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Taxation Without Representation: The Judicial Usurpation of the Power to Tax in *Missouri v. Jenkins*

Over thirty-five years ago in *Brown v. Board of Education*,¹ the United States Supreme Court held that the fourteenth amendment's equal protection clause mandated the integration of public schools. In formulating remedies for public school integration, the district courts' equitable powers have been exceedingly broad. In contrast, the Supreme Court has noted "[t]hat the power to tax involves the power to destroy."² The power to tax traditionally has been reserved for the politically accountable legislative branch. Any imposition of a tax by the independent, life-tenured federal judiciary consistently has been viewed as a violation of both separation of powers and the principle of federalism.³

In *Missouri v. Jenkins*,⁴ the Supreme Court addressed whether a district court's broad equitable powers to desegregate school systems include the power to impose a property tax directly upon local constituents, even though the tax would violate state law. The Court reversed the district court's direct imposition of a property tax, but held that the lower court had the power to compel the legislature to impose such a tax.⁵ The *Jenkins* majority⁶ ruled that the district court could enjoin state law limitations on property tax increases, empowering the local legislature to raise the tax.⁷ The majority reasoned that there is a subtle yet pivotal constitutional difference between a district court's direct imposition of a property tax and a judicial order compelling the local legislature to impose the same tax.⁸

This Note begins with a discussion of the history of the *Jenkins* litigation in the federal courts, culminating in the recent Supreme Court decision. The Note then traces the history of the equitable powers vested in the district courts to effectuate school desegregation. Subsequently, the Note examines a separate line of cases addressing the propriety of judicially compelled taxation. After outlining these two separate lines of cases, the Note evaluates the *Jenkins* Court's ruling in light of these precedents and concludes that the majority's rationale amounts to nothing more than a chimerical distinction. Because the majority's

1. 347 U.S. 483 (1954).

2. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 431 (1819). *McCulloch* was a landmark case involving the State of Maryland's improper exercise of the power to tax. The Court held that Congress had the power to establish a national bank, but that individual states did not possess the power to tax the federal government. *Id.* at 424, 436. The Court reasoned that the federal government could tax the states because they were represented in Congress. *Id.* at 435. Because the federal government had no representation in state legislatures, however, the Court held that it was improper for the states to impose a tax on the federal banks. *Id.* at 435-36.

3. *See infra* note 118 (citing cases).

4. 110 S. Ct. 1651 (1990).

5. *Id.* at 1663.

6. Justice White wrote the opinion for a unanimous Court in Part II, and for the majority in Parts I, III, and IV, in which Justices Brennan, Marshall, Blackmun, and Stevens joined. *Id.* at 1655.

7. *Id.* at 1666.

8. *See id.* at 1666-67.

distinction is merely specious, the Note asserts that the Court's ruling unconstitutionally infringes on the fundamental principles of separation of powers and federalism. The Note then discusses the possibility of the detrimental extension of the holding to other areas where the courts have broad equitable powers. The Note concludes by proffering a solution that attempts to avoid the constitutional infractions and negative ramifications of the *Jenkins* Court's ruling.

In 1977, the Kansas City Missouri School District ("KCMSD") and students from within the district filed a complaint against the State of Missouri and the districts surrounding KCMSD, alleging that the defendants were operating a segregated school system.⁹ Even though KCMSD originally had filed suit, the district court realigned it as a co-defendant in the action.¹⁰ After trial on the merits of the students' claim, the district court found that KCMSD and the State of Missouri had operated an intradistrict segregated school system.¹¹

In a subsequent hearing, the district court focused its attention on prescribing appropriate remedies and the financing necessary to fund them.¹² The court apportioned the costs at approximately seventy-five percent and twenty-five percent for the State and KCMSD, respectively.¹³ The district court concluded, however, that several provisions of Missouri state law prevented KCMSD from

9. *School Dist. v. Missouri*, 460 F. Supp. 421, 427 (W.D. Mo. 1978) (holding that students stated claim for relief, realigning KCMSD as a party defendant, and dismissing other defendants for lack of jurisdiction), *appeal dismissed*, 592 F.2d 493 (8th Cir. 1979) (dismissing action as not appealable because alignment of KCMSD was a collateral issue and all defendants were not dismissed), *related reference*, *Jenkins v. Missouri*, 593 F. Supp. 1485 (W.D. Mo. 1984) (holding that State and KCMSD had operated a segregated intradistrict school system), *related reference*, *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985) (issuing original order delineating remedies necessary to eliminate segregation, and enjoining state law in order to provide KCMSD with additional funds to finance its portion of costs), *aff'd as modified*, *Jenkins ex rel. Ageyi v. Missouri*, 807 F.2d 657 (8th Cir. 1986) (generally affirming district court's remedial plan but ordering court to apportion costs equally among defendants), *related reference*, *Jenkins v. Missouri*, 672 F. Supp. 400 (W.D. Mo. 1987) (finding no alternative, district court directly increased property tax to finance KCMSD's portion of the desegregation remedy), *aff'd in part, rev'd in part*, *Jenkins ex rel. Ageyi v. Missouri*, 855 F.2d 1295 (8th Cir. 1988) (upholding district court's direct imposition of tax, but ordering the court to enjoin state law and authorize KCMSD to levy tax itself in the future), *aff'd in part, rev'd in part*, *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990) (reversing district court's imposition of a direct tax, but affirming appellate court's alternate solution). The history of this case, as this citation indicates, is complicated, confusing, and somewhat convoluted. To avoid confusion in the remainder of the Note, the subsequent history of lower court cases cited in future footnotes will not be indicated. As an alternative to such repetitious citation, this footnote gives a comprehensive prior history and should be used as a cross reference when necessary.

10. *School Dist. v. Missouri*, 460 F. Supp. 421, 442 (W.D. Mo. 1978). KCMSD subsequently filed a cross-claim for indemnification from the State for any liability that it might incur from a finding of segregation. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1488 (W.D. Mo. 1984).

11. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984). The court, however, found no continuing interdistrict segregation and dismissed the claims against the surrounding school districts. *Id.* at 1488. The court had bifurcated the liability issue from the remedial measure and consequently did not address a potential remedy at this hearing. *Id.*

12. *See Jenkins v. Missouri*, 639 F. Supp. 19, 22-23 (W.D. Mo. 1985).

13. *Id.* at 43-44. The plan originally was estimated to cost \$88,000,000. *Id.*

The Court of Appeals for the Eighth Circuit later ruled that the district court had not given adequate justification for apportioning the costs and ordered the lower court to divide the costs equally. *Jenkins v. Missouri*, 807 F.2d 657, 685 (8th Cir. 1986) (en banc). On remand, the district court determined that the doctrine of comparative fault supported its original ruling and held the tortfeasors jointly and severally liable to ensure plenary funding of the remedy. *Missouri v. Jenkins*, 110 S. Ct. 1651, 1657 (1990) (citing App. to Pet. for Cert. at 113a (1987)).

raising funds to pay its portion of the costs of the desegregation plan.¹⁴

The principal obstacle to raising the funds was a Missouri constitutional limit on local property taxes. This constitutional restraint limited property taxes to \$1.25 per \$100 of assessed valuation, unless a majority of the voters approved an increase of up to \$3.75 per \$100; any increase beyond \$3.75 required the approval of two-thirds of the voting constituency.¹⁵ Another obstacle to the court's remedy was the "Hancock Amendment" which required property tax rates to be decreased to match any increase in revenue resulting from a property value reassessment.¹⁶ This amendment, therefore, precluded the possibility of increasing tax revenues from reassessing property values. The final obstacle was "Proposition C," which established a common trust fund for state education, but had the effect of channeling almost half of the sales tax collected in KCMSD to other parts of Missouri.¹⁷

In an attempt to fund KCMSD's portion of the remedies, the district court enjoined Proposition C to permit KCMSD to retain all of its sales tax.¹⁸ Furthermore, the court ordered KCMSD to proffer to the voters a tax increase sufficient to fund the cost of desegregation.¹⁹ When the local constituents rejected the proposed tax increase, the court once again enjoined the operation of Proposition C.²⁰

After approving expansive additional remedial measures,²¹ the district court concluded that KCMSD had "exhausted all available means of raising additional revenue."²² Accordingly, the court ruled that it had "no choice but to exercise its broad equitable powers and enter a judgment that . . . [would] enable the KCMSD to raise its share of the cost of the plan."²³ The court then ordered the KCMSD property tax to be raised from \$2.05 to \$4.00 per \$100 of assessment value.²⁴

On appeal, the Eighth Circuit Court of Appeals upheld the scope of the remedy, the allocation of costs, and the denial of intervention by a group of local

14. *Jenkins v. Missouri*, 639 F. Supp. 19, 44 (W.D. Mo. 1985).

15. MO. CONST. art. X, § 11(b), (c); *see also* *Jenkins v. Missouri*, 855 F.2d 1295, 1312 (8th Cir. 1988) (detailing effect of provision on the case).

16. MO. CONST. art. X, § 22(a); MO. REV. STAT. § 137.073 (Supp. 1990).

17. MO. REV. STAT. § 164.013.1 (Supp. 1990).

18. *Jenkins v. Missouri*, 639 F. Supp. 19, 45 (W.D. Mo. 1985).

19. *Id.*

20. *Jenkins*, 110 S. Ct. at 1657 (citing App. to Pet. for Cert. at 138-42 (1987)).

21. In addition to the original estimate of the cost of desegregation, the court continued to approve new extensive remedial measures in the same proceedings in which it was attempting to finance KCMSD's portion of these costs. For example, the district court, upon the request of the "defendant" KCMSD, eventually approved the adoption of a "magnet school" program. *Id.* "Magnet schools" are designed to integrate a school system through a program of voluntary enrollment combined with unusual curriculum and increased quality. *See id.* at 1657 n.6. This program was estimated to cost \$142,736,025, plus \$52,858,301 in additional capital improvements. *Id.* The district court subsequently ordered more capital improvements, totaling an additional \$187,450,334. *Jenkins v. Missouri*, 672 F. Supp. 400, 408 (W.D. Mo. 1987).

22. *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987).

23. *Id.*

24. *Id.* at 411-13 (citing *Griffin v. County School Bd.*, 377 U.S. 218, 233 (1964)).

taxpayers.²⁵ The Eighth Circuit concluded that the district court had the power to impose a property tax increase directly on local constituents²⁶ and "affirm[ed] the actions that the [district] court ha[d] taken to this point" to achieve the increase in property taxes.²⁷ The Eighth Circuit then noted that the principle of federal-state comity mandated the use of "minimally obtrusive methods to remedy constitutional violations."²⁸ The appellate court stated that in the future, therefore, the principle of comity would prohibit the district court from directly imposing the property tax. As a future alternative to the court-imposed tax, the Eighth Circuit held that the district court should authorize KCMSD to collect the tax and enjoin state laws barring KCMSD from financing the remedy.²⁹

The United States Supreme Court granted the State's petition for certiorari, limited to the issue of whether the district court had the power to impose a property tax increase.³⁰ The Court unanimously ruled that the district court had abused its discretion by directly imposing the tax.³¹ After concurring in this important initial determination, however, the Justices diverged sharply.

The majority ruled that the district court had violated the principle of comity governing its exercise of equitable powers in this area.³² The Court noted that the district court had the choice of an available and less intrusive method of effectuating desegregation—the appellate court's solution. Because this alternative was available, the majority reasoned that the district court's direct imposition of a tax violated the principle of comity³³ and reversed its imposition of the tax.³⁴

After reversing the district court, the majority proceeded to discuss the Eighth Circuit's modifications of the district court's order.³⁵ The Court ad-

25. *Jenkins ex rel. Agyei v. Missouri*, 855 F.2d 1295, 1318 (8th Cir. 1988).

26. *Id.* at 1313-14. The appellate court relied heavily on *Griffin v. County School Bd.*, 377 U.S. 218 (1964), in determining that the federal courts had the power to impose the tax. For a discussion of *Griffin*, see *infra* notes 72-80, 132-38 and accompanying texts.

The Eighth Circuit also relied on its own previous decisions in its opinion. *Jenkins ex rel. Agyei v. Missouri*, 855 F.2d 1295, 1313-14 (8th Cir. 1988) (citing *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.) (en banc), cert. denied, 469 U.S. 816 (1984) and *United States v. Missouri*, 515 F.2d 1365 (8th Cir.), cert. denied *sub nom.* *Ferguson Reorganized School Dist. R-2 v. United States*, 423 U.S. 951 (1975)). See *infra* note 126 and accompanying text.

27. *Jenkins ex rel. Agyei v. Missouri*, 855 F.2d 1295, 1314 (8th Cir. 1988).

28. *Id.*

29. *Id.* The court concluded that this alternative would effectuate the same purposes, while still giving deference to the authority of local and state officials. *Id.*

30. *Jenkins*, 110 S. Ct. at 1660. The Court denied certiorari on the scope of the district court's remedial order. *Id.* at 1664.

Although the Supreme Court limited its grant of certiorari to the property tax issue, the Court dedicated a disproportionate part of its opinion to a preliminary issue: Whether the State had filed a timely appeal and whether it was therefore within the Supreme Court's jurisdiction to hear the case. *Id.* at 1660-62. On this issue, the Court ultimately deferred to the Eighth Circuit's interpretation of its own order which qualified the state's appeal within the relevant time constraints. *Id.* at 1662.

31. *Id.* at 1663; *id.* at 1667 (Kennedy, J., concurring in part and concurring in the judgment).

32. *Id.* at 1663. The principle of comity in the desegregation context requires the district court to employ the method that allows local and state authorities, which have primary responsibility for implementing the remedy, the greatest amount of deference. See *id.*

33. *Id.*

34. *Id.*

35. *Id.* at 1663-67. Because the Court reversed the district court's order directly imposing the

dressed four main issues related to the Eighth Circuit's approach: federal-state comity, apportionment of costs, federalism, and separation of powers.

First, the Court confronted the issue of whether the appellate court's solution was consonant with the principle of comity. The State contended that the funding violated the principle of comity because the scope of the remedial order exceeded the constitutional mandate.³⁶ To consider whether the funding was the least intrusive method available, the State argued, the Court must also consider the expansive remedial measures approved by the district court.³⁷ The majority, however, skirted the State's argument by noting that because the Court had denied certiorari on the scope of the remedy, this issue was outside its jurisdiction.³⁸

Second, the majority addressed the district court's apportionment of costs between the State and KCMSD. The Court rejected the State's contention that because the district court found the State jointly and severally liable with KCMSD, it should have allowed any portion of the remedy not met by KCMSD to fall on the State.³⁹ The majority reasoned that because the appellate court had ordered the district court to apportion the costs, the district court had not abused its discretion in ruling that KCMSD must fund its portion of the remedy.⁴⁰ The Court concluded that apportionment of costs was within the equitable powers of the district court.⁴¹

The majority next addressed the two constitutional issues: federalism and separation of powers. The Court summarily dismissed any contention that the appellate court's modifications⁴² violated the tenth amendment⁴³ and the principle of federalism.⁴⁴ The Court reasoned that a court order compelling compliance with the fourteenth amendment does not violate the tenth amendment's reservation of powers to the states.⁴⁵ The majority noted that the enactment of the fourteenth amendment specifically limited the powers of the states, and thus a federal court could compel a state to guarantee its citizens their constitutional rights under the amendment.⁴⁶

The second constitutional issue the majority addressed was whether the or-

tax increase, Justice Kennedy characterized the remainder of the majority's opinion as mere dicta. *Id.* at 1667 (Kennedy, J., concurring in part and concurring in the judgment); see *infra* note 53.

36. *Jenkins*, 110 S. Ct. at 1664. In discussing the scope of the order, the State was referring to the expansive improvements the district court had approved. See *supra* note 21.

37. Brief for Petitioners at 42-43, *Jenkins v. Missouri*, 110 S. Ct. 1651, 1664 (1990) (No. 88-1150).

38. *Jenkins*, 110 S. Ct. at 1664; see *supra* note 30 and accompanying text.

39. *Jenkins*, 110 S. Ct. at 1664.

40. *Id.* (citing *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987)).

41. *Id.* at 1665 (citing *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977)).

42. See *supra* note 29 and accompanying text.

43. U.S. CONST. amend. X; see *infra* text accompanying note 200.

44. *Jenkins*, 110 S. Ct. at 1665. For a discussion of the principle of federalism, see *infra* text accompanying notes 200-15 and accompanying text.

45. *Jenkins*, 110 S. Ct. at 1665 (citing *Milliken v. Bradley*, 433 U.S. 267, 291 (1977)).

46. *Id.*

der violated separation of powers.⁴⁷ The *Jenkins* Court reasoned that precedent unquestionably had established the power of the federal judiciary to act according to the appellate court's decree. Specifically, the majority held that *Griffin v. County School Board*⁴⁸ permitted the federal court to compel local officials to levy a tax to desegregate schools.⁴⁹ Additionally, the Court ruled that a "long and venerable line of cases" authorized the court to disregard state law limiting taxes "where there is reason based in the Constitution for not observing the statutory limitation."⁵⁰

Thus, the *Jenkins* Court reversed the district court's direct imposition of the property tax increase.⁵¹ The majority, however, did not perceive the same constitutional obstacles in the Eighth Circuit's modifications enjoining the state statutory limitation and compelling KCMUSD to impose the property tax. The Court summarily dismissed the State's contention that these modifications violated the principles of federal-state comity, allocation of costs, federalism, and separation of powers, and affirmed the appellate court's modifications of the lower court ruling.⁵²

Justice Kennedy filed a separate opinion concurring in part and concurring in the judgment.⁵³ Except for the first two paragraphs, Justice Kennedy devoted his "concurrence" to disputing and attempting to discredit Parts III and IV of the majority's opinion.⁵⁴ The concurrence attempted to refute the underlying

47. *Id.* For a discussion of the principle of separation of powers in the taxation context, see *infra* text accompanying notes 162-99.

48. 377 U.S. 218, 233 (1964). For a discussion of *Griffin*, see *infra* notes 72-80, 132-38 and accompanying texts.

49. *Jenkins*, 110 S. Ct. at 1665.

50. *Id.* at 1665-66. The line of cases cited by the majority to support this proposition arose from the inability of municipal corporations to pay debt obligations due to state statutory tax limitations enacted subsequent to the contract loan agreements. *Id.*; see *infra* note 111 (citing cases).

51. *Jenkins*, 110 S. Ct. at 1663, 1667.

52. *Id.* at 1667.

53. *Id.* (Kennedy, J., concurring in part and concurring in the judgment). Chief Justice Rehnquist and Justices O'Connor and Scalia joined Justice Kennedy in his opinion. Presumably, Justice Kennedy labeled his opinion to denote the significance he ascribed to the separate parts of the majority's opinion. As noted previously, Justice Kennedy's opinion concurred that the district court exceeded its authority in directly imposing the tax. *Id.* (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy viewed this, however, as the only determination necessary to decide the issue before the court. See *id.* (Kennedy, J., concurring in part and concurring in the judgment). He characterized Parts III and IV of the majority's opinion as "broad dictum," "premature," and unnecessary. *Id.* (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy's failure to designate his opinion as "concurring in part and dissenting in part," despite his adamant opposition to Parts III and IV of the majority's opinion, was meant to emphasize his view that the last two sections of the majority's opinion contain no precedential value. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

54. Justice Kennedy's concurrence also considered the collateral issue of the scope of the remedial order. The majority dismissed this issue based on what it believed to be a lack of jurisdiction. *Id.* at 1664. Justice Kennedy dedicated a substantial portion of his opinion to detailing what he considered the unparalleled remedial orders approved by the district court. See *id.* at 1667-68, 1676-78 (Kennedy, J., concurring in part and concurring in the judgment). He reasoned that in order to determine whether the district court was justified in imposing the tax increase, it was necessary to consider if the remedy to be financed was constitutionally mandated. He concluded that review of the scope of the remedy was a necessary prerequisite to any judgment "whether a judicial tax was appropriate in this case." *Id.* at 1678 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis in original).

premise of the majority's opinion—that a significant distinction exists between a district court's direct imposition of a property tax increase and a judicial order compelling the legislature to implement the same burden.⁵⁵

Justice Kennedy's reasoning was as follows: Under Missouri law, local governmental bodies have no authority to levy a tax beyond the precise statute that the majority ordered to be enjoined.⁵⁶ Because no such authority existed under state law, any authority for an order directing KCMUSD to impose a tax had to come from the federal judiciary. Thus, the majority's order compelling KCMUSD to levy the property tax implicated the same problems as did a direct judicial tax, and its attempted distinction was merely specious.⁵⁷

Because he concluded that the majority's distinction was meaningless, Justice Kennedy asserted that the Court's opinion violated two fundamental constitutional axioms: due process and federalism. First, he stated that the taxing power is an exclusively legislative, not judicial function.⁵⁸ Furthermore, Justice Kennedy contended that judicial taxation circumvented the legislative process designed to give taxpayers representation in taxing decisions.⁵⁹ He concluded that a direct judicial tax was a "blatant denial of due process" of the local constituents.⁶⁰

Second, Justice Kennedy argued that the imposition of a direct tax by the federal judiciary onto a local government also implicated "federalism concerns."⁶¹ The primary concern was that the independent, life-tenured federal judiciary was in no way representative of or responsive to the local taxpayers.⁶² Justice Kennedy asserted that such a judicial tax on the local constituents was akin to the taxation without representation that spurred the American colonies' break with England.⁶³ Justice Kennedy also expressed the concern that the federal judiciary is not equipped to handle such difficult and complicated matters as

55. *Id.* at 1669-70 (Kennedy, J., concurring in part and concurring in the judgment).

56. *Id.* at 1670 (Kennedy, J., concurring in part and concurring in the judgment); see *infra* notes 148-57 and accompanying text.

57. *Jenkins*, 110 S. Ct. at 1675 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy asserted that the majority failed to recognize that a local body must possess the authority to tax before a federal court can compel it to exercise this power. He asserted that the majority's reliance on cases upholding a judicial compulsion of a tax when the local government possessed taxing authority under state law was misplaced and misconstrued. *Id.* at 1673-75 (Kennedy, J., concurring in part and concurring in the judgment).

58. *Id.* at 1671 (Kennedy, J., concurring in part and concurring in the judgment).

59. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

60. *Id.* (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy's due process argument raises the same underlying concerns as the separation of powers argument discussed later in this Note. See *infra* notes 162-99 and accompanying text. It is likely that he characterized this constitutional infraction as a denial of due process because of the Supreme Court's reluctance to apply the separation of powers doctrine to federal-state relations. See *infra* notes 193-99 and accompanying text. Justice Kennedy might have buttressed this argument by noting that taxpayers typically have no right to be heard in a judicial proceeding adjudicating tax decisions. More specifically, he might have pointed out that in *Jenkins* a group of local taxpayers did attempt to protect their interests, but were denied the right to intervene in the suit. See *Jenkins v. Missouri*, 855 F.2d 1295, 1316-17 (8th Cir. 1988).

61. *Jenkins*, 110 S. Ct. at 1672 (Kennedy, J., concurring in part and concurring in the judgment).

62. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

63. *Id.* (Kennedy, J., concurring in part and concurring in the judgment).

taxation, while a local legislature is.⁶⁴

Justice Kennedy concluded that the majority's opinion, in attempting to remedy equal protection violations in the Kansas City public school system, unnecessarily authorized the violation of other essential constitutional principles.⁶⁵ Furthermore, the repeated violation of these principles through extension to a variety of other contexts, Justice Kennedy stated, could blur the fundamental distinctions between the different branches of government which "over time could threaten fundamental alteration of the form of government our Constitution embodies."⁶⁶

In adjudicating the propriety of funding a desegregation remedy through a judicially compelled tax, the Supreme Court in *Missouri v. Jenkins* confronted two separate and conflicting lines of cases. The district courts, in vindicating the constitutional guarantees of minority schoolchildren, have assumed broad equitable powers. In contrast, the federal courts' power to remunerate petitioners through a judicially compelled tax traditionally has been severely limited. Thus, in *Jenkins*, the Supreme Court had to determine whether a district court's broad equitable powers in formulating desegregation remedies included the power to compel a property tax increase.

The first line of cases the *Jenkins* Court had to consider involved the equitable powers of the courts in desegregating public schools. In *Brown v. Board of Education (Brown I)*,⁶⁷ the Supreme Court announced that segregation in public education denies minorities equal protection of the laws in violation of the fourteenth amendment. One year later in *Brown v. Board of Education (Brown II)*,⁶⁸ the Supreme Court first attempted to delineate appropriate remedies for public school integration. In attempting to allocate responsibility for implementing solutions, the *Brown II* Court elaborated on the respective roles of the different branches of government in effectuating desegregation remedies: "School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles."⁶⁹ The *Brown II* Court then announced certain general

64. *Id.* at 1672-73 (Kennedy, J., concurring in part and concurring in the judgment). Although Justice Kennedy characterized these concerns as a violation of the principle of federalism, most if not all of these arguments also relate to the differences between the judicial and legislative branches of government. These arguments typically would be encompassed in a separation of powers problem. See *infra* notes 193-99 and accompanying text.

65. *Jenkins*, 110 S. Ct. at 1679 (Kennedy, J., concurring in part and concurring in the judgment).

66. *Id.* at 1678-79 (Kennedy, J., concurring in part and concurring in the judgment).

67. 347 U.S. 483 (1954). The Court in *Brown I* rejected the "separate but equal" doctrine announced in *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896). 347 U.S. at 494-45. The Court held that the equal protection clause of the fourteenth amendment required the integration of public schools. *Id.*

68. 349 U.S. 294 (1955). In *Brown II*, the Court addressed the issue of remedies for the constitutional violations found in *Brown I*. *Id.* at 298-99. After receiving briefs and arguments from all the parties and amicus curiae states, the Court held that the cases should be remanded to the district courts for a determination of the specific remedies. *Id.* at 299. The Court announced certain general standards for the lower courts to follow.

69. *Id.*

standards for the district courts to follow in effectuating desegregation remedies:

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. . . . But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.⁷⁰

The *Brown II* Court further held that the district courts should "take such proceedings and enter such orders and decrees . . . as are necessary and proper to admit [all children] to public schools on a racially nondiscriminatory basis with all deliberate speed."⁷¹ Thus, the *Brown II* Court expounded on the roles of the different branches of government and also attempted to delineate general guidelines for the lower courts to follow in carrying out the mandate of *Brown I*.

The Supreme Court elucidated the precise meaning of these general guidelines ten years after *Brown I*, in *Griffin v. County School Board*.⁷² *Griffin* involved a county school board's enactment of several evasive policies designed to avoid carrying out the principles of *Brown I*. Beginning in 1959, the county supervisors refused to levy any school taxes for the upcoming school year.⁷³ As a result, the county's public school system remained closed from 1959 up to the time of the suit in 1964.⁷⁴ At the same time, however, the county supervisors passed ordinances giving tuition grants to parents of schoolchildren who attended nonsectarian private schools and allowing property tax credits for donations to such institutions.⁷⁵

The Supreme Court in *Griffin* "agree[d] with the District Court that closing the Prince Edward County 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."⁷⁶ The Court then focused its attention on what remedies would be "necessary and appropriate" to eliminate the vestiges of segregation.⁷⁷ The *Griffin* Court affirmed the judgment enjoining the payment of tuition grants and tax exemptions by the county officials, ruling that the injunction was clearly within the power of the district court.⁷⁸ More importantly, the Court held:

70. *Id.* at 300.

71. *Id.* at 301.

72. 377 U.S. 218 (1964).

73. *Id.* at 222.

74. *Id.* at 222-23.

75. *Id.* at 223. The Court found that these ordinances, although neutral on their faces, had a discriminatory effect on black schoolchildren in Prince Edward County. *Id.* at 233.

76. *Id.* at 232.

77. *Id.*

78. *Id.* at 232-33.

[T]he District Court may, if necessary to prevent further 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.⁷⁹

Thus, the *Griffin* Court held that a district court's broad equitable powers include the authority to compel a local governing body to act within its existing powers to raise funds for public schools.⁸⁰

In *North Carolina State Board of Education v. Swann (Swann I)*,⁸¹ the Supreme Court addressed the propriety of enjoining a state law forestalling desegregation. This law prohibited school busing on the basis of race and was enacted in anticipation of a federal court order prescribing such action.⁸² The Court held that "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system . . . it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees."⁸³ Accordingly, the Court affirmed the lower court's injunction of North Carolina's anti-busing law.⁸⁴ In so doing, the Court expanded the extent of the district courts' broad equitable authority to include the power to enjoin state laws that hinder vindication of constitutional guarantees.

In *Swann v. Charlotte-Mecklenburg Board of Education (Swann II)*,⁸⁵ a companion case to *Swann I*, the Supreme Court addressed the extent of a district court's equitable powers to redress a local government's failure to propose an acceptable, effective desegregation plan.⁸⁶ In *Swann II*, the Court considered a controversial court-ordered school busing program that attempted to integrate schools by transporting students to schools outside their immediate geographical area.⁸⁷ In determining the propriety of the program, the Court expounded on

79. *Id.* at 233.

80. *Id.* The Virginia Constitution gave the local school board in *Griffin* the authority to levy the tax ordered by the Court. *Id.* at 221. Therefore, the Court was able to compel such action without confronting the issue of whether district courts would have this power if the local board did not possess the authority under state law.

81. 402 U.S. 43 (1971).

82. *Id.* at 44-45.

83. *Id.* at 45.

84. *Id.* at 46.

85. 402 U.S. 1 (1971). Although this case precedes *North Carolina State Board of Education v. Swann* in the reporter, it is labeled *Swann II* for purposes of this discussion. The Court handed down both decisions on the same day.

86. The Supreme Court previously had addressed the powers of the district courts to integrate schools after a local government had adopted a wholly inadequate desegregation plan. See *Green v. County School Bd.*, 391 U.S. 430 (1968). In *Green*, the local school board had adopted a "freedom of choice" plan that allowed all students to elect which of the two county schools they would attend. *Id.* at 433-34. The Court noted that this plan had been utterly ineffective in establishing the constitutionally-mandated integrated school system. *Id.* at 441. Consequently, the *Green* Court held, "The burden on a school board . . . is to come forward with a plan that promises realistically to work, and promises realistically to work now." *Id.* at 439 (emphasis in original). Thus, in *Green*, the Court mandated that local officials proffer an effective desegregation remedy, but failed to specify what powers the district court possessed to enforce the requirement. See *id.*

87. *Swann II*, 402 U.S. at 29-30. The plan at issue in *Swann II* was adopted by the Court after the local school board failed to offer an acceptable remedy. *Id.* at 10.

the proper role of the judiciary in effectuating desegregation orders,⁸⁸ an issue that the Court previously had addressed in *Brown II*.⁸⁹ The Court held that although the local school authorities traditionally have primary responsibility for formulating effective remedies, “[i]n default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system.”⁹⁰ The Court held that because the school officials had failed to offer an acceptable plan, the court-ordered remedy was within the equitable powers of the district court.⁹¹

Equally important, however, was the *Swann II* Court’s express recognition that the district courts’ remedial powers are not unlimited:

In seeking to define even in broad and general terms how far this remedial power extends it is important to remember that judicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary. Judicial authority enters only when local authority defaults.⁹²

Thus, *Swann II* established the authority of the federal district courts to formulate their own remedies when school officials fail to proffer an acceptable plan. The Court emphasized, however, that these remedial powers are not plenary. This judicial authority arises only when local authorities have failed to offer a suitable solution for the constitutional violation.

Although the Supreme Court affirmed the district court’s remedies in *Swann II*, the Court in several subsequent decisions overturned remedies ordered by district courts. In *Milliken v. Bradley (Milliken I)*,⁹³ the Supreme Court was concerned with a district court order that prescribed an interdistrict remedy in response to a showing of intradistrict segregation within the Detroit metropolitan area.⁹⁴ The Court held that this remedy exceeded the constitutional violation and, therefore, was outside the district court’s equitable powers.⁹⁵ The *Milliken I* Court reasoned that remedies exceeding constitutional violations are an unjustifiable infringement on the authority of local legislative bodies.⁹⁶ The Court also stated that such a remedy would be contrary to the

88. *Id.* at 16.

89. *See supra* text accompanying note 69.

90. *Swann II*, 402 U.S. at 16.

91. *Id.* at 30.

92. *Id.* at 16.

93. 418 U.S. 717 (1974).

94. *Id.* at 742-43. The interdistrict remedy involved relief across fifty-four independent school districts, but the violation was found to exist only in the Detroit schools. *Id.* at 743.

95. *Id.* at 745. The Court stated that the nature and extent of the constitutional violation determines the scope of the remedy and, therefore, only a showing of interdistrict segregation justifies an interdistrict remedy. *Id.* at 744-45 (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)).

96. *See id.* at 743-44.

[T]he District Court will become first, a *de facto* “legislative authority” to resolve these complex questions, and then the “school superintendent” for the entire area. This is a task which few, if any, judges are qualified to perform and one which would deprive the people of control of schools through their elected representatives.

deference traditionally given local officials in matters involving public education.⁹⁷

After several more decisions limiting the equitable powers of the district courts,⁹⁸ the *Milliken* case was re-argued before the Supreme Court in *Milliken v. Bradley (Milliken II)*.⁹⁹ In *Milliken II* the Court synthesized these various desegregation decisions and adopted a three-part test to determine the limits of the district courts' equitable powers:

Application of those "equitable principles," we have held, requires federal courts to focus upon three factors. In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation. The remedy must therefore be related to "the condition alleged to offend the Constitution . . ." Second, the decree must indeed be remedial in nature, that is, it must be designed as nearly as possible "to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." Third, the federal courts in devising a remedy must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution.¹⁰⁰

The novelty of the *Milliken II* test lies in its final prong, which added an essential element to the analysis of district courts' powers. This final element requires the federal courts to balance the rights and interests of local and state governments against an individual's rights protected by the equal protection clause of the fourteenth amendment.¹⁰¹ The state and local government interests are primarily federalism and separation of powers issues raised by a federal judicial order specifying remedies in a state or local legislative arena.¹⁰²

Because *Jenkins* involved financing for a desegregation remedy, a brief discussion of the district court's equitable powers in effectuating such orders is helpful in appreciating the significance of the case. Because the case also in-

97. See *id.* at 741-42 ("No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.").

98. In a case very similar to *Milliken I*, the Supreme Court once again held that a system-wide remedy was not justified without a showing of system-wide segregation. See *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417 (1977). The Court's rationale in *Brinkman* echoed its rationale in *Milliken I*: "But instead of tailoring a remedy commensurate to the three specific violations, the Court of Appeals imposed a systemwide remedy going beyond their scope." *Id.*

In another important case, *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the Court expounded on limitations other than the interdistrict remedies overturned in *Milliken I* and *Brinkman*. In *Spangler*, the Court held that the district court exceeded its authority in requiring an annual readjustment of the attendance zones. *Id.* at 440. The purpose of this readjustment was to prevent any school from having a majority of students composed of any one minority group. *Id.*

99. 433 U.S. 267 (1977).

100. *Id.* at 280-81 (citing *Swann II*, 402 U.S. at 16, and quoting *Milliken I*, 418 U.S. at 738, 746) (citations and footnotes omitted) (emphasis in original). The *Jenkins* Court was not concerned with the first two prongs of the *Milliken II* test because they are aimed at the scope of the remedy, an issue skirted by the *Jenkins* Court. As discussed earlier, the Supreme Court in *Jenkins* denied certiorari on this issue. See *supra* note 30 and accompanying text.

101. See Note, *Judicial Taxation in Desegregation Cases*, 89 COLUM. L. REV. 332, 339 (1989).

102. *Id.* at 340-42.

volves the judicial imposition or compulsion of a tax, it is helpful to explore a number of cases addressing the taxation issue outside the desegregation context. This line of cases illustrates both the allocation of authority between the different branches of government in matters involving taxation and the limited instances when judicial interference in these matters is permissible.

In several cases adjudicating matters involving taxation, the Supreme Court has delineated the respective roles of the different government branches in such matters. For example, the Court has held that taxation by a legislative body does not implicate any due process concerns, even if all constituents are not notified and heard.¹⁰³ In contrast, the Court has ruled that attempted taxation by other governmental branches may implicate constitutional concerns. Specifically, the Court has held that due process may be implicated even if the taxing body is an administrative agency to which the legislature has delegated the power to tax.¹⁰⁴

More importantly, the Supreme Court consistently has held that the federal judiciary has no constitutional authority to impose a tax directly.¹⁰⁵ In *Moses Lake Homes, Inc. v. Grant County*,¹⁰⁶ the Supreme Court held that the Ninth Circuit's remand of the case, directing the district court to reduce the imposed tax, was unwarranted:

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 . . . may assess and levy taxes . . . and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one.¹⁰⁷

Thus, the Supreme Court has ruled that taxation is the exclusive province of the legislative branch, and exercise of that power by any other branch may implicate constitutional problems.¹⁰⁸ More specifically, the Court has held that any action by the federal judiciary which could be viewed as a direct imposition

103. See, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445-46 (1915) ("[Taxpayers'] rights are protected in the only way they can be in a complex society, by their power, immediate or remote, over those who make the rule."). In *Bi-Metallic*, the Supreme Court held that an order to increase the valuation of all taxable property did not amount to a taking of the plaintiff's property without due process of law merely because he was not given an opportunity to be heard on the matter. *Id.* at 444-46.

104. *Londoner v. City of Denver*, 210 U.S. 373, 385-86 (1908). The *Londoner* Court held that when a state delegates the taxing power to a subordinate body, due process requires that the taxpayer have the chance to be heard. *Id.*

105. See, e.g., *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500, 1509 (1989); *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744, 752 (1961).

106. 365 U.S. 744 (1961).

107. *Id.* at 752. The Supreme Court recently reaffirmed its view that a direct imposition of a state tax is clearly outside the authority of the federal judiciary. *Davis*, 109 S. Ct. at 1509 (citing *Moses Lake Homes*, 365 U.S. at 752). In *Davis*, the Court rejected a possible remedy of eliminating all state employee retirement exemptions because it noted that this could be viewed as a direct imposition of a state tax. *Id.*

108. See *supra* notes 103-07 and accompanying text.

of a tax is plainly unconstitutional.¹⁰⁹

Although the Court has held that federal courts cannot impose a tax directly, the Court repeatedly has confronted the related issue of whether the federal judiciary has the power to compel a local government to levy taxes to enforce its debt obligations in the "municipal bond" cases.¹¹⁰ In these cases the Supreme Court has held that when a local body has taxing authority under pre-existing state law, the federal courts have the power to compel the local government to tax its constituents to satisfy its debts.¹¹¹ For example, in *Von Hoffman v. City of Quincy*,¹¹² certain bonds were issued by a municipal corporation. At the time of issuance, a state statute empowered the local municipality to levy taxes sufficient to satisfy its debt obligations.¹¹³ Subsequent to the issuance of the bonds, however, the state passed a statute that limited the municipality's ability to pay its obligations, unless a majority of the constituents approved the tax increase.¹¹⁴

The Supreme Court held that this subsequent statute unconstitutionally impaired the obligation of the municipality under its contract with the bondholders.¹¹⁵ After declaring the subsequent statute unconstitutional, the Court ruled that the presence of the preexisting statute authorized the city to levy taxes to meet its obligations to the bondholders.¹¹⁶ Thus, the Court held that a writ of mandamus could lie against city officials to compel the tax which prior state law authorized.¹¹⁷

In contrast, the Supreme Court repeatedly has held that when the local government has no authority to tax under state law, the federal courts have no power to compel the local body to tax.¹¹⁸ For example, in *Rees v. City of Water-*

109. See *supra* notes 105-07 and accompanying text.

110. Most of these cases arose out of the issuance of railroad bonds during the late nineteenth century. Local municipalities issued these bonds to provide sufficient capital for the construction of railroads. Problems arose when the municipalities could not raise sufficient revenue to pay the bonds. See Note, *Local Taxes, Federal Courts, and School Desegregation in the Proposition 13 Era*, 78 MICH. L. REV. 587, 593 n.34 (1980).

111. See, e.g., *Louisiana ex rel. Hubert v. Mayor of New Orleans*, 215 U.S. 170, 181 (1909) (holding writ of mandamus lies against county officials to tax in order to satisfy debt obligations because subsequent statute unconstitutionally impairs contract obligations); *Graham v. Folsom*, 200 U.S. 248, 253 (1906) (holding abolition of municipal corporation equivalent to statute which unconstitutionally infringes on contract obligation and therefore granting writ of mandamus to compel county officials to levy tax); *Wolff v. New Orleans*, 103 U.S. 358, 368-69 (1880) (granting a writ of mandamus against the municipality for overdue bonds because local officials had authority to tax); *Von Hoffman v. City of Quincy*, 71 U.S. (4 Wall.) 535, 554-55 (1866) (holding that after the court struck down a state law as an unconstitutional infringement on contract obligations, the preexisting state law authorized the local officials to levy a tax).

112. 71 U.S. (4 Wall.) 535 (1866).

113. *Id.* at 536-37.

114. *Id.* The limitation in question authorized the local city council to levy property taxes up to a certain level, but required voter approval in order to raise it beyond this level. *Id.* at 537. Thus, the limitation in *Von Hoffman* is similar to the one involved in *Jenkins*. See *supra* note 15 and accompanying text.

115. *Von Hoffman*, 71 U.S. (4 Wall.) at 549, 554.

116. *Id.* at 555.

117. *Id.*

118. See, e.g., *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880) (holding that when a state legislature has not granted local authority the power to tax, a court is powerless to compel a tax); *United States v. County of Macon*, 99 U.S. 582, 591 (1878) ("We have no power by mandamus to compel a

town,¹¹⁹ municipal bondholders sued to compel city officials to levy taxes to satisfy the city's debts.¹²⁰ In contrast to *Von Hoffman*, no state statutes authorized the local governmental body to levy taxes to satisfy the municipal bonds in *Rees*.¹²¹ Consequently, the Supreme Court ruled that without the underlying state grant of authority, federal courts were powerless to compel a tax.¹²²

The *Rees* Court reasoned that to compel such a tax would violate two fundamental constitutional principles: separation of powers and federalism.

We are of the opinion that this court has not the power to direct a tax to be levied for the payment of these judgments. 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.¹²³

Thus, the Supreme Court consistently has held that when no authority exists under state law, federal courts have no power to compel local governments to tax, and, in addition, any attempt to do so would violate the constitutional principles of separation of powers and federalism.¹²⁴ In juxtaposition, the Court repeatedly has held that when local authorities possess the power to levy a tax but for the enactment of a statute which unconstitutionally infringes on their contractual obligations, federal courts have the authority to compel them to exercise their preexisting taxing power.¹²⁵

The significance of *Jenkins* lies in part in its attempt to clarify conflicting circuit court rationales for problems of financing desegregation.¹²⁶ By granting

municipal corporation to levy a tax which the law does not authorize. We cannot create new rights or confer new powers. All we can do is bring existing powers into operation."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 661 (1873) (holding that when there is no specific grant of authority by the state to levy a tax, the court has no power to compel the local municipality to impose a tax); *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 116-17 (1873) (holding that the state had not given the local body the authority to tax and thus the district court had no power to compel a tax to satisfy its debt obligations).

119. 86 U.S. (19 Wall.) 107 (1873).

120. *Id.* at 107-08.

121. *Id.* at 116-17.

122. *Id.*

123. *Id.*

124. *See supra* notes 118-23 and accompanying text.

125. *See supra* notes 111-17 and accompanying text.

126. At the time the Supreme Court granted certiorari to hear *Jenkins*, the lower courts had taken three main approaches to financing desegregation. *See generally* Annotation, *Propriety of Federal Court's Ordering State or Local Tax Increase to Effectuate Civil Rights Decree*, 76 A.L.R. FED. 504 (1986) (discussing cases that have ruled on the propriety of a federal court order directly or indirectly imposing taxes on a state or local governing body). These varying approaches reflect the different views the circuits have developed regarding the proper role of the federal courts in state fiscal policies. *See Note, supra* note 101, at 332.

The first method, which was adopted by the Eighth Circuit alone, interpreted the equitable powers of the federal courts as encompassing the authority to impose a direct tax without regard to state law limitations. *Id.* at 336. The Eighth Circuit twice commented in dicta that a federal court's authority includes the power to impose a tax to effectuate desegregation even if in contradiction to state law. *Liddell v. Missouri*, 515 F.2d 1365, 1372-73 (8th Cir.) (although rejecting the district court's direct imposition of a tax, the Eighth Circuit noted that the district court's equitable power

certiorari, the Supreme Court gave itself an opportunity to make a dispositive statement on this equivocal area of the law—the juncture between the expansive equitable powers of the federal courts to formulate desegregation remedies and the restricted federal judicial power to compel taxation in contradiction to state law limitations.¹²⁷

Although the *Jenkins* Court undeniably held that direct imposition of a local tax by a federal district court was unconstitutional, a closer analysis of the majority's distinction reveals that its approval of an indirect method, which operates like a direct judicial tax, implicates the same constitutional problems. The *Jenkins* majority held that, although the district court could not impose the tax directly on KCMUSD, the federal court could enjoin the state laws limiting KCMUSD's power to increase property taxes, and "authoriz[e]" and direct the local body to implement the tax increase.¹²⁸ The Court reasoned that this distinction avoided any of the constitutional problems that might be implicated by a direct federal judicial tax.¹²⁹ The majority held that this distinction was amply supported by Supreme Court precedent.¹³⁰ As Justice Kennedy noted, however, closer analysis of the "long and venerable line of cases"¹³¹ cited by the majority reveals a fundamental flaw in the *Jenkins* Court's attempted distinction and thus its underlying rationale.

The majority interpreted *Griffin v. County School Board*¹³² as establishing a district court's authority to compel local officials to levy a tax to fund a public

included the authority to impose such a tax if all other financial alternatives had been exhausted), *cert. denied*, 469 U.S. 816 (1984); *United States v. Missouri*, 515 F.2d 1365, 1372-73 (8th Cir.) (although rejecting the district court's imposition of a tax, the appellate court stated that the district court did possess this power), *cert. denied*, 423 U.S. 951 (1975). The recent Eighth Circuit holding in *Jenkins v. Missouri*, 855 F.2d 1295, 1314 (8th Cir. 1988), approving a district court's direct imposition of a property tax, is merely the logical culmination of other previous decisions by this appellate court.

The second method, a judicial purgatory, states that although judicial deference should generally be afforded to state and local legislatures, there is some leeway for judicial interference with financing school desegregation. This is the position held by both the Third and Seventh Circuits. See *United States v. Board of School Comm'rs*, 677 F.2d 1185, 1190 (7th Cir.) (affirming district court's order to raise additional funds for desegregation remedy, but emphasizing that it was not within the court's power to order the legislature as to specific revenue alternatives), *cert. denied sub nom. Orr v. Board of School Comm'rs*, 459 U.S. 1086 (1982); *Evans v. Buchanan*, 582 F.2d 750, 777 (3d Cir. 1978) (reversing the district court's order directly imposing a tax, but noting that there could arise a situation in which the balance would permit a judicially imposed tax), *cert. denied sub nom. Delaware State Bd. of Educ. v. Evans*, 446 U.S. 923 (1980).

The third and final approach reflects the view that public school financing is the province of local and state governing bodies and, thus, is outside the purview of the federal judiciary. The Fifth and Sixth Circuits have adopted this restrictive view of federal judicial authority in the area of school taxes. *National City Bank v. Battisti*, 581 F.2d 565, 569 (6th Cir. 1977) (ruling that financing for school desegregation is a power vested in state governmental branches and not the federal judiciary); *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817, 833 (5th Cir. 1969) (holding that a district court has no power to specify the "source, manner and controls" of desegregation financing).

127. See generally Note, *supra* note 110 (discussing the implications of the interaction of state tax limitations and the equitable powers of the courts in effectuating desegregation remedies).

128. *Jenkins*, 110 S. Ct. at 1663.

129. *Id.* at 1665 ("[A] court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court.")

130. *Id.*

131. *Id.* at 1667.

132. 377 U.S. 218 (1964); see *supra* notes 72-80 and accompanying text.

school desegregation remedy. The Court relied heavily on *Griffin* in affirming the appellate court's decree, which directed the district court to order KCMSD to levy the property tax, irrespective of state-law limitations.¹³³ The majority, however, failed to recognize the inherent limitation contained in the exact language that the Court quoted from *Griffin*.¹³⁴ The *Griffin* Court held that a district court may compel local officials "to exercise the power *that is theirs* to levy taxes."¹³⁵ In *Griffin*, the local officials had the express power to levy and collect taxes for the operation of public schools.¹³⁶ As the Court's remarks indicate, this fact was essential to its ruling.¹³⁷ Consequently, under an accurate interpretation of *Griffin*, a federal court has the power to compel a local governing body to tax, but only to the extent authorized under state law.¹³⁸

This principle also is recognized in the "long and venerable line of cases" the majority cited as supporting its ruling.¹³⁹ In *Von Hoffman v. City of Quincy*,¹⁴⁰ for example, the Supreme Court held that the district court had the power to compel the local legislature to levy taxes sufficient to satisfy its debt obligations because existing state law authorized the local officials to levy this tax.¹⁴¹ In *Heine v. Levee Commissioners*,¹⁴² however, the Supreme Court specifically refused to compel the local legislature to levy taxes to pay its bond obligations.¹⁴³ The *Heine* Court based its reasoning on the lack of local authority under existing state law to levy a tax.¹⁴⁴ The juxtaposition of the different results reached in the municipal bond cases,¹⁴⁵ as well as the express language in *Griffin*,¹⁴⁶ illustrate that a local body must have authority under existing state law before federal courts can compel that body to levy a tax.¹⁴⁷

133. See *Jenkins*, 110 S. Ct. at 1665.

134. Cf. Note, *supra* note 110, at 592 (discussing, in the abstract, the problems with applying the holding in *Griffin* to situations involving a state limitation on local taxing authority).

135. *Griffin*, 377 U.S. at 233 (emphasis added).

136. *Id.* at 232; see *supra* note 80.

137. See Comment, Liddell v. Missouri: *Financing the Ancillary Costs of Public School Desegregation Through a Court-Ordered Tax Increase*, 42 WASH. & LEE L. REV. 269, 283 (1985) (noting that the language in *Griffin* presupposes that local officials possessed the power to levy taxes); see also Note, *supra* note 110, at 594 n.38 (explaining that in the "municipal bond" cases, the Court could compel the local government to levy taxes only to the extent authorized by state law, and noting that the language in *Griffin* recognized this inherent limitation).

138. See Note, *supra* note 101, at 340 (stating that the limitation that a local government body must have taxing authority under state law in order for a federal court to compel it to tax, was applied to the desegregation context in *Griffin*); Note, *An Unorthodox Usurpation of Legislative Power in Jenkins v. Missouri*, 21 CREIGHTON L. REV. 1269, 1282 (1988) ("In effect, the Court in *Griffin* limited its taxing power to directing local officials to fulfill a function they were already empowered by state law to perform.").

139. See *supra* notes 110-25 and accompanying text.

140. 71 U.S. (4 Wall.) 535 (1866).

141. *Id.* at 554-55.

142. 86 U.S. (19 Wall.) 655 (1873). *Heine* is another case in which the bondholders of a local municipality sued to compel the local body to tax to satisfy its debts. *Id.* at 657.

143. *Id.* at 661.

144. See *id.* at 658. The court ruled that it was exclusively within the power of the legislature to grant local officials the power to tax. *Id.* at 661.

145. See *supra* note 110.

146. See *supra* notes 135-38 and accompanying text.

147. *City of Cleveland v. United States*, 111 F. 341, 343 (6th Cir. 1901) ("It must, at the outset, be conceded that a mandamus cannot be awarded to compel the mayor and council of the plaintiff in

In *Jenkins*, if KCMSD had been granted the power to levy an unlimited property tax by a specific state statute, then the district court would have had the authority to compel it to exercise that power. The fundamental defect in the majority's rationale results from a failure to recognize that KCMSD had no power under state law to increase the property tax to \$4.05 per \$100 of assessment value without voter approval.¹⁴⁸ It is well established that since a local government is merely a creation of state law, any authority it possesses must emanate from that state's laws.¹⁴⁹ This principle is recognized expressly in article X, section 1 of the Missouri Constitution: "The taxing power may be exercised . . . by counties and other political subdivisions *under power granted to them by the general assembly* for county, municipal and other corporate purposes."¹⁵⁰ Thus, for KCMSD to have authority to levy a tax, the state legislature must have granted it authority under a specific Missouri law.

In *Jenkins*, however, the only state constitutional provision that granted KCMSD authority to levy property taxes simultaneously limited this power to \$1.25 per \$100 of assessment value, unless an increase was approved by the local constituents.¹⁵¹ Under existing state law, KCMSD thus had no authority to raise the property tax beyond the \$1.25 mark without voter approval. Moreover, this is the precise provision that the majority ordered the district court to enjoin.¹⁵² If the district court enjoined this provision, it would withdraw all of KCMSD's authority under existing state law to levy property taxes.¹⁵³

Although the language used by the *Jenkins* Court suggests that its order directed the district court to enjoin the entire state law limiting KCMSD's power to levy a property tax,¹⁵⁴ it could be argued that the majority intended that the district court enjoin only the limitation in the statute. This reasoning is

error to levy any tax which they were not authorized to levy by the law of the state from which they derive their powers."); see Note, *supra* note 101, at 340 ("The Supreme Court consistently held that although federal courts can use the mandamus power to compel local officials to exercise their statutory duties, the courts cannot use it to extend the officials' statutory authority."). Compare cases cited *supra* at note 111 (permitting judicial compulsion of taxation when authority exists under state law) with cases cited *supra* at note 118 (refusing to compel taxation where no specific grant of authority exists under state law).

148. See *infra* notes 149-57 and accompanying text.

149. See *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907) (In a decision concerning the taxing power of the state, the Court noted, as a "settled doctrine[]," that "[t]he number, nature and duration of powers conferred upon these [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the State."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 661 (1873) ("The [taxing] power must be derived from the legislature of the State."); *City of Cleveland*, 111 F. at 343 (holding that there must be a specific grant of authority from the state legislature for a local body to acquire authority to tax); Note, *supra* note 110, at 594 (observing that all powers of local governments must emanate from specific grants of state legislature).

150. MO. CONST. art. X, § 1 (emphasis added).

151. *Jenkins*, 110 S. Ct. at 1656 (citing MO. CONST. art. X, § 11(b), (c)); see *supra* text accompanying note 15.

152. See *Jenkins*, 110 S. Ct. at 1667 (affirming appellate court's holding that district court may enjoin state law which prevents levy of higher property taxes). In order to "authorize" a property tax increase, the court would have to enjoin the state constitutional provision which limited the local body's authority to increase property taxes. See MO. CONST. art. X, § 11(b).

153. See MO. CONST. art. X, § 11(b).

154. *Jenkins*, 110 S. Ct. at 1664 ("[T]he District Court in the future should . . . enjoin the operation of state laws that would limit or reduce the levy below that amount [necessary to fund its portion of the desegregation remedy].").

flawed because the provision inextricably coupled the grant and limitation of the power to tax.¹⁵⁵ It is impossible to enjoin the limitation without also enjoining the specific grant that authorized KCMSD to levy a property tax.¹⁵⁶ Because it is impossible for the district court to enjoin only the statutory limitation, the *Jenkins* Court order also necessarily enjoined the only state statute granting KCMSD the power to levy property taxes. Without any specific grant of authority from the state legislature, KCMSD was left without legal authority to levy a property tax.¹⁵⁷

As previously noted, a federal court possesses no power to compel a legislature to tax unless the local authority has this authority under state law.¹⁵⁸ If KCMSD possesses no power to levy a tax under state law, any authority to impose the tax necessarily must emanate from the federal judiciary. Consequently, the majority's distinction between the court compelling KCMSD to levy the tax and the court imposing the tax directly is merely superficial. Because its distinction is chimerical, the *Jenkins* Court ruling implicates the same constitutional dilemmas that the majority conceded¹⁵⁹ were violated by a direct judicial tax.

The constitutional problems implicated by the majority's ruling involve those principles that the third prong of the *Milliken II* test requires to be balanced against the equal protection rights protected by the fourteenth amendment: separation of powers¹⁶⁰ and federalism.¹⁶¹ The separation of powers

155. See MO. CONST. art. X, § 11(a), (b). Section 11(a) grants political subdivisions the authority to levy taxes "subject to their taxing power." *Id.* § 11(a). Section 11(b) delineates the limits on these local governments' taxing authority. *Id.* § 11(b) ("Any tax imposed upon such property by . . . school districts . . . shall not exceed the following rates: . . . one dollar and twenty-five cents on the hundred dollars of assessed valuation."). Thus, the grant of power in § 11(a) incorporates the inherent limitation in § 11(b).

156. See *id.* § 11(a), (b).

157. See *supra* note 149-50 and accompanying text. The majority attempted to address this issue, but missed the crucial point. See *Jenkins*, 110 S. Ct. at 1666. The Court interpreted the State's argument that there is no authority existing under state law as meaning that the courts have no power to set aside state limitations on local taxing authority. *Id.* The majority relied on *Von Hoffman* to illustrate that the federal courts do have this power, *id.*, but the majority misconstrued the State's contention. The State's argument was not that the courts have no power to enjoin the state limitation, but instead that once the law is enjoined, the local body possesses no power to levy taxes. Brief for Petitioners at 34-38, *Jenkins*, 110 S. Ct. 1651 (1990). Thus, the Court failed to recognize the crucial distinction that in *Von Hoffman*, after striking down a state law as unconstitutional, there remained a preexisting state statute which gave the local authority the power to tax. See *Jenkins*, 110 S. Ct. at 1666. The majority probably misconstrued the State's argument because the Court did not acknowledge that the local government possessed no inherent power to tax without a specific grant of authority from the Missouri General Assembly. See *supra* notes 149-50 and accompanying text.

158. See *supra* notes 132-47 and accompanying text.

159. *Jenkins*, 110 S. Ct. at 1663.

160. See generally THE FEDERALIST No. 47, 48 (J. Madison) (J. Cooke ed. 1961) (discussing separation of powers and its essential function in preventing any one branch of government from dominating the others); Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, in THE COURTS: SEPARATION OF POWERS 39 (B. Goulet ed. 1983) (discussing increasing judicial supervision of governmental bodies through injunctions ordering compliance with constitutional mandates, and the consequent implications for separation of powers); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 706-24 (1978) (advocating the re-adoption of the separation of powers doctrine in analyzing federal judicial orders to state institutions).

doctrine is "the basis . . . of organization" of the Constitution of the United States.¹⁶² Maintaining the separate and distinct nature of the different branches of government was viewed at the time of the constitutional convention as being "of vital importance."¹⁶³ In fact, some of the founding fathers of the Constitution viewed the maintenance of separation of powers as the essential element in achieving liberty.¹⁶⁴

Under the separation of powers principle, "the legislative department alone has access to the pockets of the people."¹⁶⁵ In fact, the Constitution expressly recognizes that the power of taxation is solely within the legislative purview. Article III, section 8 begins the enumeration of legislative powers with this statement: "The Congress shall have the power [t]o lay and collect taxes"¹⁶⁶ Furthermore, the Supreme Court repeatedly has recognized that the power of taxation is exclusively legislative: "The power of taxation is legislative, and cannot be exercised otherwise than under the authority of the legislature."¹⁶⁷

The exclusive allocation of the power to tax to the legislative branch was not accidental.¹⁶⁸ This delegation primarily resulted from the fundamental concept that the power of taxation must be given to the governmental body that is representative of and responsible to the taxing constituency.¹⁶⁹ The Constitution vested the taxing power in the legislative branch because the political accountability of that branch provides taxpayers with an effective and essential protection against excessive taxation or disproportionate distribution among constituents.¹⁷⁰ A related reason for granting legislatures the exclusive power to

161. See generally THE FEDERALIST No. 46 (J. Madison) (J. Cooke ed. 1961) (discussing the importance of federal-state relations in the preservation of the union); Comment, *School Desegregation and Federalism: The Court Inside the Schoolhouse Door*, 5 U. DAYTON L. REV. 77 (1980) (analyzing the effects of desegregation decisions on the principle of federalism).

162. J. STORY, COMMENTARIES ON THE CONSTITUTION 197 (R. Rotunda & J. Nowak eds. 1987).

For a discussion of the applicability of the separation of powers principle to the relationship between the federal judiciary and the branches of state government, see *infra* notes 180-99 and accompanying text.

163. J. STORY, *supra* note 162, at 196.

164. THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961); THE FEDERALIST No. 47, at 324 (J. Madison) (J. Cooke ed. 1961).

165. THE FEDERALIST No. 48, at 334 (J. Madison) (J. Cooke ed. 1961).

166. U.S. CONST. art. I, § 8.

167. *Meriwether v. Garrett*, 102 U.S. 472, 501 (1880); see also *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 116-17 (1873) ("Th[e] power to impose burdens and raise money . . . is exercised . . . by the power of legislative authority only."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 660-61 (1873) ("The power we are here asked to exercise is the very delicate one of taxation. This power belongs in this country to the legislative sovereignty, State or National."); *supra* notes 103-09 and accompanying text (discussing the respective roles of different governmental branches in matters involving taxation and concluding that it is the exclusive province of the legislature).

168. *Jenkins*, 110 S. Ct. at 1672 (Kennedy, J., concurring in part and concurring in the judgment).

169. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) (noting that local control of taxation for education is essential because it offers participation in the decision-making procedure which determines how tax revenues will be spent); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 740 (1978); Note, *supra* note 101, at 341-42; *supra* notes 103-09 and accompanying text.

170. Frug, *supra* note 169, at 739-40; Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 965-66 (1978).

tax involves the superiority of legislative processes in allocating scarce resources among competing claims.¹⁷¹

In juxtaposition, the federal judicial process by its nature is not designed to take into account all these opposing demands and interests and consequently cannot represent adequately all parties affected by a taxation decision.¹⁷² Furthermore, the appointed, life-tenured federal judiciary is by design independent of the political process and thus is in no way representative of or responsive to the constituents to be taxed.¹⁷³ For these reasons, the framers of the Constitution did not intend the power of taxation to be within judicial authority.¹⁷⁴ Any attempt by the federal judiciary to authorize imposition of a tax amounts to a judicial usurpation of the legislative power to tax. Because the federal judiciary is not designed to represent the interests of all concerned constituents adequately in taxation decisions,¹⁷⁵ a federal judicial tax amounts to nothing less than taxation without representation.¹⁷⁶

In *Jenkins*, any power to impose a tax increase necessarily must have come from the federal judiciary because KCMSSD lacked authority under existing state law.¹⁷⁷ The *Jenkins* Court's affirmance of the order compelling KCMSSD to levy a tax not authorized under state law is equivalent to a direct imposition of a property tax by the federal judiciary.¹⁷⁸ The *Jenkins* Court ruling therefore violates the fundamental principles underlying the separation of powers principle and constitutes a federal judicial usurpation of state legislative power.¹⁷⁹

Although the separation of powers doctrine implicit in the structure of the Constitution involves the different branches of the federal government, the Supreme Court has held that the policies underlying this doctrine also apply to the relationship between state and federal branches of government in matters involving taxation.¹⁸⁰ In the municipal bond cases, the Court acknowledged

171. See Frug, *supra* note 169, at 740; Mishkin, *supra* note 170, at 965.

172. See Mishkin, *supra* note 170, at 965; Note, *supra* note 101, at 342.

173. See Frug, *supra* note 169, at 742 ("This shift of power [of raising and allocating revenue] away from elected officials to individuals appointed for life weakens the democratic accountability of government."); Mishkin, *supra* note 170, at 965-66 (stating that federal judges are not under pressures of reelection and are by design insulated from such "political pressures"); Note, *supra* note 101, at 342 ("[T]he judiciary is not subject to the political accountability that is commonly held to justify the legislature's ability to levy taxes."); see also THE FEDERALIST No. 78, at 522 (A. Hamilton) (J. Cooke ed. 1961) (discussing the rationale behind the appointment and tenure of the federal judiciary).

174. THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961) ("The judiciary on the contrary has no influence over either the sword or the purse . . . and can take no active resolution whatever."); see also U.S. CONST. art. III (nowhere mentioning the power to tax among the judiciary's enumerated powers).

175. See *supra* notes 172-74 and accompanying text.

176. See Mishkin, *supra* note 170, at 970-71; Comment, *supra* note 137, at 294; Note, *supra* note 101, at 342.

177. See *supra* notes 148-59 and accompanying text.

178. See *supra* notes 158-59 and accompanying text.

179. See *supra* notes 169-76 and accompanying text.

180. See, e.g., cases cited *supra* at note 118. The separation of powers principle implicit in the structure of the Constitution relates to the interaction between the different branches of the federal government. This is referred to as the "horizontal" application of separation of powers. The "vertical" application of separation of powers refers to the relationship between the federal government and different branches of state government. Nagel, *supra* note 160, at 664-65.

that taxation is an exclusively legislative function.¹⁸¹ Repeatedly, the Court has held that a federal court has no authority to infringe on a state's exercise of its taxing power.¹⁸² In these cases, the Court recognized that the policies underlying the exclusive allocation of the power to tax to the legislative branch are equally applicable when analyzing the relationship between the federal judiciary and the different branches of state government.

In a more recent plurality decision¹⁸³ outside the taxation context, however, Justice Brennan stated in sweepingly broad terms that "the separation-of-powers principle . . . has no applicability to the federal judiciary's relationship to the States."¹⁸⁴ Justice Brennan cited no authority for his blanket rejection of this important constitutional protection in *Elrod v. Burns*,¹⁸⁵ but presumably based his plurality opinion on a previous apportionment decision, *Baker v. Carr*.¹⁸⁶ In *Baker*, the Court stated that the separation of powers concept is not involved in the relationship between the federal judiciary and the states in political question cases.¹⁸⁷ The *Elrod* plurality dramatically expanded this limited statement beyond the context of *Baker* to preclude all "vertical"¹⁸⁸ applications of separation of powers.¹⁸⁹

181. See *supra* note 167 (citing cases).

182. See, e.g., *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 116-17 (1873) ("[Taxation] 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."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 661 (1873) ("It is not only not one of the inherent 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 government."); see also Nagel, *supra* note 160, at 675 (noting cases in which Court has refused to allow judicial usurpation of taxing power).

183. *Elrod v. Burns*, 427 U.S. 347 (1976). Justice Brennan wrote the decision for the Court, in which only Justices White and Marshall joined. Justice Stewart filed an opinion concurring in the judgment, in which Justice Blackmun joined. *Id.* at 374 (Stewart, J., concurring). Justice Powell filed a dissenting opinion in which Chief Justice Burger and Justice Rehnquist joined. *Id.* at 376 (Powell, J., dissenting). The Chief Justice also filed a separate dissenting opinion. *Id.* at 375 (Burger, C.J., dissenting). Justice Stevens took no part in the decision. *Id.* at 374. As the composition of the Court indicates, the precedential value of this decision is questionable at best and may be limited to its specific facts.

184. *Id.* at 352. In *Elrod* several Republican noncivil service employees of Cook County, Illinois, sued various incumbent Democratic county officials claiming that they had been fired based solely on their political affiliation, in violation of their first and fourteenth amendment rights. *Id.* at 349-50. The Court held that it could review the case because neither the political question doctrine nor the separation of powers principle applied to federal-state relations. *Id.* at 351-52. The Court subsequently affirmed the court of appeals' issuance of a preliminary injunction against the county officials prohibiting them from firing the petitioners. *Id.* at 373-74.

185. *Id.* at 352.

186. 369 U.S. 186 (1962). The *Elrod* Court cited *Baker* in the section immediately preceding its rejection of the applicability of separation of powers to support its holding on the political question issue in the case. *Elrod*, 427 U.S. at 351; see also Nagel, *supra* note 160, at 665-66 (stating that the *Elrod* plurality relied on *Baker*). In *Baker*, qualified voters of the state of Tennessee filed suit alleging that the state apportionment scheme debased their votes by dissolution, denying them the equal protection of the laws under the fourteenth amendment. *Baker*, 369 U.S. at 187-88. The Court held that in political question cases the relationship between coordinate branches of the federal government and not the federal judiciary's relationship with the states is primarily involved. *Id.* at 210. Because this distinction allowed the federal judiciary to hear a claim of state political apportionment, the Court ruled that the petitioners were entitled to a trial and decision. *Id.* at 236-37.

187. *Id.* at 210.

188. See *supra* note 180.

189. See *Elrod*, 427 U.S. at 352; see also Nagel, *supra* note 160, at 665-66 (noting that the *Elrod*

In so doing, however, the *Elrod* plurality contradicted past precedent outside the limited context in which the *Baker* Court acted. As mentioned previously, the municipal bond cases employed a separation of powers rationale in refusing to direct federal courts to intervene in matters involving local taxation.¹⁹⁰ The *Elrod* plurality's holding ignored that, in the municipal bond cases, the equitable powers of the federal courts were limited by a vertical application of separation of powers.¹⁹¹ The *Elrod* Court also ignored the history of the tenth amendment, which suggests that it was adopted in part to preclude the federal government from violating the principle of separation of powers with regard to state branches of government.¹⁹²

Regardless of whether one accepts the *Elrod* plurality's sweeping and inconsistent rejection of the vertical application of separation of powers, the policies underlying the separation of powers principle¹⁹³ caution against a federal court's direct involvement in matters of local taxation. In response to the *Elrod* Court's holding, judges and commentators repeatedly have recharacterized infractions of these underlying policies as other constitutional violations in order to incorporate them into an analysis of the federal courts' relationship with local legislatures.¹⁹⁴ As these judicial scholars and judges have noted, a fundamental concept in the founding of the country was that no governmental branch should be allowed to tax constituents unless they are represented, in the sense of having political participation in the decision.¹⁹⁵ The federal judicial process, these scholars have stated, cannot afford the political participation required by this fundamental constitutional principle.¹⁹⁶ Furthermore, this structural inadequacy remains, irrespective of whether a federal court is infringing on the federal

Court ruling was an "extreme conclusion" considering the limited holding of *Baker* upon which it was based).

190. See *supra* notes 180-82 and accompanying text; see also Nagel, *supra* note 160, at 674-75 & n.86 (discussing the use of separation of powers analysis in the municipal bond cases).

191. See Nagel, *supra* note 160, at 674.

192. See *id.* at 668-74. Professor Nagel gives a comprehensive history of the adoption of the tenth amendment. He details the language in the original proposals of the amendment, which expressly prohibited separation of powers violations by the federal government to the detriment of the states. *Id.* at 669. Professor Nagel asserts that the failure to include this express language in the final version reflected an assumption that it was unnecessary and superfluous. *Id.* This assumption, he states, was based on the fact that this fundamental principle is not stated explicitly in the Constitution itself, but is implied through its structure. *Id.* at 670.

193. See *supra* notes 168-76 and accompanying text.

194. See, e.g., *Jenkins*, 110 S. Ct. at 1671-73 (Kennedy, J., concurring in part and concurring in the judgment) (portraying (1) the local constituents' lack of representation in either a court or legislature as a denial of due process, and (2) the imposition of a tax by the politically independent federal judiciary as a violation of the principle of federalism); Frug, *supra* note 169, at 734-43 (characterizing the allocation of state governmental funds by the federal judiciary as a violation of the "democratic process" inherent in constitutional structure); Mishkin, *supra* note 170, at 962, 970-71 (asserting that a federal judicial tax on a state or local legislature violates the "democratic structure of our government" and amounts to "taxation without representation"); see also Nagel, *supra* note 160, at 679 n.104 (asserting that the Supreme Court's ruling in *Elrod* is inconsistent and advocating the adoption of the separation of powers principle in analyzing federal courts' equitable remedies); Note, *supra* note 101, at 341-42 (ignoring the *Elrod* holding and asserting that a federal judicial tax violates the separation of powers).

195. See *Jenkins*, 110 S. Ct. at 1671 (Kennedy, J., concurring in part and concurring in the judgment); Mishkin, *supra* note 170, at 971; Note, *supra* note 101, at 342.

196. See Mishkin, *supra* note 170, at 971; Note, *supra* note 101, at 342.

or on state or local legislatures.¹⁹⁷ Whether it is characterized as a violation of separation of powers or as some other constitution infraction, the concerns of lack of representation and accountability apply with equal, if not greater, force when a federal judge orders a local legislature to impose a tax as it would if she were to impose the same requirement on Congress.¹⁹⁸ Thus, the *Jenkins* Court's ruling directing the district court to order KCMSD to impose a property tax increase on local constituents implicates the policies underlying the separation of powers doctrine.¹⁹⁹

Besides violating the underlying policies of the separation of powers principle, the *Jenkins* Court holding raises another constitutional concern—federalism. The tenth amendment to the Constitution provides that “the Powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”²⁰⁰ Under this doctrine, the power of financing for education traditionally has been reserved to the states.²⁰¹ Thus, at first glance, it appears that an attempt by the federal judiciary to intrude into financing for education violates the tenth amendment.

As the majority notes, however, the Court previously held in *Milliken II* that, “[t]he Tenth Amendment’s reservation of non-delegated 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.”²⁰² What the *Jenkins* Court failed to acknowledge, though, is that an inherent limitation restricts this judicial power. The *Milliken II* Court stated, in the very same paragraph from which the *Jenkins* Court quoted, that the district court did not violate the principle of federalism because it did not “attempt[] to restructure local governmental entities [or] mandate a particular method or structure of state or local financing.”²⁰³ Although recognizing the federal courts’ authority to enforce the fourteenth amendment’s express prohibitions, the *Milliken II* Court implied that an order mandating a particular method of local financing would violate the principle of federalism.²⁰⁴

The limitation in *Milliken II* simply recognizes the principle that the power to levy local taxes²⁰⁵ and fund public school systems²⁰⁶ traditionally has been

197. See *Jenkins*, 110 S. Ct. at 1672 (Kennedy, J., concurring in part and concurring in the judgment); Mishkin, *supra* note 170, at 971.

198. See Frug, *supra* note 169, at 743-49; Mishkin, *supra* note 170, at 970-71; Nagel, *supra* note 160, at 677-78. But see Comment, *supra* note 161, at 100-01.

199. See *supra* notes 177-79 and accompanying text.

200. U.S. CONST. amend. X.

201. See *infra* note 207 and accompanying text.

202. *Jenkins*, 110 S. Ct. at 1665 (quoting *Milliken v. Bradley*, 433 U.S. 267, 291 (1977)). This holding presumably is based on the rationale that the tenth amendment’s reservation of powers must be read in light of the subsequent enactment of the fourteenth amendment’s restrictions on state powers. See *id.*

203. *Milliken v. Bradley*, 433 U.S. 267, 291 (1977).

204. See *id.*

205. See, e.g., *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526 (1959) (“[T]he states have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests.”); *Madden v. Kentucky*, 309 U.S. 83, 88 (1940) (“[T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a [state] legislature in formulating sound tax policies.”); *Carmichael v. Southern Coal & Coke*

reserved to state and local legislatures.²⁰⁷ The rationale behind this reservation of power is that the legislatures are better equipped to handle such discretionary tasks than either the federal government or other branches of state government.²⁰⁸ The Supreme Court has held that a judicial intrusion into taxation schemes for education could dramatically and significantly alter federal-state relations.²⁰⁹ In *San Antonio Independent School District v. Rodriguez*,²¹⁰ the Court declined to strike down Texas's local taxing schemes for public education as a violation of the equal protection clause of the fourteenth amendment.²¹¹ This deferential treatment of state legislative authority in matters involving taxation for public education was the foundation for the limitation recognized in *Milliken II*.²¹²

In *Jenkins*, the Court approved an order directing the local school board to increase the property tax in order to fund the desegregation remedy,²¹³ such an order, however, certainly mandates a particular method of local financing.²¹⁴ According to the limitation on the power of the federal courts recognized in *Milliken II*, the *Jenkins* Court order violates the principle of federalism embodied in the tenth amendment.²¹⁵

Although the *Jenkins* Court order violates two fundamental constitutional principles,²¹⁶ it raises an even more serious concern. As the Supreme Court has

Co., 301 U.S. 495, 508 (1937) (The Court noted that the power of "taxation . . . was an attribute of the sovereign power of the states at the time of the adoption of the Constitution, and . . . was reserved to them by that instrument.").

206. See, e.g., *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("[L]ocal autonomy of school districts is a vital national tradition."); *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974) (stating that local control over education is a deeply rooted American tradition).

207. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973) (stressing the importance of local governmental control over decisions affecting taxation for educational purposes). For a discussion of *Rodriguez*, see *infra* note 211.

208. See *Rodriguez*, 411 U.S. at 42 ("In addition to matters of fiscal policy, this case involves the most persistent and difficult questions of educational policy, another area in which the Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."); cf. *Jenkins*, 110 S. Ct. at 1672-73 (Kennedy, J., concurring in part and concurring in the judgment) (describing the practical problems associated with a judicially administered tax and implying that only legislatures are able to gain the detailed information about the local community essential to administer such a tax).

209. *Rodriguez*, 411 U.S. at 44.

210. 411 U.S. 1 (1973).

211. *Id.* at 55. In *Rodriguez*, the parents of minority schoolchildren filed suit against seven school districts in San Antonio, Texas, alleging that the state's school financing system violated the equal protection clause of the fourteenth amendment. *Id.* at 4-5 & nn.2 & 6. The petitioners claimed that the State's system, based on local property taxes, resulted in gross disparities of expenditures between the richest and poorest districts. *Id.* at 11-16. The Court held that the principle of federalism prevented it from subjecting the state tax scheme to strict judicial scrutiny; consequently, the Court refused to strike down the state law because it was not irrational or invidiously discriminatory. *Id.* at 44, 55.

212. *Milliken v. Bradley*, 433 U.S. 267, 291 (1977) (citing *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973)).

213. *Jenkins*, 110 S. Ct. at 1663.

214. *Id.* at 1672 (Kennedy, J., concurring in part and concurring in the judgment).

215. See Note, *supra* note 101, at 341. But see Comment, *Eliminating Vestiges of School Segregation: Judiciary Empowered to Remedy Equal Protection Violation by Levying Unauthorized Taxes* [*Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988)], 28 WASHBURN L.J. 310, 325-26 (1988) (stating that principles of federal-state relations will not be violated under *Jenkins* appellate court decision).

216. See *supra* notes 160-215 and accompanying text.

noted, a "desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right."²¹⁷ Thus, the significance of *Jenkins* also lies in its potential application to other cases involving funding for constitutional violations where the equitable powers of the court also play a significant role, such as public housing,²¹⁸ prisons,²¹⁹ state apportionment schemes,²²⁰ and state mental health systems,²²¹ among others.²²² In an era when insufficient local funding is an increasingly acute problem and institutional suits involving the equitable powers of the federal courts are proliferating,²²³ the extension of the *Jenkins* holding could seriously undermine the constitutional safeguards against unbridled taxation. For example, it is conceivable that a federal court could impose several tax increases on a particular state or locality to remedy different constitutional violations. The aggregation of several of these separate tax increases within one state might result in a tax burden on constituents that is excessive, unreasonable, and inequitable. Because the litigation process does not afford taxpayers representation in any of these suits, a federal judge might not be aware of competing claims for limited state funds and might unwittingly impose such an unreasonable burden. Alternatively, a federal court could compel a particularly poor state to finance various constitutional remedies, amounting in the aggregate to a significant portion of that state's budget.²²⁴ In effect, the federal court would be usurping the state legislature's traditional discretion in allocating scarce resources among

217. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15-16 (1971).

218. *See, e.g., Spallone v. United States*, 110 S. Ct. 625 (1990) (applying basic equity limitations in holding that district court abused its discretion in fining local officials for not voting for a housing discrimination remedy without first employing other, less intrusive alternatives); *Hills v. Gautreaux*, 425 U.S. 284, 294 (1976) (holding that principles announced in desegregation cases are basic limitations on the equity powers of the federal courts and therefore apply to a public housing case).

219. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 687 n.9 (1978) (applying the equitable principles announced in desegregation cases to a case involving unconstitutional prison conditions); *Inmates of Occogan v. Barry*, 844 F.2d 828, 841 (D.C. Cir. 1988) ("[Limitations on the equitable powers of the federal courts], expounded in the main in school desegregation cases, are fully applicable in cases in which prison conditions are found to constitute cruel and unusual punishment."); *Rhem v. Malcolm*, 507 F.2d 333, 340 (2d Cir. 1974) (finding prison conditions unconstitutional but holding under the circumstances that it is better to close prison than infringe upon legislative power of raising sufficient funds).

220. *See, e.g., Whitcomb v. Chavis*, 403 U.S. 124, 160-61 (1971) (court erred in "brushing aside state apportionment policy" in light of limitations); *Reynolds v. Sims*, 377 U.S. 533, 586-87 (1964) (court acted properly in reapportioning under principles of equity); *Baker v. Carr*, 369 U.S. 186, 226 (1962) (equal protection clause provides standards for evaluation of state action absent any policy). For a discussion of *Baker*, see *supra* notes 186-87 and accompanying text.

221. *See, e.g., Wyatt v. Stickney*, 344 F. Supp. 373, 377-78 (M.D. Ala. 1972) (reserving judgment on method of raising funds until attempts made by local authorities to implement alternatives), *aff'd in part, rev'd in part sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).

222. *See Jenkins*, 110 S. Ct. at 1678 (Kennedy, J., concurring in part and concurring in the judgment).

223. *See Mishkin, supra* note 170, at 972-73; *cf. Frug, supra* note 169, at 732-33 (discussing the deplorable condition of many prisons and mental hospitals and the failure of the political branches of both the state and federal governments to remedy these conditions, and noting that this has prompted increasing intervention by federal courts into such areas).

224. *Cf. Frug, supra* note 169, at 715-16 (noting that in one case, the amount necessary to achieve full compliance with a constitutionally mandated remedy would have equalled sixty percent of the state budget).

countervailing claims.²²⁵

The *Jenkins* holding opens a subtle crack in important constitutional structures, a crack which the federal courts may be frequently called upon to widen in order to remedy other constitutional violations. As Justice Kennedy noted, "This assertion of judicial power in one of the most sensitive of policy areas, that involving taxation, begins a process that over time could threaten fundamental alteration of the form of government our Constitution embodies."²²⁶ By applying the ruling in *Jenkins* to various other contexts, the federal courts could subtly yet vitally undermine two of the essential constitutional safeguards against unrestrained taxation—the principles of separation of powers and federalism. As a consequence, the federal courts could permanently alter the relationship between the federal government and the different branches of state government.

The significance of the *Jenkins* Court holding is that, the majority's distinction aside, it marks the first time the Supreme Court has permitted the federal judiciary to impose a tax on local constituents in contradiction of state law.²²⁷ Furthermore, permitting a federal court to authorize a local governmental body to impose a property tax unsupported by existing state law violates the fundamental constitutional principles of separation of powers and federalism.²²⁸ Finally, because the courts are called upon increasingly to address the problem of local funding insufficient to support many similar types of constitutional violations, the holding in *Jenkins* could have pernicious constitutional ramifications on the relationship between different branches of government of the federal and state sovereignties.²²⁹

There is, however, an alternate solution to the dilemma raised in *Jenkins* that avoids the constitutional infractions and possible ramifications of the solution offered by the majority.²³⁰ The imposition of joint and several liability was advocated by the State²³¹ but cursorily dismissed by the majority.²³² Joint and

225. See *id.* at 716.

226. *Jenkins*, 110 S. Ct. at 1678-79 (Kennedy, J., concurring in part and concurring in the judgment).

227. See *supra* notes 128-59 and accompanying text.

228. See *supra* notes 160-215 and accompanying text.

229. See *supra* notes 217-26 and accompanying text.

230. For an overview of alternate remedies to community resistance in the school desegregation context, see generally Gerwitz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) (expansive evaluation of remedies employed against community resistance to school desegregation).

There is another potential remedy the Court could have adopted. The Court could have directed the district court to order KCMUSD to meet its share of the remedy costs while forbidding the lower court to get involved in any specific financing determinations. In *Jenkins*, however, this solution is entirely unacceptable. It would leave the district court between the Scylla of failing to meet a federal court's constitutionally mandated decree and the Charybdis of imposing a property tax increase in violation of state law.

231. Actually, joint and several liability already had been imposed on the State and KCMUSD, at least in name. See *Jenkins*, 110 S. Ct. at 1657 (App. to Pet. for Cert. 113a (1987)). The court, however, had chosen to proceed with alternatives to fund KCMUSD's portion of the costs, so the State really was arguing to have KCMUSD's unsatisfied portion of the award fall on itself. Transcript of Oral Argument at 14, *Jenkins v. Missouri*, 110 S. Ct. 1651 (1990). This is a curious aspect of the case, because with the imposition of joint and several liability, the State logically would have been required to pay any portion KCMUSD could not meet. In other words, the State was arguing for the "proper" imposition of joint and several liability.

It is odd, yet informative, that the State would argue to bear a greater portion of the damages

several liability in cases involving state and local governmental bodies would require the state to fund any portion of the remedy the local body was unable to raise. For example, in *Jenkins*, because the local government was unable to raise sufficient funds due to state law limitations, the state would have been responsible for KCMUSD's unmet portion of the financing. This solution would allow the state to choose whether to repeal the statutory limitation or fund the entire program itself. In other words, it would require the state to raise the funds necessary for desegregation but would leave the decision whether to raise taxes or cut spending to the politically accountable branch.²³³

This solution does not violate the principle of federalism because it preserves local and state autonomy by allowing state officials to specify the particular method of raising funds.²³⁴ Furthermore, it does not violate the separation of powers principle because the power of the federal courts to impose joint and several liability is well established.²³⁵ This solution also offers additional enforcement advantages, because if the state desists in raising the necessary funds, the court may prevent the state from receiving essential federal funds.²³⁶

Although it is both incomprehensible and deplorable that the process of desegregation is a continuing, recalcitrant problem more than thirty-five years after the Supreme Court's landmark decision in *Brown I*, this lamentable state of affairs cannot justify the judicial imposition of a tax. The *Jenkins* Court order permitting judicial taxation violates the fundamental principles of separation of powers and federalism, and in addition, establishes a precedent that may be applied to various other contexts involving the equitable powers of the court. In attempting to achieve the irreproachable goal of expediting the desegregation process, the majority in *Jenkins* loses sight of other fundamental constitutional principles.

Although judicial taxation might be defensible if it were the only method available to secure funding for constitutionally mandated desegregation remedies,²³⁷ it should never be upheld when other remedies are available. In light of this principle, the *Jenkins* Court's judicial usurpation of power is particularly

than was apportioned to it originally. The most logical explanation is that the State preferred to bear all of the burden of the desegregation plan, rather than to have the federal judiciary prescribe a specific method of funding in violation of a power the State perceived to be exclusively within its province.

232. *Jenkins*, 110 S. Ct. at 1664-65. The Court reasoned that it was within the district court's power and not an abuse of discretion to apportion the costs between the State and KCMUSD. *Id.* The Court noted that the district court's actions were especially justified by the appellate court's previous order to apportion the costs. *Id.*; see *supra* notes 39-40 and accompanying text.

233. Note, *supra* note 101, at 343.

234. *Id.*

235. See, e.g., *United States v. Monsanto Co.*, 858 F.2d 160, 171-72 (4th Cir. 1988), *cert. denied*, 109 S. Ct. 3156 (1989); *Faison v. Nationwide Mortgage Co.*, 839 F.2d 680, 685 (D.C. Cir. 1987), *cert. denied sub nom. Boddie v. Faison*, 488 U.S. 823 (1988); see also Note, *supra* note 101, at 343-45 (discussing joint and several liability as an alternative to judicial taxation).

236. Note, *supra* note 101, at 344 (asserting that it would be possible to employ a sequestration on all federal funds due to a state until that state complied with the federal court order).

237. *But see Meriwether v. Garrett*, 102 U.S. 472, 518 (1880) (Field, J., concurring) (stating that regardless of the urgency of the appeal of the petitioners and the hopelessness of their situation, there is no authority for the federal courts to usurp the power of the state legislature).

unwarranted because the Court was presented with an alternate solution that avoided any constitutional infractions. The imposition of joint and several liability on the State and KCMSD would have comported with the principles of federalism and separation of powers and would have avoided establishing a potentially pernicious precedent. In addition, this solution would have provided a more effective enforcement mechanism, which could have increased considerably the likelihood of State compliance by withholding essential federal funds. Presented with an effective, constitutionally prudent alternative, the *Jenkins* Court's imposition of an indirect judicial tax is unjustifiable.

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