The Remedial Problems of Stallone v. United States and Jenkins v. Missouri.pdf

Candace Kovacic-Fleischer

Available at: https://works.bepress.com/candace_kovacic_fleischer/12/
The Remedial Problems of
Spallone v. United States and
Jenkins v. Missouri

Candace Saari Kovacic-Fleischer*
Professor of Law, American University,
Washington College of Law;
Chair, Remedies Section, Association of
American Law Schools, 1990-91;
J.D., Northeastern University School of Law, 1974;

I. Introduction

THE REMEDIES SECTION of the Association of American Law Schools decided to hold a panel discussion at its annual meeting in January 1991 on two 1990 Supreme Court cases, Spallone v. United States\(^1\) and Missouri v. Jenkins,\(^2\) because these cases raise some troubling questions about the implementation of constitutional remedies. Not surprisingly, the State and Local Government Section was also planning a panel discussion about the same cases because they involve federal courts in local governmental decisions. Thus, the two Sections combined their programs into a double, joint session, the proceedings of which are printed here. This article introduces the cases and discusses the remedial issues that they present.

II. The Cases

In both Spallone v. United States and Missouri v. Jenkins governmental units were found liable for constitutional violations. In Spallone, the City of Yonkers was liable for "intentionally enhancing racial segregation in housing" in violation of Title VIII of the Civil Rights Act of 1968.\(^3\) In Missouri v. Jenkins the State of Missouri and the Kansas City

*The author would like to thank Professor Burton D. Wechsler for his consultation concerning taxpayer standing; Alicia Benson, Class of 1990, for her research; and the Washington College of Law Research Fund which supports faculty research.

Metropolitan School District were liable for “operat[ing] a segregated school system.”

In both cases, to cure the violation the district courts imposed remedies that intruded on local governmental authority. In Spallone, the district court ultimately ordered city council members to enact legislation with respect to low-income housing, while in Jenkins the district court ultimately ordered a tax increase.

In Spallone the district court initially ordered the city to stop the violation, to designate sites for public housing in East Yonkers, to submit a housing plan to the Department of Housing and Urban Development, and to develop a long term-plan. After the court of appeals affirmed the district court, and the Supreme Court denied certiorari, the city council voted 5-2 to approve a consent decree by which it agreed to pass legislation that would require multifamily housing to include twenty percent assisted units, grant tax abatements and density bonuses to developers, and change zoning provisions.

When the legislation was not passed, the district court ordered the city to enact it. The court gave the city and the council members a deadline to pass the legislative package or face coercive contempt. The city would be fined $100 for the first day, with the fine to double each day of noncompliance. The council members would be fined $500 per day and, after ten days, imprisoned until they passed the legislation. Despite the sanctions and despite the consent decree that had been approved by the city council’s vote of five to two, four of the seven city council members voted not to enact the legislative package. After a stay, the Second Circuit affirmed all of the sanctions, but limited the city’s fine to $1 million per day. The Supreme Court stayed the sanctions against the council members, but not the city. As the city’s fine approached the Second Circuit’s limit, only two members of the city council continued to oppose the legislative package, which was enacted.

4. Jenkins, 495 U.S. at 37.
5. Spallone, 493 U.S. at 271.
6. Jenkins, 495 U.S. at 41.
7. Spallone, 493 U.S. at 269.
10. Id. at 271.
11. Id. at 271–72.
12. Id.
13. Id. at 272.
by a vote of five to two.\textsuperscript{16} The Supreme Court granted certiorari\textsuperscript{17} on
the issue of sanctions against the council members, but not the city,
because of the importance of "the appropriate exercise of the federal
judicial power against individual legislators."\textsuperscript{18}

In \textit{Jenkins}, the district court had initially estimated its remedial
scheme to cost approximately $88 million, and required the state and
school district to share the cost.\textsuperscript{19} The order was later expanded at
greater cost. The order approved a school district proposal for a system
of magnet schools and capital improvements.\textsuperscript{20} To enable the school
district to raise the money, the court enjoined a state law that prohibited
the school district from getting increased revenue from increased prop-
erty assessments and ordered that the district submit a proposal for a
tax increase to the voters.\textsuperscript{21} After the Eighth Circuit affirmed the district
court, the Supreme Court denied certiorari,\textsuperscript{22} and the voters rejected
the tax increase, the district court ordered that the property tax be
"raised from $2.05 to $4.00 per $100 of assessed valuation."\textsuperscript{23} The
state again appealed. The Eighth Circuit upheld the scope of the rem-
edy,\textsuperscript{24} but, with respect to the tax increase, held that the trial court
should, in the future, authorize the school district to submit a levy,
rather than set the levy itself.\textsuperscript{25} The Supreme Court granted certiorari
"limited to the question of the property tax increase."\textsuperscript{26}

In both cases the courts of appeals had affirmed the liability and the
substantive remedy ordered by the district court. The Supreme Court
had denied certiorari on those issues but later granted certiorari on the
implementation of the remedy.\textsuperscript{27} The Supreme Court held, in both
\textit{Spallone} and \textit{Jenkins}, that the district courts had abused their discretion
in implementing the remedy.\textsuperscript{28}

\begin{itemize}
\item \textsuperscript{16} \textit{Spallone}, 493 U.S. at 265, 273.
\item \textsuperscript{17} \textit{Spallone} v. United States, 489 U.S. 1064 (1989).
\item \textsuperscript{18} \textit{Spallone}, 493 U.S. at 273.
\item \textsuperscript{19} \textit{Missouri} v. \textit{Jenkins}, 495 U.S. 33, 40–41 (1990).
\item \textsuperscript{20} \textit{Id.} at 41.
\item \textsuperscript{21} \textit{Id.} at 39.
\item \textsuperscript{22} Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986), \textit{cert. denied sub nom.} Kansas
City, Missouri, Sch. Dist. v. Missouri, 484 U.S. 816, \textit{and cert. denied}, 484 U.S. 816
\item \textsuperscript{23} \textit{Jenkins}, 495 U.S. at 41.
\item \textsuperscript{24} Jenkins v. Missouri, 855 F.2d 1295, 1301–07 (8th Cir. 1988), \textit{aff'd in part and
\item \textsuperscript{25} \textit{Id.} at 1314.
\item \textsuperscript{26} Missouri v. Jenkins, 490 U.S. 1034 (1989).
\item \textsuperscript{27} \textit{See} Spallone v. United States, 493 U.S. 265, 273–74 (1990) (no question about
liability or the district court's remedial order); \textit{Jenkins}, 495 U.S. at 53. ("We accept,
without approving or disapproving, . . . that the District Court's remedy was proper.").
\item \textsuperscript{28} \textit{Spallone}, 493 U.S. at 280; \textit{Jenkins}, 495 U.S. at 35.
\end{itemize}
In *Spallone*, the Court held that the district court should have waited to see if the sanctions against the city alone would have worked. It did not hold, however, that such sanctions could never be used. Four Justices, Brennan, Marshall, Blackmun, and Stevens, dissented on the ground that the district judge had good reasons to sanction simultaneously the city and the city council and that those sanctions would hasten compliance.30

In *Jenkins*, the Supreme Court agreed with the Eighth Circuit that the district court should have "authorized [the school district] to submit a levy to the state . . . tax authorities," rather than levy the tax itself, but disagreed that the tax increase already ordered directly by the district court judge could stand.33 The Supreme Court did not hold that a court could never impose a tax itself.34 Four Justices, Kennedy, Rehnquist, O'Connor, and Scalia, concurred in part and concurred in the judgment. They concurred that the petition had been timely filed and in the judgment reversing the Eighth Circuit's order that affirmed the district court's past order of a tax increase.35 Those four Justices disagreed that the issue of the future tax increase was before the Court and indicated that if it were, any judicially ordered tax increase, whether directly ordered or directed to officials to levy a tax, would be beyond the Court's powers under Article III of the U.S. Constitution.36

III. Remediial Problems

A. Focus on Comity, Not Remedy

Both *Spallone* and *Jenkins* quoted from *Whitcomb v. Chavis*, that while "remedial powers of an equity court must be adequate to the task, . . . they are not unlimited."38 In both cases the court's discussion of those limitations professed to apply general principles of equity courts, but was actually based on the particular issues raised by a federal court telling local governmental institutions what to do. *Spallone* said federal courts "must take into account the interests of state and local authorities

30. *Id.* at 280–81 (Brennan, J., dissenting).
32. *Id.* at 54.
33. *Id.* at 51.
34. The Court did not reach the issues whether the tax increase violated Article III or the Tenth Amendment. *Jenkins*, 495 U.S. at 50.
35. *Id.* at 58 (Kennedy, J., concurring in part and concurring in judgment).
36. *Id.* at 65 (Kennedy, J., concurring in part and concurring in judgment).
REMEDIAL PROBLEMS

in managing their own affairs.’’ Jenkins said that ‘‘one of the most important considerations governing the exercise of equitable power is a proper respect for the integrity and function of local government institutions.’’ Spallone then said that when using contempt a court must use the ‘‘least possible power adequate to the end proposed.’’ Similarly, Jenkins said that ‘‘the District Court was obliged to assure itself that no permissible alternative would have accomplished the required task.’’

Thus, both Spallone and Jenkins were discussing comity, not equity per se, in their concern for intrusion into local governmental affairs and their conclusion that the method to implement the remedy should be no stronger than necessary. While before Spallone and Jenkins comity had been recognized to be an important and delicate issue whenever a federal court is involved with local governmental matters, the thrust of those cases was to elevate comity in relation to another important focus—a remedial one. Spallone and Jenkins involve violations of the constitution that should be remedied. By focusing on comity, the Court’s attention is on the intrusiveness of the remedy. But a remedial focus looks at what is necessary to remedy a violation and the effectiveness of various means of implementing the remedy. Millikin v. Bradley, cited by Spallone for the proposition that federal courts must take into account the concerns of local governments, recognized that both comity and remedial necessity are important. Milliken II listed three factors that federal courts must consider. In addition to the local government concern, Milliken II held that courts must consider the nature and scope

40. Jenkins, 495 U.S. at 51.
41. Spallone, 493 U.S. at 272 (quoting United States v. City of Yonkers, 856 F.2d 444, 454 (1988) (quoting Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821))). Anderson v. Dunn held that an imprisonment for contempt of Congress must not continue beyond Congress’s adjournment. Id. at 231 (1821). Anderson, therefore, is a case about the scope of the contempt power, not discretion. Other cases cited by Spallone for the “least possible power adequate to the end proposed,” see Spallone, 493 U.S. at 280, also deal with the scope of power of contempt. These cases include: In re Michael, 326 U.S. 224 (1945) (holding that a federal court could not hold someone in criminal contempt for perjury alone, and thus deprive that person of a jury trial); Shillitani v. United States, 384 U.S. 364 (1966) (holding that while a court can imprison someone to compel testimony, the imprisonment cannot last beyond the length of the grand jury).
42. Jenkins, 495 U.S. at 51.
43. Equitable principles are broad. Two important principles are that equity gives extraordinary, not ordinary, relief and that equitable relief is granted at the discretion of the court. See Henry L. McClintock, Equity, § 21, at 46-47 (2d ed. 1948).
45. Id. at 280-81.
of the constitutional violation and must design the remedy to restore the victims of discrimination to where they would have been without the violation.\textsuperscript{46} \textit{Spallone}, however, did not quote those other factors in \textit{Milliken II}, and thus by implication diminished the relative importance of the promptness and full effectiveness of the remedy.

B. \textit{Puzzling Focus on Nonparty Status}

The majority in \textit{Spallone} and the concurrence in \textit{Jenkins}, both of which included Chief Justice Rehnquist and Justices O'Connor, Scalia, and Kennedy, found significance in the nonparty status of certain individuals. In \textit{Spallone}, the majority noted that the portions of the district judge's order that required affirmative action were directed only at the city, while the prohibitory decree explicitly referred to officers and agents.\textsuperscript{47} The Court also noted that the city council members were not parties and had not been found personally liable.\textsuperscript{48} The dissent questioned the relevance of the majority's remarks. It noted that Federal Rule of Civil Procedure 65(d) automatically binds officers and agents and that the preamble to the judge's order referred to officers and agents.\textsuperscript{49} Was the majority reading "officers" and "agents" to exclude all legislative personnel? If so, that premise was not spelled out.

The concurrence in \textit{Jenkins} believed that a court cannot assess a tax because, inter alia, the taxpayers "whose property . . . was at stake were neither served with process nor heard in court."\textsuperscript{50} It may be that the concurring Justices were merely embellishing their point that any action by the Court to compel municipal expenditures has an undemocratic element that should be avoided, even if at some cost to effective enforcement of minority rights. But to phrase the issue in terms of who is a party to a lawsuit is problematic.

Whenever a court orders a remedy against a municipality which will cost money, it is requiring the municipality either to raise taxes or to divert money from one use to another. In those cases the taxpayers, or the people affected by the diversion, are not parties. It may be that the remedy is undemocratic, but judicial protection of minority rights is a constitutionally mandated check on the power of the majority.

Problems of remedies affecting nonparties occur in a number of contexts. For example, when courts invalidate a statute that provides

\textsuperscript{46} \textit{Id.} at 280.
\textsuperscript{48} \textit{Id.} at 274.
\textsuperscript{49} \textit{Id.} at 304 n.14 (1990) (Brennan, J., dissenting).
benefits to one group on the ground that it wrongfully excluded another group, then courts will choose between extending the benefits to both groups or canceling them altogether. The beneficiaries may never have been parties. The statute could be invalidated at the behest of a plaintiff seeking to avoid providing benefits by suing an agency administering the benefits. With either remedy, nonparties may be affected. If the benefits are withdrawn, their recipients will be affected. If the benefits are extended, the taxpayers will be affected. And one way or the other, to cure the violation, the court must interfere with the legislation.

The impact of remedies on nonparties is an important issue and one not always focused on by the courts. The Supreme Court held in *Martin v. Wilks*, that a directly impacted and clearly defined group, such as employees who will lose rights under an affirmative action consent decree, had a right to be heard concerning a remedy despite not having timely intervened. However, the fact that a remedy may have an impact on a broad nonparty group should not be the sole reason for denying it. Particularly with constitutional violations, no remedy may be possible that does not affect an entire community. The Supreme Court has long held that standing to object to legislation generally cannot be based solely on taxpayer status. Would the concurrence in *Jenkins* give taxpayers the right to block a remedy, even though their elected representatives have been taking unconstitutional actions?

C. *Is Abuse of Discretion the Proper Analysis?*

The opinions in *Spallone* and *Jenkins* are not clear as to whether each has stated a rule or whether the outcomes were limited to the facts of

---

51. See, e.g., Califano v. Westcott, 443 U.S. 76, 89 (1979). In cases not involving benefits, the courts may take no position on the remedy and defer to the legislature. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (bankruptcy courts violate the Constitution; Congress directed to amend the legislation creating those courts).

52. See, e.g., California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987) (bank sued state agency to invalidate mandatory pregnancy leave statute, pregnant employee seeking reinstatement was denied leave to intervene).


55. Id.

the cases.  

In both cases the Supreme Court said that the district judges had abused their discretion.  

When the Court framed the issue, it sounded specific to the facts of the case. The Court said, "The nub of the matter, then, is whether, in the light of the reasonable probability that sanctions against the city would accomplish the desired result, it was within the court's discretion to impose sanctions on the petitioners as well under the circumstances of this case." Spallone then discussed facts to show the "reasonable probability" that the sanctions against the city alone would work. Those facts, however, were the ones which to the majority indicated a reasonable likelihood that the city council would act; they seem to cement rather than negate the connection between the city and the city council. Because those facts are therefore not very persuasive as to why sanctions against the city alone would work, it appears that the Court was really articulating a rule that sanctions can be used against local legislators only after sanctions against the locality have not worked. The last paragraph of the opinion is written more like a rule and less like a conclusion about abuse of discretion.

In Jenkins, the only factual discussion with respect to why the judge abused his discretion was that the "[local government] institutions are ready, willing, and-but for the operation of state law curtailing their powers-able to remedy the deprivation of constitutional rights themselves" and that the district court judge thought he "had no alternative to imposing a tax increase." Again, however, the case reads more


58. Id. at 274 ("the District Court's order . . . imposing contempt sanctions against the petitioners if they failed to vote in favor of the court-proposed ordinance was an abuse of discretion. . . ."); Missouri v. Jenkins, 495 U.S. 33, 51 (1990) ("The District Court therefore abused its discretion in imposing the tax itself.").

59. Spallone, 493 U.S. at 278.

60. According to the dissent in Spallone, that "reasonable probability" had been assessed differently by the district judge who had found that the council members were acting as "political martyrs" without considering the best interests of the city. Id. at 293-94 (Brennan, J., dissenting).

61. The Court said, "It was the city, in fact, which capitulated . . . [because] the city council . . . finally enacted the affordable housing ordinance by a vote of 5 to 2." Id. at 277 (emphasis added). And previous sanctions against the city alone had caused the city council to support a resolution. Id.

62. The Spallone majority concluded, "We hold that the District Court . . . should have proceeded with such contempt sanctions first against the city alone. . . . Only if that approach failed . . . should the question of imposing contempt sanctions against the city council members even have been considered." Id. at 280.

like a rule that the judge should never directly order a tax increase, rather than a discussion of discretion.  

If the Supreme Court is articulating rules of remedial implementation, those would be clearer if not phrased in terms of judicial discretion. When judicial rules are unclear, parties are more likely to litigate. As these cases illustrate, disputes over remedial implementation delay correction of the constitutional violations which were resolved earlier.

D. Questions About the Breadth of Jenkins

Although Jenkins was not a case applying Federal Rule of Civil Procedure 70, it raises the question whether a district judge could choose one of the options considered, but rejected, by the district court in Spallone. In Spallone the district judge considered using Rule 70 to have the act deemed done, to deem the legislative package enacted. Jenkins holds that a court cannot order a tax itself, but must order the officials to levy it. Since a tax is a legislative act, does Jenkins apply to all remedies requiring local legislation, or is Jenkins limited to cases involving taxes?

E. Possible Consequences of Spallone and Jenkins

Jenkins held that a district court could not raise taxes itself to remedy constitutional violations but must order the local officials to raise them. Jenkins did not deal with the situation when local officials are unwilling to act, however, because in that case the local officials were "ready" and "willing" to act. If, however, in a future case a district court follows the Jenkins approach and orders officials to raise taxes, and those officials refuse, then one has Spallone. Although under Jenkins a judge can order the officials to take legislative acts, under Spallone the court cannot sanction the legislators for refusing to act unless sanctions against the locality fail. Thus, the court must first fine the locality. Then the locality will have to raise money to pay the fine when it cannot raise

---

64. The Court said, "Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibility for solutions to the problems of segregation upon those who have themselves created the problems." Id. at 1663.
65. See Candace S. Kovacic, A Proposal to Simplify Quantum Meruit Litigation, 35 Am. U. L. Rev. 549, 562 (1986) (when courts are unclear as to the method of analysis, litigation may be unpredictable and unnecessary).
66. Spallone v. United States, 493 U.S. 265, 275 (1990). The district court also considered transferring the council's functions to a housing commission. Id.
68. Id.
69. Id. at 51.
money to remedy the constitutional violation. If it does not raise money to pay the fine, what will the court do-impose a fine upon a fine?

In the meantime, the locality faces the severe consequences of uncollected garbage, closed libraries and parks, and layoffs described in Spallone, while the delay is caused by those officials who cannot be sanctioned. In this circumstance the community may be forced to confront the consequences of disobedience to the Constitution without its elected officials serving as a buffer against those consequences. While potentially slowing the remedy, this process may increase community pressure on the legislators. It may also, however, increase the community's resentment of the federal courts, which is just what Spallone and Jenkins, with their concern for comity are presumably trying to prevent.

---

70. Spallone, 493 U.S. at 277.