Immigration is Not an Invasion: The Case Against Allowing State Actors to Implement Immigration Policies Under the Scope of the Invasion Clause

Mitch McCarthy

Follow this and additional works at: https://scholarlycommons.law.cwsl.edu/cwlr

Recommended Citation
Available at: https://scholarlycommons.law.cwsl.edu/cwlr/vol60/iss3/6

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cws.edu, chirsch@cws.edu.
# Immigration is Not an Invasion: The Case Against Allowing State Actors to Implement Immigration Policies Under the Scope of the Invasion Clause

## Table of Contents

INTRODUCTION ..................................................................................... 646

   A. The History of the Invasion Clause and Justiciability: Invasion Clause Cases as Historically Non-Justiciable ......................... 653
   B. Defining Invasion ........................................................................ 656
   C. Federal Immigration Power and its Ambiguous Origin .................. 658
   D. Federal Preemption of State Immigration Laws ......................... 662

II. ADOPTING MANAGEABLE STANDARDS FOR WHAT CONSTITUTES AN INVASION ..................................................... 665
   A. Applying the “Invading Force” Elements to Texas’s Buoy System ........................................................................ 666
   B. Organization of the Invading Force ............................................ 667
   C. Hostility of the Alleged Invading Force ...................................... 669
   D. Power of the Alleged Invading Force ........................................ 671
   E. Predetermined Malicious Objective of the Alleged Invading Force ........................................................................ 672

CONCLUSION ......................................................................................... 674
INTRODUCTION

The year is 2023 and the United States is being invaded from all directions by a force both indistinguishable from, and eager to replace, the American population—at least according to Texas Governor Greg Abbott.1

In July 2023, Governor Abbott deployed a 1,000-foot-long string of buoys, separated by serrated saw blades, in the Rio Grande River to deter immigrants from crossing into Texas.2 The buoy system raised the attention of both immigrant activist groups3 and the Mexican government.4 The Biden Administration not only called for Texas to remove the buoys, but also sued Texas, alleging that Texas’s buoy system violates the Rivers and Harbors Act (RHA)—a federal law intended to protect navigable waters in the United States.5 Specifically, the Biden Administration claims the buoy system violates section 10 of the RHA, which prohibits the unauthorized obstruction of any navigable water of the United States.6

Governor Abbott responded to the lawsuit by saying, “Texas will see you in court, Mr. President.”7 According to Governor Abbott, the implementation of the buoy system falls squarely within constitutionally-granted powers to the states because the Biden Administration violated

1. See Letter from Greg Abbott, Governor of Texas, to President Joe Biden (July 24, 2023) [hereinafter Second Letter from Governor Abbott].
4. See generally Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.- Mex., Feb. 3, 1944, T.S. No. 994. Mexico has raised concerns that the buoy system may violate the Mexican Water Treaty between the United States and Mexico, which covers the waters of the Rio Grande.
Article IV, section 4 of the United States Constitution. Section 4 of the Constitution contains two important clauses. First, the Guarantee Clause, which ensures a Republican form of government to the states; and second, the Invasion Clause, which promises protection to the states against Invasion. Governor Abbott contends that Mexican cartels are Invading Texas, and by failing to prevent this Invasion, the federal government is failing to uphold its constitutional duty to protect the State of Texas.

Governor Abbott specifically claims that the Biden Administration is failing to enforce 8 U.S.C. § 1325(a)(1), a federal statute that prohibits immigrants from entering the United States between authorized ports of entry. Texas has thirty-one ports of entry, including eleven ports along Mexico’s border that serve as key checkpoints. The busiest of these ports is in El Paso, where more than twelve million cars and seven million pedestrians entered the United States in 2018 alone. Undocumented immigrants crossing via the Rio Grande River do not pass through a designated port of entry, which Governor Abbott claims is a violation of §1325(a)(1).

In light of the alleged constitutional violations by the federal government, Governor Abbott has invoked Article I, section 10, clause 3 of the United States Constitution, which grants States the right to keep a militia and “engage in War” during times of invasion. Governor

8. See Letter from Greg Abbott, Governor of Texas, to President Joe Biden (Nov. 16, 2022) (citing U.S. CONST. art. IV, § 4) [hereinafter First Letter from Governor Abbott].

9. U.S. CONST. art. IV, § 4. Throughout this Comment, the term “Invasion” is capitalized in reference to the original text of the Constitution. Where the word is not capitalized, the text refers to the general definition of an invasion.


11. See id. (citing 8 U.S.C. § 1325(a)(1)); see also Port of Entry, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/port%20of%20entry (last visited Dec. 13, 2023) (defining a port of entry as a place where an alien may be permitted to enter a country).


15. U.S. CONST. art. I, § 10, cl. 3.
Abbott also points to the Texas State Constitution, which expressly names the Governor as Commander-in-Chief of the State militia, and grants the Governor the power to “call forth the militia to execute the laws of the State [and] . . . to repel invasions.”

The “Immigration as Invasion” argument raises significant questions as to the original purpose of the Invasion Clause, its intended application within the context of immigration, and the precedent that Governor Abbot’s policies of defining immigration as an Invasion might set for States hoping to employ their own deterrence and defense strategies.

Although Invasion Clause claims have historically been deemed non-justiciable, or unfit for review in federal courts, this Comment argues that Invasion Clause claims should be deemed justiciable questions for federal courts to hear. After establishing justiciability, federal courts should find that immigration is not an Invasion within the meaning of the Invasion Clause and should be distinguished from the activity of Mexican cartels under the Invading Force elements set out below. Otherwise, Governor Abbott’s “Immigration as Invasion” argument could be validated and would create a detrimental precedent for immigrant rights and future Invasion Clause cases.

The remainder of this Comment will address each of these points in turn. Part I will explore the definitions of an invasion, and the Framers’ intent behind drafting the Invasion Clause, as well as the justiciability of Invasion Clause claims; the federal government’s ability to legislate regarding immigration; and the federal government’s power to preempt certain state laws that may conflict with federal immigration legislation. Part II will apply the definition of an Invading Force to the

16. Tex. Const. art. IV, § 7. But see S.T. Ansell, Legal and Historical Aspects of Militia, 26 Yale L.J. 471, 474–80 (1917) (describing the historical development and use of the American militia and distinguishing state militias from the federal army, but also noting that the President is the Commander-in-Chief of state militias when they are called into service of the United States).

17. Throughout this Comment, the term “Immigration as Invasion” will be capitalized in reference to the text of the Constitution and the meaning of an “Invasion” within that context.

18. See infra note 77. Throughout this Comment, the term “Invading Force” will be used to reference the elements which, this Comment argues, must be satisfied for an entity to be “Invading” into the United States under the Invasion Clause of the Constitution.

19. See discussion infra Section I.C.
immigration context and will specify the identity of the alleged Invasion into Texas. More specifically, Part II will differentiate between the organization, hostility, power, and predetermined malicious objectives of Mexican cartels and immigrants.

I. BACKGROUND: THE SOUTHERN BORDER, THE INVASION CLAUSE, AND FEDERAL IMMIGRATION POWER

The shared border between the United States and Mexico spans 1,951 miles and is the busiest border in the world with more than 800,000 people arriving in the United States from Mexico every day. Roughly half of the southern border runs below Texas and much of Texas’s border falls along the Rio Grande River. This river has long been a popular entryway for undocumented immigrants entering the United States, despite its deceivingly strong current and alligator-infested waters.


23. See Leon C. Metz, Rio Grande, TEX. ST. HIST. ASS’N https://www.tshaonline.org/handbook/entries/rio-grande (last visited Dec. 13, 2023) (noting that “[t]he official border measurement ranges from 889 to 1,248 miles, depending on how the river is measured.”).

The Rio Grande River poses a deadly final hurdle for undocumented immigrants crossing into the United States.\(^{25}\) Frequently, small children attempting to cross with their parents are swept away by the river’s current.\(^{26}\) One Texas National Guard member drowned while trying to rescue a migrant attempting to swim across the Rio Grande.\(^{27}\) This crisis has led many advocates to voice their concerns the buoy system and the increased risk of drowning that it creates.\(^{28}\)

In March of 2021, Governor Abbott announced “Operation Lone Star,” an initiative aimed at increasing border security and deterring crime within the State.\(^{29}\) Under this initiative, Governor Abbott deployed additional Texas National Guard members and increased physical border barriers, including shipping containers and concertina wire.\(^{30}\) Two years after announcing Operation Lone Star, Governor


\(^{30}\) Concertina wire is “wire with razor-sharp edges or projections, placed in coils as a barrier along the tops of fences.” *Concertina Wire*, DICTIONARY.COM,
Abbott has continued to implement increased security and deterrence methods at the border\textsuperscript{31} despite pushback from various immigrant support groups, the federal government, and Texas’s own residents.\textsuperscript{32}

Policies concerning the treatment of newly-arrived immigrants have also raised disputes between Governor Abbott and the Biden Administration.\textsuperscript{33} Title 42, a Trump-era public health policy which allowed for the expedited removal of unauthorized immigrants in the United States, is considered the toughest immigration policy the United States has ever implemented, specifically because it removed the ability for unauthorized immigrants to seek asylum after crossing the border.\textsuperscript{34} Title 42 was enacted during the height of the COVID-19 pandemic to regulate the flow of people into the United States and “to stop the introduction of communicable diseases.”\textsuperscript{35} Since its implementation in March 2020,
more than 250,000 immigrants with various nationalities have been expelled to the Tamaulipas region of Mexico alone under Title 42.\textsuperscript{36} Immigrants waiting on the Mexican side of the border have been subjected to harsh conditions as well—evidence indicates that there have been at least 9,886 cases of kidnappings, torture, rape, and other violent attacks since 2021 on stranded asylum seekers in Mexico.\textsuperscript{37}

In 2022, the Biden Administration attempted to lift Title 42 and revert to less stringent policies that would allow undocumented immigrants to apply for asylum at the border.\textsuperscript{38} Many state representatives, including Governor Abbott, opposed this proposition, and sought to keep the stricter regulations in place.\textsuperscript{39} In protest, Governor Abbott tightened inspection rules and regulations for trucks crossing the border into Texas, and sent buses of immigrants from Texas to Washington D.C.\textsuperscript{40}

Twenty-one states voiced their opposition to the proposed repeal of Title 42, and a federal court ultimately stayed the Biden

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{36}
\item See id. (explaining that the crowded living conditions created by rejected asylum seekers in the Tamaulipas region has created a vulnerable situation for migrants and has allowed organized crime groups in Mexico to prey on migrants); see also \textit{Marking Two Years of Illegal, Inhumane Title 42 Expulsions: Nearly 10,000 Violent Attacks On Asylum Seekers and Migrants}, HUM. RTS. FIRST (Mar. 17, 2022), https://humanrightsfirst.org/library/marking-two-years-of-illegal-inhumane-title-42-expulsions-nearly-10000-violent-attacks-on-asylum-seekers-and-migrants/.
\item What Does the End of Title 42 Mean for U.S. Migration Policy?, supra note 34 (noting that the Biden Administration argued that Title 42 was no longer needed as a public health measure as the world emerged from the COVID-19 pandemic, and its function of deterring illegal crossings was not effective).
\item Ellis & Kuhn, supra note 35; Uriel J. Garcia, \textit{Texas Sues to Block Biden Administration from Lifting Title 42, a Pandemic-Era Health Rule Used to Expel Migrants}, THE TEX. TRIB. (Apr. 22, 2022), https://www.texastribune.org/2022/04/22/texas-biden-title-42-lawsuit/.
\item The migrants were bussed from Texas to Washington D.C. in protest of President Biden’s rollback of Title 42, and in attempt to show the surge of migrants that removing Title 42 would cause. CNBC Television, supra note 33.
\end{enumerate}
\end{footnotesize}
Administration’s proposal. When Title 42 was eventually lifted, Title 8 took its place, allowing undocumented immigrants to once again apply for asylum by making an appointment at a port of entry.

The return from our nation’s strictest asylum application policies has been met with aggressive resistance from those who favored Title 42, including Governor Abbott’s Operation Lone Star efforts along the border.

Governor Abbott’s buoy operation in the Rio Grande River is the latest addition to Operation Lone Star and seeks to repel alleged Invaders from entering Texas. For a better understanding of this argument, this Comment must first define Invasion both independently and within the scope of the Constitution.

A. The History of the Invasion Clause and Justiciability: Invasion Clause Cases as Historically Non-Justiciable

Historically, the Supreme Court has abstained from ruling on Invasion Clause claims for questions regarding their justiciability.


42. Title 42 was lifted when the Biden Administration announced the official end to the COVID-19 pandemic. Since Title 42 was a ‘health policy,’ when the public health emergency declaration expired, Title 42 automatically ended. What Does the End of Title 42 Mean for U.S. Migration Policy?, supra note 34.

43. Id.


45. See Melhado & Garcia, supra note 2; GOVERNOR GREG ABBOTT, DEFENDING TEXAS AGAINST INVASION (2022).

46. For examples of courts deeming cases to be non-justiciable, see Colorado ex rel. Suthers v. Gonzales, 558 F. Supp. 2d 1158, 1161 (D. Colo. 2007) (“The Court would therefore be in the untenable position of determining whether there has been an invasion under the Invasion Clause . . . .”); Padavan v. United States, 82 F.3d 23, 28 (2d Cir. 1996) (“[T]he plaintiffs’ Invasion Clause claim is nonjusticiable. . . . [I]t involves matters of foreign policy and defense, which are issues that the courts have been reluctant to consider.”); New Jersey v. United States, 91 F.3d 463, 470
Article III of the United States Constitution limits the power of the federal judiciary to hear only certain “Cases” and “Controversies.” The Supreme Court has defined the justiciability doctrine as a mechanism to examine the “[a]propriateness of the subject matter for judicial consideration . . . .” Various circumstances may make a case inappropriate for judicial review, such as a lack of standing of the parties bringing the case, or the lack of ripeness of the controversy between the parties.

Another bar to justiciability, or a court’s ability to hear a case, is the Political Question Doctrine, which bars federal courts from deciding questions that are political in nature. The Political Question Doctrine acknowledges the expressly-granted rights of the individual branches of federal government, and seeks to maintain “respect due [to] coordinate branches of government” by avoiding “the potentiality of embar-rassment[s]” that judicial decisions involving political questions may cause for the federal government as a whole.

*Baker v. Carr* is a seminal case in Political Question Doctrine jurisprudence, as it was one of the rare instances where a Guarantee Clause case was deemed to be justiciable, as the claim involved therein did not require the Court to decide on an inherently political question. Notably, the Court emphasized that it is only the involvement of political questions which makes Guarantee Clause claims non-justiciable. Accordantly, the Clause itself is not insulated from judicial review.

---

51. *See generally* Baker v. Carr, 369 U.S 186 (discussing justiciability concerns with cases posing political questions).
52. *Baker*, 369 U.S. at 217 (establishing that the non-justiciability of a political question is primarily a function of the separation of powers).
53. *Id.* at 228–29. Specifically, the issues that the Court addressed in *Baker* were whether the Supreme Court had jurisdiction over questions of legislative apportionment in Tennessee.
54. *Id.*
Invasion Clause claims, much like many of their Guarantee Clause claim counterparts, have consistently been deemed non-justiciable by the courts. In *New Jersey v. United States*, the Third Circuit was asked to determine whether the entry of unauthorized immigrants into New Jersey violated the Invasion Clause. New Jersey sought a declaratory judgment that it had the right to reimbursement from the federal government for costs of imprisonment and education of undocumented immigrants. The case was ultimately found to be non-justiciable because it would have required the court to “evaluate the formulation and implementation of immigration policy by the executive branch,” including making a policy judgment regarding the allocation of resources and enforcement methods put in place. This finding aligns squarely with the separation-of-powers explanation for the non-justiciability of political questions, and the courts’ hesitancy to step on the toes of other branches of government. Importantly, the Court was reluctant to accept New Jersey’s “Immigration as Invasion” argument because New Jersey did not offer support for the Invasion Clause to be applied in the context of immigration, and there were no such manageable standards in place for the Court to apply in hearing the case.

In *California v. United States*, the state of California similarly sought financial relief from the federal government for providing federally-mandated education and healthcare benefits to undocumented immigrants, in addition to the costs of imprisoning undocumented immigrants within the State. California argued that

55. See discussion supra note 46 and accompanying text.
56. See *New Jersey*, 91 F. 3d at 468.
57. *Id.* at 465.
58. *Id.* at 470.
60. *New Jersey*, 91 F.3d at 468 (noting that New Jersey only provided examples of how the Invasion Clause had been applied within a military context); see also *Baker*, 369 U.S. at 217 (explaining that political questions could also come in the form of textual commitment of the issue to another branch of government, decisions that would embarrass another branch of government, decisions that would contradict another branch of government, or the unusual need to adhere to a prior decision).
61. In *California v. United States*, California sought to recover costs it incurred from the alleged intrusion of illegal immigrants, including costs to provide public schooling, emergency health care and costs incurred in incarcerating illegal immigrants. *California v. United States*, 104 F. 3d 1086, 1090 (9th Cir. 1997).
the federal government failed to protect the State from the "intrusion of illegal aliens across the State’s borders.”62 The Ninth Circuit refused to accept the “Immigration as Invasion” argument because it would have required the Court to determine that the United States had been Invaded without such determination from another branch of government.63

Given that both New Jersey and California were deemed to be non-justiciable cases, coupled with the reasoning against the hearing of political questions in Baker, this Comment predicts that Invasion Clause claims that involve political questions will be found to be non-justiciable.64 New Jersey and California highlight courts’ hesitation to accept the “Immigration as Invasion” argument because there is no clear definition for an Invasion in the immigration context, and no clear lines exist for the courts to determine when an influx of immigrants becomes an Invading Force.65 If another branch of government were to provide a clear set of manageable standards for defining an Invasion within the scope of immigration, cases like New Jersey, California, and Governor Abbott’s current suit would have an easier time jumping the justiciability hurdle and gaining access to the federal courts.66

B. Defining Invasion

The word invasion can be traced back to the Latin word invadere, meaning to “enter violently, penetrate into as an enemy, assail, assault, or make attack on . . . .”67 More recently, invasion has been defined as “[t]he action of invading a country or territory as an enemy”68 or as

62. Id.
63. Id. at 1091 (citing Barber v. Hawaii, 42 F.3d 1185, 1199 (9th Cir. 1994)).
64. See Baker, 369 U.S. at 217 (stating that the lack of discoverable and manageable standards for the Court to apply tends to make an issue political in nature). Within the context of immigration related Invasion Clause claims, no such manageable standards or definitions have been made available.
65. See generally California, 104 F.3d 1086; New Jersey, 91 F.3d 463.
66. See generally Baker, 369 U.S. 186; California, 104 F.3d 1086; New Jersey, 91 F.3d 463.
“an occasion when an army or country uses force to enter and take control of another country.” 69

While these definitions are useful, the meaning of an Invasion within the Invasion Clause is best understood when looking at the intended purpose of the Framers upon drafting the Constitution. In their campaign to urge states to ratify the Constitution, three of the Framers: James Madison, Alexander Hamilton, and John Jay, published eighty-five essays known as the Federalist Papers. 70 These essays are considered to be the most authoritative sources for determining the Framers’ intent behind Constitutional provisions. 71 Essay forty-three, written by James Madison, describes protection against Invasion as protection from “foreign hostility” and “ambitious or vindictive enterprises of its more powerful neighbors.” 72

Notably, Madison also states that “[p]rotection against domestic violence is added with equal propriety” within the meaning of the Invasion Clause. 73 Domestic violence in this context means “ambitious or vindictive enterprises of [a state’s] more powerful neighbors.” 74 The qualification of violence as “domestic” hints that an Invasion could mean something more than a foreign action; thus, the Constitution grants the states the “right to interpose” for both foreign and domestic Invasions. 75

Modern courts have been asked to interpret the meaning of Invasion in the context of the Invasion Clause. In California v. United States, The Ninth Circuit referred to the Federalist Papers when it found that the Invasion Clause affords protection “in situations where a state is

72. THE FEDERALIST NO. 43 (James Madison).
73. Id. (emphasis added).
74. Id.
75. Id.
exposed to armed hostility from another political entity.”76 The modern focus on hostilities from political entities, rather than nations or nation-states, expands the protection afforded under the Invasion Clause.77 Whether a group is an Invading Force under the Invasion Clause is not determined by its sovereign status, but rather by its degree of organization, power, and political objectives.78 An Invading force can therefore be defined as a: (1) hostile, (2) organized, and (3) powerful force, conducting a purposeful intrusion on sovereign land in furtherance of a (4) predetermined malicious objective.79

C. Federal Immigration Power and its Ambiguous Origin

The federal government is one of enumerated powers and it may only act when authorized by the Constitution, or when the act is “necessary and proper” to execute such enumerated powers.80 Although the regulation of immigration is not expressly mentioned in the constitutional powers of the federal government, the Supreme Court has held that it is necessary for the execution of various other enumerated powers.81 The power to regulate immigration has been gradually afforded to the federal government, and encompasses “the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government’s political departments largely immune from judicial control.”82

76. California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997).
79. See Dwyer, supra note 77, at 324–25.
81. Arizona v. United States, 567 U.S. 387 394–95 (2012) (noting that Article I, Section 8, Clause 4 provides that regulation over immigration is necessary to establish a uniform Rule of Naturalization; Article I, Section 8, Clause 3 provides regulation over immigration is necessary to regulate Commerce with foreign nations).
Congress’s immigration powers are seen as plenary and “inherent” in the status of the United States as a sovereign nation. The Supreme Court first officially recognized this plenary power in the 1889 Chinese Exclusion Case. In the Chinese Exclusion Case, the Supreme Court adjudicated the constitutionality of the Immigration Act of 1917, which prohibited Chinese laborers who had previously lived in the United States from re-entering the United States after visiting China. The Chinese Exclusion Act (CEA) was passed in 1882, five years before the Chinese Exclusion Case, and was the first federal law that restricted immigration based explicitly on nationality and national security concerns from the political branches. The CEA was enacted at a time when violence against Chinese nationals was rampant in America, and Chinese workers were seen as a threat to the American workforce. In the Chinese Exclusion Case, the Court justified Congress’s plenary power over immigration as one related to
foreign affairs, necessary for a sovereign independent country, and justified by the structure of the national government. However, when viewed in the temporal context of its enactment, it is hard to separate the CEA from its prejudicial underpinnings.

Under this precedent, the federal government continued using national security concerns as justifications for implementing racially restrictive immigration laws into the 1900s. Although many of these laws, including the CEA, were repealed or replaced after World War II, the federal government has continued using this line of precedent to enact “sudden and sweeping” changes to federal immigration laws.

A recent example of this practice appears in *Trump v. Hawaii* (“The Travel Ban Case”), where the Supreme Court showed extreme deference to the executive branch when it upheld an Executive Order from former President Trump that temporarily restricted entry into the United States for foreign nationals from seven predominantly Muslim countries. The Trump administration argued that the restriction was justified by national security concerns, linking the governments of six of

88. *See* The Chinese Exclusion Case, 130 U.S. at 604 (“[T]he United States, in their relation to foreign countries and their subjects or citizens are one nation, invested with powers which belong to independent nations. . . .”); *see also* id. at 606 (“[F]or national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power.”).

89. *See* id. at 603–04 (arguing that if the federal government could not control immigration, the United States “would be to that extent subject to the control of another power”).

90. *See* id. (arguing that to be a sovereign nation equal with the powers of sovereignty possessed by other nations, a people must have control over their territory).


McCarthy: Immigration is Not an Invasion: The Case Against Allowing State A

2024] IMMIGRATION IS NOT AN INVASION 661

the seven countries to state-sponsored terrorism.94 Justice Sotomayor’s dissenting opinion emphasized that President Trump had made several Islamophobic comments during his campaign for election, and argued that the policy “masquerades behind a façade of national-security concerns.”95 Nevertheless, the Court deferred to the executive branch and its determination of potential “national security concerns,” as it has repeatedly done in the past.96

Despite legitimate challenges, the doctrine of judicial restraint has historically provided a relative buffer for federal immigration policy.97 For example, where a policy denying entry to non-citizens at the border was implemented, the Court found that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.”98

Critics of plenary federal power to regulate immigration question the broad deference given to Congress by the courts when deciding whether an issue involves foreign affairs or otherwise implicates federal jurisdiction.99 Some go further to argue that Congress’s power to regulate immigration should instead be reserved to the states under the Tenth Amendment.100 These critics urge Congress to reconsider the constitutional origins of its power to regulate immigration, and to establish more consistent guidelines for when it may or may not pass laws

94. Id. at 2404.
95. Id. at 2433 (Sotomayor, J., dissenting).
97. See, e.g., Kleindienst v. Mandel, 408 U.S. 753, 769 (1972) (finding that where the Executive Branch exercises its discretionary power over admission of foreign nationals into the country “on the basis of a facially legitimate and bona fide reason,” the courts will not question that discretion).
99. See Nikolas Bowie & Norah Rast, The Imaginary Immigration Clause, 120 MICH. L. REV. 1419, 1487–90 (2022) (stating that even where courts have ruled that foreign relations and national security are not necessarily implicated, the court will draw a connection to foreign affairs and grant Congress broad deference.).
100. See DAVID MARTIN ET AL., IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY, 29–30 (9th ed. 2020); U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).
relating to immigration.101 The ambiguous origin of the federal power to regulate immigration has led many state legislatures to pass their own immigration legislation, which has repeatedly been challenged by the federal government.102

D. Federal Preemption of State Immigration Laws

Under the United States federalist system,103 the Constitution, along with laws and treaties made pursuant to the Constitution, are the supreme law of the land.104 When state and federal policy are in conflict, the federal law will reign “supreme,” and the state law will be nullified.105 Notably, the language of the Tenth Amendment bestows upon the states the power to legislate over those areas of law which are not expressly granted to the federal government nor otherwise prohibited to the states.106 This enables states to legislate in those areas of law not enumerated to the federal government, nor implied to that end, arguably including the area of immigration law.

101. These critics include many federalist scholars and state legislators who seek to ensure that the states of the union maintain their autonomy and ability to legislate in those areas mentioned in the Tenth Amendment. See Bowie & Rast, supra note 99, at 1490–91, 1498.
103. “Federalism is a system of government in which the same territory is controlled by two levels of government.” Federalism, CORNELL L. SCH., https://www.law.cornell.edu/wex/federalism (last visited Feb. 02, 2024). In the United States, the individual states have surrendered various powers to the federal government, but have also retained various powers, generally concerning issues of local concern. Id.
104. U.S. CONST. art. VI, cl. 2.
105. Id.
106. U.S. CONST. amend. X.
Federal preemption can be classified into three categories: express,107 conflict,108 and field.109 The power to regulate immigration is not expressly enumerated within the Constitution, so the latter two methods of preemption (conflict and field) often justify federal supremacy over state immigration laws.110

In *Arizona v. United States*, the Supreme Court examined whether federal law preempted and rendered invalid four provisions of a 2010 Arizona state law that was enacted to “discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully in the United States.”111 The Court found that three sections of the “Support Our Law Enforcement and Safe Neighborhoods Act” (SB 1070) were preempted by federal law and rendered them invalid.112


109. *Gade*, 505 U.S. at 98 (quoting Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 153 (1982)) (stating that field preemption occurs “where the scheme of federal regulation is ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it . . . .’”).

110. *See* Huyen Pham, *The Constitutional Right Not to Cooperate Local Sovereignty and Federal Immigration Power*, 74 U. CIN. L. REV. 1373, 1393 (2006) (“Even in the absence of direct conflict between federal and local law, courts have been willing to imply preemption . . . .”). Implied methods of preemption are common in the context of immigration because there is no express constitutional provision granting the power to regulate immigration. *See id.*


112. *Id.* at 415. The challenged provisions included: section 3 (allowing state penalties for aliens who fail to carry registration); section 5(c) (making an unauthorized alien applying for, soliciting, or performing work a state misdemeanor); section 6 (allowing state officers to arrest a person without a warrant if the officer has probable cause to believe they have committed any public offense that makes them
Section three was preempted by federal law for the reason of field preemption. More specifically the court found that, if section three were validated, every state could give itself the authority to prosecute federal registration violations. Section 5(c) was preempted by federal law for the reason of obstacle preemption, as this section would interfere with Congress’s regulations regarding the unauthorized employment of aliens. Section six was also preempted by federal law for the reason of obstacle preemption, chiefly because this section conflicted with federal law which prohibited state officers from making warrantless arrests of aliens based on possible removability.

The court found that these three sections were preempted because they each interfered with a federal law and created an obstacle to the purposes and objectives of Congress when passing their legislation.

The Court, however, found that another section, section 2(b), was not preempted by federal law because “without . . . the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume that section 2(b) would be construed in a way that conflicts with federal law.” This section should be read to avoid concerns of conflict and therefore federal preemption was unauthorized in this circumstance.

Arizona serves as a good gauge of how the Supreme Court currently views preemption within an immigration context. When state law conflicts with a federal law or creates an obstacle for Congress in the enforcement of a federal law, then it will likely be preempted. However, if no

---

114. Id.
115. Id. at 406.
116. Id. at 410.
117. See Arizona v. United States, 567 U.S. at 402–03, 406, 409–10 (2012) (describing why sections 3, 5(c), and 6, respectively are preempted).
118. Id. at 415 (acknowledging possible constitutional concerns arising from section 2(b), which requires state officers delay releasing detainees to verify their immigration status, but adhering to “the Court’s decisions which enjoin seeking out conflicts between state and federal regulation where none clearly exists.”).
119. Id. at 414.
120. See id. at 403, 406–07, 410.
contradiction exists, and the law may be read to conform to other constitutional limitations, the state law will likely not be preempted.121

II. ADOPTING MANAGEABLE STANDARDS FOR WHAT CONSTITUTES AN INVASION

Case law suggests that Invasion Clause claims are generally non-justiciable because of their relationship to foreign policy and the lack of manageable standards for the Court to apply when determining whether immigrants are Invading.122 The political branches should consider defining an Invasion within the immigration context using the Invading Force elements to create manageable standards for the judiciary to resolve “Immigration as Invasion” claims in the future. Deeming Invasion Clause claims justiciable, and thus allowing them to come before the Court will establish a precedent of consistent policies when defining a group as an Invading Force and, within the immigration context, will ensure that immigrants are not wrongly classified as Invaders and barred entry into the United States.

Once past the justiciability hurdles, federal courts are likely to show deference to the other two political branches, given their plenary powers over immigration.123 Federal courts will also have the power to preempt state immigration laws that conflict with their federal counterparts.

Governor Abbott will likely argue that federal plenary power over immigration is too powerful for the reasons explored above.124 Additionally, Governor Abbott may point out that this power allows politicians in Washington D.C. to make the final decision regarding immigration policies that directly impact the lives of citizens living along the border, including Texas residents.

While this argument highlights the reality that many politicians are far removed from the citizens they represent and issues they wish to resolve, Arizona v. United States exemplified that states are free to legislate within the immigration field so long as their laws do not conflict

121. See id. at 415.
122. See California v. United States, 104 F.3d 1086, 1090–91 (9th Cir. 1997); New Jersey v. United States, 91 F.3d 463, 468 (3d Cir. 1996).
124. See discussion supra Part I.D.
with federal legislation. Further, because federal courts tend to defer to immigration-related decisions made by the political branches of government, focused voting efforts to elect representatives who share similar views on immigration enforcement would substantially impact immigration legislation concerning the southern border.

As established above, and Invading Force must be a (1) hostile, (2) organized, and (3) powerful force, conducting a purposeful intrusion on sovereign land in furtherance of a (4) predetermined malicious objective. Unless Governor Abbott can show that the alleged Invading Force meets these elements, and that Texas’s action to deter this Invading Force does not conflict with federal legislation, the Court is likely to defer to the Biden Administration’s choice of immigration enforcement.

A. Applying the “Invading Force” Elements to Texas’s Buoy System

Assuming that the case against Governor Abbot’s recent policies is deemed to be justiciable, the court will next apply the Invading Force elements to the alleged Invasion of Texas to decide the merits of the “Immigration as Invasion” argument. The reviewing court will likely require Texas’s reaction to the Invading Force to be necessary and proportional to the threat posed by the Invaders to prevent any over-reaching action that may unfairly effect parties who are not part of the Invading entity. The remainder of this Part predicts a court’s likely conclusions upon conducting this inquiry.

125. See Arizona, 567 U.S. at 416.
126. See United States House of Representatives Seats by State, BRITANNICA (Dec. 12, 2023), https://www.britannica.com/topic/United-States-House-of-Representatives-Seats-by-State-1787120 (showing that states along the southern border have 102 (23.4%) of the 435 seats in the House of Representatives).
127. See Dwyer, supra note 77.
128. See Maine v. Taylor, 477 U.S. 131, 138 (1986) (quoting Hughes v. Oklahoma, 441 U.S. at 337 (1979) (finding that within the Interstate Commerce context, states seeking to pass laws with discriminatory effects must show that there are no other means to achieve the legitimate local purpose of the law, and that local discrimination against interstate commerce is subject to “the strictest scrutiny”).
129. See City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (holding that when Congress enacts a law to prevent state actors from discriminating against individuals, their proposed legislation must be proportional and congruent to the injury being prevented).
In his response to the Biden Administration’s lawsuit challenging Texas’s Rio Grande buoy system, Governor Abbott claimed that Texas is protecting itself from “invasion by the Mexican drug cartels.” Governor Abbott notes, “deadly drugs like fentanyl, cartel violence, and the horrors of human trafficking” are consequences of this alleged Invasion.

However, the Invading Force impacted by the Rio Grande buoy system is not exclusively made up of Mexican cartel members smuggling drugs and people into the United States. In fact, most of the population crossing the border consists of immigrants seeking entry into America. The United States offers substantially greater economic freedom, job opportunities, and independence than many other countries, which serves as one incentive for immigrants willing to risk their lives to enter. This distinction is important when determining whether the buoy system is deterring the alleged Invasion into Texas, or whether it is an excessive border security measure promulgated under the guise of national security concerns. Governor Abbott will likely argue that the buoy system was enacted to combat activity from Mexican cartels, while the Biden Administration will emphasize the impact the buoys have on individual immigrants unassociated with cartel activity.

B. Organization of the Invading Force

The first element to consider when analyzing the alleged Invading Force is its organization. Generally, Mexican cartels are hierarchical and influential entities, while migrants crossing the border at any
given time represent a broad range of people consisting of different ages and backgrounds.\footnote{137}

Governor Abbot will likely attempt to classify the organization of the Invading Force under the identity of Mexican cartels and not immigrants, but this argument is weakened by the fractured and adversarial relationship between various cartels throughout Mexico.\footnote{138} Additionally, operations from separate South American cartels appear similarly to the work of Mexican cartels within the United States, even though they are not part of the same organizational entity.\footnote{139} Finally, cartel operations in the United States are often carried out by independent contractors who are far removed from the cartel itself, indicating a weaker organizational structure for cartel operations outside of Mexico.\footnote{140}

drug-cartels#:~:text=The%20study%20cites%20a%20greatly,employees%2C%20
Prieto%2DCuriel%20said (explaining that in 2022 there were an estimated 175,000 active cartel members serving in various capacities, making cartels the fifth largest employer in Mexico).


\footnote{138} \textit{see generally} McDonnell, \textit{supra} note 136 (stating that there are 150 unique cartels in Mexico); \textit{Mexico cartels: Which are the biggest and most powerful?}, BBC NEWS (Oct. 24, 2019), https://www.bbc.com/news/world-latin-america-40480405 (explaining that the Gulf Cartel split into multiple factions with different leaders after various leaders were killed or arrested more than twenty years after its founding).

\footnote{139} \textit{See The Colombian Cartels}, PBS https://www.pbs.org/wgbh/pages/front-line/shows/drugs/business/inside/colombian.html (last visited Nov. 12, 2023) (explaining the rise and fall of the notorious Colombian cartels and noting that at present day, the cartels have split into many smaller factions that ship cocaine “to every industrialized nation in the world.”).

\footnote{140} U.S. DEP’T JUSTICE DRUG ENF’T ADMIN., 2020 DRUG ENF’T ADMIN. NAT’L DRUG THREAT ASSESSMENT 68 (Mar. 2021) (explaining that most of the individuals who transport the cartel’s drugs in the United States are “independent, third-party contractors” who are far removed from the organization of the cartel).
A second element to consider is how to effectively target an Invading Force. Notably, cartel systems are drug trafficking operations that aim to distribute drugs, money, and people across borders using typical and atypical means of transportation, like airways, railways, highways, and even tunnels or commercial vessels. The Rio Grande buoy system is not aimed at large roadways or other channels of commerce frequently used by the cartels to traffic drugs, but rather seeks to prevent individuals from crossing the Rio Grande who are less likely to be smuggling significant quantities of drugs or people given the dangerous conditions of the river. The Biden Administration will likely emphasize this point to question the effectiveness of the buoys in preventing cartel activity in America, and will note that there are other, more efficient means for Texas to combat cartel activity than a blanket stoppage of immigrants crossing the Rio Grande River.

C. Hostility of the Alleged Invading Force

Since 2006, when the Mexican government declared war on cartels, there have been more than 360,000 homicides in Mexico. This number continues to rise as cartels gain more power and notoriety in Mexico.

141. Cartel, MERRIAM WEBSTER DICTIONARY (explaining that cartel systems are a combination of commercial and industrial enterprises designed to limit competition or fix prices).

142. See Drug Movement Into and Within the United States, supra note 132 (stating that most illegal drugs that enter the United States across the southern border come in commercial trucks and private vehicles).

143. See Melhado & Garcia, supra note 2; Kanno-Youngs, supra note 24 (explaining the dangers of the Rio Grande River, and how the buoy system makes it even more dangerous to cross the river); see also Illicit Fentanyl and Drug Smuggling at the U.S.-Mexico Border: An Overview, NAT’L IMMIGR. F. (Oct. 25, 2023), https://immigrationforum.org/article/illicit-fentanyl-and-drug-smuggling-at-the-u-s-mexico-border-an-overview/#:~:text=Most%20seizures%20concerned%20marijuana%20(150%2C000,of%20fentanyl%20(27%2C000%20pounds (emphasizing that most illicit drug substances are smuggled through ports of entry, contrary to the common belief that they are smuggled between ports of entry, such as the Rio Grande River).

and abroad. 145 Additionally, the cartels’ hostility is not limited to physical violence, but also extends into the world of synthetic drugs and drug abuse. 146 Extremely profitable and severely addictive drugs like fentanyl 147 have incentivized cartels to increase production and distribution of the drug, 148 which, in turn, has led to heightened overdose rates in the United States in recent years. 149

The Biden Administration will likely posit that while immigrants in America are often stereotyped as hostile, 150 this hostility is often dramatized by politicians hoping to appeal to voters. On the contrary, recent studies have found that immigrants, particularly undocumented immigrants, have substantially lower crime rates across a range of

145. As cartel operations grow in size and financial impact, competition and violence amongst cartels continues to increase. See McDonnell, supra note 136 (stating that in 2021, homicide rates were four times higher than in 2007); see also Mexico cartels: Which are the biggest and most powerful?, supra note 138 (explaining that many cartels are notorious for torturing and decapitating their victims). But see U.S. DEP’T JUSTICE DRUG ENF’T ADMIN, supra note 140 (stating that inter-cartel violence is rare within the United States compared to Mexico).

146. See Betsy Reed, Mexico security forces’ seizures of fentanyl rise by 486% this year, THE GUARDIAN (Dec. 31, 2020), https://www.theguardian.com/world/2020/dec/31/mexico-security-forces-fentanyl.

147. See Fentanyl, DEA, https://www.dea.gov/factsheets/fentanyl (last visited Dec. 19, 2023) (explaining that fentanyl is approximately one hundred times stronger than morphine and fifty times stronger than heroin); One Pill Can Kill, DEA, https://www.dea.gov/onepill (last visited Dec. 19, 2023) (stating that two milligrams of fentanyl is enough to kill an average American).

148. See Reed, supra note 146 (stating that fentanyl seized by the Mexican authorities more than quintupled from 2019 to 2020); One Pill Can Kill, supra note 147 (stating that in 2023, seven out of ten pills seized by the DEA contained a lethal dose of fentanyl).


violent felony offenses.\textsuperscript{151} The significant effect of the buoy system on the statistically non-hostile immigrant population, and its relatively inconsequential effect on any hostile cartel activity in the United States,\textsuperscript{152} lend support to the Biden Administration’s argument that the buoy system is a disproportionate reaction to the alleged “Invaders” crossing the Rio Grande River.

D. Power of the Alleged Invading Force

The power of cartels within Mexico is apparent both in their financial impact\textsuperscript{153} and their political influence.\textsuperscript{154} Economically, Mexican cartels bring in billions of dollars from their drug trafficking schemes, and employ enough Mexicans to be the fifth largest employer in Mexico.\textsuperscript{155} Notably, high-ranking Mexican officials like Genero Garcia Luna, former Mexican Secretary of Public Security, have been convicted of taking millions of dollars in bribes from the Sinaloa Cartel to turn a blind eye to or even assist with cartel operations.\textsuperscript{156} Additionally, when the son

\textsuperscript{151} See Micheal T. Light et al., \textit{Comparing crime rates between undocumented immigrants, legal immigrants, and native-born US citizens in Texas}, 117 PNAS 32340 (2020), (explaining that from 2012 to 2018, natural born United States citizens were twice as likely to be arrested for violent crimes and two and a half times more likely to be arrested for drug crimes than undocumented immigrants).

\textsuperscript{152} See discussion supra note 143.


\textsuperscript{155} See discussion supra notes 143, 151.

\textsuperscript{156} See Press Release, supra note 154.
of the former head of the Sinaloa Cartel, Joaquín “El Chapo” Guzmán, was arrested in 2019, cartel gunmen began fighting with the Mexican army in the streets until Mexican authorities were forced to release him, proving to be a powerful adversary to the national army of Mexico.157

Immigrants are a growing population in the United States and almost every country in the world is represented by the United States’ immigrant population.158 Immigrants make up roughly seventeen percent of the American labor force and contribute roughly $1.3 trillion of spending power into the United States economy each year159—evidencing the powerful economic effect brought by the influx of these communities. It is likely that both immigrants and Mexican cartels exhibit characteristics of a powerful entity, and courts will likely consider them as such within the Invading Force elements.

E. Predetermined Malicious Objective of the Alleged Invading Force

While Mexican cartels chiefly pursue financial motivations from their operations in the United States,160 many believe their influence over the American government is growing. Between 2008 and 2010, roughly 1,600 officials at all levels of American government were convicted following a corruption investigation linking them to cartel operations.161 Much of the effort to fight corruption has been aimed at the southwestern border, perhaps because officials working along the

157.  *Mexico cartels: Which are the biggest and most powerful?*, supra note 138;  *see also* Ioan Grillo, *How the Sinaloa Cartel Bested the Mexican Army*, TIME (Oct. 18, 2019, 7:39 PM), https://time.com/5705358/sinaloa-cartel-mexico-culiacan/ (describing the cartel’s reaction to Ovidio Guzman’s arrest and how the Sinaloa cartel “showed that in Sinaloa, they are the ones who run things.”).


border are in positions to assist cartels in their drug-smuggling endeavors.\footnote{Id. at 3 (“The Southwest border is a particular focus of our corruption-fighting efforts.”); see also Randal C. Archibold, Hired by Customs, but Working for Mexican Cartels, N.Y. TIMES (Dec. 17, 2009), https://www.nytimes.com/2009/12/18/us/18corrupt.html (detailing the story of a U.S. Customs inspector who was working with Mexican crime groups to smuggle trucks full of drugs and immigrants across the border in San Diego).} This exhibition of influence over United States government officials illustrates the predetermined malicious objectives of the Mexican cartels: to corrupt American officials into allowing cartel operations within the United States. More specifically, by targeting customs inspectors or other border officials, Mexican cartels can more easily ensure that their drug shipments will reach the United States, and ultimately enrich the cartels.\footnote{See Archibold, supra note 162.}

Immigrants, on the other hand, frequently come to the United States in search of the “American Dream”: coming to and working in America to build wealth.\footnote{See Nicole Narea, A new study shows that even the poorest immigrants lift themselves up within a generation, Vox (Nov. 1, 2019, 2:20 PM), https://www.vox.com/policy-and-politics/2019/11/1/20942642/study-paper-american-dream-economic-mobility-immigrant-income-boustan-abramitzky-jacome-perez (stating that today, immigrants and the children of immigrants build their income faster than native-born Americans).} Many of these individuals are escaping violence, financial collapse, or simply would rather take their chances working in America to provide for their families.\footnote{See Push or Pull Factors: What Drives Central American Migrants to the U.S., NAT’L IMMIGR. F. (July 23, 2019), https://immigrationforum.org/article/push-or-pull-factors-what-drives-central-american-migrants-to-the-u-s/ (stating that experts generally agree that increased immigration is attributable to immediate threats of violence, corruption, and environmental degradation in Central American countries); Mexico Labor Costs Continue to Attract US Companies, TECMA (2017), https://www.tecma.com/mexico-wages-labor-costs/#:~:text=The%20wage%20gap%20is%20the,Mexico%20is%20$291%20per%20month (stating that the average Mexican worker in the United States makes $1,870 per month, while the equivalent worker in Mexico makes $291 per month).} Characterized in this manner, there does not appear to be a predetermined malicious objective behind the plight of immigrants entering the United States illegally. Again, the Biden Administration will argue that the buoy system does more to deter these individuals coming to America for non-malice objectives.
than it does to deter cartel objectives within the United States, especially considering the ongoing corruptibility of border officials.

CONCLUSION

When applying the Invading Force elements to the population entering Texas via the Rio Grande River, much of the analysis will involve uncovering the identity of those being affected by the buoy system. Generally, Mexican cartels are easier to classify as an Invading Force due to their hostility and unified power. Immigrants, on the other hand, are a much more disorganized and non-hostile group of individuals, each with their unique reasons for coming to the United States, making them difficult to classify as an Invading Force. Governor Abbott will likely argue that the Rio Grande Buoy system prevents the cartels from entering into the United States, while the Biden Administration will likely argue that it almost exclusively impacts immigrants, who cannot be classified as Invaders. It is therefore likely that the Court will reject Governor Abbott’s “Immigration as Invasion” justification for implementing his saw-blade buoy system because it appears to impact immigrants (non-Invaders) more than it deters Mexican cartel operations (Invaders).

This decision would be wise when considering the dangers of classifying immigrants as Invaders. For example, the United States Constitution grants the people the Privilege of the Writ of Habeas Corpus—generally, the right to challenge detention—\(^\text{166}\) and only suspends this right “in Cases of Rebellion or Invasion” which threaten the public safety.\(^\text{167}\) The Supreme Court has found that detainees at Guantanamo Bay awaiting a determination as to their status as “enemy combatants have the right to Habeas Corpus review.”\(^\text{168}\) Immigrants’ Habeas Corpus rights, however, may be jeopardized if the Court finds them to


168. *See* Boumediene, 555 U.S. at 732; *see also* U.S. CONST. art. I, § 9, cl. 2 (stating that the Writ of Habeas Corpus shall not be suspended “unless when in Cases of Rebellion or Invasion the public Safety may require it.”).
be Invading Texas. Immigrant rights in America, including the right to Habeas Corpus, may be diminished if immigrants entering the United States illegally are given the status of Invaders. The potential for minimization of immigrant rights in this manner should deter the Court from making this classification.

Additionally, lenient interpretation of the alleged Invasion in this case could lead to further expansions of the definition of Invasion. Digital invasions of privacy by hackers or invasions by diseases might now risk being classified as an Invasion following the precedent of the “Immigration as Invasion” argument and could lead to severely intrusive state action responses. Understanding that the Invasion Clause also grants protection from “domestic violence,” a state might also attempt to bring an Invasion Clause claim against another state, which would be largely counterproductive to the constitutional aspiration of a union comprised of several united states.

This Comment firmly argues that the Supreme Court should reject Governor Abbott’s “Immigration as Invasion” argument to justify deploying buoys and saw-blades in the Rio Grande River because the blockade disproportionately impacts fleeing migrants, while comparatively stymying only a small percentage of Mexican cartel activity. As this Comment has argued, immigrants seeking passage to the United States across the Rio Grande do not meet the necessary elements to be considered an Invading Force that would justify using violent deterrent measures against them. Mexican cartels, on the other hand, should be considered an Invading Force because of their economic and political

169. The Federalist No. 43, supra note 72.

170. The Constitution was initially an attempt to amend the Articles of Confederation, which were notoriously filled with discrepancies between states and led to fighting between the states of the union. See Clarissa Sanders, The Articles of Confederation vs. The Constitution, Menokin, https://www.menokin.org/digital-content/constitution (last visited Mar. 25, 2024). In drafting the Constitution, the Framers hoped to create a federalist system of government to ensure cooperation amongst states to create a more unified nation. See The Federalist No. 13 (James Madison) (“If the States are united under one government, there will be but one national civil list to support; if they are divided into several confederacies, there will be as many different national civil lists to be provided for—and each of them, as to the principal departments, coextensive with that which would be necessary for a government of the whole.”).

171. See discussion supra note 77.
influence in the United States. However, cartel activity on the Rio Grande River is not significant enough when compared to non-cartel, migrant activity to justify imposing a violent blockade measure like the saw-bladed buoys in the Rio Grande River. This action represents an unjustified interpretation of the Invasion Clause and would create a problematic precedent for its future application within the immigration context and beyond.

Mitch McCarthy*

---

172. See discussion supra notes 143, 151.

* J.D. Candidate, California Western School of Law, 2025; Associate Writer, California Western Law Review, B.A. International Studies & Spanish, The University of Iowa, 2020. I would like to give special thanks to the California Western Law Review editing team for their diligent work and dedication in preparing this Comment. I would also like to thank Professor Liam Vavasour for his guidance and support during the research and writing process. Thank you to the many faculty members, classmates, and friends who were kind enough to entertain my thoughts on the Constitution, immigration, or any number of tangentially related topics. Finally, thank you to my family for encouraging me and supporting me throughout my life. All mistakes are my own.