RESTORE THE REPUBLIC: THE INCOMPATIBILITY BETWEEN THE TAXPAYER'S BILL OF RIGHTS AND THE GUARANTEE CLAUSE

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* J.D. Candidate, University of Colorado Law School, 2016. It seems a little perilous to try to thank particular individuals for their contributions to my Comment. This piece is the result of so many thoughtful and talented people offering their input, feedback, and encouragement, and helping me to weave together the brilliant work of many others. I am grateful for them all. Nevertheless, I would particularly like to thank John Michael Guevara, who pointed me to the *Kerr* case. I am most grateful to him, Mary Kapsak, and Starla Doyal for patiently shepherding my Comment through this process. I owe a debt of gratitude to the *Kerr* plaintiffs and their attorneys, not only for supplying me with a topic, but for working to solve a problem that should trouble every Coloradan. Finally, I want to thank my family and friends who encouraged me to take a risk, and have supported me every step of the way. Law school has been such fun, and I could not have done it without them.

INTRODUCTION

> *Money is with propriety considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular . . . the government must sink into a fatal atrophy, and, in a short course of time, perish.*[1]

The Colorado Constitution lacks an indispensable ingredient: it leaves its people's elected representatives powerless to procure a regular and adequate supply of money. In 1992, Colorado voters approved a citizen initiative that

1. THE FEDERALIST NO. 30, at 137 (Alexander Hamilton) (Terence Ball ed., 2003). To be sure, Hamilton warned of a second possibility: the "continual plunder" of the people. *Id.* By way of example, Hamilton noted that the sovereign of the Ottoman Empire was unable to impose new taxes. *Id.* Instead, he relied on the "[g]overnors of provinces to pillage the people without mercy; and in turn squeeze[d] out of them the sums of which he [stood] in need . . . ." *Id.*

The Taxapyer's Bill of Rights (TABOR) has resulted in some analogous plunders. Take, for instance, the 2011 decision by Adams County Commissioners to cap the number of inmates cities could house at their jail, and to charge fees for inmates jailed in excess of the cap. Monte Whaley, *Commissioners OK Plan to Cap City Inmates Housed at Adams County Jail*, DENV. POST (Oct. 31, 2011, 5:10 PM), http://www.denverpost.com/ci_19234349 [http://perma.cc/J2LQ-6AK3]. Unable to close a $7 to $9 million budget shortfall, the county turned to local governments to bridge the gap. *Id.* Unlike local governors in the Ottoman Empire, however, TABOR prevents local governments from increasing taxes on their constituents to support county or state needs. See COLO. CONST. art. X, § 20(2)(b) (defining "district"—the term used to describe the entities to which TABOR's restrictions apply—as "the state or any local government, excluding enterprises"). As such, the cities were forced to release criminals the sheriff refused to house without payment. Yesenia Robles, *Six Aurora Inmates Released Early in Ongoing Jail Dispute*, DENV. POST (Mar. 3, 2014, 1:32 PM), http://www.denverpost.com/news/ci_25265722/six-aurora-inmates-released-early-ongoing-jail-dispute [http://perma.cc/6A32-GTQW].

added the "Taxpayer's Bill of Rights" (TABOR) to the state constitution.[2] TABOR deprives Colorado state and local governments of the powers to tax and borrow money—powers that sustain the life of these governments, enabling them to perform their essential functions.[3] Instead, Colorado leaders must convince the people that current resources are no longer adequate and hope that a majority of voters are in agreement with their assessment.

Vesting the vast power to tax and borrow directly in the people of Colorado arouses one of James Madison's chief concerns about the proper structure of government: mitigating the dangers of factions.[4] The willingness to sacrifice "individual interests to the greater good of the whole community" was the "essence of republicanism."[5] "The people"—from whom the government derives its power—were thought to be a singular, unitary entity, distinct from the various private interests of groups and individuals.[6] Factions were considered aberrations that occurred when individuals "lost control of their basest passions and were unwilling to sacrifice their immediate desires for the corporate good."[7] Factions can amount to a majority or a minority of citizens if they are united by a common purpose that is adverse either to the rights of others or to the interests of the community.[8] Madison concluded that a "pure democracy" could "admit no cure for the mischiefs of faction."[9] The cure was to structure the government as a republic, delegating the exercise of government power to a small number of elected citizens.[10] The U.S. Constitution not only structures the national government in this way, but requires the national government to "guarantee to every state

2. Taxpayer's Bill of Rights, 1993 Colo. Sess. Laws 2165 (codified at COLO. CONST. art. X, § 20).

3. *See infra* note 257.

4. THE FEDERALIST NO. 10, *in* JAMES MADISON: WRITINGS 160 (James Madison) (Jack N. Rakove ed., 1999) ("Among the numerous advantages promised by a well constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.").

5. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787 at 53 (1969).

6. *Id.* at 58.

7. *Id.* at 59.

8. THE FEDERALIST NO. 10, *supra* note 4, at 161 (James Madison).

9. *Id.* at 164.

10. *Id.*

in this Union a Republican Form of Government."[11]

TABOR empowers a faction of citizens to pursue their interest in minimizing their tax burden, while simultaneously allowing them to avoid accountability for underfunding public services.[12] This faction capitalizes on voters' lack of information and appeals to that "common impulse of passion" for avoiding taxes in order to create a factious majority.[13] In so doing, TABOR cultivates "democratic despotism,"[14] where the public good is sacrificed to the private greed of the majority.

A number of TABOR opponents recently asked the federal courts to fulfill the promise of the Guarantee Clause.[15] In 2011, citizens and officials from various levels of government brought suit against Governor John Hickenlooper in federal district court.[16] The crux of their argument was that representatives in a republican government must be empowered to raise and appropriate funds to be effective.[17] Because TABOR deprives Colorado's legislature of the power to tax, the legislature cannot fulfill its obligations to the people.[18] By shifting the ability to provide the means for carrying out legislative enactments from the legislature to the people by plebiscite, the plaintiffs argued that TABOR fundamentally and impermissibly altered the structure of Colorado's government.[19]

This Comment argues that TABOR's fundamental alteration of Colorado's government is indeed incompatible with the Guarantee Clause. The authority of elected representatives to enact laws and undertake public works is illusory if they must seek voter permission to finance these laws and undertakings. Not only is TABOR antithetical to republicanism, it is illustrative of the dangers posed by the

11. U.S. CONST. art. IV, § 4.

12. *See infra* Part III.

13. *See* THE FEDERALIST NO. 10, *supra* note 4, at 161 (James Madison) (describing "factions" as any minority or majority of citizens united by an interest that is adverse either to the "rights of other citizens, or to the permanent and aggregate interests of the community").

14. *See* WOOD, *supra* note 5, at 409–11.

15. Substituted Complaint for Injunctive and Declaratory Relief, Kerr v. Hickenlooper, 880 F. Supp. 2d 1112 (D. Colo. 2011) (No. 11-cv-1350), ECF No. 12.

16. *Id.*

17. *Id.* at 4.

18. *Id.*

19. *See id.*

factions created by direct democracy.[20] TABOR impedes the government by capitalizing on the disparity between the palpable impact of taxes and the subtle impact of governmental benefits upon voters.[21] It mandates that every question be framed, not in terms of policies, goals, or public benefits, but instead, in terms of taxes.[22] When asked simply if he or she wants to pay more in taxes, the rational, self-interested voter can hardly be blamed for answering "no," even if he or she would support the same community interest for which the tax was being sought.[23] Essentially, TABOR creates the very factions that concerned Madison when he advocated for the republican form.[24]

Accordingly, the relief sought by the plaintiffs in *Kerr v. Hickenlooper*, the case arguing TABOR violates the Guarantee Clause, should be granted. Federal courts should not abdicate their responsibility for guaranteeing this important right, but should instead restore Colorado to the representative democracy that the founders envisioned. Intervention by the courts is particularly important because the majoritarian faction that TABOR has created will not likely vote to correct TABOR's wrongful alteration of power.[25]

Part I of this Comment examines the Guarantee Clause by attempting to answer two key questions. First, which of the branches are responsible for enforcing the guarantee? Second, what did the founders mean by a "republican form of government"? Answering the first question is key to understanding why *Kerr v. Hickenlooper* has focused, thus far, on the justiciability of the claim, rather than its merits.[26] The

20. *See infra* Part III.

21. *See infra* Section III.A.

22. *See* COLO. CONST. art. X, § 20(3)(c) (requiring ballot titles for tax and debt increases to begin, "SHALL TAXES BE INCREASED" and "SHALL DEBT BE INCREASED," respectively).

23. *See* Jack Citrin, *Do People Want Something for Nothing: Public Opinion on Taxes and Government Spending*, 32 NAT'L TAX J. 113, 115 (1979).

24. *See supra* text accompanying notes 9–10.

25. As Madison put it,

> As long as the reason of man continues fallible, and he is at liberty to exercise it, different opinions will be formed. As long as the connection subsists between his reason and his self-love, his opinions and his passions will have a reciprocal influence on each other; and the former will be objects to which the latter attach themselves.

THE FEDERALIST NO. 10, *supra* note 4, at 161 (James Madison).

26. Kerr v. Hickenlooper, 744 F.3d 1156, 1161 (10th Cir. 2014), *cert. granted, judgment vacated and remanded*, 135 S. Ct. 2927 (2015).

second question speaks directly to the merits of the *Kerr v. Hickenlooper* claim. TABOR's compatibility with the prescribed form can be judged only after developing an understanding of the vices the founders sought to circumscribe.

Part II surveys Colorado's constitutional history, including TABOR's adoption. It examines TABOR's origins as well as its operative restrictions. Part II also discusses key arguments in *Kerr v. Hickenlooper*, as well as major actions in the case to date. With an understanding of the fundamentals of a republican form of government, and the basic mechanisms of TABOR, Part III then proceeds to analyze TABOR's incompatibility with the republican form. It explores the difficulties in convincing voters to approve tax increases, and the impact of those difficulties on unpopular needs. Finally, Part III discusses the ways in which the republican form was intended to safeguard the public good. This Comment concludes that TABOR is incompatible with the Guarantee Clause and urges the federal courts to find TABOR unconstitutional.

I. DISCERNING THE MEANING OF THE GUARANTEE CLAUSE

Article IV, Section 4 of the U.S. Constitution provides, "The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."[27] This clause—aptly called the "Guarantee Clause" because of its operative verb—is the federal Constitution's sole restriction on the form of the states' governments.[28] It likely originated in Thomas Jefferson's 1776 drafts of a constitution for the state of Virginia.[29] Jefferson anticipated that part of Virginia's territory would become new colonies, and required that such "colonies . . . be established on the same fundamental laws contained in this instrument."[30] In 1781, when Virginia actually ceded the territory, the cession statute required "that the States so formed shall be distinct Republican States."[31]

Article IV's guarantee of a republican form of government

27. U.S. CONST. art. IV, § 4.

28. WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 1 (Milton R. Konvitz ed., 1972).

29. *See id.* at 15.

30. Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711, 1735 (2010).

31. WIECEK, *supra* note 28, at 16.

is replete with ambiguity. John Adams said, later in his life, that he never understood what a republic was, "and I believe no man ever did or ever will."[32] The Guarantee Clause's ambiguous wording raises two questions that are key to TABOR and *Kerr v. Hickenlooper*.[33] First, which branch or branches are responsible for the definition and enforcement of the guarantee?[34] The answer to this question is important to resolving *Kerr* because it touches on the justiciability of its claims. Second, the clause invites the question, What is a "Republican Form of Government"?[35] Unfortunately, as Adams perhaps foretold, these questions remain somewhat unanswered.

A. Which Branch is the Guarantor?

The placement of the Guarantee Clause in Article IV supports the conclusion that each of the branches of the national government are charged with its enforcement.[36] Its placement after the three articles outlining the duties and powers of each of the co-equal branches indicates that no single branch is responsible for ensuring its guarantee.[37] To be sure, Article IV is a bit of a catchall, containing various provisions concerning interstate relations and the relationship between

32. *Id.* at 13. Historian Gordon Wood opines that Adams's memory was "playing him badly" by 1807 when he said that he never understood what a republic was. WOOD, *supra* note 5, at 48. "When Adams himself [in 1776]," says Wood, "talked of a 'Republican Spirit, among the People,' . . . he seems to have understood clearly what it denoted." *Id.*

33. WIECEK, *supra* note 28, at 2–4.

34. *Id.* at 2–3. The Guarantee Clause presents a third question not addressed in this Comment: What does it mean to "guarantee" a republican form of government? *Id.* at 3. Congress could "guarantee" a republican form of government by refusing to admit states to the union that are not republican in character. *Id.* at 128. This solution, however, does not resolve the issues that arise when admitted states modify their government, as Colorado has done with TABOR. Nor does it address the issues created by an evolving conception of the republican form. *Id.* Because this Comment argues that the federal courts indeed have responsibility for guaranteeing a republican form under Article IV, and further argues that the means of fulfilling the guarantee in this case is to strike down TABOR, the means by which the other branches may enforce the guarantee is not discussed.

35. *Id.* at 3.

36. *Id.* at 77.

37. *Id.* at 2–3; *accord* Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 871 (1994).

the states and the national government.[38] Nevertheless, the clause's text supports the conclusion that each of the branches is responsible for its enforcement. The clause charges the "United States" with the duty of guaranteeing a republican form of government.[39] It seems unlikely that the drafters would have chosen the general term "United States" if they had a particular branch in mind.[40] After all, just one section earlier, the drafters specified that the power to admit new states is vested in Congress alone.[41]

The records of the Constitutional Convention indicate that the delegates, with one possible exception, did not consider it necessary to place the Guarantee Clause within the purview of a particular branch.[42] In a speech to convention delegates, Edmund Randolph implied that enforcement authority for the Domestic Violence Clause[43] should rest with "the General Legislature."[44] The other delegates simply used "the General Government" or "the United States" in discussing the Guarantee Clause.[45] Use of the phrase, "The United States," coupled with its placement after the three branch-specific articles, is most consistent with the view that each of the branches plays a role in shaping and enforcing the Guarantee Clause.[46]

The national government's response to domestic strife early in the country's history influenced how each branch viewed its role under Article IV. The Supreme Court's disposition of *Luther v. Borden* following Dorr's Rebellion is

38. WIECEK, *supra* note 28, at 1–2.

39. *Id.* at 2–3; *see also* Chemerinsky, *supra* note 37, at 871.

40. WIECEK, *supra* note 28, at 77.

41. U.S. CONST. art. IV, § 3, cl. 1.

42. WIECEK, *supra* note 28, at 76.

43. U.S. CONST. art. IV, § 4 ("The United States . . . shall protect each of [the states] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); *see also infra* note 49 (discussing the denomination of the clauses of Article IV, Section 4). Because both clauses are part of a sentence that begins, "The United States," changing enforcement of the Domestic Violence Clause to "The General Legislature" would necessarily change enforcement of the Guarantee Clause unless the latter was moved to a separate sentence.

44. WIECEK, *supra* note 28, at 76–77. Randolph's interpretation of the clause is particularly important given that he, along with Madison, sponsored the clause's original version. *Id.* at 54.

45. *Id.* at 77.

46. *Id*.

particularly relevant to *Kerr*.[47] Notwithstanding the peculiar facts of *Luther*, Chief Justice Taney's opinion led the judiciary to decline an active role in interpreting and enforcing the Guarantee Clause for years to come.[48] The following subsections discuss early exercises of the Article IV, Section 4 powers, the *Luther v. Borden* case, and later Guarantee Clause cases. In particular, these subsections examine why the Supreme Court initially deferred to Congress and the President, and argue that such deference is not appropriate in all Guarantee Clause cases.

1. Early Enforcement

Article IV, Section 4 of the Constitution contains two clauses.[49] The first is the Guarantee Clause.[50] The second clause—the Domestic Violence Clause—requires the United States to protect the states against invasion and domestic violence.[51] Protection against domestic violence must be initiated by the state legislature, or by the executive if the legislature cannot be convened.[52]

Congress delegated some of the responsibility for meeting the demands of Article IV, Section 4 to the executive branch by enacting the Militia Act of 1792.[53] The Militia Act authorized the President to call out state militias to suppress opposition to federal laws.[54] The act was a response to the Whiskey

47. Luther v. Borden, 48 U.S. 1, 42, 7 How. 1, 35 (1849).

48. *See* WIECEK, *supra* note 28, at 118–22; *see also* New York v. United States, 505 U.S. 144, 184 (1992) (expressing concern that the "limited holding" in *Luther* had "metamorphosed into the sweeping assertion that 'violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.'" (quoting Colegrove v. Green, 328 U.S. 549, 556 (1946))).

49. Guarantee Clause scholar William Wiecek, cited throughout this Comment, subdivides Article IV, Section 4 into two clauses. *See* WIECEK, *supra* note 28, at 42. Although Wiecek's subdivision seems to be anomalous, *see e.g.*, THE HERITAGE GUIDE TO THE CONSTITUTION 368 (David F. Forte et al. eds., 2d ed. 2014) (referring to the entirety of Section 4 as "The Guarantee Clause" without any separately numbered clauses), it is useful for understanding the context for early interpretation of this Section by the Supreme Court. Accordingly, this Comment retains Wiecek's denomination, and refers to individual clauses in the text, but does not number the clauses separately in citations in keeping with the more common method for citing Article IV.

50. U.S. CONST. art. IV, § 4.

51. *Id.*

52. *Id.*

53. Militia Act of 1792, ch. 28, 1 Stat. 264.

54. WIECEK, *supra* note 28, at 80.

Rebellion, which was a conflict with western Pennsylvania farmers over federal taxes on whiskey.[55] Although the Whiskey Rebellion had nothing to do with the form of Pennsylvania's government, the Militia Act—and its successor, the Enforcement Act of 1795[56]—revealed an important interplay between the executive and legislative branches. Specifically, the act showed that Congress thought the involvement of the executive was necessary to discharge its duty to "suppress Insurrections" and "execute the Laws of the Union" under Article I, Section 8 of the Constitution (the Militia Clause).[57]

Though never invoked explicitly by Congress or the President, the Guarantee Clause became connected to its Section 4 companion, the Domestic Violence Clause, as the latter was used to respond to various episodes of violence.[58] The use of the Militia Act and Article IV, Section 4 as a whole in this way reinforced two principles that would shape the judiciary's perceived role under the Guarantee Clause. First, the judiciary would infer that enforcement of the Guarantee Clause was primarily a presidential responsibility.[59] Second, the Guarantee Clause, and indeed all of Section 4, would be viewed primarily as a tool for suppressing insurrection and assuring tranquility.[60]

2. Dorr's Rebellion and *Luther v. Borden*

The notion that enforcement of the Guarantee Clause was a presidential responsibility to be exercised during times of violent strife influenced the outcome of the *Luther v. Borden* dispute following Dorr's Rebellion. Unfortunately for those wishing to prosecute violations of the Guarantee Clause in federal courts, the Supreme Court's reasoning in *Luther* would later be applied to effectively foreclose that option.[61] Yet, as

55. *Id.* at 78–85.
56. Enforcement Act of 1795, ch. 36, 1 Stat. 424.
57. WIECEK, *supra* note 28, at 78–79.
58. *Id.* at 85.
59. *Id.* at 84–85.
60. *Id.*
61. *See infra* Section I.A.3 for a discussion on how *Luther* was applied by later courts. Several commentators argue that Chief Justice Taney's disposition of the Guarantee Clause in *Luther* was not part of the case's holding, but was mere dicta. *See* WIECEK, *supra* note 28, at 120–22; Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 780 (1994); Hans A. Linde, *When*

this subsection will discuss, *Luther*'s peculiar circumstances should confine its holding to a very limited application.

When Rhode Island ratified the U.S. Constitution and became a member of the Union, it retained the government established by the charter of Charles II in 1663 with only minor changes.[62] Dissatisfied with the limited suffrage rights under the charter, a group of citizens drafted a new constitution.[63] The new document was then ratified by a majority of those entitled to vote under its freshly minted suffrage provisions.[64] A new government was elected, but the charter government refused to recognize its validity.[65]

Supporters of the newly elected Dorr government took *Luther* to the Supreme Court specifically to test the legitimacy of the charter government under the Guarantee Clause.[66] *Luther* was actually a trespass case.[67] The plaintiff was a Dorr supporter, and the defendant was an officer of the charter government who entered the plaintiff's home to arrest him.[68] The plaintiff's theory of the case was that Dorr's government was the only legitimate government of the state at the time, and therefore no officer of the illegitimate charter government could lawfully enter his home.[69] Conversely, the defendant argued that he was not trespassing, but acting under the authority of the legitimate charter government.[70]

The Court deferred to Congress and the President as the enforcers of the Guarantee Clause when it affirmed that the charter government and its laws were in full force and effect.[71] It held that under the Enforcement Act, Congress vested in the President "the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere . . . ."[72] If the judiciary were to second guess the President's decision, the clause would become "a guarantee

Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality, 72 OR. L. REV. 19, 29 (1993).

62. Luther v. Borden, 48 U.S. 1, 35, 7 How. 1, 29 (1849).
63. WIECEK, *supra* note 28, at 86–91; *Luther*, 48 U.S. at 35–36, 7 How. at 30.
64. *Luther*, 48 U.S. at 36, 7 How. at 30.
65. *Id.*
66. *See* WIECEK, *supra* note 28, at 111–14.
67. *Luther*, 48 U.S. at 34, 7 How. at 29.
68. *Id.* at 35–36, 7 How. at 29–30.
69. WIECEK, *supra* note 28, at 114–15.
70. *Luther*, 48 U.S. at 34, 7 How. at 29.
71. *Id.* at 42–44, 7 How. at 35–37.
72. *Id.* at 43, 7 How. at 36.

of anarchy, and not of order."[73]

> [I]t rests with Congress to decide what government is the established one in a State . . . . Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not . . . . It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee.[74]

Nevertheless, there were important facts present in *Luther* that should be emphasized lest its holding be interpreted too broadly.[75] First, the Supreme Court heard this case seven years after Dorr concluded his rebellion.[76] Had the Court held for the plaintiff, it would have been at odds with two important bodies: the Rhode Island Supreme Court and the President of the United States. The Rhode Island Supreme Court, which derived its power from the old charter, had already convicted Dorr of treason.[77] Dorr's trial affirmed the existence of the judicial power derived from the old charter and reinforced the legitimacy of the charter government.[78] Furthermore, President Tyler had, on several occasions, committed to support the charter government if it were unable to repel the violence instigated by Dorr and his followers.[79] The Court was, therefore, understandably reluctant so many years later to second-guess the conclusions of Rhode Island's highest court and the President as to which government was legitimate.[80]

Moreover, a decision for the plaintiff in *Luther* would have created a constitutional crisis in Rhode Island. Shortly after

73. *Id.*

74. *Id.* at 42–43, 7 How. at 35–36.

75. Even Professor Amar—who views the Guarantee Clause as more broadly permitting any form of popular sovereignty—agrees that *Luther* does not establish the general nonjusticiability of Guarantee Clause claims. Amar, *supra* note 61, at 753. "Indeed," he points out, "it is hard to see how other big clauses—from Section One to the Fourteenth Amendment, for example—are so different from the Republican Government Clause in their potential breadth, and their need for judicial mediating principals." *Id.*

76. WIECEK, *supra* note 28, at 86.

77. *Luther*, 48 U.S. 39–40, 7 How. at 33.

78. *Id.* at 40, 7 How. at 33 ("Judicial power presupposes an established government capable of enacting laws and enforcing their execution.").

79. WIECEK, *supra* note 28, at 101–07.

80. *Id.* at 124; *accord Luther*, 48 U.S. at 38–39, 7 How. at 32 ("When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction.").

Dorr's rebellion, the state ratified a new constitution that provided for broader suffrage rights.[81] Had the Court concluded that the charter government was illegitimate, then the new constitution ratified after the rebellion would be similarly invalid.[82] The Court was concerned that it would be condemning Rhode Island to anarchy "for the sake of permitting one action of trespass to vindicate one disputed theory of government."[83] As Daniel Webster himself said, *Luther* was an unusual case.[84] Its circumstances simply do not lend it to resolving all—probably not even many—Guarantee Clause disputes, especially those not involving domestic violence.[85]

3. Post-*Luther* Guarantee Clause Cases

Following *Luther*, there were three cases of considerable moment for the Guarantee Clause: *Pacific States Telephone & Telegraph Co. v. Oregon*,[86] *Baker v. Carr*,[87] and *New York v. United States*.[88] In *Pacific States*, the Supreme Court again declined to accept a role under the Guarantee Clause.[89] The case involved a challenge to Oregon's referendum and initiative process alleging, among other things, that the initiative was contrary to a republican form of government.[90] The Court dismissed the case for lack of jurisdiction.[91] Relying on *Luther*, the Court forcefully held that "the issues presented, in their very essence, are, and have long since by this court been, definitely determined to be political and governmental, and embraced within the scope of the powers conferred upon

81. WIECEK, *supra* note 28, at 99.
82. *Id.* at 119.
83. *Id.*
84. *Luther*, 48 U.S. at 29, 7 How. at 25.
85. WIECEK, *supra* note 28, at 124–29.
86. Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912).
87. Baker v. Carr, 369 U.S. 186 (1962).
88. New York v. United States, 505 U.S. 144 (1992).
89. 223 U.S. at 133.
90. *Id.* at 138. Oregon's initiative and referendum amendment, adopted in 1902, Act of Jan. 25, 1901, 1901 Or. Laws 476 (submitting a constitutional amendment to voters), is substantially similar to the amendment Colorado adopted in 1910, COLO. CONST. art. V, § 1. It reserved for the people the power to propose laws and amendments to the constitution. 1901 Or. Laws 476. Oregon's amendment requires signatures of eight percent of legal voters to initiate an amendment. *Id.* Colorado requires only five percent. COLO. CONST. art. V, § 1(2).
91. *Id.* at 151.

Congress."[92]

Pacific States' exaltation of *Luther* remained the fundamental law concerning the Guarantee Clause for fifty years until the opinion in *Baker v. Carr* weakened its holding.[93] Although the *Baker* Court ultimately concluded the case could proceed on equal protection grounds, it questioned whether Guarantee Clause claims were per se nonjusticiable.[94] The Court opined that the political question label was too often used to erroneously obscure the need for constitutional inquiry on a case-by-case basis.[95]

More recently, in *New York v. United States*, the Court expressed its concern that the "limited holding" in *Luther* had "metamorphosed into [a] sweeping assertion that 'violation of the great guaranty of a republican form of government in States cannot be challenged in the courts.'"[96] Much like *Baker*, however, *New York* was not decided under the Guarantee Clause.[97] Instead, its reasoning was grounded in the interplay between Congress's enumerated powers in Article I and the Tenth Amendment.[98] While neither *Baker* nor *New York* overruled *Pacific States*, they do, in dicta, "suggest[] that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions."[99]

Where history makes clear that both Congress and the President take part in determining whether a state government is passably republican, the modern view expressed in *Baker* and *New York* rightly gives the judiciary a role under the Guarantee Clause. As Justice Douglas opined in *Baker*, "The statements in *Luther v. Borden* that this guaranty is enforceable only by Congress or the Chief Executive is not

92. *Id.*

93. WIECEK, *supra* note 28, at 265.

94. Baker v. Carr, 369 U.S. 186, 210, 228 (1962).

95. *Id.* at 210–11.

96. New York v. United States, 505 U.S. 144, 184 (1992) (quoting Colegrove v. Green, 328 U.S. 549, 556 (1946)).

97. *Id.* at 183–86.

98. *Id.* at 177.

99. *Id.* at 185. As noted above, Justice Taney's opinion in *Luther* that Guarantee Clause claims present nonjusticiable political questions is arguably dicta. *See supra* note 61. Furthermore, as one author noted, "*Stare decisis* is *not* the rule of the Court, but it is a custom which continues to receive lip-service." PHILIPPA STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION 23 (1974).

maintainable."[100] The suggestion that Guarantee Clause claims may be justiciable creates an opening for federal courts to take a more active role. For issues like TABOR, which are unlikely to give rise to violent insurrection, the judiciary's decision to confront the merits or defer to the political branches may well determine whether or not the Guarantee Clause plays any role in modern constitutional law.

B. What is a "Republican Form of Government"?

The core issue in *Kerr v. Hickenlooper* is whether TABOR is incompatible with the guarantee of a "republican form of government."[101] Notwithstanding John Adams's quip to Mercy Warren,[102] there is ample support for the assertion that the republican form of government guaranteed by the Constitution was well understood by its drafters. As this Section explains, the most likely vision was governance through representatives elected by the people in a structure resembling the national government.

In its negative sense, the term "republic" was used as a contradistinction from monarchy and aristocracy.[103] As Professor Akhil Amar points out,[104] Madison listed several states in The Federalist No. 39—Holland, Venice, Poland, and England—that were denominated republican, but demonstrate "the extreme inaccuracy with which the term has been used in political disquisitions."[105] Professor Amar cites No. 39, among other articles, in support of his thesis that the key elements of republican government are popular sovereignty, majority rule, and the people's right to alter or abolish their constitution.[106] To be sure, these so-called republican states were governed by hereditary nobles, aristocracies, and monarchies, supporting the argument that Madison found these forms incompatible

100. 369 U.S. at 242 n.2 (Douglas, J., concurring) (citation omitted).

101. 744 F.3d 1156, 1161 (10th Cir. 2014), *cert. granted, judgment vacated and remanded*, 135 S. Ct. 2927 (2015).

102. *See supra* note 32 and accompanying text.

103. Amar, *supra* note 61, at 759.

104. *Id.* at 763–64.

105. THE FEDERALIST NO. 39, *in* JAMES MADISON: WRITINGS, *supra* note 4, at 211 (James Madison).

106. Amar, *supra* note 61, at 764, 749–50. *Contra* Linde, *supra* note 61, at 22 (noting that pure majoritarian theory is "difficult to square" with the adoption of bills of rights against government and arguing that "popular sovereignty was not synonymous with democracy").

with republicanism.[107] Furthermore, as Professor Amar notes in support of his thesis,[108] Madison defined a republic as "a government which derives all its powers directly or indirectly from the great body of the people."[109]

This view of republicanism is incomplete. In No. 39, Madison agreed that one branch of the English government (the elected House of Commons) could properly be called republican, implying that he thought a republican government was something more structured than simply "a government which derives all its powers directly or indirectly from the great body of the people."[110] In fact, there is little need to infer Madison's ideal structure. For in that same sentence quoted by Professor Amar,[111] Madison says that a republic is a government that "is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."[112] Although Madison stresses that the *source* of the government's power is the people, nowhere in No. 39 does he suggest that such power be *exercised* by the people directly.[113]

When the Constitution was ratified, most Americans would have agreed that a monarchy or aristocracy was antithetical to the ideal republican form.[114] Among the objectives of the Constitution's drafters was the vesting of power in "the people at large, *either collectively or* by representation."[115] Yet the notion of pure democracy—meaning the direct, complete, and continuing control of the legislative and executive branches of government by the people as a whole—was considered equally

107. THE FEDERALIST NO. 39, *supra* note 105, at 211 (James Madison).

108. Amar, *supra* note 61, at 764.

109. THE FEDERALIST NO. 39, *supra* note 105, at 211–12 (James Madison).

110. *Id.* (noting that the other two branches were a hereditary aristocracy and a monarchy, respectively).

111. Amar, *supra* note 61, at 764.

112. THE FEDERALIST NO. 39, *supra* note 105, at 12 (James Madison).

113. Taken out of context, the phrase "directly or indirectly" can be misleading. In this case, Madison is not using the phrase to suggest that the government could be administered directly by the people or indirectly through elected representatives. This is made clear in the next paragraph of No. 39 where Madison explains that the House of Representatives is "elected immediately by the great body of the people," whereas the Senate "derives its appointment *indirectly* from the people." *Id.* at 212 (James Madison) (emphasis added). This was, of course, when Article I provided that the Senators were chosen by state legislatures, and before the Seventeenth Amendment provided for the election of Senators directly by the people. U.S. CONST. art. I, § 3, cl. 1, *amended by* U.S. CONST. amend. XVII.

114. WIECEK, *supra* note 28, at 17; *accord* Linde, *supra* note 61, at 22.

115. Amar, *supra* note 61, at 758 (alteration in original) (citation omitted).

undesirable.[116] Most Americans, including some of the most radical minded, would not approve of dissolving "the GREAT GOLDEN LINE between the rulers and ruled."[117] For the eighteenth-century American, democracy connoted "a vicious progression from anarchy to the rule of the ignorant, ending in military tyranny."[118] As Madison aptly cautioned, "Wherever the real power in a Government lies . . . there is the danger of oppression."[119]

Thus, republicanism surfaced as the suitable alternative to both monarchy and pure democracy. Where a democracy would result in the rule by the ignorant, a republic would "refine and enlarge the public views, by passing them through the medium of a chosen body of citizens."[120] Moreover, simply administering the government through representatives elected by the majority was not sufficient, as the post-revolutionary government revealed.[121] During the 1780s, Americans' distrust of political power and fear of tyranny shifted from the Crown to the various state legislatures.[122] Madison felt that this shift was not the result of legislators acting contrary to the will of their constituents, but rather resulted from the government acting as "the mere instrument of the major number of the constituents."[123] Even through a representative government, the power of a majority could be wielded contrary to the public good.[124] It was important, therefore, to structure the

116. WIECEK, *supra* note 28, at 18; *accord* Linde, *supra* note 61, at 22–23.

117. WOOD, *supra* note 5, at 223 (citation omitted); *see also* Linde, *supra* note 61, at 23 ("[N]ot even Thomas Jefferson contemplated dispensing with legislators altogether in favor of direct statewide plebiscites.").

118. WIECEK, *supra* note 28, at 19.

119. WOOD, *supra* note 5, at 410.

120. THE FEDERALIST NO. 10, *supra* note 4, at 165 (James Madison).

121. WOOD, *supra* note 5, at 409.

122. *Id.*; *accord* Linde, *supra* note 61, at 23.

123. WOOD, *supra* note 5, at 410 (quoting James Madison).

124. Early constitutions, such as those of New Hampshire, vested all of the government's power in a single representative body. WOOD, *supra* note 5, at 447. This structure quickly came to be seen as a tyranny of sixty, as opposed to the tyranny of a single king or despot. *Id.* at 447. The solution, in part, was direct election of the executive by the people as a whole, thereby making him or her accountable to the people as opposed to the council. *Id.* at 446. Thus, when a group calling themselves "Republicans" sought to change Pennsylvania's first constitution, one of their goals was to replace the twelve-member Executive Council, which was selected by the legislature, with a single executive elected by the people directly. *Id.* at 439, 446. Proper division, and direct election, would ensure "the several departments become sentinels in behalf of the people to guard against every possible usurpation." *Id.* at 449 (quoting Thomas Jefferson).

government such that its various powers were "so divided and guarded as to prevent those given to one [branch] from being engrossed by the other."[125]

These key concepts of elected representation and separation of powers are reflected in the U.S. Constitution as well as early state constitutions.[126] The legislative, executive, and judicial powers of the government are divided among co-equal branches, each with powers that circumscribe the other two.[127] Such power is not exercised directly, but through representatives duly elected or chosen by those elected.[128] The people cannot even exercise their right to alter or abolish their government directly—a right that Professor Amar argues is a corollary to the "central pillar" of republican government[129]—but only through their elected representatives.[130]

In sum, it is fair to conclude that the structure of the national government reflects the form the drafters sought to guarantee to the states. Thus, in answering the question, "What is a republican form of government?" one need only look to the Constitution itself. Far from a pure democracy, a republican form of government is exemplified by a body of representatives governing in separate, co-equal branches. This is the form the founders undoubtedly desired to guarantee to posterity in Article IV. Furthermore, despite the Supreme Court's early deference to the legislative and executive branches, the structure and text of the constitution support the conclusion that each branch has a role in enforcing this important guarantee.

125. WOOD, *supra* note 5, at 449 (quoting Thomas Jefferson).

126. In his 1776 draft of the Virginia Constitution, for example, Thomas Jefferson called for proportional representation. WOOD, *supra* note 5, at 171 n.23. Furthermore, the 1776–77 constitutions of Virginia, Maryland, North Carolina, and Georgia distributed governmental powers among separate legislative, executive, and judicial branches. *Id.* at 150.

127. WIECEK, *supra* note 28, at 21–23.

128. WOOD, *supra* note 5, at 172.

129. *See* Amar, *supra* note 61, at 749 (arguing that the people's right to alter or abolish their constitution, a corollary of popular sovereignty, was understood and accepted as central to the meaning of republican government). *Contra* G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 795 (1994) ("Amar has . . . ignored a complicating factor: the importance of the principle of representation in republican theory, a principle which cannot easily be made to comport with popular sovereignty in its more 'democratic' forms.").

130. *See* U.S. CONST. art. V (requiring two-thirds of both Houses of Congress to propose amendments, or an application of the legislatures of two-thirds of the several states to initiate a constitutional convention).

II. COLORADO'S CONSTITUTION AND THE TABOR AMENDMENT

Consistent with the Guarantee Clause, Congress required Colorado's Constitution to provide for a republican form of government when it passed Colorado's enabling act in 1864.[131] Like the national government, Colorado's government was divided into three departments: legislative, executive, and judicial.[132] Colorado's legislative branch, the General Assembly, is a bicameral body comprised of elected representatives.[133] Supreme executive powers are vested in a single governor, who is also elected.[134] Unlike the national government, the justices of the Colorado Supreme Court were elected prior to 1966.[135] Although the governor now appoints them, justices face retention votes every ten years.[136]

This Part examines the Colorado Constitution, and more specifically TABOR, in three sections. Section A examines the process of drafting and ratifying the constitution. It discusses the concerns of the drafters who had the benefit of almost 100 years of state and national constitutional history to consider in forming the new state's power structure. Section B addresses the TABOR amendment itself, including its origins, restrictions, and significant amendments. Finally, Section C outlines the developments in the *Kerr v. Hickenlooper* challenge to TABOR's constitutionality under the Guarantee Clause.

A. Drafting and Ratification

The Colorado Constitution was not drafted hastily. When its drafters convened in December of 1875, more than eleven years had elapsed since Congress passed the first Enabling Act for the State of Colorado.[137] The 1875 convention was the territory's sixth, the previous conventions having produced two

131. Act of March 21, 1864, ch. 37, § 4, 13 Stat. 32, 33.

132. COLO. CONST. art. III.

133. *Id.* art. V, § 1.

134. *Id.* art. IV, §§ 2–3.

135. DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE 169 (G. Alan Tarr ed., 2002).

136. COLO. CONST. art. VI, §§ 7, 20, 25; OESTERLE & COLLINS, *supra* note 135, at 169. Newly appointed justices serve a provisional term of two years before facing a retention vote. COLO. CONST. art. VI, § 20(1). If retained, they serve ten year terms thereafter. *Id.* § 7.

137. OESTERLE & COLLINS, *supra* note 135, at 1, 4.

unsuccessful drafts.[138] The successful third draft was primarily modeled after the constitutions adopted in Illinois, Pennsylvania, and Missouri.[139] It was, and is, one of the longest state constitutions in the nation.[140]

The authority of Colorado's legislature greatly concerned the constitution's drafters. They had experienced a territorial legislature with a very poor performance record, and were cognizant of other states' experiences with corruption.[141] Large corporations, particularly railroads, were bribing elected officials to obtain government favors.[142] To prevent such behavior in Colorado, the delegates cabined the legislature's authority. Cash grants and loans to corporations, as well as bonds and loan guarantees, were forbidden.[143] Legislative sessions were short (forty days), and procedures for passing acts were cumbersome.[144] A code of ethics for legislators was also included.[145] The delegates' mistrust did not end with the legislative department. They also limited the Governor's term to two years so that the people would have ample opportunity to remove inadequate administrators.[146] Despite this mistrust, however, the proposed constitution retained the familiar three-branch structure of elected representatives.[147]

The drafters highlighted their cabining of legislative authority to encourage voters to adopt the resulting document. At the convention, delegates drafted an "Address to the

138. *Id.* at 1.

139. *Id.*

140. *Id.* The average length of a state constitution is now approximately 38,000 words. COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 2014 at 10 tbl. 1.1 (2014), http://knowledgecenter.csg.org/kc/content/book-states-2014-chapter-1-state-constitutions [http://perma.cc/46FE-YJN3]. Colorado's Constitution stands at the seventh longest with approximately 66,000 words. *Id.* Since 1990, Colorado has added more than 20,000 words to its constitution. *Compare id. with* COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 1990–91 at 40 tbl. 1.1 (1991), http://knowledgecenter.csg.org/kc/system/files/bos_1990_1.pdf [http://perma.cc/52ME-FM6J].

141. Dale A. Oesterle, *Lessons on the Limits of Constitutional Language from Colorado: The Erosion of the Constitution's Ban on Business Subsidies*, 73 U. COLO. L. REV. 587, 591 (2002).

142. *Id.*

143. *Id.* at 592.

144. OESTERLE & COLLINS, *supra* note 135, at 2.

145. Oesterle, *supra* note 141, at 591. *See also* COLO. CONST. art. V, §§ 29, 40, 43.

146. OESTERLE & COLLINS, *supra* note 135, at 7.

147. *Id.* at 92. *See also* COLO. CONST. art. III.

People,"[148] in which they argued that the constitution set forth a "fundamental law, wise and wholesome in itself . . . adapted to the general wants of the people."[149] The address repeatedly stressed the various mechanisms in place to control fraud and corruption among elected officials.[150] "[E]special effort was made," the address stated, "to restrict the powers of the Legislative Department."[151] Regarding taxes, the delegates drafted an article that, in their view, "secur[ed] sufficient revenue to defray the expenses of the State government, without imposing onerous taxation."[152] The drafters were confident that their document would ensure that the representatives of the people of the state were responsible stewards.[153] The people agreed, ratifying the proposed constitution by a wide margin.[154]

As it does today, the original constitution provided for amendment under Article XIX.[155] The General Assembly could refer specific amendments to a vote of the people upon the vote of two-thirds of the members of both houses.[156] Alternatively, the General Assembly could refer a constitutional convention to the voters.[157] Such a referendum also requires approval by two-thirds of both houses.[158] In 2004, a concurrent resolution was introduced in the House of Representatives to refer a constitutional convention to voters.[159] Its primary purpose was to address TABOR and other infirmities hampering the state budget, but the measure failed to pass out of committee.[160] Amendment by citizen initiative was added to Article V in 1910.[161]

148. OESTERLE & COLLINS, *supra* note 135, at 7.

149. THE CONSTITUTION OF THE STATE OF COLORADO ADOPTED IN CONVENTION, MARCH 14, 1876; ALSO THE ADDRESS OF THE CONVENTION TO THE PEOPLE OF COLORADO 54 (1876), https://www.colorado.gov/pacific/sites/default/files/Colorado%20Constitution.pdf [https://perma.cc/QA83-B4KJ].

150. *Id.*

151. *Id.*

152. *Id.* at 60.

153. *Id.*

154. OESTERLE & COLLINS, *supra* note 135, at 8.

155. COLO. CONST. art. XIX.

156. *Id.* § 2.

157. *Id.* § 1.

158. *Id.*

159. Kyle Henley, *Budget-Fixing Plans Defeated*, GAZETTE, Apr. 30, 2004, at METRO3.

160. *Id.*

161. OESTERLE & COLLINS, *supra* note 135, at 9.

B. The TABOR Amendment

In 1992, Colorado voters approved an initiated amendment to the Colorado Constitution called the "Taxpayer's Bill of Rights" (TABOR).[162] As one commentator remarked after its passage, "The Colorado electorate is leading the nation in terms of crippling its legislature."[163] TABOR added a number of restrictions under Article X that apply to the state and all of its political subdivisions (counties, municipalities, and school districts).[164] This Section outlines those restrictions and then discusses TABOR's origins to give a fuller understanding of its intended effects.

TABOR is one of Colorado's most controversial initiatives.[165] It imposes three key restrictions upon Colorado's state and local governments to accomplish its stated purpose of restraining the growth of government.[166] First, advance voter approval is required to add new taxes, increase tax rates, broaden tax bases, or make other tax policy changes that result in increased revenues.[167] Voters must also approve the issuance of debt, broadly defined as "any multiple-fiscal year direct or indirect debt or other financial obligation

162. *Id.* at 253.

163. *Id.* at 19 (quoting Professor Alan Rosenthal of the Eagleton Institute of Politics at Rutgers University) (internal quotation marks omitted).

164. COLO. CONST. art. X, § 20(2)(b) (defining the key term "district," to which all of TABOR's restrictions apply).

165. OESTERLE & COLLINS, *supra* note 135, at 254. For example, in the twenty years since its passage, TABOR has given rise to more than forty reported appellate court decisions. Peter J. Whitmore, *The Taxpayers Bill of Rights—Twenty Years of Litigation*, COLO. LAW., Sept. 2013, at 35. Even projects favored by voters such as school bonds have been ensnared in TABOR suits, causing delays and increasing costs. OESTERLE & COLLINS, *supra* note 135, at 254. TABOR has also imperiled voter-favored taxes. Despite two previous measures approving marijuana taxes—one of which was approved by almost two-thirds of voters—state officials determined a third election was required to prevent refunds of the taxes authorized just months earlier. Carol Hedges, *Like HAL 9000, TABOR's Programming Overrides Will of Colorado Voters*, DENV. POST (Apr. 22, 2015, 5:00 PM), http://www.denverpost.com/opinion/ci_25611250/like-hal-9000-tabors-programming-overrides [https://perma.cc/JVC2-QJGY]. Unsurprisingly, sixty-nine percent of voters allowed the state to retain and spend the taxes, John Frank, *Colorado Allowed to Spend Marijuana Tax Money, as Voters Reject Refunds*, DENV. POST (Nov. 3, 2015, 5:56 PM), http://www.denverpost.com/news/ci_29066651/colorado-allowed-to-spend-marijuana-tax-money-as-voters-reject-refunds [https://perma.cc/TP7B-ZK2B], but not before the state went to the time and expense of asking their permission.

166. COLO. CONST. art. X, § 20(1).

167. *Id.* § 20(4)(a).

whatsoever."[168] Finally, TABOR imposes a limit on the amount of revenue governments may keep.[169] Revenue collected in excess of this limit must be refunded.[170] Originally, the limit was calculated by adjusting the prior year's spending for inflation and population growth.[171] In 2005, voters approved a statute that allowed the state to retain revenues in excess of the original limit up to an amount equal to the highest revenue collections between 2005 and 2010.[172] To the extent that revenues exceed both the prior year's spending (adjusted for inflation and population growth) *and* the highest revenue collections between 2005 and 2010, the excess must be refunded.[173]

TABOR's stated purpose of restraining government growth[174] is misleading, as TABOR is actually designed to reduce the size of the government over time.[175] TABOR's precursor was a 1979 amendment to the California Constitution known as the "Gann Amendment."[176] Concerned with California's high tax burden, then Governor Ronald Reagan formed a task force to formulate ways to reduce

168. *Id.* § 20(4)(b). *But see In re* Submission of Interrogatories on House Bill 99-1325, 979 P.2d 549, 557 (Colo. 1999) (holding that this section 20(4)(b) does not apply to multiple-year lease-purchase agreements for equipment, like copy machines or computers, because such an application would lead to absurd results "crippl[ing] the everyday workings of government."). Nevertheless, in 2010 an amendment was initiated to curtail the use of lease-to-own agreements without voter approval. COLO. LEGISLATIVE COUNCIL, RESEARCH PUBL'N 599-1, 2010 STATE BALLOT INFORMATION BOOKLET 10 (2010). The measure was overwhelmingly defeated. *The Colorado Count*, DENV. POST, Nov. 3, 2010, at B.2, ProQuest Newsstand, Doc. No.762219697.

169. COLO. CONST. art. X, § 20(7).

170. *Id.*

171. *Id.*

172. COLO. REV. STAT. § 24-77-103.6 (2014).

173. COLO. CONST. art. X, § 20(7); COLO. REV. STAT. § 24-77-103.6.

174. COLO. CONST. art. X, § 20(1).

175. BRADLEY J. YOUNG, TABOR AND DIRECT DEMOCRACY: AN ESSAY ON THE END OF THE REPUBLIC 32 (2006). The means by which TABOR actually contracts government over time are beyond the scope of this Comment. Mr. Young's book, however, offers an excellent and accessible explanation of how this occurs.

176. Barry W. Poulson, Opinion, *TABOR Amendment Has Saved Colorado*, DENV. POST (Oct. 9, 2009, 1:00 AM), http://www.denverpost.com/opinionheadlines/ci_13518048 [http://perma.cc/5ADG-ECGJ]. Gann, along with entrepreneur Howard Jarvis, is credited with inciting the "modern-day romance with the initiative" by initiating California's Proposition 13, a measure that rolled back and capped property taxes in the state. DAVID S. BRODER, DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY 6–7 (2000).

taxes.[177] Headed by businessman Lewis Uhler, the task force formulated a constitutional amendment that proposed incremental reductions in state spending until spending reached a predetermined level.[178] The amendment failed, and Uhler moved on to found the National Tax Limitation Committee (NTLC) in 1975.[179] In 1979, the NTLC proposed the Gann Amendment, named after state senator Paul Gann.[180] Rather than reducing spending directly, the Gann Amendment restricted spending year-over-year by limiting increases in appropriations to an amount equal to population growth plus inflation.[181] The amendment passed with over 70% approval.[182]

TABOR proponents rarely (if ever) mentioned TABOR's design for contraction in advocating for its passage.[183] Instead, they emphasized its growth constraints.[184] TABOR's principal supporter, Douglas Bruce, assured voters that TABOR would neither cut services nor freeze revenues.[185] Opponents tried to counter by pointing out that a similar measure passed in Colorado Springs a year earlier had resulted in a 5% budget cut, a hiring freeze, and the delay of several capital improvement projects.[186] Opponents correctly noted that the spending limit would be a one-way "ratchet" down in government spending as it interacted with natural downturns in the economy.[187] But opponents were unable to convince

177. YOUNG, *supra* note 175, at 29.

178. *Id.* at 29–30.

179. *Id.* at 30.

180. *Id.* Senator Gann was one of the amendment's co-authors. CAL. ATTORNEY GEN., LIMITATIONS ON GOVERNMENT APPROPRIATIONS CALIFORNIA PROPOSITION 4, at 18 (1979), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=1863&context=ca_ballot_props [http://perma.cc/MPQ6-E3X2].

181. CAL. ATTORNEY GEN., *supra* note 180, at 17.

182. YOUNG, *supra* note 175, at 31.

183. *Id.* at 46–47.

184. *Id.*

185. Douglas Bruce, Opinion, *Ballot Issues: Should We Vote on Tax Hikes? Yes, Let's Vote*, DENV. POST, Oct. 18, 1992, at 1, Factiva, Doc. No. dnvr000020011107doai00b11.

186. Betty Ann Dittemore, Opinion, *Ballot Issues: Should We Vote on Tax Hikes? No, Let's Not*, DENV. POST, Oct. 18, 1992, at 1, Factiva, Doc. No. dnvr000020011107doai00b13. The Colorado Springs Charter was amended in 1991, adding a "Taxpayer's Bill of Rights." COLORADO SPRINGS, COLO., CHARTER art. VII, § 7-90 (2014). The city's version is similar in structure and substance to the state's, except that it did not include voter approval for debt issuance, which was already required. *Id.* §§ 7-80 to 7-90.

187. Editorial, *Bruce's 'Ratchet' Is a Hatchet*, DENV. POST, Sept. 27, 1992, Factiva, Doc. No. dnvr000020011107do9r00a5j. This "ratchet" effect results from the interaction between the spending limit and natural downturns in the

voters, and TABOR passed with 52% of the votes.[188]

C. Kerr v. Hickenlooper*: A Constitutional Attack on TABOR*

In 2011, thirty-four TABOR opponents filed suit in federal district court alleging that TABOR violates the Guarantee Clause.[189] The plaintiffs included a number of Colorado legislators, county commissioners, school board members, city councilors, university regents, teachers, professors, and other government officials.[190] They correctly noted that both the Guarantee Clause and the Enabling Act require the state to maintain a republican form of government.[191] In order to maintain a republican form of government, they argued, the state must have an effective legislative branch.[192] To be effective, a legislative branch must necessarily have the power to raise and appropriate funds.[193] Because TABOR removes the

economy. *See id.* The state is funded primarily through individual income taxes, and sales and use taxes. JASON SCHROCK & RON KIRK, COLO. LEGISLATIVE COUNCIL, COLORADO'S STATE GOVERNMENT REVENUE STRUCTURE 5, 9 (2009), https://www.colorado.gov/pacific/sites/default/files/Colorado%27s%20State%20Government%20Revnue%20Structure.pdf [https://perma.cc/L9TH-37C3]. When personal incomes decline during periods of recession and consumers refrain from purchasing, income and sales taxes decline in turn. *See id.* at 5, 10. States are normally able to cope with such declines in the short term by delaying expenditures such as equipment purchases, capital construction, and even more routine maintenance projects. *See, e.g.*, YOUNG, *supra* note 175, at 37–39 (discussing the ways that Colorado weathered the recession in 2001). Whereas most states would simply start these projects when the economy rebounds, TABOR prevents this result in Colorado. The spending limit requires refund of any revenues in excess of the *previous* year's spending, plus inflation and population growth. COLO. CONST. art. X, § 20(7). So to the extent that the recovery yields revenues in excess of inflation plus population growth, the state is unable to direct those additional revenues to delayed expenditures absent a vote of the people. This problem was somewhat alleviated by a statewide referendum in 2005. *See supra* note 172 and accompanying text. This referendum allows the state to keep revenues that exceed the original TABOR limit (previous year's spending plus population growth and inflation) up to the highest total state revenues collected between 2005 and 2010. COLO. REV. STAT. § 24-77-103.6(6)(b) (2014). Amounts in excess of this floor are still required to be refunded. *Id.* § 24-77-103.6(6)(b)(I)(b).

188. YOUNG, *supra* note 175, at 1.

189. Substituted Complaint for Injunctive and Declaratory Relief, *supra* note 15, at 1–2.

190. *Id.* at 5–10.

191. *Id.* at 3.

192. *Id.*

193. *Id.* at 4.

legislature's power to raise and appropriate funds, it prevents the legislature from operating effectively, offending the Guarantee Clause.[194] This Section discusses the procedural posture of the case to date.

In his motion to dismiss, Governor Hickenlooper—sued by the TABOR opponents in his official capacity—alleged that the claims asserted presented nonjusticiable political questions.[195] The Governor argued that a number of the factors implicated in *Baker v. Carr* rendered the issue unfit for resolution in court.[196] Specifically, the Governor argued that the Guarantee Clause lacks judicially manageable standards for determining whether a state's government is lawful.[197] Furthermore, the Governor argued that the decision as to what satisfies the Guarantee Clause is committed to Congress.[198] Accepting the plaintiff's argument, the Governor cautioned, would call into question every constitutional amendment and law enacted under an initiative or referendum mechanism.[199]

So far, the plaintiffs have succeeded in arguing that their

194. *Id.* at 17–18.

195. Defendant's Motion to Dismiss Plaintiffs' Substitute Complaint at 3, Kerr v. Hickenlooper, 880 F. Supp. 2d 1112 (D. Colo. 2011) (No. 11-CV-1350), ECF No. 18.

196. *Id.* at 7–10. *Baker v. Carr* identified six factors that may indicate a political question: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving it; (3) the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 369 U.S. 186, 217 (1962).

The Governor likely begins his argument here because *Baker* was thought to weaken the categorical bar to federal courts hearing Guarantee Clause cases. *See supra* Section I.A.3. The Governor avers, "The presence of any one or more of these elements designates a question as political and unfit for resolution in court." Defendant's Motion to Dismiss Plaintiffs' Substitute Complaint, *supra* note 195, at 7. But the rule in *Baker* is more nuanced. The Court holds that "[u]nless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence." *Baker*, 369 U.S. at 217.

197. Defendant's Motion to Dismiss Plaintiffs' Substitute Complaint, *supra* note 195, at 7–8.

198. *Id.* at 9 (citing Ohio *ex rel.* Bryant v. Akron Metro. Park Dist., 281 U.S. 74, 79–80 (1930)).

199. *Id.* at 9–10. The Governor also raised a number of arguments regarding the plaintiffs' standing, which are discussed below in this Section . *See infra* notes 226–33 and accompanying text.

claims are justiciable. The district court denied the Governor's motion to dismiss, and certified the issue for interlocutory appeal.[200] The Tenth Circuit affirmed.[201] As a threshold matter, the Tenth Circuit concluded that the political question doctrine did not bar Guarantee Clause challenges per se.[202] Responding to the Governor's argument that there were no judicially manageable standards for reviewing the lawsuit, the court held that there was no "feature of the Guarantee Clause that ma[de] it unamenable to 'normal principles of interpretation.'"[203] The court distinguished *Luther v. Borden*, noting that its outcome "rest[ed] on the impossibility of applying judicial standards to choose between two governments that each claim[ed] to be valid, rather than any extraordinary vagueness in the text of the Guarantee Clause itself."[204]

The court also disagreed with the Governor's argument that the issue is committed to the resolution of Congress.[205] It noted that the Guarantee Clause does not mention any branch of government.[206] Moreover, the court observed the clause's location in Article IV—rather than Articles I or II, where provisions committing authority to coordinate branches are normally found.[207] Finally, the court noted that two other sections of the Article empower Congress alone to act, but the Guarantee Clause does not.[208]

The Governor appealed the Tenth Circuit's ruling to the Supreme Court,[209] which granted the petition and reversed the opinion below.[210] The Court remanded the case for further consideration in light of its decision the day before in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.[211] The Court gave no clues in its two-sentence, summary disposition of *Kerr* as to the potential import, if any,

200. Kerr v. Hickenlooper, 744 F.3d 1156, 1162–63 (10th Cir. 2014), *cert. granted, judgment vacated and remanded*, 135 S. Ct. 2927 (2015).
201. *Id.* at 1183.
202. *Id.* at 1176.
203. *Id.* at 1179 (quoting Wang v. Masaitis, 416 F.3d 992, 996 (9th Cir. 2005)).
204. *Id.* at 1178.
205. *Id.* at 1177.
206. *Id.* at 1176.
207. *Id.*
208. *Id.*
209. Hickenlooper v. Kerr, 135 S. Ct. 2927 (2015).
210. *Id.*
211. *Id.* (citing Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652 (2015)).

of *Arizona Redistricting*.[212] In *Arizona Redistricting*, the Court held that the Elections Clause permits Arizona's use of an independent commission to draw congressional districts without the involvement of its legislature.[213] The opinion spoke favorably of initiatives and referenda declaring that "the animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government."[214] Nevertheless, the merits of TABOR—or initiatives more generally—were not before the Court in *Kerr*.[215] The questions presented were limited to the issues of justiciability and standing.[216]

On the issue of justiciability, the majority opinion in *Arizona Redistricting* noted that *Pacific States* held that the constitutionality of initiatives and referenda is nonjusticiable, but also quoted *New York v. United States* questioning the per se nonjusticiability of Guarantee Clause claims.[217] In his dissent, Justice Scalia opined that the Court lacked jurisdiction because the case involved a dispute between government branches regarding the allocation of power and did not, therefore, constitute a case or controversy within the meaning of Article III.[218]

In addition to justiciability, *Kerr* and *Arizona Redistricting* overlap on the issue of standing. Both cases look to *Coleman v. Miller*[219] and *Raines v. Byrd*[220] for guidance on the issue of standing. In *Coleman*, the Court held that twenty-one individual members of the Kansas Senate had standing to challenge a resolution ratifying the Child Labor Amendment to

212. Of course, it is entirely possible that after further consideration in light of *Arizona Redistricting*, the Tenth Circuit will remain convinced that the trial court was correct in denying the Governor's motion to dismiss.

213. *Arizona Redistricting*, 135 S. Ct. at 2671.

214. *Id.* Although this may seem concerning for TABOR opponents, as the *Kerr* plaintiff's point out, their case is not an attack on the constitutionality of initiatives per se. Brief in Opposition to Petition for a Writ of Certiorari at 6, Hickenlooper v. Kerr, 135 S. Ct. 2927 (2015) (No. 14-460), 2014 WL 6563347, at *6. As discussed above, they argue that TABOR is itself violative of the Guarantee Clause. *Id.* Likewise, this Comment argues that by vesting the power to tax in the people directly, TABOR is inconsistent with the principles of republicanism.

215. *See* Petition for Writ of Certiorari at i, *Kerr*, 135 S. Ct. 2927 (2015) (No. 14-460), 2014 WL 5361415 at *i.

216. *Id.*

217. Arizona Redistricting, 135 S. Ct. at 2660 n.3.

218. Id. at 2694 (Scalia, J., dissenting).

219. Coleman v. Miller, 307 U.S. 433 (1939).

220. Raines v. Byrd, 521 U.S. 811 (1997).

the U.S. Constitution.[221] Conversely, *Raines* held that six individual members of Congress lacked standing to challenge the Line Item Veto Act.[222] The *Raines* court clarified that *Coleman* "stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified."[223] In *Arizona Redistricting*, the Court found *Coleman* supportive of the legislature's standing because the initiative at issue had the effect of completely nullifying any vote by the legislature purporting to adopt a redistricting plan.[224] *Raines* was unhelpful to the *Arizona Redistricting* defendants, who sought dismissal on the basis of the legislature's standing, because the injury alleged was institutional and the entire legislature commenced the action after authorizing votes in both of its chambers.[225]

Like the Court in *Arizona Redistricting*, the Tenth Circuit found *Kerr* to be more like *Coleman* than *Raines*, concluding that the individual members of the General Assembly who are party to the suit had standing.[226] "Under TABOR, a vote for a tax increase is completely ineffective because the end result of a successful vote in favor is not a change in the law."[227] Like the Arizona legislature, which can only submit nonbinding recommendations to the redistricting committee,[228] the Colorado General Assembly operates "as an advisory body, empowered only to recommend changes in the tax law to the electorate."[229] The key difference between *Arizona Redistricting* and *Kerr* is that the Colorado General Assembly did not bring suit as an institutional body.[230] But then neither did the entire

221. *Coleman*, 307 U.S. at 435–38.

222. *Raines*, 521 U.S. at 813–14.

223. *Id*. at 823.

224. Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2665 (2015).

225. *Id*. at 2664.

226. Kerr v. Hickenlooper, 744 F.3d 1156, 1165, 1171 (10th Cir. 2014), *cert. granted, judgment vacated and remanded*, 135 S. Ct. 2927 (2015).

227. *Id.* at 1165.

228. *Arizona Redistricting*, 135 S. Ct. at 2661.

229. *Kerr*, 744 F.3d at 1165.

230. *See id.* at 1162. *But see id.* at 1168 (noting that the Colorado General Assembly as an institutional body participated in the case as an *amicus curiae* through its Committee on Legal Services).

Kansas Senate bring suit in *Coleman*.[231] Furthermore, unlike the *Raines* plaintiffs, who were members of the body that passed and could repeal the Line Item Veto Act,[232] the Colorado General Assembly neither passed, nor can they repeal, TABOR.[233] To be sure, *Kerr* does not fit perfectly within *Coleman*, *Raines*, or *Arizona Redistricting*, which may portend another petition to the Supreme Court whatever the outcome of the Tenth Circuit's rehearing.

III. TABOR'S INCOMPATIBILITY WITH THE REPUBLICAN FORM

> *[F]reedom and democracy, . . . [both] so central to our political process, are seriously threatened by a bureaucratic government which each year grabs a bigger and bigger share of our money without our consent.*[234]

> *It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part . . . . Whilst all authority in [the federal republic] will be derived from, and dependent on the society, the society itself will be broken into so many parts, interests and classes of citizens, that the rights of individuals or of the minority will be in little danger from interested combinations of the majority.*[235]

TABOR is incompatible with Madison's vision of a republican form of government because it creates and employs the very factions he worked to prevent. TABOR capitalizes on "the expected results of interactions between demagogues and the untutored masses."[236] It allows citizens singularly focused on limiting taxes to appeal to that "common impulse of passion" for avoiding taxes in order to create a factious majority.[237] In so

231. Coleman v. Miller, 307 U.S. 433, 435–36 (1939). The suit was brought by twenty-one members of the forty-member Kansas Senate, along with three members of the House of Representatives. *Id.* at 436.

232. Raines v. Byrd, 521 U.S. 811, 824 (1997).

233. *Kerr*, 744 F.3d at 1166.

234. Bruce, *supra* note 185, at 1.

235. THE FEDERALIST NO. 51, *in* JAMES MADISON: WRITINGS, *supra* note 4, at 297 (James Madison).

236. White, *supra* note 129, at 794.

237. *See* THE FEDERALIST NO. 10, *supra* note 4, at 161 (James Madison) (describing "factions" as any minority or majority of citizens united by an interest that is adverse either to the rights of other citizens or to the permanent and

doing, TABOR gives rise to a form of "democratic despotism"[238] where the public good is sacrificed to the private greed of the majority.

The first three sections of this Part examine the factious nature of TABOR. Section A illustrates why TABOR is so effective at creating a factious majority. Section B compares TABOR outcomes at the state and local level to illustrate how the diffuse nature of statewide benefits negatively impacts statewide TABOR elections. Section C examines the danger of this factious majority to unpopular needs. Finally, Section D reiterates the cure for these ills: the republican form of government.

A. The Paradox Inherent in Voter-Approved Tax Increases

For those who wish to reduce the size of government, TABOR is a highly effective mechanism. It exploits one of the central dilemmas of modern democracy: that "voters are largely uninformed but rationally self-interested."[239] The theory of rational self-interest assumes that a voter will determine how to vote by undertaking a cost-benefit analysis to maximize his or her own personal utility.[240] TABOR elections thus prompt voters to compare the costs of a tax increase with the benefits that will result. This analysis is highly dependent upon the voter's level of knowledge on both of these points.[241] Thus, it is more accurate to say that a voter will determine how to vote based upon the difference between *perceived* costs and

aggregate interests of the community).

238. *See* WOOD, *supra* note 5, at 409–11. Those living in a world of monarchies knew that the great deficiency of the monarchical form was the sacrifice of the public good to the private greed of small ruling groups. *Id.* at 54. The term "democratic despotism" refers to the ability of the majority, though acting democratically, to be as oppressive as any monarch. *Id.* at 410–11. This idea came from the realization that perhaps America was not as egalitarian as it first thought. *Id.* In a letter to Thomas Jefferson, James Madison observed, "Wherever the real power in a Government lies, there is the danger of oppression." *Id.* at 410.

239. SVEN STEINMO, TAXATION AND DEMOCRACY: SWEDISH, BRITISH AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE 193 (1993).

240. Citrin, *supra* note 23, at 122. Personal utility should not be confused with wealth maximization, which is not necessarily the sole or primary goal of voters. *See generally* Daniel Shaviro, *Beyond Public Choice and Public Interest: A Study of the Legislative Process as Illustrated by Tax Legislation in the 1980s*, 139 U. PA. L. REV. 1, 76–80 (1990).

241. Citrin, *supra* note 23, at 122.

perceived benefits.[242] If a voter is uninformed, he or she may fail to act in their own self-interest even if he or she intended to do so.[243]

To say that voters are uninformed is not to imply that they lack the intelligence or capacity to comprehend public needs and the means of serving them. Rather, it is a reflection of three axiomatic realities: (1) people are busy attending to their own wants and needs; (2) planning and preparing a state budget is a complex task; and (3) becoming sufficiently informed requires access to resources—including syntheses and analyses of information—that are not easily made available to the entire public.[244]

The challenge of becoming sufficiently informed is not only a problem of access and resources, but also a problem of trust. Douglas Bruce, one of TABOR's principal supporters, identified TABOR's opponents as "spendthrift politicians" and "special interests."[245] TABOR's passage signaled that state and local governments could not be trusted to adopt tax policies and borrow money in a manner consistent with the will of their citizens.[246] Thus, citizen authorization was necessary.[247] Yet TABOR relies upon the ability of the government to determine that the needs and wants of citizens can no longer be met with current resources and to request tax or debt increases accordingly.[248] Citizens must gauge for themselves the legitimacy of such requests in deciding how to cast their vote. Though not completely paradoxical, these concepts are in tension.

Casting aspersions on so-called special interests is equally unhelpful because it fails to yield a means for voters to distinguish untrustworthy special interests from trustworthy advocates. Particularly with votes on tax increases, everyone in the state has a stake in the outcome.[249] In other words,

242. *Id.*
243. *Id.*
244. *See* YOUNG, *supra* note 175, at 56.
245. Bruce, *supra* note 185, at 2.
246. YOUNG, *supra* note 175, at 54.
247. *See* COLO. CONST. art. X, § 20(4).
248. *Id.*
249. Professor Collins points out that every interest group now invokes the "cant phrase 'special interest'" against every other group. Richard B. Collins, *How Democratic Are Initiatives?*, 72 U. COLO. L. REV. 983, 992 (2001). "Coalition politics involve every interest in society: farmers, greens, unions, gun enthusiasts, polluters, insurance companies, churches, miners, dog owners, universities, and so

everyone—including those interested in very limited government—is aligned with an interest group. Yet if neither interest groups nor politicians can be trusted, voters will have few, if any, reliable sources of information on proposed tax policy changes.[250]

In addition to the information gap, the ability of the rational, self-interested voter to weigh costs and benefits is influenced by the disparity between the impacts of taxes and public benefits. Public benefits are often diffuse and indirect.[251] Thus, citizens may be unaware of the benefit they are realizing from particular public programs.[252] Taxes, on the other hand, are very direct, and citizens are highly aware of their impact.[253] To the extent that citizens are unable to weigh the costs and benefits as a result of this disparity, they will likely decline to increase taxes, and may seek to decrease them.[254]

While taxpayers are highly sensitive to the amount of taxes they pay, they may not be aware of the true costs of operating the government. California's passage of the Gann Amendment in the late 1970s—and its companion regarding property taxes, the Jarvis Amendment—animated attempts to gain a more precise understanding of what voters wanted from their government.[255] Various polls revealed a pervasive conviction that government is wasteful and inefficient.[256] One

on. We are all special." *Id.*

250. The Colorado Constitution requires the General Assembly's research staff to prepare and make available to voters a ballot information booklet. COLO. CONST. art. V, § 1(7.5). Although the staff is non-partisan, COLO. REV. STAT. § 2-3-304(1) (2014), the ballot information booklet is susceptible to these same credibility criticisms. The director of research and his or her staff are employees of the state, and more specifically, of the General Assembly (i.e., politicians). *Id.* Furthermore, the ballot information booklet is prepared with oversight from the Legislative Council. *Id.* § 2-3-303(1)(g). In fact, in drafting the ballot analysis, the staff solicits input and feedback from a measure's proponents and opponents (i.e., the special interests). *Ballot Analysis Process*, COLO. LEGIS. COUNCIL, https://www.colorado.gov/pacific/cga-legislativecouncil/ballot-analysis-process [https://perma.cc/BD5Y-CTFW]. Initiative consulting firms consider shaping these analyses of paramount importance "because when you make your ads, you can says, 'The voters' pamphlet says such-and-such.' You don't tell them that it's your argument in the voters' pamphlet." BRODER, *supra* note 176, at 74 (quoting Ben Goddard of the Goddard-Claussen initiative campaign management firm).

251. STEINMO, *supra* note 239, at 193.

252. *Id.*

253. *Id.*

254. *Id.*

255. Citrin *supra* note 23, at 113, 115.

256. *Id.* at 115.

poll taken on the eve of the Jarvis Amendment revealed that 38% of the electorate believed that state and local governments could provide the same level of service with a 40% reduction in their budgets.[257] National polls showed that approximately half of the public felt that property taxes could be cut by 20% without being replaced by other taxes, and such cuts would not require a serious reduction in government services.[258]

The fact that voters are uninformed is not only unsurprising, it is quite rational. Suppose that the problems of access and reliability could be resolved such that there was an adequate supply of trustworthy information available to every voter. It would be rational for any one voter to consume such information only if the marginal return of becoming informed outweighed the marginal cost.[259] The cost of becoming informed, in this case, is largely the voter's time—time that could be spent attending to the voter's own wants and needs.[260] The marginal return is each voter's expected gain from voting "correctly" as opposed to "incorrectly."[261]

However, in a large electorate, the probability that any one citizen's vote will be outcome determinative is very small.[262] Thus, each voter faces the reality that a "correct" outcome in

257. *Id.* Whether and to what extent spending could be reduced without attendant impacts on services is difficult to determine. For context, however, note that approximately 43% of Colorado's general fund expenditures goes to K–12 education. YOUNG, *supra* note 175, at 41. Thus, achieving a 40% reduction in spending would be the equivalent of providing no state funding for public schools. Currently, state funding represents 63% of total K–12 funding. CHARLES S. BROWN ET AL., UNIV. OF DENV., FINANCING COLORADO'S FUTURE: AN ANALYSIS OF THE FISCAL SUSTAINABILITY OF STATE GOVERNMENT 30 (2011), http://www.cosfp.org/HomeFiles/DUFinancingColoradosFutureApr2011.pdf [http://perma.cc/E2FE-JEE7]. The next largest category of expenditures (21%) results from the state's participation in Medicaid. YOUNG, *supra* note 175, at 41. The federal government establishes the program's requirements, and expenditure levels are largely dictated by external factors such as the cost of health care. BROWN ET AL., *supra*, at 41. In other words, to achieve a 40% reduction in spending without cutting education or Medicaid, the state would have to eliminate the equivalent of the entire state government, a task not easily accomplished without service impacts.

258. Citrin, *supra* note 23, at 115.

259. Anthony Downs, *An Economic Theory of Political Action in a Democracy*, 65 J. POL. ECON. 135, 146 (1957).

260. *Id.*

261. *Id.*

262. *Id.* Professor Shaviro correctly points out the logical problem with this theory: that the rational voter would find the very act of voting irrational. Shaviro, *supra* note 240, at 76.

any given election does not depend on how he or she votes.[263] This means that even a trivial cost of consuming information outweighs its marginal return, and any attempt to acquire such information would be an irrational waste of resources.[264] Obviously if all voters (or even a majority of voters) react rationally to this balancing, the results for the collective can be wholly undesirable. But the benefits of achieving the best policy outcome inure to all regardless of whether each individual helped bring them about.[265] "[W]hen benefits are indivisible, each individual is always motivated to evade his share of the cost of producing them."[266]

These are the behaviors advocates for tax or debt increases must overcome. Rational citizens will oppose paying for benefits they enjoy but do not perceive because such benefits are diffuse in nature.[267] Even if voters support a particular program, they may erroneously believe that it can be funded without tax increases and without concomitant reductions in other services. Furthermore, the rational voter has little incentive to become informed about the costs and benefits of the public services funded by the measures proposed. Where the average voter is rationally uninformed,[268] and unable to trust the advocacy of politicians and special interests,[269] he or she will likely vote against TABOR measures.[270]

B. Local and State TABOR Outcomes

The disparity between the outcomes of local and state TABOR elections corroborates the operation of these influences on voter behavior. In school district elections, voters approved 166 of the 269 mill levy override measures proposed.[271]

263. Downs, *supra* note 259, at 146.
264. *Id.* at 147.
265. *Id.*
266. *Id.*
267. *See* Citrin, *supra* note 23, at 115.
268. STEINMO, *supra* note 239, at 193.
269. Bruce, *supra* note 185, at 2.
270. *See* STEINMO, *supra* note 239, at 193.
271. COLO. DEP'T OF EDUC., MILL LEVY OVERRIDE ELECTION HISTORY 1999–2014 (2015), http://www.cde.state.co.us/cdefinance/bonddebt [http://perma.cc/9Q5H-C5P3]. Figures were calculated by counting the rows with values in the "Dollar Amount Approved" and "Dollar Amount Failed" columns. The 2014 elections for Cheyenne Mountain, Holyoke, and South Routt, as well as the 2005 election for Colorado Springs 11, were included in the count of approved

Similarly, through spring 2015, municipal voters approved 463 of the 803 extensions, rate increases, and base expansions proposed.[272] These results are sensible given the proximity of local governments and the visibility of the services they provide.[273] In contrast, only 3 of the 11 proposed statewide tax increases were passed by voters.[274] The high rate of passage for local measures is consistent with the greater ease with which the voter can compare the costs with the benefits.[275]

As mentioned above, statewide measures have not fared so well. Colorado voters have approved only three statewide tax increases since TABOR's enactment, while eight other statewide tax increases have failed.[276] In 2004, voters approved an initiated amendment increasing the taxes on cigarettes and tobacco products.[277] A similar initiated measure failed in

measures. The 2008 election for Pueblo City Schools, the 2001 election for Ft. Lupton RE-8, and the 2000 Salida R-32(J) election were included in the total number of measures. The 2013 Walsh election was not included in either figure. An override measure asks voters within the school district whether to increase property taxes in order to raise revenues in excess of the amount the district is required to contribute to its total program under the Public School Finance Act of 1994. COLO. DEP'T OF EDUC., UNDERSTANDING COLORADO SCHOOL FINANCE AND CATEGORICAL PROGRAM FUNDING 8 (2015), http://www.cde.state.co.us/cdefinance/fy2015-16brochure [http://perma.cc/8JKK-V2G5].

272. COLO. MUN. LEAGUE, MUNICIPAL TAX RATE ELECTION RESULTS 1993–SPRING 2015 BALLOTS 38 (2015), http://www.cml.org/issues.aspx?taxid=11107 [https://perma.cc/X88Q-ZACT]. "Extensions" refers to elections to extend the expiration date of a tax that was imposed for a finite time without increasing the rate or broadening the base. *See* Bruce v. City of Colorado Springs, 129 P.3d 988, 995 (Colo. 2006) (differentiating between tax "extensions" and "increases" for the purpose of determining whether certain election notice requirements applied to a municipal tax extension election).

273. For example, in 2005 voters rejected Referendum D—a statewide measure asking voters to authorize the state to issue $2.1 billion in bonds primarily for transportation projects. Chris Frates, *Jostling Begins for Share of Referendum C Cash*, DENV. POST (Nov. 3, 2005, 1:00 AM), http://www.denverpost.com/localpolitics/ci_3176519 [http://perma.cc/WJJ8-SW46]. Two years later, Denver voters approved eight separate bond issues to repair or upgrade transportation, among other city projects. Opinion, *The Dawn of a Better Denver*, DENV. POST (Nov. 7, 2007, 1:00 AM), http://www.denverpost.com/opinion/ci_7389079/the-dawn-of-a-better-denver [http://perma.cc/Q4SK-7PLX].

274. *See infra* Appendix A.

275. *See, e.g.*, Robert Hannay & Martin Wachs, *Factors Influencing Support for Local Transportation Sales Tax Measures*, 34 TRANSP. 17, 19–21 (2006) (discussing the increased use of local sales taxes over statewide fuel taxes to fund transportation initiatives following the tax revolts of the 1970s and noting that proximity to the funded transit system had significant effect on voting for or against proposed taxes).

276. *See infra* Appendix A.

277. *See infra* Appendix A.

1994.[278] In 2006, voters approved a referred measure increasing taxes by disallowing an income tax deduction for wages paid to unlawful aliens.[279] The ballot title stated the measure was only expected to increase taxes by $150,000 per year.[280] Finally, in 2013, voters approved a referred measure imposing taxes on retail marijuana.[281] The measures that failed included tax increases pledged to transportation, education, and services for the developmentally disabled.[282] Moreover, three out of the five ballot measures to override the spending limit refunds provided under section 7 of TABOR failed.[283] As a result, Colorado ranks 48th in the nation in terms of state taxes paid per $1,000 of income.[284] Even when local taxes are factored in, the state is only 44th.[285]

The state's inability to raise taxes is particularly troubling given the recent findings of a University of Denver study on Colorado's fiscal outlook through 2024.[286] The study concluded that in order to fund growth in Medicaid, education, and corrections at the state level, all other general fund programs must be reduced by 60% in current dollars.[287] The state's inability to persuade voters to approve taxes for education and transportation—two services directly benefiting the majority of taxpayers—bodes ill for its ability to fund Medicaid—a service that benefits only a minority of the state.[288] Higher education,

278. *See infra* Appendix A.

279. *History of Election Results for Ballot Issues*, COLO. LEGIS. COUNCIL, http://www.leg.state.co.us/lcs/ballothistory.nsf/ [http://perma.cc/UAE9-ELVQ] (under 2006, follow "Referendum H- Limiting a State Business Income Tax Deduction").

280. *Id.*

281. *See infra* Appendix A.

282. *See infra* Appendix A.

283. *See infra* Appendix A.

284. BROWN ET AL., *supra* note 257, at 25.

285. *Id.*

286. *See generally id.*

287. *Id.* at 6.

288. According to 2000 census data, over 95% of Coloradans over the age of 25 had completed at least the ninth grade. COLO. DEP'T OF LOCAL AFFAIRS, CENSUS 2000, SUMMARY FILE 3 EDUCATION PROFILE 1 at 1 (2002), https://dola.colorado.gov/dlg/demog/census/quicktables/education/Colorado.pdf [https://perma.cc/6LK3-6UB2]. Only 0.9% of Coloradans over the age of 25 have not completed any schooling. *Id.* In contrast, approximately 23.5% of the state's population is enrolled in Medicaid (including the Children's Health Insurance Program). *See State & County QuickFacts: Colorado*, U.S. CENSUS BUREAU, http://factfinder.census.gov/bkmk/table/1.0/en/PEP/2014/PEPANNRES/0400000US08 [http://perma.cc/KJ6N-HSLU] (estimating the state's population in 2014 at 5,355,866 people); *Medicaid and CHIP Program Information by State*, MEDICAID,

whose budget has dropped from 15.7% of the general fund budget to 8.2% since TABOR passed,[289] will continue to see declines in state funding requiring either increases in tuition and fees, decreases in expenditures, or both.[290] Human services, which represent 8% of the general fund budget,[291] will have to cut its various programs for seniors, people with developmental disabilities, youth, and others in need of public assistance.[292] Other state programs will face similar cuts.[293]

Certainly, the legislature is free to fund new or expanded initiatives at the expense of other existing ones.[294] But cost-shifting cannot fulfill the obligation to maintain a republican form of government because the solution is temporary at best. TABOR is designed to reduce the size of government over time, such that the legislature must constantly reduce the price of government unless and until the people say otherwise.[295] Therefore, at some point, all of the money allegedly lost to waste, and all of the money being used on desirable programs that are not necessary to ensure the general good and safety of the community, will be repurposed.[296] At that point, the legislature will be powerless to act further without the blessing

http://www.medicaid.gov/medicaid-chip-program-information/by-state/colorado.html [http://perma.cc/CPY6-5L4E] (listing Colorado's enrollment at 1,261,062 people).

289. Tim Hoover, *TABOR at Twenty*, ST. LEGISLATURES, Mar. 2013, at 20, 21–22, http://www.ncsl.org/Portals/1/Documents/magazine/articles/2013/SL_0313-Tax.pdf [http://perma.cc/K2D9-7LAN].

290. BROWN ET AL., *supra* note 257, at 5.

291. YOUNG, *supra* note 175, at 41.

292. BROWN ET AL., *supra* note 257, at 6.

293. *See id.*

294. Such reallocation is already occurring just to keep up with the growth of budgets for existing programs. The Bell Policy Center studied the impacts of TABOR ten years after its passage noting that Colorado had the second lowest appropriations growth rate among its peer states. BELL POLICY CTR., TEN YEARS OF TABOR 17 (2003), http://bellpolicy.org/sites/default/files/TABOR10.pdf [http://perma.cc/2QXZ-TY3P]. During that same period, some programs grew at rates higher than the TABOR growth limit would allow. *Id.* Programs such as higher education and public health absorbed disproportionate shares of the growth limitations as a result. *Id.*

295. YOUNG, *supra* note 175, at 15.

296. *See* BELL POLICY CTR., *supra* note 294, at 3 ("Without reform, the revenue limits in TABOR will continue to squeeze critical programs until they become ineffective and eventually disappear."); BROWN ET AL., *supra* note 257, at 5 ("Together with the rising (although more stable than in the past) cost of the state's prison system, the two biggest programs in the state General Fund will continue to crowd out higher education and other programs competing for the same tax dollars.").

of the people. Funding programs with feasible (perhaps even advisable) cuts only postpones the inexorable confrontation between the legislature and a factioned citizenry perhaps to a time when a "no" vote could render the government unable to provide even the most essential services at a reasonable level.

C. TABOR and Unpopular Needs

Among other goals, the republican form of government was intended to protect against self-interested majority rule at the expense of the minority.[297] Thus, TABOR cannot be defended merely on the basis that it was adopted by a majority of voters, or that a majority of voters still favor its restrictions. As Madison put it, "When a majority is included in a faction, the form of popular government . . . enables it to sacrifice to its ruling passion or interest, both the public good, and the rights of other citizens."[298] Madison's fear of the faction caused him to reject a form of initiative lawmaking in the national constitution.[299] Some drafters of the national Constitution advocated for a form of petitioning that would allow voters to "instruct" their representatives to vote in a particular way on a given issue.[300] Madison believed that representatives could not properly consider the common good (after deliberation and debate) if voters possessed this right of instruction.[301] He therefore favored our present First Amendment right, which allows representatives the freedom to adopt or reject petitions for redress.[302]

Factions can be particularly dangerous for minority interests when they are animated by a desire to preserve wealth. In THE FEDERALIST NO. 10, Madison opined that "the most common and durable source of factions has been the various and unequal distribution of property."[303] The initiative process tends to favor the wealthy, as the ability to place an

297. Collins, *supra* note 249, at 986; *see also* Todd Donovan & Shaun Bowler, *An Overview of Direct Democracy in the American States*, *in* CITIZENS AS LEGISLATORS 1, 16 (Shaun Bowler et al. eds., 1998).

298. THE FEDERALIST NO. 10, *supra* note 4, at 163 (James Madison).

299. Emily Calhoun, *Initiative Petition Reforms and the First Amendment*, 66 U. COLO. L. REV. 129, 131 (1995).

300. *Id.*

301. *Id.* at 132.

302. *Id.* at 131.

303. THE FEDERALIST NO. 10, *supra* note 4, at 162 (James Madison).

initiative on the ballot depends upon the ability to pay petition circulators and other expenses of qualifying.[304] Because initiative campaigns are statewide in nature, supporting or opposing them requires great sums of money.[305] Accordingly, more money is now being spent on statewide initiatives in California than on state legislative campaigns.[306] These investments are paying dividends to those able to invest. TABOR, for example, prohibits progressive income tax rates and bars new or increased real estate transfer taxes.[307] These prohibitions favor those with higher incomes and those who buy and sell valuable real estate.[308] As Madison feared, the temptation to use initiatives to secure favorable tax treatment has proven too great.[309] In addition to Colorado, California and Oregon have enacted favorable treatments for certain

304. Collins, *supra* note 249, at 993, 998. Signature collectors, for example, are often paid for each person they coax into signing a petition. *See* BRODER, *supra* note 176, at 62. A good signature collector can earn $50 an hour collecting signatures. *Id.* at 63. The Oregon Secretary of State once said he had heard of collectors earning thousands of dollars a day with reports of fist fights breaking out over the right to collect at lucrative spots. *Id.*

305. Collins, *supra* note 249, at 999.

306. *Id.* at 998.

307. COLO. CONST. art. X, § 20(8)(a). Real estate transfer taxes apply to certain sales of real property. Jeffrey Davine, *The Impact of State and Local Taxes on Your Colorado RE Investment*, COLO. REAL EST. J. (Dec. 2, 2009), http://www.ballardspahr.com/alertspublications/articles/~/media/files/articles/2009-12-02_impactofstatelocaltaxes.ashx [https://perma.cc/LBQ5-EGG7]. While TABOR banned new real estate transfer taxes, jurisdictions that imposed them prior to TABOR were allowed to continue their imposition. *Id.* They are only imposed in the mountain communities of Aspen, Avon, Breckenridge, Crested Butte, Frisco, Gypsum, Minturn, Ophir, Snowmass Village, Telluride, Vail, and Winter Park. *Id.*

308. Collins, *supra* note 249, at 993–94. Progressive tax rate systems reduce the burden of taxation on those with lower incomes, shifting the burden to those with higher incomes. JASON SCHROCK, COLO. LEGISLATIVE COUNCIL, HISTORY OF COLORADO INCOME TAX RATES 3 (2010), https://www.colorado.gov/pacific/sites/default/files/History%20of%20Colorado%27s%20Income%20Tax%20Rates%20%282010%29.pdf [https://perma.cc/X6GX-Z5VG]. Progressive structures achieve this goal by imposing a higher tax rate on higher income levels. *Id.* Adopting a single tax rate has the opposite effect. When Colorado went to a single tax rate in 1987, those with incomes less than $4,000 saw their rates increase by as much as 2 percentage points, while those with incomes above $4,000 saw their rates decrease by as much as 3 percentage points. *Id.* at 4.

309. *See* THE FEDERALIST NO. 10, *supra* note 4, at 163 (James Madison) ("The apportionment of taxes on the various descriptions of property, is an act which seems to require the most exact impartiality, yet there is perhaps no legislative act in which greater opportunity and temptation are given to the predominant party, to trample on the rules of justice. Every shilling with which they overburden the inferior number, is a shilling saved in their own pockets.").

taxpayers by initiative.[310]

The concerns of ballot access are not addressed by the ability of the legislature to refer TABOR measures to the voters. While the Colorado Constitution allows citizens to initiate a constitutional amendment by securing the signatures of only five percent of voters in the last election,[311] a full two-thirds of both chambers of the General Assembly must approve a referendum.[312] This supermajority may dissuade some legislators from even introducing resolutions to refer measures to the voters. Of all of the statewide measures to increase taxes, only three were referred by the legislature.[313] The rest were citizen initiated.[314] Those wanting (or needing) additional taxes for the benefit of a particular program are, therefore, left to navigate the initiative process facing the obstacles discussed above.

Beyond the barriers to ballot access, which the wealthy are arguably in a better position to overcome, proponents of tax increases face the obstacle of rational, self-interested, uninformed voters.[315] If a benevolent public welfare group funds the initiative, the proponent may have the means to access the ballot, but may be harmed by being branded a "special interest."[316] These headwinds favor those factions wishing to keep Colorado the 48th lowest in terms of tax burden.[317] Those hoping to avoid sixty percent cuts to departments such as higher education, human services, and the courts may not fare so well.[318]

D. The Republican Cure

Among the problems with initiatives is the reality that they are not shaped by the same "structural devices" that influence laws enacted by representative legislatures.[319]

310. Collins, *supra* note 249, at 993–94.
311. COLO. CONST. art. V, § 1(2).
312. *Id.* art. XIX, § 2(1).
313. *See infra* Appendix A.
314. *See infra* Appendix A.
315. *See supra* Section III.A.
316. *See id.*
317. BROWN ET AL., *supra* note 257, at 25.
318. *See id.* at 6 (predicting that the increasing costs of Medicaid and public school funding will force a 60% drop in funding for other state general fund programs).
319. Collins, *supra* note 249, at 987. To articulate this issue in Madisonian

Madison fervently argued that the people should be represented by a body no larger than was necessary "for the purposes of safety, of local information, and of diffusive sympathy with the whole society."[320] Laws enacted by elected legislatures reflect the accommodations made during drafting and revision to achieve a coalition of legislators to support the measure.[321] These coalitions consider minority interests in two ways. First, politicians have incentive to accommodate a variety of minority interests as a means of broadening their voter base.[322] Second, particularly at the state level, legislators are elected by district, which infuses the general assembly with geographic diversity.[323] In this way, legislatures are better able to achieve the diffusiveness Madison so prized.

Conversely, initiatives are normally conducted on a statewide basis, where appeals can be made to majority resentment of minority interests.[324] Outside of the tax realm, voters have passed initiatives disfavoring particular groups based upon their religion or sexual orientation.[325] TABOR initiatives can fall prey to similar biased appeals to voter resentment of taxes, or to particular groups of government beneficiaries.[326] As Madison wrote, "If two individuals are

terms, "A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert results from the *form* of the government itself; and there is *nothing to check the inducements* to sacrifice the weaker party, or an obnoxious individual." THE FEDERALIST NO. 10, *supra* note 4, at 164 (James Madison) (emphasis added).

320. THE FEDERALIST NO. 58, *in* JAMES MADISON: WRITINGS, *supra* note 4, at 336 (James Madison).

321. Collins, *supra* note 249, at 991.

322. *Id.*

323. *Id.* at 986.

324. *See id.* at 998.

325. *Id.* at 989. Professor Collins cites *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, calling it the "Brown v. Board" of initiative law. *Id.* at 988. In *Pierce*, the Supreme Court struck down an Oregon initiative requiring children to attend public school or be schooled at home by their parents. 268 U.S. 510, 534–35 (1925). The measure was blatantly anti-Catholic in that it sought to prevent children from attending private, parochial schools. Collins, *supra* note 249, at 989. Professor Collins also points to Colorado as an example of discriminatory uses of the citizen initiative noting the Supreme Court's decision in *Romer v. Evans*. *Id.* In *Romer*, the Court held that an initiated amendment to Colorado's Constitution repealing and proscribing laws and ordinances that prohibit discrimination on the basis of sexual orientation was unconstitutional. 517 U.S. 620, 623–24 (1996).

326. TABOR itself was billed as a measure to protect "freedom and democracy" from "a bureaucratic government which each year grabs a bigger and bigger share of our money." Bruce, *supra* note 185, at 1. Two of the three successful statewide

under the bias[] of interest or enmity [against] a third, the rights of the latter could never be safely referred to the majority of the three."[327] He believed that elected representatives could better discern the true interest of the people without sacrificing such interest to temporary or partial considerations.[328]

Restoring legislative power to adequately fund the government, by invalidating or repealing TABOR, will restore the safeguards of the republican system. In considering whether to increase or decrease taxes, or issue debt, legislators will be required to build coalitions which, in turn, will consider a variety of constituent interests.[329] These interests include, of course, an interest in keeping taxes low, but include other interests as well.[330] Legislators are constrained by their responsibilities as trustees, and the practical need to justify their vote to their constituents.[331] Their constituents include those who do not favor government growth, but also include those who do.[332] These structural influences ensure that legislators, better than individual, self-interested voters, will be stewards of the people's welfare, the exclusive end of government.[333]

tax increases arguably target unpopular minority groups: smokers and illegal immigrants. *See supra* notes 277–84 and accompanying text.

327. Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), *in* JAMES MADISON: WRITINGS, *supra* note 4, at 142, 150.

328. THE FEDERALIST NO. 10, *supra* note 4, at 165 (James Madison).

329. Collins, *supra* note 249, at 991.

330. For example, those interested in ensuring the state has a sufficiently well-trained workforce by adequately funding higher education. *See* Mark Ferrandino & Chris Holbert, *Bipartisan Bill Ensures Higher Ed. Funding*, DENV. POST (Apr. 10, 2014, 5:36 PM), http://www.denverpost.com/opinion/ci_25540636/ bipartisan-bill-ensures-higher-ed-funding [http://perma.cc/MB7G-LG7A]. Or those who believe that inadequate transportation funding is costing their communities millions of dollars annually. Monte Whaley, *Make-or-Brake Time for Region's Future: Group Striving to Steer CDOT Toward Easing Congestion on Vital Stretch*, DENV. POST, Mar. 24, 2014, at A.5, ProQuest NewsStand, Doc. No. 1510349439.

331. Calhoun, *supra* note 299, at 136–37.

332. For example, those who favored expanding the state's Medicaid program to cover more citizens. *See* Anne Warhover, Opinion, *Expanding Medicaid Makes Dollars—and Sense*, DENV. POST (Feb. 18, 2013, 12:01 AM), http://www.denverpost.com/ci_22600664/expanding-medicaid-makes-dollars-mdash-and-sense [http://perma.cc/J7HF-ECHS].

333. WOOD, *supra* note 5, at 55.

CONCLUSION

It is not surprising that no other state features TABOR's prohibition on new taxes without voter approval.[334] And although twenty-two states have spending limits, numerous states have rejected limits as strict as inflation plus population growth.[335] As Arizona Governor Jan Brewer noted in vetoing an inflation-plus-population limit in her state, "We should learn from the state of Colorado that experimented with a similar measure, and failed."[336]

TABOR insidiously employs a pervasive, perhaps even universal, hatred of taxes to reduce the size of the government. In so doing, it creates a powerful majoritarian faction acting in its own rational, uninformed self-interest to the detriment of the public good. Keenly aware of the dangerous nature of factions, the founders thoughtfully structured the national government as a republic rather than a direct democracy. They rejected a right of the people to instruct elected representatives on how to vote, fearing that such a process would undermine the purposes of representative government.[337] Most importantly, the founders sought to protect the people from the dangers of factions operating at the state and local level by commanding the national government to guarantee that each state was itself a republic.

Not only does TABOR increase the risk of faction, it capitalizes on it. Unlike other initiated measures, which empower the people to supplement legislative lawmaking, TABOR allows the people to supplant the legislature by removing from it the means to effectuate its enactments.[338] TABOR's subterfuge is transparent. Its wholesale reorganization of Colorado's government is completely

334. Hoover, *supra* note 289, at 22.

335. *Id.* (noting that Arizona, Florida, Maine, Oregon, Michigan, Missouri, Montana, Nebraska, Nevada, and Oklahoma have all rejected such limitations on spending).

336. *Id.*

337. *See* Calhoun, *supra* note 299, at 131 (discussing Madison's concerns on the subject).

338. *See* Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2687–88 (2015) (5-4 decision) (Roberts, C.J., dissenting) Chief Justice Roberts responds to the majority's opinion that Congress recognized and respected the fact that states had "supplemented the representative legislature mode of lawmaking with a direct lawmaking roll for the people," *id*. at 2669, by arguing that the state had in fact "*supplant[ed]* the legislature altogether," *id.* at 2687.

incompatible with the republican form guaranteed to the people of Colorado by the Constitution. Accordingly, federal courts should embrace their role in enforcing the guarantee clause by granting the relief sought by the *Kerr* plaintiffs, thus restoring Colorado to the representative democracy that the founders envisioned.

APPENDIX A: SUMMARY OF STATEWIDE TABOR TAX INCREASE AND EXCESS REVENUE RETENTION ELECTIONS[339]

Table 1: Tax Increase Elections

Year	Measure	Short Title	Outcome
1993	Referendum A	Reinstatement of Sales Tax on Tourist-Related Purchases	Rejected
1994	Amendment 1	Tobacco Taxes	Rejected
1996	Amendment 11	Property Tax Exemptions	Rejected
1997	Proposition 1	Tax and Fee Increase for Funding Transportation Projects	Rejected
2004	Amendment 35	Tobacco Tax Increase for Health-Related Purposes	Adopted
2006	Referendum H	Limiting a State Business Income Tax Deduction	Adopted
2008	Amendment 51	State Sales Tax Increase for Services for People with Developmental Disabilities	Rejected
2008	Amendment 58[340]	Severance Taxes on the Oil and Natural Gas Industry	Rejected
2011	Proposition 103	Temporary Tax Increase for Public Education	Rejected
2013	Amendment 66	Funding for Public Schools	Rejected
2013	Proposition AA	Retail Marijuana Taxes	Adopted

Total Proposed: 11
Total Adopted: 3 (27%)
Total Rejected: 8 (73%)

339. *History of Election Results for Ballot Issues*, COLO. LEGIS. COUNCIL, http://www.leg.state.co.us/lcs/ballothistory.nsf/ [http://perma.cc/X24S-ABS9].

340. Amendment 58 in 2008 asked the voters to both increase the severance tax and exempt the tax from state and local government spending limits.

Table 2: Excess Revenue Retention Elections

Year	Measure	Short Title	Outcome
1998	Referendum B	State Retention of Excess State Revenues	Rejected
2001	Proposition 26	Surplus Revenue to Test I-70 Fixed Guideway	Rejected
2005	Referendum C	State Spending	Adopted
2008	Amendment 58	Severance Taxes on the Oil and Natural Gas Industry	Rejected
2008	Amendment 59	Education Funding and TABOR Rebates	Rejected

Total Proposed: 5
Total Adopted: 1 (20%)
Total Rejected: 4 (80%)