday Times poll reached a contrary result to Schlemmer, finding 77 % of black South Africans support economic sanctions against South Africa. Sunday Times (London), Aug. 25, 1985. See also M. ORKIN, *DIVESTMENT, THE STRUGGLE, AND THE FUTURE* (1986).

Investment in South Africa was made a matter of national security by the National Key Points Act. This law empowers the Minister of Defense to require that corporations provide security for their facilities in cooperation with the South African Defence Forces. The cooperation between capital and military in controlling the population goes far beyond the traditional protection of private property rights. See South Africa Fact Sheet

ensorship, in suppressing certain news, complicates the fact-gathering process, as in other closed societies.⁵⁴

International law has imposed an arms embargo on South Africa that has been honored in substantial degree by the international community.⁵⁵ The United Nations has consistently recommended economic sanctions to persuade South Africa to follow a path more in keeping with the civilized standards of the U.N. Charter. The United States Congress has overwhelmingly endorsed the principle of sanctions against South Africa to the extent of repudiating a presidential veto. The Common Market has endorsed limited economic sanctions against South Africa. The Eminent Persons Group of the Commonwealth has come to a similar conclusion.⁵⁶ In the Namibia litigation, the World Court held that policies and practices of apartheid violated just about every major purpose of the U.N. Charter, and recommended a range of steps by which the international community could refrain from enhancing the standing of apartheid within that community.⁵⁷ Furthermore, the Convention on the Suppression and Punishment of the Crime of Apartheid communicates

(1984)(published in cooperation with the United Nations Centre Against Apartheid)(The Africa Fund, 198 Broadway, New York, NY 10038).

54. See, e.g., N.Y. Times, January 31, 1987, at 3, col. 4:

A result has been increasingly incomplete or distorted reporting in South Africa. In its dispatches on a visit to Washington this week by the A.N.C. president, Oliver Tambo, the Government radio and television were permitted to quote statements by Mr. Tambo supporting violent resistance. But newspapers were not allowed to quote Mr. Tambo when he spoke of conciliatory or democratic goals.

Id. at col. 6. See also N.Y. Times, Jan. 30, 1987, at A1, col. 2; N.Y. Times, Dec. 11, 1986, at A1, col. 2; N.Y. Times, June 12, 1986, at A7, col. 1.

55. G.A. Res. 1761, 17 U.N. GAOR Supp. (No. 17) at 102, U.N. Doc. A/5217 (1962). See also *The World Demands Sanctions: A Chronology*, S. AFR., Mar. 1983, at 13-16. *Western Gunrunners*, S. AFR., Jan. 1981, at 21. See generally M. McDOUGAL, H. LASSWELL, & L.C. CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER 521 (1980).

56. For a brief summary, in an editorial, of the positions of the United States, Great Britain, and the Commonwealth see *Walk, Do Not Run, Out of South Africa*, N.Y. Times, June 22, 1986, § 4 (Week in Review), at 26, col. 1. On the report of the Eminent Persons Group, see *Excerpts From Report on South Africa by Commonwealth Mission*, N.Y. Times, June 13, 1986, at A13, col. 1. On the Commonwealth position see Lelyveld, *Commonwealth Delegates Drive for South Africa Sanctions*, N.Y. Times, June 13, 1986, at A1, col. 4.

57. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)(advisory opinion). 1971 I.C.J. 16., see also UN MONTHLY CHRONICLE, June 1971, at 60.

in unequivocal terms the condemnation the international community reserves for apartheid.⁵⁸ In the light of these international statements, the idea that the transfer of capital to South Africa is a purely neutral act, or is legitimate if all the investors happen to be representing the beneficiaries of private pension plans, can only arise from moral astigmatism.⁵⁹ From the standpoint of intellectual standards, this measure of moral selectivity borders on dishonesty. One would have to be cynical to depict issues of international peace and security, or massive violation of human rights as simply a matter of interest group politics as usual.⁶⁰

In referring briefly to the codified expectations of the international community, the point is merely to show the incompatibility of apartheid with the obligations that states have under the U.N. Charter. To the casual observer, that is almost beside the point for the domestic law of investing, but when a theorist endeavors to set out the law in its broadest and most inclusive sense he should be consistent with all possible sources of author-

58. The insistence that apartheid constitutes a "crime against humanity" reached a high point when the General Assembly adopted the International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted Nov. 30, 1973, GA Res. 3068, 28 U.N. GAOR Supp.(No. 30) 756 in U.N. Doc. A/9030.

59. To the extent that the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106A, opened for signature Dec. 21, 1965, 660 U.N.T.S. 195, is at least viewed as having the status of customary international law, it is worth recalling the gist of Article 2, § 1(c). This article supports the principle that states "shall take effective measures to review governmental national and local policies and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists." If investing in the economy of apartheid, and benefiting from it, contravenes the mandate of the international law of race relations, then the rules of municipal law that permit such conduct should be subject to this proscription.

60. The mass killings in South African townships cannot be compared to other atrocities. That is only because the abhorrent behaviors of Pol Pot, Idi Amin, Pinochet, Stalin, and Hitler should each be condemned in their own right. The number of postcards, phone calls, or lunch invitations that an interest group can muster from the appropriate group of emigres, refugees, or sympathizers should not determine international morality.

[A] global perspective is easily used to belittle the sufferings of particular groups, to deny the significance of their history and particular circumstances. If it can be shown that someone in Gdansk or Kampala or Lahore is worse off than someone in Cape Town, then anyone in Cape Town who vents his unhappiness is convicted of a lack of global perspective. I was never impressed by the line that racial tyranny was easier to bear than Leninist totalitarianism. It struck me as an unseemly calculation for anyone who has never borne either.

J. LELYVELD, *supra* note 47, at 17.

ity. The Restatement (Revised) of Foreign Relations of the United States (Tent. Draft No. 6) maintains that "[t]he Charter of the United Nations has been adhered to by virtually all states and even the few remaining non-member states have apparently acquiesced in the principles it proclaims."⁶¹ Since Langbein relies on the provisions of domestic law to analyze the illegality of social investing,⁶² and since many commentators have ignored this point, it is important to address whether municipal law standards might be fairly evaluated in terms of consistency with international law standards promulgated by the U.N. Charter and expressed by the practices of states that are operating under the Charter. According to the Restatement, "[w]here fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law or with an international agreement of the United States."⁶³ This section is a codification of the practice of United States courts that dates as far

61. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 comment h (Tent. Draft No. 6, 1985).

62. By reducing the discussion of the interaction of law and economics to "neutral principles," Langbein creates a series of buffers through which American political impulse must pass before impacting on South African political action, a process designed to preserve the status quo even if reform takes place. Langbein's position expands traditional trust fiduciary obligations, but not in a manner that expands state control over the business of investment. Indeed, South African business leaders have been laying the groundwork for opening up South Africa society to adapt to the needs they see evolving in their business culture. The South African business community has provided a modest agenda that would completely undercut any support for economic sanctions. "South African businessmen have already defined what the Government must do: end the state of emergency, release political prisoners, abolish apartheid, and start negotiating the political future of the country." Lewis, *'Sharp and Short and Dramatic'*, N.Y. Times, Sept. 26, 1985, A35, col. 1. See also Lewis, *South Africa Says No*, N.Y. Times, Sept. 23, 1985, at A19, col. 1.

Arguing that economic change is sufficient and political change unnecessary for the present, American conservatives have relied on Lawrence Schlemmer's poll that "reveals that more than 75 percent of black workers surveyed oppose divestment as a strategy to liberate them." D'Souza, *Liberals' Hypocrisy on South Africa*, N.Y. Times, Aug. 22, 1985, at 13A. Working for freedom and equality through the layers of privilege that is apartheid, however, leads only to more stratification and fragmentation, making politics more intransigent. J. LELYVELD, *supra* note 47, at 93-101. E. Schmidt, *One Step — In the Wrong Direction: An Analysis of the Sullivan Principles as a Strategy for Opposing Apartheid* 11-17 (rev. ed. 1985)(available from Episcopal Church People for a Free Southern Africa, 399 Lafayette St., New York, NY 10012).

63. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 134 (Tent. Draft No. 6, 1985).

back as 1804.⁶⁴ In *Murray v. The Schooner Charming Betsy*, Chief Justice Marshall stated that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains."⁶⁵ The tentative draft of the Restatement also addresses the possibility of an ostensible inconsistency between international law and municipal law:⁶⁶

An Act of Congress supersedes an earlier rule of international law or a provision of an international agreement as law of the United States if the purpose of the Act to supersede the earlier rule or provision is clear and if the Act and the earlier rule or provision cannot be fairly reconciled.⁶⁷

A fair interpretation of this rule would suggest, for example, that if policies and practices under ERISA were inconsistent with a prior rule of international law, the ERISA standards would prevail only if it can be shown that ERISA's purpose was to supersede the international law rule.⁶⁸ State legislation cannot nullify international law in the same manner as federal legislation, however. State laws that are inconsistent with federally adopted treaties or international law are pre-empted, as they would be by any other federally enacted law.⁶⁹ It should be

64. *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

65. *Id.* at 118. The other aphorism born of admiralty jurisdiction is that "[i]nternational law is part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

66. Municipal law concerning divestment can be federal, state, or local. It is used here to mean "[t]hat which pertains solely to the citizens and inhabitants of a state, and is thus distinguished from political law, commercial law, and international law." BLACK'S LAW DICTIONARY 918 (5th ed. 1979).

67. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 (1)(a) (Tent. Draft No. 6, 1985).

68. ERISA would have to supersede all prior enactments, including treaties like the U.N. Charter. In the same way that ERISA denies individuals and states the power to allow a lesser standard for pension trusts, international human rights agreements deny individuals the power to violate human rights. A treaty may increase the power of the federal government to invade the liberty of individuals. *Missouri v. Holland*, 252 U.S. 416 (1920). "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power." *Id.* at 435. There, the action was supposed to protect migratory birds, a lesser magnitude than human life.

69. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 135 comment e (Tent. Draft No. 6, 1985):

Since any treaty or other international agreement of the United States, and any rule of customary international law, is federal law (§131), it supersedes any in-

noted, however, that courts are not required to interpret municipal rules in such a manner to avoid every possible violation of international law where legislation has a clear intent to supersede international law. This principle would be most important in the interpretation of common-law and statutory rules that allow institutions, such as corporations, to function extraterritorially.⁷⁰

III. THE LAWFULNESS OF SOCIAL INVESTING IN DOMESTIC LAW

Professor Langbein's legal analysis focuses on pension trusts and university endowments. As his and other writings elsewhere indicate, a wide range of institutions have fiduciary duties regarding the management of a capital corpus.⁷¹ The general

consistent State law or policy whether adopted earlier or later. Even a non-self-executing agreement of the United States, not effective as law until implemented by legislative or executive action, may sometimes be held to be federal policy superseding State law or policy. In principle, a U.S. treaty or international agreement may also be held to preempt a field or subject and supersede State law or policy though it is not necessarily in conflict with the international agreement.

70. For example, Congress enacted the Foreign Corrupt Practices Act of 1977 (FCPA), Pub. L. No. 95-213, 91 Stat. 1494, codified at 15 U.S.C.A. §§ 78m, 78dd-1, 78dd-2, 78ff (West 1981) to prevent foreign bribery in commercial contexts from contributing to problems in foreign relations, the perception of corporate immorality, and the erosion of the free market system. *A Comparison of the Foreign Corrupt Practices Act and the Draft International Agreement on Illicit Payments*, 13 VAND. J. TRANSNAT'L L. 795. This clearly intended to limit the power of corporations based in the United States from acting in certain ways even outside the United States. On May 18, 1979, the United Nations Committee on an International Agreement on Illicit Payments adopted the draft report (Agreement) of its first and second sessions, U.N. ESCOR, (2d regular session, agenda item 9), U.N. Doc. E/1979/104 (1979), which had the same basic aim as the FCPA — to discourage illicit payments in an international context. *Id.* at 796. Although both use a combination of disclosure and criminalization to achieve their goal, there are significant differences between the two. *Id.* It has been suggested that before the United States can lend support to the Agreement, the FCPA must be reconciled with the Agreement in the following ways:

The type of business covered under the FCPA accounting provisions would have to be expanded. Furthermore, the permissibility of "grease payments" under the FCPA would have to be eliminated. Finally, United States foreign policy is not in alignment with the Agreement's southern Africa provisions. The last objection is mitigated, however, by the significant dissension over inclusion of the provisions in the final text and by the changing attitude of the United States towards South Africa.

Id. at 822. The domestic law is arguably overreaching its jurisdiction, and the international law may not be applied by a court.

71. Langbein & Posner III, *supra* note 1, at 75. See also Troyer, Slocombe, & Bois-

thrust of Professor Langbein's writings have been to pull most charities within the ambit of common law trust traditions.⁷² His weakest arguments concern what may loosely be called charitable organizations, which include at least some university endowments. His strongest argument for imposing strict standards deals with pension funds that are subject to ERISA.⁷³ Quite understandably, his discussion begins with ERISA, in order to influence the characterization of all other fiscal institutions in the direction of strict responsibilities. In effect, Langbein would prefer ERISA standards to be extended to all fiduciaries, because these standards, actually tighter than common law standards, are a step in the right direction, both morally and ideologically.⁷⁴ This strategy has at least been partially successful in making the responsibility of managers of charitable funds, whose standard of conduct has been moving from the traditional trust model toward a corporate director model, an object of serious discussion in academic literature.⁷⁵ To turn the table on Professor Langbein, it is a good stratagem to start with his weakest argument, that concerning charitable organizations and come back to the strictures of ERISA.

In their well-known article, *The "Income" of Endowment*

ture, *Divestment of South Africa Investments: The Legal Implications for Foundations, Other Charitable Institutions, and Pension Funds*, 74 GEO. L.J. 127, 129-30 (1985)[hereinafter Troyer].

72. Troyer, *supra* note 71, at 133 n. 11.

73. Langbein, *supra* note 1, at 16-24, discussing ERISA § 404(a)(1), 29 U.S.C.A. § 1104(a)(1), from the Employees Retirement Income Security Act, 29 U.S.C.A. §§ 1001-1461 (West 1985).

74. "Since the employee is in this important sense the 'settlor' of his own pension-trust account, there is good reason to prevent plan sponsors (whether union or employer) from using the authorization doctrine to impose social investing upon him." Langbein, *supra* note 1, at 22. The individual is thus paramount and cannot be dominated by others. However, as Langbein continues, the individual cannot be given any real choice because society, through ERISA, has taken away the individual's power to use these funds for anything other than profit-maximization. *Id.* at 22-23. If society has overridden the will of the individual with its official organs, what makes informal action such an imposition? Governmental arbitrariness is supposed to be the nemesis of conservatives, and here Langbein hides behind it to save himself from social pressure.

75. Troyer, *supra* note 71, at 132 n.11. In terms of Probert's law theory games, see *supra* note 10, Langbein emphasizes ERISA to give his opponents the weakest counter-argument. He criticizes his opponent's for merely playing the "feelings" game, and denigrates their sources of information. The true legal theorist would start with the idea that there is no law, and that some set of information is accepted by all. Langbein defines that there is a law, and that it fits the facts.

Funds, Cary and Bright maintained that:

the law governing charitable corporations is not merely a branch of trust law, or corporate law, or contract law, but is *sui generis*, drawing to some extent from all three. Where the issue involves the investment of funds . . . the courts show a marked tendency to apply corporate principles rather than trust principles, in order to accord charitable corporations a maximum degree of flexibility in their operations.⁷⁶

In an early statement of the loosening of legal standards regarding charitable organizations, the Attorney General of New York stated the principle as follows:

Unless modified by statute, charter or by-law, the powers of the trustees of an educational, religious or charitable corporation in respect to the administration and investment of the corporation's funds are fundamentally no different than that of the directors of a business corporation in respect to the administration of property held by the corporation.⁷⁷

76. Cary & Bright, *The "Income" of Endowment Funds*, 69 COLUM. L. REV. 396, 407-08 (1969). This article advocated, in the context of university endowments, the abrogation of the distinction between appreciation of a trust corpus which would belong to remaindermen, and income of a trust which would belong to beneficiaries. The authors found that "[l]egal impediments which have been thought to deprive managers of their freedom of action appear on analysis to be more legendary than real." *Id.* at 417. Having perceived in court decisions "a marked tendency to favor charities in their disputes with others over property," resulting in "corporate or trust law [being] used less for guidance than to rationalize the desired result," *id.* at 411, the authors acknowledged that "[t]he law is moving in the direction of applying to management of university funds the more flexible principles applicable in the case of corporations." *Id.* at 396.

On the other hand, Langbein seems intent on freezing standards instead of letting them evolve. For example, ERISA becomes the LaBrea tar pits in which pension trust are to be fossilized. Langbein, *supra* note 1, at 6. Langbein and Posner's first article begins with the South Sea Bubble of the 1700s which was essentially speculation without substance. Langbein & Posner I, *supra* note 1, at 3. As a result of the Bubble's collapse, laws governing finance were straitened. *Id.* Corporate law gradually escaped those strict rules with industrialization and the growth of capital markets, and trust law has begun to catch up. *Id.* at 4-5. Clinging to strict rules in the face of social investing by trusts begs two questions: are trusts likely to be caught in the collapse of another Bubble; and is it possible that South Africa, or another target of social investing, could be the genesis of another Bubble.

77. N.Y. ATT'Y GEN., 1951 ANN. REP. 159, 161 (citation omitted), *cited in* J. SIMON, C. POWERS, & J. GUNNEMANN, *THE ETHICAL INVESTOR* 143 (1972).

This rule has since been codified in the Uniform Management of Institutional Funds Act, which requires that trustees use ordinary business care and prudence in investment decisions.⁷⁸ The distinction between charitable trusts and charitable corporations, however, can be made and is made.⁷⁹ Under this formalistic bifurcation, charitable corporations are governed by corporate standards, and charitable trusts are governed by trust standards.⁸⁰

Characterizing charities as corporate does not automatically validate blunderbuss divestment. As broad as the protection afforded by the business judgment rule is, charitable directors must still qualify for its protection by acting within its requirements.⁸¹

A careful and deliberate decisionmaking process is of paramount importance. Moreover, in practice, it is important not only that there be such consideration, but also that it be clearly documented in the organization's records. Thus, the board's minutes should reflect a thorough consideration of the arguments relating to divestment. Before reaching a conclusion about the financial cost of divestment, the directors should, with the aid of qualified investment advisors, carefully review the investment implications of divestment and should ensure that this review is clearly documented.⁸²

In other words, in the case of charitable corporations, the business judgment rule requires that there be some reasonable basis

78. Unif. Management of Institutional Funds § 6, 7A U.L.A. 711, 721 (1985). In addition to the list of 26 jurisdictions that had passed this act or similar legislation in Troyer, *supra* note 71, at 131-32 n. 10, North Carolina passed the act in 1985. N.C. GEN. STAT. §§ 36B-1 to -10 (Supp. 1985).

79. Most prior legal analyses of divestment have dealt with the issue in terms of traditional trust law standards, focusing on the so-called "prudent man rule." The resulting legal advice has generally been cautionary and restrictive. However, most charities are organized as corporations, not trusts, and review of the modern law applicable to most charitable institutions considering divestment reveals much greater latitude for governing boards to make good faith divestment decisions.

Troyer, *supra* note 71, at 129.

80. *Id.* at 130-31.

81. For an analysis of the business judgment rule with regard to divestment by charitable corporations, see *id.* at 134-38.

82. *Id.* at 144-45.

for investment decisions. A divestment decision which advances the interests of the corporation, among any of its constituencies, could be considered reasonable, as would a decision in conformity with an international obligation.⁸³ The liability of the directors would be minimal where the decision to divest minimizes financial costs and assures long-term financial ends.⁸⁴ The charitable purposes of the institution may also be advanced by divestment.⁸⁵ For example, divestment may help a charitable organization clarify its role in the world by forcing a conscious decision to promote human rights in the place of a half-conscious decision to invest in a corporation that is endeavoring to develop technology aimed at the extinction of other races.⁸⁶ Barring the narrowest definition of "profit maximization,"⁸⁷ and taking all factors into account, the board of directors of a chari-

83. The difficulty of determining what is in the interest of a charitable corporation is compounded by the absence of marketplace determiners on which business corporations rely. Share price and corporate raiders give business corporations a yardstick unavailable to nonprofit entities. Kurtz, *Non-Traditional Revenues Ventures of Tax-Exempt Organizations: The Role of Trustees*, 39 REC. A. BAR. CITY N.Y. 129, 133 (1984).

84. The decision to divest is analogous to the decision to make a charitable donation, which once was limited to gifts that could directly serve the interests of the corporation. Garrett, *Corporate Donations*, BUS. LAW., Jan. 1967, at 297.

85. A charity's board may, in appropriate circumstances, reasonably determine that adopting a divestment policy would strengthen the organization's credibility when it adopts potentially unpopular positions on other issues, enhance its ability to appeal to certain groups for financial support, or improve its relations with the community in which it is located or with communities otherwise important to it.

Troyer, *supra* note 71, at 142.

86. The involvement of the corporate giant, I.G. Farbin, in the war effort and "final solution" of Nazi Germany is the prime example of business leaders needing social protest to inform their "economic" decisions. See generally J. BORKIN, *THE CRIME AND PUNISHMENT OF I.G. FARBIN* (1980). The conflict between greed for profits and duty to humanity (or even nation) is too easily resolved by corporate functionaries in favor of the former, as shown by the acts of Standard Oil, I.G. Farbin, and Ford Motors in funneling supplies and technology to Germany during the '30s, and maintaining business as usual during the war. *Id.* at 76-94. See also C. HIGHAM, *TRADING WITH THE ENEMY: AN EXPOSE OF THE NAZI-AMERICAN MONEY PLOT 1933-1949*, at 130-77 (1983). American subsidiaries of German corporations even changed their names to prevent small stockholders from learning they were financing Hitler. *Id.* at 134. After these stark examples, no voice for humanity should ever be silenced, even by arguments from immutable principles of trust law, and no social investor should be barred from investigating his company's activities.

87. Through a process of circular definition, Langbein determines that average return is profit maximization, because attempting to maximize profits by picking stocks creates risk of lower-than-average return by reducing diversification. Langbein & Posner II, *supra* note 1, at 77-83.

table corporation may legally divest, but, to borrow a word from trust law, should do so prudently.⁸⁸ Indeed, a decision to divest in accordance with international law could hardly be viewed as imprudent.

Some charities are organized as trusts rather than corporations. In those organizations, financial managers face more restrictive standards.⁸⁹ Encountering these standards on the heels of corporate standards, one is lead to consider whether the restrictions are necessary, or even as explicit as is argued.⁹⁰ The

88. "Prudently" does not always mean "conservatively." If the beneficiary is not entirely dependent on his trust income to live, a trustee may prudently make high-risk investments because of their high potential returns. *Id.* at 33. Thus, the beneficiary's interest is the key to the trust's investment.

Langbein makes the preservation of the trust corpus a moral absolute. But is the pension beneficiary's interest in the preservation of the trust corpus tantamount to life itself, as threatened by a murderous foreign regime? Compare *Mathews v. Eldridge*, 424 U.S. 319 (1976) with *Goldberg v. Kelly*, 397 U.S. 254 (1970) for a stratification of such "economic" rights.

89. The duty and the liability of the fiduciary in both situations is somewhere between absolute liability and no liability. The difference between levels may not be that great in practice. Troyer, *supra* note 71, at 129-30. Cf. Cary & Bright, *The Delegation of Investment Responsibility for Endowment Funds*, 74 COLUM. L. REV. 207 (1974).

Our conclusion remains the same regardless of whether principles of trust law or corporate law are applied. It is true that trustees are not normally permitted to delegate to others the making of investment decisions for the trust. That rule reflects the emphasis placed by the typical grantor on the investment expertise of his chosen trustee. But the typical donor to a nonprofit institution focuses on the welfare of the recipient institution, not upon its investment skill. With the factor of investment expertise removed from the picture, the trust principles discussed above seem to us to sanction the delegation of investment decisions by nonprofit corporations to investment experts.

Id. at 233.

90. The standard that has been applied, is not always the standard that should be applied. The Uniform Act, *supra* note 78, is an attempt to change the standard applicable to charitable trusts.

The explicit reference to "unincorporated organizations" seems intended to make the Uniform Act applicable to charitable trusts. The limitation included in the definition of "institutional funds" appears to exclude only trust funds held for the benefit of a charity by a bank, trust company, or other noncharitable trustee. The fundamental premise of the Act is that application of the traditional trust law fiduciary standards to the investment decisions made by governing boards of universities, hospitals, and other large, nonprofit, institutions could be debilitating.

Troyer, *supra* note 71, at 146 n. 65.

The evolution of standards may make qualified persons more willing to work for charities, because of the decreasing chance of personal liability, and the increasing freedom to act as they see fit for the charity: to serve the community. "Communities that do not grow and evolve become brittle and frail—become something other than communi-

discretion of trustees is far wider, in the view of some authorities, than that accorded them by opponents of social investing. The Restatement (Second) of Trusts allocates a fair measure of reasonableness to trustees in meeting their responsibilities, and indicates courts will consider the following when faced with allegations of improprieties:

(1) the extent of the discretion conferred upon the trustee by the terms of the trust; (2) the purposes of the trust; (3) the nature of the power [being exercised by the trustees]; (4) the existence or nonexistence, the definiteness or indefiniteness, of an external standard by which the reasonableness of the trustee's conduct can be judged; (5) the motives of the trustee in exercising or refraining from exercising the power; [and] (6) the existence or nonexistence of an interest in the trustee conflicting with that of the beneficiaries.⁹¹

The trust standard in the divestment context covers two issues: the financial implications of divestment, and the relationship of divestment to trust purposes. In meeting these standards, trustees will bear the burden of showing that their financial judgments were reasonable. In most cases, they will have to consult investment analysts, and be assured that the advice thereby obtained is not unreasonable.⁹²

Trust purposes vary widely. There are as many trust purposes as there are trusts.⁹³ On their faces, some trust instruments may mandate divestment, others may never contemplate divestment, and still others may vary the trust purpose in quix-

ties. To be genuinely free, a community must be just; to be sustainable, justice must be embedded in community." Barber, *supra* note 6, at 49.

91. RESTATEMENT (SECOND) OF TRUSTS § 187 comment d (1959).

92. Divestment has been attacked as unreasonable, but there are far more irrational uses of economic power. For example, rumors that Procter & Gamble was supporting satanism cut into sales of the company's products so much that it stopped using the century-old logo that had sparked the rumors. N.Y. Times, Apr. 18, 1985, at C3, col. 1; N.Y. Times, Apr. 25, 1985, at D4, col. 4.

93. The real purpose of most charitable trusts may be tax avoidance. Today's largest medical foundation began its existence as an unfunded tax scam. See Brinkley, *The Richest Foundation*, N.Y. Times, Mar. 30, 1986, § 6 (Magazine) at 32. The general policy of societal good may, under the right circumstances, override the express intent of a settlor who never funded a trust until the I.R.S. sued his estate.

otic or idiosyncratic ways.⁹⁴ A leading authority has maintained that a trustee may justifiably consider social and moral issues in making investment decisions regardless of whether there is a nexus between those factors and the ostensible purposes of the trust.

Trustees in deciding whether to invest in or retain, the securities of a corporation may properly consider the social performance of the corporation. They may decline to invest in, or to retain, the securities of corporations whose activities or some of them are contrary to fundamental and generally accepted principles. They may consider such matters as pollution, racial discrimination, fair employment and consumer responsibility. . . . [Trustees] may well believe that a corporation that has a proper sense of social obligation is more likely to be successful in the long run than those that are bent on obtaining the maximum amount of profits. But even if this were not so, the investor, though a trustee of funds for others, is entitled to consider the welfare of the community, and refrain from allowing the use of funds in a manner detrimental to society.⁹⁵

94. The only prohibition is that a trust not be set up for an illegal purpose. This rule could be interpreted as requiring or precluding divestment depending on the decision-maker. Bequests to charity have at times been limited to a certain percentage of an estate. *See, e.g.,* *Garner v. Purcell*, 160 P. 2d 682 (1916). This disbelief that anyone to whom a large sum of money is given could use it solely for the benefit of others and obtain it without terrorizing the decedent is the ancestor of the disbelief of foes of social investment that one can invest a sum of money in a way that makes the world a better place to live without appearing in the GNP.

Benjamin Franklin created a trust in his will to make loans to artisans for a period of 100 years. The money was then to be used by the trustee, the city of Philadelphia: a social investment in the local economy. The trust to the municipality for accumulation was illegal. But the money did not become a trust for which the city became liable to private persons, but a gift to the city. *In re Franklin's Estate*, 24 A. 626 (1892).

With the correct circumstances and a sympathetic judge, trust could be used for many purposes that might otherwise be beyond the pale. A father who bribed Brazilian jailers to make conditions less harsh for his imprisoned son was denied reimbursement from the son's trust, because bribery was against public policy. *In re Sage*, 97 Misc. 2d 790, 412 N.Y.S. 2d 764 (Albany Co. Sur. Ct. 1979). The court's decision does not reflect the conditions of the jail or the reason for imprisonment. With the correct factual presentation a court might authorize such an expenditure.

95. A. SCOTT, 3 *THE LAW OF TRUSTS* § 227.17 (Supp. 1983) *cited in* *Troyer, supra* note 71, at 149 n. 78.

This position may be too broad, but there is no clear-cut decisional authority on point. Langbein's argument that "[s]ome of the schemes favored by proponents of social investing are incompatible with these legal standards" relies on only three cases, the most recent of which dates from 1959.⁹⁶ Rather than follow these archaic arcana blindly, trust purposes should be interpreted with an eye to the major purposes of our legal culture as reflected in prevailing standards of constitutional and international law.⁹⁷

The rule of international law is informed by the principle of reasonableness.⁹⁸ If trustees were made to comply with international law obligations, those standards would only require divestment decisions to be made prudently, and to result from a decision process carefully calculated to minimize the occurrence of net value losses. Nothing in international law could be construed to compel a trustee to disregard the protection of the trust corpus. International law does not require divestment to be a sacrifice, but international law does require reasonable compliance with its mandate.

The most compelling argument against divestment lies in ERISA, where private pensions are subjected to strict trust standards.⁹⁹ Even under this scheme, a careful decision process and

96. Langbein, *supra* note 1, at 27 n. 90, nn. 93-95; Langbein & Posner II, *supra* note 1, at 109-110 n. 89, and nn.92-94. National Anti-Vivisection Soc'y v. Inland Revenue Commrs., [1947] 2 All. E.R. 217, [1948] A.C. 31; Deichelmann Estate, 21 Pa. D. & C.2d 659 (1959); Trustees for the Roll of Voluntary Workers v. Commrs. of Inland Revenue, [1942] Sess. Cas. 47 (Scotland); *In re Wilkinson*, [1941] N.Z.L.R. 1065.

The real import of these cases is that organizations were denied tax exempt status. This issue is clearly addressed in our own federal tax laws, making Langbein's analysis superfluous. See I.R.C. §§ 401(a), 501(h) (West 1987). See also Troyer, *supra* note 71, at 151-54.

97. If the terms of a trust conflict directly with the norms of the investment marketplace, it may be impossible for the trust to follow Langbein's hold-the-market strategy. If Langbein's theory became the legal test, many trusts would revert from charitable purposes to avaricious remaindermen. See, e.g., *Evans v. Abney*, 224 Ga. 826, 165 S.E. 2d 160 (1968), *aff'd* 396 U.S. 435. Should not trust purposes evolve and absorb the norms of society at large and not fall apart when the conflict between concrete provisions and external reality becomes irreconcilable? There is considerable debate whether the standard of "impossibility" should become "inexpediency" and whether the trust should be administered at the discretion of the trustee instead of reverting to the remaindermen. See Comment, *Cy Pres Inexpediency and the Buck Trust*, 20 U.S.F. L. REV. 577 (1986).

98. M. McDUGAL & W. REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 15 (1981).

99. Langbein & Posner III, *supra* note 1, at 96-107. Cf. Ravikoff & Curzan, *Social*

reasonable implementation would prevent trustee liability.¹⁰⁰ From an international perspective, ERISA should not be construed as the sort of congressional enactment that automatically overrides other sources of law that could be harmonized with ERISA without doing violence to the precepts of either source of law.¹⁰¹

IV. IDEOLOGY, ACADEMIC INTEGRITY, AND LAW

Having found Langbein's anti-divestment articles to rely on a narrow view of law, excluding relevant viewpoints from his discussion of domestic law, and excluding international law from his view of domestic law, I find it necessary to discuss the basis of this narrow view in the light of the relationship between ideology and scholarly integrity; that is, when one surveys the law applicable to a currently debated topic, should one rewrite what one finds to cast in it the mold of one's ideology. The charitable view of such academic endeavors is that law and economics is a field notorious for its narrow viewpoint. Langbein's work is no narrower than that of his colleagues in the "Chicago School," and as the discipline matures it may escape its contextual blindfold and conceptual astigmatism.¹⁰² Where academia abuts on the active practice of law, however, this exercise of viewing the world through the lens of selective fragmentation, isolating each fragment from context, distorts the capacity to inform policy decisions with real value options. The net effect of selective fragmentation is selective morality, or perhaps more accurately, selective amorality. Law is a ubiquitous form of social control, intimately involved in the allocation of the good and bad that society offers individuals. It is central to public order.¹⁰³ The sa-

Responsibility and the Prudent Man Rule 68 CALIF. L. REV. 518 (1980).

100. After considering the issues of risk, liquidity, country risk, financial performance comparative analysis, transaction costs, and the implications of divestment laws, Baldwin and Brown conclude that "the evidence clearly shows that divestment policies can be financially beneficial for even the largest portfolios." B. Baldwin & T. Brown, *supra* at note 20, at 35.

101. See *supra* notes 61-70 and accompanying text.

102. This section in particular draws on the ideas of Walter Probert regarding the interaction of law and language. See *supra* note 10.

103. "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *Cox v. Louisiana*, 379 U.S. 536, 554 (1965). Cf. *supra* note 36.

lience of law to the nature of the public and civic order of the community makes certain aspects of law and economics very disquieting.

Since law and law curriculum cut across every value in modern society, the reduction of law to a set of narrow, abstract, scholastic categories misses both the richness of human experience, and the translation of that experience into a richer predicate for law.¹⁰⁴ For the scholar who searches for richness to inform his academic product, the process of the common law springs to mind as eminently qualified as a humane discipline, suitable for a major role in academic life. The effort to undercut or short-circuit the common law through economic neo-scholasticism is unfortunate,¹⁰⁵ because the long-term effects may be negative, not only on law as an academic discipline,¹⁰⁶ but also on practical matters of fundamental importance.¹⁰⁷ Abstract liberty can in practice mean the economic or political enslavement of others.¹⁰⁸ Abstract equality can be translated into "separate

104. The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policies, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had more to do than the syllogism in determining the rules by which men should be governed.

O.W. HOLMES, *THE COMMON LAW* 1 (1881). Holmes's famous statement of legal realism applies equally well to nonjudicial decisions, such as investing. If a trustee invests in accord with "the felt necessities of the time," the judge before whom he is forced to make an accounting will find his actions prudent.

105. For a capsule history of legal philosophies, comparing law and economics to its forerunners, see Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 453-59 (1974).

106. What is taken as a seminal book for this new sub-discipline was once described by Arthur Leff as "four hundred pages of tunnel vision." *Id.* at 452. For an attempt to integrate law and economics with more humanistic areas of the law, see Malloy, *supra* note 38.

107. Scholars have a duty to absorb legal advancements, to be able to articulate their foundations, instead of iterating trite arguments hoping for a political shift. A new philosophy does little to credit old injustices.

Times have changed. The nation has been embroiled in a renewed debate over civil rights since the beginning of this decade. Matters once thought settled are now being challenged, in many cases by the very same persons (e.g. President Reagan) who unsuccessfully but vociferously challenged the 1964 Civil Rights Act.

Brooks, *Civil Rights Scholarship: A Proposed Agenda for the Twenty-First Century*, 20 U.S.F. L. REV. 397, 398 (1986). See also Bell, *supra* notes 14 and 25, at 389-91.

108. In the case of South Africa, liberty is being granted to blacks by shunting them into homelands that have little to do with social reality. But each of those black nations

but equal" and "separate development"(apartheid).¹⁰⁹

In economic affairs, economic license has given way to the moderating influence of anti-trust;¹¹⁰ in labor relations, abstract equality in public employment has been moderated by principles of affirmative action for suspect classes that experience a disproportionate measure of group stigmatization.¹¹¹ Economic neo-scholasticism demands that we ignore the relationship between economic liberty and economic license, or the relationship between formal equality and operational discrimination.¹¹² This in-

becomes the equal of the white nation of South Africa which keeps the lion's share of the region's resources.

It was the bureaucrats in Pretoria, finally, who determined that there would be ten black nations. They could just as easily have counted two, three, or twenty. Black nationalists, of course, count one.

Two or three would have meant the surrender of large amounts of white land and the creation of black power bases, plausible states, from which a successful challenge to white dominance might have been mounted. Twenty would have been unmanageable. Ten was an arbitrary compromise, a way of diffusing the demand for black political rights without being any more ridiculous than necessary.

J. LELYVELD, *supra* note 47, at 132.

109. In *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court never considered whether the railway accommodations were "equal," because the key question was phrased as whether the races could be separated in theoretically equal accommodations. In *Brown v. Board of Educ.*, 347 U.S. 483 (1954), building on cases that had found factual inequality in separate facilities, *id.* at 491-92, the Court decided that separate facilities were, in the abstract, unequal, preventing any argument that truly equal facilities could be used for segregating the races. *Id.* at 494-95. South Africans are still playing this game of nice distinctions, and divestment opponents play along with their game of trustee amorality.

110. Compare the Reagan administration's position on antitrust: Morron, *The Administration's Legislation: The National Cooperative Research Act of 1984, The National Productivity and Innovation Act of 1983*, 18 J. MARSHALL L. REV. 607, 612-616 (1985); Campbell, *The Antitrust Record of the First Reagan Administration*, 64 TEX. L. REV. 353 (1985).

111. For the history of affirmative action, see Jones, *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901 (1985). The question may be whether affirmative action within our tradition of individualism is impossible, and should give way to practical solutions which treat individuals as members of collective groups. See Fox-Genovese, *Women's Rights, Affirmative Action, and the Myth of Individualism*, 54 GEO. WASH. L. REV. 338 (1986). See also Baldwin & Nagan, *Board of Regents v. Bakke: The All-America Dilemma Revisited*, 30 U. FLA. L. REV. 843 (1978).

112. Ostensibly, many of the elitists have accepted a color-blind ideal as the only morally correct one for a democracy, and have viewed any threat to that concept as morally, legally, and philosophically wrong. The elitists have generally ignored contrary history, or have not given such history weight in their moral judgments. Instead, they assert that the ideal of a world in which race is irrelevant is the only one that should have been, and ought to be, accepted in a democratic

sidious undermining of the norms of non-discrimination that have been developed in national and international decisional arenas offends the sense of academic integrity and civic responsibility.¹¹³ The overt connections between attacking divestment and supporting racism in South Africa are admittedly well concealed.¹¹⁴ The literature of race relations frequently contains code words which have unmistakable connotations to those aware of personal and institutional ambivalencies and insecurities regarding race; for example, affirmative action being transformed into "reverse discrimination" signals considerable inertia in the process of transforming society to conform to its ideals.¹¹⁵

country.

Jones, "Reverse Discrimination" in *Employment: Judicial Treatment of Affirmative Action Programs in The United States*, 25 *How. L.J.* 217 (1982). The real opposition to ideals of affirmative action only began when "efforts began to translate *theoretical rights* into *tangible results*," *id.* at 222 (emphasis in original), suggesting the limits of any formal equality.

113. Arguments to prevent change generally draw lines where no reasonable person would draw them. Either the lines are drawn too close to the heart of hallowed principles for any movement beyond them to seem reasonable, or the lines drawn are too unreasonable as compared with the *status quo* to represent reasonable change.

I know that it has frequently been said that you cannot legislate morality. You can't force people to be good. However, I believe that law should approximate as far as humanly possible in an imperfect world, goodness, right, and other moral values which we aspire after. There ought to be an almost automatic alliance between the law and the right, the true and the beautiful. I might remind you of what Martin Luther King, Jr. once said, to paraphrase him: You can't legislate to make my neighbor love me, but I am keenly aware that you should legislate to prevent him from lynching me.

Tutu, *supra* note 46, at 2.

114. I believe the law, if it is not to fall into disrepute, must bear a positive relation to morality, justice, fairness and equity. In South Africa, most of the law does not have this attribute. It is used to legitimate a vicious, immoral system unsurpassed since Nazism and Communism. It is such a system that the "constructive engagement" policy followed by the current administration of this land has helped to continue, a system that cares nothing about even the most elementary human rights. I hope one day that the United States, this great country, will recover and be true to its tradition to side with those who seek justice, democracy, peace, and equity. For without threatening anyone, we just want to remind whoever that we will be free, and we will remember those who helped us to become free.

Id. at 10. When the House approved the recent sanctions against South Africa, there was a frightening juxtaposition of the administration's positions on human rights in the *New York Times*. The President's veto of the sanctions was anticipated in the column next to the Assistant Attorney General's denouncement of affirmative action as "the major threat to individual liberty." *N.Y. Times*, Sept. 13, 1986, at A1, col. 5 and col. 6.

115. [T]he term "reverse discrimination" is a popular misconception which has

Troubling academic questions arise: Does academic flexibility in the face of societal inertia mean there is no principle which cannot be erased through economic or political power? Is the entire academic sub-discipline of law and economics being used as a conceptual code to support the perspective that racism at home or abroad is licit? Is academic integrity simply a matter of putting discreet, but pernicious content into innocuous symbols; academic disinformation, if you will?¹¹⁶ If this is the case, it strikes at the heart of intellectual integrity¹¹⁷ and in a free society the future of legal scholarship would be a dismal one should the nar-

emerged recently in American law, particularly in the law of equal employment opportunity, as a shorthand way of expressing adverse judgment on the validity of affirmative action. Moreover, while the term as a modern "buzz" word clearly carries a pejorative connotation, it is rarely accompanied by any legal analysis. It does have legal significance if it is adopted by a court, but primarily as a conclusion of law which equates illegality.

Jones, *supra* note 112, at 217.

116. In the words of a minority academician musing on the role of law professors in society:

It is generally believed that those who built and reside in the castle have achieved their lofty and prestigious positions through their ability to serve those who are rulers of the land. The residents of the castle are not the rulers, but they translate the orders of the real rulers into language which, though arcane, complex, and beyond the comprehension of even intelligent persons, communicates a sense of power that engenders an awed confusion and a subtle but real coercion toward compliance. Through the manipulation of those with power the castle's residents gained a facsimile of power. Only the truly powerful dare describe the authority of the castle's residents in that way.

Bell, *supra* note 14, at 386.

117. There is more than a tenuous connection between laissez-faire economic due process of the 1880s to the 1930s and law and economics of the present day.

Nineteenth century views of natural law are rarely followed today, however. Economic due process defended the immutable idea of the "market" from interference of petty politics through which each segment of society might seek an advantage that would upset the natural market. See Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 LAW & HIST. REV., 293, 300-01 (1985). Law and economics relies on the same assumptions of market efficiency and individual liberty, but without the underlying belief that there is a realm of pure reason from which philosophic principles guide the development of society.

Scientific analysis in the nineteenth century consisted of the exploration of the ramifications of a given basic fact which could not be questioned. Twentieth century scientific method relies on the repeated challenging of one's hypothesis against new data. Langbein and Posner's first article, *supra* note 1, follows the discredited nineteenth century method, by disingenuously beginning with an examination of the validity of trust investment in market funds, and arriving at the conclusion that "courts may one day conclude that it is imprudent for trustees to fail to use such vehicles." *Id.* at 30.

row vision of economic neo-scholasticism pre-empt the process of conceptualization in theorizing about the law in its broadest sense.