CONSTITUTIONAL LAW—STATES' RIGHTS—MINIMALLY OBTRUSIVE MEANS REQUIRED IN IMPOSING DESEGREGATION REMEDY UPON LOCAL SCHOOL DISTRICT—*Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

Principles of comity[1] require a federal district court to respect the integrity and function of a local governing institution.[2] On occasion, the United States Supreme Court has invoked the principle of comity in limiting a district court's power to craft remedial orders.[3] Specifically, the Court has utilized principles of comity in the area of school desegregation where the district courts have flexible remedial powers.[4] In this regard, the Court has sought to prevent the district courts from judicially overreaching into local affairs.[5]

Recently, in *Missouri v. Jenkins*,[6] the Court confronted the issue of whether a federal district court has the power to impose a tax increase upon a local school district as part of a desegrega-

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[1] Comity is defined as a courtesy. BLACK'S LAW DICTIONARY 242 (5th ed. 1979). "In general [the] principle of 'comity' is that courts of one state or jurisdiction will give effect to laws and judicial decisions of another state or jurisdiction, not as a matter of obligation but out of deference and mutual respect." *Id.*

[2] *See* Jenkins v. Missouri, 855 F.2d 1295, 1314 (8th Cir. 1988) (holding that principles of federal/state comity require district courts to use "minimally obtrusive methods" in imposing judicial remedies); Brown v. Babbitt Ford, Inc., 117 Ariz. 192, 198, 571 P.2d 689, 695 (1977) ("principle of 'comity' is that the courts of one state or jurisdiction will give effect to the laws and judicial decisions of another state or jurisdiction, not as a matter of obligation, but out of deference and mutual respect"); Nowell v. Nowell, 408 S.W.2d 550, 553 (Tex. Ct. App. 1966) (interpreting comity as a recognition granted between sovereignties for legislative, executive, or judicial acts).

[3] *See, e.g.*, Columbus Bd. of Educ. v. Penick, 443 U.S. 449 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976); Keyes v. School Dist. No.1, 413 U.S. 189 (1973); Green v. County School Bd., 391 U.S. 430 (1968); Louisiana v. United States, 380 U.S. 145 (1965); Goss v. Board of Educ., 373 U.S. 683 (1963).

[4] *See* Milliken v. Bradley (*Milliken II*), 433 U.S. 267 (1977); Milliken v. Bradley (*Milliken I*), 418 U.S. 717 (1974); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Griffin v. County School Bd., 377 U.S. 218 (1964); Brown v. Board of Educ. (*Brown II*), 349 U.S. 294 (1955).

[5] *See Swann*, 402 U.S. at 1, *infra* notes 36-45 and accompanying text. *See also Milliken II*, 433 U.S. at 279 (suggesting that the Court has never addressed the issue of whether federal courts can order remedial education programs as part of a school desegregation remedy); L. GRAGLIA, DISASTER BY DECREE 258, 283 (1976) (criticizing the *Brown II* decision for failing to clarify the techniques to be used by a district court in future desegregation programs); Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585 (1983) [hereinafter Gewirtz, *Remedies*] (discussing problems courts face when attempting to fashion judicial remedies for racial segregation in the schools).

[6] 110 S. Ct. 1651 (1990).

tion remedy.[7] Specifically, the Court considered whether a district court abused its discretion by ordering a property tax increase on a local school district in order to ensure funding for a desegregation order.[8] The *Jenkins* Court held that the district court, by imposing such a tax increase rather than directing and authorizing local government institutions to devise and implement their own remedies, contravened principles of federal and state comity.[9]

In 1977, students from the Kansas City, Missouri School District (KCMSD) filed a complaint in the United States District Court for the Western District of Missouri alleging that the State of Missouri, along with various other school districts in Kansas City, maintained racially segregated public schools.[10] The district court determined that the State of Missouri and the KCMSD operated a racially segregated public school system in violation of the students' rights under the equal protection clause of the fourteenth amendment.[11]

Subsequently, the State of Missouri and the KCMSD pro-

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[7] *Id.* at 1655.

[8] *Id.* at 1662-63.

[9] *Id.* at 1663. In so holding, the Court declined to address more complex constitutional issues regarding the scope of a district court's authority. *Id.* at 1662-63.

[10] *Id.* The original complaint alleged that state action had led to interdistrict segregation. *Id.* at 1656 n.2. Subsequently, upon the KCMSD's realignment by the district court as a party defendant, students filed an amended complaint further alleging intradistrict segregation. *Id. See* School Dist. v. Missouri, 460 F. Supp. 421, 442 (W.D. Mo. 1978). The KCMSD then cross-claimed against the state, requesting indemnification for possible liability that may arise out of the KCMSD's maintenance of a segregated school district. *Jenkins*, 110 S. Ct. at 1655-56. The complaint was comprised of three general allegations, "describ[ing] the metropolitan region, the constitutional violation and resulting injury, and a description of the remedy sought." *School Dist.*, 460 F. Supp. at 427. Specifically, the plaintiffs contended that the state failed to remedy racially discriminatory policies in the KCMSD and as a result, public school segregation in the district persisted. *Id.* at 428. The plaintiffs further asserted that the district's discriminatory practices worsened due to migratory movements of middle class students away from the KCMSD, known as "white flight." *Id. See also* Gewirtz, *Remedies*, *supra* note 3, at 628-43 (describing effects of white flight on racially segregated school district). Lastly, the plaintiffs claimed that as a result of the segregation, operating expenses increased while tax bases decreased. *School Dist.*, 460 F. Supp. at 428. The plaintiffs sought a judicial order re-assigning students throughout all school districts on racially balanced criteria. *Id.* The district court dismissed the complaints filed against several other suburban school districts, determining that there was insufficient evidence of interdistrict segregation. Jenkins v. Missouri, 593 F. Supp. 1485, 1488 (W.D. Mo. 1984).

[11] *Jenkins*, 593 F. Supp. at 1505. In accordance with its findings, the district court ordered the KCMSD Board of Education and the State Board of Education to prepare desegregation plans. *Id.* at 1505-06.

posed an expansive desegregation plan in order to racially integrate Kansas City's various school districts.[12] The district court ordered that the costs of the desegregation plan be paid by both the State of Missouri and the KCMSD.[13] Missouri state law, however, prohibited the KCMSD from raising its tax levies in order to finance its share of the plan.[14] After the KCMSD failed to raise sufficient funds through alternative methods,[15] the district

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[12] Jenkins v. Missouri, 639 F. Supp. 19, 22-23 (W.D. Mo. 1985). The final desegregation program proposed, in part, the following: improvement of student achievement; reduction in class sizes; implementation of summer school programs; early childhood development programs; magnet school programs; staff development programs; and mandatory student reassignment. *Id.* at 26-41. Moreover, the district court directed the KCMSD to prepare a study to determine which type of magnet school system would attract the largest number of non-minorities. *Id.* at 34-35. *See* Price & Stern, *Magnet Schools As A Strategy For Integration and School Reform*, 5 YALE L. & POL'Y REV. 291 (1987).

[13] *Jenkins*, 639 F. Supp. at 43-44. The district court opined that the State of Missouri had the "primary responsibility for insuring that the public education systems in the State comport with the United States Constitution." *Id.* at 43 (quoting *Jenkins*, 593 F. Supp. at 1506). Therefore, the court ordered Missouri to pay approximately 75% of the estimated costs. *Id.* at 43-44. Specifically, the district court opined:

> Since the minority students in the KCMSD are the victims of racial discrimination which was mandated by the Constitution and Statutes of the State of Missouri, it is only equitable to place the greatest burden of removing the vestiges of such discrimination and the continuing effects of same on the state rather than on those who are the victims.

Id. at 23-24. The court of appeals, however, disagreed with the district court's allocation of costs, and remanded the case with the order to divide the costs equally between the state and the KCMSD. *See* Jenkins v. Missouri, 807 F.2d 657, 685 (8th Cir. 1986) (en banc), *cert. denied*, 484 U.S. 816 (1987). On remand, however, the district court found it " 'clearly inequitable' to require the population of KCMSD to pay half of the desegregation cost, and that 'even with court's help it would be very difficult for the KCMSD to fund more than 25% of the cost of the entire remedial plan.' " *Jenkins*, 110 S. Ct. at 1657.

[14] Section 11(b) of the Missouri Constitution states in pertinent part:

> Any tax imposed upon such property by municipalities, counties or school districts, for their respective purposes, shall not exceed the following annual rates:
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> . . . .
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> For school districts formed of cities and towns . . . one dollar and twenty-five cents on the hundred dollars assessed valuation; For all other school districts—sixty-five cents on the hundred dollars assessed valuation.

MO. CONST. art. X, § 11(b). In addition, section 11(c) of the Missouri Constitution provides in part that, "in all . . . school districts the rates of taxation as herein limited may be increased . . . when the rate and purpose of the increase are submitted to a vote and two-thirds of the qualified electors voting thereon shall vote therefor . . . ." *Id.* at § 11(c).

[15] *See* Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987). Initially, the district court opted against imposing a direct tax increase upon the KCMSD, in-

court disregarded Missouri state law, and ordered a direct increase in property tax levies within the district.[16] Affirming in part, the United States Court of Appeals for the Eighth Circuit maintained that a district court has the authority to order state and local officials to levy taxes.[17] The Eighth Circuit, however, recognized that principles of federal and state comity require that minimally obtrusive means be utilized to remedy a constitutional violation.[18] Thus, the Eighth Circuit held that in the future, rather than setting the property tax rate itself, the district court should authorize and direct the local school board to set its own tax levies in order to adequately fund its share of the desegregation remedy.[19]

The United States Supreme Court granted the state's peti-

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stead enjoining the effect of Missouri's tax rollback laws in order to raise $4,000,000 for the fiscal year. *Jenkins*, 639 F. Supp. at 45 (citing MO. REV. STAT. § 163.013 (1967)). Additionally, the district court ordered the KCMSD to submit to its voters a proposal to increase property taxes in order to pay its share of the desegregation remedy. *Id.* After failed attempts to raise money through a vote, the court still refused to order a tax increase, instead maintaining the injunction on the tax rollbacks, enabling the KCMSD to raise an additional $6,500,000. *Jenkins*, 110 S. Ct. at 1657.

[16] *Jenkins*, 672 F. Supp. at 413. The court determined that the KCMSD had "exhausted all available means of raising additional revenue." *Id.* at 411. The district court ordered an increase of the KCMSD's property tax from $2.05 to $4.00 per $100.00 of assessed valuation through the 1991-92 fiscal year. *Id.* at 413. The KCMSD was also ordered to issue $150,000,000 in capital improvement bonds. *See also* Griffin v. County School Bd., 377 U.S. 218, 233 (1964) (district court may authorize supervisors to "levy taxes to raise funds adequate to reopen, operate and maintain without racial discrimination a public school system"); Liddell v. Missouri, 731 F.2d 1294, 1322 (en banc), *cert. denied*, 409 U.S. 816 (1984) (recognizing that "the district court's equitable power includes the remedial power to order tax increases or the issuance of bonds").

[17] Jenkins v. Missouri, 855 F.2d 1295, 1314 (8th Cir. 1988). The appellate court affirmed the district court's judgment with respect to capital improvements and magnet schools ordering only slight modifications. *Id.* at 1299.

[18] *Id.* at 1314. The court advocated that "[d]eference should be given to the views of concerned state and local officials and to the working of local tax collection procedures to the extent that they appear compatible with the goals to be achieved." *Id.* (citing United States v. Missouri, 515 F.2d 1365, 1373 (8th Cir. 1975)).

[19] *Id.* Specifically, the court opined:

> We believe a preferable method for future funding of KCMSD's obligation under the district court's desegregation orders is to authorize the school board to submit a proposed levy to the collection authorities adequate to fund its budget, including its share of the cost of the desegregation programs ordered by the district court. County and state authorities should then be enjoined from applying those Missouri constitutional and statutory limitations that would limit or reduce the levy below the amount submitted by the school board.

Id.

tion for certiorari in order to determine whether the judicial tax increase contravened principles of comity which govern a district court's exercise of its discretionary powers.[20] The Court reversed the lower courts' upholding of the tax increase, concluding that such an intrusion into local authority violated governing principles of comity.[21]

The United States Supreme Court initially established equitable guidelines for the imposition of desegregation remedies in 1955, in the landmark case of Brown v. Board of Education (*Brown II*).[22] In *Brown II*, the Court announced that while school authorities will be held responsible for resolving the segregation problems that exist in their school districts, the district courts ultimately are responsible for approving and overseeing a school's desegregation program.[23] The Court reasoned that due to a district court's relative closeness to local conditions, these courts possess the greatest ability to review whether a school district has complied with desegregation requirements.[24] The Court further articulated that when implementing desegregation remedies, "courts will be guided by equitable principles."[25] Equitable principles, the majority reasoned, should be sufficiently

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[20] Missouri v. Jenkins, 110 S. Ct. 1651, 1655 (1990). Certiorari was limited to consideration of whether the district court had the power to levy tax increases and whether the petition was timely filed. *Id.* at 1660. *See infra* notes 73-100 and accompanying text.

[21] *Jenkins*, 110 S. Ct. at 1663. The Court affirmed the court of appeals' judgment insofar as it required modification of the funding order. *Id.* at 1667.

[22] 349 U.S. 294 (1955). The first of the Brown v. Board of Education decisions, (*Brown I*), pronounced that official segregation directly violated the equal protection clause of the fourteenth amendment. *Brown I*, 347 U.S. 483, 495 (1954). The *Brown I* Court concluded that "[s]eparate educational facilities are inherently unequal," thereby depriving minority students of the equal protection of the laws under the fourteenth amendment. *Id.* at 495. This decision overruled the language in Plessy v. Ferguson, which enunciated the "separate but equal" doctrine. *See Brown I*, 347 U.S. at 494-95 (citing Plessy v. Ferguson, 163 U.S. 537 (1896)). This pronouncement by the *Brown I* Court, however, did not alone modify educational patterns in dual school systems. *See id.* The reasoning behind *Brown I* was thus extended in order to address "the manner in which relief [was] to be accorded." *Brown II*, 349 U.S. at 298 (1955). *See also* Bolling v. Sharpe, 347 U.S. 497 (1954) (holding that racial segregation in public schools denies minority students due process of law under the fifth amendment); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1028-32 (1979) (a discussion of the history leading to the *Brown I* decision).

[23] *Brown II*, 349 U.S. at 299-300. *See* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).

[24] *Brown II*, 349 U.S. at 299.

[25] *Id.* at 300.

flexible to reconcile both private and public interests.[26]

Nearly a decade later, in *Griffin v. County School Board*,[27] the Court addressed the issue of whether a federal district court may utilize its discretionary powers to ensure compliance with a desegregation order.[28] In *Griffin*, the Prince Edward County School Board refused to comply with the district court's order to desegregate its school district.[29] In defiance of the district court's order, the school board refused to levy taxes for the operation of public schools for that year.[30] Consequently, the public schools of Prince Edward County were closed.[31] Private foundations, however, taking advantage of state and local tax credits and tuition grants, established private schools for white children only.[32]

In deciding *Griffin*, the Court determined that in order to

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[26] *Id.* *See* Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944); Alexander v. Hillman, 296 U.S. 222, 239 (1935).

[27] 377 U.S. 218 (1964).

[28] *See id.*

[29] *Id.* at 222. The suit began in 1951 when black students of Prince Edward County, Virginia filed a complaint alleging that they were not granted admission to public schools, in direct violation of their rights as guaranteed under the equal protection clause of the fourteenth amendment. *Id.* at 220-21. In May 1955, the Supreme Court ordered the district court to "admit [the petitioners] to public schools on a racially nondiscriminatory basis with all deliberate speed. . . ." *Id.* at 221 (citing *Brown II*, 349 U.S. 294, 301 (1955)).

[30] *Id.* at 222. The Virginia General Asssembly announced that no public schools would operate "where white and colored children were enrolled together," and ordered that state funds to such schools be cut off. *Id.* at 221. The legislation was subsequently invalidated by the Supreme Court of Appeals of Virginia, which declared that the laws were in violation of the Virginia Constitution. *Id.* at 222-23 (citing Harrison v. Day, 200 Va. 439, 106 S.E.2d 636 (1959)).

[31] *Id.* at 222-23. The school board made a public announcement on June 3, 1959, stating:

> The School Board of this county is confronted with a court decree which requires the admission of white and colored children to all the schools of the county without regard to race or color. Knowing the people of this county as we do, we know that it is not possible to operate the schools of this county within the terms of that principle and, at the same time, maintain an atmosphere conducive to the educational benefit of our people.

Id. at 222 n.6. During the years of 1959 through 1963 colored children in the county were without any formal education. *Id.* at 223.

[32] *Id.* at 223-24. A private foundation, known as the Prince Edward School Foundation, was created to operate private schools in the county for white children. *Id.* at 223. An offer to establish private schools for negro children was rejected in favor of "continuing the legal battle for desegregated public schools." *Id.* In 1961, petitioners filed a supplemental complaint, seeking *inter alia*, to enjoin the county from aiding in the support of private schools which denied students admission based on race. *Id.* at 224. Subsequently, the district court held that "public schools of Prince Edward County may not be closed to avoid the effect of the law of the land. . . ." *Id.* The court of appeals reversed the decree, contending that the dis-

prevent racial discrimination, a district court may require school commissioners to exercise their power to levy taxes in order to raise funds necessary to operate a desegregated school district.[33] The Court recognized a district court's basic authority to intervene in the processes of local governing bodies in order to ensure compliance with a constitutional mandate.[34] Moreover, the Court approved an injunction prohibiting county officials from offering payment of tax credits and tuition grants to private schools, deeming such action necessary and proper to eradicate the county's deprivation of public school education to the students of the Prince Edward County school district.[35]

The Court further clarified and defined the duties of local school authorities as well as the scope of a federal court's authority to eliminate racial segregation in public schools in *Swann v. Charlotte-Mecklenburg Board of Education*.[36] In 1969, the school board of the Charlotte-Mecklenburg School District was ordered to submit a proposal for faculty and student desegregation.[37] In

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trict court should have awaited determination by the state court as to the validity of the public school closings. *Id.* at 225.

[33] *Id.* at 232-33.

[34] *Id.* at 281. *See also* Keyes v. School Dist. No. 1, 413 U.S. 189 (1973). In *Keyes*, the Court endorsed their earlier decision in *Brown II*, stating:

> [W]e have held that where plaintiffs prove that a current condition of segregated schooling exists within a school district where a dual system was compelled or authorized by statute at the time of our decision in Brown v. Board of Educ., 347 U.S. 483 (1954) (*Brown I*), the State automatically assumes an affirmative duty 'to effectuate a transition to a racially nondiscriminatory school system. . . .'

Id. at 200 (quoting Brown v. Board of Educ., 349 U.S. 294, 301 (1955) (*Brown II*)).

[35] *Griffin*, 377 U.S. at 233. The *Griffin* Court concluded that "the time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia." *Id.* at 234. The case was remanded to the district court with the order to enter a decree ensuring that petitioners would be granted education equal to that given in other public schools of Virginia. *Id.*

[36] 402 U.S. 1, 5-6 (1971). Specifically, the Court in *Swann* recognized that "[t]he problems encountered by the district courts and courts of appeals make plain that we should now try to amplify guidelines, however incomplete and imperfect, for the assistance of school authorities and courts." *Id.* at 14 (footnote omitted).

[37] *Id.* at 7. The district court's desegregation order came years after the Charlotte-Mecklenburg school board attempted to desegregate its school system through "geographic zoning with a free-transfer provision." *Id.* In June, 1969, the district court ordered the school board to submit new proposals for both student and faculty desegregation. *Id.* The district court took such action upon observing that 90% of the 24,000 black students who were enrolled in the Charlotte-Mecklenburg school system attended school solely within the metropolitan region of Charlotte and approximately 14,000 black students attended 21 schools consisting of 99-100% black students. *Id.* at 6-7.

February 1970, the school board submitted a final desegregation plan to the district court, aimed at closing certain schools in its district and reassigning students.[38] The district court eventually adopted the school board's plan with certain modifications.[39] The Supreme Court granted certiorari to determine the constitutional adequacy of the adopted plan.[40]

The *Swann* Court reiterated the well-accepted principle that once a constitutional violation is found the school board has an

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[38] *Id.* at 8. In December, 1969, the district court rejected the board's original proposals. *Id.* The court subsequently selected an expert in education administration to submit a desegregation plan. *Id.* In February, 1970, the district court received two alternative pupil assignment plans, the "Finger plan" and the final "board plan." *Id.* The Finger plan varied from the school board proposal mainly in its treatment of the school system's elementary schools. *Id.* at 9. In addition to relying upon geographic zoning, the Finger plan proposed the use of pairing, zoning, and grouping techniques, resulting in "student bodies throughout the system [ ] rang[ing] from 9% to 38% Negro." *Id.* The district court specifically described the Finger plan as follows:

> Like the board plan, the Finger plan does as much by rezoning school attendance lines as can reasonably be accomplished. However, unlike the board plan, it does not stop there. It goes further and desegregates all the rest of the elementary school by the techniques of grouping two or three outlying schools with one black inner city school; by transporting black students from grades one through four to the outlying white schools; and by transporting white students from the fifth and sixth grades from the outlying white schools to the inner city black school.

Id. at 9-10.

[39] *Id.* at 10. As finally submitted, the plan provided for the closure of seven schools with student reassignment. *Id.* at 8. The plan further restructured school attendance zones in order to remedy racial imbalance, but maintained established grade structures. *Id.* The plan, however, rejected pairing and clustering techniques as part of a desegregation effort. *Id.* Moreover, the plan eliminated the existing racial basis of the school bus system, created a racially mixed administrative staff and faculty, modified its present free-transfer plan into an optional "majority-to-minority" transfer system and established a single athletic league. *Id.* at 10. The court of appeals affirmed the district court's plan regarding the junior and senior high schools and faculty desegregation, but vacated the elementary school order. *Id.* Specifically, the court of appeals feared that the elementary school's pairing and grouping plan would be burdensome to the students and the board. *Id.* The court of appeals remanded the case for further reconsideration and for proposal of new plans. *Id.*

[40] *Id.* at 5, 11. The *Swann* Court ruled in favor of reinstating the district court's order pending further court proceedings. *Id.* at 10-11. The district court received two new plans on remand for elementary schools: a proposal submitted by the United States Department of Health, Education, and Welfare (HEW plan) and a proposal prepared by a minority of the school board (minority plan). *Id.* at 11. The district court determined that the minority plan, its own plan (Finger plan) and a previous draft of the Finger plan, were all acceptable. *Id.* The court ordered the board to either adopt one of the three plans or submit a new plan that would be equally effective. *Id.* The board eventually acquiesced to the adoption of the Finger plan on August 7, 1970. *Id.*

obligation to take affirmative steps to remedy the violation.[41] In addition, the Court charged that if school authorities fail to take affirmative action to eliminate the vestiges of state-imposed segregation from the public school systems, a court may invoke its equitable powers to ensure that a desegregation remedy is enforced.[42] In setting forth remedial guidelines for judicial authority, the Court emphasized that a remedial decree must be imposed in accordance with the extent of the constitutional violation.[43] The Court noted that in this particular instance, the district court's desegregation program, based in part on racial quotas, student reassignment and transportation, was an effective technique properly aimed at eliminating segregation in the school district.[44] The Court concluded that because the desegregation plan implemented by the district court did not exceed the scope of the school district's violation, the court did not abuse its power in providing equitable relief.[45]

In *Milliken v. Bradley (Milliken I)*,[46] the Court confronted the challenge of limiting a district court's power to implement a desegregation plan.[47] In *Milliken I*, the respondents claimed that the Detroit public school system was racially segregated and subsequently sought to establish a desegregated school system.[48] The district court, upon attempting to formulate a remedial program, discovered that the Detroit public school system posed a unique problem due to the predominantly black population of the city's school districts.[49] As a result, the district court ordered

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41 *Id.* at 15 (quoting Green v. County School Bd., 391 U.S. 430, 437-38 (1968)). *See also* Keyes v. School Dist. No. 1, 413 U.S. 189, 200 (1973) (upholding school authority's duty to take affirmative action in unifying its school system).

42 *Swann*, 402 U.S. at 15. The Court, however, stipulated that "[r]emedial 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." *Id.* at 16.

43 *Id. See* Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 280 (1977), *infra* notes 59-72 and accompanying text; Liddell v. Missouri, 731 F.2d 1294, 1305 (8th Cir. 1984).

44 *Swann*, 402 U.S. at 22-31.

45 *Id.* at 31.

46 418 U.S. 717 (1974).

47 *Id.*

48 *Id.* at 723.

49 *Id.* at 728-29 n.8. Specifically, the district court observed that action and inaction by the government and private organizations had led to a segregated metropolitan area. *Id.* at 724 (quoting Bradley v. Milliken, 338 F. Supp. 582, 587 (E.D. Mich. 1971)). The district court confronted the issue of determining how to "desegregate a black city, or a black school system." *Id.* at 728-29 n.8 (citation omitted). In addition, the district court found that the Detroit Board of Education created and maintained optional attendance zones which "had the 'natural, prob-

a desegregation plan that included not only the City of Detroit, but also surrounding suburban districts that were not found to have committed constitutional violations.[50] The Court of Appeals for the Sixth Circuit affirmed the multi-district desegregation plan.[51]

The Court reversed and remanded, holding that the scope of the district court's remedy exceeded that court's equitable authority.[52] Justice Burger, writing for the majority, explained that a multi-district remedy may not be instituted absent a finding that other included school districts failed to operate desegregated school systems.[53] Thus, the Court maintained that before school district lines will be ignored by the imposition of a cross-district

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able, foreseeable and actual effect' of allowing white pupils to escape identifiably Negro schools." *Id.* at 725 (quoting *Milliken*, 338 F. Supp. at 587). The district court, in support of its findings, stated that "[w]ith one exception . . . defendant Board has never bused white children to predominantly black schools. The Board has not bused white pupils to black schools despite the enormous amount of space available in inner-city schools. There were 22,961 vacant seats in schools 90% or more black." *Id.* at 727-28 (quoting *Milliken*, 338 F. Supp. at 588).

[50] *Id.* at 729-30. The district court ordered the Detroit Board of Education to formulate a desegregation plan for Detroit. *Id.* at 729. Moreover, the district court ordered the state to enact a desegregation plan for the three-county metropolitan area. *Id.* In considering the multi-district desegregation plan, the court opined:

> [I]t is proper for the court to consider metropolitan plans directed toward the desegregation of the Detroit public schools as an alternative to the present intra-city desegregation plan before it and, in the event that the court finds such intra-city plans inadequate to desegregate such schools, the court is of the opinion that it is required to consider a metropolitan remedy for desegregation.

Id. at 732 (citation omitted).

[51] *Id.* at 734-35. Specifically, the appellate court perceived that "the only feasible desegregation plan involves the crossing of the boundary lines between the Detroit School District and adjacent or nearby school districts for the limited purpose of providing an effective desegregation plan." *Id.* at 735 (quoting Bradley v. Milliken, 484 F.2d 215, 249 (6th Cir. 1973) (en banc)).

[52] *Id.* at 752-53. *See* Columbus Bd. of Educ. v. Penick, 443 U.S. 449, 465 (1979); Dayton Bd. of Educ. v. Brinkman, 433 U.S. 406, 420 (1977); Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 280 (1977); Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 433-34 (1976); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15-16 (1971).

[53] *Milliken I*, 418 U.S. at 752. The Court promulgated:

> [A]n interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where the district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

Id. at 745.

remedy, there must be proof that a constitutional violation exists within one district, which in turn causes interdistrict segregation.[54] The Court emphasized that public education is deeply rooted in local control and therefore, local autonomy is essential to maintaining a successful educational system.[55] The Court opined that imposing a multi-district remedy would in effect, alter and disrupt the entire structure of Michigan's public school system.[56] The Court remanded the case for further proceedings aimed at formulating an order consistent with its present opinion to effectively eliminate segregation within the Detroit school system.[57]

As a result of proposals submitted in compliance with the *Milliken I* decision,[58] the Court in *Milliken v. Bradley* (*Milliken II*)[59] was confronted with the issue of whether a district court may, as part of a desegregation decree, order remedial or compensatory educational programs for victims of past acts of segregation.[60] The Court additionally addressed the issue of whether a federal

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54 *Id.*

55 *Id.* at 741-42.

56 *Id.* at 753.

57 *Id.* After the *Milliken I* Court handed down its decision, the district court ordered the submission of desegregation plans limited to the Detroit school system. *See* Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 271 (1977), *infra* notes 59-72 and accompanying text.

58 On April 1, 1975, both respondent Bradley and the Detroit School Board submitted their proposed plans. *Id.* at 271.

59 433 U.S. 267 (1977).

60 *Id.* at 269. Bradley's proposal was limited to student reassignment. *Id.* at 271. The plan called for extensive student transportation to obtain a proper racial ratio in the school district. *Id.* To the contrary, the Board's plan was implemented to "provide[] for sufficient pupil reassignment to eliminate 'racially identifiable white elementary schools,' while ensuring that 'every child will spend at least a portion of his education in either a neighborhood elementary school or a neighborhood junior and senior high school." *Id.* at 272 (quoting Bradley v. Milliken, 402 F. Supp. 1096, 1116 (E.D. Mich. 1975)). The Board's remedial program, called "Educational Components," included in-service teacher training, guidance counseling programs and testing procedures. *Id.* A later proposal included reading and communication skills. *Id.* at 272 n.5. The district court approved the compensatory educational programs deeming them necessary to fully eliminate the vestiges of segregation. *Id.* at 274. Specifically, the district court noted:

> We find that the majority of the educational components included in the Detroit Board Plan are essential for a district undergoing desegregation. While it is true that the delivery of quality desegregated educational services is the obligation of the school board, nevertheless this court deems it essential to mandate educational components where they are needed to remedy effects of past segregation, to assure a successful desegregative effort and to minimize the possibility of resegregation.

Id. (quoting *Milliken*, 402 F. Supp. at 1118).

district court may order state officials to bear the cost of those remedial programs.[61]

The *Milliken II* Court held that the district court did not abuse its equitable discretion by ordering remedial "educational components" as part of Detroit's desegregation decree.[62] The Court posited that as in the instant case, the need to effectively eliminate segregation often requires innovative remedies.[63] Moreover, the Court ruled that a federal district court may require state authorities to bear the costs of part of such programs.[64] In reaching its holding, the Court enunciated three equitable principles which serve to govern a federal district court in ordering a desegregation program.[65] First, the Court determined that a federal district court must consider the extent of the constitutional violation,[66]in order to ensure that the remedy is tailored to the condition that offends the Constitution.[67] Second, the Court contended that a remedy must attempt to restore individuals to the position that they would have occupied had the constitutional violation not occurred.[68] Finally, the Court emphasized that respect must be granted to state and local authorities in managing and resolving local affairs.[69] The *Milliken* Court recognized that, in the instant case, there was no dispute over whether the second and third principles were properly ob-

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61 *Milliken II*, 433 U.S. at 277. The district court ordered that the costs of the remedial program were to be shared equally by both the state and the Detroit School Board. *Id.* The court of appeals affirmed the district court's remedial plan and the cost sharing proposal. *Id.*

62 *Id.* at 279.

63 *See Milliken II*, 433 U.S. at 283. *See also* United States v. Montgomery County Bd. of Educ., 395 U.S. 225, 236 (1969) (Court permitted faculty and staff desegregation in order to achieve a racially balanced school system).

64 *Milliken II*, 433 U.S. at 283.

65 *Id.* at 280-81.

66 *Id.* at 280 (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971)).

67 *Id. See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976); Milliken v. Bradley (*Milliken I*), 418 U.S. 717, 763 (1974) (White, J., dissenting); *Swann*, 402 U.S. at 26 (1971).

68 *Milliken II*, 433 U.S. at 280-81 (quoting *Milliken I*, 418 U.S. at 746). *See* Green v. County School Bd., 391 U.S. 430, 439 (1968) (holding that a district court is authorized to promulgate plans that promise to realistically work). The Court stipulated that "[o]ur function . . . is 'to desegregate an *educational* system in which the races have been kept apart, without, at the same time, losing sight of the central *educational* function of the schools.' " *Milliken II*, 433 U.S. at 280 n.15 (quoting *Milliken I*, 418 U.S. at 764 (White, J., dissenting) (emphasis in original)).

69 *Milliken II*, 433 U.S. at 280-81. *See* Brown v. Board of Educ. (*Brown II*), 349 U.S. 294, 299 (1955) (declaring that "school authorities have the primary responsibility" to resolve desegregation problems).

served.[70] The Court, however, did address the issue of whether the district court's remedial order was properly directed toward the constitutional violation itself.[71] The Court concluded that the district court's order did not violate the tenth and eleventh amendments to the Constitution or general principles of federalism and dismissed the petitioner's claims.[72]

Recently, in *Missouri v. Jenkins*,[73] the United States Supreme Court addressed the propriety of a district court order increasing the property tax levies of a local school district in order to ensure payment for a desegregation remedy.[74] Writing for the Court,

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[70] *Milliken II*, 433 U.S. at 281

[71] *Id.* at 281-88. The Court stressed:

> The "condition" offending the Constitution is Detroit's *dejure* segregated school system, which was so pervasively and persistently segregated that the District Court found that the need for the educational components flowed directly from constitutional violations by both state and local officials. These specific educational remedies, although normally left to the discretion of the elected school board and professional educators, were deemed necessary to restore the victims of discriminatory conduct to the position they would have enjoyed in terms of education had these four components been provided in a nondiscriminatory manner in a school system free from pervasive *dejure* racial segregation.

Id. Cf. Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) (district court exceeded its authority by requiring annual readjustments of attendance zones).

[72] *Milliken II*, 433 U.S. at 288-91. Specifically, the petitioners argued that requiring the defendants to pay one-half of the added costs pertaining to the four "educational components" is "in practical effect indistinguishable from an award of money damages against the state based upon the asserted prior misconduct of state officials." *Id.* at 289. The Court rejected this contention asserting that the order to share the future expenses of the educational components qualifies as a "prospective compliance exception." *Id.* This exception was espoused by the Court in Edelman v. Jordan, where the Court held that a suit for monetary damages against the state was appropriate to the extent that it "sought payment of state funds . . . as a necessary consequence of compliance *in the future* with a substantive federal-question determination . . . ." Edelman v. Jordan, 415 U.S. 651, 668 (1974) (emphasis in the original). Moreover, the Court rejected petitioners claims of a tenth amendment violation, declaring that the "[t]enth [a]mendment's reservation of nondelegated powers to [s]tates is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conuct enacted by the [f]ourteenth [a]mendment." *Milliken II*, 433 U.S. at 291.

[73] 110 S. Ct. 1651 (1990).

[74] *Id.* at 1655. The Court initially resolved the issue of the propriety of its own jurisdiction, ruling that the state's petition for certiorari was filed within the requisite time period. *Id.* at 1660. Under Title 28 U.S.C. § 2101(c) (1982), in a civil action, a petition for certiorari must be filed no later than ninety days after an entry of judgment by the lower court. *Jenkins*, 110 S. Ct. at 1660 (citing 28 U.S.C. § 2101(c) (1982)). The Court recognized, however, that the starting time for filing a petition for certiorari is tolled while a petition for rehearing is reviewed. *Id.* Specifically, the Court noted that, "[a] timely petition for rehearing . . . operates to suspend the finality of the . . . court's judgment, pending the court's further deter-

Justice White began his analysis by determining whether the district court exceeded its equitable authority by ordering the direct tax increase.[75] The Court, in recognizing the significance of a tax increase on a local school district, insisted that before assuming the power to tax a district court must explore other possible alternatives aimed at achieving its desired goal.[76] The Court reiterated the well-accepted principle that comity requires a federal district court to respect the authority of a local governing institution.[77] Justice White maintained that by allowing the KCMSD to submit its own tax levies, the district court would protect the functioning capacity of the board,[78] and allocate the responsibility of resolving the effects of segregation to those persons who created the problem.[79] The Court stated that although a district court should not grant a local school board "carte blanche" in structuring and implementing a desegregation program, it should at least allow the school board the opportunity to remedy its own constitutional violation.[80] The Court recognized that it has always been the function of the local authorities to solve the problems of public school desegration.[81] Thus, the Court maintained that the district court's overreaching exercise of judicial discretion in raising the tax levies of the KCMSD usurped the authority of the local school board.[82] Justice White stressed that such drastic measures to guarantee funding from the KCMSD should have been exercised only after all other fiscal alternatives

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mination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Id.* (quoting Department of Banking v. Pink, 317 U.S. 264, 266 (1942)). The Court pointed out, however, that the starting time for submitting a petition for certiorari is not tolled when a "suggestion for rehearing in banc" is reviewed. *Id.* Therefore, in determining whether the state's papers, entitled "Petition for Rehearing En Banc," tolled the ninety-day time period for submission of a petition for certiorari, the Court deferred to the court of appeals' interpretation, declaring that the state's papers included a petition for rehearing before the panel. *See id.* at 1660 n.14.

75 *Id.* at 1662.

76 *Id.* The Court noted that conducting an exploration of alternative means to ensuring payment of the KCMSD's share of the costs was especially vital where the KCMSD was "ready, willing, and—but for the operation of state law curtailing their powers—able to remedy the deprivation of constitutional rights themselves." *Id.*

77 *Id.* at 1663.

78 *Id.*

79 *Id.*

80 *Id.*

81 *Id. See also* Brown v. Board of Educ. (*Brown II*), 349 U.S. 294, 299 (1955) (declaring that the responsibility for resolving local desegration ultimately rests on the local school board).

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

have been exhausted.[83] Recognizing the court of appeals' modifications as one such viable alternative, the Court charged that it would not have been burdensome for the district court to investigate the potential success of other remedies before imposing a direct tax increase.[84] The Court explained that by enjoining the Missouri state provisions and permitting the KCMSD to set its own tax levies at a rate which would adequately fund its share of the desegregation remedy, the district court would not have abused its discretion.[85] Thus, the Court perceived the district court's failure to utilize less obtrusive means in imposing a desegregation remedy as violative of federal and state comity.[86]

Additionally, the Court rejected the state's argument that the district court's order, holding the KCMSD and the state jointly and severally liable, should render the state liable for any financial obligation not satisfied by the KCMSD, and not operate to completely disregard state law.[87] The Court, however, rejected the state's contention maintaining that 42 U.S.C. section 1983 empowers the district court to appropriate funds at its discretion and require payment from each tortfeasor.[88] The Court noted that prior case law does not prevent a court from setting aside state laws which limit the ability of local governing bodies to raise sufficient funds to satisfy their constitutional obligations.[89] The Court explained that this is true regardless of whether such funds can be obtained from the state.[90] Further, the Court opined that the district court had been influenced by an earlier order from the court of appeals to reallocate the costs

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83 *Id.*

84 *Id.* at 1663-64. The majority noted that the court of appeals' modifications were aimed at granting the KCMSD future authorization to submit tax levies to state officials sufficient to fund its budget. *Id.* Additionally, the Court emphasized that the court of appeals' modifications stipulated that the district court should enjoin state laws which reduce or limit the amount of tax levies. *Id.*

85 *Id.*

86 *Id.* at 1662-63.

87 *Id.* at 1664. The state's initial argument focused upon whether the district court's remedial order was too excessive. *Id.* The Court held that this issue fell outside of its review because it was aimed at the "scope of the remedy" itself, rather than the manner of funding the remedy. *Id.*

88 *Id.* (citing 42 U.S.C. § 1983 (1982)).

89 *Id.* at 1664-65. The Court opined that in Milliken v. Bradley (*Milliken II*), "[w]e stated that the enforcement of a money judgment against the State did not violate principles of federalism because '[t]he District Court . . . neither attempted to restructure local governmental entities nor . . . mandat[ed] a particular method or structure of state or local financing.' " *Id.* (quoting Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 291 (1977)).

90 *Id.*

of the remedy evenly between the two defendants.[91] As such, the Court contended that the district court feared that by imposing the remaining costs upon the state, the desegregation program would have been severely delayed.[92]

Further, the Court rejected the state's argument that the modifications were invalid under the tenth amendment.[93] Although the Court recognized that the tenth amendment grants the states powers not previously delegated, the majority asserted that a federal court order enforcing the fourteenth amendment does not automatically implicate the tenth amendment.[94] Moreover, Justice White contended that the modifications were valid under article III of the Constitution.[95] The Court illustrated that an order to levy taxes imposed on a local government is clearly an act within the authority of the federal courts.[96]

Finally, the Court rejected the state's argument that the judiciary can do no more than require local governments to tax "as authorized under state law."[97] The Court maintained that a state statutory limitation may be disregarded if it interferes with requirements imposed by the Constitution.[98] The Court reasoned that to rule otherwise would ignore the constitutional obligations of local governments as enunciated under the supremacy clause of the Constitution.[99] The Court asserted that in circumstances

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91 *Id.* at 1664.

92 *Id.* at 1664. The district court perceived that the state would have resisted such orders to contribute additional funds. *Id.*

93 *Id.* at 1665.

94 *Id.*

95 *Id.*

96 *Id. See* Griffin v. County School Bd., 377 U.S. 218, 233 (1964) (holding that district court may authorize school authorities to levy taxes in order to provide funding for desegregated school system). In support of its contention, the Court cited several federal decisions ordering the issuance of writs of mandamus to compel a local governing body to levy taxes in order to meet their debt obligations. *See Jenkins*, 110 S. Ct. at 1665 (citing Louisiana *ex rel.* Hubert v. Mayor of New Orleans, 215 U.S. 170 (1909); Graham v. Folsom, 200 U.S. 248 (1906); Wolff v. New Orleans, 103 U.S. 358 (1881); United States v. New Orleans, 98 U.S. 381 (1879); Heine v. Levee Comm'rs, 86 U.S. 655 (1874) (19 Wall.); City of Galena v. Amy, 72 U.S. 705 (1867) (5 Wall.); Von Hoffman v. City of Quincy, 71 U.S. 535 (1867) (4 Wall.); Board of Comm'rs v. Aspinwall, 65 U.S. 376 (1861) (24 How.)).

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

98 *Id. See Von Hoffman*, 71 U.S. at 535 (disregarding statutory limit on taxes where city violated contractual obligations under article I, § 10 of the Constitution).

99 *Jenkins*, 110 S. Ct. at 1666. The Court emphasized:

> However wide the discretion of local authorities in fashioning desegregation remedies may be, 'if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of

where a particular remedy is required to vindicate constitutional guarantees, a state may not impede the process by precluding a local government from imposing that remedy.[100]

In concurrence, Justice Kennedy supported the Court's finding that the district court exceeded its judicial authority by imposing a direct increase on the KCMSD.[101] The Justice, however, vehemently opposed the Court's implied endorsement, of the federal judiciary's expanded power to order local officials to impose tax levies.[102]

Justice Kennedy initially examined the expansive remedial plan suggested by the KCMSD and approved by the district court.[103] The Justice contended that the program fell completely outside the budget of the KCMSD and its ability to tax.[104] Justice Kennedy indicated that although federal courts maintain the authority to ensure that school districts conform to the Constitution, this power does not extend to school financing.[105] Further, Justice Kennedy charged that no federal circuit court has ever approved a direct judicial imposition of taxes.[106]

> a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees.'

Id. (quoting North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 45 (1971)).

100 *Id.*

101 *Id.* (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy was joined in his concurrence by Chief Justice Rehnquist, Justice O'Connor and Justice Scalia.

102 *Id.* Justice Kennedy rejected the majority's statements concerning a judiciary's power to tax as being unnecessary for its judgment and improper for future precedent. *Id.*

103 *Id.* at 1667-68 (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy criticized several of the capital expenditures proposed by the desegregation remedy, including a "performing arts middle school," a "technical magnet high school," and a "25 acre farm and 25 acre wildland area" for science study. *Id.* at 1668 (Kennedy, J., concurring in part and concurring in judgment). Additionally, the Justice criticized the desire of the district court and the KCMSD to designate the entire district as a "magnet." *Id.* at 1667-68 (Kennedy, J., concurring in part and concurring in judgment). Magnet schools are defined as "public schools of voluntary enrollment designed to promote integration by drawing students away from their neighborhoods and private schools through distinctive curricula and high quality." *Id.* at 1657 n. 6 (Kennedy, J., concurring in part and concurring in judgment) (citing Price & Stern, *supra* note 12, at 291-97). Justice Kennedy observed that the cost of the district court's remedial order included "$260 million in capital improvements and a magnet-school plan costing over $200 million." *Id.* at 1668 (Kennedy, J., concurring in part and concurring in judgment)

104 *Id.* at 1668 (Kennedy, J., concurring in part and concurring in judgment).

105 *Id. See* National City Bank v. Battisti, 581 F.2d 565 (6th Cir. 1977); Plaquemines Parish School Bd. v. United States, 415 F.2d 817 (5th Cir. 1969).

106 *Id.* at 1668-69 (Kennedy, J., concurring in part and concurring in judgment). The concurring Justice observed that the present Eighth Circuit Court of Appeals is

Moreover, Justice Kennedy refuted the Court's interpretation of the court of appeals' modifications of the district court's order.[107] According to Justice Kennedy, the "modifications" made by the court of appeals were merely dicta; therefore, they did not qualify as actual changes to the district court's ruling.[108] Next, Justice Kennedy attacked the Court's distinction between a court ordering a direct tax increase, and a court authorizing a local school board to increase its own tax levies.[109] The latter, Justice Kennedy noted, is "but a convenient formalism," and is still aimed at eliminating a state's statutory limitations on tax increases.[110] Justice Kennedy articulated that absent a change in state law, the KCMSD property tax levies could only be increased by a federal court decree.[111]

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the first circuit court to uphold such a judicially imposed tax. *Id.* *See* Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978), *cert. denied sub nom* Alexis I. DuPont School Dist. v. Evans, 447 U.S. 916 (1980) (Court declined to approve judicial interference with the power to tax); Kelley v. Metropolitan County Bd. of Educ., 836 F.2d 986 (6th Cir. 1987), *cert. denied*, 487 U.S. 1206 (1988). *But see* United States v. Missouri, 515 F.2d 1365, 1372-73 (8th Cir. 1975) (a district court may "implement its desegregation order by directing that provision be made for the levying of taxes"); Liddell v. Missouri, 731 F.2d 1294, 1320 (8th Cir.), *cert. denied sub nom.* Leggett v. Liddell, 469 U.S. 816 (1984) (district court may impose tax "after exploration of every other fiscal alternative").

107 *Jenkins*, 110 S. Ct. at 1669 (Kennedy, J., concurring in part and concurring in judgment).

108 *Id.* Specifically, Justice Kennedy asserted that the court of appeals only modified the district court's order by requiring less obtrusive procedures for the future. *See id.*

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

110 *Id.* at 1670 (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy observed that the KCMSD derives its taxing authority from the Missouri State Constitution. *Id.* The Missouri Constitution states in pertinent part, "[t]he taxing power may be exercised by the general assembly for state purposes, and by counties and other political subdivisions under power granted to them by the general assembly for county, municipal and other corporate purposes." MO. CONST. art. X, § 1. Thus, the Justice pointed out that the KCMSD is limited by state law, in the amount that it may raise taxes. *Jenkins*, 110 S. Ct. at 1670 (Kennedy, J., concurring in part and concurring in judgment). Pursuant to the Missouri State Constitution, the KCMSD could only raise tax levies "to $1.25 per $100 of assessed value." *Id.* (citing MO. CONST. art. X, § 11(b),(c)). The Missouri Constitution further states that "[p]roperty taxes and other local taxes may not be increased above the limitations specified herein without direct voter approval as provided by this constitution." *Id.* (quoting MO. CONST. art. X, § 16). Justice Kennedy continued that any increase up to $3.75 per $100 requires a majority vote by the people. *Id.* (citing MO. CONST. art. X, § 11(b), (c)). The Justice concluded that in order to raise it higher, two-thirds of the people must agree. *Id.* (citing MO. CONST. art. X, § 11(b), (c)).

111 *Jenkins*, 110 S. Ct. at 1670. Justice Kennedy opined "[i]t makes no difference that the KCMSD stands 'ready, willing, and . . . able' to impose a tax not authorized by state law. Whatever taxing power the KCMSD may exercise outside the bounda-

Additionally, Justice Kennedy asserted that by ordering a direct tax increase, the judiciary disregards certain constitutional mandates.[112] The Justice argued that article III of the Constitution, delineating the powers of the federal judiciary, does not include the word "tax."[113] Justice Kennedy perceived that the absence of the word tax or any word resembling it indicates the framers' intention that taxation was an improper area for judicial involvement.[114] Moreover, the Justice advanced the proposition that taxation by the judiciary, rather than by the legislature, raises substantial due process concerns.[115] Justice Kennedy maintained that where a tax is imposed by a governmental body other than the legislature, the protections of due process remain intact and the citizens to be taxed must be provided with both notice and the opportunity to be heard.[116] The Justice clarified, however, that courts are not designed to be representative of, or responsible to, the people.[117] Thus, Justice Kennedy contended

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ries of state law would derive from the federal court." *Id.* at 1663, 1670 (Kennedy, J., concurring in part and concurring in judgment).

112 *See id.* at 1670-71 (Kennedy, J., concurring in part and concurring in judgment).

113 *Id.* at 1670 (Kennedy, J., concurring in part and concurring in judgment). Article III states that, "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." *Id.* (quoting U.S. CONST. art. III).

114 *Id.* The Justice maintained that "[t]he judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." *Id.* (quoting THE FEDERALIST No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

115 *See id.* at 1671 (Kennedy, J., concurring in part and concurring in judgment).

116 *Id.* Justice Kennedy noted that legislative taxation does not raise due process concerns because the citizens to be taxed are "given notice and a hearing through their representatives, whose power is a direct manifestation of the citizens' consent." *Id.* Similarly, the Justice explained that where money is withdrawn from parties to a lawsuit by court order, the adjudication itself supplies the parties with notice and the opportunity to be heard. *Id.* The Justice observed, however, that the order at issue has "the purpose and direct effect of extracting money from persons who have had no presence or representation in the suit." *Id.* This action by the district court, charged Justice Kennedy, overrides the individuals protection against taxation without representation. *Id.*

117 *Id.* at 1672 (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy posited:

> The power of taxation is one that the federal judiciary does not possess. In our system 'the legislative department alone has access to the pockets of the people,' for it is the legislature that is accountable to them and represents their will. The authority that would levy the tax at issue here shares none of these qualities. Our federal judiciary, by design, is not representative or responsible to the people in a political sense; it is independent. Federal judges do not depend on the popular will for their office. They may not even share the burden of taxes

that citizens who are not parties to a lawsuit, and whose tax bills are increased under court order, are given none of these protections.[118] Finally, Justice Kennedy recognized that prior case law has also adamantly rejected the concept of taxation as a judicial function.[119]

In conclusion, Justice Kennedy examined whether an alternative remedy, other than a direct tax increase, would have prevented the desegregation of the school district.[120] Specifically, Justice Kennedy criticized the district court's use of magnet schools and the quality of education to attract non-minority students to these educational institutions, noting that a remedy of this nature has never been approved by the Court.[121] The Justice

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> they attempt to impose, for they may live outside the jurisdiction their orders affect. And federal judges have no fear that the competition for scarce public resources could result in a diminution of their salaries. It is not surprising that imposition of taxes by an authority so insulated from public communication or control can lead to deep feelings of frustration, powerlessness, and anger on the part of taxpaying citizens.

Id. (citation omitted).

118 *Id.* at 1671 (Kennedy, J., concurring in part and concurring in the judgment). The Justice maintained that in the instant case, taxation was imposed by a court that was clearly not "representative" of the citizens of the KCMSD. *Id.* Moreover, Justice Kennedy pointed out that the KCMSD citizens were "neither served with process nor heard in court." *Id.* The Justice declared that "a district court order that overrides the citizens state law protections against taxation without referendum appointment can in no sense provide representative due process. *Id.*

119 *Id.* at 1672 (Kennedy, J., concurring in part and concurring in judgment). The Justice noted that:

> 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.

Id. (citing Rees v. City of Watertown, 86 U.S. 107, 116-17 (1874) (19 Wall.) The Justice further noted that the Court has, in the past, rejected the opportunity to remedy an unconstitutional tax scheme by expanding the class of those being taxed, finding that such a remedy "could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court." *See* Davis v. Michigan Dept. of Treasury, 109 S. Ct. 1500, 1509 (1989). *See also* Moses Lake Homes v. Grant County, 365 U.S. 744, 752 (1961) ("Federal courts may not assess or levy taxes. . . . . The federal courts may determine, within their jurisdiction, only whether the tax levied by [local] officials is or is not a valid one. ").

120 *Id.* at 1676 (Kennedy, J., concurring in part and concurring in judgment).

121 *Id.* Justice Kennedy acknowledged:

> A remedy that uses the quality of education as a lure to attract nonminority students will place the [d]istrict [c]ourt at the center of controversies over educational philosophy that by tradition are left to this

contended that although such a remedy may be permissible in extreme cases other equitable remedies were available to correct the current problem.[122] Further, Justice Kennedy opined that a judicial tax increase should never be considered unless the court has found no other alternative to remedy the constitutional violation.[123] The Justice observed that previous courts faced with constitutional violations have never resorted to tax increases.[124]

In light of the history behind federal district court desegregation orders, the decision in *Missouri v. Jenkins* provides an ambivalent holding. Initially, the *Jenkins* Court correctly supported traditional rulings that placed the responsibility for solving the problems of segregation on the local school authorities.[125] The Court wisely denounced any indication that it would allow a district court to intervene in the matters of local government by means of a direct tax increase. Hence, the Court remained faithful to the ideals of comity, and more importantly, the underlying framework of the separation of powers.

The *Jenkins* Court, however, adopted a "less obtrusive" approach to fund the desegregation order, holding that a district court, rather than imposing a tax levy itself, may order a local governing body to raise taxes.[126] This technical distinction

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> Nation's communities. Such a plan as a practical matter raises many of the concerns involved in interdistrict desegregation remedies. District [c]ourts can and must take needed steps to eliminate racial discrimination and ensure the operation of unitary school systems. But it is discrimination, not the ineptitude of educators or the indifference of the public that is the evil to be remedied. An initial finding of discrimination cannot be used as the basis for a wholesale shift of authority over day-to-day school operations from parents, teachers and elected officials to an unaccountable district judge whose province is law, not education.

Id. (citation omitted).

122 *Id.* at 1677 (Kennedy, J., concurring in part and concurring in judgment). Justice Kennedy charged that the expansive desegregation remedy proposed by the district court was not necessary to unify the KCMSD. *Id.*

123 *Id.* Justice Kennedy emphasized that "[this] would require a finding that any remedy less costly than the one at issue would so plainly leave the violation unremedied that its implementation would itself be an abuse of discretion." *Id.* Here, Justice Kennedy noted, there was no showing by the district court that less obtrusive means to unify the school district were attempted. *Id.* at 1677-78 (Kennedy, J., concurring in part and concurring in judgment) Instead, the district court considered only funding alternatives. *Id.* at 1678 (Kennedy, J., concurring in part and concurring in judgment).

124 *Id.* at 1678 (Kennedy, J., concurring in part and concurring in judgment)

125 *Id.* at 1663. *See* Milliken v. Bradley (*Milliken II*), 433 U.S. 267, 281 (1977); Brown v. Board of Educ. (*Brown II*), 349 U.S. 294, 299 (1955).

126 *Jenkins*, 110 S. Ct. at 1658.

merely disguises what is in actuality a judicial tax levy imposed upon a local school district, and ultimately serves the identical function.

The Court failed to recognize the severe implications of its ruling of taxation without representation. In an effort to protect individuals from arbitrary lawmaking, the Constitution provides citizens with a right to due process.[127] More specifically, it allows taxpayers to elect representatives who voice their concerns before a tax levy or other proposal is legislatively enacted. Where this process is usurped by a judicial branch of government that consists of unelected, life-tenured members, the people lose their constitutional protections against non-majoritarian taxation.

In addition, the *Jenkins* decision leaves district courts with far-reaching powers to fund future remedial orders. For example, a federal district court, attempting to equalize the educational facilities of wealthy suburban schools and indigent inner city schools, may authorize the suburban district's legislature to submit higher tax levies in order to fund urban facilities. Thus, the Court's endorsement of indirect taxation may ultimately lead to undesirable tax consequences for certain tax districts. Additionally, the Court leaves open the potential for judicial abuse in structuring enormous remedial orders that may now be funded without the consent of the people.

Perhaps the most troubling aspect of the holding in *Jenkins* was the Court's unwillingness to consider the size and expense of its remedial program.[128] Unlike prior desegregation plans, the KCMSD's program fell far outside of its budget, as well as its ability to tax under Missouri state law.[129] The Court, however, insisted on implementing this extraordinary remedy, despite

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127 *See* U.S. CONST. amend. XIV. The fourteenth amendment states in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV.

128 *Jenkins*, 110 S. Ct. at 1668 (Kennedy, J., concurring in part and concurring in judgment). The total cost of the district court's remedies included approximately "$260 million in capital improvements and a magnet-school plan costing over $200 million." *Id.* (quoting Missouri v. Jenkins, 109 S. Ct. 2463, 2465 (1989)).

129 *Id.* The Eighth Circuit Court of Appeals denied a rehearing en banc, stating:

> [T]he remedies ordered go far beyond anything previously seen in a school desegregation case. The sheer immensity of the programs encompassed by the district court's order—the large number of magnet schools and the quantity of capital renovations and new construction—are concededly without parallel in any other school district in the country.

Jenkins v. Missouri, 855 F.2d 1295, 1318-19 (8th Cir. 1988).

state law limitations. Thus, the Court's perspective was overly narrow because they neglected less expensive remedies that could have eliminated the vestiges of segregation in Kansas City's school system.

Federal courts are ultimately responsible for providing an efficient remedy that will rectify constitutional violations caused by the conduct of a school district. In doing so, it must exercise equitable discretion to guarantee that the remnants of a segregated public school district are fully eliminated. This duty to implement an appropriate remedy, however, should not allow the judiciary to overreach its authority. Federal courts must not achieve constitutional objectives by circumventing local financing legislation. Such unconstrained freedom of the judiciary has the potential to severely tilt the balance of power in our government. The *Jenkins* decision has stretched the judicial sphere of influence into local governing functions too far.

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