

The Constitution, Invasion, Immigration, and the War Powers of States

by

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and

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Abstract

By express and implied reservation, the Constitution permits states to wage defensive war and take other military action in response to invasion, insurrection, and molestation by transnational criminal gangs. This article examines the under-researched area of state war powers and how they interact with federal military and other foreign affairs powers. It also recovers the meaning of the Constitution’s term “invasion” and demonstrates that several judicial decisions have construed that term far too narrowly. The article ends with reflections on justiciability and remedies in state war power cases.

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I. INTRODUCTION.³

³ Bibliographical Footnote: This note collects secondary sources employed more than once in this article. For multiple-edition works available to the Founders, we usually cite the latest accessible edition issued before the 1787-1790 ratification debates.

MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW (5th ed. 1786) (5 vols.) [hereinafter BACON]

NATHAN BAILEY, A UNIVERSAL ETYMOLOGICAL ENGLISH DICTIONARY (25th ed. 1783) [hereinafter BAILEY]

TIMOTHY CUNNINGHAM, A NEW AND COMPLETE LAW-DICTIONARY (3d ed. 1783) (2 vols.) [hereinafter CUNNINGHAM]

THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (John P. Kaminski et al. eds., 1976-2023) (41 vols.) [hereinafter DOCUMENTARY HISTORY]

THE RECORDS OF THE FEDERAL CONVENTION (Max Farrand ed., 1939) [hereinafter FARRAND]

HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE (Richard Tuck ed., 2005) (John Morrice trans., 1738) (1625), (3 vols.) [hereinafter GROTIUS]

MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN (1778) (2 vols.) [hereinafter HALE]

SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (8th ed. 1786) [hereinafter JOHNSON]

JOURNAL OF THE CONTINENTAL CONGRESS 1774-1789 (Gaillard Hunt ed., 1912) [hereinafter JCC]

A. *The Subject*

Recent events at the southern border of the United States have raised controversy about whether, and to what extent, states may respond without federal cooperation. Central to the controversy are two constitutional questions: (1) Upon ratification of the Constitution, did any state sovereign war powers survive, or was all such authority ceded to the federal government? and (2) if any state war powers did survive, what is their scope?

Thus far, scholarship and Supreme Court jurisprudence have provided no clear answers to those questions.⁴ This article tackles them.

JAMES MADISON, THE REPORT OF 1800, Founders Online,
<https://founders.archives.gov/documents/Madison/01-17-02-0202> [hereinafter MADISON,
REPORT]

ALFRED MATHEWS, OHIO AND HER WESTERN RESERVE (1902) [hereinafter MATHEWS]

Robert G. Natelson, *The Power to Restrict Immigration and the Original Meaning of the Constitution’s Define and Punish Clause*, 11 BR. J. AM. LEG. STUDIES 209 (2022)
[hereinafter *Natelson, Define and Punish*]

SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS (Basil Kennett trans., 1739)
(1672) [hereinafter PUFENDORF, NATURE]

SAMUEL PUFENDORF, THE WHOLE DUTY OF MAN, ACCORDING TO THE LAW OF NATURE
(Andrew Tooke trans., 1691) (Ian Hunter & David Saunders eds., 2003) [hereinafter
PUFENDORF, DUTY]

THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789)
[hereinafter SHERIDAN]

EMER DE VATTEL, THE LAW OF NATIONS (J. Newbery et al. eds., 1760) (1758) (2 vols.)
[hereinafter VATTEL]

⁴ One of the few, and perhaps the only, law journal article dedicated to state war powers is a student comment: Heather Dwyer, *The State War Power: A Forgotten Constitutional*

B. Background Information: The British Empire and Our Sources

Nearly all the leading Founders had been born and raised under the British flag—either in the North American colonies, in Britain, Ireland, or (as in the case of Alexander Hamilton) in the British Caribbean. Understanding the Constitution they adopted requires some information on the empire they had inhabited.

The island of Great Britain consisted (as it still consists today) of England, Wales, and Scotland. England and Wales had been united for legal purposes in the sixteenth century. The English and Scottish Crowns were conjoined upon the accession of James I in 1603, but England and Scotland remained separate kingdoms, each with its own parliament. Then in 1707, both parliaments passed an Act of Union, thereby creating the Kingdom of Great Britain with a common British Parliament. Within those limitations, Scotland retained its own legal system, as it does today.⁵

After the territorial losses from the American Revolution, the Empire encompassed the following territories: the island of Great Britain along with small

Clause, 33 U. LA VERNE L. REV. 319, 320 (2012) (claiming the existence of a “Constitutionally derived State War Power”). Outside the realm of formal scholarship is Mark Brnovich, *The Federal Government’s Duty to Protect the States and the State’s Sovereign Power of Self Defense When Invaded*, Op. Ariz. A.G. No. I22-001 (Feb. 27, 2022), <http://perma.cc/EBG8-VZ9D> (concluding that certain activities at the southern border qualify as an “invasion” as the Constitution uses the term); JOSHUA TREVIÑO, TEX. PUB. POL. INST., *THE MEANING OF INVASION UNDER THE COMPACT CLAUSE OF THE U.S. CONSTITUTION* (2022), <https://www.texaspolicy.com/wp-content/uploads/2022/11/2022-11-RR-SST-CompactClause-JoshuaTrevino-paper5-.pdf> (concluding that certain activities at the southern border qualify as an “invasion” as the Constitution uses the term).

⁵ Scotland recovered its own parliament in 1999.

nearby islands, Ireland, Canada, much of India, Bermuda, an incipient colony in and near Australia, and valuable Caribbean islands, including the Bahamas, Jamaica, and Trinidad.

Most colonies enjoyed at least some degree of self-governance, but they usually fashioned their institutions from English (rather than Scottish or Irish) models. Some core legal concepts (such as “allegiance,” discussed below in Part IV, were common to the entire empire.

As might be expected, the Constitution’s language and structure were influenced heavily by English jurisprudence.⁶ One subdivision of that jurisprudence was the *law of nations*, which today we call international law. A subdivision of the law of nations was the *law of war*. For information on the law of nations, including the law of war, English lawyers, judges, and commentators relied principally on a handful of authoritative European treatises,⁷ as well as on their own legal precedents.

To assist in reconstructing the Constitution’s meaning, we draw heavily on the European “law of nations” treatises and on Anglo-American case reports, law dictionaries, digests, and other legal works used by Founding-era lawyers. We also draw on contemporaneous lay dictionaries and other literary sources.

Courts and lawyers typically refer to Article I, Section 10 of the Constitution as the Compact Clause and Article IV, Section 4 as the Guarantee Clause. Our examination, however, focuses only on selected components of those two provisions. To increase precision, we identify the relevant components as follows: The *Self-*

⁶ Robert G. Natelson, *Did the Constitution Grant the Federal Government Eminent Domain Power? Using Eighteenth Century Law to Answer Constitutional Questions*, 19 FED. SOC’Y REV. 88 (2018).

⁷ Natelson, *Define and Punish*, *supra* note 3, at 217-25 (documenting the popularity of the international law treatises cited here).

Defense Clause is the part of the Compact Clause that provides, “No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”⁸ The *Protection From Invasion Clause* is the part of the Guarantee Clause that provides, “The United States . . . shall protect each of them [i.e., the states] against Invasion.”⁹ The *Domestic Violence Clause* is the segment of the Guarantee Clause that reads, “The United States . . . protect each of them [i.e., the states] . . . on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”¹⁰

II. THE LAW OF WAR AT THE FOUNDING

A. *Definitions and Categories of War*

The Founders’ international law authorities recognized that the term “war” could describe episodes of combat, but for legal purposes they defined it as a continuous state or condition. Hugo Grotius defined war as “the State or Situation of those . . . who Dispute by Force of Arms.”¹¹ Emer de Vattel described it as “that

⁸ U.S. CONST. art. I, § 10, cl. 3; *cf.* *United States v. Abbott*, No. 1:23-CV-853-DAE, slip op. at 31 (W.D. Tex. Sep. 6, 2023).

⁹ U.S. CONST. art. IV, § 4, cl. 2; *cf.* Scott R. Bauries, *The Education Duty*, 47 WAKE FOREST L. REV. 705, 715 n.44 (2012) (arguing that the Protection From Invasion Clause should not be amalgamated with the preceding provision).

¹⁰ U.S. CONST. art. IV, § 4, cl. 2.

¹¹ 1 GROTIUS, *supra* note 3, at 134.

state in which a nation prosecutes its right by force.”¹² For a state of war to exist, actual fighting was not necessary.¹³

Wars were classified as private, public, or mixed.¹⁴ A *private war* was prosecuted solely by private parties.¹⁵ Purely private conflict was a subject for natural law or ordinary civilian law, not for the law of nations.¹⁶ In a *public war* all contending parties were sovereigns.¹⁷ *Mixed war* was a clash between a sovereign and private persons,¹⁸ such as international criminals of the kind denominated “enemies of the human race.”¹⁹

¹² 2 VATTEL, *supra* note 3, at 1.

¹³ 1 GROTIUS, *supra* note 3, at 134; Vaughan’s Case (1696) 91 Eng. Rep. 535, 536; 2 Salk. 634, 635 (K.B.) (asserting that a state of war does not require actual fighting).

¹⁴ 1 GROTIUS, *supra* note 3, at 240 (“Mixed war is that which is made on one Side by publick Authority, and on the other by mere private Persons.”).

¹⁵ Grotius recognized even combats among single individuals as “war.” 1 GROTIUS, *supra* note 3, at 135.

¹⁶ 2 VATTEL, *supra* note 3, at 1.

¹⁷ 2 VATTEL, *supra* note 3, at 1 (“*Public war* is that betwixt nations or sovereigns, and carried on in the name of the public power, and by its order . . . *private war*, or that carried on between particulars, or private individuals, properly belonging to the law of nature.”) (Italics in original). Pufendorf called public war “solemn war,” PUFENDORF, NATURE, *supra* note 3, at 839.

¹⁸ 1 GROTIUS, *supra* note 3, at 250 (“But a publick War not Solemn, may be made both without any Formality, and against mere private Persons, and by the Authority of any Magistrate whatever”).

¹⁹ See *infra* Part II (C) for “enemies of the human race.” Pufendorf used the term “less solemn war” to denote either an undeclared war or one against private persons, as in

A war could be offensive and just, offensive and unjust, defensive and just, or—in rare cases—defensive and unjust.²⁰ The mark of a *just war* was that it was a final resort for preventing, obtaining compensation for, or avenging injury.²¹ Aggression for the sake of gain, conquest, or glory was unjust.²²

A *defensive war* was one waged to prevent injury.²³ Usually a party engaged in defensive war was not the first to strike, but defensive war could include a

defending against the “Incursion or Depredation of Robbers.” PUFENDORF, *NATURE*, *supra* note 3, at 839-40.

²⁰ 2 VATTEL, *supra* note 3, at 35 (“[B]ut this is a case very rarely known among nations. There are few defensive wars without at least some apparent reason for warranting their justice and necessity”).

²¹ 2 VATTEL, *supra* note 3, at 11 (“Let us then say in general, that the foundation or cause of every just war is injury, either already done or threatned” [*sic*]). *See also* PUFENDORF, *NATURE*, *supra* note 3, at 834:

The Causes of just War may be reduc'd to these three Heads: First, To defend ourselves and Properties against others that design to do us Harm, either by assaulting our Persons, or taking away or ruining our Estates. Secondly, To assert our Rights when others, who are justly obliged, refuse to pay them to us. And lastly, To recover Satisfaction for Damages we have injuriously sustained, and to force the Person that did the Injury, to give Caution [security] for his good Behaviour for the future.

²² PUFENDORF, *NATURE*, *supra* note 3, at 836 (listing unjust causes of war).

²³ 1 VATTEL, *supra* note 3, at 143 (“[T]he right of a just defence, which belongs to every nation; or the right of making use of force against whoever attacks it, and its privileges. This is the foundation of a defensive war.”).

preemptive strike to forestall an imminent assault.²⁴ A party also engaged in defensive war if he attacked because he was “often alarm’d and harass’d with sudden Incursions upon him, the Enemy retiring always when he appears to oppose him.”²⁵

Offensive wars were fought to seek compensation for perceived injury or to deter the enemy from inflicting anticipated injury.²⁶ For an offensive war to be considered lawful, those motivations were necessary; otherwise, the attack was unlawful—akin to robbery—and a nation assaulted in that way was not obliged to observe the rules of war in fighting off the assailant.²⁷

Under the law of nations, only a sovereign was privileged to make war or to delegate the power to do so.²⁸ The sovereign designated the precise officials empowered to begin a war, who might be agents of subordinate units of government.²⁹ Even without an express authorization, the governor of a political

²⁴ PUFENDORF, *NATURE*, *supra* note 3, at 835 (describing as “defensive” an attack when one is “assured that his Enemy hath form’d designs against him, and so disables him for the Attempt, while he is making his Preparation”).

²⁵ PUFENDORF, *NATURE*, *supra* note 3, at 835.

²⁶ 1 VATTEL, *supra* note 3, at 143 (“the right to obtain justice by force, if we cannot obtain it otherwise, or to pursue our right by force of arms. This is the foundation of an offensive war”).

²⁷ 3 VATTEL, *supra* note 3, at 3, 26.

²⁸ 2 VATTEL, *supra* note 3, at 2 (“Thus the sovereign power has alone authority to make war”).

²⁹ 1 GROTIUS, *supra* note 3, at 253 (“But it may happen, that in a very large State, the inferior Powers may have Authority granted them to begin a War; which, if so, then the War may be reputed [i.e., reckoned] as made by the Authority of the Sovereign Power: *For*

subdivision had implied authority to defend against invaders or insurrectionists.³⁰ He was not, however, to “rashly to carry the War into an Enemy’s Country.”³¹

Initiation of hostilities might be signaled by a declaration of war—sometimes called a “denunciation,” after *denuntio*, the Latin word for a declaration of war. A declaration was not required for a defensive war, but was expected for an offensive one.³² Hostilities supported by a declaration were referred to as “formal” or “solemn,” from the Latin *solemnis*, a word associated with ceremony.³³

he that gives to another the Right of doing a Thing, is esteemed the Author of it.” (Italics in original)).

³⁰ 1 GROTIUS, *supra* note 3, at 250-51 (“every Magistrate seems to have as much Right, in case of Resistance, to take up Arms in order to execute his Jurisdiction, as to defend the People committed to his Protection.”).

³¹ PUFENDORF, DUTY, *supra* note 3, at 241.

³² 2 VATTEL, *supra* note 3, at 22-23. *But see* THE FEDERALIST No. 25, N.Y. PACKET, Dec. 21, 1787 (Alexander Hamilton), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 3, at 62 (claiming that “the ceremony of a formal denunciation of war has of late fallen into disuse”). Hamilton’s conclusion is buttressed by Georg Friedrich Martens, whose international law treatise was composed in French contemporaneously with the Constitution’s adoption, but not translated into English until 1795. GEORG FRIEDRICH VON MARTENS, SUMMARY OF THE LAW OF NATIONS 274 (Wm. Cobbett trans., 1795) (“The universal law of nations acknowledges no general obligation of making a declaration of war to the enemy, previous to the commencement of hostilities”). A declaration “to the enemy” must be distinguished from one directed at all or some of the sovereign’s own people.

³³ PUFENDORF, DUTY, *supra* note 3, at 240 (“Solemn or formal wars are those marked by a declaration”). Another distinction was between *perfect* and *imperfect* war. The former entirely disrupts the tranquility of a state, whereas the latter interrupts public tranquility only in certain particulars. MICHAEL D. RAMSEY. THE CONSTITUTION’S TEXT IN FOREIGN AFFAIRS 246 (2007).

B. The Means of War

A just war empowered the sovereign to undertake nearly all means necessary to accomplish its purpose of preventing or repairing injury or forestalling future injury.³⁴ (“Nearly all means” because some, such as assassination and poisoning, were prohibited by the law of war.)³⁵ Vattel wrote of defensive conflicts:

The enemy attacking me unjustly, gives me an undoubted right of repelling his violences; and he who opposes me in arms, when I demand only my right, becomes himself the real aggressor by his unjust resistance . . . For if the effects of this force proceed so far as to take away his life, he owes the misfortune to himself; for if by sparing him I should submit to the injury, the good would soon become the prey of the wicked. Hence the right of killing enemies in a just war is derived; when their resistance cannot be suppressed, when they are not to be reduced by milder methods, there is a right of taking away their life But the very manner by which the right of killing enemies is proved, points out also the limits of this right. On an enemy’s submitting and delivering up his arms, we cannot with justice take away his life.³⁶

³⁴ 2 VATTEL, *supra* note 3, at 47-48:

For when the end is lawful, he who has a right to prosecute this end is warranted in the use of all necessary means to attain it On a declaration of war, therefore, this nation has a right of doing against the enemy whatever is necessary to this justifiable end of bringing him to reason, and obtaining justice and security from him.

³⁵ 2 VATTEL, *supra* note 3, at 56.

³⁶ 2 VATTEL, *supra* note 3, at 48-49.

Besides killing enemies who refuse to surrender their arms, a belligerent could capture them,³⁷ hold them for ransom,³⁸ make reprisals in certain circumstances,³⁹ execute war criminals,⁴⁰ and seize enemy property.⁴¹ The belligerent could seek out enemies in their territory, in its own territory, or in areas belonging to no one.⁴² It could prosecute for treason any of its own subjects caught assisting the enemy.⁴³ The belligerent also could take many defensive measures that are characteristic of war but which by themselves would fall short of (or be incidental to) full-blown hostilities, such as building protective barriers.⁴⁴

Eighteenth century war was often a brutal exercise⁴⁵—far more so than the relatively controlled conduct of both sides during the American Revolution.⁴⁶

³⁷ 2 VATTEL, *supra* note 3, at 48-49.

³⁸ 2 VATTEL, *supra* note 3, at 55-56.

³⁹ 2 VATTEL, *supra* note 3, at 49.

⁴⁰ 2 VATTEL, *supra* note 3, at 49.

⁴¹ 3 GROTIUS, *supra* note 3, at 1475; 2 VATTEL, *supra* note 3, at 61-62.

⁴² 3 GROTIUS, *supra* note 3, at 1282. *Cf.* 1 VATTEL, *supra* note 3, at 160 (“When a true necessity obliges you to enter into the country of another . . . you may force a passage that is unjustly refused.”).

⁴³ *Infra* note 173 and accompanying text.

⁴⁴ PUFENDORF, *NATURE*, *supra* note 3, at 185 (“And if I can defend myself with a Wall or a Gate, ‘tis absurd in me to expose my Breast to my Foe.”).

⁴⁵ Dennis Showalter, *Matrices: Soldiers and Civilians in Early Modern Europe, 1648-1789*, in *DAILY LIVES OF CIVILIANS IN WARTIME EUROPE, 1618-1900* at 58, 83 (Linda S. Frey & Marshal L. Frey eds., 2007) (describing armies’ devastation of areas of Europe.

⁴⁶ JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 26 (2012) (describing General Washington’s restraint during the Revolutionary War). *But see* THEODORE P. SAVAS & J. DAVID DAMERON, *A GUIDE TO THE BATTLES OF THE AMERICAN*

International law scholars, among others, sought to curb the brutality.⁴⁷ Their writings encouraged belligerents to exercise mercy and restraint whenever possible,⁴⁸ and to transport and release enemies in safe locations.⁴⁹

These authorities on the law of nations also laid down the rule that a belligerent should not pursue, seize, or kill enemies in a neutral country.⁵⁰ This rule was heavily qualified both in theory and practice. A nation aspiring to neutral status had to “shew [*sic*] an exact impartiality between the parties at war”⁵¹ and not grant to one quarrelling party what it withheld from the other.⁵² A neutral nation could not permit its citizens to injure one of the belligerents by, for example, encroaching over its borders.⁵³ Even if a country met those standards, a belligerent

REVOLUTION 180 (2006) (describing the massacre in the Wyoming Valley of Pennsylvania after a British/ Iroquois victory: “For the next twelve hours, the British allowed their Indian allies to torture and kill their prisoners.”).

⁴⁷ David B. Kopel, Paul Gallant & Joanne D. Eisen, *The Human Right of Self-Defense*, 22 *BYU J. PUB. L.* 43, 59 (2007) (mentioning this aspect of the international law commentators’ agenda).

⁴⁸ PUFENDORF, *NATURE*, *supra* note 3, at 850 (“We are not always obliged indeed to make use of the utmost Liberties of War; nay, it is often the greatest Glory to spare an Enemy, when it is in our Power to ruin and destroy him.”).

⁴⁹ 2 *VATTEL*, *supra* note 3, at 68 (“Thus, when prisoners, either on ransom or exchange, are sent away, it would be infamous to put them in a dangerous road.”).

⁵⁰ 3 *GROTIUS*, *supra* note 3, at 1282; 1 *VATTEL*, *supra* note 3, at 151.

⁵¹ 2 *VATTEL*, *supra* note 3, at 36.

⁵² 2 *VATTEL*, *supra* note 3, at 37.

⁵³ 1 *VATTEL*, *supra* note 3, at 146 (“[T]he nation in general, is guilty of the base attempt of its members . . . when by its manners or the maxims of its government it accustoms, and

still might legitimately intrude on neutral territory in cases of extreme necessity, so long as the belligerent later provided compensation.⁵⁴ A belligerent also could intrude on neutral territory if the enemy regularly fled into that territory or deposited spoil or prisoners there.⁵⁵

C. “*Enemies of the Human Race*”

Founding-era international law identified persons engaged in particularly reprehensible activities outside ties of national allegiance as “enemies of the human race”—*hostes humani generis*.⁵⁶ They included pirates (defined in eighteenth century dictionaries as “sea robbers”)⁵⁷ and other thieves; deserters;⁵⁸ poisoners, assassins, and incendiaries;⁵⁹ those who participated in combat merely for

authorizes its citizens to plunder, and use ill foreigners indifferently, or to make inroads into the neighboring countries, &c.”).

⁵⁴ 2 VATTEL, *supra* note 3, at 44.

⁵⁵ 2 VATTEL, *supra* note 3, at 46.

⁵⁶ The concept of “enemy of the human race” appears in a 358 C.E. decree of the Roman Emperor Constantius II. The Empire’s rulers were then Christian, and they disapproved of magicians: *homines magi, in quacumque sint parte terrarum, humani generis inimici credendi sunt*. CODE JUST. 9.18.7pr (Constantius II 358) (“Magicians in whatever part of the world they may be, must be believed to be enemies of the human race.”) This decree used the word *inimicus* for “enemy,” not *hostis*, the Founding-era appellation for an alien enemy. By 1736, sorcery prosecutions had ceased in England. OWEN DAVIES. WITCHCRAFT, MAGIC AND CULTURE, 1736-1951 at 79, 91 (1999).

⁵⁷ BAILEY, *supra* note 3 (unpaginated) (defining “pirate”).

⁵⁸ 3 GROTIUS, *supra* note 3, at 1609-1610 (“Pirates, Robbers, Fugitives, and Deserters”).

⁵⁹ 1 VATTEL, *supra* note 3, at 99.

depredation;⁶⁰ and foreigners who were “unauthorized volunteers [*sic*] in violence.”⁶¹ Modern analogues include international freelance terrorists and international criminal organizations, such as the Mexican drug and human trafficking cartels.⁶²

Wars against enemies of the human race were always just.⁶³ Enemies of the human race could be attacked wherever they happened to be, even if they had not crossed any international boundary. As Vattel remarked:

[I]f the justice of each nation ought in general to be confined to the punishment of crimes committed in its own territories; we ought to except from this rule, the villains, who by the quality and habitual frequency of their crimes, violate all public security, and declare themselves the enemies of the human race. Poisoners, assassins, and incendiaries by profession, may be exterminated wherever they are seized....⁶⁴

A nation capturing enemies of the human race had the choice of treating them as prisoners of war or as common criminals. William Blackstone argued for

⁶⁰ 2 VATTEL, *supra* note 3, at 26 (“A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers.”).

⁶¹ 1 WILLIAM BLACKSTONE, COMMENTARIES *249 (“[U]nauthorized volunteers [*sic*] in violence are not ranked among open enemies, but are treated like pirates and robbers . . .”).

⁶² Richard J. Samuels, *Drug Cartel*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/drug-cartel> (2023).

⁶³ 2 GROTIUS, *supra* note 3, at 1022-23 (proclaiming war just against pirates and assorted other malefactors).

⁶⁴ 1 VATTEL, *supra* note 3, at 98-99.

their being treated as criminals rather than as prisoners of war in the first volume of his Commentaries.⁶⁵ In the second volume, however, he implied that civilian-style due process was not required:

As, therefore, he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him; so that every community hath a right by the rule of self-defence, to inflict that punishment upon him which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.⁶⁶

Treating captured *hostes humani generis* as accused criminals denied them the honorable status of prisoners of war normally accorded captured enemy aliens. Treating them as captured enemy aliens, on the other hand, denied them privileges—such as trial by jury—to which accused criminals were entitled.

D. Allegiance—Cross Reference

The concept of "allegiance" also defined the scope of permissible conduct during war. This subject is addressed in Part IV.

III. THE CONTOURS OF FEDERAL AND STATE WAR POWERS

⁶⁵ 1 WILLIAM BLACKSTONE, COMMENTARIES *249; *see also* Calvin’s Case (1608) 77 Eng. Rep. 377, 406; 7 Co. Rep. 1, 24b (K.B.) (accounting *proditores* (traitors) and *praedones* (pirates) as excluded from formal enemies in war).

⁶⁶ 2 WILLIAM BLACKSTONE, COMMENTARIES *71; *see also* 2 GROTIUS, *supra* note 3, at 893 (“And in this Sense may be admitted the Distinction made by Cicero, between an Enemy in Form, with whom, he says, we have many Rights in common . . . and Pirates and Robbers.”)

A. *Preliminary Comments*

The charters of the North American colonies typically granted them authority to wage defensive war. For example, the 1629 royal charter for Massachusetts Bay colony provided in part:

AND WEE [i.e., the king] DOE further . . . give and graunte to the said Governor and Company, and their Successors, by theis Presents, that it shall and maie be lawfull . . . to incounter, expulse, repell, and resist by Force of Armes, as well by Sea as by Lande, and by all fitting Waies and Meanes whatsoever, all such Person and Persons, as shall at any Tyme hereafter, attempt or enterprise the Destrucon, Invasion, Detriment, or Annoyance to the said Plantation or Inhabitants . . . ⁶⁷

⁶⁷ MASS. CHARTER (1629), https://avalon.law.yale.edu/17th_century/mass03.asp. *See also* R.I. CHARTER (1663), https://avalon.law.yale.edu/17th_century/ri04.asp (wording similar to Massachusetts Bay); CONN. CHARTER (1662), https://avalon.law.yale.edu/17th_century/ct03.asp (granting power to defend against the “Destruction, Invasion, Detriment, or Annoyance of the said Inhabitants or Plantation”); GA. CHARTER (1732), https://avalon.law.yale.edu/18th_century/ga01.asp (granting military power to respond to “destruction, invasion, detriment or annoyance of our said colony”); MD. CHARTER (1632), https://avalon.law.yale.edu/17th_century/ma01.asp (granting power to “build and fortify Castles, Forts, and other Places of Strength . . . for the Public and their own Defence”). *See also* CAROLINA CHARTER (1663), https://avalon.law.yale.edu/17th_century/nc01.asp:

[W]e . . . do give power . . . to levy, muster and train all sorts of men, of what condition or wheresoever born, in the said province for the time being, and to make war and pursue the enemies aforesaid, as well by sea as by land, yea, even without the limits of the said province, and by God’s assistance to vanquish and take them, and being taken to put them to death by the law of war, or to save them at their pleasure; and to do all and every other thing,

When the Declaration of Independence was issued, the thirteen colonies signing the document became states. They thereby assumed as a matter of sovereign right what previously had been a subject of grant. Thus, under both the Articles of Confederation and the Constitution, the source of most *state* authority⁶⁸—including that pertaining to war—preceded the Union and was largely reserved to the states.⁶⁹ The provisions in the Articles and the Constitution addressing state war powers served only as limitations or descriptions, not as grants. By contrast, the source of *federal* authority is the Constitution’s enumeration of powers.⁷⁰

To be sure, the controversial “doctrine of inherent sovereign authority” holds that the states never enjoyed power over military foreign affairs subjects, and that

which unto the charge of a captain general of an army belongeth, or hath accustomed to belong, as fully and freely as any captain general of an army hath or ever had the same.

Although several charters authorized the grantees to oppose anyone seeking their “destruction, invasion, detriment, or annoyance,” we caution against inferring from the canon *noscitur a sociis* that, for example, all elements in this list require adversarial confrontation. An invasion can occur without initial confrontation and without destruction; conversely, *infra* Part III (E), and destruction (via a blockade, for example) can occur without invasion.

⁶⁸ “Most” because the Constitution does grant a few specific powers to the states. Robert G. Natelson, *Federal Functions: Execution of Powers the Constitution Grants to Persons and Entities Outside the Federal Government*, 23 U. PENN. J. CONST. L. 193 (2021) (describing the Constitution’s grants of specific powers to states and other entities).

⁶⁹ U.S. CONST. amend. X.

⁷⁰ *E.g.*, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 535 (2012); *Kansas v. Colorado*, 206 U.S. 46, 81-82 (1907) (both relying on *McCulloch v. Maryland*, 17 U.S. 316 (1819)).

the federal government received that authority directly from its congressional predecessors—thereby bypassing the Articles and the Constitution entirely.⁷¹ As one has us recently demonstrated, however, this thesis is fatally flawed on every level: historically, legally, and logically.⁷² In this article, therefore, we do not address it further.

B. War Powers Under the Articles of Confederation

As the North Atlantic Treaty was to do 168 years later,⁷³ the Articles of Confederation deputized a central authority with certain prerogatives and limited the signatories accordingly. The rules pertaining to war powers were laid out in Articles VI⁷⁴ and IX.⁷⁵ The text of the two articles was somewhat disorganized, but

⁷¹ The leading statement of this doctrine appears in *United States v. Curtiss-Wright Corp.*, 299 U.S. 304 (1936).

⁷² Robert G. Natelson, *The False Doctrine of Inherent Sovereign Authority*, 24 FEDERALIST SOC'Y REV. 346 (2023).

⁷³ The North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, https://www.nato.int/cps/en/natohq/official_texts_17120.htm (creating, among other obligations, mutual assistance in case of an attack on any member and creating the North Atlantic Council as an administering body). For an explanation of why the Articles of Confederation created, rather than a true constitution, a treaty or league somewhat comparable to NATO, see Natelson, *supra* note 72, at 362-65.

⁷⁴ Article VI of the Articles of Confederation provided:

No State, without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any King, Prince or State; nor shall any person holding any office of profit or trust under the United States, or any of them, accept any present, emolument, office or title of any kind

whatever from any King, Prince or foreign State; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any King, Prince or State, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessel of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defense of such State, or its trade; nor shall any body of forces be kept up by any State in time of peace, except such number only, as in the judgement of the United States in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of filed pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the Kingdom or State and the subjects thereof, against which war has been so

that text laid out a coherent scheme in which Congress received general authority to declare and wage war for the Confederation. State war powers were reserved but limited in the following respects:⁷⁶

- Congress could set a maximum on the number of naval vessels states could maintain in time of peace;
- Congress could, upon review, limit the number of state vessels during a state war against pirates;
- states could grant commissions to ships and vessels of war and issue letters of marque and reprisal only after a congressional declaration of war and only against the declared enemy;
- states were required to maintain “a well-regulated and disciplined militia, sufficiently armed and accoutered . . . and constantly . . . ready for use;”
- a state was not to engage in war unless “actually invaded⁷⁷ by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not

declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by *pirates*, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLES OF CONFEDERATION OF 1781, art. VI.

⁷⁵ Article IX stated in relevant part: “The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article....” *Id.* at art. IX.

⁷⁶ *Supra* note 74.

⁷⁷ *See infra* Part III (E) (discussing the Founding-era meaning of “invade” and its variants).

to admit of a delay till the United States in Congress assembled can be consulted.”

The upshot was that the states retained virtually unlimited flexibility to engage in defensive land war—even after Congress had been consulted—except for power to strike preemptively at non-Indian enemies. Their naval scope was more constricted: They could maintain navies to fight congressionally-declared wars. They could issue letters of marque and reprisal only against congressionally-declared enemies. They could launch fleets at any time to suppress pirates, although limited by congressional review.

As for other powers related to war, the states retained authority to limit foreign immigration, impose embargoes, and suspend the writ of habeas corpus. However, state treaties and alliances were subject to congressional review, and state imposts and duties had to be consistent with congressional treaties.⁷⁸

C. Federal War Powers Under the Constitution

Founding-era international law scholars acknowledged each nation’s prerogative of dividing war powers among different administrative levels.⁷⁹ The Constitution divided war powers between the federal government and the states by granting authority to the federal government and limiting the reserved authority of the states.

The Protection From Invasion Clause and the Domestic Violence Clause imposed duties on the federal government to wage defensive war under certain circumstances: “The United States . . . shall protect each [state] . . . against Invasion; and on Application of the Legislature, or of the Executive (when the

⁷⁸ *Supra* note 74.

⁷⁹ *Supra* note 29 and accompanying text.

Legislature cannot be convened) against domestic Violence.”⁸⁰ The mandates were addressed to the United States government as a whole rather than solely to any branch.⁸¹

The Take Care Clause⁸² similarly mandated the President to “take Care that the Laws be faithfully executed.” This was another authorization to wage defensive war.

In addition, the Define and Punish Clause deputized Congress to “define and punish Piracies and Felonies committed on the High Seas.”⁸³ This permitted “mixed wars” against pirates and any other nautical “enemies of the human race.” Finally, the Constitution granted Congress power to “declare War.”⁸⁴ This enabled Congress

⁸⁰ U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”).

⁸¹ One of us (Natelson) believes the Guarantee Clause (U.S. CONST. art. IV, § 4, including its three components), conveyed to the U.S. government power beyond that conveyed to Congress and the President elsewhere in the Constitution. *See* Natelson, *supra* note 72, at 357-58. The other (Hyman) would limit the Guarantee Clause to conveying only powers supplemental to those otherwise granted, but necessary to fulfill the Clause’s mandates. The difference is not stark.

⁸² U.S. CONST. art. II, § 3. One of us (Hyman) believes the Take Care Clause was only an authorization to wage defensive war if Congress has not enacted valid legislation to the contrary, and if (furthermore) the President seeks only to maintain the operation of federal law rather than state law, using tools lawfully at his disposal.

⁸³ U.S. CONST. art. I, § 8, cl. 10.

⁸⁴ U.S. CONST. art. I, § 8, cl. 11.

to fight both defensive and offensive wars, both public and mixed⁸⁵—although declarations of war were associated primarily with offensive rather than defensive operations.

Other enumerated powers granted Congress the *means* to wage war.

Congress could:

- “grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;”⁸⁶
- “raise and support Armies”⁸⁷ and “provide and maintain a Navy;”⁸⁸
- “make Rules for the Government and Regulation of the land and naval Forces.”⁸⁹
- “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;”⁹⁰
- “provide for organizing, arming, and disciplining, the Militia,⁹¹ and for governing such Part of them as may be employed in the Service of the United

⁸⁵ *Supra* Part II (A).

⁸⁶ U.S. CONST. art. I, § 8, cl. 11.

⁸⁷ U.S. CONST. art. I, § 8, cl. 12.

⁸⁸ U.S. CONST. art. I, § 8, cl. 13.

⁸⁹ U.S. CONST. art. I, § 8, cl. 14.

⁹⁰ U.S. CONST. art. I, § 8, cl. 15 (the Calling Forth Clause).

⁹¹ U.S. CONST. art. I, § 8, cl. 16 (the Militia Organization Clause).

The Militia Organization and Calling Forth Clauses had time frames different from the Guarantee Clause, U.S. CONST. art. I, § 4. The Militia Organization and Calling Forth Clauses authorized Congress to establish rules for *future* use of the militia. *Cf.* Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original*

States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.”

In addition, the Constitution granted Congress and the President certain powers wholly or partly associated with war. Specifically, the Constitution—

- conferred on the President, with the advice and consent of the Senate, sole authority to make treaties;⁹²
- designated the President as “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;”⁹³
- implicitly granted Congress, as a traditional incident of war-making, the prerogative of suspending the “Privilege of the Writ of Habeas Corpus . . . when in cases of Rebellion or Invasion the public Safety may require it,”⁹⁴ thus authorizing suspension during certain defensive, but not offensive, operations;
- granted Congress authority to “regulate Commerce with foreign Nations,”⁹⁵ which enabled it to override certain state measures related to war, such as

Understanding, 52 U. KAN. L. REV. 1, 15-16 (2003) (discussing the element of futurity in the Founding-era meaning of “provide”). The portion of the Calling Forth Clause after the word “Militia” is a delineation of purpose.

The Guarantee Clause, on the other hand, referred to the power and duty to *immediately* “guarantee” and “protect.”

⁹² U.S. CONST. art. II, § 2, cl. 2

⁹³ U.S. CONST. art. II, § 2, cl. 1.

⁹⁴ U.S. CONST. art. I, § 9, cl. 2.

⁹⁵ U.S. CONST. art. I, § 8, cl. 3.

embargos and other trade restrictions⁹⁶ and those governing commercial immigration, including the slave trade;⁹⁷ and

- granted Congress power to “define and punish . . . Offenses against the Law of Nations.”⁹⁸ This provision permitted Congress to enact statutes protecting diplomats, fixing protocols of international practice, and restricting non-commercial immigration and emigration.⁹⁹ Of course, this clause, like other grants in the Constitution, carried with it incidental powers, recognized under the Necessary and Proper Clause.¹⁰⁰

D. State War Powers Under the Constitution

To the extent the Constitution did not qualify them, war powers remained in the states by reservation.¹⁰¹ The ratifiers understood this, as demonstrated by the

⁹⁶ Robert G. Natelson, *The Legal Meaning of “Commerce” in the Commerce Clause*, 80 ST. JOHN’S L. REV. 789, 823 (2006); Robert G. Natelson, *The Meaning of “Regulate Commerce” to the Constitution’s Ratifiers*, 23 FED. SOC’Y REV. 307, 318, 323 (2022).

⁹⁷ *Cf. infra* Part V (C) (discussing the limits on congressional power to invade the states’ core sovereign power of self-defense).

⁹⁸U.S. CONST. art. I, § 8, cl. 10.

⁹⁹ *Natelson, Define and Punish, supra* note 3.

¹⁰⁰ On the scope of incidental powers generally, see Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in GARY LAWSON, GEOFFREY P. MILLER, ROBERT G. NATELSON & GUY I SEIDMAN, *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 60-68 (2010).

¹⁰¹ 2 FARRAND, *supra* note 3, at 332 (Aug. 18, 1787) (Madison, reporting Roger Sherman as saying, “the States might want their Militia for defence agst invasions and insurrections, and for enforcing obedience to their laws. They will not give up this point”).

proceedings of the Virginia ratifying convention. At one point, the discussion turned to the Constitution’s grant of power to Congress to

provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.¹⁰²

The Constitution’s opponents objected that this clause gave Congress exclusive power over state militias. But the Constitution’s advocates pointed out that the opponents were overlooking state reserved powers. The future Chief Justice John Marshall explained:

The State Legislatures had power to command and govern their militia before, and have it still, undeniably, unless there be something in this Constitution that takes it away All the restraints intended to be laid on the State Governments (besides where an exclusive power is expressly given to Congress) are contained in the tenth section, of the first article. This power is not included in the restrictions in that section.—But what excludes every possibility of doubt, is the last part of it.—That “no State shall engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.” When invaded, they can engage in war; as also when in imminent danger. This clearly proves, that the States can use the militia when they find it necessary.¹⁰³

¹⁰² U.S. CONST. art. I, § 8, cl. 3.

¹⁰³ Debates of the Virginia Convention (Jun. 16, 1788) in 10 DOCUMENTARY HISTORY, *supra* note 3, at 1307 (comments of John Marshall). *See also* note 118 *infra* (quoting more of Marshall’s speech). Modern commentators sometimes overlook the role of the militia in

Marshall’s analysis was reinforced by James Madison¹⁰⁴ and Edmund Pendleton, the convention chairman.¹⁰⁵ George Nicholas also affirmed that the states, “are at liberty to engage in war when invaded, or in imminent danger.”¹⁰⁶ The popular Federalist essayist Tench Coxe made the same point in the public press: “Any state may repel invasions or commence a war under emergent circumstances, without waiting for the consent of Congress.”¹⁰⁷

The Constitution limited and qualified reserved state war powers in several respects. The result was a balance between federal and state prerogatives roughly similar to that under the Articles of Confederation. But in one way the Constitution constricted the states’ war powers further, and in four way it actually *expanded* them.

The Articles had permitted states to maintain naval vessels in peacetime up to a congressionally-prescribed maximum. The Constitution provided, “No State shall, without the Consent of Congress . . . keep . . . Ships of War in time of

defending a state from invasion. *E.g.*, Robert Leider, *The Modern Militia* (2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4362391 (listing three purposes of the militia, but not its role in state defense).

¹⁰⁴ Debates of the Virginia Convention (Jun. 16, 1788) *in* 10 DOCUMENTARY HISTORY, *supra* note 3, at 1273 & 1311 (comments of James Madison).

¹⁰⁵ *Id.* at 1325 (comments of Edmund Pendleton: “But the power of governing the militia, so far as it is in Congress, extends only to such part of them as may be employed in the service of the United States. When not in their service, Congress has no power to govern them.—The States then have the sole government of them”).

¹⁰⁶ *Id.* at 1313-14 (comments of George Nicholas).

¹⁰⁷ “A Freeman II” (Tench Coxe), PA. GAZETTE, Jan. 30, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 3, at 508, 510.

Peace.”¹⁰⁸ Since the Articles gave Congress authority to fix the peacetime maximum at “zero,” the substantive effects of the two restrictions were the same.

The states’ sole loss of war power was on the naval side. This was the Constitution’s removal of their prerogative to issue letters of marque or reprisal against an enemy upon whom Congress had declared war.¹⁰⁹

The increases in state war powers were as follows: First, the Constitution did not require a congressional declaration of war for states to build ships. It required only war *de facto*, with no requirement that the war be one waged by the federal government. Second, the Constitution deprived Congress of its veto over state naval actions against invading pirates.

Third, on the land side, the Constitution preserved general state control over their militias while providing that “No State shall, without the Consent of Congress . . . keep Troops . . . in time of Peace . . . or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”¹¹⁰ This limitation omitted the Articles’ contingent requirement of consultation with Congress.¹¹¹

Fourth, while the Articles had permitted state preemptive strikes against imminent invasions by Indians only, the Constitution permitted them against all invasions.

¹⁰⁸ U.S. CONST. art. I, § 10, cl. 3.

¹⁰⁹ U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . grant letters of marque and reprisal . . .”). Letters of marque and reprisal allowed private ships to attack ships of a target nationality, and seize them or their belongings.

¹¹⁰ U.S. CONST. art. I, § 10, cl. 3.

¹¹¹ Earlier drafts of the Constitution retained the consultation language, but for unspecified reasons it was dropped two days before adjournment. 2 FARRAND, *supra* note 3, at 626 (Sept. 15, 1787).

The states also retained unmentioned prerogatives sometimes associated with war. As participants in the ratification debates observed, states would continue to have power to suspend the writ of habeas corpus.¹¹² In addition, the Constitution implicitly recognized that states could continue to control foreign immigration, subject to some federal preemption before 1808 and more extensive preemption thereafter.¹¹³ The Constitution retained state power to impose embargoes, although subject to federal preemption.¹¹⁴

¹¹² Debates of the Massachusetts Convention (Jan. 26, 1788) in 6 DOCUMENTARY HISTORY, *supra* note 3, at 1359 (comments of Samuel Adams: “this power, given to the general government to suspend this privilege in cases. of rebellion and invasion, did not take away the power of the several States to suspend it, if they see fit”); Luther Martin, *Genuine Information VIII*, BALTIMORE MD. GAZETTE, Jan. 22, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 3, at 433, 434 (“the State governments have a power of suspending the habeas corpus act”).

¹¹³ U.S. CONST. art. I, § 9, cl. 1.

¹¹⁴ 2 FARRAND, *supra* note 3, at 440-41 (Aug. 28, 1787) (Madison):

Mr. Madison moved to insert after the word "reprisal" (art. XII) the words "nor lay embargoes". He urged that such acts <by the States> would be unnecessary—impolitic—& unjust—

Mr. Sherman thought the States ought to retain this power in order to prevent suffering & injury to their poor.

Col: Mason thought the amendment would be not only improper but dangerous, as the Genl. Legislature would not sit constantly and therefore could not interpose at the necessary moments—He enforced his objection by appealing to the necessity of sudden embargoes during the war, to prevent exports, particularly in the case of a blockade—

Some readers may find the conclusion that the states retained significant military authority to be counterintuitive. In part, this may be due to the fact that the states rarely exercise such authority today. In part, also, it may be due to the general conception of the Constitution as uniformly increasing central power.

The truth, however, is more complicated. In negotiating the constitutional re-arrangement, the states sometimes gained as well as lost, and military affairs may not be only case of this happening.¹¹⁵ Furthermore, we should not overestimate the extent to which the Constitution increased central power. During the ratification debates, Justice Nathaniel Peaslee Sargent of the Massachusetts Supreme Judicial Court observed that the Constitution conveyed “[v]ery few” more powers than the Articles of Confederation.¹¹⁶ The more significant difference between the two documents was that, within its sphere, the new federal establishment was a genuine government, rooted in popular consent and able to enforce its power

Mr Govr. Morris considered the provision as unnecessary; the power of regulating trade between State & State, already vested in the Genl—Legislature, being sufficient.

¹¹⁵ Arguably Indian affairs was another area. Under the Articles of Confederation, Congress enjoyed plenary authority over Indians outside state boundaries. Under the Constitution, Congress’s authority was limited to the scope of its enumerated powers. Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER U. L. REV. 201 (2007). Claims such as that made in *Haaland v. Brackeen*, 599 U.S. 255, 273 (2023), that the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, somehow granted Congress nearly plenary authority over Indian affairs, are not supported by the historical record. See generally Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause: An Update*, 23 FEDERALIST SOC’Y REV. 209 (2022).

¹¹⁶ Letter from Nathaniel Peaslee Sargent to Joseph Badger (1788) (exact date uncertain), in 5 DOCUMENTARY HISTORY, *supra* note 3, at 563, 567.

directly on the people. It was not a mere treaty among state legislatures, as the Confederation had been.

Additionally, that curbing state prerogatives and strengthening the central power were not the only reasons for the Constitution. The Founders also sought to protect the states, to prevent them from degenerating into monarchy or anarchy, and to improve the quality of their governance. All these policies are evident in the first sentence of Article IV, Section 4.¹¹⁷

E. Defining “Invaded” and “Invasion”

The words *invade* and *invasion* served as triggers for both federal and state defensive war powers. Thus, the Constitution’s Calling Forth Clause empowered Congress to enlist state militias in federal service “to execute the Laws of the Union, suppress Insurrections and repel *Invasions*.”¹¹⁸ The Suspension Clause

¹¹⁷ U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.”). See Robert G. Natelson, *Guarantee Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION 368-370 (David F. Forte & Matthew Spalding eds., 2d ed. 2014) (discussing the reasons for the clause).

¹¹⁸ U.S. CONST. art. I, § 8, cl. 15. (Italics added).

In *Perpich v. Dept. of Defense*, 496 U.S. 334 (1990), the Supreme Court held that the National Guard can be federalized also through the congressional power to “raise and support armies,” U.S. CONST. art. I, § 8, cl. 12, and then used for whatever purposes the federal government may use armies. The authors find this interpretation of the constitutional text problematic. Under the *expressio unius est exclusio alterius* maxim, the Constitution’s list of three grounds (in the Calling Forth Clause) for federalizing the state militias should be exclusive.

acknowledged congressional power to suspend the writ of habeas corpus in certain cases of rebellion or *invasion*.¹¹⁹ The Protection From Invasion Clause imposed a federal obligation to protect states “from *invasion*.”¹²⁰ The Self-Defense Clause confirmed that a state could engage in war if “actually *invaded*, or in such imminent Danger as will not admit of delay.”¹²¹ The centrality of the words “invasion” and “invaded” renders their constitutional meaning and scope of great importance.

During the eighteenth century, “invasion” and its variants in their broadest sense could include infringements or attacks on rights and privileges—as in the phrase, “The censorship policy was an invasion of the right of free speech.”¹²² The

This construction is reinforced by the modern non-commandeering doctrine and by comments from advocates of the Constitution during the ratification debates. *See, e.g.*, Debates of the Virginia Convention, 10 DOCUMENTARY HISTORY, *supra* note 3, at 1307 (comments of John Marshall: “For Continental purposes Congress may call forth the militia; as to suppress insurrections and repel invasions. But the power given to the States by the people is not taken away”). *See also supra* notes 103-107.

In any event, during a defensive war the state still may raise “Troops” other than its militia. U.S. CONST. art. I, § 10, cl. 3. Moreover, part of the state militia is the “sedentary militia,” which consists of almost all “males age eighteen to forty-five [and is] protected against federal interference by the Second Amendment....” Glenn Reynolds & Don Kates, *The Second Amendment and States’ Rights*, 36 WM. & MARY L. REV. 1737, 1761 (1995).

¹¹⁹ U.S. CONST. art. I, § 9, cl. 2 (Italics added.)

¹²⁰ U.S. CONST. art. IV, § 4 (Italics added.)

¹²¹ U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

¹²² *E.g.*, “A Citizen of Philadelphia,” *The Weaknesses of Brutus Exposed*, Nov. 8, 1787 *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 3, at 63, 71 (“The unceasing cry of these

context of the words in the Constitution itself, however, demonstrates that their constitutional meaning is less metaphorical and more concrete: “Invasion” is an incursion into home territory by outsiders.

But what kind of incursion? Is the meaning limited to intrusion by a foreign army? Several Court of Appeals opinions have said as much, but on very sparse evidence.¹²³ Or is the meaning wider? And if wider, how is it circumscribed?

Eighteenth-century dictionaries inform us that when “invasion” and its variants applied to physical intrusions, the scope was not limited to incursions by a foreign army. Among the thirteen Founding-era English dictionaries we examined, only one seemed to limit “invasion” and its variants to formal military operations.¹²⁴ The other twelve included formal military operations, to be sure; but they also

designing croakers is, my friends, your liberty is invaded!”); *cf.* The Declaration of Independence, para. 7 (“his invasions on the rights of the people”).

¹²³ *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997); *Padavan v. United States*, 83 F.3d 23, 28 (2^d Cir. 1996); *New Jersey v. United States*, 91 F.3d 463, 468 (3^d Cir. 1996) (all interpreting “invasion” as limited to an incursion by a foreign army).

¹²⁴ THOMAS DYCHE & WILLIAM PARDON, A NEW GENERAL ENGLISH DICTIONARY (16th ed. 1777) (unpaginated), defining “invade” as

to come violently, illegally, unfairly, or unjustly, into the lands, possessions, or country of another; and is commonly understood of the army of one nation coming suddenly and unprovoked into another’s kingdome [sic] or country, and keeping possession of all or part thereof by violence, or driving away the cattle, making prisoners of the people, or doing other acts of hostility.

The same source defined “invasion” as “the violent, sudden, and illegal entering of an army, &c. into another’s country and keeping possession, or committing hostilities.” *Id.*

added definitions comprehending many other kinds of encroachments and intrusions. These definitions appear in the footnote below.¹²⁵

¹²⁵All of the following dictionaries are unpaginated, and are listed alphabetically according to the authors’ last names.

FRANCIS ALLEN, A COMPLETE ENGLISH DICTIONARY (1765):

Invade: to enter into a country in a warlike manner; to attack; to assail or assault; to seize on like an enemy

Invader: one who enters into the possessions or dominions of another; one who assails or attacks; one who encroaches or intrudes

Encroach: to invade the right and property of another

Intrude: to come in without invitation or permission; to thrust one’s self rudely into company or business; to undertake a thing without being permitted, called to it, or qualified for it.

JOHN ASH, THE NEW AND COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (1775) (2 vols):

Invade: To enter with hostile intentions, to attack a country, to assault, to assail, to encroach on another’s right or property

Invasion: An hostile entrance, an assault, the attack of an epidemical disease

Encroach: To make invasion on the right of another, to advance gradually and by stealth on the property or right of another; *with* on *or*, upon: *as*, “*He was given to encroach on his neighbours*”

Hostile: Suitable to an enemy, warlike, adverse, opposite.

BAILEY, *supra* note 3:

Invade: to attack or set upon . . . *Invasion*: a descent upon a country, an usurpation, or encroachment

Encroachment: usurpation.

Encroach: to intrench upon, to make invasion on the right of another.”

FREDERICK BARLOW, THE COMPLETE ENGLISH DICTIONARY OR, GENERAL REPOSITORY OF THE ENGLISH LANGUAGE (1772-73) (2 vols.):

Invade: to enter into a country in a warlike manner. To attack; to assail, or assault. To make the first attack. To seize on like and enemy. To encroach . . .

Invader: one who enters into the possessions of another and attacks them as an enemy. One who assails or attacks. One who encroaches

Invasion: the entrance or attack of an enemy on the dominions of another. The act of entering and attacking the possessions of another as an enemy. An incroachment. The attack of an epidemical disease

Encroachment: in Law an unlawful trespass upon a man’s grounds. Extortion, or the insisting upon the payment of more than is due

Encroach: “to invade the property of another. To advance by stealth to that which a person has no right to. To come upon or seize the territories of another.”

JAMES BUCHANAN, A NEW ENGLISH DICTIONARY (1769) (“*Invade*: 1. To enter by force, 2. To seize or lay hold of *Invasion*: 1. An inroad, or descent upon a country, &c., 2. Usurpation.”)

EDWARD COCKER, COCKER’S ENGLISH DICTIONARY (3rd ed. 1724) (a technical publication which did not define “invade”) (“*Invasion*: landing, or marching into another Prince’s Country; entering upon another Man’s right.”)

ALEXANDER DONALDSON, AN UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1763):

Invade: to attack a country; to make a hostile entrance. To attack; to assail; to assault

Invader: one who enters with hostility into the possessions of another. An assailant. *Encroacher*; intruder

Encroach: to make invasions upon the right of another. To advance gradually and by stealth upon that to which one has no right. To invade

Intrude: to come in unwelcome by a kind of violence; to enter without invitation or permission. To encroach; to force in uncalled or unpermitted.—*v.a.* to force without right or welcome

Hostile: adverse; opposite; suitable to an enemy.

JOHNSON, *supra* note 3:

Invade: 1. To attack a country; to make a hostile entrance, 2. To attack; to assail; to assault, 3. To violate with the first act of hostility; to attack

Invader: 1. One who enters with hostility into the possessions of another. 2. An assailant. 3. Encroacher, intruder

Encroach: 1. To make invasions upon the right of another; to put a hook into another man’s possessions and draw them away. 2. To advance gradually and by stealth upon that to which one has no right

Hostile: Adverse; opposite; suitable to an enemy.

WILLIAM KENRICK, A NEW DICTIONARY OF THE ENGLISH LANGUAGE (1773):

Invade: To attack a country; to make a hostile entrance.—to attack; to assail; to assault.—To violate with the first act of hostility; to attack, not defend

Invasion: Hostile entrance upon the rights or possessions of another; hostile encroachment.—Attack of an epidemical disease

Encroachment: An unlawful gathering in upon another man.—Advance into the territories or rights of another

Hostile: Adverse; opposite; suitable to an enemy.

JOHN KERSEY, A NEW ENGLISH DICTIONARY (2d ed. 1713):

The reader may observe that some of these definitions required that an invasion be “hostile.” For that reason, we included in footnote 125 the entry for “hostile” from each dictionary employing that word when defining “invasion” or its variants. As those entries show, “hostile” often meant merely “adverse.” Readers may recognize this as the non-military definition preserved in the modern law of adverse possession and in legal phrases such as “hostile takeover” and “hostile witness.” Thus, all we can infer from the requirement of “hostility” is that for an entry to be an invasion it must be unauthorized and uninvited.

Eighteenth-century American political discourse confirms what the dictionaries suggest: the scope of “invasion” and its variants was quite broad.

Invade: to attack or set upon, to usurp

Invasion: an invading or setting upon, an encroachment or inroad upon a Country . . .

Encroachment: an encroaching.

Encroach: to get wrongfully, to usurp.”

WILLIAM PERRY, ROYAL STANDARD ENGLISH DICTIONARY (1st American ed. 1788) (designed for American use):

Invade: to enter in a hostile manner

Invasion: a hostile entrance, an attack

Hostile: adverse, opposite; suitable to an enemy.”

SHERIDAN, *supra* note 3:

Invasion: Hostile entrance upon the rights or possessions of another, hostile encroachment

Encroachment: An unlawful gathering in upon another man; advance into the territories or rights of another

Invade: To attack a country, to make a hostile entrance; to assail, to assault.”

First: An invasion could be by sea as well as by land. Both the congressional records¹²⁶ and participants in the constitutional debates referred to maritime invasions.¹²⁷

Second: An invasion need not be incident to actual warfare, nor an operation of war. The Massachusetts Constitution of 1780, for example, spoke of “time of war *or* invasion” (and it still does).¹²⁸

Third: An invasion need not be launched by a formal military force. Participants in the constitutional debates referred to “invasions of barbarous tribes,”¹²⁹ “invasion of the savages,”¹³⁰ and “hostile invasions of lawless and ambitious men intending . . . to . . . introduce anarchy, confusion, and every

¹²⁶ 30 JCC, *supra* note 3, at 447 (Jul. 31, 1786) (“That in case of an invasion of any of the middle or eastern states by a marine power the possession of Hudson's River would be an object of the highest importance as well to the invader as to the United States.”).

¹²⁷ PHILA. FREEMAN’S J., Jan. 2, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 3, at 230 (“on the Atlantic side from the invasions of a maritime enemy”); “Civis,” *To the Citizens of South Carolina*, CHARLESTON COLUMBIAN HERALD, Feb. 4, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 3, at 21, 24 (“If this state is invaded by a maritime force, to whom can we apply for immediate aid?”).

¹²⁸ MASS. CONST., Part the Second, chap. II, § 1, art. VII. (Italics added). *See also infra* notes 134 and 141. This does not imply, of course, that warfare cannot be used to counter an invasion not incident to war; nor does it mean that “peaceful” invaders are not in “enmity.”

¹²⁹ Charles Carroll of Carrollton, *Draft Speech for Maryland Convention*, Jan.-Mar., 1788, *in* 12 DOCUMENTARY HISTORY, *supra* note 3, at 832, 856.

¹³⁰ “A Democratic Federalist,” PA. HERALD, Oct. 17, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 3, at 386, 391. *See also* 12 JCC, *supra* note 3, at 1006 (Oct. 13, 1778) (“repelling the invasions of the savages on the frontiers of New York, New Jersey, and Pennsylvania”).

disorder.”¹³¹ In *Federalist* No. 41, James Madison referred to attacks along the Atlantic coast by “licencious [*sic*] adventurers . . . daring and sudden invaders.”¹³² References to invasions by pirates appear in contemporaneous literature.¹³³

An “invasion” could refer also to uninvited entry by groups of immigrants.¹³⁴ Pennsylvanians used that term to describe the essentially peaceful immigration of Connecticut settlers into Pennsylvania’s Wyoming Valley, because the settlers were relying on legal title that the Pennsylvania government did not recognize.¹³⁵ Thus, in 1754, Benjamin Franklin wrote a plan “to divert the Connecticut Emigrants from their Design of *Invading* this Province [Pennsylvania], and to induce them to go where they would be “less injurious and more useful.”¹³⁶ At the time, the “invaders”

¹³¹ “Monitor,” HAMPSHIRE GAZETTE, Oct. 24, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 3, at 116, 117.

¹³² THE FEDERALIST NO. 41, N.Y. INDEP. J., Jan. 19, 1788 (James Madison), *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 3, at 418, 423.

¹³³ *E.g.* A *Concise History of England*, 3 THE LADY’S MAG. 404, 500 (1770) (“invasion of these pirates”); WILLIAM LITHGOW, TRAVELS AND VOYAGES THROUGH EUROPE, ASIA, AND AFRICA 84 (11th ed. 1770) (“the invasion of pirates”); 2 GROTIUS, *supra* note 3, at 735 (“Pirates, or any other Invaders”).

¹³⁴ Because of its insular position, Britain did not need to defend its border against unauthorized crossing by land. But Britain faced similar issues on the coast. Thus, a 1758 essay discussed “invasion by a fleet of unarmed flat-bottomed boats,” although denying that the problem was serious enough to justify a large navy. *Number CL*, THE MONITOR, OR BRITISH FREEHOLDER, June 3, 1758, at 905, 909.

¹³⁵ *See generally* MATHEWS, *supra* note 3, at 53-128 (1902).

¹³⁶ Letter from Benjamin Franklin to Peter Collinson, Jun. 26, 1755, <https://founders.archives.gov/documents/Franklin/01-06-02-0045> (emphasis added). *See also* Benjamin Franklin, *A Plan for Settling Two Western Colonies* (1754), <https://founders.archives.gov/documents/Franklin/01-05-02-0132>. Franklin’s plan came to

had done little more than purchase disputed title.¹³⁷ Peace broke down only when the Connecticut settlers sought to defend themselves from local Indians and the Pennsylvania authorities.¹³⁸

In 1775, Congress recommended that Connecticut stop sending settlers until further notice.¹³⁹ When, in 1783, the Confederation Congress established a court to adjudicate Wyoming Valley land claims,¹⁴⁰ the Pennsylvania legislature responded in resolutions again charging that the unauthorized Connecticut immigration was an invasion:

[I]f Congress should consent to establish courts at the instance of persons not first proving themselves to be included in the description aforesaid, the citizens of this State may be harassed by a multitude of pretended claims *at the suit of adventurers or invaders of the State*, and in the present instance at the suit of persons who have settled in

fruition decades later, when Connecticut’s land claims in present-day Pennsylvania were rejected, while Connecticut’s claim to the Western Reserve (in what is now Ohio) was granted. The Western Reserve became a destination for many Connecticut emigrants. VISIONS OF THE WESTERN RESERVE 14 (Robert A. Wheeler, ed., 2000).

¹³⁷ MATHEWS, *supra* note 3, at 63.

¹³⁸ MATHEWS, *supra* note 3, at 68-77.

¹³⁹ 3 JCC, *supra* note 3, at 452-53 (Dec. 23, 1775):

Whereas the colony of Connecticut has, by a certain act of their assembly, resolved that no further settlements be made on the lands disputed between them and Pennsylvania, without license from the said assembly, Resolved, That it be recommended to the colony of Connecticut not to introduce any settlers on the disputed lands with Pennsylvania until further order of Congress, or until the dispute shall be settled.

¹⁴⁰ 26 JCC, *supra* note 3, at 45 (Jan. 23, 1784).

defiance of the resolution of Congress of the 23 day of December, 1775.¹⁴¹

The Constitution did not limit invasions to large-scale incursions—an aspect of the document specifically criticized during the ratification debates.¹⁴² Perhaps the framers agreed with Sir William Yonge’s comment in Parliament that “a small Invasion may be as fatal in its Consequences as the most formidable and most successful Invasion at another Time.”¹⁴³ The passage of time seems to have confirmed the judgment that an intrusion may be small and still be classified as an invasion: In the 1942 case of *Ex Parte Quirin*,¹⁴⁴ the Supreme Court characterized a group of only eight Nazi saboteurs as “invaders.”¹⁴⁵

Nor would it seem that “invaders” had to be armed when crossing the border. Even unarmed persons can cause local disruption, and once they cross the border they may acquire arms and defend their position¹⁴⁶ or cause other damage. By way of illustration, the terrorists of September 11, 2001 arrived unarmed, exceeded the

¹⁴¹ 26 JCC, *supra* note 3, at 281 (Apr. 24, 1784). (Italics added).

¹⁴² “John DeWitt,” *Letter II*, AMERICAN HERALD, Oct. 29, 1787, *reprinted in* 4 DOCUMENTARY HISTORY, *supra* note 3, at 156, 160 (arguing “should an insurrection or an invasion, however small, take place, in Georgia” then habeas corpus could be suspended in Massachusetts).

¹⁴³ William Yonge, *Remarks in Parliament*, Nov. 6, 1742, *in* 14 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 70 (1744).

¹⁴⁴ 317 U.S. 1 (1942).

¹⁴⁵ *Id.* at 20.

¹⁴⁶ Thus, there seem to have been no resort to arms when the Connecticut “invasion” crossed the Pennsylvania border. However, but the settlers subsequently defended themselves with arms. SYDNEY GEORGE FISHER, THE MAKING OF PENNSYLVANIA 237-317 (1896); MATHEWS, *supra* note 3, at 68-77.

scope of their visas, and hijacked three aircraft on U.S. territory and used them to kill thousands of Americans. Under the Constitution’s definition, they qualify as “invaders.”

In Federalist No. 43, Madison justified the broad meaning of “invasion” when discussing the Constitution’s Protection From Invasion Clause: “The latitude of the expression here used, seems to secure each state not only against foreign hostility, but against ambitious or vindictive enterprizes [*sic*] of its more powerful neighbours.”¹⁴⁷

There were some limiting factors, however. “Invasion” and its variants did not comprehend all unauthorized intrusions. There had to be detriment (loss, harm, or annoyance) beyond the mere fact of intrusion. Franklin’s letter referred to the “injurious” consequences of the unauthorized immigration into his state.¹⁴⁸ The Pennsylvania legislature felt “harassed” by the unauthorized immigrants. Invasion that had not yet occurred but was imminent posed some “danger”¹⁴⁹—risk of detriment¹⁵⁰—against which “defense” was required.

The actual or threatened detriment from invasion could be injury to persons;¹⁵¹ physical damage,¹⁵² such as that resulting from plundering;¹⁵³ or the

¹⁴⁷ THE FEDERALIST NO. 43, N.Y. INDEP. J., Jan. 23, 1788 (James Madison) *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 3, at 439, 442.

¹⁴⁸ *Supra* note 136 and accompanying text.

¹⁴⁹ *E.g.*, 33 JCC, *supra* note 3, at 532 (Sept. 25, 1787) (“Whereas it has been represented to Congress by the delegates of Georgia that their country is in danger of an invasion”).

¹⁵⁰ 32 JCC, *supra* note 3, at 111 (Mar. 13, 1787) (“Besides its insecurity against a foreign invasion unless strongly garrisoned”).

¹⁵¹ 26 JCC, *supra* note 3, at 101 (Feb. 26, 1784) (“to defend the persons, liberty and property of the people of the U. S. against an invading and implacable foe”).

breakdown of normal processes of law¹⁵⁴ and communication.¹⁵⁵ During the Connecticut invasion of the Wyoming Valley, Pennsylvania president John Dickinson—later one of the Constitution’s more important framers¹⁵⁶—identified another kind of detriment: the Connecticut settlers were occupying land the state otherwise could sell to raise revenue.¹⁵⁷

¹⁵² 15 JCC, *supra* note 3, at 1040 (Sept. 10, 1779) (“when the Enemy invaded the said State, they took or destroyed sundry Loan office certificates”); 24 JCC, *supra* note 3, at 106 (Jan. 31, 1783) (“the destruction and loss of papers and vouchers for public expenditures sustained by the State of Virginia during the invasion of that State”).

¹⁵³ 20 JCC, *supra* note 3, at 621 (Jun. 12, 1781) (“repelling the invasion of their vindictive and plundering Enemies”); 9 JCC, *supra* note 3, at 953 (Nov. 22, 1777) (“to resist actual invasion and boundless rapine”).

¹⁵⁴ 9 JCC, *supra* note 3, at 784 (Oct. 10, 1777) (“it has been found, by the experience of all states, that, in times of invasion, the process of the municipal law is too feeble and dilatory to bring to a condign and exemplary punishment persons guilty of such traitorous practices”).

¹⁵⁵ 23 JCC, *supra* note 3, at 541-42 (Sept. 3, 1782) (“the regular line of communication has been interrupted by the invasion of the enemy”).

¹⁵⁶ See generally Robert G. Natelson, *The Constitutional Contributions of John Dickinson*, 108 PENN. STATE L. REV. 415 (2003).

¹⁵⁷ *Message from the President and the Supreme Executive Council to the General Assembly* (Jan. 24, 1784), in 14 MINUTES OF THE SUPREME EXECUTIVE COUNCIL OF PENNSYLVANIA 16 (1853):

Many persons are settling without legal authority upon lands belonging to the State, which have always been considered as a very valuable fund for relieving the Commonwealth from the heavy burthen of public debts. These settlers may become numerous and troublesome, unless some effectual means

Did an incursion have to be organized to qualify as an invasion? We found no evidence that prior coordination was necessary. A spontaneous mob might launch an invasion. On the other hand, prior coordination might demonstrate the existence of detriment or quantify the extent of the risk. Coordination also might demonstrate causation—i.e., that the intrusion was responsible for specified injury.

Relying on the premise that no government in the United States has authority to restrict peaceful immigration, some may exclude non-violent mass immigration from the definition of “invasion.”¹⁵⁸ One problem with this conclusion lies in its premise. It overlooks the Constitution’s explicit recognition that individual states may restrict immigration.¹⁵⁹ It also overlooks the Constitution’s grant to Congress of authority to “define and punish . . . Offenses against the Law of Nations,”¹⁶⁰ which encompasses authority over trans-border migration.¹⁶¹

Professor Ilya Somin is among the few who deny any federal authority to restrain peaceful immigration from nations with which the United States is not at war. He relies¹⁶² largely on James Madison’s 1800 Virginia legislative report on the

can be devised for preventing the mischiefs that are to be apprehended from such irregular proceedings.

¹⁵⁸ *E.g.*, Nikolas Bowie & Norma Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419 (2022).

¹⁵⁹ U.S. CONST. art. I, § 9, cl. 1 (“The Migration . . . of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight”).

¹⁶⁰ U.S. CONST. art. I, § 8, cl. 10.

¹⁶¹ Robert G. Natelson, *The Constitution’s Define and Punish Clause: The Source of the Power to Regulate Immigration*, 11 BRIT. J. AM. LEG. STUDIES 209 (2022).

¹⁶² Ilya Somin, *Immigration is Not “Invasion,”* VOLOKH CONSPIRACY (May 18, 2023, 10:30 AM), <https://reason.com/volokh/2023/05/18/immigration-is-not-invasion/>.

Alien and Sedition Acts.¹⁶³ However, this document is not useful evidence on the question of whether the Constitution grants Congress authority to restrict immigration. For one thing, it focused not on immigration, but on *deportation*. For another, it was written a decade after ratification, and did not represent any kind of consensus among the Founders; on the country, it was highly partisan and its conclusions were disputed hotly.¹⁶⁴

Nor does the substance of the document provide any evidence on whether Congress has power to restrict immigration.

Madison argued that the Constitution gave Congress no authority to deport “alien friends,” and he classified them as such because they had come from countries with which the United States was at peace.¹⁶⁵ But he did not address the fact (because there was no need to) that not all foreigners from friendly countries qualified as alien friends. As explained in Part IV, an alien friend was a person in *allegiance* to the host country, and a person who entered sovereign territory in defiance of its laws thereby refused allegiance.¹⁶⁶ This rendered him an alien enemy, or (if the sovereign preferred) rendered him an alien friend who could be

¹⁶³ MADISON, REPORT, *supra* note 3.

¹⁶⁴ See Kevin Gutzman, *From Interposition to Nullification: Peripheries and Center in the Thought of James Madison*, 36 ESSAYS IN HISTORY 89, 91 (1994).

¹⁶⁵ MADISON, REPORT, *supra* note 3 (“With respect to aliens, who are not enemies, but members of nations in peace and amity with the United States, the power assumed by the act of Congress, is denied to be constitutional”).

¹⁶⁶ See, e.g., note 182 *infra*.

treated as an alien enemy.¹⁶⁷ By contrast, the aliens Madison was defending had, in his word, been “invited” into the United States.¹⁶⁸

In sum: the modern judicial decisions limiting the term “invasion” only to attacks by an outside sovereignty are clearly erroneous and should not be followed. Rather, as the Constitution employs the words “invasion” and “invaded,” those words denote an unauthorized and uninvited intrusion of any size across a border—including significant unauthorized immigration—where the intrusion causes, or threatens to cause, detriment beyond the fact of the intrusion itself. An invasion need not be armed or even formally organized, although organization does tend to show a link between the intrusion and potential or actual detriment.

IV. ALLEGIANCE AND INDIVIDUAL RIGHTS

The previous discussion has led us to the subject of *allegiance*. This was the primary tool for distinguishing an alien enemy from an alien friend. It could determine whether a sovereign lawfully could kill a person, expel him from the country, seize his property, try him for treason in a civil court, try him for a war crime in a military tribunal, or merely hold him (with or without ransom) as a prisoner of war. As detailed below, allegiance has particular implications for how a state may treat those who cross its borders illegally.¹⁶⁹ However, allegiance is a complicated topic, so we must beg the reader's patience.

¹⁶⁷ See notes 210 and 211 *infra*.

¹⁶⁸ MADISON, REPORT, *supra* note 3. (Italics added).

¹⁶⁹ The concept of *allegiance* also is central to other important constitutional questions, including (1) the meaning of the rule that the President be a “natural born Citizen,” U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office

The location in which an individual was physically present was one factor in determining the sovereign to whom he or she owed allegiance. Other factors included birthplace, parental allegiance, and individual conduct and intent. In Edward Coke’s report on Calvin’s Case (the 1608 decision that became the leading Anglo-American authority on the subject), he emphasized the importance of intent by writing, “ligeance is a quality of the mind, and not confined within any place.”¹⁷⁰ Lord Coke was correct that allegiance was not confined to any one place, but it was not purely a quality of the mind either.

As understood when the Constitution was written, allegiance (or *ligeance*) was a relationship between an individual and a sovereign. The individual agreed, either expressly or by implication,¹⁷¹ to be loyal to the sovereign and to submit to its laws. In return, the sovereign engaged to protect the individual.¹⁷²

of President.”) and (2) the meaning of the Fourteenth Amendment’s phrase “subject to the jurisdiction thereof.” U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”); *United States v. Wong Kim Ark*, 169 U.S. 649, 693 (1898) (“Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.”).

¹⁷⁰ Calvin’s Case (1608) 77 Eng. Rep. 377, 388; 7 Co. Rep. 1, 9b (K.B.). Formally, the case was entitled *Calvin v. Smith*. Although presented in the Exchequer, judges from other courts participated in the argument, including all five judges of the King’s Bench, as well as Lord Coke, then Chief Justice of the Court of Common Pleas. Calvin’s Case became the leading English authority on alienage and related subjects as well as allegiance.

¹⁷¹ 1 WILLIAM BLACKSTONE, COMMENTARIES *354-357 (describing express and implied allegiance).

¹⁷² 1 WILLIAM BLACKSTONE, COMMENTARIES *354; Calvin’s Case (1608) 77 Eng. Rep. 377, 382; 7 Co. Rep. 1, 4b (K.B.) (“*projectio trahit subjectionem, et subiectio protectionem*”). See

A person in allegiance to a monarch was a *subject*. (This word was a more inclusive term than the republican analogue “citizen.”) A subject who betrayed his or her sovereign could be tried and convicted for treason. For example, a British soldier who deserted the army and fled to the enemy might be charged as a traitor.¹⁷³ However, a person not in allegiance to a sovereign who committed an offense against that sovereign—by, for example, violating the code of war by spying or slaughtering civilians—was triable only under the laws of war, not as a traitor.

English law recognized four kinds of British subjects: natural born subjects, naturalized subjects, denizens, and resident alien friends. We shall discuss each of these briefly in turn.

The *natural born subject* sometimes was referred to by the Latin terms *subditus natus* (a subject by birth) or *indigena* (native). Writers occasionally denoted natural born subjects by the term *denizens*.¹⁷⁴ However, we follow a less confusing, more common, and more precise understanding: natural born subjects were distinct from *denizens*, who comprised a separate class of subjects.¹⁷⁵

also Calvin’s Case 77 Eng. Rep. at 388; 7 Co. Rep. at 9b (“power and protection draweth ligeance”).

¹⁷³ 2 Vattel, *supra* note 3, at 51 (stating that fugitives and deserters found by the victor among his enemies may be killed as traitors).

¹⁷⁴ 1 CUNNINGHAM, *supra* note 3 (unpaginated) (defining the word denizen: “He that is *born within the King’s ligeance*, is called sometimes a *denizen* . . . for *ligeus* is ever taken for a natural-born subject, but many times in actions of parliament *denizen* is take for *alien born*, that is *infranchised*, or *denized by letters patent*”) (emphasis in original).

¹⁷⁵ *Infra* note 188 and accompanying text.

A natural born subject usually was an individual born within the Empire¹⁷⁶ of parents then in allegiance to the Crown.¹⁷⁷ But the requirement of birth within the Empire was waived if the father was natural born and not engaged in disloyal activity.¹⁷⁸ Thus, if the father and mother were of different nationalities, in allegiance cases the English courts generally followed the doctrine *partus sequitur patrem*—“the offspring follows the father”—rather than the maxim that prevailed in most other areas of the law: *partus sequitur ventrem*: “the offspring follows the womb,” *i.e.*, the mother.¹⁷⁹

¹⁷⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *357; Calvin’s Case (1608) 77 Eng. Rep. 377, 383; 7 Co. Rep. 1, 5b (K.B.) (“they that are born under the obedience, power, faith, ligeality, or ligeance of the King, are natural subjects, and no aliens”).

¹⁷⁷ Calvin’s Case (1608) 77 Eng. Rep. 377, 399; 7 Co. Rep. 1, 18a (K.B.). Thus, the British-born child of an alien friend living in England and in temporary allegiance (discussed *infra*) was natural born. 1 WILLIAM BLACKSTONE, COMMENTARIES *361-62.

¹⁷⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *361. To clarify: In 1584, Parliament prescribed that any child born abroad to an Englishman and a foreign woman was a denizen. Bacon v. Bacon (1625) 79 Eng. Rep. 1117, Cr. Car. 601 (K.B.). By 1608, the child of an English ambassador born overseas of an English woman was seen as natural born. Calvin’s Case (1608) 77 Eng. Rep. 377, 399; 7 Co. Rep. 1, 18a (K.B.). Subsequently, the courts construed the word “denizen” in the 1584 statute to mean natural born. Baron Hale’s Argument, Case of Collingwood and Pace, (1661-1664), 86 Eng. Rep. 262, 271; 1 Vent. 413, 428 (Ex. Ch.). Thereafter, for a foreign-born child to be natural born only the father need be English. In 1731, Parliament confirmed this by statute. British Nationality Act 1730, 4 Geo. 2, c. 21 (1731).

¹⁷⁹ Some commentators have argued that a person who, for any reason, was a citizen at birth is therefore qualified as a natural born citizen and that power to grant such citizenship is unlikely to be abused because Congress “may not declare any person a ‘citizen at birth’ retroactively.” Jill Pryor, *The Natural Born Citizen Clause and Presidential*

Not everyone born within British dominions was natural born. The child born in London of a foreign ambassador’s wife was not a natural born Englishman, because his father’s allegiance was solely to his homeland.¹⁸⁰ Likewise, the child of a foreign invader born on British territory was not natural born: His parent’s act of invasion rebutted any inference of allegiance to the British Crown.¹⁸¹ More generally, no alien could enter into any sort of allegiance to the British Crown unless “received” into the country.¹⁸²

Natural born subjects enjoyed unique privileges, such as qualification to serve in national office¹⁸³ and unfettered power to own land.¹⁸⁴

The second class of subjects were *naturalized subjects*.¹⁸⁵ Naturalization was effected by an act of Parliament. It brought the same privileges enjoyed by a natural

Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty, 97 YALE L.J. 881, 885 (1988) (so asserting without supporting evidence). In fact, however, during the Founding-era naturalization could be retroactive. John Vahoplus, “*Natural Born Citizen*”: A Response to Thomas H. Lee, 67 AM. U. L. REV. F. 15, 27 (2018). Allowing Congress such would undercut the reason for the Constitution’s eligibility requirement.

¹⁸⁰ Cf. 1 WILLIAM BLACKSTONE, COMMENTARIES *361 (“as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent”).

¹⁸¹ 1 BACON, *supra* note 3, at 77.

¹⁸² 1 BACON, *supra* note 3, at 80 (no alien can “pay any Allegiance to any other Society, unless he be afterwards received into it”); Rex v. Tucker (1693), 90 Eng. Rep. 160; Skinner 360 (“[I]f an alien come here in an hostile manner, and never was under the protection and obedience of the King, there he cannot be indicted omnino [at all], but ought to be try’d by martial law, or ransom”).

¹⁸³ 1 BACON, *supra* note 3, at 80.

¹⁸⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *360.

¹⁸⁵ 1 BACON, *supra* note 3, at 79.

born subject, other than the right to hold national office.¹⁸⁶ The naturalized subject’s promise of allegiance was express, and his or her new status was for life.¹⁸⁷ His or her children born within the Empire were natural born.

The third class of subjects were *denizens* in the precise sense of that word. William Blackstone described them this way:

A DENIZEN is an alien born, but who has obtained *ex donatione regis* [by a gift from the king] letters patent to make him an English subject . . . A denizen is in a kind of middle state between an alien, and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance . . . And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant from the crown.¹⁸⁸

As in the case of naturalized subjects, the denizen’s promise of obedience was express. His or her children born on British territory were natural born.

The fourth class of subjects consisted of *resident alien friends*.¹⁸⁹ These were people who were (1) aliens, (2) who entered and remained in the country under

¹⁸⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *362.

¹⁸⁷ 1 BACON, *supra* note 3, at 79.

¹⁸⁸ 1 WILLIAM BLACKSTONE, COMMENTARIES *362.

¹⁸⁹ Courteen’s Case (1618) 80 Eng. Rep. 416, 417; Hobart 270, 271 (Star Chamber) (ruling that Dutch alien friends were subjects, although not natural born subjects); *accord*: 1 CUNNINGHAM, *supra* note 3 (unpaginated) (defining “alien”). Thus, the suggestion in ROBERT W. HEIMBERGER, GOD AND THE ILLEGAL ALIEN 33 (2018) that aliens could not be subjects appears to be erroneous.

circumstances implying submission to British laws, and (3) were not alien enemies.¹⁹⁰

An alien (Latin: *alienigena*—“foreign born”) was a person “born out of the ligeance of the King, and under the ligeance of another.”¹⁹¹ The term “alien” was synonymous with “foreigner.”¹⁹² When an alien who was not an enemy entered or remained within British territories under circumstances implying agreement to comply with British laws, he or she entered *local allegiance*.¹⁹³ He or she thereby became a British subject for the duration of the stay.¹⁹⁴ The resident alien friend owed allegiance to his natural sovereign that superseded allegiance to the British

¹⁹⁰ Every alien was either a friend or an enemy. Calvin’s Case (1608) 77 Eng. Rep. 377, 397; 7 Co. Rep. 1, 17a (K.B.). *See also* Calvin’s Case 77 Eng. Rep. at 407; 7 Co. Rep. at 25a (“Every stranger born must at his birth be either *amicus* or *inimicus*.”).

¹⁹¹ Calvin’s Case (1608) 77 Eng. Rep. 377, 396; 7 Co. Rep. 1, 16a (K.B.).

¹⁹² Calvin’s Case, 77 Eng. Rep. at 396; 7 Co. Rep. at 16a-16b (“*Alienigena est alienae gentis seu alienae ligeantiae, qui etiam dicitur peregrinus, alienus, exoticus, extraneus, &c. Extraneus est subditus, qui extra terram, i.e., potestatem Regis natus est*”—that is, “An alien is one of another people or another allegiance, who also is called ‘traveler,’ ‘stranger,’ ‘exotic,’ ‘foreigner,’ etc.”). Eighteenth century dictionaries confirm the synonymy of the words “alien” and “foreigner.” *See, e.g.*, BAILEY, *supra* note 3 (unpaginated) (defining “alien” as “a foreigner or stranger, one born in a foreign country”); JOHNSON, *supra* note 3 (unpaginated) (defining “alien” as “A foreigner; not a denizen; a stranger” and “foreigner” as “A man who comes from another country; not a native; a stranger.”). Thus, the argument in M. Anderson Berry, *Whether Foreigner or Alien: A New Look at the Original Language of the Alien Tort Statute*, 37 BERKLEY J. INT. L. 316 (2009) does not reflect eighteenth century law.

¹⁹³ 1 WILLIAM BLACKSTONE, COMMENTARIES *357; Calvin’s Case (1608) 77 Eng. Rep. 377, 383; 7 Co. Rep. 1, 5b (K.B.) (describing the *ligeantia localis* of the resident alien in amity).

¹⁹⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *357.

Crown, but this was not a problem as long as the two allegiances were not inconsistent.¹⁹⁵

If a resident alien friend betrayed the duty of allegiance seriously enough, he or she could be convicted of treason.¹⁹⁶ An alien enemy could not be.¹⁹⁷ Moreover, any alien, whether an alien friend or an alien enemy, was “liable to be sent home whenever the king sees occasion.”¹⁹⁸

The two classes of subjects known as denizens and resident alien friends approximately corresponded to the two species Vattel referred to in the wider genus he called “inhabitants:”

The inhabitants, as distinguished from citizens, are strangers, who are permitted to settle and stay in the country [*cf.* resident alien friends]. Bound by their residence to the society, they are subject to the laws of the state, while they reside there, and they are obliged to defend it, because it grants them protection, though they do not participate in all the rights of citizens. They enjoy only the advantages which the laws, or custom gives them. The *perpetual inhabitants* [*cf.* denizens] are

¹⁹⁵ Conflicting allegiance likewise would not be a problem if an alien friend foreswore allegiance to the nation of his birth, but that generally was not done prior to the U.S. Constitution. JAMES KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870* at 54 (2014) (“Locke and his successors could agree with Coke that allegiance was binding”).

¹⁹⁶ *E.g.*, *Sherleys’s Case* (1557) 73 Eng. Rep. 315, 2 Dyer 114b (K.B.).

¹⁹⁷ *Tucker’s Case* (1693) 91 Eng. Rep. 533; 2 Salk. 630 (K.B.). *See also* 1 HALE, *supra* note 3, at 59.

¹⁹⁸ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *252. Like any other subject, a resident alien friend who was not deported could remain a British subject in allegiance to the king despite committing crimes, but no allegiance to the king was available to people who did not enter the realm legally in the first place, unless received into British society. *See* note 182 *supra*.

those who have received the right of perpetual residence. These are a kind of citizens of an inferior order, and are united, and subject to the society, without participating in all its advantages. Their children follow the condition of their fathers; and as the state has given to these the right of perpetual residence, their right passes to their posterity.¹⁹⁹

Perhaps the most famous English case involving a resident alien friend was *Somerset’s Case*—the 1772 King’s Bench decision that declared that slavery did not exist in England because no positive law authorized it. James Somerset was a native of Africa who had been transported to Virginia to serve as a slave. When he arrived in England he submitted himself to English jurisdiction, and therefore entered allegiance to the Crown. This entitled him to the protection of the privilege of the writ of habeas corpus.²⁰⁰

An alien was a friend if not classified as an enemy.²⁰¹ The presumptive definition of an alien enemy was a foreigner from a country at war with Britain.²⁰²

¹⁹⁹ 1 Vattel, *supra* note 3, at 92. Note that everyone in the genus of “inhabitants” was “permitted to settle;” whereas people in the country without permission were not inhabitants. English law was more liberal to the children of denizens than the European law described by Vattel; the children of English denizens were not merely denizens, but natural born subjects. *Supra* note 188.

²⁰⁰ *Somerset v. Steward* (1772), 98 Eng. Rep. 499, 501; Lofft 1, 4 (K.B.) (“From the submission of the negro to the laws of England, he is liable to all their penalties, and consequently has a right to their protection”).

²⁰¹ *Supra* note 190.

²⁰² 2 Vattel, *supra* note 3, at 27 (“When the head of a state or sovereign declares war against another sovereign, it implies that the whole nation declares war against the other . . . Thus, these two nations are enemies, and all the subjects of the one are enemies to all the subjects of the other inclusively.”).

However, this definition was presumptive only. Circumstances, including the alien’s own conduct, could designate a foreigner as an alien friend or an alien enemy.

Suppose, for example, that a Dutch merchant resided and did business in London during a time of peace between Britain and the Netherlands. This merchant conducted himself according to English law and was classified as an alien friend. Suppose further that war then broke out between Britain and the Netherlands. According to international norms,²⁰³ the merchant was permitted to remain for a while to wrap up his affairs before departing. Parliament fixed the period for Britain at 40 days, extendable to 80.²⁰⁴ During that time the Dutch merchant remained, or at least was treated as,²⁰⁵ an alien friend. By the time of the American Founding, this courtesy was extended to all foreigners, not just merchants.²⁰⁶

²⁰³ 3 GROTIUS, *supra* note 3, at 1280 (“But they who went thither before the War, are by the Law of Nations a reasonable Time to depart, which if they do not make Use of they are accounted Enemies.”); *see also* 2 VATTTEL, *supra* note 3, at 24.

²⁰⁴ 1 HALE, *supra* note 3, at 93-94.

²⁰⁵ Sometimes it is not clear whether a protected person was classified as an alien enemy against whom hostilities are suspended or as an alien friend. *Cf.* 2 VATTTEL, *supra* note 3, at 27 (“the same rites are not allowable against every kind of enemies.”). But some were clearly enemies who were merely entitled to indulgence:

Women, children, the sick and aged, are in the number of enemies....And there are rights with regard to them, as belong to the nation with which another is at war....But these are enemies who make no resistance; and consequently give us no right to treat their persons ill, or use any violence against them, much less to take away their lives.

2 VATTTEL, *supra* note 3, at 51.

²⁰⁶ 1 HALE, *supra* note 3, at 93 (“all foreigners living or trading here are comprised”).

In wartime, resident aliens could petition (either explicitly or implicitly) to remain in Britain indefinitely, promising to obey local law and do nothing contrary to British interests. This was an affirmation of allegiance. If the authorities acquiesced, the alien could remain as long as he conducted himself properly.²⁰⁷ But if he betrayed that trust and violated his obligation of allegiance to the British Crown, the authorities could opt to treat him either as a traitor who could be tried under municipal law²⁰⁸ or as an alien enemy who could be tried and punished under martial law.²⁰⁹

It worked the other way, too: a person from a friendly country could be an alien enemy. If a foreigner participated in an invasion of British territory, this negated any implication of allegiance to the British Crown. The invader was an alien enemy and subject to martial law, even though his home country was in amity with England.²¹⁰ For example, as the Duke of Norfolk’s Case (1603) demonstrated,

²⁰⁷ 1 HALE, *supra* note 3, at 60.

²⁰⁸ 1 HALE, *supra* note 3, at 60 & 92.

²⁰⁹ 1 HALE, *supra* note 3, at 94. *See also* 1 BACON, *supra* note 3, at 84 (referring to such a person as an alien enemy, but recognizing him as having the power to sue as an alien friend).

²¹⁰ Calvin’s Case (1608) 77 Eng. Rep. 377, 384; 7 Co. Rep. 1, 6b (K.B.). An excerpt:

But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted for treason . . . for he never was in the protection of the King, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he shall be put to death by martial law.

Id. *See also* STEPHEN PAYNE ADYE, A TREATISE ON COURTS MARTIAL 61 (3rd ed. 1786); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 51 (6th ed. 1778) (“But it seemeth that aliens, who in a hostile manner invade the kingdom, whether their king were

there was no requirement that an alien act as the agent of a foreign power to be deemed an enemy.²¹¹

at war or peace with ours, and whether they come by themselves or in company with English traitors, cannot be punished as traitors, but shall be dealt with by martial law.”).

²¹¹ Duke of Norfolk’s Case (1603), in 1 THE LIBRARY OF ENTERTAINING KNOWLEDGE: CRIMINAL TRIALS (David Jardine ed., London 1832) (reproducing transcript). The case arose before the merger of the English and Scottish crowns. The Duke, during a time of amity between Scotland and England, was accused of treason for assisting enemies of the Crown—that is, certain Scots who wished to overthrow Elizabeth I. He questioned whether those Scots, who included Lord Herries, could be classified as enemies, since Scotland was in amity with England. In accordance with the practice of the time, he was denied legal counsel and therefore posed his question to the court. The following appears in the transcript:

Duke. I beseech you, my Lords the Judges, may a subject be the Queen’s Majesty’s enemy while the [subject’s own] prince is her friend, and in amity with her?

Catline, C. J. In some cases it may be so; as in France, if the dukedom of Brittany should rebel against the French King, and should (during the amity between the French and the Queen’s Majesty) invade England, those Britons were the French King’s subjects, and the Queen’s enemies, though the French King remaineth in amity; and so in your case.

Id. at 226. This opinion was cited as authority by Edward Coke in 3 INSTITUTES OF THE LAWES OF ENGLAND at 11, and in other English law books as well, *e.g.*, 1 HALE, *supra* note 3, at 164 (“so that an enemy extends farther than a king or a state in enmity, namely an alien coming into *England* in hostility”) (citing the Duke of Norfolk’s Case, italics in original).

The facts in *Vaughan’s Case* (1696)²¹² present another instance of persons from a friendly country being classified as enemy aliens. Britain was allied with the Netherlands and at war with France. Some Dutch citizens²¹³ joined the French cause. The court stated that they were alien enemies despite the fact that their country and Britain were in amity:

If the States [i.e., the Netherlands] be in alliance, and the French at war with us, and certain Dutchmen turn rebels to the States, and fight under command of the French King, they are *inimici* [enemies] to us, and *Gallici subditi* [French subjects]: for the French subjection makes them French subjects in respect of all other nations but their own....²¹⁴

The Supreme Court cited *Vaughan’s Case* favorably in *Miller v. United States*, relying on it for the Court’s own discussion of alien friends and enemies.²¹⁵

²¹² *Vaughan’s Case* (1696) 91 Eng. Rep. 535; 2 Salk. 634 (K.B.).

²¹³ “Citizens” rather than “subjects” because at the time the Netherlands was a federal republic: the United Provinces of the Netherlands. The echo of that name in “the United States of America” is not accidental. The United Provinces lasted until 1795 with the establishment of the Batavian Republic. The Netherlands became a kingdom in 1806.

²¹⁴ *Vaughan’s Case* (1696), 91 Eng. Rep. at 536; 2 Salk. at 635.

²¹⁵ *Miller v. United States*, 78 U.S. 268 (1870):

It is ever a presumption that inhabitants of an enemy’s territory are enemies, even though they are not participants in the war . . . But even in foreign wars persons may be enemies who are not inhabitants of the enemy’s territory . . . And it would be strange if they did, for those not inhabitants of a foreign state may be more potent and dangerous foes than if they were actually residents of that state . . . Clearly, therefore, those must be considered as public enemies, and amenable to the laws of war as such, who, though

The wider principle was, as Vattel stated it, “Whoever offends the state, injures its rights, disturbs its tranquility, or does it a prejudice in any manner whatsoever, declares himself its enemy, and puts himself in a situation to be justly punished for it.”²¹⁶ In another passage, Vattel clarified the terms on which one entering a country was to be treated as an alien friend:

Since the lord of the territory may forbid its being entered when he thinks proper, he has, doubtless, a power to make the conditions on which he will admit of it But, even in those countries which every stranger freely enters, the sovereign is supposed to allow him access, only upon this tacit condition, that he be subject to the laws . . . The public safety, the rights of the nation, and of the prince, necessarily require this condition; and the stranger tacitly submits to it, as soon as he enters the country, as he cannot presume on having access upon any other footing. The empire has the right of command in the whole country, and the laws are not confined to regulating the conduct of the citizens among themselves; but they determine what ought to be

subjects of a state in amity with the United States, are in the service of a state at war with them, and this not because they are inhabitants of such a state, but because of their hostile acts in the war.

Id. at 310-11.

Cf. note 211 *supra*, wherein Lord Herries was not in service of any state at war with England but nevertheless was found to be an enemy of England.

²¹⁶ 1 VATTEL, *supra* note 3, at 144. *See also* 1 VATTEL, *supra* note 3, at 140 (“a sovereign has a right to treat as enemies those who endeavor to interfere, otherwise than by their good offices, in his domestic affairs”).

observed by all orders of people throughout the whole extent of the state.²¹⁷

V. HOW THE STATES MAY WAGE DEFENSIVE WAR

We have seen that reserved state power to wage defensive war is triggered by insurrection, actual or threatened invasion, or challenges from transnational criminal organizations of the kind the founding generation referred to as “enemies of the human race.” The discussion below assumes state policy makers have reached a determination that one of these triggers has been pressed.

A. *Insurrection*

Except in cases of actual civil war, official response to insurrection is generally a matter for the police power rather than the war power. Even during civil war, the punishment of insurrectionists is likely to be handled through the civilian criminal justice system, including the prosecution of civil crimes such as treason and sedition.

²¹⁷ 1 VATTEL, *supra* note 3, at 154. *Cf.* 8 U.S.C. §1182 (listing dozens of deportable offenses).

To the extent permitted by a state constitution, officials may suspend the writ of habeas corpus or declare martial law,²¹⁸ so long as they do not dispense entirely with the due process guarantee of the Fourteenth Amendment.²¹⁹ If the circumstances call for it, they also may request that Congress suspend the writ. They may restrict immigration to the extent that doing so does not conflict with federal law. Obviously, they may employ other devices common in wartime, such as curfews and roadblocks.

Under the Domestic Violence Clause, the state legislature may, by due notice (“Application”) compel the federal government to suppress “domestic Violence.”²²⁰ A state resolution to that effect probably does not need the signature of the governor,

²¹⁸ See *supra* note 112 (remarks of Samuel Adams and Luther Martin). See also Richard L. Aynes, *Refined Incorporation and the Fourteenth Amendment*, 33 U. RICHMOND L. REV. 289, 305-306 (1999) (“The Fourteenth Amendment Founders do not seem to have intended to ‘incorporate’ the Suspension Clause of Article I, Section 9”); *cf.* *Moyer v. Peabody*, 212 U.S. 78, 84 (1909) (upholding Colorado statute providing that, “when an invasion of or insurrection in the state is made or threatened, the Governor shall order the national guard to repel or suppress the same”).

²¹⁹ Originally “due process of law” referred to all the rights a person held according to the law of the land. See generally Andrew Hyman, *The Little Word Due*, 38 AKRON LAW REV. 1 (2005). Another way of saying the same thing is that the due process requirement prevented the government from altering or allowing the omission of any aspect of applicable pre-existing rules when proceeding against a person.

The Supreme Court has adopted quite different formulations. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (substantive due process rights are those “deeply rooted in this nation’s history and tradition”); *Rochin v. California*, 342 U.S. 165 (1952) (due process is violated by governmental “conduct that shocks the conscience”).

²²⁰ U.S. CONST. art. IV, § 4, cl. 3.

because an application to Congress is not an act of lawmaking.²²¹ If the state legislature cannot be convened, then the governor may issue the application.²²²

B. *Invasion*

The Constitution’s Self-Defense Clause specifically recognizes the reserved state power to wage defensive war against invaders.²²³ As documented above,²²⁴ the Constitution’s definition of “invasion” is quite broad: It is not, as some courts have opined,²²⁵ limited to military attack from another sovereignty. An incursion qualifies as an invasion if it is unauthorized and uninvited and causes or threatens detriment beyond the mere fact of crossing.²²⁶

If a state is invaded, the Protection From Invasion Clause requires the federal government to protect that state. However, a state’s ability to respond to the invasion does not depend on federal compliance with the Protection From Invasion Clause. The state may react with the full panoply of measures traditionally

²²¹ *Cf.* *Leser v. Garnett*, 258 U.S. 130 (1922) (state legislature had power to ratify federal constitutional amendment despite the fact that it contradicted state constitution). *Cf.* *Smiley v. Holm*, 285 U.S. 355 (1932) (state legislature had no power to disregard governor’s veto of redistricting map).

²²² U.S. CONST. art. IV, § 4, cl. 3. An invasion may spark violence within the borders of the state, thereby qualifying as the “domestic violence” necessary to justify an application.

²²³ U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”).

²²⁴ *Supra* Part III (E).

²²⁵ *Supra* note 123.

²²⁶ *Supra* Part III (E).

associated with defensive war—that is, with all means necessary to repel the invasion,²²⁷ while avoiding excessive means.²²⁸

Thus, under the Constitution, a state facing an imminent or actual invasion may issue warnings against further invasion and erect barriers at the border.²²⁹ It may conscript and otherwise raise troops and ships beyond its militia and National Guard establishments.²³⁰ It may deploy those troops in all ways traditionally characteristic of defensive war, other than by issuing letters of marque and reprisal.²³¹ It may create internal checkpoints, fight the invaders within the state, repel them at the border, or return them whence they came. In the course of military operations, state armed forces may capture invading combatants and seize their property, or kill them if they refuse to surrender their arms.²³² The state may launch preemptive attacks and, under some circumstances, make forays into a neighboring sovereignty (including one claiming to be neutral) if that sovereignty is guilty of harboring the enemy.²³³ As in cases of insurrection, the state may,

²²⁷ *Supra* notes 34 and 36 and accompanying text.

²²⁸ *Supra* notes 36, 47, 48, 49 and accompanying text.

²²⁹ *Supra* note 44 and accompanying text. The barriers must be such as deter invasion while not preventing legitimate passage at a lawful point of entry. *See also* 2 Vattel *supra* note 3, at 151 and 153.

²³⁰ U.S. CONST. art. I, § 10, cl. 3 (recognizing that in time of war states may keep “Troops” and “Ships of War” outside of its usual militia forces).

²³¹ U.S. CONST. art. I, § 10, cl. 1.

²³² *Supra* notes 36, 37, 41 and accompanying text.

²³³ *Supra* notes 55 and accompanying text.

consistently with its constitution, suspend the writ of habeas corpus and, of course, may ask Congress to do so as well.²³⁴

Typically, invaders are not in allegiance to the state before the invasion. Rather, they are alien enemies or persons the state lawfully can treat as such. This renders them subject to rules different from those applied to insurrectionists.²³⁵ Generally speaking, the state must treat captured combatants as honorable prisoners of war, unless found guilty of war crimes or qualifying as “enemies of the human race.”²³⁶

²³⁴ *Supra* notes 112 and accompanying text.

²³⁵ *Supra* notes 172 & 173, and accompanying text.

A decision by federal officials to waive or not enforce applicable federal law may give rise to the claim that the intruder has been “invited” and therefore is not an alien enemy and cannot be treated as such by states. Such a claim might be warranted if that decision is pursuant to state or federal pardon powers; we do not believe such a claim is warranted simply because the executive fails to enforce federal law.

As a practical matter, states and the federal government usually will classify the same people as either alien friends or enemies. However, outside the naturalization and bankruptcy contexts, U.S. CONST. art. I, § 8, cl. 4 (“The Congress shall have power...to establish an uniform Rule of naturalization, and uniform laws on the subject of Bankruptcies throughout the United States”), we are aware of no principle requiring uniform classification in all circumstances—particularly if the federal agent has acted contrary to federal law. If uniformity were compelled in the immigration context, no state could deviate from a President’s opinion as to whether the state is invaded—even though the Self-Defense Clause does not involve the President.

²³⁶ 1 WILLIAM BLACKSTONE, COMMENTARIES *411 (war “gives no other right over prisoners, but merely to disable them from doing harm to us, by confining their persons . . .”).

In some cases, state policy makers may determine that international criminal organizations qualifying as *hostes humani generis* comprise all or part of an invasion. In cases of insurrection, a sovereign treats captives as people in allegiance who have abused their trust. In cases of invasion by alien enemies, a sovereign treats them as prisoners of war. But as for “enemies of the human race,” a sovereign may handle them either way.²³⁷

C. *May Treaties or Federal Law Impair State War Powers?*

There are clear limits on the power of states to wage defensive war, even when faced with insurrection or invasion. Federal statutes or treaties may override state efforts to restrict immigration or the free flow of goods.²³⁸ The Fourteenth Amendment prohibits dispensing with due process or equal protection of the laws, although both concepts are malleable enough to take wartime exigencies into

²³⁷ *Supra* notes 65 & 66, and accompanying text.

²³⁸ *Supra* notes 95-100 and accompanying text.

consideration.²³⁹ Congressional approval is necessary for mutual agreements with other states, military or otherwise,²⁴⁰ although such approval can be implied.²⁴¹

More difficult is the question of the extent to which federal execution of incidental powers, such as statutes enacted under the Necessary and Proper Clause,²⁴² may impair further the ability of states to wage defensive war.

²³⁹ U.S. CONST. amend. XIV, § 1 (“No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”). *See generally* Andrew Hyman, *The Substantive Role of Congress Under the Equal Protection Clause*, 42 S.U.L. REV. 79 (2014) (asserting that a greater role was envisioned for Congress beyond enforcement legislation). *See also* note 221 *supra* (discussing original meaning of due process of law).

²⁴⁰ U.S. CONST. art. I, § 10, cl. 3 (“No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”). The absence of a semicolon after the word “Power” suggests that a permissible construction is that “unless actually invaded, or in such imminent Danger as will not admit of delay” modifies the restriction on agreements and compacts as well as the restriction on waging war. This is probably not, in our view, the best reading, but its credibility is raised by this consideration: a state defending itself from invasion should be able seek aid if the federal government fails to honor its obligations under the Protection From Invasion Clause. States cannot join any “treaty, alliance, or confederation” even with consent of Congress. *See* U.S. CONST. art. I, § 10, cl. 1. But a pact that allows the state to exit without penalty, quickly and at any time and for any reason is not necessarily a “treaty.” *See* Andrew Hyman, *The Unconstitutionality of Long-Term Nuclear Pacts that are Rejected by Over One-Third of the Senate*, 23 DENV. J. INT’L LAW & POL. 313 (1995).

²⁴¹ *United States Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452 (1978).

There are several relevant Supreme Court cases. *Missouri v. Holland*²⁴³ held that when Congress legislates pursuant to a treaty, Congress is not otherwise restricted to its specifically-enumerated powers, apparently because the Necessary and Proper Clause grants Congress authority to enact laws “necessary and proper” for treaty execution.²⁴⁴ In *Reid v. Covert*,²⁴⁵ the plurality opinion clarified *Missouri v. Holland* by stating that, although Congress may exercise otherwise-unenumerated powers when legislating pursuant to treaties, it may not adopt laws in violation of “any specific provision of the Constitution,”²⁴⁶ such as the limitations in the first eight amendments of the Bill of Rights. Presumably, this would include the reservation in the Self-Defense Clause of state powers to wage defensive war.

*Bond v. United States*²⁴⁷ qualified the rule of *Missouri v. Holland* further: Congressional legislation adopted pursuant to treaties should be construed when possible to avoid intruding on areas of traditional state concern.

Finally, *Prinz v. United States*²⁴⁸ held that a law adopted for a purpose outside Congress’s specifically-enumerated powers cannot be upheld under the Necessary and Proper Clause if it intrudes on state sovereignty to such an extent

²⁴² U.S. CONST. art. I, § 8, cl. 18.

²⁴³ *Missouri v. Holland*, 252 U.S. 416 (1920).

²⁴⁴ *Missouri v. Holland*, 252 U.S. at 432 (“If the treaty is valid there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.”).

²⁴⁵ *Reid v. Covert*, 354 U.S. 1 (1957).

²⁴⁶ *Id.* at 18.

²⁴⁷ *Bond v. United States*, 572 U.S. 844 (2014).

²⁴⁸ *Prinz v. United States*, 521 U.S. 898 (1997).

that the law is not “proper.”²⁴⁹ The state interest overridden in *Missouri v. Holland* was control over human interactions with migratory birds. The state interest protected in *Prinz* was freedom from federal “commandeering”—federal imposition of an administrative function on state officials. However, the power to wage defensive war is even more central to state sovereignty than the interest defended in *Prinz*. It may be necessary to territorial integrity and, potentially, to survival. Presumably the *Prinz* doctrine protects it against federal exercise of incidental authority.

D. *Some Thoughts on Justiciability*

Several Supreme Court cases have determined that the “republican Form” mandate in Article IV, Section 4 is committed to the political branches of the federal government, and, therefore, “republican Form” cases are not justiciable.²⁵⁰ Without much analysis, some lower courts have extended this rule to the Protection From Invasion Clause²⁵¹ and to other aspects of reserved state territorial integrity.²⁵²

Detailed examination of modern justiciability issues is beyond the scope of this article. Several observations may, however, assist in framing future discussion.

²⁴⁹ *Id.* at 924.

²⁵⁰ *Luther v. Borden*, 48 U.S. 1 (1849); *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912); *Baker v. Carr*, 369 U.S. 186 (1962); *Rucho v. Common Cause*, 588 U.S. ___, 139 S.Ct. 2484, 2506 (2019) (dicta).

²⁵¹ *California v. United States*, 104 F.3d 1086 (9th Cir. 1997); *Padavan v. United States*, 83 F.3d 23 (2d Cir. 1996) (both holding the Protection From Invasion Clause to be non-justiciable).

²⁵² *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996).

First: the Supreme Court’s reasons for rendering “republican Form” cases non-justiciable are based on considerations unique to that portion of Article IV, Section 4. These considerations involve matters of definition (“When is a government republican?”) and matters of practicality (“What is the retroactive and prospective legal effect of declaring a government “non-republican?”).²⁵³ Those considerations are of limited relevance to invasion cases, because the definitional doubt is smaller, and the meaning of “invasion” can be determined by a state government having authority to do so.

Second: the courts’ opinions holding “invasion” cases to be non-justiciable also displayed the belief that the constitutional term “invasion” refers only to a military attack from a foreign government.²⁵⁴ Because such an attack was not a feature of those cases, it was easier to dismiss them as non-justiciable. As demonstrated above, however,²⁵⁵ that belief is clearly erroneous.

Third: The consequences from failing to enforce the insurrection and invasion mandates may be far more severe than those arising from failing to enforce the “republican Form” mandate. If Texas or Montana decided to enthrone a king, the Union could continue with all 50 states intact. Failure to protect a state against insurrection or invasion could sever or topple the Union itself.²⁵⁶

²⁵³ *Luther v. Borden*, 48 U.S. 1 (1849) (discussing such factors). *Cf. Colgrove v. Green*, 328 U.S. 549, 553 (1946) (a court decision declaring a state government non-republican followed by the state’s failure to erect a complying government would create a vacuum, such that, “The last stage may be worse than the first”).

²⁵⁴ *See* cases cited *supra* note 253.

²⁵⁵ *Supra* Part III (E).

²⁵⁶ One is reminded of the neglect of the administration of President James Buchanan in the face of secession.

Fourth: Judicial failure to enforce the federal duty to protect states from insurrection or invasion would convert a clear constitutional requirement into a mere suggestion that federal politicians could ignore at will. This, in turn, would undercut a central reason the Constitution was adopted: to “provide for the common Defence.”²⁵⁷

Treating insurrection and invasion as non-justiciable has implications beyond the scope of the federal duty to protect. It also has implications for the extent of state war powers. After all, “Insurrection” and “invasion” not only trigger the federal government’s duty under the Protection From Invasion Clause, but also trigger exercise of state war powers. If the terms are too vague for courts to define for federal purposes, then they also are too vague for courts to define for state purposes. If Protection From Invasion Clause cases are held to be non-justiciable because the Constitution commits the decision of whether and how to protect states against invasion to the political branches of the federal government, then the Constitution even more clearly commits (as demonstrated by the Self-Defense Clause) the determination of whether a state has been “Invaded” or in “imminent Danger” to the state government. If redressibility issues impede justiciability in Protection From Invasion Clause cases, then they could also impede justiciability when a state has gone onto a war footing and raised an army.

To be clear: If federal officials are proceeding in good faith to crush an insurrection or repel an invasion, the courts should not second-guess their tactics.²⁵⁸

²⁵⁷ U.S. CONST., *Preamble* (“provide for the common defence”). On the paramount need for a central authority to protect the Union, see the extended discussions in *THE FEDERALIST* Nos. 4 & 5 (John Jay), Nos. 7 & 8 (Alexander Hamilton), No. 45 (James Madison).

²⁵⁸ *Cf.* *United States v. Texas*, 599 U.S. 670 (2023) (holding that Texas had no standing in a case seeking to have the government make more arrests under an immigration statute).

But judicial intervention is appropriate when federal officials utterly neglect their duty or adopt measures so plainly insufficient as to demonstrate a lack of good faith effort.

Like the issue of justiciability, the choice of remedies against recalcitrant officials is best left to another day. We might suggest, however, that where mandamus, declaratory judgments, or injunctions are not practical, monetary damages might well be. Damages could, for example, fund or reimburse state expenses incurred in addressing the problem without federal assistance.

VI. CONCLUSION

Before ratification of the Constitution, the fourteen North American states were the ultimate repository of the power to wage war, although all but Vermont had entered a treaty (the Articles of Confederation) pooling some of their war powers. While the Articles lasted, most war-making authority—including exclusive authority to wage offensive war—was lodged in the Confederation Congress. The states were required to maintain militias, enjoyed wide flexibility to wage defensive land war, and retained more limited flexibility to wage defensive naval war.

Under the Articles, the states also reserved the prerogative, with congressional approval, of entering treaties, and they could levy exactions on imports not inconsistent with congressional treaties. They reserved almost untrammelled authority in certain areas related to war, such as immigration and the writ of habeas corpus.

The Constitution re-arranged this scheme. The new central government received exclusive power to wage offensive war, symbolized by the grant of an enumerated power to Congress to declare war. The federal government also received the exclusive right to enter treaties and alliances and issue letters of marque and

reprisal. The states retained their militias, although subject to federalization for limited and enumerated purposes. States also were freed of some of the Articles’ restrictions on their flexibility in waging defensive war.

The federal government also obtained the prerogative of suspending habeas corpus in certain circumstances. States retained that prerogative as well. States kept the power to restrict immigration and regulate foreign trade, but their laws on these matters were largely subject to congressional preemption.²⁵⁹

The Constitution imposed certain war-related obligations on the federal government. The federal government was charged with defending the states against invasion and, upon state request, with suppressing insurrection.

The states reserved the sovereign’s prerogative of engaging in defensive military action. That authority is triggered by insurrection, by actual or imminent invasion, or by attacks from “enemies of the human race”—that is, by transnational criminal gangs. The Founders envisioned insurrectionaries being treated as criminals who have betrayed their legal obligation of allegiance to the state,

²⁵⁹ In *Arizona v. United States*, 567 U.S. 387 (2012), the court said that the federal government’s authority over immigration “rests, in part, on the National Government’s constitutional power to ‘establish an uniform Rule of Naturalization’ . . . and its inherent power as sovereign to control and conduct relations with foreign nations” *Id.* at 394-95. But that case did not involve naturalization, and the proper basis for decision was the Define and Punish Clause. *See Natelson, Define and Punish, supra* note 3. The Court also relied on the (mythical) doctrine of inherent sovereign authority, another error. *See Natelson, supra* note 72.

It is outside the scope of this article to analyze whether those errors resulted in erroneous outcomes, but the case did not involve naturalization, there was no *constitutional* requirement of nationwide uniformity.

“invaders” as alien enemies, and international criminals being treated either way, at the option of the state.

State warmaking authority is at its apex in the case of invasion, against which the states have reserved full war powers. Of course, a state may opt not to exercise the full scope of its war powers, and any actions it undertakes are subject to the law of war.

The constitutional term “invasion” denotes an unauthorized and uninvited intrusion of any size across a border, where the intrusion causes, or threatens to cause, detriment beyond the fact of the intrusion itself. It includes illegal immigration of a kind, magnitude, or degree of organization that may inflict harm.

Finally, the Constitution’s reservation of defensive war power to the states encompasses all procedures customary during the Founding era for fighting defensive war except those, such as letters of marque and reprisal, specifically interdicted by the Constitution. These procedures are constrained only by necessity, the law of war, and specific constitutional provisions (such as the ban on state letters of marque and reprisal). They include, when necessary, preemptive and even cross-border attacks.

State resort to their war powers does not depend on federal assistance or federal permission, and federal measures adopted as incidents to enumerated powers—including legislation adopted to enforce treaties—may not destroy or unreasonably burden the ability of a state to defend itself.²⁶⁰

²⁶⁰ We leave unresolved the question of the extent to which federal actions within core federal powers (such as the power to regulate Commerce), U.S. CONST. art. I, § 8, cl. 3) rather than incidental powers (*cf. id.*, art. I, § 8, cl. 18) (such as the regulation of manufacturing as an incident to commerce) may override the state authority reserved by the Self-Defense Clause.

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Natelson believes that incidental powers trump reserved ones, because only powers not granted are reserved, and the Constitution grants incidental powers; Hyman believes that the Self-Defense Clause is a concurrent power, and is an express right similar to those enumerated in the Bill of Rights, not just a residual effect of granting limited power to the federal government. They agree that, where possible, federal statutes should be interpreted to avoid intruding into traditional areas of state authority, including self-defense.