

The Volokh Conspiracy

Call For Drastic Changes In Educating New Lawyers

By: David Kopel - February 11, 2013

Colorado's Constitution (Art. X, sect. 20) is the Taxpayer's Bill of Rights. Like similar provisions in other states, Colorado's TABOR requires voter approval for tax increases, and for most spending increases that exceed inflation plus population growth. Several state legislators have filed suit in federal court to have TABOR declared unconstitutional. Allegedly, requiring voter approval for tax or spending increases violates Article IV, sect. 4 of the U.S. Constitution, which provides: "The United States shall guarantee to every State a Republican Form of Government. . ."

In federal district court, the Colorado Attorney General filed a motion to dismiss *Kerr v. Hickenlooper*, based on the argument that RFOG claims are non-justiciable. That motion was denied, and the case is currently on interlocutory appeal to the 10th Circuit.

On Friday, I filed an amicus brief on behalf of the Independence Institute and the Cato Institute. The brief draws heavily from Rob Natelson's article, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*. 80 *Texas Law Review* 807 (2002). Natelson shows that the Founders consistently used the words "republic" or "republican" to refer to governments which had direct democracy. As the brief summarizes an analysis of every known Founding-Era dictionary: "Not one of these sixteen definitions from nine different Founding-Era definitions contained the least suggestion that a republic had to be purely representative."

Moreover, the Supreme Court, in *Luther v. Borden* and *Minor v. Happersett*, has stated that the admission of a State into the Union is a conclusive determination that the State, at the time of admission, had a Republican Form of Government. Significantly:

In 1907, Congress admitted Oklahoma into the Union, although Oklahoma's Constitution contained very strong provisions for initiative and referendum (Okla. Const., art. V, §§1-7) and provided for a mandatory referendum before the legislature could incur debt. *Id.* art. X, §25. Similarly, in 1912, Congress admitted New Mexico with a constitution that specifically contemplated enactment of laws, including fiscal measures, by citizen initiative. N.M. Const., art. XIX, §3.

Opponents of direct democracy rely heavily on a line from James Madison's *Federalist* no. 10. They are misreading the document, however. Madison was criticizing pure democracy (no representation, no magistrates). A fuller examination of *The Federalist* shows that direct democracy was an accepted feature of what was considered to be a "republic." See *Federalists* 6, 39, 43, 55, 63.