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The Constitutional Right to a Treaty Preemption Defense

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I. INTRODUCTION

THE Constitution includes several provisions specifically designed to protect criminal defendants. For example, the Fourth Amendment prohibits "unreasonable searches and seizures,"[1] the Sixth Amendment guarantees that criminal defendants have a right to legal representation,[2] and the Eighth Amendment prohibits cruel and unusual punishments.[3] The Constitution's Founders recognized that state power is at its apex when the state threatens individuals with criminal sanctions.[4] Accordingly, they adopted special constitutional rules to protect "the individual defendant from the awesome power of the State."[5]

The Due Process Clause provides critical protection for criminal defendants; it stipulates that no State shall "deprive any person of life, liberty, or property, without due process of law."[6] The Due Process Clause guarantees all criminal defendants the right to defend themselves against criminal charges filed by the state.[7] But how far does that right extend? In this article I contend that, for a criminal defendant in state court, the right to mount a defense includes a right to challenge the validity of the state law that authorizes criminal sanctions. Moreover, a criminal defendant who challenges the validity of a state penal law has a constitutional right to invoke any federal law, including federal treaty law, to support his argument that the state law is invalid. Finally, a state court may not impose criminal sanctions on such a defendant without first deciding that the state law at issue is valid. In short, a criminal defendant in state court has an

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1. U.S. CONST. amend. IV.
2. *Id.* amend. VI.
3. *Id.* amend. VIII.
4. *See, e.g.*, THE FEDERALIST NO. 83 (Alexander Hamilton).
5. Johnson v. Louisiana, 406 U.S. 399, 399-400 (1972) (Marshall, J., dissenting).
6. U.S. CONST. amend. XIV.
7. *Id.*

individual constitutional right, rooted in the Due Process Clause, to raise a treaty-based federal preemption defense. This right applies to any treaty provision that has the force of preemptive federal law, even if the relevant treaty does not itself create individual rights.[8]

If this interpretation of the Due Process Clause is correct, it calls into question the constitutional validity of three types of provisions that the United States has adopted in the past two decades. First, the United States has concluded several free-trade agreements with implementing statutes that impose significant restrictions on the procedural rights of criminal defendants.[9] For example, two separate provisions of the North American Free Trade Agreement (NAFTA) Implementation Act curtail the rights of criminal defendants. First, the Act states, "No person other than the United States ... shall have any cause of action *or defense* under the Agreement or by virtue of Congressional approval thereof."[10] Second, the Act states, "No State law ... may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid."[11] Together, these two provisions appear to preclude a criminal defendant in state court from challenging the validity of a state criminal law on the grounds that NAFTA preempts it. The United States has concluded nine other free-trade agreements in the past decade with implementing statutes containing conditions virtually identical to the NAFTA provisions.[12] The implementing legislation for the agreement creating the World Trade Organization contains similar provisions.[13] There are various hypothetical cases in which a private company or individual might wish to raise a federal preemption defense based on one of these free-trade agreements. If such defenses are barred, a state government could theoretically impose criminal sanctions on a person for violating a state law that is invalid (because it is preempted by a free-trade agreement). Thus, it is important to ascertain whether the statutory limits on federal preemption defenses are constitutionally valid.

Second, in fall 2008, the Senate consented to ratification of eight treaties subject to a declaration that the treaties do "not confer private rights enforceable

8. *See infra* Part IV (defining more precisely the scope of this individual right and elaborating the supporting constitutional arguments).

9. *See, e.g.*, North American Free Trade Agreement Implementation Act, 19 U.S.C. §§ 3301-3473 (2006).

10. *Id.* § 3312(c) (emphasis added).

11. *Id.* § 3312(b)(2).

12. These include bilateral agreements with Australia, Bahrain, Chile, Jordan, Morocco, Oman, Peru, and Singapore, as well as a multilateral agreement with the Dominican Republic and Central American states. *See id.* § 4012 (implementing legislation for agreement with Dominican Republic and Central American states); *id.* § 2112 (implementing legislation for agreement with Jordan); 19 U.S.C. § 3805 (implementing legislation for agreements with Australia, Bahrain, Chile, Morocco, Oman, Peru, and Singapore).

13. *See id.* § 3512.

in United States courts."[14] These declarations are ambiguous. One possible interpretation is that the declarations are functionally similar to the statutory conditions attached to free-trade agreements. In that case, any constitutional defects in the free-trade legislation might also apply to these declarations, subject to one caveat. Defenses based on these eight treaties are more likely to be directed against federal government agents, rather than state or local government agents. Assuming that there is a constitutional right to raise a treaty-based preemption defense in a state criminal trial, it does not necessarily follow that there is a similar right to raise a treaty-based defense to federal criminal charges.[15]

Third, the United States ratified three major international human rights treaties in the early 1990s: the International Covenant on Civil and Political Rights (ICCPR),[16] the Convention against Racial Discrimination,[17] and the Convention against Torture.[18] For all three treaties, the United States adopted declarations specifying that the treaties are "not self-executing" (NSE declarations).[19] The question of how best to interpret these NSE declarations has been a subject of considerable scholarly debate.[20] Some scholars have suggested that the NSE declarations are functionally equivalent to the statutory restrictions in legislation implementing free-trade agreements.[21] If this assertion is correct, and if those statutory restrictions are unconstitutional insofar as they purport to preclude a defendant in a state criminal trial from raising a federal preemption defense, then the NSE declarations would also be vulnerable to a constitutional

14. *See* 110 CONG. REC. S9332-33 (daily ed. Sept. 23, 2008) (Senate resolution of ratification for Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons); *id.* at S9333 (daily ed. Sept. 23, 2008) (Senate resolution of ratification for Protocol on Blinding Laser Weapons); *id.* (Senate resolution of ratification for Amendment to Article 1 of Convention on Conventional Weapons); *id.* at S9555 (daily ed. Sept. 25, 2008) (Senate resolution of ratification for Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict); *id.* (Senate resolution of ratification for Amendment to the Convention on the Physical Protection of Nuclear Material); *id.* at S9555-56 (Senate resolution of ratification for the International Convention for the Suppression of Acts of Nuclear Terrorism); *id.* at S9556 (Senate resolution of ratification for the Protocol to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf); *id.* at S9850 (daily ed. Sept. 26, 2008) (Senate resolution of ratification for the Protocol on Explosive Remnants of War).

15. *See* Carlos M. Vazquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: A Critical Guide*, 101 AM. J. INT'L L. 73, 82-87 (2007) (contending that defendants in trials before military commissions have a constitutional right to invoke the Geneva Conventions in support of a defense to criminal charges).

16. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

17. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

18. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, *modified*, 24 I.L.M. 535 (1985).

19. *See* 140 CONG. REC. S7634-35 (1994); 138 CONG. REC. S4783-84 (1992); 136 CONG. REC. S17491-92 (1990).

20. *See* David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 144-71 (1999).

21. *See, e.g.*, John C. Yoo, *Globalism and the Constitution, Treaties, Non-Self-Execution and the Original Understanding*, 99 COLUM. L. REV. 1955, 1973-74 (1999).

challenge in a case where a defendant invoked a treaty-based preemption defense to a state criminal charge.

The remainder of this article has four parts. Part II explains why *Ex parte Young* and its progeny are relevant to the central constitutional question posed in this article. Part III demonstrates that NAFTA's key substantive provisions have the force of preemptive federal law within the U.S. legal system. The analysis supporting this conclusion rests primarily, but not exclusively, on statutory interpretation of NAFTA's implementing legislation. Part III also contends that § 3312(b)(2) of the NAFTA Implementation Act is unconstitutional,[22] insofar as it purports to preclude a state court from deciding the merits of a properly raised federal preemption defense. Given that NAFTA has the force of preemptive federal law, part IV shows that § 3312(c) of the NAFTA Implementation Act is unconstitutional[23] where it may preclude a defendant in a state criminal trial from invoking NAFTA to support an argument that the treaty preempts the state law authorizing penal sanctions. Although the analysis in parts III and IV focuses on NAFTA, the implications are much broader because the arguments apply equally to comparable provisions in implementing legislation for other free-trade agreements.

As a practical matter, the opportunities for defendants in state criminal trials to invoke free-trade agreements in support of non-frivolous arguments challenging the validity of state penal laws are rather limited. In contrast, there is a fairly broad range of circumstances where defendants in state criminal trials could plausibly invoke international human rights treaties in support of non-frivolous arguments challenging the validity of state criminal laws.[24] Therefore, the constitutional arguments developed in this article will have their greatest practical significance if they can be applied to human rights treaties that the United States ratified subject to NSE declarations. Part V addresses the application of the constitutional arguments in parts III and IV to the NSE declarations attached to human rights treaties.

II. *EX PARTE YOUNG* AND *SEMINOLE TRIBE*

In *Ex parte Young*,[25] the stockholders of several railroad companies sued the Minnesota Attorney General to enjoin enforcement of state laws that limited the fares railroad companies could charge.[26] The Minnesota laws imposed criminal penalties on railroad companies (and company officers) that charged fees higher than the authorized fares.[27] The plaintiffs alleged that the laws were designed to "prevent the railway company ... or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of" the subject

22. 19 U.S.C. § 3312(b)(2) (2006).
23. 19 U.S.C. § 3312(c).
24. *See infra* notes 173-179 and accompanying text.
25. 209 U.S. 123 (1908).
26. *Id.* at 126-31.
27. *Id.* at 127-29.

laws.[28] The Supreme Court held that the Minnesota laws at issue were unconstitutional because they prevented "the company and its officers from resorting to the courts to test the validity of ... laws which deeply affect its rights."[29] Thus, although *Ex parte Young* is best known as a case about the Eleventh Amendment, it also contains an important holding about access to courts.[30] In brief, *Ex parte Young* stands for the proposition that the U.S. Constitution does not permit a state government to enact legislation that imposes sanctions on private parties *and also* prevents those parties from resorting to the courts to challenge the legislation's validity.[31]

It bears emphasis that the parties in *Ex parte Young* assumed that the railroad companies could have challenged the validity of the Minnesota law by violating the law, waiting for the Minnesota attorney general to file criminal charges, and then raising a federal constitutional defense.[32] Indeed, the state argued expressly "that the proper way to test the constitutionality of the act is to disobey it" and then raise a defense to criminal charges by challenging the law's validity.[33] The Court assumed that the railroad companies could have adopted this approach,[34] but held that the Constitution also entitled them to raise their claims offensively by suing the attorney general to enjoin enforcement of the state law before he filed criminal charges against them.[35]

Consider the following hypothetical case. To protect the state's avocado growers from foreign competition,[36] California enacts legislation imposing a special tax on avocado sales. Merchants can obtain a full tax rebate by showing that their avocados were grown in California; no such rebate is available for imported avocados.[37] The California statute imposes criminal sanctions on companies that willfully fail to pay the tax. The ABC Company imports avocados from Mexico.[38] ABC believes that California's tax scheme is illegal because it violates NAFTA article 302.[39] However, the NAFTA Implementation

28. *Id.* at 144.

29. *Id.* at 147.

30. *Id.* at 146-48.

31. *Id.*

32. *Id.* at 163.

33. *Id.*

34. *See id.* at 165 ("We do not say the company could not interpose this defense in an action ... upon the trial of an indictment....").

35. *Id.* at 168.

36. California accounts for about ninety percent of U.S. avocado production. Agricultural Marketing Resource Center, Avocado Profile, http://www.agmrc.org/commodities_products/fruits/avocado_profile.cfm (last visited June 8, 2009).

37. This tax scheme is functionally equivalent to an import duty, but it is designed to evade the constitutional rule that prohibits state governments from imposing duties on imports. *See* U.S. CONST. art. I, § 10 ("No State shall ... lay any Imposts or Duties on Imports or Exports ....").

38. "Nearly 80 percent of the avocados imported into the United States came from Mexico in 2007.... About 63 percent of the fresh avocados consumed domestically are imported." Agricultural Marketing Resource Center, *supra* note 36.

39. *See* North American Free Trade Agreement, art. 302(1), U.S.-Can.-Mex., Dec.17, 1992, 32 I.L.M. 289, 300 (1993) [hereinafter NAFTA] ("Except as otherwise provided in this Agreement, no Party may increase any existing customs duty, or adopt any customs duty, on an originating

Act precludes ABC from filing a claim in state or federal court to test the California statute's validity under NAFTA.[40] Accordingly, ABC decides to violate the California law by purposefully refusing to pay the required tax. When state officers learn about ABC's conduct, the California Attorney General files criminal charges against ABC in California state court. ABC raises a federal preemption defense, arguing that the California law is invalid because NAFTA article 302 preempts it.

This hypothetical case is similar to *Ex parte Young* in two key respects. Both cases involve state laws imposing criminal penalties on private companies that refuse to comply with state economic regulations.[41] In each case, the regulated company challenges the state law's validity on the grounds that it conflicts with supreme federal law. Therefore, inasmuch as the Supreme Court held that the stockholders in *Ex parte Young* had a constitutional right of access to the courts to challenge the Minnesota law's validity, one could argue that ABC has a constitutional right of access to the courts to challenge the California law's validity.

There are, however, three important differences between the two cases. First, the federal law at issue in *Ex parte Young* was the Fourteenth Amendment; in contrast, the federal law at issue in *ABC Co.* is NAFTA, an international agreement.[42] Second, the petitioners in *Ex parte Young* raised their claim offensively, whereas ABC is raising its claim defensively. Third, *Ex parte Young* involved a *state law* that restricted the railroad companies' ability to seek a judicial ruling on the law's validity. In contrast, *ABC Co.* involves a *federal statute* that restricts ABC's ability to obtain a judicial ruling on the validity of the California tax.

To evaluate the significance of these three factors, it is helpful to consider the Supreme Court's decision in *Seminole Tribe of Florida v. Florida.*[43] In *Seminole Tribe*, an Indian tribe sued the State of Florida and its Governor to compel state compliance with the Indian Gaming Regulatory Act (IGRA), a federal statute.[44] The Court held that the Eleventh Amendment barred the suit against the State.[45] The Court also held that *Ex parte Young* did not authorize a suit against the Governor in these circumstances.[46] Specifically, the Court held that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate

good."). The term "customs duty" includes "a charge of any kind imposed in connection with the importation of a good." *Id.* art. 318.

40. *See* 19 U.S.C. § 3312(c) (2006) ("No person other than the United States ... may challenge, in any action brought under any provision of law, any action or inaction by any ... State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the Agreement....").

41. In *Young*, the railroad companies complied voluntarily with certain laws at issue, but refused to comply with others. *See Ex parte Young*, 209 U.S. 123, 127-29 (1908).

42. There is no question that NAFTA is a "federal law." *See infra* Part III.B.

43. 517 U.S. 44 (1996).

44. *Id.* at 51-52.

45. *Id.* at 72-73.

46. *Id.* at 73.

before casting aside those limitations and permitting an action against a state officer based on *Young*."[47]

There are two key similarities between *Seminole Tribe* and *ABC Co.* that distinguish both cases from *Ex parte Young*. First, in both cases (unlike *Ex parte Young*), the restriction on private judicial enforcement is rooted in federal law, not state law.[48] Second, whereas the petitioners in *Ex parte Young* invoked the U.S. Constitution to challenge the validity of the Minnesota law, in both *Seminole Tribe* and *ABC Co.* a federal law that ranks lower than the Constitution provides the substantive basis for challenging state action.[49] Thus, *Seminole Tribe* supports the constitutional validity of the NAFTA Implementation Act, to the extent that the Act precludes ABC from bringing an offensive claim against a California state officer to challenge the validity of the hypothetical California law on the grounds that NAFTA Article 302 preempts it.

On the other hand, *ABC Co.* differs from *Seminole Tribe* in two key respects. First, ABC is raising its claim defensively, not offensively. Second, ABC, like the petitioners in *Ex parte Young*, is challenging the validity of a state penal law that imposes criminal sanctions on private parties. In contrast, *Seminole Tribe* involved a challenge to state executive action (or inaction).[50] Penal sanctions were not at issue in *Seminole Tribe*. Thus, the question remains whether Congress has the power to preclude a criminal defendant in state court from raising a federal preemption defense to a state criminal charge.

III. IS NAFTA PREEMPTIVE FEDERAL LAW?

As noted above, § 3312(c) of the NAFTA Implementation Act states, "No person other than the United States ... shall have any cause of action *or defense* under the Agreement or by virtue of Congressional approval thereof."[51] Section 3312(b)(2) states, "No State law ... may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid."[52] These statutes clearly envision that the United States has the power to initiate proceedings to obtain a judicial declaration that NAFTA preempts a particular state law. However, § 3312(c), on its face, precludes civil and criminal defendants from raising a federal preemption defense based on NAFTA. Moreover, § 3312(b)(2), on its face,

47. *Id.* at 74.

48. In *ABC Co.*, there is an explicit federal statutory restriction on private enforcement. *See supra* notes 39-40 and accompanying text. In *Seminole Tribe,* the Supreme Court construed IGRA to create an implied restriction on private enforcement pursuant to the *Young* doctrine. *See Seminole Tribe*, 517 U.S. at 73-76.

49. In *Seminole Tribe*, the tribe invoked IGRA, a federal statute, to support its challenge to state executive action. *Seminole Tribe*, 517 U.S. at 48-52. In *ABC Co.*, the company is invoking NAFTA, an international agreement that is equivalent to a federal statute, to support its challenge to state legislative action.

50. *Id.* at 51.

51. 19 U.S.C. § 3312(c) (2006) (emphasis added).

52. *Id.* § 3312(b)(2).

precludes courts from ruling on the merits of a NAFTA preemption claim or defense, except when the United States is the party bringing the claim. Part III analyzes the constitutionality of § 3312(b)(2). Part IV analyzes the constitutionality of § 3312(c).

Part III has three sections. The first section contends that § 3312(b)(2) is unconstitutional insofar as it purports to preclude a state court from applying NAFTA in a state criminal trial in which a defendant alleges that NAFTA invalidates the state penal law that provides the basis for the criminal charges against him. The next two sections address various objections to this argument. Because § 3312(b)(2) is subject to different interpretations, part III includes both statutory analysis to determine the correct interpretation of the statute and constitutional analysis to examine its constitutional validity.

A. 3312(b)(2) and the Supremacy Clause

The Supremacy Clause of the U.S. Constitution specifies that "the Judges in every State shall be bound" by supreme federal law, "any Thing in the Constitution or Laws of any State to the contrary notwithstanding."[53] On its face, the Clause establishes a constitutional conflict-of-laws rule. Faced with a direct conflict between state and federal law, state-court judges must apply federal law. This "conflict-of-laws" interpretation of the Supremacy Clause is "widely accepted among scholars."[54]

The Supremacy Clause's application to the hypothetical *ABC Co.* case is fairly straightforward. ABC argues that there is a direct conflict between NAFTA article 302(1) and the California law imposing a tax on imported avocados. Article 302(1) specifies that "no Party may increase any existing customs duty, or adopt any customs duty, on an originating good."[55] Avocados imported from Mexico qualify as "originating goods" under NAFTA.[56] Although the matter is not free from doubt, the California tax law is probably a "customs duty" as that term is defined under NAFTA.[57] If the California law is a "customs duty," then there is a direct conflict between NAFTA and the California law,

53. U.S. CONST. art. VI, cl. 2.

54. Allison H. Eid, *Preemption and the Federalism Five*, 37 RUTGERS L.J. 1, 28-29 n.204 (2005) (citing several scholars, representing a broad spectrum of political views, who have endorsed the conflict-of-laws interpretation of the Supremacy Clause).

55. NAFTA, *supra* note 39, art. 302(1).

56. Article 401 defines the term "originating good" to include a good "produced entirely in the territory" of a State Party. *Id.* art. 401(a). Thus, avocados grown in Mexico qualify as originating goods.

57. Article 318 specifies that the term "customs duty includes any customs or import duty *and a charge of any kind imposed in connection with the importation of a good*." *Id.* art. 318 (emphasis added). As a formal matter, the California tax is a sales tax, not an import charge. Nonetheless, in functional terms, the California tax is indistinguishable from an import duty. *See supra* notes 36-40 and accompanying text. Article 318 does specify some exceptions to the broad definition of "customs duty" quoted above. *See* NAFTA, *supra* note 39, art. 302(1). Whether one of those exceptions applies depends on facts not specified in the hypothetical case. Regardless, one can fairly assume that there is some set of facts under which none of the exceptions apply. Under those facts, the California law probably qualifies as a "customs duty" under NAFTA.

because California adopted a customs duty on an originating good, and NAFTA prohibits customs duties on originating goods.[58] Given this direct conflict, the Supremacy Clause requires California state courts to apply federal law, not state law.[59] Therefore, § 3312(b)(2) of the NAFTA Implementation Act is unconstitutional insofar as it attempts to preclude state courts from applying federal law, because the Supremacy Clause *obligates* state courts to apply federal law in these circumstances.

The preceding argument assumes that NAFTA Article 302 is preemptive federal law. One could challenge this assumption by arguing that NAFTA is not actually federal law, or that § 3312(b)(2) is a valid anti-preemption provision. Section B shows that NAFTA Article 302 is federal law. Section C addresses the anti-preemption argument.

B. Is NAFTA Federal Law?

Section 111(3) of the *Restatement (Third) of Foreign Relations Law* ("*Restatement*") stipulates that "[c]ourts in the United States are bound to give effect to international law and to international agreements of the United States."[60] A comment to this section adds, "Under Subsection (3), strictly, it is the implementing legislation, rather than the agreement itself, that is given effect as law in the United States."[61] Congress adopted a very detailed statute to implement the United States' international legal obligations under NAFTA.[62] Therefore, one could argue, the implementing legislation has the status of supreme federal law, but NAFTA itself is not federal law.

This argument is flawed for several reasons. First, the *Restatement* does not say that an international agreement that is implemented by legislation lacks the status of federal law. The comment in the *Restatement* concerns the role of

58. The treaty says that "no party" shall adopt a customs duty. NAFTA, *supra* note 39, art. 302(1). Under general principles of international law, the legislative action by California is attributable to the United States, which is the actual party to the agreement. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, [2001] 2 Y.B. Int'l L. Comm'n 26, 40, U.N. Doc. A/56/10, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions ... and whatever its character as an organ of the central government or of a territorial unit of the State."). Thus, from the perspective of international law, when California adopts a customs duty, the United States adopts a customs duty.

59. The state court could potentially dodge the issue by ruling in favor of ABC on other grounds. For example, ABC might raise a constitutional challenge to the validity of the state law under Article I, section 10, which specifies that "No State shall ... lay any Imposts or Duties on Imports or Exports." For the purpose of this hypothetical case, however, I am assuming that ABC's effort to invalidate the California law rests entirely on a NAFTA preemption argument.

60. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111(3) (1987) [hereinafter RESTATEMENT].

61. *Id.* § 111 cmt. h.

62. North American Free Trade Implementation Act, Pub. L. No. 103-182 (Dec. 8, 1993).

domestic courts.[63] The comment makes clear that if an international agreement provides one substantive rule, and the legislation implementing that agreement provides a different substantive rule, then the courts are bound to apply the rule embodied in the legislation.[64] However, the *Restatement* does not say that courts are precluded from applying the agreement itself as a rule of law in cases where the legislation does not provide a different rule. NAFTA Article 302(1) prohibits the adoption of new customs duties.[65] The NAFTA implementing legislation does not provide a different substantive rule.[66] In these circumstances, the *Restatement* comment specifying that courts should apply the legislation, rather than the agreement itself, is inapplicable, because the implementing legislation does not include any substantive rule that differs from the rule in Article 302(1).

In *United States v. Belmont*[67] and *United States v. Pink*,[68] the Supreme Court established that an international agreement concluded by the President, on the basis of his own constitutional authority without any congressional participation, has the status of "supreme federal law" under the Supremacy Clause.[69] Unlike the agreements at issue in those cases, NAFTA is an international agreement approved by a majority vote in both Houses of Congress.[70] Indeed, Congress specifically authorized the President "to exchange notes with the Government of Canada or Mexico providing for the entry into force ... of the Agreement for the United States with respect to such country" once certain preconditions were satisfied.[71] It is untenable to claim that an international agreement approved by a majority vote in both Houses of Congress has a lower status under U.S. law than an international agreement that the President concluded on the basis of his independent constitutional authority.[72] Thus, given that sole executive agreements have the status of supreme federal law under *Belmont* and *Pink*, it follows that congressional-executive agreements (such as NAFTA) also have the status of supreme federal law.

One could argue that NAFTA Article 302 differs from the Litvinov Agreement (the international agreement at issue in *Belmont* and *Pink*) because the drafters of the Litvinov Agreement intended it to operate as supreme federal law, whereas the drafters of NAFTA did not intend for NAFTA to operate as supreme federal law. The Supreme Court's recent decision in *Medellin v.*

63. This is clear from the fact that comment h refers explicitly to subsection (3) of section 111. Subsection (3) addresses the role of domestic courts in applying international law. *See* RESTATEMENT, *supra* note 60, § 111(3).

64. *Id.* § 111 cmt. h.

65. *See* NAFTA, *supra* note 39, art. 302(1).

66. *See* North American Free Trade Implementation Act, Pub. L. No. 103-182 (Dec. 8, 1993).

67. 301 U.S. 324, 330-31 (1937).

68. 315 U.S. 203, 206 (1942).

69. *See id.* at 230 ("A treaty is a 'Law of the Land' under the supremacy clause ... of the Constitution. Such international compacts and agreements as the Litvinov Assignment have a similar dignity.").

70. *See* 19 U.S.C. § 3311 (2006).

71. *Id.*

72. *See generally* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003).

Texas[73] could be interpreted to mean that an international agreement has the status of supreme federal law if, but only if, the drafters intended it to have that status. Hence, one could argue, NAFTA Article 302 does not have the status of supreme federal law because the drafters did not intend it to have that status.

There are several flaws in this argument. First, it is based on a contestable interpretation of *Medellin*.[74] Second, the view that a treaty's status as supreme federal law hinges on the intent of the treaty drafters is impossible to reconcile with the text of the Supremacy Clause, which states explicitly that all treaties "made under the authority of the United States" have the status of supreme federal law.[75] Finally, the text of the NAFTA Implementation Act makes it abundantly clear that Congress intended NAFTA to operate as federal law. The statute provides that a state law "may be declared invalid ... on the ground that the provision ... is inconsistent with the [NAFTA] Agreement, [but only] in an action brought by the United States for the purpose of declaring such law ... invalid."[76] Since Congress explicitly provided that the courts may declare that a state law is invalid on the grounds that it is inconsistent with NAFTA, Congress must have intended for NAFTA to operate as federal law.

Those who defend section 3312(b)(2)'s constitutionality may argue that NAFTA is analogous to a statute that delegates rulemaking authority to the executive branch. For example, the statute creating the Federal Communications Commission authorizes the Commission to "perform any and all acts, make such rules and regulations, and issue such orders ... as may be necessary in the execution of its functions."[77] As a formal matter, a statute of this type has the status of federal law once Congress approves it and the President signs it.[78] The substantive rules that flow from the statute, however, do not become a part of federal law until the Commission has exercised its rulemaking authority to create a substantive federal rule.[79] Similarly, one could argue, NAFTA delegates rulemaking authority to the President to promulgate federal rules to implement NAFTA.[80] NAFTA's substantive rules, including Article 302(1), do not actually become a part of federal law until after the executive branch publishes

73. 128 S. Ct. 1346 (2008).

74. *See, e.g.*, Curtis A. Bradley, *Intent, Presumptions and Non-Self-Executing Treaties*, 102 AM. J. INT'L L. 540, 547-49 (2008) (contending that this interpretation of *Medellin* is wrong).

75. *See* David Sloss, *Non-Self-Executing Treaties: Exposing a Constitutional Fallacy*, 36 U.C. DAVIS L. REV. 1, 56-57 (2002). *See also* Bradley, *supra* note 74, at 550 ("If the Court's decision is interpreted more broadly as holding that non-self-executing treaties do not have any domestic law status, it may be difficult to reconcile with the text of the Supremacy Clause.").

76. 19 U.S.C. § 3312(b)(2) (2006).

77. 47 U.S.C. § 154(i).

78. *See* U.S. CONST. art. I, § 7, cl. 2.

79. *See* Atkins v. Rivera, 477 U.S. 154, 162 (1986).

80. *See* North American Free Trade Implementation Act, Pub. L. No. 103-182, § 201(a)(1) (Dec. 8, 1993) (authorizing the President to proclaim tariff modifications that "the President determines to be necessary or appropriate to carry out or apply articles 302, 305").

regulations to implement the treaty rules.[81] Therefore, according to this argument, if a criminal defendant invokes Article 302(1) in an effort to invalidate a state criminal law, his defense fails because the prohibition on import duties codified in Article 302(1) is not part of federal law, except to the extent that the President has promulgated rules to incorporate that prohibition into the corpus of federal law.

This argument is unpersuasive because it overlooks a critical distinction between the President's rulemaking authority and his enforcement authority. Under the NAFTA implementing legislation, the President has both types of authority. Section 201(a)(1) of the NAFTA Implementation Act grants the President authority to proclaim any tariff modifications that "the President determines to be necessary or appropriate to carry out or apply" specified articles of the NAFTA agreement.[82] Rules promulgated under the authority of this provision "may not take effect before the 15th day after the date on which the text of the proclamation is published in the Federal Register."[83] These provisions are analogous to statutory provisions that grant rulemaking authority to the Federal Communications Commission.

In contrast, sections 102(b)(2) and 102(c) of the NAFTA Implementation Act recognize that the President has authority to enforce the international agreement itself. Section 102(c) states that the United States may file suit to challenge "any action or inaction by any department, agency, or other instrumentality of ... any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the [NAFTA] Agreement."[84] Moreover, section 102(b)(2) makes clear that, "in an action brought by the United States," courts have the authority to declare that a "State law, or the application thereof, ... [is] invalid ... on the ground that the provision or application is inconsistent with the Agreement."[85] It bears emphasis that both statutory provisions refer expressly to "the Agreement"—that is, the international agreement itself, not the implementing legislation. Thus, Congress believed that the President would have the authority to bring suit to enforce the international agreement, and courts would have the authority to invalidate a state law on the grounds that it conflicts with the international agreement.[86] If the agreement

81. *See id.* § 103(b) (stipulating that an "action proclaimed by the President ... may not take effect before the 15th day after the date on which the text of the proclamation is published in the Federal Register").

82. *Id.* § 201(a)(1).

83. *Id.* § 103(b).

84. *Id.* § 102(c) (codified at 19 U.S.C. § 3312(c) (2006)).

85. *Id.* § 102(b)(2) (codified at 19 U.S.C. § 3312(b)(2)).

86. It is not entirely clear whether the legislation is the source of the President's authority to enforce the agreement and the courts' authority to invalidate state laws. One could plausibly argue that the President's authority to enforce the international agreement derives from his constitutional power to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3. Similarly, one could argue that the courts' authority to invalidate state laws that conflict with federal law is rooted in the Supremacy Clause, or in their inherent judicial power. In any case, the statutory language makes clear that Congress believed that the President and the courts had the requisite authority, even though the statute is not framed as a grant of authority.

lacked the force of law within the domestic legal system, the President could not sue to enforce it, and courts could not apply it to invalidate a state law. Therefore, Congress must have thought that the international agreement itself would have the force of federal law.

C. Is Section 3312(b)(2) a Valid Anti-Preemption Provision?

Professors Bradley and Goldsmith argue that "it is widely accepted that Congress and the President can limit the self-executing effect" of free-trade agreements like NAFTA by adopting statutory conditions like 3312(b)(2).[87] They suggest that the conditions in statutes implementing free-trade agreements are analogous to other federal statutes where Congress "specifies that federal statutes do not preempt state law."[88] While Congress undoubtedly has *some* power to control the domestic effects of federal statutes and international agreements, it does not necessarily follow that Congress has the power to preclude a state court from applying supreme federal law in a case where there is a direct conflict between state and federal law. Moreover, outside the free-trade context, there do not appear to be any so-called "reverse preemption" or "anti-preemption" statutes in which Congress has directed state courts to refrain from applying supreme federal law in the event of a direct conflict between state and federal law. To illustrate this point, it is instructive to compare § 3312(b)(2) to two other statutory reverse-preemption provisions: one in the McCarran-Ferguson Act,[89] and one in the Electronic Signatures in Global and National Commerce Act.[90]

1. *Comparing NAFTA to McCarran-Ferguson*

The McCarran-Ferguson Act contains one of the most frequently applied anti-preemption provisions. The Act states, "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance."[91] This provision instructs courts to construe future federal statutes—other than those that relate specifically to the insurance business—in a manner that avoids conflicts with state laws regulating the insurance business. The Act does not tell courts how to resolve conflicts between state and federal law; it merely provides an interpretive tool that courts can use to avoid such conflicts.

87. Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights and Conditional Consent*, 149 U. PA. L. REV. 399, 447 & n.218 (2000). Professors Bradley and Goldsmith cite the implementing legislation for the Uruguay Round Agreements, Pub. L. No. 103-465, 108 Stat. 4809 (1994). In particular, they cite section 102(c)(1) of that legislation, which is substantially identical to 19 U.S.C. § 3312(c). They could also have cited section 102(b)(2), which is substantially identical to 19 U.S.C. § 3312(b)(2).

88. Bradley & Goldsmith, *supra* note 87, at 447.

89. 15 U.S.C. § 1012(b) (2006).

90. Pub. L. No. 106-229 (2000) (codified at 15 U.S.C. § 7001 note).

91. 15 U.S.C. § 1012(b).

In contrast, § 3312(b)(2) states, "No State law ... may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with [NAFTA]."[92] Whereas McCarran-Ferguson provides a rule of statutory interpretation designed to avoid conflicts between state and federal law, § 3312(b)(2) provides a conflict-of-laws rule that ostensibly precludes judges from ruling that a state law is invalid, even if that state law conflicts with NAFTA. McCarran-Ferguson does not conflict with the Supremacy Clause because it does not purport to modify the conflict-of-laws rule embodied in the Supremacy Clause. In contrast, § 3312(b)(2) does conflict with the Supremacy Clause because the Clause requires courts to resolve federal-state conflicts in favor of federal law, and 3312(b)(2) directs courts to refrain from applying supreme federal law, even when state and federal law conflict.[93]

2. *Comparing NAFTA to the Electronic Signatures Act*

In 1997, the United Nations General Assembly adopted a model law on electronic commerce.[94] The model law is a non-binding instrument, not a treaty.[95] The drafters intended this model law to promote the development of uniform commercial practices regarding the use of electronic signatures to consummate legally binding contracts.[96] In 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) adopted the Uniform Electronic Transactions Act (UETA), which was designed in part to implement the U.N. model law.[97] UETA itself is merely a model law that state legislatures may choose to implement or not, but forty-seven out of fifty state legislatures have enacted statutes modeled on UETA.[98]

In June 2000, Congress enacted the Electronic Signatures in Global and National Commerce Act (E-SIGN).[99] E-SIGN establishes a federal policy to remove obstacles to the use of electronic signatures. Hence, the Act specifies that a contract relating to "any transaction in or affecting interstate or foreign commerce ... may not be denied legal effect, validity, or enforceability solely

92. 19 U.S.C. § 3312(b)(2).

93. *Compare* U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...."), *with* 19 U.S.C. § 3312(b)(2) ("No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with [NAFTA], except in an action brought by the United States for the purpose of declaring such law or application invalid.").

94. Model Law on Electronic Commerce, G.A. Res. 51/162, U.N. Doc. A/RES/51/162 (Jan. 30, 1997).

95. *See id.*

96. *See* Paul B. Stephan, *What Story Got Wrong: Federalism, Localist Opportunism and International Law*, 73 MO. L. REV. 1041, 1053-55 (2008).

97. *See* ULC, Uniform Electronic Transfer Act, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited June 8, 2009).

98. *See id.*

99. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified at 15 U.S.C. §§ 7001-31 (2006)).

because an electronic signature or electronic record was used in its formation."[100] The Act provides detailed rules for implementing this broad policy objective.[101] Because state law traditionally governs the validity and enforceability of contracts, Congress did not wish to displace state laws that apply different detailed rules that are designed to achieve the same broad policy objective.[102] Hence, section 102 of E-SIGN contains an anti-preemption rule: it provides that a state law "may modify, limit, or supersede the provisions of section 101 with respect to State law," but only if that state law "constitutes an enactment or adoption of" UETA.[103] Thus, Congress effectively adopted UETA as a minimum federal standard with which all states must comply. In states that adopt UETA, state law applies. In states that do not adopt UETA, E-SIGN preempts state law.[104]

In one respect, the anti-preemption provision in E-SIGN is similar to section 3312(b)(2) of the NAFTA Act. Both statutes define circumstances in which federal law applies and circumstances in which state law applies.[105] However, the two statutes define the field of application of federal law in very different ways. E-SIGN defines the field of application of federal law in terms of substantive federal policy objectives: states are free to apply their own laws, provided that those laws are consistent with federal policies. In contrast, section 3312(b)(2) defines the field of application of federal law in terms of the party who invokes that federal law before a court. If the United States invokes the federal law (i.e. NAFTA), section 3312(b)(2) instructs the court to apply federal law. If a party other than the United States invokes NAFTA, the statute directs the court to disregard federal law, even if the application of state law yields a result that conflicts directly with the federal policies embodied in NAFTA.[106]

Congress undoubtedly has the power to define the material field of application of a federal statute, as it did in E-SIGN. Nevertheless, Congress does not have the power to order a state court to disregard supreme federal law in a case where the court has jurisdiction and the federal law provides a substantive rule of decision that, by its terms, applies to a disputed issue in the case.[107] The

100. *Id.* § 101(a).

101. *Id.* § 101(b)–(j).

102. *See* Stephan, *supra* note 96, at 1053-55.

103. Pub. L. No. 106-229, § 102(a)(1).

104. UETA contains a provision that allows states to adopt specific exceptions to the general UETA rules. E-SIGN provides that any such exception adopted by a state "shall be preempted to the extent such exception is inconsistent with this title." *Id.* § 102(a)(1). Thus, E-SIGN also preempts certain state-law provisions in states that adopt UETA insofar as states implement UETA in a way that is inconsistent with federal policies.

105. *See* 19 U.S.C. § 3312(b) (2006); Pub. L. No. 106-229, § 102(a)(1) (codified at 15 U.S.C. § 7002(a)(1)).

106. *See* 19 U.S.C. § 3312(b)(2) ("No State law ... may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.").

107. *See* U.S. CONST. art. VI ("This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of

Supremacy Clause obligates state courts to apply supreme federal law in these circumstances and Congress lacks the power to amend the Supremacy Clause by means of ordinary legislation.[108]

In sum, the preceding analysis demonstrates that the substantive rules included in NAFTA, such as Article 302, have the force of supreme federal law to preempt conflicting state law. This conclusion rests partially on statutory analysis, which shows that the so-called "anti-preemption" provisions in the NAFTA Implementation Act are materially different from the anti-preemption provisions in the E-SIGN Act and the McCarran-Ferguson Act. The statutory analysis also shows that—in contrast to federal laws that merely delegate rulemaking authority to an administrative agency—Congress understood that certain NAFTA provisions would have the force of preemptive federal law from the time the treaty entered into force, and that no further rulemaking was necessary to give those treaty provisions the force of federal law. One key constitutional conclusion follows from this statutory analysis: section 3312(b)(2) is unconstitutional insofar as it purports to require state courts to disregard supreme federal law in circumstances where the Supremacy Clause obligates them to apply supreme federal law.

IV. DUE PROCESS AND CRIMINAL DEFENDANTS

Section 3312(c) of the NAFTA Implementation Act, on its face, precludes both plaintiffs and defendants (other than the U.S. government) from invoking NAFTA in any type of civil or criminal proceeding in either state or federal court.[109] There does not appear to be any significant dispute about the correct interpretation of this statute: the language is unambiguous and extremely broad. Since there is no genuine dispute about statutory interpretation, part IV analyzes the statute's constitutionality.

This part contends that the Due Process Clause grants criminal defendants in state court a constitutional right to invoke any treaty provision with the force of preemptive federal law to argue that the treaty at issue constrains the state's authority to impose criminal sanctions or invalidates the state law authorizing criminal sanctions. Moreover, when presented with such an argument, the state court has a constitutional duty to decide on the merits whether the state law authorizing criminal sanctions is a valid law (that is, whether the treaty preempts the state law), because the Constitution does not permit a state government to impose criminal sanctions pursuant to an invalid law.

It is important to emphasize at the outset the narrowness of this claim. First, the argument is premised on an assumption that the treaty at issue is preemptive

the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.").

108. *Id.*

109. *See* 19 U.S.C. § 3312(c) ("No person other than the United States ... shall have any cause of action *or defense* under the Agreement or by virtue of Congressional approval thereof.").

federal law.[110] Second, the claim applies only to treaty provisions that create specific, mandatory obligations that are binding on the United States as a matter of international law.[111] Third, the claim applies only to criminal defendants in state court. The argument assumes that Congress has the power to preclude civil plaintiffs from invoking treaties offensively.[112] This article does not address the questions: (1) whether Congress has the power to preclude criminal defendants in federal court from invoking a treaty; or (2) whether Congress has the power to preclude habeas petitioners from invoking a treaty.[113] Finally, the argument applies only to criminal defendants who invoke a treaty in support of an argument that the state lacks authority to impose criminal sanctions because the treaty at issue preempts the state law authorizing criminal sanctions. Cases in which a defendant claims that a state officer violated a treaty in the process of collecting evidence to support the criminal charges against him raise distinct issues that are beyond the scope of this article.[114]

110. Part III defends this premise with respect to NAFTA on both statutory and constitutional grounds. The argument in part III applies equally to the other free-trade agreements referenced in the Introduction, *see supra* notes 12-13, because the implementing legislation for all those agreements includes statutory provisions that are substantially identical to 19 U.S.C. §§ 3312(b)(2) and 3312(c).

111. If a treaty does not impose binding obligations on the United States as a matter of international law, it cannot impose binding obligations on domestic legal actors as a matter of domestic law, even if the Supremacy Clause makes the treaty the "Law of the Land" in some sense. Moreover, courts generally refuse to enforce treaty provisions that are excessively vague or indeterminate, for the same reasons that they refuse to enforce statutory provisions that are excessively vague or indeterminate. *See* Carlos M. Vazquez, *The Four Doctrines of Self-Executing Treaties*, 89 AM. J. INT'L L. 695, 712-13 (1995) (discussing this principle as it applies to treaties). *See also* Wilder v. Va. Hosp. Ass'n, 496 U.S. 498, 509 (1990) (declining to enforce a statute that was "vague and amorphous").

112. As noted above, the Supreme Court decision in *Seminole Tribe v. Florida* supports this assumption. *See supra* notes 43-49 and accompanying text.

113. In the Military Commissions Act of 2006 ("MCA"), Pub. L. No. 109-366, 120 Stat. 2600 (2006), Congress adopted statutory provisions that are similar to the provisions in the NAFTA Implementation Act. Section 948b(g) purportedly bars criminal defendants from invoking the Geneva Conventions "as a source of rights" in a trial before a military commission. 10 U.S.C. § 948b(g). Section 5(a) of the MCA purportedly bars habeas petitioners from invoking the Geneva Conventions "as a source of rights." *See* 28 U.S.C. § 2241 note. Professor Vazquez has argued persuasively that both provisions raise serious constitutional questions. *See* Vazquez, *supra* note 15, at 82-87, 92-94. Although the issues are slightly different, his argument concerning section 948b(g) generally supports the due-process analysis presented here.

114. In numerous cases, criminal defendants have moved to exclude evidence on the ground that police officers violated their rights under Article 36 of the Vienna Convention on Consular Relations. U.S. courts have consistently refused to grant an exclusionary remedy for violations of Article 36. *See, e.g.*, Sanchez-Llamas v. Oregon, 548 U.S. 331, 343-50 (2006) (holding that suppression of statements made to the police is not an appropriate remedy for an Article 36 violation); United States v. Torres-Del Muro, 58 F. Supp. 2d 931, 932-34 (C.D. Ill. 1999) (denying motion to suppress self-incriminating statements made to federal officers); Sierra v. State, 157 S.W.3d 52, 59-60 (Tex. 2004) (holding that suppression of evidence is not an appropriate remedy for an Article 36 violation); State v. Homdziuk, 848 A.2d 853, 859-60 (N.J. 2004) (holding "that the exclusionary rule is inapplicable as a remedy for violation of Article 36 of the VCCR"); State v. Prasertphong, 75 P.3d 675, 687-88 (Ariz. 2003) (holding that suppression of evidence is not an available remedy for an Article 36 violation). The argument presented in this part is entirely

Although this argument is quite narrow in certain respects, it is fairly broad in other respects. First, the argument applies to treaty provisions that satisfy the requirements specified in the preceding paragraph, even if those treaty provisions might be deemed "non-self-executing" for other purposes.[115] Second, the argument applies to treaties that have the force of federal law, regardless of whether a particular treaty creates "individual rights." As explained in more detail below, the Due Process Clause grants individual rights to criminal defendants, and those rights are sufficiently broad to empower criminal defendants in state court to raise treaty-based legal arguments in their defense, even if the treaty itself does not create individual rights.[116]

Part IV includes two sections. The first section contends that the Due Process Clause guarantees criminal defendants a meaningful opportunity to be heard, which includes the right to demand a judicial ruling on the merits of a treaty-based defense. The next section contends that the Due Process Clause accords constitutional status to the traditional maxim *nulla poena sine lege*, which means that there can be no punishment without law. Section 3312(c) is unconstitutional as applied in the narrow set of circumstances defined above because, if enforced, it would deprive criminal defendants of a meaningful opportunity to be heard and it would effectively permit a state government to impose criminal sanctions on an individual for violating an invalid (and therefore legally ineffective) state criminal law.

A. The Opportunity to Be Heard[117]

To the extent that § 3312(c) precludes a defendant from raising a meritorious defense to a criminal charge, it violates the firmly established rule that "a State must afford all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."[118] The opportunity to be

consistent with the view that the Constitution does not require an exclusionary remedy for these types of treaty violations.

115. The term "non-self-executing," as applied to treaties, is notoriously ambiguous. *See* Vazquez, *supra* note 111; Sloss, *supra* note 20, at 144-52. One common usage of the term effectively defines "non-self-executing" to mean that a treaty does not create a private right of action. *See* Sloss, *supra* note 20, at 151-52. A treaty that is "not self-executing" in this sense of the term might still satisfy the requirements for defensive judicial enforcement noted above.

116. Federal courts have consistently recognized that there are situations in which an individual is entitled to invoke a federal statute in support of a legal argument, even if the statute does not grant that individual "federal rights." *See, e.g.*, Indep. Living Ctr. of S. Cal. v. Shewry, 543 F.3d 1050 (9th Cir. 2008). Thus, the proposition that the Due Process Clause grants individuals a constitutional right to invoke federal statutes and treaties that do not themselves create individual rights is not entirely novel.

117. The argument presented in this section is an expanded version of an argument I set forth elsewhere in a more abbreviated form. *See* David Sloss, *When Do Treaties Create Individually Enforceable Rights? The Supreme Court Ducks the Issue in* Hamdan *and* Sanchez-Llamas, 45 COLUM. J. TRANS'L L. 20, 49-50 (2006).

118. Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

heard is an essential procedural right of both civil and criminal defendants.[119] Although the Due Process Clause does not guarantee plaintiffs a right of access to courts, "'due process of law signifies a right to be heard in one's defence [sic].'"[120] The distinction between plaintiffs and defendants is fundamental because plaintiffs have the option of resolving their disputes through "private structuring of individual relationships," but defendants are "forced to settle their claims of right and duty through the judicial process."[121]

At least as early as 1876, the Supreme Court affirmed the principle that the Constitution guarantees defendants an opportunity to be heard:

> Wherever one is assailed in his person or his property, there he may defend, for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.[122]

The case of *Hovey v. Elliott* is instructive in this regard.[123] In that case, Hovey and Dole sued McDonald and White to collect money allegedly owed for professional services.[124] The defendants raised a fraud defense.[125] While the case was pending, the court ordered the defendants to "pay over to the registry of the court the sum of $49,297.50."[126] After the defendants failed to comply with this court order, they were held in contempt of court.[127] As a sanction for contempt, the court "decreed that the answer filed in this cause by the defendants ... be stricken out and removed from the files of the court, and that this cause do proceed as if no answer herein had been interposed."[128] The court then entered judgment in favor of the plaintiffs, without giving the defendants an opportunity to present their defense.[129]

The issue for the Supreme Court was whether the judgment against the defendants was valid. The Court framed the question as follows: "whether a court possessing plenary power to punish for contempt ... has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer ... and condemn him ...

119. *See* Bouie v. City of Columbia, 378 U.S. 347, 354 (1964) ("When a state court ... [denies] a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his]) substantive right.'" (quoting Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 (1930))).

120. *Boddie*, 401 U.S. at 377 (quoting Hovey v. Elliott, 167 U.S. 409, 417 (1897)).

121. *Id.* at 375, 377.

122. Windsor v. McVeigh, 93 U.S. 274, 277 (1876).

123. 167 U.S. 409 (1897).

124. *Id.* at 410.

125. *Id.* at 411.

126. *Id.*

127. *Id.* at 412.

128. *Id.* at 411-12.

129. *Id.* at 412.

without a hearing."[130] The Court held that the judgment below was invalid because the lower court "did not possess the power to disregard an answer which was in all respects sufficient, and had been regularly filed, and to ignore the proof taken in its support."[131] The Court presented a detailed exposition of a long line of authorities supporting its conclusion, including the Magna Carta, Blackstone, Justice Story, various English authorities dating from the 1680s through the 1880s, and numerous decisions of U.S. courts.[132] Moreover, the Court stated expressly that "[t]he right which was here denied by rejecting the answer ... involved an essential element of *due process of law*."[133]

Three key points emerge from the Court's analysis in *Hovey*. First, there is a critical distinction between plaintiffs' and defendants' due-process rights. Second, no meaningful distinction exists between civil and criminal defendants in this regard. The Court explicitly compared the facts in *Hovey* to a criminal proceeding in which the court denied "to the accused all right to be heard."[134] It stated, "No distinction between the two cases can be pointed out. The one would be as flagrant a violation of the rights of the citizen as the other."[135] Third, "[t]here is no distinction in principle between determining a cause ... in the actual absence of the party, and rendering a decree by refusing to ... consider the merits of a sufficient defense."[136] Both procedures deny the defendant the opportunity to be heard, and hence deny him due process of law.

The Court's analysis in *Hovey* applies with equal force to the hypothetical *ABC Co.* case discussed above.[137] Section 3312(c) directs the California court to render a decree in *ABC Co.* without considering the merits of ABC's defense.[138] As the Court stated in *Hovey*, "there is no distinction in principle" between a law of this type and a law authorizing a criminal defendant to be tried *in absentia*.[139] If Congress enacted a statute stipulating that a certain class of criminal defendants should be tried *in absentia*, no U.S. court would hesitate to rule that the law is unconstitutional. For similar reasons, § 3312(c) is unconstitutional insofar as it directs state courts to refrain from deciding the merits of a defense in a state criminal trial in which the defendant contests the state's legal authority to impose criminal sanctions.

Further, the Supreme Court's decision in *Yakus v. United States* supports this conclusion.[140] *Yakus* involved criminal defendants who were convicted in federal court for violations of Price Regulation No. 169, promulgated under the

130. *Id.*
131. *Id.* at 444.
132. *See* Hovey v. Elliott, 167 U.S. 409, 414-44 (1897).
133. *Id.* at 444 (emphasis added).
134. *Id.* at 419.
135. *Id.*
136. *Id.* at 446.
137. *See supra* text accompanying notes 36-40.
138. 19 U.S.C. § 3312(c) (2006).
139. *Hovey*, 167 U.S. at 419.
140. 321 U.S. 414 (1944).

Emergency Price Control Act of 1942.[141] At trial, defendants sought to challenge the regulation's validity.[142] Section 204(d) of the Act, however, "preclude[d] consideration by a district court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation."[143] Hence, defendants also challenged the constitutionality of section 204(d) on the grounds that it violated the Due Process Clause.[144] The Court rejected defendants' constitutional argument and upheld the statute's validity.[145]

The Court's analysis emphasized the fact that Congress had created an alternative procedure for individuals affected by price regulations to challenge the validity of those regulations.[146] Section 203(a) of the Act established "a procedure by which 'any person subject to any provision of (a) regulation (or) order' may within sixty days after it is issued 'file a protest specifically setting forth objections to any such provision ....'"[147] The statute granted the Price Administrator authority to rule on the merits of such protests.[148] If the Administrator ruled against a petitioner, the petitioner could appeal that decision to a specially constituted "Emergency Court of Appeals" and ultimately to the Supreme Court.[149] The defendants in *Yakus* did not file a protest to register their objections to the contested regulation within the 60-day period provided in the statute.[150] The Court concluded that they were not entitled to challenge the validity of the contested regulation as defendants in federal criminal trials because they had waived the opportunity to challenge its validity by failing to file a protest at the proper time in the proper forum.[151] The Court explained:

> [T]he present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, *so long as there is an opportunity to be heard and for judicial review* which satisfies the demands of due process.[152]

In sum, the Court upheld the constitutional validity of section 204(d) because section 203(a) provided affected individuals "an adequate opportunity to

141. *See id.* at 418.
142. *Id.* at 419.
143. *Id.* at 418, 427-31.
144. *Id.*
145. *Id.* at 431-47.
146. *Id.* at 428-31.
147. *Id.* at 428.
148. *Id.*
149. *Id.* at 428-29.
150. Yakus v. United States, 321 U.S. 414, 447 (1944) (stating that "petitioners have taken no step to challenge its validity by the procedure which was open to them").
151. *Id.* at 444 (stating that "we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity").
152. *Id.* (emphasis added).

be heard on the question of validity" of a contested regulation.[153] Section 3312(c) is unconstitutional because it provides no opportunity whatsoever for affected persons to be heard on the question of the validity of a state law that allegedly conflicts with NAFTA. The statutory provision permitting the United States to initiate a judicial proceeding "for the purpose of declaring" the invalidity of a state law[154] is the only statutorily authorized procedure for challenging the validity of a state law on the grounds that NAFTA preempts it. That procedure does not provide *affected persons* an opportunity to be heard; it merely provides the United States an opportunity to be heard. Therefore, § 3312(c) does not satisfy the constitutional requirement that the government "must afford *all individuals* a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."[155]

B. Nulla Poena Sine Lege

The maxim *nulla poena sine lege* means that there can be no punishment without law. This principle "'dates from the ancient Greeks.'"[156] Justice Scalia, a jurist who is not known for being especially sympathetic to criminal defendants, has invoked the *nulla poena* maxim in support of criminal defendants' rights, stating that the maxim reflects "one of the most 'widely held value-judgment[s] in the entire history of human thought.'"[157] Implicit in the *nulla poena* principle is the idea that there can be no punishment without a *valid* penal law.[158]

Commentators have typically linked the *nulla poena* maxim to the Constitution's Ex Post Facto Clause,[159] which states that "[n]o State shall ... pass any ... ex post facto Law."[160] The Ex Post Facto Clause precludes the state from applying a criminal law retroactively to punish a defendant for conduct that was legal at the time the defendant engaged in that conduct.[161] The Clause does not protect the defendant in the hypothetical *ABC Co.* case because California is not applying any law retroactively. Instead, California is doing something worse: it is applying an invalid law to punish a defendant for conduct that was never illegal because the law prohibiting the conduct was never valid.

The Supreme Court has acknowledged "that the Due Process and *Ex Post Facto* Clauses safeguard common interests—in particular, the interests in

153. *Id.* at 446.

154. 19 U.S.C. § 3312(b)(2) (2006).

155. Boddie v. Connecticut, 401 U.S. 371, 379 (1971) (emphasis added).

156. Rogers v. Tennessee, 532 U.S. 451, 467 (2001) (Scalia, J., dissenting) (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960)).

157. *Id.*

158. *See* HALL, *supra* note 156, at 59.

159. *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 792 (2004) (noting that the *nulla poena* principle bars "ex post facto sanctions").

160. U.S. CONST. art. I, § 10, cl. 1.

161. *Rogers*, 532 U.S. at 459.

fundamental fairness."[162] It is fundamentally unfair to apply a law retroactively to punish a defendant for actions that were legal when he or she performed them.[163] The *nulla poena* maxim and the Ex Post Facto Clause embody this principle.[164] Similarly, if a state criminal law is invalid because supreme federal law preempts it, the state law is a legal nullity. If the only "law" prohibiting specified conduct is a legal nullity, then the "prohibited" conduct cannot be deemed illegal. Just as it is fundamentally unfair to punish a defendant for engaging in conduct that was legal at the time but later became illegal, it is fundamentally unfair to punish a defendant for engaging in conduct that has never been illegal. Indeed, the application of an invalid law to punish a defendant for legal conduct is the very antithesis of the procedural protection the Due Process Clause secures.[165]

In response to the preceding argument, one might defend the constitutionality of § 3312(c) as follows. Section 3312(c) does not actually enable California, or any other state, to apply an invalid law to punish a defendant because § 3312(b)(2) expressly authorizes the United States to file suit to obtain a judicial declaration that NAFTA preempts a state law.[166] Thus, if a state attempts to punish a defendant pursuant to an invalid law, the federal government can intervene to prevent a violation of the defendant's rights. Moreover, given the complexity of NAFTA (and other free-trade agreements), any real case involving an alleged conflict between NAFTA and a state law is likely to involve difficult issues of treaty interpretation. Congress created a special remedial scheme to ensure that courts do not attempt to resolve difficult treaty interpretation issues without first obtaining the expert judgment of the federal executive branch. This remedial scheme shows that Congress made a reasonable policy choice. If Congress and the President have agreed on a particular mechanism for implementing an international agreement that has a direct bearing on U.S. foreign policy interests, then the courts should not invalidate that mechanism on constitutional grounds.

Although this argument has some surface appeal, it is ultimately unpersuasive because the right not to be punished for engaging in legal conduct is a fundamental, individual right.[167] In *Ex parte Young*, the Supreme Court held that a state law was unconstitutional because it prevented "the company and its officers from resorting to the courts to test the validity of ... laws which deeply affect [their] rights."[168] Section 3312(c) is unconstitutional for precisely the same reason. It prevents ABC from resorting to the courts to test the validity of a state

162. *Id.* at 460. *See also* Bouie v. City of Columbia, 378 U.S. 347, 353-54 (1964) ("If a state legislature is barred by the *Ex Post Facto* Clause from passing [an Ex Post Facto] law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.").

163. *See Rogers*, 532 U.S. at 470 (Scalia, J., dissenting).

164. *See id.*

165. *See* Hicks v. Oklahoma, 447 U.S. 343, 345 (1979).

166. 19 U.S.C. § 3312(b)(2) (2006).

167. *Rogers*, 532 U.S. at 456; *Hicks*, 447 U.S. at 345.

168. *Ex parte* Young, 209 U.S. 123, 147 (1908).

law that deeply affects its rights. Congress cannot solve the problem by granting only federal executive officers access to courts to test the state law's validity, because the right not to be punished for engaging in lawful conduct is a fundamental right. Congress cannot make the exercise of that right dependent on the discretionary decision of a federal executive official.

Those who defend the constitutionality of § 3312(c) and similar provisions may argue that judicial acceptance of the preceding due-process argument would inhibit the United States from joining additional treaties because the government will resist judicial review of governmental action for compliance with treaty-based norms. Thus, to the degree that the preceding constitutional argument is motivated, at least in part, by a normative commitment to compliance with international standards, the argument may yield unintended consequences by reducing the likelihood that the United States will join additional treaties. In response, it bears emphasis that the preceding constitutional argument assumes that conditions like § 3312(c) are valid as applied to civil plaintiffs. Therefore, the government does have substantial power to constrain judicial review of governmental action for compliance with treaty-based norms. In contrast, when the government files criminal charges against private parties, it necessarily exposes itself to judicial scrutiny of defendant's assertion that the law authorizing penal sanctions is invalid. Any government that has the power to impose criminal sanctions on private parties without subjecting itself to this type of judicial review is, in substance, a despotic power, even if it otherwise preserves a democratic veneer.

V. HUMAN RIGHTS IMPLICATIONS

Part III demonstrated that NAFTA's key substantive provisions have the force of preemptive federal law within the U.S. legal system. The analysis supporting this conclusion rests primarily, but not exclusively, on interpretation of the NAFTA implementing legislation.[169] This conclusion applies equally to the treaty establishing the World Trade Organization and to nine other free-trade agreements that the United States has ratified in the past decade, because Congress enacted substantially identical legislation to implement all of these agreements.[170]

Part IV demonstrated that the Due Process Clause grants every criminal defendant a "meaningful opportunity to be heard," which includes the opportunity to challenge the validity of a state penal law on the grounds that supreme federal law preempts that state law.[171] Given that NAFTA has the force of preemptive federal law, § 3312(c) of the NAFTA Implementation Act is unconstitutional insofar as it purports to preclude a defendant in a state criminal trial from invoking NAFTA to argue that the state lacks the legal authority to impose penal sanctions. Once a criminal defendant has properly invoked supreme federal law to challenge the validity of a state penal law, the Supremacy

169. *See supra* Part III.

170. *See supra* notes 12-13 and accompanying text.

171. *See supra* Part IV.A.

Clause obligates state courts to decide on the merits whether that federal law actually preempts (and therefore invalidates) the state penal law.[172] Therefore, § 3312(b)(2) of the NAFTA Implementation Act is unconstitutional insofar as it attempts to preclude a state court from deciding the merits of a properly raised federal preemption defense. The constitutional defects in §§ 3312(c) and 3312(b)(2) apply equally to the comparable provisions in implementing legislation for other free-trade agreements.

As a practical matter, the opportunities for defendants in state criminal trials to invoke free-trade agreements in support of non-frivolous arguments challenging the validity of state penal laws are rather limited. In contrast, there are a fairly broad range of circumstances where defendants in state criminal trials could plausibly invoke international human rights treaties to challenge the validity of state criminal laws.[173] Therefore, the constitutional arguments developed in this article will have their greatest practical significance if they can be applied to human rights treaties that the United States ratified subject to non-self-executing declarations (NSE declarations).

For example, consider the practice of sentencing juvenile offenders to life without parole (LWOP). Currently, about 2500 individuals in the United States are serving LWOP sentences for crimes they committed as juveniles.[174] From 2005 to 2007, U.S. courts sentenced 259 juvenile offenders to LWOP.[175] The United States is now the only country in the world where juvenile offenders serve LWOP sentences for their crimes.[176] The Human Rights Committee, the U.N. body responsible for overseeing the implementation of states' treaty obligations under the ICCPR, has stated that the practice of sentencing juvenile offenders to LWOP is "not in compliance with article 24(1) of the" ICCPR.[177] Article 24(1) is directly binding on the United States as a matter of international law.[178] Thus,

172. *See supra* Parts III.A, III.C.1.

173. *See, e.g.*, David Sloss, *Using International Law to Enhance Democracy*, 47 VA. J. INT'L L. 1, 35-38 (2006) (discussing article 6 of the ICCPR as a constraint on the state's authority to impose capital punishment); Sloss, *supra* note 20, at 210-14 (discussing article 18 of the ICCPR as the basis for a freedom of religion defense that is broader than the comparable constitutional defense).

174. *See* Connie de la Vega & Michelle Leighton, *Sentencing Our Children to Die in Prison: Global Law and Practice*, 42 U.S.F. L. REV. 983, 990 (2008).

175. *Id.* at 985-86.

176. *See id.* at 990.

177. Concluding Observations of the Human Rights Committee, United States of America, CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006), ¶ 34, *available at* http://www.unhchr.ch/tbs/doc.nsf. Article 24(1) provides, "Every child shall have ... the right to such measures of protection as are required by his status as a minor." ICCPR, *supra* note 16, art. 24(1). Although the views of the Human Rights Committee are not binding on the United States, U.S. courts have said that the Committee's views constitute persuasive authority. *See, e.g.*, United States v. Duarte-Acero, 208 F.3d 1282, 1288 (11th Cir. 2000) (stating that the Human Rights Committee's "decisions in individual cases are recognized as a major source for interpretation of the ICCPR"); Maria v. McElroy, 68 F. Supp. 2d 206, 232 (E.D.N.Y. 1999) (stating the same).

178. When the United States ratified the ICCPR, it adopted numerous reservations to limit the scope of its obligations under international law. For the text of U.S. reservations, see ICCPR U.S. Reservations, http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet (last visited June 8, 2009). The United States did not adopt any reservation to article 24. *See id.* Therefore, the United States is bound by Article 24 as a matter of international law.

there is a plausible argument that the United States is violating its international treaty obligations every time a state court sentences a juvenile offender to LWOP.[179]

Assume that a state prosecutor seeks an LWOP sentence for a juvenile offender who faces criminal trial in state court. The defendant invokes Article 24 of the ICCPR in support of his argument that the state law authorizing LWOP for juvenile offenders is invalid. Does the NSE declaration preclude the court from reaching the merits of that argument? Or does the Due Process Clause require the court to reach the merits of that argument? The answer to these questions depends, in part, on the correct interpretation of the NSE declaration.

The constitutional arguments presented above suggest that the NSE declarations attached to human rights treaties violate the Due Process Clause if, but only if, two conditions are true: (1) the human rights treaties to which those NSE declarations are attached have the force of preemptive federal law; and (2) the President and the Senate, at the time of treaty ratification, intended that the NSE declarations would preclude defendants in state criminal trials from invoking the treaties defensively. If both conditions are true, and if the constitutional analysis in part IV above is correct, the NSE declarations violate the Due Process Clause to the extent that they purport to preclude a defendant in a state criminal trial from invoking a human rights treaty to argue that the treaty preempts the state law authorizing penal sanctions, and that the state therefore lacks the legal authority to impose such sanctions.

The conventional wisdom holds that the first condition is false and the second condition is true. In other words, the President and Senate adopted the NSE declarations to ensure that human rights treaties would not have the force of preemptive federal law and that litigants could not invoke the treaties in U.S. courts, either offensively or defensively.[180] If the conventional wisdom is correct, and the treaties lack the force of preemptive federal law, the constitutional arguments presented in parts III and IV do not apply to human rights treaties, because those arguments apply only to treaties that have the status of supreme federal law. The Senate record associated with ratification of human rights treaties, however, provides compelling evidence that the treaty makers believed that, after ratification, those treaties would have the force of supreme federal law under the Supremacy Clause.[181] Moreover, even if the President and Senate attempted, by means of the NSE declarations, to deprive the treaties of their constitutional status as supreme federal law, there are reasons to doubt that

179. For present purposes, it does not matter whether the U.S. is actually violating its treaty obligations under Article 24. The key point is that there is a non-frivolous argument in support of the claim that the U.S. is violating Article 24.

180. *See, e.g.*, Bradley & Goldsmith, *supra* note 87, at 446-49.

181. *See* Sloss, *supra* note 20, at 144-71 (providing a detailed analysis of the Senate record associated with ratification of human rights treaties).

the treaty makers have the constitutional power to override the Supremacy Clause in this manner.[182]

I have argued elsewhere, based on a detailed analysis of the Senate record associated with treaty ratification, that the second condition is false: the NSE declarations limit offensive application of human rights treaties by civil plaintiffs, but do not preclude defensive invocation of the treaties by civil or criminal defendants.[183] Under this interpretation, the NSE declarations are not constitutionally problematic.[184] This is the best interpretation of the NSE declarations because it is consistent with the Senate record, it permits courts to exercise their judicial power to protect the procedural rights of criminal defendants, and it avoids the constitutional deficiencies that invalidate the restrictive conditions included in the NAFTA implementing legislation.

182. *See* Sloss, *supra* note 75, at 45-80 (contending that Article II does not grant the treaty makers the constitutional authority to alter the constitutional rule, codified in the Supremacy Clause, that treaties have the status of supreme federal law).

183. *See* Sloss, *supra* note 20, at 203-16.

184. *See* Sloss, *supra* note 75, at 39-41.