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Constitutional Law—Taxation—Federal Court May Order School District to Increase Tax Levy beyond Limits of State Constitution in Order to Amend Constitutional Violation. Missouri v. Jenkins, 110 S. Ct. 1651 (1990).

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CONSTITUTIONAL LAW—TAXATION—FEDERAL COURT MAY ORDER SCHOOL DISTRICT TO INCREASE TAX LEVY BEYOND LIMITS OF STATE CONSTITUTION IN ORDER TO AMEND CONSTITUTIONAL VIOLATION. *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

In 1977 students of the Kansas City Missouri School District (KCMSD)[1] filed an action under 42 U.S.C. Section 1983[2] in the United States District Court for the Western District of Missouri against the State of Missouri and various federal agencies.[3] The action alleged that the State of Missouri and the named federal agencies had failed to eliminate vestiges of the racially discriminatory dual school system.[4] In 1978 the students made KCMSD a defendant and made similar allegations against it.[5] The KCMSD cross-claimed against the state for its failure to eliminate the dual school system.[6] After finding no liability on the part of the federal agencies, the district court held that KCMSD and the State of Missouri continued to operate a segregated school system within the KCMSD.[7] The court ordered the KCMSD and the State of Missouri to submit a proposed plan to remove the vestiges of the dual school system.[8]

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1. The KCMSD joined with the plaintiffs in the original action until it was realigned as a defendant. Jenkins v. Missouri, 593 F. Supp. 1485, 1487 (W.D. Mo. 1984).

2. 42 U.S.C. § 1983 (1982) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. The defendants named in the original suit included the surrounding school districts, the Department of Health, Education, and Welfare (HEW), and the Department of Housing and Urban Development (HUD). The district court dismissed the suburban school districts and the HEW following the presentation of the plaintiff's evidence. 593 F. Supp. at 1488. The court subsequently found in favor of HUD. *Id.*

4. *Id.* at 1487.

5. *Id.*

6. *Id.* at 1488-89. The KCMSD alleged that Missouri had failed to meet its constitutional obligation to eliminate its pre-1954 dual school system and, therefore, was primarily liable for the district's existing segregation. *Id.*

7. *Id.* at 1505.

8. *Id.* at 1506. The court ordered the defendants to concentrate their efforts on schools in

The United States Court of Appeals for the Eight Circuit affirmed the district court's findings on the issues of segregation and liability of the Department of Housing and Urban Development.[9] In addition, the court found that the finding of liability of the district itself was justified and authorized the court to determine the appropriate remedy.[10]

In a hearing on a motion by KCMSD for approval of its long-range capital improvement plan,[11] the district court rejected the state's proposal as inadequate and adopted the plan submitted by the KCMSD.[12] The adopted plan provided for renovations and capital improvements costing an estimated $194,328,578.[13] The court then ruled on KCMSD's motion for funding relief.

The court found that KCMSD had exhausted all of its potential sources of additional revenue and was unable to meet its share of the desegregation costs.[14] Having fully explored the alternatives enunciated by the Eighth Circuit, the court found that it was "left with no choice but to exercise its broad equitable powers" in providing for KCMSD's share of the costs.[15]

The court stated that its broad equitable powers included "the power to order tax increases and bond issuances."[16] Therefore, the court imposed a 1.5% surcharge on the Missouri State Income Tax on both "residents and nonresidents of the KCMSD."[17] Additionally, the court ordered that the property tax levy be increased $1.95 per $100

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which the enrollment was more than 90% black. The court also stated that the parties, to the extent possible, should "see that students are permitted to attend a school nearest the student's home so long as by so doing it does not deter from properly integrating the students in the KCMSD." *Id.* Finally, the court added that they should "bear in mind cost factors" in addition to their purpose of providing quality education. *Id.* Under the court's holding, the state was required to pay approximately 75% of the ultimate cost to the KCMSD's 25%. *See* Jenkins v. Missouri, 807 F.2d 657, 662 (8th Cir. 1986).

9. *Id.* at 682.

10. *Id.* at 666-68.

11. The district court had already approved $37,000,000 to be applied toward the most critical capital improvement needs of the KCMSD. Jenkins v. Missouri, 639 F. Supp. 19, 41 (W.D. Mo. 1985). The court also authorized $12,877,330 in capital improvement expenditures for six planned magnet schools, and ordered the KCMSD to submit a long-range capital improvement plan. *Id.* at 53.

12. Jenkins v. Missouri, 672 F. Supp. 400, 405-08 (W.D. Mo. 1987).

13. *Id.* at 405.

14. *Id.* at 411. A bond issue and tax levy increases proposed by the KCMSD were defeated in four separate elections in 1986 and 1987. Additionally, legislation introduced in the Missouri General Assembly failed to pass. *Id.*

15. *Id.*

16. *Id.* at 411-12.

17. *Id.* at 412.

assessed valuation in order to fund costs other than capital improvements.[18]

The state appealed to the United States Court of Appeals for the Eighth Circuit, contending that the federal court lacked the power to order a tax increase.[19] The Eighth Circuit held that the district court exceeded its authority in ordering the income tax surcharge.[20] Regarding the property tax increase, the court held that state law limitations must fall to the remedies of constitutional violations and affirmed the district court's actions as to that point.[21]

The court then stated that in the future the district court should authorize the school board to submit a proposed levy to the collection authorities who would be enjoined from applying those state limitations that would limit or reduce the levy.[22] This, the court reasoned, would be the least obtrusive method of remedying the constitutional violations.[23]

The United States Supreme Court granted certiorari[24] and reversed in part, holding that the Eighth Circuit erred in allowing the tax increase to stand.[25] However, the Court affirmed the Eighth Circuit's modifications of the district court order.[26] The Court held that a district court can direct a local government body to levy its own taxes when necessary to fulfill the obligations of the Constitution.[27] *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

Article III of the Constitution provides that "[t]he judicial Power

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18. *Id.* at 413.

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

20. *Id.* at 1315.

21. *Id.* at 1313-14.

22. *Id.* at 1314. In accordance with article X of the Missouri Constitution the real and personal property tax levy is limited to $1.25 per $100 of assessed valuation unless a majority of voters approve a greater levy of up to $3.75 per $100. MO. CONST. art. X, § 11(b) to (c). The levy may be increased above a rate of $3.75 only upon approval by two-thirds of the voters. MO. CONST. art. X, § 11(c). Proposition C allocates one cent on each dollar of the state sales tax to the School District Trust Fund, which is then distributed among the schools. MO. ANN. STAT. §§ 144.700 to .701, 163.087 (Vernon 1976 & Supp. 1990). As a result, each district's operating levy is decreased by an amount equal to 50% of the previous year's sales tax receipts. MO. ANN. STAT. § 164.013 (Vernon 1965 & Supp. 1990). Finally, the Hancock Amendment requires an adjustment of the tax levy so the amount of tax revenue collected after reassessment equals the amount produced the previous year. MO. CONST. art. X §§ 16 to 24; MO. ANN. STAT. § 137.073 (Vernon 1988 & Supp. 1990).

23. 855 F.2d at 1314.

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

25. *Id.* at 1667.

26. *Id.*

27. *Id.* at 1666.

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."[28] Article III limits the jurisdiction of the federal courts and was intended by the proponents of the Constitution to mean that the judiciary would be involved in neither the waging of war nor the levying of taxes.[29] Throughout the years, the Supreme Court has confirmed this interpretation.[30]

Article I of the Constitution also has been cited as evidence refuting a judicial power of taxation. Article I states that "[t]he Congress shall have power to lay and collect taxes."[31] The Supreme Court has held this to mean that Congress "is the sole organ for levying taxes."[32]

In a series of cases involving overindebted municipalities which were unable to meet their financial obligations, the Supreme Court held that the federal courts could use their power of mandamus to compel local officials to exercise their statutory powers.[33] However, the Court refused to go further by expanding the powers given to the officials by statute[34] or levying the taxes themselves.[35]

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28. U.S. CONST. art. III, § 1.

29. The judiciary . . . has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

THE FEDERALIST NO. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961). *See also* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW § 2.1 (1986) (Original jurisdiction of the federal courts cannot be expanded beyond article III.).

30. *See, e.g.*, Davis v. Michigan Dep't of Treasury, 109 S. Ct. 1500, 1509 (1989) (Eliminating tax exemption "could be construed as the direct imposition of a state tax, a remedy beyond the power of a federal court."); Moses Lake Homes, Inc. v. Grant County, 365 U.S. 744 (1961) (district court may not substitute valid tax for invalid one); South Dakota v. North Carolina, 192 U.S. 286, 319 (1904) ("A levy of taxes is not within the scope of the judicial power except as it commands an inferior municipality to execute the power granted by the legislature."); Spencer v. Merchant, 125 U.S. 345, 355 (1888) ("The power to tax belongs exclusively to the legislative branch of the government.").

31. U.S. CONST. art. I, § 8.

32. National Cable Television Ass'n v. United States, 415 U.S. 336, 340 (1974) ("Taxation is a legislative function, and Congress . . . is the sole organ for levying taxes.").

33. *See* United States v. New Orleans, 98 U.S. 318 (1878) (Mandamus should have been issued to compel city to levy tax necessary for payment of judgment against it.); Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 137 (1870) (Writ of mandamus may be issued to compel county officials to levy tax to pay judgment.).

34. United States v. County of Macon, 99 U.S. 582, 591 (1878) ("We have no power by *mandamus* to compel a municipal corporation to levy a tax which the law does not authorize.").

35. Heine v. Levee Comm'rs, 86 U.S. (19 Wall.) 655 (1873). In *Heine* the board of levee commissioners was authorized to levy taxes for the payment of interest on and principal of levee

In *Von Hoffman v. City of Quincy*[36] the Supreme Court held that a writ of mandamus could be issued directing the city to levy taxes sufficient to pay interest due bond holders.[37] The Court held that a state statute limiting the city's power to tax could be disregarded because it was passed after the issuance of the bonds.[38] The statute impaired the contractual entitlements of the bondholders and was therefore in violation of article I of the Constitution.[39]

After declaring that "separate but equal" had no place in public education and that segregation in the public schools had deprived minorities of equal protection guaranteed under the fourteenth amendment,[40] the Supreme Court invited interested parties to argue concerning the manner in which relief should be accorded.[41] In *Brown II*[42] the Court addressed these arguments and held that "the courts will be guided by equitable principles" in fashioning remedial decrees.[43] The Court felt that, during this time of adjustment, it would be appropriate for the courts to review the steps taken by the districts and participate in the framing of remedies.[44]

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district bonds. *Id.* at 656. The commissioners refused to levy the taxes and resigned their office. *Id.* The Supreme Court refused to order the district court to levy the taxes, stating "[i]t 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." *Id.* at 661. *See also* Meriwether v. Garrett, 102 U.S. 472, 518 (1880) (Fields, J., concurring) ("No Federal court, either on its law or equity side, has any inherent jurisdiction to lay a tax for any purpose, or to enforce a tax already levied, except through the agencies provided by law.").

36. 71 U.S. (4 Wall.) 535 (1866).

37. *Id.* at 554-55.

38. *Id.* at 555.

39. *Id.* Article I of the Constitution states that "[n]o State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts." U.S. CONST. art. I, § 10. "It is the duty of the city to impose and collect the taxes in all respects as if that act had not been passed." *Von Hoffman*, 71 U.S. at 555.

40. Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (*Brown I*).

41. *Id.* at 495-96.

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

43. *Id.* at 300. In *Milliken v. Bradley*, 433 U.S. 267 (1977) the Supreme Court held that application of those "equitable principles" requires the federal courts to focus on three factors. First, the remedy's nature must be determined by the nature and scope of the constitutional violation. *Id.* at 280. Second, the desegregation plan must be "*remedial* in nature." *Id.* Third, the courts "must take into account the interest of state and local authorities in managing their own affairs, consistent with the Constitution." *Id.* at 280-81. It is this last factor which is implicated by orders concerning financing. For a complete discussion of the courts' remedial powers and the policies underlying the *Milliken* factors see Note, *Judicial Taxation in Desegregation Cases*, 89 COLUM. L. REV. 332, 337-43 (1989).

44. *See Brown II* at 300-01. The Court further stated that a "prompt and reasonable" start toward compliance with *Brown I* was required and:

In *Griffin v. County School Board*[45] the Supreme Court affirmed a district court's order enjoining the actions of county officials attempting to avoid the mandate of the *Brown* decisions.[46] In response to actions of the Virginia General Assembly,[47] the United States Court of Appeals for the Fourth Circuit ordered the federal district court to take steps toward enforcing the mandate of the *Brown* decisions.[48] Having resolved that they would not operate integrated schools, the Supervisors of the county refused to levy any taxes for the following school year.[49]

Addressing what kind of judicial decree would be appropriate to end the racial discrimination, the Court noted that it was the Supervisors' "special responsibility to levy local taxes to operate public schools."[50] The Court continued, saying, "the 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."[51]

In the wake of *Brown* and *Griffin*, the federal courts have repeatedly faced questions involving the judiciary's power to levy taxes as part of a desegregation remedy.[52] In response, the federal appellate

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> To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a non-racial basis, and *revision of local laws and regulations which may be necessary in solving the foregoing problems.*

Id. (emphasis added).

45. 377 U.S. 218 (1964).

46. *Id.* at 225.

47. In reaction to the *Brown* decisions, the Virginia General Assembly had enacted legislation making school attendance optional and providing for tuition grants for children attending nonsectarian private schools. *Id.* at 222-23.

48. *Id.* at 222.

49. *Id.* As a result, the county's public schools closed and remained closed at the time of the *Griffin* decision. *Id.* at 222-23.

50. *Id.* at 232.

51. *Id.* at 233.

52. *See* Kelley v. Board of Educ., 836 F.2d 986 (6th Cir. 1987); Liddell v. Missouri, 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984); United States v. Board of School Comm'rs, 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982); Evans v. Buchanan, 582 F.2d 750 (3d Cir. 1978); National City Bank v. Battisti, 581 F.2d 565 (6th Cir. 1977); United States v. Missouri, 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975); Plaquemines Parish School Bd. v. United States, 415 F.2d 817 (5th Cir. 1969); *see also* Comment, *Eliminating Vestiges of School Segregation: Judiciary Empowered to Remedy Equal Protection Violation by Levying Unauthorized Taxes*, 28 WASHBURN L.J. 310, 316-19 (1988) and Comment, *Liddell v. Missouri: Financing the Ancillary Costs of Public School Desegregation Through Court-Ordered Tax Increase*, 42 WASH. & LEE L. REV. 269, 278-80 (1985).

courts have assigned various interpretations to the holding in *Griffin*.

Four years after the Supreme Court decided *Griffin*, the United States Court of Appeals for the Fifth Circuit faced a desegregation financing problem. In *Plaquemines Parish School Board v. United States*[53] the Fifth Circuit cited *Griffin* for the proposition that district courts have the power to order agencies operating public schools to levy taxes.[54] The district court had ordered the school board to apply for federal financial aid whenever necessary to effectuate compliance with the court's desegregation order.[55] The Fifth Circuit found this went beyond the holding of *Griffin*, and reversed that part of the order.[56]

The court noted that in *Griffin* "[t]he subjects of levy, tax rates, and collection methods were left to the commands of state law under state standards."[57] The district court had overstepped its bounds by ordering funding from a specific source.[58] However, the court did state that such an order could be made in the future if the purpose in not applying for the funding was to impede desegregation or to discriminate.[59]

In *National City Bank v. Battisti*[60] the United States Court of Appeals for the Sixth Circuit also declined to interpret *Griffin* broadly.[61] In *Battisti* the creditors of the Cleveland City School District filed for a writ of prohibition or mandamus, seeking relief from two orders of the district court.[62]

Following a report by the Auditor of the State of Ohio that the Board of Education would incur a multi-million dollar deficit,[63] the district court prohibited the Board from closing any school without the

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53. 415 F.2d 817 (5th Cir. 1969).

54. *Id.* at 833. "[D]istrict courts have the power to require the persons or agencies operating a public school system to levy taxes in order to raise funds adequate for the operation and maintenance of a public school system without racial discrimination." *Id.*

55. *Id.* The order required that "[w]henever necessary to operate the school system in accordance with the terms of this Order, the defendant School Board shall make application for financial aid from programs operated by the United States Government." *Id.* at 833, n.27.

56. *Id.* at 833.

57. *Id.*

58. *Id.*

59. *Id.*

60. 581 F.2d 565 (6th Cir. 1977).

61. *Id.* at 569.

62. *Id.* at 568.

63. The audit revealed that the Board would face a deficit in excess of $19 million by the end of that calendar year. The cash flow shortage included all projected income and expenses, including payment of the $15 million in notes held by the petitioners. *Id.* at 566.

court's prior approval.[64] In response, the petitioners filed for a writ of mandamus in the Supreme Court of Ohio to compel the Board to retain the taxes collected to pay the bonds in a separate fund.[65]

The judge then issued a temporary restraining order enjoining the petitioners from proceeding with their petition for a writ of mandamus from the state supreme court.[66] Fourteen days later the court issued another order directing that the County Auditor's disbursements proceed in substantially the same manner as they did "prior to any decision and Writ of the Supreme Court of the State of Ohio."[67] Rather than intervening as the district judge suggested, the creditors filed an application for writ of mandamus or prohibition with the Sixth Circuit.[68]

The Sixth Circuit treated the motion as one for an expedited appeal and remanded the case for a hearing at which all the parties would be present.[69] The court, having noted that both orders were made amid threats of school closings for lack of financial resources,[70] then addressed the extent of the federal court's power to fashion remedies in school desegregation cases.[71] The court stated that school financing was purely a matter of state responsibility and the power of the federal courts to intervene was limited to vindicating provisions of the Constitution.[72] Citing *Griffin*, the court held that only upon purposeful school closings with the intent to defeat desegregation, could a district court intervene to the point of prioritizing the payment of school debts.[73] Like the Fifth Circuit, the Sixth Circuit limited the power of a district court to intervene in questions of financing to those times when officials' actions are taken with the intent of defeating desegregation efforts.

In *Evans v. Buchanan*[74] the Third Circuit reversed a court-ordered tax rate, citing the district court's failure to defer to the legislature's

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64. *Id.* at 567. Ordering the Board and its agents to continue operation of the school district, the district court decreed that the Board would be "expressly relieved from any and all personal liability" which might result from compliance. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 568.

68. *Id.*

69. *Id.* at 569.

70. *Id.* at 567.

71. *Id.* at 569.

72. *Id.*

73. *Id.*

74. 582 F.2d 750 (3d Cir. 1978).

judgment.[75] The district court had given a court-appointed desegregation planning board the authority to levy taxes for operating expenses.[76] The legislature could raise or lower this tax rate as long as such action did not imperil the desegregation process.[77]

Following the mandate of the Delaware General Assembly, the State Board of Education set a rate lower than that authorized by the planning board and applied for an injunction enjoining the planning board from levying taxes.[78] The court denied the injunction on the ground that the State Board of Education's plan would "frustrate or imperil the desegregation process."[79]

The State of Delaware immediately filed a petition for mandamus directing the district court to vacate its order.[80] The Third Circuit directed the district court to vacate its order and conduct a new hearing, receiving the legislative solution with "a presumption of regularity and constitutionality."[81] Citing *Griffin*, the court stated that if the state's tax plan resulted in the allocation of "substantially insufficient funds" for the school's continued operation, "such action . . . would clearly be unacceptable as interference with the operations of the desegregation decree."[82] However, the Third Circuit did not indicate that such interference must be intentional to justify the intervention of a federal court.

In *United States v. Board of School Commissioners*[83] the United States Court of Appeals for the Seventh Circuit held that it was not an abuse of discretion for the district court to order the state to use unappropriated funds to finance desegregation costs.[84] The court held that,

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75. *Id.* at 778.

76. *Id.* at 774.

77. *Id.*

78. *Id.* at 775-76.

79. *Id.* at 776 (quoting the district court below: 455 F. Supp. 692, 696 (D. Del. 1978)).

80. *Id.* at 776.

81. *Id.* at 779. *Cf.* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) (Legislature's efforts to solve problems of financing public school system are entitled to respect.); Hugg, *Federalism's Full Circle: Relief for Education Discrimination*, 35 LOY. L. REV. 13, 28-30 (1989).

82. *Id.* at 780. *See also* Comment, *Eliminating Vestiges of School Segregation: Judiciary Empowered to Remedy Equal Protection Violation by Levying Unauthorized Taxes*, 28 WASHBURN L.J. 310, 317 (1988) (Stating in reference to *Evans*, "Unlike the school board in *Griffin* which refused to levy school taxes, the state's bond levy sufficiently funded the program; the difference in revenue generated by the state and county tax rates was $2.5 million, a small percentage of the $40 million required to fund the program.").

83. 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982).

84. *Id.* at 1190. For a general look at the Seventh Circuit's treatment of desegregation cases, see Erlinder & Evenson, *Civil Liberties: Judicial Immunity, Prisoners' Rights, Title VII*

because the Indiana Constitution permitted the expenditure of funds only in accordance with appropriation and the legislature had already adjourned, the district court's order was necessary to protect the school districts.[85]

The Seventh Circuit affirmed the district court's authority to order funding in violation of the state constitution in order to remedy the constitutional violation. The court noted that the plan's provision did not affect the legislature's future appropriation of funds "so long as it appropriates sufficient funds for the desegregation plan."[86] The order prevented the state from continuing discrimination by forcing the districts to pay the cost of desegregation out of their regular appropriations.[87] It did not, however, limit the power of the legislature to reallocate funds for other government functions or to raise taxes.[88]

In 1975 the United States Court of Appeals for the Eighth Circuit laid the groundwork for the issue that would ultimately reach the Supreme Court. In *United States v. Missouri*[89] the Eighth Circuit affirmed the power of a district court to direct that provisions be made for the levying of taxes sufficient to operate a school district.[90]

The State Board of Education appealed the district court's order of a specific tax rate to operate the district.[91] The Eighth Circuit affirmed the district court's power to direct a tax levy.[92] The court stated that "the remedial power of the federal courts under the Fourteenth Amendment is not limited by state law."[93] However, the court held that deference should have been given to the views of the Board regard-

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and School Desegregation, 57 CHI.[-]KENT L. REV. 57, 85-96 (1981).

85. 677 F.2d at 1189.

86. *Id.*

87. *Id.* at 1190 (citing Griffin v. County School Bd., 377 U.S. 218, 233 (1964)).

88. *Id.*

89. 515 F.2d 1365 (8th Cir.), *cert. denied*, 423 U.S. 951 (1975).

90. *Id.* at 1372-73.

91. Following the consolidation of three Missouri school districts, the district court found that a uniform tax rate of $6.03 was necessary to operate the new district. *Id.* at 1371. Therefore, the court ordered a tax rate of $6.03 throughout the new district. *Id.* at 1372. The tax rates of each of the three districts before consolidation were $3.80, $4.97, and $5.38. *Id.* at 1371. The State Board of Education moved to amend the judgment to $5.38, stating "that other funds may be available through action of the Missouri Legislature." *Id.* at 1372. The court denied the motion, noting that the rate could be lowered by the Board under the power of the State Constitution if additional funds became available in the future. *Id.*

92. *Id.* at 1372-73.

93. *Id.* at 1372 (quoting Haney v. County Bd. of Educ., 429 F.2d 364, 368 (8th Cir. 1970) and citing Griffin v. County School Bd., 377 U.S. 218, 233 (1964)).

ing the necessary tax rate.[94] Therefore, the circuit court ordered that the tax rate equal the Board's suggested rate of $5.38.[95]

Twenty years after the Supreme Court handed down its decision in *Griffin*, the Eighth Circuit expanded its already broad interpretation of the powers of federal courts in desegregation cases. In *Liddell v. Missouri (Liddell VII)*[96] the court stated that *Griffin* affirmed the district court's authority to increase taxes to fund desegregated schools.[97] The court noted that the holding in *Griffin* was not limited merely to a return to the previous levy or procedures.[98]

The St. Louis school districts submitted a desegregation plan for the district court's approval.[99] The court approved the plan and ordered the board to submit a bond issue to the voters to finance its part of the costs.[100] The court also deferred a planned reduction in the property tax levy, reserving the right to increase the tax if necessary.[101]

Affirming the court's order, the Eighth Circuit held that the district court's "broad equitable powers" to remedy segregation included the power to order increases in local property taxes.[102] *Griffin*, the court reasoned, required only that the tax be necessary to prevent continued discrimination and adequate to operate and maintain a discrimination-free school system.[103] Although deference was to be given state authorities,[104] the court authorized the district court to levy taxes in excess of state law limitations to remedy a constitutional wrong.[105]

Missouri v. Jenkins[106] again presented the Supreme Court with the issue of whether a district court's equitable powers in fashioning

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94. *Id.* at 1373.
95. *Id.*
96. 731 F.2d 1294 (8th Cir.), *cert. denied*, 469 U.S. 816 (1984).
97. *Id.* at 1320.
98. *Id.*
99. *Id.* at 1300.
100. *Id.*
101. *Id.* at 1300-01.
102. *Id.* at 1320.
103. *Id.*
104. The court did order that upon remand the district court should determine whether the Board would be able to fund its share of the costs with its own resources. *Id.* at 1323. If the Board's resources were insufficient, then the court was to consider alternative revenue sources including submission of a referendum to the voters and legislative action. *Id.* Finally, if these alternatives were fruitless, the court was to hold an evidentiary hearing and enter a judgment. *Id.*
105. *Id.* at 1320-23. *But see id.* at 1332 (Gibson, J., dissenting in part). "The Court need not and should not go this far. The taxing power of the states is primarily vested in their legislatures, deriving their authority from the people." *Id.*
106. 110 S. Ct. 1651 (1990).

remedies in school desegregation cases include the power to impose taxes. The Court held that the district court had abused its discretion in directly imposing the tax itself.[107] The Court also held that the Eighth Circuit erred in allowing the district court's self-imposed tax increase to stand and reversed that part of the decision.[108]

According to the Court, the alternative method outlined by the Eighth Circuit in its modification of the district court's order was a plausible alternative.[109] The district court could have authorized the District "to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented KCMSD from exercising this power."[110] The Court reasoned that such a method not only protects the functions of local government institutions, but places the responsibility for solutions to the evils of segregation on those who have created the problems.[111]

The Court then addressed the modifications to the district court's order made by the court of appeals. The Court summarily dismissed the State of Missouri's argument that the order "violates principles of equity and comity because the remedial order itself was excessive."[112] The Court held that this argument was aimed at the scope of the remedy and, therefore, fell outside the Court's limited grant of certiorari.[113]

The Court also dismissed the State's contention that the modifications were invalid under the tenth amendment.[114] The Court reasoned that, because it was directed against the power of the states, the fourteenth amendment "permits a federal court to disestablish local government institutions that interfere with its commands."[115]

Finally, the Court addressed the argument that such a tax increase could not be sustained under article III of the Constitution. Citing *Griffin*,[116] the Court stated that "a court order directing a local government body to levy its own taxes is plainly a judicial act within the

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107. *Id.* at 1663.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 1664.
113. *Id.*
114. *Id.* at 1665.
115. *Id.* (citing Pennsylvania v. Union Gas Co., 109 S. Ct. 2273, 2302 (1989) (Scalia, J., concurring in part and dissenting in part).
116. For a discussion of *Griffin*, see *supra* text accompanying notes 45-51. *See also* Comment, *supra* note 82, at 313-15.

power of a federal court."[117] The Court stated that *Griffin* was an extension of a long line of cases allowing the issuance of a writ of mandamus compelling local governments to levy taxes to satisfy their debt obligations.[118]

The state argued, however, that even under the cases cited by the Court, the judiciary's power is limited to "requir[ing] local governments to levy taxes *as authorized under state law.*"[119] The Court relied on *Von Hoffman*[120] for the proposition that a court could order a local government to levy taxes in excess of a state statutory limit "where there is reason based in the Constitution for not observing the statutory limitation."[121] Any other holding, the Court reasoned, would disregard the obligations of local governments under the supremacy clause to fulfill the requirements imposed on them by the Constitution.[122] In closing, the Court stated "where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy."[123]

Justice Kennedy, joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, concurred in part and concurred in the judgment. He expressed a belief that the Court's discussion approving the Eighth Circuit's modifications of the district court's order was unnecessary and "cannot be seen as . . . precedent for the future."[124] However, because the majority chose to discuss the issue of "future taxa-

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117. 110 S. Ct. at 1665.

118. *Id.* The Court cited Louisiana *ex rel.* Hubert v. Mayor and Council 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. (19 Wall.) 655 (1873); City of Galena v. Amy, 72 U.S. (5 Wall.) 705 (1867); Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866); and Board of Comm'rs v. Aspinwall, 65 U.S. (24 How.) 376 (1861).

119. 110 S. Ct. at 1666.

120. 71 U.S. (4 Wall.) 535 (1866).

121. 110 S. Ct. at 1666.

122. *Id.* The supremacy clause provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. For an in depth look at the supremacy clause, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 479-528 (2d ed. 1988).

123. 110 S. Ct. at 1666. "[S]tate 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)).

124. *Id.* at 1667 (Kennedy, J., concurring in judgment). Justice Kennedy argued that the court of appeals' discussion of a modification of the district court's order could be nothing more than dictum, in light of the fact that the court of appeals affirmed the district court's actions to that date. *Id.* at 1669.

tion," Justice Kennedy felt compelled to express his disagreement in a separate concurring opinion.[125]

First, Justice Kennedy rejected the majority's distinction between "direct imposition of a tax by the federal court and an order commanding the school district to impose the tax" as a "convenient formalism."[126] He concluded that the KCMSD and other local government bodies derive their power from the state and, therefore, their power is defined by state laws, "including taxation provisions legitimate and constitutional in themselves."[127] Therefore, "[w]hatever taxing power the KCMSD may exercise outside the boundaries of state law would derive from the federal court."[128]

Second, Justice Kennedy argued that the Court's opinion bestowed upon the judiciary a power to tax, a power which is not authorized by article III.[129] He noted that the district court's order provided taxpayers no due process protections.[130] Also, article I specifically delegates the power to levy taxes to the legislature.[131] *Griffin*, Justice Kennedy argued, did not apply to the case at hand because it "endorsed the power of a federal court to order the local authority to exercise *existing* authority to tax."[132]

Justice Kennedy argued that *Von Hoffman*[133] was distinguishable from the case at hand because, in that case, the statutory limitation itself was unconstitutional.[134] He observed that the Missouri tax law violated no specific provisions of the Constitution and, therefore, the majority relied on some "vague 'reason based in the Constitution.' "[135]

He suggested that this case was more analogous to *Heine*[136] than to *Von Hoffman*. *Heine* and its progeny[137] were more applicable be-

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125. *Id.* at 1669.

126. *Id.* at 1669-70.

127. *Id.* at 1670.

128. *Id.*

129. *Id.*

130. *Id.* at 1671. "Where a tax is imposed by a governmental body other than the legislature . . . due process requires notice to the citizens to be taxed and some opportunity to be heard." *Id.* (citation omitted).

131. *Id.*

132. *Id.* at 1673.

133. 71 U.S. (4 Wall.) 535 (1866).

134. 110 S. Ct. at 1674-75.

135. *Id.* at 1674.

136. 86 U.S. (19 Wall.) 655 (1873).

137. *See* Meriwether v. Garrett, 102 U.S. 472 (1880) (no authority in federal court to levy taxes which are collectible only under legislative authority); United States v. County of Macon, 99 U.S. 582 (1879) (unless a subsequent limitation violates the contracts clause, the court has no

cause they "show that where a limitation on the local authority's taxing power is not a subsequent enactment itself in violation of the Contracts Clause, a federal court is without power to order a tax levy that goes beyond the authority granted by state law."[138] Here, the KCMSD was not vested with the power to levy a higher tax under state law and, consequently, such power could only have come from the federal court.[139]

Finally, Justice Kennedy questioned the apparent presumption by the majority that the remedy approved by the district court was the only cure for the constitutional violations. In his opinion the Court should have declined to address the question of judicial authority to mandate taxes without a prior "finding that without the particular remedy at issue the constitutional violation will go unremedied."[140] This belief was fostered in part by the elaborateness and costliness of the plan chosen by the KCMSD and approved by the district court.[141]

The *Jenkins* decision not only stirs deeply rooted emotions over the inherent offensiveness of court-imposed taxes, but also raises important questions about future desegregation remedies. One troubling aspect of the decision is that it removes the power of resource allocation from the people (in the form of their elected representatives), in favor of an appointed federal judge. Local school districts, frustrated by their inability to gain public support for increased spending, could conceivably bring desegregation suits with the ulterior motive of financing their own education policies.[142]

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authority to levy a tax in excess of state law limitations); Rees v. City of Watertown, 86 U.S. (19 Wall.) 107 (1874) (tax limitation in effect at time bond obligation undertaken may not be exceeded by court order).

138. 110 S. Ct. at 1675.

139. *Id.*

140. *Id.* at 1677.

141. The plan called for all the schools except one-half of the elementary schools to be magnet schools (schools offering special programs to attract students). *Id.* at 1668. The capital improvement plan provided for every high school classroom to have air conditioning, an alarm system, and 15 microcomputers. Other items included a planetarium, greenhouses, a model United Nations wired for language translation, radio and television studios with broadcast capabilities and an editing and animation lab, a temperature controlled art gallery, a dust-free diesel mechanics room, and numerous other facilities. *Id.* at 1676-77.

142. The KCMSD was originally a plaintiff along with the students until realigned as a defendant by the district court. See *supra* notes 1 and 3. Justice Kennedy noted in his concurrence, "The plaintiffs and the KCMSD might well be seen as parties that have 'joined forces apparently for the purpose of extracting funds from the state treasury.'" 110 S. Ct. at 1676 (Kennedy, J., concurring in part and concurring in the judgment) (quoting Milliken v. Bradley, 433 U.S. 267, 293 (1977)).

On the other hand, if a court is without the power to order the levy, what alternative is there to letting the constitutional violation continue? Some commentators have suggested that a "simple demand for desegregation" will leave the local authorities to decide whether to raise taxes or reallocate the budget.[143] The local citizens will then face the choice of a lower standard of education versus a higher standard, rather than a desegregated or segregated school district.[144]

However, such a prospect presents a frightening proposition in this era of anti-taxation sentiment. Local citizens weary from paying increasing taxes might allow the standard of education in their community, including the condition of school facilities, to decline to shamefully low levels. Such a decline would not be a constitutional violation.[145] Actually, authorizing a district court to order a tax increase might be seen as the least intrusive means of correcting the constitutional violations resulting from segregation. The court can provide a school district with the means to comply with an order to eliminate the vestiges of discrimination without lowering the district's educational standards.

The decision also raises troubling questions concerning the balancing of the power of the federal government against the sovereignty of the states. In his concurrence, Justice Kennedy raises the issue that the Court's holding is apparently not limited to the context of school desegregation.[146] Indeed, the action involved here was brought under 42 U.S.C. Section 1983, which is applicable in any situation involving an action under color of state authority.[147] It is plausible that a district court could order the levy of taxes to fund the construction of state prisons or mental hospitals under the authority of this holding in a section 1983 case involving unconstitutional living conditions.[148]

It remains to be seen whether the *Jenkins* decision will be strictly

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143. *See* Note, *Local Taxes, Federal Courts, and School Desegregation in the Proposition 13 Era*, 78 MICH. L. REV. 587, 595-607 (1980).

144. *Id.* at 596.

145. In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973), the Supreme Court stated that education is not within the category of rights recognized as guaranteed by the Constitution. *See also* Note, *supra* note 143, at 596-97 n.46.

146. 110 S. Ct. at 1678 (Kennedy, J., concurring in part and concurring in the judgment).

147. See *supra* note 2.

148. However, such application would be limited to constitutional violations and could not be used to require, for example, the construction of roads or the hiring of law enforcement officers. Of course, it is more likely that the court would mandate the release of a certain number of prisoners to correct the wrong. *Cf.* Note, *supra* note 143, at 597 n.47 ("the threat of release may provide sufficient motivation for expenditures without judicial decree").

construed and limited to its facts or cited by courts as authority to mandate tax increases to fund all kinds of local government responsibilities. At least one commentator has suggested that elected officials who do not want the negative publicity that comes with raising taxes will encourage district judges to read the case broadly to relieve them of this unpopular responsibility.[149] However, if limited to its facts, the case cannot be so easily expanded.

School districts are a unique branch of local government by virtue of the fact that they are "special function districts."[150] They perform the single function of providing public education.[151] As a type of single function district, they are not responsible for funding other local government functions such as sewer service or police protection.[152] Therefore, a district court seeking to ensure adequate funding of a desegregation plan does not have the alternative of allowing the school district to voluntarily reallocate its funds from another service to public education. The school district's funds are already dedicated entirely to public education and any increase in local funds by the district must most likely come from an increase in taxes.

On its face, Justice White's majority opinion appears to be applicable to all actions alleging constitutional violations brought under section 1983. However, it would appear improbable that the Supreme Court would affirm the application of the decision beyond the context of desegregation. The fact that the ruling was 5-4 makes the future of *Jenkins* even more uncertain. With the recent resignation of Justice Brennan (who joined in the majority opinion) and his imminent replacement with a justice chosen by President Bush, it is unlikely that the High Court will expand *Jenkins'* application. However, with the existence of literally hundreds of formerly segregated school districts currently under the jurisdiction of federal courts, it is likely that the authority vested by the *Jenkins* decision in federal judges presiding over desegregation cases will be exercised and tested in the future.

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149. *See* Chi. Tribune, Apr. 23, 1990, p. 14, zone C.
150. *See* O. REYNOLDS, JR., LOCAL GOVERNMENT LAW 26-32 (1982).
151. *Id.* at 29.
152. *Id.*