

Sec. 4—Obligations of United States to States

Baker v. Carr,³³⁹ despite its substantial curbing of the political question doctrine, did not release it.³⁴⁰

Similarly, in *Luther v. Borden*,³⁴¹ the Court indicated that it rested with Congress to determine the means proper to fulfill the guarantee of protection to the states against domestic violence. Chief Justice Taney declared that Congress might have placed it in the power of a court to decide when the contingency had happened that required the Federal Government to interfere, but that instead Congress had by the act of February 28, 1795,³⁴² authorized the President to call out the militia in case of insurrection against the government of any state. It followed, said Taney, that the President “must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress,”³⁴³ which determination was not subject to review by the courts.

In recent years, the authority of the United States to use troops and other forces in the states has not generally been derived from this clause and it has been of little importance.

³³⁹ 369 U.S. 186, 218–32 (1962). In the Court's view, Guarantee Clause questions were nonjusticiable because resolution of them had been committed to Congress and not because they involved matters of state governmental structure.

³⁴⁰ Subsequently, the Court, speaking through Justice O'Connor, raised without deciding the possibility that the Guarantee Clause is justiciable and is a constraint upon Congress's power to regulate the activities of the states. *New York v. United States*, 505 U.S. 144, 183–85 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991). The opinions draw support from a powerful argument for using the Guarantee Clause as a judicially enforceable limit on federal power. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

³⁴¹ 48 U.S. (7 How.) 1 (1849).

³⁴² 1 Stat. 424.

³⁴³ *Luther v. Borden*, 48 U.S. (7 How.) 1, 43 (1849).