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The Prospects for the Peaceful Co-existence of Constitutional and International Law

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JULIAN KU

The Prospects for the Peaceful Co-Existence of Constitutional and International Law

There is much to admire in Michael Stokes Paulsen's elegant and bold polemic on the Constitution and international law. Paulsen deserves substantial praise both for offering a clear and accessible theory of the Constitution and international law, and for then bravely taking that theory to its logical though controversial conclusions. He rightly emphasizes that the Constitution is supreme over international law and that the political branches, Congress, and the President, have an independent and dominant role in the interpretation of international law's effect on the United States. He also properly criticizes those who have used their interpretations of international law to support highly politicized attacks on the Bush Administration's war on terrorism policies.

Although I warmly welcome Paulsen's articulate and persuasive voice to (my favored side of) the ongoing debate over international law and the U.S. Constitution, we are not in complete agreement. It is not surprising that Paulsen, as a leading scholar of constitutional law, concerns himself only with the classic questions of constitutional law and is largely unconcerned with the impact of his analysis on the international legal system. Even so, I find it hard to understand this almost gleeful dismissal of international law, which is worth quoting at length:

The force of international law is thus largely an illusion. Once the fog has lifted, international law as it concerns the United States—treaties of the United States, executive agreements, customary international law norms and practices—can be seen as largely a matter of international politics and policy, not binding “law,” at least not in the sense in which law is usually understood. It is international relations or international politics

dressed up as law. It may be highly relevant in that sense—that is, as a rhetorical, political trope—but it is essentially irrelevant as law. To misquote Clausewitz once again, international law is simply the continuation of international politics by other means.¹

In this Response, I will explain how one can accept Paulsen's constitutional arguments while continuing to believe that international law is more than an illusion for the United States. I will begin by situating Paulsen's argument within the broader intellectual debate over the relationship between international law and the U.S. Constitution. I will then argue that although his constitutional arguments are sound, they do not necessarily lead to the conclusion that international law has no legal force. To the contrary, I will argue that where the political branches clearly (and pursuant to their constitutional powers and following the proper constitutional processes) decide to bind the United States to follow rules of international law as law, the United States is bound as deeply as it is bound to any other nonconstitutional legal norm.

I will then conclude by considering perhaps the most powerful example of how international law can be transformed into a binding legal rule in the U.S. system that is arguably more powerful than other forms of U.S. nonconstitutional law: international delegations of legal authority to international organizations. Like Paulsen, I am troubled by the implications of such delegations for constitutional law. But rather than simply reject such delegations as unconstitutional, I offer a more flexible approach to accommodate the political branch's desire to delegate this authority while maintaining constitutional legitimacy and accountability.

I. WHERE PAULSEN IS RIGHT

As Paulsen acknowledges, his Essay does not offer a radically new point of view. Almost all scholars acknowledge Paulsen's fundamental premise of constitutional supremacy over international law.² For this reason, the vast

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1. Michael Stokes Paulsen, *The Constitutional Power To Interpret International Law*, 118 YALE L.J. 1762, 1804 (2009).
 2. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2) & cmt. b (1987); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 187 (2d ed., Clarendon Press 1996) (1972); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 393 (1998). Cf. Peter J. Spiro, *Treaties, International Law, and Constitutional Rights*, 55 STAN. L. REV. 1999 (2003) (acknowledging the dominance of the constitutional supremacy view but offering a theory for rethinking this approach in the context of individual rights). But see FRANCISCO FORREST MARTIN, *THE CONSTITUTION AS TREATY: THE INTERNATIONAL LEGAL CONSTRUCTIONALIST APPROACH TO*

majority of commentators that have addressed similar questions have, like Paulsen, analyzed these issues on purely constitutional grounds.

In this way, Paulsen's argument slides comfortably into the longstanding and straightforward separation of powers debate over which branch of the federal government should have the power to adopt binding interpretations of international law. Most of the "internationalists" that Paulsen criticizes could also be called "judicialists" because they typically support a robust role for *domestic* courts in the interpretation of international law.³ By the same token, Paulsen's "constitutionalist" views could easily be adopted by those scholars, like myself, who support an independent and dominant role for the political branches of the federal government in the interpretation of international law.⁴

Thus, I agree with Paulsen that a rule of international law should generally have no legal force in the U.S. legal system unless that rule of international law has been independently adopted by one or both of the political branches of the U.S. government.⁵ This means that a treaty has no legal force in the U.S. system unless the President and Senate have indicated their intent to make a treaty self-executing or unless Congress implements the treaty's provision by statute.⁶ Similarly, I also agree with Paulsen that a rule of customary international law has no domestic legal force unless Congress adopts the rule by statute pursuant to one of its delegated constitutional powers. The President can also declare adherence to or interpret a rule of customary international law on matters within his constitutional purview. In some cases, federal and state courts may also interpret a rule of customary international law as long as they have done so consistent with their jurisdiction under the Constitution and as long as their interpretations do not conflict with interpretations adopted by Congress or by the President on matters within his exclusive constitutional authority.⁷

THE U.S. CONSTITUTION (2007) (arguing that the U.S. Constitution has the status of a treaty among the states, and must therefore be interpreted consistent with international law).

3. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).
4. See, e.g., Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153; John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739 (2009).
5. John Yoo and I have argued that, in some circumstances, states may adopt rules of customary international law subject to preemption by the federal government's political branches. See Ku & Yoo, *supra* note 4, at 199-219.
6. See Julian G. Ku, *Treaties as Laws: A Defense of the Last in Time Rule for Treaties and Federal Statutes*, 80 IND. L.J. 319, 327 (2005).
7. See Ku & Yoo, *supra* note 4, at 199-219.

As John Yoo and I have argued elsewhere,⁸ there are sound reasons to favor an approach that gives the political branches of the U.S. government the preeminent authority to interpret and control the impact of international law, whether treaties or customary international law, within the U.S. legal system. Not only is political branch dominance in this area the most natural interpretation of the Constitution's text and structure,⁹ but these branches also possess substantial functional advantages over federal courts in the interpretation of international law.¹⁰ These functional advantages further strengthen the case for political branch control over the interpretation or incorporation of international law.

II. WHERE PAULSEN IS WRONG

Supporting a dominant role for political branches in the interpretation of international law does not imply support for international law as merely a species of policymaking. Indeed, the political branches are the primary reason that international law is more than just an illusion. For better or for worse, the political branches of the U.S. government depend and rely on international law as "law" to pursue various important policies on behalf of the United States.

Such policies encompass a very broad range of topics, including the harmonization of private contracts for sale of goods;¹¹ the enforcement of private and public arbitration awards;¹² the terms of international trade in goods and services;¹³ the extradition of criminal suspects;¹⁴ the adoption of children;¹⁵ the protection of diplomats and consular officials;¹⁶ the use and

8. See Ku & Yoo, *supra* note 4, at 181-99; see also Julian G. Ku, *International Delegations and the New World Court Order*, 81 WASH. L. REV. 1, 65-69 (2006).

9. See Michael D. Ramsey, *THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS* (2007).

10. See Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181-99.

11. See, e.g., United Nations Convention on Contracts for the International Sale of Goods, *concluded* Apr. 11, 1980, 1489 U.N.T.S. 3.

12. See, e.g., Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3.

13. See, e.g., Marrakesh Agreement Establishing the World Trade Organization, *concluded* Apr. 15, 1994, 1867 U.N.T.S. 3; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289 (1993).

14. See, e.g., Treaty of Extradition, U.S.-Braz., Jan. 13, 1961-June 18, 1962, 15 U.S.T. 2093; T.I.A.S. 5691; 532 U.N.T.S. 198 (Dec. 17, 1964).

15. See, e.g., Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, *concluded* May 29, 1993, 1870 U.N.T.S. 167.

limitation of chemical, nuclear, and biological weapons;¹⁷ the protection of human rights;¹⁸ and climate change and environmental protection.¹⁹ The list of topics is nearly endless.

Not only does the U.S. government wield international law as a tool of policy, but private parties often rely on international law as law to shape and organize their activities. Private parties contracting for the sale of goods or enforcing their arbitral judgments are not likely to be amused when told that they are acting pursuant to merely illusory norms.

In other words, the political branches, the President and Congress, often *need* and *want* international law to be more like law than politics. For this reason, the President and Congress often take actions to legalize U.S. legal obligations under international law. The President can, for instance, declare U.S. adherence to particular norms of international law and he can direct lower executive branch officials to adhere to such norms.²⁰ Congress can enact statutes incorporating international law norms into U.S. law.

To be sure, the President can revoke or alter his interpretations of international law, and Congress can repeal prior statutes or treaties. This is a necessary power that, as Paulsen rightly points out, flows from the premise of constitutional supremacy over international law. But the fact that the President or Congress can, pursuant to particular constitutional processes, repeal or alter international law obligations does not mean those obligations are not “law.” Any kind of federal regulation or legislation is just as vulnerable to repeal or alteration pursuant to the same constitutional processes. But that does not mean we should declare those legal norms illusory. To put it another way, if international law is illusory within the U.S. system, so is every other kind of law that is not constitutional law.

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16. See, e.g., Vienna Convention on Diplomatic Relations, *done* Apr. 18, 1961, 22 U.S.T. 3227, T.I.A.S. 7502, 500 U.N.T.S. 95.
 17. See, e.g., Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *done* Jan. 13, 1993, 32 I.L.M. 800; Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161. See generally Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *done* Mar. 26, 1975, 26 U.S.T. 583, 1015 U.N.T.S. 163.
 18. See, e.g., International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.
 19. See, e.g., Kyoto Protocol to the United Nations Framework Convention on Climate Change, *adopted* Dec. 10, 1997, 2303 U.N.T.S. 148.
 20. Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf, Proclamation No. 2667, 3 C.F.R. 39 (1945 Supp.); Policy of the United States with Respect to Coastal Fisheries in Certain Areas of the High Seas, Proclamation No. 2668, 3 C.F.R. 40 (1945 Supp.).

III. THE PROBLEM OF DELEGATION

Far from devaluing international law, the political branches sometimes seek to raise international law “above” or at least “outside” of the typical constraints imposed on domestic nonconstitutional law. The problem here is not that international law is not enough like law, but that the political branches favor “legalizing” international law too much. These institutions may be authorized to issue “legal” rulings to which the U.S. government is bound (as a matter of domestic law) to follow.

The Supreme Court recently considered an example of such a delegation in *Medellín v. Texas*.²¹ This case involved a petition by Medellín, a Mexican national facing execution by the State of Texas, and the effect of an interpretation of the Vienna Convention on Consular Relations (“VCCR”) by the International Court of Justice (ICJ). According to Medellín, the U.S. Supreme Court was obliged to follow the ICJ’s interpretation of the VCCR because of two separate treaty provisions. Medellín’s theory of the case was that the political branches, the President and the Senate acting together, had delegated the power to interpret U.S. obligations under a treaty (the VCCR) to the ICJ. Once that delegation was made, the Court and other judicial entities were required to treat the ICJ’s interpretations as binding and authoritative. In *Medellín* itself, the Supreme Court avoided the delegation issue by interpreting the relevant treaties to be “non-self-executing.”²² That is to say, the Court refused to find that the intent of the political branches was in fact to make such a delegation. Indeed, the Court appeared to require a clear statement of intent before it would recognize such a delegation.²³ But as the Court itself acknowledged, there are treaties where the intent of the political branches to make similar delegations is crystal clear, or at least clearer than in the Optional Protocol to the Vienna Convention on Consular Relations and the UN Charter. Most prominently, the Court cited²⁴ Article 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID),²⁵ which requires the United States to recognize an ICSID award “as binding and [to] enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.” Congress put to rest any doubt whether Article 54 is a sufficiently clear

21. 128 S. Ct. 1346 (2008).

22. *Id.* at 1356 n.2 (2008).

23. Julian G. Ku, *Medellín’s Clear Statement Rule: A Solution for International Delegations*, 77 *FORDHAM L. REV.* 609 (2008).

24. 128 S. Ct. 1373 (2008).

25. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

statement of intent by enacting a statute obligating U.S. courts to give ICSID awards “the same full faith and credit as if the award” was a judgment of a state of the United States.²⁶

ICSID demonstrates not only how international law can attain the status of law, but also how, with the assent of the political branches, it can acquire a status different from, and potentially more independent than, other forms of domestic law. ICSID requires, essentially, that U.S. courts enforce the judgment of an international arbitral tribunal without any independent judicial review of the merits of that judgment or that tribunal’s interpretation of the ICSID treaty or any other related treaty. Not surprisingly, Paulsen’s constitutionalist analysis renders short work of such delegations, which violate “the Constitution’s exclusive assignment of U.S. governmental powers to Article I, Article II, and Article III constitutional actors.”²⁷

Although straightforward, Paulsen’s analysis is hardly satisfying given the practical need for deeper levels of U.S. cooperation with international institutions and the sheer lack of textual or historical precedent on this question. In prior work,²⁸ I have argued that courts should subject such delegations to a “super-strong” clear statement rule to ensure that the delegation was intended. But where the statement was “super-clear,”²⁹ as it is in the case of ICSID, I am inclined to find such delegations constitutional as long as such delegations also satisfy the nondelegation doctrine.

I depart from Paulsen not because I value international law and mechanisms for international cooperation more than he does. Rather, it is because I believe that the political branches should enjoy substantial deference in their judgments about how to use international law to pursue U.S. policies. Although there are many circumstances where international law should not act as a serious constraint on U.S. government activities, I believe it can act as a constraint *where the political branches want it to be a constraint and follow the proper constitutional processes to make it such a constraint*. This understanding, I believe, is most consonant with the Constitution’s text, structure, and design.

26. 22 U.S.C. § 1650a(a) (2006).

27. Paulsen, *supra* note 1, at 1805-06 n.113 (2009).

28. See Julian G. Ku, *International Delegations and the New World Court Order*, *supra* note 8, at 59-66 (2006).

29. See *id.* at 51-52.

CONCLUSION

Paulsen's eloquent entry into the debate on the Constitution and international law is a valuable reminder that the Constitution is the supreme touchstone of the status of international law, not international law itself or the needs of the international system. Yet obeisance to the Constitution does not render international law a meaningless illusion. Rather, the Constitution allocates to Congress and the President the power to transform international law into binding domestic law that is as binding as any other kind of U.S. law. For better *and* for worse, then, international law will continue its co-existence with constitutional law as an important form of law for the United States.

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