HJR

30

STATE OF ALASKA
1995 LEGISLATIVE SESSION

Nb. 1
Bill Version: HJR 30
(H) Publish Date: 3/22/95

F I S C A L N O T E

REQUEST:
Revision Date: _____ Affected Agency: _____
Title: Amend US Constitution to limit Federal Courts BRU: _____
Sponsor: Representative Vezey Components: _____
Requestor: World Trade St/Fed Rel.

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 96	FY 97	FY 98	FY 99	FY 2000	FY 2001
Personal Services						
Travel						
Contractual						
Supplies						
Equipment						
Land & Structures						
Grants, Claims						
Miscellaneous						
TOTAL OPERATING	-0-					
CAPITAL	-0-					
REVENUE	-0-					

FUNDING: (THOUSANDS OF DOLLARS)

General Fund	-0-					
Federal Fund						
Other						
TOTAL	-0-					

POSITIONS:

Full-Time	-0-					
Part-Time						
Temporary						

Estimated FY 95 Impact: -0-
ANALYSIS: (ATTACH A SEPARATE PAGE IF NECESSARY)

Prepared By: World Trade and State/Federal Relations Date: 3/20/95
Division: _____ Phone: _____

Approved By: Dr. Damara L. Barrera
Agency: Office of World Trade & Fed. Affairs Date: 3/21/95

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AGENCY(IES)

COMMITTEE COPY

ALASKA STATE LEGISLATURE
HOUSE JOINT RESOLUTION NO. 30

HISTORY IN THE HOUSE

1995

2/8 Read first time and referred to: WTR Jud

3/22 WTR RPT CS( ) New Title
3 DP Ø DNP 1 NR Ø AM
FN 1 0FN Previous FN

4/13 Jud RPT CS( ) New Title
5 DP 2 DNP Ø NR Ø AM
FN 0FN 1 Previous FN Ø

RPT CS( ) New Title
DP DNP NR AM
FN 0FN Previous FN

4/20 Read second time
CS( ) Adopted

Amended
4/20 fld to Adv

4/21 Advanced

4/21 Read third time

Return to second for specific amendment

4/21

PASSED	EFD Same ___ or
Yeas 25	Yeas
Nays 12	Nays
Excused 3	Excused
Absent Ø	Absent

___ Intent adopted

4/21 Reconsideration NQUARRE
4/22 Reconsideration not taken up

PASSED ON RECON.	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

___ Intent adopted

4/22 Reported correctly engrossed
Signed by Speaker, to the Senate

Suzi Lowell
Chief Clerk of the House

HISTORY IN THE SENATE

1995

4/25 Read first time and referred to: JUD

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ RPT(___) CS ___DP ___NR ___DNP ___AM
___New Title ___Same Title ___Previous FN
___FN ___0FN To___

___ Rules Calendar(___) CS ___AM ___Other
___New Title ___Same Title ___Previous FN
___FN ___0FN

Read second time

___ CS Adopted (___) ___New Title
___Amended ___Advanced

Read third time

___ Letter of Intent adopted
___ Return to second for specific amendment

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reconsideration
Reconsideration not taken up

PASSED	EFD Same ___ or
Yeas	Yeas
Nays	Nays
Excused	Excused
Absent	Absent

Reported correctly engrossed
Signed by President, to the House

Secretary of the Senate

HOUSE-SENATE HISTORY Continued

19	
	Received from the Senate _____ Concur in Senate amendment Y___ N___ E___ A___ ____Efd same or Y___ N___ E___ A___ Failed to concur Senate amendment, ask Senate recede Y___ N___ E___ A___ Senate failed to recede from amendment Y___N___ E___ A___ CC appointed by House_____Chair _____ _____ CC appointed by Senate_____Chair _____ _____ (H) Granted Limited Powers of Free Conference (S) Granted Limited Powers of Free Conference

19	
	(H) Adopted CC Rpt_____ Y___ N___ E___ A___ ____Efd same or Y___ N___ E___ A___ (S) Adopted CC Rpt _____ Y___ N___ E___ A___ ____Efd same or Y___ N___ E___ A___ To enrolling Reported enrolled and sent to Governor _____By Governor Legislative Resolve Number _____ Filed with Lieutenant Governor

Official Business

COMMITTEE:

SENATE JUDICIARY

DATE: JANUARY 19, 1996

SIGN-IN

Subject of meeting:

HJR 30 AMEND U.S. CONSTITUTION TO LIMIT FEDERAL COURTS

*SB 194 GANG RELATED CRIMES

PLEASE PRINT!

NAME	ADDRESS (MAILING) & (ZIP)	PHONE	REPRESENTING	DO YOU WANT TO TESTIFY?
SANDY PERRY-PROVOST	DEPT PUBLIC SAFETY	4322	DPS	NO OBSERVE
Rep. Al Vezey's Office	Rm 216 Capitol Bldg	3719	Bill Sponsor	
Anne Carpenter	Room 717 Court Bldg	342P	Dept of Law	yes
	← ROBIN - can on Anne before you go to ANC			

JUDICIARY COMMITTEE
DELIVERY ACCEPTANCE LOG

MEETING DATE 1/19/96

BILL NUMBERS [illegible]

LEGISLATOR	ACCEPTED BY	TIME	DATE
SEN. GREEN.			
SEN. MILLER.			
SEN. ADAMS.			
SEN.ELLIS			

Alaska State Legislature

House of Representatives

Official Business

State Capitol
Juneau, Alaska 99801-1182
(907) 465-3718

House Majority Leader

SPONSOR STATEMENT

The purpose of HJR-30 is to petition the Congress of the United states to prepare and present to the legislatures of all the states an amendment to the Constitution of the United States. This amendment would prohibit the Supreme Court or any inferior court of the United States, from ordering a state or political subdivision of a state to levy or increase taxes.

The resolution comes about as the only means to address the problem of the courts mandating imposition of taxes by judicial edict. This effort was brought about by a court case in Missouri, whereby the Supreme Court mandated the city of Kansas City to charge a tax to fund desegregation expenses ordered by the courts.

Previous to that time the courts had addressed the power of taxation in the following opinions.

In People v. Baltimore & Ohio Southwestern Railway Co., 187 N.E.(1933):

Courts will not interfere with the exercise of sound business judgment on the part of taxing authorities, but will intervene only to prevent a clear abuse by such officers of their discretionary powers.

Marion and M. Ry. Co. v. Alexander County, 64 P. 978 (1901)

The authority to levy taxes is an extraordinary one. It is never left to implication, unless it is a necessary implication. Its warrant must be clearly found in the act of the legislature...when there is a reasonable doubt as to its (authority to levy taxes) existence the right must be denied.

Appeal of School District of City of Allentown, 87 A.2d 480 (1952)

Neither municipalities nor school districts are sovereigns, and they have no original or fundamental power of legislation or taxation, but have only the right and power to enact those legislative and tax ordinances or resolutions which are authorized by the act of the legislature.

Burris v. Wilkerson, 310 F.Supp. 572 (W.D. Va. 1969) affirmed 397 U.S. 44, 90 S.Ct. 812 (1970).

The courts have neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs.....

Missouri v. Jenkins, 110 S.Ct. 1651 (1990): is not a "so what" case as Representative Finklestein stated on the House floor. It is a case that reverses decisions of courts for two hundred years and allows the Supreme Court to legislate tax laws throughout misinterpretation of the Constitution.

Presently there are ten states which have introduced a similar resolution.

The Case For A Constitutional Amendment To Limit The Power To Tax Which Has Been Assumed By The Federal Courts

By John R. Stoeffler

SUPPORTING DOCUMENTS

The Case For A Constitutional Amendment To Limit The Power To Tax Which Has Been Assumed By The Federal Courts

By John R. Stoeffler

Alexander Bickel in his book *The Least Dangerous Branch* makes the following observation regarding those who embrace what he calls the utility of benevolent illusions and the justification for creating them. Such individuals, he wrote, believe that, " The people of a democracy must be mercifully soothed when they find themselves ruled, to whatever extent, by the nine (justices) of the Supreme Court. (They) know what the people imagine. (The people) imagine that they rule themselves, and they imagine Marbury v. Madison. To the extent that this is not so, some explanation perhaps may be found or even made up. It would be no sin. It has been done before.

"But", Mr. Bickel notes, "this is very dangerous. What is even more ominous, (is) the illusion (thus created) may engulf its maker and breed, as it has occasionally done, (a) free-ranging "activist" government by the judiciary. Such government is incompatible on principle with democratic institutions." *1.*

The United States Supreme Court and other federal courts do in fact pose a threat to representative government. All too often their rulings and decrees are attempts at judicial illusion; and all too often they succeed. Rulings and decrees from the courts today seem more often to reflect the social, economic and moral views of what the editorial board of the *St. Louis Post Dispatch* and the American Civil Liberties Union believe America should be than the unequivocal and uncompromising guidelines for a democratic republic which were clearly spelled out by the founding fathers in the United States Constitution. Such rulings and decrees only enhance the political power of the courts while diminishing those of the people through their duly elected representatives in the legislative branch of government.

As I see it there are three sources of power which control government; these are the power to legislate, the power of the sword and the

power of the purse. These are **political powers.** In any democratically elected government these political powers must remain in the hands of that branch closest to the people, the legislative branch of government, if representative government is to survive.

In addressing the Missouri General Assembly in 1982 Robert T. Donnelly, then Chief Justice stated, "I profoundly respect the United States Supreme Court as an institution. However, even the United States Supreme Court should not be permitted to wield power it was never given. The greed for power has surfaced from time-to-time in all civilizations. The uniqueness of our present concern is that the disease has cropped out among the judges, where one would least expect it." *2.* Th's power grab, if left unchallenged, can only lead to a substantial lessening of those ties which bind our republican form of government, and the potential for the establishment of a judicial oligarchy which, despite any assurances to the contrary, will be anything but benign.

I stated earlier that there are three sources of political power which I believe control government, and while the subject of my talk deals with the power to tax which the federal courts have seized and what action needs to be done to address it, I feel it is also necessary to discuss ways in which the judiciary has reached into those two other areas of legislative power to support my contention that a pattern of judicial activism and usurpation is not only alive, but a real and growing threat to representative government.

First let me discuss the usurpation of legislative power by the federal judiciary.

In 1717 Bishop Hoadly stated, "(W)hoever hath an absolute authority to interpret any written or spoken laws it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote them " *3.* Today, the federal judiciary has taken upon itself the power to legislate by interpretation. Justice Holmes noted this in his 1930 dissent in *Baldwin v. Missouri*, he stated, "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States...I cannot believe that the Amendment was intended to give us carte blanche to embody our economic and moral beliefs in its prohibitions." *4.* He could have been echoing the thoughts of Alexander Hamilton in *Federalist 78* when he wrote, "It can be of no weight to say that the courts, on the pretense of repugnancy, may substitute their own pleasure to the constitutional intent of the legislature." Courts today, however, make no pretense concerning their

social or economic views and continue to claim the sole constitutional right to interpret the constitution in order to achieve such views and objectives. Alexander Bickel's observations led him to write that the judiciary sees itself as having an intellect and judgment superior to elected officials. Elected officials, he claimed, are viewed as, "(S)pokesmen for the expedient short-run solutions while judges (have) a greater capacity to deal with principles of long run importance. Courts," he continued, "have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training and the insulation to follow the ways of the scholar in pursuing the ends of government." *5.* To support their claim to a constitutional right to make law they refer back to John Marshall's often cited opinion in the case of *Marbury v. Madison*, however they neglect the fact that by John Marshall's own admission his "assertions of judicial supremacy were mere *orbiter dicta*, i.e. private expressions of opinion that did not form a part of the decision, the *ratio descidendi*, of the case." *6.* More recently the United States Supreme Court, in the 1958 case of *Cooper v. Aaron*, declared its decisions to be, "(T)he supreme law of the land...and of binding effect upon (all) the States." *7.* Such self-serving declarations bring to mind these words of Abraham Lincoln from his first inaugural address, "If the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court...the people will have ceased to be their own ruler, having to that extent practically resigned their government into the hands of that eminent tribunal." *8.*

"The Constitution", writes Joseph Sobran, " was meant to assure us that every act of the federal government would be clearly traceable to a general heading: coining money, declaring war, providing postal service and a few other broad yet well-defined powers. It didn't leave much room for discretionary authority." *9.* Today, however, the courts make law by judicial decree. Said Benjamin Cardozo in his book, *The Nature of The Judicial Process*, "I take judge made law as one of the existing realities of life." *10.* Judicial opinions then become the law of the land with no legislative input or stamp of approval from those who should be the guardians of our republic...the Congress of The United States. Shouldn't we expect the Congress to step in and invoke their power to reign in the federal judiciary's appellate powers as spelled out under Article III? I think we should. But, based on the record, if we plan on counting on those procrastinating and pontificating Pontious Pilates of politics to stand up for us, we had better

think again. Consider this observation by Federal Judge Arthur Stanley, Jr., "I've been called on to do things that I felt properly should have fallen within the legislative field. I have a sneaking impression that Congress deliberately creates situations to avoid making decisions itself." *11.*

At this point let me suggest to those who may be thinking that the solution to Congress' inaction is to elect a particular brand of politician or party to office. I wish it were that simple. Sure, we can change parties in the White House or in the United States Congress but political victories are meaningless if an activist Court will nullify any law it deems to be "unconstitutional" with arguments which, however ingenious, have no relation to the Constitution.

To many, the most blatant example of ongoing legislative activism by the federal judiciary is the ever increasing use by the courts of the Fourteenth Amendment to excise the Bill of Rights. It was the 1925 case of *Gitlow v. The People Of New York* which, for many, stands as the landmark case in which the Supreme Court accomplished this. The Court stated, "(W)e...assume that freedom of speech and of the press--which are protected by the First Amendment from abridgment by Congress--are among the fundamental "liberties" protected by the Fourteenth Amendment". *12.* You may recall that the Bill of Rights as written was to apply to the federal government not the states. This is because the founding fathers had a deep and abiding fear of a strong central government. Although this may have been the founding fathers' intent it has not inhibited the federal judiciary today as they continue, through subjective rulings and decrees, to amend the United States Constitution whenever they deem it necessary to conform to their own economic or moral view of what they believe America should be.

One of the more notorious examples of judicial legislating is the Court's insistence that the First Amendment's wording grants to the court the authority to declare that the term "separation of church and state" is a constitutional imperative. Using this logic the Courts have removed any vestige of God from the classroom. You may agree with this or you may not, but it is not the right of any court to use the Fourteenth Amendment to temporarily set aside any part of the Bill of Rights in pursuit of a pragmatic philosophical objective. The founding fathers provided a method for change, it is called the amendment process, a part of the Constitution the judiciary ignores when it suits their purpose. And while all this is taking place, members of Congress, who have sworn to protect and defend the Constitution from all enemies foreign and domestic, sit upon their collective hands

claiming that it is not their place to challenge the courts inasmuch as they view them as the ultimate arbiters of Constitutional intent. Oh, really? They would do well to harken to the words of President Andrew Jackson, one known to not mince words when it came to the Court. On July 10, 1832 he stated, "Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. The (judiciary's) authority must not (be) permitted to control the Congress or the Executive when acting in their legislative capacities, **but to have only such influence as the force of their reasoning may deserve.**" *13.* (emphasis mine)

As to the power of the sword Article I, Section 8 of the Constitution grants to Congress alone the authority, or power "to raise and support armies'; 'to provide and maintain a Navy'; and 'To make Rules for the Government and Regulation of the land and naval forces.'" In *Federalist 78* Alexander Hamilton addressed colonists' concerns over a strong federal judiciary. "The judiciary", he proclaimed, " has no influence over either the sword or the purse". That was the intent of the Founding Fathers, but today, whatever the courts want is a constitutional imperative while everything they choose to oppose is unconstitutional.

Recently the federal judiciary has begun to take upon itself the responsibility for our nation's defense readiness. While nowhere under Article III will one find such power granted to the courts this has not deterred them for even a millisecond. Having taken unto themselves the power to legislate by decree they have now begun a quest to acquire the political power of the sword to achieve subjective goals.

In an Associated Press report of Tuesday, October 19, 1993 it was noted that the Supreme Court agreed to decide whether states and communities hard hit by cuts in defense spending may challenge military base closings in court. The justices indicated that they would review a federal appeals court ruling which let local officials and union members try to overturn the government's decision to close the Philadelphia Naval Shipyard. Lawsuits, the report continued, over individual base closings would upset the process Congress adopted for making such **politically difficult decisions**. While the loss of jobs is a tragedy it is not the responsibility of the courts to interfere with political decisions made by Congress as they carry out the responsibilities delegated to them under Article I, Section 8 of the Constitution. The responsibility for our nation's defense rests with the legislative branch of government alone, and nowhere in the Constitution is

Congress authorized in any manner to delegate this power, in any form, to the judicial branch of government; yet Congress gives its blessing to the judiciary to act on its behalf by an implied silent assent.

Another example. The courts are challenging the right of the military to set rules and regulations by restricting homosexuals from serving in the armed forces of the United States.

On January 28, 1993 United States District Judge Terry J. Hatter, Jr., in the case of *Meinhold v. United States*, otherwise known as the "Gay Sailor's Case", held that the military's policy of excluding homosexuals was "unconstitutional" claiming that it violated equal protection laws, but his remarks indicated that it was he who was ignoring not only the Constitution but factual testimony as well. For example, in paragraph 5 of his opinion Judge Hatter stated, "In determining whether the policy is rationally related, the Court cannot merely defer to the "military judgment" as the rationale for the policy--the Court must consider the factual basis underlying the "military judgment." *14.* Still, when facts were presented Judge Hatter ignored them. Judge Hatter also chose to ignore a 1953 Supreme Court opinion in the case of *Orloff v. Willoughby*. In the Court's opinion the justices noted that, "(J)udges are not given the task of running the Army." *15.* Judge Hatter also chose to ignore the more recent 1983 Supreme Court case of *Chappel v Wallace*. Here the Supreme Court noted that, "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *16.* But that was then, and this is now. Congress should make it clear to the judiciary that they have trespassed into Article I powers and that they are directed to remove themselves forthwith. Unfortunately the silence from Capitol Hill is deafening.

In a letter to me Congressman Jim Talent, R-MO stated, "This decision, *Meinhold v United States*, is only one of many in a growing trend by the U.S. court system to extend its power well beyond the intentions of the framers of our Constitution." My question to Congressman Talent, and all members of a laissez faire Congress is, "You have recognized the challenge. You have articulated the challenge. When will you exercise your constitutional responsibilities and address this challenge?"

Today the Supreme Court of the United States and various inferior courts throughout the land have invaded another political area which belongs to the people alone. I refer to the principle espoused by the early colonists, to

wit, there shall be no taxation without representation. In a commentary I penned for the March 5, 1992 edition of the *St. Louis Post Dispatch*, entitled "When Judges Subvert The Constitution", I addressed the abuse of judicial power in the area of court ordered taxation. I pointed out then that, "The framers of the Constitution specifically limited the power to tax and vested such power to lay and collect taxes in the legislature...No exceptions to this view were ever expressed" *17.* or, I hasten to add, implied. Earlier I quoted these words of Bishop Hoadly, "(W)hoever hath an absolute authority to interpret any written or spoken laws it is he who is truly the lawgiver." I would suggest to you that whoever controls the purse strings ultimately controls power, the ability of a government to function and the direction it shall go. Alexander Hamilton put it another way in Federalist 79 when he stated, "In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" Of the three sources of political power to which I have referred, the power of the purse is the most critical for the power to tax is not only the power to build, but in the wrong hands it can be an instrument of destruction, and the power of total control.

When did the federal judiciary take upon itself the power tax? In November 1982, Missouri voters approved a referendum (Proposition C) which directed local school officials to reduce their operating levies by an amount equal to fifty percent of the revenues local school districts would receive under a one-cent increase in the state sales tax. *18.* On July 5, 1983 the federal district court enjoined the voter approved roll back of real estate taxes. (*Liddell v Board of Educ.*, supra, 567F. Supp at 1056) and directed the Board of Education to use this money to fund the quality education programs necessary to restore the St. Louis schools to their AAA status. The U.S. Court of Appeals for the Eighth District sustained the district court's injunction of the roll back on what it termed "Equitable grounds". The court claimed that it had **"broad equitable powers to remedy...evils...(including) a narrowly defined power to order increases in local tax levies on real estate."** *19.* (emphasis mine) In a dissenting opinion Judge John R. Gibson noted that, "The Court need not and should not go this far. The taxing power of the states is primarily vested in their legislatures, deriving their authority from the people." *20.* Judge Bowman concurred with Judge Gibson's opinion and stated, "I join in Judge John R. Gibson's well-reasoned dissent....and the singular inappropriateness in our Constitutional system of a federal court's ordering state and local taxing authorities to impose specific tax increases." *21.* There are those who choose not to call this example a tax increase, but it

can be called nothing less when citizens are denied monies they voted for themselves. I was taught in school that taxation without representation as practiced in the late 1700s was wrong. The question is, if it was wrong then why is it right today? And, if it is wrong, where are our elected representatives to right this wrong? There is more.

In September of 1987 Judge Russell G. Clark of the District Court entered an order approving extensive Kansas City Missouri School District capital improvement projects and a far-reaching magnet schools plan. In order to fund this order Judge Clark ordered a surtax of 1.5% added to Missouri's State Income Tax for all persons and entities receiving income for work done, services rendered, and income received from activities within the KCMSD and further ordered the tax levy for the KCMSD to be raised from $2.05 to $4.00 per $100 of assessed valuation. *22.* On appeal the Eighth Circuit reversed the "Judicially imposed income tax surcharge, holding that **the trial court invaded the province of the legislature in ordering this surcharge,**(emphasis mine) and that the order (was) beyond the power of the district court as outlined in Specified Supreme Court and Eighth Circuit precedent". *23.* On the other hand the Court of Appeals affirmed the District Court's $1.95 levy increase in effect until the end of the 1991 - 92 fiscal year,... then authorized the Kansas City School Board to obtain from the trial court each year ad infinitum, and without voter approval, a "reasonable" levy (tax) increase over and above the $1.95 levy (tax) to fund desegregation expenses ordered by the courts." *24.* In 1988 The United States Supreme Court upheld the lower federal court's order imposing a property tax increase claiming that the order did, "satisfy equitable and **constitutional principles** governing the District Court's power." *25.* (emphasis mine)

In a dissenting opinion, however, Supreme Court Justice Kennedy stated that, "The premise of the Court's analysis is infirm." He continued , "The question is whether a district court possesses a power to tax under federal law, either directly or **through delegation.**" (emphasis mine) Justice Kennedy points out that, "The description of the judicial power nowhere includes the word 'tax' or anything that resembles it."; *26.* but this constitutional fact did not deter the Supreme Court from upholding the lower court's order or "authorization" to increase property taxes in Kansas City, Missouri.

Such power to allocate or reallocate funds by an unaccountable judiciary denies elected officials the necessary tools to properly and responsibly represent and provide for those who have freely elected them. An unelected and unaccountable judiciary, sitting miles from the people affected,

has no true interest in them. only subjective goals cloaked in robes of Trojan Horse legalese. As Justice Kennedy notes in his dissenting opinion, "Perhaps it is good educational policy to provide a school district with the items included in the KCMSD capital improvement plan....(B)ut these items are part of legitimate political debate over educational and spending priorities, not the Constitution's command of racial equity." *27.*

This decision "authorizing" a tax increase represents "the first in which a lower federal court has in fact upheld taxation to fund a remedial decree". *28.* As Justice Kennedy noted, "...rules of taxation that override state political strictures not themselves subject to any constitutional infirmity raise serious question of federal authority." This decision, "a first" according to Justice Kennedy, sets a *stare decisis*, or precedent, which will at some time in the future affect all states, and the fact that Congress remains silent on this issue lends credibility to the claim by the courts that they do in fact have the power to tax. In his book, *The Tempting of America*, Judge Robert Bork spelled out his view of the responsibilities of the legislative vis-a-vis the judicial branch of government. He wrote, "Where the law stops, the legislator may move on to create more; but where the law stops, the judge must stop." *29.* Here let me add that the only change a court may make is to change the period at the end of the law to an exclamation point!

In a column of October 18, 1993 columnist Charley Reese made this observation about government, " (T)he men who signed the Declaration of Independence and who wrote the Constitution recognized that government--any government--was the potential enemy of individual freedom. They held high the value of governments with limited powers and limited jurisdiction, bound tightly by constitutions, which they viewed as **contracts between the people and their governments**. (emphasis mine) Today", he continues, "there is virtu zilch talk about freedom or principles of good government. It's all about social and economic issues." *30.* Again Justice Kennedy, "**This assertion of judicial power is one of the most sensitive of policy areas, that involving taxation, (it) begins a process that over time could threaten fundamental alteration of the form of government our *Constitution embodies." 31.*** (emphasis mine) In his farewell remarks to the new nation President George Washington warned, "Let there be no change by usurpation; for through this, in one instance may be the instrument of good, it is the customary weapon by which free governments are destroyed". James Madison also noted, "I believe there are more instances of the abridgment of freedom of the people by gradual and silent encroachments of those in power,

than by violent and sudden usurpations." *32.* In a recent commentary columnist Thomas Sowell wrote, "History shows many great nations and civilizations declining and falling, but we may be the first to destroy ourselves from within.". *33.*

In 1982 Judge Robert T. Donnelly addressed the Missouri General Assembly. In his remarks he stated, "History tells us that the Framers (of the Constitution), in establishing a federal government, were influenced by the teachings of Locke, Rousseau, and others, and by the social concept they espoused. This concept would recognize a continuing right in the people to call their agents, even the United States Supreme Court, to account. It would assure that the people, and not an agency of government, will determine the direction of their lives. If, in fact, the United States Supreme Court is exercising powers without the consent of the governed - the people - then the rights it purports to secure in their name are counterfeit - its benevolence a fraud." *34.*

Again let me pose the question. Where were our elected officials while all this was taking place? Where are they today? Do they even have an opinion? In May of 1992 I traveled to Washington and visited with a number of members of Congress, among them Congressman Henry Hyde (R-IL). In his office I discussed my concern; his response, "While I'm sympathetic to your concern, on this issue frankly Congress just doesn't give a damn." Today we have a Congress that won't balance the budget, a Congress in which many members were unable or unwilling to balance their own personal checkbooks until their irresponsible and culpable behavior was exposed and a Congress which has shown a willingness to turn over to an un-elected judiciary the most sacred of trusts, the authority to tax. So who is to rein in the judiciary if not the legislative branch of government? The people? Think again!

Today the American people are under the illusion that they are being constitutionally governed, without even understanding what that means. Sure, they and members of Congress will tell you that they have read the Constitution, but without knowledge of prior intent they will never understand its true meaning. "Government", writes columnist Walter Williams, "is about coercion. Limiting government is the single most important instrument for guaranteeing liberty. We're working on the third generation which has had little in the way of education about what our Constitution means and why it was written. Thus, they fall easy prey to charlatans, quacks and hustlers." *35.*

In 1982 Judge Donnelly attempted to persuade the General Assembly to petition Congress to rein in the federal judiciary. His admonishment to do so fell upon deaf ears; but as time passes we all see things in a different light.

In 1993 the Missouri General Assembly passed a resolution calling upon Congress to submit to the states an amendment to the Constitution which would curb the taxing powers of the judiciary. It reads, "Neither the Supreme Court nor any inferior court of the United States shall have the power to instruct or order a state or political subdivision thereof, or an official of such state or political subdivision, to levy or increase taxes." *36.* Credit for the success in passing this resolution is due primarily to the tireless and persistent efforts of State Senator Walt Mueller (R-Kirkwood) and those of Representative Bill Skaggs (D-Kansas City).

Gordon Crovitz, writing in *The Wall Street Journal* noted, "No legal principal carves illegitimate rulings in stone." *37.* If this be true, as I believe it to be, then no unconstitutional ruling, opinion or declaration can be wrapped in robes of declared constitutional legitimacy and become the law of the land unless the misinformed, uninformed or those who know better do not act to stop it. Inasmuch as Congress chooses to ignore the unconstitutional actions of the Court, I believe it is now up to the state legislatures to call the Supreme Court of The United States to account by calling for an amendment to the United States Constitution which will rein in the federal judiciary's usurpation of the taxing powers which belong to the people alone through their elected representatives.

In November of 1993 Senator Mueller asked me to chair a group we call The Madison Forum. In that capacity Senator Mueller, Representative Skaggs and I have contacted the majority and minority leaders in both the upper and lower chambers of every state legislature seeking support for passage in their state of a resolution identical to the one which was passed by the Missouri General Assembly in 1993. But the passing of this resolution in Missouri is just a first step on what will be a long and arduous journey. When the legislatures of thirty three additional states pass this resolution it will assume the form of a petition to Congress. Congress will then be forced to submit to the states for consideration an amendment to the United States Constitution which will curb the power to tax which the judiciary has assumed.

It has been said that Benjamin Franklin, coming out of the constitutional convention, was approached by a woman who asked him, "What kind of government have you given us?" His reply, "A Republic, madam, if you can keep it."

Senator Mueller, Representative Skaggs and I and others who feel as we do will continue to work to see that the federal judiciary and the Supreme

Court are brought to account for their unconstitutional actions. It is our intention to insure that this government will remain the Republic to which Benjamin Franklin referred. A Republic for which thousands have given their last great measure of personal sacrifice. A Republic in which those inseparable twins, liberty and freedom will not, like sand, slip through our fingers.

We intend to share with others these self evident truths which the founding fathers embraced knowing full well this is the only way to insure that this Republic will remain a government of the people, by the people and for the people. So help us God.

END

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FOOTNOTES

1. Alexander M. Bickel, The Least Dangerous Branch, Yale University Press (2nd Edition). Pg 92 - 93

2. Chief Justice Robert T. Donnelly, The State of The Judiciary in Missouri, 1982 Journal of The Senate, pg 82

3. Robert Bork quoting Bishop Hoadly in The Tempting of America, The Free Press, pg 176

4. Baldwin v Missouri, 281 U.S. 586.595 (1930) (J. Holmes dissenting opinion)

5. Cited in The Tempting of America, Robert H. Bork, The Free Press, pg 151

6. Congressman Robert K. Dornan and Csaba Vedlik, Jr., Judicial Supremacy: The Supreme Court On Trial, Nordland Series In Contemporary American Social Problems, 1980, pg 85

7. Cooper v Aaron, (358 U.S. 1) 78 S. Ct. 1401, pg 1410

8. Cited in Haines, Judicial Supremacy, pg 333, and Corwin, Court Over Constitution, pg 71

9. Joseph Sobran writing in The Conservative Chronicle, 11-11-92, pg 17

10. Benjamin N. Cardozo, The Nature of The Judicial Process, (New Haven:Yale University Press, 1921) pg 10

11. Judge Arthur Stanley Jr., Quoted in The Kansas City Star, 3-1-92, pg B-2

12. Gitlow v The People of New York, (268 U.S. 652) 45 S. Ct., pg 630

13. Cited in Haines, Judicial Supremacy, pg 333, and Edwin S. Corwin, Court Over Constitution pg 71

14. Judge Hatter Citing Pruitt v Chaney, 963 F 2d at 1166 - 67

15. Orloff v Willoughby, (345 U.S. 83) 73 S. Ct., pg 540

16. Chappel v Wallace, (462 U.S. 296) 103 S. Ct., pg 2366

17. John R. Stoeffer, When Judges Subvert The Constitution, St. Louis Post Dispatch, Commentary Page, 3-5-92

18. Mo. Rev. Stat. 164.013 (Supp. 1983)

19. 731 Federal Reporter 2d Series, pg 1320

20. ibid, pg 1332

21. ibid, pg 1333

22. Brief for Amici Curie, State of Missouri v Kalima Jenkins, Court No. 88-1150, June 1989

23. ibid

24. ibid

25. Missouri v Jenkins, 110 S. Ct. 1651 (1990)

26. ibid

27. ibid

28. ibid

29. Robert H. Bork, The Tempting Of America, The Free Press, pg 151

30. Charley Reese writing in The Conservative Chronicle, 11-3-93, pg 18

31. Missouri v Jenkins, 110 S. Ct. 1651, 1990

32. David Robertson, Debates And Other Proceedings Of The Convention Of Virginia, Richmond, 1805, pg 87

33. Thomas Sowell writing in The Conservative Chronicle, 12-15-93, pg 21

34. Chief Justice Robert T. Donnelly, The State of The Judiciary In Missouri, 1982 Journal of The Senate, pg 81

35. Walter Williams writing in The Conservative Chronicle, 12-8-93, pg 15

36. House Substitute for Senate Concurrent Resolution NO. 9, Journal of the House, 5-5-93, pg 1846 and House Substitute for Senate Concurrent Resolution No. 9, Final vote 5-10-93, (passed 118 "ayes" to 30 "noes") pg 2091

37. Grodon Crovitz writing in The Wall Street Journal, 7-10-91, pg A-11

[495 US 33]

MISSOURI, et al., Petitioner

v.

KALIMA JENKINS et al.

495 U.S 33, 109 L Ed 2d 31, 110 S Ct 1651

[No. 88-1150]

Argued October 30, 1989. Decided April 18, 1990.

Decision: Federal District Court held (1) to have abused discretion in directly imposing property tax increase to fund desegregation remedy, but (2) to have authority to order Missouri school district to levy such taxes.

SUMMARY

The Kansas City, Missouri, School District (KCMSD) and a group of KCMSD students filed a complaint based on 42 USCS § 1983 in the United States District Court for the Western District of Missouri. The complaint alleged that several defendants, including the state of Missouri, had operated a racially segregated public school system in the Kansas City area. In a series of decisions, the District Court (1) realigned the KCMSD as a party defendant; (2) found that the KCMSD and the state had operated a segregated school system within the KCMSD; and (3) issued an order as to (a) the remedies deemed necessary to eliminate the vestiges of segregation, and (b) the financing deemed necessary to implement those remedies. While the finding of liability was eventually upheld, further litigation ensued on other matters, including the appropriate remedy and its financing—litigation which was complicated by alleged problems concerning the limits, under several state constitutional and statutory provisions, on the KCMSD's authority to tax. As the proceedings continued and as the District Court endorsed, as part of its desegregation remedy, a multimillion-dollar expansion of a magnet-school program, the District Court eventually, in 1987, (1) concluded that the KCMSD had exhausted all available means of raising additional revenue to pay for the KCMSD's share of the cost of the remedy; and (2) among other decisions, exercised what the court called its broad equitable powers and ordered the KCMSD property tax levy raised—regardless of any state-law limits—from $2.05 to $4.00 per $100 of assessed valuation through the 1991-1992 fiscal year (672 F Supp 400). On appeal, the United States Court of

Briefs of Counsel, p 806, infra.

Appeals for the Eighth Circuit, in affirming in part and reversing in part on August 19, 1988, (1) upheld the scope of the desegregation order and the District Court's allocation of costs; (2) said that state-law limitations which prevented the KCMSD from raising funds sufficient to implement the desegregation remedy had to fall to the command of the Federal Constitution; and (3) affirmed the actions that the District Court had taken to that point with respect to the property tax increase; but (4) ruled that, under the principles of federal-state comity, the District Court, in the future, should not set the property tax rate itself, but should (a) authorize the KCMSD to submit to the state tax collection authorities a levy adequate to fund the KCMSD's budget, and (b) enjoin the operation of state laws that would limit or reduce the levy below that amount (855 F2d 1295). Under 28 USCS § 2101(c), a petition for certiorari in a civil case must be filed within 90 days after the entry of the judgment below. The state's petition for certiorari was filed within 90 days after an October 14, 1988 denial of rehearing by the Court of Appeals. The United States Supreme Court (1) granted the state's petition, limited to the question as to the property tax increase, but (2) requested the parties to address whether the petition was timely filed (490 US 1034, 104 L Ed 2d 402, 109 S Ct 1930).

On certiorari, the Supreme Court affirmed the judgment of the Court of Appeals insofar as it required the District Court to modify its funding order, reversed the judgment of the Court of Appeals insofar as it allowed the tax increase imposed by the District Court to stand, and remanded the case for further proceedings. In an opinion by WHITE, J., expressing the unanimous view of the court as to holding 1 below, and joined by BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., as to holdings 2–4 below, it was held that (1) the state's petition for certiorari was timely filed; (2) the District Court abused its equitable discretion in imposing the property tax increase itself, because, (a) under the principles of comity, the District Court, before taking such a drastic step, was obliged to assure itself that no permissible alternative would have accomplished the required task, and (b) the alternative means existed of (i) authorizing or requiring the KCMSD to levy property taxes at a rate adequate to fund the remedy, and (ii) enjoining the operation of state laws that would have prevented the KCMSD from exercising such a power; (3) the difference between the two approaches was more than a matter of form; and (4) accepting for purposes of decision, as a result of the limited grant of certiorari, the Court of Appeals' conclusion that the District Court's desegregation remedy was proper, the equitable and constitutional principles governing the District Court's power with respect to financing the remedy were satisfied by the Court of Appeals' modifications as to what the District Court should do in the future, because (a) even though it is claimed that the alleged excessiveness of the remedy causes such funding to violate the principles of equity and comity, such an argument is aimed at the scope of the remedy, rather than the manner in which the remedy is to be funded, (b) under the circumstances, it was not an abuse of discretion for the District Court to rule that the KCMSD would be liable for funding its share of the cost of the remedy, instead of shifting any funding in excess of the state-law limits to the jointly liable

state, (c) the KCMSD's obligation to fund the desegregation remedy arose from its operation of a segregated school system in violation of the Federal Constitution, (d) the Constitution's Tenth Amendment reservation of nondelegated powers to the states is not implicated by a federal-court judgment enforcing the express prohibitions against unlawful state conduct enacted by the Constitution's Fourteenth Amendment, (e) a court order directing a local government body to levy its own taxes is a judicial act within the power of a federal court, under Article III of the Constitution, and (f) under the Constitution's supremacy clause (Art VI, cl 2), the KCMSD may be ordered to levy taxes, despite the state-law limitations, in order to compel the discharge of an obligation imposed on the school district by the Fourteenth Amendment.

KENNEDY, J., joined by REHNQUIST, Ch. J., and O'CONNOR and SCALIA, JJ., concurring in part and concurring in the judgment, expressed the view that (1) the Supreme Court had jurisdiction to decide the case; and (2) the District Court had exceeded its authority by attempting to impose a tax; but (3) any purported distinction between the direct imposition of a tax by a federal court and an order commanding the KCMSD to impose the tax was but a convenient formalism, where the court's opinion was predicated on elimination of state-law limitations on the KCMSD's taxing authority; (4) a federal court is without power to order a tax levy that goes beyond the taxing power granted by state law to a local authority, where the state-law limitation was not a subsequent enactment itself in violation of the Federal Constitution's clause against impairing the obligation of contracts (Art I, § 10, cl 1); (5) even if a federal court might in some extreme case authorize such taxation, the case at hand was not such a case, where, even though the limited grant of certiorari required an assumption that the District Court's choice of an expensive magnet-school remedy was a permissible exercise of discretion, (a) a taxation order ought not to be considered unless there has been a finding that, without the particular remedy at issue, the constitutional violation would go unremedied, and (b) there was no such showing in the record of the case at hand; and (6) the Supreme Court's opinion, by broad dictum, embraced an expansion of judicial power beyond all precedent.

Kennedy, concurring, joined by Rehnquist, O'Connor, & Scalia

October 27, 1987, order increasing property taxes in the KCMSD *through the end of fiscal year 1991-1992*. The District Court's January 3, 1989, order does not support, but refutes, the Court's characterization. The District Court rejected a request by the KCMSD to *increase* the property tax rate using the method endorsed by the Eighth Circuit from $4.00 to $4.23 per $100 of assessed valuation. The District Court reasoned that an increase in 1988 property taxes would be difficult to administer and cause resentment among taxpayers, and that an increase in 1989 property taxes would be premature because it was not yet known whether an increase would be necessary to fund expenditures. App 511-512. In rejecting the KCMSD's request, the District Court left in effect the $4 rate it had established in its October 27, 1987, order.

Whatever the Court thinks of the Court of Appeals' opinion, the District Court on remand appears to have thought it was under no compulsion to disturb its existing order establishing the $4 property tax rate through fiscal year 1991-1992 unless and until it became necessary to *raise* property taxes even higher. The Court's discussion today, and its stated approval of the "method for future funding" found "preferable" by the Court of Appeals, is unnecessary for the decision in this case. As the Court chooses to discuss the question of future taxation, however, I must state my respectful disagreement with its analysis and conclusions on this vital question.

The premise of the Court's analysis, I submit, is infirm. Any purported distinction between direct imposition of a tax

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by the federal court and an order commanding the school district to impose the tax is but a convenien formalism where the court's action i predicated on elimination of stat law limitations on the school di trict's taxing authority. As th Cour describes it, the local KCMSD po sesses plenary taxing powers whic allow it to impose any tax it chooses not "hinder[ed]" by the Missouri Co stitution and state statutes. Ante, 57, 109 L Ed 2d, at 58. This puts th conclusion before the premise. Loc government bodies in Missouri, elsewhere, must derive their pow from a sovereign, and that sovereig is the State of Missouri. See M Const. Art. X, § 1 (political subdiv sions may exercise only "[tax] pow granted to them" by Missouri Ge eral Assembly). Under Missouri la the KCMSD has power to impose limited property tax levy up to $1. per $100 of assessed value. The pow to exact a higher rate of property t remains with the people, a majori of whom must agree to empower t KCMSD to increase the levy up $3.75 per $100, and two-thirds whom must agree for the levy to higher. See Mo Const, Art X, §§ 11 (c). The Missouri Constitution stat that "[p]roperty taxes and other loc taxes . . . may not be increased abo the limitations specified herein wit out direct voter approval as provid by this constitution." Mo Const, A X, § 16.

For this reason, I reject the art cial suggestion that the Distr Court may, by "prevent[ing] . . . o cials from applying state law t would interfere with the willing le of property taxes by KCMSD," an at 56, n 20, 109 L Ed 2d, at 57, ca the KCMSD to exercise power u der *state* law. State laws, incl

ing taxation provisions legitimate and constitutional in themselves, define the power of the KCMSD. Cf. Washington v Washington Commercial Passenger Fishing Vessel Assn., 443 US 658, 695, 61 L Ed 2d 823, 99 S Ct 3055 (1979) (whether a state agency "may be ordered actually to promulgate regulations having effect as a matter of state law may well be doubtful"). Absent a change in state law, no increase in property taxes could take

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place in the KCMSD without a federal court order. It makes no difference that the KCMSD stands "ready, willing, and . . . able" to impose a tax not authorized by state law. Ante, at 51, 109 L Ed 2d, at 54. Whatever taxing power the KCMSD may exercise outside the boundaries of state law would derive from the federal court. The Court never confronts the judicial authority to issue an order for this purpose. Absent a change in state law, the tax is imposed by federal authority under a federal decree. The question is whether a district court possesses a power to tax under federal law, either directly or through delegation to the KCMSD.

II

Article III of the Constitution states that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The description of the judicial power nowhere includes the word "tax" or anything that resembles it. This reflects the Framers' understanding that taxation was not a proper area for judicial involvement. "The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." The Federalist No. 78, p 523 (J. Cooke ed 1961) (A. Hamilton).

Our cases throughout the years leave no doubt that taxation is not a judicial function. Last Term we rejected the invitation to cure an unconstitutional tax scheme by broadening the class of those taxed. We said that such a remedy "could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." Davis v Michigan Dept. of Treasury, 489 US 803, 818, 103 L Ed 2d 891, 109 S Ct 1500 (1989). Our statement in Davis rested on the explicit holding in Moses Lake Homes, Inc. v Grant County, 365 US 744, 6 L Ed 2d 66, 81 S Ct 870 (1961), in which we reversed a judgment directing a District Court to decree a valid tax in place of an invalid one that the State had attempted to enforce.

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"The effect of the Court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one." Id., at 752, 6 L Ed 2d 66, 81 S Ct 870.

The nature of the District Court's order here reveals that it is not a proper exercise of the judicial power. The exercise of judicial power involves adjudication of controversies

and imposition of burdens on those who are parties before the Court. The order at issue here is not of this character. It binds the broad class of all KCMSD taxpayers. It has the purpose and direct effect of extracting money from persons who have had no presence or representation in the suit. For this reason, the District Court's direct order imposing a tax was more than an abuse of discretion, for any attempt to collect the taxes from the citizens would have been a blatant denial of due process.

Taxation by a legislature raises no due process concerns, for the citizens' "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." Bi-Metallic Co. v Colorado State Bd. of Equalization, 239 US 441, 445, 60 L Ed 372, 36 S Ct 141 (1915). The citizens who are taxed are given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent. A true exercise of judicial power provides due process of another sort. Where money is extracted from parties by a court's judgment, the adjudication itself provides the notice and opportunity to be heard that due process demands before a citizen may be deprived of property.

The order here provides neither of these protections. Where a tax is imposed by a governmental body other than

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the legislature, even an administrative agency to which the legislature has delegated taxing authority, due process requires notice to the citizens to be taxed and some opportunity to be heard. See, e.g., Londoner v Denver, 210 US 373, 385-386, 52 L Ed 1103, 28 S Ct 708 (1908). The citizens whose tax bills would have been doubled under the District Court's direct tax order would not have had these protections. The taxes were imposed by a District Court that was not "representative" in any sense, and the individual citizens of the KCMSD whose property (they later learned) was at stake were neither served with process nor heard in court. The method of taxation endorsed by today's dicta suffers the same flaw, for a district court order that overrides the citizens' state-law protection against taxation without referendum approval can in no sense provide representational due process. No one suggests the KCMSD taxpayers are parties.

A judicial taxation order is but an attempt to exercise a power that always has been thought legislative in nature. The location of the federal taxing power sheds light on today's attempt to approve judicial taxation at the local level. Article I, § 1, states that "*[a]ll* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Emphasis added.) The list of legislative powers in Article I, § 8, cl 1, begins with the statement that "[t]he Congress shall have Power To lay and collect Taxes . . ." As we have said, "[t]axation is a legislative function, and Congress . . . is the sole organ for levying taxes." National Cable Television Assn., Inc. v United States, 415 US 336, 340, 39 L Ed 2d 370, 94 S Ct 1146 (1974) (citing Article I, § 8, cl 1).

True, today's case is not an instance of one branch of the Federal Government invading the province of another. It is instead one that brings the weight of federal author-

.ty upon a local government and a State. This does not detract, however, from the fundamental point that the Judiciary is not free to exercise all federal power; it may exercise only the

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judicial power. And the important effects of the taxation order discussed here raise additional federalism concerns that counsel against the Court's analysis.

In perhaps the leading case concerning desegregation remedies, Milliken v Bradley, 433 US 267, 53 L Ed 2d 745, 97 S Ct 2749 (1977), we upheld a prospective remedial plan, not a "money judgment," ante, at 54, 109 L Ed 2d, at 56, against a State's claim that principles of federalism had been ignored in the plan's implementation. In so doing the Court emphasized that the District Court had "neither attempted to restructure local governmental entities nor to mandate a particular method or structure of state or local financing." 433 US, at 291, 53 L Ed 2d 745, 97 S Ct 2749. No such assurances emerge from today's decision, which endorses federal-court intrusion into these precise matters. Our statement in a case decided more than 100 years ago should apply here.

"This power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only, and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. Especially is it beyond the power of the Federal judiciary to assume the place of a State in the exercise of this authority at once so delicate and so important." Rees v City of Watertown, 19 Wall 107, 116-117, 22 L Ed 72 (1874).

The confinement of taxation to the legislative branches, both in our Federal and State Governments, was not random. It reflected our ideal that the power of taxation must be under the control of those who are taxed. This truth animated all our colonial and revolutionary history.

"Your Memorialists conceive it to be a fundamental Principle without which Freedom can no Where exist, that the People are not subject to any Taxes but such as are laid on them by their own Consent, or by those who are legally appointed to represent them. Property must become too precarious for the Genius of a free People

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which can be taken from them at the Will of others, who cannot know what Taxes such people can bear, or the easiest Mode of raising them: and who are not under that Restraint, which is the greatest Security against a burdensome Taxation, when the Representatives themselves must be affected by every tax imposed on the People." Virginia Petitions to King and Parliament, December 18, 1764, reprinted in The Stamp Act Crisis 41 (E. Morgan ed 1952).

The power of taxation is one that the Federal Judiciary does not possess. In our system "the legislative department alone has access to the pockets of the people." The Federalist No 48, p 334 (J. Cooke ed 1961) (J. Madison); for it is the Legislature that is accountable to them and represents their will. The authority that would levy the tax at issue here shares none of these qualities. Our Federal Judiciary, by design, is not representative or responsible to the people in a political sense; it is independent. Federal judges do not depend on the popular will for their

ends of the spectrum: one mother was freed from prison without having to disclose the location of her daughter,[79] while the other mother must remain in prison until she discloses the whereabouts of her son.[80]

Although the outcomes were extremely different, both cases emphasized the child's best interest and safety as the primary concern. In *Houknight*, the Court feared Maurice's safety and believed his life would be threatened if the mother *was not forced* to reveal the location of her child. In contrast, Congress feared Morgan's daughter's safety and welfare would be threatened if Morgan *was forced* to reveal the location of her child.[81]

The Court's decision in *Houknight* is significant because it illustrates the attitude prevalent in today's society of protecting a child's safety and welfare at all costs. The Court went to great lengths in attempting to ascertain the location of Maurice to protect him, including denying an individual her right to constitutional protection.

Debora L. Hewett

79. Marlene Cimons, *Mother Imprisoned 33 Months Is Freed*, L.A. Times, Sept. 28, 1989, § 1, at 32, col. 1.

80. *See supra* text accompanying note 11.

81. *See* Marlene Cimons, *Father Pledges on Diagram with Ex-Hostage and Mother Jailed Since '87, Says Child Safety Is Key*, L.A. TIMES, Nov. 7, 1989, § 1, at 34, col. 3.

CONSTITUTIONAL LAW—Principles of Comity Prohibit Federal Courts from Directly Imposing State Tax Levy Increases. Federal Courts Have the Authority, However, to Order School Districts to Levy Taxes in Excess of Limits Set by State Law to Fund Court-Ordered Desegregation Plans—*Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

I. INTRODUCTION

Several students brought suit against the State of Missouri and the Kansas City Missouri School District ("KCMSD") alleging racially segregative conditions in their school district.[1] The federal district court found the State and the KCMSD had failed to eliminate all vestiges of a previously mandated dual school system and held both in violation of the Fourteenth Amendment.[2]

Both defendants offered proposals to remedy the constitutional violation.[3] The district court adopted, in large part, the remedial plan proposed by the KCMSD and ordered both defendants to finance the plan.[4] The remedial plan focused on compensatory educational programs rather than mandatory busing.[5] The scope and cost of the remedial plan were unprecedented.[6] Initially, it included programs totaling in excess of $87 million over three years.[7]

1. *Jenkins v. Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984). In 1977, the KCMSD and students brought suit as co-plaintiffs. Noting possible conflicts of interest if the KCMSD and students remained joined as plaintiffs, the district court realigned KCMSD as a co-defendant. *Kansas City Missouri School Dist. v. Missouri*, 460 F. Supp. 421, 422 (W.D. Mo. 1978).

2. *Jenkins v. Missouri*, 593 F. Supp. at 1500.

3. *Jenkins v. Missouri*, 639 F. Supp. 19, 23 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987).

4. *Id.* at 63-66, 85-86.

5. *Id.* The district court adopted a *Milliken II* type remedy designed to restore the KCMSD students "to the position they would have enjoyed absent constitutional violations by state and local officials." *Milliken v. Bradley*, 433 U.S. 267, 281 (1977) (*Milliken II*).

6. The on-going remedy called for compensatory educational programs, capital improvements, and magnet school programs. *See Jenkins v. Missouri*, 639 F. Supp. at 61-66, 85-86; *see also Jenkins v. Missouri*, 855 F.2d 1295, 1299 n.2 (8th Cir. 1988) (listing subsequent district court orders); *cert. denied sub nom. Jackson County v. Jenkins*, 109 U.S. 1034 (1989).

A "magnet school" offers students an expanded curriculum in specific fields of study. *Missouri v. Jenkins*, 110 S. Ct. 1651, 1657 n.8 (1990) (citing Janet R. Price & Jane R. Stern, *Magnet Schools as a Strategy for Integration and School Reform*, 3 YALE L. & POL'Y REV. 291 (1985)). For example, a magnet high school with an expanded curriculum in the sciences might offer advanced courses and resources in biology, physics, and chemistry. The primary goals of a magnet school program are: (1) to provide educational opportunities to minority school children that are comparable to those provided non-minority school children, and (2) to "attract" to "quality" urban students but one predominately black or minority districts. *Id.*

7. *Jenkins v. Missouri*, 639 F. Supp. at 63-66. In June 1986, the district court broadened the plan's magnet planning costs to circulate to an amount in excess of $220 million. *Id.* at 63-66. Subsequent court orders further increased the scope and costs of the desegregation plan. *See*

Although the KCMSD was cooperative, it was unable to implement the desegregation plan because state tax laws prevented the school district from funding its share of the plan.[8] Consequently, the district court enjoined application of the State's tax laws against the KCMSD for one year to ensure full financing of the plan.[9] On appeal the Eighth Circuit affirmed the scope of the remedial order but remanded on the issue of cost allocation.[10]

In the meantime, the scope and costs of the desegregation plan continued to rise.[11] To ensure the KCMSD could fund its rising obligation, the district court imposed a property tax increase in the school district.[12] The

Jenkins v. Missouri, 855 F.2d at 1299 n.2 (listing of subsequent district court orders). By the time certiorari was granted, Justice Kennedy noted the allocations for the capital improvement and magnet school plans alone had risen to more than $460 million. Missouri v. Jenkins, 110 S. Ct. 1651, 1668 (1990).

8. Jenkins v. Missouri, 639 F. Supp. 19, 45 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). Under Missouri law, the KCMSD is authorized to levy property taxes at a rate of $1.25 per $100 assessed value to operate and maintain the district's schools. Jenkins v. Missouri, 855 F.2d at 1312 (citing MO. CONST. art. X, § 11). Any increase in the tax levy requires voter approval. *Id.* (citing MO. CONST. art. X, § 11). An increase up to $1.75 per $100 assessed value requires the approval of a simple majority; an increase above $1.75 per $100 assessed value requires a two-thirds majority. *Id.* (citing MO. CONST. art. X, § 11). School bond issues for capital improvements and construction also require a two-thirds majority. *Id.* (citing MO. REV. STAT. § 164.151 (1986)). Additionally, a statutory rollback provision operates to further reduce the district's tax levy. *Id.* (citing MO. REV. STAT. § 164.013 (Supp. 1987)).

9. Jenkins v. Missouri, 639 F. Supp. at 45. The district court noted the voters in the school district had consistently rejected the school board's prior attempts to increase the property tax levy. *Id.*; *see also* Jenkins v. Missouri, 855 F.2d at 1312 (discussing KCMSD's previous attempts to increase the tax levy).

10. Jenkins v. Missouri, 807 F.2d 657, 686 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987). The Eighth Circuit Court of Appeals suggested the costs of the desegregation plan should be equally divided between the State and the KCMSD. *Id.* (citing Milliken v. Bradley, 433 U.S. 267, 277 (1977)). On remand, the district court found the State 75% at fault, the KCMSD 25% at fault, and held both jointly and severally liable. Jenkins v. Missouri, 855 F.2d at 1309 (citing the district court's unpublished order dated July 6, 1987, slip op. at 14). The State was assigned 75% of the costs for two reasons. First, the State created the segregated school system. *Id.* The KCMSD merely implemented the system as required by Missouri law. *Id.* Although both failed to desegregate the school system after the *Brown* decision in 1954, the district court rationalized "the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out." *Id.* (citing the district court's unpublished order dated July 6, 1987, slip op. at 13). Second, the KCMSD was unable to finance more than 25% of the plan. *Id.* (citing the district court's unpublished order dated July 6, 1987, slip op. at 14). Although the State and the KCMSD were held jointly and severally liable, the district court refused to pass the KCMSD's funding shortfall to the State. Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 855 F.2d 1295 (8th Cir. 1988), *cert. denied sub nom.* Jackson County v. Jenkins, 490 U.S. 1034 (1989).

11. Jenkins v. Missouri, 672 F. Supp. at 402-03. The district court adopted a long range capital improvement plan and an expanded magnet school plan as part of the *en banc* remedy. *Id.*

12. *Id.* at 412-13. In addition to the the property tax increase, the district court ordered the KCMSD to issue $150 million in capital improvement bonds and ordered a 1.5% surcharge on the state income tax for residents and nonresidents transacting business within the KCMSD.

court of appeals affirmed the property tax increase but cautioned the district court to use less obtrusive methods in the future.[13]

The State, contesting the scope of the remedial plan and the power of the district court to levy property tax increases, petitioned for certiorari.[14] The United States Supreme Court granted certiorari limited to the issue of judicial taxation.[15]

The Supreme Court *held*, reversed in part and affirmed in part.[16] The Court unanimously reversed the appellate court's decision regarding the direct imposition of a property tax.[17] The Supreme Court held principles of comity prohibit federal district courts from directly imposing tax levy increases.[18] On the broader question concerning judicial taxation, a divided Court held courts have the authority to order school districts to levy taxes in excess of limits set by state law in order to remedy constitutional violations.[19] *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

Id. The Eighth Circuit Court of Appeals nullified the 1.5% income tax surcharge on appeal. Jenkins v. Missouri, 855 F.2d at 1315.

11. Jenkins v. Missouri, 855 F.2d at 1314. The court of appeals' discussion regarding future taxation became a point of contention within the Supreme Court. The controversy centered on whether the appellate court's discussion modified the district court's order or was simply dictum. *See infra* Part III. The opinion reads:

> While we affirm the actions that the court has taken to this point, as we deal with an on going remedy we think it appropriate to consider the procedures which the district court should use in the future. We believe a preferable method for future funding of KCMSD's obligations under the district court's desegregation orders is to authorize the school board to submit a proposed levy to the collection authorities adequate to fund its budget, including its share of the cost of the desegregation programs ordered by the district court. County and state authorities should then be enjoined from applying those Missouri constitutional and statutory limitations that would limit or reduce the levy below the amount submitted by the school board.

Jenkins v. Missouri, 855 F.2d at 1314.

14. Missouri v. Jenkins, 110 S. Ct. 1651, 1659 (1990).

15. *Id.* at 1660.

16. *Id.* at 1667.

17. *Id.* at 1662 n.1.

18. *Id.* at 1667.

19. *Id.* at 1666. While the Supreme Court's decision striking down the district court's direct imposition of a tax levy increase was unanimous, its decision affirming the court of appeals' modification order generated much controversy. Five Justices supported the modification order endorsing judicial authority to order levying of taxes, but four opposed it. *Id.* at 1665. Justices White, Brennan, Marshall, Blackmun, and Stevens composed the majority. *Id.* Justices Kennedy, O'Connor, Scalia, and Chief Justice Rehnquist concurred in the judgment but disagreed with the majority's rationale. *Id.*

II. DISTRICT COURT TAX INCREASE STRUCK DOWN ON PRINCIPLES OF COMITY

In striking down the district court's tax levy increase,[20] a unanimous Court accepted the State's argument that court-imposed tax increases violated principles of comity.[21] Justice White reasoned the remedial powers of federal courts are limited by a duty to show "proper respect for the integrity and function of local government institutions."[22] He noted the district court failed to properly consider this duty and intruded into an area reserved to local government by directly imposing an increase in the school district's property tax levy.[23] The district court order disregarded principles of federal/state comity because less obtrusive methods were available.[24] The Court concluded the district court abused its discretion and reversed.[25]

III. COURT OF APPEALS' "MODIFIED" ORDER DEEMED CONSTITUTIONAL

Arguably, the case could have been concluded at this point, but Justice White, writing for the majority, went one step further. He construed the court of appeals' discussion concerning future taxation as a "modification" to the district court's tax order[26] and endorsed the modification as constitutional.[27] The court of appeals' order permitted the district court to: (1) *authorize the KCMSD to increase its tax levy* to finance the desegregation plan, and (2) enjoin the application of state laws that prevented the KCMSD from raising adequate funds.[28] The majority implied the federal judiciary had the power to indirectly order a local government body, such as a school board, to increase tax levies in excess of state law limitations.

Justice White considered the distinction between the district court's order and the court of appeals' "modification" crucial. The district court's order was a tax imposed directly by the court; it was issued for a specific

20 *Id.* at 1667.

21 *Id.* at 1662-63. Comity requires federal courts to show "a proper respect for state functions." Younger v. Harris, 401 U.S. 37, 44 (1971). The concept recognizes "the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States, and their institutions are left free to perform their separate functions in their separate ways." *Id.*

22 *Id.* at 1663 (referring to Whitcomb v. Chavis, 403 U.S. 124, 161 (1971)).

23 *Id.* at 1663.

24 *Id.* (citing Jenkins v. Missouri, 855 F.2d 1295, 1318 (8th Cir. 1988)). Justice White made reference to the alternative outlined by the Eighth Circuit Court of Appeals. *Id.*; *see supra* note 13.

25 Missouri v. Jenkins, 110 S. Ct. at 1667.

26 *Id.* at 1663-64 n.10; *see also supra* note 13.

27 Missouri v. Jenkins, 110 S. Ct. at 1666.

28 *Id.* at 1663 (referring to Jenkins v. Missouri, 855 F.2d at 1318).

amount over a specific period.[29] The court of appeals' modification, on the other hand, allowed the district court to authorize the KCMSD to levy tax increases in the future.[30] In the first instance, the taxing authority rests directly with the district court; in the second instance, the school district imposes the increase. Justice White preferred the court of appeals' approach because it placed "responsibility for solutions to the problems of segregation upon those who have themselves created the problems."[31]

Justice Kennedy, concurring, characterized the distinction as a "convenient formalism."[32] He refused to construe the Eighth Circuit's discussion on future taxation as a "modified" order and insisted the appellate court's discussion was dictum.[33] He argued the appellate court's discussion of future taxation merely outlined a "preferable" method to secure funding for desegregation in the future.[34]

Deriving its taxing power from the state, Justice Kennedy argued the KCMSD could only impose tax levies that comport with state law.[35] The court of appeals' "modified" order, however, set aside state law limitations, thus permitting the KCMSD to exact a higher tax.[36] In doing so, the federal court expanded the school district's power to tax. The tax, in essence, is "imposed by federal authority under a federal decree."[37] Justice Kennedy questioned a court's authority to impose such taxes and strongly disagreed with the majority's assertion that federal courts have the power to authorize school districts to levy taxes in excess of limits set by state law.[38] Justice Kennedy considered the assertion an unprecedented expansion of judicial authority with little constitutional justification.[39]

The opinions of Justices White and Kennedy present contrasting views of the broader constitutional question: whether the federal judiciary has the power to authorize tax increases to remedy constitutional violations. Justice White adopted the position the federal judiciary has the power to order

29 *Id.*

30 *Id.*

31 *Id.*

32 *Id.* at 1669-70 (Kennedy, J., concurring).

33 *Id.* at 1669 (Kennedy, J., concurring).

34 *Id.* (Kennedy, J., concurring) (citing Jenkins v. Missouri, 855 F.2d 1295, 1314 (8th Cir. 1988)).

35 *Id.* at 1670 (Kennedy, J., concurring). "Under Missouri law, the KCMSD has power to impose a limited property tax levy up to $1.25 per $100 of assessed value." *Id.* (Kennedy, J., concurring). If the school district needs a higher levy, state law requires direct voter approval. *Id.* (Kennedy, J., concurring) (citing MO. CONST. art. X, §§ 1, 11, 16); *see supra* note 9 (discussing state law limitations on a school district's taxing authority).

36 Missouri v. Jenkins, 110 S. Ct. at 1666.

37 *Id.* at 1670 (Kennedy, J., concurring).

38 *Id.* at 1667 (Kennedy, J., concurring).

39 *Id.* (Kennedy, J., concurring). "[T]axation imposed by the unelected, life tenured federal judiciary disregards fundamental precepts for the democratic control of public institutions." *Id.* (Kennedy, J., concurring).

local governments to levy tax increases to remedy constitutional violations[40] even if the tax increases exceed state law limitations.[41] Justice Kennedy argued the federal judiciary lacks the power to impose such tax increases.[42]

IV. JUDICIAL TAXING AUTHORITY

The State challenged the court's power to tax on three grounds: (1) it violated Article III of the United States Constitution, (2) it violated the Tenth Amendment, and (3) it violated principles of equity and comity.[43]

A. *Article III*

Article III of the United States Constitution makes no mention of judicial taxing authority.[44] The power to levy and collect taxes is assigned to Congress in Article I, Section 8.[45] The absence of the word "tax" in Article III, coupled with its inclusion in Article I, indicates an intent by the Framers of the Constitution to exclude taxation from the functions of the judiciary.[46] This interpretation is consistent with political maxims of the Colonial and Revolutionary War periods and "reflect[s] our ideal that the power of taxation must be under the control of those who are taxed."[47]

Justice Kennedy cited *Davis v. Michigan Department of Treasury*[48] and *Moses Lake Homes v. Grant County*[49] to further support the argument against judicial taxation. In *Davis*, the Supreme Court declined to correct

40 *Id.* at 1665.
41 *Id.* at 1666.
42 *Id.* at 1675 (Kennedy, J., concurring).
43 *Id.* at 1662-63.
44 *Id.* at 1670 (Kennedy, J., concurring).
45 U.S. CONST. art. I, § 8, cl. 1.
46 Missouri v. Jenkins, 110 S. Ct. at 1670 (Kennedy, J., concurring).
47 *Id.* at 1672 (Kennedy, J., concurring). Justice Kennedy made specific reference to the Stamp Act Crisis. *Id.* (Kennedy, J., concurring).
48 Davis v. Michigan Dept. of Treasury, 489 U.S. 803 (1989). In *Davis*, a retired federal employee challenged the constitutionality of the Michigan Income Tax Law. *Id.* at 806-07. The Michigan law exempted state and local government retirement benefits from taxation but did not exempt federal retirement benefits. *Id.* The United States Supreme Court held the law "violate[d] principles of intergovernmental tax immunity by favoring retired state and local government employees over federal government employees." *Id.* at 817. The Court refused to validate the Michigan tax law "by extending the tax exemption to retired federal employees . . . or by eliminating the exemption for retired state and local government employees [thereby lowering the class of those taxed]." *Id.* at 818.
49 Moses Lake Homes v. Grant County, 365 U.S. 744 (1961). In *Moses Lake Homes*, the Grant County tax assessor improperly assessed taxes on the Moses Lake Homes federal leasehold. *Id.* at 752. The United States Supreme Court held the tax discriminatory and void. *Id.* The Court refused to replace the invalid tax with a valid tax. *Id.*

"an unconstitutional tax scheme by broadening the class of those taxed."[50] The Court refused to replace the invalid tax scheme with a valid scheme because the remedy "'could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court.'"[51]

Similarly, in *Moses Lake Homes*, the Supreme Court reversed a judgment that directed a district court to replace an invalid tax with a valid tax.[52] The Court acknowledged the judiciary had the power to determine whether a tax was valid, but the judiciary did not possess the power to assess or levy taxes.[53] In *Jenkins*, Justice Kennedy noted other circuits facing funding problems for remedial decrees have refused to interfere with state and local financing.[54] The Eighth Circuit, however, is the only circuit upholding judicial taxation.[55]

Proponents of judicial taxation, including Justice White, rely on *Griffin v. County School Board*.[56] In *Griffin*, county officials refused to levy taxes to operate the county's public schools.[57] As a result, the county's schools were closed.[58] The United States Supreme Court found the closings were designed to avoid integration of the county's public school system[59] and ordered the schools reopened.[60] The Court in *Griffin* went on to state it could "'require the Supervisors to exercise the power *that is theirs* to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system.'"[61]

50 Missouri v. Jenkins, 110 S. Ct. at 1670 (Kennedy, J., concurring).
51 *Id.* (Kennedy, J., concurring) (quoting Davis v. Michigan Dept. of Treasury, 489 U.S. at 818).
52 *Id.* at 1670-71 (Kennedy, J., concurring) (citing Moses Lake Homes v. Grant County, 365 U.S. 744 (1961)).
53 *Id.* at 1671 (Kennedy, J., concurring) (quoting Moses Lake Homes v. Grant County, 365 U.S. at 752).
54 *Id.* at 1668 (Kennedy, J., concurring) (citing Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978), *cert. denied sub nom.* Alexis I. DuPont School Dist. v. Evans, 447 U.S. 916 (1980); National City Bank v. Battisti, 581 F.2d 565 (6th Cir. 1977); Plaquemines Parish School Bd. v. United States, 415 F.2d 817 (5th Cir. 1969)).
55 Missouri v. Jenkins, 110 S. Ct. at 1668 (Kennedy, J., concurring).
56 *Id.* at 1665 (citing Griffin v. County School Bd., 377 U.S. 218 (1964)).
57 Griffin v. County School Bd., 377 U.S. at 222.
58 *Id.* at 222-23. White children were permitted to attend all-white, private schools operated by the Prince Edward School Foundation, a private organization. *Id.* at 223. State and county officials authorized tuition grants and tax credits for white families who enrolled their children in these private schools. *Id.* The county's black children, on the other hand, were denied formal schooling; there was no comparable private organization established for black children nor was there any effort from county officials to provide black families with tuition assistance or tax credits. *Id.*
59 *Id.* at 231.
60 *Id.* at 234.
61 Missouri v. Jenkins, 110 S. Ct. at 1673 (Kennedy, J., concurring) (quoting Griffin v. County School Bd., 377 U.S. 218, 233 (1964) (emphasis added by the *Jenkins* Court)).

Proponents assert *Griffin* is consistent with a line of cases supporting judicial taxation.[62] Justice White relied heavily on one case in particular—*Von Hoffman v. City of Quincy*.[63] According to Justice White, *Von Hoffman* stood for the proposition that "a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation."[64] The majority in *Jenkins* held the KCMSD had an obligation under the Fourteenth Amendment to operate a unitary school district.[65] Consequently, the district court could order the KCMSD to increase its tax levy in excess of state law limitations to fulfill its constitutional obligations.[66]

Justice Kennedy attacked the majority's reliance on *Griffin*, arguing the passage cited by Justice White was dictum and had no application to the current case.[67] According to Justice Kennedy, the dictum in *Griffin* stood for the proposition that federal courts have the power "to order the local authority to exercise *existing* authority to tax."[68] The modified order endorsed by the majority, however, went beyond the scope of *Griffin* by permitting a federal court to authorize a local school district to exercise its taxing authority in excess of limits established by state law.[69]

Justice Kennedy also disagreed with Justice White's analysis of *Von Hoffman*.[70] In *Von Hoffman*, Justice Kennedy noted a state's limitation on the city's power to tax had been held unconstitutional.[71] When the invalid limitation was removed, however, the city's original grant of taxing authority remained.[72] Therefore, the city could levy taxes within its pre-existing authority to meet its contractual obligations. According to Justice Kennedy, *Von Hoffman* did not suggest the city could levy taxes beyond its original grant of authority.[73] He distinguished *Von Hoffman* from *Jenkins*, noting nothing suggested Missouri's tax laws were unconstitutional.[74] Consequently, he concluded there was no constitutional justification for setting them aside.[75]

After attacking *Griffin* and *Von Hoffman*, Justice Kennedy cited a line of "more relevant" cases including *Heine v. Levee Commissioners* and *United States v. County of Macon*.[76] In *Heine*, bondholders brought suit against the levee commissioners for nonpayment of bond obligations.[77] The levee commissioners resigned their positions.[78] Consequently, the Court was unable to issue a writ of mandamus compelling an official to collect the taxes to satisfy the bond obligations.[79] "[T]he Court held that it had no power to impose a tax in order to prevent the [bondholders'] right[s] from going without a remedy."[80]

Similarly, in *County of Macon*, the petitioner sought a writ of mandamus compelling the County to levy and collect taxes sufficient to pay a judgment on delinquent bond payments.[81] The County, however, was unable to levy and collect taxes "sufficient to pay the interest annually accruing on the bonds" due to state law limitations.[82] The Court held it lacked the power to order a higher levy not authorized by state law.[83]

Justice Kennedy concluded from these cases that a federal court lacks the power to order tax increases that exceed state law limitations unless the limitations are subsequent enactments "in violation of the contracts clause."[84] Justice Kennedy conceded a limit on judicial power may, in some circumstances, prevent a court from providing a remedy.[85] Such a

62 *Id.* at 1665. Justice White cited a line of cases in which federal courts issued writs of mandamus ordering municipalities to levy taxes to pay their debts. For a complete list see Missouri v. Jenkins, 110 S. Ct. at 1665.

63 Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1867). In *Von Hoffman*, the city authorized tax levies to support bond obligations. *Id.* at 536. After the bonds were issued, the state enacted a statute limiting the city's power to tax. *Id.* at 536-37. Von Hoffman sought a writ requiring the city to levy the taxes to pay interest coupons due on the bonds. *Id.* at 536. The city argued it could not levy the necessary taxes to satisfy its bond obligations because of the new state restrictions. *Id.* at 537. The Supreme Court concluded the state law violated the contract clause because it impaired the pre-existing contractual obligations of the city and the entitlements of the bondholders. *Id.* at 558. Consequently, the state statute was set aside and the city was ordered to levy taxes sufficient to meet its obligations. *Id.* at 555.

64 Missouri v. Jenkins, 110 S. Ct. at 1666.

65 *Id.*

66 *Id.* For a discussion of the state law limitations see *supra* note 8.

67 *Id.* at 1673 (Kennedy, J., concurring).

68 *Id.* (Kennedy, J., concurring).

69 *Id.* (Kennedy, J., concurring).

70 *Id.* at 1674 (Kennedy, J., concurring).

71 *Id.* (Kennedy, J., concurring).

72 *Id.* (Kennedy, J., concurring).

73 *Id.* (Kennedy, J., concurring).

74 *Id.* (Kennedy, J., concurring).

75 *Id.* (Kennedy, J., concurring).

76 *Id.* at 1675 (Kennedy, J., concurring) (citing Meriwether v. Garrett, 102 U.S. 472 (1880); United States v. County of Macon, 99 U.S. 582 (1879); Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655 (1874); Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1874)).

77 *Id.* (Kennedy, J., concurring).

78 *Id.* (Kennedy, J., concurring).

79 *Id.* (Kennedy, J., concurring).

80 *Id.* (Kennedy, J., concurring). The Court in *Heine* recognized the power to levy taxes to satisfy the bond obligations resided with the state legislature. Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) at 661. The state delegated that power to the levee commissioners. *Id.* "If that body has ceased to exist, the remedy is in the legislature either to assess the tax by special statute or to vest the power in some other tribunal. It is certainly not vested . . . in any Federal court." *Id.*

81 United States v. County of Macon, 99 U.S. 582, 582 (1879).

82 *Id.* at 583.

83 *Id.* at 591.

84 Missouri v. Jenkins, 110 S. Ct. at 1675 (Kennedy, J., concurring).

85 *Id.* (Kennedy, J., concurring).

possibility, however, is simply the natural and "necessary consequence of *any* limit on judicial power."[86]

B. *The Tenth Amendment*

The State argued the court of appeals' modification violated the Tenth Amendment.[87] The Tenth Amendment to the United States Constitution reserves to the states all powers not delegated to the federal government or prohibited by the Constitution.[88] The State argued the power to levy taxes to operate public schools is a power reserved to the states.[89] Therefore, a federal court order interfering with a state's taxing power violates the Tenth Amendment.[90]

The majority argued the Fourteenth Amendment permits the federal courts to disestablish state institutions that deny equal protection of the law.[91] Justice White stated: "'The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.'"[92] Missouri's tax limitations prevented the KCMSD from complying with the Fourteenth Amendment's command to operate a unitary school system.[93] Consequently, the federal courts are permitted to enjoin the application of tax laws preventing the KCMSD from correcting its constitutional wrong.[94]

This view is problematic because it permits a federal court to set aside constitutional state tax laws. Justice Kennedy found the Missouri tax laws limiting the taxing authority of its school districts valid; the laws violated no specific provision of the United States Constitution.[95]

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86 *Id.* at 1675-76 (Kennedy, J., concurring).
87 *Id.* at 1665.
88 U.S. CONST. amend. X.
89 Missouri v. Jenkins, 110 S. Ct. at 1665.
90 *Id.*
91 *Id.* The Fourteenth Amendment reads in part:
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.
92 Missouri v. Jenkins, 110 S. Ct. at 1665 (quoting Milliken v. Bradley, 433 U.S. 267, 291 (1977) (Milliken II)).
93 *Id.*
94 *Id.*
95 *Id.* at 1674 (Kennedy, J., concurring).

C. *Equity and Comity*

The State maintained the district court's funding order was excessive and therefore violated principles of equity.[96] Although the costs of the magnet school and capital improvement programs alone had risen in excess of $160 million,[97] the majority refused to address the unprecedented cost of the remedial order. Justice White interpreted the State's argument as attacking the scope of the desegregation plan rather than the manner of its funding and concluded the issue was outside the Court's limited grant of certiorari.[98]

The State also argued the district court's interference with state tax laws violated principles of comity.[99] The district court held the State and the KCMSD jointly and severally liable.[100] Consequently, if the KCMSD could not meet its financial obligations, the district court should have passed any funding shortfalls to the State rather than enjoin the application of Missouri's tax laws.[101] The majority rejected this argument and concluded the district court did not abuse its discretion by requiring the KCMSD to fund its full portion of the desegregation plan.[102]

Justice Kennedy found merit in the State's arguments and concluded the Court had a duty to review the district court's choice of remedy before it addressed the issue of judicial taxation.[103] He maintained that if the lower court's choice of remedy had been addressed by the Court, the constitutional question of judicial taxation could have been avoided.[104] According to Justice Kennedy, the district court operated under the assumption its remedy was "the *only* possible cure for the violations it found."[105] This assumption was not necessarily true. There was no indication the lower court considered less costly remedies that would have precluded the need for judicial taxation.[106]

Justice Kennedy insisted the majority failed to exercise the proper degree of prudence normally practiced by the Court when federal courts intrude into the affairs of local government.[107] Prudence demands the

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96 *Id.* at 1664.
97 *Id.* at 1668 (Kennedy, J., concurring).
98 *Id.* at 1664.
99 *Id.*
100 *Id.*, *see supra* note 10 and accompanying text.
101 Missouri v. Jenkins, 110 S. Ct. at 1664.
102 *Id.*
103 *Id.* at 1678 (Kennedy, J., concurring).
104 *Id.* at 1678 (Kennedy, J., concurring).
105 *Id.* (Kennedy, J., concurring).
106 *Id.* at 1678 (Kennedy, J., concurring).
107 *Id.* at 1677 (Kennedy, J., concurring) (citing Spallone v. United States, 110 S. Ct. 625 (1990)). *Spallone* stands for the proposition "that a court must exercise '[t]he least possible power adequate to [achieve] the end proposed.'" Spallone v. United States, 110 S. Ct. at 635 (citations omitted).

district court properly consider any remedy that would correct the constitutional violation without causing a funding crisis.[108] Justice Kennedy went on to assert "that [if] a federal court might order taxation in an extreme case, the unique nature of the taxing power would demand that this remedy be used as a last resort."[109]

Although the district court acknowledged other remedies were possible, the court failed to properly consider them.[110] Instead of reviewing less obtrusive remedies, the district court pursued an intradistrict remedy unprecedented in scope and cost.[111] In essence, the remedy attempted to make the entire school district a magnet district.[112] The Supreme Court, however, has never endorsed a desegregation remedy of such magnitude.[113]

V. CONCLUSION

The Supreme Court in *Brown v. Board of Education (Brown II)*[114] directed federal district courts to use their equitable powers to dismantle segregated school systems.[115] Since *Brown II*, the Supreme Court has been called upon repeatedly to define the permissible bounds of court action.[116] *Missouri v. Jenkins* reflects the Court's latest attempt to define those bounds.

108 Missouri v. Jenkins, 110 S. Ct. at 1677-78 (Kennedy, J., concurring).

109 *Id.* at 1677 (Kennedy, J., concurring).

110 *Id.* (Kennedy, J., concurring).

111 *Id.* at 1676 (Kennedy, J., concurring). Justice Kennedy attacked the scope and costs of the magnet school and capital improvement plans. *Id.* at 1676-77 (Kennedy, J., concurring). These programs were designed to improve the quality of education in the school district and to attract nonminority students from adjacent school districts. *Id.* (Kennedy, J., concurring). Justice Kennedy argued the expenditure of funds to lure nonminority students back into the KCMSD exceeded the Constitution's command to remedy racial inequality. *Id.* (Kennedy, J., concurring). According to Justice Kennedy, the district court had the authority to eliminate racial discrimination, it did not have the authority, however, to shape educational policy. *Id.* at 1676 (Kennedy, J., concurring).

112 *Id.* at 1677 (Kennedy, J., concurring).

113 *Id.* at 1676 (Kennedy, J., concurring). Justice Kennedy concluded the district court's remedy was not the only remedy possible. *Id.* at 1677 (Kennedy, J., concurring). According to Justice Kennedy, any suggestion the students' constitutional rights will go without remedy unless the entire school district is turned into a magnet district "suggests that the remedies approved in our past [school desegregation] cases should have been disapproved as insufficient to deal with the violations." *Id.* (Kennedy, J., concurring). Justice Kennedy was unwilling to characterize the Court's past desegregation decisions as insufficient. *Id.* (Kennedy, J., concurring).

114 Brown v. Board of Educ., 349 U.S. 294 (1955) (Brown II).

115 *Id.* at 300.

116 *See, e.g.*, Green v. County School Bd., 391 U.S. 430 (1968) (holding courts may compel integration where elimination of formal racial barriers fails to abolish racially identifiable schools); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (holding courts may authorize busing, racial balancing, and alteration of school attendance zones to remedy past discriminatory actions); United States v. Scotland Neck City Bd. of Educ., 407 U.S. 484 (1972) (holding courts may enjoin application of state law designed to impede dismantling of existing dual school systems); Keyes v. School Dist., 413 U.S. 189 (1973) (holding courts may authorize district-wide remedy to eliminate segregation in part of a district); Milliken v. Bradley, 418 U.S. 717 (1974) (Milliken I) (holding courts may not order interdistrict desegregation plan to remedy finding of intradistrict *de jure* segregation); Milliken v. Bradley, 433 U.S. 267 (1977) (Milliken II) (holding courts may order compensatory or remedial education programs to remedy constitutional violations).

117 Missouri v. Jenkins, 110 S. Ct. at 1644.

118 *Id.*

119 *Id.*

120 *See* Spallone v. United States, 110 S. Ct. 625, 635 (1990); *see also* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("The Court will not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed of.").

The decision is controversial because it pulls into conflict two basic principles of our democratic society. The first principle involves the notion that the power to tax must rest with the people through their elected representatives. The second involves the equal protection clause of the Fourteenth Amendment. Pitted against each other, these two principles present a novel constitutional question: which principle is preeminent? The majority concludes the Fourteenth Amendment is preeminent.[117] A federal court, exercising its equitable powers pursuant to *Brown II*, may order a school district to levy taxes in excess of state law limitations to ensure funding of its desegregation plans.[118]

The Constitution, however, does not include taxation as a function of the judiciary. A federal court decree setting aside state limitations on a school district's power to tax removes the taxing power from the people and vests it in the unelected federal judiciary. In this regard, *Missouri v. Jenkins* disregards the basic principle that the power to tax rests with the people through their elected representatives. More importantly, the decision disregards the Constitution's balance of power among branches of government. State legislatures and the Congress have the power to levy taxes. State and federal courts do not. A court may declare a legislature's taxing scheme unconstitutional; it may not, however, craft tax schemes to remedy every state's violation of the United States Constitution.

The majority insists it merely authorized the School District to levy taxes sufficient to redress the wrong.[119] Yet the KCMSD had no authority to levy taxes in excess of limitations set by state law. The KCMSD's authority for such a tax derived from the Court, not the state legislature. Was it really necessary for the Court to vest itself with such power?

The Supreme Court often has expressed the need for judicial restraint. In the past, the Court has refused to address constitutional questions if some other method is available to dispose of a case.[120] The absence of judicial restraint in *Missouri v. Jenkins* is puzzling. Desegregation could have been achieved by other means; the Court did not have to reach the constitutional question of whether it had the power to order school districts to levy

taxes in excess of state law limitations. Both the KCMSD and the State were held jointly and severally liable.[121] The Court could have avoided the question by simply passing the KCMSD's funding shortfall to the State.

Furthermore, if a constitutional tax scheme must be set aside to enable funding of a desegregation plan that is unprecedented in scope and cost, perhaps the district court's choice of remedy should be questioned. The current plan calls for expenditures of hundreds of millions of dollars to cure the constitutional wrong—an amount far in excess of the State or the KCMSD's funding ability. The logical effect of such a high-cost remedy is an increase in white flight from the KCMSD to avoid unwanted increases in property taxes as well as an overall reduction in state services and programs.

The long-term impact of the Court's decision is difficult to assess. Could it mean, as Justice Kennedy suggested, the door is open for the Court to assert its newly-found taxing power to vindicate constitutional violations "in cases involving prisons, hospitals, [and] other public institutions?"[122] Or is the Court only willing to exercise such an extraordinary remedy "in the compelling context of school desegregation?"[123]

Karl Tage Olson

121 *See supra* note 10
122 Missouri v. Jenkins, 110 S.Ct. at 1670 (Kennedy, J., concurring)
123 *Id.* (Kennedy, J., concurring)

CRIMINAL LAW—Parents or Persons Standing *In Loco Parentis* to a Child or Minor Victim Are Not Beyond the Reach of the Iowa Kidnapping Statute—*State v. Siemer*, 454 N.W.2d 857 (Iowa 1990).

I. INTRODUCTION

The facts of *State v. Siemer*[1] are chilling. Defendant Larry Siemer was the live-in boyfriend of Donna Simmons.[2] Donna's seven-year-old son Tracey and ten-year-old daughter April lived with the couple.[3]

In late 1987, Siemer began physically abusing Tracey.[4] After Christmas, Siemer removed Tracey from the family living quarters and forced the child to live in a dark and dirty room in the basement of the home.[5] During the three months Tracey was confined to the basement, he suffered various kinds of torture from Siemer on a regular basis.[6] Tracey was handcuffed to his bed each weekday from the time he arrived home from school until 6:30 the next morning.[7] On weekends he was locked to his bed for the entire two days.[8]

Ironically, Tracey saw his sister April daily under Siemer's perverse rules.[9] April was allowed to give Tracey some food each day, and was given the "privilege" of unlocking Tracey from his bed every weekday morning.[10] To secure the girl's cooperation, Siemer promised April a similar fate if she ever revealed Tracey's plight.[11]

At trial, Tracey testified Siemer routinely beat him, suspended him from the ceiling, cut him with a knife, scalded him with hot water, sub-

1 State v. Siemer, 454 N.W.2d 857 (Iowa 1990)
2 *Id.* at 858
3 *Id.*
4 *Id.*
5 *Id.* The condition of the basement room was deplorable. The doorway and windows of the room were covered so no light could enter. *Id.* Siemer handcuffed Tracey to rusty bed springs that functioned as his bed. *Id.* Initially, Siemer did not extend any bathroom privileges or facilities to Tracey. *Id.* Therefore, Tracey had to lie in his own excrement. *Id.* Eventually, a chair with a bucket on it was placed next to the bed so Tracey could relieve himself while still handcuffed. *Id.*
6 *Id.* at 858
7 *Id.* at 858
8 *Id.*
9 *Id.* at 858-59
10 *Id.*
11 *Id.* at 859. Siemer ordered April to "forget about" her brother outside of the times she fed him. *Id.* Additionally, April was not to tell her friends about her brother's condition. *Id.* at 864

TAXATION AND DESEGREGATION: PUSHING THE LIMITS OF FEDERAL COURTS' REMEDIAL POWERS

Randall H. Warner

Federal courts may not assess or levy taxes.[1]

[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees.[2]

INTRODUCTION

In the thirty-eight years since the United States Supreme Court held that segregated schools violate the equal protection clause of the fourteenth amendment,[3] the federal courts have been overseeing school desegregation. During that time, the Court has attempted to define the scope of federal judicial power to effect desegregation.[4] *Missouri v. Jenkins*[5] is the latest Supreme Court pronouncement on the role of federal courts in the desegregation process.

In *Jenkins*, the District Court for the Western District of Missouri ordered the Kansas City, Missouri, School District (KCMSD) to desegregate,[6] and further ordered the State of Missouri and KCMSD to split the cost of the desegregation remedy.[7] The school district, however, lacked the funds to meet its obligations under the desegregation order because of state law limitations on its tax authority.[8] Thus, to raise the necessary funds, the district court ordered a property tax increase within KCMSD.[9] The Court of Appeals for the Eighth Circuit affirmed, but directed the district court to use a less obtrusive method

1. Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744, 752, *reh'g denied*, 366 U.S. 947 (1961).
2. North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971).
3. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
4. *See, e.g.*, Griffin v. County School Bd., 377 U.S. 218 (1964); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, *reh'g denied*, 403 U.S. 912 (1971); Swann, 402 U.S. 43; Milliken v. Bradley, 433 U.S. 267 (1977).
5. 110 S. Ct. 1651 (1990).
6. Jenkins v. Missouri, 593 F. Supp. 1485 (W.D. Mo. 1984), 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd in part, rev'd in part*, 110 S. Ct. 1651 (1990).
7. *Jenkins*, 639 F. Supp. at 43-44. The remedy was a comprehensive plan mandating new programs, additional funding for some current programs, and capital improvements. *Id.*
8. Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987). The initial desegregation plan was approved by the district court on June 14, 1985. *Jenkins*, 639 F. Supp. at 19. It was not until two years later that the district court provided funding relief. *Jenkins*, 672 F. Supp. at 411.
9. *Jenkins*, 672 F. Supp. at 413.

of raising funds in the future.[10] Instead of directly imposing a tax increase, the district court was to authorize the school district to raise additional taxes, and to enjoin the enforcement of state-imposed limitations on the school district's tax authority.[11]

The United States Supreme Court unanimously reversed the district court's direct imposition of a property tax increase, holding it to be an abuse of discretion.[12] By a five to four majority, however, the Court held that the district court could order the school district to levy taxes at a rate beyond the limits of state law, and could enjoin the enforcement of state laws preventing the school district from doing so.[13]

Although the *Jenkins* majority viewed its decision as consistent with past precedent,[14] the dissent characterized the majority opinion as an unprecedented approval of taxation by the judiciary.[15] The purpose of this Note is to analyze the *Jenkins* case and determine whether it is, as the dissent says, "an expansion of power in the federal judiciary beyond all precedent."[16]

This Note begins with a discussion of past Supreme Court decisions addressing the scope of the federal courts' remedial powers in desegregation cases, and the role of federal courts in the area of judicial taxation. This Note then analyzes the *Jenkins* decision, and concludes that the premises underlying the majority opinion are unsound.[17] Finally, this Note offers a narrow interpretation of *Jenkins* and concludes that *Jenkins* need not be read as an endorsement of judicial taxation.

THE REMEDIAL POWER OF FEDERAL COURTS IN DESEGREGATION CASES

Brown v. Board of Education

In *Brown v. Board of Education* (*Brown I*),[18] the Supreme Court declared that segregation in public schools violates the equal protection clause of the fourteenth amendment.[19] In *Brown v. Board of Education* (*Brown II*),[20]

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10. *Jenkins v. Missouri*, 855 F.2d 1295, 1314 (8th Cir. 1988), *aff'd in part, rev'd in part*, 110 S. Ct. 1651 (1990).
11. *Id.*
12. *Id.* at 1655.
13. *Id.* at 1663-64.
14. *Id.* at 1665-66.
15. *Id.* at 1667 (Kennedy, J., dissenting).
16. *Id.*
17. At least one commentator has agreed with the majority's analysis. *See* Casenote, *When the Prohibition on Judicial Taxation Interferes with an Equitable Remedy in a School Desegregation Case, Missouri v. Jenkins, 110 S. Ct. 1651 (1990)*, 26 LAND & WATER L. REV. 373 (1991).
18. 347 U.S. 483 (1954).
19. *Id.* at 495. The plaintiffs in *Brown I* were black children who were denied admission to white schools under legally sanctioned segregated school systems in various states. *Id.* at 487-88. The Court held that this effected a denial of equal protection:

> We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated ... are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.

decided one year after *Brown I*, the Court considered the relief warranted by that violation.[21]

The Court directed the district courts in *Brown II* to take steps necessary to effect desegregation with "all deliberate speed."[22] Thus, the Court's decision in *Brown II* represented a compromise between the positions of those who desired a Court decree admitting Negro children immediately to white schools,[23] and those who originally opposed desegregation, but by that time had retreated to advocating gradual change[24] and local autonomy[25] in the desegregation process.[26]

The varied nature of segregated school districts demanded flexible relief and a knowledge of local conditions. Therefore, in *Brown II*, the Court remanded the cases before it to the district courts to fashion equitable decrees.[27] The district courts were instructed to look to equitable principles, and could consider a wide variety of problems and interests.[28] Although district courts could consider the interest of local governments in avoiding disruptions of their governmental functions, these considerations would ultimately have to yield to the demands of desegregation.[29]

As a consequence of *Brown II*, federal courts became involved in the affairs of local institutions to an unprecedented degree.[30] Local school boards were first required to formulate desegregation plans. The plans would then be

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Id. at 495. The Court then directed that the question of appropriate remedies be argued later that term. *Id.*

20. 349 U.S. 294 (1955).

21. *Id.*

22. *Id.* at 301. The Court stated: "[T]he cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." *Id.*

23. *See* Brief for Appellant, Brown v. Bd. of Educ., 99 L. Ed. 1083, 1089 (1955).

24. *See* Brief for Petitioners, *id.* at 1091.

25. *See* Brief for Appellees, *id.* at 1095.

26. *See generally* P. BLAUSTEIN & C. FERGUSON, JR., DESEGREGATION AND THE LAW 160-67 (1957); D. BERMAN, IT IS SO ORDERED 117-121 (1966).

27. 349 U.S. at 301.

28. The Court stated:

> [T]he courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulation which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, these courts will retain jurisdiction of these cases.

Id. at 300-01.

29. The Court stated: "Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should be without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them." *Id.* at 300.

30. *See* Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 DUKE L.J. 1265, 1280 (1983); Hanson, *Perspectives on Federal Court Efforts to Reform State Institutions*, 59 U. COLO. L. REV. 289, 289 (1988); G. McDOWELL, EQUITY AND THE CONSTITUTION 93-94 (1982).

submitted to the district court, which would determine their conformity with the guidelines set out in *Brown II*.[31]

Shortly after *Brown II* was decided, it was predicted that "a generation of litigation" would follow,[32] and this appears to have come true.[33] The unwillingness of many local and state governments to voluntarily eliminate segregation,[34] as well as outright resistance to desegregation,[35] required the federal courts to formulate specific desegregation plans and to direct local officials to implement those plans.[36] This would eventually force the Court to confront two issues. First, what remedial measures may a district court include in its desegregation plan? Second, assuming these remedial measures are appropriate, to what extent may a court remove legal or practical impediments to the implementation of those measures?[37]

Appropriate Remedial Measures

Although *Brown II* gave the district courts some guidelines to govern their equitable discretion, it did little to define the limits of that discretion. Clearly, laws establishing a segregated school system were unconstitutional and could be struck down.[38] However, until *Swann v. Charlotte-Mecklenburg Board of Education* (*Swann I*),[39] the Supreme Court remained silent about what specific remedial measures were permissible.

The district court, in *Swann I*, approved a desegregation plan ordering the assignment and transportation of students from primarily black schools to primarily white schools, and rearranging attendance zones to achieve a greater

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31. D. BERMAN, *supra* note 26, at 121-22.

32. P. BLAUSTEIN & D. FERGUSON, JR., *supra* note 26 at 173, (quoting the Brief of Harry McMullan, Attorney General of North Carolina, cases 1, 2, 3 and 4, Supreme Court of the United States, Oct. Term, 1954, p. 19).

33. It has been estimated that between 1970 and 1975 forty to fifty such cases reached the trial stage in federal and state courts. Kalodner, *Introduction*, LIMITS OF JUSTICE (H. Kalodner & J. Fishman eds. 1978). As *Jenkins* illustrates, litigation to desegregate schools continues today, over thirty years after *Brown I*. *Jenkins*, 110 S. Ct. 1651.

34. *See, e.g., Griffin*, 377 U.S. at 221, where, to avoid desegregating its schools, the Supervisors of Prince Edward County, Virginia simultaneously closed the public schools and subsidized private segregated schools.

35. The most famous instance of resistance was Governor Orville Faubus's effort in Little Rock, Arkansas to use the Arkansas National Guard to prevent the entry of nine black children into Central High School. *See* Olney, *A Government Lawyer Looks at Little Rock*, 45 CALIF. L. REV. 516 (1957). Resistance to desegregation was also present in some federal district courts. *See, e.g.*, Stell v. Savannah-Chatham County Bd. of Educ., 220 F. Supp. 667, 678 (S.D. Ga. 1963), *rev'd*, 333 F.2d 55 (5th Cir. 1964), where the district court interpreted the *Brown* Court's decision as dependent on a finding of fact that segregation negatively affected the students in that case; thus, *Brown I* was not binding precedent. *Id.* at 677-78. The district court then considered scientific testimony that black students were intellectually inferior to white students (*id.* at 668-76), and found "on the unassailable facts, that education is best given in separate schools adapted to [black and white students'] varying abilities." *Id.* at 682.

36. *See, e.g., Jenkins*, 639 F. Supp. at 56.

37. In addition to these two issues, the Court has been confronted with a third issue: What measures may a court take to compel local officials to carry out its orders? *See, e.g.*, Spallone v. United States, 493 U.S. 265 (1990). This topic is, however, beyond the scope of the present Note.

38. *Brown II*, 349 U.S. at 298.

39. 402 U.S. 1 (1971).

racial balance throughout the Charlotte-Mecklenburg school system.[39] The Fourth Circuit Court of Appeals affirmed the plan with respect to secondary schools, but reversed with respect to elementary schools on the ground that the plan unreasonably burdened elementary school pupils.[41]

The Supreme Court reinstated the district court's entire order,[42] and discussed the scope of the district court's remedial powers.[43] Concluding that the limits of federal court power could not be defined by the establishment of fixed guidelines,[44] the Court reaffirmed the broad, flexible power of district courts to formulate equitable remedies.[45]

The Court then established two limits on the use of district courts' equitable powers. First, judges may exercise their equitable powers only when local officials have defaulted in their affirmative obligation to eliminate segregation.[46] With respect to this criterion, the Court held that the record supported the finding that the school board defaulted in its affirmative duty to desegregate.[47] Second, the scope of the desegregation remedy must be limited by the nature of the constitutional violation.[48] In *Swann I*, the constitutional violation was the operation of a segregated school system. Therefore, the remedy could only go as far as was necessary to eliminate the effects of past discrimination in public schools; the remedy could not seek to eliminate other causes or forms of discrimination.[49] The district court's order, the Court held, was so limited.[50]

The Court affirmed and elaborated upon these principles in *Milliken v. Bradley*.[51] However, whereas *Swann I* approved a remedy designed to integrate schools by assigning students to schools on the basis of race, the remedy in *Milliken* went a step further. The district court, in *Milliken*, ordered the implementation of a number of remedial education programs as part of its

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40. *Id.* at 10.

41. *Id.* The court of appeals concluded that the plan for junior and senior high school students "provide[d] a reasonable way of eliminating all segregation in these schools." *Id.* at 145 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 431 F.2d 138 (4th Cir. 1970), *on remand*, 318 F. Supp. 786 (W.D.N.C. 1970)). The elementary school plan, however, required too much additional busing. The school board, the court stated, "should not be required to undertake such extensive additional busing to discharge its obligation to create a unitary school system." *Id.* at 147.

42. *Swann I*, 402 U.S. at 32.

43. *Id.* at 28.

44. The Court stated: "No fixed or even substantially fixed guidelines can be established as to how far a court can go, but it must be recognized that there are limits." *Id.*

45. *Id.* at 15.

46. The Court stated that "judicial powers may be exercised only on the basis of a constitutional violation. . . . Judicial authority enters only when local authority defaults." *Id.* at 16.

47. *Id.* at 24-25.

48. The Court stated that, "[a]s with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16.

49. The Court stated: "The elimination of racial discrimination in public schools is a large task and one that should not be retarded by efforts to achieve broader purposes lying beyond the jurisdiction of school authorities." *Id.* at 22.

50. *Id.* at 31.

51. 433 U.S. 267 (1977).

desegregation order.[51] The Sixth Circuit Court of Appeals affirmed, finding that the programs were necessary to achieve the goal of integration.[52] The state then appealed to the Supreme Court, which affirmed the decision.[53]

The Supreme Court noted that federal courts must focus on three factors in fashioning an appropriate remedy: (1) the remedy must be related to the condition that offends the Constitution;[54] (2) the decree must be designed to restore the victims to the position in which they would have been absent discriminatory conduct;[55] and (3) the court must "take into account the interests of state and local authorities in managing their own affairs. . ."[56] In light of these factors, the Court held that ordering remedial education programs was within the scope of the district court's authority.[57]

Both *Swann I* and *Milliken* suggest that there are limits to the remedial measures a federal court may order,[58] although neither case prohibits a court from taking any particular type of remedial action if such action is necessary to eliminate the effects of past segregation. Moreover, the remedial measures approved of in *Swann I* and *Milliken* were potentially very expensive. Those cases, therefore, paved the way for district courts to order desegregation remedies the cost of which were beyond the means of local school districts.

Federal Court Power to Remove Impediments to the Implementation of Desegregation Decrees

Only three years after *Brown II*, the United States Supreme Court confronted the question of how to handle obstructions to desegregation. In *Cooper v. Aaron*,[59] the Arkansas School Board petitioned the district court to postpone the implementation of its desegregation plan for two and one-half years due to public hostility to the plan.[60] The district court granted the postponement, but the Eighth Circuit Court of Appeals reversed. The court held that local resistance to desegregation could not constitute a legal basis for suspending the desegregation plan.[61] In a *per curiam* opinion, the Supreme Court affirmed the court of appeals' decision.[62] Seventeen days later, the Court published a full

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52. *Id.* at 272-77. *See also* Bradley v. Milliken, 402 F. Supp. 1096, 1138-44 (E.D. Mich. 1975). The term "remedial education program" refers to programs designed to remedy segregation by improving the quality of education, as distinct from programs designed merely to affect the assignment of students. *Id.* at 281-83. *Cf. Swann I*, 402 U.S. 1 (concerning only the assignment of students).

53. *Milliken*, 433 U.S. at 278-79 (citing Bradley v. Milliken, 540 F.2d 229, 241 (6th Cir. (1976)).

54. *Id.* at 279.

55. *Id.* at 280. This followed from the requirement in *Swann I* that the scope of the remedy be determined by the nature of the constitutional violation. *Id. See Swann I*, 402 U.S. at 16.

56. 433 U.S. at 280.

57. *Id.* at 280-81.

58. *Id.* at 288.

59. *Swann I*, 402 U.S. at 16, *Milliken*, 433 U.S. at 280-81.

60. 358 U.S. 1 (1958). For a contemporaneous account of the events leading up to *Cooper*, see Olney, *supra* note 35.

61. *Cooper*, 358 U.S. at 12-13.

62. Aaron v. Cooper, 257 F.2d 33, 40 (8th Cir.), *aff'd*, 358 U.S. 1 (1958).

63. The *per curiam* opinion is set out in the margin of the Court's full opinion. *Cooper*, 358 U.S. at 5. It is also reported at 78 S. Ct. 1399 (1958).

opinion explaining its decision.[64] In strong language, the Court emphasized that desegregation was essential to the protection of the freedoms guaranteed by the Constitution and, therefore, could not be prevented or delayed by public hostility.[65]

In *Griffin v. County School Board*,[66] the Supreme Court addressed the extent to which federal courts may interfere in state finances if necessary to effect desegregation. In the late 1950's, both the Virginia legislature and the Supervisors of Prince Edward County resisted the desegregation of Prince Edward County schools. The Virginia legislature repealed mandatory attendance laws, and the Supervisors of Prince Edward County refused to levy school taxes for the 1959-60 school year.[67] As a result, the public schools in Prince Edward County were closed, although the schools in every other county in Virginia remained open.[68] At the same time, the legislature established a program making children eligible for tuition grants to attend private schools,[69] and the county passed an ordinance allowing property tax credits for contributions to a private foundation formed to operate white-only private schools.[70]

The district court found that these measures were designed to perpetuate segregation, and therefore enjoined both the payment of tuition grants and the giving of tax credits for contributions to the foundation.[71] The district court also held that allowing the Prince Edward County schools to be closed while other schools in Virginia remained open was unconstitutional.[72] The Fourth Circuit Court of Appeals reversed, holding that the district court should have awaited state court determination of the validity of the tuition grants, the tax credits, and the closing of the schools.[73]

The Supreme Court, however, affirmed the district court.[74] The Court concluded that closing the public schools in Prince Edward County, while sup-

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64 *Cooper*, 358 U.S. at 1.

65 The Court stated: "The principles announced in [*Brown*] and the obedience of the States to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth." *Id.* at 19-20.

66 377 U.S. 218 (1964).

67 *Id.* at 222.

68 *Id.* at 223. The Court does not state why Prince Edward County was the only county whose schools were closed. Presumably, only Prince Edward County was involved in a desegregation lawsuit.

69 *Id.*

70 *Id.* at 223-24. The Negroes in the county rejected an offer to set up a similar foundation for the purpose of supporting all black schools. *Id.* at 223.

71 *Id.* at 224.

72 *Id.* at 224-25. The district court stated: "This Court holds that the public schools of Prince Edward County may not be closed to avoid the effects of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers." Allen v. County School Bd., 207 F. Supp. 349, 355 (E.D. Va. 1962). Initially, however, the district court refrained from ordering the county to reopen the schools. *Griffin*, 377 U.S. at 231.

73 *Griffin*, 377 U.S. at 231 (citing Griffin v. Board of Supervisors, 322 F.2d 332 (4th Cir. 1963)).

74 *Id.* at 232.

porting segregated private schools, violated the equal protection clause.[73] The Court then considered the appropriate remedy for this violation.[74] It first upheld the district court's injunction against both the payment of tuition grants and the giving of tax credits for contributions to the foundation.[75] The Court then stated that the district court could order the county supervisors to exercise existing tax authority if necessary to raise sufficient funds to open and maintain a desegregated school system in Prince Edward County.[76]

In *North Carolina State Board of Education v. Swann* (*Swann II*),[77] the Court again addressed the issue of state law impediments to desegregation. During the course of the litigation leading up to the *Swann* cases, the North Carolina legislature enacted a statute prohibiting the assignment of students on a racial basis.[78] This statute operated to obstruct the district court's remedy, because the proposed remedy included the assignment of students to schools based on race.[79] The Court struck down the statute on the ground that state laws cannot prevent desegregation.[80] Because the law prohibited the assignment of students on a racial basis, it prevented school authorities from taking essential steps to effect desegregation.[81]

Cooper, *Griffin*, and *Swann II* make clear that desegregation is a constitutional imperative of the highest order, and stand for the proposition that state law must yield to desegregation. These cases, along with *Mullaney* and *Swann I*, could be interpreted to mean that a federal court has the power to do whatever is necessary to effect desegregation. Whether this includes the power of

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73 The Court found that the plan was created to accomplish "the perpetuation of racial segregation by closing public schools and operating only segregated schools supported privately by state or county funds." *Id.* Thus, the Court stated, "closing the Prince Edward Schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws." *Id.*

74 *Id.*

75 *Id.* at 232-33.

76 The Court stated:

> [T]he District Court may, if the county is to provide future racial discrimination, require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia. . . . An order of this kind is within the court's power if required to assure these petitioners that their constitutional rights will no longer be denied them.

Id. at 233-234. This language is ambiguous, however, in two respects. First, while *Griffin* clearly authorized the district court to compel the county to exercise current tax authority under state law, it is not clear whether *Griffin* allows a district court to compel the exercise of tax authority beyond the current limits of state law. The Court states that the district court could order the supervisors' exercise of "the power that is theirs" (*id.* at 233), which could be interpreted as limiting the district court's order to the exercise of existing tax authority under state law. Alternatively, it could be interpreted as stating more than an acknowledgment that, as a municipal corporation, the county is an entity with tax authority. Second, it is unclear how "necessary" a tax increase must be before a district court may order it.

77 402 U.S. 43 (1971). This was a companion case to *Swann I*, 402 U.S. 1 (1971).

78 *Swann II*, 402 U.S. at 44.

79 *Id.* at 45-46.

80 The Court stated: "[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or eliminate the operation of a unitary school system or impede the disestablishment of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Id.* at 43.

81 *Id.* at 46.

taxation is a question raised — though not definitively answered — by *Jenkins*.[88]

TAXATION BY THE JUDICIARY

Alexander Hamilton wrote that "[t]he judiciary . . . has no influence over either the sword or the purse . . ."[89] The Constitution assigns to Congress the power of taxation,[90] and although the language of the Constitution does not explicitly deny the judiciary the power to tax,[91] the U.S. Supreme Court has clearly held that taxation is not a judicial function.[92]

In *Heine v. Levee Commissioners*, the Court was asked to order a local government to raise taxes sufficient to meet a debt obligation.[93] The Court refused to grant the order because it would amount to taxation, a power that the Court did not possess.[94]

In *Motes Lake Homes, Inc. v. Grand County*, the Court explicitly held that federal courts may not impose taxes.[95] The district court disallowed a state tax claim against leaseholds on federal property on the ground that the state tax illegally discriminated against the federal government.[96] The basis for the discrimination claim was that those leaseholds were taxed at a rate higher than other similar leaseholds.[97] The Tenth Circuit Court of Appeals assumed the district court's finding that the tax was discriminatory.[98] It held, however, that "[a]n appropriate remedy was to require the assessor of taxes to a non-discriminatory level, rather than to invalidate the entire tax."[99] That, it

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88 *Jenkins*, 110 S. Ct. 1651. The dissent interpreted the Court's opinion as having found that collection and allocation is the alternative. *Id.* at 1673 (Kennedy, J., dissenting). The majority, however, does not claim to have held that. *Id.* at 1666.

89 THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

90 U.S. CONST. art. I, § 8.

91 Article III of the United States Constitution, which defines the power of the judiciary, makes no mention of taxation. Rather, it simply declares that "[t]he judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S. CONST. art. III, § 2 (emphasis added). The relevant inquiry is, therefore, whether taxation is part of "the judicial power."

92 *See generally Heine v. Levee Commissioners*, 86 U.S. (19 Wall.) 655, 661 (1874) (the power of taxation "is an invasion by the judiciary . . . of the legislative functions of government"); *Motes Lake Homes*, 365 U.S. at 719 ("[f]ederal courts may not assess or levy taxes"); Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 818 (1989) (imposing a tax is "a remedy beyond the power of a federal court"). *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 41, *reh'g denied*, 411 U.S. 959 (1973) ("we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and expenditure of public revenues.").

93 86 U.S. (19 Wall.) 655 (1874).

94 The Court stated that the power of taxation "is not vested, as in the exercise of an original jurisdiction, in any federal court. . . . It is not only not one of the ordinary powers of the court to levy and collect taxes, but it is an invasion by the judiciary of the federal government of the legislative functions of the State governments." *Id.* at 661.

95 365 U.S. 708 (1961).

96 *Motes Lake Homes*, 276 F.2d 838, 846 (9th Cir. 1960).

97 Section 511 of the Housing Act of 1956 allowed such leaseholds to be taxed by state and local governments, but only at a rate equal to other similar property. *Id.*

98 *Id.* at 847.

99 *Id.*

remanded the case to the district court to determine the proper level of taxation.[96]

The United States Supreme Court agreed that the tax was discriminatory, but reversed the court of appeals' decision ordering the district court to reduce the amount of taxes collectable.[97] The Court concluded that the court of appeals, in effect, directed the district court to decree a valid tax in place of the invalid one.[98] This, the Court held, was something the district court had no power to do.[99] Rather, the appropriate remedy for an illegal tax is to invalidate the entire tax.[100]

In *Davis v. Michigan Department of Treasury*,[101] the Supreme Court refused to extend a state tax exemption for state and local employees to federal employees as a remedy to a discriminatory tax scheme. Relying on *Moses Lake Homes*, the Court concluded that extending the tax exemption would directly impose a state tax, and therefore would be "a remedy beyond the power of a federal court."[102]

None of these cases involved judicial taxation in the context of desegregation. On that basis, therefore, they are arguably distinguishable from *Jenkins*. However, *Heine*, *Moses Lake Homes*, and *Davis* all stand for the proposition that federal courts may not impose taxes. Thus, if *Jenkins* does indeed endorse judicial taxation, then it is inconsistent with these precedents. The remainder of this Note discusses whether *Jenkins* should be interpreted as endorsing judicial taxation.

MISSOURI V. JENKINS

The United States Supreme Court heard *Missouri v. Jenkins* after more than a decade of litigation.[103] In 1984, the District Court for the Western District of Missouri held that both the State of Missouri and the Kansas City, Missouri, School District (KCMSD) operated a segregated school system.[104] In June 1985, the district court adopted a detailed desegregation plan to remedy this situation. The estimated cost of the plan was $87,732,544 over three years, and the state and KCMSD were required to pay $67,592,072 and $20,140,472, respectively.[105] The court's stated goal was the "elimination of all vestiges" of

96. *Id.* at 855.
97. *Moses Lake Homes*, 365 U.S. at 752.
98. *Id.*
99. The Court stated that "[f]ederal courts may not assess or levy taxes." *Id.*
100. *Id.*
101. 489 U.S. 803, 818 (1989).
102. *Id.*
103. The complaint was first filed in 1977. *Jenkins*, 110 S. Ct. at 1655. The Supreme Court decided *Jenkins* on April 18, 1990. *Id.* at 1651.
104. *Jenkins*, 593 F. Supp. 1485. The school district had originally filed suit as a plaintiff, but was realigned as a party defendant. School Dist. of Kansas City v. State of Missouri, 460 F. Supp. 421, 442 (W.D. Mo. 1978).
105. *Jenkins*, 639 F. Supp. at 43-44. Requiring that a state bear the cost of a desegregation order was held not to violate the eleventh amendment in *Milliken*, 433 U.S. 267. For a discussion of the benefits of holding states and local governing bodies jointly and severally liable for the cost of desegregation orders, see Note, *Judicial Taxation in Desegregation Cases*, 89 COLUM. L. REV. 332, 343-45 (1989).

segregation in the Kansas City, Missouri, School District.[106] To that end, the court's plan was directed primarily at improving the quality of education throughout the school district.[107] Thus, the court ordered a series of programmatic improvements,[108] as well as $37 million worth of capital improvements for the first year.[109] In June, 1986, the court approved the expenditure of $12,972,727 for a magnet school program and an additional $12,877,330 for further capital improvements.[110]

In 1987, the court approved a $187,450,334 long-range capital improvement plan that involved the expansion and renovation of existing facilities and the construction of new facilities.[111] A significant portion of these improvements were attributed to the magnet school program.[112] By that time, however, it became apparent to the court that KCMSD lacked the resources to finance its obligations under the desegregation order.[113] Specifically, the court projected that, between 1986 and 1992, the school district would operate at a total deficit of $282,401,915.[114] The court determined that it would be necessary to provide some sort of funding relief if KCMSD was to continue financing its share of the desegregation order.[115]

At that time, KCMSD levied taxes on property within the school district at a rate of $2.05 per $100 of assessed valuation,[116] a level the district court found insufficient to meet KCMSD's obligations under the desegregation plan.[117] According to Missouri law, however, this rate of taxation could not be increased without voter approval. The Missouri Constitution required approval of any new property tax levy in KCMSD above $1.25 per $100 of assessed valuation by a majority of the voters, and approval of any levy above $3.75 per $100 by two-thirds of the voters.[118] The district court concluded that it would be fruitless to order KCMSD to submit a tax increase for voter approval, since no such increase had been approved since 1969.[119] The court itself, therefore, ordered a property tax increase of $1.95 per $100 of assessed valuation.

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106. *Jenkins*, 639 F. Supp. at 23.
107. *Id.* at 24-26.
108. The court specifically approved the allocation of funds to improve libraries, to hire additional teachers to reduce teaching loads and decrease class sizes, to hire additional counselors, and to implement a summer school program, full day kindergartens, early childhood development programs, and after-school tutoring programs. *Id.* at 26-33.
109. *Id.* at 41.
110. *Id.* at 53-55. The 1985 and 1986 orders are published together at 639 F. Supp. at 19.
111. *Jenkins*, 672 F. Supp. at 408.
112. *Id.* This was in addition to a previously approved $53 million in capital improvements related to the magnet school program. *Id.* at 406.
113. *Id.* at 410-411.
114. *Id.* at 411, 415. This included the following yearly deficits: $62,509,653 for 1986-88; $53,684,429 for 1988-89; $59,840,203 for 1989-90; $42,543,837 for 1990-91; and $33,823,793 for 1991-92. *Id.* at 415.
115. *Id.* at 411.
116. *Id.* at 413.
117. *Id.*
118. MO CONST. art. X, §§ 11(b), 11(c).
119. *Jenkins*, 672 F. Supp. at 411.

bringing the rate of property taxation in the school district to $4.00 per $100.[120]

The district court's taxation orders, as well as the scope of the desegregation order, were appealed.[121] The Eighth Circuit Court of Appeals affirmed the remedy itself, concluding that it was within the scope of the district court's authority.[122] With respect to the property tax increase, the Eighth Circuit affirmed the district court's direct imposition of a tax increase, but then considered the means of raising funds in the future.[123] A preferable method of raising funds, the court concluded, would be to authorize the school district to levy additional taxes and to enjoin the enforcement of state laws prohibiting it from doing so.[124] Thus, the court of appeals affirmed the district court's direct imposition of a property tax increase, but remanded for "modifications" as provided in the opinion.[125]

THE SUPREME COURT DECISION IN *JENKINS*

The Supreme Court granted certiorari to consider the propriety of the property tax imposed by the district court and the modifications made by the court of appeals.[126] The Court held unanimously that the district court's order imposing a tax increase was an abuse of discretion, concluding that the order contravened principles of federal/state comity.[127] By a five to four majority, however, the Court affirmed the modifications of the court of appeals. Although the district court could *not* decree a tax increase, the Court held, it *could* authorize KCMSD to levy additional property taxes, and *could* enjoin the enforcement of state laws preventing this.[128] This, the Court concluded, was consistent with *Griffin*.[129] Justice Kennedy, joined by three other justices, dissented from the Court's endorsement of the modifications made by the court

120. *Id.* at 413. The district court also ordered a surtax to Missouri's income tax of 1.5% on income deriving from activities within the school district. *Id.* at 412-13. This, however, was reversed by the court of appeals. *Jenkins*, 855 F.2d 1295, 1315 (8th Cir. 1988).

121. *Jenkins*, 855 F.2d 1295.

122. *Id.* at 1318. "The remedy itself" refers to those programs the court deemed necessary to eliminate segregation, as distinct from the property tax levy, which the court found necessary to finance the remedy.

123. *Id.* at 1314.

124. *Id.*

125. *Id.* at 1318. The Supreme Court refers to the method of raising funds, whereby the district court would order the school district to raise taxes and would enjoin the enforcement of state laws preventing the school district from doing so, as "the *modifications* to the District Court's order made by the Court of Appeals" (110 S. Ct. at 1663-64 (emphasis added)) since the court of appeals preferred this method. This Note will use the term "the court of appeals' modifications" when discussing this method.

126. *Jenkins*, 110 S. Ct. at 1655. The Court did not review the scope of the desegregation remedy. The dissent, however, pointed out the immensity of the order. *Id.* at 1668, 1677 (Kennedy, J., dissenting). It included, for example, the building of a technical magnet school featuring programs in areas such as cosmetology and robotics; a 25 acre farm and a 25 acre wildland area; a 2000 square-foot planetarium; a Model United Nations wired for language translation; an art gallery; radio and television studios; movie and editing rooms; and a 3500 square-foot, dust-free diesel mechanics room. *Id.* at 1668, 1676-77.

127. *Id.* at 1663.

128. *Id.* at 1663-64.

129. *Id.* at 1665.

of appeals.[130] Ordering KCMSD to raise taxes beyond the limits of state law, the dissent concluded, amounted to judicial taxation, and was therefore beyond the power of a federal court.[131]

The Majority Opinion

The majority avoided deciding whether the district court's direct imposition of a tax increase was beyond its power,[132] instead holding that the decree was an abuse of the court's equitable discretion.[133] This was because the district court had an alternative that more properly respected the integrity of local governments, namely the alternative suggested by the court of appeals.[134] In the majority's view, the court of appeals' "modifications" — directing the school district to raise additional taxes and restraining the enforcement of state laws preventing the school district from doing so — placed greater responsibility for effecting desegregation on KCMSD than would an order directly imposing a tax increase.[135] The Court concluded that the district court's order violated principles of federal/state comity by failing to implement an alternative less intrusive on local authority.[136]

Turning to the court of appeals' "modifications," the Court rejected Missouri's argument that the modifications authorized the district court to do something beyond its power.[137] *Griffin*, the Court noted, specifically held that a federal court has the power to order a local government to exercise tax authority it already possesses.[138] The Court then considered whether the district court could enjoin the enforcement of state law limitations on the school district's tax authority.

In *Von Hoffman v. City of Quincy*, the State of Illinois authorized the City of Quincy to levy a special tax to service bonds that were issued.[139] The legislature, however, placed a limitation on the city's tax power after the bonds were issued. The city was left with insufficient funds to meet its bond obligations.[140] Von Hoffman, a holder of some of the bonds, applied for a writ of mandamus ordering the city to levy the taxes necessary to repay the bonds.[141]

The United States Supreme Court held that the enactment of the state law limiting the city's tax power violated the contract clause of the United States

130. *Id.* at 1667 (Kennedy, J., dissenting). The dissent also argued that such "modifications" were dicta. *Id.* The dissent concluded that since no order of the district court was under consideration by the court of appeals, the Supreme Court's decision affirming those modifications was also dictum. *Id.* at 1669.

131. *Id.* at 1671.

132. *Id.* at 1662-63.

133. *Id.*

134. *Id.* at 1663.

135. *Id.*

136. *Id.*

137. *Id.* at 1665.

138. *Id.* It is unclear whether *Griffin* intended to limit such an order to the exercise of existing tax authority under state law. *See* discussion *supra* note 78. The Court, however, appears to have concluded that the school district possessed tax authority that it could exercise, once the limitations on that authority were removed. *See infra* note 199 and accompanying text.

139. 71 U.S. (4 Wall.) 535, 535-36 (1867).

140. *Id.* at 536-37.

141. *Id.* at 536.

Constitution.[142] The Court found that the state law disabled the city from meeting its contractual obligation to repay the bonds.[143] Thus, the city could be ordered to levy taxes sufficient to repay the bonds.[144]

The *Jenkins* majority interpreted *Von Hoffman* as allowing a court to strike down state laws limiting a local government's power to tax "where there is *reason based in the Constitution* for not observing the statutory limitation."[145] Since the Missouri limitations on KCMSD's tax authority inhibited the implementation of the district court's desegregation order, those laws prevented the school district from discharging a duty imposed on it by the Constitution.[146] Furthermore, the court noted that *Swann II* specifically held that state laws may not impede the implementation of a desegregation order.[147] Consequently, the enforcement of those laws could be enjoined.[148]

The Dissent

The dissent concurred in Part II of the Court's opinion, which held the district court's imposition of a tax increase to be an abuse of discretion.[149] It disagreed with the majority, however, on the validity of the court of appeals' "modifications." Although the majority found the distinction between the district court's direct imposition of a tax increase and the court of appeals' "modifications" to be dispositive, the dissent dismissed this distinction as mere formalism.[150] According to the dissent, both the district court's order and the court of appeals' "modifications" amounted to judicial taxation and were beyond the power of a federal court.[151]

The disagreement between the majority and dissent over the court of appeals' modifications reflects a disagreement about the nature of the school district's tax power. According to the majority, the school district possesses inherent tax authority which, in turn, is limited by the Missouri Constitution.[152] To the dissenters, however, this interpretation "put[] the conclusion before the premise."[153] Justice Kennedy, writing for the dissent, argued that the school district has no inherent tax authority.[154] Rather, it possesses tax authority only

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142. U.S. CONST. art. I, § 10.

143. The Court stated: "[W]here a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied." 71 U.S. (4 Wall.) at 554-55.

144. *Id.*

145. *Jenkins*, 110 S. Ct. at 1666 (emphasis added).

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.* at 1667 (Kennedy, J., dissenting).

150. Justice Kennedy stated: "Any purported distinction between direct imposition of a tax by the federal court and an order commanding the school district to impose a tax is but a convenient formalism where the court's action is predicated on elimination of state law limitations on the school district's taxing authority." *Id.* at 1669-70.

151. *Id.* at 1670-71.

152. The majority opinion never expressly addresses this issue. It does, however, indicate that the school district possessed tax authority it could exercise once the limitations on it were removed. *Id.* at 1666.

153. *Id.* at 1670 (Kennedy, J., dissenting).

154. *Id.*

because state law grants it.[155] Therefore, a state statute limiting that tax authority is not a limit on the school district's inherent power to tax, but a limited grant of tax power.[156] Thus, if the district court enables the school district to raise taxes beyond the limits of state law, the court is granting *additional* tax authority to the school district. Because this additional tax authority is not derived from the state, it must be derived from the courts. Therefore, the dissent concluded that this act constituted an act of judicial taxation.[157] Consequently, because taxation is not a function of the judiciary,[158] both the district court's order and the court of appeals' "modifications" were beyond the scope of the federal court's power.[159]

A CRITICAL ANALYSIS OF *JENKINS*

The majority's decision that the court of appeals' "modifications" were within the power of a federal court rests on two premises. First, if state law limitations on the school district's tax authority were removed, the school district would possess tax authority that the district court could order it to exercise.[160] Second, the limitations on KCMSD's tax authority actually prevented the implementation of the district court's desegregation remedy and, therefore, could be struck down.[161] This section will assess the validity of each of these propositions.

The Source and Nature of the School District's Tax Authority

The significance of how KCMSD's tax authority is characterized

The *Jenkins* majority states that KCMSD, a government entity with tax authority, may be ordered to levy taxes in excess of limitations placed upon it by the state, if the laws are enjoined by a district court. Thus, once state law limitations were removed, the school district would possess tax authority that it could be ordered to exercise.

By contrast, the dissent argued that the school district does not possess plenary tax authority which would be unlimited if not for state law limitations.[162] Instead, the state granted limited tax authority to the school district.[163] Thus, any judicial action that enables the school district to levy taxes at a rate above the limits of state law is a grant of additional tax authority by the court. Whether one interprets *Jenkins* as an endorsement of judicial taxation depends, therefore, on how one conceptualizes the nature of KCMSD's tax authority.

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155. *Id.*
156. *Id.*
157. *Id.* at 1670.
158. *Id.* at 1670-71. To support this proposition, the dissent cites *Dowd*, 489 U.S. 803, and *Motes Lake Homes*, 365 U.S. 744. *See supra* text accompanying notes 91-102.
159. *Jenkins*, 110 S. Ct. at 1670-71.
160. *Id.* at 1665-66.
161. *Id.* at 1666.
162. *Id.* at 1669-70 (Kennedy, J., dissenting).
163. *Id.*

A school district may levy taxes on Missouri citizens only because it is granted that power by the State of Missouri.[164] As the sovereign,[165] the State of Missouri is the sole source of tax authority within the state.[166] Although a sovereign state has plenary tax power, political subdivisions do not. They only exercise tax power because they have been granted that power by the state.[167] Thus, the dissenters are correct: the school district does not possess inherent tax authority, only tax authority delegated to it by the state.

However, even if the dissent is correct that KCMSD's tax authority is not *inherent*, that authority might nonetheless be *plenary*. The State of Missouri might have primarily granted the school district whatever tax authority is necessary to fulfill its duties, and only secondarily placed dollar limitations on the property tax rate. If this is the case, then an injunction against the enforcement of those limitations leaves the school district with the tax authority it needs to fulfill its mission. This tax authority would ultimately be derived from the state, not the court.

Whether enjoining the dollar limitations on KCMSD's tax authority constitutes judicial taxation, therefore, depends on Missouri law. The relevant inquiry is whether the State of Missouri intended to grant KCMSD limited tax authority, or intended the grant of tax authority to be independent of the limitations placed upon it. This issue may be analyzed using the Supreme Court's "doctrine of severability."

The doctrine of severability

According to the "doctrine of severability," a court passing on the validity of a statute should not invalidate the entire statute if the objectionable portion is severable from the rest of the statute.[168] If the objectionable portion is severable, only that portion will be invalidated.[169] Whether part of a statute is severable is a matter of legislative intent: if it is shown that, absent the invalid provision, the statute will function in a manner inconsistent with the intent of

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164. *See* Hunter v. Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state.... The number, nature, and duration of the powers conferred upon these corporations ... rests in the absolute discretion of the state.").

165. "[A]n institution may be said to be sovereign if he or it exercises authority ... over every other person or institution in the legal system, there being no authority competent to override him or it." 7 ENCYCLOPEDIA OF PHILOSOPHY 501 (P. Edwards ed. 1967).

166. Except, of course, the United States. However, the *Jenkins* majority does not assert that the district court may exercise federal tax authority.

167. The Supreme Court has recognized, in other contexts, that the power to tax is an attribute of sovereignty. Dobbins v. Commissioners of Erie County, 41 U.S. 435, 447 (1842), *overruled on other grounds*, Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939) ("Taxation is a sacred right, essential to the existence of government, an incident of sovereignty."). The Court has also stated that local governments are not sovereign. Reynolds v. Sims, 377 U.S. 533, 575 (1964) ("Political subdivisions of States ... never were and never have been considered as sovereign entities.").

168. Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987). Although *Brock* involved a federal statute, the doctrine applies to state statutes as well. *See, e.g.*, Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 506 (1985).

169. *Brock*, 480 U.S. at 684.

the legislature, then the statute is not severable and the entire statute must be invalidated.[170]

Although this doctrine typically applies to the invalidation of part of a statute, its rationale applies to *Jenkins* as well. The doctrine of severability prohibits a court from striking down part of a statute if this action would leave in effect a statute that the legislature would never have enacted. If the Missouri legislature would not have granted the school district unlimited tax authority, then the *Jenkins* district court, by restraining the enforcement of limitations on the school district's tax authority, is leaving in operation a law the legislature would never have enacted. It is giving KCMSD tax authority the state did not give it. Therefore, it must be asked whether, as a matter of Missouri law, the grant of tax authority to KCMSD is severable from the limitations placed on it.

Missouri law

A thorough review of the legislative history behind Missouri's delegation of tax authority to local governments is beyond the scope of this Note.[171] A brief review of Missouri law, however, militates against severability.

Article X, section 1 of the Missouri constitution operates as a general grant to the state legislature of both the power to tax and the power to delegate tax authority.[172] Missouri case law, however, indicates that the legislature possesses inherent tax power independent of the constitution,[173] although the amount of tax power that may be delegated by the legislature is limited by article X, section 11 of the Missouri constitution.[174] Missouri statutory law, which grants school districts and other municipalities the power to tax, specifically states that the grant is subject to constitutional limitations.[175]

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170. *Id.* at 684-85. The *Brock* Court quotes language from Buckley v. Valeo, 424 U.S. 1, 108 (1976), suggesting that legislation is presumed severable. Language in other cases suggests that there is a presumption of severability if what remains after severance is operative as law. *See, e.g.*, I.N.S. v. Chadha, 462 U.S. 919, 934 (1983).

171. Such a review is likely to be fruitless anyway, since it is unlikely that the framers of the Missouri constitution ever considered the choice between granting to municipalities an unlimited tax power and granting no tax power at all.

172. "The taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes." MO. CONST. art. X, § 1.

173. *See* Kansas City v. Frogge, 352 Mo. 233, 240, 176 S.W.2d 498, 501 (1943).

174. Article X, section 11(b) states: "Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates...." Article X, section 11(c) provides exceptions to this limitation by popular vote. MO. CONST. art. X, §§ 11(b), 11(c). *See supra* text accompanying note 118.

175. MO. ANN. STAT. § 137.035 (Vernon 1988) states: "The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the constitution and laws of this state, viz: ... the taxes for current expenditures for ... school districts...." *See also* MO. ANN. STAT. § 137.073 (Vernon 1988), which states:

> It is the intent of the general assembly ... that a political subdivision, including a school district, may increase its tax rate ceiling by a vote of its governing body ... provided such increase in tax rates does not exceed a rate limit specified in statute or the constitution or levels previously approved by voters.

Missouri case law confirms that local governments in Missouri may only impose taxes in the manner and to the extent prescribed by the state.[176]

The Missouri constitution of 1875 is the source of both the general tax power provision in article X, section 1, and the limits on the levels of municipal tax power in article X, section 11.[177] Thus, at least as far back as 1875, the Missouri legislature's ability to delegate tax authority has been tempered by limitations on the amount of tax authority delegable. Although it is uncertain whether the Missouri legislature would have granted KCMSD the power to tax if that power were unlimited, the coexistence of the grant of tax authority to municipalities and limitations on that authority supports the argument against severability.

This brief survey of Missouri law tentatively indicates that the grant of tax power to the school district is not severable from the limitations placed upon it. Consequently, the limitations may not be struck down while leaving the grant intact. If they are, then the district court, by ordering a tax increase beyond the limits of that grant, has become a source of tax authority. In such a case, the court has effectively given the school district power that was not, and would not have been, given to it by the state, the power to raise taxes beyond the limitations set out in article X, section 11 of the Missouri constitution. If the above analysis is correct, then the *Jenkins* court has indeed approved judicial taxation.

The Necessity of Enjoining the Enforcement of Limitations on KCMSD's Tax Authority

The second premise of the Court's opinion is that KCMSD's limited tax authority prevented the implementation of the court's remedial order. According to *Swann II*, when a state law inhibits or prevents the implementation of a desegregation remedy, that law must yield to the demands of the Constitution.[178] Yet a state law does not prevent the implementation of an order if there is another means of implementing the order without striking down that law. If there is such an alternative, then judicial taxation is unnecessary, and therefore unjustified.

In *Jenkins*, the district court had an alternative to enjoining the enforcement of limitations on KCMSD's tax authority. Although it ordered the state and KCMSD to finance 25% and 75%, respectively, of the cost of the desegregation order, the district court also held the two defendants jointly and severally liable for the entire cost.[179] Thus, if KCMSD lacked the resources to finance its portion of the order, the district court could have ordered the State of Missouri to finance what the school district could not.

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176. *See, e.g.*, First Nat'l Bank of St. Joseph v. Buchanan County, 205 S.W.2d 716, 729 (1947) ("municipalities in Missouri may only levy taxes in the manner and for the purposes granted by the state"); Kansas City v. J.I. Case Threshing Machine Co., 337 Mo. 913, 930, 87 S.W.2d 195, 199 (1935) (it is a "well-established principle" that municipalities may levy taxes only if granted the power by the state). *See also State ex rel.* Clinton County v. St. L. & S. J. R.R., 87 Mo. 236 (1885) (when the state imposes conditions on the exercise of tax power those conditions must be fulfilled before the tax may be levied).

177. Historical Notes to article X, §§ 1, 11, in MO. ANN. STAT. (Vernon 1988).

178. *Swann II*, 402 U.S. at 45.

179. *Jenkins*, 110 S. Ct. at 1657 (citing *Jenkins*, 672 F. Supp. at 480).

The existence of this alternative distinguishes *Jenkins* from *Von Hoffman*.[180] The *Jenkins* Court interpreted *Von Hoffman* as allowing a court to strike down state laws limiting a local government's power to tax "where there is reason based in the Constitution for not observing the statutory limitation."[181] In *Von Hoffman*, the Court held that the statute itself was unconstitutional.[182] By contrast, the Missouri limitations were not unconstitutional; rather, their application hindered one means of financing a desegregation order.

The Court has consistently recognized the principle that when a state law conflicts with the command of the Constitution, the state law must yield.[183] Therefore, when a state law is unconstitutional, as in *Von Hoffman*, the statute must be struck down in order to vindicate the Constitution.[184] In *Jenkins*, however, striking down the limitations on KCMSD's tax authority was not necessary to vindicate the Consutution. By applying the doctrine of joint and severable liability, the district court could have ordered the state to finance what the school district could not. Therefore, the desegregation order could have been implemented without resorting to the restraint of Missouri laws.

The *Jenkins* majority rejected the argument that the district court could have adopted this alternative means of financing, on the ground that the state might have resisted paying more than its original allocated share.[185] The Court, however, cites no evidence to indicate that the state would resist. Although the state had previously opposed an attempt by the district court to impose the entire cost of the order on it,[186] this occurred before it was necessary for the court to enjoin state laws to enable the school district to finance its share.[187] Moreover, the risk that the state might resist paying was already a possibility with respect to the portion of the remedy for which the state was already financially responsible.[188] Nevertheless, it is a risk worth taking compared to the gravity of striking down a statute.[189]

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180. 71 U.S. (4 Wall.) 535.

181. *Jenkins*, 110 S. Ct. at 1666.

182. The statute in *Von Hoffman* violated the contract clause. 71 U.S. (4 Wall.) at 554-55.

183. *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("[A]n act of the legislature, repugnant to the constitution, is void."); *Swann II*, 402 U.S. at 45 ("[S]tate policy must give way when it operates to hinder vindication of federal constitutional guarantees.").

184. In *Von Hoffman*, the very enactment of the statute was an unconstitutional act, because it violated the contract clause. 71 U.S. (4 Wall.) at 554-55. The only way to "undo" a constitutional violation of that type is to strike down the statute. Thus, striking down the statute is necessary to vindicate the Constitution.

185. 110 S. Ct. at 1664.

186. *Jenkins*, 807 F.2d at 684-85.

187. *Jenkins*, 672 F.2d at 411.

188. *Jenkins*, 110 S. Ct. at 1664. Just as the state might have resisted financing KCMSD's share of the remedy, it might have resisted funding its own share of the remedy by refusing to allocate the necessary funds. If it had, the court would have been forced to take further action to compel compliance with its orders. This undoubtedly would have delayed the implementation of the remedy. The Court cites no evidence, however, indicating that the state would be more likely to resist a court order directing it to finance part of *KCMSD's* share than financing its own share.

189. Justice Holmes described the striking down of a statute as a drastic measure: "[T]o declare an Act of Congress unconstitutional ... is the gravest and most delicate duty that this

The majority's reliance on *Swann II* and *Von Hoffman* is therefore misplaced. Since there was an alternative means of financing the desegregation order that involved neither striking down state laws nor an act of judicial taxation, the court of appeals' "modifications" were not necessary. Thus, the Court should have held that method to be an abuse of discretion in this case.

THE FUTURE OF JUDICIAL TAXATION: A LIMITING INTERPRETATION OF *JENKINS*

A brief look at the history of desegregation cases demonstrates the significance of *Jenkins*. In *Brown II*, the Court approved the exercise of a district court's equitable power to formulate and to order the implementation of desegregation remedies.[190] *Griffin* held that courts could order local governments to exercise existing tax authority if necessary to finance a desegregation order.[191] In *Jenkins*, the Court went a step beyond *Griffin*, holding that a district court may order a local government to raise taxes at a rate higher than that allowed by state law.[192] Just how large a step this is will depend on how *Jenkins* is interpreted. If *Jenkins* is interpreted, as the dissenters interpret it, as an endorsement of judicial taxation,[193] it indeed represents an unprecedented expansion of judicial power. *Jenkins*, however, can be read more narrowly than that.

The dissent interprets the court of appeals' "modifications" to be a grant of additional tax authority because it viewed KCMSD as possessing limited tax authority, rather than inherent tax authority subject to limitations.[194] The majority opinion, however, shows no indication that it intended to endorse judicial taxation.[195] Rather, it characterized the court of appeals' "modifications" as ordering KCMSD to exercise its tax authority and removing state laws preventing this.[196] Thus, the majority opinion implies that KCMSD had remaining tax power that the district court could order it to exercise if the limitations on that power were removed.[197] However, both federal and Missouri authority indicate that a local government's power to tax exists only by delegation from the sovereign.[198] Therefore, *Jenkins* should not be interpreted as endorsing the proposition that a school district has inherent tax power that is not derived from the state. It should, instead, be interpreted as an implicit[199] conclusion that, according to Missouri law, the *limitations* on the school district's tax power are severable from the *grant* of tax power.

Court is called on to perform." Blodgett v. Holden, 275 U.S. 142, 147-48 (1928) (Opinion of Holmes, J.).

190. 349 U.S. at 299-300.
191. 377 U.S. at 233.
192. 110 S. Ct. at 1666.
193. *See id.* at 1667 (Kennedy, J., dissenting).
194. *Id.* at 1670.
195. *Id.* at 1665-66.
196. *Id.* at 1666.
197. *Id.*
198. *See supra* notes 164-67 & 172-77 and accompanying text.
199. The majority never explicitly discusses the relationship between Missouri's grant of tax power to KCMSD and the limitations placed on that power. Rather, it glosses over the issue of where the school district derived its additional tax authority. There are only three possible

Although the weight of Missouri authority favors a finding of non-severability,[200] neither the majority nor the dissent indicates having considered such authority. It would, however, be consistent with the doctrine of severability to presume that the two are severable.[201] Thus, absent any finding that severing the limitations from the grant would operate in a manner inconsistent with the purposes of the Missouri constitution, the Court could presume severability.[202] This would lead to the conclusion that, although KCMSD's tax authority is derived from the state, it nonetheless exists independent of, and is severable from, state-imposed limitations on that authority. Thus, the limitations may be removed while leaving the grant intact.

Even if *Jenkins* is interpreted in this manner, the fact remains that the *Jenkins* Court allowed the suspension of the limitations on KCMSD's tax authority despite the existence of an alternative means of financing. Because the district court could have ordered the state to pay what KCMSD could not, striking down the Missouri limitations was not absolutely necessary.[203] However, while the Court would allow the district court to strike down state laws when it was not necessary to do so, this need not mean that district courts can strike down such laws any time they want.

A plausible interpretation of *Jenkins*, which finds at least some textual support, is that striking down the Missouri limitations *was*, in a sense, necessary. Arguably, because the district court's remedial order and the financing of it were found not to be an abuse of discretion, both became "required" by the Constitution.[204] It could be argued that neither the remedy nor the means of financing it was "required" because there were less intrusive, yet constitutionally adequate, alternatives to both.[205] However, this would place district courts in the impossible position of having to fashion a remedy that is just broad enough to do the job, and no broader.[206] The *Jenkins* majority, apparently wanting to avoid placing district courts in this position, did not require the district court to implement a less restrictive means of financing.

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sources of that authority: the federal courts, the inherent power of a school district, and the State of Missouri.

200. *See* discussion, *supra*, at notes 172-77 and accompanying text.

201. *See Brock*, 480 U.S. at 684; *Chadha*, 462 U.S. at 934.

202. This approach would also be consistent with the Court's policy of construing statutes to avoid constitutional issues, because the Court avoided deciding whether judicial taxation is justifiable if necessary to effect a desegregation order. *See, e.g.*, United States v. Clark, 445 U.S. 23, 27 (1980); St. Martin Evangelical Lutheran v. South Dakota, 451 U.S. 772, 780 (1981).

203. *See supra* text accompanying notes 179-89.

204. The majority does not explicitly state this, but it may be fairly inferred from the following statement: "Even though a particular remedy may not be required in every case to vindicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy." 110 S. Ct. at 1666.

205. The dissent makes this argument. *Id.* at 1676-78.

206. This is, of course, a much larger problem with regard to the remedy than it is to the means of financing. There will commonly be an endless array of remedial options and it will rarely be clear exactly how much is needed to desegregate. By contrast, financing options are few and it is relatively easy to determine whether they will be sufficient. It may, therefore, be much easier to determine whether a financing method is the least intrusive than it is to make the same determination for a remedy. The *Jenkins* Court, however, does not appear to make this distinction. *See supra* note 204.

According to this interpretation, because neither the district court's remedial order nor the order to split the cost between the state and KCMSD was an abuse of discretion, those orders became constitutionally required. Thus, the limitations on KCMSD's tax authority prevented the implementation of a constitutionally required court order, and could, therefore, be struck down.[207]

CONCLUSION

The desegregation decisions of the United States Supreme Court since *Brown v. Board of Education* make clear that state law will not be allowed to prevent the process of desegregation. As *Jenkins v. Missouri* illustrates, the Court is not willing to retreat from this principle. While *Jenkins* may represent an expansion of the power of federal courts to implement their desegregation orders, however, it need not be interpreted as an endorsement of judicial taxation. Rather, *Jenkins* should be read as standing for the proposition that a district court may enjoin state law limitations on a school district's tax authority when two conditions have been met: (1) a particular means of financing a desegregation decree is found to be appropriate, and (2) it has not been proven that the state law limitations on a school district's tax authority are severable from the grant of tax authority.

Although this interpretation of the *Jenkins* opinion infers much that is not explicit in the majority opinion itself, it is the most plausible interpretation of an opinion that does not squarely address several issues. It is also an interpretation which alleviates the fears of the dissent. Given this interpretation, the number of instances in which district courts will do what the *Jenkins* district court did will be rare. As discussed above, such instances will be limited to cases in which there is no proof of inseverability. Moreover, such instances will be further limited to cases in which the cost of a desegregation order exceeds the tax authority of the responsible defendant. In light of these factors, what was an extraordinary judicial act in *Jenkins* should prove to be an infrequent one as well.

207. *Jenkins*, 110 S. Ct. at 1666.