

Approved: 3/31/00
Date

MINUTES OF THE HOUSE TAXATION COMMITTEE.

The meeting was called to order by Chairperson Wagle at 9:00 a.m. on March 23, 2000, in Room 519-S of the Capitol.

All members were present except: Representative Jenkins - excused
Representative Howell - excused
Representative Johnston - excused
Representative Kirk - excused
Representative Ray - excused
Representative Vickery - excused
Representative Gatewood - excused
Representative Tomlinson - excused
Representative Edmonds - excused

Committee staff present: Chris Courtwright, Legislative Research Department
April Holman, Legislative Research Department
Don Hayward, Revisor of Statutes
Shirley Sicilian, Department of Revenue
Ann Deitcher, Committee Secretary
Edith Beaty, Taxation Secretary

Conferees appearing before the committee: John R. Stoeffler of the Madison Forum

SCR 1635 - memorializing the Congress of the United States to propose submission to the states an amendment to the Constitution of the United States of America restricting the ability of the federal judiciary to mandate any state or subdivision thereof to levy or increase taxes.

The Chair recognized John Stoeffler who appeared as a proponent of **SCR 1635**. (Attachments 1 and 2).

Written testimony in support of **SCR 1635** was provided by Senator Alicia Salisbury. (Attachment 3).

A motion was made by Representative Osborn and seconded by Representative Wilk to pass SCR 1635 favorably out of Committee. The motion carried on a voice vote.

The meeting was adjourned at 10:30 a.m. The next meeting will be on the call of the Chair.

Conference On Judicial Taxation And Coercive Remedies
The Heritage Foundation, Washington, D.C.
December 11, 1996

Judicial Taxation - The States Respond

By John R. Stoeffler

President

The Madison Forum - St. Louis, Missouri

The Madison Forum was founded in 1993 by Missouri State Senator Walt Mueller and me for three reasons. First, to respond to the Supreme Court's claim in *Missouri v. Jenkins* [495 US 33, 110 S.Ct. 1651 (1990)] that the federal judiciary has authority and power to levy or increase taxes. We believe this constitutionally baseless assertion by the Court poses a direct threat to our democratic political system. 1.

The second reason is that the federal judiciary has what is known colloquially as an attitude problem. This "attitude" as reflected in the Court's decision in *Jenkins* was made clear to me in a meeting Missouri State Senator Walt Mueller and I had with Federal District Judge Russell G. Clark. On August 16, 1994 we met for almost two hours with Judge Clark in his office at the Federal Courthouse in Springfield, Missouri. It is Clark who has overseen the *Jenkins* case for over ten years and who levied the tax in *Jenkins*. 2.

The following is from my notes of that meeting: "Clark acknowledged that 'taxation (without representation) was what the Revolution was all about.' Senator Mueller and I stated that we took strong exception to his order which nearly doubled the property taxes in Kansas City, Missouri. 3. We stated our belief that 'the authority and power to tax is vested in the legislative branch alone.' Clark's response was to state that the United States Supreme Court has declared the (judiciary's) power to tax to be 'constitutional.'" I responded by saying that he 'would have us believe that when it is raining outside the

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Court can declare it to be a sunny day.' Clark's response: 'It may be raining outside, but if the Court says the sun is shining then the sun is shining. What you believe makes no difference.'"

The third reason has to do with Congress. In *Federalist 33* Hamilton stated: "What is the power of laying and collecting taxes, but a legislative power? And in *Federalist 81* he pointed out that it was an impeachable offense for the judiciary to usurp a legislative power. But Congress, being fully cognizant of the Court's decision in *Jenkins*, has neglected or refused to address this usurpation and exercise of what has always been by custom, history and tradition a legislative function.

In his defense of *McCulloch v Maryland* Chief Justice John Marshall observed that the exercise of the judicial power to decide all questions "arising under the Constitution and laws" of the United States "cannot be the assertion of a right to change that instrument." 4.

Former Chief Justice of Missouri Robert T. Donnelly narrowed that perspective further when he stated: "If, in fact, the United States Supreme Court is exercising powers without the consent of the governed - the people - then the rights it purports to secure in their name are counterfeit - its benevolence a fraud." 5.

We contend that in *Jenkins* the Court committed what amounts to judicial fraud by declaring that the District Court's authority to levy or increase taxes did "satisfy equitable and constitutional principles governing the District Court's power." 6. That is an incredible assertion when you consider that it took the *Sixteenth Amendment* to the United States Constitution to empower and authorize the legislative branch to tax the people. Yet in *Jenkins* the Supreme Court, in a five to four decision, declared the judicial branch of government now has a constitutional basis to exercise the authority and power to levy or increase taxes.

Because the Court has taken upon itself the authority and power to execute a clearly legislative function, and because Congress by its silence has given its implied consent to

the Court's assertion, we of the Madison Forum have contacted the political leadership in every state. We are requesting that each State petition Congress seeking an amendment to the *United States Constitution* which would put an end to what amounts to a political power play by the federal judiciary. To date the following states have sent to Congress such a request: Missouri, Tennessee, New York, Colorado, Louisiana, Alaska, Massachusetts, Arizona, South Dakota, Nevada and Michigan. In addition, the American Legislative Exchange Council, ALEC, at its annual meeting in August adopted a "Model Resolution" which will be forwarded to the states next year.

Some of you may be thinking that by proposing a constitutional amendment we are putting the cart before the horse. Shouldn't other avenues be thoroughly pursued before one seeks to amend the *Constitution*? That is a fair and reasonable question. Consider the following and then, no pun intended, you be the judge whether the route we seek to end judicial taxation is, under the circumstances, rational and reasonable.

Following the Court's 1990 ruling in *Jenkins* Congress held hearings to receive testimony in response to a proposal by United States Senator Jack Danforth for an amendment to the *Constitution* which would end the federal judiciary's self-proclaimed authority to exercise the power to levy or increase taxes. Some members of Congress objected to the amendment route. They indicated a preference for exercising Congress' *Article III* power to end the taxing authority of the federal judiciary by statute. There was a lot of talk but no legislation materialized. 7.

In May of 1992, seeking to determine the interest level in Congress in ending the judiciary's self-proclaimed power to tax, I traveled to Washington and made a number of personal calls upon members of Congress including Congressman Henry Hyde. We discussed the Supreme Court's ruling in *Jenkins*. Congressman Hyde, a member of the House Judiciary Committee, was quite candid: "While I am sympathetic to your concern," he said, "on this issue, quite frankly, Congress just doesn't give a damn." He was right. It turns out that when the budgets of the states are jeopardized by unfunded judicial

mandates Congress couldn't care less. But when Congress' fiscal turf is faced with such a threat, well that's another story.

In 1994 a balanced budget amendment was still in the talking stage. At that time Senator Jack Danforth cautioned his colleagues: "A balanced budget amendment would be a disaster," he said, "if federal courts were able to increase taxes or cut spending." 8.

The following year, during balanced budget amendment debate, members of Congress expressed concern that should a balanced budget amendment pass a potential existed whereby the judicial branch might inject itself into the federal budget process. United States Senator Paul Simon stated: "I don't think that will happen in the immediate future. I'm not sure but that 30 or 40 years from now the court might not be in a position to order Congress to comply."

Others, including United States Senator Robert Byrd, 9. Former U.S. Senator Tom Eagleton 10. and syndicated columnist James J. Kilpatrick expressed similar concerns. 11.

And Senator Sam Nunn admonished those who were skeptical of the judiciary injecting itself into what is a federal legislative function by saying "if you don't think this is a danger look at the Missouri case." 12.

Earlier this year Congressman Jim Talent (R-MO) introduced *House Joint Resolution 167*. *H.J.R. 167* proposed "an amendment to the *Constitution of the United States* to limit the judicial power of the United States." He could find only a handful of co-sponsors.

Senators Thurmond and Dole sponsored *Senate Bill 1708* in another response to judicial taxing orders. *S. 1708* "would preclude the lower Federal courts from issuing any order or decree requiring imposition of any new tax or to increase any existing tax or tax rate." 13. But this Bill only addresses new taxes while letting stand current judicially imposed tax orders. We believe judicial levying of any taxes past, current or future is unconstitutional. Leaving judicial tax orders intact gives credibility to the Court's assertion that it acted constitutionally. And that ladies and gentlemen amounts to nothing less than compromising the *Constitution* which is totally unacceptable.

In another response to judicial taxation members of Congress introduced legislation which would permit or delegate the authority and power to tax to the judicial branch of government.

Both *House Resolution 3100* and *Senate Bill 1817* grant to the federal courts the authority and power to directly tax the citizens of this nation. Both bills extend the power of the federal courts into what has always been the legislative branch of government's historical, traditional and constitutionally mandated turf. *H.R. 3100* and *S.1817* permit the judicial branch to add both force and will to their judgments. But in *Federalist 78* Hamilton stated that the courts were "to have neither FORCE nor WILL, but merely judgment." And he warned that there would be "no liberty, if the power of judging be not separated from the legislative and executive powers." 14.

I mentioned earlier that when it comes to the *United States Constitution* there are members of Congress who have expressed a preference for addressing grievances by statute as opposed to a constitutional amendment. This would be fine if statutes worked. The record shows otherwise.

In 1978, for example, Congress enacted a bill offered by Senator Harry F. Byrd, Jr. (R-Va) which declared: "Beginning with fiscal year 1981, the total budget outlays of the Federal Government shall not exceed its receipts." But Senator Byrd's statute had no effect on the deficit problem. 15.

Seven years later Congress enacted the *Balanced Budget and Emergency Deficit Reduction Act*, known as the *Gramm-Rudman-Hollings Law* after its sponsors. 16. This statute established an elaborate system of automatic budget-cutting procedures and devices to achieve a balanced budget. In spite of fine tuning by the Congress the statute has never met the goals of its authors.

Another example. In 1989 Congress passed *Public Law 101-194*. It sought to limit pay raises by both houses of Congress. But in 1991 Congress passed *Public Law 102-90* in which a pay raise for the Senate was piggybacked onto another piece of legislation. The

Senate voted in favor of the raise for itself and the House rewarded the Senate's action by voting for *PL 102-90*.

Finally, the Supreme Court can declare statutes passed by Congress to be "unconstitutional." In *Bowsher v. Synar* [478 U.S. 714 (1986)] for example the Court ruled that certain provisions of the *Gramm-Rudman-Hollings* statute called for specific budget cuts. The Court ruled that these cuts were executive functions and as such vested an executive function in a legislative branch officer. Vesting such power and authority in a legislative branch officer thus violated the constitutionally mandated principle of separation of powers. 17. Despite having taken this position in *Bowsher*, it took only four more years for the Court to determine that it could exercise the power to tax, a clearly legislative function.

From the *Magna Carta* in 1215 through the (English) *Petition of Right* (1628), the *Fundamental Orders* (1639), The English *Bill of Rights* (1689), the *Declaration of Independence* (1775), *The Federalist Papers* (1787-1788), the *Constitution of the United States* (1787), the *Northwest Ordinance* (1787), France's *Declaration of the Rights of Man and of the Citizen* (1789), the *Confederate Constitution* (1861), and the constitutions of those States comprising these United States, levying taxes remains in history, custom and tradition an act of government permitted only with the consent of those to be taxed.

Earlier this year Michigan State Senator Loren Bennett, introduced Michigan *Senate Current Resolution 273*. *SCR 273* calls upon the Congress to send to the states an amendment to the Constitution which would end judicial taxation. Discussing his Resolution Senator Bennett took note of the threat judicial taxation poses. "What would be the point of our last 21 tax cuts," he said, "if we allowed the courts to indiscriminately raise taxes? This practice is dangerous and must stop now." 18.

And Arizona State Senator Marc Spitzer, sponsor of *Arizona Senate Concurrent Resolution 1014*, was just as emphatic when he stated: "(W)e need to send a message that

the people of this country do not approve of Federal judges sitting as "Super Legislators."
19.

The history of the Congress in protecting constitutional integrity where the subject of taxation is concerned is, to be charitable, wanting. Given the aforementioned circumstances we of the Madison Forum contend that the only way to end what can only be described as taxation without representation is by constitutional amendment. Unlike a statute, an Amendment is definitive. It is final. And it is the only way to stay the judicial hand when judges and Congress ignore the constitutionally mandated separation of powers principle. The amendment we propose reads:

"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 levy or increase taxes."

It is an undeniable truth that taxation is a political power. It is a power the Founders clearly intended to be exercised by that branch of government closest to and directly accountable to the people, the legislative branch. In our federal Constitution 20. as with state constitutions all revenue bills originate in the legislative branch of government. **It is axiomatic that whoever controls the purse strings ultimately controls power, the ability of government to function and the direction it shall go.**

Justice Joseph Story stated that "(T)he government of the United States is one of limited and enumerated powers, and that a departure from the true import and sense of its powers is *pro tanto* (to that extent) the establishment of a new constitution. It is doing for the people what they have not chosen to do for themselves. It is usurping the functions of a legislator" 21.

When asked by a lady what kind of government the Founders had given the new nation Benjamin Franklin replied: "A Republic madam, if you can keep it."

Given the aforementioned circumstances I trust you can see why we believe that ending judicial taxation by the federal judiciary now lies in the hands of the states. And unless

circumstances change the constitutional amendment route is now the only viable remedy available.

Thank you.

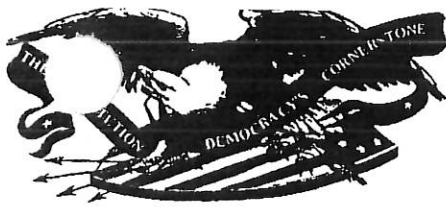
END

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FOOTNOTES:

1. In *Jenkins* Justice Kennedy (dissenting) stated: "This assertion of judicial power in one of the most sensitive of policy areas; that involving taxation, begins a process that over time could threaten fundamental alteration of the form of government our Constitution embodies." *110 S.Ct.* 1678-79 (1990).
2. *672 F. Supp.* 400 (W.D. Mo. 1987)
3. *id* at 413
4. Raoul Berger citing *John Marshall's Defense of McCulloch v Maryland*, in *Government By Judiciary*, Harvard University Press, Pg 377 (1977).
5. *Journal of the Missouri Senate*, Pg 81 (January 7, 1982).
6. *110 S.Ct.* 1654 (1990)
7. Hearing before the Subcommittee of the Committee On The Judiciary, U.S. Senate, 101st Congress (2d Session) on *S.34* and *S.J.295*, June 19, 1990.
8. *Kansas City Star*, Pg A-6, February 25, 1994.
9. Senator Robert Byrd stated: "It would ... bring the judicial branch into the equation, and to that extent our representative democracy would become less of a representative democracy."
10. Former U.S. Senator Tom Eagleton observed in a commentary published in the *St. Louis Post Dispatch* on February 27, 1994: "The proposed (balanced budget amendment) means either too much or too little -- take your pick. Only the federal courts can tell, and therein lies much of the potential evil. The courts would ultimately have to enforce it. Experts believe it is conceivable that the whole federal budget, item by item, would end up for review and pruning by the Supreme Court."
11. Syndicated columnist James J. Kilpatrick expressed his concern over the federal courts' propensity to usurp Congress' power of the purse. "In recent years federal judges have not hesitated to order states and localities to raise taxes in order to carry out judicial decrees. Who or what would restrain them in the matter of declaring ways to achieve a balanced budget? My own distrust is massive."
12. *St. Louis Post Dispatch*, 3-1-95, Pg 8A

13. See *Senate Calendar No. 386, 104th Congress, 2d Session, S.1708, April 29, 1996*; Also Statement the by Senator Strom Thurmond before the Administrative Oversight and the Courts Subcommittee, Reference "*Assessing The Impact Of Judicial Taxation On Local Communities*", Thursday, September 19, 1996, 2:00 PM., SD-226. In his statement Senator Thurmond stated in part: "Mr. Chairman, how long will it be before a Federal judge orders tax increases to build new highways and prisons? The power to tax is an exclusive legislative right belonging to the Congress and governments at the state level. (W)e must provide protection against the imposition of taxes by an independent judiciary."
14. *Federalist 78*
15. *Public Law 95-435, Sec. 7*
16. *Public Law 99-177, 99 Stat. 1037 (1985)*
- 17 *Oxford Companion to the Supreme Court*, Edited by Kermit L. Hall, Oxford University Press, Pgs 80-81 (1992).
18. News Release: "Bennett Introduces *Taxpayer Protection Act* To Eliminate Judicial Taxation.", Lansing Michigan, May 22, 1996.
19. Letter to Missouri State Senator Walter H. Mueller Jr., January 30, 1995.
20. *United States Constitution*, Article I, Sec. 7
21. 1 Joseph Story, *Commentaries on the Constitution of the United States*, Sec. 426 (5th ed. 1891).



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Update Brief

January 2000

Illinois Senate passes resolution calling for constitutional amendment to end the federal judiciary's self-proclaimed authority to levy or increase taxes.

On November 16th Illinois Senate President James "Pate" Philip introduced *Senate Resolution No. 216*. *SR 216* calls upon Congress to send to the States an amendment to the United States Constitution that would put an end to the federal judiciary's self-proclaimed power to levy or increase taxes. The following day members of the senate of the ninety-first general assembly voted 56 to 0 adopt *SR 216*.

The resolution declares that "(T)he Court's actions are an intrusion into a legitimate legislative debate over state spending pri- and not a response to a constitutional directive." The Resolution states further that "(T)he Constitution of the United States of America does not allow, nor do the states need, judicial intervention requiring tax levies or increases as solutions to potentially serious problems (and that) this usurpation of legislative authority begins a process that over time could threaten the fundamental concept of separation of powers that is precious to the preservation of the form of government



Senator James "Pate" Philip

embodied by the Constitution."

Pointing out that fifteen states, Alabama, Alaska, Arizona, Colorado, Delaware, Louisiana, Massachusetts, Michigan, Missouri, Nevada, New York, Oklahoma, South Dakota, Tennessee and Utah have already petitioned Congress to propose an amendment to end judicial taxation Senator Philip's resolu-

tion states that "(U)nfunded mandates by the United States Congress and the Executive branch of the federal government increasingly strain already tight government budgets; (and) to further compound this assault on state revenues federal district courts, with the blessing of the United States Supreme Court, continue to order states to levy or increase taxes."

The wording of the amendment sought declares: "*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 levy or increase taxes.*"

"Judicial taxation is a clear violation of the separation of powers. It represents a far more dangerous attack on our constitutional order than any external enemy has been able to mount. Rule by judges...means the end of political accountability and the replacement of persuasion with coercion." Nationally Syndicated Columnist Paul Craig Roberts

In Memorial



In 1999 the Madison Forum lost a great friend, counselor and supporter, Judge Robert T. Donnelly.

As Missouri's Chief Justice Donnelly called attention to the ever-encroaching authority of the United States Supreme Court upon the rights of the governed under the guise of self-declared benevolence. In a speech to the Missouri General Assembly in 1982 he warned of the expansionist power of the federal courts: *"If in fact the Court is acting without the consent of the governed, the people, then the rights it purports to secure in their name are counterfeit, its benevolence a fraud."*

As a contributing writer to the book Derailing the Constitution Judge Donnelly

again called attention to the attempt to subject the people to an unelected judicial authority, he wrote: *"(T)he essence of the relationship between the people and their government is that the people, not the Court are sovereign."*

Judge Donnelly shared our belief that the only way to end the federal judiciary's violation of the separation of powers was by constitutional amendment. "That's great!" was Judge Donnelly's reaction upon learning that yet another state had adopted a resolution calling upon Congress to send to the states an amendment to the Constitution that would end the federal judiciary's self-proclaimed power to levy or increase taxes.

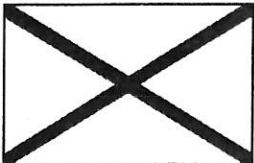
Judge Donnelly served with distinction as a member of the Supreme Court of the State of Missouri for nearly a quarter of a century, two terms as Chief Justice. During his service on the Court Judge Donnelly wrote 546 opinions. He retired from the Court in 1989.

In noting his passing numerous editorials throughout the State praised his past service. Prior to his death the Senate of the State of Missouri, for the first time in its history, passed a resolution honoring a former member of the State's highest Court.

Judge Donnelly will be greatly missed.



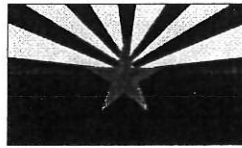
The following States have passed a Resolution or Memorial calling upon Congress to send to the states for ratification an amendment to the Constitution that would end the federal judiciary's self-proclaimed power to levy or increase taxes. (As of October 1999.)



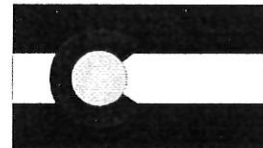
Alabama



Alaska



Arizona



Colorado



Delaware



Louisiana



Massachusetts



Michigan



Missouri



Nevada



New York



Oklahoma



South Dakota



Tennessee



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VICE PRESIDENT • KANSAS SENATE

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COMMERCE

VICE-CHAIRMAN:
WAYS AND MEANS

MEMBER:
CAPITOL AREA PLAZA AUTHORITY
CONFIRMATIONS
CORRECTIONS AND JUVENILE
JUSTICE
ECONOMIC DEVELOPMENT
INTERSTATE COOPERATION
KANSAS WORKFORCE INVESTMENT
PARTNERSHIP
ORGANIZATION, CALENDAR, RULES
UTILITIES
WORKERS' COMPENSATION FUND

Testimony
Before the Senate Federal and State Affairs Committee
March 13, 2000
SCR 1635

The United States Constitution establishes our nation's democracy as one which employs a separation of powers between the Legislative, Executive and Judicial Branches of government.

The U.S. Constitution clearly charges the legislative branch with the sole authority to levy taxes. (Article I, Sec. 8; Sixteenth Amendment)

In 1983, a case began in a federal district court in Kansas City, Missouri, and ended with the court imposing a tax on residents in that area. In 1990, the Supreme Court, in a ~~five~~ to four (5-4) decision, upheld the district court's decision to impose this tax - - thereby setting the dangerous precedent under which courts continue to impose taxes in violation of the U. S. Constitution.

In 1997 a federal judge in Rockford, Illinois ordered property taxes increased by 12% and threatened public officials with fines, incarceration and loss of their voting rights if they did not vote for a tax which they believed to be illegal. He then ordered U. S. Marshals to serve his order on each individual elected official.

Ordering tax monies spent by the judicial branch of government, that branch of government which is neither responsible nor accountable to the people for its actions, makes a mockery of the credo expressed by the Founders in the Declaration of Independence and the Constitution that there shall be no taxation without representation.

To understand just how far the Supreme Court and the inferior courts of the United States have strayed from the constraints of the Constitution one only needs to review the printed record of our Republic's Founders. The *Federalist Papers* are a good start.

The *Federalist Papers* were written by Alexander Hamilton, James Madison and John Jay to explain the proposed Constitution to the people of New York and the colonies. In *Federalist 33* Hamilton asked rhetorically: "What is the power of laying and collecting taxes but a legislative power, or a power of making laws, to lay and collect taxes?" And in *Federalist 78* he spelled out the role the Founders envisioned for the judicial branch in the new Republic. "The

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judiciary,” he wrote, “has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society. It may be truly said to have neither Force nor Will, but **merely judgment.**

Fifteen states, including three of our border states, are urging passage and ratification of a U. S. Constitutional amendment to clarify and preserve the intent and integrity of the United States Constitution. These states are: Missouri, Colorado, Tennessee, Michigan, Alaska, New York, Louisiana, Arizona, South Dakota, Massachusetts, Nevada, Delaware, Oklahoma, Alabama and Utah.

Such an amendment, when adopted by 38 states, would protect taxpayer rights from judicial taxation by prohibiting the courts from ordering any state or political subdivision, or an official of such state or political subdivision thereof, to levy or increase taxes.

The proposed amendment reads:

“Neither the Supreme Court nor any inferior court of the United States shall have the Power to order or instruct a State or political subdivision thereof, or an official of such State or political subdivision, to levy or increase taxes.”

The decision of the court to allow the imposition of state and local taxes by federal courts to fund remedial plans violates the limits of authority granted to the judiciary under *Article III* of the U. S. Constitution; and *Article I*, Section 8 which grants to the legislative branch the sole authority to levy and increase taxes. It is true that the courts have power to order the remedy of constitutional violations, but they do not have the power to make the remedial law, to fund the law by increasing taxes without voter approval, to set aside state constitutional tax limiting provisions, nor to execute the law.