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# The Limited Power of Courts to Order Spending

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# The Limited Power of Courts to Order Spending

Alexander Hamilton advocated the notion of the judiciary as the "least dangerous branch."[1] Such a belief has faced a number of challenges over recent years against a backdrop of court decisions increasingly relying on what is known as the "judicial power of the purse."[2] In confronting various constitutional challenges, from enforcing civil rights to fixing unacceptable government institutions, the courts, notably the lower-level federal courts, have taken a progressively more active role in mandating spending by the local governmental entities. Such actions by the federal courts press at the heart of fundamental theories of separation of powers and federalism. The debate about these issues, however, is far from settled and the resolution far from clear. The Supreme Court has noted that, although the remedial powers of the courts must "be adequate to the task, . . . they are not unlimited."[3] This Briefing Paper will examine the development of the judicial power of the purse in creating and enforcing remedies, including the power of the courts to order particular methods of raising the revenue necessary to ensure the remedies.[4] In Part I we will discuss the background of judicially mandated spending, in Part II we will turn to the pivotal case of *Missouri v. Jenkins*, and in Part III we will examine the implications of *Jenkins* and the future of court mandated remedial spending.

[1] THE FEDERALIST NO. 78 (Alexander Hamilton).
[2] Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PENN. L. REV. 715 (1978).
[3] Whitcomb v. Chavis, 403 U.S. 124, 161 (1971).
[4] Although this Briefing Paper focuses on the federal judiciary's imposition of spending requirements on state legislatures, it will also discuss, in relevant parts, the application of many of the same principles to cases involving the state courts imposing requirements on the state legislatures.

## PART I: HISTORY OF JUDICIALLY MANDATED SPENDING

*a. Separation of Powers, Federalism, and the Constitution*

In contemplating a separation of powers, the Constitution states that "no money shall be drawn from the Treasury but in consequence of appropriations made by law."[5] In Federalist 78, Hamilton noted that the judiciary has "no influence over either the sword or the purse . . . and can take no active resolution whatsoever."[6] Such a view was shared by many of the Founders, envisioning separate spheres of influence between the legislative branch, with the power to authorize spending and raise revenue, and the judicial branch, with its role as the arbiter of the law. Professor Gerald Frug, in his seminal article on the judicial power of the purse, wrote that these distinctions are slowly fading away as the lower federal courts increase their influence over government spending through judgments to remedy constitutional violations.[7] Professor Frug also notes that, although this practice has become increasingly popular in lower court judgments, the use does not necessarily make the practice legitimate.[8] Because of the enormity of such separation of powers arguments and the complexities of creating appropriate judicial remedies, the Supreme Court will often sidestep these issues on non-justiciability grounds.[9]

There are a number of policy arguments, despite the constitutional concerns, for allowing the lower courts to engage in such remedial judgments. First, without the courts' intervention, it is sometimes unlikely that the problems confronted by the courts

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[5] U.S. CONST. art. I, § 9, cl. 7.
[6] THE FEDERALIST NO. 78 (Alexander Hamilton).
[7] Frug, *supra* note 2 at 715.
[8] *Id.* at 716.
[9] *See* Richard H. Fallon, Jr. *Justiciability and Remedies—And Their Connections to Substantive Rights* (forthcoming). The justiciability concerns raised by the Court in such situations often include standing, political question doctrine, ripeness, and mootness, among others.

will be solved through the legislative power of the government.[10] Often, these situations involve such politically unpopular groups as indigent criminals and the mentally ill, or court orders for desegregation where the legislatures are unlikely to expend significant resources. The courts accordingly provide protection for minorities that may otherwise suffer from the strictures of majoritarian politics. Second, the courts often state a remedy without mandating any manner in which that remedy must be appropriated. This type of order can come in the form of an injunction and will not directly step on the power of the legislature to appropriate, but will instead reside in the grey region of remedial measures where spending is necessary but no specific means are required.

The Supreme Court, however, has observed three interests in restraining the power of the federal judiciary.[11] First, there is an inherent interest in placing such remedial decisions in the hands of the democratic process where the branches may be held politically accountable for their actions.[12] By mandating spending by the legislature, the voters accordingly may place the blame for higher spending on the legislature, rather than the members of the federal judiciary mandating the spending. The same logic applies to situations in which politically unaccountable state court judges mandate spending from the state treasury. Second, respect for federalism presents problems in these situations since it is typically the federal courts that, when creating remedies for constitutional violations, will direct the spending of the state funds.[13] Thus, the states' treasuries are effectively controlled by the federal government in such

[10] *See* Part I(b).
[11] *See* Frug, *supra* note 2, at 733–34.
[12] *Id.* at 734.
[13] *Id.* Frug also notes that the same federalism concerns would also exist even if it were Congress mandating the spending of the state legislatures to remedy such problems as this still represents the same state-federal power struggle. *See* National League of Cities v. Usery, 426 U.S. 833 (1976).

circumstances. Finally, in cases not involving issues of federalism, there will be problems of inter-branch allocations of power as the courts will order another branch to allocate resources, which could run afoul of the designated powers of the respective branches.[14] The difficult constitutional interests noted by the Supreme Court substantiate the reasoning behind the Court's desire to avoid such difficult questions through doctrines like standing, political questions and other forms of justiciability.

*b. Court Ordered Remedies without Mandated Spending*

Courts will often mandate certain remedial measures in cases involving constitutional violations, which may have a substantial fiscal impact on legislatures and treasuries alike. Specifically, these situations arise in cases involving court access and the improvement of state institutions.[15] Over the years, the Supreme Court has continually upheld such remedial orders, even where the measures will require significant spending by the legislature.

To begin with, the Supreme Court has consistently upheld the rights of individuals to access the court system, which is a goal requiring a great deal of spending. The Supreme Court first addressed the issue of expanding access in *Griffin v. Illinois*.[16] In *Griffin*, the Supreme Court held that indigent criminal defendants must be provided with transcripts of their trial for appeal, and that not allowing such defendants the right to receive transcripts free of charge violated the Equal Protection Clause of the Fourteenth

[14] *Id.* (citing Elrod v. Burns, 427 U.S. 347, 351-53 (1976); Baker v. Carr, 369 U.S. 186, 210 (1962)). This takes place when the federal judiciary orders spending by another government agency or Congress. This may even take place in situations where the judiciary is not mandating any particular way to raise the funds, but simply orders the spending of already allocated resources. *See also infra* Part III.

[15] *See* Frug, *supra* note 2, at 715. While Professor Frug's article covers many of the same issues that will be discussed in this part, and a great deal of this section is attributable to his work, we hope to update and expand some of the areas of law with more recent Supreme Court cases and examples.

[16] 351 U.S. 12 (1956).

Amendment.[17] The states were accordingly forced to create a system that would provide transcripts to the indigent defendants, presenting a substantial cost to the state legislatures. In *Griffin*, however, the Court did not require any particular revenue raising technique to cover the cost, it merely stated that this was now a requirement of the Constitution and the states are obligated to fund the cost of the transcripts.

The Supreme Court has mandated costly remedial measures in many situations to provide not only equal access to the courts, but also what the Court considers *fair* access. In one of its most influential decisions, *Gideon v. Wainwright*,[18] the Supreme Court held that indigent defendants have an affirmative right to counsel in felony cases.[19] Over the years this right has been expanded beyond felonies to all cases where jail is a possibility for the defendant.[20] Such a system imposes significant costs on the states by forcing them to expend substantial resources in providing legal counsel for indigent defendants.

Since the fundamental access decisions of *Griffin* and *Gideon*, the state courts have confronted the issues of guaranteeing these rights against a backdrop of challenges for inadequate funding.[21] Numerous cases have continually extended the Supreme Court's reasoning that there are no mandated levels of expenditures, but only that the

[17] *See id.* at 18–20. The Supreme Court has used a similar rationale in a number of cases to determine that access to the courts should not depend on one's financial status or wealth. *See, e.g.*, Ake v. Oklahoma, 470 U.S. 168 (1985).
[18] 372 U.S. 335 (1963).
[19] *Id.* at 343–345. This affirmative right to counsel stands in marked contrast to the theory that the right to counsel is a negative right, representing a right that the government may not take away but has no duty to help an individual obtain a legal defense.
[20] *See, e.g.*, Argersinger v. Hamlin, 407 U.S. 25 (1972) (holding that defense counsel must be appointed in any criminal prosecution that "leads to imprisonment"); Scott v. Illinois, 440 U.S. 367 (1979) (limiting *Argensinger* to only those situations where a defendant is actually sentenced to prison time); Alabama v. Shelton, 535 U.S. 654 (2002) (finding that a suspended sentence that ends with a deprivation of a person's liberty may not be imposed unless the defendant had counsel).
[21] *See* Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1735–37 (2005).

constitutional right exists.[22] Accordingly, as the lower courts have looked to enforce the Supreme Court's decisions, they have been reluctant to mandate the states to allocate certain levels of funding ensuring the rights; instead, the courts merely acknowledge the constitutional requirements must be met.

Within state institutions, courts have ordered states legislatures to revamp their facilities for the mentally ill, state prison systems, and juvenile detention centers.[23] These cases primarily focus on the Eighth Amendment's restriction on cruel and unusual punishment. In *Wyatt v. Stickney*,[24] the federal district court ordered the state to fully comply with a judgment to improve the conditions of its involuntary commitment institutions or the institutions would be shut down. The court stated that a lack of funding cannot justify the failure to comply with the court order, but the court did not provide the method of creating adequate state funds. As noted by Professor Frug, in state prisons the courts have ordered significant costs such as structural improvements,[25] limiting the number of prisoners confined in a facility,[26] the daily cleaning of the institutions,[27] and visiting rights.[28] These decisions necessarily impose a high cost of compliance on the states, but often came in the form of injunctive orders.[29]

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[22] For a discussion of the state court cases stopping short of ordering increased spending on indigent defense, *see id.* at 1735–1751 (citing State v. Peart, 621 So. 2d 780 (La. 1993); State v. Lynch, 796 P.2d 1150 (Okla. 1990); State v. Smith, 681 P.2d 1374, 1382)).
[23] Frug, *supra* note 2 at 718-719.
[24] 344 F. Supp. 373, (M.D. Ala. 1972), *aff'd in part, remanded in part, decision reversed in part sub nom*, Wyatt v. Aderhold, 503 F.2d 1305 (5th Cir. 1974).
[25] *See, e.g.*, Gates v. Collier, 501 F.2d 1291 1303 (5th Cir. 1974).
[26] *See, e.g.*, Battle v. Anderson, 564 F.2d 388 (10th Cir. 1977).
[27] *See, e.g.*, Mitchell v. Untereiner, 421 F. Supp. 886,897–98 (N.D. Fla. 1976).
[28] *See, e.g.*, *Gates*, 501 F.2d 1291.
[29] *See, e.g.*, Inmates of Occoquan v. Barry, 717 F. Supp 854 (D.C. 1989). Professor Frug does discuss some research citing estimates concerning the dollar costs to improve the correctional facilities. In Louisiana, costs were estimated at more than 106 million dollars. In Alabama compliance with one order was more than 28 million dollars. Frug, *supra* note 2 at 727–728. In the wake of many of these decisions, Congress passed the Prison Litigation Reform Act of 1995, which provides, among other things, limitations on both the suits and remedies in prison litigation. *See* Pub. L. No. 104-134 (1996).

Although these cases present situations where the Court is, in effect, mandating spending by the states to create new remedial programs, it does not require any particular revenue-raising method in these situations. The Court is creating the rights, but not necessarily mandating the remedies. Some of the Court's decisions, however, have noted that the economic feasibility of implementing constitutional requirements of creating access to courts can be a factor in determining the remedy for a constitutional violation.[30] States may accordingly use a variety of revenue raising tactics in order to comply with the Court orders.[31] The states may, for example, use attorneys who will take pro bono cases for indigent defendants and will therefore limit their costs in providing counsel. Indeed, a common critique of the right to counsel or other claims regarding access to courts center around the underfunding of such rights.[32]

The Court in many of these constitutional cases does not explicitly mandate the appropriate level of expenditures and thus they are often poorly funded. As Professor Frug notes, such cases are unlikely to greatly effectuate the concerns of federalism and separation of powers above because there is limited judicial intrusion in the process of state decisionmaking.[33] As the discussed in state prison cases, the courts are merely granting the state the option of spending the money in compliance or shutting down the prisons,[34] a move that clearly would be more politically costly than the monetary investment necessary to comply. Here, the courts are not "commandeering" the powers of the state legislature, but are directing the states to engage in some activity which will indirectly effect the spending decisions of the legislature. The spending decisions in these

[30] *See* Bounds v. Smith, 430 U.S. 817, 825 (1977).
[31] *See* Frug, *supra* note 2 at 727–30.
[32] *See id.*
[33] *Id.* at 762.
[34] *Gates*, 501 F.2d at 1320.

situations are left to the politically accountable branches, which will allocate the resources in a manner necessary to fulfill compliance with the court's order.

*c. The Rise of Court Ordered Spending*

While the previous section discussed the ability of the courts to mandate costly remedies, it did not address the power of the courts to mandate the actual manner in which the states would raise the necessary revenue. The Supreme Court has consistently found that the Court does not have the power to tax.[35] The Court, however, has a lengthy history of exerting power over the local governments in order to effectuate its mandated remedies. In the wake of the Civil War, many states began defaulting on their state debt obligations, and the Supreme Court stepped in by enforcing those debts against the states.[36] In a string of post-Civil War cases, the Supreme Court held that federal courts had the power to issue writs of mandamus compelling the local governments to raise adequate taxes to satisfy the debt obligations.[37] Not surprisingly, the Court began to expand remedial measures even further in subsequent cases, and eventually found that it

[35] *See, e.g.*, Heine v. Levee Comm'rs, 86 U.S. 655, 660-61 (1874) (noting that taxation represents a legislative power and invades the province of the state government's legislative functions).
[36] For reference, these cases are commonly known as the "bond" cases.
[37] See, *e.g.*, 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 Commissioners, 19 Wall. 655 (1874); City of Galena v. Amy, 5 Wall. 705 (1867); Von Hoffman v. City of Quincy, 4 Wall. 535 (1867); Board of Commissioners of Knox County v. Aspinwall, 24 How. 376 (1861). An interesting modern case study in the area of debt occurred in Orange County, California when the county went bankrupt from a complex system of poor investments, suffering a loss of around $1.6 billion. As a result of the turn in the markets, the investments firms sought the collateral, and reached an agreement with Orange County that the Bankruptcy Court approved. Because of the settlement, it is unclear how, or if, the government would be forced to raise the money through an increase in taxes. For an overview of the development of Orange County's debt problem *see generally* Rob Jamson, Case Study: Orange County, BancWare ERisk (June 2001), http://www.erisk.com/Learning/CaseStudides/OrangeCounty.asp.

is a "judicial act" within the power of the federal courts to order a local governmental body to levy taxes to support court orders in other circumstances.[38]

The most preeminent use of this budding power was found in cases of school desegregation. In the years after *Brown v. Board of Education*,[39] the federal courts used this "judicial act" in order to enforce desegregation orders and fund costly measures necessary to undertake many of the requirements. In *Griffin v. County School Board of Prince Edward County*,[40] the Supreme Court first used the principles of *Brown* in order to effectuate court mandated revenue-raising. The problem in *Griffin* arose out of a post-*Brown* desegregation order where the school district refused to levy any taxes and the county schools were subsequently shut down, leaving only private-white schools.[41] Accordingly, the only schools in the county were the all-white private schools used as a tool for avoiding the desegregation order in the public schools. The Supreme Court found that closing all of the public schools in Prince Edward County while all other public schools in Virginia stayed open violated equal protection.[42] Most significantly for these purposes, the Court also upheld the district court's order to levy taxes to support the re-opened public schools.[43]

In response to *Brown* and *Griffin*, lower courts soon began to believe that the power to tax was expansive, and could be used in order to implement the desegregation orders, though at this time the courts would still gave great deference to the states in what

[38] *See* Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233 (1964). For a more in depth examination of the rise of the taxing power and the pre-*Jenkins* line of cases, *see* Janice C. Griffith, *Judicial Funding and Taxation Mandates: Will Missouri v. Jenkins Survive Under the New Federalism Restraints?* 61 OHIO ST. L.J. 483, 530-37 (2000).
[39] 347 U.S. 483 (1954).
[40] 377 U.S. 218 (1964).
[41] *Id.* at 222-23.
[42] *Id.* at 225.
[43] *Id.* at 232-33.

the appropriate levels of would be and where they would come from.[44] However, even cases that recognized the power did not authorize any rates higher than the level authorized pursuant to state law.[45]

The Supreme Court set up a three part test for the use of remedial equity power in *Milliken v. Bradley* (*Milliken II*).[46] In *Milliken II*, the Court determined that (1) the nature of the orders remedial orders are determined by the scope of the constitutional violation; (2) the decree must be to return victims to a point at which they would be without the discriminatory conduct; and (3) the federal courts must balance the interest of state and local authorities in their own affairs against the remedial constitutional interest.[47] The third prong was often the most determinative in courts' evaluation of remedies under the *Milliken II* test.

In response to the seeming expansion of judicial power, many states argued that the courts cannot force the local governments to create taxes beyond those that are authorized under state law because such taxes would have the courts fulfilling the role of the legislature.[48] The Court, however, was less than receptive to such an argument and often rejected these claims on the bases of the Supremacy Clause. The state policy cannot stand in the face of a constitutional violation that the Court is required to remedy; federal constitutional guarantees will always trump the interests of the state in maintaining the barriers on increased taxation.[49] In examining the difficulty of setting any tax rate, the Third Circuit believed that the judiciary did not posses the power to

[44] *See* United States v. Missouri, 515 F.2d 1365, 1372-73 (8th Cir. 1975) (stating in dicta that courts have the power to levy tax to support implementation of a desegregation order, but deferring to state judgments).
[45] *Id.*
[46] 433 U.S. 267 (1977).
[47] *Id.* at 280-81.
[48] *See* Missouri v. Jenkins, 495 U.S. 33, 55 (1990). Essentially, this argument maintains that the courts may not create "new" taxes in order to raise the necessary revenue for a remedial measure.
[49] *See* North Carolina Bd. of Ed. v. Swann, 402 U.S. 43, 45 (1971).

"disregard the usual deference accorded to legislatures in taxation matters."[50] In *Evans v. Buchanan*,[51] the Third Circuit stated that such judicial taxation, against state imposed legislation, was in violation of two principles: "[t]axation without representation is tyranny and the power to tax involves the power to destroy."[52] Also, in setting such levels of taxation, the district court was not giving deference to the legislature's understanding of local conditions, the respect between the branches, and the legislature's independence.[53]

Such deference, however, was not absolute. Other circuits continued to hear cases concerning the power of the district court to levy taxes in support of desegregation orders. The Eighth Circuit, in particular, tackled this issue in *Liddell v. Missouri* (*Liddell VII*).[54] The court affirmed a district order to finance a desegregation plan, but struck down the increased taxation.[55] The court stated that "limitations on [the power to increase local tax levies] require that it only be exercised after exploration of every other fiscal alternative."[56] In *Liddell*, there were three alternatives: (1) a voter referendum to increase the tax levy; (2) authorization by the state for the City School Board to impose non-real estate taxes; or (3) another possible agreement between the school board and the state on alternate methods.[57]

Accordingly, in the post-*Brown* world, the courts sought to impose remedial measures that would ensure compliance with desegregation orders with which counties may not otherwise comply. The cases on judicial power over taxation and ordering

[50] Griffin, *supra* note 38 at 534.
[51] 582 F.2d 750 (3d Cir. 1978).
[52] *Id.* at 777.
[53] *Id.* at 777-78.
[54] 731 F.2d 1294 (8th Cir. 1984).
[55] *Id.* at 1320
[56] *Id.*
[57] Griffin, *supra* note 38 at 537-38 (citing *Lidell VII*, 731 F.2d at 1323).

spending percolated in the lower courts until the Supreme Court stepped into the matter in *Missouri v. Jenkins*.

**PART II: *MISSOURI V. JENKINS***

Perhaps the most important Supreme Court decision regarding the power of courts to impose taxes is *Missouri v. Jenkins*.[58] In *Jenkins*, the Supreme Court upheld a district court's mandating an increased tax levy to fund desegregation order and an enjoining of state law limitations preventing such an increase. The decision was immediately controversial, and its legacy is still unclear even sixteen years later.

a. *Factual Background*

In the decades following the Supreme Court's decision in *Brown v. Board of Education*,[59] the Kansas City Missouri School District (KCMSD), like many other urban school systems, became subject to court-mandated desegregation. The litigation implementing the desegregation of the Kansas City schools began in 1977 and lasted continuously until 1997, producing numerous district court and circuit court orders and opinions, as well as three separate decisions from the Supreme Court. The litigation began, curiously, with the school district as plaintiff rather than as defendant. The school district and a group of students sued the states of Missouri and Kansas, the federal government, and several Kansas City area suburban school districts, alleging that the defendants' actions caused and perpetuated racially segregated school districts in the Kansas City metropolitan area.[60] The plaintiffs sought a court-ordered reassignment of

[58] 495 U.S. 33 (1990).
[59] 347 U.S. 483 (1954).
[60] *See* Sch. Dist. of Kansas City v. Missouri, 460 F. Supp. 421, 427 (W.D. Mo. 1978). The state of Kansas and the Kansas suburban school districts were dismissed from the case by the District Court for lack of personal jurisdiction. *See id.* at 445.

students throughout the metropolitan area school districts, claiming that such reassignment was the only possible way to achieve greater racial balance.[61]

Following several years of litigation, the District Court found no interdistrict constitutional violation or effect, and dismissed the suburban school districts as defendants, rejecting the proposed remedy of a metropolitan area reassignment program pursuant to the Supreme Court guidelines set forth in *Milliken II*.[62] The court did, however, find that KCMSD and the State of Missouri had operated a segregated school system within the KCMSD, and so it ordered intradistrict relief.[63]

The remedies imposed by the District Court through various court orders were extensive and ambitious. In addition to ordering measures aimed at eliminating vestiges of intradistrict segregation (for example, through increased hiring and training of teachers and reduction of class sizes), the court also "set out to achieve the benefits of an interdistrict plan . . . [seeking] to attract white students to voluntarily enroll in the KCMSD's schools primarily through the creation of many magnet programs and a massive capital improvement program."[64] The plaintiffs and KCMSD had jointly proposed the comprehensive magnet program, while the State resisted and asked that the court consider other less extensive remedies.[65]

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[61] *See id.* at 428.
[62] 433 U.S. 267 (1977).
[63] *See* 593 F. Supp. 1485 (W.D. Mo. 1984). By this point, the District Court had realigned KCMSD as a party defendant.
[64] Griffith, *supra* note 38, at 513–14. The District Court described "[t]he long term goal" of its remedial order as "[making] available to *all* KCMSD students educational opportunities equal to or greater than those presently available in the average Kansas City, Missouri metropolitan suburban school district." Jenkins v. Missouri, 639 F. Supp. 19, 54 (W.D. Mo. 1985). The Court of Appeals in affirming similarly described the goals of the orders: "First, to improve the educational lot of the victims of unconstitutional segregation; second, to regain some portion of the white students who fled the district and retain those who are still there; and third, to redistribute the students within the KCMSD to achieve the maximum desegregation possible." Missouri v. Jenkins, 855 F.2d 1295 at 1302 (8th Cir. 1988).
[65] *See* Griffith, *supra* note 38, at 515.

Once the court had approved the full-scale magnet program, the subsequent litigation focused on how the project would be financed. The court estimated the costs of the initial remedies to be near $88 million.[66] As the scope of the relief grew in subsequent court orders, the total mandated expenditures reached close to $1.8 billion, 75% of which was to be paid by the State and 25% of which was to be paid by KCMSD.[67]

The costs imposed on the school district were far more than its resources could bear. Further, state law made it difficult for the district to raise additional revenue through increased property taxes. Under the Missouri Constitution, local property taxes were normally limited to $1.25 per $100 of assessed valuation.[68] A majority of voters in the district could approve an increased tax up to $3.25 per $100; and a two-thirds majority of voters could approve even higher taxes.[69] In 1969, KCMSD voters approved raising the property tax to $3.75 per $100, but all proposed tax raises since then had been consistently rejected.[70] Additionally, a state law known as the "Hancock Amendment" required property tax rates to be rolled back when property was assessed at a higher valuation to ensure that taxes would not increase solely as a result of reassessment.[71] Finally, a state law, "Proposition C," allocated one cent of every dollar raised by the state sales tax to a schools trust fund and required school districts to reduce property taxes by

[66] *See* Jenkins v. Missouri, 639 F. Supp. at 43–44.
[67] *See* Stephen Winn, *Clark's Final Assessment Is Portent Worth Heeding*, KAN. CITY STAR, March 29, 1997.
[68] *See* Missouri v. Jenkins, 495 U.S. at 38.
[69] *See id.*
[70] *See id.*
[71] *See id.* at 38–39.

an amount equal to 50% of the previous year's sales tax receipts in the district.[72] The effect of Proposition C reduced KCMSD's operating levy to $3.26.[73]

*b. District Court Taxation Orders*

Initially, the District Court resisted directly ordering that the property tax rate be raised in order to fund the mandated programs, although it asserted that it had the power to order such an increase.[74] Rather, the court enjoined the effect of Proposition C, allowing KCMSD to raise an additional $4 million for the coming fiscal year (1986-1987).[75] It also ordered that a tax increase be proposed to the voters.[76] That proposal failed at the ballots, prompting the court to continue its injunction against Proposition C the following year.[77]

By 1987, with the court having ordered further expansions to the school district's programs and with costs quickly increasing, the court accepted that KCMSD had "exhausted all available means of raising additional revenue" and would be unable, under the current situation, to fund its portion of the total costs.[78] The court stated that it thus had "no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan."[79] Relying on *Griffin v. Prince Edward County Sch. Bd.*,[80] as well as the Eighth Circuit precedent in *Liddell*, the court asserted that "a tax may be increased 'if necessary to raise funds adequate to . . .

[72] *See id.* at 39.
[73] *See* Griffith, *supra* note 38, at 540.
[74] *See* Missouri v. Jenkins, 495 U.S. at 39.
[75] *See id.*
[76] *See id.*
[77] *See id.*
[78] Jenkins v. Missouri, 672 F. Supp. 400, 411 (W.D. Mo. 1987).
[79] *Id.*
[80] 377 U.S. 218 (1964).

operate and maintain without racial discrimination a public school system."[81] As such, it ordered that, notwithstanding state law, the KCMSD property tax levy be raised from $2.05 (the level at that time) to $4.00 per $100 of assessed valuation through the 1991–92 fiscal year.[82] The court further directed KCMSD to issue $150 million in capital improvement bonds.[83] Finally, the court imposed a 1.5% surcharge on the Missouri state income tax assessed within the KCMSD.[84]

*c. Circuit Court Affirmation*

The Court of Appeals for the Eight Circuit affirmed, for the most part, the District Court's ruling and orders. The Court of Appeals upheld the scope of the desegregation order, with its accompanying remedial programs, and also the allocation of costs between the state and the KCMSD.[85] The Court of Appeals further agreed that the District Court had authority to order county officials to levy taxes as well as to enjoin state-law limitations that might prevent KCMSD from raising the necessary funds.[86]

Though the Court of Appeals affirmed the District Court's actions, it cautioned that courts should, when possible, employ "minimally obtrusive methods to remedy constitutional violations."[87] As such, it would be preferable in the future for the District Court to, rather than set the tax rate itself, permit the school board to determine the appropriate levy necessary, while at the same time enjoining the operation of state laws that would prevent adequate funding.[88]

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[81] Jenkins v. Missouri, 672 F. Supp. at 412.
[82] *See id.* at 412–13.
[83] *See id.* at 413.
[84] *See id.* at 412.
[85] Jenkins v. Missouri, 855 F.2d 1295 at 1301–08 (8th Cir. 1988).
[86] *See id*. at 1314.
[87] *Id.*
[88] *See id.*

The Court of Appeals did, however, overturn the District Court's order imposing the 1.5% income tax surcharge, finding that such action "invaded the province of the legislature" and is "beyond the power of the district court" as given in *Swann*, *Griffin*, *Liddell*, and another Eighth Circuit precedent, *United States v. Missouri*.[89] The Court of Appeals found the surcharge to be substantively different than the property tax increase because, "rather than merely removing the levy limitation on an existing state or local taxing authority, the income tax surcharge restructures the State's scheme of school financing and creates an entirely new form of taxing authority."[90]

*d. Supreme Court Affirmation*

The Supreme Court granted the State's petition for certiorari on the issue of whether the District Court had the power to impose an increased property tax. The Court unanimously agreed only that the district court abused its discretion by directly imposing the tax, but the Court split as to whether the modifications suggested by the Court of Appeals would make the increased tax nevertheless acceptable.

The majority[91] found those modifications to be sufficient, holding that a federal court has the power to order a school district to levy taxes to raise funds for compliance with a desegregation mandate, and also that a district court may enjoin the enforcement of state law that might impede such taxation.[92] As the majority saw it, the problem with the District Court's direct imposition of the increased tax rate was that the exercise of equitable power requires "a proper respect for the integrity and function of local government institutions," and that respect was not given in light of the alternative

[89] *Id.* at 1315.
[90] *Id.*
[91] Justice White wrote the majority opinion, part of which was joined by a unanimous Court and part of which was joined only by Justices Brennan, Marshall, Blackmun, and Stevens.
[92] *See* Missouri v. Jenkins, 495 U.S. at 50–58.

possible path suggested by Court of Appeals.[93] The majority rejected the dissent's criticism that the difference between a direct imposition of the tax and an order that the school district determine and impose a tax is mere formalism. The Court claimed that the latter method "not only protects the function of [local] institutions but . . . also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems."[94]

The majority went on to dismiss the State's claims that such judicial taxation violates principles of federalism and is outside the scope of the judiciary's Article III powers. According to the Court, compelling compliance with desegregation orders imposed under the Fourteenth Amendment does not violate any reservation of powers to the states made by the Tenth Amendment.[95] In fact, the Fourteenth Amendment was designed specifically to limit the powers of the states. Further, the Court agreed with the District Court and Court of Appeals that *Griffin*, as well as a "long and venerable line" of other cases, had permitted the federal judiciary to compel school districts to levy taxes to fund desegregation.[96]

Finally, the majority relied on *Von Hoffman v. City of Quincy*[97] for the proposition that a federal court may set aside state-imposed limitations when requiring local governments to levy taxes.[98] In *Von Hoffman*, a bond holder sought a writ of mandamus requiring the city to pay interest then due, which the city would not pay because of a state statute—enacted after the issuance of the bonds—that limited the city's

[93] *Id.* at 51.
[94] *Id.*
[95] *See id.* at 55.
[96] *See id.* at 55–56.
[97] 4 Wall. 535 (1867).
[98] *See* Missouri v. Jenkins, 495 U.S. at 56–57.

power to tax to raise funds for the payment of interest. The Court ruled that the enforcement of the statute, as it limited the city's ability to pay interest to bond holders, violated the Contracts Clause.[99] Under the Court's holding, the city could be ordered to levy the necessary taxes, and the limiting statute could be disregarded.[100]

Justice Kennedy wrote an opinion concurring in part and concurring in the judgment, although it reads more as a dissent.[101] The concurrence attempted to limit the majority's opinion regarding the ability of a federal court to order taxation by characterizing that part of the opinion as "broad dictum" that "goes further, much further, to embrace . . . an expansion of power in the Federal Judiciary beyond all precedent," and by asserting that those statements should not "be seen as necessary for [the Court's] judgment, or as precedent for the future."[102]

Justice Kennedy asserted that "while courts have undoubted power to order that schools operate in compliance with the Constitution, the manner and methods of school financing are beyond federal judicial authority."[103] Further, he disputed that there is any difference between a direct imposition of a tax by the court and an order requiring the school district to impose a tax.[104] More importantly, Justice Kennedy insisted that "taxation is not a judicial function,"[105] and he disagreed with the majority's reliance on

[99] Art. I, § 10, cl. 1.
[100] *See* Missouri v. Jenkins, 495 U.S. at 57.
[101] Justice Kennedy's opinion was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. The only part of Justice White's majority opinion to which this group concurred dealt with the issue of whether the state had been timely in its filing for certiorari. They concurred in the judgment of reversing the Court of Appeals insofar as it allowed the District Court order to increase taxation. They did not concur, however, in the majority's opinion and judgment to uphold what the majority described as the Court of Appeals' modification of the District Court order. *See id.* at 58–59.
[102] *Id.*
[103] *Id.* at 61.
[104] *See id.* at 63–65.
[105] *Id.* at 65.

*Griffin* in finding a judicial power to tax.[106] He insisted that *Griffin* endorsed only "the power of a federal court to order the local authority to exercise *existing* authority to tax."[107] Finally, Justice Kennedy argued that *Von Hoffman* and the other cases in the "long and venerable line" cited by the majority show only 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."[108]

**PART III: COURT ORDERED SPENDING IN THE WAKE OF *JENKINS***

*a. Academic Commentary*

Many legal observers had already taken notice of the *Jenkins* litigation long before the 1990 Court decision, especially because the case had already been to the Supreme Court once before in 1989 (on a question relating to lawyers' fees).[109] Few, it seems, expected the Court to embrace the Eighth Circuit's assertion of a judicial taxation power. The surprising decision produced numerous law review articles and comments, most of them critical of the majority's decision.

Some commentators drew parallels between the Court's action in *Jenkins* and the classic prohibition on "taxation without representation."[110] While courts may be guided by equitable principles, it is argued, they may not violate the traditional constitutional principles that have steered conduct and action since the foundation of the country.[111] Other scholars, though not in complete agreement with the Court's decision, nevertheless

[106] *Id.* at 70–71.
[107] *Id. at* 71.
[108] *Id.* at 75.
[109] Missouri v. Jenkins, 491 U.S. 274 (1989).
[110] Douglas J. Brocker, Note, *Taxation Without Representation: the Judicial Usurpation of the Power to tax in Missouri v. Jenkins*, 69 N.C. L. REV. 741 (1991).
[111] *See id.* at 749.

accepted the basic holding while at the same time arguing in favor of new standards and guidelines to reign in the potentially expansive judicial power of taxation. Janice Griffith, for example, argued that, before ordering extensive and costly remedial reforms, the courts should balance the governmental interests, fiscal restraints, and likely effectiveness against the need to remedy a constitutional violation.[112] Similarly, D. Bruce La Pierre argued that the federal courts do have the power to enforce judgments against local governments by ordering officials to levy taxes above levels authorized by state law and that such a power is justified, but also warns that such power should be limited in application.[113]

*b. The Return of Missouri v. Jenkins*

The *Jenkins* litigation reappeared at the Supreme Court in 1995, this time on the question of whether or not the District Court's remedial authority in implementing desegregation included the ability to order across-the-board salary increases for school district staff and funding for other "quality education" programs.[114] The 1995 decision is important in its own right for seemingly pushing back against the broad equitable powers enjoyed by courts in education litigation and other areas involving civil rights throughout the previous few decades. The majority, led by Chief Justice Rehnquist,[115] made clear that courts must adhere to firmer limitations of equitable power and refrain from engaging in the perpetual management of public institutions that had at one time engaged in unconstitutional conduct.

[112] *See generally* Griffith, *supra* note 38.
[113] *See* D. Bruce La Pierre, *Enforcement of Judgments against States and Local Governments: Judicial Control Over the Power to Tax*, 61 GEO. WASH. L. REV. 299, 301-307 (1993).
[114] *See* Missouri v. Jenkins, 515 U.S. 70 (1995).
[115] The Chief Justice was joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Id*. at 72.

The Court ruled that the District Court's ordering of salary increases and funding for quality education programs was beyond the acceptable scope of equitable judicial power in this instance.[116] In reaching that conclusion, the majority reasoned that these orders were part of the District Court's efforts to improve the "desegregative attractivenss" of the school district.[117] Such a goal was beyond the court's equitable powers because it was not aimed directly at remedying the unconstitutional *de jure* segregation that had been found in the district in the late 1970s.[118] Rather, the remedy was part of an attempt to create a "magnet district" to achieve a more racially balanced school system; such a goal was, in essence, a type of interdistrict relief contrary to the Court's opinion in *Milliken*.[119] More broadly, the Court emphasized that the remedial powers of the judiciary in these situations should be limited to restoring the actual victims of discriminatory conduct to the position they would have occupied absent that conduct.[120] As part of the imposition of remedies, the majority explained that courts should keep focus on the eventual return of full institutional management to the local authorities to continue operating in compliance with the Constitution.[121]

In a concurrence, Justice Thomas further argued, at some length, that the judiciary had gone much too far in its expansion of equitable powers, especially to the extent that courts were increasingly engaged in the administration of public institutions.[122] Justice Thomas lamented that the Court's jurisprudence over the last few decades had "indicated that trial judges had virtually boundless discretion in crafting remedies once they had

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[116] *See id.* at 99.
[117] *See id.* at 89–100.
[118] *See id.* at 96–99.
[119] *See id.* at 92–93.
[120] *See id.* at 86–89.
[121] *See id.* at 89.
[122] *See id.* at 114–38 (Thomas, J., concurring).

identified a constitutional violation."[123] The result was extensive and unprecedented judicial intrusion into the management of education, prisons, mental hospitals, and public housing.[124] Appealing to the history of equitable powers in English Courts and the Framers' understanding of judicial powers, Justice Thomas argued that such intrusions violated the limitations imposed on the judiciary by the principles of federalism and separation of powers.[125] As such, he asserted that the "time has come for [the Court] to put the genie back in the bottle." [126] Justice Thomas called on the Court to "impose more precise standards and guidelines on the federal equitable power, not only to restore predictability to the law and reduce judicial discretion, but also to ensure that constitutional remedies are actually targeted toward those who have been injured."[127] The Supreme Court's decision in this case, then, appears to be just such an attempt to impose limitations on the courts' equitable powers, including the ability of courts to order state spending.

*c. The Response of Federal Courts*

The response by the courts to the 1990 *Jenkins* decision has been mixed and the prospects for the judicial power of taxation are somewhat unclear. On the one hand, independent of any specific power to order taxation, courts have become less and less inclined to apply equitable remedies in many areas of institutional reform, such as prisons and schools. As a result, there would seem to be far fewer opportunities for courts to impose taxation in order to fund such remedies. The prospects for the judicial power to tax are also clouded by the fact that it remains somewhat unclear what did and did not

[123] *Id.* at 124–25.
[124] *See id.* at 126.
[125] *See id.* at 126–33.
[126] *Id.* at 123.
[127] *Id.* at 133.

constitute dicta from the 1990 *Jenkins* decision. Justice Kennedy's concurrence insisted that the decision had no precedential value for future courts in ordering taxation. One might speculate that his position would hold a majority of the Court as currently constituted.

For their part, lower courts have been less than ecstatic about applying the principles of *Jenkins* outside of the narrowly defined set of facts presented in the case. Shortly after *Jenkins*, a California District faced a claim by indigent persons seeking to increase real estate taxes to pay for medical services for the poor in *Berry v. Alameda Board of Supervisors*.[128] The district court rejected an attempt to raise the taxes above the state taxation limit, stating that the state's taxation limit is a right that must be balanced in this case against the right of the plaintiffs for medical attention.[129] In addition, this case did not involve the obligation of state debts where the Supreme Court has found the courts have power to raise revenue to meet those debts.[130] The court found that there is no right cited by the plaintiffs that specifically relates to the Constitution or other federal law that would justify the rejection of adequate state law.[131]

One significant exception is a post-*Jenkins* case from the Sixth Circuit, *Bylinski v. City of Allen Park*.[132] In that case, the Environmental Protection Agency (EPA) and the Michigan Department of Natural Resources brought suit against Wayne County and thirteen surrounding local municipalities for violations of the Federal Clean Water Act relating to the Wyandotte Wastewater Treatment Plant. Under supervision of the court, the parties engaged in a process to study, fund, and construct sewer system improvements

[128] 753 F. Supp 1508 (N.D. Cal. 1990).
[129] *Id.* at 1513.
[130] *Id.* at 1513.
[131] *Id.* at 1513-14.
[132] 8 F. Supp. 2d 965 (E.D. Mich. 1998).

in order to expeditiously achieve compliance.[133] Part of the funding was provided for by increased property taxes, which were issued by the municipalities under a consent decree by the district court, but which exceeded the levies authorized under Michigan state law (very similar to the tax limits at issue in *Jenkins*).[134] When the increased taxes were challenged by local tax payers in the district court, the court relied heavily on *Jenkins* to uphold the taxes:

> Under *Jenkins*, when a federal court determines that a local municipality's actions violate a federal statute that is based on provisions of the United States Constitution (in this case defendant municipalities violated the Federal Clean Water Act, 33 U.S.C. §§ 1251 et seq., enacted by Congress empowered by provisions in the Constitution), the court may order a local government unit with taxing authority to levy taxes adequate to satisfy the municipality's debt obligations incurred in complying with federal law, even if the taxes exceed state constitutional and statutory limitations. In other words, Jenkins permits a federal court to enjoin operation of state statutes and constitutional provisions prohibiting a local government unit from levying taxes at a rate above limits set by state law without majority electorate approval. Thus, the defendant municipalities' tax levies are valid and enforceable . . . .[135]

On appeal, the Sixth Circuit did not reach the issue of the district court's application of *Jenkins*, instead affirming the district court's holding that the plaintiffs' claim was, in any case, barred under the doctrine of laches.[136] The Supreme Court denied certiorari.[137]

*d. The Effect on State Courts*

Recent years have seen an increase in the states creating spending guidelines in order to rectify past budgetary deficits. Accordingly, many states may require appropriation by the legislature and then limit the spending to the amount for a stated

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[133] *See id.* at 967.
[134] *See id.* 967–68.
[135] *Id.* at 970–71.
[136] *See* Bylinski v. City of Allen Park, 169 F.3d 1001 (6th Cir. 1999).
[137] *See* Bylinski v. City of Allen Park, 527 U.S. 1037 (1999).

purpose.[138] State courts have been hesitant to direct any appropriation of funds to serve as a judicial remedy.[139] In the years after *Jenkins*, commentators have suggested that the Court's opinion demonstrated that the federal judiciary could essentially assume the role of the state legislature and work past these state budgetary requirements while attempting to remedy constitutional violations.[140] Such a maneuver would not violate principles of separation of powers, but would seemingly abrogate the limiting powers of federalism by allowing the federal judiciary to take away the power of the states when it requires certain spending. Additionally, in *Butt v. State of California*,[141] the California Supreme Court did not apply the *Jenkins* principle, stating that the power to remedy constitutional violations does not necessarily extend to state courts actions which would violate the state constitution.[142]

*e. Statutory Reform Proposals*

In 1996, with a still-fresh Republican Congress in power, the Senate considered the "Fairness in Judicial Taxation Act of 1996."[143] The Bill sought to limit the ability of federal courts to engage in "judicial taxation" in cases like *Jenkins*.[144] Many in Congress, including Congressman Donald Manzullo (AZ-R), recognized that this new

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[138] *See* Griffith, *supra* note 38, at 574

[139] *See id.* at 574-75 (citing City of Ellensburg v. State, 826 P.2d 1081, 1084 (Wash. 1992) (holding that while the state had a statutory obligation to reimburse a city that provided fire protection services to protect state property located in the city, the court, in the absence of constitutionally mandated funding, will not direct the legislature to act because the extent of such funding is a legislative prerogative); City of Camden v. Byme, 411 A.2d 462, 470 (N.J. 1980) (affirming the denial of a court order directing the legislature to appropriate funds for anticipated statutorily funded state aid to municipalities because courts cannot redress the legislature's refusal to exercise its constitutional power over appropriations)).

[140] *Id.* at 631-34.

[141] 842 P.2d 1240 (1992).

[142] *Id.* at 1262.

[143] Statement of Roger Pilon, Director, Center for Constitutional Studies, Cato Institute, before the Senate Subcommittee on Administrative Oversight and the Courts, September 19, 1996, http://www.cato.org/testimony/ct-rp091996.html.

[144] *Id.*

form of taxation presented a significant problem for the local governments.[145] The hearings noted the vastly different treatment of constitutional cases falling under different provisions of the Constitution.[146] Indeed, when comparing situations such as *Jenkins* to other cases court access or prison conditions, the remedies are not enforced in the same way and that variation has little explanation, other than their place in the Constitution. The bill, however, never made it out of committee.

**CONCLUSION**

In the post-*Jenkins* world, the debate over judicially mandated spending is far from over, both within the lower courts and in the halls of Congress. Though there are a few instances in which courts have relied upon *Jenkins* to impose tax increases in spite of state law limitations, most courts seem hesitant to do so, especially given the lack of clarity within the *Jenkins* decision and the changing composition of the Supreme Court. Additionally, the 1995 *Jenkins* decision epitomizes what seems to be a strong trend away from expansive equitable remedies to solve major societal problems like school segregation. Still, neither *Jenkins* nor the principal cases the *Jenkins* majority relied upon have been overturned, leaving open the possibility of expanded judicial authority to mandate spending and taxation in the future.

[145] *See id.*
[146] *See id.*

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