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The Fog of Certainty

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Robert Ahdieh

The Fog of Certainty

In *The Constitutional Power To Interpret International Law*, Michael Paulsen argues that “[t]he force of international law, as a body of law, upon the United States is . . . largely an illusion.”¹ Rather than law, international law is “policy and politics.”² For all the certainty with which his argument is advanced, however, it cannot survive close scrutiny. At its foundation, Paulsen’s essay rests on a pair of fundamental misconceptions of the nature of law. Law is not reduced to mere policy, to begin, simply because it can be undone. The sources of law, meanwhile, are not singular, but plural. Even were international law *not* domestic law, it would still be law.

Paulsen insists, to the contrary, that international law is not law, because Congress, the President, and the courts can displace it.³ Yet what distinguishes binding law from discretionary policy cannot possibly be that it may not be undone. Were that true, little if anything would be law. The distinguishing characteristic, instead, is that the displacement of *law* requires some substantive standard to be met and some prescribed process followed.⁴

Professor Paulsen’s misconception about the sources of law, in turn, arises from his unwillingness to analyze international law as anything more than a subset of U.S. law. International law may have force—and even be “binding”—entirely apart from its status as domestic law. This would not be true were the Constitution to be understood not simply as failing to give force to international law in certain cases, but as affirmatively *negating* the possibility that international law could exert such force. Yet this would imply a further misunderstanding—one of the Constitution itself.⁵

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1. Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1842 (2009).
 2. *Id.*
 3. *See id.* at 1776-85, 1816-22.
 4. *See infra* Part II.
 5. *See infra* Part III.

These errors, it bears noting, are fairly basic. Before considering them in greater detail, therefore, it is worth considering how Professor Paulsen manages to go so completely astray. Here, the invocation of Clausewitz’s “fog” of war – with its attendant distortions and misperceptions – is perhaps telling.⁶ A species of just this may be at work here, with Professor Paulsen misled not by the fog of war, but by an exaggerated sense of certainty in the idiosyncratic premises with which he begins, and the heterodox conclusions he hopes to establish.⁷ Such certitude is perhaps most visible in the sharply dismissive tone of the essay.⁸ Less apparent – but more consequential – is Professor Paulsen’s selective use of authority.⁹ I begin with a few words on the latter, thus, before exploring the twin errors that arise from Paulsen’s exaggerated sense of certainty, and which ultimately undermine his claim that “[i]nternational law is not, in the main, *law* for the United States.”¹⁰

I. THE USE, NON-USE, AND ABUSE OF AUTHORITY

Professor Paulsen’s issues with authority begin with his lack of citation for even some of his most striking claims – among them that “*none* of the branches is literally bound by the views or actions of the others”¹¹ and that Congress’s power to define “Offences against the Law of Nations”¹² is “best understood as bounded by the President’s power to command the nation’s military

6. See CARL VON CLAUSEWITZ, ON WAR 140 (Michael Howard & Peter Paret eds. & trans., Princeton Univ. Press 1984) (1832); see also Alan Beyerchen, *Clausewitz, Nonlinearity, and the Unpredictability of War*, INT’L SECURITY, Winter 1992, at 76–77 (reviewing Clausewitz’s analysis of the “fog” and “friction” of war); Paulsen, *supra* note 1, at 1770 (noting Clausewitz’s use of the metaphor of “fog” to capture “the inability to think clearly and sensibly in the midst of battle”).

7. See *infra* Part I.

8. Paulsen describes international law scholars as a “clique” that is “intellectually isolationist and parochial,” and prone to “disorganized thinking,” including the view that international law trumps U.S. law because the earth is bigger than the United States. See Paulsen, *supra* note 1, at 1764–65, 1824. What might lead international law scholars to such an absurd conclusion? They are, Paulsen would seem to believe, too emotional. See *id.* at 1824. Scare quotes are sometimes placed around “International Law” and even the “consular rights” mandated by the Vienna Convention on Consular Relations, and scholars of the International Court of Justice are cast as “self-styled” experts. See, e.g., *id.* at 1764, 1786, 1792, 1806.

9. See *infra* Part I.

10. See Paulsen, *supra* note 1, at 1822.

11. Paulsen, *supra* note 1, at 1766. But see Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1268 (2002) (suggesting the opposite conclusion as Paulsen with regard to the reconciliation of the enumerated powers of Congress and the President).

12. U.S. CONST. art. I, § 8, cl. 10.

forces”¹³ Moreover, where the essay does offer authority for its arguments, the most common source is Professor Paulsen’s own – famously idiosyncratic – prior work.¹⁴ Where the analysis of others is cited, finally, it is subject to a strict litmus test: agreement with the view Professor Paulsen seeks to advance.¹⁵ Reading the piece, thus, one might be forgiven for thinking that scholars are in agreement that customary international law is not federal law and that the President can disregard “unconstitutional” decisions of the Supreme Court.¹⁶

All of this, of course, is misleading to the reader. It is the implications for Professor Paulsen’s own analysis, however, that concern me here. Ultimately, he gets things dramatically wrong, offering conclusions that simply cannot stand the light of day. Why? At least in part, I believe, it is because his arguments go untested against the views of those who might disagree.¹⁷

Even more damning than its omissions of relevant authority, however, are the essay’s errors of commission, particularly in its treatment of Supreme Court precedent. Where the Court agrees with Professor Paulsen, its decisions are meticulously reviewed, in the spirit of not merely dispositive, but compelling, authority. No mention is made of close votes, limited holdings, or controversy. *Sanchez-Llamas v. Oregon*¹⁸ was thus “forthright” and “unabashed” in its holding.¹⁹ *Medellín v. Texas*²⁰ was “rightly” decided.²¹ By contrast, decisions that cut against Paulsen’s claims – most of them, it turns out – are given the back of the hand. They are “highly controversial,”²² “deeply and bitterly divided,”²³ wrongly decided,²⁴ issued only because the Supreme Court

13. Paulsen, *supra* note 1, at 1833.

14. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 7 n.10 (2001) (citing Paulsen as the *only* academic author to endorse strong-form departmentalism). References to his own work, it turns out, outnumber even citations to the Constitution.

15. See, e.g., Paulsen, *supra* note 1, at 1787 n.56, 1802 n.107, 1835 n.198. No effort is made, thus, to engage the contrary analysis and arguments offered by international law scholars, or even to distinguish their work.

16. But see, e.g., T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91, 97–98 (2004); Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT’L L. 43, 47 (2004); Kramer, *supra* note 14, at 7.

17. See, e.g., Paulsen, *supra* note 1, at 1787 n.56, 1802 n.107, 1835 n.198.

18. 548 U.S. 331 (2006).

19. Paulsen, *supra* note 1, at 1796.

20. 129 S. Ct. 360 (2008).

21. See Paulsen, *supra* note 1, at 1796.

22. *Id.* at 1834 (describing the decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)).

23. *Id.* at 1835 (describing the decision in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006)); see also *id.* at 1790 (highlighting that *American Insurance Ass’n v. Garamendi*, 539 U.S. 396 (2003), was “decided by a narrow 5–4 majority”); *id.* at 1827 n.171 (“The decision [in *Hamdan v.*

had no other choice,²⁵ or—in the most memorable case—best ignored, “so as to save the Court from the embarrassment of contradicting the Constitution”²⁶

I do not mean to suggest that legal scholars should limit themselves to a doctrinal approach to the Court, in which the Constitution, international law, and law generally are simply what the Court says they are. But as scholars trying to find, rather than promote, answers, we do well to be careful in our picking and choosing. A close vote is a close vote, whether it is for me or against me. Likewise, a binding decision is final regardless of whether it supports or contradicts my proposition. If *Sanchez-Llamas v. Oregon*²⁷ and *Medellín v. Texas*²⁸ tell us something important about the subject at hand, then so do *The Paquete Habana*,²⁹ *Charming Betsy*,³⁰ *Dames & Moore*,³¹ *Garamendi*,³² *Hamdan*,³³ *Boumediene*,³⁴ and other decisions, all of which Professor Paulsen is

Rumsfeld, 548 U.S. 557 (2006)] was five-to-three; the dissent was vigorous on this and other points.”). Reading Professor Paulsen’s account of the divided decisions in *Sanchez-Llamas* and *Medellín*, on the other hand, one might have thought they were unanimous. See *id.* at 1796 (describing *Sanchez-Llamas* as “forthright” and “unabashed” in its holding, and *Medellín* as “rightly” decided).

24. This apparently includes the complete line of War on Terror cases, which were of lower quality, Paulsen suggests, than the so-called “torture memos,” see Paulsen, *supra* note 1, at 1826, as well as the Court’s entire political question jurisprudence, *id.* at 1784 n.53, 1817–18, its decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), see Paulsen, *supra* note 1, at 1809 n.123, and the “manifestly unsound” and “thoroughly unpersuasive” decision in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), Paulsen, *supra* note 1, at 1789.
25. See Paulsen, *supra* note 1, at 1790 (suggesting that for *Dames & Moore v. Regan*, 453 U.S. 654 (1981), the “precedential weight is, perhaps, limited by the seeming necessity that the Court reach the result it did”).
26. *Id.* at 1802–03 (dismissing the Court’s longstanding decisions in *The Paquete Habana*, 175 U.S. 677 (1900), and *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804)). Paulsen’s critique of *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), might well be read to exemplify such prudential disregard of otherwise relevant Supreme Court precedent. Professor Paulsen thus seeks to emphasize the limited holding in *Hamdan* with the suggestion that it would be “a different matter” if Congress had itself authorized military commissions. And this, he tells us triumphantly, “is precisely what Congress (and President Bush) did, with the enactment of the MCA.” Paulsen, *supra* note 1, at 1835. What Professor Paulsen neglects to mention is that the Supreme Court apparently does not agree with him that this was “a different matter”—at least if its subsequent decision in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), is to be believed.
27. 548 U.S. 331 (2006).
28. 129 S. Ct. 360 (2008).
29. 175 U.S. 677 (1900).
30. 6 U.S. (2 Cranch) 64 (1804).
31. 453 U.S. 654 (1981).
32. 539 U.S. 396 (2003).
33. 548 U.S. 557 (2006).

too quick—and determined—to dismiss. One cannot claim to offer a positive account of constitutional practice, ultimately, if one insists on ignoring actual constitutional practice.

II. THE NATURE OF CONSTRAINT: LEGAL AND POLITICAL

Rather than a minor quibble with Professor Paulsen’s style, his misuse of authority deserves emphasis, given the pair of misunderstandings of the nature of law that arise from it. The first of these—as described at the outset—is his notion that law is not law, but policy, where it can be undone. Seemingly binding international law norms are not law, Professor Paulsen seems to believe, because they can be displaced by subsequent decisions of Congress, the President, and the courts.³⁵ But can this possibly be true?

Surely not, since the very same can be said of most *domestic* law as well.³⁶ Congress can displace prior legislation, as well as executive orders, agency regulations, and even some decisions of the Supreme Court.³⁷ The President—especially one empowered along the lines Professor Paulsen would favor³⁸—can displace prior executive orders, some agency regulations, and perhaps much more. The Supreme Court can invalidate any of the above.³⁹ And if we embrace Professor Paulsen’s strong-form departmentalism, Congress and the President can thereafter choose to ignore the offending decision of the Court.⁴⁰ By

34. 128 S. Ct. 2229 (2008).

35. See Paulsen, *supra* note 1, at 1786-88.

36. As Professors Goldsmith and Levinson have recently suggested, one might even see international law and constitutional law to have relatively more in common than do constitutional law and the rest of domestic law. See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1794 (2009).

37. See, e.g., Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker*, 6 J. PUB. L. 279, 289-91 (1957) (identifying the practice of congressional reversal of Supreme Court decisions).

38. See, e.g., Michael Stokes Paulsen, *The Constitution of Necessity*, 79 NOTRE DAME L. REV. 1257, 1258 (2004) [hereinafter Paulsen, *The Constitution of Necessity*] (reading the Presidential Oath Clause to create a “duty to preserve the constitutional order of the United States,” which has “priority over . . . specific provisions of the constitutional document”); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217, 221, 223 (1994) [hereinafter Paulsen, *The Most Dangerous Branch*] (suggesting that the executive branch has independent authority “to say what the law is,” and consequently “has the last word on most controversies”).

39. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

40. See, e.g., Paulsen, *supra* note 1, at 1817; see also Paulsen, *The Most Dangerous Branch*, *supra* note 38, at 219 (describing strong-form departmentalism in definition of executive power).

Professor Paulsen's measure, then, the U.S. domestic legal system turns out to be quite lawless.⁴¹

But we are not lawless. Professor Paulsen, instead, misunderstands what law is. Or, in his own terms, what makes something a "political" versus "legal" constraint.⁴² He is at least partially right, of course, to suggest that the international law obligations of the United States can be displaced by subsequent domestic legislation.⁴³ But a constraint does not cease to be so simply because it can be undone. In the first order, this is true as a conceptual matter. That "I *can* repeal the law" does not mean that "it fails to bind me even when I have not *yet* repealed it. Hobbes is wrong that, if you can free yourself at will, then you are already free . . ." ⁴⁴ It is no less true as a practical matter. The constraints of international law cannot be undone *at will*. Rather, to undo an obligation under international law—like one under domestic law—some threshold standard must be met and some prescribed process followed.⁴⁵ By contrast with mere policy, it cannot be undone by fiat. *As law*, it can only be undone *by law*.

No claim of exclusivity or equivalence need follow. Certain "laws" may enjoy a *political* force equal to their *legal* force. The nature of their constraint, as such, may be both political and legal. The political implications of the repeal of domestic law, meanwhile, may well be greater—even *far* greater—than any rejection of international law. Yet this is not less true across divergent domestic settings: amendments to the U.S. Constitution are subject to far more stringent political oversight than are zoning variances in the City of New Haven. Both zoning rules and the Constitution remain *legal* constraints, however, no less than international law.

41. At the extreme, if Paulsen were correct, the notion of *state* law would be almost entirely a non-sequitur, given the still-expansive scope of Congress' Commerce Clause authority. See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 125 n.61 (2008) (noting the persistent breadth of congressional power, even after *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000)).

42. See Paulsen, *supra* note 1, at 1770.

43. See Carlos Manuel Vázquez, *Laughing at Treaties*, 99 COLUM. L. REV. 2154, 2189 (1999).

44. G.A. Cohen, *Reason, Humanity, and the Moral Law*, in CHRISTINE M. KORSGAARD ET AL., THE SOURCES OF NORMATIVITY 167, 170 (Onora O'Neill ed., 1996); see also Christine Korsgaard, *Reply*, in CHRISTINE M. KORSGAARD ET AL., THE SOURCES OF NORMATIVITY 219, 234 (Onora O'Neill ed., 1996) (noting the need for even the sovereign to change his or her mind in order to change the law, and inability to change one's mind without a reason).

45. These standards and processes are what Paulsen himself outlines, in successively describing the Constitution's provision for congressional, presidential, and judicial displacement of international law. See, e.g., Paulsen, *supra* note 1, at 1776-85, 1816-22.

III. THERE CAN BE ONLY ONE

That international law—like most law—can be displaced by subsequent domestic initiative, then, does not make it policy rather than law. Professor Paulsen’s assertion to the contrary, however, turns out to be even more problematic than the foregoing suggests. For even if we assume, *arguendo*, that international law is not law in *any* domestic sense, it would still be *law*.

Here we find the essay’s second misconception of the nature of law. This begins with Professor Paulsen’s embrace of an Austinian notion of law as limited to the coercive commands of a singular sovereign. Further, in Professor Paulsen’s account, a rule cannot be law *for* the United States, unless it is law *of* the United States. As above, however, these conclusions do not survive close scrutiny.

International law constitutes its own system of rules and processes, to which the United States may be obliged and held liable. Consider the case of the World Trade Organization (WTO), which Professor Paulsen assiduously avoids.⁴⁶ The WTO is founded on a highly detailed set of rules, to which the United States has committed itself. Further, it offers a mechanism by which adherence to those rules can be tested, including trial-level proceedings and subsequent appellate review. At the end of this process, potentially costly sanctions can be—and have been—imposed on parties found to be out of compliance, including the United States.

Professor Paulsen would have us regard these sanctions as “illusory,” as mere “policy and politics.”⁴⁷ But why? At least in part, one might surmise, because of the lack of a WTO infantry charged to implement its sanctions. Such narrowly positivist accounts of the nature of law have largely been abandoned, however, even in domestic settings.⁴⁸ Law, we now understand, consists of far more than what the army will enforce.⁴⁹

Overlooking all this, Professor Paulsen insists that “[t]he question of international law compliance is one of international politics and international

46. See DAVID PALMETER & PETROS C. MAVROIDIS, *DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION* 13-16 (2d ed. 2004); cf. John H. Jackson, *The WTO Dispute Settlement Understanding—Misunderstandings on the Nature of Legal Obligation*, 91 AM. J. INT’L L. 60, 62-64 (1997) (describing the binding nature of WTO commitments).

47. See Paulsen, *supra* note 1, at 1842.

48. Cf. Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275, 2287 (2003) (noting the irony in the critique of international law as “a matter of social norms, not law,” in light of the growing appreciation of the power of social norms in domestic settings).

49. See Goldsmith & Levinson, *supra* note 36, at 1822-23.

relations, not one of binding U.S. law.”⁵⁰ But this misses the obvious middle ground. Even if international law were not binding U.S. law, neither would it be “international politics and international relations” alone. Rather, it would be *international law*.⁵¹

Professor Paulsen’s error, however, goes beyond a *sub rosa* attempt to resuscitate the long-moribund claim that international law is not law, for lack of coercive force behind it.⁵² He might be right to cast international law as mere policy for the United States, if the Constitution could be read to assert a claim of *exclusivity* in its statement of “what the law is.”⁵³ Professor Paulsen, in fact, might be understood to endorse just this view:

While international law may prescribe that some exercises of the decision of the United States to engage in war are unlawful within the regime of international law, such restrictions may not interfere with Congress’s (and the President’s) constitutional powers. They are, in U.S. domestic constitutional law terms, *unconstitutional* purported restrictions on U.S. actors.⁵⁴

This reading, however, erroneously equates a lack of constitutional provision for some constraint with that constraint being *unconstitutional*. That

50. Paulsen, *supra* note 1, at 1823. At various points, Professor Paulsen seems to recognize—if only fleetingly—the status of international law as a distinct system of law. *See, e.g., id.* at 1774, 1801. Generally speaking, in fact, much of the difficulty with Professor Paulsen’s essay lies in its ambiguous—and often inconsistent—use of terms. *Compare id.* at 1774 (identifying treaties that Paulsen considers to be “part of supreme federal law”), *with id.* at 1775-76 (declaring that a treaty obligation “is of essentially no consequence” in terms of limiting the scope of military actions).
51. Professor Paulsen’s resistance to the possibility of multiple sources of law also places him in conflict with a growing body of work, in both domestic and transnational settings, that recognizes the reality—and perhaps even the inevitability—of pluralism in the sources of law. *See, e.g.,* Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2095-96 (2004); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1230-31 (2007).
52. This debate has long been resolved in international law’s favor. *See* DAVID J. BEDERMAN, *THE SPIRIT OF INTERNATIONAL LAW* 25-26 (2002); Goldsmith & Levinson, *supra* note 36, at 1822-23; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2608-24 (1997).
53. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). One might think of such a reading of the Constitution as embracing a kind of “field preemption,” *see* Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000), in which the very mention of an issue by the Constitution precludes other legal authority from speaking to it.
54. Paulsen, *supra* note 1, at 1823 (emphasis added); *see also id.* at 1770 (stating that international law “cannot be binding law except to the extent provided in the U.S. Constitution”); *id.* at 1771 (suggesting the potentially “unconstitutional” character of international law); *cf. id.* at 1775 n.33 (positing constitutional limitations on the scope of the Treaty Clause).

the Constitution allows Congress or the President to do something thus need not be understood as preventing some other regime from precluding that very conduct.⁵⁵ And similarly, that the Constitution states that the President enjoys certain powers and is precluded from doing certain things is not the same thing as a statement that he or she *must* do those things or may do anything else he or she chooses. If it were, then nothing else—international law included—could limit the President’s powers. Or more precisely, no government official could—consistent with his or her constitutional obligations—embrace such a limitation. The Constitution, however, does not state anything of the sort.

Congress constrains presidential power all the time, in ways that go well beyond the text of Article II.⁵⁶ Justice Jackson’s tripartite scheme in his *Youngstown Sheet & Tube Co. v. Sawyer* concurrence might even be read to endorse as much, with its recognition that presidential authority expands and contracts in ways beyond the bare outline of executive power offered in Article II, as Congress variously acts and fails to act.⁵⁷ Broadly, one might plausibly see the contrast between the “formidable list of enumerated powers under Article I” and the “very general language” of executive power in Article II⁵⁸ to suggest a reading of the latter as something less than a complete and exclusive statement of the parameters of presidential power.⁵⁹

I do not, to be clear, mean to suggest that the Constitution can *never* be understood to offer an exclusive statement of applicable law. The maxim of

55. To appreciate as much, consider Professor Paulsen’s blunt claim that “a treaty may not declare war in Congress’s stead *or* bar Congress from declaring war.” Paulsen, *supra* note 1, at 1775 n.33 (emphasis added). Even here, the assertion of constitutional exclusivity turns out to be tenuous. Of more than one hundred occasions for armed conflicts since the founding of the United States, Congress has only declared war as to five. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 12 (2005). As a matter of constitutional practice, then, the Constitution’s provision for congressional authorization has not functioned as an *exclusive* statement of the means by which the United States may go to war.

56. *Cf.* Paulsen, *supra* note 1, at 1767 (noting the potential for legislative powers to limit executive power). The War Powers Act might be cited as a fairly extreme example. See War Powers Resolution, 50 U.S.C. §§ 1541-1548 (2006). Professor Paulsen might object that such limits are themselves unconstitutional constraints on presidential power. If that is the critical point, however, then he should acknowledge that his essay is— as it often seems to be—about the separation of powers, rather than international law. See, *e.g.*, Paulsen, *supra* note 1, at 1785-86, 1840.

57. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

58. Craig Green, *Repressing Erie’s Myth*, 96 CAL. L. REV. 595, 657 (2008).

59. The historical context of the Constitution’s drafting might also be seen to support such a reading, with a nonexclusive design most capable of minimizing potential conflict with the global powers in whose sights the United States remained at the time of its Founding. *Cf.* Daniel J. Hulsebosch, *The Founders’ Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS U. L.J. 209, 209-10 (2008) (linking constitutional design to geopolitical constraints on the United States at the time of its founding).

expressio unius est exclusio alterius, which teaches that the express mention of one or more things in a class excludes other things of that class, may support this result in some settings, as perhaps with the statement of necessary qualifications for service in Congress.⁶⁰ Professor Paulsen fails to demonstrate, however, why this should be true as to the Constitution's provision for Congress's declaration of war and the President's pursuit of it. Given the lack of any enumerated constitutional "qualifications" of those powers, in fact, one might plausibly favor just the opposite conclusion.⁶¹

This is important, because it means that there is nothing to prevent the President and the Senate from agreeing to at least some international constraints on congressional or presidential power. Surely there is some limit to how far they might go down that path. Presumably, they could not agree to allow "faceless bureaucrats" in Geneva to dissolve the presidency at will. But such slippery-slope claims generate more heat than light. The question raised by Professor Paulsen's essay is whether the President and the Senate may agree—as they did with the Geneva Conventions, the Convention Against Torture, and elsewhere—to limit the conduct of the President in his or her pursuit of congressionally authorized war.⁶² That the Constitution itself does not itself impose such limits, I would argue, does nothing to suggest that the political branches are constitutionally disabled from advancing the national interest in that way.⁶³

CONCLUSION

Professor Paulsen's claim is not, to be clear, that international law functions differently—or enjoys some lesser stature—than domestic law. Nor does he simply suggest that international law stands on less stable political ground and is hence more susceptible to repeal. Each of these propositions might warrant

60. See U.S. CONST. art. I, § 2, cl. 2.

61. Ultimately, such an analysis would necessarily depend on the nature of both the operative constitutional provision—its level of detail, demarcation of relevant limits, and the like—and the relevant international constraint.

62. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 2, § 1, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (entered into force June 26, 1987); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

63. In the final analysis, the issue at hand might be seen as a question of what constitutes a *conflict* between the Constitution and international law. Professor Paulsen emphasizes that where there is a conflict, the Constitution must prevail. See Paulsen, *supra* note 1, at 1765, 1772. Few are likely to disagree. The critical question is when there is—and when there is not—a conflict.

support—even among the “clique” of international law scholars.⁶⁴ The insight that Professor Paulsen hopes to advance, however, is rather more extreme. International law does not mean *less* than domestic law; at least as law, it means *nothing*. No authority beyond his own certainty in this proposition, however—be it the Constitution, Supreme Court precedent, congressional legislation, or executive decree—can get him there. As Professor Paulsen points out, there is a fog—but it is not in international law.

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64. See Paulsen, *supra* note 1, at 1764.