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CONSTITUTIONAL LAW—When the Prohibition on Judicial Taxation Interferes with an Equitable Remedy in a School Desegregation Case. *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990).

The *Missouri v. Jenkins* litigation began when the Kansas City Missouri School District (KCMSD) and a group of students from the KCMSD filed an action in United States District Court for the Western District of Missouri against the State of Missouri. The suit alleged that the State and the surrounding school districts had operated a dual school system in the Kansas City metropolitan area.¹ After realigning KCMSD as a defendant, the district court found that the State of Missouri and KCMSD had failed in their collective duty to eliminate the vestiges of a segregated school system within the KCMSD.²

Accordingly, the district court issued an order outlining the remedies necessary to eliminate the remnants of the dual school system and to finance the implementation of those remedies.³ While concluding that it had the power to order a tax increase, the district court, instead of ordering a tax increase, enjoined the State from enforcing state laws that would have prevented KCMSD from raising taxes to fund the desegregation plan.⁴

The Eighth Circuit affirmed the district court's findings of liability and remedial actions, and modified the district court's cost allocation between KCMSD and the State.⁵

Meanwhile, the district court moved forward with the enforcement of the desegregation plan approving several plans proposed by KCMSD, each one more elaborate and expensive than the previous one.⁶ KCMSD's desegregation plans continued to be plagued with

1. School Dist. of Kansas City v. Missouri, 460 F. Supp. 421 (W.D. Mo. 1978).

2. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1505 (W.D. Mo. 1984). The district court found the State had taken positive actions which discriminated against blacks. The State had intentionally mandated separate white and black schools, established separate institutions for educating black teachers, established and maintained a separate institution of higher learning for blacks, and had authorized local school authorities to establish separate libraries, parks and playgrounds. *Id.* at 1503. Additionally, it was the mandate of the State, not the KCMSD School Board, that had originally created a dual school system within the KCMSD. *Id.* at 1504.

3. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985). The original estimated cost of the remedy was about \$88,000,000 over three years. *Id.* at 43-44. The district court also concluded that the Missouri Constitution infringed on the KCMSD's ability to raise taxes sufficient to fund the cost of the program. *Id.* at 45. The problem the district court faced was that the Missouri Constitution prohibited increasing property taxes without a referendum vote. Mo. Consr., art. X, § 22(a).

4. *Jenkins v. Missouri*, 639 F. Supp. 19, 45 (W.D. Mo. 1985).

5. *Jenkins v. Missouri*, 807 F.2d 657, 686 (8th Cir. 1986). The district court originally determined that Missouri should bear most of the costs, reasoning that the State was the more culpable party in creating school segregation. *Id.* at 684.

6. The original plan called for KCMSD to operate six magnet schools during the 1986-1987 school year, and a capital improvements budget of \$37,000,000, to be spent

funding problems when tax initiatives failed at the polls and the state legislature was unwilling to help.⁷

At this point, the district court concluded that in order to provide a remedy, it had no other option than to use its broad equitable powers to render a judgment that would enable KCMSD to meet its financial obligations.⁸ The district court then ordered the KCMSD property tax levy raised from \$2.05 to \$4.00 per \$100 of assessed valuation, and directed the issue of \$150,000,000 in capital improvement bonds.⁹

The State appealed the decision of the district court, challenging the scope of the desegregation remedy, the apportionment of cost between the KCMSD and the State, and the tax increase.¹⁰ A panel of the Eighth Circuit affirmed the desegregation order and the apportionment of cost, but held that in the future, the district court should not levy the tax directly; instead, the district court should authorize KCMSD to submit a tax levy to the state tax collection authorities and enjoin the State from hindering the collection of revenue necessary to fund KCMSD's program.¹¹

The United States Supreme Court granted certiorari to resolve the tension between two well established judicial doctrines; the broad equitable powers of federal courts to enforce equal protection rights in desegregation cases, and the prohibition on the federal judiciary to exercise taxing powers generally reserved to the legislature. This case-note will discuss the Court's attempt to reconcile these two doctrines, and suggests that while the language of the Court's decision would allow the federal courts' fourteenth amendment remedial powers to overreach constitutional prohibitions on judicial interference with the taxing power, the practical effect of the decision was an acceptable compromise between the two doctrines.

over three years. *Jenkins v. Missouri*, 672 F. Supp. 400, 402 (W.D. Mo. 1987). A year later, the district court authorized an additional \$12,877,330 for capital improvements. The district court later approved a long range magnet school program in which all high schools, middle schools, and one-half of the elementary schools were to become magnet schools. The accompanying capital improvements budget was \$52,858,301. *Id.* The total capital improvements budget for the long range magnet school plan required an additional \$187,450,334, or a total of \$250,308,635 over five years. *Id.* at 414-15.

7. *Missouri v. Jenkins*, 110 S. Ct. 1651, 1657 (1990). KCMSD tried to pass the tax increases by referendum vote in accordance with state law, but each one failed to find support among a sufficient number of the voters. *Id.* KCMSD also approached members of state government in an effort to secure funding assistance, but was unsuccessful. *Id.*

8. *Jenkins v. Missouri*, 672 F. Supp. 400, 412 (W.D. Mo. 1987) (quoting *Griffin v. Prince Edward County School Bd.*, 377 U.S. 218, 233 (1964)).

9. *Jenkins v. Missouri*, 672 F. Supp. 400, 413 (W.D. Mo. 1987).

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

11. *Id.* at 1314. Upon denial of rehearing by the Eighth Circuit, the State petitioned for writ of *certiorari*, which was granted to consider the State's argument that the district court lacked power to raise local property taxes. *Jenkins*, 110 S. Ct. at 1654.

BACKGROUND

The landmark decision of *Brown v. Board of Education of Topeka (Brown I)*¹² upheld the right of the Nation's black school children to attend non-segregated public schools. The Court concluded that separate but equal systems for white and black students deprived black school children of equal educational opportunities, and, therefore, violated the fourteenth amendment's equal protection clause.¹³ In a hearing on the effects that *Brown* would have on the Nation's school systems, the Court recognized that district courts needed broad equitable powers to give flexibility in shaping remedies, and ordered desegregation be made "with all deliberate speed."¹⁴

In *Green v. County School Board*, more than a decade after *Brown I*, the Court concluded that little progress toward desegregation had been made, and held that local school authorities had an affirmative duty to come forward with a realistic plan that promised to work.¹⁵ In *Swann v. Charlotte-Mecklenburg Board of Education*, the Court further expanded federal court remedial power by imposing an immediate affirmative duty on local authorities to desegregate school systems.¹⁶ In *Swann*, the Court empowered the district court to take specific and detailed actions to remedy intentional school segregation under certain circumstances.¹⁷ However, the Court also wanted to avoid replacing the authority of local elected officials, and would permit such drastic judicial intervention only if the offending school district failed to submit an adequate desegregation plan.¹⁸

In *Milliken v. Bradley*,¹⁹ the Supreme Court curbed the expansion of remedial power by limiting the federal courts' equitable power to remedy public school segregation. The *Milliken* Court reversed a district court remedy and confined the remedy to the boundaries of the offending school district, and, thereby, required that the scope of the desegregation remedy be geographically matched to the scope of

12. 347 U.S. 483 (1954).

13. *Id.*

14. *Brown v. Board of Educ. of Topeka (Brown II)*, 349 U.S. 294, 300 (1955). The Court was concerned with the effect that *Brown I* would have on local school authorities and invited further argument from the states on the relief question. *Id.* at 298-99. The Court also charged district courts with supervising the efforts of local school authorities in implementing adequate desegregation plans. *Id.* at 299.

15. 391 U.S. 430, 437-39 (1968). The Court was faced with a freedom-of-choice program which allowed students to attend the school of their choice. The Court found that the program not only failed to remedy segregation in the County's public schools, but worked to preserve the dual school system. *Id.* at 441-42.

16. 402 U.S. 1 (1971). The district court was given broad powers to take specific steps to effectuate a desegregation plan because the school district's proposed remedy was inadequate. Specific acts the district court could take under such circumstances included the hiring of faculty and staff, busing, and extracurricular activities. *Id.* at 18.

17. *Id.* at 15-16.

18. *Id.* at 16.

19. 418 U.S. 717 (1974).

the violation.²⁰ The Court refused to allow the district court's equitable power to circumvent the deeply rooted tradition of local control over the operation of schools.²¹

*Dayton Board of Education v. Brinkman (Dayton I)*²² reaffirmed the Court's decision in *Milliken* by holding that the district courts' power to fashion equitable desegregation remedies had limits, and that absent a system-wide violation, no system-wide remedy could be ordered.²³ In other words, the Dayton School District was not responsible for segregation it did not cause.²⁴ In a later proceeding between the same parties, *Dayton Board of Education v. Brinkman (Dayton II)*,²⁵ the Court did not overrule *Dayton I*, but was inconsistent with its *Dayton I* holding because the Court expanded, instead of limited, the scope of the district courts' inquiry into segregation in public schools.²⁶ The Court's reasoning created a presumption of intentional segregation by the Dayton School District if (1) segregation had existed within the school district in 1954, and (2) evidence of currently segregated schools existed.²⁷ *Dayton II* expanded the influence the federal courts have over school systems by making school systems responsible for segregation they may have only caused indirectly.²⁸

In the recent decision of *Spallone v. United States*,²⁹ the Supreme Court again limited the use of broad equitable powers to remedy fourteenth amendment violations; this time to correct housing segregation. The Court upheld contempt citations against the City of Yonkers, New York, but reversed the district court's contempt cita-

20. *Id.* at 745. The district court determined that an interdistrict remedy was appropriate because the State of Michigan and the Detroit School District committed intentional acts that created and maintained a segregated school system. The neighboring school districts were not parties to the action, but the district court included the other school districts in the remedial order. *Id.* at 728. The scope of remedy exceeded the scope of the violation by ordering non-segregated school districts to be included in the desegregation plan of the segregated school district. *Id.* at 745.

21. *Id.* at 741. The district court's plan would have required the consolidation of some fifty-four independent school districts into one super district. The Supreme Court considered not only the long history of local autonomy of school administration, but also the tremendous logistical problems and the practicality of the proposed solution. *Id.* at 742. See also *Milliken v. Bradley*, 433 U.S. 267 (1977) (*Milliken II*) (The Supreme Court upheld the revised desegregation plan which required Michigan to pay one half the costs.).

22. 433 U.S. 406 (1977).

23. *Id.* at 420.

24. *Id.* at 421.

25. 443 U.S. 526 (1979).

26. Comment, *Overcoming Original Sin: The Redemption of the Desegregated School System*, 27 Hous. L. Rev. 557, 589 (1990).

27. *Id.* at 589.

28. *Id.*

29. 110 S. Ct. 625 (1990). The development authority of the City of Yonkers, New York, was found to have located public housing in order to maintain segregated housing within the city. The City entered into a consent decree to pass legislation to end its discriminatory practices. When the city council refused to enact such legislation, the district court held the city in contempt, and also found each of the council members who voted against the legislation in contempt personally. *Id.*

tions against the individual members of the city council.³⁰

In the context of school desegregation, the counterpoint to the federal courts' broad remedial powers is the reluctance of federal courts to intrude on the taxing power. This reluctance has its origins in the Constitution. The taxing power is expressly granted to the legislative branch.³¹ On the other hand, the constitutional grant of power to the judiciary has no language indicating that it shares in Congress' taxing power.³² The Framers of the Constitution knew the dangers of giving life-tenured judges control over the purse of the nation.³³ Such dangers include inadequate representation by those who are to be taxed, and inadequate political accountability of the life-tenured judiciary.³⁴

Consistent with the intent of the Framers, the Supreme Court has generally required that the taxing power be left in the hands of the legislative branch. In *Londoner v. Denver*,³⁵ the Court had to decide whether a state legislature could constitutionally delegate the taxing power to an executive agency. The Court struck down the delegation of taxing power because the executive agency could not meet the due process required before imposing a tax, nor was the agency accountable to the electorate.³⁶

The Court has also held independent attempts to exercise the taxing power by the executive branch to be unconstitutional. For example, in *National Cable Television Association v. United States*,³⁷ the Court struck down the Federal Communications Commission (FCC) policy requiring that cable television companies pay fees to the FCC based on the number of cable subscribers each company serviced. The fee assessments were designed to make the FCC's oversight function self-funding. The Court concluded that the fee was too similar to the assessment and levy of taxes, and that only Congress could impose such a tax.³⁸

The Court has also restrained federal courts from interfering with a state's exercise of its taxing power. In *Moses Lake Homes, Inc. v. Grant County*,³⁹ the Court reversed a district court order which sub-

30. *Id.* at 634-35.

31. U.S. CONST., art. I, § 8. "The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises. . . ." *Id.*

32. *Id.*, art. III.

33. See *The Federalist* No. 48, at 332 (J. Madison) (J. Cooke ed. 1961), and *The Federalist* No. 78, at 521 (A. Hamilton) (J. Cooke ed. 1961). Judicially imposed taxes represent a union of the judiciary and legislative branches, and represent a move toward tyranny. *The Federalist* No. 78 at 523.

34. *The Federalist* No. 78 at 523.

35. 210 U.S. 373 (1908).

36. *Id.* at 385.

37. 415 U.S. 336 (1974).

38. *Id.* at 341.

39. 365 U.S. 744 (1961). The lower court correctly struck down a county taxing scheme that discriminated against developers that leased property from the United

stituted a valid tax for an invalid one because federal courts have no authority to assess or levy taxes on behalf of states or their political subdivisions.⁴⁰ The Court, as recently as 1989, refused to allow a district court to broaden a class of taxpayers in order to make an invalid tax valid because the taxing power is beyond the remedial power of the federal judiciary.⁴¹ However, none of the precedents cited have had to resolve judicial intervention in the taxing power in the context of the remedial power of federal courts under the fourteenth amendment, as was the case in *Jenkins*.

PRINCIPAL CASE

The Supreme Court, in a five to four decision, reversed the district court's direct levy of additional property taxes on the people of KCMUSD to fund a desegregation plan for the public schools.⁴² The majority opinion, written by Justice White,⁴³ concluded that a district court could directly impose taxes only if there was no less intrusive remedy.⁴⁴

Justice White rejected the State's contention that the tax increase violated article III of the Constitution and the tenth amendment.⁴⁵ Justice White considered the district court's imposition of a tax increase to be an improper assumption of the taxing power, and, therefore, the district court contravened the principles of federal and state comity.⁴⁶ Consequently, Justice White reasoned that the Court did not need to reach the constitutional questions raised by the State.⁴⁷ Justice White, however, concluded that a district court could impose a tax, but that a district court was first obligated to assure itself that no other permissible means would have accomplished the same end.⁴⁸

States, but incorrectly ordered a change in the tax so that the tax would be valid. *Id.*
40. *Id.* at 751.

41. *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500 (1989). *Davis*, a retired federal employee, brought suit against the state for discriminatorily taxing federal retirement benefits while exempting state retirement benefits. The Court would not allow the district court to broaden a class of taxpayers in order to cure an unconstitutional tax because to do so could be construed to be the direct imposition of a state tax. *Id.* at 1509. The Court decided *Davis* on the basis of intergovernmental tax immunity, not on the basis of the equal protection clause of the fourteenth amendment. *Id.* at 1508.

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

43. Justice White was joined by Justices Brennan, Marshall, Blackmun, and Stevens. *Id.* at 1655.

44. *Id.*

45. *Id.* at 1662.

46. *Id.* Sometimes called cooperative federalism, comity is the working relationship of our co-sovereign Union. The mutual deference between the state and federal governments, while not explicit in the Constitution, is the day-to-day working principle of our Union. B. SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, FEDERAL AND STATE POWERS 80-83 (1963).

47. *Jenkins*, 110 S. Ct. at 1662-63.

48. *Id.*

Justice White concluded that the less intrusive alternative recommended by the Eighth Circuit was the appropriate remedy.⁴⁹ The district court could authorize or require the KCMSD to levy property taxes sufficient to fund its part of the desegregation plan, and enjoin the operation of the State laws that would prevent the KCMSD from exercising its taxing power.⁵⁰ This approach placed on local school authorities the primary responsibility of solving their own segregation problems, which is a traditional objective of equitable remedies in desegregation cases.⁵¹

Although he previously concluded that the constitutional issues need not be reached, Justice White next addressed constitutional issues raised by the dissent. He determined that "[t]he Tenth Amendment[. . .] is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment."⁵² Therefore, a court order directing local authorities to levy taxes that they are already empowered to levy is within the power of the federal judiciary.⁵³

Finally, Justice White addressed the power of a federal court to enjoin state law. Missouri argued that a political subdivision, such as the KCMSD, derives its power, including the power to tax, from the state.⁵⁴ Therefore, Missouri claimed the district court could not enjoin the State's taxing power to restrict the raising of taxes on one hand, and order the political subdivision to exercise that same taxing power to increase taxes on the other.⁵⁵ Justice White rejected this argument by relying on precedents that restrict state action under article I, section 10, clause 1, the contracts clause, of the Constitution, and the preemptive effect on states of obligations imposed by the fourteenth amendment.⁵⁶ He considered the funding of the court-approved desegregation plan to be an obligation imposed by the fourteenth amendment on the KCMSD, and that state laws impeding the discharge of that obligation must yield if such laws interfere with constitutional guarantees.⁵⁷

In dissent, Justice Kennedy⁵⁸ concluded that the district court

49. *Id.*

50. *Id.*

51. *Id.* at 1665.

52. *Id.* (quoting *Milliken v. Bradley (Milliken II)*, 433 U.S. at 289); see also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (The Court recognized limitations imposed on state sovereignty, as embodied in the tenth and eleventh amendments, by the fourteenth amendment.).

53. *Jenkins*, 110 S. Ct. at 1665 (citing *Griffin v. School Bd. of Prince William County*, 377 U.S. 218, 233 (1964)).

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

55. *Id.*

56. *Id.*

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

58. Justice Kennedy was joined in his dissent by Justices Rehnquist, O'Connor, and Scalia. *Jenkins*, 110 S. Ct. at 1667 (Kennedy, J., dissenting).

had overreached its judicial power by levying a tax.⁵⁹ He also considered the majority's reversal of the judicially imposed tax levy while upholding the district court's authority to order the school district to levy a tax, to be a distinction without a difference.⁶⁰

Justice Kennedy concluded that the majority's opinion would allow federal courts to overreach the judiciary's constitutional powers. After noting the apparent disregard that KCMUSD had for the financial cost of the proposed desegregation plan,⁶¹ Justice Kennedy contended that the judicial taxation sustained by the majority was without parallel, and that methods of school financing are beyond federal judicial authority.⁶² He reasoned that local taxing authorities derive their power, including the taxing power from the state's constitution. Accordingly, local taxing authorities are limited to those powers granted to them by the state. Therefore, if a district court orders the use of more taxing power than the state has granted, the court order must be based on the authority of the federal court because the order has exceeded the power given by the state.⁶³ Based on this analysis, Justice Kennedy considered the real issue to be, whether the district court has direct taxing authority under federal law, or indirectly through the KCMUSD.⁶⁴

Justice Kennedy maintained that judicially imposed taxes do not allow sufficient due process protections and that federal courts could never exercise the power to assess or levy taxes.⁶⁵ He then reviewed the due process rationale of vesting the taxing authority in the legislative branch, and why judicially imposed taxes run afoul of due process.⁶⁶

Finally, Justice Kennedy answered the majority's contention that reversing the district court's order would leave the plaintiff without a remedy. He argued that equal protection, not the extravagance of KCMUSD's particular remedy, is a constitutional guarantee.⁶⁷

ANALYSIS

While the far-reaching equitable power of the federal courts upheld in *Jenkins* is alarming, so is the fact that more than three decades after *Brown I*, segregated school systems still exist in our Nation's cities.⁶⁸ The historical role of the federal courts' enforcing the

59. *Id.* at 1672.

60. *Id.* at 1670.

61. *Id.* at 1667.

62. *Id.* at 1668 (citing *National City Bank v. Battisti*, 581 F.2d 565 (6th Cir. 1977); *Plaquemines Parish School Bd. v. United States*, 415 F.2d 817 (5th Cir. 1969)).

63. *Jenkins*, 110 S. Ct. at 1670 (Kennedy, J., dissenting).

64. *Id.*

65. *Id.* (citing *Moses Lake Homes v. Grant County*, 365 U.S. 744 (1961)).

66. *Id.* at 1671.

67. *Id.* at 1673.

68. Note, *Attacking School Segregation Root and Branch*, 99 YALE L.J. 2003, 2004

guarantees of equal protection under the fourteenth amendment is well known.⁶⁹ The very purpose of the fourteenth amendment was to protect people from racially discriminatory state action. Therefore, it should not be surprising that the guarantees of the fourteenth amendment have priority over state sovereignty as embodied in the tenth and eleventh amendments.⁷⁰

The judicial branch, however, derives its authority from article III of the Constitution. Article III does not use the word tax, or any other similar concept.⁷¹ Indeed, the Framers intended for the legislature to "command the purse, but. . .the judiciary on the contrary has no influence over either the sword or the purse. . . ."⁷² In establishing the framework for the separation of powers among the branches of government, the Framers understood the potential tyranny of a life-tenured judiciary which was not accountable to the electorate: "though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered. . .so long as the judiciary remains truly distinct from both the legislative and executive."⁷³

In *Jenkins*, the Court's language blurred the lines between the judicial and the legislative functions of government. The majority, while reversing the judicially imposed tax, did not recognize any absolute prohibition against the judicial imposition of taxes to remedy segregation in the future.⁷⁴ The only limit the Court placed on a federal court's power to directly impose taxes was that there be no other alternative to achieve desegregation.⁷⁵ In other contexts, the Court has applied a different standard when it has reviewed executive branch efforts to assess taxes, stating that "[t]axation is a legislative function, and [that] *Congress is the sole organ for levying taxes.*"⁷⁶ The Court has held that federal courts cannot formulate a valid tax to replace an

(1990).

69. See *supra* notes 13-28 and accompanying text.

70. See *Milliken v. Bradley*, 418 U.S. 717 (1974); *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In *Fitzpatrick*, the Court had to decide if the general state immunity applied to prevent recovery of a back pay award for state employees who had been discriminated against in the administration of the state employees retirement system. The Court recognized that the fourteenth amendment is a limit on state power, and, accordingly, the Court has "sanctioned intrusions. . .into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." *Fitzpatrick v. Bitzer*, 427 U.S. at 455.

71. U.S. CONST., art. III.

72. *The Federalist* No. 78, at 523 (A. Hamilton) (J. Cooke ed. 1961).

73. *Id.*

74. *Jenkins*, 110 S. Ct. at 1663. The Court held that before a district court could impose a tax it "was obliged to assure itself that no permissible alternative would have accomplished the. . .task," the funding of judicially mandated remedies. *Id.*

75. *Id.*

76. *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974) (emphasis added) (The Federal Communications Commission was assessing annual fees to cable companies in order to pay for the Commission's administration of the cable industry; however, the Court held that the fees constituted a tax and could not be levied by the executive branch.).

invalid tax because doing so overreaches judicial authority.⁷⁷

The taxing power rests with the legislative branch because of the legislature's relationship to the people, and because the legislature is politically accountable. Taxation by a legislature satisfies due process because the interests of the taxpayers are represented by their elected representatives.⁷⁸ Taxpayers' due process rights, notice and an opportunity to be heard, are achieved vicariously through their elected officials.⁷⁹ In effect, taxpayers consent to the tax by electing the legislators who levy the tax.⁸⁰

In contrast, judicially imposed taxes do not offer these same protections. Federal judges have life-terms, and in many cases may not be citizens of the community affected by any tax so imposed.⁸¹ In the traditional judicial setting, the proceedings provide the parties with due process, notice and an opportunity to be heard, before the court can deprive a party of his property.⁸² Judicial proceedings do not provide due process rights to non-parties.⁸³ Consequently, the adjudication is not binding on non-parties and, therefore, non-parties are not deprived of property by proceedings to which they are not a party.⁸⁴

In the instant case, KCMSD taxpayers were not a party to the action. However, the Supreme Court's ruling that a district court may, as a last resort, directly impose a tax in order to give effect to a desegregation remedy, would deprive taxpayers of their property without due process.⁸⁵ In another context, the Supreme Court has refused to allow state legislatures to delegate the taxing power to the state executive branch without providing for taxpayers' due process rights.⁸⁶ Yet the majority would seem to exempt the district court from providing those same due process rights to KCMSD taxpayers if the district court had no other alternative.

Despite the Court's language that the judiciary may directly impose taxes, the practical effect of what the Court did was less drastic. The Court sustained the broad remedial power of district courts to oversee local desegregation efforts, and at the same time, observed the

77. *Moses Lake Homes, Inc. v. Grant County*, 365 U.S. 744 (1961) (The Court reversed the Ninth Circuit which had directed a district court to replace an invalid tax that discriminated against federal lessees in favor of county residents with a valid tax.).

78. *Jenkins*, 110 S. Ct. at 1671 (citing *Bi-Metallic Co. v. Colorado State Bd. of Equalization*, 239 U.S. 441, 445 (1915)).

79. *Id.*

80. *Id.*

81. *Id.* at 1672.

82. *Id.* at 1671.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Londoner v. Denver*, 210 U.S. 373, 385 (1908). The Court held that while the state legislature may assess and apportion taxes to pay for municipal improvements without petitioning landowners, the state legislature could not delegate that same power to the City of Denver without violating due process. *Id.*

traditional separation of powers framework intended by the Framers.

Ordering the KCMSD to levy taxes is different than directly imposing a tax. The Court has long recognized that the scope of a district court's remedy was determined by the degree of the equal protection violation.⁸⁷ As early as *Griffin v. School Board of Prince William County*⁸⁸ (1964), for example, the Court ordered local school authorities to use the "power that is theirs to levy taxes to raise funds adequate to reopen, operate and maintain" a desegregated school system within their county.⁸⁹

The rationale behind such an approach to financing a school desegregation plan is to keep the responsibility of desegregation with local school officials.⁹⁰ The KCMSD School Board knew, or should have known, that their desegregation plan would obligate KCMSD taxpayers. The school board also knew that they would be responsible for funding some portion of the desegregation plan.⁹¹ A district court's order to the school board to raise taxes gives effect to a desegregation plan which was developed and proposed, not by the district court, but by KCMSD officials.⁹² Moreover, due process for the KCMSD taxpayers has been met. The KCMSD School Board is an elective body. Taxpayers of KCMSD can effectively register their approval or disapproval at board meetings and at the polls. Since the school board consists of representatives elected by the taxpayers of KCMSD, the normal due process that taxpayers receive through their elected representatives was satisfied.

The holding in *Jenkins* (that the district court may order the KCMSD to raise taxes) also leaves local school authorities with more flexibility than if the district court's direct tax had been sustained. The Court's decision may indirectly allow KCMSD an opportunity to modify the desegregation plan to reflect the collective will of the taxpayers to fund it.⁹³ If KCMSD taxpayers are unwilling to fund KCMSD's portion of the elaborate plan presently approved by the district court, it may yet be possible to reduce the plan to a level that

87. See *Green v. County School Bd.*, 391 U.S. 430 (1968); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Milliken v. Bradley*, 418 U.S. 717 (1974).
88. 377 U.S. 218, 233 (1964).

89. *Id.* at 233.

90. See *supra* notes 16-23 and accompanying text.

91. *Jenkins v. Missouri*, 672 F. Supp. 400, 408 (W.D. Mo. 1987). KCMSD sought funding relief from the district court by requesting that the State pay an even greater portion of the costs. *Id.* Instead of allocating more to the State, the district court ordered the contested tax increases. *Id.* at 412.

92. *Id.*

93. Since the district court had already approved less costly desegregation plans proposed by the KCMSD, see *supra* note 6, the district court might approve still another modification, this time scaling back the current plan. Given the *Jenkins* decision, if the KCMSD proposed a more moderate plan, the State and the KCMSD voters might more readily approve of the more moderate plan. If a more moderate plan had the support of both the KCMSD and the State of Missouri, less coercion would be required of the district court.

can accomplish desegregation at a more reasonable price. The practical result of *Jenkins* keeps the responsibilities of implementing and funding the desegregation plan with local authorities and not with the federal judiciary.

CONCLUSION

The Supreme Court faced the unenviable task of reconciling two divergent judicial doctrines. The Court has consistently upheld the broad equitable power of federal courts to enforce fourteenth amendment protections against segregation. If the federal court was to give effect to the local desegregation plan, the plan had to be funded. To overcome the funding obstacle and give effect to the remedy, the federal court had to directly, or indirectly, control the purse of the local taxpayers. However, interfering in the taxing power presented the Court with other constitutional and philosophical concerns.

While the language of the majority's opinion arguably proposes an expansion of federal judicial power beyond the intent of the Framers, the practical result of the majority's decision comports with the traditional notions of local supervision and operation of public schools.⁹⁴ At the same time, the Court has reiterated its determination to afford the district courts the breadth of equitable powers necessary to combat violations of the fourteenth amendment. By directing the district court to order the KCMUSD to levy taxes sufficient to fund its portion of the desegregation plan, the Supreme Court has placed the district court back within the separation of powers intended by the Framers.

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94. See *supra* notes 21-23 and accompanying text. The question not answered by *Jenkins* is, under what circumstances, if any, will a district court be left with no alternative but to impose a tax.