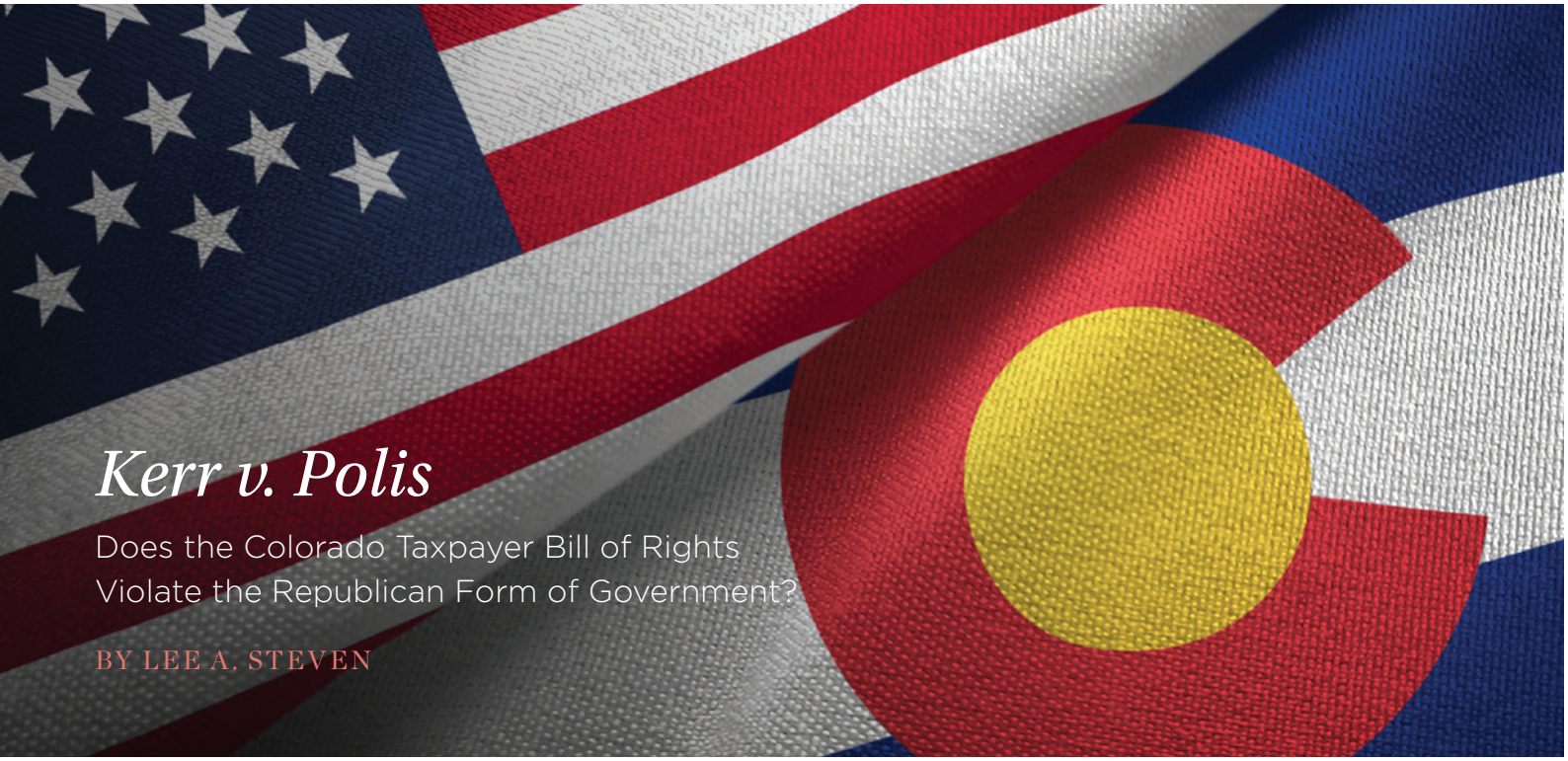

Kerr v. Polis

Does the Colorado Taxpayer Bill of Rights Violate the Republican Form of Government?

BY LEE A. STEVEN

The Guarantee Clause of the US Constitution promises that the federal government "shall guarantee to every State in this Union a Republican Form of Government."[1] But what, exactly, is a republican form of government and what does it mean for the United States to guarantee it?

Both those questions are central to the merits in *Kerr v. Polis*,[2] a long-running case initiated in May 2011 by a coalition of Colorado interests, led by then State Representative Andy Kerr, in an attempt to invalidate the Colorado Taxpayer Bill of Rights (TABOR).[3] In illustration of how slowly the wheels of justice can turn, the case has been proceeding for 10 years but has not yet reached the merits. To date, it has generated two district court opinions,[4] three substantive Tenth Circuit opinions,[5] two Tenth Circuit decisions on en banc petitions,[6] and a US Supreme Court order,[7] all limited to questions of jurisdiction, standing, and justiciability.

The latest opinion from the Tenth Circuit upheld the standing of a subset of the current plaintiffs and remanded the case back to the district court for proceedings on the merits. However, in October 2020, that opinion was vacated when the Tenth Circuit granted a petition for rehearing en banc and directed the parties to brief specific standing questions.[8] So, it is still not clear if the case will ever reach the merits.

Nevertheless, the merits questions are worth considering, both as to the meaning of "a Republican Form of Government" and its application to TABOR. The latter was added to the Colorado Constitution by voter initiative in 1992, the result of work by a committed group of Colorado citizens who sought to check the growth of government by limiting the government's taxing and spending power.[9] At its core, TABOR prevents the state legislature, local governments, and school boards from increasing tax rates or enacting new taxes without voter approval.[10] Since its enactment, many politicians have chafed under its restrictions, and the government has adopted numerous methods to avoid its application.[11] The plaintiffs in *Kerr v. Polis* have taken a more direct route of attack: they argue TABOR violates the Guarantee Clause by removing the legislature's taxing power and placing it in the hands of the people. According to plaintiffs, the republican form of government prevents the direct exercise of political power by the people and requires all such power—including the taxing power—to reside in the hands of elected representatives. Because the US Constitution requires the United States to guarantee a republican form of government, plaintiffs are asking the federal courts to declare TABOR unconstitutional.[12]

The meaning and application of the Guarantee Clause has been litigated before, but in most circumstances courts have preferred to dismiss such claims on jurisdictional grounds, holding them to be non-justiciable political questions. In *Luther v. Borden*, a case arising out of the 1840s Dorr's Rebellion in Rhode Island, the Court refused to determine which of two rival governments was legitimate.[13] It held the case was non-justiciable because the question at issue was political and reserved to Congress:

> Under this article of the Constitution [the Guarantee Clause], it rests with Congress to decide what government is the established one in a State. For as the United States guarantee[s] to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not.[14]

In *Pacific States Telephone and Telegraph Co. v. Oregon*, a case like *Kerr v. Polis* that challenged

the constitutionality of enacting state law through initiative or referendum, the Court refused to reach the merits because it considered the matter a political question outside its jurisdiction.[15] Notably, the Court reached that decision in part because it looked at the logical consequence of any finding that the Guarantee Clause had been violated, namely, that all laws enacted and actions taken by the state government since the adoption of the initiative and referendum process, not just those laws created by initiative or referendum, must be deemed invalid because the state government itself would be invalid.[16] In 1946, the Court cited *Pacific States* for the categorical proposition that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts."[17]

In more recent cases, the Supreme Court has signaled a retraction of this categorical approach and left open the possibility that the justiciability of Guarantee Clause claims should be decided on a case-by-case basis. In *New York v. United States*, for example, the Court observed that the contemporary jurisprudence "has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[18] The Tenth Circuit relied in part on this language in the first appeal in the *Kerr v. Polis* case to reject defendant's argument that the case should be dismissed as a non-justiciable political question, instead analyzing the justiciability question and upholding its jurisdiction under the six-factor test articulated in *Baker v. Carr*.[19] Whether the Tenth Circuit resolved this question correctly remains an open question, as that aspect of the case has not yet been addressed by the Supreme Court.

If *Kerr v. Polis* ever does see a merits determination, what might be the result? Notwithstanding the majority of Supreme Court cases dismissing such claims as non-justiciable political questions, a few early Supreme Court cases have discussed the contours of the Guarantee Clause, albeit never has the Court invalidated a state law or constitutional provision as violative of the clause. These cases do not definitively answer the question at the heart of *Kerr v. Polis*, but they do outline key concepts that should guide any court's decision-making.

In *Minor v. Happersett*, the Court explained the "guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated."[20] It then analyzed the right to vote in various states upon their entry into the Union to show that not "all the citizens of the States were [] invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters."[21] The applicable principle, then, is that the Constitution does not guarantee any one republican form of government and that variations in that form, even variations deemed less than ideal, are acceptable.[22]

At its core, TABOR prevents the state legislature, local governments, and school boards from increasing tax rates or enacting new taxes without voter approval. Since its enactment, many politicians have chafed under its restrictions, and the government has adopted numerous methods to avoid its application.

If the above presents a negative outline of the Guarantee Clause's meaning, *In re Duncan* set forth a positive articulation:

> By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, National and State, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.[23]

Here, republicanism is defined in terms of the rule of law,[24] whereby all political power ultimately resides in the people but that political power is cabined by the requirements of a written constitution and directed through elected representatives.[25] Thus stated, this would appear to favor the plaintiffs in *Kerr v. Polis*, but that conclusion would be premature because the Court did not address whether and to what extent the people may reserve political power to themselves over and against their elected representatives. It might be argued that direct democracy in all matters would violate a republican form of government,[26] but a reservation of certain powers to the people appears fully compatible with the founders' notion of republicanism, as evidenced by the reservation of powers by and to "the people" in the Ninth and Tenth Amendments.[27]

In re Duncan provides further support for the notion that, at the very least, republicanism allows the people to reserve a certain subset of political power to themselves. There the Court summarized at length and with approval the argument Daniel Webster presented to the

Court in *Luther v. Borden*. The Court explained that Webster's argument "contained a masterly statement of the American system of government as recognizing that the people are the source of all political power, but that, as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law and the results ascertained by some certain rule."[28]

This passage illustrates two key points: first, that "the people are the source of all political power," and second, that the exercise of that power through elected representatives is necessary only because a direct exercise is impracticable. In other words, there is nothing inherent in a republican form of government that requires exercise of all political power through elected representatives. At the very least, where it is practicable for the people to exercise political power directly and that exercise is carried out in accordance with the procedure and safeguards provided by law, that direct exercise of political power by the people should be deemed compatible with the republican form of government contemplated by the US Constitution.

As applied to *Kerr v. Polis*, that means TABOR—an amendment to Colorado's constitution enacted in accordance with procedures provided by that constitution that reserves a subset of political power to direct control by the people—is constitutional and the federal courts should uphold it. But we may be waiting some time yet before we know whether and on what grounds the courts will decide this question. CL

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NOTES

1. U.S. Const. art. IV, § 4.
2. The case, previously designated as *Kerr v. Hickenlooper*, was brought against the Governor of Colorado in his official capacity. The current case designation reflects the change in governors following the election of Jared Polis as governor in 2018.
3. *See, e.g.*, the case material and chronology collected at TABOR Lawsuit, http://taborcase.org/index.html.
4. *Kerr v. Hickenlooper*, 259 F.Supp.3d 1178 (D.Colo. 2017); *Kerr v. Hickenlooper*, 880 F.Supp.2d 1112 (D.Colo. 2012).

5. *Kerr v. Polis*, 930 F.3d 1190 (10th Cir. 2019); *Kerr v. Hickenlooper*, 824 F.3d 1207 (10th Cir. 2016); *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014).

6. *Kerr v. Polis*, 977 F.3d 1010 (10th Cir. 2020); *Kerr v. Hickenlooper*, 759 F.3d 1186 (10th Cir. 2014).

7. *Hickenlooper v. Kerr*, 576 U.S. 1079 (2015) ("Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Arizona State Legislature v. Arizona Independent Redistricting Comm'n, ante* p. 787.").

8. Oral argument was heard on May 10, 2021; as of this writing, the decision is pending.

9. *See, e.g.*, Defend TABOR, the TABOR Foundation, & TABOR Committee, About Us, http://thetaborfoundation.org/about-us.

10. *See* Colo. Const. art. X, § 20, cl. 4(a) ("[D]istricts must have voter approval in advance for . . . any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district.").

11. *See* Staver, "TABOR FAQ: Colorado's Taxpayer Bill of Rights explained," *Denver Post* (June 20, 2019), https://www.denverpost.com/2019/06/20/tabor-colorado-taxpayer-bill-of-rights.

12. Plaintiffs assert the same argument under the Colorado Statehood Enabling Act of 1875 in which Congress, as a condition for Colorado statehood, required the state to establish and maintain a republican form of government.

13. *Luther v. Borden*, 48 U.S. 1 (1849).

14. *Id.* at 42.

15. *Pac. States Tel. and Tel. Co. v. Or.*, 223 U.S. 118 (1912).

16. *Id.* at 141 ("[Plaintiff proceeds] upon the theory that the adoption of the initiative and referendum destroyed all government republican in form in Oregon. This being so, the contention, if held to be sound, would necessarily affect the validity not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum. And indeed the propositions go further than this, since, in their essence, they assert that there is no governmental function, legislative or judicial, in Oregon, because it cannot be assumed, if the proposition be well founded, that there is at one and the same time one and the same government which is republican in form and not of that character."); *id.* at 142 ("[I]t [would] become[] the duty of the courts of the United States, where such a claim is made, to examine as a justiciable issue the contention as to the illegal existence of a State, and, if such contention be thought well founded, to disregard the existence in fact of the State, of its recognition by all of the departments of the Federal Government, and practically award a decree absolving from all obligation to contribute to the support of or obey the laws of such established state government.").

17. *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion). *See also Baker v. Carr*, 369 U.S. 186, 218 (1962) ("Guaranty Clause claims involve those elements which define a 'political question,' and for that reason and no other, they are nonjusticiable."); *id.* at 223–24 (citing numerous cases holding Guarantee Clause claims non-justiciable political questions); *City of Rome v. United States*, 446 U.S. 156, 182, n.17 (1980) ("We do not reach the merits of the appellants' argument that the Act violates the Guarantee Clause, Art. IV, § 4, since that issue is not justiciable." (citing *Baker*)).

18. *N.Y. v. United States*, 505 U.S. 144, 185 (1992) (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) and several law review articles).

19. *See Kerr v. Hickenlooper*, 744 F.3d 1156, 1174–81 (10th Cir. 2014).

20. *Minor v. Happersett*, 88 U.S. 162, 175 (1875).

21. *Id.* at 176.

22. James Madison agrees, as he wrote in Federalist No. 43: "Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for antirepublican Constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

23. *In re Duncan*, 139 U.S. 449, 461–62 (1891).

24. *Accord Kies v. Lowrey*, 199 U.S. 233, 239 (1905) (if the state legislature acts under applicable law "to create and alter school districts and divide and apportion the property of such district, no contract can arise, no property of a district can be said to be taken, and the action of the legislature is compatible with a republican form of government").

25. *See also* Federalist No. 57 ("The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust. The elective mode of obtaining rulers is the characteristic policy of republican government.").

26. *See, e.g.*, Federalist No. 10 (distinguishing republics from direct democracies).

27. *See also Forsyth v. Hammond*, 166 U.S. 506, 519 (1897) ("It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the federal Constitution to prevent the people of a state from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government[.]").

28. *Duncan*, 139 U.S. at 461. The Court continued to summarize Webster's presentation as follows: "that through its regulated exercise, each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms of the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes, and that the Constitution and laws do not proceed on the ground of revolution, or any right of revolution, but on the idea of results achieved by orderly action under the authority of existing governments, proceedings outside of which are not contemplated by our institutions." *Id.* at 461–62.