Terrorism, America's Porous Borders, and the Role of the Invasion Clause Post-9/11/2001

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[On September 11, 2001, a] patch of blue sky that should not have been there opened up in the New York skyline.... [T]he heavens were raining human beings. Our city was changed forever. Our country was changed forever. Our world was changed forever.¹

I. INTRODUCTION

A perfect world is a world without borders. In this world, concerns regarding terrorism, suicide bombers, war, chemical, biological, and nuclear attacks, missiles, anthrax-laced mail, shoe bombs, crop dusters, hijackers, skyscrapers, color-coded terrorist alerts, defense strategies, and smallpox vaccinations do not pollute the thoughts and dreams of mankind. In this world, mass slayings in the name of religion and ideology are fictional, and every individual on the planet lives in peace and harmony as one nation.

Regrettably, a group of terrorists have thrust open our nation’s collective eyes to reveal an ominous reality: Our world is far from perfect. The terrorist acts of September 11, 2001 catastrophically and poignantly illustrated that in the name of safety and security, the vision of a borderless world must remain a vision for the future. On September 11, 2001, terrorists invaded our country in the worst possible way—and the world will never forget this day.

As a result of the 9/11 attacks, the majority of Americans have called for enhanced homeland security measures, including heightened border security efforts.² However, if Mohamed Atta, one of the 9/11 hijackers, “could send a message from hell—where he surely went after he piloted American Airlines Flight 11 into the World Trade Center—Atta would have good news for his band of homicidal brothers around the world: The doors to America are still wide open.”³ Although terrorists invaded our homeland soil on 9/11/01 and America remains vulnerable to another terrorist attack, the federal government has opted to employ only incremental efforts to strengthen the manpower and security on America’s borders. Chillingly, the terrorist invasion of 9/11 in combination with our federal government’s continuing lax border control

2. See infra Part II.
policies exemplify the reality that our country remains highly vulnerable to another terrorist attack.

What few Americans realize is that the federal government's failure to provide sufficient border security for the states and the American people may transgress a constitutional mandate. The United States Constitution provides as follows: "The United States . . . shall protect each of . . . [the states] against Invasion." This constitutional provision has rarely arisen as a topic of legal commentary or as a question within the judiciary, which is likely attributable to the fact that the 9/11 terrorist invasion of our mainland soil initiated a new chapter in American history, as America has never been invaded in a manner similar to the terrorist invasion of 9/11. However, after the hostile terrorist invasion of our homeland on 9/11, this provision theoretically could impose innumerable duties on the federal government. This Comment will address only the most elementary and imminently necessary element of "protection" that could be found to fall under the Invasion Clause's umbrella: border control. Border control is the most fundamental method of protection that the federal government can provide the states because our nation "cannot possibly have a system that prevents [terrorism if it does not] begin with the issue of border security." 

Specifically, this Comment will address the role that the Invasion Clause may play in increasing the number of border personnel and improving the quality of technological equipment along the Canadian-American border in the vast, unchartered areas between established border crossing points. This Comment will not address whether the border control procedures utilized to regulate the flow of people and commerce at established border checkpoints constitute sufficient protection from invasion.

As discussed in detail in this Comment, because of various political reasons, the political branches currently refuse—and will in all likelihood continue to refuse—to sufficiently augment border security along the porous Canadian-American border. This political inaction likely violates the Invasion Clause and leaves our states and citizens largely unprotected from a future terrorist invasion. Thus, if the Invasion Clause is to be enforced, the

4. U.S. CONST. art. IV, § 4. This constitutional provision is commonly referred to as the "Invasion Clause."

5. To sufficiently protect the states from invasion, these duties could include, among countless others, the following: improving airport security, revamping immigration regulations, creating missile defense shields, increasing the number of law enforcement personnel, maintaining terrorist lookout lists, and improving the visa system.

structural mechanisms inherent in our federal government dictate that the federal judiciary is the only means through which the federal government can be ordered to comply with its constitutional duty.

Because of the well-documented congressional and executive apathy relating to border security, this Comment urges the federal judiciary to reach the merits of an Invasion Clause claim and render a decision in favor of the states. To mandate governmental compliance with the Invasion Clause, the states could file suit in federal court, requesting a declaration that the federal government has failed to comply with the Invasion Clause and a mandamus directing the President or the Director of Homeland Security, among others, to comply with the Clause.7 In the alternative, the states could request damages for funds expended on terrorism prevention and/or border control that can be linked to the federal government's lax border control policies, and they could request the Court to grant a mandatory injunction that requires the federal government to pay the states restitution until the Invasion Clause is properly enforced.8 In their claims for relief, the states could demand three possible remedies: restitution, border militarization, or a mass hiring of Border Patrol personnel and increased and improved technological equipment for the northern border.9

In reality, however, judicial enforcement of the Invasion Clause is much easier theorized than accomplished. The only cases in which the states alleged that the federal government failed to comply with the Invasion Clause were dismissed as political questions. Consequently, the doctrine of standing and the political question doctrine may bar any court from reaching the merits of this issue. Additionally, the judiciary has always shied from mandating presidential or congressional compliance with a constitutional provision,10 and until further information is obtained, it may be difficult for the judicial branch—or any branch of the federal government for that matter—to determine the number of border personnel and the amount and quality of

7. For a discussion addressing declaratory judgments and writs of mandamus used to direct members of the government to comply with the Constitution or with a statute, see the following decisions: Colgrove v. Green, 328 U.S. 549 (1946); Smith v. Reagan, 844 F.2d 195 (4th Cir. 1988); Walker v. Munro, 879 P.2d 920 (Wash. 1994).

8. Because courts will rarely, if ever, explicitly mandate congressional or presidential compliance with a statute or the Constitution, a number of states resorted to this claim for relief when requesting the federal judiciary to mandate governmental compliance with the Invasion Clause. See, e.g., Chiles v. United States, 874 F. Supp. 1334, 1337 (S.D. Fla. 1994). For a detailed discussion of these prior Invasion Clause cases, see infra Part IV.B.

9. Although some may vehemently disagree with border militarization, this Comment advocates the position that, as long as someone is guarding our borders, any of the three remedies is acceptable.

10. See supra notes 7-8 and accompanying text.
technological equipment that will suffice to protect the states from further terrorist invasion.

While considering these counterarguments, this Comment avers a number of rationales to support the contention that the current Court may opt to reach the merits of an Invasion Clause claim and order the federal government to augment border security. First, Part II of this Comment explains the necessity for augmented Canadian-American border security. Part II also addresses efforts that the political branches have employed since 9/11 to improve border security, why these efforts are insufficient to protect the states from a future terrorist invasion, rationales underlying the President and Congress’s laissez faire approach to border control, and the issue of border militarization. Part III describes the role of the federal judiciary in interpreting and enforcing the Constitution, and it explains the components of the doctrine of standing and the political question doctrine, including a discussion of the scope of the “modern” political question doctrine in the realm of domestic and foreign affairs. Part IV analyzes case law in which the courts of the federal judiciary found the states’ allegations that the federal government’s failure to properly enforce immigration laws violated the Invasion Clause to be nonjusticiable. Part V applies the doctrine of standing and the components of the political question doctrine to the present Invasion Clause inquiry to determine whether the federal judiciary could reach the merits of the states’ Invasion Clause claim brought against the federal government; this Part urges the Court to mandate compliance with the Invasion Clause by means of augmented border security before the blood of more Americans is shed.

II. THE POLITICAL BRANCHES AND BORDER CONTROL

The statistics speak for themselves. Seventy-seven percent of Americans assert that the government is not doing enough “to control the border and to screen people allowed into the country.” 1 Eleven percent of Americans want the government to militarize the border. 2 Yet, the popular democratic support for stricter border control has

2. Id.
not caused the federal government to supply funding in an attempt to remedy this problem. The only inquiry that rationally results from this scenario is as follows: If the majority of Americans advocate stricter border control and agree that our insufficient border security tactics do not thwart terrorists from entering the country, why does the federal government fail to plug the border with thousands more personnel and supply technological devices as best as our nation’s resources will allow? Americans have posed this question time and time again, and each time we receive the same answers from most of our representatives: rationalization, silence, claims that the government has added more guards at the border, or utter avoidance of the question.14

This Part will address and critique the political branches’ current border control policies. First, because this Comment focuses on the need for augmented Canadian-American border security, the security dilemma along this border will be discussed. Second, the federal government’s efforts to improve border control since 9/11 will be highlighted. Third, startling facts and rationales will be presented to support the assertion that these efforts currently are insufficient to protect the states from another terrorist attack. Fourth, a number of rationales will be conjectured as to why the federal government employs a laissez faire approach to border control issues. Lastly, the issue of border militarization and the federal government’s response to this issue will be discussed.

A. The Canadian-American Border: An Unlikely Suspect

As one Border Patrol Agent declared after 9/11, “I believe the [Canadian-American] border is so far out of control that we don’t even have an idea how far out of control it is.”15 This Comment will focus on the need for augmented Canadian-American, as opposed to Mexican-American, border security. The northern border will be highlighted because of Canada’s liberal immigration policies and the country’s existing lax border security.

1. Canada’s Liberal Immigration Policies

Canada is widely known for its extremely liberal open-door immigration
huge numbers of immigrants flock to Canada each year because of this noninterventionist policy, creating a yearly increase of one percent in the country's population. Refugees from countries such as Pakistan, Iraq, and Lebanon are allowed into the country without passports or background checks. The refugees are permitted to travel boundlessly about the country until the date of an asylum hearing. Approximately one-quarter of the refugees fail to attend the hearing—and they disappear. Yet, because of Canada's strong economic footing, many Americans feel much less threatened by immigrants that enter our nation through the Canadian-American, as opposed to the Mexican-American, border. This false sense of security promotes decreased consternation among Americans with regard to the status of Canadian-American border security.

Predictably, Canada's open-door immigration policy has caused the areas of the country in close proximity to the United States to become sanctuaries for criminals, including terrorists. Canada's geographic location in relation to the United States makes the country a favorite home for terrorists, particularly because of Canada's accessible and technologically advanced banking system. The city of Montreal is notorious for its links to terrorist activity; the city recently was in the limelight for housing Ahmed Ressam.

16. On the Record with Greta Van Susteren: 'Below the Radar'—Our Homeland Security Investigation (FOX News television broadcast, Sept. 5, 2002), available at http://www.foxnews.com/story/0,2933,62300,00.html [hereinafter Van Susteren]; see also Patrolling the Border, THE BURLINGTON FREE PRESS, May 29, 2002, LEXIS, News Library [hereinafter Patrolling the Border, THE BURLINGTON FREE PRESS] (“Years of Canada's generous immigration policies have opened the door to many legitimate immigrants and refugees who provide Canada a depth and multicultural flavor that is celebrated and encouraged.”). Additionally, as one Senator asserted: "The Canadians 'have policies that are so lax that Osama bin Laden could land there tomorrow, claim refugee status and be allowed to walk into the nation .... They don't ask for proof of identity or refugee status. All you have to do is claim it.'" Julia Malone, Eyes in Sky Help Watch Borders, DAYTON DAILY NEWS, Aug. 25, 2002, LEXIS, News Library (quoting Rep. Tom Tancredo) [hereinafter Malone, Eyes in Sky Help Watch Borders].


19. Id.

20. Id.


22. Id. at 222.

23. MALKIN, supra note 3, at 76-77.

24. Halliday, supra note 21, at 222.
before American border agents thwarted his conspired "Millennium terrorist strike." As many as fifty international terrorist organizations call Canada home, including the Armed Islamic Group and al-Qaida, both of which are linked to Osama bin Laden. Distressingly, this terrorist activity may not alarm Canadians to the extent that it alarms Americans: "Many Canadians feel fairly comfortable that [they] are not going to be a target because there is a bigger and better target next door." 

2. Lax Protection on the Northern Border

Canada's liberal immigration policies combined with the fact that the northern border is woefully undermanned amounts to a dangerous combination for the citizens of the United States. Three different agencies are assigned to protect our nation's northern border: the Immigration and Naturalization Service (INS), the Customs Service, and the Border Patrol. Customs and the INS police "the cross-border flows of people and goods—on roads, over bridges, through tunnels, and on ferries." The Border Patrol performs the task of "stopping or deterring illegal border crossings in the mountains, deserts, and woods between established crossing points." Because this Comment focuses on the lack of border security between established crossing points, the severe understaffing of Border Patrol agents on our northern border will be addressed in detail.

The Canadian-American border is approximately 4000 miles long. After 9/11, Congress appropriated funds to triple the number of INS inspectors and Customs Agents on this border, thereby creating positions for a total of 1470 inspectors and 5319 agents. This congressional bill also tripled the number

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25. Brown, Security Concerns, supra note 18. With regard to the arrest of Ressam, Representative Lamar Smith of Texas stated: "This case is the best wake-up call that either Canada or the U.S. are going to get." Phinney, Staging Terror, supra note 17.


27. Patrolling the Border, THE BURLINGTON FREE PRESS, supra note 16.


32. Id.


of Border Patrol agents from 300 to 900 agents.\textsuperscript{35} Conversely, the Mexican-American border runs approximately 2000 miles, or half the length of the Canadian-American border,\textsuperscript{36} and 9150 Border Patrol agents are stationed on this border.\textsuperscript{37} Approximately 16,000 total Customs and Border Patrol agents guard the Mexican-American border.\textsuperscript{38}

This disparity is troubling: There is one Border Patrol agent for every one-quarter mile on the Mexican-American border but only one Border Patrol agent for every four miles on the Canadian-American border. It must be kept in mind, however, that Border Patrol agents are not stationed uniformly throughout the northern border: “The 917-mile stretch of border in the Grand Forks sector has about one field agent for every thirty-eight miles,”\textsuperscript{39} and “Detroit has only 20 [border guards] who are expected to train their eyes on border crossings in three neighboring states as well.”\textsuperscript{40} Because one individual cannot be expected to effectively cover anywhere from four to forty miles of rugged terrain at one time, it is much easier for terrorists to crawl, walk, run, or swim into our nation through our northern border than through our southern border.

Furthermore, not only is the manpower on the northern border lacking but also the government has failed to implement any physical barriers at established border checkpoints during times when the checkpoints are not staffed. The northern border has a few gates along the border that will not close—in Montana, they are “rusted open, so to speak.”\textsuperscript{41} At other border checkpoints along the northern border, the barriers set up at night consist of orange cones,\textsuperscript{42} and some people do not even have the courtesy to move the cone before they illegally enter this country: “They come whipping through at 60 miles an hour and just shred the cone.”\textsuperscript{43} These ineffective barriers at border checkpoints and along the rest of the border illustrate the ease with

\textsuperscript{36} Gorman, A Nation Without Borders, supra note 34.
\textsuperscript{38} U.S. to Triple Guards, supra note 35.
\textsuperscript{39} MALKIN, supra note 3, at 8.
\textsuperscript{40} Phinney, Staging Terror, supra note 17. Similarly, in Michigan, one Border Patrol team is expected to cover 140 miles. Gorman, A Nation Without Borders, supra note 34. In Idaho, there are only sixteen officers to watch over 400 miles of the Canadian border. Malone, Eyes in Sky Help Watch Borders, supra note 16.
\textsuperscript{41} Senate Hearing, supra note 6 (statement of Sen. Conrad Burns (R-MT)).
\textsuperscript{42} Id. (statement of Sen. Dorgan).
\textsuperscript{43} Id.
which terrorists can enter our country on established roadways under the cover of darkness.

Lastly, the southern border receives considerably more technological equipment than the northern border. In Michigan, "[t]wenty-eight field agents were sharing one working boat and a remote surveillance camera that had been out of service for six months." In 2000, the INS transferred two aircraft from the northern border to the southern border; the aircraft were to be used on the southern border to locate illegal aliens lost in the desert. As a result of constant equipment transfers from the northern to the southern border, the northern border is both understaffed and without proper technology to detect terrorists entering this country.

These security glitches on our northern border illustrate how uncomplicated it is for a terrorist—especially a terrorist with resources—to enter our nation through its porous and unguarded borders potentially carrying biological, chemical, or nuclear weapons. Morally and economically speaking, our nation must maintain the flow of commerce, traffic, and people through our borders, but it is just as important that we “keep out of this country those who are not supposed to come in.” As it currently stands, our nation’s Canadian-American border control policies between checkpoints are some of the most lax in the world. The FBI Director has warned that “walk-in suicide bombings in America are ‘inevitable,’” and the state of our nation’s border security is “not something that should make people sleep well tonight.”

B. Efforts to Improve Border Control Since 9/11

Despite this criticism of the federal government’s border control policies post-9/11, it must be noted that the government has employed a number of proactive measures to improve border security and frustrate attempts by

44. MALKIN, supra note 3, at 165.
46. For an in-depth discussion regarding the nature and scope of these weapons, see GAVIN DEBECKER, FEAR LESS: REAL TRUTH ABOUT RISK, SAFETY, AND SECURITY IN A TIME OF TERRORISM 98-115 (2002).
47. Senate Hearing, supra note 6 (statement of Sen. Dorgan). Although our nation must strive to thwart terrorist entry into the United States, we must not presume that all foreigners are terrorists. Hernan Rozemberg, Immigration Reform May Be a Casualty of Sept. 11 Terror, THE ARIZ. REPUBLIC, Sept. 6, 2002, at 1A, LEXIS, News Library.
48. MALKIN, supra note 3, at 229.
terrorists to enter our country. These efforts are especially noticeable at
established border checkpoints. Since 9/11, funds have been appropriated to
promote further training and proficiency of INS inspectors\(^5\) and to improve
the INS and the Custom Service’s border security technology.\(^5\) An
appropriation was also included for increased narcotics and antiterrorist
detection equipment to be used at border checkpoints.\(^5\) Additionally, as
mentioned earlier in this Comment,\(^5\) the federal government appropriated
funds to increase the quantity and quality of technological equipment at
border checkpoints and to triple the number of Border Patrol agents, Customs
Service personnel, and INS inspectors on the northern border.\(^5\) Border Patrol
agents were granted an increase in their annual basic rate of pay,\(^5\) and the
President’s proposed 2003 budget includes funds to hire approximately 500
more security agents.\(^5\) A “comprehensive preparedness program” was
enacted; this program includes plans to train and equip border security agents
to counter the smuggling of weapons of mass destruction.\(^5\)

The federal government also has commissioned studies to evaluate border
control effectiveness. Studies were commissioned to determine the feasibility
of developing an intergovernmental network of electronic data systems that
operates between all countries participating in the visa waiver program,\(^5\)
to develop a method of enhancing the flow of commerce and people at border
checkpoints,\(^5\) to determine the feasibility of establishing a North American
Security Program between the United States, Canada, and Mexico,\(^5\) and to
ascertain whether Customs Service personnel are provided appropriate
training.\(^5\)

To further improve border security, the federal government has attempted
to facilitate cooperation with the Canadian government. Canada and the

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102, 116 Stat. 543, 102 (2002); Uniting and Strengthening America by Providing Appropriate Tools
Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-
53. See supra Part II.A.2.
54. USA PATRIOT ACT § 402.
56. Remarks by Senator Robert C. Byrd: “Protecting the Nation From Terrorist Attack,” FIN.
United States have begun data sharing, and the FBI has granted the Royal Canadian Mounted Police access to the fingerprint database. The INS and other federal border inspection agencies are now permitted to conduct joint U.S./Canada inspections on the international border. The United States and Canada signed a “Smart Border Declaration” that implements measures to provide for the secure flow of people and goods, to improve the border’s infrastructure, and to promote information and intelligence sharing between the two countries. Thus, the federal government has facilitated a number of efforts to improve border security, and these efforts are especially beneficial to aid in terrorist detection at established border checkpoints.

C. Remaining Vulnerability to Terrorist Attack

The federal government’s efforts since 9/11 to remedy security troubles at the northern border’s established crossing points constitute a commendable response to a complex and immense security issue. However, little has been done to improve border security for the thousands of miles of open land between these crossing points. The federal government’s efforts are insufficient to protect the states from further terrorist invasions and attacks, as there “seems to be this . . . disconnect between what the people who are on the job in the field say they need and what we hear in Washington on the organizational charts of what they need.” The federal government can continue to sidestep controversy by appropriating funds and Border Patrol guards in small increments, but “outside experts argue that more frontline agents alone will provide little extra safety without a comprehensive strategy for managing U.S. border security.”

62. All Things Considered: Controversy Over the Use of National Guard Troops to Patrol the US Borders with Mexico and Canada (National Public Radio broadcast, Mar. 13, 2002), LEXIS, News Library.
65. As mentioned above, the government tripled the number of Border Patrol agents and appropriated funds to improve technological support at the northern border after the 9/11 attacks. See supra Part II.A.2. Yet, each guard is forced to cover, at the very least, four miles of unchartered territory at one time, with many guards forced to cover much greater amounts of land. The government’s efforts since 9/11 do not sufficiently resolve the security dilemma on our borders.
67. Terrorism: Questions & Answers, supra note 30; see also Amy Borrus, Keep America’s Gates Open. Just Watch Them Better, BUS. WEEK, Nov. 19, 2001, LEXIS, News Library (“[T]he wave of illegal Mexican immigration in the 1990s occurred despite a threefold increase in patrol agents along the southern border . . . . If hundreds of thousands of poor Mexicans can sneak into the U.S. each year, so can a terrorist with a sophisticated support network.”); Siobhan Gorman, et al.,
The government's post-9/11 efforts are not sufficient to satisfactorily improve border security at the areas of the border between established crossing points, and these efforts fail to protect the states from further terrorist invasion. Another terrorist attack will never be entirely preventable even with increased security, but the federal government can decrease the likelihood of another attack with increased border control. Although more Border Patrol agents have been added along the northern border, these numbers still are not sufficient to protect the states from a terrorist invasion because of the sheer amount of territory these agents must cover. Additionally, current agents are exiting their positions almost as quickly as they are being added: The San Diego sector lost almost 200 Border Patrol agents in the first six months of 2002, as many agents departed for higher paying jobs as airport security guards and air marshals. Even after 9/11, many of the established crossing points on our northern border are manned during only daylight hours, and criminals "know the times when the fewest [agents] are on duty, and they plan their illegal operations accordingly." Further, a number of widely publicized incidents involving individuals who illegally entered this country, including the Washington D.C. "Serial Sniper" and a freighter filled with Haitian refugees, remind us precisely why the government's border control efforts have proven unsatisfactory since 9/11. Despite these documented

Preventing New Attacks, THE NAT'L J., Aug. 10, 2002, LEXIS, News Library [hereinafter Gorman, Preventing New Attacks] ("In lieu of coming to terms with illegal immigration or focusing on how to restructure the INS, the federal government's policy is merely to beef up personnel along the borders . . .").

68. See supra Part II.A.2 and note 65.


72. One cannot easily forget the images of Haitian refugees streaming off a fifty-foot wooden freighter at the Florida shore, and these individuals were able to reach the shores of our nation in the middle of the day. Porteous, Critics Decry Ease of Getting Ashore, supra note 49. One retired Border Patrol agent saw this incident as "proof that anyone can enter the country illegally if he tries hard enough." Id. Similarly, our nation will be haunted by memories of John Lee Malvo, the Washington D.C. "serial sniper"; prior to his acts of murder, the Border Patrol handed Malvo over to the INS under the assumption that he would be deported after it identified him as an illegal alien and detained him. The O'Reilly Factor: Tension Between U.S. Border Patrol Agents vs. the INS (FOX News television broadcast, Oct. 29, 2002), available at http://www.foxnews.com/story/0,2933,66967,00.html. Instead, the INS released him, illustrating that our nation's security problems stretch far beyond our unmanned borders. Id.; see also The O'Reilly Factor: The War Between the Border Patrol & the INS (FOX News television broadcast, Nov. 18,
problems on our northern border, the current Administration is attempting to cut funding for border security by $705 million,\textsuperscript{73} even though an estimated 480,000 new illegal aliens entered the United States in the ten months following 9/11.\textsuperscript{74}

Additionally, the technological equipment acquired since 9/11 has been widely written off as inadequate. Since 9/11, the technological devices have been used "too haphazardly and sporadically to significantly bolster security,"\textsuperscript{75} and most of the equipment purchased since 9/11 "has largely been the same as the gear already in use."\textsuperscript{76} Small airplanes are still able to fly undetected from Canada to small airports in northern Minnesota, and officials admit that the radar view in this area is incomplete.\textsuperscript{77} Some Border Patrol sectors have received new equipment, such as specialized cameras, to be utilized for terrorist detection, but because these sectors still lack manpower, it is understandable why one border agent asserted that he has "never met a camera that can climb down from a pole and take an illegal alien [or terrorist] into custody."\textsuperscript{78} Further, our federal government does not hesitate to equip troops overseas with high-tech equipment (these troops are, by the way, guarding borders of other countries),\textsuperscript{79} but it refuses to provide the personnel guarding our borders with comparable equipment. As one Senator asserted:

> Our troops in the desert are bouncing their communications off of satellites, while our homeland defenders may have to communicate with twine and coffee cans.... When it comes to fighting overseas, this Administration's attitude is spare no expense. When it comes to fighting the war here at home, this Administration prefers to shop in bargain basements.\textsuperscript{80}

The attacks of 9/11 distressingly illustrated the reality that protection is

\textsuperscript{73} Senator Byrd, Protecting the Nation, supra note 56.

\textsuperscript{74} Matthew Maddox, Military Needed to Enforce U.S. Border, THE BATTALION, July 1, 2002, LEXIS, News Library [hereinafter Maddox, Military Needed to Enforce U.S. Border]. One can only hope that none of the aliens entering through our northern border were terrorists.

\textsuperscript{75} Gorman, Preventing New Attacks, supra note 67.

\textsuperscript{76} Id.

\textsuperscript{77} Van Susteren, supra note 16. As one commentator stated with respect to this security concern: "[T]here are so many ways to cross our northern border into the United States... that it would seem to me a... general aviation aircraft would be a lot more trouble than one needed to go to get across the border." Id.

\textsuperscript{78} MALKIN, supra note 3, at 8.

\textsuperscript{79} Maddox, Military Needed to Enforce U.S. Border, supra note 74.

\textsuperscript{80} Senator Byrd, Protecting the Nation, supra note 56.
not a prerequisite in our workplaces, schools, and homes. The legislative and executive branches must either deploy troops or greatly increase the number of Border Patrol agents and equipment on the northern border so this task does not have to fall elsewhere, but it has become apparent that these branches are willing to employ only incremental measures to improve security. In the meantime, terrorists can enter and exit our nation through the porous northern border virtually at will.

D. Rationales Underlying the Political Branches’ Laissez Faire Approach to Border Control

Despite the incidents documented above, which illustrate our government’s failure to protect the states from a terrorist invasion, the federal government has refused to plug our nation’s borders. Two chief rationales can be advanced for this refusal. The first rationale is the federal government’s ubiquitous desire for political correctness as well as concerns regarding international relations. The second rationale relates to the economic implications plugging our borders will have for the nation.

1. Political Correctness and International Relations

"[T]he exclusion of persons from entry into the United States for ideological or political beliefs has long been a source of controversy,"[81] and for a Republican White House that is strapped for minority votes,[82] any loss of support could mean a loss of employment in 2004. On numerous occasions, commentators have criticized harshly the President and other politicians for their failure to address border control issues in order to obtain and retain minority votes, especially those of Mexican-Americans.[83] Even Homeland


83. See, e.g., Gorman, Preventing New Attacks, supra note 67 ("[T]he White House has been reluctant to address the problem of illegal immigration, for fear of upsetting Hispanic voters."); M.E. Sprengelmeyer, Tancredo Assails Bush Policy: GOP Congressman Says Open Border Invites Terrorism, ROCKY MOUNTAIN NEWS, Apr. 20, 2002, at 1B, LEXIS, News Library [hereinafter Sprengelmeyer, Tancredo Assails Bush Policy] ("Bush is pushing to give certain illegal immigrants amnesty partly out of misguided 'altruism,' but also to woo Hispanic voters . . . ."); The O'Reilly Factor: Talking Points: Trouble on Our Borders (FOX News television broadcast, May 24, 2001),
Security Director Tom Ridge has not forgotten his political affiliation: When asked why he would not deploy the National Guard to the southern border, he replied that there are “political and cultural reasons” for not doing so.\textsuperscript{84} Well, “[a]t least Ridge is honest. He’s telling you, ‘We want Hispanic votes.’”\textsuperscript{85} As one commentator pithily asserted with respect to these political shenanigans: “There’s a fine line between reaching out and selling out our national security for votes.”\textsuperscript{86}

Similarly, some have suggested that President Bush’s close relationship with Mexican President Vicente Fox constitutes a barrier to augmented border control.\textsuperscript{87} President Fox visited the United States immediately preceding 9/11; prior to the terrorist attacks, “there seemed to be a new opening in the United States’ relationship with Mexico, and a possibility for re-examining immigration and border safety policies.”\textsuperscript{88} Although the events of 9/11 quickly altered our national focus from immigration policies to fighting terrorism, this relationship likely constitutes another reason why President Bush will employ only incremental and virtually unnoticeable measures to augment border security.

This opposition to augmented border security is not limited to our neighbor to the south. Many Canadians have opposed the placement of personnel on the northern border; this lack of support from our northern neighbor also illustrates why our representatives fail to properly address this issue. Recently, one Canadian forestry worker crossed the border to fuel up at an American gas station without notifying American officials and was arrested.\textsuperscript{89} He had a rifle in the back of his truck.\textsuperscript{90} Canadians were outraged, reportedly labeling this incident as “yet another sign of American heavy-handedness” with respect to border control, as border crossing at will had been quietly and perpetually permitted to persist.\textsuperscript{91} Our nation’s politicians are extremely concerned with international relations, as they should be, but


\textsuperscript{85} Id.

\textsuperscript{86} MALKIN, supra note 3, at 62.

\textsuperscript{87} Diaz, Ramstad Urges Reinforced Borders, supra note 37.

\textsuperscript{88} Phares, Border Tightens, Relationship Chills, supra note 81.


\textsuperscript{90} Id.

\textsuperscript{91} Id.
most Americans would not deny the following fact: "It is [also absolutely] essential that the U.S. government place the welfare of U.S. citizens above the interests of non-citizens."  

2. Economic Implications

Our nation's legislative and executive branches also abstain from plugging our northern border because of economic concerns. As with any substantial governmental security effort, the taxpayers will bear the burden of funding the additional personnel and improved technological equipment. Millions of Americans deem homeland security that of paramount importance and will absolutely expend this money, but dissent will resound from those taxpayers that have no desire to invest in insurance for our nation.

Additionally, the North American Free Trade Agreement (NAFTA) encourages liberated trade between the North American countries, and Canada is the United States' number one trading partner, with nearly $1 billion of commerce passing between the countries each day. The established crossing points at our northern and southern borders were nearly brought to a standstill post-9/11 because of security concerns, thereby harming the flow of commerce between the two countries. Some commentators assert that increasing the number of border personnel would further harm trade between the two countries. This argument is not compelling because plugging the northern border at areas outside the border checkpoints will serve only to hamper illegal trade between the United States and Canada, including the transportation of drugs, arms, and people into our nation—and if plugging the northern border hampers this form of commerce, is this not something our politicians should advocate?

Another economic concern that rationalizes our representatives' failure to avoid plugging our nation's borders is the economic repercussions for businesses that employ illegal immigrants. Many businesses in our nation rely on illegal immigrants to provide cheap labor, and especially during the current economic downturn, many of these businesses could not survive if forced to pay minimum wage to all workers. This concern is a viable one in terms of our nation's economic position, but when our representatives

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92. Maddox, Military Needed to Enforce U.S. Border, supra note 74.
95. Phares, Border Tightens, Relationship Chills, supra note 81.
96. U.S. to Triple Guards, supra note 35; see also Gorman, A Nation Without Borders, supra note 34 ("Congress has routinely shortchanged the Border Patrol . . . because [it] create[s] friction in a free-trade oriented system.").
97. Border Sieve, supra note 69.
consider this fact when formulating their stance on border control, they are doing all Americans a great injustice by advocating the employment of illegal immigrants in generally harsh working conditions for little or no pay, thereby exploiting these individuals. Thus, our nation’s security interest unquestionably must be balanced with its economic needs, but “[o]bviously, if it’s a choice between the two, security must come first.”

E. Border Militarization

The political opposition to border militarization is even more evident than the opposition to plugging our borders with non-military border personnel. This section will explore the issue of border militarization and highlight the political response to the efforts of Colorado Representative Tom Tancredo, one of the few politicians who avidly has promoted border militarization. This section will also discuss the Posse Comitatus Act, a law that may hinder border militarization efforts.

1. The Political Response to Border Militarization

Seventy-nine percent of Americans support the militarization of our borders, but the vast majority of our representatives will not advocate military deployment to the border. Unlike the majority of political issues, this opposition to border militarization is not limited to party lines. Bill and Hillary Clinton, Al Gore, and Ted Kennedy oppose this move, as do Newt Gingrich, Jack Kemp, and Drug Czar John Walters. In contrast to our representatives, groups of American citizens are so passionate about our lax border policies that they have actually formed their own Border Patrol groups.

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98. Senate Hearing, supra note 6 (statement of Sen. Mike Dewine (D-OH)).
99. See supra note 13 and accompanying text.
100. Despite the federal government’s widespread opposition to border militarization, the dire circumstances following the 9/11 attacks compelled the federal government to temporarily deploy 1600 National Guard troops to the Mexican and Canadian borders to aid with inspecting goods and improving the flow of traffic at established crossing points. See Bradley Graham, Rumsfeld Reconsiders Decision Not to Arm Troops at Border, THE WASH. POST, Mar. 28, 2002, at 6, LEXIS, News Library. However, the government did its best to avoid any appearance of militarization: The troops were not permitted to be armed, even though critics claimed that this placed unarmed troops in dangerous situations. Id. Additionally, the government quickly made it known to the public that the move was only temporary (the troops were stationed on the border only two to four months). See James W. Crawley & Leonel Sanchez, National Guardsmen End Border-Crossing Duties Today, THE SAN DIEGO UNION-TRIB., July 19, 2002, at B1, LEXIS, News Library. Tom Ridge, Director of Homeland Security, publicly noted that “the last thing we want to do is militarize the border between friends.” Maria Pe, Border Militarization is Temporary Measure, FIN. TIMES INFO., Feb. 28, 2002, LEXIS, News Library.
and volunteer their days and nights patrolling the border—*while armed*. This divergence between what Washington publicly advocates and what citizens actually do epitomizes the difference in opinions with regard to the militarization of our borders.

The callous treatment of one United States Congressman exemplifies why many politicians will not publicly advocate the militarization of our borders. Colorado Representative Tom Tancredo launched an initiative to militarize the northern and southern borders. He delivered approximately 30,000 petitions to the White House, urging the President to deploy military personnel to the border, as an interim step, to enhance the federal agencies that are engaged in border security; the petition resulted in an overload of the White House email system. Tancredo stated the following regarding this public espousal of his initiative:

> Perhaps the White House is finally getting the message . . . . It's about time they realize that the people of this country justifiably feel that the U.S. border is a sieve. It poses a real threat to our security and ignoring this fact represents the most egregious evidence that the federal government is shirking its responsibility to the people of this nation.

Representative Tancredo is one of the only politicians that has publicly advocated border militarization, and he certainly is the most adamant. Tancredo has overtly avowed that President Bush's open-door policy is politically motivated, leaving the country highly vulnerable to another terrorist attack as a result. Referring to the average citizen's stance on border militarization, he has accused the President of being "out of step with the majority of Americans." Additionally, Tancredo controversially asserted that if a terrorist illegally entered the United States through its borders and perpetrated another terrorist attack, the blood of those killed

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103. *O'Reilly: Continuing Chaos on the Border*, supra note 102.


105. Id.


107. The statistics support Tancredo's assertion. *See supra* Part II.
would be on the hands of Congress and the President.108

After this controversial statement was made public, top Bush adviser Karl Rove informed Tancredo that he was unwelcome at the White House Christmas Party and warned Tancredo never again to “darken the doorstep of the White House.”109 Hispanic groups have labeled Tancredo’s statements as “close to being racist.”110 Additionally, both political parties have criticized Tancredo for his public disagreement with the President; as one commentator asserted: “He seems to have little concern with advancing within the Republican Party or ingratiating himself with a Republican president... [and his statements] will certainly complicate the president’s efforts to improve the Republican Party’s standing with Hispanics and Asian-Americans.”111 Thus, the ostracism that has been bestowed upon Representative Tancredo illustrates exactly why more politicians will not advocate border militarization and publicly transgress the President’s stance on lax border control policies.

In contrast to Representative Tancredo’s proactive approach to border militarization, other representatives have asserted a number of unconvincing, and sometimes virtually nonsensical, rationales as to why our borders should not be militarized. Texas Congressman Ciro Rodriguez maintained that the border should not be militarized because “there’s no chaos on the border”; but when confronted with the fact that more than a million illegal aliens cross the southern border every year, and these aliens cost our country $24 billion, he simply opined that the military would not help this problem anyway.112 Another Texas politician, Representative Silvestre Reyes, asserted two negative implications that would result from border militarization: “First it affects our troops and their readiness. Secondly, it gives the border communities the equivalent of martial law to contend with.”113 Edward Emanuel, the chairman of the Tohono O’Odham Indian Nation, opposes the militarization of the border based on the “liability” involved “because we

109. Id.
111. Sprengelmeyer, Tancredo Assails Bush Policy, supra note 83.
112. O’Reilly: Continuing Chaos on the Border, supra note 102. Additionally, one commentator opposes militarization because, “[a]t best, an active armed presence would reduce but not eliminate those determined to enter the country illegally.” Wes Hasden, In Search of Safer Borders, CHATTANOOGA TIMES/CHATTANOOGA FREE PRESS, June 20, 2002, at B6, LEXIS, News Library [hereinafter Hasden, In Search of Safer Borders]. This point may be valid, but certainly this argument does not mean that our current political lethargy is the superior approach.
have drug smugglers that are armed with machine guns." Incredibly, Mr. Emanuel’s statement implies that governmental apathy in the face of dangerous chaos is the superior solution. Other commentators allege that the militarization of the border would hamper trade between Canada and Mexico, but this argument fails if the military is placed only in the areas where it is most needed—in the vast territory between established crossing points.

2. The Posse Comitatus Act: A Possible Bar to Border Militarization

Although these arguments advanced by our representatives in opposition to border militarization are ineffectual at best, most representatives and commentators would strongly enhance their arguments by acknowledging a law that may not legally permit militarization of the border. The 1878 Posse Comitatus Act was enacted in response to the use of troops in the southern states after the Civil War to assist with enforcement of the 1867 Reconstruction Act. The Act provides as follows:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.

The Posse Comitatus Act "prohibits the use of the military to execute the civil laws of the United States." The Act is inapplicable to the Reserves and the State National Guard when the members are not on active federal duty, and it does not apply to the Coast Guard. Additionally, a number of exceptions to this Act exist: The Secretary of Defense may assist the Department of Justice in an emergency situation if nuclear material is involved, and the Act does not prohibit the President from using the military in civil emergencies. Currently, there is "considerable confusion both in


115. See, e.g., Diaz, Ramstad Urges Reinforced Borders, supra note 37; Hasden, In Search of Safer Borders, supra note 112.


117. Id.

118. Id.

119. Id.

120. Id.
the public and among lawmakers about what this law actually says and whether any changes in it might be warranted.\textsuperscript{121} Amid calls for revisiting and defining the Act during the War on Terror, the Bush administration will reportedly review and attempt to define the scope of the Act.\textsuperscript{122} Thus, although the majority of our representatives fail to advocate border militarization despite public predilection, and they tend to exert unconvincing arguments to explain their opposition, a valid argument may be asserted that, at present, the militarization of our border is not permitted under the Posse Comitatus Act.

In conclusion, the federal government’s efforts since 9/11 to improve border security between established crossing points fail to sufficiently protect the states from a future terrorist invasion. The federal government has failed to augment border security despite public support for this action, and the members of the federal government especially have avoided the controversial issue of border militarization. In all likelihood, the federal government’s political concerns dictate that this governmental apathy with respect to the issue of border security will persist. Thus, because the federal government’s border control policies leave the states unprotected from a terrorist invasion, the federal government’s inaction likely violates a constitutional mandate: The Invasion Clause.

III. THE FEDERAL JUDICIARY, JUSTICIABILITY, AND CONSTITUTIONAL ENFORCEMENT

In transgression of the constitutional provision known as the Invasion Clause, the legislative and executive branches will not conclusively employ sufficient border security measures, and they fail to protect the states from a future terrorist invasion. If Americans are to be protected from terrorist invasion, the only branch of the federal government left to mandate

\begin{itemize}
  \item \textsuperscript{121} Joseph D’Agostino, \textit{Will Military Enforce Domestic Law?}, at http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=28433 (July 29, 2002) [hereinafter D’Agostino, \textit{Will Military Enforce Domestic Law?}]. In 6 U.S.C.S § 466 (Law. Co-op. 2002), Congress recently reaffirmed the importance and applicability of this Act. However, although the law exists, it may not always have been adhered to, thereby furthering the confusion surrounding this law. Presidents Nixon and Reagan deployed military forces to replace striking employees. \textit{Id}. The National Guard has been deployed during riots, to secure airports, and during the desegregation of the South. \textit{The Big Story with John Gibson: Interview with Jim Bunning} (FOX News television broadcast, July 16, 2002), LEXIS, News Library. Some commentators asserted that the deployment of National Guard troops to aid the Border Patrol post-9/11 violated the Act, see \textit{supra} note 100, but this argument likely is without merit because the troops did not carry weapons and were not directly used for domestic law enforcement purposes. \textit{All Things Considered: Controversy Over the Use of National Guard Troops to Patrol the US Borders with Mexico and Canada} (National Public Radio broadcast, Mar. 13, 2002), LEXIS, News Library.
  \item \textsuperscript{122} D’Agostino, \textit{Will Military Enforce Domestic Law?}, \textit{supra} note 121.
\end{itemize}
governmental compliance with the Invasion Clause is the federal judiciary. To begin the determination of whether the federal judiciary may reach the merits of an Invasion Clause claim, the basic responsibilities of the federal judiciary must be discussed. Additionally, because members of the federal judiciary have dismissed as political questions the only cases in which the Invasion Clause was litigated, the modern scope of the political question doctrine must be addressed to determine if the states’ allegation that the federal government has failed to protect them from a “terrorist invasion” would similarly present a political question. First, this Part discusses the fundamental obligation of the judiciary to interpret the Constitution and enforce justiciable constitutional provisions. Second, this Part addresses the means by which the constitutional structure serves to insulate the federal judiciary from majoritarian and political pressures and why this insulation renders the judiciary the preeminent branch to enforce controversial constitutional provisions. Third, potential bars to the states’ Invasion Clause claim will be discussed; these potential bars include the doctrine of standing and the political question doctrine.

A. Constitutional Interpretation and Enforcement

The Invasion Clause was included in the Constitution so the federal government would protect the rights of the states and the individual inhabitants of the states, and “the judiciary is clearly discernible as the primary means through which these [constitutional] rights may be enforced.” Ever since Justice Marshall uttered the oft-cited words: “It is emphatically the province and duty of the judicial department to [s]ay what the law is,” it has appeared that “it is the Supreme Court’s province and duty to answer all constitutional questions” and that the judicial branch is vested with the ultimate authority to determine the meaning of the Constitution. This authority is subject to a handful of limitations, such as the political question doctrine and standing requirements, which will be discussed in much more detail shortly. Notwithstanding these exceptions, it is the Court’s duty to interpret the Constitution, enforce constitutional provisions, and interpret and apply federal law.

123. See infra Part IV.B.
128. See infra Part III.C.
rights, and resolve disputes. Furthermore, the judiciary must not permit unconstitutional governmental action to continue without intervention, as "the traditional responsibility of the courts as the last guardians of the Constitution . . . point[s] to the propriety of an active role for the judiciary in ensuring governmental compliance with the law." As Professor Martin Redish maintained: "The moral cost of [permitting a manifest constitutional violation to continue], both to society in general and to the Supreme Court in particular, far outweighs whatever benefits are thought to derive from the judicial abdication of the review function." Moreover, if the Court avoids an otherwise justiciable claim in deference to the judgment of the legislative and executive branches, the Court transgresses its role as the ultimate interpreter of the Constitution, as "laws that are not subject to judicial enforcement are not laws at all." If the Court refuses to enforce the Invasion Clause in deference to the political branches, and the political branches refuse to comply with the Clause because of political concerns, the judicial power is rendered a nullity and the constitutional language becomes merely precatory. This deference leaves the nation in a "constitutional state of nature, in which the constitutional position that prevails is the one that is the politically or physically most powerful." Thus, the Court is obligated to interpret and enforce the Constitution and resolve justiciable disputes.

131. Id. at 107.
132. Id. at 110 (quoting Martin H. Redish, Judicial Review and the "Political Question," 79 NW. U. L. REV. 1031, 1060 (1984)).
136. Martin H. Redish, Judicial Review and the "Political Question," 79 NW. U. L. REV. 1031, 1050 (1984). Additionally, if the judiciary defers to the political branches to interpret and enforce a constitutional provision, "the political branches that are accused of violating the Constitution are allowed to judge the constitutionality of their own behavior. No check exists. Nor is there the reasoned elaboration of the meaning of these constitutional provisions, something only the judiciary provides." CHEMERINSKY, supra note 127, at 99.
B. Insulation From Political and Majoritarian Pressures

Of the three branches of federal government, the federal judiciary is best suited to enforce controversial constitutional provisions because the judiciary is insulated from majoritarian and political pressures. Article III of the Constitution grants federal judges life tenure and salary protection.\(^{137}\) The Framers granted federal judges life tenure “precisely so that they will not be accountable to the people.”\(^{138}\) This non-accountability serves to insulate the federal judiciary from majoritarian pressures.

Similarly, the federal judiciary is the “authoritative interpreter of the Constitution” because it “can best enforce the Constitution against the desires of political majorities.”\(^{139}\) The judiciary tends to be shielded from political pressures\(^{140}\) because, much unlike the executive and legislative branches, federal judges never face reelection.\(^{141}\) The federal judiciary is best suited to interpret the Constitution because its “primary commitment is to the Constitution, not to gaining reelection.”\(^{142}\) Therefore, “[i]f anything is clear from the structure of the Constitution and the language of Article III,” the Constitution relieves the judiciary from political pressures to ensure the federal judiciary’s independence.\(^{143}\) The modern Court is well suited to interpret and enforce the Invasion Clause in the context of border security because it can interpret the Constitution and formulate this determination without worry of political conformance. Thus, the basic responsibility of the judicial branch is to enforce constitutional provisions, and the Constitution was structured to insulate courts from politics so they can render controversial

\(^{137}\) U.S. CONST. art. III, § 1; see also Erwin Chemerinsky, Guaranteeing a Republican Form of Government: Cases Under the Guarantee Clause Should be Justiciable, 65 U. COLO. L. REV. 849, 865 (1994) [hereinafter Chemerinsky, Guarantee Clause].

\(^{138}\) ROBERT H. BORK, THE TEMPTING OF AMERICA 5 (1990); see also CHEMERINSKY, supra note 127, at xi-xii (“[I]t is desirable for society to have an institution such as the Court, which is not popularly elected or accountable, to identify and protect values that it deems sufficiently important to be constitutionalized and safeguarded from social majorities.”); WILLIAM GANGI, SAVING THE CONSTITUTION FROM THE COURTS 221 (1995) (“[S]ince judges have life-tenure and are insulated from electoral accountability they are well suited to carrying out the Court’s task.”); id. at 41 (“The delegates . . . consciously departed from the republican principle of elector accountability.”). But see Barkow, supra note 126, at 327 (positing that the political branches, as opposed to the federal judiciary, should answer constitutional questions because the political branches are accountable to the people).

\(^{139}\) CHEMERINSKY, supra note 127, at 86.

\(^{140}\) Id.; see also id. at 89 (The judicial branch is “unique in that it is the only institution committed to arriving at decisions based entirely on arguments and reasoning.”). However, because the judicial nomination procedures are inherently political, this shield from political pressure may never be absolute.

\(^{141}\) Id. at 86.

\(^{142}\) Id. at 88.

\(^{143}\) Chemerinsky, Guarantee Clause, supra note 137, at 865.
decisions without fear of political and majoritarian backlash. However, the federal judiciary likely can reach the merits of an Invasion Clause claim only if the claim does not present a political question.

C. Potential Bars to an Invasion Clause Claim: Standing and The Political Question Doctrine

The Invasion Clause has been litigated in an extremely limited context. In the only cases in which states have alleged a governmental violation of the Invasion Clause, a number of states brought suit, asserting that illegal aliens had invaded their states and that the federal government failed to protect them from this, if you will, “alien invasion.” The states sought reimbursement from the federal government for monies expended on illegal aliens. In all of these cases, the courts found that the issue presented a nonjusticiable, political question pursuant to the Supreme Court’s holding in Baker v. Carr. These Invasion Clause cases will be discussed in detail in the subsequent Part.

Because the prior Invasion Clause claims were dismissed as nonjusticiable questions, the justiciability of the Invasion Clause will be the vanguard issue if the states attempt to bring an Invasion Clause claim to the federal judiciary. Thus, this Part will address in detail the scope and modern status of the political question doctrine in the realm of foreign and domestic affairs. Additionally, the doctrine of standing will be discussed.

1. The Doctrine of Standing

Although the crux of this Comment addresses the political question doctrine and the justiciability of the Invasion Clause, the doctrine of standing must also be discussed, as these two doctrines are inextricably interwoven. Pursuant to the doctrine of standing, all courts must inquire “whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.” Standing has also been described as follows: “[T]he very first question that is sometimes rudely asked when one person complains of another’s actions: ‘What’s it to you?’” The doctrine of standing, similar to the political question doctrine, is based on the concept of separation of powers.

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144. 369 U.S. 186 (1962).
145. See infra Part IV.B.
148. Id. at 306; see also Allen, 468 U.S. at 750 (“Article III of the Constitution confines the federal courts to adjudicating actual ‘cases’ and ‘controversies.’”).
The Supreme Court in *Lujan v. Defenders of Wildlife* explained the constitutional components of the modern standing doctrine. The Court stated as follows:

Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical....'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

In addition to the constitutional components of the modern standing doctrine, the doctrine is comprised of prudential components, which have been described as follows:

First, the Court has required that the injury be within the "zone of interest" to be protected by the Constitution or statute. Second, the Court has often refused to adjudicate claims on behalf of third parties not before the Court. Finally, ... the Court has rejected cases that allege "generalized grievances," injuries that are not peculiar to an individual or a small body of people, even when the "technical" injury-in-fact specification is satisfied.

Thus, although the crux of this Comment addresses the justiciability of the Invasion Clause, the states must also prove that they have standing to assert the claim that the federal government's lax border control policies violate the Invasion Clause.

2. "Is There a 'Political Question' Doctrine?"

In this section, the historical underpinnings of the political question

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150. Id. at 560-61 (alterations in original) (internal citations omitted).
152. The doctrine of standing will be applied to the facts of the present Invasion Clause analysis in Part V.A.
The role of the invasion clause post-9/11

Additionally, the modern scope of the political question doctrine will be discussed.

a. Baker v. Carr and the Political Question Doctrine

The historical underpinnings of the political question doctrine lie with the Court's decision in Marbury v. Madison, in which Justice Marshall opined: "Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." This classical form of the political question doctrine is grounded in the Constitution, but the doctrine has evolved to include prudential components as well as constitutional components. The political question doctrine is derived from the concept of "separation of powers." Pursuant to the political question doctrine, "certain allegations of constitutional violations are not to be adjudicated by the federal judiciary even though all of the jurisdictional and other justiciability requirements are met." If the political question doctrine is applicable, the federal court rules that it cannot hear the claim that a constitutional violation has occurred, and it defers the question for resolve through the political process.

With its holding in Baker v. Carr, the United States Supreme Court pioneered a framework pursuant to which courts may determine whether a case or controversy presents a nonjusticiable, and thus political, question. The Court's decision in Baker v. Carr included the Court's "most detailed discussion of the political question doctrine to date." When the Baker decision was handed down, it was understood that the "application of the Baker 'formulations' through 'discriminating inquiry' would narrow the scope of the political question doctrine."

154. Barkow, supra note 126, at 248 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 170 (1803)).
155. Id. at 247-48.
156. Id. at 253 ("[T]he prudential political question doctrine is not anchored in an interpretation of the Constitution itself, but is instead a judge-made overlay that courts have used at their discretion to protect their legitimacy and to avoid conflict with the political branches.").
159. Id. at 853; see also Scott Birkey, Note, Gordon v. Texas and the Prudential Approach to Political Questions, 87 CAL. L. REV. 1265, 1266 (1999) ("[T]he doctrine in its entirety dictates that courts should refrain from adjudicating nonjusticiable political questions from both a prudential and a constitutional perspective.").
161. Barkow, supra note 126, at 264.
In Baker, Tennessee residents challenged a state statute that based the apportionment of voting districts on a 1901 census. The plaintiffs sought a declaration that the reapportionment statute was unconstitutional because the statute "debase[d]... their votes" and denied them their right to equal protection pursuant to the Fourteenth Amendment. The issue before the Court was whether the claim presented a nonjusticiable, political question.

To illuminate the components of the political question doctrine, Justice Brennan, writing for the majority, discussed a number of attributes of the doctrine; four of the attributes most relevant to the present analysis are as follows. First, the determination of justiciability "is primarily a function of the separation of powers." Second, "[i]n determining whether a question falls within [the political question] category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant considerations." Third, because the Court is the "ultimate interpreter of the Constitution," the Court is vested with the power to decide whether the Constitution commits a matter to another branch of government. Fourth, the political question doctrine is implicated only when there exists a relationship between the judiciary and the other branches of the federal government, but the doctrine is not implicated when there is a relationship between the federal judiciary and the states.

After scrutinizing several cases in which courts had utilized various forms of the political question doctrine to articulate their jurisdictional decisions, the Court combined a number of considerations underlying these decisions, thereby formulating the political question doctrine. Applying this doctrine to the facts of the case before it, the Court held that the case presented a non-political, justiciable claim, and the equal protection challenge could proceed. The Baker v. Carr Court's oft-quoted components of the political doctrine.

163. Baker v. Carr, 369 U.S. 186, 187 (1962). This statute allocated legislative representation based on the total number of qualified voters within the counties. Id. at 189. Between the time of the census and the time the case reached the Supreme Court, Tennessee's population had grown exponentially and was substantially redistributed; this growth resulted in a "shifted and enlarged voting population." Id. at 192.
164. Id. at 194.
165. Id.
166. Id. at 210.
167. Id.
168. Id. (alterations in original) (quoting Coleman v. Miller, 307 U.S. 433, 454-55 (1939)).
169. Id. at 211.
170. Id. at 210.
171. Id. at 226.
question doctrine are as follows:

Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.\(^{172}\)

The *Baker* decision codified the constitutional and prudential components of the political question doctrine into judge-made law. The first and second components of the *Baker* Court’s test are the constitutional components, and the third through sixth components are the prudential components.\(^{173}\) Courts must not and often will not apply each of the *Baker* criteria to the facts of their cases.\(^{174}\) If a court opts to focus only on the constitutional components, it “will tend to focus its attention on whether a conflict exists between the federal judiciary and other branches of the federal government.”\(^{175}\) Conversely, if a court focuses on the prudential components, it “will tend to examine the issue presented with an eye toward judicial manageability.”\(^{176}\) The prudential components function to conserve judicial resources and impede courts from deciding matters outside of their expertise.\(^{177}\)

b. The Modern Scope of the Political Question Doctrine

In the forty years following *Baker v. Carr*, the modern scope of the political question doctrine has resulted in a great deal of scholarly comment.

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172. *Id.* at 217.
173. Barkow, *supra* note 126, at 265; see also Birkey, *supra* note 159, at 1265 (“Many scholars recognize both prudential and constitutional aspects of the political question doctrine.”).
174. Although the *Baker* Court sets forth numerous factors to determine whether a claim presents a political question, “only two, lack of clear standards for judicial determination and the need to attribute finality to coordinate branch decisions, have been consistently and coherently articulated by the courts.” Linda Champlin & Alan Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 Hofstra L. Rev. 215, 219 (1985).
176. *Id.* at 1277.
177. *Id.* at 1265. One notable scholar, Alexander Bickel, has viewed the political question doctrine as “more prudentially limiting than constitutionally limiting.” *Id.* at 1273.
As discussed in this section, this commentary has resulted because the Court has rarely applied the political question doctrine to questions that appear to be political. Much disagreement has arisen among commentators with respect to the political question doctrine, as they disagree about the doctrine's wisdom, validity, scope, rationale, and very existence. Moreover, quite frequently, commentators have advocated the stance that the political question doctrine "ought at last . . . to be made to go away." A number of scholars and commentators have posited that the political question doctrine in its modern form should be abandoned. Professor Louis Henkin advocates the position that "all the political question cases can be read as instances of constitutional interpretation." Professor Martin Redish maintains that the political question doctrine should be abandoned. He believes that the doctrine should play no role once it is recognized that judicial review is legitimate because constitutional law is obviously and inescapably political. Redish acknowledges, however, that the federal judiciary should defer to the political branches in cases in which there is a constitutional textual commitment of a power to a political branch, but the Constitution fails to identify how this power must be exercised. Professor Erwin Chemerinsky advocates judicial deference to the political branches "only in areas where there is reason to believe that the judiciary is substantially less able than other branches of the federal government to interpret and enforce a constitutional provision.

In opposition to these views, Dean Choper advocates the notion that the judicial branch should "abstain from cases involving the Constitution's structure (e.g., separation of powers) and instead conserve its resources for protecting individual rights." Additionally, one commentator asserts two rationales to support the conclusion that it is imprudent to reject the political question doctrine in its entirety. First, the political branches would not be able to exercise constitutional judgment in true political question cases, and

178. Nagel, supra note 162, at 654.
179. Id.
180. Id.
182. Redish, supra note 136, at 1059-60.
183. Nagel, supra note 162, at 657.
185. Chemerinsky, Guarantee Clause, supra note 137, at 852.
186. Pushaw, supra note 157, at 502. One commentator believes this view should be rejected, as "[t]he Constitution's structure preserves liberty every bit as much as its provisions guaranteeing individual rights." Id.
187. Barkow, supra note 126, at 334-35.
second, the Court would be left to police the boundaries of its power.\textsuperscript{188}

Post-\textit{Baker}, the Court has done little to resolve this confusion surrounding the scope and/or existence of the political question doctrine. From the time of \textit{Baker v. Carr} to the present—a span of forty years—"a majority of the Court has found only two issues to present political questions, and both involved strong textual anchors for finding that the constitutional decision rested with the political branches."\textsuperscript{189} In more than a dozen cases, the Court expressly rejected the application of the political question doctrine.\textsuperscript{190}

The two cases in which the Court held that the political question doctrine barred judicial resolution were \textit{Gilligan v. Morgan}\textsuperscript{191} and \textit{Nixon v. United States}.\textsuperscript{192} In \textit{Gilligan}, the Court held that the question of whether the government's alleged negligence in training National Guard members caused the death of several student protestors at Kent State University presented a political question.\textsuperscript{193} The Court neglected to hear the claim for two reasons: It did not believe it was competent to regulate the National Guard's jurisdiction, and there existed a constitutional textual commitment to Congress of the ability to organize, arm, and discipline the Militia.\textsuperscript{194}

After \textit{Gilligan}, twenty years passed before a majority of the Court found that another case presented a political question.\textsuperscript{195} In \textit{Nixon v. United States}, the Court held that the issue of whether the Senate could impeach a federal judge presented a political question.\textsuperscript{196} Similar to the textual commitment in \textit{Gilligan}, the Constitution grants the Senate the "sole" power "to determine what the Constitution means by the 'tr[ial]' of impeachments," so the Court deferred the issue for congressional resolution.\textsuperscript{197} Thus, the existence of the political question doctrine has been frequently questioned because in the forty

\textsuperscript{188} \textit{Id.}

\textsuperscript{189} \textit{Id.} at 268. Although a majority of the Court has found only two cases to present political questions, a plurality of the Court in \textit{Goldwater v. Carter}, 444 U.S. 109 (1986), found that the issue as to whether the President possessed unilateral authority to terminate a treaty presented a political question. See Nagel, \textit{supra} note 162, at 649. Additionally, although the Supreme Court has shied from applying the political question doctrine since its decision in \textit{Baker}, lower courts continue to apply the \textit{Baker} analysis in determining whether to reach the merits of a case. David J. Bederman, \textit{Deference or Deception: Treaty Rights as Political Questions}, 70 U. COLO. L. REV. 1439, 1442 (1999). This Comment, however, will focus on the relationship between the Supreme Court and the political question doctrine.

\textsuperscript{190} Sandstrom Simard, \textit{supra} note 147, at 305.

\textsuperscript{191} 413 U.S. 1 (1973).

\textsuperscript{192} 506 U.S. 224 (1993).

\textsuperscript{193} Barkow, \textit{supra} note 126, at 270.

\textsuperscript{194} \textit{Id.}

\textsuperscript{195} \textit{Id.} at 271.

\textsuperscript{196} \textit{Id.}

\textsuperscript{197} \textit{Id.} at 272 (alteration in original).
years following the *Baker* decision, the Court repeatedly has failed to defer to the political branches by means of the political question doctrine. The Court’s disregard of the doctrine has led time and time again to the now infamous question: “Is there a ‘political question’ doctrine?”

As the infrequent application of the *Baker* criteria demonstrates, the political question doctrine has become largely incomprehensible to the Court, and “it has come to seem altogether normal that federal courts should resolve issues that have no distictively legal quality and that the judicial function should be thought of as political conversation.” With its fairly recent decision in *New York v. United States*, the Court even hinted at its willingness to abrogate its extremely long-standing bar on reaching the merits of Guarantee Clause claims, stating that “perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.” Consequently, the Court’s recent decisions illustrate that judicial review has risen out of the ashes, and there is “no place in it for an exemption for uncertain ‘political questions.’”

Similarly, because constitutional cases or controversies tend to be inherently political, and “the Constitution requires the Supreme Court and the lower federal courts to decide any number of ‘political’ questions as a matter of course,” the politicization of the federal judiciary comes as no surprise to many. The fact that the federal judiciary often chooses to answer political questions “challenges the notion . . . that they cannot decide them.” Thus, the fall of the political question doctrine could lead to judicial resolution of most (if not all) domestic cases or controversies—including a determination by the Rehnquist Court as to whether the federal government’s border protection policies comply with the Invasion Clause.

3. The Political Question Doctrine in the Realm of Foreign Affairs

The political question doctrine seems to have all but disappeared in the majority of the Court’s recent precedent, but the disappearance of the political question doctrine may not be absolute. Although the Rehnquist Court is

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200. *Id.*
202. *Id.* at 185.
203. Sandstrom Simard, *supra* note 147, at 303. Moreover, the notion that judicial deference is proper in cases of political questions has become antiquated, and the political question doctrine has fallen into the shadow of judicial supremacy. Barkow, *supra* note 126, at 240.
204. Barkow, *supra* note 126, at 244.
extremely unlikely to examine the political question doctrine in the context of a domestic case or controversy,\textsuperscript{206} "in the area of foreign affairs, the judiciary has traditionally practiced great restraint vis-à-vis the political branches."\textsuperscript{207} Although the modern Court is more likely than Courts of the past to find that a foreign affairs question does not present a political question, many commentators believe that the political question doctrine is thriving in the realm of foreign affairs.\textsuperscript{208}

Even though the Constitution grants the federal judiciary some power over foreign affairs, the judiciary has historically employed a laissez faire approach to foreign affairs cases or controversies.\textsuperscript{209} Justice Marshall authored the language constituting "the touchstone of the political question doctrine and its use in foreign affairs matters"\textsuperscript{210} when he noted that ""[t]he acts of [the President], as an officer, can never be examinable by the courts."\textsuperscript{211} It must be kept in mind, however, that this statement is dicta\textsuperscript{212} and does not exclude all foreign relations questions from the judiciary.\textsuperscript{213} Additionally, the Baker Court included in its discussion of the political question doctrine this declaration: "'[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.'\textsuperscript{214} This statement explicitly illustrates the Court's inclination to avoid a bright-line characterization of foreign relations questions as political questions.\textsuperscript{215}

Three key reasons have been advanced to rationalize judicial deference of foreign affairs questions to the political branches. First, because of the nature of foreign controversies, all branches of the federal government must display

\begin{itemize}
\item \textsuperscript{206} For a discussion addressing the difference between foreign and domestic affairs and the role of the courts, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) and Cherokee Nation v. Georgia, 30 U.S. 1 (1831).
\item \textsuperscript{207} Breuer, \textit{supra} note 133, at 1030; see also Franck, \textit{supra} note 205, at 4 ("Carried to its logical extreme, this doctrine holds that the political authorities are suit-proof as long as they purport to act in pursuance of their 'foreign-affairs' power.").
\item \textsuperscript{208} Champlin & Schwarz, \textit{supra} note 174, at 217.
\item \textsuperscript{209} Judy Wurtzel, \textit{First Amendment Limitations on the Exclusion of Aliens}, 62 N.Y.U. L. REV. 149, 180 (1987) ("Article III, section 2 gives the federal judiciary the authority to determine international law and to adjudicate cases arising under treaties and cases in which foreign states or citizens are parties.").
\item \textsuperscript{210} Bederman, \textit{supra} note 189, at 1441 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)).
\item \textsuperscript{211} Michael E. Tigar, \textit{The "Political Question Doctrine" and Foreign Relations}, 17 UCLA L. REV. 1135, 1168 (1970).
\item \textsuperscript{212} Bederman, \textit{supra} note 189, at 1441.
\item \textsuperscript{213} Tigar, \textit{supra} note 211, at 1168 ("A close reading of this statement reveals that it does not purport to exclude all questions of foreign relations from judicial cognizance, but only certain functions of the Secretary of State.").
\item \textsuperscript{214} Baker v. Carr, 369 U.S. 186, 211 (1962).
\item \textsuperscript{215} Wurtzel, \textit{supra} note 209, at 186.
\end{itemize}
a sense of uniformity. Second, a court's ability to define an undefined term may be especially limited in the context of a foreign affairs dispute. Third, although disputed, an arguable textual commitment to Congress and the President exists with many matters touching on foreign affairs.

Post-Baker, the Supreme Court has dismissed several dozen foreign relations cases on account of the political question doctrine, and it is especially likely to do so when the dispute can best be resolved between Congress and the President. Moreover, as can be gleaned from the prior line of "alien invasion" cases in which the Invasion Clause was implicated, the federal judiciary has been particularly willing to defer to Congress's judgment when questions regarding illegal aliens have been presented, even though this issue "cannot be thought among the most urgent of foreign-policy concerns." Thus, the political question doctrine as a whole has fallen into disuse, but the modern Court may find that a question touching on foreign affairs presents a nonjusticiable question.

Conversely, although many contend that the political question doctrine is alive and well in the context of foreign relations questions, others have concluded that this area of law suffers from "jurisprudential chaos." The Court's dismissals of foreign affairs questions pursuant to the political question doctrine "are matched by dozens of other cases that have a significant foreign relations quotient, but are nonetheless adjudicated on the

216. Breuer, supra note 133, at 1046.
217. Id. at 1056.
218. FRANCK, supra note 205, at 91 ("[T]he Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security." (quoting United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 128 (D.C. Cir. 1977))).
219. Arguably, the Constitution vests the President with the powers ""to make treaties and appoint Ambassadors."" Id. (quoting United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 128 (D.C. Cir. 1977)). Additionally, Congress's powers over foreign affairs issues may consist of the following: ""[T]he powers to declare war, raise and support armed forces and, in the case of the Senate, consent to treaties and the appointment of Ambassadors."" Id. (quoting United States v. Am. Tel. & Tel. Co., 567 F.2d 121, 128 (D.C. Cir. 1977)).
221. Id. at 1403.
222. FRANCK, supra note 205, at 54; see also Nagel, supra note 162, at 643. For a discussion of the ""alien invasion"" cases, see infra Part IV.B.
223. Goldsmith, supra note 220, at 1403. This chaos is heightened when judges ""say they will abstain but fail to do so; judges proclaim the separation of powers but almost always decide in favor of the government in a process where the players . . . appear not to be playing on a level field."" FRANCK, supra note 205, at 30; see also Jonathan I. Charney, Judicial Deference in Foreign Relations, in FOREIGN AFFAIRS AND THE U.S. CONSTITUTION 98 (Louis Henkin, Michael J. Glennon, & William D. Rogers eds., 1990); Henkin, supra note 153, at 612.
merits, often without discussion of the political question doctrine.\textsuperscript{224} The Court has reached the merits of cases touching on foreign relations, including cases involving the use of the treaty power and the constitutionality of the President's use of executive agreements, even though these cases had foreign overtones.\textsuperscript{225} Moreover, the Court has rendered decisions that may adversely affect foreign relations,\textsuperscript{226} and the Court has not hesitated to adjudicate certain cases with foreign relations and national security overtones without mention of the political question doctrine. This "jurisprudential chaos" even extends to cases involving illegal aliens, as courts have adjudicated these cases without even discussing the political question doctrine.\textsuperscript{227}

Similar to scholarly commentary advocating the abandonment of the political question doctrine, the criticisms of the doctrine have extended to the judiciary's application of the doctrine in the realm of foreign affairs. Many commentators believe it is alien to our nation's judicial system to assume that only the executive branch has the tools to make decisions regarding our national security\textsuperscript{228} and that unbridled judicial deference is cause for concern.\textsuperscript{229} As our nation becomes more globally interdependent, the majority of judicial determinations will affect foreign affairs,\textsuperscript{230} and if the judiciary abstains from hearing all these cases, the judicial power may be rendered a nullity.\textsuperscript{231} Additionally, many believe that foreign relations questions present no more difficult questions than do "antitrust, securities, and family law

\textsuperscript{224} Goldsmith, supra note 220, at 1403.

\textsuperscript{225} Chemerinsky, Guarantee Clause, supra note 137, at 856; see also Bederman, supra note 189, at 1444-45. But see id. at 1470 (positing that a possible resurrection of the political question bar in adjudicating treaty rights has occurred within the federal judiciary).

\textsuperscript{226} Goldsmith, supra note 220, at 1398 ("Federal courts . . . do this, for example, when they apply a federal statute extraterritorially, or interpret a treaty, or adjudicate the validity of a foreign act of state."). For an example of a decision in which the Court reached the merits of a case that impacted foreign relations, see Japan Whaling Ass'n v. American Cetacean Society, 478 U.S. 221 (1986).

\textsuperscript{227} FRANCK, supra note 205, at 85; see also Norman Dorsen, Foreign Affairs and Civil Liberties, 83 AM. J. INT'L L. 840, 845 (1989).

\textsuperscript{228} FRANCK, supra note 205, at 5; see also id. at 7 ("Judges are much better suited than is sometimes alleged to make decisions incidentally affecting foreign relations and national security."). Additionally, the political branches have deferred to the judiciary in recent years to resolve questions of sovereign immunity, which illustrates that "the president and Congress do not take for granted that judicial reticence in foreign-affairs and national-security matters invariably advances the national interest." Id. at 97.

\textsuperscript{229} Bederman, supra note 189, at 1440. Conversely, if the judiciary does not defer to Congress on account of the political question doctrine, a greater likelihood exists that Congress will disregard a court's holding. See Redish, supra note 136, at 1053.

\textsuperscript{230} Goldsmith, supra note 220, at 1413.

\textsuperscript{231} FISHER & DEVINS, supra note 134, at 68.
controversies that raise complex economic and psychological issues.\textsuperscript{232}

Moreover, the Supreme Court itself has acknowledged that the "existence of 'foreign commitments' could not relieve the government of its obligation to 'operate within the bounds laid down by the Constitution.'\textsuperscript{233} The Constitution does not allocate sole power over foreign affairs to the political branches, and the Constitution contains no language prohibiting courts from rendering decisions that affect foreign affairs.\textsuperscript{234} Additionally, the Court's basic function is to safeguard individual rights, and there is nothing to suggest that the rights of individuals differ between domestic and foreign relations questions.\textsuperscript{235} Therefore, although some courts have chosen to defer foreign affairs questions to the political branches under the pretense of the political question doctrine, the actions of other courts significantly differ when they fail to acknowledge the existence of the political question doctrine in a foreign affairs case, and many commentators support the latter courts' actions in so doing.

IV. "\textsc{Alien Invasion}": The Federal Courts' Limited Encounter with the Invasion Clause

This Part will address the scope of the Invasion Clause and the past cases in which the states alleged that the federal government violated the Invasion Clause because it failed to adequately enforce immigration regulations. First, historical commentary on the purpose and scope of the Invasion Clause will be provided. Second, Invasion Clause precedent will be discussed and analyzed.

\textit{A. Historical Commentary on the Invasion Clause}

Since its inclusion in the Constitution, the Invasion Clause has rarely arisen as a topic of commentary; this lack of commentary is likely attributable to the fact that our mainland soil has never been attacked in the manner in which it was on 9/11. James Madison provided the most detailed discussion of the Clause in \textit{The Federalist No. 43}. The relevant commentary is as follows:

\begin{quote}
A protection against invasion is due from every society to the parts composing it. The latitude of the expression here used seems to
\end{quote}

\textsuperscript{232} Dorsen, \textit{supra} note 227, at 844.

\textsuperscript{233} Breuer, \textit{supra} note 133, at 1053 (quoting Reid v. Covert, 354 U.S. 1, 14, 17 (1957)).

\textsuperscript{234} Chamey, \textit{supra} note 223, at 99.

\textsuperscript{235} \textit{Id.} at 100 ("[M]atters with foreign relations implications may involve the legal rights and duties of individuals or the states under federal law clearly within the courts' authority.").
secure each State, not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors. The history, both of ancient and modern confederacies, proves that the weaker members of the union ought not to be insensible to the policy of this article.\footnote{236. The Federalist No. 43, at 298 (James Madison) (Tudor Publishing Co. 1947).}

Thus, the Invasion Clause was included in the United States Constitution so the federal government would protect the states, or the “weaker members of the union,” if subject to foreign or domestic hostility. Neither the Constitution nor the Framers specified whether the “invasion” must be perpetrated by a recognized foreign entity (such as a foreign state or country), or whether a terrorist attack perpetrated by foreign citizens would constitute a sufficient “invasion.” However, this determination is likely inconsequential because it appears that the term “invasion” can be interpreted to refer to any hostile and foreign invasion perpetrated on American soil.

Moreover, that the Framers intended the “invasion” to be a hostile one is supported on two fronts. First, the Framers correspondingly utilized the word “invasion” to refer to a hostile invasion in Article I, Section 9, Clause 2 of the Constitution.\footnote{237. On Petition For a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit, Brief For the Respondents in Opposition at 10, Arizona v. United States, 104 F.3d 1095 (9th Cir. 1996) (No. 96-1595); California v. United States, 104 F.3d 1086 (9th Cir. 1996) (No. 96-1596) (citing U.S. Const. art. I, § 9, cl. 2) (“[T]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”), available at http://www.usdoj.gov/osg/briefs/1996/w961595a.txt (last visited Feb. 13, 2003).} Second, defining an “invasion” as a hostile invasion is consistent with the Eighteenth Century understanding of this definition.\footnote{238. Respondents' Brief at 10 n.3, Arizona (No. 96-1591); California (No. 96-1596).} In his Dictionary of the English Language, “Dr. [Samuel] Johnson defined ‘invasion’ as a ‘[h]ostile entrance upon the rights or possessions of another; hostile encroachment.’ . . . Similarly, Dr. Johnson’s primary definition of ‘invade’ is ‘[t]o attack a country; to make an hostile entrance.’”\footnote{239. Id. (alterations in original) (internal citations omitted).} Thus, the Invasion Clause was included in the Constitution so the federal government would protect the states if the states had been and/or likely would be subject to a hostile, foreign invasion.

**B. Invasion Clause Precedent**

The lower courts have applied the Baker standard in determining whether a state’s Invasion Clause claim against the federal government may proceed. In these prior Invasion Clause cases, numerous states asserted that they had
been invaded by illegal aliens, and the lower federal courts recurrently held that this assertion presented a nonjusticiable, political question. These cases will be examined in detail below.

In *Chiles v. United States*, the State of Florida and its representatives filed suit against the United States, alleging that the United States failed to appropriately enforce immigration policies and accordingly caused the State of Florida to incur tremendous expense in providing funding for illegal aliens. The plaintiffs sought an injunction that required the United States to pay restitution until the immigration laws were properly enforced; they maintained that they were entitled to judicial relief because “[t]he national political process has provided no adequate safeguard.” Consequently, the plaintiffs asserted, among other claims, that the federal government’s lax immigration control policies violated the Invasion Clause because illegal aliens had invaded the State of Florida.

Applying the political question doctrine, the *Chiles* court held that the Invasion Clause claim presented a political question for the following reasons. First, it was well settled that the federal government possessed plenary control over immigration, and the plaintiffs’ claims related directly to immigration and the admission of aliens. Thus, a textually demonstrable commitment to a coordinate branch of government existed. Second, because the plaintiffs sought an injunction regarding the federal government’s enforcement of the immigration laws, this decision would be well “beyond the competence of the Court as it would involve the Court in matters relating to the conduct of foreign relations and the deployment of the military forces of the United

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241. *Id.* at 1335-36.

242. *Id.* at 1336.

243. In addition to the Invasion Clause claim, the plaintiffs asserted three additional counts in their complaint. In Count I, “Plaintiffs allege[d] that they [w]ere entitled to grants from an Immigration Emergency Fund administered by the Attorney General of the United States, and they ask[ed] the Court to direct that Defendants develop a plan to disburse that fund.” *Id.* In Count II, plaintiffs maintained that they were entitled to restitution based on the United States’ failure to enforce the administration laws. *Id.* In Count III, the plaintiffs asserted that the federal government must provide Medicaid and AFDC in Florida because the State of Florida was disproportionately affected by the restrictions on these programs that limited the payment of funds to certain aliens. *Id.*

244. *Id.; see also id.* at 1342; BILL O’REILLY, THE NO SPIN ZONE 140 (2001) (“Someone needs to remind our leaders that we have a Constitution and that it requires, among other things, that the federal government protect the states from invasion.”).

245. *Chiles*, 874 F. Supp. at 1339. The *Chiles* court opined: “It is undisputed that the Federal Government’s control over immigration is plenary. ‘The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.’” *Id.* (quoting Truax v. Raich, 239 U.S. 33, 42 (1915)).

246. *Id.* at 1343.
The court expressed assent to the federal government’s assertion that “[t]he Constitution provides no criteria either for determining when a peacetime influx of immigrants has risen to the level of an ‘invasion,’ or for assessing the adequacy of the federal government’s response to such a threat.”

Third, the court held that the claim presented a political question because the court had no judicially manageable standards to determine “when the migration, as well as the costs associated with such migration, reaches the point at which it invades the State of Florida’s state sovereignty.” Thus, the court did not have jurisdiction to hear the claim, and it deferred the question for resolve through the legislative and executive branches.

Other courts have employed parallel reasoning and formulated holdings similar to the holding of the Chiles court. In Padavan v. United States, the State of New York and its representatives alleged that the federal government had failed to control the influx of illegal aliens into the state and that this influx constituted an invasion. The plaintiffs sought monetary


248. Respondent’s Brief at 7, Chiles (No. 95-1249).

249. Chiles, 874 F. Supp. at 1344. With respect to this finding, the court opined:

In order to grant the restitution requested by Plaintiffs, the Court would be forced to review the United States [sic] entire enforcement of Federal immigration laws including the enforcement methods used and their effectiveness, determine the reasonableness of budget allocations, determine whether more resources are available and, if so, decide how those addition [sic] resources should be allocated. The Court is unable to identify satisfactory criteria for making these determinations.

Id.

250. Id.

251. Additionally, some states have asserted claims similar in substance to the states’ Invasion Clause claims, but have proffered their claims pursuant to the Naturalization Clause rather than the Invasion Clause. For example, in Texas v. United States, 106 F.3d 661 (5th Cir. 1997), the State of Texas and its representatives brought suit against the federal government, alleging that the federal government breached its duty to the states to regulate immigration pursuant to the Naturalization Clause. Id. at 665-66. The court held that this claim presented a political question for the same reasons that other courts have found the Invasion Clause claims to be nonjusticiable. Id. One of the named plaintiffs in Texas v. United States was then-governor and current President of the United States, George W. Bush.

252. 82 F.3d 23 (2d Cir. 1996).

253. Id. at 28.
support to compensate the state for funds it expended in accordance with the federal government's immigration policy. 254 The court held that the claim presented a political question for two reasons. First, because there existed a constitutional textual commitment to Congress of naturalization regulation, "'the power over aliens is of a political character and therefore subject only to narrow judicial review.'" 255 Second, "'[t]he protection of the states from 'invasion' involves matters of foreign policy and defense, which are issues that the courts have been reluctant to consider." 256 Additionally, the court opined that, assuming that the claim presented a non-political question, the claim was not colorable because "'[i]n order for a state to be afforded the protections of the Invasion Clause, it must be exposed to armed hostility from another political entity.'" 257 Thus, the court dismissed the Invasion Clause claim as a nonjusticiable, political question. 258

Similarly, the court in New Jersey v. United States 259 dismissed the state's "alien invasion" claim brought pursuant to the Invasion Clause claim because it presented a political question. 260 The court cited the following reasons to support its holding. First, the Naturalization Clause represented a textually demonstrable commitment to Congress. 261 Second, because the regulation of the relationship between aliens and the United States "'must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the

254. Id. The allegations of "invasion" were supported by convincing statistics: the plaintiffs asserted that, in 1993, "the cost to New York State and its subdivisions of providing services to legal and illegal immigrants amounted to $5.6 billion." Id.

255. Id. at 27 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).


257. Id. (citing THE FEDERALIST No. 43 (James Madison)); see also California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997) ("California ignores the conclusion set forth by our Founders."); Arizona v. United States, 104 F.3d 1095 (9th Cir. 1997); New Jersey v. United States, 91 F.3d 463, 468 (3d Cir. 1996) (dismissing the state's Invasion Clause claim premised on an alleged "illegal alien" invasion because "'[t]he State of New Jersey] offers no support whatsoever for application of the Invasion Clause to this case or for its reading of the term 'invasion' to mean anything other than a military invasion").

258. Padavan, 82 F.3d at 28; see also Barber v. Hawaii, 42 F.3d 1185, 1199 (9th Cir. 1994) (finding without discussing that allegations of invasion premised on Japan's economic invasion of Hawaii constituted a nonjusticiable political question).

259. 91 F.3d 463 (3d Cir. 1996).

260. Id. at 470.

261. Id. at 469; see also California v. United States, 104 F.3d 1086, 1091 (9th Cir. 1997) ("'[T]he issue of protection of the States from invasion implicates foreign policy concerns which have been constitutionally committed to the political branches."); Arizona v. United States, 104 F.3d 1095 (9th Cir. 1997).
Executive than to the Judiciary.'\textsuperscript{262} Third, the court lacked judicially manageable standards to resolve the immigration issue because this issue "involve[s] policy judgments about resource allocation and enforcement methods. . . . They are by their nature peculiarly appropriate to resolution by the political branches of government . . . because . . . independent resolution of such issues by a court would express a lack of the respect due a coordinate branch of government."\textsuperscript{263} Therefore, precedent dictates that courts will find any claim of an "alien invasion" brought pursuant to the Invasion Clause to be a nonjusticiable, political question, but, as discussed shortly,\textsuperscript{264} claims of a "terrorist invasion" may be wholly distinguishable from this line of cases.

V. JUDICIAL ENFORCEMENT OF THE INVASION CLAUSE

This Comment advocates the position that the Court should reach the merits of an Invasion Clause claim and render the following decision: The Court should issue a declaration that the federal government has failed to comply with the Invasion Clause and, to protect the states from a future terrorist invasion, order restitution until constitutional compliance is attained or order the deployment of the military or a large number of border personnel and technological equipment to the northern border. As discussed in this Part, a number of rationales support this conclusion. First, the states likely have suffered pecuniary injuries in attempting to prevent acts of terrorism, and these damages likely are traceable to the government’s lax border control policies; if the states can quantify these damages and establish a nexus, they will have standing to assert the Invasion Clause claim. Second, even if a court would choose to apply the components of the \textit{Baker} Court’s political question doctrine, the Invasion Clause claim arguably does not fall within these components, and a court may find that the claim is justiciable. Third, assuming that the political question doctrine is thriving in the area of foreign affairs, a court may find that the issue of homeland security does not sufficiently touch on foreign affairs to require judicial abstention. Lastly, because the modern Court has become politicized and rarely has deferred political questions to the political branches, the Court may not apply the

\textsuperscript{262} \textit{New Jersey}, 91 F.3d at 469-70 (citing Mathews v. Diaz, 426 U.S. 67, 81 (1976)); \textit{see also} \textit{California v. United States}, 104 F.3d 1086, 1091 (9th Cir. 1997) ("For this Court to determine that the United States has been ‘invaded’ when the political branches have made no such determination would disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the Court making an ineffective non-judicial policy decision."); \textit{Arizona v. United States}, 104 F.3d 1095 (9th Cir. 1997).

\textsuperscript{263} \textit{New Jersey}, 91 F.3d at 470.

\textsuperscript{264} \textit{See infra} Part V.
political question doctrine and may reach the merits of the Invasion Clause claim without hesitation.

A. The Doctrine of Standing

The states must satisfy the doctrine of standing before a court will entertain the merits of an Invasion Clause claim against the federal government. Modernly, courts have “heightened standing requirements to deny judicial review to a broader range of cases.” In the Invasion Clause cases, the sole court to discuss the issue of standing found that the State of Florida had standing to bring the Invasion Clause claim against the federal government. The court merely provided: “[B]ecause an order against the named defendants would offer some relief to Florida, we suppose that the State does have standing to raise this claim.” As applied to the present analysis, the doctrine of standing dictates that the states must assert an injury that is fairly traceable to the federal government’s lax border control policies, and the injury must be redressable by either a military or personnel deployment to the border or restitution to provide for augmented border security.

None of the 9/11 terrorists entered our nation through its northern or southern border. Consequently, the states likely cannot utilize the damages suffered from the attacks of 9/11 to fulfill the requirements of standing because, unless it can be proven differently, these pecuniary damages are not fairly traceable to the federal government’s lax border control policies. The states could, however, quantify the funds expended on terrorism prevention since 9/11 to prove they have standing to claim that the federal government has not complied with the Invasion Clause.

To establish standing, the states must uncover the following information and perform a number of analyses regarding this information. Have any of the states expended their own funds to augment border security or police presence near the borders, and can this expense be linked to the federal government’s failure to expend these funds? Has a state expended funds on terrorism detection or prevention that would not have been expended but for the federal government’s lax border control policies? Did any of the individuals currently in custody for suspected terrorist activity enter our nation illegally through the northern border? Did the states expend funds to

265. See supra Part III.C.1.
266. Sandstrom Simard, supra note 147, at 306.
269. Malkin, supra note 3, at 240.
capture these individuals, and did a causal link exist between the federal government's lax border control policies and the entrance of these terrorists through our borders? Have the states expended funds to prevent terrorists from transporting weapons into the country, and can this expense be linked to the federal government's lax border control policies?

Furthermore, although the events of 9/11 cannot be linked to the federal government's lax border control policies between established checkpoints, other terrorists have entered or attempted to enter the nation through its northern border. For example, two of the three terrorists that conspired to commit the 1999 "Millennium" attacks on America "snuck back and forth across the U.S.-Canadian border," as did one of the 1997 New York subway bombing conspirators. To obtain standing, the states must prove that these incidents are directly linked to the government's lax border control policies and that the states expended funds related to these conspiracies. Although this information may be difficult to obtain and link to the federal government's inaction, the states have a viable argument regarding the relation between the expended funds and the federal government's inaction because of the well-documented chaos on the northern border.

At this time, if the states fail to establish any nexus between the funds they have expended on border control or terrorism prevention and the federal government's failure to control our borders, the states may have a difficult time establishing that any injury resulting from the acts of 9/11 or terrorism in general is linked to the federal government's lax border control policies, and the claim may not be ripe for judicial review. Disturbingly, if the states are unable to identify an injury-in-fact and link the injury to the federal government's lax border control policies, the federal judiciary will refuse to reach the merits of the claim until the government's inaction causes terrorists to illegally enter our northern border between established crossing points and harm or kill more innocent Americans. In the name of public policy and

270. Id.

271. This information could be derived through, for example, the following means: interviewing accused terrorists in custody post-9/11 to determine if any of these individuals illegally entered the country through the northern border, determining whether states have expended funds to capture or detain these individuals, quantifying the funds that border states have expended to augment border security, quantifying the funds that border states have expended on terrorism detection.

272. As discussed in the following section, the states may also have a difficult time proving a redressable injury because the requested remedy may not be judicially manageable. Furthermore, even if the Court would find that the states satisfied the constitutional components of standing, the Court could elect to find that the states failed to satisfy the prudential components, as "the Court has rejected cases that allege 'generalized grievances,' injuries that are not peculiar to an individual or a small body of people, even when the 'technical' injury-in-fact specification is satisfied." Blumoff, supra note 151, at 310.
because of the elevated likelihood that this type of attack could occur, the citizens of this country can only hope that the Court will address the chaos on the border before more innocent citizens are murdered.

B. Baker v. Carr and the Justiciability of The Invasion Clause

Although it appears unlikely that the Rehnquist Court would apply the political question doctrine to the vast majority of domestic cases or controversies before it, this section will assume that the states satisfied the doctrine of standing and that the Baker Court’s political question doctrine would be applied to any Invasion Clause claim brought before any court. This Comment concludes that even if the Baker elements are applied to an Invasion Clause claim, the claim arguably could be justiciable. The components of the Baker Court’s political question doctrine most relevant to the present analysis will be examined in detail.

1. A Textually Demonstrable Constitutional Commitment

This component of the Baker Court’s political question doctrine will be examined from two different perspectives. First, this component will be analyzed assuming that the states request relief that includes border militarization. Second, this component will be analyzed assuming the states’ request for relief does not include border militarization, but does include a request for increased Border Patrol agents and improved technological equipment or an award of restitution until constitutional compliance with the Invasion Clause is attained.

If the states request the federal judiciary to order border militarization, there likely exists a textually demonstrable constitutional commitment of this issue to Congress. The Constitution grants to Congress the power “[t]o provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions.”273 Thus, the plain language of the Constitution commits to Congress the power to determine whether the military should be deployed to the borders, and if a court chooses to apply this Baker factor, it likely would find that the judiciary must defer to Congress’s decision regarding this matter.

Conversely, a textually demonstrable constitutional commitment to the political branches likely does not exist for the states’ request for an increase in border personnel that are not military personnel or for an award of restitution. In the prior line of Invasion Clause cases, the lower courts succinctly and unanimously found that a constitutional commitment to Congress existed to

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This finding was accurate, as the Constitution provides as follows: "The Congress shall have power... [t]o establish a uniform rule of naturalization." However, although the Constitution grants Congress plenary power to address immigration issues, an increase in border personnel for homeland security purposes neither falls within this, nor any other, textually demonstrable commitment to Congress or the President for the following reasons.

The federal judiciary is specifically bound by the text of the Invasion Clause, which provides that "[t]he United States... shall protect each of [the states] against invasion." Although in the context of the Guarantee Clause, which is located in the same phrase as the Invasion Clause, the Court has found the term "United States" to include only Congress, the plain meaning of the Invasion Clause binds all branches of the federal government, including the federal judiciary. The Invasion Clause does not contain a textually demonstrable commitment to the political branches; "[q]uite the contrary... it unambiguously says 'the United States' and includes all of the branches of the federal government." Because the federal judiciary specifically is bound by this Clause, deference to the political branches would be wholly improper.

Similarly, the placement of the Invasion Clause within the Constitution supports the lack of a textually demonstrable commitment to the political branches. If the Framers intended the Invasion Clause to be subject to only congressional enforcement, "it likely would have been placed in Article I which defines congressional powers. The text of the Constitution simply does not support excluding judicial enforcement." Thus, the placement of the Invasion Clause supports a lack of a textually demonstrable constitutional commitment to Congress.

Moreover, many of the laws passed post-9/11 have recognized terrorism
The immigration and nationality laws define "naturalization" as "the conferring of nationality of a state upon a person after birth, by any means whatsoever." Additionally, "alien" is defined as "any person not a citizen or national of the United States." An "immigrant" is defined as "every alien except an alien who is within one of the following classes of nonimmigrant aliens— . . . an alien . . . having a residence in a foreign country which he has no intention of abandoning and who is visiting the United States temporarily for business or temporarily for pleasure." As the 9/11 terrorists so repugnantly illustrated to the nation, terrorists penetrate the United States for pleasure and to perform "business"; consequently, the law classifies these and other terrorists as nonimmigrants—and only Congress has plenary power under the Constitution to regulate immigrants.

Further, even plain-meaning connotations of the words "alien" and "terrorist" conjure different definitions: an alien is motivated to enter the nation for a reason other than perpetrating acts of destruction and usually intends to remain in the country for a certain period of time, but a terrorist enters the nation with the intent to perpetrate acts of devastation and abscond if still alive. Because terrorists and non-terrorist immigrants are mutually exclusive, and because Congress has plenary power to regulate immigrants and not terrorists, no textually demonstrable constitutional commitment to Congress exists for issues regarding homeland security.

With regard to the conclusion that there exists no textually demonstrable constitutional commitment to Congress to regulate homeland security, dissent will reverberate from those who oppose an increase in border personnel. This dissent will result from the following fact: If the Court orders the federal government to protect the states by means of increased border personnel, this increased border personnel will have the effect of thwarting the entrance of illegal aliens, as well as terrorists, into our country, and Congress has plenary power under the Constitution to regulate immigration.

This argument is devoid of merit. If the Court renders such a decision, any incursion on Congress's plenary power to regulate immigration and naturalization would be only incidental; modernly, courts recurrently render decisions that have incidental or even direct effects on the powers of other branches, including decisions that infringe Congress's plenary power over

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282. Id. § (a)(3).
283. Id. § (a)(15)(B).
immigration. Therefore, the Court’s decision to increase border personnel would only incidentally affect Congress’s immigration power, and no facially textually demonstrable constitutional commitment to Congress exists.

2. Judicially Discoverable and Manageable Standards

In the prior Invasion Clause cases, the courts unanimously held that there existed a lack of judicially discoverable and manageable standards to resolve the states’ claims that illegal aliens had invaded the states. The courts asserted the following rationales to support their findings: “[T]he Court is unable to identify . . . a manageable standard for determining when the migration, as well as the costs associated with such migration, reaches the point at which it invades the [state’s] state sovereignty”\textsuperscript{285} the issue “involve[s] policy judgments about resource allocation and enforcement methods”\textsuperscript{286} and “there are no manageable standards to ascertain whether or when an influx of illegal immigrants should be said to constitute an invasion.”\textsuperscript{287}

Applying these findings to the present Invasion Clause inquiry, after the events of 9/11, judicially manageable standards exist to determine whether an invasion of the states occurred. Terrorists invaded our states when they reached our mainland soil and murdered innocent Americans.\textsuperscript{288} Because of the global instability that resulted from the terrorist attacks, there certainly exists a chance that terrorists or another foreign entity will again invade the states, and it was for this precise reason that the Invasion Clause was included in the Constitution.\textsuperscript{289} Determining whether a terrorist invasion occurred is much less complicated than determining whether a sufficient number of illegal aliens have invaded a state’s sovereignty. Consequently, a court will likely find it has manageable standards to determine that an invasion occurred and that the states are at risk for further invasion, and the Invasion Clause claim likely would be found to be colorable if the Court reached the merits of the claim. However, formulating a judicially manageable remedy pursuant to which the federal government must provide sufficient protection from invasion presents a much different inquiry.

A determination of what constitutes “sufficient protection” from a

\textsuperscript{284} See supra note 227 and accompanying text.
\textsuperscript{285} See supra note 249 and accompanying text.
\textsuperscript{286} See supra note 263 and accompanying text.
\textsuperscript{287} See id.
\textsuperscript{288} The Framers failed to distinguish between an invasion perpetrated by a terrorist organization or an invasion perpetrated by a foreign state or country; consequently, the fact that terrorists, rather than a recognized foreign state, invaded our mainland soil is likely inconsequential.
\textsuperscript{289} See supra Part IV.A.
possible future terrorist invasion is a difficult determination for any political branch to articulate. A chief Border Patrol agent has asserted that “[a]n estimated 20,000 troops would be needed to provide a credible border force along both U.S. land borders.”

Another commentator estimated that 100,000 Border Patrol and interior enforcement agents would be necessary to plug our porous borders. The amount and quality of technological equipment on the borders would also aid in protection and lessen the number of personnel needed on the borders; this equipment could include surveillance or sensing technology, marine vessels, “sensors, night scopes, helicopters, light planes, all terrain vehicles,” and unmanned surveillance planes.

Determining the amount of personnel and equipment that is necessary to sufficiently protect the states and the American people from further terrorist invasion is a daunting task for any member of the federal government, especially considering that no amount of border security will definitively thwart the entry of every individual that desires to illegally enter the United States.

This Comment concludes that the federal judiciary has manageable standards to determine what border control measures would provide the states sufficient protection from invasion. The federal judiciary recurrently has applied “generalized and ambiguous abstract principles to specific factual situations, even when the application of those principles is unclear,” and “there is no reason why the judiciary is uniquely less qualified to be involved [in this determination] than the other branches of the federal government.” Further, few constitutional standards are judicially manageable, and the court has not shied from interpreting and applying vague constitutional standards such as the Due Process Clause and the Equal Protection Clause. As one commentator maintained: “[O]ne would think that the Due Process Clause would be a prime example of a constitutional clause that lacks

292. Senate Hearing, supra note 6 (statement of Sen. Dorgan).
295. Gorman, A Nation Without Borders, supra note 34.
296. Redish, supra note 136, at 1050.
297. Chemerinsky, Guarantee Clause, supra note 137, at 870.
298. Champlin & Schwarz, supra note 174, at 225-26; see also Pushaw, supra note 157, at 500 ("[A] lack of judicially discoverable and manageable standards’ seemingly exists in many constitutional clauses, not merely those triggering political questions.")
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'judicially discoverable and manageable standards.' Consequently, because the Supreme Court has not hesitated to develop "necessary standards for undefined terms," the Court is as able as any other branch to formulate a necessary standard for border protection even though "protection" is undefined in the Constitution.

Furthermore, the Supreme Court can determine what constitutes sufficient "protection" from invasion because a zealous advocate would present the Court with the same information addressing the necessity for augmented border security that would be presented to Congress or the President. Currently, federal inspection services are performing studies to determine "the most effective mix of staff and technology necessary to achieve an optimal level of border security." No compelling reason exists as to why the results of this and similar studies, as well as the opinions of Border Patrol agents, government officials, civilians, and members of the Department of Homeland Security as to what constitutes sufficient "protection," could not be presented before the Court just as they could be presented before Congress. These issues "can be addressed as they always are, namely, through the use of interrogatories, depositions, testimony and all the other means of gathering evidence." Additionally, "[w]hile it is true that 'political question' cases . . . involve issues as to which fact-gathering is difficult, this does not at all justify invocation of a barrier to decision." Although it may be difficult for the federal judiciary, just as it would be for Congress and the President, to determine what constitutes sufficient "protection" from future terrorist invasion, "this is an argument for great caution," not an argument for absolute

299. Sandstrom Simard, supra note 147, at 331 n.162; see also Chemerinsky, Guarantee Clause, supra note 137, at 871 ("[T]here is no reason why 'republican form of government' is more lacking in standards than 'due process' or 'equal protection.'"); Redish, supra note 136, at 1047 ("It is difficult for me to understand why the words 'republican form of government' in article IV are thought not to be susceptible to judicial interpretation, while the words 'due process' or 'equal protection' are deemed not to suffer from this difficulty.").

300. Breuer, supra note 133, at 1056 ("[U]nfazed by a lack of textually identifiable limits, the Court consistently decided issues of scope and identified limits impacting constitutional provisions, e.g., when punishment is 'cruel and unusual,' when bail is '[e]xcessive,' when searches and seizures are 'unreasonable,' and when congressional action is 'necessary and proper.'").

301. Charney, supra note 223, at 102.


304. Tigar, supra note 211, at 1165.
Lastly, although judicial determination of what constitutes sufficient “protection” from invasion certainly is a difficult one, the Court must bear in mind that the lack of political activism with regard to border control policies dictates that the Supreme Court truly is the Court of Last Resort for the resolution of this issue. If the Court defers this issue to the political branches, the political branches may opt to either decrease border control personnel or maintain the current level of personnel at our borders; at best, the political branches will continue their slight and incremental increase of border control personnel. In the meantime, terrorists can enter this nation through the unguarded northern border virtually at will.

"'[G]reat tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.'" 306 Like the rest of Americans, members of the federal judiciary and their families are American citizens that surely desire security in their homes and workplaces. Thus, even though a determination of “protection” is an extensive and complex determination, the Court must recognize that if it fails to attempt to determine what constitutes sufficient “protection” from further terrorist invasion, our states will not be protected. Certainly any amount of protection that the Court finds is necessary to protect the citizens from harm is superior to the amount of protection Congress and the President will provide American citizens in the near future.

3. A Lack of the Respect Due Coordinate Branches of Government

If the federal judiciary finds that Congress and the President’s border control policies have not complied with the Invasion Clause, some may view this finding as “expressing lack of the respect due coordinate branches of government." 307 This may be the case; however, “respect due the coordinate branches of government cannot protect such branches from judicial review when their acts are challenged on grounds that they failed to adhere to specific constitutional limits on their authority." 308 The federal judiciary must exercise its duty to interpret and enforce constitutional rights, and the Court’s duty is especially imperative when the political branches are failing to fulfill a constitutional duty.

Additionally, as our Supreme Court has opined: “‘Our system of government requires . . . courts on occasion [to] interpret the Constitution in a

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305. Chemerinsky, supra note 127, at 103.
308. Breuer, supra note 133, at 1059.
manner at variance...[with] another branch." 309 It must be kept in mind that when the federal judiciary exercises power against Congress or the President, including the widely accepted practice of judicial review, this always shows a lack of respect due these branches. 310 The judiciary does not abstain from judicial review because of this possible display of "disrespect" towards the political branches. Further, our political system has gone direly astray when the members of our federal government are more concerned with disrespecting each other than with respecting the lives of American citizens. Because the political branches have not complied with the Invasion Clause, and because the Court, as the ultimate interpreter of the Constitution, has not hesitated to "disrespect" and exercise power against the political branches in many circumstances, this factor will not require judicial abstention and deference of the states' Invasion Clause claim to the political branches.

4. Multifarious Pronouncements

No danger of "multifarious pronouncements" exists if the federal judiciary reaches the merits of an Invasion Clause claim because "the other branches of government do not act pursuant to the provision." 311 Congress and the President have not employed sufficient measures to protect the states from invasion, and their inaction "is likely to remain that way." 312 Neither Congress nor the President will publicly proclaim that border security between established checkpoints will be greatly enhanced, as this news will infuriate well-organized minority groups; likewise, neither branch will proclaim that no visible steps will be employed to enhance border protection, as this news will anger the majority of Americans. 313 Thus, in all likelihood, the political branches will remain virtually silent on the issue, and if the judiciary proclaims that the federal government must comply with the Invasion Clause, little danger exists of "multifarious pronouncements." Further, the political branches may be relieved if the federal judiciary renders a decision on this matter, as it absolves the political branches from the lose-lose choice of angering either organized minorities or dispersed majorities. 314

309. Id. at 1059 n.191 (alterations in original) (quoting Powell v. McCormack, 395 U.S. 486, 548 (1969)).

310. See Nagel, supra note 162, at 647 (positing that judicial review often, if not always, expresses a lack of respect due the other branches); Pushaw, supra note 157, at 500 ("[A]ny exercise of judicial power against the political branches...shows a 'lack of respect.'"). Many commentators believe that the modern Court has not shied from rendering decisions that exhibit a lack of respect due Congress or the President. See infra Part V.D.

311. Chemerinsky, Guarantee Clause, supra note 137, at 874.

312. Id.

313. See Hawkins, Twelve Questions With Michelle Malkin, supra note 291.

314. See id.
C. Homeland Security and Foreign Affairs

Some commentators have suggested that the political question doctrine is currently thriving in the realm of foreign affairs, but other commentators have sharply disagreed with this assertion.\(^\text{315}\) In this section, it will be assumed that the federal judiciary would apply the political question doctrine to any case or controversy relating to foreign affairs; however, it must be kept in mind that many courts will render decisions in cases that have foreign affairs implications without even mentioning the political question doctrine. Thus, in the context of an Invasion Clause claim brought by the states against the federal government, this section will address whether the issue of border control relates to foreign affairs such that judicial deference to the political branches is appropriate.

Characterizing “homeland security” as an issue “touching on foreign affairs” drips with irony, but a chance exists that a court would find as such. Whether or not we desire or intend for this to occur, our nation’s border control policies will affect the Mexican-American and Canadian-American borders as well as our relations with these countries, thereby implicating questions of foreign affairs. Some may argue that courts must abstain from determining any question relating to foreign affairs, no matter how tenuously the relation can be characterized. This Comment posits that a judicial mandate requiring increased border control within our nation does not sufficiently affect foreign affairs to the extent that judicial abstention and deference is required.

If the flow of traffic at border checkpoints is maintained and border personnel are placed in the vast and open areas of the border, the flow of legal commerce and people between Canada and the United States will not be affected. This would calm the fears of many Canadians and drastically reduce the extent to which foreign affairs concerns are implicated, as the Canadian government’s most imminent concern relating to border security has been said to be the need for improved traffic flow at the border.\(^{316}\) The “foreign affairs” issue that would be implicated involves the obstruction of the flow of illegal commerce between Canada and the United States, but it is difficult to maintain a straight-faced contention that our judiciary should refrain from hearing the claim for this reason.

Moreover, although certainly not in every decision,\(^{317}\) courts historically have found that questions relating to illegal aliens and immigration are areas of law “touching on foreign affairs” and are not properly subject to judicial

\(^{315}\) See supra Part III.C.3.

\(^{316}\) MALKIN, supra note 3, at 77.

\(^{317}\) See supra Part III.C.3.
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The rationale underlying this judicial abstention is likely as follows: Because an illegal alien is a resident of another country, if a United States court assumes jurisdiction over him or her and renders a decision, especially one addressing that person's liberty, this assumption of jurisdiction over a non-citizen has obvious foreign affairs implications. Conversely, when addressing issues of homeland security, the court assumes jurisdiction over the states and renders a decision to benefit American citizens; this action is exactly what the province and duty of the federal judiciary entails. Moreover, if a federal court cannot render a decision regarding national homeland security, one of the country's most fundamental concerns, because the issue "-touches on foreign affairs," there is little that the courts will be able to decide, as almost every case or controversy could relate to foreign affairs in some manner.

Additionally, the Mexican and Canadian governments may disagree with our choice to plug our borders, especially if the military is deployed, but these governments quite likely will do little else but voice their complaints. The political question doctrine is alive in the realm of foreign affairs to prevent courts from placing the nation in international jeopardy; short-lived disagreement from foreign governments is not what was intended to be avoided by the application of the political question doctrine to foreign affairs issues. If the courts were forced to defer a claim for political resolution every time a foreign nation may disagree with the final decision, the courts would be forced to abstain from rendering decisions pursuant to most constitutional provisions, including the constitutionality of the death penalty, as our nation's death penalty practices provoke much disagreement among the European nations and Mexico.

Lastly, the Baker Court recognized that the federal judiciary may on occasion hear cases or controversies with foreign relations implications; the Court stated that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." Based on the relatively minor impact that increased border security would have on foreign relations and the unruly state of our nation's border security, if ever the Court were to formulate an exception to the general bar on hearing claims that relate to foreign relations, the time is now.

318. See supra notes 230 and 231 and accompanying text.
319. See Charney, supra note 223, at 104 ("[F]ew cases involving international law and relations present the possibility of resulting in a decision that could cause significant international ramifications adverse to the United States.").
D. The Supreme Court, Politics, and the Political Question Doctrine

This discussion applying the Baker Court’s political question doctrine to the Invasion Clause in the context of border security is moot if the Court fails to apply the political question doctrine. The modern Court will often render decisions with political implications without even acknowledging the existence of the doctrine;322 if this occurs, no distinction exists between a remedy that orders the military or non-military personnel to the border,323 as both are acceptable remedies if the doctrine is not applied.

Many commentators argue that the political question doctrine should be abandoned in its entirety, as the Court has found only two cases to present political questions since the Baker Court’s decision.324 Given the modern Court’s activist role in rendering decisions with political implications,325 this reasoning is extremely persuasive, and it appears that judicial supremacy has abrogated the political question doctrine.326 The modern Court “acknowledges few limits on its power to say what the law is,”327 and it has assumed the view that “it alone among the three branches has been allocated the power to provide the full substantive meaning of all constitutional provisions.”328 The federal judiciary has become politicized, and if there exists “any urge to deny the political character of our public law it arises largely because we have become so accustomed to courts making such judgments.”329

322. See supra Part III.C.2.
323. This conclusion is correct assuming that the duties of the military border personnel would not violate the Posse Comitatus Act. See supra Part II.E.2.
324. See supra Part III.C.2.
325. See Zeigler, supra note 129, at 1367 (“[T]he current Court is very activist, perhaps as activist as the Warren Court in its heyday.”); see also Nagel, supra note 162, at 650 (“[T]he role of the federal courts in managing public institutions and public policy ha[s] grown significantly.”); Pushaw, supra note 157, at 497 (The political question doctrine “has always been based on ‘separation of powers,’ but those two concepts mean far different things to the modern Court than they did to the Framers.”).
326. See supra note 203.
327. Barkow, supra note 126, at 302.
328. Id. at 240.
329. Nagel, supra note 162, at 663; see also id. (“The Court and most of the rest of us have come to regard political questions as legal questions because that is a convenient (perhaps necessary) precondition to maintaining or extending the scope and scale of judicial supervision of public policy.”); Pamela S. Karlan, Lessons For Getting the Least Dangerous Branch Out of the Political Thicket, 82 B.U. L. REV. 667, 671-72 (2002) (“[T]he Supreme Court is now embroiled in the very heart of the political thicket. A substantial share of the Court’s docket consists of cases involving the regulation of politics . . . . If anything, recent history reveals a Court that seems willing to head even deeper into the woods.”). But see id. at 668 (“[W]hen the court strikes down legislative actions, it ‘thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it.’” (quoting ALEXANDER M. BICKEL, THE LEAST
Moreover, the political question doctrine "is at odds with the Court's view of its place in the constitutional order and of its superior competency vis-à-vis Congress and the Executive to decide all constitutional questions." One need only mention decisions such as *Lochner v. New York*, *Griswold v. Connecticut* and *Roe v. Wade* for support that the Supreme Court will not hesitate to subscribe judge-made, substantive meaning to undefined constitutional provisions. Further, the Court's recent decision in *Bush v. Gore* exemplifies the fact that the Court will not hesitate to answer political questions, as the Court failed to even mention the political question doctrine in this momentous decision. One commentator believes that the members of the *Bush v. Gore* Court "took for granted that they had the 'responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront.'"

As the demise of the political question doctrine illustrates, the modern Court will not hesitate to disregard the political question doctrine and involve itself in rendering decisions on political issues. If the Court has found itself able to render decisions that ascribe substantive content to undefined constitutional provisions and render highly political decisions without even mentioning the political question doctrine, certainly mandating increased border security in compliance with the Invasion Clause is not outside the realm of "politicalness" of these other political decisions. Additionally, if the Court so chooses, it can opt not to formulate a bright-line rule rendering all Invasion Clause cases or controversies non-political questions; the Court can

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330. Barkow, supra note 126, at 242; see also id. at 241 ("The Rehnquist Court's view of the relationship among the three branches of the federal government is decidedly more hierarchical than coordinate. And at the top of that hierarchy sits the Court itself."); Karlan, supra note 329, at 698 ("[T]he current Court is deeply distrustful of the political branches and ambitious for its own power.").

331. 198 U.S. 45 (1905).

332. 381 U.S. 479 (1965).

333. 410 U.S. 113 (1972).

334. BORK, supra note 138, at 18; see also Chemerinsky, *Guarantee Clause*, supra note 137, at 859 ("History demonstrates that judicial credibility and legitimacy are not fragile. Some of the Court's most controversial rulings...ultimately enhanced the judiciary's stature.").


338. See supra Part III.C.2.

339. See supra Part III.C.
limit its justiciability determination to the very unique issue of augmented border security at the area of our northern border between established crossing points.

Let us not forget: Terrorists that detest Americans can easily bring weapons of mass destruction into our country through the porous northern border, the political branches will not conclusively remedy this issue, and the federal judiciary is the last means by which the states' constitutional rights can be enforced. If the Court chooses to do nothing, nothing will be done. The Rehnquist Court has not shied from political involvement, and whether or not the average American or the legal scholar supports a politicized judiciary, certainly this time of national insecurity dictates that the time is right for the Court to remain consistent with its recent precedent that illustrates the demise of the political question doctrine, perform its basic judicial duty of constitutional enforcement, and save the nation from its leaders—that is, before terrorists invade our country through our borders and cause more destruction than our country can endure.

VI. CONCLUSION

Crave death.... Make sure that nobody is following you.... Bring knives, your will, IDs, your passport.... Pray: "Oh God, you who open all doors, please open all doors for me, open all venues for me, open all avenues for me."

These instructions were found in 9/11 hijacker Mohammed Atta's luggage.341 Although Atta and his co-conspirators' acts of martyrdom were their last, innumerable others are willing to follow these instructions. As long as this terrorist threat remains, the federal government must aggressively protect our borders to ensure the safety of the citizens of the United States of America—and the majority of Americans support this conclusion. Yet, the legislative and executive branches refuse to employ sufficient efforts to plug the nation's porous Canadian-American border; political, cultural, and economic concerns foster the federal government's border security apathy. Because terrorists effortlessly can invade our nation through our porous borders and perpetuate acts of terrorism, the government's inaction fails to protect the states from further terrorist invasion and likely violates a constitutional mandate: The Invasion Clause.

Because the legislative and executive branches have failed to sufficiently


341. Id.
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protect the states from terrorist invasion in violation of the Invasion Clause, the federal judiciary is the only means by which the federal government can be ordered to comply with its constitutional duty. The federal judiciary is the preeminent branch to enforce controversial constitutional provisions because it is insulated from majoritarian and political pressures. However, the judiciary can mandate legislative or executive compliance with the Invasion Clause only if the states’ suit presents a justiciable claim.

Unlike the prior Invasion Clause cases in which the federal courts found claims of “alien invasions” to present political questions, the states’ allegation that the federal government has failed to protect them from a future hostile terrorist invasion is wholly distinguishable from this line of cases; consequently, the modern Court may find this claim to be justiciable. Even if the federal judiciary would apply the *Baker v. Carr* Court’s political question doctrine, the states’ allegations quite arguably could be found to be justiciable. Additionally, although the Court may apply the political question doctrine to issues touching on foreign affairs, the issue of “homeland security” does not affect foreign affairs to the extent that judicial abstention and deference is required. Recent precedent dictates, however, that the modern Court may fail to apply the political question doctrine and will reach the merits of the Invasion Clause claim. This author implores the Court to reach the merits of the states’ allegations that the federal government’s lax border control policies have violated the Invasion Clause, render a decision in favor of the states, and potentially save the lives of millions of Americans. The Court must make this finding in the name of safety and security for the American people and generations of Americans to follow, as the next terrorist attack on the United States of America may be far worse than the already devastating terrorist attack of September 11, 2001.

MELISSA BLAIR*

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