

# THE MEANING OF INVASION UNDER THE COMPACT CLAUSE OF THE U.S. CONSTITUTION



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# The Meaning of Invasion Under the Compact Clause of the U.S. Constitution

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## Introduction

The porousness of the United States' southern border, through which record numbers of illegal immigrants have crossed in recent years ([Sullivan et al., 2021](#)), has made it easier for Mexican transnational criminal organizations to continue to solidify their control of drug trafficking operations throughout the region ([Drug Enforcement Administration, 2015](#)). Between 2020 and 2021, migrant encounters quadrupled in the sectors on the Texas border ([U.S. Customs and Border Protection, n.d.](#)). Meanwhile, the Texas Department of Public Safety reported the seizure of nearly 300 million lethal doses of fentanyl as of April 2022 through Operation Lone Star, the most recent Texas effort to secure the border ([Office of the Texas Governor, 2022](#)). This situation represents a grave threat to the safety and well-being of U.S. citizens in general and of the citizens of U.S. border states in particular. Certain Texas county officials, in considering the increased levels of crime associated with the recent growth in illegal border crossings, have even requested that Gov. Abbott declare the state to be under invasion ([Barragán, 2022](#)).

A U.S. state's appeal to invasion as a legally defined concept involves a consideration, among other things, of the meaning of Article I, Section 10, Clause 3 of the U.S. Constitution—the so-called Compact Clause—which provides in part as follows: “No State shall, without the consent of Congress ... engage in war, unless actually invaded, or in such imminent danger as will not admit of delay” ([Art. I § 10, cl. 3](#)). In this paper, we will explain the original public meaning of “invasion” with a view to clarifying whether a U.S. state has the constitutional right to use its military powers to defend itself from such an invasion—pending an appeal to Congress for its decision and aid.

The meaning of invasion under the U.S. Constitution involves two core concepts: entry and enmity. That is, an invasion must involve both physical ingress into a state (entry) and the intent by the invader to act as an enemy to that state (enmity).

Notably, entrants need not occupy territory or attack with or against military forces to meet the threshold of enmity. While invasion is most often and aptly used to describe the hostile military action of one nation against another and thereby typically excludes the actions of rogue individuals and roving gangs, it can also describe, and has been authoritatively used in American history to describe, the actions of non-state actors like “pirates and barbarians” (Hamilton et al., 1788/2014). The crucial qualification is not the size or equipment or even sovereignty of the invading force but its willingness and capacity to commit hostile acts against the state or its people. It is worth pointing out that entering the territory of a state for the sake of engaging in unlawful trade, committing acts of violence against rival gangs, or

## Key Points

- The American history of the term “invasion” reveals that its literal meaning is entry plus enmity: Entry alone, which is trespass, is not sufficient to constitute an invasion.
- Although the Framers occasionally used “invade” in a metaphorical sense, we know that in the Compact Clause they used the word in its literal sense, because that clause’s ancestor text in the Articles of Confederation refers to invasion “by enemies.”
- Past non-state actors, like pirates and barbarians, fell under the category of “invaders” in the opinion of certain American statesmen, such as Madison.
- Present-day non-state actors, like cartel-affiliated gangs operating within the territory of a U.S. state, may fall under the category of invaders, provided their criminal activity reaches a scale or degree of organization that deliberately overthrows or curtails the lawful sovereignty of the state.

## Under the U.S. Constitution, an invasion must involve both physical ingress into a state (entry) and the intent by the invader to act as an enemy to that state (enmity).

engaging in criminal activity on a scale that falls within the bounds of what the trespassed state's police powers can ordinarily handle, are not acts that fall within the scope of enmity as constitutionally defined. Mere unlawful entry, in other words, does not qualify as enmity. And only entry *plus* enmity, as we have said, constitutes invasion.

### The History of the Term “Invasion”

The word “invade” as used in the Constitution has never been defined by the Supreme Court (or any other federal court), but there is a wealth of material by which we can come to grips with its original public meaning.

The word “invade” derives from the Latin *invado*, formed by adding the prefix *in-* to a verb meaning “to go,” thus yielding a meaning of “to enter” or “go within.” Because Latin prefixes and prepositions denoting approach toward an object often indicate an attack upon the object or an adversarial posture toward it, *invado* bore a second sense of “to attack or assault” (Smith, 1997).

### Meaning of “Invasion” Prior to the American Revolution

When it appeared in English, the word “invade” carried a meaning compounded of these two Latin senses. We see this in its first known appearance in English, in Fabyan's 1494 *Chronicle*: “The Pictes and other Enemyes, which daily invaded the Lande” (Burchfield, 1971). Here, “invade” refers to the entrance into the land for purposes of acting as

enemies within it. The word thus has two elements: (1) ingress and (2) enmity. As we will see below, these two elements continued to characterize the word “invade” up through the Founding period. The paragraphs that follow will focus on the second of these elements as more germane to present purposes.

The word “invade” is an entry in Robert Cawdrey's 1604 *Table Alphabetical*, often credited as the first English dictionary. It is defined as “to set upon, to lay hold on” (Cawdrey, 1604/2007). When the word began to appear in American legal usage some decades later, its use was consistent with Cawdrey's definition. “Invade” appears in several of the colonial charters. Most notably, it was part of a standard formula of four verbs appearing in a number of charters, including those of [Connecticut](#), [Georgia](#), [Maine](#), [Massachusetts Bay](#), and [New Hampshire](#). In the standard formula, the monarch authorized the colonists to resist anyone attempting “the Destruction, Invasion, Detriment, or Annoyance of” the colonists. Under the time-honored interpretive canon *noscitur a sociis*,<sup>1</sup> “invasion” in the formula can be glossed from the surrounding terms, all of which have to do with adversarial encounters of varying severity. This gloss is strengthened by other uses of the word in the colonial charters, such as the authorization to institute martial law in the event of “invasion insurrection or war” appearing in one of the [Massachusetts charters](#), and the reference to “Intrusions or Invasions as well of the barbarous people as of Pirates and other enemies” in a [Maine charter](#). Considered together, these numerous uses of the word “invade” and its derivatives in contexts of enmity suggest that, in American colonial legal usage, the term referred to an adversarial encounter.<sup>2</sup>

### Meaning of “Invasion” During the American Revolution

This usage continued into the 18th century. John Kersey's *Dictionarium Anglo-Britanicum*, 1708 defined “invade” as “to attack, or set upon,” and “invasion” as “the Act of invading, or setting upon; an Usurpation, or Encroachment; an Inrode or Descent upon a Country” (Kersey, 1708/1969). Samuel Johnson's famous 1755 *Dictionary of the English*

1 The *noscitur* canon is especially probative for early modern legal documents in light of that period's well-known penchant for employing consecutive synonyms. The [Charter of Connecticut of 1662](#), for example, reads: “Our Will and Pleasure is, and We do for Us, Our Heirs and Successors, ordain, declare, and grant.” If any doubt remained, the [Commission of John Cutt of 1680](#) refers to “invasions ... or other [emphasis added] destruction, detriment, or annoyance,” indicating that invasion is one subspecies of a species including also the other three terms for an adversarial encounter. See also [Jarecki v. G.D. Searle & Co., 1961](#).

2 See the [Fundamental Constitutions of Carolina](#), wherein a single jurisdictional provision uses the term in another sense, giving jurisdiction to a particular court over “all invasions of the law, of liberty of conscience, and all invasions of the public peace, upon presence of religion.” This isolated, unusual use seems to reflect the metaphorical sense we will discuss below and, in any event, does not alter the conclusion that early American legal usage understood the term to refer to an adversarial encounter.



Language defined “invade” as “to attack a country; to make an hostile entrance”; “to attack; to assail; to assault”; and “to violate with the first act of hostility; to attack, not defend” (Johnson, 1755/1994). George Lemon’s *English Etymology*, published during the American Revolution, defined “invasion” as “to go against, march against, assail” (Lemon, 1783/2018). And Noah Webster’s *Compendious Dictionary of the English Language*, published in America in 1806, defined “invade” as “to enter or seize in a hostile manner”; an “invader” as “an assailant, encroacher, intruder”; and an “invasion” as a “hostile entrance, attack, assault” (Webster, 1806/1970). Each of these definitions leaves no doubt that hostility is a defining element of the word “invade.”

Eighteenth-century American legal and governmental usage was consistent with the dictionaries’ approach, including in the legal documents of the American Revolution itself. The Declaration of Independence famously referred to George III’s “invasions on the rights of the people” and accused him of “expos[ing the colonies] to all the dangers of invasion from without, and convulsions within.” Enmity is apparent here. It also appears in [South Carolina’s 1776 preface](#) to its revolutionary constitution, which referred to British military action in Massachusetts “whereby a number of peaceable, helpless, and unarmed people were wantonly robbed and murdered,” as “lawless invasions and depredations.” In 1777, [New York’s constitutional convention](#) likewise referred to the “hostile invasions and cruel depredations of our enemies.”

### Meaning of “Invasion” During the Early Republic

As the word was used during the Revolution, so it was during the early days of the Republic: The word “invade” continued to mean an ingress for adversarial purposes. The word appears in various forms some 41 times in *The Federalist Papers*. It is used synonymously with the word “attack” to describe the activities of “the enemy,” “foreign powers,” and an opposing “army.” “Invaders” may threaten “the terrors of a conflagration” or “menace the conquest and destruction” of the invaded territory (Hamilton et al., 1788/2014).<sup>3</sup>

This use continued into the early years of the Republic. Early American statutes regularly used the word “invade,” and most specified the potential invader of concern. In every

such instance, the potential invader is a hostile military power. For instance, a statute of the Second Congress refers to “invasion from any foreign nation or Indian tribe” ([Stat. I, ch. 28 § 1](#)); statutes of the Fifth Congress authorized presidential action in the event of invasion “by a foreign power,” “by any foreign nation or government,” or by “a foreign European power” ([Stat. II, ch. 66, § 1](#)); and a statute of the Sixth Congress authorized enlistments in the event of immigrant invasion by the French Republic ([Stat. I, ch. 9](#)).

Two metaphorical ways of understanding “invasion” were also prevalent in the Founding era. The first way referred to the action of one party against the rights of another. The quotation given above from the Declaration of Independence exemplifies this use, as does one of Samuel Johnson’s definitions of the term: “hostile entrance upon the rights or possessions of another” (Johnson, 1994). This metaphoric use appears over a dozen times in *The Federalist*.<sup>4</sup> The second metaphorical use of “invasion” during the Founding era was as a description of the action of a contagious disease, as the following sentence from Johnson’s dictionary illustrates: “What demonstrates the plague to be endemial to Egypt, is its invasion and going off at certain seasons.” These and other metaphoric uses of the word “invade” played on the elements of both ingress and enmity; indeed, the conjunction of these elements is what made the word “invade” a good metaphor for the phenomena we have described. With that said, the nature of metaphoric use means that the word was sometimes stretched to cover situations that would not qualify as invasions in the usual sense. Thus, for instance, in *Federalist 28*, Hamilton refers to the maintenance of “the just authority of the laws against those violent invasions of them which amount to insurrections and rebellions”—violent outbreaks that do not involve an element of physical ingress. And, of course, diseases cannot form the hostile intent that characterizes invasion in its literal sense.

Whenever the phrase “actually invade” was used, however, it retained its non-metaphorical meaning. The phrase was used as a common term of art, first appearing in [Georgia’s 1732 colonial charter](#)<sup>5</sup> and at least 60 times in the Revolutionary- and Framing-era correspondence found in the National Archives’ online database ([Founders Online, n.d.](#)). The phrase always referred to the physical presence of the enemy within the invaded territory and was frequently used to distinguish such a state of affairs from an

<sup>3</sup> The preceding five quotations are taken from *Federalist*, 4, 7, 14, 41, and 70, respectively.

<sup>4</sup> See, for example, *Federalist* 60: “that so fundamental a privilege ... should be invaded to the prejudice of the great mass of the people ... is altogether inconceivable and incredible.” See also *Federalist* 73: “If even no propensity had ever discovered itself in the legislative body, to invade the rights of the executive.”

<sup>5</sup> The charter permits the imposition of martial law “in time of actual war and invasion or rebellion.”

anticipated or possible invasion. A typical example appears in a letter from Patrick Henry to Henry Laurens explaining that the Virginia Legislature had amended Virginia law, which previously permitted sending the Virginia militia to the aid of a sister state only “in cases of actual Invasion,” to authorize sending the militia “when certain Intelligence of an intended Invasion should be received [emphasis omitted]” ([Letter from Patrick Henry to Henry Laurens, 1778](#)).

### The Meaning of “Invasion” under the Constitution: Entry Plus Enmity

The term’s appearance in Article I, Section 10, Clause 3 of the U.S. Constitution—the Compact Clause—derives from the Articles of Confederation, which provided as follows:

No state shall engage in any war without the consent of the united states in congress assembled, unless such state be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such state, and the danger is so imminent as not to admit of a delay till the united states in congress assembled can be consulted. ([Art. VI, cl. 5](#))

A provision substantively identical to this text (except for the omission of the reference to Indians) was added to the draft of the Constitution. That draft provision demanded that

no state shall, without [the] Consent [of Congress] engage in any War, unless it shall be actually invaded by Enemies, or the Danger of Invasion be so imminent as not to admit of a Delay, until the Legislature of the United States can be consulted. ([Art. I, § 10, cl. 3](#))

The text remained materially the same when the Constitution was reported out of the Convention’s Committee of Style as part of what is now called the Compact Clause. But on the last day of debate, a few hours before the Convention voted on the final draft of the Constitution, a short disagreement erupted on the powers of states to lay duties on tonnage. Language on tonnage was added to the clause, which was then, in Madison’s words, “remoulded and passed” (Farrand, 1911, pp. 626–627). This “remoulding” resulted in the text of the Compact Clause we have today.

We can draw a few conclusions from the preceding. First, the word “invade” includes an element of hostility

or enmity—ingress alone does not constitute invasion. Second, the term of art always refers to the physical incursion of enemies into the invaded jurisdiction. Third, the soundness of interpreting “invade” in the Compact Clause in accord with its strict, non-metaphorical meaning is confirmed by the fact that the clause’s ancestor in the Articles of Confederation referred to actual invasion “*by enemies*.” And fourth, the records of the Convention show no intent to depart from the Articles of Confederation on this point. Taken together, the preceding amounts to compelling evidence that an invasion, for purposes of the Compact Clause, is ingress into a state with the intent of acting as an enemy to the invaded state—that is, entry plus enmity.

### The Meaning of Enmity

But what does it mean to act as an enemy under the Compact Clause? Enmity was ordinarily understood to mean an engagement in the kind of armed conflict within an ingressed jurisdiction that is characteristic of war between sovereign states. But this definition does not comprehend the full meaning of “invasion” as it was understood by leading U.S. statesmen during the early days of the Republic. We see this from references, in some few but important early American sources, to invasion by pirates.<sup>6</sup> The most notable such reference occurs in *Federalist* 41, in which Madison worries that, absent a navy, America’s seaboard cities would have to pay ransom to “daring and sudden invaders,” whom he calls “pirates and barbarians.” This text illustrates the condition upon which the ingress of pirates into a jurisdiction could constitute an invasion: The pirates must enter as enemies of the ingressed jurisdiction, such as for the purpose of plundering its people—as opposed to entering to trade, transit, or attack a rival pirate gang within the jurisdiction.

That an incursion by pirates qualified as an invasion means that an invasion need not aim at the conquest of the ingressed jurisdiction or at inflicting defeat on its armed forces. Nor need it involve the large masses of troops used in wars between sovereigns, although the ingress of just a handful of pirates for purposes of theft and thuggery would likely not have been different enough from the garden-variety crime that is the object of the police power to qualify as an invasion. Enmity as understood in the preceding reference to pirates entails a degree of actual or prospective criminality that deliberately overthrows or curtails the lawful sovereignty of the state.

6 See the [Grant of the Province of Maine](#) and also the [Charter of Carolina](#), which refers to invasion by “salvages [i.e., savages] as of other enemies, pirates and robbers.”

On the other hand, the intent to enter a jurisdiction unlawfully does not, standing alone, bespeak the enmity necessary to qualify as an invasion. We are aware of no early American sources that use the word “invade” to refer to unlawful ingress but that does not involve the intent to engage in hostile conduct within the jurisdiction. Nor is there reason to believe that, in the Founding era, there existed a widespread view that the breaking of some of the laws of a community necessarily makes one an enemy of that community, such that the intent to violate the law would be enough to create the enmity necessary for an ingress to qualify as an invasion.

Colonial- and Revolutionary-era Americans had a word other than “invasion” for unlawful entry without enmity: “trespass.” That word was defined in Johnson’s 1755 *Dictionary of the English Language* as “to enter unlawfully on another’s ground” and similarly in Webster’s 1806 *Compendious Dictionary of the English Language* as “to enter or go unlawfully.” The word “trespass” was regularly used in early American correspondence (see [Letter from James Madison to Hoboiloithle, 1809](#)) and statutes ([First Congress, stat. II, ch. 34, § 5](#)) to refer to unlawful entry of the domain of another. The distinction between trespass and invasion appears in a letter from General Nathanael Greene to George Washington about the difficulties of finding accommodations for the officers of the Continental Army ([Letter from Nathaniel Greene to George Washington, 1779](#)). General Greene uses the word “invaded” twice, both times in reference to the intrusion of a hostile military force into the invaded jurisdiction. He also uses the word “trespass” twice, both times to refer to the intrusion of the invaded jurisdiction’s *own soldiers* upon the property of its citizens. Both types of intrusion are unlawful, but only the former is an invasion.

Several of the early Congresses took up the issue of unlawful entry in one form or another, and none of them referred to it as an invasion (e.g., [First Congress, stat. II, ch. 33, § 5](#); [Fifth Congress, stat. III, ch. 46, § 4](#); [Ninth Congress, stat. II, ch. 46, § 1](#)). A statute of the Eighth Congress is particularly probative. That statute, creating a government for the newly purchased Louisiana Territory, directed that each military commander in the territory “shall be specially charged with the employment of the military and militia of his district, in cases of sudden invasion ... and at all times with the duty of ordering a military patrol ... to arrest unauthorized settlers” ([Eighth Congress, stat. I, ch. 38, § 12](#)). Thus, Congress distinguished between invasion and unlawful entry, directing the commanders to act against invaders and against unlawful settlers as two distinct tasks.

## That an incursion by pirates qualified as an invasion means that an invasion need not aim at the conquest of the ingressed jurisdiction or at inflicting defeat on its armed forces.

Other Founding-era communications are consistent with this usage. An 1809 letter from President Madison to a Creek Indian leader is instructive. The Creek leader had complained that U.S. citizens were entering Creek lands and depleting their natural resources. President Madison urged him to speak with the federal agent in his territory if “the White People trespass again upon your lands” ([Letter from James Madison to Hoboiloithle, 1809](#)). Consistent with the usage described above, Madison does not describe the entry of U.S. citizens into Indian land as an invasion but as a trespass.

### Conclusion: The Application of the Compact Clause to the Current Crisis at the Southern Border

The phrase “actually invaded” in the Compact Clause refers to the presence of flesh-and-blood enemies on the soil of the invaded state. The phrase “imminent danger” in the same clause refers to the possibility of such enemies coming to be present soon. It is clear that the “danger” to which this phrase refers is that of invasion, rather than of some other catastrophe, both on the basis of the text itself as well as on the basis of the ancestors of the phrase in the Articles of Confederation and the drafts of the Constitution, which expressly referred to such danger. The question, then, is whether enemies at the southern border are physically present within the United States or threatening to become imminently present.

It should first of all be highlighted that, as *only entry plus enmity constitutes invasion*, the unlawful entry of people into the United States cannot be construed as an invasion. Nor, for the same reason, can the prospect of further illegal entry in the imminent future be so construed.

The presence or threatened presence of hostile criminal groups, such as the Mexican cartels, raises different

## **It is incumbent on states that believe they have been invaded by hostile bands to seek immediate aid and direction from Congress, which retains the ultimate legal authority in matters relating to war.**

questions. An analogy between some of these groups, if large or harmful enough, and the pirate bands whose incursions were held to constitute invasions by one of the leading architects of America’s constitutional order, may be warranted. Recent and disturbing instances of cartel members showing violent contempt for U.S. sovereignty along the U.S.–Mexico border certainly strengthen the case for that analogy, as do rising fentanyl deaths ([Lepore, 2021](#); [Casiano, 2022](#); [Farberov, 2022](#)). But we must underline that just as the unlawful entry of pirates into a jurisdiction was by itself insufficient to constitute an invasion during the Founding era, so too the unlawful entry of criminal groups into a jurisdiction is by itself insufficient to constitute an invasion at present.

What needs to be shown in order to prove that the activity of such groups constitutes an invasion of a U.S. state is evidence that they have committed or are manifestly intending to commit acts of hostility, such as murder and armed robbery, against state officials or the people of the state; and that, moreover, they have committed or are intending to commit such acts on a scale or with a degree of organization that deliberately overthrows or curtails the lawful sovereignty of the state. For, to repeat, only such acts of enmity, in conjunction with entry, constitute an invasion as defined by the Constitution.

It should be made absolutely clear, moreover, that the purpose of the Compact Clause is not to carve out a domain in which states hold the ultimate authority on whether the United States (or part of it) shall go to war, but rather to provide authority for states to exercise war powers during emergencies, *pending an appeal to Congress for its decision and aid*. The clause’s purpose, in other words, cannot be to alter the principle that Congress decides matters of peace and war, but rather to cover situations in which Congress cannot make a decision in time, such as in the case of an invasion that is already occurring. For there is no reason to believe that the Framers introduced the Compact Clause in order to depart from their foundational principle that the United States must speak with one voice on matters of peace and war. Had they done so, they would have given every state the unreviewable power, as *Federalist 42* puts it, “to embroil the Confederacy with foreign nations” (Hamilton, 1788/2014) and would have thereby critically undermined the very unity the federal constitution was designed to ensure. It follows, then, that once the federal government makes a decision regarding the situation of a particular state, that decision is final. It is therefore incumbent on states that believe they have been invaded by hostile bands to seek immediate aid and direction from Congress, which retains the ultimate legal authority in matters relating to war. ★



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