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# DESEGREGATING AN IDEAL: NEIGHBORHOOD SCHOOLS, URBAN SCHOOL SYSTEMS AND *MISSOURI V. JENKINS*

MARK S. DAVIES\*

One can approach the Supreme Court's recent school desegregation decision, *Missouri v. Jenkins*,<sup>1</sup> from several theoretical perspectives. Like previous school desegregation opinions, *Jenkins* implicates the role of the courts,<sup>2</sup> the appropriate power of local government,<sup>3</sup> and issues of race and racism.<sup>4</sup> Although a political theory cohering these and other perspectives would be a significant achievement, such a theory would inevitably be both too abstract and too controversial to help lawyers seeking to understand *Jenkins*.

This essay will instead focus on the public school "ideal."<sup>5</sup> Citizens who elect school board members and residents who pay taxes to fund public schools share a basic understanding of what constitutes a public school.<sup>6</sup> The meaning of "public school," however, varies depending on the aspirations of the community supporting

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<sup>1</sup> 115 S. Ct. 2038 (1995).

<sup>2</sup> See *Jenkins*, 115 S. Ct. at 2062 (Thomas, J., concurring); see also GERALD ROSENBERG, *THE HOLLOW HOPE* 9-28 (1991).

<sup>3</sup> See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 94 (1990).

<sup>4</sup> See Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 656-58.

<sup>5</sup> See *Introduction*, Symposium, Changing Images of the State, 107 HARV. L. REV. 1179, 1179 (1994). "The image of the state that we start with—the state's powers and limits, the dangers it poses, and the promise it provides—often shapes legal arguments." *Id.*

<sup>6</sup> See AMY GUTMANN, *DEMOCRATIC EDUCATION* 7 (1987). Gutmann suggests that "social goods [such as education] have social meanings." *Id.*; MICHAEL WALZER, *SPHERES OF JUSTICE* 19 (1986) [hereinafter *SPHERES OF JUSTICE*]; see also MICHAEL WALZER, *THICK AND THIN: MORAL ARGUMENT AT HOME AND ABROAD* 26 (1994); Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 279 (1993) (applying Walzer's more general argument about self-identity to issues of local government law).

the school.<sup>7</sup> These aspirations are reflected in the character of a "place."<sup>8</sup> The location of a school informs the meaning of school.

One criticism of "the public school ideal" approach is that it risks missing any larger point the Court is making. For example, reading *Brown v. Board of Education*<sup>9</sup> as a "school" desegregation decision probably understates, or even distorts, the more universal teaching of *Brown*.<sup>10</sup> Nevertheless, in the pragmatic view promoted recently by Judge Richard Posner, the usefulness of a perspective ought to be judged by its practical payoff.<sup>11</sup> Focussing on the public school ideal is useful, or so this essay tries to show.

This article discusses the meaning of "public school" in the Supreme Court's recent school desegregation decisions. Part One compares two places, the suburban township and the urban city, and the meaning that residents of these communities ascribe to their public schools. Part Two describes the Court's recent school desegregation cases, focussing on *Missouri v. Jenkins*. Part Three analyzes the Supreme Court's understanding of "public school." This Part argues that the Court's desegregation decisions illustrate that the Court assumes a suburban place, a neighborhood school, when it reasons about public schools. Part Three then argues that the assumption of neighborhood schools results in emphasizing the quality of education aspect to school desegregation. Part Three closes by arguing that the neighborhood school assumption overlooks school desegregation's urban location; desegregation is an urban, not suburban, phenomenon.

<sup>7</sup> See ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 94 (1993) (noting that different communities properly have different ideals and therefore social goods, such as education, have different meanings depending on each community).

<sup>8</sup> See Roger K. Lewis, "Gated" Areas: Start of New Middle Ages, *WASH. POST*, Sept. 9, 1995, at E1; George F. Will, *Our Towns*, *N.Y. TIMES*, Sept. 17, 1995, § 7, at 1 (discussing favorable book review of *City Life: Urban Expectations in a New World* by Witold Rybczynski and noting our cities reflect attributes we possess).

<sup>9</sup> 347 U.S. 483 (1954)

<sup>10</sup> See Richard A. Posner, *The Learned Hand Biography and the Question of Judicial Greatness*, 104 *YALE L.J.* 512, 519 (1995) (explaining *Brown*'s holding as easier to defend once it was applied in noneducational settings); see also J. Harvie Wilkinson III, *The Law of Civil Rights and Dangers of Separatism in Multicultural America*, 47 *STAN. L. REV.* 993, 998 (1995).

<sup>11</sup> See RICHARD A. POSNER, *OVERCOMING LAW* 11 (1995); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 309 (1990); see also Cass R. Sunstein, *The Idea of a Useable Past*, 95 *COLUM. L. REV.* 601, 607 (1995).

## I. PLACES AND THEIR PUBLIC SCHOOLS

A. *The Suburban Township and the Urban City*

The suburb is a physical manifestation of at least three values. Richard Briffault describes how the “essence of the suburban model is the association of home and family.”<sup>12</sup> For example, he argues that in *Milliken v. Bradley*<sup>13</sup> (Milliken I) the Supreme Court adopted the notion that suburban governments are “defenders of local families and homes.”<sup>14</sup>

In addition to family and homes, the suburb reflects decisions to live near those who share certain demographic characteristics, most often income and race. Thus, Justice O'Connor's recent description of “white flight” as the result of “natural, if unfortunate, demographic forces”<sup>15</sup> recognizes that some people strongly prefer to live with people who share certain demographic similarities. The suburbs are exclusive.

The suburbs also represent notions of “community.” A township conjures up visions of mythic New England town meetings, bastions of citizen control, participation and responsibility. The self-image of the suburbs is the place about which DeToqueville wrote.<sup>16</sup>

Describing the values represented by the urban city is harder. Briffault criticizes the Court and legal theory for not distinguishing between the suburb and the city.<sup>17</sup> Yet, he does not attempt to describe an “urban model.” Similarly, Professor Richard Ford argues that legal theory should focus on urban life as a normative

<sup>12</sup> See Richard Briffault, *Our Localism: Part II—Localism and Legal Theories*, 90 COLUM. L. REV. 346, 381 (1990).

<sup>13</sup> 418 U.S. 717 (1976).

<sup>14</sup> See Briffault, *supra* note 12, at 387.

<sup>15</sup> *Missouri v. Jenkins*, 115 S. Ct. 2038, 2060 (1995) (O'Connor, J., concurring).

<sup>16</sup> See Frug, *supra* note 6, at 279. There are, of course, many possible descriptions of the suburb. *Id.* This article's description ignores the relationship between the suburbs and the urban city. *Id.* As Professor Frug writes, “suburbs would not be what they are without this love/hate relationship [that they have] with the city . . . [and] there would, for example, be no place for those excluded by exclusionary zoning to live except the suburbs.” *Id.* School desegregation, indeed, *Jenkins* itself, involves this relationship. *Id.* Nevertheless, the suburban self-image ignores the urban city and so it is omitted from the description here. *Id.*

<sup>17</sup> See Briffault, *supra* note 12, at 349. “Cities and suburbs differ from each other politically, economically and socially notwithstanding these differences, local government law does not distinguish between city and suburb.” *Id.*

ideal.<sup>18</sup> To strive for the ideal, however, we need a nuanced description of the ideal urban city.<sup>19</sup>

A positive description of urban America must acknowledge the variety, spontaneity, energy, individuality, and accommodation urban communities offer. "Great cities" are "great" because of their diversity of people, industry and architecture, and so on.<sup>20</sup> The "urban idea" consists of a city's culture, its physical form, and "its unique capacity for accommodating disparate individuals within a shared environment."<sup>21</sup> Our urban cities reflect this country's ideals of "democracy and toleration."<sup>22</sup> These attributes attract people, from within and beyond the nation's borders, to the urban cities.

### B. *The Meaning of Public School*

The ideal suburban neighborhood public school has many of the characteristics of its surroundings. Public schools are the public service which is most closely associated with the idea of family.<sup>23</sup> As Michael Walzer notes, parents are often more concerned with their child's classmates than with their child's curriculum.<sup>24</sup> In the suburbs, the public school is almost always the neighborhood school which is attended by children from similar backgrounds, family life and homes. Local government control and participation is reflected and reinforced by the suburban public school.

In the same way, the ideal urban public school system is comprised of the attributes of cities. An urban public school board operates many schools in order to allow every different child in the city to attend school.<sup>25</sup> Each urban school within a given system is independent from other urban schools within the same system. Teachers and students rarely change schools, but are connected to

<sup>18</sup> See Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1908 (1994). "We must redescribe city life as a normative ideal." *Id.* "Urban life brings[s] glimpses of what is best about plural culture." *Id.*

<sup>19</sup> See *id.* at 1908 (explaining necessity for positive view of urban life).

<sup>20</sup> See generally JANE JACOBS, *CITIES AND THE WEALTH OF NATIONS* 222-38 (1984).

<sup>21</sup> See Lewis, *supra* note 8, at E14.

<sup>22</sup> See Will, *supra* note 8, at 13.

<sup>23</sup> See Briffault, *supra* note 12, at 385.

<sup>24</sup> See SPHERES OF JUSTICE, *supra* note 6, at 215. "Parents take a much livelier interest in the schoolmates than in the schoolbooks of their children. . . . [t]hey are right to do so. . . . [s]ince so much of what we know we learn from our peers, whom and what always go together." *Id.*

<sup>25</sup> See, e.g., Valerie Strauss, *The Pull of Private School*, WASH. POST, Nov. 13, 1995, at A1.

other city schools by a similar curriculum and a single school board. Thus, urban public schools are an expression of unity despite difference and an accommodation, rather than an avoidance of diversity.

Despite this contrast between suburban and urban public school ideals, in many important ways the public school ideal does not change with the location. For example, religion plays a fairly circumscribed role in every public school ideal, regardless of its location.<sup>26</sup> Nevertheless, a complete understanding of a public school ideal requires a rough description of the number of schools and students included in the system, the demographic diversity or homogeneity, the organization of the staff, administrators and faculty who run the school and who are accountable for its success. Those who discuss the ideal public school usually have a particular place in mind for that school in the suburbs.

## II. RECENT SUPREME COURT'S SCHOOL DESEGREGATION DECISIONS

### A. *Dowell*, *Freeman* and *Jenkins*

After more than a decade of silence, the Supreme Court has returned its attention to school desegregation. The 1991 decision, *Board of Education v. Dowell*,<sup>27</sup> set forth the standard for ending district court supervision of the desegregation of a school district.<sup>28</sup> The Court held that in order for a court to terminate its supervision of a school, the school board must show that it has operated in compliance with constitutional standards and that "the vestiges of past discrimination had been eliminated to the extent practicable."<sup>29</sup>

Soon after *Dowell*, the Court revisited the issue of a district court's ceasing supervision of a school board. In *Freeman v. Pitts*<sup>30</sup> the issue was whether a district court could stop supervising certain aspects of the school system while retaining supervision over

<sup>26</sup> U.S. CONST. amend. I. The First Amendment guarantees the free exercise of religion. *Id.*

<sup>27</sup> 498 U.S. 237 (1991).

<sup>28</sup> *See id.* at 240-41. The school district in *Dowell* had unconstitutionally segregated students and was therefore under the supervision of a district court. *Id.*

<sup>29</sup> *See id.* at 248, 250. The Court found that a school board must demonstrate that it has operated in accordance with the Constitution for a reasonable time period and that "the vestiges of past discrimination had been eliminated to the extent practicable." *Id.*

<sup>30</sup> 503 U.S. 467 (1992).

other areas of education. The Court held that the district court has discretion to order either a partial or absolute withdrawal of its supervision and control.<sup>31</sup>

*Missouri v. Jenkins*<sup>32</sup> moves beyond the relatively narrow question of when and to what extent a district court is permitted to relinquish control of a school system to the question of what a supervising district court may order a desegregating school board to do. This area of law is quite complex<sup>33</sup> as well as controversial. For background, a brief description of the Supreme Court's decision in *Milliken I*,<sup>34</sup> the Court's most important case restricting the authority of the district court, is necessary.<sup>35</sup>

The *Milliken I* Court struck down a regional busing order that included schools in Detroit and its surrounding suburbs.<sup>36</sup> The Court held that local government, specifically in this case, a suburban school board, could not be forced to comply with a court desegregation order when the local entity itself had done nothing wrong.<sup>37</sup>

In *Jenkins*, the Court returned to the *Milliken I* question of interdistrict remedies. The *Jenkins* district court had ordered both the State and the local school boards to improve the quality of the city public schools to attract white students from both inside and outside the school district.<sup>38</sup> The State argued that *Milliken I*'s principle of local autonomy was not implicated because local government entities were not forced to comply with the order.<sup>39</sup>

The Court gave two reasons for holding the voluntary interdistrict order beyond the court's remedial authority. First, the district court's effort to integrate students from outside the district

<sup>31</sup> See *id.* at 489.

<sup>32</sup> 115 S. Ct. 2038 (1995).

<sup>33</sup> See CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 330 (1993) (describing school desegregation cases as "exceedingly complex").

<sup>34</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>35</sup> See Mark S. Davies, 'Virtually Integrated Classrooms': Using the Internet to Eliminate the Effects of Unconstitutional Racial Segregation in the Public Schools, 24 J. L. & EDUC. 569, 577 (1995).

<sup>36</sup> *Id.* at 752-53.

<sup>37</sup> *Id.* at 746-47; see also SPHERES OF JUSTICE, *supra* note 6, at 222; Ford, *supra* note 18, at 1875.

<sup>38</sup> See *Missouri v. Jenkins*, 115 S. Ct. 2038, 2042-43 (1995) (noting history of *Jenkins* result, which was to restore Kansas City, Missouri school district to AAA rating by implementing several court-imposed measures).

<sup>39</sup> See Respondent's Oral Argument at \*37, *Missouri v. Jenkins*, 1995 WL 61093 (1995) (No. 93-1823) (arguing that district court's order was acceptable because it was voluntary and therefore did not impinge upon autonomy of suburban school districts); see also *Jenkins*, 115 S. Ct. at 2048.

calls for massive expenditures in an effort to attract white students.<sup>40</sup> Persuading students from outside the district to attend the school is expensive.<sup>41</sup> Second, and related, permitting the district court to retain authority while the school seeks to attract students from outside the district justifies lengthy district court supervision of the school and thereby overrides the local autonomy of schools.<sup>42</sup> Under *Jenkins*, a supervising district court exceeds its remedial authority when it orders voluntary measures to attract students from outside of the district because such a remedy is too expensive and too lengthy.

### B. *The Jenkins Puzzle*

It is tempting to read *Jenkins* as another retreat from the goal of school desegregation. Some commentators have read *Dowell* and *Freeman* as being profoundly anti-school desegregation opinions.<sup>43</sup> The *Jenkins* Court's refusal to allow the district court to involve, even voluntarily, students from outside the school district fits with this view. Moreover, with its concern for expense and duration, *Jenkins* can be seen as an implicit attack on even single-district voluntary measures, which are also often expensive and lengthy.

The "animus" thesis is undermined, however, at least to some extent, by the *Jenkins* Court's apparent approval of voluntary single district desegregation efforts. The Court expressly noted the advantages of using magnet schools as single-district remedies, stating that such voluntary measures avoid extensive busing and limit the number of white students that withdraw from the public school district.<sup>44</sup>

This apparent approval of voluntary single-district desegregation efforts in turn undermines the Court's rationale for striking down the multi-district plan in *Jenkins*. School districts in Chicago, Illinois and Prince George County, Maryland have expended large amounts of time and money trying, with limited success, to

<sup>40</sup> See *Jenkins*, 115 S. Ct. at 2048.

<sup>41</sup> See *id.* at 2043 (estimating total spending on quality of education programs at \$220 million and on magnet schools at \$448 million).

<sup>42</sup> SPHERES OF JUSTICE, *supra* note 6. The concern with limiting the time that schools must operate under the desegregation order is often expressed as an argument about the "effects" of segregation. *Id.*

<sup>43</sup> See Hayman & Levit, *supra* note 4, at 677.

<sup>44</sup> *Missouri v. Jenkins*, 115 S. Ct. 2038, 2051 (1995).



encourage white students from within the district to choose to attend magnet schools.<sup>45</sup> It may be, as the Court evidently believes, that the expense and duration of desegregation are worse when schools are permitted to include students from outside the district. But, if large numbers of the students from outside a district can be recruited, eliminating racial imbalance may ultimately be cheaper and quicker.<sup>46</sup>

The puzzle of *Jenkins* is that the Court does not explain why the school district line matters. The cost and duration of a remedy may increase with the number of districts involved but may also decrease. The rationale of *Milliken I*, which supports autonomy of the school board, does not support the conclusion in *Jenkins* because neither a school board nor autonomy was involved. Here, the plan involved students from other school districts, not school boards, and, more fundamentally, the interdistrict plan was voluntary not mandatory. Despite the lack of elaboration, *Jenkins* illustrates that the Court wants to respect local school district lines.

### III. DESEGREGATING NEIGHBORHOOD SCHOOLS

#### A. *The Supreme Court's Definition of Public School: Solving the Jenkins Puzzle*

The Court's recent school desegregation cases suggest that a majority of the Court imagines public schools as suburban neighborhood schools.<sup>47</sup> Chief Justice Rehnquist, writing for the majority in *Dowell*, argued that local control of education allows citizens to participate in decision making and permits schools to adapt to local needs.<sup>48</sup> In the *Freeman* decision, Justice Kennedy opined that local schools promote accountability and that local control

<sup>45</sup> See John Kass & Rick Pearson, *Daley Quickly Flexes School Muscle*, CHI. TRIB., May 25, 1995, at A1. "[S]chools have a student population that is 89% minority, yet the system spends about \$117 million each year to meet desegregation guidelines, including about \$35 million for busing programs, that school officials say are impossible to attain given that only one percent of the students are white." *Id.*; Lawrence Sherrod, *Magnet Program May Be Modified, Board Plans to Ask Permission to Rewrite Racial Requirements*, PRINCE GEO. J., Oct. 30, 1995. Sherrod reports that the 10% white requirement has led to a waiting list that is 91% black in the \$13 million magnet school program. *Id.*

<sup>46</sup> See, e.g., JENNIFER HOSCHILD, *THE NEW AMERICAN DILEMMA* 75 (1984).

<sup>47</sup> See *Jenkins*, 115 S. Ct. at 2048 (Kennedy, J., concurring).

<sup>48</sup> See *Board of Educ. v. Dowell*, 498 U.S. 237, 247 (1991) (citing *Milliken v. Bradley*, 418 U.S. 717, 742 (1974) (*Milliken I*)).

over public schools is a "vital national tradition,"<sup>49</sup> a line thereafter incorporated into the opinion of the Court in *Jenkins*. Although not incontrovertible, these paeans to local control suggest that the Court thinks in terms of suburban schools.

The *Jenkins* Court respects school district lines because the Court understands public schools to be suburban neighborhood schools. Attracting students from outside the school district is unacceptable because it is inconsistent with the belief that public schools serve the local neighborhood. Likewise, spending a lot of money to encourage students from outside the district to attend a school, which was done by the district court in *Jenkins*, is inconsistent with the vision of the local public school that serves its own neighborhood. Placing emphasis on the neighborhood character of public schools explains why the *Jenkins* Court respects school district lines.

### B. *Neighborhood Schools and Quality of Education*

Reading *Jenkins* as a suburban neighborhood school opinion, rather than a straightforward anti-desegregation opinion, still leaves the Court vulnerable to the charge that it no longer believes in school desegregation. As the Court acknowledges, in a country where people of different races rarely live together,<sup>50</sup> a commitment to maintaining neighborhood public schools is tantamount to encouraging racially isolated schools.<sup>51</sup>

Despite this racially isolating result, a commitment to maintaining neighborhood public schools is not necessarily indicative of an end to the Court's effort to desegregate the schools. In *Milliken II*,<sup>52</sup> the Court approved the district court's order which required the school board to fund remedial educational programs.<sup>53</sup> There is a long tradition which argues that school desegregation is most

<sup>49</sup> See *Freeman v. Pitts*, 503 U.S. 467, 490 (1992) (quoting *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 410 (1971)).

<sup>50</sup> See SPHERES OF JUSTICE, *supra* note 6, at 117. "The residential segregation of black Americans is very different than that of other groups: a great deal more thoroughgoing and a great deal less voluntary." *Id.* at 62.

<sup>51</sup> Cf. SPHERES OF JUSTICE, *supra* note 6, at 117 (citing *Green v. County Sch. Bd. of New Kent County*, 391 U.S. 430 (1968), as traditional neighborhood school's opinion but noting that neighborhood at issue was racially integrated).

<sup>52</sup> 433 U.S. 267 (1977).

<sup>53</sup> See *Milliken v. Bradley*, 433 U.S. 267, 287 (1977). The Court stated that:

Children who have been thus educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct and attitudes reflecting cultural isolation. They are likely to acquire speech habits, for example, which vary

fundamentally related to the quality of education. For neighborhood schools not to be equated with abandoning school desegregation, strong local schools must promote "an American vision in which shared purposes, common efforts, and interracial partnerships remain the goal."<sup>54</sup>

*Milliken II* quality of education programs are likely to continue to be looked upon favorably by the Court because the aim of improving the quality of education at a local school reinforces, rather than overrides, the understanding that public schools are neighborhood schools. Justice O'Connor, who has determined the outcome in many recent cases involving race,<sup>55</sup> noted in her *Jenkins* concurrence that "the district court may be able to justify some remedies without reliance on these goals."<sup>56</sup> She did not suggest any particular rationale, but she may have had a *Milliken II* "quality of education" argument in mind. In other words, the Court might uphold an expensive and lengthy desegregation order that was aimed solely at improving the quality of education at local schools.

### C. Desegregating Urban School Systems

The Supreme Court's understanding that public schools are by definition suburban neighborhood schools is a mistake. *Milliken I* ensures that many suburban schools are not under desegregation orders. A suburban school board is rarely ordered to integrate its single neighborhood school.<sup>57</sup> City school districts are the districts that are operating under school desegregation orders.

from the environment in which they must ultimately function and compete, if they are to enter and be apart of that community.

*Id.*; see also *Keyes v. Denver Sch. Dist.*, 413 U.S. 189, 238 (1973) (Powell, J., concurring in part & dissenting in part). See generally WILKINSON, *supra* note 10, at 164.

<sup>54</sup> See WILKINSON, *supra* note 10, at 998; see also SPHERES OF JUSTICE, *supra* note 6, at 225. Walzer reconciles his effort to promote justice with the priority of local communities by insisting that all local schools be "strong." *Id.* "When every neighborhood has its own strong school, then justice has been done." *Id.* In words that mirror a sentence quoted by the *Jenkins* Court, he writes: "the goal of an integrated society was never a reason for going beyond the remedies required to end wilful segregation." *Id.* at 226. If everyone has a good, albeit racially isolated, education, then "children are equals within a complex set of distributive arrangements." *Id.* at 225. Furthermore, Walzer concedes that "neighborhood schools keep black and white children apart" and acknowledges the "harsh criticism" this result has caused. *Id.* Nevertheless, he maintains that local schools are "the preferred principle." *Id.* This claim is weakened by his insistence that neighborhoods be "open." *Id.*

<sup>55</sup> See, e.g., *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097, 2097 (1995); *Shaw v. Reno*, 113 S. Ct. 2816, 2816 (1993).

<sup>56</sup> See *Jenkins v. Missouri*, 115 S. Ct. 2038, 2061 (1995).

<sup>57</sup> See WILKINSON, *supra* note 10, at 222 (noting that *Milliken I* Court "saved" suburbs).

The urban rather than suburban location of current school desegregation is illustrated by the school districts involved in the Court's most recent desegregation cases. In *Board of Educ. v. Dowell*,<sup>58</sup> the Oklahoma City Board of Education operated sixty-four elementary schools<sup>59</sup> to educate over 18,000 students.<sup>60</sup> In *Freeman*, the school board, which was operating under a desegregation order, was serving some 73,000 students from kindergarten through high school.<sup>61</sup> Similarly, the *Jenkins* Kansas City school board was responsible for 37,151 students. In 1990, school districts in many cities throughout the country were under federal court orders to desegregate.<sup>62</sup> Urban school boards with immense responsibilities, hundreds of thousands of students and numerous schools are the boards that are forced to desegregate their schools.

The Court's assumption that public schools mean suburban neighborhood schools when the Court is in fact deciding issues involving urban school systems leads to two problems. First, the Court over-emphasizes local accountability and citizen participation. It is difficult to argue for granting more authority to the urban school board based on values such as local participation and accountability. More often, advocates of accountability and local participation seek to remove power from the centralized city school boards.<sup>63</sup> Although the urban school boards are probably more accountable than district courts, the Court is not a champion of accountability and local participation when it increases the power of an urban school board.

Not only has ignoring school desegregation's location led to an overemphasis on citizen participation and accountability, the same oversight caused the *Jenkins* Court to be unduly skeptical of attempts to attract students to the urban school district. Urban public schools, like the cities themselves, strive to attract students from outside the city limits. Just as the arts and industry of ur-

<sup>58</sup> 498 U.S. 237 (1991).

<sup>59</sup> *Id.* at 242.

<sup>60</sup> *Dowell v. Board of Educ.*, 890 F.2d 1483, 1511 (10th Cir. 1989), *rev'd*, 498 U.S. 237 (1991).

<sup>61</sup> See *Freeman v. Pitts*, 503 U.S. 467, 471 (1992).

<sup>62</sup> See James S. Liebman, *Desegregating Politics: "All-Out" School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1469-70 (1990).

<sup>63</sup> See generally Joseph A. Kirby, *For New York's New Schools Chief, Jobs May End Before It Really Starts, Giuliani Bids to Wrestle Control of Beleaguered System*, CHI. TRIB., Nov. 13, 1995, at 3 (stating that New York City Mayor, Rudolph Giuliani, is using same tactics as Chicago's Mayor Daly to gain control over city schools).

ban communities attract people from all over the country and even the world, the urban city aspires to attract people to its public schools. Unlike the exclusive suburban neighborhood school ideal, the urban public school vision values attracting people to the school system. Thus, the "attractiveness" rationale offered by the Kansas City board in *Jenkins* fits comfortably with the image of the urban public school.

Finally, it is worth noting the beginnings of an urban educational aesthetic on the Court. In *United States v. Lopez*,<sup>64</sup> the recent case invalidating the Gun Free School Zones Act as beyond Congress's Commerce Clause power, Justice Kennedy spoke of accountability and participation in public schools. Dissenting, Justice Bryer pointed out that there are "guns in the hands of six percent of inner-city high school students and gun-related violence throughout the city's schools."<sup>65</sup> Although this emphasizes the negative part of the urban story, Breyer's opinion is a step in the right direction because it acknowledges the urban context. The Court must next develop a sense of the positive urban ideal for use in school desegregation cases.

#### CONCLUSION

*Missouri v. Jenkins* represents yet another school desegregation decision that sees public schools as suburban neighborhood schools. Desegregation orders, however, rarely involve suburban neighborhood schools. Rather, the school boards operating under desegregation orders are almost invariably urban. The Court needs a vision of public schools that accounts for desegregation's urban setting.

<sup>64</sup> 115 S. Ct. 1624, 1657 (1995).

<sup>65</sup> *Lopez*, 115 S. Ct. at 1661 (Bryer, J., dissenting).