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Schoolbooks in the Missouri River - a Possible Response to Missouri v. Jenkins

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Schoolbooks In the Missouri River? A Possible Response to *Missouri v. Jenkins*[1]

Rally Mohawks! bring out your axes,
And tell King George we'll pay no taxes
On his foreign tea;
His threats are vain, and vain to think
To force our girls and wives to drink
His vile Bohea!

fragment of a Boston tavern song (1773-74)
inspired by the Boston Tea Party[2]

I. INTRODUCTION

Nearly everyone who has been a student in an American history course is familiar with the Boston Tea Party. As a prelude to the Revolutionary War, a group of Colonists dumped a load of tea into Boston Harbor in protest of a tax levied by George III, King of Great Britain, and the British Parliament.[3] The event, which was synonymous with the cry of "no taxation without representation," served the Colonists by uniting them to further resist British interference in their affairs.[4]

Recently, the theme of this phrase has once again served as a rallying point to bring together an informal coalition of citizens from across the nation. The focus of their concern is *Missouri v. Jenkins*,[5] a 1990 United States Supreme Court decision. In *Jenkins*, a majority of the Court held that, under the appropriate set of circumstances, a judge could indirectly order a tax increase to generate revenue for the purpose of remedying a constitutional violation.[6]

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1. 110 S. Ct. 1651 (1990).

2. W. GRISWOLD, THE NIGHT THE REVOLUTION BEGAN title page (1972).

3. For a historical account of the Boston Tea Party, see B. WOODS, THE BOSTON TEA PARTY (1964).

4. *Id.* at 255.

5. 110 S. Ct. 1651 (1990).

6. *Id.* at 1666. The Court reversed the lower court's decision to impose a property tax under this set of facts. In sixteen-plus pages of dicta, however, the Court embarks in a sharply worded debate on whether a court, under any circumstance, could impose such a tax. *Id.* at 1662-79.

The reaction to *Jenkins* was swift and severe. Less than seventy-two hours after the opinion was announced, Senator Jack Danforth (R-Mo.), along with Senators Bond (R-Mo.), Dole (R-Kan.), Wallop (R-Wyo.), and Kassebaum (R-Kan.), introduced a constitutional amendment that would prevent members of the judiciary from imposing taxes directly or indirectly.[7] Within two weeks, more than twenty senators joined as co-sponsors of the amendment.[8] In the debate that followed, other senators voiced their opinions on the *Jenkins* decision. Senator Arlen Specter (R-Pa.) summarized the Court's action:

> I can think of no more far-reaching decision the Court has handed down, when it has, in effect, authorized the imposition of taxes or has entered an order that a district court has the power to set aside State constitutional limitations.
>
> This may even be a more far-reaching decision than *Brown versus Board of Education*. In fact, it may be that we have to go back to *Marbury versus Madison*, in 1803, where the Supreme Court of the United States decided that the Court itself had the power to decide constitutional issues, to find a decision which is as far-reaching as is this decision.[9]

It is too early to determine whether *Jenkins* will earn such a prestigious place in American legal history. It is apparent, however, that the Court in *Jenkins* did act in an extraordinary manner. Thus, it is important to understand the facts surrounding the case in order to place the decision in proper perspective.

II. BRIEF HISTORY, FACTS, AND HOLDING OF *JENKINS*

A. The Kansas City Desegregation Case

Missouri v. Jenkins is one piece of the complex puzzle of litigation involving the desegregation of the Kansas City Metropolitan School District (KCMSD).[10] The original lawsuit was filed in 1977 on behalf of Kalima Jenkins, alleging that a number of actors, including both the Missouri and Kansas state governments, had contributed to the continued existence of a dual

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7. S.J. Res. 295, 101st Cong., 2d Sess., 136 CONG. REC. S4771 (daily ed. Apr. 20, 1990). The text of the amendment reads as follows: "Neither the Supreme Court nor any inferior court of the United States shall have the power to instruct or order a State or political subdivision thereof, or an official of such State or political subdivision, to lay or increase taxes." *Id.*

8. 136 CONG. REC. S5291 (daily ed. Apr. 30, 1990) (statement of Sen. Danforth).

9. *Id.* at S5342 (statement of Sen. Specter).

10. *Jenkins*, 110 S. Ct. at 1655.

school system.[11] The case was argued before Russell G. Clark, United States District Judge for the Western District of Missouri.[12] Judge Clark ruled against the State of Missouri and the KCMSD and ordered development of a plan to "remov[e] the vestiges of the dual school system as it presently exists in the KCMSD."[13] The scope and financing of the remedy have served as further sources of contention between the litigants and other disputes have been brought before the courts regarding these issues.[14]

Both the State of Missouri and the KCMSD submitted to the district court separate detailed proposals to raise the overall effectiveness of the Kansas City schools and to eliminate the effects of segregation.[15] The plans called for numerous changes to increase student achievement.[16] These changes included adding staff members to enable the KCMSD to achieve AAA status, reducing class sizes, instituting a summer school program, providing a full-day kindergarten opportunity for all eligible students, and developing an early childhood program.[17] A capital improvements component also was included.[18]

The court selected portions of both plans in reaching a final decision on the appropriate remedy.[19] The cost of the various programs totaled more

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11. Jenkins v. State of Mo., 593 F. Supp. 1485, 1487 (W.D. Mo. 1984). The KCMSD joined with the Jenkins class as plaintiffs in the original suit. School Dist. of Kansas City v. State of Mo., 460 F. Supp. 421 (W.D. Mo. 1978), *appeal dismissed*, School Dist. of Kansas City v. State of Mo., 592 F.2d 493 (8th Cir. 1979). Judge Clark, who stated that "the potential for conflict of interest between the KCMSD and the student plaintiffs [was] so severe," dismissed the KCMSD as plaintiff and realigned it as a defendant. *Id.* at 442. The original complaint also named the State of Kansas, a number of Kansas City, Kansas suburban school districts, a number of Kansas City, Missouri suburban school districts, and various federal agencies including the Department of Housing and Urban Development (HUD) as defendants. *Id.* at 421. Judge Clark dismissed all of the Kansas parties due to lack of personal jurisdiction. *Id.* at 445.

12. *Jenkins*, 593 F. Supp. at 1485.

13. *Id.* at 1506. The Kansas City, Missouri suburban districts were dismissed from the case in an earlier order. *Id.* at 1488. HUD was the only federal agency to proceed to trial, but it was absolved of any wrongdoing. *Id.* at 1506.

14. *See* Jenkins v. State of Mo., 639 F. Supp. 19 (W.D. Mo. 1985) (scope of remedy), *aff'd as modified*, Jenkins by Agyei v. State of Mo., 807 F.2d 657 (8th Cir. 1986).

15. *Id.* at 25.

16. *Id.* at 26-39.

17. *Id.* AAA status is the highest attainable classification in Missouri's educational scheme. *Id.* at 26.

18. *Id.* at 39-41.

19. *Id.* at 26-41.

than 87,000,000 dollars, which was to be expended over a three-year period.[20] The State of Missouri was ordered to pay approximately 67,500,000 dollars, or seventy-eight percent of the total cost, with the remainder to be funded by the KCMSD.[21] The Eighth Circuit affirmed the plan formulated by the district court but divided the costs equally between the State of Missouri and the KCMSD.[22]

The district court re-examined the issue of liability and held that "the State was responsible for seventy-five percent of the costs of desegregation, and KCMSD for twenty-five percent."[23] The court reasoned that "the State had created the dual school system, and that KCMSD was required to implement this system under Missouri law."[24] The court included this factor in its reasoning and concluded that "the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out."[25] The court also found the State of Missouri and the KCMSD jointly and severally liable.[26]

In 1987, the case was before the district court again.[27] The state and the KCMSD submitted proposals for long-range capital improvements that would remedy "numerous health and safety hazards, educational environment hazards, functional impairments, and appearance impairments."[28] The district court found such expenses to be desegregation expenses "crucial to the overall success of the desegregation plan."[29]

The court found the state's plan, at a total cost of more than 61,000,000 dollars, a "'patch and repair' approach, . . . [which] would not achieve suburban comparability or the visual attractiveness sought by the Court."[30] Instead, the court adopted the district's plan, with modifications, at a three-year cost of approximately 187,500,000 dollars.[31] The district's plan included funds for new buildings and for the renovation of other buildings to

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20. *Id.* at 43-44.

21. *Id.*

22. Jenkins by Agyei v. State of Mo., 807 F.2d 657, 686 (8th Cir. 1986).

23. Jenkins by Agyei v. State of Mo., 855 F.2d 1295, 1308 (8th Cir. 1988).

24. *Id.*

25. *Id.* (quoting Order of July 6, 1987).

26. *See* Missouri v. Jenkins, 110 S. Ct. 1651, 1664 (1990).

27. Jenkins v. State of Mo., 672 F. Supp. 400 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, Jenkins by Agyei v. State of Mo., 855 F.2d 1295 (8th Cir. 1988).

28. *Id.* at 403 (citation omitted).

29. *Id.*

30. *Id.* at 404.

31. *Id.* at 408, 413. The total cost of the remedy has reached 460,000,000 dollars, including a 260,000,000 capital improvements plan and a 200,000,000 dollar magnet school plan. Missouri v. Jenkins by Agyei, 109 S. Ct. 2463, 2465 (1989).

raise them to acceptable standards or to convert them into magnet school facilities.[32]

B. The Taxation Question

The judicial taxation question arose when Judge Clark decided that the KCMSD would be unable to pay its portion of the costs of the desegregation remedy.[33] The KCMSD previously had petitioned the district court for funding relief.[34] Judge Clark decided not to rule on the motion until after funding proposals were submitted and a final plan was approved.[35] After devising a plan, he calculated that the KCMSD would realize a deficit of over 282,000,000 dollars after funding their portion of the desegregation remedy.[36] The court suggested that the Missouri Legislature "explore the possibility of enacting legislation that would permit a district involved in a desegregation plan more versatility than it presently has to raise funds with which to support the program."[37] The court noted that "[s]uch legislation was introduced but was received unfavorably and ultimately failed."[38]

The district court decided that it was "left with no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan and therefore insure that the

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32. *Id.* at 404-08.

> The essence of a magnet school is that special programs of educational significance are placed on a single school site, where students who desire to pursue those special interest areas are allowed to voluntarily select and attend the school. Because participation in the program is voluntary, the school authorities have the ability to control the registration and to establish proportionate racial representation.

Gordon, *School Desegregation: A Look at the 70's and 80's*, 18 J. L. & EDUC. 189, 197 (1989).

Magnet Schools have been utilized in St. Louis, Chicago, and Tulsa, as well as in numerous other desegregation plans. *Id.* at 197-203. Gordon comments that "[t]he use of magnets for the purposes of school desegregation is over fifteen years old and has yet to be proven effective." *Id.* at 202. He notes, however, that there are exceptions to the general rule. *Id.* at 198.

33. *Jenkins*, 672 F. Supp. at 410-11.

34. *Id.* at 409.

35. *Id.*

36. *Id.* at 410.

37. *Id.* at 411 (quoting Order of November 12, 1986). Missouri has a complex taxation scheme that makes it difficult for school districts to generate additional funds. For a brief discussion of the Missouri constitutional and statutory provisions, see Jenkins by Agyei v. State of Mo., 855 F.2d 1295, 1311-13 (8th Cir. 1988).

38. *Jenkins*, 672 F. Supp. at 411.

constitutional violations committed by the KCMSD and the State of Missouri are cured."[39] Judge Clark continued, stating that "[t]he Court is of the firm conclusion that it has no alternative but to impose tax measures which will enable KCMSD to meet its share of the cost of the desegregation plan."[40] Specifically, Judge Clark "ordered the property tax levy to be increased to $4 per $100 assessed valuation through the 1991-92 fiscal year, and authorized KCMSD to issue $150,000,000 in capital improvement bonds, to be retired within twenty years."[41] In addition, he also "imposed a 1.5 percent surcharge on income of residents and non-residents of KCMSD subject to the Missouri State Income Tax."[42]

Judge Clark briefly explained his authority to take these measures. First, he cited the Eight Circuit decision of *Liddell v. State of Missouri*,[43] summarizing it to read that "[a] district court's broad equitable power to remedy the evils of segregation includes the power to order tax increases and bond issuances."[44] Second, he relied upon *Griffin v. School Board of Prince Edward County*,[45] which stated that a court could raise taxes if it was "necessary to raise funds adequate to . . . operate and maintain without racial discrimination a public school system."[46]

The Eighth Circuit affirmed in part and reversed in part the decision of the district court.[47] First, the court affirmed the scope of the remedy ordered by the district court.[48] Next, the court approved the district court's allocation of fiscal responsibility.[49]

Finally, the court addressed the taxation questions.[50] The state, as well as others, challenged both the property tax and the income surcharge.[51] Concerning the property tax, the appellate court explained that it "[did] not

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39. *Id.*

40. *Id.* at 412.

41. Jenkins by Agyei v. State of Mo., 855 F.2d 1295, 1309 (8th Cir. 1988).

42. *Id.*

43. 731 F.2d 1294 (8th Cir. 1984) (en banc) (dealing with St. Louis desegregation), *cert. denied*, 469 U.S. 816 (1984).

44. *Jenkins*, 672 F. Supp. at 412-13.

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

46. *Jenkins*, 672 F. Supp. at 412 (quoting Griffin, 377 U.S. 218, 233 (1964)).

47. Jenkins by Agyei v. State of Mo., 855 F.2d 1295, 1318 (8th Cir. 1988).

48. *Id.*

49. *Id.* at 1308.

50. *Id.* at 1308-09.

51. *Id.* at 1308. The United States, Icelean Clark (a citizen taxpayers' group), and the State of Kansas filed amicus briefs. *Id.* at 1299. Jackson County and Icelean Clark motioned to intervene as of right, but were denied. *Id.* at 1299, 1316.

write on a clean slate."[52] Apparently satisfied that the United States Constitution did not forbid judicial imposition of the property tax, the court found that the reasoning in *Liddell* applied.[53] In *Liddell,* the Eighth Circuit concluded that the "broad equitable power" afforded to the district court "include[d] a narrowly defined power to order increases in local tax levies on real estate. Limitations on this power require that it be exercised only after exploration of every other fiscal alternative."[54] The *Jenkins* court concluded that the district court analyzed properly the facts of the case using the *Liddell* framework and that Judge Clark was within his authority to levy the property tax.[55]

The court indicated that the district court would have been within its power independent of the *Liddell* decision.[56] The court based its relief upon *North Carolina State Board of Education v. Swann.*[57] In *Swann,* a unanimous Court stated that "if 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."[58] The Eighth Circuit concluded that the principle enunciated in *Swann* applied to all areas of state law, including taxation questions.[59]

The court of appeals explained that the property tax was the district's sole means of generating revenue and that Missouri's taxing scheme made it extremely difficult, if not impossible, to generate funds sufficient to finance the district's portion of the remedy.[60] This scenario allowed the district court to take action that, in effect, disarmed state statutory and constitutional provisions.[61]

The court, however, held that Judge Clark exceeded his authority in ordering the income tax surcharge.[62] The panel felt that this intrusion into

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52. *Id.* at 1310.

53. Jenkins by Agyei v. State of Mo., 855 F.2d 1295, 1310-11 (8th Cir. 1988).

54. *Liddell,* 731 F.2d at 1320.

55. *Jenkins by Agyei,* 855 F.2d at 1310-11.

56. *Id.* at 1311.

57. 402 U.S. 43 (1971). This case struck down North Carolina's "Anti-busing Law." This case was a companion case to the more publicized Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

58. *Swann,* 402 U.S. at 45.

59. *Jenkins by Agyei,* 855 F.2d at 1313.

60. *Id.* at 1311-13; *see supra* note 37.

61. *Id.* at 1313.

62. *Id.* at 1315.

state affairs was beyond acceptable limits.[63] The court drew a line between "merely removing the levy limitation on an existing state or local taxing authority . . . and creat[ing] an entirely new form of taxing authority."[64]

C. The Supreme Court's Decision

The State of Missouri, Jackson County, and a group of taxpayers appealed the Eighth Circuit's affirmation of the property tax.[65] The United States Supreme Court denied certiorari to Jackson County and the citizen group, but agreed to hear the State of Missouri's argument regarding the property tax.[66]

The Court, without dissent, reversed the Eighth Circuit's decision to allow the increased property tax to stand.[67] After arriving at this conclusion, the Court might have ended its discussion of the case.[68] Instead, the Justices engaged in a spirited debate over whether a court, under the appropriate set of circumstances, could duplicate the remedy prescribed by the district court.[69] While technically dicta, the remainder of the opinion provides insight into the Court's division on the subject.

1. The "Majority" Opinion[70]

The State of Missouri argued that the district court's action violated both article three and the tenth amendment to the United States Constitution and infringed upon the power of the state in its relationship with the federal government.[71] Justice White, writing for the majority, agreed that the district

63. *Id.*

64. *Id.*

65. *Jenkins*, 110 S. Ct. at 1651.

66. *See* Clark v. Jenkins, 490 U.S. 1034 (1989) (denying certiorari); Jackson County v. Jenkins, 490 U.S. 1034 (1989) (denying certiorari); Missouri v. Jenkins, 490 U.S. 1034 (1989) (granting limited certiorari).

67. *Jenkins*, 110 S. Ct. at 1651.

68. *Id.* at 1662-63.

69. *Id.* at 1663-79.

70. All nine Justices voted to reverse the order of the lower court; therefore, there is no true dissenting opinion in the case. The debate on the constitutionality of a judicially-imposed tax was five to four. For purposes of this Note, the five Justices supporting indirect judicial taxation will be labeled the majority. The four Justices concurring only in part (Justice Kennedy, Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia) will be labeled the dissent.

71. *Id.* at 1662.

court's action violated principles of federal/state comity but held that no constitutional principles were violated.[72]

Justice White explained that Judge Clark should have ordered the school board, which was the appropriate taxing authority, to set the tax levy at a level adequate to the task rather than adjusting the levy himself.[73] He emphasized a significant difference between these two approaches.[74] The majority concluded that the implementation of its solution would enable any final action to be of local origin.[75]

The opinion summarily dismissed the tenth amendment challenge.[76] Using language from *Milliken v. Bradley*,[77] in which the Court dealt with the desegregation of the Detroit public schools, the court stated that "[t]he Tenth Amendment's reservation of non-delegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment."[78]

The Court relied primarily on two cases to dispel the state's contention that article three would prohibit the indirect imposition of the property tax by the judiciary.[79] The first case, *Griffin v. School Board of Prince Edward County*,[80] arose when local officials allowed the county's public school to be closed rather than to be segregated.[81] The majority affirmed Judge Clark's application of the holding to the facts in *Jenkins*.[82]

The second case, *Von Hoffman v. City of Quincy*,[83] involved the issuance of bonds with the understanding that a tax would be levied against its citizens to pay off the notes.[84] The bonds were issued within the limits of state law.[85] Before the city's obligations on the bonds had been satisfied, the state passed legislation limiting the tax rate on real and personal property to fifty cents per one hundred dollars of assessed valuation.[86] As a result,

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72. *Id.* at 1662-67.
73. *Id.* at 1663.
74. *Id.*
75. *Id.*
76. *Id.* at 1665.
77. 433 U.S. 267 (1977).
78. *Jenkins*, 110 S. Ct. at 1665 (quoting Milliken v. Bradley, 433 U.S. 267, 291 (1977)).
79. *Id.*
80. 377 U.S. 218 (1964).
81. *Id.* at 222-23.
82. *Jenkins*, 110 S. Ct. at 1665. *See supra* notes 45-46 and accompanying text.
83. 71 U.S. (4 Wall.) 535 (1867).
84. *Id.* at 536.
85. *Id.* at 535-36.
86. *Id.* at 542.

the city could not fully meet its obligations and concluded that it was excused from paying any amount in excess of what could be generated within the limits set by the state law.[87] A dissatisfied bondholder applied for a writ of mandamus.[88] The United States Supreme Court held that the legislation, with respect to the city's bond agreement, violated the Contract Clause of the United States Constitution.[89] The Court reversed the decision of the circuit court and ordered the city to meet its obligations on the bonds.[90]

2. The "Dissenting" Opinion

Justice Kennedy wrote to express his displeasure with what he believed to be "an expansion of power in the federal judiciary beyond all precedent."[91] First, he attacked the majority's premise that, while it was unacceptable for a court directly to levy a tax, it was permissible for the court to direct the KCMSD school board members to "levy property taxes at a rate adequate to fund the desegregation remedy."[92] Justice Kennedy contended that "any purported distinction between direct imposition of a tax by the federal court and an order commanding the school district to impose the tax is but a convenient formalism where the court's action is predicted on elimination of state law limitations on the school district's taxing authority."[93] He argued that the KCMSD is subject to the laws of Missouri, and Missouri law clearly outlines the district's authority to tax.[94]

Next, the dissent contended that judicial power, as expressed in article three of the Constitution, does not mention the power to tax.[95] The dissent viewed this silence as conclusive evidence that the courts do not possess any power, directly or indirectly, to levy taxes.[96] The dissent further argued that judicial taxing power poses due process concerns.[97]

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87. *Id.*
88. *Id.* at 536.
89. *Id.* at 555.
90. *Id.*
91. *Jenkins*, 110 S. Ct. at 1667 (Kennedy, J., joined by Rehnquist, C.J., O'Connor, J., and Scalia, J., concurring in part and concurring in the judgment [hereinafter dissenting opinion]).
92. *Id.* at 1663.
93. *Id.* at 1669-70.
94. *Id.* at 1670.
95. *Id.* at 1670-72.
96. *Id.* at 1670.
97. *Id.* at 1671.

Finally, Justice Kennedy addressed the Court's action in *Von Hoffman* and other similar cases cited by the majority.[98] He divided various mandamus actions into three categories.[99] He contended that the first group of cases merely demonstrated that if a litigant is successful in a mandamus action, government officials will be required to "perform a clear duty imposed by state law."[100] The second group, which included *Von Hoffman*, stands for the premise that a state may not pass legislation that affects an already existing contract between a municipality and an independent party.[101] The third group, which the dissent instructed would encompass *Jenkins*, holds that "where there is no state or municipal taxation authority that the federal court may by mandamus command the officials to exercise, the court is itself without authority to order taxation."[102] The dissent deemed this group of cases, coupled with the previous arguments, sufficient to dispel the majority's conclusions.[103]

III. LEGAL BACKGROUND

A. School Desegregation In General

Since the landmark decision of *Brown v. Board of Education*,[104] the nation has attempted to desegregate its schools. While the courts have been somewhat united in their quest to remedy past constitutional violations, their approaches to the problem have been anything but uniform.[105]

There was considerable resistance to the desegregation movement during the fifties and early sixties.[106] The subsequent decision of *Brown v. Board of Education* (*Brown II*)[107] instructed the desegregation process to move

98. *Id.* at 1674-76.
99. *Id.* at 1674-75.
100. *Id.* at 1674.
101. *Id.* at 1674-75.
102. *Id.* at 1675.
103. *Id.* at 1667.
104. 347 U.S. 483 (1954).
105. Desegregation remedies may be implemented in various forms. *Compare* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (busing used to achieve desegregation) *with* Milliken v. Bradley, 418 U.S. 717 (1974) (interdistrict remedy not always appropriate). These are but two examples. *See* text accompanying *infra* notes 113-17.
106. *See* K. ALEXANDER & M. ALEXANDER, AMERICAN PUBLIC SCHOOL LAW 414-16 (2d ed. 1985) [hereinafter ALEXANDER & ALEXANDER].
107. 349 U.S. 294 (1955).

forward "with all deliberate speed."[108] One commentator mused that "the notion of all deliberate speed came to mean 'deliberate' for the white establishment and 'speed' for the black plaintiffs. Interpretation of the phrase boiled down to whose ox was getting gored."[109] Dissatisfied with the progress of desegregation efforts, the Court, in *Alexander v. Holmes*,[110] modified the *Brown II* standard to one of immediacy.[111]

Most desegregation remedies include pupil reassignment to achieve acceptable racial balance among schools, additional funding to improve the quality of the educational opportunity afforded to victims of past discrimination, or a combination of these two approaches.[112] Transporting of students may occur within a single district or among multiple districts.[113] Numerous variations of these basic approaches exist and are encouraged by the Court.[114] In *Green v. County School Board*,[115] the Court once again referred to its ultimate goal, stating that

> [t]he obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance.[116]

B. Judicial Taxation in School Desegregation Cases

The dissent outlined the various circuits' treatment of taxation questions in desegregation actions.[117] At least one commentator has examined the approaches in detail.[118] He has classified the holdings into three groups: courts that have refused to assume the power to tax; courts that have refused to levy taxes in a particular case, but have stated that judicial taxation may be

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108. *Id.* at 301.

109. Gordon, *supra* note 32, at 189.

110. 396 U.S. 19 (1969).

111. *Alexander v. Holmes*, 396 U.S. 19, 20 (1969).

112. *See generally* ALEXANDER & ALEXANDER, *supra* note 106, at 432, 438-41; Note, *Jenkins v. Missouri: The Future of Interdistrict Desegregation*, 76 GEO. L.J. 1867 (1988).

113. Gordon, *supra* note 32, at 191-93.

114. *See* text accompanying *infra* notes 115-16.

115. 391 U.S. 430 (1968).

116. *Id.* at 439.

117. *Jenkins*, 110 S. Ct. at 1668-69.

118. *See* Wolohojian, *Judicial Taxation in Desegregation Cases*, 89 COLUM. L. REV. 332 (1989).

appropriate under a different set of circumstances; and courts that have levied a tax.[119] This framework is useful in understanding the current state of this new, extremely controversial phenomenon.

Both the Fifth and Sixth Circuits have ruled that a federal judge may not infringe upon state or local governments by levying a tax to fund a desegregation remedy.[120] The Fifth Circuit, in *Plaquemines Parish School Board v. United States*,[121] held that while a court may order funding of a desegregation remedy, "the 'necessity' for funds is to be measured against the quality of instruction, equipment, books and transportation."[122] The Fifth Circuit held that the district court could not enact a "broadly written" order requiring desegregation funding, but that the district court could mandate action in a "specific situation as to specific funds."[123]

The Sixth Circuit, in *National City Bank v. Battisti*,[124] spoke more directly to the question of whether the judiciary could interfere with state law in order to advance a desegregation remedy. The court was asked to make a determination on a petition for mandamus or prohibition.[125] The issue before the court focused on the state's funding scheme and was peripheral to the Cleveland Public School desegregation case.[126] The court of appeals ruled that the case was not properly before the court, and instead directed it to the district court.[127] The court issued a directive to the district court, however, stating that "public schools are state controlled and supported by state or local government. School financing is thus clearly a matter of state responsibility through its appropriate executive, legislative and judicial branches."[128] The Sixth Circuit concluded that if a state, "for constitutionally neutral reasons," adopted measures regulating school finance, "the federal courts have no power to pass judgment on the wisdom of the state decision."[129]

The Third Circuit was considerably more cautious in its approach to the desegregation funding issue. In *Evans v. Buchanan*,[130] the appellate court

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119. *Id.* at 332.

120. *Jenkins*, 110 S. Ct. at 1668 (dissenting opinion) (citing decisions of the Fifth and Sixth Circuits).

121. 415 F.2d 817 (5th Cir. 1969).

122. *Id.* at 833.

123. *Id.*

124. 581 F.2d 565 (6th Cir. 1977).

125. *Id.* at 566.

126. *Id.* at 569.

127. *Id.*

128. *Id.*

129. *Id.*

130. 582 F.2d 750 (3d Cir. 1978).

was faced with a situation similar to *Jenkins*. The district court in *Evans* created a new school district, merging the predominately black Wilmington Public School District with a number of New Castle County suburban school districts.[131] After creating the new district, the judge also set its tax rate, subject to the legislature's approval.[132] The judge warned, however, that any reduction in the rate would be closely scrutinized.[133] On appeal, the Third Circuit felt that this warning intruded upon the legislature's power to tax and instructed that the legislature should control the tax rate.[134] In retrospect, the Third Circuit neither embraced nor precluded the possibility of a judicially imposed tax.[135] Citing the 1940 Supreme Court decision of *Madden v. Kentucky*,[136] the court, however, did caution that

> in taxation, even more than other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and aggressive discrimination against particular persons and classes.[137]

To date, no case in the Third Circuit has met this stringent standard.

The Eighth Circuit adopted a considerably more aggressive position on the subject. Originally, in *United States v. Missouri*,[138] and subsequently in *Liddell* and *Jenkins*, the court deemed judicial taxation an appropriate element in constructing a desegregation remedy.[139] In *Liddell*, the district court had ordered both the district and the State of Missouri to take action which, in effect, would amount to a tax increase.[140] The appellate court refused to allow the ruling to stand on the grounds that the district court had acted before exhausting other appropriate, and less intrusive, alternatives.[141]

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131. Evans v. Buchanan, 447 F. Supp. 982, 1001-03 (D. Del. 1978), *aff'd*, 582 F.2d 750 (3d Cir. 1978).

132. *Id.* at 1026.

133. *Id.*

134. Evans v. Buchanan, 582 F.2d 750, 779 (3d Cir. 1978).

135. *Jenkins*, 110 S. Ct. at 1668 (dissenting opinion).

136. 309 U.S. 83 (1940).

137. Evans, 582 F.2d at 778 (quoting Madsen v. Kentucky, 309 U.S. 83, 88 (1940)).

138. 515 F.2d 1365 (8th Cir. 1975).

139. *Id.* at 1372-73.

140. Liddell v. State of Mo., 731 F.2d 1294, 1322-23 (8th Cir. 1984).

141. *Id.* at 1323.

The *Liddell* court was explicit in its instructions to the district court as to when a judicial tax increase would be allowed to stand.[142] The court announced a four step analysis that must be employed to determine if a judicially imposed tax is warranted.[143] First, the court must decide what amount of money will be necessary to fund the remedy.[144] Next, it should determine whether the district has the resources to pay its portion of the costs.[145] Third, if the district will realize a deficit, the court should explore other alternatives to generate revenue.[146] Finally, after all possible alternatives have been exhausted, the court "shall conduct an evidentiary hearing and thereafter enter a judgment sufficient to cure the constitutional violations."[147] At this point, Eighth Circuit courts have "a narrowly defined power to order increases in local tax levies on real estate."[148]

The majority in *Jenkins* implicitly adopted the Eighth Circuit's standards expressed in *Liddell*, with one exception.[149] Specifically, the Court required future courts faced with appropriate fact patterns to order indirectly any tax increase rather than to become involved directly.[150]

C. *Political and Fiscal Considerations*

Jenkins has stimulated emotions that parallel in intensity those expressed during the early years of the desegregation movement. This is not to suggest that Missouri, or Senator Danforth in his push for a constitutional amendment against judicial taxation, are opposed to equal opportunity for minority students. Recently, Senator Danforth was a member of a small group of Republican senators voting to override the presidential veto of the Civil Rights Act of 1990.[151] In addition, Senator Danforth has gone on record, stating that his "dispute with the remedial order in [*Jenkins*] should not be misconstrued as in any way implicit approval for segregated schools."[152]

The State of Missouri has also acted in a manner consistent with its approach to education in general. As of December 1990, Missouri ranked

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142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.* at 1320.
149. *Jenkins*, 110 S. Ct. at 1663.
150. *Id.*
151. 136 CONG. REC. S16589 (daily ed. Oct. 24, 1990) (roll call vote).
152. Address by Senator John C. Danforth, University of Mo.-Columbia School of Law, Earl F. Nelson Memorial Lecture (Nov. 2, 1990).

42nd among the states in per capita funding for elementary and secondary education in the United States.[153] If the amount attributable to desegregation expenses was subtracted, the state would rank 49th.[154] For the 1991-92 school year, the State Board of Education had requested an additional 144,000,000 dollars in basic state funding.[155] Governor John Ashcroft countered, proposing a modest increase of only 1,200,000 dollars.[156] The state's efforts to challenge strenuously numerous issues in both *Liddell* and *Jenkins* can be classified as representative of its general attitude toward the financing of public education.

Jenkins also involves some unusual fiscal facts. The KCMSD has not passed a tax levy increase since 1969.[157] Ironically, that was also the last year in which caucasian children comprised a majority of the student population.[158] Between 1969 and 1985 six attempts were made to pass a tax levy increase.[159] Every attempt failed.[160] A school board member summarized the situation by stating, "[W]e started at a subsistence level, and then went for 16 years without a raise. The school district found itself in a situation like a poverty family that has to choose between food, shelter and health care."[161] As a result of the desegregation remedy, the KCMSD has afforded its children with a number of facilities and programs that few school districts anywhere are capable of providing.[162] In his dissenting opinion, Justice Kennedy provided a partial list of these improvements, including

> high schools in which every classroom will have air conditioning, an alarm system, and 15 microcomputers; a 2,000-square-foot planetarium; greenhouses and vivariums; a 25-acre farm with an air-conditioned meeting room for 104 people; a Model United Nations wired for language translation; broadcast capable radio and television studios with an editing and animation lab; a temperature controlled art gallery; movie editing and screening

153. St. Louis Post Dispatch, Nov. 27, 1989, at 1A, col. 4.

154. *Id.* at 5A, col. 2.

155. R. BARTMAN, INFORMATION FROM THE MISSOURI DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, VOL. 24, NO. 43 (Aug. 17, 1990).

156. GOV. J. ASHCROFT, EXECUTIVE BUDGET, STATE OF MISSOURI, FISCAL YEAR 1992, at 2-2.

157. Jenkins v. State of Mo., 672 F. Supp. 400, 411 (W.D. Mo. 1987).

158. *Jurisdiction of Federal Courts: Hearings on S.J. Res. 295 and S.34 Before the Subcomm. on the Constitution of the Senate Judiciary Committee*, 101st Cong., 2d Sess. __ (June 19, 1990) (statement of Sue Fulson, Member of the Board of Directors, KCMSD) (forthcoming) [hereinafter *Hearings*].

159. *Id.*

160. *Id.*

161. *Id.*

162. *Jenkins*, 110 S. Ct. at 1676-77 (dissenting opinion).

> rooms; a 3,500-square-foot dust-free diesel mechanics room; 1875-square-foot elementary school animal rooms for use in a Zoo Project; [and] swimming pools.[163]

Thus, the KCMSD "rags to riches" story has been realized, but only at a price; a price that many citizens of Kansas City were not willing to pay.[164] Mark J. Bredemeier, General Counsel of the Landmark Legal Foundation, a public interest foundation, stated that "over the past three years more than 15,000 Kansas City property taxpayers have paid under protest nearly $34 million of the $102 million worth of property tax revenues generated as a result of the trial court's 1987 decision."[165] While some residents of the KCMSD were outraged at the prospect of being forced to pay additional taxes, it is ironic that a significant portion of the district's population is being forced to pay for twenty-five percent of the costs to remedy violations of their constitutional rights.[166] The plaintiffs in *Jenkins* also contend that others who benefitted from the dual-school system have escaped liability.[167]

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163. *Id.*

164. *Hearings, supra* note 159, at __ (statement of Mark J. Bredemeier, General Counselor of the Landmark Legal Foundation).

165. *Id.* at __.

166. Members of minority races, through taxes, also pay a part of the State's portion of the remedy.

167. The plaintiffs tried to join a number of Missouri and Kansas suburban districts. School Dist. of Kansas City v. State of Mo., 460 F.Supp. 421 (W.D. Mo. 1978). *See supra* notes 11 & 13. In 1989, a subset of the *Jenkins*' class filed suit against a number of Kansas City, Missouri school districts. Naylor v. Lee's Summit Reorganized School Dist., 703 F.Supp. 803 (W.D. Mo. 1989) *rev'd sub nom.* Jenkins by Agyei v. State of Mo., 904 F.2d 415 (8th Cir. 1990), *cert. denied sub nom.* Lee's Summit Reorganized School Dist. v. Naylor, 111 S. Ct. 346 (1990). The plaintiffs contended that a district court order requiring the State of Missouri and various Kansas City, Missouri suburban school districts to develop and implement a voluntary interdistrict program had been virtually ignored. *Id.* at 805-07. *See* Jenkins v. State of Missouri, 639 F. Supp. 19 (W.D. Mo. 1985), *aff'd* 807 F.2d 657 (8th Cir. 1986), *cert. denied sub nom.* Kansas City, Mo. School Dist. v. Missouri, 484 U.S. 816 (1987). The district court ruled in favor of the suburban districts. *Naylor*, 703 F. Supp. at 823. The court of appeals reversed and remanded the case, ordering the district court to develop its own plan. Jenkins by Ageyi v. State of Missouri, 904 F.2d 415 (8th Cir. 1990). A final solution to the problem has yet to be reached.

IV. ANALYSIS

Jenkins addresses delicate issues. It treads upon ground felt by many to be hallowed.[168] Volumes have been written about the struggles of our ancestors in forming a new nation free from the oppression of the British crown. At the forefront of this process was the clear consensus that government should have limits and that the citizenry should maintain ultimate control over their lives either by the direct vote or through elected representatives. Few would contest that setting well-defined limits on the power of taxation was a major concern.

Equally important, however, was the notion that government should be constrained from infringing upon an individual's rights and liberties. The fourteenth amendment guarantees to every citizen "equal protection under the law."[169] This promise provided little comfort to persons in minority groups who have continued to receive mistreatment implicitly sanctioned by governmental bodies.

Brown, decided over eighty years after the adoption of the fourteenth amendment, sought to end the dual educational systems that existed throughout the nation.[170] The phrase "separate but equal is inherently unequal" set the tone for a new era of equal educational opportunity for all children regardless of race.[171] *Jenkins* represents an attempt to make both *Brown* and the promises of the fourteenth amendment a reality for the children of Kansas City. When these vitally important interests seem to conflict, neither side is willing to concede any ground.

Both the majority and the dissent agreed that the district court exceeded its authority in *Jenkins*.[172] The majority believed that the court should have empowered the school board to set the levy "at a rate adequate to fund the desegregation remedy."[173] The court's direct involvement would be limited to "enjoin[ing] the operation of state laws that would have prevented KCMSD from exercising this power."[174] The dissent considered this adjustment to be "artificial" and unacceptable.[175] Instead, the dissenting Justices would

168. *Hearings*, *supra* note 159, at __ (statement of Stephen B. Presser, Professor of Law, Northwestern University).

169. U.S. CONST. amend. XIV, § 1.

170. Brown v. Board of Educ., 347 U.S. 483 (1954).

171. *Id.*

172. *Jenkins*, 110 S. Ct. at 1667 (dissenting opinion).

173. *Id.* at 1663 (majority opinion).

174. *Id.*

175. *Id.* at 1670 (dissenting opinion).

have supported a remedy which would have removed the constitutional violation without disturbing Missouri's taxation scheme.[176]

The dissent also argued that taxation by the judiciary poses due process concerns.[177] With judicial taxation, a citizen neither receives notice nor has an opportunity to be heard.[178] It is possible that the majority's notion of an indirect tax would eliminate these concerns. By empowering the district to levy the necessary tax, the burden shifts to the school board. School board members are elected by the citizens and directly responsible to them. If the school board is overzealous in setting the new rate, its members will be held accountable at the polls. Election campaigns would undoubtedly focus on this important issue. Therefore, citizens would receive notice and have an opportunity to be heard and the dissent's concerns about due process would be addressed.

This course of action could create an interesting situation in Kansas City. Citizen support for the district's agenda could fall somewhere between the simple majority required to elect a school board member and the two-thirds majority required to levy a tax increase. By indirectly empowering the district to impose the tax, it is possible that the will of the majority, as opposed to a super majority, would be carried out. While the district court would have to enjoin state law to allow the board to act, this action would still be significantly less intrusive than direct imposition of the tax.

The dissent's most problematic constitutional argument focused on the straightforward language of articles one and three.[179] Justice Kennedy noted that "the description of judicial power nowhere includes the word 'tax' or anything that resembles it."[180] He stated that article one clearly places the power to tax on the Congress and that article three supports this contention by remaining silent when discussing the powers and duties of the judicial branch.[181] While this is true, it appears that there have been other times in this country's history in which the "plain language" approach has been abandoned.

Two specific instances illustrate the abandonment of the "plain language" approach. First, it is plainly stated that Congress has been given the power "[t]o declare War."[182] There has been considerable debate, however, concerning where the President's power as Commander-in-Chief begins and

176. *Id.* at 1670, 1677.
177. *Id.* at 1671-72.
178. *Id.* at 1671.
179. *Id.* at 1670-71.
180. *Id.* at 1670.
181. *Id.* at 1670-71.
182. U.S. CONST. art. 1, § 8.

ends. The War Powers Resolution was adopted to clarify who has what power.[183] The very existence of this legislation is proof that questions arise even in an area that seems relatively straightforward. The Korean Conflict, Vietnam "War," and the Gulf Crisis are three examples of comprehensive military actions that have been conducted without any formal declaration of war.

Another example is found within the fourteenth amendment. Section five of the amendment states that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[184] Few members of the judiciary would agree that, as a result of this provision, the courts are powerless to act. Desegregation of schools is a reality today because the courts, not Congress, took initial action.[185] Often, it is the federal courts that must take the lead on issues that involve the constitutional rights of minorities.

It is possible that a supporter of indirect judicial taxation can sidestep the above discussion and, instead, argue that the action approved by the *Jenkins* majority did not involve the levying of an article one tax.

To accomplish this goal, it is crucial to distinguish between an article one, section eight tax and the action suggested by the majority in *Jenkins*. The action taken in *Jenkins* was a judicial remedy employed to remove the effects of a constitutional violation. Taxes, in contrast, generally are viewed to be political in nature.[186] Justice Kennedy alluded to this distinction in his disapproval of the KCMSD remedy.[187] In his discussion of the various improvements ordered by the district court, Justice Kennedy stated that "these items are part of a legitimate political debate over educational policy and spending priorities, not the Constitution's command of racial equality."[188] Justice Kennedy implicitly may have isolated the key factor that served as the basis for the majority's conclusion that an indirect tax may be imposed. If a component of a proposed remedy is necessary to remove the effects of segregation and provide equal opportunity, then a court may take whatever action is necessary to insure that the order is carried out. Once the components of a school desegregation remedy exceeds this goal, however, it becomes political in nature and is beyond the purview of the judiciary.

This Note takes no position on whether the doctrine of indirect judicial taxation should be applied to the facts of *Jenkins*. Both the majority and the dissent agreed that the scope of the remedy was beyond the "limited grant of

183. 50 U.S.C. §§ 1541-48 (1988).
184. U.S. CONST. amend. XIV, § 5.
185. *See* Brown v. Board of Educ., 347 U.S. 483 (1954).
186. *Jenkins*, 110 S. Ct. at 1672 (dissenting opinion).
187. *Id.* at 1676-77.
188. *Id.* at 1677.

certiorari."[189] Justice Kennedy, however, seemed particularly disturbed at the extravagance of the district court's plan and made numerous references to its provisions.[190] He noted that "the taxation power is sought here on behalf of a remedial order unlike any before seen."[191] Concern about the scope of a desegregation plan in a given case, however, should have little effect on the concept of indirect judicial taxation in general. One scholar agreed with Justice Kennedy's conclusion, stating that "[t]he district court's $460 million [dollar] gold-plated school desegregation remedy in *Jenkins* probably violated the doctrine of remedial austerity, [though] that error was not reviewed by the High Court."[192] It is vital for the Court to recognize that the principle of indirect judicial taxation, and its suggested misapplication in *Jenkins*, should not be confused.

The answer to the dilemma faced by the Court in *Jenkins* is affected by the structure of the inquiry. If one asks the question, "Should a judge have the right to levy a tax?", the answer would be a resounding NO! If one asks, however, "Given the need to remedy an extremely damaging and longstanding constitutional violation, can a court, when all other means of correcting the violation have been exhausted, empower a local taxing authority to levy a tax at a rate sufficient to correct the violation and enjoin state law when it requires more than the majority of the people to accomplish the same act?", the answer is less certain. This latter question is extremely narrow and there is little chance that the grant of power can be abused.

V. CONCLUSION

David A. Strauss, Professor of Law at the University of Chicago, appeared before the Senate Judiciary Committee's Subcommittee on the Constitution to address the subcommittee on the *Jenkins* case.[193] In his testimony, he viewed the proposed constitutional amendment as "a serious overreaction."[194] He argued that if this amendment is adopted, it "will disable the courts in precisely those cases where the reasons for the broad federal powers are the greatest—where a violation of the Constitution has been shown, and there is no way to remedy that violation other than to order a tax increase."[195] What happens when a state, in an attempt to hinder desegrega-

189. *Id.* at 1664 (majority opinion), 1677 (dissenting opinion).

190. *See* text accompanying *supra* notes 164, 189.

191. *Jenkins*, 110 S. Ct. at 1676 (dissenting opinion).

192. *Hearings*, *supra* note 159, at __ (statement of Bruce Fein).

193. *Id.* at __ (statement of David A. Strauss, Professor of Law, University of Chicago).

194. *Id.* at __.

195. *Id.* at __.

tion efforts, adopts a seventy-five or ninety percent voter approval rate to increase a tax levy? Strauss contends that if the proposed constitutional amendment is adopted, the only absolute protection is that of a "state engaged in a flagrant, proven violation of its citizens' constitutional rights."[196] This end would defeat the goals of equal protection and undo the commendable progress our nation has made in the desegregation arena.

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196. *Id.* at __.