ESSAYS

WHAT WOULD WARREN SAY NOW—CAN *BROWN* AND *BAKER* BE RECONCILED?

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Fifty years ago, "Impeach Earl Warren!" billboards lined roadsides throughout the United States.[1] That strong sentiment was prompted primarily by the landmark decision of the Supreme Court in May 1954 in *Brown v. Board of Education*,[2] the case with which Warren's name and reputation have become inextricably intertwined. Then new to the Court,[3] Chief Justice Earl Warren had skillfully persuaded a unanimous tribunal to hold that compulsory segregation by race of primary school children was "inherently" a denial of their "equal protection" under the law and, therefore, unconstitutional.[4] The reasoning of the Court was based less on elegant analyses of precedents and more on sociological data and instinctive feelings of "fairness," namely, that

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1. Louis H. Pollak, *The Legacy of Earl Warren*, 88 HARV. L. REV. 8, 9 (1974).

2. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

3. *See generally* Mark Tushnet with Katya Lezin, *What Really Happened in* Brown v. Board of Education, 91 COLUM. L. REV. 1867 (1991). Chief Justice Earl Warren was appointed in 1953, following the unexpected death of Chief Justice Fred Vinson, who had presided over the first oral argument in *Brown* and then ordered a reargument when it became clear that a unanimous decision could not be reached. The reargument was to focus on such difficult issues as the intent of the drafters of the Fourteenth Amendment to "reach" public school enrollment and possible remedies in the event the Court ruled in favor of the petitioners. Newly elected President Dwight D. Eisenhower appointed Warren to the vacancy pursuant to their agreement prior to the 1952 election, in which Warren withdrew his bid for the Republican nomination for President in return for Eisenhower's pledge to appoint Warren to the first vacancy on the U.S. Supreme Court for which Eisenhower could nominate a candidate. Unexpectedly, it was the seat of the Chief Justice, and Eisenhower was said to have confided to friends some years later that his appointment of Warren was "the biggest damn fool thing I ever did." ED GREY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 335 (1997).

4. *Brown*, 347 U.S. at 495.

concentrating black children, of often undereducated parents, in schools largely populated by similarly situated classmates, deprived those children of an equal—a fair—chance to succeed.[5] "Fairness" was indeed the touchstone of Earl Warren's jurisprudence.[6]

It took the Court another year and a second decision, *Brown II*,[7] to announce procedures for the implementation of its judgment.[8] It used the phrase "deliberate speed"[9] to underscore a view that an immediate wholesale change in applicable enrollment procedures was not envisaged, but that a constant concerted forward movement was anticipated.

More than a half century later, what has *Brown* wrought? Statistics lay bare the brutal facts that a very large proportion of minority students continue to attend schools that are de facto segregated, even if the schools are neither compelled nor allowed to admit students of only one race. At the public primary school level, racial segregation may be as prevalent today as it was when the Warren Court ruled.[10] Voluntary and court-mandated plans, from magnet schools to busing to area-wide assigned enrollments, have been tried and often found ineffective or impractical.[11] And courts, from the Supreme Court down, have retreated from "affirmative action" to a "color-blind" approach that defers to the unwillingness of most white parents to send their children to schools in which minority-race children begin to approach a majority of the school population.[12] Thus, *Brown* and its companion case cannot be celebrated as successful transformative

5. *Id.* at 493–94.

6. *See* William J. Brennan, Jr., *Chief Justice Warren*, 88 HARV. L. REV. 1, 3 (1974).

7. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294 (1955).

8. *Id.* S*ee generally* Sweatt v. Painter, 339 U.S. 629 (1950) (holding unanimously that a state-run law school could not deny admission to a black applicant solely based on his race). This opinion carefully excluded from its holding the practices of primary and secondary public schools.

9. *Brown*, 349 U.S. at 301.

10. *See* Tim Lockette, *The New Racial Segregation at Public Schools*, S. SHIFT (Mar. 3, 2012), http://www.thesouthernshift.com/news/2010/02/new-racial-segregation-public-schools (noting that, today, fewer than 30 percent of black students in the South are attending majority white schools—roughly the same percentage as in the late 1960s).

11. *See* Michael Dobbs, *Schools and Lives Are Still Separate*, WASH. POST, May 17, 2004, at A1 (reporting that on the fiftieth anniversary of the *Brown* decision, white and black children still lead separate lives). In a Summerton, South Carolina, public high school, the only non-African Americans are six whites and two Hispanics out of an enrollment of 480. *Id.* at A6. For a more comprehensive report, see Charles T. Clotfelder et al., *Segregation and Resegregation in North Carolina's Public School Classrooms*, 81 N.C. L. REV. 1463 (2003).

12. *See generally* Destiny Peery, *The Colorblind Ideal in a Race-Conscious Reality: The Case for a New Legal Ideal for Race Relations*, 6 NW. J.L. & SOC. POL'Y 473 (2011).

decisions with regard to public primary education—what the initial case was all about.[13]

Recognizing the continued racial division in our public school population, however, does not diminish the enormous impact *Brown* has had on the larger American society, particularly its role in bringing about an end to state-sponsored racial discrimination. In contexts other than primary and secondary public education, the rationale of *Brown* has been a key building block of our ever-hoped-for "more perfect Union." Clearly, from playgrounds to boardrooms, America today is far less segregated by color than it was sixty years ago.

I. *BAKER V. CARR*

Paradoxically, although Earl Warren is remembered best for *Brown v. Board of Education*, the decision's limited impact on public school education may have been abetted by another pivotal decision of his tenure. After Warren retired from the Court, he called it "the most important" decision announced during his service as Chief Justice.[14] That decision, *Baker v. Carr*,[15] held that residents of urban areas in a state, deprived by state law of appropriately proportional representation by their state legislature, stated a proper federal claim to be more equitably represented.[16] *Baker* was soon followed by *Reynolds v. Sims,*[17] expressly announcing the "one person, one vote" formula as the only standard for constitutionally appropriate voting districts in state and local governments.[18] As the *Brown v. Board* implementation decree was issued in the year following the initial

13. *Brown*, 349 U.S. at 301 (ordering desegregation to proceed with all "deliberate speed"). In 1964, the Court remarked that there had been "entirely too much deliberation and not enough speed." Griffin v. County School Board, 377 U.S. 218, 229 (1964). In 1971, it affirmed the Court's power to formulate remedies to "correct past constitutional violations." Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 25 (1971). Thereafter, the Court's membership changed, and the judiciary's role in achieving racial integration of public schools declined sharply. The Voting Rights Act of 1965 created procedures for federal government review of the composition of school boards and the boundaries of their jurisdiction. 42 U.S.C. § 1983 (2006). But its ability to overcome existing patterns of housing, which continue as the principal determinant of elementary school enrollment, is limited.

14. BERNARD SCHWARTZ, SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT 410 (1983).

15. Baker v. Carr, 369 U.S. 186 (1962).

16. *Id.*

17. Reynolds v. Sims, 377 U.S. 533 (1964).

18. *Id.* at 558.

judgment that announced its "revolutionary" principle, the "one person, one vote" apportionment of representation at every level of government other than the U.S. Senate (whose two-senators-per-state principle is in the Constitution itself)[19] was not published until two years after the concept was first articulated.[20]

The *Baker v. Carr* "one person, one vote" principle has enhanced the voting power of the voting residents of defined political areas called voting districts.[21] To the extent that residents live in a lawfully drawn district, their interests can be and are heeded. Those living in suburban districts can—and do—boost "suburban" interests and values in the political life of the country. Suburbanites now outnumber urban residents and, even more substantially, clearly outnumber the rural population.[22] The suburban ideal of private homes on peaceful cul-de-sacs is a standard image of success in America. Although many suburbanites derive their livelihood, shop, and are entertained in nearby urban centers, the problems of those cities—particularly with respect to education—are what the folks on the other side of the city line wish to leave behind. The values of suburban communities not only conform to, they are reinforced by, political boundaries that emphasize separation for social purposes. They need not, and cannot be required to, share the burden (if a burden is what it is viewed to be) of multiracial education.

Baker was limited to assuring each qualified voter who cast a ballot that his vote was of no less importance than any other, without an examination of the race or economic status of the voter.[23] But an unforeseen consequence of the respect given to the boundaries of political districts for the purpose of assuring equality of voting rights was the sanctification it gave to barriers behind which suburbanites could insulate themselves (and their public schools) from the groups intended to be benefitted by the ruling in *Brown v. Board*. It provides constitutional cover to the avoidance of integration of the suburbs into an electorate and tax-base required and able to deal with the problems of our multiracial society. It blesses a balkanization of voting districts, so

19. U.S. CONST. art. I, § 3, cl. 1.

20. The "one person, one vote" principle was first articulated in 1962 in *Baker*, 369 U.S. 186, but was not expressed in that popular phrase until 1964 in *Reynolds*, 377 U.S. at 558.

21. *See, e.g.*, *Reynolds*, 377 U.S. at 562–64.

22. THEODORE CAPLOW, LOUIS HICKS & BEN J. WATTENBURG, THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900–2000, at 12 (2001).

23. *See, e.g.*, *Reynolds*, 377 U.S. at 557.

long as each vote cast within a district has weight equal to all other votes cast within that district. Moreover, to the extent that suburbanites have the interest, time, job requirements, and incentives to go to the polls and cast their votes, they are the citizens most likely to vote on Election Day. Thus, it is not surprising that the causes they support become the laws of the commonwealth. Cities, with more transient populations, including many residents without the education or employment situations in which voting can be pursued, are limited by boundaries drawn in the past or created currently by state legislatures, which are now often controlled by the suburbanites. As *Baker v. Carr* dealt only with the equality of voting within state-created districts, its requirements of equal treatment cannot overcome the inherently unequal racial complexion of the nation's urban public schools.

Clearly both decisions were right. Are they, nevertheless, incompatible? I argue that they are not. Both are examples of Court initiatives taken when other institutions did not act. Although the later decision in *Baker* did not reinforce the earlier *Brown* ruling—despite their common roots in concepts of equality and fairness that only a court seemed able to impose—they each reflect the limits of court decisions on the subject matter before the tribunal. Both decisions reflect a willingness of an active court to set right what its members saw as basically unfair treatment of citizens without a real remedy in the political branches of our government.

But it would be incorrect to regard them as examples of mere assertions of judicial power by a Supreme Court from which there is no appeal short of constitutional amendment. Principles of law exist to overcome the dilemmas of "blacks go only there" faced by African American school children in Topeka or "no way to win" confronting urban residents in Tennessee. Justice Frankfurter's dissenting valedictory opinion in *Baker* (the last he wrote before he was forced to retire after a stroke) argued that only a legislature had the democratic and moral right to fashion remedial laws.[24] But the Court's majority saw that idea as a principle unfairly disfranchising urban residents in a legislature that could not, and would not, be corrected if left to its own devices.[25] Judicial intervention was the sole practical remedy

24. *Baker*, 369 U.S. at 270 (Frankfurter, J., dissenting).

25. *See id.* at 236 (stating that a federal court has jurisdiction over claims involving a deprivation of a federal constitutional right).

remaining. In its expansive view of judicial rights and abilities, *Baker* was very close to *Brown*. In *Brown*, too, the Court considered the powerless in a political arena and intervened to redress the imbalance.[26] Both decisions were examples of judicial activism at its best.

Where is that spirit today? A sharply divided Supreme Court discussed these ideas of fairness at length in *Vieth v. Jubelire*.[27] The present Court majority is skeptical of its right and ability to undertake the "social engineer[ing]" the Warren Court found necessary and proper.[28]

II. WARREN'S ROLE IN *BROWN* . . .

To better understand the bases of the Warren Court's outlook and, in particular, the Chief Justice's views in the two key cases being discussed, it may be useful to understand his background. Earl Warren was born in Los Angeles, the son of a Norwegian immigrant who worked for the Southern Pacific Railroad.[29] Warren put himself through college, receiving his law degree from the University of California at Berkeley in 1914.[30] After twelve years as a district attorney, he turned to politics and was the only California governor elected to serve three successive terms.[31] During his second campaign for governor in 1946, Warren was nominated by both major parties.[32] In 1948, Warren ran for Vice President of the United States.[33] In part because Tom Dewey ignored his running mate, the Dewey-Warren ticket narrowly lost to Harry Truman and Alben Barkley.[34] Warren aspired to the Presidency four years later, but recognizing the greater popularity of Dwight Eisenhower, he entered the "deal"

26. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494–95 (1954) (concluding that the legislative doctrine of "separate but equal" has no place in public education, in part because such segregation "generates a feeling of inferiority as to [minority students'] status in the community that may affect their hearts and minds in a way unlikely ever to be undone").

27. *See* Vieth v. Jubelirer, 541 U.S. 267, 290–91 (2004) (5-4 decision). The Court affirmed the dismissal of claims in that politically (as distinguished from racially) motivated redistricting plans are "non-justiciable." *Id.* at 305.

28. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., 551 U.S. 701, 766 n.14 (2007) (Thomas, J., concurring).

29. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 9, 11 (1982).

30. *Id.* at 9.

31. *Id.* at 31, 101, 107.

32. *Id.* at 131.

33. *Id.* at 132.

34. *Id.* at 134–35.

that placed him on the Supreme Court.[35] At the Republican Convention, he was persuaded to back Eisenhower with the substantial California delegation (over the other principal contender, Bob Taft) in exchange for Eisenhower's promise to name Warren to the first seat on the Supreme Court that became available in an Eisenhower Administration.[36]

That Warren would have an interest in a Supreme Court seat may have been a surprise to many. Warren had risen in California's politics primarily through his role as Attorney General of the State, in which he had been instrumental in the decisions to intern thousands of Japanese-Americans living in California at the time of the Pearl Harbor attack.[37] He was extremely personable, with superb political skills that included an amazing capacity to recall the names of people he had met.[38] He exuded a sense of fairness in seeking solutions for problems and possessed a unique ability to articulate difficult concepts in simple terms that all could readily understand.[39]

All of these skills were necessary to craft a unanimous decision in *Brown*. State-imposed segregation of public schools was a fact of life in the Old South during the 1950s.[40] De facto segregation was widely prevalent in the remainder of the country.[41] But a variety of forces sought change. World War II had been fought and won against governments that had espoused and demonstrated the evils of racist ideology. President Harry Truman, as Commander-in-Chief, ordered an end to segregation in the U.S.

35. *Id.* at 138.

36. *Id.* at 138–40, 144.

37. Notwithstanding efforts by some of Warren's greatest admirers, such as former Supreme Court Justice and Secretary of Labor Arthur Goldberg, to claim that Warren eventually regarded his role in the internment program his "greatest mistake," Warren never publicly made such an admission and only stated he regretted his actions when he wrote his memoirs. *See id.* at 75–76. Warren hired me as his law clerk in 1961 (while I was then an active duty judge advocate in the U.S. Air Force) to assist him in preparing a talk on "The Bill of Rights and the Military" that he had agreed to deliver at the N.Y.U. Law School in early 1962. In that speech, he defended his actions as appropriate based on the advice and information he was provided by Washington, DC; the horror of the sneak attack on Pearl Harbor; the relative coherence and isolation of much of the Japanese-American community in California; and the absence of a "margin of safety" to enable the government to deal with an adverse decision. *See* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192–93 (1962).

38. *See* WHITE, *supra* note 29, at 188.

39. *See id.* at 217.

40. *See, e.g.*, Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 486 n.1 (1954).

41. *See, e.g.*, *Grade School Segregation: The Latest Attack on Racial Discrimination*, 61 YALE L.J. 730, 737 nn.32 & 34, 740 n.46 (1952).

Armed Forces.[42] Similarly, the courts began to intervene to curb state-sponsored or supported race-based disadvantages, including the invalidation of court-enforceable restrictive covenants on the sale of private residential property[43] and exclusions from state-financed institutions of higher learning.[44] In 1952, the Supreme Court heard oral arguments (for an almost unprecedented three hours) in *Brown v. Board of Education* and the three cases challenging the racial segregation of primary schools in Kansas and other states.[45] The companion case, *Bolling v. Sharpe*,[46] focused on the same issues in the District of Columbia, which is governed by Congress (subject to some limited "home rule"), but is not a state in our federal system. Thus, the Fourteenth Amendment's requirement of equal protection did not literally extend to residents of the District of Columbia.

The Supreme Court Justices recognized that the issue was politically explosive and that only a unanimous Court could effectively deal with it. When the cases were first argued, Chief Justice Vinson was unable to forge that consensus and the Court decided to request a reargument the following year.[47] But before that argument was heard, Vinson had a fatal heart attack.[48] (Justice Felix Frankfurter was widely reported to have commented at the funeral that Vinson's death demonstrated that "there is a God.")[49] President Eisenhower then delivered on his promise and appointed Warren as the Chief Justice. Quickly confirmed, Warren presided at the December 1953 reargument and in May 1954 announced the Court's unanimous decision.[50] It was a feat achieved through all of the political skills for which he is remembered. The short and plainly worded opinion has been criticized for its reliance on non-legal evidence, its short shrift

42. Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 28, 1948).

43. *See* Shelley v. Kraemer, 334 U.S. 1 (1948).

44. *See* Sweatt v. Painter, 339 U.S. 629, 629 (1950).

45. Oral arguments for *Brown v. Board of Education*, *Briggs v. Elliot*, *Davis v. County School Board of Prince Edward County*, *Bolling v. Sharpe*, and *Gebhart v. Belton* were held over a three day period in December 1952. These cases, except for *Bolling v. Sharpe*, were later consolidated into *Brown v. Board of Education*. *See* BROWN V. BOARD: THE LANDMARK ORAL ARGUMENT BEFORE THE SUPREME COURT 11–143 (Leon Friedman ed., 2004) (providing the transcript for the 1952 oral arguments in *Brown*, *Briggs*, *Davis*, *Bolling*, and *Gebhart*).

46. Bolling v. Sharpe, 347 U.S. 497 (1954).

47. MICHAL R. BELKNAP, THE SUPREME COURT UNDER EARL WARREN, 1953–1969, at 28–30 (2005).

48. *Id.* at 30.

49. *See* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II 199 (5th ed. 2008).

50. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

given to the historic federal structure of our government in which elementary school education was always regarded as the quintessentially locally controlled agency, and the reversal of the Court's post-New Deal tendency to defer to the policy choices of legislatures on complex economic and social issues.[51] But it also had an undeniable majesty of justice, equality, and fairness.

Unfortunately, the President did nothing to applaud, much less support, the Court's decision. Congressmen from the South in particular and state governments throughout the former Confederacy rushed to devise all manner of schemes to prevent implementation of the Court's mandate. Not until the violence in Little Rock in 1958 did the federal government take visible action to support the Court's judgment in the context of public school enrollments.[52] Many lower courts also found numerous ways to delay and deter the progress of plans to implement the holding of *Brown*.[53]

In the context of public schooling, the promises of *Brown* still seem distant today. On the occasion of the decision's golden anniversary in 2004, one commentator reported:

> In Chicago . . . 45 percent of black men ages 20 to 24 are out of school—most without a diploma of any kind—and out of work. Even among high school graduates . . . 'a huge percentage are functionally illiterate, meaning they can't read the front page of the local newspaper and pass an exam

51. *See* BELKNAP, *supra* note 47, at 35–36 (discussing criticisms that the *Brown* decision rested on a shaky legal foundation); *see also* WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID 15–16 (Jack M. Balkin ed., 2001) (arguing that the rejection of segregation laws symbolized that democracy meant more than majority rule and that *Brown* ushered in the idea that the basic fundamental rights for minorities were deserving of protections even in a post-New Deal era of deferring to the judgment of state legislatures).

52. President Eisenhower issued Executive Order No. 10730, 22 Fed. Reg. 7628 (Sept. 24, 1957) (authorizing and directing the Secretary of Defense "to take all appropriate steps to enforce any orders of the United States District Court for the Eastern District of Arkansas for the removal of obstruction of justice in the State of Arkansas with respect to matters relating to enrollment and attendance at public schools in the Little Rock School District, Little Rock, Arkansas").

53. *See, e.g.*, Goss v. Bd. of Educ., 186 F. Supp. 559, 568–70 (E.D. Tenn. 1960) (approving a school board plan that provided for a-grade-a-year desegregation beginning with the first grade in 1960 because of the threats and disturbances associated with integration in neighboring communities); Aaron v. Cooper, 163 F. Supp 13, 21 (E.D. Ark. 1958) (postponing desegregation in Little Rock schools because of the "deep seated popular opposition in Little Rock to the principle of integration, which, as is known, runs counter to the pattern of southern life which has existed for over three hundred years").

> about it.' . . .
> . . . [O]nly 45 percent of black people 18 and older are gainfully employed.[54]

On the other hand, the result of the *Brown* decision cannot be so narrowly viewed. The Court's ruling "energize[d] the fight for equality in the workplace, the voting booth, in neighborhoods, parks, movie theaters and other places of public accommodation."[55]

Properly seen, *Brown* was a seminal decision, all the more so because it was announced by a unanimous Court.[56] Warren's role was crucial in obtaining the result. It would have been difficult for any Justice to have done more. The Court's decisions are not self-enforcing. As President Andrew Jackson was supposed to have said of the then-Chief Justice, "John Marshall has made his decision, now let him enforce it,"[57] meaning, of course, the President can subvert a Court decision by ignoring it or failing to provide the support its implementation requires. No less than Marshall, Warren had to depend on the other branches of government to turn a court mandate into a public action. Not until the Johnson administration, a decade later, was that support provided.[58]

From the unanimous judgment of the Warren Court and the engaged President and Congress of the Great Society era, the Court came to *Grutter v. Bollinger*,[59] in which, by a 5-4 majority, it upheld the University of Michigan's "affirmative action" program

54. Courtland Milloy, *A Challenging Analysis of Black America*, WASH. POST, Mar. 21, 2004, at C1.

55. Colbert I. King, Editorial, *Slow Progress, 50 Years After Brown*, WASH. POST, Feb. 28, 2004, at A21.

56. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

57. LEONARD BAKER, JOHN MARSHALL: A LIFE IN LAW 475 (1974).

58. The Eisenhower administration did intervene to prevent State inference with the Little Rock School Board's effort to integrate a public high school and enforce the Supreme Court's ringing opinion in *Cooper v. Aaron*, 358 U.S. 1 (1958). Furthermore, the Kennedy Administration assisted James Meredith's effort to gain access to the University of Mississippi Law School. Neither presidential action initiated comprehensive plans for dealing with the resistance to integration of the primary and secondary public schools. And, once President Richard Nixon was able to appoint four Justices, the Court quickly turned to curb innovative desegregation efforts. *Milliken v. Bradley*, 418 U.S. 717 (1974), marked the change by invalidating a cross-jurisdictional plan for Detroit and its suburbs. As Justice Thurgood Marshall, now in the minority, lamented, "Our nation, I fear, will be ill served by the Court's refusal to remedy separate and unequal education, for unless our children learn together, there is little hope that our people will ever learn to live together." *Id.* at 783.

59. *See* Grutter v. Bollinger, 539 U.S. 306 (2003).

to promote diversity in the classroom of a state-financed college undergraduate institution.[60] That decision sanctioned the admission of minority students who were less qualified than majority students according to certain ostensibly neutral standards to a prestigious college as a rational and permitted "affirmative action."[61] But it did not deal with the vast majority of younger students who remained in poor primary and secondary schools with nowhere else to go. *Brown* held there is some discrimination that all public institutions of learning may not adopt;[62] *Grutter* held that there was some "benign" discrimination that at least some institutions of higher learning may use.[63] Neither decision commands a particular program to overcome what the Warren Court identified as the "inherently inferior" schooling for disadvantaged children of our public primary schools. That conclusion recognizes the inescapable fact that the judgments of courts, by themselves, are incapable of bridging "the gap between ideals and reality."[64]

III. . . . AND HIS ROLE IN *BAKER*

In *Baker v. Carr*, the Court was faced with a claim of city residents that the Constitution and laws of the State of Tennessee unfairly denied them appropriate representation in the state legislature.[65] Rural interests were disproportionately favored, and no reapportionment of seats had occurred for sixty years.[66] Some residents of Nashville finally turned to the federal courts to complain.

Americans are known for their willingness to seek redress in the courts, but American courts also have fashioned important limitations on their own power to act. The district court in which

60. *Id.* at 310.

61. *Id.* at 340–41 (holding that race may be considered as an admission factor so as to assemble a diverse student body so long as the race-conscious admission program "does not unduly harm members of any racial group").

62. Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 494–95 (1954) (holding that the separation of students with similar qualifications solely because of their race is inherently discriminatory and violates the Equal Protection Clause of the Fourteenth Amendment).

63. *Grutter*, 539 U.S. at 340–43 (stating that race may be considered as one factor among many so as to obtain the educational benefits that come from a diverse student body).

64. Goodwin Liu, *From Brown to Grutter and Beyond: Pursuing the Quest for Equal Educational Opportunity*, 37 BOALT HALL TRANSCRIPT 26, 27–29 (Spring/Summer 2004).

65. Baker v. Carr, 369 U.S. 186, 186 (1962).

66. *Id.* at 191.

Mr. Baker and his colleagues filed suit dismissed their case because it raised what the court found was a non-justiciable "political question."[67] The Supreme Court responded in 1962 by noting "[o]f course the mere fact that the suit seeks protection of a political right does not mean it presents a political question."[68] A majority of six justices supported that view and ordered the lower court to hear the suit on its merits. Only Justices Frankfurter and John Harlan dissented. (Justice Charles Whittaker had resigned by then and did not take part in the decision.)

Although a unanimous Court could have been as important in the case as it had been in *Brown*, that goal proved impossible. Chief Justice Warren tried to achieve the same show of universal agreement, but ultimately decided that the more legalistic approach of Justice William Brennan was needed to articulate views sufficient to counteract the lengthy and passionate dissent Justice Frankfurter devoted most of the 1961 term to writing.[69]

Baker, itself, only opened the courthouse door; it did not decide the merits of the case the plaintiffs had brought. But two years later, Warren was able to write in *Reynolds v. Sims* that "[l]egislators represent people, not trees or acres."[70] Neither farms nor cities have a right to representation; only citizens have such rights. Therefore, state legislatures—and ultimately all branches of sub-federal government, including city councils or school boards—could avoid claims of a denial of "equal protection" under the law only if they scrupulously adhered to a "one person, one vote" principle. He regarded this as only "fair," and Warren truly believed that fairness was a bedrock principle of any democratic government, even if the Constitution of the United States, with its two-senators-per-state provision, undeniably disadvantaged the residents of his home state of California or other populous states. He may well be "turning in his grave" at decisions, such as *Vieth v. Jubelirer,* based on the view that "'[f]airness' does not seem to us a judicially manageable standard."[71]

67. *Id.* at 209.
68. *Id.*
69. *See id.* at 266–330.
70. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
71. Vieth v. Jubeliere, 541 U.S. 267, 291 (2004).

IV. WHAT WOULD WARREN SAY NOW?

Before and after his appointment to the Court, Warren was an optimist. He firmly believed in the ability of the American people to right wrongs, achieve a just society, and provide opportunity to all. He had risen from modest family beginnings to the heights of the nation's judiciary. Even if primary and secondary education for minority groups had made slow progress in the sixty plus years since *Brown* was announced, he would try to convince (not coerce) those living in the suburbs to voluntarily set aside their court-guaranteed right to separate themselves from the problems of their nearby urban neighbors. He regarded "one person, one vote" as no less important than equal educational opportunity. He certainly would speak out against the views of some of his Republican Party colleagues, both on the Supreme Court and elsewhere, who claim incapacity to define "fairness." To Warren, law made no sense if it was not fair. He would disassociate himself from those who claimed that efforts to assist the previously disadvantaged demean those who receive such aid.

It is interesting to speculate whether Warren would have joined the majority in the Supreme Court's 2003 decision in *Grutter v. Bollinger*, in which, by a 5-4 majority, the more current Court upheld the University of Michigan's "affirmative action" program to promote "diversity" in the classroom of a state-financed college undergraduate institution.[72] *Brown* held there are some discriminations that all public institutions of learning may not adopt;[73] *Grutter* held that there were some "benign" discriminations that at least some institutions of higher learning may use.[74] In my view, Warren would have agreed with the majority.

On the other hand, he would probably have joined the four dissenters in the more recent *Vieth* case, who would have reached the merits of a constitutional challenge to political (as

72. *See* Grutter v. Bollinger, 539 U.S. 306, 307 (2003) ("The Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body is not prohibited by the Equal Protection Clause, Title VI, or § 1981.").

73. *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954) (holding that discrimination based on race in public schools is not allowed).

74. *See Grutter*, 539 U.S. at 327 ("Not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.").

opposed to racial) gerrymandering.[75] Justice Anthony Kennedy, who cast the deciding vote, considered such claims justiciable in principle, but could discern no current standard by which to adjudicate them, and thus reached the same result as the conservative four-Justice plurality who deemed such claims non-justiciable.[76] The opinion of Justice Antonin Scalia states that the "one-person, one-vote" cases have no bearing upon the issues raised by gerrymandering either in principle or practicality.[77] But it is interesting to note that even while his opinion denigrates the concept of "fairness" as a judicially usable standard, he also stated:

> [The] purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered. Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it. . . . For these reasons, to the extent that our racial gerrymandering cases represent a model of discernable and manageable standards, they provide no comfort here.[78]

Justice Kennedy agreed with the plurality view that the complaint under review should be dismissed because he found "no agreed upon substantive principles of fairness in districting, [so that] we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights."[79]

Thus, even the present Court appears to have accepted the notions that racially segregated public schools—so structured due to some action by governments—are unlawful, and the action of governmental authorities to impose or maintain that structure can be judicially reviewed and invalidated. On the other hand, that view does not compel remedial actions by the courts to create new

75. *Vieth*, 541 U.S. at 317 (Stevens, J., dissenting).
76. *Id.* at 308 (Kennedy, J., concurring).
77. *Id.* at 290.
78. *Id.* at 286.
79. *Id.* at 307–08 (Kennedy, J., concurring).

boundaries of school districts nor to impose plans—such as mandatory busing of children to non-neighborhood schools—to "compel" integration.[80]

Neither does *Baker* require a particular program to overcome misshaped or rigidly inflexible voting districts that then create what the Warren Court identified as the venues of "inherently inferior"[81] schooling for disadvantaged children in public primary schools. That conclusion recognizes the inescapable fact that the judgments of courts, by themselves, are incapable of bridging the gap between ideals and reality.

As one of Earl Warren's law clerks—in the very term in which *Baker v. Carr* was decided—I feel confident in saying that The Chief would not have changed a word in the Court's opinion in either case. But Warren, no doubt, would argue that the American way of life in the twenty-first century cannot be limited to families living in homogeneous neighborhoods in terms of income, interests, and race. If there is a single defining problem in the city that large numbers of suburban residents have sought to avoid, it is the quality and racial composition of the city's public primary and secondary schools.

Efforts by courts or "metropolitan" governments, as in St. Louis and Toronto, to build a more inclusive model for school enrollment that straddles traditional political boundaries demonstrate ways to resolve de facto school segregation. Federal initiatives aimed at improving education for all children, such as the No Child Left Behind Act,[82] were adopted to help urban public schools once classified as "failing" to attract students from all socioeconomic and racial groups.[83] Whether that effort was a success is, however, questionable. The gentrification of American cities that has followed recent movements of younger professionals into urban areas to overcome the time lost and cost incurred in commuting from home to work may be an even greater factor in reducing the separation of public school children. The large number of particularly young immigrants has also had an

80. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No 1, 551 U.S. 701 (2007) (holding that improving diversity in higher education could not justify a school district's use of racial classifications in student assignment plans).

81. 347 U.S. 483, 494–95.

82. 20 U.S.C. § 6301 (2006).

83. *See id.* §§ 3–4 (stating the purpose of the No Child Left Behind Act is to close the achievement gap, hold schools accountable for improving academic achievement, and turn around low-performing schools that have "failed").

"integrating" effect.

As Warren pointed out in his 1972 book, *A Republic, If You Can Keep It*, the disparate branches of government must work as a single organism.[84] Within their constitutionally prescribed limits, the branches of government must cooperate if the nation is to succeed in securing for all of its citizens the visions and promises in our founding Declaration of Independence, which asserts that "all men are created equal and endowed by their Creator with certain inalienable rights," including, above all, due process and equal protection of the law.[85] That cooperation cannot always be compelled, but it can be—as Warren felt and opined—nurtured and upheld.[86]

So, to return to the opening question—can *Brown* and *Baker* be reconciled? Surely they can. Each is evidence of Warren's consistent commitment to "fairness" and the view that the Court can and should use its remarkable powers to try to assure that fundamental concept when the political branches of our democratic government fail to do so. That is Chief Justice Warren's enduring legacy.

84. *See* EARL WARREN, A REPUBLIC, IF YOU CAN KEEP IT 72 (1972) ("These similarities between the body politic and the human body demonstrate that the proper functioning of all parts is as important in one as the other. Neither can be wholly healthy if any part is diseased.").

85. *See id.* at 73 (arguing that it is incumbent upon the people to keep all the parts functioning to "fulfill the vision of unity and peace implicit in the Constitution").

86. In a prescient article published soon after the Court's decision, Professor Friedelbaum of Rutgers University observed,

> As a result of the Supreme Court's decision in *Baker v. Carr*, the age-old quest for effective representation is being pressed with urgency . . . across the land. . . . [T]he issues go deeper than malapportionment and, in many respects, the Court's reversal of long-standing policy in *Baker* may rank with that effected in the *School Desegregation Cases*, [*Brown v. Board* . . .]. The latter foreshadowed a social revolution under the guise of a modification of judicial doctrine. The former could prepare the way for an equally momentous political upheaval in the traditional fabric of American federalism.

Stanley H. Friedelbaum, *Baker v. Carr: The New Doctrine of Judicial Intervention and Its Implication for American Federalism*, 29 U. CHI. L. REV. 673 (1962).