



SALE! 6 Months for 99¢

Sign in

OPINION // OUTLOOK

Greg Abbott's dangerous misreading of the U.S. Constitution (Opinion)



By **Stephen Vladeck**

Jan 26, 2024



Texas Governor Greg Abbott at the U.S.-Mexico border wall. His claim that states have the right to defend themselves against “invasion” – authority that, in Abbott’s words, “supersedes any federal statutes to the contrary” – echoes arguments made by the South before the Civil War.

The Washington Post/The Washington Post via Getty Im

Listen Now: **Greg Abbott's dangerous misreading of the U.S.**1x
5:52
 Everlit

Gov. Greg Abbott made headlines on Wednesday when he claimed that the “failure of the Biden administration” to stem the tide of unlawful immigration has “triggered” a provision of the U.S. Constitution that authorizes states to defend themselves against “invasion” — authority that, in Abbott’s words, “supersedes any federal statutes to the contrary.”

Although some took the governor’s missive as defiance of the U.S. Supreme Court — which ruled against Texas on Monday in a dispute over whether federal officials can remove razor wire that state officials had placed along some stretches of the U.S.-Mexico border — it is both less than that and far more than that.

Abbott didn’t actually propose to defy the Supreme Court. The court didn’t order Abbott or other Texas officials to *do* anything on Monday; it only allows federal border agents to remove the barrier that Texas erected. Hence there is no mandate for state officials to ignore.

Abbott, though, makes an argument that’s a modern variation on one in vogue in the early 19th century: that states can “nullify” those federal laws that *they* believe are unconstitutional. No matter how much one might sympathize with Abbott’s efforts to address current immigration problems, the power he is claiming, just like nullification itself, is utterly antithetical to the constitutional structure of our federal system in the long term — and likely *will* be repudiated by the Supreme Court sooner rather than later.

EDITORIAL: Now we have a Yass man in the governor’s office



Want more Houston Chronicle?

Make us a Preferred Source on Google to see more of us when you search.

[Add Preferred Source](#)

Abbott's claim rests on an obscure provision of Article I, Section 10 — a part of the federal Constitution as it was adopted in 1787 that imposes *limits* on states. Under that section, states aren't allowed to conduct foreign policy. They aren't allowed to have their own money. They can't pass laws that retroactively impose criminal liability or legislation that declares a party guilty of a crime. And unless Congress allows them to, they can't “engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”

The upshot of this last clause is that “war” was to be a national business — one of the countless ways in which the Constitution centralized power in the federal government in response to the impotent national government (and too-powerful states) under the then-extant Articles of Confederation.

The reason why Article I carves out cases in which states are “actually invaded” has never been seriously disputed: At the time the Constitution was drafted, the entire “regular army” had fewer than 1,000 soldiers. And if the United States was invaded along one of its many land borders, it would take days — if not weeks — to muster even *those* forces into action.

Just as importantly, Congress at the United States' founding (and well into the 20th century) was only in session for a few months out of each year. In the early years of the Republic, it was a very real threat that British troops might invade from Canada,

or Spanish troops invade from Florida, or French troops from Louisiana. In those cases, it was entirely possible — if not likely — that the federal government would be both formally and practically powerless to respond right away.

MORE ABBOTT NEWS: [Gov. vow to 'eliminate rape' draws scrutiny after study on rape-related pregnancies](#)

The “actually invaded” proviso was thus a stopgap, a recognition that states would be allowed to use their otherwise prohibited war powers “[until resources of the federal government can reach the invasion.](#)” So framed, the Article I exception was to allow states to *supplement* federal authority — not to *supplant* it.

What Abbott is arguing for, in contrast, is the right of states to use this language as cover for deciding for themselves that they have been “invaded,” and to use that as justification for *interfering* with federal laws that, in the state’s view, are preventing them from responding to the invasion. That’s not a claim about the right to “engage in War” (which, notably, Texas is *not* doing); it’s a claim about the right to resist *federal* policy not just in the short-term, but indefinitely.

In that respect, it has eerie parallels to arguments advanced by Southerners during the Antebellum era — that states have the [right to “nullify” federal laws](#) that *they* believe are unconstitutional, whether or not the courts agree with them. If anything, Abbott’s claim goes even further: if he’s right, then each state could use a finding of an “invasion” as a pretext for waging war against whomever it wants to — presumably *including* the federal government. After all, in Abbott’s framing, what would have prevented South Carolinians from arguing in 1861 that the federal troops stationed at Fort Sumter were themselves “invaders”?

If the Civil War example seems extreme, so is Abbott’s rhetoric. It may make for good politics, especially with news that congressional Republicans [have backed](#)

away from reform legislation at the behest of former President Donald Trump, who would rather run on the issue than work to solve it. But it's very bad constitutional law.

LETTERS TO THE EDITOR: Razor wire at the Texas border: Come and take it

And although the Supreme Court has not yet repudiated this particular argument, Abbott's behavior may soon force its hand — whether in the razor-wire case or one of the other two ongoing lawsuits between Texas and the Biden administration over border enforcement.

It was Justice Hugo Black, himself a product of Jim Crow-era Alabama, who wrote for the Supreme Court in 1947 about how these very “fundamental issues over the extent of federal supremacy had been resolved by war.” In thumbing his nose at that history, Abbott is sacrificing long-settled principles of constitutional federalism and risking a physical confrontation between state and federal officials along the U.S.-Mexico border. And he's doing it all in order to score short-term political points.

Stephen Vladeck holds the Charles Alan Wright Chair in Federal Courts at the University of Texas School of Law. He is the author of the New York Times bestselling book, “The Shadow Docket,” and the popular Supreme Court newsletter, “One First.” He lives in Austin.

Submit a letter to the editor

The Houston Chronicle welcomes your feedback. We prefer letters containing fewer than 250 words that offer original, timely viewpoints, criticism or analysis responsive to an article or other item appearing in the Chronicle. Submissions should include the writer's full name and, for verification purposes only, contact information including home address, e-mail and phone number. Letters may not be accepted from writers who have had another letter published within 30 days. When writing about political issues, writers should disclose any relationship with a campaign or candidate. Letters are subject to editing. Those containing libelous statements, profanity or name calling will be rejected.

rob.natelson1@gmail.com [Switch account](#)



Not shared

* Indicates required question

Name *

Your answer

Contact email address

Your answer

Home address *

Your answer

Contact phone number (include area code) *

Your answer

Article you are responding to

Your answer

Text of your submission (please keep under 250 words) *

Your answer

Relevant expertise, conflicts of interest or other comments

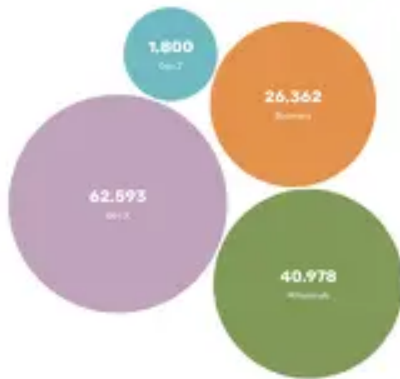


Your answer

Jan 26, 2024

Stephen Vladeck

Editor's Picks



CENSUS

Jobs of the rich: What highest-earning Houstonians do for work



RESTAURANT & FOOD NEWS

Houston's biggest restaurant openings of 2025



EDITORIAL

**Luis i
crimi
| Edit**

Let's Play



SpellTower



Pile-Up Poker



Typeshift



Really Bad Chess



Top

About

Contact

Services

Account

HEARST *newspapers* © 2025 Hearst Newspapers, LLC [Terms of Use](#) | [Privacy Notice](#) | [DAA Industry Opt Out](#) |

Your Privacy Choices (Opt Out of Sale/Targeted Ads)