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Recognition of the State War Power: The Forgotten Constitutional Clause

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This article argues for the existence of a State War Power; a power both antecedent to, and affirmatively acknowledged in, the Constitution. This power permits a state to engage in war if invaded by a hostile force, independent of any federal action. Where a state government and the federal government are at odds, this paper argues that reasonable actions a state takes pursuant to the State War Power can withstand a supremacy challenge by the federal government because the State War Power is a constitutionally enshrined power and provisions of the Constitution must be construed so that the Constitution is not self-destructive. This article proposes that the State War Power is essential to the preservation of federalism. It ensures a vital aspect of the constitutional republic, state sovereignty, and allows states to compensate for the failure of the federal government to protect against invasion as required by the Guarantee Clause. Although, there has been little necessity for states to invoke the State War Power because the federal government has historically fulfilled its obligation under the Guarantee Clause, this paper uses the border states, Arizona in particular, as an example of an appropriate application of the State War Power: defense against invasion by Drug Trafficking Organizations.
INTRODUCTION

This note proposes that the Constitution recognizes a limited State War Power, wherein a state may engage in war if invaded by a hostile force, independent of any federal action. This power is given to the states in Article I, section 10, clause 3 of the Constitution which states, “No state shall, without the consent of the congress . . . engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”\(^1\) Although the purpose of section 10 is to catalog a list of restrictions on the states, the single affirmative power it gives to states is the right to engage in war when invaded. This note designates the power granted the State War Power.\(^2\)

The State War Power and the Guarantee Clause are interrelated.\(^3\) The Guarantee Clause of the Constitution provides, “The United States shall . . . protect each [state] against invasion . . . .”\(^4\) The two are intertwined because when a state is invaded both clauses are triggered; the United States has a duty to protect against invasion and the state has a concurrent right to defend itself by engaging in war against an invading force. The strong likelihood is that the State War Power will only be exercised when the federal government has failed under the Guarantee Clause. Failure of the federal government under the Guarantee Clause is not a prerequisite for invocation of the State War Power, but there would be little necessity for the state to defend itself if the United States fulfills its obligation under the Guarantee Clause.

This note makes a twofold argument. First, a state may engage in war under the constitutionally derived State War Power to defend itself. Second, where the federal government shirks its duty under the Guarantee Clause, a state has a justiciable claim against the United States.

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\(^1\) U.S. CONST. art. I, § 10, cl. 3 (emphasis added).
\(^2\) For the purposes of this note, U.S. CONST. art. I, § 10, cl. 3 will be referred to as the State War Power.
\(^3\) The Guarantee Clause is alternately referred to in texts, cases, and commentary as the Invasion Clause.
\(^4\) U.S. CONST. Art. IV, § 4.
States. This note will endeavor to support these claims, paying particular attention to the original understanding of the Constitution.

Part I will define “invasion” within the meaning of the Constitution’s Guarantee and State War Power Clauses as well as review other pertinent language, such as “declare” and “engage” in the context of war in the 18th century. Part II will explore the scope of the State War Power within the framework of the federal war power and traditional state police powers. Part III will discuss the justiciability of the Guarantee Clause by reviewing the history, conventional wisdom, and emerging views of the clause. Part IV will consider the interplay of the State War Power, the Guarantee Clause and the Supremacy Clause and Part V will examine application of the State War Power and the historical and modern roles of the militia.

PART I: THE CONSTITUTION AND INVASION

“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.”

Making commerce regular among the states and providing for the common defense of all the states were the primary objectives of the new Constitution. As stated in Federalist 43:

A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors.

5 U.S. CONST. art. VI, § 2, the Supremacy Clause (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).
6 U.S. CONST. art. IV, § 4, the Guarantee Clause.
7 THE FEDERALIST PAPERS.
8 FEDERALIST NO. 43 (James Madison).
Prior to the Constitution the states had an inherent right to defend themselves against incursion from external factions. However, the states feared that, individually, they were incapable of successfully defending themselves from superior or larger forces (foreign powers or even fellow states) and that other states would not aid in the invaded state’s defense because of distance, lack of interest in the plight, or sympathies with the invading force.9 The Guarantee Clause was to assuage that fear.

The Virginia ratifying convention and debates therefrom were perhaps the most telling of the conventions with respect to the meaning and interpretation of the provisions of the Constitution.10 During the Virginia Ratifying Convention, James Madison said:

A republican government is to be guaranteed to each state, and they are to be protected from invasion from other states, as well as from foreign powers . . . . Does this bar the states from calling forth their own militia? No; but it gives them a supplementary security to suppress insurrections and domestic violence.11

Thus, the guarantee of protection against invasion contained in the Guarantee Clause12 was an additional measure of security - complementary to the state’s inherent right of defense, not a signal of total acquiescence to the new federal government or a vestment of responsibility for security solely in the federal government.

This notion is reinforced by the language of Article I section 10 clause 3:

No State shall, without the Consent of Congress, lay any duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact

9 The Federalist Papers.
10 John Yoo, War and the Constitutional Text, 69 CHI. L. REV. 1639, 1657 (autumn 2002) [hereinafter Constitutional Text] (“Virginia was the critical state for ratification. Virginia . . . experienced the fullest and most contested debate over the Constitution. Anti-Federalists brought forth their greatest leaders, such as Patrick Henry, George Mason, and Edmund Randolph, to do battle with Federalist leaders such as George Washington, James Madison, and John Marshall. Virginia was also the toughest hurdle that the Constitution surmounted on its way to ratification; an Anti-Federalist motion to send the Constitution back for amendment lost by only 88-80. Virginia, therefore, should be of decisive importance in interpreting the Constitution because it was a critical ‘vetogate’ through which the Constitution had to pass before becoming law.”).
11 James Madison, VIRGINIA RATIFYING CONVENTION (June 16, 1788).
12 In other works, U.S. CONST. art. IV, § 4 is sometimes called the Invasion Clause rather than the Guarantee Clause.
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.\textsuperscript{13}

This clause is a list of activities which states may not engage in, with one notable exception. States may engage in war if actually invaded. Madison remarked, “[States] are restrained from making war, unless invaded, or in imminent danger. When in such danger, they are not restrained.”\textsuperscript{14} John Marshall stated this right in detail:

Gentlemen have said that the states cannot defend themselves without an application to Congress, because Congress can interpose! Does not every man feel a refutation of the argument in his own breast? . . . All the restraints intended to be laid on the state governments . . . are contained in the 10th section of the 1st article. . . . 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 call engage in war, as also when in imminent danger. This clearly proves that the states can use the militia when they find it necessary . . . [T]he power of governing the militia was not vested in the states by implication, because, being possessed of it antecedent to the adoption of the government, and not being divested of it by any grant or restriction in the Constitution, they must necessarily be as fully possessed of it as ever they had been.\textsuperscript{15}

The language, meaning, and interplay of the Guarantee Clause and Article I section 10 provides a limited State War Power; a state may engage in war in response to actual or imminent invasion. This was not a new power conferred on the states by the Constitution, but a preexisting one that was affirmatively recognized in the Constitution. The Framers were of the mindset that repelling an invasion was an inherent right of any sovereign and codified that natural right in the Constitution.\textsuperscript{16}

The key to both the Guarantee Clause and State War Power is defining the term “invasion.” Unless invasion is defined, the point at which the clauses are triggered cannot be

\textsuperscript{13} U.S. CONST. art. I, § 10, cl. 3 [hereinafter, the State War Power] (emphasis added).
\textsuperscript{14} James Madison, VIRGINIA RATIFYING CONVENTION, (June 16, 1788).
\textsuperscript{15} John Marshall, DEBATE FROM VIRGINIA RATIFYING CONVENTION, (June 16, 1788).
\textsuperscript{16} THE HERITAGE GUIDE TO THE CONSTITUTION 127 (Edwin Meese III ed., 2005) (hereinafter Meese) (“Intimately familiar with the treatises on international law, the Framers were undoubtedly aware of the general rule that, as Hugo Grotius had put it [in The Law of War and Peace (1646)], ‘By the law of nature, no declaration is required when one is repelling an invasion.’”).
identified. The term invasion is most often found in a legal context within the phrase “invasion of privacy” which is generally defined as an unjustified intrusion. The word invasion alone is defined variably as: an intrusion upon the property or rights of another; the entry of a hostile military force, the hostile entry of a public enemy; a hostile or forcible encroachment on the rights of another; the action of invading a country or territory as an enemy, an entrance or incursion with armed force, a hostile inroad.

Synonyms for invasion are: aggression, assault, attack, encroachment, foray, hostile entry, incursion, infiltration, and intrusion. These are modern definitions of the word invasion, but etymological research of the term reveals that the meaning has not changed since at least the 15th century. “Invade” originates in 1491 from the Middle French word “invader” which comes from the Latin word “invader,” meaning “go into, fall upon, attack.” The word “invasion” is older. It probably existed before 1439, spelled “invasioun,” meaning assault or attack and borrowed from middle French “invasion” and Latin “invasionem” and “invasus.”

Although these definitions are helpful, the most pertinent meaning of “invasion” is the one given to the word at the time the Constitution was written by the men who wrote it. The Federalist Papers describe protection against invasion as providing security against “foreign hostility” and “ambitious or vindictive enterprises.” Madison described the presence of smugglers in Virginia as an instance which necessitated suppression by the militia, indicating

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17 BLACK’S LAW DICTIONARY (2nd pocket ed. 2001); WEBSTER’S NEW WORLD LAW DICTIONARY (Susan Ellis Wild ed., 2006); DICTIONARY OF LEGAL TERMS (4th ed. 2008); LAW DICTIONARY (5th edition 2003).
19 BLACK’S LAW DICTIONARY (9th ed. 2009).
21 BURTON’S LEGAL THESAURUS (3d ed. 1998).
23 Id.
24 Id.
25 FEDERALIST NO. 43 (James Madison) (“A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors.”).
that it was an invasion where the smugglers were numerous and the local civil law was overwhelmed. The invasion by smugglers necessitated calling the militia under the service of the federal government to suppress the smugglers and fulfill the Guarantee Clause:

The militia ought to be called forth to suppress smugglers. Will this be denied? The case actually happened at Alexandria. There were a number of smugglers, who were too formidable for the civil power to overcome. The military quelled the sailors, who otherwise would have perpetrated their intentions. Should a number of smugglers have a number of ships, the militia ought to be called forth to quell them. We do not know but what there may be a combination of smugglers in Virginia hereafter.\(^\text{26}\)

Modernly, courts have referred to Madison’s description as “situations wherein a state is exposed to armed hostility from another political entity.”\(^\text{27}\)

The plain definition of the word, taken with the views of the Framers and modern interpretation by the courts demonstrate that “invasion” within the Constitutional meaning specifies that the invading force may be either a foreign state or some other external, organized force which executes a hostile or malicious attack or incursion on another’s sovereign land with the purpose of fulfilling some predetermined malicious objective or “vindictive enterprise,” often, but not limited to, conquest.Parsed into fundamental elements, invasion defined within the meaning of the Constitution is: 1) a hostile and organized external force 2) conducting a purposeful intrusion on sovereign land 3) in furtherance of a predetermined malicious objective.

**PART II: THE STATE WAR POWER, FEDERAL WAR POWER, STATE POLICE POWER**

The State War Power carries with it more authority than the traditional state police powers, but is not as powerful as the federal government’s War Power. Under the Constitution, when the

\(^{26}\) James Madison, *Virginia Ratifying Convention* (June 16, 1788).

\(^{27}\) California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997).
federal government declares war, it is Congress that has the power to “declare war”\(^\text{28}\) and the president who is the Commander in Chief of the armed Forces.\(^\text{29}\) Much of the discussion surrounding the War Powers revolves around the balance of power between Congress and the President as Commander in Chief, chiefly surrounding the interpretation of the phrase “declare war.”\(^\text{30}\)

The State War Power clause provides that a state may “engage” in war, as opposed to the power of Congress to “declare” war.\(^\text{31}\) In 18\(^{th}\) century dictionaries, the word “engage” is defined as, “‘to embark in an affair; to enter an undertaking’, or ‘to conflict; to fight’”\(^\text{32}\); “to encounter or fight”\(^\text{33}\); and “to conflict, to fight.”\(^\text{34}\) Whereas “declare” meant: “‘to clear, to free from obscurity’; ‘to make known, to tell evidently and openly’; ‘to publish; to proclaim’; ‘to shew in open view’; or ‘to make a declaration, to proclaim some resolution or opinion, some favour or opposition’”\(^\text{35}\); “to make known, to manifest, publish or shew,”\(^\text{36}\); or “to make known.”\(^\text{37}\)

The importance of the distinction is that the State War Power only confers the power to fight invaders with force. The power to declare war is the power to change the legal relations

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\(^\text{28}\) U.S. CONST. art. I, § 8 (“Congress has the power to. . . declare war. . . to provide for calling forth the militia to execute the laws of the union, suppress insurrections, and repel invasions.”).

\(^\text{29}\) U.S. CONST. art. II, § 2 (“The President shall be 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.”).

\(^\text{30}\) Congress passed the War Powers Resolution of 1973 to clarify the President’s role and powers as Commander in Chief in the context of Congress’ authority to declare war. The act provides that the president may introduce troops into hostilities only where there is, “(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.” Pub. L. 93-148, § 2, 87 Stat. 555 (codified as amended at 50 U.S.C. § 1541 (1973)).

\(^\text{31}\) Constitutional Text, supra note 10, at 1670 (“‘Declare’ carried a distinct and separate meaning from ‘levy,’ ‘engage,’ ‘make,’ or ‘commence.’”).

\(^\text{32}\) Id. at 1670 (citing SAMUEL JOHNSON’S ENGLISH DICTIONARY).

\(^\text{33}\) Id. (citing NATHAN BAILEY’S DICTIONARY).

\(^\text{34}\) Id. (citing THOMAS SHERIDAN’S DICTIONARY).

\(^\text{35}\) Id. (citing SAMUEL JOHNSON’S ENGLISH DICTIONARY).

\(^\text{36}\) Id. (citing NATHAN BAILEY’S DICTIONARY).

\(^\text{37}\) Constitutional Text, supra note 10, at 1670 (citing THOMAS SHERIDAN’S DICTIONARY).
between the United States and other entities; “To use the eighteenth century understanding, they make public, show openly, and make known the state of international legal relations between the United States and another nation.”

Subsequent to a declaration of war, the federal government enjoys enhanced domestic powers; “the Supreme Court has suggested that in terms of declared war, certain actions by the federal government would survive strict scrutiny but would certainly fail if attempted in peacetime.” However, this perspective has been tempered at times. The Supreme Court has noted “. . . while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests” and “actions and regulations taken pursuant to the War Power . . . are subject to Constitutional limitations.” Whether a particular statute or regulation is valid depends on its reasonableness under the circumstances of emergency. Regulations made in pursuance of the War Power are construed, if possible, in such a way that rights of citizens are preserved while the common defense is

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38 Id. at 1672 (“During the eighteenth century, declarations often took the form of a legal complaint in which the nation identified the grounds for waging war, explained the new rules that would apply to interaction between the two nations, and outlined the remedy.”).
39 Id.
40 Id. (“Congress has recognized the distinction between declared total wars and non-declared hostilities by providing the executive with expanded domestic powers – such as seizing foreign property, conducting warrantless surveillance, arresting enemy aliens, and taking control of transportation systems, to name a few – only when war is declared.”); John Yoo, Continuation of Politics by Other Means: The Original Understanding of War Powers, 84 CAL. L. REV. 167, 247-8 (Mar 1996) (hereinafter Continuation ) (“Because the declaration of war has a primary domestic effect of notifying the citizens of their new rights and obligations, it grants the government a different standard of conduct in relation to those rights and duties. Thus, a declaration of war would permit the government to treat its citizens in a way that restricted peacetime liberties in favor of a more effective war effort . . .”).
41 Constitutional Text, supra note 10, at 1673.
43 Id. at 264 (“The phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. ‘(E)ven the war power does not remove constitutional limitations safeguarding essential liberties.’ Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934)).
44U.S. v Tire Center, Inc., 50 F. Supp. 404 (1943) (“Whether a particular statute, or a regulation promulgated thereunder, satisfies constitutional requirements depends upon its reasonableness under circumstances of emergency. Obviously, war may so change circumstances as to make reasonable regulation which could never be justified in peace time.”); see also 93 C.J.S. War and National Defense § 53 (2010).
provided for, so that the Constitution is not made self-destructive. In essence, enhanced powers exercised by the federal government in time of war may or may not be allowed. The courts will make decisions on a case by case basis based on the reasonableness of the action and the ability of the action to coexist with individual liberties guaranteed under the Constitution.

The reason for the usage of the term “engage” rather than “declare” may have been to place some limits on the boundaries of the State War Power, or it may have been because it was superfluous to speak of a declaration of war in the context of an invasion. Commentators suggest, with respect to the federal War Power:

The Framers [believed] that a declaration of war was unnecessary when a nation was under attack . . . An invasion, or even the threat of attack, converted peacetime into wartime just as easily as a declaration of war. Under international law, by its act of invasion, the offensive nation effectively transformed the legal relationship between the two nations into one of war, rendering a declaration of war by the defending nation superfluous. A declaration of war only recognized the existing state of war, and was unnecessary for the commencement of hostilities by the invaded nation.

If engaging in war pursuant to an invasion is equivalent to a legal declaration of war, then both scenarios imbue the federal government with enhanced domestic powers. However, it was also understood in the eighteenth century that a declaration of war was a function of the national government, not state governments. This understanding supports the notion that the use of “engage” with respect to the State War Power has a limiting effect in the sense that the state governments do not have the power to change the legal relationship of the United States with a foreign entity and do not have enhanced powers to abridge individual liberties.

45 Henderson v Kimmel, 47 F. Supp. 635 (1942) (“That power, explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the Constitution, or by any one of the amendments. These may be all construed so as to avoid making the Constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard, the common defense and the perpetuity of our liberties. They rest upon the preservation of the Nation.”) (quoting Chief Justice Hughes, The Fighting Powers of the United States Under the Constitution, 55 CONG.REC. (1917) pt. 8, app. ix, 551-555).


47 Id. at 243 (“A declaration of war performed a primarily juridical function under eighteenth-century international law, and it was this understanding that the Framers drew upon in giving Congress the authority to declare war.”).
The scope of the State War Power is, therefore, similar to the tempered edge of the federal War Power. That is, actions and regulations taken pursuant to the State War Power are subject to Constitutional limitations. The State War Power, although constitutionally granted, cannot suspend or violate other provisions of the Constitution. However, “[Provisions and Amendments of the Constitution] may be all construed so as to avoid making the Constitution self-destructive, so as to preserve the rights of the citizen from unwarrantable attack, while assuring beyond all hazard, the common defense and the perpetuity of our liberties.”

The State War Power does not imbue the states with certain enhanced powers during wartime and does not rid them of the requirement to stay within the margins of the Constitution. So how is the State War Power greater than the traditional state police power? First, a discussion of the traditional police power is appropriate.

Traditional state police power is the power of a state to enforce laws reasonably calculated to protect the legitimate state interests of the health, welfare, morals, and safety of its citizens. They are the residual powers the states retained after ratification of the Constitution. That is, they are powers under the 10th amendment; those not divested by, or surrendered to, the Constitution to “make all laws necessary and proper to preserve the public security, order, health, morality, and justice.”

The primary difference between the State War Power and the police power is that the police powers are the remnants left after the states adopted the Constitution and the State War

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48 *Robel*, 389 U.S. at 264 (“The phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. (E)ven the war power does not remove constitutional limitations safeguarding essential liberties.’ Home Bldg. & Loan Assn. v. Blaisdell, 290 U.S. 398, 426 (1934).”).
49 *Henderson v Kimmel*, 47 F. Supp. 635.
50 *BLACK’S LAW DICTIONARY* (9th ed. 2009).
51 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.”).
52 *BLACK’S LAW DICTIONARY* (9th ed. 2009).
Power is affirmatively expressed in the Constitution. Because of the nature of the police powers as left-over, they are subject to displacement by Congressional Acts or Executive Orders pursuant to powers vested by the Constitution under the Supremacy Clause.\textsuperscript{53}

Under the Supremacy Clause, federal law made pursuant to powers granted by the Constitution preempts state law. State law may be preempted by federal law expressly, where Congress expressed a clear intent to preempt state law\textsuperscript{54} or impliedly,\textsuperscript{55} through field preemption\textsuperscript{56} or conflict preemption.\textsuperscript{57} In a battle between a state law pursuant to the state police power and a federal law pursuant to a constitutional power, the federal law is superior.

The State War Power is more than the police power in that it is not a ‘left-over’; it is a power both antecedent to the Constitution and, more importantly, affirmatively recognized in the Constitution. The result is that actions taken by a state as a valid exercise of the State War Power are better equipped to withstand a federal preemption claim under the Supremacy Clause than those exercised under state police powers because Congressional measures can easily displace state actions taken pursuant to traditional police powers but cannot displace the State War Power. Legislation enacted, or actions taken, under the State War Power must be construed in a way which gives a presumption of compatibility with other provisions of the Constitution. Hence, where a statute enacted pursuant to a state’s War Power is reasonably calculated to

\textsuperscript{53} U.S. CONST. Art. VI Cl. 2 (“The Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.”).  
\textsuperscript{54} 16 AM. JUR. 2D Constitutional Law § 55.  
\textsuperscript{55} Chicanos Por La Causa v Napolitano, 544 F.3d 976, 982 (9th Cir. 2008); Lee v Astoria Generating Co., 13 N.Y. 3d 382 (2009).  
\textsuperscript{56} Field preemption occurs where the breadth of legislation in a particular area is so great and comprehensive that there is no room for states to supplement federal law. 16 AM. JUR. 2D Constitutional Law § 55; see also Chicanos, 544 F.3d at 982.  
\textsuperscript{57} Conflict preemption occurs where there is a conflict between federal and state law making it impossible to comply with both or where state law represents a barrier to the execution or purpose of federal law; see also Chicanos, 544 F.3d at 982.
defend against the invasion, and preserves Constitutional rights of citizens, it must be found valid. John Marshall’s words echo the premise that the Supremacy Clause cannot nullify the State War Power:

Gentlemen have said that the states cannot defend themselves without an application to Congress, because Congress can interpose! Does not every man feel a refutation of the argument in his own breast? I will show that there could not be a combination, between those who formed the Constitution, to take away this [defense against invasion] power.\(^{58}\)

It would be illogical for the Constitution to allow a state to engage in war when invaded under the State War Power, but then took that right away under the Supremacy Clause by allowing the federal government to tell the state it cannot defend itself (engage in war), particularly where the federal government has failed under the Guarantee Clause and a state’s only recourse against invasion is to defend itself (engage in war). Such a construction would render both the State War Power Clause and Guarantee Clause meaningless. The inclusion of two meaningless clauses in the carefully crafted and much debated Constitution would be an absurd construction. The Constitution must be interpreted so that it is not self-destructive.

PART III: GUARANTEE CLAUSE AND (NON?)JUSTICIABILITY

Faced with constitutional issues regarding war powers, courts have “historically been inclined to duck constitutional issues of war powers, finding lack of standing, dismissing cases on ‘political question’ ‘ripeness’ or other ‘non-justiciability’ grounds, or deferring substantively to the executive branch’s constitutional interpretations.”\(^{59}\) This note argues that, where a court is faced with an issue involving the State War Power in context with the Supremacy Clause and Guarantee Clause, it is justiciable.

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\(^{58}\) John Marshall, DEBATE FROM VIRGINIA RATIFYING CONVENTION, (June 16, 1788) (emphasis added).

Although Guarantee Clause issues are often thought of as nonjusticiable, this note supports the argument that the provisions of the Guarantee Clause are meant to preserve state sovereignty and are appropriate for judicial review insofar as they relate to the State War Power.

**HISTORY OF NONJUSTICIABILITY OF THE GUARANTEE CLAUSE**

The two provisions of the Guarantee Clause are a republican form of government and protection against invasion. A republican form of government is one which is accountable to the people. Distinguishing principles are popular rule, wherein a voting citizenry makes political decisions by majority votes, the absence of a monarchy, and government by rule of law. The guarantee against domestic violence is a component of the republican form of government in that domestic violence breaches the rule of law and is illustrative of mob rule rather than popular rule.

The classic Guarantee Clause case is *Luther v Borden*. In 1841, the citizens of Rhode Island rebelled against the state government in an armed insurrection known as the Dorr Rebellion. Unlike other states, Rhode Island did not adopt a new Constitution after the Revolution. The original charter of Rhode Island, established in 1663, gave only landowners the right to vote. At a time, when most citizens were farmers, this was an innocuous provision. However, the onset of the Industrial Revolution shifted the demographics from predominantly

60 Meese, supra note 3, at 282-3.
61 Id. at 283.
63 Id. at **2.
64 Id. at **1.
65 Id.
landowning farmers to large numbers of non-landowning city dwellers. The result was, along with women and non-whites, up to 60% of white males were also ineligible to vote.

Thomas Wilson Dorr led a movement which asserted that the voter eligibility scheme under the original charter violated the Guarantee of a republican form of government in the Constitution. Dorr and his supporters wrote a new state constitution and held a vote on it. They claimed it was adopted and ratified by the people of Rhode Island and proceeded to hold an election and organize a new government. The charter government refused to recognize the legitimacy of Dorr’s government and declared martial law. The defendants in Luther were members of the state militia under the charter government. Pursuant to orders, they entered the plaintiff’s home and arrested him for aiding and abetting in the insurrection. The plaintiff brought an action for trespass.

The Supreme Court found the defendants not guilty of trespass because the charter government was the legitimate government. The court rested its decision on the fact that the president, pursuant to powers granted him in a congressional act, implicitly recognized the charter government as the governing body of the state by discussing with the charter government governor whether troops were needed to put down the rebellion. The President, via Congressional authority, recognized the charter government, therefore, the court did not have to decide which was legitimate or whether it was republican in form.

\[^{66}\text{Id.}\]
\[^{67}\text{Id.}\]
\[^{68}\text{Luther v. Borden, 48 U.S. 1 (1849).}\]
\[^{69}\text{Id.}\]
\[^{70}\text{Id.}\]
\[^{71}\text{Id.}\]
\[^{72}\text{Id.}\]
\[^{73}\text{Id.}\]
\[^{74}\text{Luther v. Borden, 48 U.S. 1 (1849).}\]
\[^{75}\text{Id. at **2.}\]
What is most striking about *Luther* is not the decision or the court’s reasoning, but that it came to represent ALL Guarantee Clause issues:

The question which of the two opposing governments was the legitimate one, viz. the charter government, or the government established by the voluntary convention, has not heretofore been regarded as a judicial one in any of the State courts. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State, and the judicial power has followed its decision.

The Constitution of the United States has treated the subject as political in its nature, and placed the power of recognizing a State government in the hands of Congress. Under the existing legislation of Congress, the exercise of this power by courts would be entirely inconsistent with that legislation."76

The nonjusticiability of the Guarantee Clause was born in this decision in 1849. Citing *Luther*, the court has maintained the position that Guarantee Clause issues are political questions not in the court’s purview.77 Though the decision in *Luther* proclaimed only that the question of which of two governments was the legitimate one is a question for Congress not courts, the proclamation of nonjusticiability has been applied to the entire Guarantee clause. More than a century later, *Baker v Carr* set forth the parameters of the nonjusticiable political question doctrine and proclaimed the Guarantee Clause nonjusticiable because it was a political question.78

*Baker v Carr* stated emphatically, “Guaranty Clause claims involve those elements which define a ‘political question,’ and for that reason and no other, they are nonjusticiable.”79 *Baker* set forth the six criteria for determining whether an issue is a political question: 1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department” 2) “a lack of judicially discoverable and manageable standards for resolving it” 3) inability to decide

76 Id.
77 See, e.g., Colegrove v. Green, 328 U.S. 549 (1946); Pacific States Telephone & Telegraph Co. v Oregon, 223 U.S. 118 (1912).
79 Id. at 218.
without making a policy determination that is inappropriate for the judiciary 4) impossibility of
deciding without lack of respect to coequal branches 5) need for adherence to political decision
already made and 6) potential of embarrassment from multiple decisions on the same issue.

Essentially, the reason for the nonjusticiability of political questions is that they are a
function of the separation of powers and, as such, the judiciary is barred from inserting itself into
issues which would upset the balance of the separation of powers. Baker reiterated the finding in
Luther that the judiciary was not empowered to resolve a Guarantee Clause issue: “For as the
United States guarantee to each state a republican government, Congress must necessarily decide
what government is established in the state before it can determine whether it is republican or
not.”

In addition to the importance of separation of powers, Baker also stresses that the
importance of Luther was the notion that the Guaranty Clause is not in itself a “repository of
judicially manageable standards” that can be used as an independent means to identify a state’s
lawful government or to invalidate a state action. The court seems to ultimately point to two
types of nonjusticiable political questions: those explicitly assigned to another branch and those
which, as a matter of judicial discretion, should be left to a coordinate branch. Noticeably, the
cases which have invoked the Guarantee Clause concern only the “republican form of
government” aspect.

Very little has been said in case law or legal commentary about the second provision of
the Guarantee Clause, the guarantee of protection against invasion, because it has rarely been
invoked. In instances where a state has actually been invaded the federal government has
responded, satisfying the Guarantee Clause (and negating the need for states to independently

80 Luther, 48 U.S. at **1.
81 Baker, 369 U.S. at 186.
82 KATHLEEN SULLIVAN & GERALD GUNThER, CONSTITUTIONAL LAW 49 (17th ed. 2010).
defend themselves). For example, Hawaii was invaded when it was bombed by Japanese war planes. The target was the U.S. Naval Base Pearl Harbor, a federal military installation. The United States responded by entering World War II with its full military might to defeat Japan and countries allied with Japan.\textsuperscript{83}

In 1942, a German submarine carried German citizens to the United States where they landed clandestinely at points in New York and Florida with explosive devices and instructions to destroy war facilities in the United States.\textsuperscript{84} The Germans were taken into custody by federal authorities and turned over to a military tribunal pursuant to the Articles of War.\textsuperscript{85}

These are instances where the invaders were agents of a sovereign foreign state and were targeting federal installations. However, invasions have also occurred on United States soil by agents of foreign hostile entities who targeted civilians. On September 11, 2001, the perpetrators who attacked the World Trade Center towers and the Pentagon were agents of a terrorist organization, Al Qaeda.\textsuperscript{86} The United States responded with full military force by attacking Al Qaeda abroad and those harboring the terrorists, namely the Taliban in Afghanistan. The “War on Terror” - as the effort to root out Al Qaeda and sympathizers is called – has expanded to points around the globe.

On the few occasions where a state claimed it was invaded and the issue reached the court, the guarantee of a protection against invasion was held a nonjusticiable political question.\textsuperscript{87} For example, Colorado filed suit against the United States government for violating the Guarantee Clause by failing to secure the borders against illegal immigration.\textsuperscript{88} Colorado

\textsuperscript{83} SPARKNOTES 101: U.S. HISTORY 1865 THROUGH THE 20\textsuperscript{TH} CENTURY 177 (2005).
\textsuperscript{84} Ex Parte Quirin, 317 U.S. 1 (1942).
\textsuperscript{85} Id.
\textsuperscript{86} Sullivan & Gunther, supra note 82, at 275.
\textsuperscript{87} Colorado v Gonzales et al., 558 F. Supp. 2d 1158, 1160 (D. Col. 2007); California v United States, 104 F. 3d 1086 (9\textsuperscript{th} cir. 1997).
\textsuperscript{88} Colorado, 558 F. Supp. 2d 1158.
sought two claims for relief. First, a writ of mandamus “ordering the Secretary of Homeland Security to prepare and implement a comprehensive plan to secure the nation’s borders against illegal immigration and to implement all of the requirements of the Intelligence Reform and Terrorism Prevention Act of 2004.” Second, if the United States failed to adequately execute such a plan, Colorado sought reimbursement for the costs incurred by state and local law enforcement for performing the duties associated with security against illegal immigration.

Colorado argued that the claim was justiciable because the political branches already declared that an invasion occurred. The judiciary, Colorado argued, did not have to make an independent determination, thereby bypassing the “lack of judicially discoverable and manageable standards” consideration set forth in Baker. The court was not convinced. Colorado, the court said, produced some statements and policies from the government which “at best, imply that the United States was invaded as a result of the terrorist attacks on September 11, 2001 and is at risk for further invasion through future terrorist acts.” This court found that the statements did not constitute a legal determination of invasion as required under the Guarantee Clause and, therefore, would be left “in the untenable position of determining whether there has been an invasion under the [Guarantee] Clause . . . .”

In Padavan, however, the court did make such a determination. The court cited Federalist No. 43, finding that “invasion” under the Guarantee Clause requires “[exposure] to

89 Id. at 1160.
90 Id at 1158.
91 Id. at 1161.
92 Id.
93 Id.
94 Colorado, 558 F. Supp. 2d, at 1161.
95 Padavan v. United States, 82 F.3d 23 (2nd Cir. 1996).
96 Id. at 28 (“See FEDERALIST NO. 43 (James Madison) (stating the reason for the [Guarantee] Clause is to protect the states from “foreign hostility” and from “ambitious or vindictive enterprises” on the part of other states or foreign nations).
armed hostility from another political entity”\textsuperscript{97} and determined, “New York State is not being subjected to the sort of hostility contemplated by the Framers.”\textsuperscript{98} The Padavan court determined that invasion could be defined; a determination made, \textit{supra}, in this article as well. However, the court found the guarantee of protection against invasion nonjusticiable on other grounds, namely that the protection of states from invasion “involves matters of foreign policy and defense, which are issues that the courts have been reluctant to consider.”\textsuperscript{99}

California and Arizona also filed suit against the federal government to recover reimbursement for expenses in connection with illegal immigrants present in the state based on the theory that the state was under invasion and the federal government was in violation of the Guarantee Clause.\textsuperscript{100} The claims of California and Arizona were consolidated for argument.\textsuperscript{101} California argued that federal immigration policy deprived it of a republican form of government by forcing it to spend money on emergency medical services, incarceration, and education of illegal aliens that it would not otherwise have spent.\textsuperscript{102} The state also argued that the government’s failure to stop illegal immigration was a violation of the guarantee of protection from invasion under the Guarantee Clause.\textsuperscript{103} The court held California’s claim under the Guarantee Clause to be a nonjusticiable political question, citing \textit{Luther}\textsuperscript{104} and continuing, in error, to apply the Luther decision regarding a republican form of government to the guarantee against invasion. The court noted:

\begin{flushright}
\textsuperscript{97}\textit{Id.}
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\textsuperscript{98}\textit{Id.}
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\textsuperscript{100} California, 104 F. 3d at 1086.
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\begin{flushright}
\textsuperscript{101} \textit{Id.} (Complaints of Arizona and California contained similar prayers for relief, but California asserted additional claims, therefore, the opinion addresses California and disposes of Arizona on the same grounds in an ordered filed concurrently).
\end{flushright}
\begin{flushright}
\textsuperscript{102} \textit{Id.} at 1090 n.3.
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\textsuperscript{103} \textit{Id.} at 1090.
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\textsuperscript{104} \textit{Id.}
\end{flushright}
Even if the issue were properly within the Court’s constitutional responsibility, there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion. . . Moreover, California ignores the conclusion set forth by our founders. In the federalist No. 43, James Madison referred to the Invasion Clause as affording protection in situations wherein a state is exposed to armed hostility from another political entity. Madison stated that Article IV §4 serves to protect a state from “foreign hostility” and “ambitious or vindictive enterprises” on the part of other states or foreign nation. It was not intended to be used as urged by California.105

Although the court stated there were no manageable standards by which it could define invasion with respect to illegal immigration, it did in fact define invasion as envisioned under the Constitution using Madison’s words. A more accurate statement by the court would have been that illegal immigration in and of itself does not meet the standard outlined by Madison.

A NEW LOOK AT THE GUARANTEE CLAUSE

Although decisions have traditionally found claims brought under the Guarantee clause are nonjusticiable,106 courts have started to back away from the seemingly per se nonjusticiability rule. The Padavan court noted, “It is possible that ‘perhaps not all claims under the Guarantee Clause present nonjusticiability political questions also’”107 The view that not all Guarantee Clause issues are nonjusticiable was noted in New York v United States:

More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances.108

105 Id. at 1091.
106 California v United States, 104 F. 3d 1086, 1091 (9th cir. 1997) (“As Justice O’Connor for an unanimous court in New York v United States stated, in most cases in which the court has been asked to apply the clause, the court has found the claims nonjusticiable under the ‘political question’ doctrine.”).
107 Padavan, 82 F.3d at 28 (quoting New York v. United States, 505 U.S. 144, 185 (1992)).
The placement and language of the Guarantee Clause suggests that it was not intended to be nonjusticiable.\textsuperscript{109} The assignment of enforcement to Congress by Luther and subsequent courts is curious because the Clause does not appear in Article I, which is devoted to the structure, rules, and duties of the legislature. It appears in Article IV. The language used is “The United States shall,” not “Congress shall.” Significantly, sections 1 and 3 state “Congress may”\textsuperscript{110} and “Congress shall”\textsuperscript{111} respectively. “The United States” certainly encompasses the judiciary. If the Framers intended the Guarantee Clause to be solely the purview of Congress, they likely would have written “Congress shall guarantee to every state in this union . . .”\textsuperscript{112}

Commentators have proposed various circumstances in which a Guarantee Clause issue would be justiciable. Some argue that it was intended to be a restraint on the states by creating a federal claim where actions by an individual’s state violates the state’s own constitution or laws\textsuperscript{112} or where structural defects of the state or local government threaten individual rights in other provisions of the Constitution.\textsuperscript{113}

The better interpretation of the Guarantee Clause is that it was not intended to be a restraint on the states, but a restraint on interference with state sovereignty by promising states “sufficient independence to maintain the responsiveness of their governments to popular will.”\textsuperscript{114}

Both provisions of the clause, ensuring a republican form of government and protecting against
invasion, facilitate state sovereignty. Supreme Court’s decisions lend credence to this view of the Guarantee Clause because they have been:

[M]ost hospitable to challenges founded on the guarantee clause when those challenges reinforced state autonomy [and] some of the most significant cases in which the court refused to enforce [G]uarantee [C]lause claims were cases in which the court feared that judicial review would interfere unduly with the processes of state government.\(^{115}\)

The *Baker* court identified 6 criteria of nonjusticiability which can be distilled into two areas of concern: those explicitly assigned to another branch and those which, as a matter of judicial discretion, should be left to a coordinate branch. Using the Guarantee Clause as a predicate for challenges to federal interference with state autonomy satisfies the *Baker* concerns. First, the guarantee of a republican form of government and protection from invasion are not explicitly assigned to another branch of government. As noted earlier, the text of the Constitution does not commit the Guarantee Clause to Congress, but “The United States” generally.\(^{116}\) Secondly, no reason exists for the judiciary to leave it to a coordinate branch as a matter of discretion because it involves no policy determination or adherence to a political decision already made or lack of respect to a coordinate branch. Review of Guarantee Clause issues merely requires the court to perform their constitutional responsibility of reviewing the validity of state and federal statutes,\(^{117}\) thereby safeguarding a fact of our history - that states enjoy and should retain a “separate and independent existence.”\(^{118}\) This new perspective does not require upsetting or overturning precedent but merely represents a reformulation of the existing rule.

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\(^{115}\) *Id.* at 108, at 29.

\(^{116}\) U.S. CONST. Art. IV § 4; *Niche*, at 681, 683; *Merritt, supra* note 108, at 75.

\(^{117}\) *Merritt, supra* note 108, at 76 (“Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch.”) (quoting Powell v McCormack, 395 U.S. 486, 549 (1969)).

\(^{118}\) *Id.* at 76 (quoting County of Lane v Oregon, 74 U.S. (7 Wall.) 71, 76 (1869).
Notwithstanding facing the Guarantee Clause with a new perspective, courts have erroneously applied the *Luther* decision to the entire Guarantee Clause. The guarantee against invasion should not be conclusorily identified as nonjusticiable also. “Invasion” can and has been defined by Madison, which has been relied upon by the courts as the appropriate definition. The courts have a duty to ensure that the Constitution is not violated by the federal government when a state claims it is under invasion and the federal government has failed to protect it. The Guarantee Clause would be an insignificant clause if it was unenforceable. It is an untenable position to claim that the Guarantee by the “United States” given to the individual states to protect against invasion is nonjusticiable. If a state has no recourse against the federal government when it breaches this duty, then there is no actual guarantee and the clause serves no purpose.

The justiciability of the Guarantee Clause and recognition that the intent of the clause is an assurance of state sovereignty is important in the context of the State War Power. Although the State War Power exists independently of the Guarantee Clause, practically speaking, the two are intertwined because the circumstance under which a state will invoke the State War Power will likely be the unusual circumstance where the state has been invaded and the federal government has failed to protect it, breaching the Guarantee Clause. The failure of the federal government under the Guarantee Clause necessitates a state’s invocation of the State War Power.

**PART IV: APPLICATIONS OF THE STATE WAR POWER**

States should, as a preemptive protection of their interest, explicitly state when a measure is taken pursuant to the State War Power and state its position that the state is under invasion by 1) a hostile and organized external force 2) conducting a purposeful intrusion on sovereign land
3) in furtherance of a predetermined malicious objective. In addition, if the state is under invasion and feels the federal government has failed to protect it under the Guarantee Clause, the state should file suit against the government. As discussed, this should be a justiciable claim.

THE BORDER

A firestorm of controversy erupted when Arizona passed legislation aimed at stemming the tide of “illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns” infiltrating the state over its border with Mexico. The state passed SB1070 in an attempt to deal with consequences of illegal immigration within the state, to encourage “self-deportation” and to discourage future illegal entry into the state. The debate has centered on whether it was an attempt by the state to make immigration law, in contravention of the Constitution under the Supremacy Clause. The United States filed suit against Arizona claiming preemption. Arizona recently countersued claiming the federal government has violated the Tenth Amendment, failed to enforce federal immigration law and failed to protect Arizona against invasion by illegal immigrants. Arizona seeks reimbursement for the costs it has sustained for the public education, emergency medical services, and incarceration of illegal immigrants. In essence, with respect to SB1070, the state was attempting to deal with illegal immigration in the interior because of the failure of the government to do so at the border.

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121 SB 1070 § 1 (“The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.”).
122 Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (The United States argues principally that the power to regulate immigration is vested exclusively in the federal government, and that the provisions of SB 1070 are therefore preempted by federal law).
This note argues that Arizona and the other border states – California, Texas, and New Mexico – have an alternate, more powerful, and Constitutionally enshrined route to deal with the problem of illegal entry over the border: The State War Power. Unlike the previous suits which claimed illegal immigration was an invasion, the border states, and Arizona in particular, have a very solid basis on which to claim they are under invasion. Illegal entries are no longer primarily an unorganized influx of unrelated individuals. The crossings are increasingly tied to highly organized, hostile criminal organizations based in Mexico\textsuperscript{124} who are participating in human and drug smuggling.\textsuperscript{125} The major smuggling route used by the cartels is through Arizona and the cartels have become increasingly emboldened.

In Mexico, the cartels (or Drug Trafficking Organizations)\textsuperscript{126} have essentially hijacked the local governments through intimidation, force, and bribery. The level of violence between rival cartels and the brazen assassinations of politicians are unprecedented. In 2010 alone, the cartels killed 12 mayors of Mexican cities because they would not bend to the cartels’ will.\textsuperscript{127}

\textsuperscript{124} \textit{Mexico-U.S. Relations: Issues for Congress}, CRS REPORT RL 32724, at 11 (April 14, 2009) (“In the U.S. Justice Department’s \textit{National Drug Threat Assessment} 2009 (published in December 2008), Mexican drug trafficking organizations (DTOs) were identified as the greatest drug trafficking threat to the United States worldwide. Today’s situation arose with the closing of the Caribbean route through which drugs, and particularly cocaine from Colombia, was channeled to the United States in an earlier era. With increased U.S. efforts to interdict narcotic smugglers in the Caribbean and Florida in the late 1980s and 1990s, the Colombian drug cartels began subcontracting with Mexican DTOs to smuggle cocaine into the United States across the Southwest border. By the late 1990s, Mexican DTOs had pushed aside the Colombians and gained greater control and market share of cocaine trafficking into the United States.”).

\textsuperscript{125} \textit{Id.} at 13 (“According to the Department of State’s 2009 International Narcotics Control Strategy Report, as much as 90\% of the cocaine entering the United States now transits through Mexico. A small number of Mexican DTOs control the most significant drug distribution operations along the Southwest border. The criminal activities of these Mexican DTOs reach well beyond the towns and cities of the border, extending along drug trafficking routes into cities across the United States.”).

\textsuperscript{126} Drug Trafficking Organization and the colloquial term cartel are used interchangeably to describe drug smuggling groups, although cartel technically refers to organizations engaged in coordinated price-fixing.

\textsuperscript{127} Mayor of Guadalupe y Calve, Chihuahua Ramon Mendivil Sotelo on Feb 17; Mayor of el Mezquital, Hidalgo Manuel Estrada on Feb 22; Mayor of Zapotitlan Tablas, Guerrero Jose Santiago Agustín on April 28; Mayor of Guadalupe, Chihuahua Jesus Manuel Lara Rodriguez on June 19; Mayor of San Jose del Progreso, Oaxaca Oscar Venancio Rivera on June 20; Mayor of Santo Domingo de Morales, Oaxaca Nicolas Garcia Abrosio.; Mayor of Santiago, Nuevo Leon Edelmiro Cavazos on Aug 16; Mayor of Hidalgo, Tamaulipas Marco Antonio Leal Garcia on Aug 29; Mayor of el Naranjo, San Luis Potosi Alexander Lopez Garcia Sept 8; Mayor of doctor Gonzalez, Nuevo Leon Prisciliano Rodriguez Salinas on sept 23; Mayor Gustavo Sanchez of Tancitaro, Micoacan november 12).
Secretary of State for the United States Hillary Clinton likened Mexico to Columbia in the 1980’s and 1990’s and described their drug wars as an “insurgency.” Newspapers in the border regions of Mexico stopped covering the drug wars for fear of retaliation. Those who do cover it are told what to publish and not publish through bribery or intimidation. Two journalists for El Diario de Juarez were killed. El Diario states that the cartels are the de facto authority in Mexico and issued a front page editorial, essentially asking the cartels what they want the paper to publish and not publish.

Because of the proximity to the Arizona border regions, Phoenix and Tucson are regional and national distribution centers for the drugs these deadly organizations bring from Mexico. These border regions are identified by Department of Justice, National Drug Intelligence Center (NDIC) as a High-Intensity Drug Trafficking Area (HIDTA). They are used by Mexican Drug Trafficking Organizations (DTOs) to transport drugs because they are vast, remote, and under-protected. The DTO’s also conduct alien smuggling activities. According to the Government

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130 Paper to Cartel: What Do you Want Us to Publish? CBS NEWS, Sept 20, 2010 (“At least 22 Mexican journalists have been killed over the past four years, at least eight of them targeted because of their reports on crime and corruption, says the Committee to Protect Journalists, a U.S.-based media watchdog group that plans to present its report to Mexican President Felipe Calderon on Wednesday. At least seven other journalists have gone missing and more have fled the country, the report says. Many media outlets, especially in border areas, have stopped covering the drug war. Until Sunday, El Diario was not one of them.”), available at http://www.cbsnews.com/stories/2010/09/20/world/main6884454.shtml.
131 Id.
132 Id. (“The El Diario editorial Sunday said it addressed its plea to the drug gangs because they are now the city's de facto authorities.”).
133 Id. (“Leaders of the different organizations that are fighting for control of Ciudad Juarez: The loss of two reporters from this publishing house in less than two years represents an irreparable sorrow for all of us who work here, and, in particular, for their families,” the editorial said. "We ask you to explain what you want from us, what we should try to publish or not publish, so we know what to expect.") (quoting El Diario newspaper front page article).
Accountability Office (GAO), the DTOs are very involved in alien smuggling, including the smuggling of aliens from special interest countries. NDIC reports that certain DTOs specialize in smuggling these special interest aliens. The DTOs have control of certain smuggling routes and charge a fee for the use of the smuggling routes. NDIC states:

“[F]ew physical barriers exist in border areas between [ports of entry], particularly in the West Desert area of the U.S. Border Patrol Tucson Sector, to impede drug traffickers, chiefly Mexican DTOs, from smuggling illicit drug shipments into the United States from Mexico.”

The Mexican DTO’s control the transportation and distribution in the area. They are highly organized and well entrenched. They use mules to carry backpacks across the border and throw bags over or through holes in the border fence for trucks to pick up on the U.S. side. They have lookouts in Arizona who monitor and communicate information about law enforcement patrol patterns.

from Mexico, and bulk cash is transported from the area into Mexico. These trafficking activities are facilitated by several factors unique to the region, including the continuing economic and population growth in Arizona’s two primary drug markets (Phoenix and Tucson), the highways that connect major metropolitan areas in Arizona with major illicit drug source areas in Mexico, and a remote, largely under-protected border”).


136 Id.

137 Id.


139 Id. at 4 (“Mexican DTOs and their smuggling operations are firmly entrenched in border communities within the Arizona HDTA region. Their influence and control over drug trafficking in the region are unrivaled by any other trafficking group.”).

140 Mules are individuals recruited by the DTO to smuggle drugs for a fee or passage.

141 HIDTA 2009, supra note 133, at 9 (2009); U.S. DOJ NAT’L DRUG INTELLIGENCE CTR., No. 2007-R0813-002, DRUG MARKET ANALYSIS: ARIZONA HIGH INTENSITY DRUG TRAFFICKING ANALYSIS 2009, at 8 (2007) [hereinafter HIDTA 2007] (noting that Mexican traffickers on either side of the Arizona-Mexico border often hire backpackers to carry marijuana-filled burlap bags, weighing 50 pounds or more, north across the border. They transfer bundles of marijuana through holes in the fence or throw bundles of drugs over the fence for retrieval by other traffickers in pickup trucks and other four-wheel-drive vehicles. As part of these operations, lookouts or individuals who reside on either side of the border monitor patrol patterns and determine the best times to conduct illicit drug smuggling operations).

142 Id.
Smugglers confronted by law enforcement previously would drop the cargo and run, now they engage law enforcement with high powered weapons. According to the NDIC:

Mexican DTOs and their affiliates are more sophisticated and significantly more violent than they were in the past. Enforcement arms of these DTOs have shot and otherwise injured law enforcement officials, rival DTO members, and gang members on both sides of the border. Drug traffickers now vigorously protect the product that they transport; they confront law enforcement directly or engage in high-speed chases to avoid arrest and interdiction. . . Additionally, assault statistics indicate that drug smugglers have noticeably increased their level of violent assaults against USBP and other federal law enforcement officers and agents who protect the border. Although most of these assaults involve rockings, smugglers are increasingly ramming USBP vehicles, attempting to run over agents, and firing upon agents, often with automatic weapons.143

On Interstate 8 in Arizona, night vision cameras have captured military-style, armed drug traffickers carrying semi and fully automatic weapons delivering drugs to vehicles for transportation to the next stop in the distribution chain.144 I-8 is about 100 miles from the border, well into Arizona’s interior, yet local law enforcement routinely encounters traffickers.

Kidnappings are rampant in Arizona. Victims often have a connection to the smuggling cartels or are family members of individuals with a connection.145 In 2009, a drug-related kidnapping occurred every thirty three hours in Phoenix.146 In 2007, there were 260 kidnappings in Phoenix; in 2008, 299; and in 2009, 267.147 The numbers make Arizona the kidnapping

143 HIDTA 2007, supra note 140, at 9.
144 Mary Ellen Resendez, Pinal County Sheriff: Mexican drug cartels now control parts of Arizona, ABC15.COM.
145 U.S. DOJ NAT’L DRUG INTELLIGENCE CTR. NAT’L DRUG THREAT ASSESSMENT 2010, No. 2010-Q0317-001, at 14 (2010) [hereinafter THREAT ASSESSMENT 2010] (“Often, the U.S. kidnapping victims have some connection to alien smuggling or local drug trafficking activities, although some are innocent family members or relatives of alien smugglers or drug traffickers. Kidnappings related to alien smuggling often occur because smugglers demand more money for their services. Kidnappings related to drug trafficking usually occur only as a direct result of localized drug trafficking activities. For example, an individual or individuals may be kidnapped because of a lost drug load or failure to pay a drug debt.”), available at, http://www.justice.gov/ndic/pubs38/38661/38661p.pdf
146 (365days x 24 hrs) / 267 kidnappings in 2009 = every 32.81hrs.
147 THREAT ASSESSMENT 2010, supra note 144, at 14.
capital of the United States, and kidnappings are likely underreported since the victims’ families may fear retaliation.\textsuperscript{148}

Signs have been posted by the Bureau of Land Management (BLM) along Interstate 8. Interstate 8 is a major highway which runs east-west about 100 miles north of the U.S. Mexico border. The interstate links Tucson and Phoenix to San Diego. BLM erected signs along a 60 mile stretch of the highway, between Casa Grande and Gila Bend.\textsuperscript{149} The signs read:

\begin{itemize}
  \item Danger – Public Warning
  \item Travel Not Recommended
  \item Active Drug and Human Smuggling Area
  \item Visitors May Encounter Armed Criminals and Smuggling Vehicles Traveling at High Rates of Speed
  \item Stay Away From Trash, Clothing, Backpacks, and Abandoned Vehicles
  \item If You See Suspicious Activity, Do Not Confront! Move Away and Call 911
  \item BLM Encourages Visitors To Use Public Lands North of Interstate 8.\textsuperscript{150}
\end{itemize}

The danger is so high and the presence of traffickers so common that signs in the United States, erected by the federal government 100 miles into the interior of Arizona, actually tell travelers to stay away.

The Border Patrol’s latest report states that the U.S. has “[operational] control” of only 862 miles of the 1,954 mile border with Mexico.\textsuperscript{151} That means that Border Patrol does not have the ability to detect illegal entries and respond effectively to fifty-six percent of the border.

The Mexican drug cartels are hostile; they are organized external entities; they make purposeful incursions into the sovereign land of Arizona in furtherance of their predetermined

\textsuperscript{148} Id. (“The number of U.S. kidnapping incidents is most likely underreported because many victims' families are unwilling to report the crime for fear that the victim will be killed, the kidnappers will retaliate against the family, or law enforcement will discover the family's drug trafficking activities or illegal alien status.”).


\textsuperscript{150} Id.

“vindictive enterprise” of smuggling drugs and persons. Arizona is quite literally under invasion by drug cartels. Arizona should invoke the State War Power and defend itself. It is a more powerful tool than legislation such as SB1070.

**MILITIA**

The traditional method of defense for states was the militia. The National Guard is thought of as today’s militia. However, its role has drastically changed. The militia was once a group of citizen-soldiers in the service of, and loyal to, their respective state who could be called up for federal service as a supplementary force.\textsuperscript{152} The founding generation regarded the militia as a vital protection against tyranny, providing a “check” on the federal government and a standing army:\textsuperscript{153}

The states also recognized the checks on the executive imposed by the citizens, particularly through their participation in the militia. Composed of armed, everyday citizens, the militia not only served as a state’s only military force, it also played an important role in revolutionary ideology as a locus of republican values. . . Virginia’s provision is representative: “that a well-regulated militia, composed of the body of the people, trained in arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty . . . .”\textsuperscript{154}

Anti-Federalists feared that federal control over the militia would leave the states defenseless.\textsuperscript{155} Due to this concern, although Congress kept national control over the militia\textsuperscript{156} it was balanced with the Second Amendment: an individual right to bear arms afforded every citizen who would, in time of need, become the state’s ultimate defense as a member of the militia.

\textsuperscript{152} *Recapturing the War Power*, 119 HAVARD L. REV. 6, 1815, 1828 (Apr 2006) (“The militias were decentralized state organizations whose officers were appointed by (and thus loyal to) the states rather than the federal government, they were a check against potential tyranny.”).

\textsuperscript{153} Meese, *supra* note 16, at 141 (“The militia, long a staple of republican thought, loomed large in the deliberations of the Framers, many of whom were troubled by the prospect of a standing army in times of peace. For the founders the militia, composed of ‘a people numerous and armed,’ was the ultimate guardian of liberty.”).

\textsuperscript{154} *Continuation*, *supra* note 40, at 227.

\textsuperscript{155} *Id.*

\textsuperscript{156} *Id.*
In 1820, the Anti-Federalists’ fear began to be realized. In *Houston v Moore* the Supreme Court stated that the federal government’s power over the militia “may be exercised to any extent that may be deemed necessary by Congress.” After the Civil War, the militia emerged as the National Guard. Their role was more akin to a police role. However, in the Militia Act of 1903 (the Dick Act) the mission of the guardsmen became a national reserve for the United States Army. The National Security Act of 1916 explicitly federalized the National Guard. This brought greater federal funding and control. However, the power of the federal government to order National Guard units to active duty was restricted to periods of national emergency. In 1952, the Armed Forces Reserve Act “authorized orders to ‘active duty or active duty for training’ without any emergency requirement, but provided that such orders could not be issued without gubernatorial consent.” In 1986, the Montgomery Amendment repealed the portion which required gubernatorial consent and completed the process of extinguishing the militia.

The National Guard is no longer a militia but primarily a national reserve for the regular army. The current commitments of the U.S. military power abroad and the number of guardsmen deployed or in rotation for deployment coupled with federal control, funding, and

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157 Meese, *supra* note 16, at 141 (quoting Houston v Moore, U.S. (1820)).
158 *Id.* at 142.
159 *Id. See also* Perpich et al. v. DOD, 496 U.S. 334 (1990) (“[I]n 1916 Congress decided to "federalize" the National Guard. In addition to providing for greater federal control and federal funding of the Guard, the statute required every guardsman to take a dual oath—to support the Nation as well as the States and to obey the President as well as the Governor—and authorized the President to draft members of the Guard into federal service. The statute expressly provided that the Army of the United States should include not only "the Regular Army," but also "the National Guard while in the service of the United States," and that when drafted into federal service by the President, members of the Guard so drafted should "from the date of their draft, stand discharged from the militia, and shall from said date be subject to" the rules and regulations governing the Regular Army. § 111, 39 Stat. 211.”).
162 The Montgomery Amendment, Pub.L. 99-661, § 522, 100 Stat. 3871 (“The consent of a Governor described in subsections (b) and (d) may not be withheld (in whole or in part) with regard to active duty outside the United States, its territories, and its possessions, because of any objection to the location, purpose, type, or schedule of such active duty.”).
supremacy of mission, leave governors with little ability to call up the National Guard.\textsuperscript{163} A Governor can apply to the federal government for permission to deploy the Guard using federal funds or can directly call up the Guard and use state funds. However, in a situation where the federal government is at odds with a state over the mission, the federal government can deny the request in the former scenario and claim supremacy of mission in the latter by keeping Guard units in federal service and under federal authority. The states no longer have the militia the Framers felt was the ultimate protector of liberty. This thwarts a state’s ability to defend itself from invasion, especially where the federal government fails to.

States can cure this by reinstituting the original concept of the militia and establishing a force of citizen-soldiers who would be in the service of the state when called upon by the governor to suppress insurrections or repel invasions in times of exigency where police are overwhelmed or the federal government does not send aid. Arizona, for example, could deploy its militia in the border regions of Arizona to do what the federal government has not; gain operational control of the border region and stop the invasion of drug and human traffickers into its sovereign territory.

The states should reconstitute the state militias solely under the authority and direction of the Governor of the state, with no duty to federal service.\textsuperscript{164} This would enable states to execute their Constitutional right to defend against invasion pursuant to the State War Power. By creating state defense forces, states can restore the balance required of federalism and ensure their ability to implement the State War Power.

\textsuperscript{163} Id.

\textsuperscript{164} 32 U.S.C. §109(c) (2006) allows for the creation of such a force (“In addition to its National Guard, if any, a State, the Commonwealth of Puerto Rico, the District of Columbia, Guam, or the Virgin Islands may, as provided by its laws, organize and maintain defense forces. A defense force established under this section may be used within the jurisdiction concerned, as its chief executive (or commanding general in the case of the District of Columbia) considers necessary, but it may not be called, ordered, or drafted into the armed forces.”).
CONCLUSION

Article I section 10 clause 3 of the Constitution recognizes a State War Power which affords states an inviolable right to defend itself against invasion. This power is independent from federal action or approval. Invasion is defined as a hostile and organized external force conducting a purposeful intrusion on sovereign land in furtherance of a predetermined malicious objective. A state will most likely act pursuant to the State War Power when the federal government fails in its responsibility under Article IV section 4, the Guarantee Clause. If the federal government fails under the Guarantee Clause, states have a justiciable claim with respect to protection against invasion. States need to preserve their ability to exercise the State War Power by reconstituting militias, who act completely under the Governors’ authority.

The simultaneous horizontal (separation of powers) and vertical (federalism) dispersion of power embodied in our Constitutional government provides us with a system wherein the overreach or failure of one part of the apparatus will be met with pushback or compensation from its counterpart. The State War Power should be recognized as an integral part of that system. The State War Power ensures a vital aspect of a constitutional republic, state sovereignty, and allows states to compensate for a failure by the federal government to protect against invasion as required by the Guarantee Clause.