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**Senator John C. Danforth
Earl. F. Nelson Memorial Lecture
University of Missouri-Columbia
November 2, 1990**

In a five-to-four decision on April 18, 1990, the United States Supreme Court extended the power of the third branch of government, its own branch, beyond any defensible bounds. In *Missouri v. Jenkins*,¹ the Supreme Court held that a federal court had the power to order an increase in state and local taxes.² This unprecedented decision violates the fundamental tenet of separation of powers: those who serve for life, answerable to no one, would not have control over the power of the purse.

In response to this decision, I joined with Senators Bond, Kassebaum and Dole in introducing a constitutional amendment to re-establish a principle that I thought was well-settled: Judges do not have the power to tax. This constitutional amendment will serve not only to reverse an unfortunate decision, but also to reassert the legislature's constitutional role in maintaining a strong tripartite system of government, a system in which each of the branches is constrained by the others.

James Madison argued that the genius of our constitutional government is in its separation of powers. Each of the branches has an interest in monitoring and policing the others.³ This self-policing maintains a healthy and creative tension among the co-equal branches. The enforcement of separation of powers is not in the document. It is in the aggressive response of the branches whose rights and prerogatives are being taken. If a branch fails to react to an infringement on its responsibilities, that branch is not only losing power, it is also failing to perform its constitutional duties.

This proposed amendment is a long-overdue response to a judiciary that, in the pursuit of seemingly good ends, fails to recognize the constitutional limits on its power. I fear the slow erosion of the boundaries separating each of the branches, and I believe that for this Constitution to continue to work, the branches must be aggressive in protecting their own prerogatives.⁴

In 1977, a group of Kansas City students filed a complaint against the State of Missouri for operating a segregated school system. The district judge, Judge Russell G. Clark, found that the school district and the state had

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

2. *Id.* at 1666.

3. THE FEDERALIST NO. 48, at 343 (J. Madison) (B. Wright ed. 1961).

4. *Id.*

violated the Constitution.⁵ From the start, I want to make one thing clear. My strong disagreement with the holding in this case does not mean that I am defending the operation of a dual school system. I agree with the Supreme Court's directive that racial discrimination in the operation of schools should "be eliminated root and branch."⁶ All students deserve equal opportunity in the classroom, and my dispute with the remedial order in this Supreme Court case should not be misconstrued as in any way implicit approval for segregated schools.

In our system of government, however, the ends do not justify the means.⁷ Favorable results do not justify abuses of process. Simply put, one violation of the Constitution, no matter how wrong, does not justify a second violation as its remedy. In this case, the district court not only ordered "the most expensive capital improvements and elaborate magnet school program in the history of the United States,"⁸ it levied a tax to pay for it.

The district court in trying to desegregate the schools decided to create a magnet system on the theory that excellent schools in Kansas City would draw students from the suburbs voluntarily. Integration would not be forced, but pursued.⁹ In order to make the school system attractive to those in the surrounding area, the judge decided that the school district needed a very elaborate system of upgrading, including, among other things, the installation of a planetarium, the creation of a model U.N. General Assembly wired for simultaneous translation, a twenty-five acre farm, and a twenty-five acre wild land area.

The price tag on this magnet school system turned out to be very high. The order on appeal to the Supreme Court "included some \$260 million in capital improvements and a magnet school system costing over \$200 million."¹⁰ Judge Lay of the Eighth Circuit found that "the remedies in this case were more elaborate than any other previous school desegregation case."¹¹

After determining what was necessary to cure the constitutional violation, the district court then was faced with the dilemma of how to implement its order. The district court decided that seventy-five percent of the amount

5. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492 (W.D. Mo. 1984).

6. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

7. *See Jenkins*, 110 S. Ct. at 1678 (Kennedy, J., concurring in part).

8. Landmark Legal Foundation, Press Release Concerning *Missouri v. Jenkins*, at 1.

9. *See Price and Stern, Magnet Schools As A Strategy For Integration and School Reform*, 5 YALE L. & POL'Y REV. 291 (1987).

10. *Jenkins*, 110 S. Ct. at 1668 (Kennedy, J., concurring in part).

11. *Jenkins v. Missouri*, 855 F.2d 1295, 1318-19 (8th Cir. 1988), *aff'd in part, rev'd in part*, 110 S. Ct. 1668 (1990).

should be collected from the state and twenty-five percent from the Kansas City School District. There was only one problem—the laws and the Constitution of the State of Missouri. The Missouri statutes and the state constitution limit the amount of taxes that can be collected by the Kansas City School District.¹² Unfortunately, in order to pay for the planetarium, the twenty-five acre farm and the like, the district court needed more from the school district than the state law would allow.

Claiming that it had no other alternative, the district court decided that it had to raise the taxes needed for its remedy. The Judge then ordered the Kansas City School District to issue bonds worth over 144 million dollars and to add more than \$1.70 to its property tax.¹³ The Eighth Circuit affirmed the lower court, but found that the district court should, in the future, use more restraint as a matter of federal/state comity.¹⁴ Instead of raising the taxes itself, the court should authorize the school board to raise the money and then enjoin any state law or constitutional provision that prevents the increase.

The Supreme Court reversed in part and affirmed in part. All nine Justices agreed that the district court abused its discretion in imposing the taxes itself.¹⁵ Yet, the Justices split five to four over whether the court could order the school district to levy the needed tax and then enjoin contrary state law.¹⁶ The majority and the dissent had radically different views of the difference between taxing the people directly and ordering someone else to tax them. The majority found that an order, as opposed to a direct tax, made the act constitutional.¹⁷ The dissent's view speaks for itself, and I quote: "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."¹⁸

As is obvious from my remarks thus far, I find myself in agreement with the dissent. Whether a judge orders an increase in taxes himself or orders the proper state official to increase the taxes is immaterial. In either case, a federal court is the source of authority for the taxes, not the people or their properly elected officials.¹⁹ In my view, the issue is simple—judges do not have the power to tax. It is beyond the judicial power established in article

12. MO. CONST. art. X, § 11(b), (c), *cited in Jenkins*, 110 S. Ct. at 1656.

13. *Jenkins v. Missouri*, 672 F. Supp. 400, 412 (W.D. Mo. 1987), *aff'd in part, rev'd in part*, 110 S. Ct. 1651 (1990).

14. *Jenkins v. Missouri*, 855 F.2d 1295, 1314-15 (8th Cir. 1988), *rev'd in part, aff'd in part*, 110 S. Ct. 1651 (1990).

15. *Jenkins*, 110 S. Ct. at 1663.

16. *Id.* at 1666.

17. *Id.*

18. *Id.* at 1669-70.

19. *Id.* at 1670.

three of the Constitution.²⁰ This proposition is supported by the text of the Constitution, the original intent of the Framers and plain common sense.

Article one, section eight of the Constitution gives Congress the "power to lay and collect taxes, duties, imposts, and excises."²¹ Therefore, the Constitution specifically gives the taxing power to Congress. Article three of the Constitution states that "[t]he judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish."²² The word "tax" does not appear in article three, and four Justices of the Supreme Court believe that this conspicuous absence reflects the "Framers' understanding that taxation was not a proper area for judicial involvement."²³

In addition, article one, section seven states that "all bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments as on other bills."²⁴ Why do tax bills start in the House of Representatives? Because the House of Representatives is that body of the Congress which is closest to the people. Until 1913, senators were elected by the state legislatures, and therefore were considered more removed from their constituents. The origin of this provision was a fight between the House of Commons and the King over the King's influence on the appointed and Hereditary House of Lords.²⁵ In Justice Joseph Story's words, "[t]he general reason for this privilege of the House of Commons is, that the supplies are raised upon the body of the people; and therefore it is proper, that they alone should have the right of taxing themselves."²⁶ The text of the Constitution, therefore, is clear and unambiguous. Only Congress has the power to tax, and only one house, the house traditionally closest to the people, has the power to initiate those taxes.

The clarity of the document has not been lost on the Supreme Court. In case after case, the Court has identified the taxing power as a "legislative function."²⁷ Why was the taxing power withheld from the courts? Because

20. *Id.*

21. U.S. CONST. art. I, § 8.

22. *Id.* at art. III, § 1.

23. *Jenkins*, 110 S. Ct. at 1670 (Kennedy, J., concurring in part).

24. U.S. CONST. art. I, § 7.

25. *See Mikell v. School Dist. of Philadelphia*, 359 Pa. 113, 116-17 n.1, 58 A.2d 339, 341 n.1 (1948).

26. J. STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 338 (2d ed. 1833).

27. *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 340 (1974) (Congress is the sole organ for levying taxes). *See also Milliken v. Bradley*, 433 U.S. 267 (1977) (district court upheld because did not attempt to mandate particular method or structure of state or local financing); *Rees v. City of Watertown*,

the founders of this country realized the danger of giving the taxing power to unelected officials.

Every schoolchild is taught in the second or third grade that the fundamental premise of the American Revolution was the rallying cry, "No taxation without representation." That is the standard of American democracy. If the American people are to be taxed, they are to be taxed only by those who are elected. If the American people do not like the taxes imposed on them, they should be able to throw those who have levied the taxes out of office. In fact, we will observe this exercise of electoral power in less than a week. The proponents and opponents of the gas tax, the luxury tax, and the increased Medicare deductible will make their case to the American people and then receive the public's verdict. The politician will be accountable, and believe me, that was on our minds as we voted for or against the budget package.

The original intent of the authors of the Constitution is not difficult to discover. It emerged out of a history that demanded political accountability. The issue goes all the way back to the early 17th century. In the Petition of Right in 1628, Parliament challenged the power of an unelected individual, namely the King, to raise taxes. In this document, the authors stated, and I quote, "No person can be called upon for taxes except through common consent in Parliament."²⁸ This history informed everything that came after it.

In 1764 and 1765, a British Government desperate to pay off its war debts and raise new revenues passed the Sugar Act and the Stamp Act. The colonists, mirroring the example of their British forbearers, organized themselves and declared the taxes unconstitutional. In May of 1765, the Virginia House of Burgesses resolved that it had, and I quote, "[t]he only and exclusive right and power to lay taxes . . . upon the inhabitants of this colony."²⁹ Other states followed Virginia's example, and the Stamp Act Congress in 1765 clearly stated its views on the power to tax. Resolved:

That it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes be imposed on them but with their own consent, given personally or by their representatives...that the only representatives of the people of these colonies are persons chosen therein

86 U.S. (19 Wall.) 107, 116-17 (1874) ("The power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised . . . by the power of the legislative authority only . . ."); *Heine v. Levee Comm'rs*, 86 U.S. (19 Wall.) 655, 661 (1874) (taxing power belongs to the legislative sovereignty and is not vested in federal court).

28. The Petition of Right.

29. R. KELLEY, 1 *THE SHAPING OF THE AMERICAN PAST* 92 (1982).

by themselves, and that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures.³⁰

These colonists knew the danger of taxation without representation.

Why did the colonists throw tea off the ships in the Boston Harbor? They did so because the British had not repealed the Townshend Duty on tea.³¹ They did so because a Parliament unaccountable to the colonists was taxing the people without their consent.

Yet, we do not need to base our understanding of original intent solely on the revolutionary rhetoric of colonists struggling to free themselves from England. The principal authors of the Constitution stated their understanding quite clearly.

In the Federalist Papers, Alexander Hamilton and James Madison went on record early with their ideas about the taxing power. In a series of remarkable letters to the New York newspapers, Hamilton, Madison, and John Jay attempted to persuade skeptical New Yorkers to ratify this new Constitution. These letters are the best constitutional history that we have. They were written with the express purpose of explaining the Constitution and advocating its adoption. I can think of no better guide.

In Federalist 48, James Madison sought to persuade the public that the new Constitution, with its checks and balances, provided the most effective method for keeping all of the power out of the hands of one branch.³² In arguing that the executive and judiciary had to be vigilant in constraining the legislature, Madison claimed that "the legislative department alone has access to the pockets of the people."³³ That was what we assumed until the decision in *Missouri v. Jenkins*.

Hamilton, in Federalist No. 33, entitled the Constitutionality of National Tax Laws, asks himself rhetorically, "What is the power of laying and collecting taxes, but a legislative power?"³⁴ He then goes on to explore the power of taxation and concludes that only the national legislature has been given power to tax.

In Federalist No. 78, Hamilton argued that under the new Constitution, the judicial branch would be the least dangerous to the rights of the people.³⁵ Why? Because judges would have "no influence over either the sword or the purse."³⁶

30. *Id.*

31. *Id.* at 93.

32. THE FEDERALIST NO. 48, at 343 (J. Madison) (B. Wright ed. 1961).

33. *Id.* at 345.

34. THE FEDERALIST NO. 33, at 245 (A. Hamilton) (B. Wright ed. 1961).

35. THE FEDERALIST NO. 78, at 490 (A. Hamilton) (B. Wright ed. 1961).

36. *Id.*

It is absolutely clear that the intent of those drafting the Constitution was to give sole authority over taxation to the Congress. Only those closest to the people would have the right to reach into their pockets. That is common sense. We fought a revolution over this principle, and it was certainly enshrined in our Founding Charter. If the separation of powers means anything, it means that there are certain governmental powers reserved to each branch. The judicial branch has the sole power to decide cases and controversies arising under the Constitution. The executive branch acts as the sole enforcer of the law, and the legislative branch has the power to tax the people.

Yet, as is obvious, these persuasive arguments were only successful in convincing four Supreme Court Justices that courts do not have the power to order an increase in taxes. With the addition of Justice Souter to the Court, I hope that I could now convince five Justices. But, I am not content to rely on four or five Justices who are willing to exercise judicial restraint. In my view, the judiciary has assumed a power that under our system of government it simply cannot exercise, and it is imperative that Congress react. It is imperative that the legislature protect its constitutional prerogative. The judiciary has carved a hole in our democratic decision making, and we need to pass a constitutional amendment to fill that hole.

Those who support the decision use three overlapping arguments in its defense; pragmatism, precedents and the parade of horrors. The pragmatists argue that this case is an anomaly. It is unlikely to happen again, and therefore there is no use in getting all worked up over it.³⁷ I cannot accept this position. Erosion always begins slowly. Courts move into new areas one case at a time. I cannot believe that courts, when they understand the enormous power that taxation gives them, will be able to restrain themselves from choosing to improve and fund better mental hospitals, prisons, or school systems.

After all, these remedies are intended for good ends. They will improve the lives of children, the disabled and the imprisoned. They will cut through the lack of resources available for needed policy changes. They will end-run vacillating politicians who refuse to spend public money on those who do not vote.

I have visited the Kansas City school system, and I was very impressed with what I saw. There were spotless conditions, expensive computer systems

37. *Jurisdiction of Federal Courts: Hearing on S.J. Res. 295 and S. 34 Before the Subcomm. on the Constitution of the Committee on the Judiciary*, 101st Cong., 2d Sess. __ (June 19, 1990) (forthcoming) (written statement of Julius Chambers) ("In short, it is clear, from the long history of school and other litigation to ensure the enforcement of rights under the Federal Constitution and Civil Rights Laws, that it will be the rare case in which a district court will need to exercise even the limited power authorized by the Supreme Court in *Jenkins*.")

and beautiful buildings. There were eager students, interested parents and an invigorated atmosphere. But, in spite of these good results, judicial taxation slowly and silently diminishes the vitality of our democracy. It takes decision-making out of the hands of the many and gives it to the hands of a few.

The decision in *Missouri v. Jenkins* is alarming but not surprising.³⁸ It is the next step in a march for power "that has been underway for many years."³⁹ For years, the federal courts have been "assuming an increasing influence over governmental spending."⁴⁰ In a Fifth Circuit case in 1974, the court of appeals upheld a decree requiring a state to expend sixty percent of the state's budget to pay for the court's remedy.⁴¹ As early as 1978, federal courts had ordered at least eleven states to overhaul their facilities for the mentally ill or mentally retarded.⁴² In one case, a federal district court placed a public high school directly under judicial control.⁴³ In another, the court ordered the reorganization of an entire city government.⁴⁴

I do not mention this trend toward ever-expansive remedies to challenge a court's power to order them. Broad equitable remedies, even involving the expenditure of huge sums of public money, are certainly permissible under the Constitution.⁴⁵ When the equitable remedy is necessary to cure the results of past discrimination, courts have even greater discretion to exercise broad equitable powers.⁴⁶ Yet, this discretion is not unlimited. I understand why courts want the power to tax. Federal courts are faced with difficult modern problems, like desegregating large urban school systems. These controversies are not easy to resolve, and it is understandable that courts will strain against the limits of their judicial powers in trying to remedy them. I do not fault the courts for their zeal, but I want to show them their limits.

Now, when presented with facilities which in their view are not up to snuff, courts will realize that they have the power to improve these facilities beyond anyone's expectations. No longer will courts have to feel constrained

38. *Hearing on S.J. Res. 295 and S.34 Before the Subcomm. on the Constitution of the Committee on the Judiciary*, 101st Cong, 2d Sess. 55 (June 19, 1990) (testimony of Robert Nagel).

39. *Id.*

40. Frug, *The Judicial Power of the Purse*, 125 U. PA. L. REV. 715, 715 (1978).

41. *Id.* at 716 (citing *Wyatt v. Aderholt*, 503 F.2d 1305, 1317 (5th Cir. 1974)).

42. *Id.* at 718-19 (citations omitted).

43. *See, e.g., Wright v. County School Bd.*, 252 F. Supp. 378 (E.D. Va. 1966).

44. Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 662 (1978).

45. *See Milliken v. Bradley*, 433 U.S. 267, 279 (1976).

46. *Spallone v. United States*, 110 S. Ct. 625, 632 (1990) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)).

by the needs and interests of local authorities. No longer will courts have to structure their remedies to accommodate democratic institutions. Courts can now short-cut the system. They can assume legislative power. For this reason, I disagree with the pragmatists. This will not be a single or rare occurrence. The slow erosion of traditional democratic processes will continue unless the Congress performs its constitutional duty and "resists the encroachments" of the third branch.⁴⁷

As you may remember, I identified three arguments used in support of the majority opinion in *Missouri v. Jenkins*. Having discarded the pragmatism defense, I now turn to what I have called the "precedents" argument. There are those who argue that the Supreme Court's holding is not an undue extension of prior law. They claim, in fact, that the decision is controlled by prior precedents. In particular, they cite two lines of cases relied upon by the majority. The first is a line of desegregation cases in which the Supreme Court gave district courts wide discretion in fashioning equitable remedies. The second is a line of bond issue cases in which local governments issued bonds and then by statute impeded their own authority to repay the debts. I do not believe that either line of cases justifies the extension of judicial power allowed in this case.

In buttressing its position that courts can order an increase in taxes, the majority relies most heavily on *Griffin v. Prince Edward County*,⁴⁸ a 1964 desegregation case. In *Griffin*, a Virginia county blatantly violated the rights of its black citizens. The county attempted to avoid desegregation by closing its public schools and giving vouchers for white students to attend all-white private schools. The Supreme Court affirmed an injunction against the vouchers. Then, in understandable frustration, the Court threatened that it might have to force the county to levy taxes in order to re-open its schools.⁴⁹

I agree with Justice Kennedy's concurrence that *Griffin* should not be read to support judicial taxation. First of all, the Court did not reach the issue of taxation. In dicta, it stated that the court might be able to order the county supervisors to use the power that is theirs to levy a tax.⁵⁰ That is a far cry from ordering a local body to exercise a taxing power that it does not have. For these reasons, the Supreme Court erred in relying on this statement as authority for the holding in *Missouri v. Jenkins*.

But, even if the Supreme Court correctly relied on this statement in *Griffin*, this dicta is wrong. It is wrong for the same reason that the holding in *Missouri v. Jenkins* is wrong. A federal court does not have the power to order a tax levy.

47. THE FEDERALIST NO. 51, at 380 (J. Madison) (J. Cooke ed. 1961).

48. 377 U.S. 218 (1964).

49. *Id.* at 233.

50. *Id.*

I can understand the Supreme Court's frustration with Prince Edward County. The Justices were dealing with the worst kind of racism, the worst kind of segregation, and the worst kind of disrespect for the law. The facts of that case made their blood boil, and the Justices wanted to impress upon the officials of this county the serious consequences of flouting the law. But, even under these circumstances, a court cannot order that which it does not have the power to do.

With respect to the bond issue cases, I believe that they are easily distinguishable. In *Von Hoffman v. City of Quincy*,⁵¹ the Supreme Court held that a municipality violated the contracts clause when it failed to raise the resources necessary to pay off a debt obligation.⁵² In this case, the city had limited a tax levy after issuing bonds. The tax limitation prevented the city from collecting the amount necessary to repay the debt, and the federal court simply invalidated the tax limitation as a violation of the contracts clause. This nullification left the previous tax in place which was sufficient to pay off the bonds. The invalidation of an unconstitutional tax limitation is well within the powers granted to the judiciary under article three.

If the "precedents" argument is met with resistance, proponents of *Missouri v. Jenkins* fall back on what I call the "parade of horrors" argument. The proponents of this position are masters of the hypothetical. They ask the "what if" questions. What should a court do if the only way to remedy a constitutional violation is through a judicially-ordered tax increase? They cite cases like *Von Hoffman* in which the Court states that "a right without a remedy is as if it were not."⁵³

Senator Arlen Specter was concerned with this issue at the Judiciary Committee hearing on my amendment. He was concerned that there might come a time when a judge would have to choose between remedying a constitutional right through judicial taxation or leaving it unremedied. My response is that these people sorely underestimate the ingenuity and the power of federal courts.

In *Missouri v. Jenkins*, for example, the district court did not have to order an increase in local taxes. It had numerous other alternatives at its disposal. The first was to order a less expensive remedy. Although I have no doubt that Kansas City will have great schools, I am not sure that the city needed to spend 460 million dollars in order to cure its constitutional violation. The second would have been to follow the advice of the concurring judge at the court of appeals. Judge Lay suggested that the court should not have insisted that twenty-five percent of the costs come from the city. If one tortfeasor cannot pay, the court should look to the other, in this case, the state.

51. 71 U.S. (4 Wall.) 535 (1866).

52. *Id.* at 555.

53. *Id.* at 554.

The court then could have ordered the state to implement the remedy, and if the state did not, the court could have used its ultimate power, civil contempt.

Recently, in *Spallone v. United States*, the Supreme Court upheld the discretion of a federal court to hold a city in contempt for failure to comply with a court's desegregation order.⁵⁴ Civil contempt is a powerful tool, and should be used with caution.⁵⁵ But, as a last resort, courts can use the contempt power to insure compliance with their orders. Therefore, in the case at hand, the court had other alternatives at its disposal before the right to desegregated schools would have been left unremedied.

I believe that the Constitution gives the federal courts sufficient power to enforce their orders. Since 1954, when the Supreme Court decided *Brown v. Board of Education*, the Supreme Court has been entering orders relating to school desegregation and it has been doing that without purporting to increase the taxes of the American people. Courts simply do not need the taxing power in order to implement their remedies. For that reason, I believe that hypotheticals about rights going unremedied are overly speculative. Certainly, *Missouri v. Jenkins* was not a case where the district judge had his back against the wall. He had numerous other options and should have exercised them. But, if I am forced to answer the hypothetical parade of horrors, I can only say that a court cannot exercise a power that is not granted to it by the Constitution. Courts simply do not have the power to tax.

'For these reasons, Senator Bond and I have introduced a constitutional amendment to restate what we believe the Constitution said in the first place. Federal judges do not have the power to raise the taxes of the people of this country directly or indirectly. We recognize that this amendment will not pass the Congress and the state legislatures immediately. It will take time and it will take debate and it will take discussion and it will take input and it will take the reflection of the American people themselves as to their understanding of the power of the legislative branch and their understanding of the power of the courts. Yet, we believe that it is our constitutional responsibility to raise these issues.

The most basic constitutional issues always are those that relate to the locus of governmental power; where does the power reside, at what level of government, at what branch of government; not what decisions are made, but who is making the decisions. That is the constitutional argument; not whether we approve or disapprove of the Zoo or the Planetarium or the United Nations wired for sound; not the specific decision, but who is making the decisions, who is making the decisions to reach into our pockets.

54. *Spallone v. United States*, 110 S. Ct. 625, 632 (1990).

55. *Id.*

Who is making the decisions to tax our people; legislators or judges, elected officials or unelected officials, those who serve for a term of years or those who serve until they are carried out feet first from federal courthouses?

This is a matter of grave importance. It is about the fabric of our constitutional society. We cannot allow this fabric to be unraveled one thread at a time. After all, this case is only a thread. According to its supporters, it is only a small thread. According to its supporters, it will probably not happen again. It is the exception, not the rule. But, I am here to say that the fabric of our Constitution is more important than the result in any particular case. The process is more important than the ends. When courts begin to take short-cuts on the process, to pull on the threads of our constitutional fabric, the people lose part of their democracy. We lose part of our sovereignty. We fail to take responsibility. This, we cannot allow to happen.