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STRUCTURES OF GOVERNANCE: "FIXING" INTERNATIONAL LAW WITH LESSONS FROM CONSTITUTIONAL AND CORPORATE GOVERNANCE

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INTRODUCTION

To mark the tercentenary of Harvard University in 1936, Professor John M. Maguire described the law as "the system of wise restraints that make men free,"[1] a definition that is still used to confer the law degree on the university's graduates and recently made more famous by Chief Justice John Roberts in his confirmation hearing.[2]

The law protects liberty, most basically, by addressing the structural problem of organizational governance: How to give decision makers enough discretion to do their jobs but to circumscribe such discretion sufficiently with consistent neutral principles so that their decisions are, and perceived to be, the product not of arbitrary whim or unfettered power but of legitimate authority.

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[1] *See* Viet D. Dinh, *What is the Law in Law & Development?*, 3 GREEN BAG 2D 19, 27 (1999).

[2] *See, e.g.*, Jay Ambrose, Editorial, *No Winners in Biden vs. Roberts: Sen. Joseph Biden Failed To Get Judge Roberts To Reveal Future Rulings During Supreme Court Confirmation Hearings*, GRAND RAPIDS PRESS, Sept. 16, 2005, at A7.

The disparate areas of law to which I will refer today, speak to different actors with different doctrines, but all seek to address the problem of governance with wise restraints. Constitutional law restrains the actions of government officials; corporate law restrains the actions of directors; and international law restrains the actions of nation-states.

The contrast among these areas is that in constitutional and corporate law, the central questions facing lawyers, judges, and academics concern the wisdom of specific rules and doctrines. In international law, the questions are less about the wisdom of the rules—which are generally if not universally shared—and much more about how they can be enforced to restrain the conduct of regulated actors, the nation-states. My purpose here is not to debate the wisdom of constitutional or corporate law doctrine—God knows we do enough of that elsewhere—but rather to explore how the U.S. Supreme Court and the Delaware courts developed into effective institutions governing primary conduct, and how these lessons can help make international legal institutions more effective in resolving disputes that inevitably rise.

At first blush, the answer may be that there is no answer, or at least no lesson to be learned, because domestic law so fundamentally differs from international law that any comparison is futile. Most obviously, domestic law operates against the background of a governmental monopoly on force that ensures enforceability of legal mandates. I think this is an important observation, but not a complete one.

For one thing, even in international law, the threat of force in order to coerce compliance is always implicit in the commitment to a treaty-based obligation. During the opium wars, the British considered certain Chinese actions to be violative of treaties. They resolved this dispute not only through negotiation, but ultimately by sending in the Far East Squadron, sinking the entire Chinese Navy, and then threatening to level Peking.[3] Modern examples, of course, include the UN-sanctioned first Persian Gulf War and the invasion of Afghanistan. And the possibility is reflected in the UN Charter, in which Article 94(2) commits to the enforcement of the decrees of the International Court of Justice through the Security Council.

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[3] *See generally* JACK BEECHING, THE CHINESE OPIUM WARS (1975).

Conversely, even in domestic constitutional history, outliers of defiance of judicial mandates suggest the fallacy of assuming unquestioned compliance with the courts. For example, the Supreme Court held in *Worcester v. Georgia,*[4] that Native Cherokees were entitled to federal protection from Georgia's infringements on the tribe's sovereignty. President Andrew Jackson reportedly responded, "John Marshall has made his decision; now let him enforce it," paving the way for the infamous Trail of Tears.[5] Because constitutional law seeks to restrain government officials, reliance on the coercive power of the state to enforce judicial decrees—power that is controlled by executive officials—cannot be taken for granted.

Likewise, in corporate law, the opportunity to reincorporate in a different state, even in a different country, gives corporate actors a real choice whether to continue the commitment to comply with the legal rules set forth by the Delaware Chancery Court and Supreme Court.

Legal institutions, like all institutions, are not one-shot, one-decision players. Mechanisms and strategies for continual commitment and consistent compliance are essential to build an enduring system of wise restraints. The question posed, therefore, is what the lessons from constitutional and corporate law can teach us in an effort to improve compliance with international law mandates and thus to build more enduring international legal institutions.

The common feature that promotes compliance in constitutional law and corporate law is the well-earned legitimacy of the respective courts to resolve disputes. That legitimacy is earned through practices and doctrines that recognize the fragility of the judicial role and the authority, autonomy, and competence of the actors upon which the law operates, respectively, namely government officials and corporate directors. It is also a recognition of humility and restraint that is missing in our effort to promote and build international legal institutions.

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[4] 31 U.S. (6 Pet.) 515 (1832).

[5] JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 518-519 (1996). For a thorough description of the case in general and the ensuing conflict between the Supreme Court and President Jackson, *see* Ronald A. Berutti, *The Cherokee Cases: The Fight to Save the Supreme Court and the Cherokee Indians*, 17 AM. INDIAN L. REV. 291 (1992).

Despite this ambitiously theoretical introduction and the rather grandiose title of this lecture, for both of which I apologize, my thesis is a simple one. We who believe in the premise and promise of international law need to temper our zeal with a healthy dose of humility and restraint. We, and the institutions we hope to build, need to recognize the authority, autonomy, and competence of nations and their leaders at the same time that we seek legitimately to constrain their actions when necessary to ensure the rule of international law. I will illustrate the point by looking at the "passive virtues"[6] in constitutional law and the business judgment rule in corporate law before turning to international law—using as a concrete illustration the ongoing dispute over rights under the Vienna Convention on Consular Relations.

I. LESSON FOR INTERNATIONAL LAW FROM CONSTITUTIONAL GOVERNANCE-

I start with the lessons from Constitutional law. Any comparison between domestic constitutional law and the law of nations must, of course, acknowledge the obvious difference. Constitutional law proceeds from the premise of a unitary government, a written constitution, and judicial review—preconditions that are absent or at least precarious in the international legal system. But I do not think that this difference is fatal to the endeavor.

For one thing, the work in comparative constitutional law, most notably by Vicki Jackson and Mark Tushnet, illustrates that constitutionalism—that is, adherence to fixed rules that limit governmental power and protect the rights of citizens—can be achieved without a written constitution (as in the case of England) or without judicial review (as in the case of Denmark).[7]

More fundamentally, our system of government is not a unitary one such that political acceptance and executive enforcement of judicial mandates can be taken as a given. The Framers, of course, divided governmental authority both horizontally with the separation of powers and vertically by preserving the sovereignty of states. As Justice Kennedy puts colorfully in his concurring

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[6] *See generally*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1961).

[7] *See generally* VICKI C. JACKSON AND MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 212-228 (2nd ed. 2006).

opinion in *U.S. Term Limits, Inc. v. Thornton,*[8] "The Framers split the atom of sovereignty."[9]

This metaphor is perhaps more true than Justice Kennedy intended. I was taught in basic physics that the splitting of atoms results in nuclear fission, causing a chain reaction that leads to an explosion of immeasurable magnitudes. The danger of such an exercise in constitutional design and governance is well indicated by the story of *Worcester v. Georgia*, President Jackson, and the subsequent Trail of Tears.[10]

But at the risk of overstretching the metaphor, nuclear fission, properly controlled, can produce immense clean and efficient energy to further human productivity and progress. So too *Worcester v. Georgia* has its historical counterweight in *Cooper v. Aaron,*[11] where the Court held that the states were bound by the Court's rulings with respect to desegregation, and President Eisenhower sent in federal troops in response to Governor Faubus blockading the school doors of Arkansas.

The school segregation cases yield an additional illustrative story. When the NAACP petitioned the en banc Circuit Court of Appeals for the Fifth Circuit for enforcement of its order admitting James Meredith, a school board member told Governor Ross Barnett that the school board would defy the 5th Circuit "till hell freezes over."[12] An hour later, after their attorney had explained the significance of being held in contempt by the en banc 5th Circuit, the school board settled with the NAACP and acquiesced. The same member explained their action to Governor Barnett by saying, "well governor it, froze over in a hurry."[13]

As painful as the stories were of intransigence and resistance to the Court's school integration cases, one could argue that the system of sovereignty split both horizontally and vertically worked better than the alternatives. The conflict galvanized the Nation's attention, strengthened our resolve, and produced a more

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[8] 514 U.S. 770 (1995).
[9] *Id.*. at 838 (Kennedy, J., concurring).
[10] *See*, e.,g SMITH and Berutti, *supra*, note 5 and accompanying text.
[11] 358 U.S. 1, 16-19 (1958).
[12] JACK BASS, UNLIKELY HEROES 184-185 (1981).
[13] *Id* at 185.

enduring legacy of commitment than reflexive compliance with a fiat from a unitary, centralized government edict.

The surprising, or at least interesting thing is that, given the divided nature of our constitutional government, stories of defiance like *Worcester v. Georgia* are the extremely rare exception rather than the norm. Justice Breyer traces this same history of *Worcester* and *Cooper v. Aaron* through *Bush v. Gore*[14] and characterizes the general acceptance of the Court's mandate as "a miracle." "And the miracle of today's reality is driven home to me every day in my job where, from my seat at the far side of the bench, I see before us men and women of every race, every religion, every ethnic origin, representing groups of every conceivable point of view, who are before us because they will decide their differences through law, not on the streets with fists or rocks or guns."[15]

The success, of course, is directly attributable to the Supreme Court, the legitimacy with which it is viewed, and the respect that it commands. As Bernard Schwartz recounts the history of the disputed Presidential election of 1876, where an electoral deadlock was broken by an ad hoc Electoral Commission led by Supreme Court justices:

> It must be recognized that without the Justices it is doubtful that the Electoral Commission could ever have been approved—much less had its decision upheld by the country. . . . With Henry Adams, the country 'still clung to the Supreme Court, much as the churchman still clings to his last rag of Right.[16]

It is, of course, this "clinging" conception of judges as defenders of what is Right—as opposed to what is popular, convenient, or desirable—that protects the legitimacy of the judicial institutions that they serve and commands respect for the judgments they render. As Alexander Hamilton puts it in Federalist 78:

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[14] 531 U.S. 98 (2000).

[15] Stephen Breyer, Opening Keynote Address at the Annual Meeting of the American Bar Association: Our Civic Commitment (Aug. 4, 2001) *available at* http://www.supremecourtus.gov/publicinfo/speeches/sp_08-04-01.html.

[16] BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 173 (1993) (internal citations omitted).

> The judiciary, on the contrary, has no influence over either the sword of the purse; no direction either of the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its own judgments.[17]

The efficacy of the Court's judgments, therefore, depends critically on how the judges do their work. On this score, I think few can do better than Sir Thomas More, then Lord High Chancellor of England. A courtier challenged whether More really meant what he said about strictly applying the law: after all, he would never rule against his own father. To this More replied: "[I]f the parties will at my hands call for justice, then, all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right."[18] Perhaps it may have been simpler for the Great Saint to recuse.

There are many other stories illustrating this ideal of a judge, but one of my favorites comes again from the school desegregation cases. John Fassett clerked for Justice Stanley Reed in the 1953 Term. In a piece published by the Supreme Court historical society entitled *Mr. Justice Reed and* Brown v. Board of Education, Fassett recounts a conversation about the case with Justice Reed, who at the time was inclined to disagree with the majority's overruling of *Plessy v. Ferguson.* Here is what Fassett wrote:

In response to my observation that it seemed to me that the result *they* [the majority] sought to achieve was desirable, he said he did not conceive that to be the Court's function. He then inquired whether I believed in "krytocracy." When I confessed my ignorance of the definition of such term he directed me to one of his favorite

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[17] THE FEDERALIST No. 78, at 465 (A. Hamilton) (Clinton Rossiter ed., 1961).
[18] R. W. CHAMBERS, THOMAS MORE 268 (1962).

sets of books, The Oxford English Dictionary, from which I learned that krytocracy means government by the Judges.[19]

Justice Reed, of course, ultimately joined the unanimous decision in *Brown v. Board of Education,*[20] presumably because he was convinced that it was legally correct under our Constitution and not only because he thought the result to be desirable.

Reed recognized that although our constitutional structure depends on the judiciary as the backstop to safeguard the rule of law, we need to ensure that judges themselves discharge their judicial function according to the rule of law. As Justice Curtis puts it in his dissent from the decision in *Dred Scott v. Sandford*:

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.[21]

Besides adhering to these general principles of the judicial craft, the Supreme Court has recognized the limits of its authority with respect to the political branches since its inception —the actors whose conduct it seeks to regulate in constitutional law. Even as he established judicial review, or more likely because he was doing it, Chief Justice Marshall in *Marbury v. Madison*[22] planted the seeds of the political question doctrine. Answering arguments that courts should not intermeddle with the prerogatives of the executive, he wrote:

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[19] John D. Fassett, *Mr. Justice Reed and Brown v. Board of Education*, *in* Y.B. OF SUP. CT. HIST. SOC'Y 48, 63 (1986).
[20] 347 U.S. 483 (1954).
[21] 60 U.S. (19 How.) 393, 620-21 (1856) (Curtis, J., dissenting).
[22] 5 U.S. (1 Cranch) 137 (1803).

> It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. . . . Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.[23]

The Court recognizes the limits of its jurisdiction, limits that were much narrower before the Judiciary Acts of 1867 & 1875,[24] and jurisdiction that is subject to restriction or elimination by the political branches.[25]

The Court also recognizes the limits of its competence, as indicated by the self-imposed prudential limits to its authority. In applying these discretionary limits, "the court is making a determination that despite the existence of statutory authority to adjudicate, the case has been presented in the wrong court or at the wrong time."[26]

Aside from the traditional hesitance to grant equitable relief, the prudential limits generally trace to the separation of powers (for example, the political question doctrine and prudential limits to standing) and federalism. By according respect to the political branches and the states (the actors that constitutional law seeks to regulate) the Court thus recognizes their autonomy and competence and its own institutional limitations--all the more, I would posit, to make its judgments really count and be respected when they matter.

For example, the Court stays its hand of federal authority with respect to states through doctrines such as abstention under *Younger v. Harris*[27] – that federal courts could not enjoin on-going

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[23] *Id.* at 170.

[24] *See* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (granting federal courts power to issue writs of habeas to prisoners in state custody); Act of Mar. 3, 1875, ch. 137, 18 Stat. 470 (granting federal question jurisdiction).

[25] *See* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32-36, 330-355 (5th ed. 2003) (discussing Congressional power to limit federal jurisdiction and its limits).

[26] David Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 547 (1985).

[27] 401 U.S. 37 (1971), *see also* Samuels v. Mackell, 401 U.S. 66 (1971) (applying *Younger* to complaint for declaratory relief.).

state prosecutions absent truly extraordinary circumstances.[28] *Pullman* abstention requires federal courts to allow dispositive state law issues to be resolved by the state court in preference to federal constitutional questions.[29] And federal courts abstain in situations in which difficult questions of state law will dispose of statutory claims and in those cases in which a complex state system is implicated by the litigation.[30] Notably, federal courts and state legislatures have worked to strengthen this mutual respect through statutes by which federal courts can certify questions of state law to be resolved by the state's highest court.[31]

II. LESSONS FOR INTERNATIONAL LAW FROM CORPORATE GOVERNANCE

In the law of corporations, one finds similar expressions of judicial humility and respect for the autonomy, authority, and competence for the regulated institutions. Indeed, except in specific circumstances, the Delaware courts defer to the business judgments of directors—those whom the shareholders trust to manage the corporation.

The hallmark of the business judgment rule[32] is the presumption that, within certain broad parameters, directors are better at managing the corporation than are courts. Courts will not second-guess the directors' decisions, even if they turn out to be wrong. The courts would review the process of decision-making, of

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[28] *See Younger*, 401 U.S. at 47-48 (discussing such circumstances); Dombrowski v. Pfister, 380 U.S. 479 (1965) (finding such circumstances).

[29] *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496, 498-500 (1941).

[30] *See, e.g.*, Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100 (1981); Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25 (1959); Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341 (1951); Thompson v. Magnolia Petroleum Co., 309 U.S. 478 (1940).

[31] *See* HART & WESCHLER, *supra* note 25, at 1200-1203 (discussing rise of certification); Fiore v. White, 528 U.S. 23 (1999) (certifying state law question precedent to intelligent resolution of the merits); Clay v. Sun Ins. Office Ltd., 363 U.S. 207, 212 (1960) (saluting "rare foresight" of Florida's—at that time novel—certification of law statute).

[32] *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (explicating the business judgment rule as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

course, but even in so doing would exhibit a significant amount of deference to how directors conduct their business.

Thus, although Delaware law insists that directors exercise a minimum standard of care, that standard is minimal indeed. Chancellor Allen has characterized a breach of due care as "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win a judgment"[33] because courts do not lightly get into the business of telling how much time and effort the law should require of directors. One of the few examples of liability is in a case where the director, by her own description, "was old, was grief-stricken at the loss of her husband, sometimes consumed too much alcohol, and was psychologically overborne by her sons."[34] Not surprisingly and comfortingly, the court found the director liable for failure even to look at the accounts of the company. She was not active in running the business, briefly visited the offices, and did not pay any attention to the operations of the corporation.[35]

A more famous example is when the Delaware Supreme Court did not find a breach of care in *Graham v. Allis-Chalmers*.[36] There, the company and some employees pled guilty to federal price-fixing violations.[37] These violations were in hindsight not that surprising because the company as a matter of policy devolved pricing decisions to the lowest operational level,[38] and there had been two prior FTC decrees for price-fixing activities.[39] Nevertheless the Court held that the directors were not liable: "Absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists." For decades, this decision was interpreted by many as broadly holding that the board had no duty to establish corporate information, reporting, and compliance programs.

Chancellor Allen revisited the meaning of this quote in an opinion that resounded through the corporate law community, *In re*

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[33] *In re* Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 967 (Del. Ch. 1996).
[34] Francis v. United Jersey Bank, 432 A.2d 814, 820 (N.J. 1981).
[35] *Id.* at 819.
[36] 188 A.2d 125 (Del. 1963).
[37] *Id.* at 127.
[38] *Id.* at 128.
[39] *Id.* at 129.

Caremark International Inc. Derivative Litigation.[40] He wrote that *Chalmers* only stood for the narrower proposition that, absent red flag, directors can rely on the integrity and honesty of corporate employees. More importantly, Chancellor Allen traced the evolution of corporate law, especially in the takeover context, and of corporate criminal liability and concluded that whatever Chalmers meant in 1963—a broad immunity for the directors' head-in-the-sand behavior—is not the law today. Chancellor Allen in short, told directors that they can trust, but they must also verify.

In the wake of *Caremark*, academics wrote articles, lawyers counseled their clients, boards of directors took notice, and corporations upgraded their reporting and compliance programs. But the most interesting thing for our present purposes is that the opinion had so much impact. It was only dictum—albeit dictum from a very respected source. Chancellor Allen actually held that the board of Caremark likely faced no liability, even though they knew of an alleged Medicare kickback arrangement, because they acted in good faith in relying on advice that the practice, while contestable, was legal.

Likewise, the litigation concerning board approval of the contract dealings between Michael Ovitz and the Walt Disney Company, resulting in a severance payment of $140 million, commanded the attention of both the popular and legal media. The terms of Ovitz's employment were presented to the compensation committee at a meeting that lasted only one hour,[41] and the committee reviewed only a term sheet and not the actual employment agreement.[42] In the end, however, the court did not hold the directors liable. They may have been negligent, but they did not act in bad faith.

To me, the interesting point to take away from these illustrative cases is the transformative effect they have had on the primary conduct of directors even though the courts did not, and generally do not, impose liability on directors. As Professor Edward Rock has observed:

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[40] 698 A.2d 959 (Del. Ch. 1996).
[41] In re Walt Disney Co. Derivative Litig., 825 A.2d 275, 280 (Del. Ch. 2003).
[42] *Id.*

> Delaware courts generate in the first instance the legal standards of conduct (which influence the development of the social norms of directors, officers, and lawyers) largely through what can best be thought of as 'corporate law sermons.' These richly detailed and judgmental factual recitations, combined with explicitly judgmental conclusions, sometimes impose legal sanctions but surprisingly often do not.[43]

A lot has been written to describe and pinpoint the explanations for the development of corporate governance norms even without legal liability. I think some of the most interesting work right now tries to explain or disprove how the capital markets, reputational concerns, and intermediating entities such as the academy and the corporate bar serve to keep directors in line even when the courts do not impose liability for straying. As Professor Rock puts it: "A system that relies on public shaming is perfectly suited to such contexts: The cost to the actor—the disdain in the eyes of one's acquaintances, the loss of directorships, the harm to one's reputation—may often be sufficiently great to deter behavior, even without anything more."[44]

To these potential factors I would add the role of the Delaware courts and judges themselves. At the most basic level, by recognizing the limited role of the law that they have devised and the judicial institutions they serve, the judges create the precondition for norms of compliance to develop. Their work is hortatory, but its effect is real in constraining primary conduct. Their judicial opinions command respect because the judges themselves are respected by corporate law community.[45]

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[43] Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 U.C.L.A. L. REV. 1009, 1016 (1997).

[44] *Id.* at 1104.

[45] *Id.* at 1102 ("Because of the enormous discretion exercised by Delaware Chancery and Supreme Court judges, the personnel are critical. If one is to depend on the courts to fill out the details of proper behavior in the corporate community, the judges must be respected by the community. Delaware accomplishes this in two ways. First, a substantial number of the judges are drawn from the very world at issue, that is, they are experienced and respected practitioners of Delaware corporate

My emphasis on the hortatory effect of the Delaware courts does not mean that they are mere potted plants. They do intrude into director actions and decisions under specific circumstances. Foremost is the insistence that directors not infringe on the shareholder franchise, even unintentionally or in good faith, as established by *Auer v. Dressel*,[46] and extended in *Unitrin, Inc. v. American General Corp.*[47]

In the corporate takeover context, since *Unocal Corp. v. Mesa Petroleum Co.*,[48] the Delaware courts have increased judicial scrutiny under the enhanced business judgment rule. That is so because a potential change of control poses a structural concern that directors may naturally favor continuation of their control and management at the expense of shareholder interests. Thus, instead of deferring to the director's business judgment, courts ask them instead to show, first, "reasonable grounds for believing that a danger to corporate policy and effectiveness existed because of another person's stock ownership."[49] Directors satisfy that burden by showing good faith and reasonable investigation.[50] Even if such a threat exists, the defensive measure taken needs to be reasonable in relation to the threat posed. Unlike typical decisions by boards of directors, in this unique situation the burden is on the board of directors to justify their actions.[51]

The court's approach thus can be roughly summarized in three categories: (1) strong deference to business judgment in ordinary cases; (2) per se invalidity on infringements to shareholder franchise; and (3) little deference in conflicts of loyalty to the shareholders. Viewed in this light, the board can be seen as a

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law. Second, the Delaware courts have traditionally been characterized by a very high degree of collegiality among the judges, so that even those judges who did not practice in the area are socialized into the peculiar practices after joining the court.").

[46] 118 N.E.2d 590 (N.Y. 1954).

[47] 651 A.2d 1361 (Del. 1995).

[48] 493 A.2d 946 (Del. 1985).

[49] *Id.* at 955.

[50] Examples of legitimate concerns for the board of directors in the takeover context include inadequacy of the price offered by the third party to shareholders, the nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders, risk of non-consummation of the deal, and the quality of securities being offered in the exchange.

[51] *Unocal,* 493 A.2d at 955.

middle institution between the courts and the constituent shareholders. At the same time that the courts recognize and respect the competence and authority of directors to manage the corporation, they would not hesitate to step in where the board misuses that autonomy to advance its own interests at the expense of shareholders. In many ways, this relationship compares to the role of the Supreme Court, the government and the people in constitutional law, and the role of international tribunals, the nation-states, and domestic voters in international law—to which I now turn.

III. LESSONS FOR INTERNATIONAL LAW FROM CONSTITUTIONAL LAW AND CORPORATE GOVERNANCE

The lessons I have drawn from the Supreme Court and the Delaware courts are admittedly selective. They are selective because I have focused on those features which I think make their decisions accepted, their values internalized, and their influence durable. And I think that international legal institutions would do well to explain clearly their decision based on legal principles, to respect their institutional role, and to recognize to the extent possible the authority, autonomy, and competence of the sovereign nation states that international law seeks to regulate. This may sound obvious in theory, but such restraint is hard to practice.

Consider the decade-long controversy over enforcement of rights protected by the Vienna Convention on Consular Relations, which the United States ratified in 1963.[52] Article 36 of the Convention requires that "when a national of one country is detained by authorities in another, the authorities must notify the consular officers of the detainee's home country if the detainee so requests."[53] The article also requires that arresting authorities inform the foreign national of his right to consular notification, a requirement that U.S. law enforcement authorities, especially state and local police, did not routinely observe. These are important rights, and the United

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[52] Vienna Convention on Consular Relations, Dec. 14 1969, 21 U.S.T. 77, 596 U.N.T.S. 621 [Hereinafter "VCCR"].
[53] *Id*.

States had sought to enforce them against Iran in the ICJ during the Iranian hostage crisis.[54]

In 1977, Joseph Stanley Faulder, a Canadian citizen, was convicted of murder and sentenced to death in Texas. He was not informed of his right to consular notification under the Convention.[55] In 1992, after habeas counsel contacted the Canadian embassy, Canada immediately sent a protest and request for clemency to Texas Governor George W. Bush.[56] Faulder lost his federal habeas litigation based on the VCCR as he could not show prejudice.[57] Canada then obtained a request from the Inter-American Court of Human Rights for the execution to be stayed. Secretary of State Madeline Albright also sent a formal request to the Governor for clemency. Then-Governor Bush declined clemency and Faulder was executed.[58]

The first full airing of the implication of the VCCR for domestic cases involved Angel Breard, a national of Uruguay who was convicted and sentenced to die for a rape and murder in Virginia.[59] In his habeas litigation, Virginia argued that the claim was procedurally defaulted, and the default was not excused as trial counsel was aware of Breard's nationality.[60] The District Court agreed and the 4th Circuit affirmed, noting that any failure to make a VCCR claim was not the kind of legal error that could excuse defaults. In September of 1996, the Republic of Paraguay commenced parallel litigation against the State of Virginia seeking a vacatur of Breard's conviction. The District Court and then the 4th Circuit both dismissed the action as barred on sovereign immunity grounds.[61] On July 7, 1997, the State Department formally apologized for what

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[54] *See* United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran) 1980 I.C.J. 3 (Judgment of 24th of May).

[55] Mark Warren, *Bordering on Discord*, J. INST JUST. INT'L STUD. 79, 88 (2006).

[56] *Id*.

[57] Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996), *cert. denied*, 519 U.S. 955 (1996).

[58] Margaret McGuinness, *Medellin, Norm Portal, and The Horizontal Integration of International Human Rights*, 82 NOTRE DAME L. REV. 755, 805 (2006).

[59] Breard v. Greene, 523 U.S. 371, 373 (1998).

[60] Breard v. Netherland, 949 F. Supp. 1255, 1263 (E.D. Va. 1996), *aff'd sub. nom.* Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998), *cert. denied sub. nom.* Breard v. Greene, 523 U.S. 371 (1998).

[61] Republic of Paraguay v. Allen, 949 F. Supp. 1269, 1272 (E.D. Va. 1996), *aff'd*, 134 F.3d 622 (4th Cir. 1998), *cert. denied sub nom.* Breard v. Green, 523 U.S. 371 (1998).

it admitted was a breach of the convention, but took the position that the VCCR credited no individual rights and hence was not enforceable in domestic proceedings.[62]

On April 3rd, a complaint, and an application for "the indication of provisional measures,"[63] was filed by Paraguay in the ICJ. The complaint alleged a VCCR violation, alleged that the procedural default doctrine could not be used to bar review of a VCCR claim, and demanded vacatur of Breard's conviction. On April 9th, the ICJ indicated a provisional measure that: "the United States should take all measures at its disposal to ensure that…Breard is not executed pending the final decision in these proceedings."[64] In many ways this order is quite exceptional in terms of the requirements for interim relief traditionally employed by the Supreme Court. First, the ICJ did not stay its hand until the Supreme Court ruled upon pending stay applications in Breard and Paraguay's cases.[65] Second, it stated that the sole measure for provisional relief was "irreparable prejudice," a standard that would be met a priori in any death penalty case.[66]

At this point, Breard supplemented his pending certiorari petition with a motion for an original writ of habeas corpus to "enforce" the ICJ's provisional order, and Paraguay filed for leave to file a bill of complaint under the Supreme Court's original jurisdiction.[67] In response to this lawsuit, Solicitor General Seth Waxman filed a brief—also signed by the State Department legal advisor—urging the court to deny the applications for stay as the ICJ order was not legally binding.[68] At the same time, Secretary of State Albright sent a letter to Governor Gilmore urging him to stay the execution out of principles of comity, while noting to him that the

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[62] Jonathan I. Charney & W. Michael Reisman, *The Facts*, 92 AM. J. INT'L L. 666, 667 (1998).
[63] Breard Case, Vienna Convention on Consular Relations (Para. v. U.S.), 1998 I.C.J. 248 (Order Indicating Provisional Measures of Apr. 9), 251.
[64] *Id.* at 258.
[65] *Id.* at 249.
[66] *Id.* at 257.
[67] Breard, 523 U.S. at 374-375.
[68] Brief for the United States as Amicus Curiae at 49-51, in Breard v. Green, 523 U.S. 371 (1998) (Nos. 97-1390, 97-8214).

United States was defending the rights of Virginia and that the order of the ICJ used "non-binding language."[69]

Five days later, the Supreme Court denied all relief. The Court noted that Breard had procedurally defaulted his claim, and that the only question was whether the VCCR, by operation of the Supremacy Clause, trumped the procedural default rule. The *Breard* Court rejected this argument on two grounds. First, noting that the VCCR expressly contemplated that rights therein "shall be exercised in conformity with the laws and regulations of the receiving state," the Court held that the procedural default bar was a basic rule of criminal procedure that the VCCR did not displace.[70] Second, the Court noted that Congress had adopted the procedural default rule in 28 U.S.C. § 2254(a) after the VCCR and thus had displaced the Convention under the later in time principle.[71]

Governor Gilmore denied Breard clemency and specifically addressed the question of federal versus state interests:

> The concerns expressed by the Secretary of State are due great respect and I have given them serious consideration. However, it is but one of the various concerns that I must take into consideration in reaching my decision. As Governor of Virginia my first duty is to ensure that those who reside within our border . . . may conduct their lives free from the fear of crime.[72]

After the execution Paraguay withdrew its case before the ICJ. At home, a number of prominent commentators criticized President Clinton for the "hands off" approach and his refusal to issue an executive order staying the execution. In their minds the President had ignored his international law obligations and harmed

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[69] Letter from Madeleine K. Albright, U.S. Secretary of State, to James S. Gilmore III, Governor of Virginia (Apr. 13, 1998) *available at* http://www.state.gov/documents/organization/65744.pdf.
[70] *Breard*, 523 U.S. at 375-376
[71] *Id.* at 376.
[72] Press Release, Commonwealth of Virginia, Office of the Governor, Statement by Governor Jim Gilmore Concerning the Execution of Angel Breard (Apr. 14., 1998).

the international relationships of the country.[73] These are powerful critiques that will soon resonate in different circumstances.

The next case involved German citizens Karl and Walter LaGrand, brothers scheduled to be executed in Arizona. Both raised their VCCR claims for the first time on collateral review. Additionally, both argued that their default was due to ineffective counsel.[74] After Karl was executed, Germany sued the United States in the ICJ seeking provisional remedies for Walter on March 2nd.[75] The court did not act on this motion until the next day, and did so without hearing argument over the United States' objection, apparently accepting the argument of Germany that there was no time to do so.[76] The actual stay order issued some 2 ½ hrs before Walter was scheduled to be executed. Germany then sought to enforce the order in an original action brought before the Supreme Court. Solicitor General Waxman argued that ICJ provisional measures were not binding, and the Supreme Court denied relief on grounds of sovereign immunity and laches.[77] LaGrand was executed, but Germany continued to litigate, eventually winning before the ICJ.[78] The ICJ held that the Convention created individual rights, that the United States had violated LaGrand's Convention rights, and that the doctrine of "procedural default" under U.S. and Arizona law could not be applied to bar review of LaGrand's claim.[79]

Quite incredibly, the ICJ opinion began by holding that its provisional measures were binding, in a manner that suggested complete indifference to its impotence to enforce its judgments.[80]

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[73] *See, e.g.*, Louis Henkin, *Provisional Measures, U.S. Treaty Obligations, and the States*, 92 AM. J. INT'L L. 679 (1998); Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance With ICJ Orders of Provisional Measures*, 92 AM. J. INT'L L. 683 (1998); Jordan J. Paust, *Breard and Treaty-Based Rights Under the Consular Convention*, 92 AM. J. INT'L L. 691 (1998).

[74] LaGrand v. Stewart, 133 F.3d 1253, 1262 (9th Cir. 1998), *cert. denied*, 525 U.S. 971 (1998).

[75] LaGrand Case (F.R.G. v. U.S.), 1999 I.C.J. 9, 12 (Order of Mar. 3).

[76] *Id.* at 13-16.

[77] Federal Republic of Germany v. United States, 526 U.S. 111 (1999).

[78] McGuinness, *supra*, note 58 at 822-823.

[79] LaGrand Case (F.R.G. v. U.S.), 2001 I.C.J. 466 (Judgment of June 27) [hereinafter *LaGrand*].

[80] Colter Paulson, *Compliance With Final Judgments of the International Court of Justice Since 1987*, 98 AM. J. INT'L L. 434, 443-444 (2004).

Indeed, Judge Oda and Judge Buergenthal dissented on the order finding provisional measures to be binding, and Judge Buergenthal criticized the ICJ for failing to hold Germany's application as time barred.[81]

After the execution of two Mexican nationals in 1997, Mexico sought and received an advisory opinion from the Inter-American Court on Human Rights that the United States had violated its obligations under the VCCR.[82] Diplomatic protests were ineffective in stopping more executions in 2000 and 2002, so Mexico established a legal apparatus to intervene in capital cases involving Mexican nationals.[83] It also sued the United States in the ICJ on behalf of 52 Mexican nationals then on death row in the United States. Unlike prior litigation efforts, the proactive suit was filed well in advance of execution dates.[84] In the 2004 *Avena* decision, the ICJ held that the United States breached the VCCR and ordered the United States to hold prejudice hearings for each of the 52 Mexican nationals regardless of procedural default.[85]

As a practical and doctrinal matter, the most important part of both the *LeGrand* and *Avena* decisions is the holding that Convention obligations override state and federal procedural default rules. It is also, in my mind, the most difficult question that the ICJ faced. Nevertheless, the *LeGrand* and *Avena* decisions disposed of it in two conclusory paragraphs. The relevant provision of the Convention reads as follows:

> The rights referred to in paragraph 1 of this Article shall be exercised in conformity with the laws and regulations of the receiving State, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for

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[81] LaGrand, 2001 I.C.J. at 537-539 (Oda, J., dissenting); La Grand, 2001 I.C.J. at 548-557 (Buergenthal, J., dissenting).
[82] McGuinness, *supra* note 58, at 814-818.
[83] Brief of Mexico as Amicus Curiae Supporting Petitioner at 14-17, Medellin v. Texas, 544 U.S. 660 (2005) (No. 06-984).
[84] McGuinness, *supra*, note 58 at 823.
[85] *See* Case Concerning Avena and Other Mexican Nationals (Mex. v.U.S.), 2004 I.C.J. 12, 71-73 (Judgment of Mar. 31) (Avena).

> which the rights accorded under this Article are intended.[86]

The first part of this provision, "in conformity with the laws and regulations of the receiving State," seems clearly to allow state and federal procedural default rules to control notwithstanding violations of the right under the VCCR. Incredibly, given the nature of this language the ICJ's review was confined to two paragraphs in the *LeGrand* judgment, which held first that procedural default barred effective review, and second that allowing claims of ineffective assistance of counsel as cause for the default did not cure this defect.[87] The ICJ did not do much more in *Avena*, merely citing one paragraph of its *LeGrand* judgment[88] despite the strenuous U.S. objection.

The Supreme Court took up the question in 2006 in *Sanchez-Llamas v. Oregon*,[89] and in a 6-3 decision held that state procedural default rules applied to bar the defendant's claim under the Convention. What is interesting to me is not how the Court came out on the question, but rather the contrast in judicial methodology. The main part of Justice Breyer's dissent provided the clear, well-reasoned explanation for the position that the ICJ summarily declared by judicial fiat.

Justice Breyer explained, relying on the text and drafting history of Article 36, that the failure to notify caused the defendant not to assert his right in a timely manner, and thus the procedural default bar did not give "full effect" to the Convention as required by its text.[90] Ultimately, he was unsuccessful in his argument because, as the Court holds, defense counsel should have known about the Convention rights and, as Justice Ginsburg points out in her concurring opinion, trial counsel for Sanchez-Llamas actually did know about but did not assert the right.[91] But at least he, unlike the ICJ, tried.

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[86] VCCR Art. 36(2)
[87] LeGrand Case, 2001 I.C.J. at 497-498 (Judgment of June 27th).
[88] Avena, 2004 I.C.J. at 48-57.
[89] 126 S. Ct. 2669 (2006).
[90] *Id.* at 2698-2705 (Breyer, J., dissenting).
[91] *Id.* at 2690 (Ginsberg, J., concurring).

It is quite amazing to me that a domestic jurist, who is generally assured of the legitimacy of his authority and the efficacy of his rulings, takes greater pains to justify and explain a dissenting view than the ICJ in espousing its ruling—a ruling whose efficacy in binding the conduct of the United States was very much in doubt. For either want of effort or lack of respect for the United States and its domestic institutions, I think the ICJ's failure of judicial craftsmanship does not bode well for the court's enduring institutional effectiveness.

Given the number of Mexican nationals on death row, the issue of what to do with the *Avena* judgment soon arose directly in the VCCR context when the Supreme Court granted certiorari in *Medellin v. Dretke* to consider whether the VCCR created privately enforceable rights and whether the decision of the ICJ in *Avena* controlled on the question of procedural default.[92] Then a surprising turn occurred. Shortly before the Solicitor General—who had entered the case on the side of Texas—was due to file his amicus brief, President Bush issued a "memorandum" in which he recited the obligations under the optional protocol, and then stated:

> I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States of America, that the United States will discharge its international obligations under the decision of the International Court of Justice in the [Avena case] by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.[93]

Solicitor General Paul Clement argued in his brief that the ICJ's *Avena* judgment could not be applied on collateral review and that Court should affirm the dismissal of the federal habeas

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[92] 543 U.S. 1032 (2004).

[93] Memorandum from President George W. Bush to Attorney General Alberto Gonzales Re. ICJ Avena Decision *available at* http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html.

petition.[94] At the end of his brief, however, Clement noted that affirming the dismissal would not bar relief in state courts—because the President's memorandum requires Texas Courts to give Medellin a hearing on the merits.[95] After argument, the Court recited its holding in *Breard* on procedural default, but dismissed the petition as improvidently granted to allow the Texas courts to consider the matter in the first instance.[96]

At the same time of the Presidential memorandum, the United States withdrew from the optional protocol establishing mandatory jurisdiction in the ICJ for any dispute over Convention terms or obligations. There was no outcry. The President's authority to unilaterally terminate a treaty has been quite controversial,[97] but here Congress was silent as to the President's withdrawal from the Optional Protocol. Even the international law community was muted in its criticism. The United States' ability to withdraw with zero political cost suggests that the ICJ had overplayed its hand and, wittingly or not, sacrificed the long-term institutional interest for the momentary victory in an important case. The press entirely missed the quick tactical move by the United States and covered the ICJ opinion as a victory for international opponents of the death penalty, and all but ignored the fact that the ICJ decision prompted the U.S. to withdraw.

Back before the Texas Court of Criminal Appeals, Medellin and the Solicitor General argued that the presidential memorandum required that court to adjudicate his VCCR claim on the merits. In a series of fractured opinions the Court of Criminal Appeals denied Medellin relief. A four judge plurality held that the President's memorandum could not pre-empt state court procedural bars, as it was not in the form of an executive agreement with another country, and was not supported by Congressional authorizing legislation.[98] Justice Cochran filed a concurrence for three justices arguing

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[94] Brief for the United States as Amicus Curiae supporting Respondent, Medellin v. Dretke, 544 U.S. 660 (2005) (No. 04-5928), 2005 WL 504490.
[95] *Id.* at 38-48.
[96] Medellin v. Dretke, 544 U.S. 660, 664-667 (2005).
[97] *See, e.g,* Goldwater v. Carter, 444 U.S. 996 (1979).
[98] Ex Parte Medellin, 223 S.W.3d 315, 342-348 (Tex. Crim. App. 2006), *affirmed,* 128 S. Ct. 1346 (2008).

that the President's memorandum was just that – a memorandum – and it was not legally enforceable like an executive order.[99]

Medellin, supported by the Solicitor General, sought certiorari on whether the President's memorandum was binding on the states.[100] The court granted the writ and the case will be argued on Wednesday, October 10, 2007. It is not my place here to suggest how the Court should resolve the merits of the case, other than to note that everyone involved believes the decision will be a close one. Moreover, I would note that although the United States and foreign states have submitted amicus briefs in favor of Medellin, most of the academic analysis runs against the validity of the presidential memorandum, with professors as different in political view as Erwin Chemerinsky and John Yoo joining to support Texas.[101]

This story of the Medellin case, for me, inspires both a sense of optimism and a note of caution for the project of building durable and effective international legal institutions. The optimism is that even though the Bush Administration vigorously contested the ICJ litigation and continues to argue at every juncture that the *Aveno* decision was wrong, it nevertheless did not flout the judgment of the court. Instead, contrary to its policy position on the death penalty and offending its traditional deference to states, the Administration went out of its way—and some would say out of the way prescribed by the Constitution—in order to comply with the ICJ decision. This counterintuitive response suggests that the international obligations are taken seriously and international legal mandates are honored, however begrudgingly.

The caution, I hope, should be obvious. The triumph is short-lived, certainly for ICJ jurisdiction and continued vindication of rights under Convention. But beyond that, the withdrawal from the optional protocol was not only costless, but I suspect a net gain

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[99] *Id.* at 358-359 (Cochran, J., concurring in part and concurring in judgment in part).

[100] Petition for Writ of Certiorari, Medellin v. Texas, No. 06-984 (U.S. Jan. 16, 2007), 2007 WL 119139; Brief for the United States as Amicus Curiae Supporting Petitioner, Medellin v. Texas, No. 06-984 (U.S. Mar. 22, 2007), 2007 WL 923105.

[101] *See* Brief of Mexico as Amicus Curiae Supporting Petitioner, Medellin v. Texas, 544 U.S. 660 (2005) (No. 06-984); Brief of Foreign Sovereigns as Amici Curiae Supporting Petitioner, Medellin v. Texas, 544 U.S. 660 (2005) (No. 06-984); Brief of Constitutional and International Law Scholars as Amicus Curiae Supporting Respondent, Medellin v. Texas, 544 U.S. 660 (2005) (No. 06-984).

in terms of domestic political calculations. The controversies of the last decade over NAFTA and WTO ratification, focusing on loss of sovereignty to international dispute resolution panels despite the obvious benefits to international cooperation, suggests that the political willingness to continuing commitment to international legal institutions should not be taken for granted. We who seek to develop and participate in those institutions need to build the case that they do their jobs with a healthy dose of humility and restraint and that they take the autonomy, authority, and competence of domestic institutions seriously, even when—especially when—those domestic institutions must yield to international mandates. In this regard, I think the international legal institutions and their personnel can take lessons from the Supreme Court in expounding constitutional law and from the Delaware courts in formulating corporate law.

CONCLUSION

In his classic *How Nations Behave: Law and Foreign Policy*, the great Lou Henkin concluded by observing that:

> Idealists who do not recognize the law's limitations are largely irrelevant to the world that is. . . . Those who press for optimum laws or agreements which would not be accepted, or which if accepted would not be observed, indulge in futility that may damage the cause of law generally and frustrate more modest, realizable progress.[102]

International legal institutions have developed a long way since Professor Henkin wrote in 1968, but the caution his words embody remains true as ever.

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[102] LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 337 (2nd ed. 1979).