Land & Water Law Review

Volume 26 | Issue 2 Article 10

1991

Constitutional Law - Limits on Federal Judicial Power: Can Federal Courts Vote - Spallone v. United States

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CASENOTES

CONSTITUTIONAL LAW—Limits on Federal Judicial Power: Can Federal Courts Vote? *Spallone v. United States*, 110 S. Ct. 625 (1990).

Spallone v. United States involved a showdown between a United States District Court and the city council for the City of Yonkers, New York.[1] The showdown began in 1980, when the United States filed a complaint alleging that the City of Yonkers and the Yonkers Community Development Agency intentionally engaged in a pattern and practice of housing discrimination[2] in violation of the Fair Housing Act of 1968,[3] and the equal protection clause of the fourteenth amendment.[4] The district court held that the City's actions in confining subsidized housing to areas outside East Yonkers and other predominantly white areas had a "consistent and extreme" segregative effect, and the court enjoined the City of Yonkers from intentionally promoting racial residential segregation.[5] The decision was affirmed on appeal.[6]

In January 1988, the parties entered a consent decree setting forth affirmative steps that the City would take to remedy past dis-

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1. 110 S. Ct. 625 (1990).

2. *Id.* at 628. The Government and plaintiff-intervenor National Association for the Advancement of Colored People (NAACP) claimed that the City had perpetuated residential racial segregation for over thirty years. The plaintiffs also claimed that housing projects had disproportionately been restricted to areas of the City predominantly populated by minorities. *Id.*

United States v. Yonkers Bd. of Educ., 518 F. Supp. 191 (S.D.N.Y. 1981) (ruling on motions) was the first case in which the Department of Justice "exercised its Fair Housing Act and school desegregation enforcement authorit[y] in a single judicial proceeding." The Department of Justice argued that the location of subsidized housing contributed to racial segregation in the schools. Selig, *The Justice Department and Racially Exclusionary Municipal Practices: Creative Ventures in Fair Housing Act Enforcement*, 17 U.C. DAVIS L. REV. 445, 489 (1984).

3. 42 U.S.C. §§ 3601-3619 (1988).

4. *Spallone*, 110 S. Ct. at 628.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

5. *Spallone*, 110 S. Ct. at 628. The district court stated that "the desire to preserve existing patterns of segregation ha[d] been a significant factor in the sustained community opposition to subsidized housing in East Yonkers and other overwhelmingly white areas of the City." United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1371 (S.D.N.Y. 1985).

6. In December 1987, the Court of Appeals for the Second Circuit affirmed the district court's judgment, and the Supreme Court denied certiorari. United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988).

crimination.[7] Specifically, the City agreed to enact the "Affordable Housing Ordinance" to promote development of subsidized housing in East Yonkers through tax incentives, density bonuses,[8] and zoning changes.[9]

On July 26, 1988, after continued foot-dragging,[10] the district court ordered the City to enact the "Affordable Housing Ordinance" to comply with the consent decree.[11] The order imposed contempt fines against the City of $100 for the first day, to be doubled for each consecutive day of noncompliance.[12] The order also provided that any council member voting against the ordinance would be held in contempt and would be imprisoned and fined $500 for each day of noncompliance.[13]

However, faced with intense public opposition to the consent decree,[14] the city council defeated a resolution of intent to adopt the "Affordable Housing Ordinance."[15] The next day, after a show cause hearing, the district court held the City and the council members in contempt,[16] and imposed fines against the City and the four council members who voted against the resolution.[17]

On appeal, the Second Circuit affirmed the district court's contempt sanctions, finding no abuse of discretion because the city council had already approved the consent decree.[18] With the City's daily

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7. *Spallone*, 110 S. Ct. at 629.

8. *Id.* Density bonuses allow a developer to construct more housing units on a given parcel of land. This enables the developer to spread land costs over a greater number of housing units, effectively decreasing the cost per unit. R. BASILE, DOWNTOWN DEVELOPMENT HANDBOOK 63 (1980).

9. *Spallone*, 110 S. Ct. at 629.

10. The City refused to adopt the "Affordable Housing Ordinance" within the ninety-day period as required by the consent decree, because it wanted to exhaust its remedies on appeal. However, the City had not obtained any stay of the district court's order. *Id.* at 629-30.

11. *Id.* at 630. The consent decree was approved by the city council in a five to two vote on January 27, 1988 (Spallone and Chema voted against). *Id.* at 629. The City of Yonkers' charter vests all legislative powers in the city council. *Id.*

12. *Id.* at 630.

13. *Id.* The district court simultaneously imposed sanctions against the City and individual council members to increase the chance of compliance. *Id.* at 641.

14. *Id.* at 638.

15. *Id.* at 630. The resolution was defeated on August 1, 1988, by a vote of four to three (Spallone, Chema, Longo and Fagan voting against). United States v. City of Yonkers, 856 F.2d 444, 450-51 (2d Cir. 1988), *rev'd*, 110 S. Ct. 625 (1990).

16. *Spallone*, 110 S. Ct. at 630.

17. *Id.* The district court's order imposed fines against recalcitrant council members beginning on August 2, 1988. If the ordinance was not enacted by August 10, 1988, the council members were to be imprisoned. The facts, outlined in greater detail by the appellate court, do not indicate that any council members were ever imprisoned. *City of Yonkers*, 856 F.2d at 450-52.

18. *City of Yonkers*, 856 F.2d at 457. The appellate court agreed that the district court was obliged to use the "least possible power adequate to the end proposed." However, the appellate court stated that there was a fundamental reason why the trial court's order requiring the council to implement legislation and imposing contempt sanctions against individual council members was not an abuse of discretion. "That

contempt sanction approaching $1,000,000 per day,[19] the city council finally enacted the "Affordable Housing Ordinance" on September 9, 1988, by a vote of five to two.[20]

The United States Supreme Court granted the council members' petition for certiorari,[21] but denied the City's petition.[22] The Supreme Court reversed the court of appeals, holding that the district court abused its discretion.[23] According to the Court, contempt sanctions against council members should not have been imposed unless sanctions against the City alone failed to produce compliance within a reasonable time.[24]

This casenote examines whether a federal district court should have the authority to impose contempt sanctions against local legislators compelling them to vote for specific legislation in order to remedy fourteenth amendment violations. It analyzes the underlying policies considered by the Court, including a federal court's responsibility to remedy constitutional violations and to enforce consent decrees, as weighed against fundamental principles of comity and legislative immunity.

BACKGROUND

Generally, "the supremacy of federal law, including federal court orders to implement remedies for federal constitutional and statutory violations, prevails over conflicting state laws."[25] This principle is perhaps most clearly demonstrated in the school desegregation cases.

In *Griffin v. County School Board*, black children sued the County School Board to require it to reopen public schools in the County and to enjoin the payment of public funds in support of private schools which excluded students because of race.[26] The Supreme

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reason is the blunt fact that the City agreed in the Consent Judgment to comply with the Housing Remedy Order by the adoption of necessary implementing legislation, specifically including tax abatements and zoning changes." *Id.* at 454. The court of appeals capped the fines against the City at $1,000,000 per day. *Id.* at 460.

19. The City paid approximately $820,000 in contempt fines. The four council members held in contempt paid $3,500 each. All fines were paid into the United States Treasury. Brief for the United States at 15, Spallone v. United States, 110 S. Ct. 625 (1990) (Nos. 88-854, 88-856, 88-870).

20. *Spallone*, 110 S. Ct. at 631. Spallone and Fagan voted against. *Id.*

21. Spallone v. United States, 109 S. Ct. 1337 (1989). The Supreme Court granted certiorari because the contempt orders raised important issues about the appropriate exercise of the federal judicial power against individual legislators. *Spallone*, 110 S. Ct. at 631.

22. City of Yonkers v. United States, 109 S. Ct. 1339 (1989).

23. *Spallone*, 110 S. Ct. at 631.

24. *Id.* at 634.

25. United States v. City of Yonkers, 856 F.2d at 455, *rev'd on other grounds*, 110 S. Ct. 625 (1990); *see also* Cooper v. Aaron, 358 U.S. 1 (1958).

26. Griffin v. County School Bd., 377 U.S. 218 (1964). The public schools in the county were closed in 1959 and private schools were opened in order to avoid compliance with a court decree requiring desegregation of public schools. *Id.* at 222-23, 230.

Court held that the school board's actions violated the equal protection clause of the fourteenth amendment.[27] The Court stated that "actions against a county can be maintained in United States Courts in order to vindicate federally guaranteed rights."[28] The Court upheld the district court's order requiring the Board of Supervisors to levy taxes to raise funds adequate to reopen, operate, and maintain a public school system free of racial discrimination.[29]

Federal courts have broad discretion in fashioning remedies for fourteenth amendment violations.[30] In *Swann v. Charlotte-Mecklenburg Board of Education*, for example, the Supreme Court approved a plan to desegregate secondary schools, which included limited use of racial quotas, gerrymandering of school districts, and busing in order to remedy state imposed segregation.[31] The Court noted that a district court's remedial decree will be judged by its effectiveness.[32]

In 1990, the Supreme Court in *Missouri v. Jenkins* upheld the power of the district court to order a school district to levy property taxes in excess of a limit set by state statute, to fund a school desegregation plan in Kansas City.[33] However, the Supreme Court reversed the district court in part, holding that it had abused its discretion by directly imposing the tax.[34] Justice Kennedy, in a concurring opinion, noted that this case was the first in which a federal district court had ordered the imposition of taxes, beyond the limit set by state statute, to fund a remedial decree.[35]

The power of the federal courts to remedy fourteenth amendment violations is generally not limited by the tenth or eleventh amendments. In *Milliken v. Bradley*, the Supreme Court upheld a court ordered desegregation plan, splitting the cost equally between the Detroit School Board and the State.[36] The Supreme Court held that the tenth amendment, which reserves powers not delegated to the federal government for the state, was not violated by a federal court order remedying a fourteenth amendment violation.[37] The Court also held

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27. *Id.* at 232.
28. *Id.* at 233.
29. *Id.*
30. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 11-15 (1971).
31. *Id.* at 22-30.
32. *Id.* at 25.
33. 110 S. Ct. 1651, 1665 (1990). *Jenkins* was decided approximately three months after *Spallone*. Both cases were decided by five-to-four votes. Justice White was the swing vote. Missouri v. Jenkins, 110 S. Ct. 1651 (1990); Spallone v. United States, 110 S. Ct. 625 (1990). Together, the decisions suggest the Court is divided on the question of the proper scope of federal judicial power to remedy segregation.
34. *Jenkins*, 110 S. Ct. at 1663. The alternative was to require the school district to levy property taxes to fund the desegregation remedy. *Id.*
35. *Id.* at 1669 (Kennedy, J., concurring). *Jenkins* is different from *Griffin*. In *Griffin*, the district court ordered the Board of Supervisors to exercise its existing authority to tax. *Id.* at 1673. In *Jenkins*, the district court ordered the school district to levy taxes in excess of the limit set by state statute. *Id.* at 1674.
36. Milliken v. Bradley, 433 U.S. 267, 277, 291 (1977).
37. *Id.* at 291. "The powers not delegated to the United States by the Constitu-

that the eleventh amendment, which limits federal court jurisdiction over the states, does not preclude a federal court from entering a remedial decree to secure compliance with federal law, even if the order impacts the state treasury.[38]

Likewise, in *Fitzpatrick v. Bitzer*, a class action alleging that the state retirement plan discriminated on the basis of sex, the Supreme Court rejected the State's argument that the eleventh amendment barred a back pay award to petitioners.[39] The Court noted that section five of the fourteenth amendment gives Congress the authority to enforce "the substantive provisions of the fourteenth amendment, which themselves embody significant limitations on state authority."[40]

Federal judicial authority to remedy constitutional violations has also been exercised through use of consent decrees. A consent decree is a resolution to a dispute, voluntarily negotiated by the parties, and entered by the court.[41] The agreement between the parties serves as the court's authority to enter a judgment.[42] Courts have the inherent power to enforce consent decrees through civil contempt,[43] and a consent decree is a final determination and is *res judicata* on the merits.[44]

A consent decree, because it is a negotiated settlement, can be used to obtain broader relief from the courts than can be obtained through litigation.[45] For example, in *Local No. 93 v. City of Cleveland*, the Supreme Court held that the district court could enter a consent decree providing broader relief than could have been awarded under Title VII of the Civil Rights Act of 1964 after a trial.[46] Consent decrees, to the extent that they provide greater relief than could have been awarded at trial, broaden a federal court's equitable powers.

Although federal courts have extensive powers in devising remedies for fourteenth amendment violations, those powers are not unlimited.[47] In *Swann*, the Court stated that "the nature of the violation

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tion, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

38. *Milliken*, 433 U.S. at 289. "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

39. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976).

40. *Id.* at 446. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

41. Local No. 93 v. City of Cleveland, 478 U.S. 501, 522 (1986); *see also* Resnik, *Judging Consent*, 1987 U. CHI. L.F. 43, 47.

42. *Local No. 93*, 478 U.S. at 522.

43. Shillitani v. United States, 384 U.S. 364, 370 (1966).

44. *See* United States v. Swift & Co., 286 U.S. 106 (1932); *see also* 1B J. MOORE, MOORE'S FEDERAL PRACTICE 325-26 (1988 & Supp. 1990-91).

45. *See* Resnik, *Judging Consent*, *supra* note 41, at 60.

46. *Local No. 93*, 478 U.S. at 525. *See* Resnik, *Judging Consent*, *supra* note 41, at 60.

47. In Board of Educ. of Okla. City Pub. Schools v. Dowell, the Supreme Court

[should] determine the scope of the remedy."[48] In *Milliken*, the Supreme Court stated that in fashioning a remedy for constitutional violations, federal courts must consider the interests of state and local authorities in managing their own affairs.[49]

A federal court's equitable powers are further limited by the principle of comity.[50] Comity requires proper respect, cooperation, and institutional restraint by state and federal governments toward each other.[51] Comity, in the context of state and federal interaction, is referred to as "Our Federalism."[52] In *Younger v. Harris*, the Supreme Court explained:

> [Comity is] a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.[53]

The principle of legislative immunity also constrains a federal court's equitable powers. Legislative immunity is the absolute privi-

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reversed the Tenth Circuit which held that a desegregation decree could not be lifted or modified absent a showing of "grievous wrong evoked by new and unforeseen conditions." 59 U.S.L.W. 4061, 4064-65 (1991). The Supreme Court stated that the "test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future." *Id.* at 4064. The Court remanded the case, holding that the desegregation decree could be terminated if the "Board had complied in good faith with the desegregation decree . . . [and] the vestiges of past discrimination had been eliminated to the extent practicable." *Id.* at 4065. This case suggests a possible retrenchment by the Court in the area of school desegregation. The Court's holding makes termination of desegregation decrees possible even though some vestiges of segregation remain. This holding arguably lessens a federal court's ability to remedy fourteenth amendment violations in the area of school desegregation.

48. *Swann*, 402 U.S. at 16.

49. *Milliken*, 433 U.S. at 280-81. The Court has acknowledged that the states "retain a significant measure of sovereign authority." Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 549 (1985) (quoting EEOC v. Wyoming, 460 U.S. 226, 269 (1983)). "[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature." Federal Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 761 (1982). *Cf.* Carter v. Carter Coal Co., 298 U.S. 238, 295 (1936) (The Supreme Court, in discussing the federal government's commerce clause power, stated that the federal government has no "inherent power in respect of the internal affairs of the states; and emphatically not with regard to legislation.").

50. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 4 (1973), *reh'g denied*, 411 U.S. 959 (1973) ("Questions of federalism are always inherent in the process of determining whether a state's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny.").

51. Wilson, *Federalism Issues in "No Airbag" Tort Claims: Preemption and Reciprocal Comity*, 61 NOTRE DAME L. REV. 1, 28 (1986).

52. Younger v. Harris, 401 U.S. 37, 44 (1971). In *Younger*, a federal district court enjoined a district attorney from prosecuting under a state criminal statute, which was held to be unconstitutional. The Supreme Court reversed, holding that the federal court should not have issued an injunction because issuance was not required to prevent irreparable injury to constitutional rights. *Id.* at 40, 53-54.

53. *Id.* at 44.

lege of legislators to be free from arrest or civil liability for what they do or say in legislative proceedings.[54] "The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference."[55]

The founders of our nation recognized the importance of legislative immunity in a representative government.[56] Provisions protecting this immunity were written into the Articles of Confederation[57] and later into the Constitution.[58] A majority of the states have also included specific provisions in their constitutions protecting this privilege.[59]

James Wilson, a member of the Committee of Detail which was responsible for the speech or debate clause of the federal Constitution, explained that in order to encourage a legislator "to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may [cause] offense."[60]

In *Tenney v. Brandhove*, the Supreme Court recognized a state legislator's right to legislative immunity. The case involved a section 1983 action[61] brought by Brandhove against the Tenney Committee, a California Senate Committee on Un-American Activities.[62] Brandhove alleged that the Tenney Committee had tried to intimidate and silence him in violation of his constitutional rights.[63] The United States

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54. Tenney v. Brandhove, 341 U.S. 367, 372 (1951). The Supreme Court has held that the privilege is absolute. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975). *See also Developments In The Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1616 (1985).

55. Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 731 (1980).

56. *Tenney*, 341 U.S. at 372.

57. "Freedom of Speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . ." THE ARTICLES OF CONFEDERATION, art. V.

58. "[F]or any speech or debate in either House, [the Senators and Representatives] shall not be questioned in any other place." U.S. CONST. art. I, § 6.

"The immunities of the Speech or Debate clause were not written into the constitution simply for the personal or private benefit of members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators." United States v. Brewster, 408 U.S. 501, 507 (1972).

59. *Tenney*, 341 U.S. at 375. The *Tenney* Court listed forty-one states which have constitutional clauses corresponding to the federal speech or debate clause, including Wyoming, Colorado, Utah, Nebraska and Montana. *Id.* at n.5. After *Tenney* was decided, Alaska and Hawaii gained statehood, and their constitutions also contain similar provisions. *Developments In The Law—Privileged Communications*, 98 HARV. L. REV. 1450, 1615 (1985).

60. *Tenney*, 341 U.S. at 373.

61. "Every person who, under color of any statute, ordinance, regulation . . . of any state . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . ." 42 U.S.C. § 1983 (1988).

62. *Tenney*, 341 U.S. at 369.

63. *Id.* at 371. Brandhove had circulated a petition in the state legislature charging that the Committee had used Brandhove "as a tool in order to smear Congressman

Supreme Court held that state legislators have common law immunity from liability for their legislative acts, and that Congress did not intend section 1983 to abrogate a state legislator's immunity.[64]

The Supreme Court has also acknowledged that absolute legislative immunity applies to legislators at the regional level. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, the Court extended legislative immunity to the Tahoe Regional Planning Agency,[65] a regional legislative body created by California and Nevada to coordinate and regulate development in and around Lake Tahoe.[66] The majority, however, expressly left open the question of whether or not individuals performing legislative functions at the local level should be afforded absolute legislative immunity.[67] Justice Marshall, in dissent, was concerned that the majority's reasoning "[left] little room to argue that municipal legislators stand on a different footing than their regional counterparts."[68] Since *Lake Country Estates*, at least seven circuits have ruled that absolute legislative immunity is available to local legislators.[69]

In *Baker v. Mayor of Baltimore*, the Court of Appeals for the Fourth Circuit held that legislative immunity barred discharged municipal employees from suing the City under the Age Discrimination in Employment Act (ADEA).[70] The suit would have required board members to testify as to their motives for eliminating positions in the Budget Ordinance.[71] Legislative immunity barred the action because one of the purposes of the doctrine is to "prevent legislators from having to testify regarding matters of legislative conduct."[72]

Franck Havenner as a 'Red' when he was a candidate for mayor of San Francisco in 1947." *Id.* at 370.

64. *Id.* at 378-79. In *Tenney*, the defendants, state legislators, had legislative immunity from a damages suit brought at law. *Id.* at 371. By contrast, in *Spallone*, the defendants claimed legislative immunity from fines imposed by the court in equity. To that extent, *Tenney* is distinguishable from *Spallone* because the holding did not limit the federal court's equitable power. *See also* Owen v. City of Independence, 445 U.S. 622, 653 n.37 (1980). (The Court stated that § 1983 allowed suits against municipalities, but was not intended to abrogate a legislator's immunity from personal liability).

65. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 406 (1979).

66. *Id.* at 394.

67. *Id.* at 404 n.26.

68. *Id.* at 407 (Marshall, J., dissenting).

69. *City of Yonkers*, 856 F.2d at 456. *See* Aitchison v. Raffiani, 708 F.2d 96, 98-100 (3d Cir. 1983); Reed v. Village of Shorewood, 704 F.2d 943, 952-53 (7th Cir. 1983); Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349-50 (9th Cir. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193-94 (5th Cir. Unit A 1981), *cert. denied*, 445 U.S. 907 (1982); Bruce v. Riddle, 631 F.2d 372 (4th Cir. 1980); Gorman Towers v. Bogoslavsky, 626 F.2d 607, 611-14 (8th Cir. 1980).

70. Baker v. Mayor of Baltimore, 894 F.2d 679, 682 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 56 (1990). The court found that the Board of Estimates, which prepared the Budget Ordinance, performed a legislative function. *Baker*, 894 F.2d at 682.

71. *Id.* at 682.

72. *Id.*

In *Spallone*, city council members argued that the district court's imposition of contempt sanctions violated their common law right to legislative immunity.[73] The Supreme Court granted certiorari to review the district court's exercise of federal judicial power against local legislators.[74]

PRINCIPAL CASE

In *Spallone*, the United States Supreme Court granted certiorari to address the narrow issue of whether the district court abused its discretion by imposing contempt sanctions against individual council members who voted against the "Affordable Housing Ordinance."[75] The Court held that the district court had abused its discretion. Contempt sanctions should not have been imposed against council members unless sanctions against the City alone failed to produce compliance within a reasonable time.[76]

The Supreme Court distinguished between sanctions against council members and sanctions against the City.[77] Sanctions against council members caused a "greater perversion of the normal legislative process" because they were "designed to cause them to vote, not with a view to the interest of their constituents or of the City, but with a view solely to their own personal interests . . . ."[78]

The majority stated that while the holdings in *Tenney*, *Lake Country Estates*, and *Supreme Court of Virginia* did not "control the question whether [the council members] should be immune from contempt sanctions," the district court should have considered the underlying principles of legislative immunity in exercising its discretion.[79] The majority explained that "[a]ny restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process."[80]

Focusing on the facts of the case, the Court determined that there was a "reasonable probability" that the district court could have secured compliance with its order by imposing sanctions against the City alone.[81] The majority applied the rule from *Anderson v. Dunn*,

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73. *Spallone*, 110 S. Ct. at 631.

74. *Id.*

75. *Id.* The Court said that there was no question that the City of Yonkers had engaged in racial discrimination. All of the courts agreed on this point; therefore, discrimination was not directly at issue. *Id.*

76. *Id.* at 634-35.

77. *Id.* at 631. The district court's sanctions against the City were affirmed by the court of appeals, and the Supreme Court denied certiorari. *Id.*

78. *Id.* at 634.

79. *Id.* at 633-34. The majority did not address the question left open by *Lake Country Estates* of whether absolute immunity extended to local legislators. *Id.*

80. *Id.* at 634.

81. *Id.* at 633. The district court had previously secured compliance of a remedial order by threatening fines against the City alone. *Id.*

reasoning that the district court abused its discretion by imposing sanctions against individual council members because it failed to "exercise the least possible power adequate to the end proposed."[82]

Justice Brennan, in his dissenting opinion,[83] argued that the political realities in July of 1988 did not support the conclusion that a "reasonable probability" existed that sanctions against the City alone would have worked.[84] He quoted council member Fagan's statement that his vote against the housing ordinance "was an act of defiance" and that "[t]he people clearly wanted me to say no to the judge."[85] An article in the New York Times opined that "[t]he defiant Councilmen [were] riding a wave of resentment among their white constituents that [was] so intense that many insist[ed] they [were] willing to see the City bankrupted . . . ."[86]

Justice Brennan argued that the Court should have deferred to the district court's discretion, particularly because the record showed that the lower court exercised extreme caution.[87] He emphasized that the district court judge had first-hand experience with the parties and was in the best position to know whether or not sanctions against the City alone would work.[88] Further, he argued that the sanctions against the council members were calculated to achieve prompt compliance, and that this was justified because mounting "[f]ines assessed against the public fisc directly 'diminish[ed] the limited resources which the city ha[d] to comply with the decree.' "[89]

Justice Brennan insisted that federal court orders to remedy the effects of a prior constitutional violation must be enforced, even at the expense of legislative immunity.[90] "Legislators certainly may not defy court-ordered remedies for racial discrimination merely because their constituents prefer to maintain segregation."[91]

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82. *Id.* at 635 (citing *City of Yonkers*, 856 F.2d at 454, quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 61, 204, 231 (1821)). In *Anderson*, the Supreme Court upheld the power of the house of representatives to imprison a nonmember for breach of privileges and high contempt of dignity of the house. The court held that the house must use "[t]he least possible power adequate to the end proposed." The Court noted that while imprisonment may be appropriate, corporal punishment would not be. *Anderson*, 19 U.S. (6 Wheat.) at 204, 208, 231-32.

83. Justice Brennan was joined in the dissent by Justices Marshall, Blackmun, and Stevens. *Spallone*, 110 S. Ct. at 635 (Brennan, J., dissenting).

84. *Id.* at 643.

85. *Id.* at 641. Council member Spallone said, "I will be taking on the judge all the way down the line." *Id.*

86. *Id.* (quoting N.Y. Times, Aug. 5, 1988, at B2, col. 4).

87. *Spallone*, 110 S. Ct. at 640 (Brennan, J., dissenting).

88. *Id.* at 641.

89. *Id.* at 643 (quoting United States v. Providence, 492 F. Supp. 602, 610 (D.R.I. 1980)).

90. *Spallone*, 110 S. Ct. at 645 (Brennan, J., dissenting).

91. *Id.*

ANALYSIS

Spallone is an unusual case. The district court judge stated: "I know of no parallel for a court to say to an elected official, 'You are in contempt of court and subject to personal fines and may eventually be subject to personal imprisonment because of a manner in which you cast a vote.' I find that extraordinary."[92] Even so, the district court judge decided that he had no alternative but to impose contempt sanctions against individual council members.[93]

The Supreme Court reversed, holding that sanctions against the council members should have been considered only if sanctions against the City alone failed to produce compliance within a reasonable time.[94] This holding leaves open the possibility that a federal court may be justified in imposing sanctions against individual legislators if no other alternatives exist, or if less intrusive alternatives fail to produce compliance within a reasonable time.

In *Spallone*, the Justices weighed four established legal principles which conflicted when considered under the facts of the case. First, a federal equity court should have broad discretion in fashioning remedies for fourteenth amendment violations.[95] Second, legislators ought to be free from arrest or civil actions for what they do or say in legislative proceedings.[96] Third, courts should have the power to enforce consent decrees through civil contempt.[97] Fourth, a court, when protecting federal rights, should not unduly interfere with legitimate state and local activities.[98] Remedying fourteenth amendment violations and enforcing consent decrees are principles supporting a broader interpretation of a federal court's equity power. On the other hand, comity and legislative immunity are principles supporting a narrower interpretation of a federal court's equity power.

The school desegregation cases establish the proposition that federal district courts have broad discretion in fashioning remedies for fourteenth amendment violations.[99] In *Spallone*, there is no question that the City of Yonkers violated the equal protection clause of the

92. *Id.* at 634.
93. *Id.* at 643 (Brennan, J., dissenting).
94. *Id.* at 634-35.
95. *See* Griffin v. County School Bd., 377 U.S. 218 (1964); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Milliken v. Bradley, 433 U.S. 267 (1977); Missouri v. Jenkins, 110 S. Ct. 1651 (1990). *See supra* notes 26-38 and accompanying text.
96. *See* Tenney v. Brandhove, 341 U.S. 367 (1951); Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); Baker v. Mayor of Baltimore, 894 F.2d 679 (4th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3244 (1990). *See supra* notes 54-72 and accompanying text.
97. *See* Shillitani v. United States, 384 U.S. 364 (1966); Local No. 93 v. City of Cleveland, 478 U.S. 501 (1986); Resnik, *Judging Consent*, 1987 U. CHI. L.F. 43. *See supra* notes 41-46 and accompanying text.
98. *See* Younger v. Harris, 401 U.S. 37 (1971).
99. *Swann*, 402 U.S. at 15.

fourteenth amendment and the Fair Housing Act of 1968, and that the district court had a responsibility to remedy the violations.[100] However, in exercising its equity powers, the district court should have given greater consideration to important competing values such as legislative immunity.

Justice Rehnquist, in his majority opinion for the Court, discussed the importance of legislative immunity. Although the Court declined to answer whether absolute legislative immunity applied to local legislators, it did state that the principles underlying legislative immunity should have been considered by the district court in exercising its discretion.[101]

The dissent countered that legislative immunity cannot shield a local legislator from court-ordered remedies for constitutional violations.[102] This may be true in an absolute sense. However, the dissent's reasoning misses the mark because the majority did not say that legislative immunity could be used as a shield to perpetuate constitutional violations. All of the Justices agreed that the City's discrimination was impermissible. The issue was how to remedy the violation. The majority's position was that the district court should have initially fashioned a remedy that was less intrusive, recognizing the importance of legislative immunity. Another alternative was available. The district court should have first imposed sanctions against the City.

Spallone sends a message to federal district courts that a remedy for a constitutional violation should be fashioned, if possible, in a way that will not infringe upon legislative immunity. To that extent, legislative immunity acts as a constraint on a court's equitable power.

The appellate court affirmed the district court's imposition of contempt sanctions against the council members in order to enforce the terms of the consent decree, which the council members had previously agreed to. However, enforcing a consent decree, solely because it has been agreed to, may not be sufficient justification. Some commentators argue that enforcement of consent decrees should be subjected to constitutional scrutiny and that there are times when consent decrees should not be enforced.[103]

Consent decrees that limit the discretion of other branches or levels of government may violate the Constitution and therefore can-

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100. *Spallone*, 110 S. Ct. at 628. *See* Note, *United States v. Yonkers Board of Education: The National Symbol of Contempt for Civil Rights*, 10 HAMLINE J. PUB. L. & POL'Y 441 (1989).

101. *Spallone*, 110 S. Ct. at 634.

102. *Id.* at 645-46 (Brennan, J., dissenting).

103. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CH. L.F. 295, 317 (1987) [hereinafter McConnell, *Why Hold Elections*]; Rabkin, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements With the Federal Government*, 40 STAN. L. REV. 203, 276 (1987); Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, U. CH. L.F. 103 (1987).

not be enforced.[104] Even if a consent decree does not violate the Constitution, if enforcement of the decree violates the principle of legislative immunity, or impinges upon the legislative process, it should be carefully scrutinized. Consent decrees may operate to "insulate the policies embodied in the decree from future political change, and thus from the democratic process."[105] They also "undermine a central tenet of democracy: the people, and their elected official's [right] to change their minds."[106]

In *Spallone*, the district court imposed contempt sanctions against individual legislators to enforce the consent decree. The sanctions violated the principle of legislative immunity by penalizing legislators because of how they voted. The fact that the council members agreed to the consent decree did not justify its enforcement, at least not at the expense of legislative immunity.

However, in *Spallone*, there was a more compelling reason that did justify enforcement of the decree. The Court, by enforcing the decree, was remedying the City's past discrimination. The effective cost of entering and enforcing the decree was that the council members were precluded from changing their minds and future council members were bound to comply with the terms of the consent decree. In *Spallone*, this cost was reasonable. Present and future council members should not have been allowed to discriminate in their housing policies. Continued discrimination would have violated the equal protection clause of the fourteenth amendment and the Fair Housing Act of 1968. Even though the consent decree limited the city council's legislative discretion, the district court was obligated to enforce it.

The real issue in *Spallone*, however, was not whether the consent decree should be enforced; rather, the issue was how to enforce the consent decree. The district court should have first imposed sanctions against the City. Those sanctions would not have violated the principle of legislative immunity, and there was a "reasonable probability" that they would have worked.[107]

In determining how to enforce the consent decree, the district court should also have given greater consideration to the principle of comity. Comity requires a sensitivity to legitimate interests of state and local authorities in managing their own affairs.[108]

In *Spallone*, the judge's role was limited to remedying the City's past discrimination in the least intrusive way. However, the district court judge exceeded his role. The judge commented that the council members acted without regard to what was in the best interests of the

104. *See* McConnell, *supra* note 103, at 304 n.34.
105. *Id.* at 300.
106. *Id.* at 318.
107. *Spallone*, 110 S. Ct. at 633; Comment, *The Effects of Decrees on Legislative Immunity*, 56 U. CHI. L. REV. 1121, 1135 (1989).
108. *Milliken*, 433 U.S. at 280-81.

City of Yonkers.[109] He also stated that the council had "crossed the line of any form of fiscal or other governmental responsibility."[110] The judge acted improperly by making these comments. It was not his role to determine what was in the best interests of the City of Yonkers, or whether the city council was fiscally responsible.

The dissent stated that the district court judge imposed sanctions against individual council members to secure prompt compliance with the decree in order to avoid bankrupting the City, and to preserve the resources that the City had to comply with the decree.[111] However, the judge, to the extent that he imposed contempt sanctions to save the City from its council members' irresponsible acts, or even from bankruptcy, acted improperly. He supplanted his judgment, that of an unelected, life tenured judge, in place of the council members' judgment.

The judge should have exercised greater restraint. The council members, as elected representatives, were responsible for making decisions for the City. Even if the council members made a poor decision, or acted irresponsibly by not immediately adopting the "Affordable Housing Ordinance," and caused harm to the City, they were directly accountable to the people.

The dissent argued that the Supreme Court should have deferred to the district court's discretion in imposing sanctions against individual council members because it was in the best position to determine whether sanctions against the City alone would have worked.[112] While it is true that the district court was in a better position than the Supreme Court to make this factual determination, the majority was still correct in ruling that the district court abused its discretion and that sanctions against the City alone should have been tried first.

The majority's position, that there was a "reasonable probability" that sanctions against the City alone would have worked, was partially supported by the fact that sanctions against the City alone had worked in the past.[113] Yet, that does not refute the dissent's contention that the district court was in the best position to make a factual determination.

A more compelling argument is that in application, the "reasonable probability" test was more than a pure factual determination; it became a balancing test. The majority attached great importance to the competing values of legislative immunity and comity. Therefore, the probability that sanctions against the City alone would work did not have to be very great in order to hold that they should have been

109. *Spallone*, 110 S. Ct. at 641 (Brennan, J., dissenting).
110. *Id.* at 643.
111. *Id.*
112. *Id.* at 641.
113. *Id.* at 633.

tried first.

In *Spallone*, it was troubling that the district court attempted to steer the legislative outcome by pressuring individual council members through personal sanctions. In doing so, the district court was effectively voting itself. Justice Kennedy, in his concurring opinion from *Jenkins*, commented on *Spallone*:[114] "A legislative vote taken under judicial compulsion blurs lines of accountability by making it appear that a decision was reached by elected representatives when the reality [was] otherwise."[115] Justice Kennedy was correct; the reality in *Spallone* was otherwise. When a court exercises powers that are traditionally legislative in nature, there are few checks against that power. Under these circumstances, it is particularly important that federal courts exercise restraint.[116]

The majority held that sanctions against the City alone should have been tried first because there was a "reasonable probability" that they would have worked. The majority opinion suggests that a district court should almost never compel local legislators to vote in a particular way. An exception can be made if no alternatives exist to remedy a fourteenth amendment violation, or if less intrusive alternatives fail to produce compliance within a reasonable time. By telling the district court that it had to sanction the City first, the majority sent a message that federal courts must exercise restraint when intruding into a local government's traditional legislative functions.

CONCLUSION

In *Spallone*, a federal judge imposed contempt sanctions against individual city council members because of how they voted. The Supreme Court, in reversing the appellate court, was concerned about the proper role of federal courts.

A federal district court should endeavor to use the "least possible power adequate to the end proposed." The Supreme Court was correct in holding that the district court abused its discretion by imposing sanctions against individual council members. Not only was there a "reasonable probability" that sanctions against the City alone would have worked, but more importantly, the underlying concerns for legislative immunity and comity support the Court's holding that sanc-

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114. Justice Kennedy joined the majority in *Spallone*. 110 S. Ct. at 628.

115. *Jenkins*, 110 S. Ct. at 1673 (Kennedy, J., Rehnquist, J., O'Connor, J., Scalia, J., concurring).

116. In *Jenkins*, Justice Kennedy argued that the federal government's supremacy over state and local governments is not justification for the federal judiciary "to exercise all federal power; it may exercise only the judicial power." *Jenkins*, 110 S. Ct. at 1672 (Kennedy, J., concurring). Although this quote indicates a possible separation of powers issue, it should be noted that *Spallone*, like *Jenkins*, "is not an instance of one branch of the Federal Government invading the province of another. It is instead one that brings the weight of federal authority upon a local government and a state." *Id.*

tions against the City should have been tried first.

By imposing sanctions against individual counsel members to cause them to vote in a particular way, the district court was in effect voting itself. There are few checks when a life-tenured judiciary exercises power that is traditionally legislative in nature. *Spallone* sends a message that in those areas, a federal court must exercise restraint.

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