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

Randall H. Warner

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

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

INTRODUCTION

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

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

---

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

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

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

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

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

THE REMEDIAL POWER OF FEDERAL COURTS IN DESEGREGATION CASES

Brown v. Board of Education

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

---

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

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

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

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

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

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

---

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

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

21. *Id.*

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

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

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

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

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

27. 349 U.S. at 301.

28. The Court stated:

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

Id. at 300-01.

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

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

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

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

Appropriate Remedial Measures

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

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

---

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

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

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

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

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

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

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

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

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

racial balance throughout the Charlotte-Mecklenburg school system.[40] The Fourth Circuit Court of Appeals affirmed the plan with respect to secondary schools, but reversed with respect to elementary schools on the ground that the plan unreasonably burdened elementary school pupils.[41]

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

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

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

---

40. *Id.* at 10.

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

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

43. *Id.* at 28.

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

45. *Id.* at 15.

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

47. *Id.* at 24-25.

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

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

50. *Id.* at 31.

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

desegregation order.[52] The Sixth Circuit Court of Appeals affirmed, finding that the programs were necessary to achieve the goal of integration.[53] The state then appealed to the Supreme Court, which affirmed the decision.[54]

The Supreme Court noted that federal courts must focus on three factors in fashioning an appropriate remedy: (1) the remedy must be related to the condition that offends the Constitution;[55] (2) the decree must be designed to restore the victims to the position in which they would have been absent discriminatory conduct;[56] and (3) the court must "take into account the interests of state and local authorities in managing their own affairs...."[57] In light of these factors, the Court held that ordering remedial education programs was within the scope of the district court's authority.[58]

Both *Swann I* and *Milliken* suggest that there are limits to the remedial measures a federal court may order,[59] although neither case prohibits a court from taking any particular type of remedial action if such action is necessary to eliminate the effects of past segregation. Moreover, the remedial measures approved of in *Swann I* and *Milliken* were potentially very expensive. Those cases, therefore, paved the way for district courts to order desegregation remedies the cost of which were beyond the means of local school districts.

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

Only three years after *Brown II*, the United States Supreme Court confronted the question of how to handle obstructions to desegregation. In *Cooper v. Aaron*,[60] the Arkansas School Board petitioned the district court to postpone the implementation of its desegregation plan for two and one-half years due to public hostility to the plan.[61] The district court granted the postponement, but the Eighth Circuit Court of Appeals reversed. The court held that local resistance to desegregation could not constitute a legal basis for suspending the desegregation plan.[62] In a *per curiam* opinion, the Supreme Court affirmed the court of appeals' decision.[63] Seventeen days later, the Court published a full

---

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

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

54. *Id.* at 279.

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

56. 433 U.S. at 280.

57. *Id.* at 280-81.

58. *Id.* at 288.

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

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

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

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

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

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

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

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

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

---

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

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

66. 377 U.S. 218 (1964).

67. *Id.* at 222.

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

69. *Id.*

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

71. *Id.* at 224.

72. *Id.* at 224-25. The district court stated: "This Court holds that the public schools of Prince Edward County may not be closed to avoid the effect of the law of the land as interpreted by the Supreme Court, while the Commonwealth of Virginia permits other public schools to remain open at the expense of the taxpayers." Allen v. County School Bd., 207 F. Supp. 349, 355 (E.D. Va. 1962). Initially, however, the district court refrained from ordering the county to reopen the schools. *Griffin*, 377 U.S. at 233.

73. *Griffin*, 377 U.S. at 225 (citing Griffin v. Board of Supervisors, 322 F.2d 332 (4th Cir. 1963)).

74. *Id.* at 232.

porting segregated private schools, violated the equal protection clause.[75] The Court then considered the appropriate remedy for this violation.[76] It first upheld the district court's injunction against both the payment of tuition grants and the giving of tax credits for contributions to the foundation.[77] The Court then stated that the district court could order the county supervisors to exercise existing tax authority if necessary to raise sufficient funds to open and maintain a desegregated school system in Prince Edward County.[78]

In *North Carolina State Board of Education v. Swann* (*Swann II*),[79] the Court again addressed the issue of state law impediments to desegregation. During the course of the litigation leading up to the *Swann* cases, the North Carolina legislature enacted a statute prohibiting the assignment of students on a racial basis.[80] This statute operated to obstruct the district court's remedy, because the proposed remedy included the assignment of students to schools based on race.[81] The Court struck down the statute on the ground that state laws cannot prevent desegregation.[82] Because the law prohibited the assignment of students on a racial basis, it prevented school authorities from taking essential steps to effect desegregation.[83]

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

---

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

76. *Id.*

77. *Id.* at 232-33.

78. The Court stated:

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

Id. at 233-234. This language is ambiguous, however, in two respects. First, while *Griffin* clearly authorized the district court to compel the county to exercise current tax authority under state law, it is not clear whether *Griffin* allows a district court to compel the exercise of tax authority beyond the current limits of state law. The Court states that the district court could order the supervisors' exercise of "the power that is theirs" (*id.* at 233), which could be interpreted as limiting the district court's order to the exercise of existing tax authority under state law. Alternatively, it could be interpreted as nothing more than an acknowledgment that, as a municipal corporation, the county is an entity with tax authority. Second, it is unclear how "necessary" a tax increase must be before a district court may order it.

79. 402 U.S. 43 (1971). This was a companion case to *Swann I*, 402 U.S. 1 (1971).

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

81. *Id.* at 45-46.

82. The Court stated: "[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." *Id.* at 45.

83. *Id.* at 46.

taxation is a question raised — though not definitively answered — by *Jenkins*.[84]

TAXATION BY THE JUDICIARY

Alexander Hamilton wrote that "[t]he judiciary ... has no influence over either the sword or the purse...."[85] The Constitution assigns to Congress the power of taxation,[86] and although the language of the Constitution does not explicitly deny the judiciary the power to tax,[87] the U.S. Supreme Court has clearly held that taxation is not a judicial function.[88]

In *Heine v. Levee Commissioners*, the Court was asked to order a local government to raise taxes sufficient to meet a debt obligation.[89] The Court refused to grant the order because it would amount to taxation, a power that the Court did not possess.[90]

In *Moses Lake Homes, Inc. v. Grant County*, the Court explicitly held that federal courts may not impose taxes.[91] The district court disallowed a state tax claim against leaseholds on federal property on the ground that the state tax illegally discriminated against the federal government.[92] The basis for the discrimination claim was that those leaseholds were taxed at a rate higher than other similar leaseholds.[93] The Ninth Circuit Court of Appeals affirmed the district court's finding that the tax was discriminatory.[94] It held, however, that the appropriate remedy was to reduce the amount of taxes to a non-discriminatory level, rather than to invalidate the entire tax.[95] Thus, it

---

84. *Jenkins*, 110 S. Ct. 1651. The dissent interpreted the Court's opinion as having raised this question and answered it in the affirmative. *Id.* at 1675 (Kennedy, J., dissenting). The majority, however, does not claim to have held this. *Id.* at 1666.

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

86. U.S. CONST. art. I, § 8.

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

88. *See generally* Heine v. Levee Commissioners, 86 U.S. (19 Wall.) 655, 661 (1874) (the power of taxation "is an invasion by the judiciary ... of the legislative functions of ... government"); *Moses Lake Homes*, 365 U.S. at 752 ("[f]ederal courts may not assess or levy taxes"); Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 818 (1989) (imposing a tax is "a remedy beyond the power of a federal court"). *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 41, *reh'g denied*, 411 U.S. 959 (1973) ("we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues.").

89. 86 U.S. (19 Wall.) 655 (1874).

90. The Court stated that the power of taxation "is not vested, as in the exercise of an original jurisdiction, in any Federal court.... It is not only not one of the 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.

91. 365 U.S. 744 (1961).

92. *Moses Lake Homes*, 276 F.2d 836, 846 (9th Cir. 1960).

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

94. *Id.* at 847.

95. *Id.*

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

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

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

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

MISSOURI V. JENKINS

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

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

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

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

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

---

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

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

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

THE SUPREME COURT DECISION IN *JENKINS*

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

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

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

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

123. *Id.* at 1314.

124. *Id.*

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

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

127. *Id.* at 1663.

128. *Id.* at 1663-64.

129. *Id.* at 1665.

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

The Majority Opinion

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

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

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

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

---

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

131. *Id.* at 1671.

132. *Id.* at 1662-63.

133. *Id.*

134. *Id.* at 1663.

135. *Id.*

136. *Id.*

137. *Id.* at 1665.

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

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

140. *Id.* at 536-37.

141. *Id.* at 536.

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

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

The Dissent

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

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

---

142. U.S. CONST. art. I, § 10.
143. The Court stated: "[W]here a State has authorized a municipal corporation to contract and to exercise the power of local taxation to the extent necessary to meet its engagements, the power thus given cannot be withdrawn until the contract is satisfied." 71 U.S. (4 Wall.) at 554-55.
144. *Id.*
145. *Jenkins*, 110 S. Ct. at 1666 (emphasis added).
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* at 1667 (Kennedy, J., dissenting).
150. Justice Kennedy stated: "Any purported distinction between direct imposition of a tax by the federal court and an order commanding the school district to impose a tax is but a convenient formalism where the court's action is predicated on elimination of state law limitations on the school district's taxing authority." *Id.* at 1669-70.
151. *Id.* at 1670-71.
152. The majority opinion never expressly addresses this issue. It does, however, indicate that the school district possessed tax authority it could exercise once the limitations on it were removed. *Id.* at 1666.
153. *Id.* at 1670 (Kennedy, J., dissenting).
154. *Id.*

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

A CRITICAL ANALYSIS OF *JENKINS*

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

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

The significance of how KCMSD's tax authority is characterized

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

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

---

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

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

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

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

The doctrine of severability

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

---

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

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

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

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

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

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

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

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

Missouri law

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

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

---

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

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

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

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

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

175. MO. ANN. STAT. § 137.035 (Vernon 1988) states: "The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner, and not to exceed the rates prescribed by the constitution and laws of this state, viz: ... the taxes for current expenditures for ... school districts...." *See also* MO. ANN STAT. § 137.072 (Vernon 1988), which states:

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

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

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

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

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

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

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

---

176. *See, e.g.*, First Nat'l Bank of St. Joseph v. Buchanan County, 205 S.W.2d 726, 729 (1947) ("municipalities in Missouri may only levy taxes in the manner and for the purposes granted by the state."); Kansas City v. J.I. Case Threshing Machine Co., 337 Mo. 913, 920, 87 S.W.2d 195, 199 (1935) (it is a "well-established principle" that municipalities may levy taxes only if granted the power by the state). *See also* State *ex rel.* Clinton County v. H. & St. J. R.R., 87 Mo. 236 (1885) (when the state imposes conditions on the exercise of tax power, those conditions must be fulfilled before the tax may be levied).

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

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

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

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

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

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

---

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

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

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

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

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

185. 110 S. Ct. at 1664.

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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