

Judges Impose Taxes

A PRIME EXAMPLE of judicial supremacist mischief was the federal district court's imposition of increased property taxes in Kansas City to pay for the world's most extravagant public school facilities. In *Jenkins v. Missouri* (1985), the district court simply ignored the principle that the taxing power is a purely legislative function, definitely not one for the courts. James Madison wrote in *Federalist 48*: "The legislative branch alone has access to the pockets of the people."

This highly controversial case bounced around in federal courts for years. When it finally reached the Supreme Court in *Missouri v. Jenkins* (1990), Justice Anthony Kennedy's opinion, joined by Justices Rehnquist, O'Connor and Scalia, concurred in part with the majority decision to uphold the court-ordered tax, but included a scathing indictment of judicial supremacists:

The Court . . . goes further, much further, to embrace by broad dictum an expansion of power in the federal

judiciary beyond all precedent. Today's casual embrace of taxation imposed by the unelected, life-tenured Federal Judiciary disregards fundamental precepts for the democratic control of public institutions. . . .

The judicial taxation approved by the Eighth Circuit is also without parallel. . . . The description of the judicial power nowhere includes the word "tax," or anything that resembles it. This reflects the Framers' understanding that taxation is not a proper area for judicial involvement. . . . A judicial taxation order is but an attempt to exercise a power that always has been thought legislative in nature. . . .

The judiciary is not free to exercise all federal power; it may exercise only the judicial power. . . . The power to impose burdens and raise money is the highest attribute of sovereignty, and is exercised, first, to raise money for public purposes only; and, second, by the power of legislative authority only. It is a power that has not been extended to the judiciary. . . . The power of taxation is one that the federal judiciary does not possess.

We often hear it said that Supreme Court decisions are the law of the land, not merely the law of the case. That heresy has crept into conventional wisdom over the last fifty years. This concurring opinion by four justices, warning that *Missouri v. Jenkins* "cannot be seen . . . as precedent for the future," shows that, every now and then, the justices recognize that their decisions should apply only to the parties involved in the case before them.

The four justices' opinion explained the sequence of how such overreaching decisions evolve. "Judicial taxation" was first endorsed in dicta in Eighth Circuit cases in which taxation orders were in fact disapproved. Then the activist judges on the Eighth Circuit built on the dicta and, for the first time in history, ordered judicial "taxation to fund a remedial decree."

Again and again in this concurring opinion, Justices Kennedy, Rehnquist, O'Connor, and Scalia reminded the Supreme Court majority that they have no constitutional authority to tax the American people. Continuing to point out the overreaching of *Missouri v. Jenkins*, this opinion states that imposing a tax wasn't even necessary to achieve the goal of providing equal protection to minority schoolchildren.

The four justices' opinion concludes by saying that *Missouri v. Jenkins* "is a stark illustration of the ever-present question whether ends justify means." The judicial supremacists opted to pursue the end of integrating Kansas City schools not only by violating the Constitution but by ordering unprecedented taxes to pay for an incredibly costly capital improvement plan that included

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 rooms; a 3,500-square-foot dust-free diesel mechanics room; 1,875-square-foot elementary school animals rooms for use in a Zoo Project; swimming pools; and numerous other facilities.

All that tax-funded extravagance turned out to be a colossal waste. Not only did the end not justify the means, but the desired end wasn't even achieved. Two decades and billions of dollars later, the Kansas City schools are just as segregated as ever and test scores are just as low.

BULLYING NEVADA'S LEGISLATURE

Some *state* court judges have also swallowed the heresy that judges can impose taxes.

Nevada voters approved a constitutional amendment by a wide margin in 1996 to require a two-thirds vote in the state legislature for new or increased taxes. In 2003, the Nevada legislature was deadlocked in a budget dispute and had to either raise taxes or cut spending in order to balance the budget. The governor wanted a tax increase, so he persuaded the Nevada supreme court to issue an advisory ruling that the legislature could pass a tax increase with a simple majority (ignoring the two-thirds constitutional requirement).

The legislature then did precisely that, allowing itself to be bullied by the judicial supremacists on the state court. The Speaker of the Assembly declared the tax increase

passed, based on the court's opinion in *Guinn v. Legislature of the State* (2003).

The Nevada court rationalized its opinion by saying that the constitutional mandate to fund education was more important than the procedural limit on tax increases. But Nevada did not have to raise taxes in order to fund education. It could have just funded education at previous levels.

Taxation and funding decisions should always belong to the people and their elected representatives, not to judges. In order to avert a constitutional crisis, the legislature later repassed the tax increase with a two-thirds vote.

The *Las Vegas Review* later reported that the Nevada supreme court decision was an advance deal between the governor and the court, that the governor spoke with the supreme court judges at the beginning of the budget battle and received assurances from them that the court would approve his proposed tax hike.

SUPREMACISTS HIDE BEHIND CHILDREN

If any issues should be solely legislative prerogatives, they are raising taxes and spending the taxpayers' money. But in recent years Congress and state legislatures have been, for the most part, wisely unwilling to raise taxes. So what are tax-and-spend liberals to do?

Run to supremacist judges, of course. State judges have responded enthusiastically to lawsuits that invite them to showcase their powers, and schools offer an inviting target.

Courts not only are issuing orders to pour more taxpayers' money into public schools but are micromanaging schools, telling them how much money to spend and on what, right down to making decisions about computers and textbooks.

The famous Kansas City case (*Missouri v. Jenkins*), in which the Supreme Court swallowed hard but nevertheless approved a court-ordered tax increase, gave a big boost to school finance litigation, and it has since become a billion-dollar business. Schools are desirable plaintiffs: the lawsuits are "for the children."

In the 1970s, activist judges were ordering schools to spend more money to achieve racial balance. But forced busing turned out to be expensive, disruptive, and unproductive.

When judges and lawyers began to see that desegregation was an academic failure and minorities began filing suits to return to neighborhood schools, the rationale for school litigation changed to "equity." Dozens of suits were filed in the 1980s under equal protection clauses in state constitutions to get activist judges to order state tax levies to equalize spending on schools in rich and poor districts.

"Equity" has been a spectacular failure, too. It did little or nothing to improve test scores. Spending disparities between districts were narrowed in some cases, but Education Trust, a Washington-based research group, found that in half the states the funding gap between rich and poor districts actually widened.

In the 1990s, the lawyers changed their takeover rationale again. They abandoned the argument of "equity" and

sought out subjective words in state constitutions such as “thorough and efficient,” “sound basic,” “adequate,” “quality,” or “suitable.” “Adequate” became one of the most popular words. These words gave great power to the courts—only a judge could be wise enough to determine exactly how many millions of tax dollars are “adequate.”

The New York Court of Appeals, after ten years of litigation, ruled that the taxpayers must spend 43 percent more money to provide schoolchildren a “sound, basic education.” A court-appointed panel ordered New York City to spend an additional \$5.6 billion, plus \$9.2 billion on new classrooms, laboratories, libraries, and other facilities, making tax increases inevitable.

In Montana, the state supreme court decided in 2004 that the school financing system was fatally flawed and ordered the legislature to appropriate more money to give children “a basic system of free, quality public elementary and secondary schools.”

Kentucky is still in court sixteen years after activist judges first intervened to tell the state how to run its schools. A 1981 lawsuit filed against New Jersey was decided four years later, but has since returned to court nine times.

Kansas became ground zero in the battle to transfer tax-and-spend powers from state legislatures to state courts. The Kansas supreme court in *Montoy v. Kansas* (2005) ordered the legislature to put nearly a billion dollars more money into the public schools, even though Kansas already spends nearly \$10,000 per pupil, pays teachers more than most Kansas workers, and graduates students who score well in national tests.

The judges seized on the word “suitable” in the state constitution and ruled that its definition means a specific amount of money knowable only to judges. The court gave the legislature a deadline and threatened to close all the state’s schools unless the legislature obeyed the court order by a date certain.

Some valiant Kansas legislators tried to retain the legislature’s authority over spending. Senator Kay O’Connor said, “Folks, we have a constitutional crisis. If we bow down to their orders, where does it end?” But the constitutionalists were outvoted by those who chose to accept the court’s arrogant ruling as the law of the land. There may have been another motive. The capitol corridors were filled with gambling lobbyists who whispered that the legislature could avoid a tax increase if it would instead vote to bring casinos into the state.

Lawsuits are pending in twenty-four states asking judges to order the state legislature to pour lots more money into the public schools which, obviously, will require tax increases. Activist judges have accepted these adequacy arguments in most major school finance decisions since 1989.

The tremendous amounts of money and the financial burden that these state court decisions impose on the taxpayers are mind-boggling. No end is in sight because of the ingenious ways that liberals try to get courts to order the spending of taxpayers’ money. University of Virginia law professor James E. Ryan, for example, argues that “a very strong legal case, based on education clauses within

every state constitution, can be made on behalf of a state constitutional right to preschool.”

This is all taking place under the radar of public notice because most of the news coverage is local and the local politicians are afraid to challenge the public school establishment and the unions.

The case of *Flores v. Arizona*, which has been pending in federal court in Tucson since 1992, exemplifies many of the worst supremacist notions described in this book. A Carter-appointed judge ruled in 2000 that federal law requires Arizona “to take appropriate action to overcome language barriers that impede equal participation” by the estimated 160,000 children of illegal aliens (euphemistically called “English Language Learners”) in Arizona’s public schools.

When that judge retired, the *Flores* case was handed off to a Clinton-appointed judge, who decided in 2005 that “appropriate action” means spending much more money and imposed fines of \$500,000 a day, escalating in stages to \$2 million a day, for every day that the legislature failed to appropriate the money the judge demanded. With millions of dollars in fines accumulating since January 25, 2006, the judge has effectively taken the power of taxing and spending away from the state legislature.

12 *Judges Impose Taxes*

- The Nevada supreme court decision was severely criticized in “Recent Cases,” 117 *Harvard Law Review* 972 (Jan. 2004), which concluded that the decision “poses a serious threat to the separation of powers.”
- *Las Vegas Review* columnist Vin Suprynowicz (July 20, 2003) wrote that the crucial Nevada supreme court decision was decided long before the lawsuit was actually filed. Citing a retired Nevada judge, Suprynowicz wrote that Governor Guinn spoke with Justices Bob Rose and Miriam Shearing at the beginning of the budget battle and received assurances from them that the Nevada supreme court would impose his proposed tax hikes. They even predicted that it would be a 6 to 1 vote, which turned out to be the exact outcome of the Nevada supreme court decision. The U.S. Supreme Court declined to hear an appeal of the case.
- An especially egregious example of judicial usurpation of legislative power occurred in Yonkers, New York, in 1988. When the Yonkers city council voted 4 to 3 not to ratify a court ordered plan to build rent-subsidized multi-family housing in a predominately white neighborhood, federal district judge Leonard Sand slapped huge fines on the individual members of the city council who had voted against the judge’s plan. After the individual fines had been upheld by the Second Circuit U.S. Court of Appeals, the city adopted the judge’s plan in the face of daily fines of \$1 million. The Supreme Court rejected the personal fines on narrow technical grounds in a 5 to 4 decision. *Spallone v. United States* (1990).

- James E. Ryan's comment: University of Virginia Legal Working Paper Series, June 22, 2005.

LESSON TWELVE

JUDGES IMPOSE TAXES

QUESTIONS FOR DISCUSSION:

- ★ Why should imposition of taxes be strictly a legislative function?
- ★ What is the famous case that started the trend of judges imposing taxes, and what was the final result?
- ★ Discuss what a court did to the city council in Yonkers, New York.
- ★ Discuss how state court judges are assuming the power to order state legislatures to appropriate more money for public schools, which necessarily requires tax increases.
- ★ Why do judges like to impose taxes?
- ★ How do judges convince themselves that only they have the wisdom to decide exactly how much money must be appropriated to be “adequate” or “equitable” or “thorough and efficient”?
- ★ Why do state legislators acquiesce in this invasion of legislative power and judicial defiance of the separation of powers?