may exercise admiralty jurisdiction despite the fact that such jurisdiction may be exercised in the States only by constitutional courts.[8]

SECTION. 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

GUARANTEE OF REPUBLICAN FORM OF GOVERNMENT

The first clause of this section, in somewhat different langauage, was contained in the Virginia Plan introduced in the Convention and was obviously attributable to Madison.[1] Through the various permutations into its final form,[2] the object of the clause seems clearly to have been more than an authorization for the Federal Government to protect States against foreign invasion or internal insurrection,[3] a power seemingly already conferred in any

---

[8] *American Ins. Co.* v. *Canter,* 1 Pet. (26 U.S.) 511, 545 (1828).

[1] "Resd. that a Republican government . . . ought to be guaranteed by the United States to each state." 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 22. In a letter in April, 1787, to Randolph, who formally presented the Virginia Plan to the Convention, Madison had suggested that "an article ought to be inserted expressly guaranteeing the tranquility of the states against internal as well as external danger . . . Unless the Union be organized efficiently on republican principles innovations of a much more objectionable form may be obtruded." 2 *Writings of James Madison,* G. Hunt ed. (New York: 1900), 336. On the background of the clause, *see* W. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: 1972), ch. 1.

[2] Thus, on June 11, the language of the provision was on Madison's motion changed to: "Resolved that a republican constitution and its existing laws ought to be guaranteed to each state by the United States." 1 M. Farrand, *The Records of the Federal Convention of 1787* (New Haven: rev. ed. 1937), 193–194, 206. Then, on July 18, Gouverneur Morris objected to this language on the ground that "[h]e should be very unwilling that such laws as exist in R. Island ought to be guaranteed to each State of the Union." 2 id., 47. Madison then suggested language "that the Constitutional authority of the States shall be guaranteed to them respectively against domestic as well as foreign violence," whereas Randolph wanted to add to this the language "and that no State be at liberty to form any other than a Republican Govt." Wilson then moved, "as a better expression of the idea," almost the present language of the section, which was adopted. Id., 47–49.

[3] Thus, Randolph on June 11, supporting Madison's version pending then, said that "a republican government must be the basis of our national union; and no state in it ought to have it in their power to change its government into a monarchy." 1 id., 206. Again, on July 18, when Wilson and Mason indicated their understanding that the object of the proposal was "merely" to protect States against violence, Randolph asserted: "The Resoln. has 2 Objects. 1. to secure Republican government. 2. to suppress domestic commotions. He urged the necessity of both these provisions."

case.[4] No one can now resurrect the full meaning of the clause and intent which moved the Framers to adopt it, but with the exception of the reliance for a brief period during Reconstruction the authority contained within the confines of the clause has been largely unexplored.[5]

In *Luther* v. *Borden*,[6] the Supreme Court established the doctrine that questions arising under this section are political, not judicial, in character and that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character." [7] *Texas* v. *White* [8] held that the action of the President in setting up provisional governments at the conclusion of the war was justified, if at all, only as an exercise of his powers as Commander-in-Chief and that such governments were to be regarded merely as provisional regimes to perform the functions of government pending action by Congress. On the ground that the issues were not justiciable, the Court in the early part of this century refused to pass on a number of challenges to state governmental reforms and thus made the clause in effect noncognizable by the courts in any matter,[9] a state from which the Court's opinion in *Baker* v. *Carr*,[10] despite its substantial curbing of the political question doctrine, did not release it.

Similarly, in *Luther* v. *Borden*,[11] the Court indicated that it rested with Congress to determine upon the means proper to fulfull

---

2 id., 47. Following speakers alluded to the dangers of monarchy being created peacefully as necessitating the provision. Id., 48. *See* W. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: 1972), ch. 2.

[4] *See* Article I, § 8, cl. 15.

[5] *See generally* W. Wiecek, *The Guarantee Clause of the U.S. Constitution* (Ithaca: 1972).

[6] 7 How. (48 U.S.) 1 (1849).

[7] Id., 42.

[8] 7 Wall. (74 U.S.) 700, 729 (1869). In *Georgia* v. *Stanton*, 6 Wall. (73 U.S.) 50 (1868), the State attempted to attack Reconstruction legislation on the premise that it already had a republican form of government and that Congress was thus not authorized to act. The Court viewed the congressional decision as determinative.

[9] *Pacific States Tel. & Tel. Co.* v. *Oregon*, 223 U.S. 118 (1912); *Kiernan* v. *City of Portland*, 223 U.S. 151 (1912); *Davis* v. *Ohio*, 241 U.S. 565 (1916); *Ohio* v. *Akron Park District*, 281 U.S. 74 (1930); *O'Neill* v. *Leamer*, 239 U.S. 244 (1915); *Highland Farms Dairy* v. *Agnew*, 300 U.S. 608 (1937). *See* the discussion of the political question doctrine, *supra*, pp. 659–669. But in certain earlier cases the Court had disposed of guaranty clause questions on the merits. *Forsyth* v. *Hammond*, 166 U.S. 506 (1897); *Minor* v. *Happersett*, 21 Wall. (88 U.S.) 162 (1875).

[10] 369 U.S. 186, 218–232 (1962). In the Court's view, guaranty clause questions were nonjusticiable because resolution of them had been committed to Congress and not because they involved matters of state governmental structure.

[11] 7 How. (48 U.S.) 1 (1849).

Sec. 4—Republican Form of Government

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 which required the Federal Government to interfere, but that instead Congress had by the act of February 28, 1795,[12] 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",[13] 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.[14]

---

[12] 1 Stat. 424.

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

[14] *Supra, pp.* 472–473, 557–561.