

The TABOR Case
Governmental Research Association
2015 Annual Policy Conference

July 27, 2015

Michael Feeley
Brownstein Hyatt Farber Schreck, LLP
410 17th Street, Suite 2200
Denver, CO 80202
Tel: 303.223.1237

Brownstein Hyatt
Farber Schreck

The TABOR Case

Kerr v. Hickenlooper
<http://taborcase.org>

- > Legal theory of the case
- > Key issues
- > What the case is NOT about
- > Procedural history
- > Our clients and co-counsel

2

bhfs.com ©Brownstein Hyatt Farber Schreck, LLP

The Issue

Does TABOR violate Article IV section 4 of the United States Constitution and the Colorado Statehood Enabling Act of 1875?

Both require Colorado to maintain "a Republican Form of Government."

3

bhfs.com ©Brownstein Hyatt Farber Schreck, LLP

"Republican Form of Government"

What does that mean? Where to look for legal authority? What did the Founders say?

Best available evidence: *The Federalist* essays by Madison, Hamilton and Jay explaining the purpose and rationale for the Constitution during the debate about ratification in 1787 and 1788.

4

bhfs.com ©Brownstein Hyatt Farber Schreck, LLP

The Federalist Papers

Madison 10: A republican form of government means government by elected representatives not direct or "pure" democracy

Madison 39: A republican form of government includes two parts – power derived from the people and "administered . . . by persons holding office . . . for a limited period."

5

bhfs.com ©Brownstein Hyatt Farber Schreck, LLP

The Federalist Papers

Madison 51: "In republican government, the legislative authority necessarily predominates."

Madison 57: the "elective mode of obtaining rulers" is characteristic of a republican form of government

6

bhfs.com ©Brownstein Hyatt Farber Schreck, LLP

What about taxation?

Hamilton 30: “The conclusion is, that there must be . . . in the frame of the government, a general power of taxation. . . . Money is . . . the vital principle of the body politic . . . which sustains its life and motion, and enables it to perform its most essential functions.

7

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

What about taxation?

Hamilton 30, continued: “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.*”

8

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

So, what does the Constitution require?

Reading the inter-related arguments of Madison and Hamilton together against the backdrop of 1787 (the lack of national source of revenue under Articles of Confederation) . . .

➔ The states are required to have representative governments with legislatures that have the power to tax.

9

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

Article IV Sec. 4 (the “Guaranty Clause”) requires Colorado to maintain a republican form of government, that is, a legislature with tax power

TABOR strips legislature of tax power

10

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

Key Issues

Threshold procedural issues [where we are now]:

- Do [any of] plaintiffs have Art. III “standing”— concrete personal injury due to TABOR?
- Justiciability or “political question” – is the Q of RFG one federal courts should avoid and defer to Art. I and Art. II branches?

Issues “on the merits” [TBD eventually]

- What does a republican form of government mean?
- Does TABOR violate the republican form of government?
- What is the remedy?

11

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

What the case is NOT about

- Not an attack on the initiative process
- No implication re other issues (e.g., A 64)
- No “slippery slope” beyond Colorado
- No claim *only* GA can deal with taxes:
- Does *not* exclude voters from tax decisions
- *Not* raising taxes – just restoring GA power

12

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

And then there's everything else about TABOR

- Spending caps
- Special election requirements
- Prohibited taxes
- Et cetera

13

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

Procedural history

- Case filed in U. S. Dist. Ct., May 2011
- AG's Motion to Dismiss denied by Judge Martinez, July 2012
- 10th Circuit (3 judge panel) affirmed Judge Martinez ruling, March 7, 2014
- AG petition 10th Circuit rehearing *en banc* denied July 2014
- AG petition for U S Supreme Court review considered January 9, 2015; decision by ?
- June, 2015 Supreme Court "RFGs" to the 10th Circuit.

14

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

Plaintiffs, co-counsel & amici curiae

Plaintiffs: 2/3 Dems, 1/3 Repubs, including 33 current and former legislators, university presidents, county commissioners, school board members, city councilors, teachers, and citizens.

Pro bono co-counsel: Dentons: Lino Lipinsky, David Skaggs; BHFS: Mike Feeley, Sarah Clark, Carrie Johnson, John Herrick; Perkins Coie: former Chief Justice Mike Bender; Covington & Burling: Herb Fenster

Amici curiae at 10th Circuit (7 amicus briefs): CFI, CASE, CASB, The Bell, CBPP, PTA, CANP, ACP, Con Law Profs, Colorado General Assembly

15

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP

Back to the beginning

The TABOR case is all about understanding our own form of government.

16

bhfs.com

©Brownstein Hyatt Farber Schreck, LLP